

**DRAFT OF EU DIRECTIVE ON SOFTWARE PATENTS OF 18 MAY 2004
LOST QUALIFIED MAJORITY IN EU COUNCIL ON 1 NOVEMBER 2004
AND CAN THEREFORE NOT BE LEGITIMATELY ADOPTED AS AN "A" ITEM**

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Florian Müller, campaign manager of www.NoSoftwarePatents.com*

I. NUMERICAL OVERVIEW

<u>COUNTRY</u> ¹	<u>NUMBER OF VOTES</u> from 1 May 2004 until 31 October 2004	<u>NUMBER OF VOTES</u> from 1 November 2004 onward
COUNTRIES THAT SUPPORTED THE PROPOSAL ON 18 MAY 2004		
Czech Republic	5	12
Denmark	3	7
Germany	10	29
Estonia	3	4
Greece	5	12
France	10	29
Ireland	3	7
Cyprus	2	4
Latvia	3	4
Lithuania	3	7
Luxembourg	2	4
Hungary	5	12
Malta	2	3
Netherlands	5	13
Portugal	5	12
Slovenia	3	4
Slovakia	3	7
Finland	3	7
Sweden	4	10
United Kingdom	10	29
TOTAL "YES" VOTES	89	216
QUALIFIED MAJORITY	88	232
	YES	NO
COUNTRY THAT VOTED AGAINST THE PROPOSAL ON 18 MAY 2004		
Spain	8	27
COUNTRIES THAT REITERATED ABSTENTION IN FINAL PART OF 18 MAY 2004 MEETING		
Belgium	5	12
Italy	10	29
Austria	4	10
COUNTRY THAT OFFICIALLY STATED TO HAVE REFRAINED FROM REITERATING ITS ABSTENTION IN FINAL PART OF 18 MAY 2004 MEETING BECAUSE OF THEN-IRRELEVANCE		
Poland	8	27
TOTAL MISSING VOTES	35	105
BLOCKING MINORITY	37	90
GRAND TOTAL OF VOTES	124	321

¹in the order in which they appear in the Accession Act

II. CHRONOLOGY

On 18 May 2004, the Council of the European Union announced a "political agreement" on the Council's common position on a "Proposal for a Directive of the European Parliament and of the Council on the patentability of computer-implemented inventions"².

The Council purportedly intends to formally adopt that legislative proposal as its common position in the forthcoming meeting of the EU Competitiveness Council on 25 and 26 November 2004³, as an "A" item. Article 3(6) of the Council's Rules of Procedure⁴ states: "The provisional agenda shall be divided into Part A and Part B. Items for which approval by the Council is possible without discussion shall be included in Part A [...]". The rationale behind the division of the agenda into Part A and Part B is an accelerated approval of those items for which a qualified majority has already been ascertained, usually at the level of the permanent representatives of the member states to the European Union.

The political agreement on 18 May 2004 was reached with the consent of 20 member states. The collective votes of those 20 countries pursuant to article 26(1) of the Accession Act⁵, which pertains to the period of 1 May 2004 through 31 October 2004, amounted to 89, marginally above the qualified majority requirement for that period (88).

However, the collective number of votes of those 20 countries falls short of a qualified majority as of 1 November 2004, due to the voting weights stipulated by article 12(1) of the Accession Act, which pertains to the period beginning on 1 November 2004. With the voting weights that took effect today, the respective countries have a total of 216 votes, 16 votes short of the 232 that are required for a qualified majority.

III. POLAND'S THEN-IRRELEVANT AND NOW-DECISIVE ABSTENTION

In the Council meeting on May 18, the Irish then-presidency sought a qualified majority for its legislative proposal, with the support of Internal Markets Commissioner Frits Bolkestein. The majority-building effort on that day was tripartite: Some countries expressed their consent before a break⁶, some followed during the break, and a few after the break⁷. After Denmark's consent and Italy's and Austria's reiterated abstentions, the then-presidency announced a qualified majority.

In the first part of the meeting, the Polish delegation said that they could not support the proposal and would have to abstain, citing as a reason that the term "computer-implemented invention" was insufficiently defined. There is no record of any change of mind by the Polish delegation during the meeting.

The Polish representative in that Council meeting, Minister Jarosław Pietras, subsequently stated on a government Web site⁸ that the Polish delegation "did not support the proposal" but "refrained from presenting its position in the second round of voting" because, after several countries had accepted a compromise proposal by Germany, there had not been any more arithmetic possibility to gather the number of votes required for a blocking minority, while the Polish votes had been potentially decisive in the earlier part. That pragmatic decision was based on the voting weights on 18 May, and back then it was unforeseeable that the Polish abstention alone would make the difference at the time of formal adoption.

²2002/0047 (COD)

³<http://www.computable.nl/nieuws.htm?id=386198>

⁴2002/682/EC

⁵Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded

⁶<http://wiki.ael.be/index.php/V002.ogg>

⁷<http://wiki.ael.be/index.php/V003.ogg>

⁸<http://www2.ukie.gov.pl/WWW/en.nsf/0/76DA032444747675C1256E9F0044B4F4>

IV. APPEAL

We hereby urge the governments of the member countries of the European Union and their representatives on the Council of the European Union not to adopt a legislative proposal on the present basis. No one must be held to a political agreement that is null and void today.

The existence of a true, valid, verifiable and legitimate majority is the most fundamental principle of democracy. This legislative process would be forever tainted with illegitimacy if a legislative proposal were adopted without properly meeting the majority requirement.

There is no theory, no matter how far-fetched, that could legitimate the refusal to conduct a formal vote since the meeting on 18 May did not result in a qualified majority on today's basis. Not to do so would mean to dishonor the Accession Act and to disrespect all citizens of Europe whose countries are party to it. Today the support of the proposal falls short of a qualified majority by more votes than any of 19 (out of 25) EU member states singly has. It would take more than a country the size of the Netherlands to rebuild a qualified majority.

This is an unprecedented situation. A qualified majority, based on the problematic approach of *qui tacet consentit*, has not stood the test of time due to a change of voting weights.

Under no circumstances can the Polish position be construed to have been in support of the proposal of the Irish then-presidency. The only position that the Polish delegation took was that of withholding its support for the proposal. The then-presidency may have known that the Polish position had not changed and therefore refrained from asking the Polish delegation again. The Polish representative remained silent because intervention was futile from a practical standpoint. The Polish delegation did not reiterate its known position, but only due to the voting weights at the time of the political agreement. That was a pragmatic decision under the circumstances in May when no one could anticipate that the formal decision would be taken after a change of the voting weights, which has, however, occurred in the interim and which has given decisive relevance to the Polish abstention as of today.

The purpose of an "A" item is to eliminate the need for an unnecessary verification of a *majority that exists*. It must never be abused to circumvent the statutory requirements for a qualified majority. Those who claim a majority bear the burden of proof if there is any reasonable doubt concerning the existence of a true, valid, verifiable and legitimate majority.

The passage of time since the political agreement is the formal reason why the qualified majority of 18 May has been lost but that fact is not a substitute to a legitimate qualified majority. Quite the reverse, the notion of the simplified and accelerated adoption of an "A" item implicitly requires that the political agreement to be reaffirmed has been reached on an identical basis. There were 5 ½ months during which the Council could have formally adopted the political agreement with identical voting weights, without the support of Poland.

There are several more reasons why the political agreement of 18 May is now illegitimate. After the respective meeting of the Council, reports came up that seriously question the consistence of the votes of certain delegations with the will of their governments. Moreover, on 1 July, the Tweede Kamer of the Netherlands passed a resolution, with a very broad majority, that called upon the Dutch government to withdraw its support of the political agreement. On 21 October, all four groups in the German Bundestag criticized the legislative proposal as insufficient and demanded that it be modified. Additionally, the ten new member states of the European Union were never given an equal opportunity to understand the legislative process since the original legislative proposal by the European Commission⁹ has, even as of today, never been translated into the official languages of those countries despite an explicit requirement by the Protocol on the role of national parliaments in the European Union¹⁰, which is an annex to the Amsterdam Treaty.

⁹COM (2002)92

¹⁰<http://europa.eu.int/eur-lex/en/treaties/selected/livre305.html>