

Brainstorming on IPR, use and dissemination issues in the FP7 Future Internet Public Private Partnership

Workshop Report – Brussels, 8 July 2010

I. Introduction

During the Presidential conference "The European RTD Framework Programmes: from economic recovery to sustainability" in October 2009, a new Public Private Partnership on the Future Internet (FI-PPP) was launched, following a European Commission (EC) Communication calling for its set-up under the 7th Framework Programme (FP7).

The EC Communication proposes to leverage the high European research investments and momentum on Future Internet technologies through comprehensive network and service platforms, which will enable the advent of Internet-enabled innovative applications of high societal and economic relevance. A multi sector approach will be adopted, that will cover important economic and policy usage sectors, including health, energy, transport and the environment. An EU budget of 300 million EUR has been earmarked over the period 2011-2013 to support this PPP, which is implemented under the existing legal framework of the ICT Theme of the 7th Framework Programme, with a first Call for Proposals launched in July 2010. More information about the FI-PPP initiative is available on the Europa website of the European Commission http://ec.europa.eu/information_society/activities/foi/index_en.htm, and on the European Future Internet Portal <http://initiative.future-internet.eu/>.

In order to achieve a good balance between application pull and technology push and to produce viable results within a medium term perspective (~5 years), the FI-PPP activities are implemented through a coherent programme with strong interdependencies between the different objectives and projects. To make extensive collaborations possible between the projects of the initiative under the common objectives, it is important to put an appropriate programme level regime in place for the handling of IPR (intellectual property rights), including ownership, use and dissemination rights for background and foreground information. This is a challenging task owing to the fact that such an industrially-driven initiative is much closer to the market than the average FP7 research project.

The EC called for a small brainstorming workshop on IPR, use, and dissemination issues with potential PPP actors of different backgrounds and their legal advisors. The goal was to have a first open discussion in order to identify a set of potential critical issues. This report summarises the reflections made during the meeting.

II. Legal and contractual basis

The FI-PPP is implemented under the existing legal framework for FP7. Grant Agreements for each individual project under the initiative will therefore be based on the FP7 Model Grant Agreement. Here, IPR, use and dissemination issues are ruled in Annex II General Conditions, Part C INTELLECTUAL PROPERTY RIGHTS, *USE AND DISSEMINATION* (ftp://ftp.cordis.europa.eu/pub/fp7/docs/fp7-ga-annex2-v5_en.pdf).

The first two Calls for the FI-PPP are under ICT Work Programme 2011-2012. The FI-PPP is described under Challenge 1, Objectives 1.7 – 1.10. The programme notion is described in many contexts of the FI-PPP. Two clauses particularly refer to a regime on IPR, use and dissemination:

- **FI-PPP Introductory text:** "... In terms of intellectual property rights and dissemination, it is expected that the FI-PPP projects under Objectives 1.7 to 1.10 agree on a programme level regime. ... "
- **Objective FI. ICT-2011.1.10 Programme Facilitation and Support:** "... This includes the study and the development of a programme "IPR, use and dissemination rights" regime to be adopted by the FI-PPP as a whole (at programme level rather than only project level) and may require legal expertise and advice provided to the various projects. ... "

Possibility of a special clause on "complementary contracts"

As a starting point for the discussion, the EC proposed to reflect on whether and how to raise the regime on "INTELLECTUAL PROPERTY RIGHTS, USE AND DISSEMINATION", as defined by Annex II of the FP7 Model Grant Agreement, from an individual project level to the FI-PPP programme level. In concrete terms the participants were suggested to consider whether a special clause in the main contract of the grant agreement introducing the notion of "complementary contracts" and "complementary contractors" would help participants of the programme to agree on a programme level "IPR, use and dissemination" regime. Such a special clause would be mandatory binding for all contracts. Its formulation would be the same across all contracts.

In FP7, "complementary contracts" and "complementary contractors" are not determined yet, because there was a lack of demand for this kind of special conditions. Therefore the EC provided Special Clause Nr.3 used under FP6 for complementary contracts and complementary contractors as a basis for discussion. A comparable special clause would have to be requested using the standard Framework Programme procedures for special clauses. The EC officials pointed out that they would only consider such a special clause and the related heavy procedure, if there was clear mutual benefit and broad demand expressed by the constituency.

Special Clause Nr.3 used in FP6 for special conditions (for discussion only):

- 3) *Complementary contracts*
1. *In addition to the provisions of Article II.1, the following definitions shall apply to this contract:*
- (a) **Complementary contract(s)** means a contract(s) concluded with the Community in respect of work technically related to the project, including for the purposes of use, and recognised in writing by the contractors to each contract as being complementary.
- (b) **Complementary contractor** means a contractor of the contract(s) recognised as a complementary contract to this contract.
2. *The following contract[s] [are] [is] complementary to the present one: [number]*
3. *Complementary contractors enjoy the rights and bear the obligations of contractors with regard to Part C of Annex II.*
- Complementary contractors are not members of the consortium for the purpose of this contract.*
4. *The co-ordinator shall provide copies of the reports referred to in Article II.7.2.a and II.7.4.a to the co-ordinator[s] of the complementary contract[s]. Complementary contractors shall treat this information in accordance with Article II. 9 and Part C of Annex II.*

As the IPR, use and dissemination provisions have changed from FP6 to FP7, the FP6 guidelines for applying this clause are only partially applicable. Therefore they were not provided in the workshop.

The discussion is summarised as follows:

1. As the FI-PPP to a large extent is an integration project for technologies gradually coming out of the labs, access to background is extremely important. The Programme Architecture of the FI-PPP, with three interlinked phases, complicates matter because foreground in one project turns into background of a successor project in the next phase.
 - What may help is defining foreground and background on a programme level rather than on a project level.
 - Instead of, or in addition to, using the terms of "background" and "foreground", a way of indicating deliverables which need to pass across project boundaries may be introduced: "Free movement of deliverables" within the PPP.
 - Instead of deliverables one could speak of results.
 - Results can be of different types, e.g. specifications and design documents, reference implementations, documents of the support actions related to programme facilitation, contributions to standardisation, PR, experimentation infrastructures, etc.
 - An agreement may also need to address relations between projects and entities outside the programme.
2. A special clause can only build the framework for the handling of IPR, use, and dissemination issues. According to good practice, it should not exceed half a page. It does not substitute a programme-level consortium agreement, which is needs-oriented and refines the overall framework.
 - A special clause should therefore also specify that a consortium agreement on programme-level is mandatory.
 - Such an agreement could possibly include a detailed IPR registry, which is gradually updated.
3. The participating experts unanimously agreed that a special clause would significantly limit the degrees of freedom in the negotiation of a consortium agreement on programme level in a positive way. If derived properly, it may significantly simplify the negotiations within and between FI-PPP contracts. Therefore, the option of a special clause as described above should be further investigated.
4. The following next steps are proposed:
 - The EC checks as soon as possible the overall feasibility of having such a special clause.
 - Within two weeks of the workshop, the workshop participants send comments and propose modifications to the FP6 special clause for complementary contracts/contractors to reflect the special situation of the FI-PPP initiative.
 - The wording of a special clause should be publicly available as soon as possible, so that proposers can take it into consideration when preparing their proposal. It needs to be checked whether and when there is any obligation for the EC to publish its intention of introducing a special clause for special conditions in the FI-PPP.

IV. Consortium agreements

The participants reached broad consensus on the need for consortium agreements on two levels, which complement and refine the rules established under the grant agreement and its annexes:

- i) A consortium agreement between the partners of respective individual projects;
- ii) An extended **programme-level consortium agreement** applying to all partners of all projects of the initiative, associated with a special clause concerning "complementary contracts" and "complementary contractors" to be defined for the FP7 Model Grant Agreement.

Further discussions are summarised as follows:

a) *Content of consortium agreements:*

- The consortium agreements have to reflect the hybrid management structure of the programme properly, i.e. the programme management including reviews by the EC, and the programme facilitation by a support action selected under Objective 1.10. This relates in particular to the propagation of changes on programme level into the projects. This process is expected to be complex, because there may be well over a hundred partners participating.
- In consortium agreements on all levels, it is important to not only address the IPR and use of technologies, but to address non-technical issues as well. One question, for example, is how deep knowledge of one project in the initiative has to be open to individual partners of other projects.
- Consortia may want to specify the basic fallback processes (as defined in Part C of Annex II) in more detail, e.g. on joint ownership.

b) *How to come to an agreement on consortium agreements?*

- Consortium agreements, be it on project-level or be it on programme-level, should reflect the interests of all groups of stakeholders, e.g. multinationals, small companies, technology providers, Internet user organisations/companies, research centres, and public bodies. Therefore all groups need to be consulted in a consensus building process.
- To save time, it may be appropriate to start the discussion regarding access rights from existing model consortium agreements. Participants have experience with project consortium agreements based on the IPCA model (Integrated Projects Consortium Agreement) as developed by DIGITALEUROPE (formerly EICTA) and the DESCA model (DEvelopment of a Simplified Consortium Agreement for FP7, developed by academia). With regard to access rights in consortium agreements on programme level, some participants referred to the Wireless World Initiative (WWI) agreement, which was developed by DIGITALEUROPE. Other models could also be considered. Some of the participants consider the model as used in WWI not appropriate for the FI-PPP.
- A core group of stakeholders should try to agree on a draft for a programme-level consortium agreement, and provide it for public discussion and consensus building. Developing an agreement involving many stakeholders from the very beginning is likely to be unsuccessful. Discussions should start as soon as possible, so that broad consensus can potentially be achieved within the community of stakeholders before the Call is closing.
- Agreements should be kept simple, and sharing should be based on needs and communalities. These need to be clearly identified before an agreement can be drafted.
- It would be advantageous if all projects could agree on a commonly agreed template for individual project consortium agreements. There should not be any possibility of an opt-out of the project- and programme-level consortium agreements.

c) *Next steps:*

- A group of stakeholders under chairmanship of Eurescom has agreed to publish draft models for consortium agreements on project- and programme level (<http://www.future-internet.eu/>) by 15 September.
- As a next step they plan to start an open discussion and consensus building process with all groups of stakeholders in October 2010.

V. Signing of consortium agreements

Learning from the past, it was considered essential for the success of the initiative that proper consortium agreements are concluded directly at the start of the project, both on project and on programme level. It should be prevented that parties delay the agreement for whatever reason. The industrial participants advised the EC to make use of all possible means to ensure that project level and programme level consortium agreements are signed by all parties at the latest at the same time when the grant agreement is signed.

From the EC perspective, article 1.4 of the FP7 Model Grant Agreement is foreseeing this: "The beneficiaries are deemed to have concluded a consortium agreement regarding the internal organisation of the consortium." Therefore the EC takes it as confirmed that such an agreement is concluded when the co-ordinator signs the contract Note that article 1.4 only refers to consortium agreements at project level.

VI. Conclusions:

On 8 July, a meeting with representatives of the FI-PPP constituency took place to brainstorm on IPR, use and dissemination rights in the FI-PPP. 7 Companies and 1 research lab were represented by 7 FI-PPP experts and 5 lawyers. The EC was represented through DG INFSO Directorates F and S. The meeting was chaired by Max Lemke, DG-INFSO F4.

- The participants welcomed the meeting and the pro-active discussion at proposal preparation stage. They recognised the advantage of eventually being able to mature ideas and get constituency buy-in at an early stage so that agreements during negotiation can be found easier.
- The participants endorsed the idea of the EC of potentially having a special clause which would raise the provisions on "IPR, use, and dissemination" as specified in Annex II of the FP7 Model Grant Agreement from project to programme level. They agreed to provide comments on the basis of a model FP6 special clause within 2 weeks of the meeting. The EC agreed to check the feasibility of such a special clause.
- There was wide agreement that such a special clause will simplify agreements between projects and partners. However, there is still need for a programme level consortium agreement complementing project level consortium agreements.
- A group of industrialists will make public a proposal for such a programme level agreement by 15 September, for an open discussion with the constituency reflecting the interests of all relevant groups of stakeholders.
- The industrial participants advised the EC to make use of all possible means to ensure that project-level and programme-level consortium agreements are signed by all parties at the latest at the same time when the grant agreement is signed.
- The participants encouraged the EC to organise a similar workshop in early October.

VII. Participants of the workshop:

The meeting was attended by the following representatives:

EC – INFSO F: Mario Campolargo (opening), Max Lemke (chair), Georgios Tselentis
EC – INFSO S: Nicolae Mitu, Anna Muengersdorff

TNO: Folkert Teernstra, Frank den Hartog
BT: Paul Jenkins, Philip Hewitt
SAP: Klaus-Dieter Platte
Siemens: Esther Gahlmann, Johannes Riedl
Alcatel, FR/BE: Anne De Moor, Didier Bourse
Eurescom: David Kennedy
Nokia Siemens Networks (DE): Werner Mohr

Additional Experts were also invited, but were not available at the time:

SAP, DE: Nadine Heitmann
Thales, FR: Leila Gide, Thales lawyer

VIII. Attachments/CORDIS: (continuative links) WP 2011-2012, etc.

This report was prepared by Max Lemke, DG INFSO-F4, in agreement with the participants.