COMMENTS UNICE COMMENTS

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UNICE COMMENTS ON THE AMENDMENTS ADOPTED BY THE EUROPEAN PARLIAMENT TO THE PROPOSAL FOR A DIRECTIVE ON THE PATENTABILITY OF COMPUTER-IMPLEMENTED INVENTIONS

1. GENERAL REMARKS

In UNICE's view, if the proposed directive is adopted by the Council as amended by the European Parliament, large parts of what is currently patentable will no longer be patentable.

Examples include: car navigation systems, electronic controls in modern airplanes, computer-controlled motor management necessary to render cars compliant with current environmental regulations, image processing in medical diagnostic equipment, data processing in chemical process technology, compression of audio / video / data signals to make them suitable for recording on a CD / DVD, image enhancement techniques in TVs and monitors, teletext processing in a TV, anything relating to user control of e.g. a TV, speech and data signal processing in GSM phones, ICs (e.g. Intel Pentium) that process signals faster than previous generation ICs, telecom systems of any kind using computer and information processing related technologies, technical improvements to data processing systems.

The above list of inventions that will no longer be patentable if the Competitiveness Council approves the draft directive with the amendments adopted by the European Parliament, is the result of:

- **Article 2(bb): everything not relating to the automated production of material goods is no longer patentable.**
- **Article 3a: data-processing-related inventions are no longer patentable**
- **Article 5(1b): one can no longer infringe a patent on an information-processing-related invention.**
- **Article 6(a): conversion technologies will no longer be patentable, undermining the protection of information processing and telecom systems and networks.**

All the above-mentioned provisions go directly against what has been prescribed in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights, namely that:

- **all inventions in any field of technology have to be patentable if they are new, non-obvious and industrially applicable, and**
- **only limited exceptions to the exclusive rights conferred by a patent may be permitted, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unreasonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.**

Despite the deletion by the European Parliament from the recitals of the draft directive of the reference to the WTO-TRIPs agreement, the EU is a member of the WTO-TRIPs agreement and should comply with the provisions of that agreement. It seems that the European Parliament has overlooked this.

The bulk of the amendments adopted by the European Parliament would have a significantly damaging impact on the overall IP framework and would work against the interests of European economy in promoting innovation and competitiveness as well as protecting investment in European R&D in almost all cutting-edge technologies.

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2. DETAILED COMMENTS

UNICE would like to highlight in particular the following amendments that cannot be accepted by UNICE:

AMENDMENTS 32 AND 112 (RECITAL 7):

The resulting amendment is a misrepresentation of the European Patent Convention (EPC) as it makes no reference to the provision of Art. 52. 3 EPC. Additionally, it is incorrect to suggest that computer-implemented inventions do not belong in a field of technology.

For UNICE, these amendments are unacceptable.

AMENDMENT 95 (RECITAL 7B):

This amendment is illogical: all patent offices are financed by user fees, and the EPO simply does not make an exception to this general rule. The alternative would be to finance patent offices from the general budget.

Moreover, the European Patent Office is publicly accountable: all decisions are published, oppositions may be filed against all granted patents no less than 9 months from grant, and representatives from all Member States (accountable to their respective national parliaments through their respective national governments) have the final word on the EPO's way of doing business.

This amendment is therefore unacceptable for UNICE.

AMENDMENTS 36, 42 AND 117 (ARTICLE 2 POINT A):

The proposed definition is flawed in the sense that it restricts the scope of the directive to inventions where only non-technical features are realised by programs. This would not leave much in the scope of the directive.

Therefore, these amendments are unacceptable for UNICE.

AMENDMENTS 107 AND 69 (ARTICLE 2 POINT B):

The proposed additions to the definition of a technical contribution tend to complicate rather than add value. The last sentence would eliminate all existing patents in the field of information and communication technologies.

These amendments cannot be accepted by UNICE.

AMENDMENTS 55/REV, 97 AND 108 (NEW ARTICLE 2, POINT BA):

This new article is confusing. This circular definition does not add any value. This amendment is, in UNICE's view, unacceptable.

AMENDMENTS 38, 44 AND 118 (NEW ARTICLE 2, POINT BB):

The proposed amendment is unacceptable for industry as it wipes out a century and a half of application of the Paris Convention. There is no reason why industry is limited to **automated** production as many industrial companies, especially SMEs, carry out non-automated production of goods.

UNICE cannot accept this anomaly.

AMENDMENT 45 (NEW ARTICLE 3A):

This amendment constitutes another attempt to remove all patents from the field of computers and computer applications. Furthermore, it is inconsistent with the definitions of data handling and processing means in the industrial world today.

This amendment is unacceptable for UNICE.

AMENDMENTS 16, 100, 57, 99, 110 AND 70 (ARTICLE 4):

New paragraph 3a in Article 4 is an unnecessary and unwelcome return to an old and long-abandoned concept and therefore unacceptable for UNICE.

AMENDMENT 60 (NEW ARTICLE 4B):

This amendment constitutes one step below the complete ban on protection for data processing systems of amendment 45 as, here, only improvements in the efficiency of such systems are banned.

This amendment is unacceptable for UNICE.

AMENDMENT 102 AND 111 (ARTICLE 5, PARAGRAPH 1) AND AMENDMENT 72 (NEW PARAGRAPH 1A IN ARTICLE 5):

For European industry, it is essential that the directive should permit to apply for patenting of product claims as is now allowed by the case law.

Article 5 has been amended by the Legal Affairs Committee Report to allow program product claims in line with the existing practice of the European Patent Office and of Member States' national courts. This guarantees the right of enforcement of patent protection for computer- implemented inventions. **The Competitiveness Council of 14 November 2003 also endorsed program product claims.**

The original Commission proposal would have had the effect that a product claim could have only been enforced when a user implemented the program with some hardware or apparatus. It would have been contradictory to provide for a right that is not easily enforceable against the suppliers (or distributors), which cause (or participate in) the infringement. Curiously, a patent owner would have been able to stop the supplier of a software product if the supplier is in the same Member State where the software was used but not if the software product was exported for use in a different Member State.

The Commission proposal, if not amended, would have been a serious drawback by introducing a cross-border anomaly and distortion in the internal market. The Commission's approach would also not have been consistent with the stated objective that the Directive should not diverge from existing practice.

In conclusion, these amendments are unacceptable for industry.

AMENDMENTS 103 AND 119 (NEW PARAGRAPH 1B IN ARTICLE 5):

The same comments made for amendment 45 apply equally to these amendments. New proposed Art. 5.1b. states that production, handling, processing, distribution and publication of information can never constitute infringement of a patent, even when a technical apparatus is used for that purpose. This exemption would seem to cover any working computer or microprocessor (in such use). **Hence, any operating data processing device would be exempt, rendering practically all patents where the invention resides in such devices ineffective.**

Additionally, they are contrary to the TRIPs agreement.

AMENDMENTS 104 AND 120 (NEW PARAGRAPHS 1C AND 1D IN ARTICLE 5):

New paragraph 1d apparently imposes on the patentee the obligation to disclose and licence without restrictions "a well-functioning and well documented reference implementation" of any program, the use of which is implied in a claim (although there is no reference to an obligation to indemnify users if the program does not operate properly, this would be clearly the next step).

Article 5(1d) results in the disadvantage that in his patent description an applicant has to include a full listing of the software, with a free licence to use it.

This additional requirement is a clear violation of both the Patent Cooperation Treaty (PCT) and the WTO-TRIPs Agreement, as this requirement goes beyond the existing requirement that a description has to be sufficiently clear and complete to enable a skilled person to carry out the invention. Moreover, there is no use in having a patent if it is not possible to use the patent in order to stop one's competitors or to demand royalties because of one's own reference implementation.

AMENDMENT 76 (NEW ARTICLE 6A):

Amendment 76 would make it impossible for wide areas of European industry that develop new solutions depending on data communication, especially telecommunications and information technology companies, to obtain useable patent protection for those solutions. Such an amendment goes beyond the scope of the proposed directive. It is not restricted to "computer-implemented inventions" but extends to **"patented techniques"** thus clearly including pure hardware inventions, applicable, for example, to integrated circuits.

Moreover, amendment 76 goes beyond current EU law on interoperability. By restricting the enjoyment of patent rights in a specific field of technology, it is also contrary to the WTO TRIPs agreement, as this is a compulsory licence without fair compensation for the patentee and without an individual evaluation on the merits.

This amendment is also unacceptable for UNICE.

AMENDMENTS RELATING TO ARTICLE 8:

Amendment 89 would be acceptable if 76 were to be deleted. Amendment 93 pre-supposes adoption of amendment 76, therefore is unacceptable.