Future of Proposed Software Patent Directive is Uncertain
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Recent events have cast further doubt on the future of the controversial Computer Implemented Inventions Directive proposed by the European Commission (the “Proposed Directive”). Touted as a necessary measure for ensuring that the European software community remains competitive with the industries of other jurisdictions, such as Japan and the United States, the Proposed Directive has also faced some vocal resistance, much of which has focused upon the Proposed Directive’s potential for stifling the ability of small and medium enterprises.

Background
The Proposed Directive was developed as a result of a number of concerns. For instance, legislators wished to address ambiguities existing at law. Computer programs “as such” have been excluded from patentability by Member States’ patent laws and the European Patent Convention. However, many patents for computer-implemented inventions have been granted by the European Patent Office as well as the national patent offices. The Proposed Directive would address these ambiguities by harmonizing national patent laws with respect to the patentability of computer-implemented inventions. It would also make the conditions of patentability for such inventions more transparent.

Legislators were also motivated by the desire to create a more level playing field among software companies and hoped to accomplish this by expanding the scope of protection of European patent law.

As a result of these concerns, European legislators began researching and drafting proposed legislation. The result of these efforts is the Proposed Directive.

Principle among its requirements, the Proposed Directive would oblige Member States to protect computer-implemented inventions as any other invention, subject to the basic requirements of novelty, inventive step and industrial applicability as laid down in Article 52(1) of the European Patent Convention. In order for the presence of an “inventive step” to be found, a computer-implemented invention would have to make a technical contribu...
tion, that is, a contribution to the state of the art in a technical field which is not obvious to a person skilled in the art. In determining the technical contribution, the invention would have to be assessed as a whole. The Proposed Directive would also establish that computer-implemented invention may be claimed either as a programmed computer or similar apparatus or as a process carried out by such an apparatus.

The Proposed Directive would require on-going monitoring of its impact. Specifically, Article 7 would require the European Commission to monitor the impact of computer implemented inventions on innovation and competition, both within Europe and internationally, and on European businesses, including electronic commerce. In addition, the Proposed Directive would also require the European Commission to report to the Parliament and the Council on the operation of the Directive within three years from the date by which Member States have to transpose it into national laws.

Strong Opinions
There has been considerable opposition to the Proposed Directive since it was first proposed. On a first parliamentary reading, Members of European Parliament had attempted to limit the impact of the Proposed Directive by restricting its scope. However, many of the amendments proposed by Parliament were rejected at a council of EU ministers held in May 2004. More recently, a European Parliament committee rejected the Proposed Directive in the Parliament’s “Conference of Presidents” and demanded that the Proposed Directive be started from scratch.

Since then, however, both the EU Council and the European Commission have appeared to be reluctant to observe the Parliamentary committee’s request. The Commission has gone as far as to state that it was “very disappointed” that the EU Council has postponed ratifying the Proposed Directive. The Parliament unable to demand that the European Commission redrafts the legislation but can under EU treaty law demand that Members of European Parliament are re-consulted.

There has been considerable opposition to the proposed Directive outside of Parliament as well. Recently, on February 17, 2005, a large group of individuals campaigning against the Propose Directive marched past the buildings of the EU Council, the European Commission and the European Parliament – the main European bodies involved with the Proposed Directive. The protest was organized by the Foundation for a Free Information Infrastructure, a pan-European group. Generally, opponents are concerned that the legislation would benefit large companies at the expense of small to medium sized enterprises.

On the other side of the spectrum, certain segments of the European and foreign software industries have been making vocal and repeated calls for rapid action to remove the ambiguity and legal uncertainty surrounding the patentability of computer-implemented inventions.

There have also been significant national divisions about the need for the Proposed Directive. Poland, in particular, with some support from other countries, including Hungary, Latvia, and the Netherlands, has allied with Members of the European Parliament to effectively reboot the legislation. Other countries, such as the UK, have been more supportive of the proposal.

The Future?
The future of the proposed Directive will likely become more clear on March 7, 2005 when European official are set to decide the fate of the proposal. On that date, the Council of Ministers must rule on the European Parliament’s request to withdraw the proposed Directive. Clearly, it will be interesting to see how events unfold.

2 Defined as: “any invention the performance of which involves the use of a computer, computer network or other programmable apparatus and having one or more prima facie novel features which are realized wholly or partly by means of a computer program or computer programs.” Id. at Article 2 (a).
3 Id. at Article 4(1).
4 Id. at Article 4(2).
5 Id. at Article 4(3).
6 Id. at Article 5.

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