Jeannot Krecké
Minister of the Economy and Foreign Trade
6, Boulevard Royal
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Dear Jeannot Krecké

As I mentioned in my letter of 19 May 2005 the proposal for a directive on the patentability of computer-implemented inventions has attracted much attention in Denmark. Against the background of the negotiations currently conducted in the European Parliament I would like to provide some details as to the statement made by Denmark at the Council meeting on 7 March 2005.

The statement points out the fact that in the future negotiations Denmark will attach particular importance to ensuring that only technical inventions can be patented, that neither pure software programs nor business methods can be patented and that access to interoperability is ensured.

In Denmark we have followed the debate in the Parliament with keen interest, particularly the work of Parliament rapporteur Michel Rocard. Generally we support the intentions behind rapporteur Rocard's report, which is in keeping with the views presented by Denmark. It is important that we now find the right solutions to the problems raised.

Clear definitions are needed of what is required to obtain a patent so that we can avoid any inexpedient developments of practice, such as the unfortunate examples seen under the European Patent Organisation. The rules must aim to ensure that we do not end up with American conditions in Europe.

The rules regarding patenting of computer-implemented inventions must be uniform and transparent. It should not be possible to patent pure software programs where the only "technical" contribution is that the program runs on a computer. Similarly it should not be possible to patent business methods.

In rapporteur Rocard's positive definition of what it takes to obtain a patent he refers to the fact that only inventions using forces of nature can be designated as technical and are consequently patentable. Even though the concept of "forces of nature" is new within patent law and consequently results in a certain uncertainty as to its interpretation, rapporteur Rocard's definition means that pure software programs (e.g. pure algorithms/mathematical methods) and business methods are exempted from the patentable area, which is completely in keeping with the Danish wishes. Denmark consequently supports the intentions behind rapporteur

Rocard's proposal for a positive definition. Pure software programs will remain protected in pursuance of the law of copyright.

With regard to a negative definition of patentable inventions Denmark believes that the processing of information in itself should not be able to constitute a patentable invention. But there are several situations where a technical contribution (new knowledge about the use of forces of nature) is made in which case the invention should be patentable. Such is e.g. the case if the processing of information forms an important part of a physical product.

Patentability should require a high degree of inventive step. The inventive step should be defined based on what even an expert in the area would find surprising.

Consequently it should remain possible to patent e.g. control systems for wind turbines and programs improving the audio quality of loudspeakers and hearing aids in the future as well. Patent protection is important in the interest of the future development and researches within i.a. these areas.

It is important that the rules are not drawn up static but in such a way as to allow for future technologies and development opportunities.

Rapporteur Rocard points out the importance of interoperability. The problem of interoperability is closely connected with the criteria set for obtaining a patent. Therefore these two problems should be regarded in close connection.

Denmark agrees that we need to introduce a provision into the proposal for the directive ensuring non-limited, easy access to interoperability. It must not be possible to prevent interoperability. It is in society's interest that access to communicating with one another is not unduly prevented.

Therefore the challenge lies in formulating a perfectly balanced provision. Today undertakings apply the rules of competition law regarding abuse of a dominant position or the existing compulsory licensing system according to which the patent holder in certain cases is ordered to accept a third party's exploitation of its patent. However, it is my impression that these systems are rarely used and particularly small undertakings find them much too resource-intensive and time-consuming. This is unfortunate, especially in an area such as information and communications technology where developments are very rapid. Consequently it is my opinion that neither of these systems will be adequate for ensuring access to interoperability.

Denmark would like to see that the possibilities of a special set-up to help ensure rapid access to interoperability for the technologies essential to the information infrastructure are considered, such as the Internet. Such ac-

cess to interoperability must be possible without the permission of the patent holder if necessary to ensure interoperability between two or more computer programs and if no other equally effective or efficient non-patented method exists. However, the access to interoperability must not be used in such a way that it conflicts with the patent holder's legitimate interests or goes beyond normal exploitation of the invention. At the same time the software developer's legitimate interests in obtaining inter-operability should be considered, as should the end-users' interests in having access to interoperable programs.

It is not a matter of establishing a system similar to the existing compul-sory licensing system. The criteria are and should be different. At the same time a procedure should be established which provides the under-takings with access to a rapid and easy opinion on whether it is possible to use a patented technology for obtaining interoperability. However, it should be left to the Member States themselves to asses how they can best establish an administrative procedure to that effect.

Acts that can freely be performed under the Copyright Directive (91/250/EEC) regarding legal protection of computer programs shall re-main freely performable without the patent holder's permission.

As mentioned I believe that the vague wording of the current rules in the area is the cause of the current existence of patents that should never have been granted. Therefore Denmark has commenced a process in which we together with other EPO member countries have called into question the quality of the patents granted. This also involves the question of inventive step. In its recent report "Recommendations for the Patent System of the Future", the Danish Board of Technology also recommends that clear cri-teria be laid down for the evaluation of the inventive step for computer-implemented inventions. This way the granting of trivial and too broad patents is attempted to be avoided. Denmark supports this recommenda-tion.

I hope that the above can contribute positively to the continued negotia-tions and please allow me, once again, to point out the importance of in-volving the Member States and the Competitiveness Council in the future negotiations.

Yours sincerely

Bendt Bendtsen

c.c.: Commissioner Charlie McCreevy
      Rapporteur, MEP, Michel Rocard