

Provisional: to be updated in light of COREPER meeting

**REUNION DU GRI du
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Note for the attention of Members of GRI

Fiche drafted by **DG MARKT**, under the authority of the cabinet of Mr McCreevy

1. SUBJECT

Proposal for a directive on the “Patentability of computer-implemented inventions”

[COM(2002) 92 – 2002/47/COD]

Note for the attention of the members of the GRI

on the state of play and recommended position of the Commission for the July I plenary session of the Parliament at which the EP’s opinion in second reading will be adopted.

2. BACKGROUND

- (1) In February 2002, the **Commission** presented the proposal, which aims at harmonising provisions within the Community for dealing with inventions which make use of software. The Directive will bring under the supervision of the European Court of Justice the rules applicable by national Courts and patent offices charged with assessing the validity of patents and applications. The proposal is subject to the co-decision procedure.
- (2) The **European Parliament** adopted in first reading some 50 amendments to the Commission’s proposal in September 2003. The substance of half of such amendments has been incorporated in the Council’s political agreement, while those which were completely unacceptable to the Commission have not been taken on board (they would create large discrepancies between patent practice for computer-implemented compared to other types of inventions, which defeat the objective of a harmonisation directive and could also raise problems under the TRIPS agreement).
- (3) In May 2004, the “Competitiveness” **Council** reached, by qualified majority (ES voting against and IT, BE, AT abstaining), a political agreement on the proposal. The Commission accepted the text of the political agreement, though it departs from its original proposal, since it considered that the text preserved the balance of the Commission’s initial proposal.

3. SITUATION IN COUNCIL

- (1) The Council finally adopted its common position at the Competitiveness Council of 7 March 2005, when several delegations filed minutes statements. The reasons for delay were subject of previous consideration by the GRI.
- (2) In order to explore whether rapprochement is possible between the Council and the Parliament, allowing for adoption in second reading, the Luxembourg Presidency has held two meetings of the Council working group (attaches) to examine the amendments tabled in the EP JURI Committee. However given uncertainty about the EP's likely position, the wide divergence of the 256 amendments tabled and the quality of drafting, only on a couple of issues was any clear steer possible from the Council. The Rapporteur has not been prepared to give any sign of possible compromise between his radical position against patentability and the Council common position. An informal trilogue on 14 June merely underlined the Rapporteur's entrenched position.

Possible evolution in Council

- (3) The Council (attaches) will discuss on 22 June the package of some 38 amendments voted through by the JURI committee on 20 June, and the Luxembourg Presidency will report to COREPER on 23 June and 28 June. A further informal trilogue meeting is planned for 29 June.
- (4) If the Council can broadly accept the JURI package, or anything between it and the common position, then the Presidency could signal this to the EP in time for the plenary session, so as to allow for a possible agreement in second reading.
- (5) However support for the common position is fragile in the Council, and if the EP votes through a more radical set of amendments then conciliation will be likely and difficult, possibly leading to an unsatisfactory outcome for all parties.

4. SITUATION IN THE EUROPEAN PARLIAMENT

- (1) The Rapporteur Mr Rocard tabled a draft report in the Legal Affairs Committee of the European Parliament which was far removed from the Council Common position and maintained the radical position of the Parliament in 1st Reading with 39 amendments to the Council's common position.
- (2) Members of the JURI committee tabled a further 217 amendments, some merely repeating the Rapporteur's, while others sought to include helpful clarifications upholding the common position. There was no party discipline, the quality of drafting was variable, and individual Members tabled contradictory amendments. However some of this can be explained as attempts to table as much material as possible in order to allow compromises to be found.
- (3) Mr Rocard then tabled 17 "compromise" amendments, which did not bridge any gaps, and the shadow rapporteur, Mrs Kauppi tabled another 4 compromise amendments on the day of the vote in the JURI Committee (20 June).
- (4) The vote in JURI committee took place on 20 June. As a result of the vote the Rapporteur's position was soundly defeated, essentially by a coalition of the EPP and ALDE, but it is not yet clear how this will play into the plenary because

vote reservations were expressed and a number of amendments were subject to a tight vote. 38 amendments were accepted including only 4 of the rapporteur's "compromise" amendments. A compromise amendment on interoperability from Mrs Kauppi was adopted which is a compulsory licensing scheme based on RAND (reasonable and non-discriminatory terms) with reference to the public interest.

- (5) In terms of the overall package, some fine-tuning may be necessary at technical level, but on the whole the amendments go in an acceptable direction in relation to the Council common position. One possible difficulty is amendment 178 of Mr Manders which calls on the Commission to prepare within a year a proposal giving the EP democratic control over the European Patent Office, which is not a Community institution. This is institutionally and legally problematic, and contacts are being taken to see if the amendment could be rejected in plenary.

Possible evolution in Parliament

- (6) Some believe that given divergent views the EP will not muster sufficient majority to vote through any amendments, but opponents of the common position will be keen to press for conciliation, by retableting amendments which the JURI committee rejected. Outright rejection of the Directive appears unlikely.
- (7) Given the uncertainty of the possible outcome in the plenary it is difficult to know at this stage how far any concessions should be made with a view to possible agreement at second reading, since they may be unnecessary if the EP adopts no amendments.

5. COMMISSION POSITION

The College is requested to authorise Commissioner McCreevy to continue working with the colegislators, in view to securing an agreement in line with the objectives of the Commission's original proposal, the Council's Common position and the recommendations in this fiche. Bearing in mind the uncertainty about possible evolution in the Parliament, these are as follows:

- The Commission maintains its position in support of the Council common position and can accept amendments which introduce useful technical or contextual clarifications, subject to minor fine-tuning or interpretative statements where necessary
- The Commission can accept additional reporting requirements, including the establishment of new advisory committees, providing that resource implications are borne in mind by the EP
- The Commission should resist amendments which relate to the Commission's right of initiative, or the relationship with non-Community institutions
- On key issues of substance:
 - the Commission recognises the importance of interoperability for reaching agreement and therefore maintains a certain flexibility as to the solution found to deal with interoperability, providing that agreement can

be reached between the Council and the Parliament, and that our international obligations are respected

- on the scope of patentability, further clarification of the common position is acceptable but not significant changes departing from the current situation or from general patent law solutions
- on claims to computer programs on a carrier, where such programs implement a patented invention, the Commission can accept any solution between the common position and the Commission's original proposal, including alternative formulations to achieve the same objective of enforcing valid patents.

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