UNICE
THE VOICE OF BUSINESS IN EUROPE

COREPER

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THE SECRETARY GENERAL

Dear Ambassador,

In view of the ongoing discussions at Council level regarding the proposal for a directive on the patentability of computer-implemented inventions, UNICE would like to voice its assessment of the current proposals on the table.

Even though UNICE has expressed its preference for the Council's Common Approach of November 2002, which constitutes a balanced, consistent and in line with current European patent practice text, UNICE has pointed out that it considers the compromise proposal of the Irish presidency an acceptable compromise, to build the Council's common position.

However, UNICE considers it necessary to address two significant issues:

Article 6a (Luxembourg proposal)

UNICE has to express its strong disapproval of the latest Luxembourg proposal regarding a new Article 6a on interoperability. If the Luxembourg proposal were to be adopted, it would render patents unenforceable over a wide area of interest to European industry that depends on data interchange. This includes innovations in, among other sectors, telecommunications, information technology and consumer electronics. Article 6a would significantly reduce incentives for R&D investment in these areas, since it would make it difficult for innovators to obtain effective patent protection. Therefore, UNICE strongly urges Member States to reject this proposal.

It is claimed that article 6a would meet the need to ensure interoperability, especially regarding dominant suppliers. However, the need to ensure interoperability has been satisfactorily addressed in the article 6 of the proposed directive. Additionally, no actual cases are known of patent holders who abused their patent rights to prevent interoperability. To the extent there is a problem beyond the safeguards provided for in article 6, for e.g. in a case of an alleged abuse of a dominant position, the redress should be found in competition law. For that reason, proposed new recital 17 should be preferred, since it makes clear that articles 81 and 82 of the Treaty remain available to deal with any abuse by reason of a dominant supplier's refusal to allow the use of a patented technique necessary for data interchange.

Union of Industrial and Employers' Confederations of Europe – Union des Confédérations de l'Industrie et des Employeurs d'Europe
Avenue de Cortenbergh 168 - B-1000 Brussels - VAT BE 536.059.612 - Tel. +32(0)2 237.65.11 - Fax +32(0)2 231.14.45 - E-mail: main@unice.be - Website: //www.unice.org

Article 5.2

Furthermore, there is still room for an important improvement regarding proposed Article 5.2 on program product claims. UNICE welcomes the fact that Member States fully recognise the importance of program product claims in allowing a straightforward enforcement of granted patents for computer-implemented inventions against the supplier. Yet the wording would place unnecessary constraints on the applicant in drafting the claims and would complicate and increase the cost for drafting patents, particularly for SMEs.

On the basis of the Presidency compromise text, Member States are given discretion to decide to allow such claims. The formulation of Amendment 18 of the Legal Affairs Committee would be preferable since it would allow greater clarity by using prescriptive language. The optional nature of the Presidency wording could lead to a situation where some Member States, when implementing the directive, would allow this kind of claims whereas others would not.

We remain at your disposal for any further clarification.

We thank you in advance for your support.

Yours sincerely,

Philippe de Buck