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THE EUROPEAN UNION**

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**ADDENDUM 2 TO "A" ITEM NOTE**

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Subject : Proposal for a Directive of the European Parliament and of the Council on the patentability of computer-implemented inventions  
- Common position  
- Statement of the Council's reasons

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The Council will find in Annex an additional statement for entry in the minutes of the Council meeting at which the above-mentioned common position will be adopted.

**Statement for entry in the Council Minutes**

**5. Statement by Poland**

Poland – having regard to the necessity of further work on the draft directive in order to strengthen legal certainty and to protect economic interests, particularly of small and medium-sized enterprises, as well as activities in research and technological development – notes, despite the reservations submitted, the fact of reaching political agreement at the 18 May 2004 meeting of the Competitiveness Council concerning a common position leading up to a second reading of the draft directive.

Poland supports the goals that guided the preparation of the directive, especially the need for:

- improvement of the transparency and legal certainty of the protection of computer-implemented inventions, which is particularly important for economic decisions taken by natural and legal persons active in the area of information technology,
- harmonisation of diverse practices in the said area in the EU Member States,
- preclusion of the possibility of patenting non-technical inventions (ones not pertaining to the domain of technology), inventions lacking the characteristics of innovativeness, business methods and computer programs as such,
- development of an environment conducive to innovations in industry and computer science.

Poland states, however, that several key provisions included in the text of the proposal resulting from the Council meeting on 18 May 2004 do not meet her expectations.

Poland thus firmly favours unequivocal legal instruments guaranteeing that computer-implemented inventions will be patentable but a computer program or its fragment will not – beyond any doubt – be patentable. Poland therefore informs that she will support the draft directive on its second reading at the Council only if introduced amendments prohibit the patenting of computer programs.

In its current form, the draft directive does not meet Poland's expectations because:

1. although it appears (in Art. 4) to disallow considering a computer program to be a patentable invention, in fact (by virtue of Art. 5.2) it provides for the possibility of introducing patent protections relating to computer programs as such whenever there are more protections concerning the object of the patent submission,
2. it states that also computer programs may be treated as computer-implemented inventions for they belong in the area of technology, and are thus bound by the provision of Art. 27 of the TRIPS Agreement. Because of this inadmissibly broad interpretation of the TRIPS Agreement, the draft directive contradicts Art. 52 (2) and (3) of the Convention on the Grant of European Patents, according to which computer programs as such are not considered as inventions,
3. it recognizes simple use of a computer as “technical”, which is contradictory to the essence and understanding of an invention, adopted both in the Convention on the Grant of European Patents, and in the Polish legal system,
4. it does not ensure the protection of interoperability, admissible on the basis of Art. 30 of the TRIPS Agreement. The draft directive allows for reverse engineering and decompilations analogically to the provisions of the directive on the protection of computer programs by means of copyright. While the exceptions provided for in that directive are sufficient in the context of copyright, Art. 6 of the draft directive does not actually enforce interoperability on a patent holder.

Moreover, the draft directive contains what Poland views as a number of legal incoherencies, many vague provisions and terms explained with notions whose definitions are not found in the proposal. The definitions of a “field of technology”, or of “technical”, are a case in point. The proposal lacks a clear statement that the programming of computers, computer networks or other devices, is not a field of technology.

The preamble (point 8) states that a goal of the directive is to prevent divergent interpretations of the provisions of the Convention on the Grant of European Patents. This is to be served through harmonisation of the national legal arrangements regulating the patentability of computer-implemented inventions. This is provided for both in point 5 of the preamble and in Art. 10 that directly obliges the Member States to enact statutory law, as well as executive and administrative regulations, indispensable to the implementation of the directive’s provisions. This contradicts point 18 of the preamble, where it is claimed that the legal protection of such inventions does not call for the creation of a separate code of law replacing national law, and the directive itself merely makes the legal status quo clear.

A detailed analysis of the directive’s provisions leads to the conclusion that there is a need for the introduction into national law of a new definition of a patentable computer-implemented invention. The draft directive defines a computer-implemented invention in such a way that every program installed in a computer and executed in it becomes an invention. On the other hand, when defining technical input, the draft directive does not sufficiently distinguish between technical and non-technical features of an invention. Art. 2b and 3 suggest that patentability will be enjoyed by an invention whose contribution to knowledge resides only in the non-technical part.

In many cases it is necessary to underscore in the text of the directive the technical character of an invention. It is therefore advisable to explain that computer-implemented inventions should be protected only when limited to products such as programmed technical equipment or a technical operation executed with this equipment.

Poland is also of the opinion that in view of the highly difficult legal issues involved, further work on the document should be assisted by a document including examples of inventions that will enjoy patentability and ones that will not. Those examples will constitute an interpretation aid for rulings on the patentability of computer-implemented inventions.

Poland deems it necessary as well to include in the document proposed above a preliminary assessment of possible legal and financial consequences caused by the implementation of the directive.

In conclusion, Poland wishes to emphasise that the goals that underlie the work on the directive can only be achieved when it establishes explicit legal instruments making it impossible to patent computer programs or their fragments, while enabling computer-implemented inventions to enjoy patentability. Poland will steadfastly strive, at later stages of the legislative work, for these conditions to be met. She will do so in the conviction that a proper settlement of the issues related to patenting computer-implemented inventions will become an important factor in enhancing the competitiveness of the European economy and in strengthening of the European Research Area.

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