

Translated by:

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Motion

by the members of parliament Dr. Uwe Küster, Dirk Manzewski, Jörg Tauss, Ulrich Kelber, Dr. Axel Berg, Dr. Herta Däubler-Gmelin, Gernot Erler, Dr. Ernst Ulrich von Weizsäcker, Franz Müntefering, and the parliamentary group of the SPD (Social Democratic Party of Germany);

by the members of parliament Dr. Günter Krings, Dr. Norbert Röttgen, and the parliamentary group of the CDU/CSU (Christian Democratic Union/Christian Social Union);

by the members of parliament Grietje Bettin, Jerzy Montag, Volker Beck (Köln), Katrin Göring-Eckardt, Krista Sager, and the parliamentary group of BÜNDNIS 90/DIE GRÜNEN (Alliance 90/The Greens);

and by the members of parliament Rainer Funke, Dr. Karl Addicks, Daniel Bahr (Münster), Rainer Brüderle, Ernst Burgbacher, Helga Daub, Jörg van Essen, Ulrike Flach, Otto Fricke, Horst Friedrich (Bayreuth), Hans-Michael Goldmann, Joachim Günther (Plauen), Dr. Karlheinz Guttmacher, Klaus Haupt, Ulrich Heinrich, Birgit Homburger, Dr. Werner Hoyer, Hellmut Königshaus, Dr. Heinrich L. Kolb, Gudrun Kopp, Jürgen Koppelin, Sibylle Laurischk, Harald Leibrecht, Sabine Leutheusser-Schnarrenberger, Dirk Niebel, Eberhard Otto (Godern), Detlef Parr, Dr. Hermann Otto Solms, Dr. Max Stadler, Dr. Rainer Stinner, Carl-Ludwig Thiele, Jürgen Türk, Dr. Claudia Winterstein, Dr. Wolfgang Gerhardt, and the parliamentary group of the FDP (Liberal Democratic Party)

Safeguarding competition and innovation dynamics in the field of software – Effectively confining the patenting of computer programs

May the Bundestag resolve as follows:

I. The German Bundestag states:

In a global knowledge and information society and an increasingly knowledge-based world economy, information technology solutions are gaining more importance. The framework for the development of powerful, cost-efficient, dependable and, not least,

safe computer programs and software is becoming a critical factor for the German innovation system. The dynamic evolution of the German and the European software industry is, in particular, also based upon small and medium-sized enterprises. On 20 February 2002, the EU Commission put forward its proposal for a directive of the European Parliament and of the Council on the patentability of computer-implemented inventions (COM(2002)92 final). On 24 September [2003], the European Parliament passed fundamental amendments; on 18 May 2004, the Council of the European Union, with the consent of the [German] federal government, was able to agree on a common position (Council document no. 9713/04).

In principle, the German Bundestag welcomes the initiative for a European harmonization of the patent granting practice with respect to computer-implemented inventions. It reaffirms its conviction that the sufficient protection of intellectual property is indispensable for the sustaining and the development of creative potentials in society, in the interest of the creative, the consumers, as well as culture, economy and society as a whole. Moreover, the innovation dynamics in many economic segments – increasingly also in traditional economic segments such as, for instance, the machine construction, automotive and electrical industries – depend upon the growing capabilities and successful integration of information technology components. The German Bundestag shares the conviction that technical inventions, even if they contain software components, must be amenable to protection by patent law. Nevertheless, the German Bundestag has arrived at the conclusion that the present state of opinions concerning the draft directive at the European level does, thus far, not provide sufficient solutions to central questions.

The definition of the "technical contribution" of a computer-implemented invention as a requirement for its patentability represents a central item of the proposed directive. For reasons of legal certainty, the definition of the technical contribution therefore has to be shaped as precisely as possible in order to achieve sufficient quality control in the patent granting practice and to prevent the patenting of so-called trivial patents. Computer-implemented inventions have to make such a technical contribution in order to become patentable. The European Parliament and the Council start from basically the same definition, according to which a "technical contribution" is a contribution to the state of the art in a field of technology, which contribution is not obvious to a person skilled in the art. However, the European Parliament additionally stipulated in its amendments to article 2b that the use of forces of nature to control physical effects only belongs to a field of technology if it transcends the numerical representation of information. The presentation, handling and processing of information should, however, not represent a technical contribution, according to the position of the [European] Parliament, even if technical devices are employed for such purposes.

Such a restrictive definition is missing from the Council's proposal. The directive as proposed by the Council only contains such reasons for exclusion [from patentability] in its article 4(2) that make reference to the technical contribution of a computer-implemented invention. Thereby, the Council has only partially adopted the reasons for exclusion from the position of the European Parliament. Also, the common position of the Council lacks a concrete definition of the term "technical", which could be helpful to achieve the stated objectives. For this purpose, the jurisdictional practice of the Federal Supreme Court [of Germany] has developed a practical definition: "Technical" is a teaching for an action according to plan by using controllable forces of nature for the achievement of a causally surveyable result, which result is, without intermediary activity by the human mind, the direct outcome of the use of controllable forces of nature. With such a definition, the individual elements of the technical contribution would be easier to understand. At the same time, this would make an important contribution to ensuring the continued interoperability of different computer systems. All in all, the proposal by the Council does not meet those requirements.

A too far-reaching patentability of computer programs threatens to adversely affect innovation dynamics and to lead to new legal uncertainties, particularly for open source

concepts. An important role must be ascribed to those and to open standards with an eye to the growing requirements in terms of interoperability and IT security. From a technical point of view, copyright-related privileges concerning decompilation and interoperability do not meet those requirements by themselves and are to be complemented by a regulation of patent law. In particular, small and medium-sized enterprises fear that a too far-reaching patentability of computer programs requires a high degree of efforts in terms of human resources, legal costs and financial expenditures, and creates substantial economic and legal risks. Excessive patent claims or trivial patents furthermore bear the danger of undermining the societal acceptance of the patent system as an effective instrument for innovation and progress. In this regard, an independent evaluation of the controversial patent granting practice of the European Patent Office in recent times is to be ensured.

According to article 10 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization (WTO), computer programs shall be protected according to the rules of copyright law. The copyright protection of computer programs is guaranteed by Council Directive 91/250/EEC of 14 May 1991, which guideline has been incorporated into German law by articles 69 et seq. of the [German] Copyright Law. Correspondingly, computer programs "as such" (as well as business models) are, according to the statutes of the European Patent Convention that are in force and effect, excluded from patentability. That principle has to be adhered to. Computer-implemented inventions must therefore be construed as narrowly as possible. Hence, the German Bundestag welcomes the objectives of the decisions taken by the European Parliament. It requests the European Parliament to further gain recognition for those objectives in the upcoming consultations of the draft directive. It welcomes the recent initiative by the [German] federal government with respect to a "roundtable" for sounding out possible paths to a compromise in a dialog with stakeholders and the potentially affected.

II. The German Bundestag calls upon the [German] federal government:

1. to take into account, to an increased extent, aspects of industrial location policy, competition policy and innovation policy as well as the particular parameters of the development and the specific characteristics of computer programs, in forthcoming debates and measures for reforming the protection of intellectual property in computer programs and in the field of information technology;
2. to further and intensify the commenced dialog with small and medium-sized software enterprises, science and other representatives of civil society;
3. to further its efforts for an improved information of small and medium-sized enterprises about the opportunities of an active patent policy.

With respect to the further consultation of the draft directive at the European level, the German Bundestag calls upon the [German] federal government:

4. to use its influence so that, in further consultations, the draft directive be changed to the effect that the definition of the technical contribution in article 2b be stated more concretely, and that a definition of the term "technical", which is oriented towards the definition of "technical" by the [German] Federal Supreme Court, be included. The very definition has to ensure that computer programs as such, business methods and algorithms cannot be patented;
5. to use its influence so that an interoperability privilege under patent law, to the fullest extent possible, be incorporated as a statute;
6. to use its influence so that, in article 5 of the draft directive, the scope of permissible patent claims be restricted to product and process claims by excluding independent program claims;

7. to use its influence at the European level so that an independent evaluation of the decision-making practice of patent offices, particularly the EPO, be performed. That could, for instance, be an integral element of the envisioned report on the effects of the directive;
8. to take into account to a greater extent, in the further quest for a compromise, the objectives of the decisions taken by the European Parliament in the spirit of this motion, and the future results of the roundtable of the [German] Federal Ministry of Justice;
9. to use its influence, with determination, so that alternative development concepts such as, in particular, open source projects not be impaired.

Berlin, this 1st of December 2004

Franz Müntefering and his group

Dr. Angela Merkel, Michael Glos, and their group

Katrin Göring-Eckardt, Krista Sager, and their group

Dr. Wolfgang Gerhardt and his group