

**DRAFT**

**AGREEMENT**

**between the European XFEL GmbH,  
[its Shareholder XXX]<sup>1</sup> and Institute YYY<sup>2</sup>**

**concerning their collaboration  
on construction, commissioning and operation<sup>3</sup>  
of the European X-ray Free-Electron Laser Facility  
in the field of .....**

**The European X-ray Free-Electron Laser Facility GmbH,**

hereinafter referred to as “the XFEL Company”,  
Limited Liability Company subject to German law,

located at ...,

represented by ..... (*name*), Chairperson of the Management Board,  
and ..... (*name*), Director of Administration,

**[Shareholder XXX, hereinafter referred to as “XXX”,**

.....,

located at .....,

represented by .....,]

and

**Institute YYY, hereinafter referred to as “YYY”,**

.....,

located at .....,

represented by .....,

hereinafter collectively referred to as “the Parties”,

**HAVE AGREED UPON THE FOLLOWING PROVISIONS:**

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<sup>1</sup> The Shareholder must not necessarily be Party to the Agreement.

<sup>2</sup> Clearly, if Shareholder and Institute are identical (as will be the case for DESY), then only a bilateral agreement is necessary. On the other hand, several institutes (and Shareholders) might be involved, for example if DESY provides a contribution together with another institute.

<sup>3</sup> In the title and body text of any specific Agreement: “operation” only if appropriate.

## Preamble

The European X-ray Free-Electron Laser (XFEL) is planned to be built within a collaboration of several countries. Legal basis for this undertaking are in particular

- an intergovernmental Convention (hereinafter: "XFEL Convention"), which entrusts the construction and operation of the Facility to a Limited Liability Company, the XFEL Company, and specifies that the Shareholders of the Company shall contribute to the construction costs in cash or in kind,
- the Articles of Association of the XFEL Company (= Annex 2 to the XFEL Convention), according to which XXX is one of the Shareholders of the XFEL Company, and
- Basic Rules and Procedures for In-Kind Contributions (= Annex 5 to the XFEL Convention).

YYY has considerable know-how in ..... and expressed its interest in collaborating in the construction / commissioning / operation of the XFEL Facility by contributing equipment / manpower / R&D work in this field.

Representatives of the XFEL Company and of YYY have clarified work distribution, time planning and integration in the overall XFEL time schedule, quality control, risk management and controlling, as well as financial and scientific-technical details of such collaboration. XXX proposed that YYY's deliverables be counted as contribution in-kind of XXX, in accordance with Article 5(2) of the XFEL Convention.

Based on recommendations by the In-kind Review Committee and by the XFEL Management Board, the XFEL Council approved the allocation of this in-kind contribution at its n<sup>th</sup> meeting on .....

## Article 1 Scope of the agreement

- 1.1 This Agreement regulates the specific responsibilities and obligations of the XFEL Company and YYY in relation to the in-kind contribution provided by XXX and carried out by YYY to the construction / commissioning / operation of the XFEL Facility in the field of .....
- 1.2 This Agreement only refers to the subject mentioned in § 1.1. Other in-kind contributions will be governed by separate agreements.
- 1.3 Various general obligations of the Parties to this Agreement on organisational, managerial and financial matters are set out in the "*Internal Provisions on In-kind Contributions*", hereinafter referred to as "IKC Provisions", which were approved by the XFEL Council at its meeting on .....

The IKC Provisions are to be regarded as an integral part of this Agreement and are thereby implicitly accepted by the parties.

## **Article 2**

### **Basic documents**

- 2.1 The documents that govern this Agreement are as follows, in order of priority:
- I. This agreement including the IKC Provisions.
  - II. Its annexes :
    - Annex 1 - Description of the in-kind contribution, including time schedule, overall planning and the distribution by work package, dated ....
    - Annex 2 - Technical specifications (interface, performance)
    - Annex 3 - List of equipment to be procured and later to be transferred to the XFEL GmbH, dated ...
    - Annex 4 - Overview of manpower requirements related to the in-kind contribution, dated ...
- 2.2 In the event of a conflict between any conditions specified in the annexes and the provisions of the present Agreement, the latter shall prevail.
- 2.3 Each Party declares that it is cognisant of the documents cited in this Agreement and its annexes, that these documents are in its possession, that it has received all the necessary information for the execution of this Agreement, and that it is fully aware of the requirements imposed by the same.

## **Article 3**

### **Time schedule, milestones, deliverables**

- 3.1 The collaboration on the in-kind contribution covered by this Agreement and described in its Annex 1 begins / has begun on ..... and runs until .....
- 3.2 The schedule includes the following milestones (example):
- (month) (year): specifications agreed upon
  - (month) (year): formal design review
  - (month) (year): final design completed
  - (month) (year): first prototype manufactured
  - (month) (year): prototype acceptance tests
  - (month) (year): series production ordered
  - (month) (year): installation completed

(month) (year): commissioning without beam accomplished  
(month) (year): training of operating and maintenance staff completed  
(month) (year): documentation (in agreed form) delivered .

- 3.3 The agreement has attained its objective once (example) the equipment is installed, respects the interface conditions and is performing in accordance with the specifications set out in Annex 2.

#### **Article 4**

### **Quality control, performance testing, acceptance, transfer of property**

- 4.1 YYY is fully responsible for the design review (internal or external), prototype tests (incl. report), production, delivery, installation, documentation and commissioning of the equipment provided as in-kind contribution, as well as the agreed training of staff, in accordance with the schedule and the specifications set out in Article 3.

The XFEL Company will monitor the technical progress. To this end YYY will provide quarterly progress reports and accord access to relevant information and data. The XFEL Company reserves the right to proceed to unannounced inspections at the premises of YYY.

- 4.2 The XFEL Company and YYY endeavour to establish jointly the general testing and acceptance procedure for (the equipment).
- 4.3 The result of the acceptance procedure will be recorded in a written document and signed by representatives of each Party.
- 4.4 The transfer of property to the XFEL Company shall be carried out free of charge as a contribution in kind of the Shareholder concerned. It is understood that the equipment, which will be part of the XFEL Facility, shall be used by the XFEL Company only for research purposes according to its Articles of association.

#### **Article 5**

### **Value and resources**

- 5.1 The value assigned to the in-kind contribution covered by this Agreement is based on the XFEL cost book and amounts to

..... € (in 2005 prices),

out of which ..... € for investments and ..... € for personnel.

5.2 The XFEL Company will credit the value set out in paragraph 5.1 to XXX's contribution towards the XFEL construction costs. This will be done in several instalments taking account of the milestones set out in paragraph 3.2.

For example:

- ..... € will be credited once the final design is completed,
- ..... € once the first prototype is manufactured,
- ..... € once the series production is ordered,
- ..... € once the installation is completed, and
- ..... € once the commissioning without beam is accomplished and the documentation (in agreed form) is delivered.

5.3 YYY will provide the resources required. A list of the equipment to be procured and later to be transferred to the XFEL Company free of charge and/or additional costs is attached as Annex 3 to this arrangement; an overview of the manpower requirements is given in Annex 4.

## **Article 6**

### **Coordination and Spokespersons**

6.1 General questions of coordination will be discussed and agreed upon at regular project meetings. For direct day-to-day contacts YYY and the XFEL Company nominate spokespersons.

6.2 The spokespersons of YYY in relation to the execution of this Agreement are:

- a) for technical matters: .....(name),
- b) for administrative matters: .....(name),
- c) for scientific and organisational matters: .....(name),
- d) for safety matters: .....(name).

YYY reserves the right to change the spokespersons and their responsibilities after written notice to the XFEL Company.

6.3 The spokespersons of the XFEL Company in relation to the execution of this Agreement are:

- a) for technical matters: .....(name),
- b) for administrative matters: .....(name),
- c) for scientific and organisational matters: .....(name),
- d) for safety matters: .....(name).

The XFEL Company reserves the right to change the spokespersons and their responsibilities after written notice to YYY.

- 6.4 YYY will inform the XFEL Company without delay of any incidents bearing the risk that the planned schedule and/or the specifications cannot be achieved.

## Article 7 Definitions

The following definitions shall apply in relation to Articles 8 to 12:

- **Intellectual property:** specific legal rights (e.g. patents) held by one of the Parties, resulting from certain scientific activities carried out by the Party or its employees.
- **Knowledge:** information, techniques, know-how, software and materials, regardless of the form or medium in which they are disclosed or stored and whether they are protected or not.
- **Background:** knowledge generated prior to the signature of this Agreement by one Party and provided to the other Party(ies) for use in the framework of the XFEL Project.
- **Foreground:** knowledge generated separately by one Party or together by the Parties after the signature of this Agreement during the execution of the XFEL Project.
- **Confidential information:** any background disclosed by one Party to the other for use during the execution of the XFEL Project and identified as confidential before or at the time of disclosure.
- **Invention:** object, process or technique, which consists of a patentable matter, is industrially applicable (useful), displays an element of novelty and exhibits an inventive step.
- **Patent:** set of exclusive rights granted by a State for a fixed period of time (generally 20 years) in exchange for the disclosure of an invention.

## Article 8 Exchange of knowledge

- 8.1 The Parties shall make available to each other, free of charge and without any restriction, the background of which they can legally dispose and which is needed for the purposes of the cooperation required by this Agreement.
- 8.2 The Parties shall also make available to each other, free of charge and without any restriction, all foreground and further improvements, generated in the framework of the cooperation based on this Agreement.

## **Article 9 Confidentiality**

9.1 The Parties agree that the open exchange of information shall honour the following principles:

- The Parties shall treat any information as strictly confidential, which is appropriately designated as such, for the duration of this Agreement and for a period of five years thereafter, unless otherwise agreed in writing.
- The Parties shall take all appropriate steps to safeguard the confidential information. Accordingly, the receiving Party shall not use any such information for any purpose other than in accordance with the terms of the Agreement. At the same time, the receiving Party shall not disclose any such confidential information to any third party, and such information shall neither be reproduced nor duplicated in any form.

9.2 The aforementioned shall not apply to information for which the receiving Party can prove that it

- had a public nature prior to its communication by the disclosing Party;
- fell within the public domain after such communication, but not through its own fault;
- was already in its possession at the time of signature of this Agreement;
- was received from a third party without any obligation to keep it confidential;
- was developed by the receiving Party independently, outside the scope of this Agreement;
- was required to be disclosed according to mandatory national legislation or by a Court decision.

## **Article 10 Intellectual Property**

10.1 Any title in intellectual property as regards to foreground, developed by a Party in the framework of this Agreement, shall be vested in that Party. The Parties shall

- grant to each other a free, non-exclusive license to such intellectual property for the exclusive use in the framework of this Agreement, as well as for the receiving Party's internal research purposes
- have the right to grant non-exclusive licenses to third parties not being part of this Agreement at any time.

- 10.2 Where foreground is jointly developed by the Parties in the framework of this Agreement, they shall jointly hold the regarding intellectual property title and agree on ways of protecting, and of making available to third parties, such intellectual property.
- 10.3 The providing Party grants no warranty, including but not limited to fitness for purpose and non-infringement of intellectual property rights held by third parties, in respect of intellectual property made available to the other Party(ies) under this Agreement. The receiving Party(ies) shall hold the providing Party free and harmless from any liability arising from the use (including, if permitted, any sub-licensing) of such intellectual property.

## **Article 11 Publications**

- 11.1 In so far as the Parties do not jointly publish their foreground, publications by one Party involving foreground developed by the other Party shall be subject to the latter's prior written consent. Such consent shall not unreasonably be withheld.
- 11.2 All publications shall acknowledge the collaboration between the Parties, including, if so requested by a Party, the persons having taken part in the development of the foreground, which forms the object of the publication.

## **Article 12 Inventions**

- 12.1 In case of inventions made by the XFEL Company's staff, the XFEL Company shall apply the rules of the German "Law on Inventions by Employees" (*Gesetz über Arbeitnehmererfindungen*).
- 12.2 In case of inventions made by staff seconded to the XFEL Company by the Party(ies), the following provisions shall apply:
- 12.3 Subject to legislative or contractual provisions applicable to inventions of employees, the seconding Party shall be the owner of all rights in the foreground obtained solely by the seconded employee in the course of his work at the other Party. If any of the foreground constitutes inventions, the respective Party / the seconded employee shall have the right to apply in any country in own name, on own costs and benefit for patents necessary for the protection of such inventions.

- 12.4 In respect of the inventions, protected or not, the XFEL Company shall have free of charge the right of use for research purposes. It shall also have the right to a licence for purposes other than research on conditions more favourable than those of licences granted to third Parties. Additionally, the Company shall receive a share of the net returns from all licences granted by the other Party(ies) for purposes other than research. The said share shall be determined having regard to the respective contributions to the inventions of the Company and of the seconded person.
- 12.5 When applying for intellectual property rights and granting licences, the XFEL Company and the other Party(ies) shall consult each other in cases of doubt and refrain from any actions which may prejudice each other.
- 12.6 The XFEL Company shall be the sole owner of all rights in that foreground obtained by a seconded employee in the course of his work at the XFEL Company that was not solely obtained by the seconded employee, but by a seconded employee together with employees of the XFEL Company or by a seconded employee together with employees seconded by other Party(ies).

### **Article 13 Liability**

- 13.1 Except in case of gross negligence or wilful misconduct, each Party shall bear its own loss and damage in connection with this Agreement. Neither Party shall be liable for any indirect or consequential loss or damage incurred by the other Party.
- 13.2 Except in case of gross negligence or wilful misconduct, each Party shall hold the other Party free and harmless from any liability for loss or damage caused by the former Party to third parties.

### **Article 14 Continuing Application of provisions**

The provisions relating to Intellectual Property Rights, Confidentiality and Liability shall apply during the term of this Agreement and the following five years thereafter.

## **Article 15 Disputes**

- 15.1 The Parties will do their utmost to settle amicably any disputes which may arise during their cooperation.
- 15.2 A difference or difficulties on technical matters, which cannot be resolved between YYY and the XFEL Company, shall be brought to the attention of XXX and the XFEL Council.
- 15.3 Any dispute between the Parties or any claim by one Party against another which cannot be settled by the Parties out of court, shall be brought before the courts of Hamburg.
- 15.4 In the event a court of competent jurisdiction holds any provisions of this agreement or of the IKC Provisions to be invalid, such holding shall have no effect on the remaining provisions of the agreement and the IKC Provisions and they shall continue in full force and effect, unless the Parties decide otherwise.

## **Article 16 Language**

All documents relating to this Agreement shall be composed in English.

## **Article 17 Amendments, Changes**

Amendments or changes to this Agreement shall be valid only if made in writing and signed by authorised signatories of each of the Parties.

## **Article 18 Applicable Law**

The Agreement shall be construed with, and governed by, the law of Germany.

## **Article 19 Final provisions**

- 19.1 The present Agreement takes effect on ..... (date).

19.2 The Agreement is valid for a period of ..... years. Each party reserves the right to terminate the agreement by registered letter giving twelve months notice.

19.3 At the end of the .....-year period, the Agreement may be extended subject to a prior agreement to be signed by the parties.

Established in Hamburg on ...(date), in ... copies.

For XFEL Company ...(name)

...(name)

[For XXX, ...(name)

...(name)]

For YYY, ...(name)

...(name)