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### **The European Legal Framework for Software Patents**

The patentability of software has undergone a fast development in the last 15 years: Starting with a strong rejection of software patentability as software was qualified as a sort of algorithm courts of Germany and UK as well as the EPO began to accept patent claims for software in recent years. This evolution culminated in a famous decision of the German Supreme Court which attributed the quality of being a technical innovation to a software designed to analyze speech on a computer. Hence, legal practice tended to enlarge the patentability even to products which were not far away from mere methods or algorithms – which are commonly not deemed to be patentable in order to avoid a blocking of future innovations. The core issue is to assess software in the conflict between mere ideas and methods on one side and pure technical solutions on the other side – above all taking into account that more and more technical (hardware) solutions are being replaced by software solutions. In particular, software innovations tend to be incremental, thus requiring a wide common non protected basis of knowledge. Hence, patent protection for software may endanger potentially this common basis as software development needs to build upon code modules. The new EU-Proposal for Software on Patents restricts the mentioned tendencies in Member States and of the EPO to grant patent protection to software as the proposal strictly adheres to technical innovations and avoids any consideration of business methods when the question of novelty is arised. However, the proposal does not define the notion of “technical” so that the qualification problem will persist in the future. Thus, it is preferable to adopt a proposal put forward by the Fraunhofer Institute and the Max-Planck-Institute which favors a case-by-case method in combination with guidelines in order to find a compromise between flexibility and legal certainty.

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