

Patent Briefing

Software Patents in Europe – What Now?

Update on Patenting Computer-Implemented Inventions at the EPO

As mentioned in our earlier briefing note “Patenting Business Methods and Computer Programs at the EPO*”, the European Commission has for some time been attempting to gain approval of a directive on so-called Computer-Implemented Inventions (CII). This could potentially have had far-reaching consequences for the patenting of computer programs in the countries of the EU, with corresponding effects on practice at the European Patent Office (EPO).

Earlier this month, however, and following strong lobbying from pro-patent interests including Nokia, Siemens and Microsoft, the directive was overwhelmingly rejected at its second reading by the European Parliament. This might not have ended the story completely, as re-introduction of the directive was possible, but the Commissioner responsible has now announced that there are no plans to do this.

Thus, for the foreseeable future there will be no EU-wide policy on granting of patents for CII.

For us at Haseltine Lake, this turn of events has good points and bad points.

We are pleased that the possibility of a “software-unfriendly” directive has been avoided. The worst case, in our view, would have been if the European Parliament had continued to bow to the no doubt well-meaning views of “open source” advocates such as the Free Software Foundation and the NoSoftwarePatents lobby group. These bodies had persuaded the European Parliament, in its first reading of the directive, to make amendments which would have effectively prohibited software patenting throughout Europe – despite the fact that software patenting has been going on for some years at the European Patent Office (EPO) with around 50,000 software-related patents already granted.

Moreover, we are happy that the failure of the directive puts the EPO back in the driving seat of setting policy in this area. The EPO’s practice on CII is undoubtedly confusing and in need of clarification. It is case law decided by the Boards of Appeal which determines the extent to which CII may be patented at the EPO, and individual decisions are not always consistent with each other. Nevertheless, the cautious and independent approach taken so far by the EPO makes us hopeful that they will set a sensible middle course between the

prohibition of software patents on the one hand and the “free-for-all” policy introduced (but now being reconsidered) by the US Patent Office.

As a related point, the loss of the directive may lead the Patent Office in the UK – which had called for the directive in the first place – to align itself with the more applicant-friendly attitude of the EPO. Whilst the UK Patents Act is designed to have the same effect as the law governing the EPO, practices have diverged over the years with the result that inventions which probably would be accepted by the EPO are being rejected by the UK Patent Office.

One drawback is that whilst the EPO will doubtless continue to grant patents for CII, their validity and enforceability is still a matter for national courts, and thus open to question. For example, current EPO practice allows an invention to be defined (or “claimed”) in terms of a software program, whether or not embodied on a carrier such as a disk. However, no UK court decision has yet approved this form of “claim”, making it doubtful whether such claims are enforceable in the UK.

Conversely, recent German decisions tend to be moving more closely towards convergence with the EPO approach.

Meanwhile, different European countries have different views on “cross-border” infringement, where only part of a claimed system exists in one country with the rest elsewhere. This indicates the need for patent applications in this area to include various claim forms, thus maximising the chances that at least some claims will be valid in each country.

Perhaps the biggest drawback is that it remains unclear, in any given case, whether a CII can be patented or not. However, given that a software-related innovation (even one having more to do with business method than with technology) might be patentable in Europe, professional advice should be sought before disclosing it to third parties.

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** An updated version of our earlier briefing note is attached.*



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