International Chamber of Commerce
The world business organization

CC Policy Statement

The draft EU directive on the patentability of computer-implemented inventions

Prepared by the Commission on Intellectual Property

Summary

ICC reiterates its longstanding support for a balanced European Union directive on the patentability of computer-implemented inventions.

In line with this objective, ICC supports the Political Agreement reached by the Competitiveness Council in May 2004. This agreement confirms existing European Patent Office practice, which has served European inventors and consumers well. It also incorporates a number of the amendments proposed by the European Parliament in its first reading, while avoiding the most harmful amendments, which would compromise innovation in Europe.

ICC therefore calls upon all governments to adopt a Common Position based on the Political Agreement reached in May 2004 and calls upon all Members of the European Parliament to support such a Common Position in the forthcoming Second Reading.

The Lisbon Goal is at risk

The EU Member States have agreed on the Lisbon Agenda's goal: to make the EU "the most competitive and dynamic knowledge-driven economy by 2010". One of the most important tools to reach that goal is to maintain and increase the high level of inventiveness within all business sectors in the EU, while at the same time enhancing Europe's competitiveness and its attractiveness as a destination for foreign direct investment. Patent protection of inventive ideas is necessary in order to achieve the Lisbon goals; copyright does not protect such ideas.

The draft directive on patentability of computer-related inventions covers innovations that can be found in an overwhelming number of everyday products marketed by European companies. Examples of such products, based on modern technology and using data and information processing are: telecommunication systems, including mobile phones (Alcatel, Ericsson, Nokia and Siemens, Sony Ericsson), consumer electronic devices (Philips, Siemens, Thomson), integrated circuits (Infineon, Philips, ST Microelectronics), ABS brakes and fuel injection in cars (Volvo, Scania), industry robots (ABB), etc. The consequences of the directive will therefore not be limited to a narrow industry sector but will have a direct impact on many small and large companies involved in a wide range of business activities.

The present European patent system has served European industry well, giving it a much needed platform for both small and large companies to innovate and compete. No need has been demonstrated to change this system of protecting inventive ideas. If changes are contemplated, they must be preceded by thorough and comprehensive studies of their effects on all sectors of the European industry. Some of the amendments proposed by the European Parliament in its first reading would substantially change the current system - without any such solid basis - by introducing substantial limitations to the patentability of computer implemented inventions. This could seriously harm European companies, damage the inventive climate in Europe, reduce the European competitive platform and have a negative impact on employment in Europe.

International Chamber of Commerce
38 Cours Albert 1er, 75008 Paris, France
Tel +33 (0)1 49 53 28 28 Fax +33 (0)1 49 53 29 42
E-mail icc@iccwbo.org Website www.iccwbo.org

The draft directive does not introduce new law

Contrary to what is often claimed, the draft directive does not intend to widen the scope of patentability by allowing patents which today are not permitted. Its purpose is only to codify current European patent law, as provided for in the European Patent Convention (EPC) and national patent laws and the case law of the European Patent Office (EPO) Board of Appeal and national courts. It would expressly exclude patents on "pure" business methods and non-technical innovations implemented in computer programs.

Opponents to the draft directive repeatedly state that the EPO has been granting so-called "software patents" in direct violation of the EPC. This is not correct. On the contrary, the case-law established by the EPO Board of Appeal with respect to patents on computer-implemented inventions is based on a careful analysis of the Convention.

Under the EPC, while a mathematical method as such cannot be an invention, a technical invention **in which a mathematical method is applied**, (e.g. concerning image sharpness enhancement) , is patentable. Consequently, a technical invention, even if implemented by a computer program, is patentable under European patent law. This is the basis for current EPO case law as well as for the proposed directive.

Almost all EU Member States are party to the EPC, which serves as a model for the national patent laws on the requirements for patentability. Article 52 of EPC states that "patents shall be granted for any inventions which are susceptible of industrial application, which are new and which involve an inventive step". In the second paragraph of the article, mathematical method schemes, rules and methods for performing mental acts, playing games or doing business, and programs for computers are mentioned as examples that shall not be regarded as inventions. However, this must be read together with the third paragraph of the same article, saying that the exceptions just mentioned shall be excluded from patentability *"**only** to the extent to which a European patent application or European patent relates to such subject-matter or activities as such."*

Computer implemented inventions must not be treated separately

Patent laws should be technology neutral: patents shall be available for any inventions and patent rights enjoyable without discrimination as to the field of technology. This is one of the basic principles of the internationally agreed WTO TRIPs Agreement which binds the EU and its Member States.

This is a well founded policy. Technology specific laws are difficult to draft and equally difficult to change when necessary, and become quickly outdated as technologies evolve. Different rules for different inventions also makes patenting more complicated, time consuming and expensive, which is particularly harmful for SMEs.

Many of the amendments proposed by the Parliament in its first reading are in conflict with this basic principle and with the EU's TRIPS obligations. Consequently, the Competitiveness Council was forced to reject amendments aiming to exclude certain types of inventions from patentability. These amendments state, for instance, that *"processing, handling and presentation of information do not belong to a technical field, even where technical devices are employed for such purposes"* (see Parliament's Article 2b), that *" data processing is not considered to be a field of technology within the meaning of patent law"*, and that *"innovations in the field of data processing are not considered to be inventions within the meaning of patent law"* (see Parliament's Article 3a)

These amendments attempt to define certain inventions as not being technical and thereby unpatentable. However, one cannot define an apple to be other than a fruit. It would defy common

sense and the EU's legal obligations to define clearly technical things as non-technical. For example, Intel's Pentium integrated circuits are clearly technical, while only processing information and data.

Certain amendments would seriously harm inventive enterprises

Some of the amendments proposed by the European Parliament would have far-reaching effects on the possibilities to protect innovations. The most notable are the following:

- The amendments mentioned above (Parliament' Articles 2b and 3 a) which exclude inventions relating to data processing etc from the patentable field, would make it impossible to obtain patents for innovations relating to engine control systems in cars, telecommunication systems, chemical process technology, control systems for industry robots, etc.

- Parliament's Article 6a would make it impossible for companies that develop new solutions based on data communication to enforce patents granted for those solutions. The proposed rule would thus make patents for many inventions worthless, such as Bluetooth or digital imaging.

- The proposed restrictions as regards allowed types of patent claims (Parliament's Article 5) would make it much more difficult to obtain truly enforceable patents.

These proposals and others that the Council did not adopt, would seriously harm the possibilities to protect innovations in Europe.

ICC therefore urges the Member States and the European Parliament not to pursue these amendments, but to accept the Political Agreement reached by the Competitiveness Council in May 2004. This agreement incorporates a number of the amendments proposed by the European Parliament in its first reading, while avoiding the amendments which would compromise innovation.

< p>

Document n° 450/992
9 November 2004