

Brussels, 23 December 2011

**AGORIA responses to the Commission Communications on Horizon 2020
COM(2011) 808/809/810/811/ final**

AGORIA welcomes the Commission Communications on Horizon 2020 including COM(2011) 808/809/810/811/ final. COM(2011) 810 final on the rules for participation and dissemination in 'Horizon 2020' is hereinafter referred to as the "Rules".

AGORIA congratulates the Commission for their tremendous effort. It has to be said that the Horizon 2020 Program is ambitious.

- AGORIA welcomes the budget increase to 80 bn€ and the one program approach for research and innovation.
- AGORIA supports the one program approach (FP, CIP, EIT) for research and innovation. Different programs will be lined up resulting in a simplification of the European instruments.
- The Horizon 2020 programme is ambitious in this sense that it includes a lot of efforts to focus on the whole chain from research towards implementation and innovation diffusion, including innovation-related activities, such as piloting, demonstration, test-beds and market take-up of innovation.
- AGORIA welcomes the introduction of pre-commercial procurement and procurement of innovative solutions and the focus on standardisation since this should give companies more recognition in their field and create new business opportunities.
- AGORIA welcomes the effort the Commission has done on the level of simplification in line with the Commission's Communication COM(2010) 187 on simplifying the implementation of the Research Framework Programmes: a single set of rules, an easy to use cost reimbursement model, the extension of the Research Participant Portal, fewer controls and audits, with the overall aim to reduce the average time to grant.
- AGORIA strongly supports the public-private partnership (PPP) approach and asks for strengthening the existing ones. However an integrated approach is necessary avoiding duplication of research activities and a complex research and innovation landscape.

1. AGORIA has the following concerns on programme level:

- AGORIA is of the opinion that the success of the Horizon 2020 programme will rely on the governance structure integrating the three priorities: Excellent Science, Industrial Leadership, and Societal Challenges. Focusing on the whole chain from research towards implementation will require smart interaction. Much more will be needed than only joint activities as mentioned in the Communication.
- The interaction with the European Innovation Partnerships, the Joint Programming Initiatives and the European Technology Platforms should be clear.
- Agoria is of the opinion that research and innovation programmes where co-financing of the Member States is required should be kept to the minimum. The complexity in terms of governance and implementation is very complex and is seen as a nightmare

for the industry. E.g. JTI's ENIAC and ARTEMIS. (*This concern is not valid for the EUREKA initiatives.*) In case the instruments which will require co-financing from the Member States will increase, the local governments have to be clear in their position and foresee the required means and instruments.

- AGORIA believes that the right balance for the industrial involvement should be found in the three priorities "Excellent Science, Industrial Leadership, and Societal Challenges". Societal Challenges can only be successful when a strong relationship with the enabling technologies from Industrial Leadership will be implemented. As the Communication mentioned "ICT plays an important role as it embraces some of the KETs and provides the key basic infrastructures, technologies and systems for vital economic and social processes and new private and public products and services". The same applies for an integrated approach on manufacturing, where the Factories of the Future PPP is showing a good example. On the other hand, Societal Challenges can also create new opportunities for Industrial Leadership in Europe. Competences can be developed towards a specific challenge resulting in being world leader in certain technological solutions and in the creation of new industrial business on a worldwide scale.
- The amount of budget foreseen for the industrial leadership is at the minimum level. The total amount of budget that will be foreseen for the industry will also depend on the success of the industrial involvement in the priority Societal Challenges.
- Analysing the statistics on participation to FP AGORIA observes that the participation level to FP of the industry decreases. The focus of Horizon 2020 should be clearly to encounter this trend.
- AGORIA believes that there should be a common sense concerning the smart specialisation concept driven by the Cohesion Policy and the objectives of Industrial Leadership and Societal Challenges. Smart specialisation should not only take excellence into account but also economic and societal impact, as well as the needs cities and regions have.

2. AGORIA has the following remarks on priority level:

a. Excellent Science

- AGORIA welcomes the introduction of Future and Emerging Technologies (FET) as a horizontal programme, where industrial involvement should be stimulated.
- AGORIA supports the launch of industrial doctorates in the Marie Curie action.
- AGORIA has some doubts on the return the ESFRI action will have within the priorities Industrial Leadership and Societal Challenges.

b. Industrial Leadership

- AGORIA welcomes the recognition of the themes ICT and advanced manufacturing and processing as an enabling and industrial technology, both also having a strong potential to deliver solutions for the societal challenges.
- AGORIA asks for remaining the collaborative R&D projects in the priority Industrial Leadership.
- AGORIA welcomes the focus on the SMEs although it is unclear what the impact of the "new SME instrument" will be. SMEs should not be disconnected and isolated from the stakeholders in research and innovation.

- AGORIA is of the opinion that sufficient attention should be given not only to large-scale pilots but also small-scale pilots. E.g. manufacturing and Factories of the Future.
- AGORIA asks to introduce aerospace as a theme since several Belgian companies are active in this field. Also the JTI Clean Sky should be continued.

c. Societal Challenges

- The Commission proposes six new KICs within the EIT programme. AGORIA believes that the industrial involvement should be strengthened and that exchange of best practices should occur with the three existing KICs. AGORIA would like to stress certain shortcomings that needs to be addressed:
 - o allow KICs to have a transparent operational and governance structure facilitating partners to contribute to common goals in a learning business-like environment;
 - o it is not clear what kind of national resources and initiatives can be used in co-funding the KICs;
 - o focus on excellence, not only in terms of scientific research and education, but also in terms of creating new commercial/industrial innovations and its models;
 - o open up and allow new partners, also SMEs, in a specific co-location center of a KIC in order to ensure excellence, recognizing the local strong eco-system.

3. AGORIA has the following concerns on the Rules:

General concerns

- There is lack of flexibility to adapt ongoing projects to the market developments.
- The participation of SMEs to projects will be stimulated in case the category “associate partner” is reintroduced.
- The result-based funding approach is likely to lead to low-risk research and innovation, which cannot be the intention of the European research and innovation policy.
- Concerning article 19.2 AGORIA believes that the provision limiting the financial responsibility of each participant to its own debt is unclear and needs to be specified. Since participants in a project have a joint and several liability for the technical implementation of the project, “own debt” could also be extended to the debt that is incurred for reason of not performing the obligations from another participant under the joint and several technical liability. AGORIA requests a clear statement in the Rules that a participant can never be financially liable for funding that it has not directly received itself.

Funding scheme

- The use of a simplified reimbursement model is appreciated. However, **if reimbursement for actual direct and indirect costs will be dropped effectively below the level of 50%, industrial participation will further decrease.** The proposed funding scheme with a financial contribution of 70-100% of the total eligible costs of the action combined with a flat rate of 20% of the total direct eligible costs is really at the minimum, especially when 70% funding rate will be used for the industry.
- AGORIA believes that it is not acceptable when the funding rate shall be determined in the Grant Agreement. This will lead to an increased administrative burden. The funding

rates should be fixed in the Rules itself or should be the same in all Grant Agreements of a beneficiary.

- AGORIA believes that the prescription of the number of annual productive hours in the Grant Agreement is not acceptable. The prescription of annual productive hours leads to problems if it is not the same in all Grant Agreements of a beneficiary. The handling of different hourly rates dependent on the project leads to increased administrative burden.
- AGORIA is of the opinion that it is not acceptable for an industrial company if it cannot use its basic usual accounting principles and practices to determine the project costs of a funded project.
- In case lump sums or scale of unit costs will be used AGORIA believes it should always be optional and based on actual direct and/or indirect costs using the accounting principles and practices of the beneficiaries.

Intellectual property rights

It is necessary to avoid as much as possible barriers which may have a negative impact on exploitation.

General remarks

- Europe first IP policy. Limiting exploitation of results of funded projects to Europe first, is not in the interest of Europe and will not support the objectives of Horizon 2020. AGORIA is of the opinion that **“stipulating that IP from EU-funded projects needs to first be exploited within the EU is incompatible with the way European companies operating in a global environment”**.
- AGORIA wants to remark that the provisions related to ownership, exploitation and dissemination of the Rules may be appropriate for R&D activities, but not necessarily also for innovation activities, e.g. the set-up of a start-up which requires different IPR approaches.

Article 16 – Grant Agreement – European Charter

AGORIA supports the basic principles of the Charter for Researchers and the Code of Conduct for their Recruitment. Nevertheless, AGORIA has some serious concerns regarding their implementation. Whereas to a large extent Charter and Code are already being applied in industrial research labs, a full implementation of every element is simply not possible. Whereas the Charter and Code may be suited for academic researchers and partly also to industrial researchers in Corporate labs, they are certainly not workable for developers in the business sectors or large firms even less for innovators in SMEs. For example, innovating SMEs do not have the capacities to publish all their vacancies for R&D staff on the European Researcher’s Mobility portal. **Charter and Code should not be mandatory**, at least not for industry.

Article 38.2 – Ownership of results – joint ownership

AGORIA believes that:

- a. **With regard to joint ownership, the Rules, in particular the default regime with prior notification and compensation for non-exclusive licensing to third parties as reconfirmed in the Rules - are providing substantial barriers for the exploitation of the jointly owned intellectual property.**
- b. As a general principle partners, and their affiliates, should be able to use jointly owned intellectual property in the same unrestricted manner as they can use solely owned foreground. Since joint ownership of results implies that it is not possible to separate the work leading to the invention or invention itself into “separate” IPRs, if a default regime includes barriers for exploitation, parties will avoid as much as possible real cooperation to avoid such joint ownership, at the expense of the efficiency gains of cooperation.
- c. Each joint owner should in principle have the right to benefit fully from all benefits resulting from its own work, including the exploitation potential, without permission of others. The fact the benefits of joint IP for industry is different – generally it will lead to monetary benefits from exploiting - from the benefits for academic partners, should not change this principle by stipulating a default regime that has the consequence that the industry partners should share its benefits with the academic partners and vice versa.
- d. The default regime for joint ownership should be a regime that supports exploitation and does not drive parties away from collaboration. That regime should support **unrestricted use of a joint owner and its affiliates of its joint IP, without giving notice to another or paying compensation to another, like for its solely owned IP.** Parties however should have the freedom to deviate from that if they explicitly so agree.
- e. For most of the bigger companies in the ICT domain it is not possible to give prior notice in case joint IP is licensed to a third party through a (broad scope) cross-license that is already in place. Common practice in this field is that all new IP generated by the parties to the cross-license, whether it is solely or jointly owned IP, is absorbed by the cross-licenses. For competitive and confidentiality reasons it is generally not possible to disclose the list of companies with which cross licenses are in place.
- f. **The fair compensation requirements of the default regime are unclear due to article 43.4.** The default regime is proven to have a detrimental effect on the conclusion of the consortium agreements. It often results in long discussions between the partners and it creates a lot of mistrust between the parties.

Article 39.2 - Protection of results by the Commission

AGORIA believes that although this rule has been included in the Rules for FP7, from a practical point of view, industry has seen that the Commission was not having the system in place to deal with a generic implementation of this rule. AGORIA therefore proposes that **obtaining the consent from the EU Commission should not be the rule**, but the exception for specific circumstances when the European interests are at stake. The Rules therefore should only provide a basis that includes this right to object in the specific Grant Agreement of projects in which it is likely that EU interest might be at stake in case of a transfer outside Europe.

Article 40.2 - Exploitation and dissemination of results – open access

AGORIA has no objection against open access if scientific publications are concerned. However it is not in the interest of exploiting results of these funded projects

that all data and other results of the projects should be publicly disclosed. The current definition of “dissemination” however includes the obligation to “publicly” disclose all results of the project. This would have a serious impact on the exploitation potential of the results of the project and the willingness of parties to invest themselves in these type of projects or in their commercialisation if everything is “open”. The current definition of dissemination leads to a much more “open access” than apparently intended in the open access clause or in the current Open Access pilot in FP7. Therefore, the definition of dissemination should go back to the text of FP7 and previous FPs. The clause on open access should be clarified in the sense that it is made clear what open access means, to what it exactly applies and what other conditions the EC could impose in the Grant Agreement.

AGORIA believes that open access should have the following boundary conditions:

- the scope must be limited to published versions or final manuscripts accepted for publication resulting from EU-funded or co-funded research projects;
- there must be no obligation to publish;
- there must be no interference with commercial exploitation of research results or the possibility to protect results by intellectual property rights such as patents.

Article 41.1 and 41.3 - Transfer and licensing of results

AGORIA believes that the requirement **that other participants receive prior notice in case of transfer of the results is not necessary** and very burdensome to implement in practice. The key concern for the participants is that in case of transfer of ownership, their access rights are safeguarded. This is already provided for in the text of the Rules, so there is no strong reason to restricted transfers, which very well may be a form of exploitation, with such a burdensome requirement. Moreover the requirement to notify is not possible to implement in M&A transactions. The “carve out” for M&A transactions does not work since limitations to disclose intentions to transfer are not only based on statutory or regulatory restrictions but also confidentiality agreements between the parties involved to facilitate a proper negotiation process.

Moreover it would significantly limit companies’ rights to sell patents and therefore the value of patents generated from EU funded projects would decrease.

AGORIA believes that **matters related to security, ethical or competitiveness issues** which are deemed to be particularly sensitive by the Commission, should be treated ad hoc making this explicit in the call and including specific arrangements **in the Grant Agreement**.

Article 42 – Background and Article 2.1.(4)

a. AGORIA prefers to introduce a so-called “negative list” of what background parties made not available for the performance of the project or use of results.

The current definition of “background” substantially deviates from the usual definitions in FP7 and previous FPs in the sense that it does not included the basic principle anymore that background is “all intellectual property” that is “needed” for the performance of the project or exploitation of results, should be made available in order not to block performance of the project or the use of the results. The deletion of this

basic principle may lead to the situation that projects cannot be performed or results cannot be exploited since relevant background is not made available.

The current definition only leaves open the possibility to include a so-called “positive list” of what background parties make available for performance of the project or use of results.

- b. **Sideground**, being intellectual property that is generated outside the project and after the start of the project, should be available for access rights if it is brought into the project and if it is needed to avoid that such sideground will be a blocking factor for performance of the project or use of project results.

Article 45.1 and 45.2 - Access rights for exploitation

As described earlier AGORIA is of the opinion that the **definition of fair and reasonable conditions** as in article 43.4 **should be clear**.

Limiting this definition to “circumstances of the collaboration” does not take into account (very) relevant circumstances outside the collaboration/action that influence the compensation that is fair and reasonable to be paid. The definition should be amended in such a way that all relevant circumstances are being taken into account in determining what is “fair and reasonable”.

Article 45.3 - Access rights for exploitation

AGORIA believes that the definition of affiliated entity should be broaden and should also include **non-EU affiliates** as well. Preferably affiliates should have same access rights as participants.

Exploitation of results of projects by companies, even by SME’s, often takes place through other legal entities belonging to the same group of companies than the entities that have carried out the research. Efficient exploitation therefore means that companies must have the possibility to use the results within the group of companies to which they belong. In the global economy of which Europe forms part, effective exploitation of results means that **results should be accessible/open for exploitation, whether by transfer or licensing arrangements, for all entities belonging to a group, on a worldwide basis**.

Article 46 - Access rights for the European Union and Member States

AGORIA has some **concerns about** the participant’s intellectual property rights in connection to the rights to the European Union Institutions and bodies as well as Member States’ national authorities **to grant to third parties access rights**.

Article 49 – Procurement, pre-commercial procurement and public procurement of innovative solutions

AGORIA is of the opinion that also in the case of pre-commercial public procurement the principle should apply that the **“inventor owns the results”**. Since competitive offers will be formulated for tenders for pre-commercial public procurement, this shall imply that the companies participating in the tender offer specific solutions to the public body involved in the procurement, taking into account the specific needs of the public body (for example including a licensing scheme).



About AGORIA:

AGORIA is Belgium's largest employers' organization and trade association. The mission of AGORIA is to make every effort to serve its members, bringing all its influence to bear to improve the social and economic environment in which they operate. AGORIA represents and helps more than 1.600 companies in the technology industry. 80% of the members are SMEs and 900 members have a subsidiary abroad. AGORIA represents 13 sectors from the "A" in automotive industry to the "S" in security and defence. The 4 products offered are networking, collective actions, lobbying and individual services. AGORIA represents 283.100 employees, which is 11% of the private employment in Belgium, and has a turnover of 73 billion €. The export rate amounts 74% which is 31% of the Belgian exports.