

FFII calls on Committee of National Parliaments (COSAC) to review Council Patent legislation

<http://swpat.ffii.org/xatra/LtrCosac040905/index.en.html>

Workgroup

swpatag@ffii.org

english version 2004/09/09 by Hartmut PILCH*

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The lack of democratic control in the EU's lawmaking system has been a cause of concern for decades. In particular the Council's legislative processes are notoriously intransparent. One approach to address this problem is the Committee of National Parliaments (COSAC). A protocol to the Amsterdam Treaty assigns this committee important functions in the Council's legislative process. These functions have been grossly neglected in the case of the software patent directive. Vrijschrift, the dutch branch of the Foundation for a Free Information Infrastructure, has written a letter to COSAC president Sharon Dijksma, to raise concerns and call for an intervention of COSAC before September 24th, the date when the Council will presumably meet to rubberstamp a "political agreement" from 2004-05-18 to remove all limits on patentability of "computer-implemented" algorithms and business methods, thereby radically overturning the legislative proposals of the European Parliament as well as the consultative organs of the EU.

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*<http://www.ffii.org/~phm>

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To: Voorzitter vaste Kamercommissie Europese Zaken, COSAC Presidency, Mrs Sharon Dijkma

From: Vrijschrift/FFII

Subject: Dutch EU Presidency Negates European Democratic Procedure and the Protocol on the Role of National Parliaments in the European Union

Attachement: printversion of this letter¹

Amsterdam, September 5 2004

Dear Mrs Dijkma,

2 Body

We write to inform you of our concerns regarding the way the Dutch EU Presidency is conducting itself with respect to European procedures and the Protocol on the Role of National Parliaments in the European Union. The road taken by the Dutch government negates the Protocol on the Role of National Parliaments and weakens European democracy.

On May10th Minister Brinkhorst misinformed the Dutch Parliament about the Directive “computer-implemented inventions”, and voted for the Council’s proposal on May 18th based on that misrepresentation. As a result, the Dutch Parliament has adopted a motion by MP Van Dam calling the government to withdraw its vote.

The Dutch Parliament required two sessions of the Committee on Economic Affairs to come to realize the issues with the Council’s text, and how detrimental it would be for SMEs and innovation. The Directive’s text is overcomplicated, with double negations, duplicitous qualifications (“exceptions” that are always true) and undefined exclusions. The Parliament fears “excesses” with regards to the patentability of software. Empirical evidence shows patents on software impede innovation.

The Dutch Parliament concluded that since there was ongoing discussion of the Directive, the government should abstain from the Council’s vote for political agreement.

Minister Brinkhorst stated in a debate on the matter that for constitutional reasons the Council’s vote cannot be reversed. The State Secretary also misrepresented the facts in the debate on the Van Dam motion, by calling the political agreement a “common position”, thereby presenting the non-binding agreement as a binding one. Furthermore, a Brussels Permanent Representative said the vote cannot be changed 1. In these actions, the Dutch government has spread critical incorrect information about European Union democratic procedures three times 2.

¹http://www.vrijschrift.nl/Members/awessels/vrijschrift.nl_cosac040905.pdf

The Protocol on the Role of National Parliaments in the European Union assures Parliaments early access to legislative proposals. The Parliaments of the 10 new members of the Union have not had early access, since the translations of the EU Council's political agreement have only very recently become available.

Since the translations became available during the Parliaments' recess periods, it would be appropriate to add a short extension to the six weeks period provided under the Protocol, within which national Parliaments may render their conclusions regarding the Council's political agreement. No shortening of the six weeks period can be allowed.

Without the six weeks review period, the Parliaments of the new members are denied the rights the Protocol provides for. There is no ground to deny the new members these rights, since, so far as we know, there is no jurisprudence on the Protocol, and no mention of this situation in the Treaty of Accession. The new members of the European Union must enjoy their full rights to address the Directive.

Eastern Europe would bear the hardest burden in the outcome of this decision. SMEs in Europe can little afford to compete in a context that would include the kinds of patents this Directive will validate. The new Eastern European members of the Union are hardly in a better position than the rest of Europe. Eastern Europe will never own its software industry under the Council's text.

Europe needs a sensible patent system. The Council's misleading text is no contribution to that. Critical amendments contributed by the European Parliament, including a key definition clarifying the term "technical", were discarded by the Council for the dissembling language that they favor 3.

The Council worked entirely on the basis of text developed in the JURI committee 4. They simply discarded clear language such as 'programs are not inventions' of the European Patent Convention and clarifications like 'data processing is not a field of technology' and 'publication and distribution of software is never a patent infringement' of the Parliament.

We believe the Directive must be discussed as a B-item in the Council, not allowed to pass as a mere formality under the A-item agenda points. The Netherlands has adopted a motion showing a lack of faith in the vote. There has been discussion all over Europe regarding the misleading nature of the Directive and the problematic conduct of the vote. A large group of Ministers joined in supporting Germany in including a critical text that was dropped at the very moment of the vote, putting those Ministers, including a substitute Danish Minister, in a difficult position. The Directive should not be handled by non-involved ministers 5.

Every Parliament in the European Union has the right to debate the Directive on Computer-Implemented Inventions, and to render their opinions. Any Council member may unilaterally act to transfer an A-item decision indicating a mere formality to the list of B-item agenda points 5. Every member of the Council has the right to change their present vote 2. Any Council member may unilaterally block any proposed shortening of the six weeks review period. All of the national members of the European Union have the freedom and the right to engage in any decision that determines their future.

The proceedings surrounding the Directive on Computer-Implemented Inventions are a particularly transparent instance representing democratic deficits in the European

Union. The misrepresentations of the procedure and of the status of the Council's political agreement, and the failure to apply the Protocol on the Role of National Parliaments to the new members of the Union in the deliberations, are not only signals of a failure to conduct the deliberations on the Directive in an open and accountable manner. They also represent a cessary and worthy occasion to set the right precedent for democratic process.

Please require the Council and the Dutch Presidency to make clear that democracy is here to stay in Europe.

Voorzitter vaste Kamercommissie Europese Zaken, we hope you will forward this letter to the COSAC members as well.

3 footer

On behalf of Vrijschrift/FFII,

Sincerely,

Ante Wessels

Arend Lammertink, Ir

Harmen van der Wal, Mr.

cc: Voorzitter vaste kamercommissie Europese Samenwerkingsorganisaties

ANP

1. Detailed analysis (Dutch)

Octrooien op software werpen hun schaduw vooruit²

2. Lopez report

http://fajardolopez.com/informes/Fajardolopez.com_18th-May-EU-Council-voting.pdf

This opinion was confirmed by the Council itself: "PUBLIC INFORMATION"
<public.info@consilium.eu.int>

3. <http://swpat.ffii.org/news/04/cons0507/>

4. See Kauppi comment at <http://swpat.ffii.org/news/04/cons0507/>, and Tauss on the Danish Parliament's level of participation at URL2

5. See for this the Council Political Agreement Reversal HowTo³

www.vrijschrift.nl

www.ffii.org

²http://www.vrijschrift.nl/Members/awessels/vrijschrift.nl_misleiding-kamer.pdf

³http://www.vrijschrift.nl/Members/awessels/vrijschrift.nl_change-the-vote-howto.pdf

4 Annotated Links

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- **Urgent Call to National Governments and Parliaments⁴**

Europe's governments are about to put their stamps under a directive proposal for unlimited patentability and unfettered patent enforcement of "computer-implemented" algorithms and business methods. The agreement by the Council of Ministers of 2004-05-18 discards well-deliberated decisions of the European Parliament and the EU's consultative organs without any justification and without democratic legitimation. The majority was secured by deceptive packaging and by questionable diplomatic maneuvering at the decisive session. The undersigned, who represent the leaders of software innovation and informed discussion on software innovation policy in Europe, ask the responsible politicians to pull the emergency brake and to reorganise the process of competitiveness legislation in the Council.

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- **Software Patent News⁵**

FFII reports about latest developments concerning the limits of patentability.

⁴<http://localhost/swpat/xatra/cons0406/index.en.html>

⁵<http://localhost/swpat/lisri/cnino/index.en.html>