

[IDEA's initial comments (16 Jan 2015) are in italics and our latest comments (22 Jan 2015) are in red with **IDEA:** prefix]

Dear Vedrin

Answers below, inline by Barry> and Markus>.

Dear Barry,

We have a number of concerns regarding the approach you have taken towards establishing an OpenTox Association and therefore we would suggest you to remedy these issues before proceeding any further.

First of all, organising a founding meeting on such a short notice (1 to 4 days, according to the Doodle poll you have set at <http://doodle.com/tt2qpqdv6aqfnqdh> and the corresponding emails you have sent on Thu, 15 Jan 2015 06:31:10 +0100 and Thu, 15 Jan 2015 07:19:12 +0100), without giving the potential founding members the opportunity to study the proposed OpenTox Association articles in detail, is arguably not a good management practice.

> Barry: *We thought the advantages of action and making a start this week outweighed the disadvantages. Note we have included additional periods of time to include additional founding members and additional work on the articles. e.g., The founding members will consist of individuals who will be invited to review the initial statutes and to accept the invitation of becoming a founding member within 30 days of the founding date. Within 180 days of the founding date a GA meeting will be held, which may include consideration of any needed refinements to the initial statutes or refinements to the committee membership.*

> Markus: An Association (= German: Verein) in Swiss law is a very flexible legal entity: It is usually started by a few people having a common goal, and that is really all you need for founding a Verein: Writing down the common goal. It does not need any registration or legal process, but rather leaves the possibility to get more formal to a later stage. Here the law, Art 60-79: <http://www.admin.ch/opc/de/classified-compilation/19070042/index.html#a60>
And an English version: <http://www.admin.ch/ch/e/rs/2/210.en.pdf>

Moreover you are not entitled to make unilateral choices on the organization type, the place of its registration and the selection of potential founding members.

> Barry: I have seeded the process, but it is up to the group to agree not just me. My feedback so far both in f2f meetings and virtually has been very positive to the approach. We can invite further founding and other members and develop the list of confirmations and share it among the group. To initiate, I for example did contact original project partners.

Such decisions that prepare the ground for the establishment of the organization should be at the discretion of a larger set of stakeholders and entities, including for example (but not necessarily limited to) the consortium members of the OpenTox FP7 project (http://cordis.europa.eu/project/rcn/87812_en.html), which has not been the case so far to our best knowledge. In addition, the non-disclosure of the list of invited founding members is obviously unacceptable as well.

> Markus: We are currently setting up an email list for all (future) members of the Association.

Having said this, and after a preliminary and very quick assessment of the proposed draft articles, we have the following remarks to make, which are by no means exhaustive, given the ridiculously short notice:

-- General Questions:

1) What is the advantage of creating an Association over the status-quo and how will it further the development of OpenTox?

> Barry: It would provide a legal community-based organisation to progress OpenTox.

> Markus: An Association is a more formal, but still flexible enough legal entity.

IDEA: An association (Verein) under Swiss law is indeed a fairly a flexible entity; you say that the GA meeting will be held within 180 days of the founding date. In their present refined form, the statutes offer several possibilities for a GA meeting to be called: 1) 1/5 of all Association members can call an extraordinary GA meeting (9.5) 2) The Committee can call an extraordinary GA meeting 3) There is a regular assembly meeting, which takes place once a year. There is no clarification of any period in the year when the GA meeting will take place (for instance in the beginning of month X each year). In addition, there is the possibility for the GA to change the statutes but that will require a majority of 4/5 of the members present at the GA meeting (9.9; this needs to be redrafted again, see below).

-- Regarding the Articles of Association:

2) "OpenTox API" is a specification of an Application Programming Interface, which is developed by a workgroup of the Association" -> What happens if a stakeholder who contributes significantly to the development of the OpenTox API is not member of the Association and/or the corresponding working group?

> Barry: The workgroup is not prohibited from accepting contributions from any source.

IDEA: Then this should be stated in the statutes.

3) "and other open standards maintained or approved by the Association." -> What other standards?

> Barry: Can be elaborated by the group.

IDEA: Then there should be a power in the statutes for the GA to approve such open standards and perhaps even a different procedure (if needed).

4) "The Committee decides about the approval of the use of brands or other intellectual capital of the Association for commercial activities of member organizations." -> That is very unclear both in its original German version and in the English translation. In German it says that the Committee decides about the use of brands and other intellectual capital in general, it does not make it clear that it is only the Association's intellectual capital. Furthermore, you

should be aware that there is a distinction to be made between intellectual property and intellectual capital (http://en.wikipedia.org/wiki/Intellectual_capital).

> Barry: Ok, noted, we can discuss improvements, fix the translation.

> Markus: We can of course replace "intellectual capital" through "Intellectual assets". I think that is more precise.

In General: Articles of an Association have to be formulated very open in the beginning, otherwise we would restrict future development unnecessarily. Over the years, the articles can be extended and further specified, according to the needs and interests of the members.

IDEA: Assets (or Werte in German) is equally unclear for us, in fact in German it is just a synonym. These might include know-how, brands and even functioning processes in research or administration. Could you provide us with your understanding of what 'an intellectual asset' (Intellektuelle Werte) is?

Again, in German it states that the Committee decides about the use of brands and intellectual assets (whatever that might be) in general, in other words it does not spell it out that it is only the Association's intellectual assets.

5) "The association has no commercial objectives and does not aim for profit. Only the Association's assets may be used for obligations/commitments contracted in its name. Members have no personal liability." -> Arguably, the very nature of the association means that it will further the commercial activities of its members. More attention needs to be paid in regards to this article and it should be redrafted in a clearer manner.

> Barry: I don't see what is not clear in this clause. Can you provide clarification?

> Markus: This is a standard formulation, found in a lot of Association: If the Association would have any commercial interest, it would have to be registered.

IDEA: Exactly because of the requirement to register if there is any commercial interest, we need to pay closer attention to the drafting of this article. If the purpose of association is to 'promote the use of OpenTox Software and the OpenTox API in the scientific activities of predictive toxicology, safety assessment and risk management, including the "3Rs" goal of the Reduction, Refinement and Replacement of Animal Testing,' would not that mean that it would involve some commercial activities? Of course it depends on what exactly the association's activities would be, which is why we have repeatedly stated that we want to clarify why we want to create this association in the first place.

6) "A valid exclusion takes place on request of one Member, and with a 2/3rd majority of the GA meeting." -> There should be something along the lines of "in the presence of quorum, which will be reached when n% members are present".

> Barry: we should add an article on definition of quorum.

> Markus: To define a quorum is a risk, especially in such an early phase - Most of the Swiss Associations do not define one for the complications associated with it.

Suppose, for example the Association suddenly gets a lot of new passive members? People, who like the objectives, who like to pay the yearly fee, but do not want to have an active role? - That would mean, that we may not reach the quorum anymore at any GA, and that we are stuck ...

IDEA: Well, even if that will be the case, the exclusion of a member is an important decision for the association and there should be a requirement for a quorum (albeit with a low percentage of members present).

7) *"Change of statutes requires a quorum of 4/5 of all voters" -> But they will still be changed by a simple majority. We would argue that a qualified majority of at least 2/3rds would be the preferable way to go.*

> Barry: We could add more detail on this clause. e.g., what is quorum, and then the vote definition.

> Markus: I would like to suggest to change Art. 9.9 to the following (see also my previous comment on a quorum):

"Change of statutes requires a 4/5 majority."

We could exchange 9.8 and 9.9 then, and write "All other decisions ..."

IDEA: That has been resolved, although now there is no mention of the quorum required for that to happen... In our opinion, there should be both a quorum and a majority requirement. In addition, although we understand that under Swiss law an association is a fairly flexible legal entity, prior to establishing it, we should aim to clarify the main points, in order to avoid complications in the future.

8) *"The committee consists of at least 3 members." -> Who is to decide of the number of the committee members? Will that be the GA? If that is the case, then it needs to be stated.*

> Barry We could cover that under GA powers 9.6?

> Markus: It is covered by 9.6: "... To elect the president, as well as all members of the committee." - The GA is open to elect any number of members.

IDEA: Then something along the lines of 'to choose the number of committee members' should be added in 9.6.

9) *"The committee issues regulations" -> What regulations? This power should be better qualified.*

> Barry: related to the Association activities

IDEA: Which will be?

10) *"The committee constitutes itself, with exception of the presidency." -> In other words there is no quorum. In addition, nothing mentions the way of decision-making of the committee, will this be by simple majority?*

> Barry: Simple majority sounds ok?

> Markus: The committee decides with the majority rule - but is free to come up with other decision rules, like a quorum, or veto rights. I think we dont want to limit this in the statutes, at least not in such an early stage of the Association.

IDEA: We understand your point, however considering the special role of the committee, we would insist on stating that it is by simple majority. There should be a provision of what happens in case of an equal number of votes as well.

11) *"In case of dissolution, the liquidation funds are given to a non taxable organisation with similar objectives. The distribution of funds amongst members is forbidden." -> What happens if there is no such organization?*

> Barry: There should be a standard clause in templates to cover this?

> Markus: This is a requirement of the Swiss law for non commercial Associations. If there is no similar organization, we will have to find the "most similar" of the many organizations in Toxicology or OpenSource.

IDEA: This is only logical and we suppose this is stated somewhere in the Swiss law, however could you provide a citation (just to make sure)?

12) *"Über 100 Employees / Mitarbeiter, or in case of a membership organisation / oder im Falle einer Mitglieder Organisation: To be negotiated by the committee / Durch den Vorstand zu Verhandeln." Does that mean that the amount of the fee for any membership organization is to be decided by the committee? We would argue against that or at least for a qualification of what is 'a membership association'.*

> Barry I think we need to let the committee run the month by month operational decisions like this? There can always be an appeal to the GA?

> Markus: Membership organizations are for example other OpenSource Associations. We cant have a fixed rule on their membership fees. Or, for example consortia: What if a consortia like eNanoMapper wants to become a member? How would we handle that? We need a certain flexibility here.

IDEA: That is a fair point, however the statutes should then state an association (or a Verein) and not an organization in general, as the latter is too broad and unclear.

Also, we are not sure if the fee structure will be compliant with Swiss legislation, that needs to be confirmed.

> Barry We can check?

> Associations are free to select any fee structures, there are no restrictions by the law. The only point here is, that it should not be too high in order not to conflict with the "non commercial" rules. But currently, I dont see any issues here.

13) *"Founding members will be invited because a) they participated significantly in the research activities leading to the initial development of OpenTox concepts, standards and software, b) they have participated in activities and discussions involving the further development of OpenTox, c) they show clear commitment to advancing the OpenTox Association goals" -> We thought any legal/natural person can become a member (as specified in article 6.1: "Membership is open for natural, as well as legal persons"). Can we become 3 members (Ideaconsult, Vedrin and Nina for example)? Can anybody become a member? That is deeply problematic, there needs to be some kind of an 'accession approval procedure'.*

> Barry I don't see the issue here - we get the association going with founding members, others are free to join? Is the concern a hostile takeover of the association by an archestrated massive number of members? How can we protect against that?

> Markus: By law, a Swiss Association is an open organization, which anyone can join, who shares the goals. It is difficult to restrict access, but of course Association can EXCLUDE members, in case they don't pay their fees, or they act against the interests of the Association. And yes, Vedrin, you two could have 3 memberships. At the GA, however, one person has one vote - hence, you would have to delegate the power to vote for Ideaconsult to another employee ...

IDEA: Then possibly we should consider some other type of legal entity perhaps under a different jurisdiction, in order to be able to restrict access one way or another? It really depends on what the association's activities will be, which brings us back to our initial point.

-- Regarding the compliance of the Articles of Association with Swiss legislation (we have only looked at <http://www.admin.ch/ch/e/rs/2/210.en.pdf>, there might be other relevant Acts as well, though if you want us to research that further we will need more time):

> Barry Not sure what the point is here?

> Markus: These are adapted standard Articles, and I am pretty sure, they are according to Swiss Law. Let us know, in case you have any concerns or open questions.

14) After the first GA meeting, there needs to be a consideration of "an entry in the commercial register" (Art. 61). Will the activities of the association constitute "commercial activities"?

> Barry: We don't need to register. We will not have commercial activities, at least in this founding form.

IDEA: Again, we would argue for a meeting prior to a potential founding meeting, in order to clarify what the activities of the association will be.

15) Art. 62: "Associations which cannot acquire or have not yet acquired legal personality are treated as simple partnerships." We are not sure of the meaning of this Article. It may be the case that the association will become a simple partnership and then its members might be wholly liable for the Association. That needs to be confirmed.

> Barry Not sure what the concern is here, as we would have legal status.

16) Art. 68: "Each member is by law excluded from voting on any resolution concerning a transaction or dispute between him or her, his or her spouse or a lineal relative on the one hand and the association on the other." That should be noted.

> Barry I am not sure we need to over complicate the articles by quoting Swiss law? Such items could be in our handbook?

IDEA: We fully agree, though they should be communicated to the members one way or another.

17) Art. 72: "The articles of association may specify the grounds on which a member may be excluded, but exclusion may also occur without reasons being given." Again, that should be noted.

> Markus: I think it would be good practice for OpenTox, that we always give a reason for an exclusion. But yes, I don't think so we should restate Swiss Law in the Articles nor restrict us further at this point.

IDEA: Same point as above.

All of the above are fully relevant to the association on the basis of Art. 63 (2): "Mandatory provisions of law cannot be altered by the articles of association."

Therefore, we consider that the potential founding meeting should be cancelled (or postponed), until all of the issues (including those that might have been identified later on upon further inspection) are properly resolved to all potential founding members satisfaction.

> Barry: The current understanding agreed at the first 16 Jan meeting is to allow two weeks review of the articles with a 30 Jan 16.30 CET meeting to take place to discuss and agree on the initial articles.

*On behalf of IDEA's team and with best regards,
Vedrin*

> Markus: The idea and 'spirit' of a Swiss Association is, that it can be founded very easy (by 2 people writing Articles for the purpose), and then adapted / extended very flexible to evolve over time into a format, which is most suitable for the purpose.

IDEA: We understand this, however as this is not two people creating an association but instead a number of partners creating an association as a follow-up to several projects, we would like to spend more time considering our options. Having in mind that the activities of the association are still unclear to us, as well as what the intellectual assets might be, we would propose to have a meeting to clarify those before proceeding with a review of what legal entity under what jurisdiction might be the best option for us.