

CEC patent officials 2004-04-28 pushing for program claims

<http://swpat.ffii.org/papers/europarl0309/cec0405/cec0405.en.html>

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english version 2004/05/04 by FFII*

2004-05-04

The software patent directive was on the order of the day of the Commission on wednesday, 2004-04-28. We publish the minutes of the meeting of the directors of cabinets and the reference documents. The text tries to push the Commission's various directorates to accept a position that is even more clearly in favor of unlimited patentability than what they had accepted in February 2002. The cabinet chiefs of Liikanen and Monti seem to be willing to go give the patent movement what it wants, including program claims and enforcable patents on communication standards. If the Commission accepts these positions, the Council will be able to decide without unanimity. After the last CoRePer meeting it appeared that a few delegations, such as DE, BE and DK, had reservations on some minor points. Therefore, in order to push the "compromise" through, the Commission needs to agree with the working party. In order to justify such agreement, the document falsely presents provisions for unlimited patentability as limitations on patentability and argues that thereby the text maintains the "original balance". Moreover it uses the TRIPs lie as its sole justification for discarding the Parliament's amendments.

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*<http://lists.ffii.org/mailman/listinfo/traduk/TradukListinfo.en.html>

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1 [Document Header]

PROPOSITION DE DIRECTIVE DU PARLEMENT EUROPEEN ET DU CONSEIL CONCERNANT LA BREVETABILITE DES INVENTIONS MISES EN OeVRE PAR ORDINATEUR (SEC(2004) 525 ; SI(2004) 320)

Les chefs de cabinet recommandent au Collège d’autoriser M. BOLKESTEIN à soutenir le compromis de la présidence dans la perspective d’une prochaine décision du Conseil, conformément à la ligne indiquée au document SEC(2004) 525 et dans la mesure où l’équilibre de la proposition initiale de la Commission est préservé.

Il est pris acte que M. BOLKESTEIN, en accord avec M. MONTI, veillera au contenu du considérant n^o 17, aux termes duquel les dispositions de la directive, en particulier concernant la question de l’interopérabilité, ne préjugent pas l’application des articles 81 et 82 du Traité.

Le Chef de cabinet de M. LIIKANEN émet une réserve d’attente concernant l’aspect de l’interopérabilité.

FICHE “GrAC”

Updated version of fiche “GrAC” in the light of the Intellectual Property Working Party (Patents) meeting of 30 March 2004 and COREPER on 21 April 2004

Subject:

Proposal for a Directive of the European Parliament and of the Council on the patentability of computer-implemented inventions.

2 Demande d’habilitation

The objective of this fiche is to request a mandate for Commissioner Bolkestein to accept the Presidency’s compromise package along the lines indicated in this fiche to facilitate adoption of the Council’s common position. The habilitation would allow Commissioner Bolkestein to go along with the Presidency compromise, providing that the balance of the Commission’s original proposal is preserved.

3 Current package on form of claims/interoperability

Elements of package

- Computer programs on carriers
- Interoperability

The package previously agreed at GAP/hebdo (August 2003) balanced an acceptance of claims for computer programs on carriers (Article 5(2)) in exchange for an additional interoperability exception (Article 6a).

The current Presidency compromise is based on this package except that the intention behind Article 6a is covered by a new Recital 17 agreed by MSs in Council working group.

In our view, the new Recital 17 provides adequate provision to deal with abuses hindering interoperability. This is rightly dealt with under competition rules and the Commission has shown that it is not afraid to defend third parties by robustly applying these rules (e.g. Microsoft). Interoperability in the context of acts permitted under copyright is already covered by existing Article 6.

Moreover, any fear that Article 5(2) may appear to allow the patenting of computer programs as such is addressed in several places as follows:

- Recital 7a clearly states that “a computer program as such cannot constitute a patentable invention”
- Article 4 sets out the conditions for patentability and stipulates that an a computer program as such cannot be patentable;
- Article 4a provides clarification that the simple specification of technical means is not enough to imply patentability.

Additionally, other aspects serve to reinforce the overall balance of the text, such as Recital 12 on technical contribution and Articles 7, 8(ca) 8(cd) and 8a on reporting. Therefore, as a whole we feel that this text provides a compromise with which the Commission could agree.

4 2. State of Play: Council

On 14 November 2002 the Council (Competitiveness) reached broad agreement on a common approach, pending adoption of the European Parliaments opinion at first reading, noting a reservation by the Commission, a general scrutiny reservation by FR and a parliamentary scrutiny reservation by ES, as well as statements made by BE (supported by IT) and FR.

The Intellectual Property Working Party (Patents) discussed the amendments proposed by the European Parliament on several occasions, the latest being 30 March 2004 and has agreed to take on board a number thereof. The Presidencys compromise text

reflects the text of the Councils common approach mentioned above, as amended in order to accommodate some of the amendments proposed by the European Parliament. Furthermore, the Presidency's text generally reflects the position taken by Commissioner Bolkestein at the EP plenary session.

As a result of COREPER on 21 April, the Presidency's text (8731/04) appears to be

- acceptable without change for UK, IE, NL, AT, FI, SE, PT, LU, IT and EL
- subject to a general scrutiny reservation by FR, BE, ES at this stage although FR indicated a positive attitude on a technical level
- subject to parliamentary scrutiny reservation by DK
- subject to a general reservation by DE as well as specific reservations on the definition of technical contribution in Article 2(b) and on recitals 7a and 13.

Article 2 (b) contains a definition of "technical contribution". DE, with some support from BE and DK for the intention, has proposed an expanded definition which draws on amendments 107 and 69 (slightly modified) of the European Parliament, which were rejected by the Commission. The other delegations prefer the wording contained in the Presidency text. At COREPER the Presidency was not minded to take this amendment on board.

In relation to the issue of interoperability, the competition aspect is now covered by recital 17. Some MS were interested in a more extensive provision in the direction of Parliament's Article 6a, which was unacceptable to the Commission because the wording went considerably beyond the context of interoperability and would introduce exceptions to the scope of patent protection which are incompatible with our international obligations under the WTO TRIPs Agreement. However most agreed that that the issue could be dealt with through competition rules as in recital 17, and any further provision should be kept in hand for the second reading.

5 3. State of Play - Parliament

The EP plenary of 24 September 2003 approved some 50 amendments to the Commission's proposal. Many of these amendments are completely unacceptable to the Commission and have not been taken on board in the Presidency text. They create large discrepancies between patent practice for computer-implemented compared to other types of invention which defeat the object of a harmonisation directive. Exceptions for patentability are created which could remove patent protection from almost all computer-implemented inventions in the EU, particularly in the telecommunications field. For example, the form of interoperability exception contemplated by Parliament would severely damage incentives for innovation in the computer-related area. Furthermore, it would be in breach of the Community's obligations under the TRIPs Agreement and would invite retaliation by our major trading partners.

6 4. Details of the submission to GrAC

The main elements of the Presidency's compromise are spelt out below. This compromise safeguards the overall balance between interests of right holders and other parties that was contained in the original proposal. Adoption of this package would require a modification of the Commission's position to accept new wording in Recital 17 to deal with abuses hindering interoperability rather than an additional Article 6a as previously contemplated. Further aspects of the package are outlined below.

Claims to a computer program on its own or on a carrier

The compromise text states in Article 5, paragraph 2 that:

A claim to a computer program, either on its own or on a carrier, shall not be allowed unless that program would, when loaded and executed in a computer, programmed computer network or other programmable apparatus, put into force a product or process claimed in the same patent application in accordance with paragraph 1.

All delegations accept this Article.

The requirement that claims which are consistent with paragraph 1 be included in the patent application if the form of claim in paragraph 2 is used ensures that the substance of all claims in a patent is in conformity with what was originally intended by the Commission.

Interoperability

New Recital 17 clarifies the role of competition law in cases where a dominant supplier limits the use of a technique required for interoperability. It states that:

The provisions of this Directive are without prejudice to the application of Articles 81 and 82 of the Treaty, in particular where a dominant supplier refuses to allow the use of a patented technique which is needed for the sole purpose of ensuring conversion of the conventions used in two different computer systems or networks so as to allow communication and exchange of data content between them.

Most delegations feel that this is the best way to deal with any potential difficulties in this area. FR has a reservation because they feel that the particular wording may be broader than necessary to ensure interoperability.

In light of the recent decision in the Microsoft case, the Commission has shown itself capable of dealing with this issue in the manner foreseen by this recital.

Commission report on the effect of the directive

Articles 7, 8(ca) 8(cd) and 8a require that the Commission monitor and report on the effect of the directive on the development and commercialisation of interoperable computer programs. This requirement will allow the Commission to propose amendments to this directive if the provisions relating to interoperability are found to be insufficient.

7 5. Possible Developments in the Council

The adoption by the Commission of the above provisions would allow adoption of the directive in Council by a qualified majority rather than unanimity. The latter seems unlikely in any case given the current reservations of certain Member States.