Advancing Industry's View On Intellectual Property Since 1920

GREEN PAPER - EUROPEAN TRANSPARENCY INITIATIVE

Draft response to Commission

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This Federation welcomes the opportunity to reply to the questions in this Green Paper and appreciates the extension of time in which to do so. An extension was requested because the Green Paper has only very recently been brought to our attention. It is perhaps a failing of present consultation methods that the Federation, which has often submitted carefully considered opinions to the Commission on Community issues, usually but not exclusively concerning intellectual property matters, was not informed about the Green Paper as a matter of routine but only became aware of it at a very late date.

A. The need for a more structured framework for the activities of interest representatives.

Generally, we welcome the proposals to bring more structure to consultation procedures and endorse many of the criticisms of the present arrangements noted in the green paper, such as lack of clarity about who lobbying organisations represent and the need to avoid the submission of misleading information.

Questions:

- *Do you agree that efforts should be made to bring greater transparency to lobbying?*

  Yes. We agree that efforts along the lines suggested in the Green Paper should be made.

- *Do you agree that lobbyists who wish to be automatically alerted to consultations by the EU institutions should register and provide information, including on their objectives, financial situation and on the interests they represent?*

  We agree that lobbyists, i.e., interest representatives, who wish to be automatically alerted to consultations should register and should provide information on their objectives and the interests they represent. We are not convinced that a substantial amount of information about their "financial situation" should be supplied. We note that the supporting explanation on page 8 of the Green Paper says that lobbyists should provide information on how they are funded. We consider that this is the appropriate requirement and would have no problem in reporting on how this Federation is funded.

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Although not mentioned in the question, the supporting explanation on pages 8 and 9 suggests that applicants for entry on the register should subscribe to a (voluntary) code of conduct. We agree with this suggestion.

We consider that registration should be voluntary, in the sense that any submissions from organisations not on the register should not be ignored (though they may not always be given the same weight).

- *Do you agree that this information should be available to the general public?*

  Yes. We agree with publishing both the information on the register (subject to our comment about "financial information" above) and the submissions made.

- *Who do you think should manage the register?*

  We would have no difficulty if the register were to be managed by a clearly identified unit within the Commission.

- *Do you agree to consolidating the existing codes of conduct with a set of common minimum requirements?*

  We agree that the aim should be to establish a single code expressed as a set of minimum requirements, on the understanding that flexibility will be necessary, particularly if and when new problems call for new or different requirements.

- *Who do you think should write the code?*

  We would have no problem if the Commission were to draft a code, provided that there is full and proper consultation about it.

- *Do you agree that a new, inclusive external watchdog is needed to monitor compliance and that sanctions should be applied for any breach of the code?*

  We agree that the accuracy of information on the register should be monitored, as should compliance with the code. Whether or not sanctions for non compliance would be appropriate would depend on both the seriousness of any failure to comply and also on whether non compliance was deliberate or accidental. Sanctions should be withdrawn once compliance has been restored.

B. Feedback on the Commission's minimum standards for consultation.

We realise that the minimum standards have been in force for a relatively short time. Nevertheless, we are not convinced that they have been fully applied, especially in the area of target groups. The question will be answered by considering the minimum standards in turn.

Question:

In your view, has the Commission applied the general principles and minimum standards for consultation in a satisfactory manner? You may refer to the individual standards (provided, for ease of reference, in Annex 2).
Please give reasons for your reply and, where appropriate, provide examples.

[These comments concern consultations of which we have become aware during the past 3 years.]

A Clear content of the consultation process: The subjects of consultations that have concerned us have normally been satisfactorily clear and deserving of exposure. Explanations and questions have in the main been clear.

B. Consultation target groups: This has not been satisfactory. We have frequently been omitted from the target group for consultation on intellectual property and licensing matters, as well as matters of wider interest, and have not often been given an adequate opportunity to express our opinions in such matters. It has never been suggested to us, despite our contribution to a number of consultations, that we should register in order to be contacted.

C. Publication: We are not satisfied that raising awareness about consultation issues has been satisfactory. Our secretariat and members monitor websites and access points, but even so, we have several times become aware of consultations late in the period allowed for reply.

D. Time limits for participation: In our view, insufficient time is allowed for planning and responses. Our experience is that eight weeks is barely sufficient for an organisation to convene meetings, prepare a reply and secure its adoption by the members, particularly when holiday periods intervene. Moreover, it is rare to get a full eight weeks, due to difficulties pointed out above.

In the UK, the government guideline for the period for reply to a consultation is at least 12 weeks. We consider that the Commission should adopt this period too.

E Acknowledgement and feedback: Performance has generally been satisfactory and we have appreciated the opportunities in the past to have open discussion with the Commission and to be able to present our opinions at public hearings. However, more could be done to foster contact between interested circles whose views are dissimilar and to build consensus, by organising meetings involving those organisations that are particularly affected by or concerned with new proposals in order to discuss the way forward.

We commented on consultation matters in reply to a recent Commission consultation on the future and functioning of the internal market last June. Our replies to the relevant questions in that consultation were as follows:

> ***Questions on consultation (see http://europa.eu.int/comm./internal_market/strategy/docs/consultation_en.pdf)***
>
> 1. *What are your views on how we carry out consultations on internal market policy? For instance what are your views on the consultation process and on the relevance and presentation of issues in our consultation documents?*
> 2. *What are your views on the way in which we carry out impact assessments on internal market policies? In your experience, are we using the right policy instruments to achieve the objectives?*
> 3. *What are your views on evaluations conducted for internal market policies and the follow up given to them?*
> 4. *Do you think that member states should be encouraged to carry out national screening exercises (of existing and new rules and*

administrative procedures) and if so how?

The Commission, the Parliament, and those member states that do not have them at present, should institute formal consultation mechanisms that ensure that users, especially business and industry, and those others affected by IP rights, such as consumer groups, are properly informed and consulted before any initiative. Such consultation is important to reaching informed judgments as to policy. It is most important that those judgments should also be based on the quality, rather than the volume, of the argument. There have been occasions in the past where consultation on IP matters – at national and EU level - has been limited or non existent.

It is important that users should be consulted at the beginning of any consideration of new legislation, before detailed drafting has started. Systematic consultation should reinforce careful and considered analysis. A mechanism such as an Advisory/Consultation Committee, on which the main representative organisations of those likely to be affected are present, should be established. Such a committee would have the incidental benefit of encouraging interaction between the interested groups, so that better understandings might be achieved.

But adequate consultation is not sufficient. An intellectual change is necessary, whereby supposed "political" concerns and perceptions of political expediency are subordinated to the practical requirements of an efficient, workable system. There is no point in consulting if full weight is not given to the considered opinions of those most qualified to comment and of those most likely to be affected by the policy choices to be made. Consultation should be real, not just for show. Thus a serious exercise to explain the national, regional and international patent systems, and the careful checks and balances within them that have been developed over very many years, to those who will make the decisions concerning future development, is called for.

As regards the relevance and presentation of issues in policy documents, we usually find that these are handled quite well, although, as is only to be expected, consultation documents are usually biased in favour of the policy that the Commission desires to promote. A good example would be the presentation of the proposed (now withdrawn) directive on utility models, where the serious disadvantages of the regime promoted were not pointed out.

In the IP field, we have seen little of impact assessments and evaluations and are unable to comment on them.

We agree that member states should be encouraged to carry out national screening exercises. It is important to consult users, through national consultation processes involving user organisations.

C. Mandatory disclosure of information about the beneficiaries of EU funds under shared management.

Our competence to comment on this issue is limited, since we have little if any involvement with the major funds under shared management referred to in this item. However, we are concerned about the ways in which funds may be

distributed for use by member states, or retained unnecessarily, by OHIM (the Office for Harmonisation in the Internal Market (trademarks and designs)). We are also concerned about distribution of funds by the EPO (European Patent Organisation). While we appreciate that this Organisation is not a Community body, nevertheless membership of it is a requirement for membership of the EU (this is part of the *acquis*) and in the future it is expected to administer the Community patent. Both of these bodies set fees that may be unnecessarily high, and onerous to users, in order to provide funds for, or avoid competition with, national offices.

Questions:

• Do you agree that it is desirable to introduce, at Community level, an obligation for Member States to make available information on beneficiaries of EU funds under shared management?

Yes (at least in relation to funds generated from registration activities for patents, trademarks and designs).

• If so, what information should be required at national level? What would be the best means to make this information available (degree of information required, period covered and preferred medium)?

[This reply concerns only those funds distributed by OHIM or EPO.] The amount of funds transferred and the ways in which they are used should be transparently disclosed in the annual reports of the industrial/intellectual property offices of the member states. States should authorise the repetition of the information in the Official Journal of the Communities, particularly should there not be an annual report of the national industrial/intellectual property office. If funds are transferred to national finance ministries so as to reduce borrowing requirements or general taxation, this should be disclosed. If funds are used in other ways, e.g., as grants to assist modernisation of foreign patent offices or grants to information retrieval services, this should be disclosed.

Furthermore, OHIM and EPO should in their reports draw attention to the sums transferred.

Finally, we repeat our appreciation of the opportunity to submit our comments later than the period mentioned in the Green Paper, and regret that, due to the limited time, our reply is not as full or complete as we would have wished.

September 2006.

NOTE: TMPDF represents the views of UK industry in both IPR policy and practice matters within the EU, the UK and internationally. This paper represents the views of the innovative and influential companies which are members of this well-established trade association; see list of members on the next page.

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