

InternetInfo.column: European Council Approves Software Directive for Patentability of Computer- Implemented Inventions



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In an effort to harmonize the national patent laws for European Union member states, the European Council of Ministers recently approved the European Union's Directive on the Patentability of Computer-implemented Inventions. The European Council, which represents the governments of the European Union, voted through changes that dismissed many of the amendments made last year by the European Parliament that would have limited the scope of patentability for computer software and computer-implemented technologies in Europe. The approved directive is consistent with the terms of the original proposal made by the European Commission in February 2003. The amended directive, if approved by the European Parliament in Fall 2004, will effectively pave the way for widespread patent protection of computer software in European Union countries.

The proposed patent legislation has stirred a controversial debate among European Union member countries over the merits of adopting a U.S. patent model offering a broad scope of patent protection for computer software and computer technologies. In contrast to patent practices today in Europe, the U.S. Patent & Trademark Office routinely grants patents

covering computer-implemented inventions and business models. Proponents assert that the proposed legislation would provide a clear definition for the scope of patentable subject matter in Europe. Supporters argue that businesses in Europe need a well-defined patentability standard that can be consistently applied by both the European Patent Office and the European Union member states. On the other hand, critics allege that the proposed legislation would improperly extend patent protection to computer software programs and present a threat to open source software development in Europe.

The Council's approval of the amended directive represents a legislative effort to harmonize European national intellectual property laws for the protection of computer software. While the approved directive extends patent protection to computer-implemented inventions, the directive excludes business processes and mathematical algorithms from the scope of subject matter that can be patented in Europe. The directive recognizes that patent claims can define a computer-implemented invention as a product, such as a programmed computer, computer network or apparatus or as a process carried out by a programmed computer, network or apparatus as a result of software execution.

Article 4 of the directive, as approved by the Council, provides that "In order to be patentable, a computer-implemented invention must be susceptible of industrial application and new and involve an inventive step. In order to involve an inventive step, a computer-implemented invention must make a technical contribution." A "technical contribution" is defined in Article 2 as "a contribution to the state of the art in a field of technology which is new and not obvious to a person skilled in the

art. The technical contribution shall be assessed by consideration of the difference between the state of the art and the scope of the patent claim considered as a whole, which must comprise technical features, irrespective of whether or not these are accompanied by non-technical features."

Article 4a provides exclusions to the scope of patent protection under the directive, stating that "A computer-implemented invention shall not be regarded as making a technical contribution merely because it involves the use of a computer, network or other programmable apparatus. Accordingly, inventions involving computer programs, whether expressed as source code, as object code or in any other form, which implement business, mathematical or other methods and do not produce any technical effects beyond the normal physical interactions between a program and the computer, network or other programmable apparatus in which it is run shall not be patentable."

While the amended directive has passed a vote before the European Council, the European Union's decision process also requires further evaluation of the proposed legislation by the European Parliament. This approval process places the controversial directive on a collision course for an airing of the differing views held by Parliament and the Council on the scope of software patent protection in Europe. Parliament is likely to complete its second reading of the directive in the second-half of 2004. In the event that the Council disagrees with the directive proposed by Parliament, the Council will convene a reconciliation committee that has a six-week period to resolve legislative differences. If Parliament and the Council approve the directive, the member states of the European Union would modify their national laws to implement the patent legislation. One commentator has suggested that a likely time frame for adoption of the proposed legislation, if approved by the European Union, is in 2005. **IPT**