

The recombining of the European political scene illustrated by the directive on the software patents

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Abstract

On September 24th, 2003, European Parliament has voted in plenary for a very controversial directive on patentability of software. Beyond the particular aspects concerning the subject of this directive and contents of various voted amendments, the course of this vote - and of the whole of the legislative procedure - reveals political behaviors which differ from traditional right vs left oppositions.

First, strong oppositions have happened between big political groups, either from left or from right, which brought unexpected affinities between parts of each camp. In addition, very given positions were seen on behalf of the "small" parties, including the extremes, which, for different reasons, were found joined together. Lastly, this vote - and it is certainly its major characteristic - marks a rupture between the legislative representation and executive authorities of the European Union.

While Europe is about to elect its Parliament in June 2004, integrating ten new members, the analysis of these somewhat unusual practices appeared appropriate to reflect the drafts of the European political scene that takes shape for the future.

1 Division of the great parties

While the legislative procedure concerning the European directive on "the patentability of the computer-implemented inventions" could have led to a consensus adopted relatively quickly, it happened differently.

It is actually a codecision procedure of the Council of the European Union and of the European Parliament, in which the parliamentary report, preliminary to the vote in first reading at the Parliament, was entrusted to the Committee on Legal Affairs and the Internal Market - JURI -, directed by the socialist British Arlene McCarthy, after advisory opinion of the Committees on Culture, Youth, Education, the Media and Sport - CULT -, directed by Michel Rocard, deputy of the same European parliamentary group, the PSE, and on Industry, External Trade, Research and Energy - ITRE -, directed by EDLR Elly Plooij-Van Gorsel.

However, committees CULT and ITRE have delivered opinions going against the original proposal of the European Commission, by defining clear limits in the patentability of the software. On the contrary, commission JURI in his final report has completely ignored these opinions, proposing only cosmetic amendments with the pro-software patents position of the European Commission and have persisted in supporting an unlimited patentability and an unlimited enforceability of patents.

The vote of the Parliament in plenary has confirmed this relatively unusual political configuration. The two big European political groups, the PSE on the left and EPP-DE on the right, were divided from inside leading to a vote per two thirds of the PSE and a third of EPP-DE reversing the position of JURI committee.

That does not go without pointing out the last presidential campaign of 2002 in France, in which the majority of the political commentators had underlined convergences between the social democrat program and the traditional right's program. Moreover, following this presidential election, same division than the one shown by the European vote of September 24th, 2003, could have been observed within the socialist Party, which was torn apart between holding of more radical left-wing policies and those in favour of a "management accompanying socially the liberal globalization".

2 Position of the "small" parties

Without entering in details of this directive, the principal danger which an unmitigated patentability of software could have raised was the one on freedom of ideas. It is without any doubt this consequence on the freedom of ideas which involved a great mobilization of the European Greens, leaded by Daniel Cohn-Bendit - self designed as a "liberal-libertarian". Greens were the principal point of support, inside the European institutions, for associations¹, companies and scientists fighting software patents, by supporting the organization of debates, briefings and demonstrations...

In this opposition to the pro-software patents proposal of the European Commission, the Greens were joined by various groups. First of all, as we saw above, by some of socialist Members of European Parliament – MEP – but in a rather shy way, having had to compose with internal antagonisms, also by liberals MEP of EDLR, seeing in software patentability an active risk of monopolization against the rules of free trade, and but also by groups located at the two extremes of the political spectrum.

The extreme left, for reasons rather close to those of the Greens, was opposed to a privatization of ideas. Indeed the software patents offer an appropriation - accessible very often only to the large private companies which are the only ones who can afford this race to monopolization - of underlying ideas in data-processing expressions. The writing of a software is an expression of the mind as literature or musical composition. Supporting a particular expression of a work of the mind, as it is the case when granting a software patent, is like denying any legitimacy to any alternative expression.

Of the extreme right-hand side and among souverainists, one can think that the vote was guided by a protectionist intention. Indeed, the legalization of software patentability would have actually involved validation of about 30,000 software patents already granted - for the moment in an illegal way - by the European Patent Office. However three-quarters of these patents are deposited by extra-community firms, mainly American or Japanese. Also, a vote in favour of a limitation of software patentability would without any doubt counter the imperialist goals of the United States in IT field.

Thus, vote on this directive has shown a bringing together of the extremes, although for very different reasons, even opposed, as that had already been the case, for example at the time of the referendum on the treaty of Maastricht, or today in the debates relating to the alternatives and the oppositions to neo-liberal globalization.

¹In particular, the FFII – Foundation for a Free Information Infrastructure, see <http://swpat.ffii.org/> – and the Eurolinux coalition who have launched a petition, accepted by the European Parliament a few days after the vote in plenary and collecting at that time about 250,000 signatures.

3 Reaction of the executive power

I am aware that a large number of amendments to the McCarthy report have been tabled, many of which seek to reintroduce ideas and themes already considered and rejected by the committee during the preparation of the report. There are some interesting points but, in the main, I am afraid that the majority of those amendments will be unacceptable to the Commission. I am very concerned about this situation: many of these amendments are fundamental. There is a very real prospect that the proposal will fail if Parliament chooses to accept them.

This threat was uttered the day before vote, in the debate at plenary, by Frits Bolkestein, the European Commissioner of Internal Market Directorate-General, in charge of the directive on the software patents. Knowing the influence of software multinationals on Bolkestein², its warnings indicate the current tendency of what is called "la pensée unique" to discredit any alternative proposal.

Big IT companies, who are the major beneficiary of unlimited patentability along with the lobby of the corporate lawyers, have applauded and supported the attempts to accelerate the procedure³. In November 2002, the Council of the European Union, whereas the rules of the legislative procedures do not require it before European Parliament's vote, has bother giving its opinion which push even further for software patentability and enforceability of these patents.

Since the vote of the parliamentary representation was opposing their intentions, these powers try by all the means to make this vote out to be irresponsible and incompatible with economic reality⁴.

This attitude can be brought closer to the one of governments which have wanted at all costs to avoid a debate of the legislative representation at the time of the recent decisions leading military actions in Kosovo, in Afghanistan or in Iraq, whatever the manifestations of the citizen opinion.

Then, one does not hesitate to claim that the issues were raising a technical expertise out of reach of common comprehension. This technicality is revealed in the example of software patents by the use of the term "computer-implemented invention", deliberately masking the stakes of a true appropriation of work of the mind. The pro-software patents supporters have thus tried to minimize the negative effects of the directive. But the European Parliament was not left misused, detecting the need for amendments reversing the directive so that pure software or business methods are not patentable as that would have been the case with the original proposal.

It is remarkable on this point that this ideology dictated to the Council of the UE by the working group "intellectual Property (patents)", is designed by the same people who defend interests of the community of patent lawyers, who are also sitting within the national offices of patents. This illustrates the fact well that the powers that be are extremely related to dominant economic interests.

²One could for example discover that the "original" proposal of the directive presented by the European Commission had been written by copying an text coming from the Business Software Alliance, a coalition gathering the most significant software publishers. See <http://swpat.ffii.org/papiers/eubsa-swpat0202/>

³JURI committee has by twice tried to rush the vote on its proposal for a directive which de facto legalize software patents. The failure of this pressure made it possible to the opponents to organize a counter-offensive in order to expose their arguments to the Members of European Parliament. See <http://swpat.ffii.org/news/03/plen0626/>

⁴See for example, distorted assertions concerning TRIPs treaty <http://swpat.ffii.org/analysis/trips/>

Conclusion

The European directive on software patents, beyond justified criticisms that it intrinsically raises, reveals a redistribution of the political cards in the UE. Pro-software patents supporters are defending their situation come hell or high water, strengthened by the defense of dominant economic interests, not even hesitating to go against their acknowledged policy of free trade. When the powers that be feel that their vision is threatened, democracy becomes a danger.

While time is come for citizen to express themselves about the renewal of a widened European Parliament, it is advisable to wonder about the effective power of this representative authority. Faced with imposition of an ideology supporting the dominant economic interests, isn't the responsibility of European Parliament to defend the public interest? Going beyond traditional right vs. left opposition , is the vote of European Parliament in September 2003 the precursory sign of a will to see the citizen representation leaving a role up to now negligible ?