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REPORT/OPINION by **Mr. M. Rocard**

On the proposal for a directive of the European Parliament and of the Council on the patentability of computer-implemented inventions

Proposal for a Directive

COM (02): 0092

C6:

0058/2

005

Date: Monday, 02 May 2005

Signature:

 (Amendment 1)

Title

Proposal for a directive of the European Parliament and of the Council on the patentability of **computer-implemented inventions**

Proposal for a directive of the European Parliament and of the Council on the patentability of **computer-aided inventions**

Justification

This replacement is to be performed at all places in the text where the expression "computer-implemented invention" is used.

In their press release upon adoption of the "Common Position", the Council says that that their text did not allow patenting of software as such but only of washing machines, mobile phones etc, which they called "computer-aided inventions".

When a solution is "aided" by a computer, such as is the case e.g. in "computer-aided design" and "computer-aided manufacturing" (CAD/CAM), the claim is usually not

directed to the software as such, but to an industrial engineering process. A computer can aid such a process but not implement it. A computer alone can only implement a software solution, and software together with a computer is nothing more than software as such and thus not an "invention" in the sense of patent law. The Council has good reasons to avoid this misleading term in its press release. The same reasons apply to the whole directive text.

(Amendment 2)
Article 1

This Directive lays down rules for the patentability of **computer-implemented** inventions.

This directive lays down **limiting** rules for the patentability of **computer-aided** inventions.

Justification

Only software solutions can be "computer-implemented". The aim of the directive is not to state that software solutions are inventions in the sense of patent law.

(Amendment 3)
Article 2 (a)

(a) "computer-implemented invention" means **any** invention the performance of which involves the use of a **computer, computer network or other** programmable apparatus, **the invention having one or more features which are realised wholly or partly by means of a computer program or computer programs;**

(a) "**Computer-aided invention**", also **called** "computer-implemented invention", means **an** invention **in the sense of patent law** the performance of which involves the use of a programmable apparatus.

Justification

In their press release upon adoption of the "Common Position", the Council says that that their text did not allow patenting of software as such but only of washing machines, mobile phones etc, which they called "computer-aided inventions".

When a solution is "aided" by a computer, such as is the case e.g. in "computer-aided

design" and "computer-aided manufacturing" (CAD/CAM), the claim is usually not directed to the software as such, but to an industrial engineering process. A computer can aid such a process but not implement it. A computer alone can only "implement" (= run) a software solution, and software running on a computer is nothing more than software as such thus not an "invention" in the sense of patent law.

As long as the old term is still in use, it has to be defined here as a synonym.

This amendment removes wordings from the Council text which are unclear and redundant and whose only purpose seems to be to suggest that the claimed invention can consist in nothing but software running on a computer.

This amendment is a simplified version of an amendment adopted in 1st reading.

(Amendment 4)
Article 2 (b)

(b) "technical contribution" means a contribution to the state of the art in a field of technology which is new and not obvious to a person skilled in the art. The technical contribution shall be assessed by consideration of the difference between the state of the art and the scope of the patent claim considered as a whole, which must comprise technical features, irrespective of whether or not these are accompanied by non-technical features.

(b) An "invention" in the sense of patent law is a contribution to the state of the art in a field of technology. The contribution is the set of features by which the scope of the patent claim as a whole is claimed to differ from the prior art. The contribution must be a technical one, i.e. it must comprise technical features and belong to a field of technology. Without a technical contribution, there is no patentable subject matter and no invention. The technical contribution must fulfill the conditions for patentability. In particular, the technical contribution must be novel and not obvious to a person skilled in the art.

Justification

Upon close reading, it appears that according to the Council's text the "technical contribution" may consist solely of non-technical features. The text is full of redundant statements and misleading ambiguities, but does contain some usable elements.

The concept of "technical contribution" has pervaded the discussion about the directive and generated great confusion and therefore to some extent deserves to be clarified. While

intuitively and in the subjective belief of most discutants the "technical contribution appears to be related to the question of patentable subject matter (Art 52 EPC), the EPO used the term as a means of abolishing the subject matter test by mixing it into the non-obviousness test (Art 56 EPC) in obscure ways, which national courts and ministerial patent officials have found difficult to follow. It is thus particularly important that, as far as the written law uses this term, it is understood to be connected to the concept of "invention" (patentable subject matter) and dissociated from all other conditions of patentability.

A similar amendment that was adopted in first reading by the EP. This amendment adds some ideas of the Council such as that of subtracting the prior art from the claimed object. If worded carefully like here, this can help provide further clarification.

(Amendment 5)

After Article 2: insert a new Article 2 (c)

(c) A "field of technology" is a discipline of applied sciences in which new knowledge is gained by experimentation with controllable forces of nature. "Technical" means "belonging to a field of technology";

Justification

This amendment clarifies the term "field of technology" from Art 27 TRIPs.

It is an improved version of the Parliament's first reading article 2(c).

A discipline is normally characterised not by its domain of application but by the way in which it gains knowledge. For patent granting, what matters is where the achievement lies, not to which domain it is applied. Also, "industrial applicability" is a requirement is a separate requirement of patentability. Patentability requirements should stand on their own, relying on each other as little as possible.

(Amendment 6)

After Article 2: insert a new Article 2 (d)

(d) The production and distribution of information goods is not an "industry" in the sense of patent law.

Justification

Information goods can be reproduced on millions of computers within seconds at near to zero cost. More than material goods, information goods are suitable for production by freelancers. The economics differ, and the business models for information goods tend to be closer to those of the service sector than of the classical "industry" sector.

This amendment clarifies, using a negative definition, a central term of Art 27 TRIPs which has been used in several provisions and amendments within this directive. If the term is to retain any limiting meaning at all, production information goods can not fall within it.

(Amendment 7)

After Article 2: insert a new Article 2 (e)

(e) "Industry" in the sense of patent law means commercially organised production of material goods;

Justification

This amendment clarifies, using a positive definition, a central term of Art 27 TRIPs which has been used in several provisions and amendments within this directive.

Innovations in the "music industry" or "legal services industry" should not meet the TRIPs requirement of "industrial applicability". The word "industry" is nowadays often used in extended meanings which are not appropriate in the context of patent law.

In the tradition of patent law, "industry" refers to the primary and secondary sector, i.e. it includes agriculture. The distinction between these sectors and the tertiary (software and service) sector is economically meaningful. E.g. in the anti-trust proceedings against IBM, the company was split into two along these lines.

This amendment corresponds to article 2(d) in the consolidated text of the EP's first reading, except that "automated" was replaced with "commercially organised", so as to approximate the original meaning in the legal tradition more closely.

It should be noted that the requirement of industrial applicability in itself has very little

excluding force. Most advances in the area of mathematics or business methods are applicable to industry, no matter how the term is defined.

(Amendment 8)

Article 3

In order to be patentable, a computer-implemented invention must be susceptible of industrial application and new and must involve an inventive step. In order to involve an inventive step, a computer-implemented invention must make a technical contribution.

In order to be patentable, a computer-aided invention must make a technical contribution. The technical contribution must be new and involve an inventive step. If there is no technical contribution, there is no patentable subject matter, and no invention.

Justification

Even the Council's Art 2(b) agrees that the "technical contribution" must be new and involve an inventive step, and not vice versa. The second sentence makes it absolutely clear that the "technical contribution" requirement is closely connected to the requirement of patentable subject matter and dissociated from that of non-obviousness.

Moreover, this amendment deletes the attribute "computer-implemented", since the above logic applies to all patentable inventions. There is no advantage in creating sui generis software patent law.

(Amendment 9)

After Article 3: Insert a new article 3 (a)

(a) Member States shall ensure that data processing is not considered to be a field of technology within the meaning of patent law, and that innovations in the field of data processing are not considered to be inventions within the meaning of patent law.

Justification

This amendment clarifies Art 27 TRIPs by a negative definition of "fields of technology".

Data processing is a branch of mathematics, a mental activity whose innovative advances lie in the area of abstraction, and whose technical aspects, if existent at all, are known and trivial. This amendment in no way affects the patentability of the computers themselves, or of any processes involved in implementing the abstract data processing machine into silicon, wood or DNA.

Strictly speaking, the amendment does not even exclude software from patentability. Rather, it forbids certain extensive interpretations of Art 27 TRIPs which have been used to circumvent Article 52 of the European Patent Convention and to reduce the freedom of the judiciary to interpreting this article in meaningful ways (i.e., this amendment makes sure that one cannot interpret TRIPs in a way which makes it require software patents, but does not say anything about whether or not it allows them).

This amendment corresponds to article 3 in the consolidated text of the EP's first reading.

(Amendment 10) Article 4 paragraph 1

1. A computer program as such cannot constitute a patentable invention. Programs for computers are not inventions in the sense of patent law.

Justification

Art 52(2) EPC states that programs for computers are not inventions in the sense of patent law. It is a good idea to transfer this provision into EU law. The additional provision of Art 52(3) (exclusion only pertains to computer programs as such) should be reflected in an additional clause (amendment to Art 4.2), which also clarifies the above provision. The EU law should be clearer, not less clear, than Art 52 EPC

(Amendment 11) Article 4 paragraph 2

2. A computer-implemented invention shall not be regarded as making a technical contribution merely because it involves the use of a computer, network or processing machine, such as input, output of a problem by calculation with the abstract entities of a generic data processing machine, such as input, output,

other programmable apparatus. Accordingly, inventions involving computer programs, whether expressed as source code, as object code or in any other form, which implement business, mathematical or other methods and do not produce any technical effects beyond the normal physical interactions between a program and the computer, network or other programmable apparatus in which it is run shall not be patentable. processor, memory, storage as well as interfaces for information exchange with external systems and human users. A computer program may take various forms, e.g. a computing process, an algorithm, or a text recorded on a medium. If the contribution to the known art resides solely in a computer program then the subject matter is not patentable in whatever manner it may be presented in the claims.

Justification

This amendment proposes to replace the Council's amendment with a text which concretises the meaning of Art 52(2) and 52(3) EPC. This proposal is based on the explanation given in the original EPO Examination Guidelines of 1978 and subsequent caselaw.

The Commission's last minute amendments inserted at the Council 18 May 2004 meeting redefine a "computer program as such" to referring to the "source code or machine code" of an individual computer program, as defined by copyright. This is meaningless in the context of patent law. The effect of the Council's proposal can only be to make Art 52 EPC meaningless.

The "normal interaction between programs and computers" is about as well defined as the "normal interaction between the cook and the recipe". It is a legal formula which the EPO invented in 1998 in order to circumvent Art 52 EPC. Only two years later, the EPO itself commented this formula as follows:

There is no need to consider the concept of "further technical effect" in examination, and it is preferred not to do so for the following reasons: firstly, it is confusing to both examiners and applicants; secondly, the only apparent reason for distinguishing "technical effect" from "further technical effect" in the decision was because of the presence of "programs for computers" in the list of exclusions under Article 52(2) EPC.

If, as is to be anticipated, this element is dropped from the list by the Diplomatic Conference, there will no longer be any basis for such a distinction. It is to be inferred that the Board of Appeals would have preferred to be able to say that no computer-implemented invention is excluded from patentability by the provisions of Articles 52(2) and (3) EPC.

(Amendment 12)

After Article 4: insert a new Article 4 paragraph 3

3. Member States shall ensure that data processing solutions are not considered to be patentable inventions merely because they improve efficiency in the use of resources within data processing systems.

Justification

Nobody ever writes software without trying to optimise the use of computing resources.

This amendment makes sure that this fact does not justify the granting of a patent. This codifies both UK case law (Gale's application) and Germany's case law (BpatG's ruling in the Error Search case). As the German court found: if an improvement of efficiency in the use of computing resources, such as time or data space, is deemed to be a technical contribution, then all computer-implemented business methods become patentable.

This amendment corresponds to article 6 in the consolidated text of the EP's first reading, except that "computer-implemented" was changed into "computer-aided".

(Amendment 13)

Article 5.1

1. Member States shall ensure that a computer-***implemented*** invention may be claimed as a product, that is as a ***programmed computer, a programmed computer network or other*** programmed apparatus, or as a process carried out by such ***a computer, computer network or apparatus through the execution of software.***

1. Member States shall ensure that a computer-***aided*** invention may be claimed as a product, that is as a programmed apparatus, or as a process carried out by such ***an*** apparatus.

Justification

Software in combination with generic computing equipment is still not more than software (as such). Suggestions that software can be patentable are outside the scope of this article and should be avoided.

This amendment roughly corresponds to article 7.1 in the consolidated text of the EP's first reading (except that "implemented" has been replaced with "aided", "device" with "apparatus" and "technical production" has been deleted from "technical production process")

(Amendment 14)

Article 5.2

2. A claim to a computer program, either on its own or on a carrier, shall not be allowed ***unless that program would, when loaded and executed in a programmable computer, programmable computer network or other programmable apparatus, put into force a product or process claimed in the same patent application in accordance with paragraph 1.***

2. A patent claim to a computer program, either on its own or on a carrier, shall not be allowed.

Justification

It is contradictory to say that computer programs at the same time cannot be inventions, and saying that they nevertheless can be claimed in a patent. Additionally, the condition after the "unless" in the Council version can always be fulfilled.

The Commission purposefully did not include these so-called "program claims" in its original proposal, as allowing patent monopolies on programs on their own is hard to defend if you at the same time want to maintain that "program as such" are not patentable.

Getting rid of this Council amendment is one of the most basic requirements. In first reading, the EP rejected a similar amendment, and the replacement is part of an amendment which was adopted (article 7 paragraph 2 of the consolidated version).

(Amendment 15)

After Article 5: insert a new Article 5 (a)

(a) Member States shall ensure that the distribution and publication of information, in whatever form, can never constitute direct or indirect infringement of a patent.

Justification

Freedom of publication, as stipulated in Art 10 ECHR, can be limited by copyright but not by patents. Patent rights are broad and unsuited for information goods. This amendment does not make any patents invalid, rather it limits the ways in which a patent owner can enforce his patents. Such a provision should be complemented by other provisions which make sure that information patents are not granted in the first place.

This amendment is a simplified and reduced version of article 7 paragraph 3 in the consolidated text of the EP's first reading.

(Amendment 16)

After Article 5: insert a new Article 5 (b)

(b) Member States shall ensure that whenever a patent claim names features that imply the use of a computer program, an well-functioning and well-documented program text shall be published as part of the patent description without any restricting licensing terms.

Justification

A program listing is an excellent means of describing to a skilled person what a computer-aided process does. This amendment ensures that the obligation of disclosure is taken seriously, and that software is treated as a means of describing the invention, rather than as an invention in itself. The Commission's objection that patent law does not normally require the disclosure of a full reference implementation does not apply, because this amendment does not ask for a reference implementation but only for an accurate description.

This requirement makes it a little more difficult to block people from doing things you even

haven't done yourself, but which are obviously possible since the computing model is perfectly defined and you always know in advance what is theoretically possible with a computer. When you publish working source code you at least offer some real knowledge on how to solve the problem, unlike when you say in the claims language that a "processor means coupled to input output means so that they compute a function such that the result of said function when output through said output means solves the problem the user wanted to solve".

Note that this amendment does not require that the source code for all programs of the patent owner which use these features be disclosed. He only has to provide a single, simple text which describes the monopolised functionality in a programming language.

This amendment roughly corresponds to article 7 paragraph 5 in the consolidated text of the EP's first reading (it's been made more clear that only an example must be provided).

(Amendment 17)

After Article 6: insert a new Article 6 (a)

Member States shall ensure that, wherever the use of a patented technique is needed for the sole purpose of ensuring conversion of the conventions used in two different data processing systems so as to allow communication and exchange of data content between them, such use is not considered to be a patent infringement.

Justification

Interoperability of data processing systems (e.g. computers) lies at the foundation of the information economy and allows for fair competition by all players large and small.

Article 6 of the Council only refers to the exemption provided for by the Copyright directive. This means that a software developer is allowed to find out how to make his data processing system interoperable with that of a competitor, but afterwards he cannot necessarily use his gained knowledge, since that could be covered by patents.

This amendment makes sure that patents also cannot be used to prevent interoperability. It was passed in an almost identical form by ITRE and JURI prior to the first reading ("data processing systems" read "computer systems or networks"). In first reading, a more sweeping version of this amendment was passed, which appeared as Article 9 in the

consolidated version.

The expression "for the sole purpose" reverts to the spirit of the original ITRE/JURI version of the interoperability exemption (which is more limited), which was also supported by Luxembourg and several others in the Council (but didn't make it).

(Amendment 18)
Recital 6

The Community and its Member States are bound by the Agreement on trade-related aspects of intellectual property rights (TRIPS), approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) 1. Article 27(1) of TRIPS provides that patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Moreover, according to that Article, patent rights should be available and patent rights enjoyable without discrimination as to the field of technology. ***These principles should accordingly apply to computer-implemented inventions.***

The Community and its Member States are bound by the Agreement on trade-related aspects of intellectual property rights (TRIPS), approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) 1. Article 27(1) of TRIPS provides that patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. Moreover, according to that Article, patent rights should be available and patent rights enjoyable without discrimination as to the field of technology. ***This means that patentability must be effectively limited in terms of general concepts such as "invention", "technology" and "industry", so as to avoid both unsystematic exceptions and uncontrollable extensions, both of which would act as barriers to free trade. Thus inventions in all fields of applied natural science are patentable, whereas innovations in fields such as mathematics, data processing and organisational logic, are not patentable, regardless of whether a computer is used for their implementation or not.***

Justification

It must be made clear that there are limits as to what can be subsumed under "fields of technology" according to Art 27 TRIPS and that this article is not designed to mandate unlimited patentability but rather to avoid frictions in free trade, which can be caused by undue exceptions as well as by undue extensions to patentability. This interpretation of TRIPS is indirectly confirmed by lobbying of the US government last year against Art 27 TRIPS, on the account that it excludes business method patents, which the US government wants to mandate by the new Substantive Patent Law Treaty draft.

In its first reading, Parliament deleted this recital, and therefore the amendment that proposed the above change was not voted upon. Deletion is better than keeping the original, but clarification regarding the applicability and interpretation of the TRIPS agreement is better.

(Amendment 19)

Recital 7

(7) Under the Convention on the Grant of European Patents signed in Munich on 5 October 1973 (European Patent Convention) and the patent laws of the Member States, programs for computers together with discoveries, scientific theories, mathematical methods, aesthetic creations, schemes, rules and methods for performing mental acts, playing games or doing business, and presentations of information are expressly not regarded as inventions and are therefore excluded from patentability. This exception, ***however, applies and is justified only to the extent that a patent application or patent relates to the above subject-matter or activities as such***, because the said subject-matter and activities ***as such*** do not belong to a field of technology.

(7) Under the Convention on the Grant of European Patents signed in Munich on 5 October 1973 and the patent laws of the Member States, programs for computers together with discoveries, scientific theories, mathematical methods, aesthetic creations, schemes, rules and methods for performing mental acts, playing games or doing business, and presentations of information are expressly not regarded as inventions and are therefore excluded from patentability. This exception applies because the said subject-matter and activities do not belong to a field of technology.

Justification

Art 52 EPC says that programs for computers etc are not inventions in the sense of patent law, i.e. that a system consisting of generic computing hardware and some combination of calculation rules operating on it can not form the object of a patent. It does

not say that such systems can be patented by declaring them to be "not as such" or "technical". This amendment reconfirms Art 52 EPC. Note that the exclusion of programs for computers is not an exception, it is part of the rule for defining what an "invention" is.

This amendment corresponds to recital 7 in the consolidated text of the EP's first reading.

(Amendment 20)
Recital 9

Patent protection allows innovators to benefit from their creativity. Whereas patent rights protect innovation in the interests of society as a whole; they should not be used in a manner which is anti-competitive.

Patents are temporary exclusion rights granted by the state to inventors in order to stimulate technical progress. In order to ensure that the system works as intended, the conditions for granting patents and the modalities for enforcing them must be carefully designed. In particular, inevitable corollaries of the patent system such as restriction of creative freedom, users' rights or legal insecurity and anti-competitive effects must be kept within reasonable limits.

Justification

Innovators can benefit from their creativity without patents. Whether patent rights "protect" or stifle innovation and whether they act in the interests of society as a whole is a question that can only be answered by empirical study, not by statements in legislation.

(Amendment 21)
Recital 10

In accordance with Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, **the expression in any form of an original computer program is protected by copyright as a literary work. However, ideas and principles which underlie any element of a computer program are not protected by copyright.**

In accordance with Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, **property in computer programs is acquired by copyright. General ideas and principles which underlie a computer program must stay freely usable, so that many different creators may simultaneously obtain property in individual creations based**

thereon.

Justification

Copyright does not only apply to literary works, but also to textbooks, operation manuals, computer programs and all kinds of information structures. Copyright is the system of "intellectual property" for computer programs, not only a system for a "literary" side aspect of computer programs.

If copyright does not cover the "underlying idea" of a book or a program then that is not an indication of an insufficiency of copyright but rather an indication of the need to keep "underlying ideas" (general concepts) free, so that many different creators have a chance to obtain property in individual works based on these general concepts.

(Amendment 22)

Recital 11

In order for any **invention** to be considered **as** patentable it should have a technical character, and thus belong to a field of technology.

In order for any **innovation** to be considered **a** patentable **invention** it should have a technical character, and thus belong to a field of technology.

Justification

The Council text is not in line with Art 52 EPC. Art 52(2) EPC lists examples of non-inventions. It is not permissible to subsume these under "inventions" and then test their technical character. Moreover, while it can not be inferred from Art 52 EPC that all technical innovations are inventions, it can, based on a unanimous tradition of patent law, be assumed that all inventions have technical character.

(Amendment 23)

Recital 12

It is a condition for inventions in general that, **in order to involve an inventive step**, they **should** make a technical contribution to the state of the art.

It is a condition for inventions in general that they **must** make a technical contribution to the state of the art. **The technical contribution must be new and not obvious to the person skilled in the art. If there is**

no technical contribution, there is no patentable subject matter and no invention.

Justification

This amendments was newly inserted by the Council. It attempts to further codify the EPO's "technical contribution in the inventive step" doctrine. What one invents is his contribution to the state of the art, and for this contribution to be patentable it has to (among other things) involve an inventive step. Not the other way round.

The justification for the replacement text is the same as the one for article 2 (b) (amendment 4)

(Amendment 24)

Recital 13

(13) Accordingly, ***although a computer-implemented invention belongs to a field of technology, where it does not make a technical contribution to the state of the art, as would be the case, for example, where its specific contribution lacks a technical character, it will lack an inventive step and thus will not be patentable.***

(13) Accordingly, ***an innovation that*** does not make a technical contribution to the state of the art ***is not an invention within the meaning of patent law.***

Justification

The Council text declares computer programs to be technical inventions. It removes the independent requirement of invention ("technical contribution") and merges it into the requirement of non-obviousness ("inventive step"). This leads to theoretical inconsistency and undesirable practical consequences, as explained in detail in the justification of the amendment to article 4.

This amendment corresponds to recital 14 in the consolidated text of the EP's first reading

(Amendment 25)

Recital 16

(16) Furthermore, an algorithm is inherently non-technical and therefore cannot constitute a technical invention. ***Nonetheless, a method involving the use of an algorithm might be patentable provided that the method is used to solve a technical problem. However, any patent granted for such a method should not monopolise the algorithm itself or its use in contexts not foreseen in the patent.***

(16) Furthermore, an algorithm is inherently non-technical and therefore cannot constitute a technical invention.

Justification

The nature of the problem solved should be irrelevant to patentability. It's the nature of the solution that counts. Problems are not invented, but solutions are, and it's the invention that must be technical (or have technical character).

This was a new recital from the Council.

(Amendment 26)

Recital 19

(19) This Directive should be limited to laying down certain principles as they apply to the patentability of such inventions, such principles being intended in particular to ensure that inventions which belong to a field of technology and make a technical contribution are susceptible of protection, and conversely to ensure that those inventions which do not make a technical contribution are not susceptible of protection. ~~*deleted*~~

Justification

Similarly to Council recital 13, this amendment claims that there are non-technical inventions. See the justification under the amendment to recital 13 for more information.

This was a new recital from the Council.