



**International Chamber of Commerce**

*The world business organization*

## **Policy statement**

### **Amended proposal for a European Parliament and Council directive approximating the legal arrangements for the protection of inventions by utility model**

Commission on Intellectual and Industrial Property, 7 October 1999

#### [French version](#)

The International Chamber of Commerce (ICC) is the world business organization. It is the only representative body that speaks with authority on behalf of both large and small enterprises from all sectors in every parts of the world. Founded in 1919, it represents today thousands of member companies and associations from over 130 countries. ICC's purpose is to promote international trade, investment and the market economy system. It makes rules that govern the conduct of business (eg. Incoterms) across borders and provides essential services, foremost among them being the ICC International Court of Arbitration.

Business leaders and experts drawn from ICC membership establish the business stance on global issues of importance for business such as intellectual property. Since 1922, the ICC policy in this field has been elaborated by its Commission on Intellectual and Industrial Property, which brings together leading intellectual property experts from business and private practice from all over the world. As the world business organization, ICC firmly believes that the protection of intellectual property stimulates international trade and investment, and encourages transfer of technology, which are both essential for economic growth.

ICC has always campaigned for the provision of strong world-wide cost-effective non-discriminatory intellectual property systems as being an essential requirement for the world business community. As part of this campaign, ICC has supported all efforts to harmonize national intellectual property laws because such harmonization is beneficial to world business by for example reducing the cost of obtaining intellectual property rights and then enforcing them against infringers. ICC campaign has been directed in particular towards the protection of innovative technology by patents and similar rights. This is because ICC firmly believes that companies which do innovate technology should be able to obtain and enforce quickly and cheaply and without aggravation the intellectual property rights protecting such technology but most importantly the potency of the rights so provided should at the same time always be commensurate with the contribution made by the innovation. Further, a third party wishing to commercialize its own technology must be able to determine also quickly and cheaply and without aggravation whether it is free to work that technology as far as intellectual property rights belonging to competitors are concerned. Therefore, any intellectual property system must, if it is to be acceptable to world business, maintain a fair balance between these two factors and so any proposals for harmonizing national intellectual property laws in Europe or anywhere else will be carefully scrutinized by ICC. If such harmonization would result in a country being required to introduce a completely new intellectual property right, ICC will consider most carefully whether such a right would be of overall benefit to the world business community.

In view of the above, ICC has naturally been most interested in the European Commission's recent initiative to harmonize national utility model laws throughout the European Union. Last year, ICC issued a Policy Statement (dated 21 October 1998 and enclosed as Appendix A) which considered whether the Proposal for a Directive was on balance in the interest of the world business community. ICC particularly studied this Directive to see if the utility model system provided by the Directive if adopted satisfies the above-mentioned fair balance test between, on the one hand, the proprietor of a

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utility model to his or her innovation having a right commensurate with the contribution made by the innovation and, on the other hand, a competitor being free to work its own technology which is sufficiently distinguished from the technology protected by the utility model. In addition, ICC considered whether the introduction of a new intellectual property right in three EU countries (i.e. Luxembourg, Sweden and the UK) would be of overall benefit to the world business community. ICC concluded that the harmonized utility model system envisaged by that Directive did not provide the necessary fair balance between the innovator on the one hand and third parties on the other, and that therefore this system was not in interests of the world business community. However, ICC did stress that if the system were modified to increase the entry threshold for obtaining the right and/or reducing the potency of the right once obtained, ICC might be able to support a system so modified.

The Commission clearly received comments on the Proposal from, in addition to ICC, many professional and industry bodies interested in intellectual property, and the Economic and Social Committee issued an opinion on it in May last year. Last March, the European Parliament approved the Proposal subject to 34 amendments being made, and, in response to the Parliament's position, the Commission issued in June an Amended Proposal for a Directive which ICC has again studied with interest to see whether the lack of fair balance in the earlier Proposal has been corrected. Unfortunately, although the entry level is now a little higher, the potency remains the same and the necessary fair balance between entry level and potency is not provided.

In the Directive of the original Proposal, the Commission suggested that a utility model should be obtainable for any innovation which "exhibits either (a) particular effectiveness in terms of, for example, ease of application or use; or (b) a practical or industrial advantage" (Article 6 of that draft Directive). This meant that the right would be obtainable for any innovation which is novel over the prior art and has some advantage over it even though the innovation may be completely obvious to the skilled person in the art. In Article 6 of the Directive of the Amended Proposal, an innovation is protectable "if it exhibits an advantage and, having regard to the state of the art, is not very obvious to a person skilled in the art". This is still a too low entry level for a right with the same potency of a patent. ICC could only support a harmonized utility model system if the entry level were raised still further and/or the potency were reduced significantly.

ICC will not be commenting at this stage on the detail of the system proposed in the Directive of the amended Proposal but would probably wish to do this later in the process of gaining adoption of the Directive.

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