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From: Dimitris Xenos [REDACTED]
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To: Euro-Ombudsman
Subject: [EOWEB] Composition of EU Commission expert groups
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Date Monday, September 1, 2014 12:28:19 AM CEST

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Subject Composition of EU Commission expert groups

Dear Ms O'Reilly,

Please find attached my contribution for the European Ombudsman consultation on the composition of EU

Content Commission expert groups.

Yours sincerely,

Dimitris Xenos

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30 August 2014

Re: European Ombudsman Consultation: Composition of EU Commission expert groups

Dear Ms O'Reilly,

This contribution focuses on the composition of EU Commission expert groups relating to intellectual property (IP) matters. Overall, it is pointed out that the interests of important stakeholders remain underrepresented in EU expert groups of IP.

1a. Which specific Commission Expert Groups do you consider to lack a balanced representation of relevant areas of expertise and interest in their membership?

The composition of expert groups in IP matters presents an unbalanced representation of stakeholders, in particular, the European small and medium-sized enterprises (SMEs) representation is conspicuously lacking, despite the fact that 'the more than 20 million SMEs in the EU represent 99% of businesses'.¹ This appears problematic since the EU's IP policy has been pursued by the Commission as part of an EU-wide innovation strategy to support the development needs of SMEs.²

Expert group on Intellectual Property Valuation (E02863) is predominantly composed by middlemen in the IP evaluation business such as patent attorneys and IP lawyers, management consultants, finance specialists, business valuers etc. The composition of this group is striking, as SME stakeholder representation is absent. As such, the composition of this group reflects only the interests of IP management and consulting professionals who are naturally promoting the businesses of their own corporate activities, such as the expansion of IP services, licensing, IP evaluation for securitisation etc.

¹ EU Commission's SMEs portal: http://ec.europa.eu/enterprise/policies/sme/index_en.htm

² EU Commission Press release: Industrial Property Rights: Commission launches strategy to drive innovation from the laboratory to the marketplace, IP/08/1157, Brussels, 16 July 2008.

The lack of a balanced composition is also reflected in the output of this group. For example, in their latest report, the expert group focuses on promoting practice in IP valuation “as performed by financial institutions that are providing capital, particularly to SMEs”.³ These experts do not point out the known fact that the SMEs in the EU-zone have a very low patenting activity. As a result, the experts’ consulting activity is likely to consider first the business needs of their larger corporate clients. It is clear, therefore, that an unbalanced expert opinion may be reflected in their advice to the Commission.

Expert Group on the development and implications of patent law in the field of biotechnology and genetic engineering (EO2973) is another expert group on IP matters. Here, there is only one NGO representative and, again, no SME representatives are included. Academic participation can be helpful in advising on various policy matters, but evidence from past IP policy evaluations suggests that good quality expert opinion cannot be guaranteed if only one study is commissioned. A good example is the study that was needed for justifying the creation of a supranational pan-European patent litigation system. The only study that the EU Commission presented to the member states to justify the setting up of one of the biggest supranational institutions in whole the history of Europe, was *one* report produced by *one* academic (the Harhoff report).⁴ The EU Commission’s system did not allow other studies to ensure quality and fair representation of the expert opinion. It should be noted that in 2012, the European Scrutiny Committee of the UK Parliament (House of Commons) found that the Harhoff report was outdated and contained errors,⁵ which were pointed out in subsequent studies.⁶ Such incidents highlight the lack of check and balances that have so far been noted due to very limited and unbalanced representation or selection of experts. It can be then concluded that any strategy for improving quality expert output is dependent on broadening the representation of stakeholders in expert studies. Regrettably, a fair and broad representation system does not exist in the composition of expert groups or the selection of ad hoc experts in the context of IP.

1b. What, according to you, is the root cause of the unbalanced composition of the Commission expert groups identified by you?

The root of the problem is systemic – it results from a) strong lobbying culture b) weak accountability culture in the selection panels. This situation that characterises the Commission panels stems from the wider problem of transparency and accountability that are permeating all EU institutions.

●Strong lobbying culture

The unbalanced composition of expert groups appears to be linked to the general lobbying culture in the EU. It is not surprising that the Commission does not supervise with efficiency lobbying efforts of experts groups, since the lobbyists already sit in the European Parliament as MEPs. As been noted in academic commentary “the Commission in particular has always been hostile to all compulsory forms of supervision of interest groups, thus basically neutralising parliamentary efforts already burdened by pronounced inertia.”⁷ It should be noted that [REDACTED]

[REDACTED] was a concurrent employee of a large international law firm, which has corporate clients, at the time of the passing of the relevant patent legislation.⁸ Additionally, the drafting of the European Unified Patent Court’s

³ Final Report from the Expert Group on Intellectual Property Valuation (2014)

⁴ D. Harhoff, “Economic cost-benefit analysis of a unified and integrated European patent litigation system”, (2009) (Tender No. MARKT/2008/06/D 1)

⁵ House of Commons, European Scrutiny Committee, “The Unified Patent Court: help or hindrance?”, 65th Report of Session 2010–12, Vol 1, 3 May 2012, note 6, at Ev2

⁶ D. Xenos, “The European Unified Patent Court: Assessment and Implications of the Federalisation of the Patent System in Europe.” (2013).

⁷ D. Chabanet, “The Regulation of Interest Groups in the EU”, CONNEX Research Group 4 (2006)

⁸ For a possible conflict of interest at the EU level, see, M. Jacoby and G. Simpson, ‘Politics, Business Mix Freely In Europe Parliament: Patent-Law Reversal Shows How Members Outside Jobs May Aid Corporate Interests’ *Wall Street Journal* 5 July 2005; [REDACTED]

Rules of Procedure that will determine key aspects of patent litigation In Europe has been prepared by a very small group of persons that includes employees of international law offices that have large corporate clients.

Moreover, due to the strong lobbying culture in the EU, some countries, mainly in central Europe, and predominantly those around the Brussels area, are overrepresented compared to the periphery countries. This can also be confirmed by looking at the country of origin of the expert group members. For the Commission, this is the usual situation, as it regularly bases its policy on expert opinion which is derived only from some interest groups. For example, in the Harhoff report mentioned above, it was stated that the expert work was presenting a study for the whole of the EU. In reality, however, the Harhoff report concentrated mainly on very few member states.

• **Weak accountability culture**

In general, the important procedural requirement to give reasons is not always observed in the EU legislative process. As recently noted in the academic research: *“It is notorious that the legislature frequently inserts a Recital into measures asserting compliance with these principles without the slightest elaboration of why this is so.”*⁹ Similar and more pronounced tendencies are observed in the pre-legislative stages and, therefore, it is not surprising that the panels deciding on the composition of expert groups do not feel the need to strengthen accountability.

To give but one example of such disregard for accountability, in a recent EU legal case,¹⁰ the Court of Justice of the EU had to adjudicate on the duty of the EU Institutions to give reasons for the unitary patent legislation, following complaints from Spain and Italy. According to the Italian Republic the decision to initiate enhanced co-operation in the area of unitary patent protection was vitiated *inter alia* due to failure to conduct a proper examination and give reasons. It was also claimed that an excessively laconic explanation was given as to why the Council considered that the conditions laid down in the EU and TFEU Treaties for enhanced cooperation had been satisfied. In its decision, the Court responded that *“it is to be borne in mind that, when the measure at issue was adopted in a context with which the persons concerned were familiar, summary reasons may be given”*.

According to the Court, since Italy had participated in the negotiations it could not be concluded that that the quality of the decision to proceed with the new patent system was undermined by any failure to formally state reasons. This judgement confirms the general culture that characterises the EU Institutions, i.e. not to check or question the quality of studies when initiating legislation.

2. The Commission's horizontal rules on expert groups allow for the Commission to appoint individual experts in their personal capacity. In your experience, does this possibility give rise to concern in terms of the balanced composition of expert groups and/or conflicts of interest?

[Redacted text block]

⁹ Weatherill, Stephen. "The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has Become a Drafting Guide" German LJ 12 (2011): 827 (emphasis added).

¹⁰ C-295/11 adjudicated jointly with C-274/11, 16 April 2013.

In the notes regarding the Selection Procedure for members, it is stated that "[i]n addition, the selection of experts was carried out in such a way as to avoid any conflict of interests". However, the Commission has not stated how this can be achieved. For example, a member can register only in their academic status or title and becloud the fact that they are active in a business that is directly affected by the policy they might champion in their expert opinion work.

[REDACTED]
[REDACTED]
[REDACTED] This second professional identity is not stated in the Registry, which is misleading, as it is not reflected in the composition of representation. This practice is another manifestation of poor transparency standards, and weak accountability, in the EU institutions.

3. Do you consider that the current level of transparency regarding the composition of Commission expert groups, in particular through the Register of Commission Expert Groups and Other Similar Entities, is sufficient? In particular, does the information made available by the Commission allow you to ascertain which interests are represented by the members of Commission expert groups? If not, where do you see room for improvement? Do you consider that the current level of transparency regarding the work of expert groups, in particular through the publication of agendas and minutes, is sufficient?

Although the public register of expert groups is supposed to provide increased transparency, it is noted that important information is missing. In particular, full information of the activities of group members is not provided (see also Question 2, above). The publication of agendas, as such, is not sufficient to inform the public of the background interests of the expert members. The Commission should consider expanding the available information, for example, by providing CVs or links to relevant websites, and a full declaration of possible conflicting interests. It is also noted that the Register does not include various past expert groups which are not currently active. This could be due to technical reasons, as the Registry has been established quite recently, but it is important that the Registry maintains a full historical record of defunct groups. It is also important that the relevant legislative initiatives and ensuing legislative measures should be clearly identified and linked to expert groups involved.

4. Where the Commission publishes calls for application for membership in expert groups, do you consider that these calls provide for selection criteria which sufficiently take into account the need for a balanced composition of expert groups? If not, where do you see room for improvement? In your view, could the Commission do more to raise awareness about these calls, with a view to encouraging applications? If so, what concrete steps could it take in this regard?

Given the importance of expert groups in pre-legislative work, opportunities for application for group membership are relatively restricted. Therefore, more effort should be taken to broaden the participation base in the composition of such groups. To begin with, calls for application should be advertised more broadly. It is proposed that the Commission should set up an email subscription service (e.g. similar to the updates email service of the EU parliament) that will provide timely notice to interested stakeholders on

¹¹
<http://ec.europa.eu/transparency/regexpert/index.cfm?do=memberDetail.memberDetail&memberID=44134&orig=group>
<http://ec.europa.eu/transparency/regexpert/index.cfm?do=memberDetail.memberDetail&memberID=44137&orig=group>

incoming calls for application. There should also be an agreed period of 1-2 months between the initial call and the deadline. The Commission should also review their funding policy to increase the chances of participation of underrepresented members of the public.

5. Do you have any experience in applying for membership in a Commission expert group? If so, did you face any problems in the application process? If not, are you aware of any such problems faced by civil society organisations? Based on your experience, do the costs inherent in participation/the lack of comprehensive reimbursement schemes discourage civil society organisations from applying for membership?

n/a

6. Please give us your views on which measures could contribute to a more balanced composition of Commission expert groups.

It is important that the Commission formally acknowledges the problem of unbalanced representation. In addition, it should not create groups in which only one stakeholder, be that corporate or other professional group, forms a majority. It is also important that the Commission takes concrete steps to increase the chances of participation of important, but resource-poor stakeholders, such as SMEs, and other small civil society organisations. The Commission should also ensure that candidates expressing an interest in a personal capacity do not participate in groups where there is a potential conflict of interest, in order to ensure that their presence in the group won't be used as an opportunity to promote client's interests.

In view of the foregoing, a more open and transparent call for membership applications, and a review of the present funding policy for expert groups to attract underrepresented stakeholders is certainly pertinent and timely, if not overdue.

7. Do you have any other comments? – Final Comments.

Although the Ombudsman's investigation in this area is important, it is noted that "Commission expert groups" provide only one source of expert evaluation that is sought in pre-legislative stages, because the Commission uses also EU agency papers, green papers, commissioned studies, etc. Therefore, in practice, the concept of "Commission expert groups" is more general and should encompass a broader range of professionals, who are chosen selectively by the Commission with a view to justifying pre-determined legislative goals. In such cases, any transparency measure regarding the composition of "Commission expert groups", in the narrow sense of the term, can be futile, as the Commission focuses on a pre-set agendas. A good example is the parliamentary question of MEP Chountis regarding assessment studies that the Commission used to evaluate the impact of the new Unitary Patent system on member states. In his response (given with a delay of almost 3 months, and after the Parliament's voting session and the member states' signatures), Mr Barnier, the Internal Market Commissioner, acknowledged that the Commission "had not systematically reviewed impact assessments/studies in the different Member States".¹³

Additionally, there is ample evidence that the expert opinion stage and the main legislative stage are interlinked because the same individuals can provide input and exert influence at both pre- and main legislative stages. Again, an important example is the EU Unitary Patent regulation¹⁴ and its affiliated Agreement on the Unified Patent Court that were rushed through the various EU Institutions with an

¹³ <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-011245&language=EN>, answer provided on 13 Feb 2013.

¹⁴ Regulation No 1257/2012 and 1260/2012

unprecedented lack of transparency.¹⁵ In this regard, members of expert groups in advisory roles at pre-legislative stages can again be involved in legislative drafting, participate in secret negotiations, and have privileged access to documents of the legislative process not shared with the public.

Therefore, transparency, accountability and quality standards should apply to all expert input material and, more crucially, to the material used as a justification for new legislation. The definition of ‘ Commission experts’, for the purposes of setting high quality standards, should also include those selected to undertake commissioned studies on ad hoc basis or otherwise. If high-standard requirements do not apply to the selection of all experts in the EU who influence legislative decisions and important development policies, it is unlikely that the implementation of higher standards for the Commission expert groups alone will improve the quality of EU decision-making processes.

Yours sincerely,

Dimitris Xenos

¹⁵ http://www.stjerna.de/unitary_patent.htm