UNICE
THE VOICE OF BUSINESS IN EUROPE

Comments

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# UNICE VIEWS ON THE PROPOSED RULES FOR PARTICIPATION UNDER FP7

## Part I – General comment

UNICE fully endorses the need for urgent and more coherent action at the European level. Europe needs more R&D and it is essential that this investment translates into sustainable benefit. The Framework Programme should establish the conditions and provide the resources so that this can happen. Correspondingly, the principles under which FP7 is directed and managed also require reform.

Simplification of the rules for participation should in our view be based on a clear understanding that a key purpose of FP7 is now to improve the longer-term competitiveness of European industry in the knowledge economy. This requires language, procedures and predictable practices and resources, more accurately reflecting the realities of running business in a global economy.

Our main comments with regard to the Rules for Participation under FP 7 are:

- Solve the affiliate problem: Allow full dissemination of project results within one legal group of companies and arrange allowable transfer conditions when acquisitions or divestments are concerned. This full dissemination requires that affiliates of participants get the same access rights to foreground and background of other participants "for use" as granted to the legal entity in their group that is participating in the project. (Affiliates are – in summary - to be defined as legal entities that are controlled by, controlling or under common control with a participant, where control is defined as holding more than 50% of the voting shares in such entity or the right by other means to appoint the directors of such entity who have a majority vote).
- Solve background issues: Only background that is explicitly agreed in advance will be available to consortium partners and thereby excluding all other proprietary background. Access rights to background can only conditionally be awarded by the sole discretion of its owner. Companies must be allowed to use the 'major business interest' principle to reject requests for background dissemination/transfer and not be forced to prove 'suffering disproportionately great harm'.
- Refrain from full liability. Restrict participants' liability to the maximum of its funding amount. No 'collective financial responsibility (joint and several liability' for amounts paid by Commission to other participants or damage claims based on non-performance of other participants)..
- Refrain from detailed prerequisites. Leave arranging all details to participants.

## Part II – Specific comment on how the Rules for Participation can be improved

In the following sections we make some specific comments on the Commission's December 2005 proposal which should be taken into consideration in order to facilitate industrial participation in FP7:

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- In general, the readability of the Rules of Participation will be improved by listing all definitions in one article. There also needs to be more clarity regarding certain definitions including what is meant by basic terms such as 'needed', 'participant', 'receipts', 'legitimate interests'; whether the definition of 'public body' differs from that outlined in FP6? How would 'associated company', 'dissemination', 'frontier research projects', 'conflict of interest' etc. will be defined?

- The changes to *IPR*[1] provisions are not an improvement on the arrangements for FP6. They undermine the ability to agree with consortium partners on an IPR arrangement. Agreement such as this is necessary to give companies the legal security that results of projects can be commercialised in a profitable way.

  Regarding *joint ownership of foreground*[2], we do not believe that a default regime providing notification and compensation to the co-owners in the case of granting non-exclusive licenses to third parties is the right way to proceed. The arrangements in case of joint ownership should be entirely left to the participants to decide. (For the consequences of this approach refer to our comments below regarding the need for "concluding the consortium agreement before entering into the grant agreement".)

  With regard to *transfer of ownership*[3], we believe that no requirement is necessary other than to give *ex post* notification is necessary. Sufficient protection to participants of all their relevant rights is given by the rules themselves, which require that obligations of the assignor are passed on to the assignee. It is sufficient that participants are made aware of this by *ex post* notification and there is no need for a right to object. Should a right to object be maintained, then such right should never apply with respect to any transfer to associated companies of a participant and should only exist for a limited period, e.g. 30 days, following notification.

  The Rules for Participation foresee that the grant agreement may provide for a requirement that the Commission is notified[4] in advance of any intended transfer of ownership to a third party. This is nothing more then the Commission retaining the right to impose still more burdensome requirements on participants. This may be particularly onerous in M&A type of dealings. If the Commission insists on retaining this possibility then its remit should be strictly defined in advance and limited to very specific situations and have a short time window, e.g. 30 days following notification..

  In the same indirect action, we believe that the possibility should exist that all participants and their associated companies shall enjoy access rights to all foreground. Our reading of the proposal also leads us to believe that such access rights should be granted royalty-free unless otherwise agreed before signature of the grant agreement or consortium agreement. It is of utmost importance that participants in a project know at the beginning of the

[1] *Ibid.*, Articles 2, 24, 46 and 47.
[2] *Ibid.*, Article 40.
[3] *Ibid.*, Articles 42.
[4] *Ibid.*, Article 43.

project that they will have the potential to exploit specified results generated in the project.

- Concluding the *consortium agreement*[5] before entering into the grant agreement is of critical importance. Participants need to know in advance all the terms and conditions under which they can cooperate. This will help avoid situations where participants become "hostage" to deteriorated IPR arrangements, for example regarding potentially royalty-free access to background **for use**, the compensations to be paid for joint foreground and the possibility to define and exclude background. By introducing negative default regimes (e.g. on joint ownership) it becomes even more important to ensure that such regimes are clearly defined and correctly structured before being committed to the Commission. The likely consequence of not addressing this requirement in the Rules of Participation is to dissuade companies (particularly in the ICT field) from full participation in FP7 as the commercialisation of results will become even more complex and costly.

  The Rules for Participation and the *grant agreement* should take into account the structuring of (large) industrial partners (for example within wider groups of companies) often means that intellectual property is necessarily used in several legal entities to effectively commercialise the results of research and development activities. Some legal entities in the group may only be involved in R&D, while other entities are only commercialising the results.

  Therefore we believe that full dissemination of project results within one legal group of companies should be allowed with allowable transfer conditions being arranged when acquisitions or divestments are concerned. This full dissemination requires that affiliates of participants get the same access rights to foreground and background of other participants "for use" as granted to the legal entity in their group that is participating in the project.

  The granting of access rights to associated and daughter companies should not depend on the willingness of other participants in the project.

- The limited time set of one year to apply for *access rights*[6] is too short. If there would be any time limit this should at least be the two years as provided for in FP6.

- The number of participants in a syndicate must as a minimum make a total of four parts from at least two member states[7]. We believe that the Commission should also allow for a wider use of flexible project types.

- The principle of *financial collective responsibility*[8] established in FP6 for most actions is discontinued in order to remove barriers of participation, in particular for SMEs.

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[5] *Ibid.*, Articles 13 and 24.
[6] *Ibid.*, Article 51.
[7] *Ibid.*, Article 7.
[8] *Ibid.*, page 4.

This has been a significant concern in previous framework programmes and to fully address the issue we believe that the legal situation of the participants needs to be rendered completely clear. Joint and several liabilities of participants for repayment of amounts paid by the Commission to other participants and for any other damage claims based on non-performance of the work by other participants should be excluded from the Rules for Participation explicitly.

A mechanism is in addition outlined to cover the financial risk of a participant's failure to reimburse any amount due to the Community which would be financed by a *small contribution from undertakings*[9] and other participants that are not public bodies. Further clarification as to what is intended by this is required. We also believe that all projects should be treated in the same manner and that there should be no project specific assessments needed, since this will be a costly and bureaucratic measure with questionable results.

- While welcoming that Community financial contribution will cover *75% of eligible costs*[10], for SMEs, we believe that applying similar financial limitations to research institutes could result in difficulties, maybe even severe difficulties, in reaching the same reimbursement levels as in FP6.

- It is not clear what the Commission means with financial capacity[11] for the participants. It is important, that FP7 contribute in a positive way to fulfilling the Lisbon objectives. This underscores the importance that measures are taken to improve access for, and participation of, SME´s in the Framework Programme. Hence, the Commission ought not to let too strict solvency claims influence the possibility to securing grants. Such criteria will limit the participation in particular of SME´s.

- The wider use of *lump sums* and *flat rates*[12] may simplify the rules, but more detailed information is needed on how rates and sums will be calculated and established. The 'new' forms of grants should also be evaluated in a similar way as new instruments in FP6 were evaluated. A default regime of compensation of actual costs should in any case be applied.

- We do not support inclusion of a reference to the 'European Charter for Researchers' and the '*Code of Conduct for the Recruitment of Researchers*'[13] in the Rules for Participation for FP7. It is completely unacceptable to suggest or mandate that grant agreements should reflect these principles.

- When applications are unsuccessful we believe that the applicants should receive a qualified refusal. The experience of refusal in previous Framework Programmes has left companies frustrated due to a lack of any

[9] *Ibid.*, Article 38.
[10] *Ibid.*, Article 33.
[11] *Ibid.*, Article 16.
[12] *Ibid.*, Articles 19, 30 and 35.
[13] *Ibid.*, Article 19.

feedback in the form of a qualitative evaluation. This in turn makes it harder for companies to pinpoint where improvements are needed with a view to possible future applications.

- ☐ The Commission's suggestion to establish a database of former applicants is in our view a positive suggestion. This can have the positive result of contributing to a reduction in administrative burdens in proportion to the information demanded in later applications.