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on the proposal for a directive of the European Parliament and of the Council on the patentability of computer-implemented inventions (COM((2002) 92 – (C5-0082/2002 – 2002/0047(COD)))

- The Need for a Directive and Issues at Stake

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Rapporteur: Arlene McCarthy

Why does the Commission think a directive is necessary

As far as the European Patent is concerned, there have been divergences of interpretation, leading to a lack of legal certainty, particularly in the UK and Germany where most of the case-law on computer-related inventions has been developed. This is because national courts are not bound to follow decisions of the Boards of Appeals. However, Germany and the UK have agreed to follow the recent decisions of the Boards in Computer program product I and II, but other Member States have not clearly followed suit. Furthermore, national patents can still be granted. This uncertainty could affect investment decisions and the free movement of goods within the Internal Market.

Some arguments

A vociferous section of public opinion believes that there should be no patentability of software at all. In order to be able to give proper consideration to this argument, we will need to have full information about what effects the proposed directive might have on open-source software and on the creativity and vitality of the industry. It seems to many that the opponents of software patents have not been able to show that software with a technical effect should cease to be patentable. The arguments against patenting software which satisfies the tests of the EPC could well be levied at patenting in general. All patents grant a limited monopoly as a reward for invention.

Moreover, open-source software has flourished alongside the existing patenting regime in recent years. Again, under the present patenting regime many firms have invested billions of euros in R&D – investments founded on, among other things, the availability of patents. It is argued that it would be very unwise to jeopardise this investment by reducing patentability of software.

On the other hand, patents impose indirect regulatory and other costs and there is always a trade off between freedom and intellectual property. These considerations would suggest that the burden of proof is very much with the minority of persons who wish to extend the boundary of what is patentable (e.g. in the direction of patentability of business methods).

For your rapporteur, what is important above all is legal certainty. The European Patent Convention is now over 20 years old and the consultations held by the European Commission indicate that legal certainty needs improving. Otherwise some will incur the costs of submitting patent applications with little chance of success, while there is evidence that additional complexity is helping to deter others, particularly SMEs, from seeking patents at all, which means they may be missing financially advantageous opportunities. Uncertainty tends to drive up costs at every part of the patenting system, making infringement harder to predict and disputes more likely. In addition the complexity of intellectual property rules may act as a barrier to entry to the market.

Some questions to be answered before tacking the draft directive

1. Is such a directive necessary or can we just leave matters to the Boards of Appeal and the national patent courts?
2. Will the directive achieve its ends, in particular without unwanted side effects?

3. Does Art. 5 run counter to TRIPs in imposing artificial restrictions on the type of claims permissible in this field? Is it intended to be retroactive? If so, with what effects?
4. Is the proposal legally watertight (legal certainty)?
5. Is there any merit in following in the footsteps of the USA (patentability of business methods) or should patentability of business methods be clearly and specifically precluded?
6. Should the system of (compulsory) licences be reviewed to prevent abuse of the patent system?
7. Is the issue of trivial patents a problem? If so, how should it be addressed?
8. What risk, if any, is posed to open-source software? If so, how is it that open-source and proprietary software seem to co-exist at present?
9. Is it possible to argue that patents may stifle innovation, if so how?
10. Is it possible to quantify in economic terms/employment the benefits/disbenefits of software patentability?
11. What impact, if any, will action in this area, one way or another, have on SMEs?
12. What is the impact of TRIPs?
13. The EPC is not limited to EU countries. What are the implications of this in the event that the directive is adopted?
14. Do recital 18 and Art. 6 of the proposal for a directive need to be reworded in order to allow decompilation of programs for the purposes of interoperability as is permitted under Directive 91/250?