ISSN 0378-6986

Official Journal of the European Communities

C 375

Volume 40

10 December 1997

English edition

Information and Notices

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EN

Price: ECU 19,50

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(Information)

COUNCIL

COMMON POSITION (EC) No 41/97

adopted by the Council on 7 October 1997

with a view to adopting Council Directive 97/. . ./EC of . . . on the protection of the health and safety of workers from the risks related to chemical agents at work 14th individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)

(97/C 375/01)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 118a thereof,

Having regard to the proposal from the Commission [1], drawn up after consultation with the Advisory Committee on Safety, Hygiene and Health Protection at Work,

Having regard to the Opinion of the Economic and Social Committee [2],

Acting in accordance with the procedure laid down in Article 189c of the Treaty [3],

(1) Whereas Article 118a of the Treaty provides that the Council shall adopt by means of Directives minimum requirements for encouraging improvements, especially in the working environment, to guarantee a better level of protection of the safety and health of workers;

(2) Whereas, pursuant to that Article, such Directives shall avoid imposing administrative, financial and legal constructs in a way would hold back the creation and development of small and medium-sized undertakings;

(3) Whereas the improvement of workers' safety, hygiene and health at works is an objective which should not be subordinated to purely economic considerations;

(4) Whereas the respect of minimum requirements on the protection of the health and safety of workers from the risks related to chemical agents aims to ensure not only the protection of the health and safety of each individual worker but also to provide a level of minimum protection of all workers in the Community which avoids any possible distortion in the area of competition;

(5) Whereas a consistent level of protection from the risks related to chemical agents has to be established for the Community as a whole; whereas that level of protection has to be set not by detailed prescriptive requirements but by a framework of general principles to enable Member States to apply the minimum requirements consistently;

(6) Whereas a work activity involving chemicals agents is likely to expose workers to risk;

(7) Whereas Council Directive 80/1107/EEC of 27 November 1980 on the protection of workers from the risks related to exposure to chemical, physical and biological agents at work [4], Council

[1] OJ C 165, 16. 6. 1993, p. 4.
[2] OJ C 34, 2. 2. 1994, p. 42.
[3] Opinion of the European Parliament of 20 April 1994 (OJ C 128, 9. 5. 1994, p. 167), Council common position of 7 October 1997 and Decision of the European Parliament of . . . (not yet published in the Official Journal).

[4] OJ L 327, 3. 12. 1980, p. 8. Directive as last amended by Directive 88/642/EEC (OJ L 356, 24. 12. 1988, p. 74).

Directive 82/605/EEC of 28 July 1982 on the protection of workers from the risks related to exposure to metallic lead and its ionic compounds at work (first individual Directive within the meaning of Article 8 of Directive 80/1107/EEC[1]) and Council Directive 88/364/EEC of 9 June 1988 on the protection of workers by the banning of certain specific agents and/or certain work activities (fourth individual Directive within the meaning of Article 8 of Directive 80/1107/EEC)[2], for the sake of consistency and clarity as well as for technical reasons, should be revised and included in a single Directive laying down minimum requirements for the protection of the health and safety of workers in work activities involving chemical agents; whereas these Directives can be repealed;

(8) Whereas this Directive is an individual Directive within the meaning of Article 16 (1) of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work[3];

(9) Whereas therefore the provisions of the said Directive apply in full to the exposure of workers to chemical agents, without prejudice to more stringent and/or specific provisions contained in this Directive;

(10) Whereas more stringent and/or specific provisions relating to the transport of hazardous chemical agents are contained in binding international agreements and conventions incorporated into Community provisions on transport of dangerous goods by road, rail, water and air;

(11) Whereas in Directive 67/548/EEC[4] and Directive 88/379/EEC[5] on the approximation of the laws, regulations and administrative provisions relating to the classification, packaging and labelling of, respectively, dangerous substances and preparations, the Council laid down a system of criteria for the classification of dangerous substances and preparations;

(12) Whereas the definition of hazardous chemical agent should include any chemical substance which meets these criteria and also any chemical substance which whilst not meeting these criteria may because of its physico-chemical, chemical or toxicological properties, and the way it is used or is present in the workplace, present a risk to the safety and health of workers;

(13) Whereas in Directive 90/492/EEC[6] the Commission defined and laid down a system of specific information on dangerous substances and preparations, in the form of safety data sheets principally intended for industrial users to enable them to take the measures necessary to ensure the protection of the safety and health of workers; whereas Council Direction 92/58/EEC of 24 June 1992 on the minimum requirements for the provision of safety and/or health signs at work (ninth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC[7]) established a system for marking containers and pipes used for dangerous substances or preparations at work;

(14) Whereas the employer should assess any risk to the safety and health of workers arising from the presence of hazardous chemical agents at the workplace, in order to take the necessary preventive and protective measures set out in this Directive;

(15) Whereas the preventive measures identified by the assessment of risk and taken by the employer should be consistent with the need to protect public health and the environment;

(16) Whereas, to supplement the information available to workers so as to ensure an improved level of protection, it is necessary for workers and their representatives to be informed about the risks which chemical agents can pose for their safety and health and about the measures necessary to reduce or eliminate those risks, and for them to be in a position to check that the necessary protective measures are taken;

(17) Whereas the health surveillance of workers for shom the results of the aforementioned assessment reveal a risk to health, can contribute to the prevention and protection measures to be undertaken by the employer;

(1) OJ L 247, 23. 8. 1982, p. 12.
(2) OJ L 179, 9. 7. 1988, p. 44.
(3) OJ L 183, 29. 6. 1989, p. 1.
(4) OJ 196, 16. 8. 1967, p. 1. Directive as last amended by Directive 96/56/EC (OJ L 236, 18. 9. 1996, p. 35).
(5) OJ L 187, 16. 7. 1988, p. 14. Directive as last amended by Commission Directive 96/65/EC (OJ L 265, 18. 10. 1996, p. 15).
(6) OJ L 275, 5. 10. 1990, p. 35.
(7) OJ L 245, 26. 8. 1992, p. 23.

(18) Whereas the employer must on a regular basis carry out evaluation and measurements and be aware of new developments in technology with a view to improving the protection of workers' safety and health;

(19) Whereas the latest scientific data should be evaluated by independent scientists to assist the Commission in setting occupational exposure limit values;

(20) Whereas, although in some cases scientific knowledge may not be such that a level of exposure to a chemical agent can be established below which risks to health cease to exist, a reduction in exposure to these chemical agents will nonetheless reduce these risks;

(21) Whereas in Directive 91/322/EEC[1] and Directive 96/94/EC[2] the Commission laid down indicative limit values as provided for by Directive 80/1107/EEC; whereas the former Directives should be maintained as part of the current framework;

(22) Whereas necessary technical adjustments to this Directive should be drawn up by the Commission in cooperation with the Committee set up by Directive 89/391/EEC to assist the Commission in making technical adaptations to individual Directives adopted under the framework of that Directive; whereas the Commission, after first seeking the advice of the Advisory Committee on Safety, Hygiene and Health Protection at Work in accordance with Decision 74/325/EEC[3], should also draw up practical guidelines for the application of this Directive;

(23) Whereas the repeal of Directive 80/1107/EEC must not give rise to the lowering of the present standards of worker protection from chemical, physical and biological agents; whereas standards resulting from the existing Directives on biological agents, the proposed Directive on physical agents, this Directive and any amendments to these texts should reflect and at least maintain the standards laid down in the said Directive;

(24) Whereas this Directive is a practical contribution towards creating the social dimension of the internal market,

HAS ADOPTED THIS DIRECTIVE:

SECTION I

GENERAL PROVISIONS

Article 1

Objective and scope

1. This Directive, which is the fourteenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC, lays down minimum requirements for the protection of workers from risks to their safety and health arising, or likely to arise, from the effects of chemical agents that are present at the workplace or as a result of any work activity involving chemical agents.

2. The requirements of this Directive apply where hazardous chemical agents are present or may be present at the workplace, without prejudice to the provisions for chemical agents to which measures for radiation protection apply pursuant to Directives adopted under the Treaty establishing the European Atomic Energy Community.

3. For carcinogens at work the provisions of this Directive shall apply without prejudice to more stringent and/or specific provisions contained in Council Directive 90/394/EEC of 28 June 1990 on the protection of workers from the risks related to exposure to carcinogens (sixth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC)[4].

4. The provisions of Directive 89/391/EEC shall apply fully to the whole field referred to in this Article, without prejudice to more stringent and/or specific provisions contained in this Directive.

5. As far as the transport of hazardous chemical agents is concerned, the provisions of this Directive shall apply without prejudice to more stringent and/or specific provisions contained in Directive 94/55/EC[5], in Directive 96/49/EC[6], in the provisions of the IMDG

(1) OJ L 177, 5. 7. 1991, p. 22.
(2) OJ L 338, 28. 12. 1996, p. 86.
(3) OJ L 185, 9. 7. 1974, p. 15. Decision as last amended by the 1994 Act of Accession.
(4) OJ L 196, 26. 7. 1990, p. 1.
(5) Council Directive 94/55/EC of 21 November 1994 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by road (OJ L 319, 12. 12. 1994, p. 7). Directive as amended by Commission Directive 96/86/EC (OJ L 335, 24. 12. 1996, p. 43).
(6) Council Directive 96/49/EC of 23 July 1996 on the approximation of the laws of the Member States with regard to the transport of dangerous goods by rail (OJ L 235, 17. 9. 1996, p. 25). Directive as amended by Commission Directive 96/87/EC (OJ L 335, 24. 12. 1996, p. 45).

Code, IBC Code and IGC Code as defined in Article 2 of Directive 93/75/EEC [1], in the provisions of the European Agreement concerning the International Carriage of Dangerous Goods by Inland Waterway and of the Regulation for the Carriage of Dangerous Substances on the Rhine as incorporated in Community law and in the technical instructions for the safe transport of dangerous goods issued, at the date of entry into force of this Directive, by the International Civil Aviation Organization.

Article 2

Definitions

For the purpose of this Directive, the terms used shall have the following meanings:

(a) 'Chemical agent' means any chemical element or compound, on its own or admixed, as it occurs in the natural state or as produced, used or released, including release as waste, by any work activity, whether or not produced intentionally and whether or not placed on the market;

(b) 'Hazardous chemical agent' means:

(i) any chemical agent which meets the criteria for classification as a dangerous substance according to the criteria in Annex VI to Directive 67/548/EEC, whether or not that substance is classified under that Directive, other than those substances which only meet the criteria for classification as dangerous for the environment;

(ii) any chemical agent which meets the criteria for classification as a dangerous preparation within the meaning of Directive 88/379/EEC, whether or not that preparation is classified under that Directive, other than those preparations which only meet the criteria for classification as dangerous for the environment;

(iii) any chemical agent which, whilst not meeting the criteria for classification as dangerous in accordance with (i) and (ii), may, because of its physico-chemical, chemical or toxicological properties and the way it is used or is present in the workplace, present a risk to the safety and health of workers, including any chemical agent assigned an occupational exposure limit value under Article 3.

(c) 'Activity involving chemical agents' means any work in which chemical agents are used, or are intended to be used, in any process, including production, handling, storage, transport or disposal and treatment, or which result from such work;

(d) 'Occupational exposure limit value' means, unless otherwise specified, the limit of the time-weighted average of the concentration of a chemical agent in the air within the breathing zone of a worker in relation to a specified reference period;

(e) 'Biological limit value' means the limit of the concentration in the appropriate biological medium of the relevant agent, its metabolite, or an indicator of effect;

(f) 'Health surveillance' means the assessment of an individual worker to determine the state of health of that individual, as related to exposure to specific chemical agents at work;

(g) 'Hazard' means the intrinsic property of a chemical agent with the potential to cause harm;

(h) 'Risk' means the likelihood that the potential for harm will be attained under the conditions of use and/or exposure.

Article 3

Occupational exposure limit values and biological limit values

1. The Commission shall evaluate the relationship between the health effects of hazardous chemical agents and the level of occupational exposure by means of an independent scientific assessment of the latest available scientific data.

2. On the basis of the evaluation described in paragraph 1, the Commission, after first consulting the Advisory Committee on Safety, Hygiene and Health Protection at Work, shall propose European objectives in the form of indicative occupational exposure limit values for the protection of workers from chemical risks, to be set at Community level.

These limit values shall be established or revised, taking into account the availability of measurement techniques, in accordance with the procedure laid down in Article 17 of Directive 89/391/EEC. Member States shall keep workers' and employers' organizations informed of occupational expose limit values set at Community level.

3. For any chemical agent for which an indicative occupational exposure limit value is established at Community level, Member States shall establish a national occupational exposure limit value, taking into account the Community limit value, determining its nature in accordance with national legislation and practice.

[1] Council Directive 93/75/EEC of 13 September 1993 concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods (OJ L 247, 5. 10. 1993, p. 19). Directive as last amended by Commission Directive 97/34/EC (OJ L 158, 17. 6. 1997, p. 40).

4. Binding occupational exposure limit values may be drawn up at Community level and, in addition to the factors considered when establishing indicative occupational exposure limit values, shall reflect feasibility factors while maintaining the aim of ensuring the health of workers at work. Such limit values shall be established in accordance with Article 118a of the Treaty and laid down in Annex I to this Directive.

5. For any chemical agent for which a binding occupational exposure limit value is established, Member States shall establish a corresponding national binding occupational exposure limit value based on, but not exceeding, the Community limit value.

6. Binding biological limit values may be drawn up at Community level on the basis of the evaluation described in paragraph 1 and of the availability of measurement techniques, and shall reflect feasibility factors while maintaining the aim of ensuring the health of workers at work. Such limit values shall be established in accordance with the procedure laid down in Article 118a of the Treaty and laid down in Annex II to this Directive, together with other relevant health surveillance information.

7. For any chemical agent for which a binding biological limit value is established, Member States shall establish a corresponding national binding biological limit value based on, but not exceeding, the Community limit value.

8. Where a Member State introduces or revises a national occupational exposure limit value or a national biological limit value for a chemical agent on the basis of new data, it shall inform the Commission and other Member States thereof together with the relevant scientific and technical data. The Commission shall undertake the appropriate action.

9. Standardized methods for the measurement and evaluation of workplace air concentrations in relation to occupational limit values shall be developed in accordance with Article 12 (2).

SECTION II

EMPLOYERS' OBLIGATION

Article 4

Determination and assessment of risk of hazardous chemical agents

1. In carrying out the obligations laid down in Articles 6 (3) and 9 (1) of Directive 89/391/EEC, the employer shall first determine whether any hazardous chemical agents are present at the workplace. If so, he shall then assess any risk to the safety and health of workers arising from the presence of those chemical agents, taking into consideration the following:

— their hazardous properties,

— information on safety and health that shall be provided by the supplier (e.g. the relevant safety data sheet in accordance with the provisions of Directive 67/548/EEC or Directive 88/379/EEC),

— the level, type and duration of exposure,

— the circumstances of work involving such agents, including their amount,

— any occupational exposure limit values or biological limit values established on the territory of the Member States in question,

— the effect of preventive measures taken or to be taken,

— where available, the conclusions to be drawn from any health surveillance already undertaken.

The employer shall obtain additional information which is needed for the risk assessment from the supplier or from other readily available sources. Where appropriate, this information shall comprise the specific assessment concerning the risk to users established on the basis of Community legislation on chemical agents.

2. The employer must be in possession of an assessment of the risk in accordance with Article 9 of Directive 89/391/EEC, and shall identify which measures have been taken in accordance with Articles 5 and 6 of this Directive. The risk assessment shall be documented in a suitable form according to national law and practice, and may include a justification by the employer that the nature and extent of the risks related to chemical agents make a further detailed risk assessment unnecessary. The risk assessment shall be kept up-to-date, particularly if there have been significant changes which could render it out-of-date, or when the results of health surveillance show it to be necessary.

3. Certain activities within the undertaking or establishment, such as maintenance, in respect of which it is foreseeable that there is a potential for significant exposure, or which may result in deleterious effects to safety and health for other reasons, even after all technical measures have been taken, shall be included in the risk assessment.

4. In the case of activities involving exposure to several hazardous chemical agents, the risk shall be assessed on the basis of the risk presented by all such chemical agents in combination.

5. In the case of a new activity involving hazardous chemical agents, work shall only commence after an assessment of the risk of that activity has been made and any preventive measures identified have been implemented.

6. Practical guidelines for the determination and assessment of risk, and for their review and, if necessary, adjustment, shall be developed in accordance with Article 12 (2).

Article 5

General principles for prevention of risks associated with hazardous chemical agents and application of this Directive in relation to assessment of risks

1. In carrying out his obligation to ensure the health and safety of workers in any activity involving hazardous chemical agents the employer shall take the necessary preventive measures set out in Article 6 (1) and (2) of Directive 89/391/EEC and include the measures set out in this Directive.

2. Risks to the health and safety of workers at work involving hazardous chemical agents shall be eliminated or reduced to a minimum by:

— the design and organization of systems of work at the workplace,

— the provision of suitable equipment for work with chemical agents and maintenance procedures which ensure the health and safety of workers at work,

— reducing to a minimum the number or workers exposed or likely to be exposed,

— reducing to a minimum the duration and intensity of exposure,

— appropriate hygiene measures,

— reducing the quantity of chemical agents present at the workplace to the minimum required for the type of work concerned,

— suitable working procedures including arrangements for the safe handling, storage and transport within the workplace of hazardous chemical agents and waste containing such chemical agents.

Practical guidelines for preventive measures to control risk shall be developed in accordance with Article 12 (2).

3. Where the results of the assessment referred to in Article 4 (1) reveal a risk to the safety and health of workers, the specific protection, prevention, monitoring and information measures laid down in Articles 6, 7, 8 and 10 shall be applied.

4. Where the results of the risk assessment referred to in Article 4 (1) show that, because of the quantities of a hazardous chemical agent present in the workplace, there is only a slight risk to the safety and health of workers, and the measures taken in accordance with paragraphs 1 and 2 of this Article are sufficient to reduce that risk, the provisions of Articles 6, 7 and 10 shall not apply.

Article 6

Specific protection and prevention measures

1. The employer shall ensure that the risk from a hazardous chemical agent to the safety and health of workers at work is eliminated or reduced to a minimum.

2. In applying paragraph 1, substitution shall by preference be undertaken, whereby the employer shall avoid the use of a hazardous chemical agent by replacing it with a chemical agent or process which, under its condition of use, is not hazardous or is less hazardous to workers' safety and health, as the case may be.

Where the nature of the activity does not permit risk to be eliminated by substitution, having regard to the activity and risk assessment referred to in Article 4, the employer shall ensure that the risk is reduced to a minimum by application of protection and prevention measures, consistent with the assessment of the risk made pursuant to Article 4. These will include, in order of priority:

(a) design of appropriate work processes and engineering controls and use of adequante equipment and materials, so as to avoid or minimize the release of hazardous chemical agents which may present a risk to workers' safety and health at the place of work;

(b) application of collective protection measures at the source of the risk such as adequate ventilation and appropriate organizational measures;

(c) where exposure cannot be prevented by other means, application of individual protection measures including personal protective equipment.

Practical guidelines for protection and prevention measures to control risk shall be developed in accordance with Article 12 (2).

3. The measures referred to in paragraph 2 of this Article shall be accompanied by health surveillance in accordance with Article 10 if it is appropriate to the nature of the risk.

4. Unless the employer clearly demonstrates by other means of evaluation that, in accordance with paragraph 2, adequate prevention and protection have been achieved, the employer shall carry out on a regular basis, and when any change occurs in the conditions which may affect workers' exposure to chemical agents, such measurements of chemical agents which may present a risk to workers' health at the workplace as are necessary, in particular in relation to the occupational exposure limit values.

5. The employer shall take into account the results of the procedures referred to in paragraph 4 of this Article in carrying out the obligations laid down in or resulting as a consequence of Article 4.

In any event, where an occupational exposure limit value effectively established on the territory of a Member State has been exceeded, the employer shall immediately take steps, taking into account the nature of that limit, to remedy the situation by carrying out preventive and protective measures.

6. On the basis of the overall assessment of and general principles for the prevention of risks in Articles 4 and 5, the employer shall take technical and/or organizational measures appropriate to the nature of the operation, including storage and handling, providing protection of workers against hazards arising from the physico-chemical properties of chemical agents. In particular he shall take measures, in order of priority, to:

(a) prevent the presence at the workplace of hazardous concentrations of inflammable substances or hazardous quantities of chemically unstable substances; or, where the nature of the work does not allow that,

(b) avoid the presence of ignition sources which could give rise to fires and explosions, or adverse conditions which could cause chemically unstable substances or mixtures of substances to give rise to harmful physical effects; and

(c) mitigate the detrimental effects to the health and safety of workers in the event of fire or explosion due to the ignition of inflammable substances, or harmful physical effects arising from chemically unstable substances or mixtures of substances.

Work equipment and protective systems provided by the employer for the protection of workers shall comply with the relevant Community provisons on design, manufacture and supply with respect to health and safety. Technical and/or organizational measures taken by the employer shall take account of and be consistent with the equipment group categorization in Annex I to Directive 94/9/EC of the European Parliament and of the Council of 23 March 1994 on the approximation of the laws of the Member States concerning equipment and protective systems intended for use in potentially explosive atmospheres[1].

The employer shall take measures to provide sufficient control of plant, equipment and machinery or provision of explosion suppression equipment or explosion pressure relief arrangements.

Article 7

Arrangements to deal with accidents, incidents and emergencies

1. Without prejudice to the obligations laid down in Article 8 of Directive 89/391/EEC, the employer shall, in order to protect the safety and health of workers from an accident, incident or emergency related to the presence of hazardous chemical agents at the workplace, establish procedures (action plans) which can be put into effect when any such event occurs, so that appropriate action is taken. These arrangements shall include any relevant safety drills which are to be performed at regular intervals, and the provision of appropriate first aid facilities.

2. In the case of the occurrence of an event such as is mentioned in paragraph 1, the employer shall immediately take steps to mitigate the effects of the event and to inform the workers concerned thereof.

In order to restore the situation to normal:

— the employer shall implement appropriate measures to remedey the situation as soon as possible,

— only those workers who are essential to the carrying out of repairs and other necessary work shall be permitted to work in the affected area.

3. The workers who are permitted to work in the affected area shall be provided with appropriate protective clothing, personal protective equipment, specialized safety equipment and plant which they must use as long as the situation persists; that situation shall not be permanent.

[1] OJ L 100, 19. 4. 1994, p. 1.

Unprotected persons shall not be permitted to remain in the affected area.

4. Without prejudice to Article 8 of Directive 89/391/EEC the employer shall take the measures necessary to provide the warning and other communication systems required to signal an increased risk to safety and health, to enable an appropriate response and to launch remedial actions, assistance, escape and rescue operations immediately if the need arises.

5. The employer shall ensure that information on emergency arrangements involving harzardous chemical agents is available. The relevant internal and external accident and emergency services shall have access to this information. It shall include the following:

— advance notice of relevant work hazards, hazard identification arrangements, precautions and procedures, so that the emergency services can prepare their own response procedures and precautionary measures, and

— any available information concerning specific hazards arising, or likely to arise, at the time of an accident or emergency, including information on procedures prepared pursuant to this Article.

Article 8

Information for workers

1. Without prejudice to Article 10 of Directive 89/391/EEC the employer shall ensure that workers and/or their representatives are provided with:

— the data obtained pursuant to Article 4 of this Directive, and further informed whenever a major alteration at the workplace leads to a change in these data,

— information on hazardous chemical agents, such as the identity of such agents, the risks to safety and health, relevant occupational exposure limit values and other legislative provisions,

— information on appropriate precautions and actions to be taken in order to safeguard themselves and other workers at the workplace;

— access to any safety data sheet provided by the supplier in accordance with Article 10 of Directive 88/379/EEC and Article 27 of Directive 92/32/EEC [1];

and that the information is:

— provided in a manner appropriate to the outcome of the risk assessment pursuant to Article 4 of this Directive. This may vary from oral communication to individual instruction and training supported by information in writing, depending on the nature and degree of the risk revealed by the assessment required by the said Article,

— updated to take account of changing circumstances.

2. Where containers and pipes for hazardous chemical agents used at work are not marked in accordance with the relevant Community legislation on the labelling of chemical agents and on safety signs at the workplace, the employer shall, without prejudice to the derogations provided for in the abovementioned legislation, ensure that the contents of the containers and pipes, together with the nature of those contens and any associated hazards, are clearly identifiable.

3. Member States may take measures necessary to ensure that employers may, preferably from the producer or supplier, obtain on request all information on hazardous chemical agents needed to apply Article 4 (1) of this Directive, insofar as Directives 67/548/EEC and 88/379/EEC do not include any obligation to provide information.

SECTION III

MISCELLANEOUS PROVISIONS

Article 9

Prohibitions

1. To prevent the exposure of workers to health risks from certain chemical agents and/or certain activities involving chemical agents, the production, manufacture or use at work of the chemical agents and the activities set out in Annex III shall be prohibited to the extent specified therein.

2. Member States may permit derogations from the requirements of paragraph 1 in the following circumstances:

— for the sole purpose of scientific research and testing, including analysis,

— for activities intended to eliminate chemical agents that are present in the form of by-products or waste products,

— for the production of the chemical agents referred to in paragraph 1 for use as intermediates, and for such use.

[1] OJ L 154, 5. 6. 1992, p. 1.

The exposure of workers to chemical agents to in paragraph 1 must be prevented, in particular by providing that the production and earliest possible use of such chemical agents as intermediates must take place in a single closed system, from which the aforesaid chemical agents may be removed only to the extent necessary to monitor the process or service the system.

Member States may provide for systems of individual authorizations.

3. When derogations are permitted pursuant to paragraph 2, the competent authority shall request the employer to the following information:

— the reason for requesting the derogation,

— the quantity of the chemical agent to be used annually,

— the activities and/or reactions or processes involved,

— the number of workers liable to be involved,

— the precautions envisaged to protect the safety and health of workers concerned,

— the technical and organizational measures taken to prevent the exposure of workers.

4. The Council, in accordance with the procedure laid down in Article 118a of the Treaty, may amend the list of prohibitions under paragraph 1 of this Article, to include further chemical agents or activities.

Article 10

Health Surveillance

1. Without prejudice to Article 14 of Directive 89/391/EEC, Member States shall indroduce arrangements for carrying out appropriate health surveillance of workers for whom the results of the assessment referred to in Article 4 of this Directive reveal a risk to health. These arrangements, including the requirements specified for health and exposure records and their availability, shall be introduced in accordance with national laws and/or practice.

Health surveillance, the results of which shall be taken into account in applying preventive measures in the specific workplace, shall be appropriate where:

— the exposure of the worker to a hazardous chemical agent is such that an identifiable disease or adverse health effect may be related to the exposure, and

— there is a likelihood that the disease or effect may occur under the particular conditions of the worker's work, and

— the technique of investigation is of low risk to workers.

Furthermore, there shall be valid techniques for detecting indications of the disease or effect.

Where a binding biological limit value has been set as indicated in Annexe II, health surveillance shall be a compulsory requirement for work with the hazardous chemical agent in question, in accordance with the procedures in that Annex. Workers shall be informed of this requirement before being assigned to the task involving risk of exposure to the hazardous chemical agent indicated.

2. Member States shall establish arrangements to ensure that for each worker who undergoes health surveillance in accordance with the requirements of paragraph 1, individual health and exposure records are made and kept up-to-date.

3. Health and exposure records shall contain a summary of the results of health surveillance carried out and of any monitoring data representative of the exposure of the individual. Biological monitoring and related requirements may from part of health surveillance.

Health and exposure records shall be kept in a suitable form so as to permit consultation at a later date, taking into account any confidentiality.

Copies of the appropriate records shall be supplied to the competent authority on request. The individual worker shall, at this request, have access to the health and exposure records relating to him personally.

Where an undertaking ceases to trade, the health and exposure records shall be made available to the competent authority.

4. Where, as a result of health surveillance:

— a worker is found to have an identifiable disease or adverse health effect which is considered by a doctor or occupational health-care professional to be the result of exposure at work to a hazardous chemical agent, or

— a binding biological limit value is found to have been exceeded,

the worker shall be informed of the result which relates to him personally, including information and advice

regarding any health surveillance which he should undergo following the end of the exposure, and

the employer shall:

— review the risk assessment made pursuant to Article 4 (1),

— review the measures provided to eliminate or reduce risks pursuant to Articles 5 and 6,

— take into account the advice of the occupational health-care professional or other suitably qualified person or the competent authority in implementing any measures required to eliminate or reduce risk in accordance with Article 6, including the possibility of assigning the worker to alternative work where is no risk of further exposure, and

— arrange continued health surveillance and provide for a review of the health status of any other worker who has been similarly exposed. In such cases the competent doctor or occupational health-care professional or the competent authority may propose that exposed persons undergo a medical examination.

Article 11

Consultation and participation of workers

Consultation and participation of workers and/or their representatives shall take place in accordance with Article 11 of Directive 89/391/EEC on the matters covered by this Directive, including the Annexes hereto.

Article 12

Adaptation of the Annexes, preparation and adoption of technical guidance

1. Adjustments of a strictly technical nature to the Annexes in line with:

— the adoption of Directives in the field of technical harmonization and standardization concerning chemical agents, and/or

— technical progress, changes in international standards or specifications and new findings concerning chemical agents,

shall be adopted in accordance with the procedure laid down in Article 17 of Directive 89/391/EEC.

2. The Commission shall draw up practical guidelines of a non-binding nature. These guidelines shall address the topics referred to in Articles 3, 4 5 and 6, and Annex II, section 1.

The Commission shall first consult the Advisory Committee on Safety, Hygiene and Health Protection at Work in accordance with Decision 74/325/EEC.

In the context of the application of this Directive, Member States shall take account as far as possible of these guidelines in drawing up their national policies for the protection of the health and safety of workers.

Article 13

Repeal and amendment of earlier Directives

1. Directives 80/1107/EEC, 82/605/EEC and 88/364/EEC shall be repealed on the date referred to in Article 14 (1).

2. Council Directive 83/477/EEC of 19 September 1983 on the protection of workers from the risks related to exposure to asbestos at work (second individual Directive within the meaning of Article 8 of Directive 80/1107/EEC)[1], is amended as follows:

(a) in the first sentence of Article 1 (1), the following words shall be deleted: 'which is the second individual Directive within the meaning of Article 8 of Directive 80/1107/EEC';

(b) Article 9 (2) shall be replaced by the following:

'2. The amendments necessary to adapt the Annexes to this Directive to technical progress shall be adopted in accordance with the procedure laid down in Article 17 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at the workplace(*).

(*) OJ L 183, 29. 6. 1989, p. 1.';

(c) in the second subparagraph of Article 15 (1) the words 'in accordance with the procedure set out in Article 10 of Directive 80/1107/EEC' shall be replaced by 'in accordance with the procedure laid down in Article 17 of Directive 89/391/EEC'.

3. Council Directive 86/188/EEC of 12 May 1986 on the protection of workers from the risks related to exposure to noise at work[2] is amended as follows:

(a) in Article 1 (1), the following words shall be deleted: 'which is the third individual Directive within the meaning of Directive 80/1107/EEC';

(b) in Article 12 (2), the second subparagraph shall be replaced by the following:

[1] OJ L 263, 24. 9. 1983, p. 25. Directive as amended by Directive 91/382/EEC (OJ L 206, 29. 7. 1991, p. 16).
[2] OJ L 137, 24. 5. 1986, p. 28.

'Annexes I and II shall be adapted to technical progress in accordance with the procedure laid down in Article 17 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at the workplace(*).

(*) OJ L 183, 29. 6. 1989, p. 1.'

4. Any other reference in Directive 83/477/EEC and Directive 86/188/EEC to Directive 80/1107/EEC shall be obsolete from the date of repeal of the said Directive.

5. Directives 91/322/EEC and 96/94/EC remain in force.

SECTION IV

FINAL PROVISIONS

Article 14

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive not later than [. . .](*). They shall forthwith inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods for making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the texts of the provisions of national law which they have already adopted or which they adopt in the field governed by this Directive.

Article 15

Member States shall report to the Commission every five years on the practical implementation of this Directive, indicating the views of employers and workers.

The Commission shall inform the European Parliament, the Council and the Economic and Social Committee thereof.

Article 16

This Directive shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Communities.*

Article 17

This Directive is addressed to the Member States.

Done at . . .

For the Council

The President

(*) Three years after publication of this Directive in the *Official Journal of the European Communities.*

ANNEX I

LIST OF BINDING OCCUPATIONAL EXPOSURE LIMIT VALUES

Name of agent	Einecs No [1]	CAS No [2]	Occupational exposure limit value eight hours [3]		Occupational exposure limit value Short-term [4]	
			mg/m^3 [5]	ppm [6]	mg/m^3	ppm
Inorganic lead and its compounds			0,15			

[1] Einecs: European Inventory of Existing Commercial Chemical Substances
[2] CAS: Chemical Abstracts Service.
[3] Measured or calculated in relation to a reference period of 8 hours, time-weighted average
[4] A limit value above which exposure should not occur, and which is related to a 15 minute period unless otherwise specified
[5] mg/m^3 = milligrams per cubic metre of air at 20 °C and 101,3 KPa
[6] ppm = parts per million by volume in air (ml/m^3)

ANNEX II

BINDING BIOLOGICAL LIMIT VALUES AND HEALTH SURVEILLANCE MEASURES

1. Lead and its ionic compounds

1.1. Biological monitoring must include measuring the blood-lead level (PbB) using absorption spectrometry or a method giving equivalent results. The binding biological limit value is:

70 μg Pb/100 ml blood

1.2. Medical surveillance is carried out if:

— exposure to a concentration of lead in air is greater than 0,075 mg/m^3, calculated as a time-weighted average over 40 hours per week, or

— a blood-lead level greater than 40 μg Pb/100 ml blood is measured in individual workers.

1.3. Practical guidelines for biological monitoring and medical surveillance must be developed in accordance with Article 12 (2). These must include recommendations of biological indicators (e.g. ALAU, ZPP, ALAD) and biological monitoring strategies.

ANNEX III

PROHIBITIONS

The productions, manufacture or use at work of the chemical agents and activities involving chemical agents set out below are prohibited. The prohibition does not apply if the chemical agent is present in another chemical agent, or as a constituent of waste, provided that its individual concentration therein is less than the limit specified.

a) *Chemical Agents*

Einecs(1) No	CAS(2) No	Name of agent	Concentration Limit for exemption
202-080-4	91-59-8	2-naphtylamine and its salts	0,1 % w/w
201-177-1	92-67-1	4-aminodiphenyl and its salts	0,1 % w/w
202-199-1	92-87-5	Benzidine and its salts	0,1 w/w
202-204-7	92-93-3	4-nitrodiphenyl	0,1 % w/w

(1) Einecs: European Inventory of Existing Commercial Chemical Substances
(2) CAS: Chemical Abstracts Service

b) *Work Activities*

None.

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

1. On 17 May 1993, the Commission forwarded to the Council the abovementioned proposal for a Directive, based on Article 118 of the EC Treaty.

   The European Parliament and the Economic and Social Committee delivered their Opinions on 20 April 1994 and 24 November 1993 respectively.

   Following these Opinions, the Commission submitted an amended proposal on 9 June 1994.

2. On 7 October 1997, the Council adopted its common position pursuant to Article 189c of the Treaty.

II. OBJECTIVE

The aim of the draft Directive, which as an individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC[1] is designed to complement that Directive, is to establish minimum standards for the protection of workers from the effects of exposure to the multiplicity of hazardous chemical agents to be found in today's workplace. In line with the legal basis, the proposal is couched in general terms with general principles covering all chemical agents, as the Commission considered that this was the most cost-effective approach to providing a general framework which would avoid the need for a large number of specific Community provisions.

To this end, the Directive:

— lays down mechanisms for the establishment at Community level of exposure limits in the form, on the one hand, of indicative and binding occupational exposure limit values (the concentration, in the air breathed in by a worker, of a chemical agent over a certain period) and, on the other hand, of binding biological limit values (the concentration, in the human body, of the relevant agent),

— imposes duties on employers regarding the assessment of risks arising from hazardous chemical agents, the prevention of such risks, arrangements to deal with accidents, incidents and emergencies, and information for workers, and

— prohibits, subject to limited derogations, the use of certain chemical agents.

III. ANALYSIS OF THE COMMON POSITION

1. General remarks

On account of significant divergences in delegations' positions, work on the amended proposal was suspended in 1994 and only resumed on the basis of a compromise text put forward by the Irish Presidency in October 1996.

Four broad considerations underlay this revised text, upon which the Council's common position is based:

— the clarification of the scope of the Directive, by the provision of a definition of 'hazardous chemical agent',

[1] Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (OJ L 183, 29. 6. 1989, p. 1).

— the establishment of clear distinctions between, in particular, the factors to be taken into account in the risk assessment, the documentation of the results of the risk assessment and the various preventive and protective measures to be taken to minimise the risk itself,

— the elimination of the duplication of provisions already contained in Directive 89/391/EEC (hereafter, 'the Framework Directive')[1],

— the avoidance of excessive levels of detail such as were to be found in the original text of the Annex.

Furthermore, the essential provisions regarding the establishment of occupational exposure limit values and biological limit values are given greater prominence by being relocated towards the beginning of the text (Article 3).

The need to clarify the text resulted in changes to the numbering of many of the articles; a table of correspondence between the articles of the common position and those of the original proposal and of the amended proposal is annexed. It will be noted that a number of key points previously contained in the Annex have been integrated into the text of the articles.

The resulting structure is as follows:

Section I: General provisions (Articles 1 to 3)

These include the objectives and scope of the Directive, definitions, and the mechanism for drawing up limit values.

Section II: Employers' obligations (Articles 4 to 8)

These cover the determination and assessment of risks arising from hazardous chemical agents, general principles for the prevention of such risks, specific protection and prevention measures, arrangements to deal with accidents, incidents and emergencies, and information for workers.

Section III: Miscellaneous provisions (Article 9 to 13)

These deal with prohibited chemical agents, health surveillance, consultation of workers, and detailed provisions regarding the application of the Directive.

Section IV: Final provisions (Articles 14 to 17)

Annexes

Limit values relating to lead (Annexes I and II), and prohibited chemical agents (Annex III).

2. Analysis of the Articles

— *Article 1* (Scope)

The text of Article 1 broadly corresponds to that of the Commission's amended proposal.

However, the original fifth paragraph has been deleted since it is in any event the responsibility of the Member States to enforce legislative provisions deriving from Community Directives.

The new paragraph 5 makes clear that the Directive applies in principle to the transport sector,

[1] Attention is drawn, in particular, to the fact that provisions regarding the need for trained and competent personnel are to be found in Articles 6 and 8 of the Framework Directive.

— *Article 2* (Definitions)

The definitions correspond largely to those found in the amended proposal. It was, however, considered necessary to include a new definition of 'hazardous chemical agent' (cf. Article 2 (b)) in order to clarify the scope of the Directive by distinguishing genuinely hazardous agents or agents present in a hazardous form (e.g. high-pressure steam) from other harmless substances.

In Article 2 (d), the term 'occupational exposure limit value' is used in preference to 'occupational exposure level', which corresponds in essence to Amendment 3 as proposed by the European Parliament. It was not considered necessary to include the words 'in this Directive'.

The definitions contained in points (g) and (h) of the original proposal are deleted since the terms themselves are not used in the text of the common position,

— *Article 3* (previously Article 8) (Limit Values)

This key article lays down the procedures for establishing occupational exposure limit value and biological limit values.

For the main part, the text of Article 3 follows that of Article 8 of the amended proposal and consequently respects the spirit of Amendment 23 of the European Parliament. Subject to the changed terminology ('Occupational exposure limit values . . .'), Amendment 22 has also been followed. A new paragraph 1 makes it clear that there should be an independent assessment of the latest scientific data.

The terms 'indicative' and 'binding' are introduced to convey more precisely the concepts of 'guidance values' and 'limit values'.

The new paragraph 7 corresponds, as regards binding biological limit values, to paragraph 5 regarding binding occupational exposure limit values.

The final sentence of paragraph 4 of Amendment 23 was not followed by the Council as it would have the effect, albeit delayed, of transforming indicative limits into binding limits. Similarly, taking into account the likely timescale for the adoption of Community indicative exposure limit values, it was considered that it would be premature to provide for the five-year review referred to in paragraph 4a of Amendment 23.

The new Article 3 (9) provides for standardised measurement methods to be developed in accordance with Article 12 (2); the procedures provided for in point 12 of the Annex to the amended proposal (Amendment 38 of the European Parliament) were not followed as they were considered too detailed to be included in the text of the Directive,

— *Article 4* (Risk Assessment)

— *paragraph 1*

Article 4 (1) brings together provisions regarding the assessment of the risk previously contained in Article 3 (2) and Article 6 (2), 2nd sentence.

Amendment 9 of the European Parliament is taken into account in the first second and fourth indents, Amendment 10 being reflected in the sixth indent,

— *paragraph 2*

This paragraph, which concerns the documentation of the assessment of the risk, reflects in its revised wording Amendment 8 of the European Parliament,

— *paragraph 4*

This paragraph, which takes up the former point 3.4 of the Annex, is in fact broader in its formulation. It also goes further than the text set out in Amendment 29 of the European Parliament in that it covers all hazardous chemical agents; the reference to the risk arising from several agents in combination takes up that part of Amendment 9 which is not covered by the text of Article 4 (1),

— *paragraph 5*

This paragraph, which refers to new work activities involving chemical agents, cover the same ground as the original Article 11 (1) which has been deleted. The original Article 11 (2) has also been deleted since existing activities involving chemical agents will automatically fall within the scope of the Directive,

— *paragraph 6*

This new paragraph provides for the drawing-up of practical guidelines for the assessment of risk, in accordance with Article 12 (2),

— *Article 5* (Prevention of Risks)

— *paragraph 1*

This paragraph, which lays down the employer's basic obligations in respect of health and safety, provides a key link to the framework Directive (89/391/EEC). In so doing, it closely follows Amendment 4 of the European Parliament,

— *paragraph 2*

This paragraph lays down the measures to be taken to reduce risks to the health and safety of workers. It takes up, in whole or in part, the following amendments put forward by the European Parliament:

— Amendment 11 (cf. first indent, together with Article 6 (2)),

— Amendment 14 (cf. introduction of 'at work'),

— Amendment 15 (cf. seventh indent, together with the framework Directive),

— Amendment 17 (cf. sixth indent, together with Article 6 (6)),

— *paragraph 3*

This paragraph provides a link to later articles whenever the existence of a risk is revealed (cf. *inter alia* Amendment 33 of the European Parliament).

— *Article 6* (Specific protection and prevention measures)

— *paragraph 1*

The text of this paragraph reflects Amendment 14 of the European Parliament,

— *paragraph 2*

This paragraph corresponds essentially to Article 3 (3), Article 4 and point 3.2 of the Annex to the amended proposal. It follows Amendments 11 and 16 of the European Parliament and, by implication, Amendment 13. Practical guidelines for protection and prevention are to be drawn up in accordance with Article 12 (2),

— *paragraph 3*

Together with Article 5 (3), this paragraph follows Amendment 33 of the European Parliament,

— *paragraph 4*

This paragraph, which lays down the employer's responsibilities in respect of measurement, corresponds essentially to point 3.5 of the Annex to the amended proposal. Exposure records (cf. Amendment 28 of the European Parliament) are dealt with as part of the health surveillance requirements (Articles 6 (3) and 10 (1) and (2)),

— *paragraph 5*

This key provision corresponds to point 3.3 of the Annex to the amended proposal. It takes account of the nature of the exposure limit in the Member State in question,

— *paragraph 6*

This paragraph, which concerns inflammable, unstable and explosive substances, corresponds to the final indents of Article 4 of the amended proposal. It takes up that part of Amendment 17 not already covered by Article 5 (2), and the essence of Amendment 18 and 28 (2nd subparagraph),

— *Article 7* (Accidents, incidents and emergencies)

This reformulated provision, which corresponds to Article 5 and Point 4 of the Annex to the original proposal also takes account of Amendments 6 (in paragraph 1), 19 (in paragraph 4) and 30 (in paragraphs 1, 4 and 5) of the European Parliament,

— *Article 8* (Information for workers)

— *paragraph 1*

This paragraph brings together the provisions regarding information for workers previously to be found in Article 3 (2) (final subparagraph) and Article 6. It corresponds in part to Amendment 12 of the European Parliament. Amendment 20 is covered in part by the fifth indent, and in part by Article 10 of the Framework Directive.

The Council has not followed Amendment 35 of the European Parliament, which was considered excessively detailed,

— *paragraph 2*

This paragraph, which concerns the labelling of containers and pipes, respects the spirit of Amendment 21 of the European Parliament. Since there is no reference to the size of containers, smaller containers are also covered (cf. Amendment 36 of the European Parliament),

— *paragraph 3*

This paragraph takes up the content of point 9.5 of the Annex to the amended proposal,

— *Article 9* (Prohibitions)

This article closely corresponds to Article 7 of the amended proposal, together with point 5.1 of the Annex. Amendment 31 of the European Parliament is taken into account,

— *Article 10* (Health Surveillance)

Provisions relating to health surveillance which were previously to be found in Article 9 and points 7 and 8.2 of the Annex are now brought together in Article 10. It was considered preferable that these provisions should be drafted in general terms, and should avoid lists of the type previously to be found in point 7 of the Annex which, because they can never be exhaustive, are liable to be misleading.

— *paragraph 1*

This paragraph specifies the circumstances in which health surveillance is to be undertaken, and is to be read in conjunction with Article 6 (3).

The final subparagraph lays down that health surveillance shall be mandatory when a biological limit value exists for the agent in question (cf. Amendment 33 of the European Parliament),

— *paragraphs 2 and 3*

These paragraphs follow Amendment 34 of the European Parliament in referring to health and exposure records,

— *paragraph 4*

This paragraph sets out measures to be taken in the light of the results of the health surveillance,

— *Article 11* (Consultation and participation of workers)

This article corresponds to Article 10 of the amended proposal. It was not considered necessary to enlarge on the provisions of the Framework Directive relating to the consultation and participation of workers which, together with Article 8 (1) of the present text, were considered to reflect Amendment 12 of the European Parliament,

— *Article 12* (Adaptation of the Annexes and technical guidance)

— *Title*

The reworded title reflects the essence of Amendment 25 of the European Parliament,

— *paragraph 2*

Difficulties were experienced with the drafting of the paragraph on account of the inherent contradiction in the original text between the notion of 'guidance', considered to be non-binding, and that of 'rules' which by definition would be binding.

Since implementation of the Directive will be essentially the responsibility of the Member States, it was considered that a margin of flexibility was required and that non-binding guidelines would therefore be the most appropriate instrument. It was not considered appropriate that the adoption of such guidelines should be subject to a 'Comitology' procedure.

In any event, the social partners are represented in the Advisory Committee on Safety, Hygiene and Health Protection at Work (cf. Amendment 26 of the European Parliament).

It is recalled that it is envisaged that the drawing-up of detailed guidance regarding measurement methods will also be undertaken in the context of this paragraph (cf. Article 3 (9) and Amendment 38 of the European Parliament),

— *Article 13* (Repeal and amendment of existing provisions)

Subject to differences of presentation, this article is essentially similar to Article 14 of the amended proposal.

In paragraph 1, it was considered more appropriate to refer to the time-limit for transposition (three years from the date of publication), rather than to the date of formal entry into force of the Directive (cf. Article 16).

Paragraph 5 makes it clear that, despite the repeal of Directive 80/1107/EEC, the two subsequent implementing Directives (91/322/EEC and 96/94/EC) will remain in force.

— *Article 14 and 15* (Implementation and reporting)

These articles replace the original Article 15. At time-limit of three years from the date of publication of the Directive is set, in order to give Member States a reasonable period within which to comply with the provisions of a relatively complex text,

— *Article 16 and 17*

Standard provisions.

— *Annex I*

This Annex corresponds to Point 10.1 of the regional Annex,

— *Annex II*

This Annex corresponds to Points 10.2 and 11 of the original Annex. Practical guidelines are to be drawn up in accordance with Article 12 (2),

— *Annex III*

This Annex corresponds to Article 7 (1) of the Commission's proposal.

Although no work activities are at present included, the possibility of prohibiting such activities is covered by Article 9 (1) and a corresponding title is therefore provide.

3. **Preamble**

The preamble has been adapted in accordance with the changes made to the text of the Commission's amgended proposal.

Amendment 1 of the European Parliament has been included as Recital No 6.

4. **Other Amendments proposed by the European Parliament**

Amendment 2: this amendment was not taken up by the Commission in its amended proposal.

Amendment 5: the content of this amendment is covered by Article 6 (2) (d) and (i) and Article 6 (3) (b) and (d) of the Framework Directive.

Amendment 7: the content of this amendment is covered by Article 8 (1) and (2) of the Framework Directive.

Amendment 24: this amendment was considered superfluous since the scope of the Directive covers all such activities.

Amendment 27: the measurement and evaluation methods referred to in Article 3 (9) will be subject to the provisions of Article 12 (2). Since the

drawing-up and revision of practical guidelines is seen as an ongoing process, a specific review clause was considered to be unnecessary.

Amendment 32: this amendment is covered by Article 8 (2) of the Framework Directive.

Amendment 37: this amendment was not taken up by the Commission in its modified proposal, since it is already covered by Directive 92/85/EEC[1].

IV. CONCLUSION

The Council considers that the text of the common position, although differing in its presentation and structure from that of the Commission's amended proposal, fulfils the fundamental aims of the proposal. Furthermore, the text has been simplified without sacrificing essential content and, at the same time, the duplication of provisions which are already to be found in Directive 89/391/EEC has been avoided.

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[1] Council Directive 92/85/EEC of 19 October 1992 concerning the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (10th individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC (OJ L 348, 28. 11. 1992, p. 1)).

ANNEX

TABLE OF CORRESPONDENCES

Common Position	Original Commission Proposal	Amended Commission Proposal
Article 1 (1)	Idem	Idem
1 (2)	Idem	Idem
1 (3)	Idem	Idem
1 (4)	Idem	Idem
Deleted	1 (5)	1 (5)
1 (5) (new)	—	—
Article 2 (a)	Idem	Idem
2 (b)	—	—
2 (c)	2 (b)	2 (b)
2 (d)	2 (c)	2 (c)
2 (e)	2 (d)	2 (d)
2 (f)	2 (i)	2 (i)
2 (g)	2 (e)	2 (e)
2 (h)	2 (f)	2 (f)
—	2 (g)	2 (g)
—	2 (h)	2 (h)
Article 3 (1)	—	—
3 (2)	8 (1)	8 (1)
3 (3)	8 (4)	8 (3)
3 (4)	Annex, Point 10	8 (4)
3 (5)	8 (2)	8 (5)
3 (6)	—	8 (7)
3 (7)	—	8 (8)
3 (8)	8 (5)	8 (9)
3 (9)	—	Annex, Point 12
Article 4 (1)	3 (2) + 6 (2), 2nd sentence	3 (2) + 6 (2), 2nd sentence
4 (2)	3 (2)	3 (2)
4 (3)	3 (4)	3 (4)
4 (4)	Annex, Point 3.4	Annex, Point 3.4
4 (5)	11 (1)	11 (1)
4 (6)	—	—
Article 5 (1)	3 (1) + 11 (2)	3 (1) + 11 (2)
5 (2)	4	4
5 (3)	—	—
5 (4)	—	—
Article 6 (1)	3 (3)	3 (3)
6 (2)	3 (3) + 4 + Annex, Point 3.2	3 (3) + 4 + Annex, Point 3.2
6 (3)	9	9
6 (4)	Annex, Point 3.5	Annex, Point 3.5
6 (5)	Annex, Point 3.3	Annex, Point 3.3
6 (6)	4	4

Common Position	Original Commission Proposal	Amended Commission Proposal
Article 7 (1)	3 (1) (d) + Annex, Point 4.1	3 (1) (d) + Annex, Point 4.1
7 (2)	Annex, Point 4.2	Annex, Point 4.2
7 (3)	Annex, Point 4.3	Annex, Point 4.3
7 (4)	5	5
7 (5)	Annex, Point 4.5	Annex, Point 4.5
Article 8 (1)	3 (2) final subparagraph and 6 (1)	3 (2) final subparagraph and 6 (1)
8 (2)	6 (2)	6 (2)
8 (3)	Annex, Point 9.5	Annex, Point 9.5
Article 9 (1)	7 (1)	7 (1)
9 (2)	7 (2)	7 (2)
9 (3)	Annex, Point 5.1	Annex, Point 5.1
9 (4)	7 (3)	7 (3)
Article 10 (1)	9 + Annex, Point 7	9 + Annex, Point 7
10 (2)	Annex, Point 8.2	Annex, Point 8.2
10 (3)	Annex, Point 8.2	Annex, Point 8.2
10 (4)	Annex, Point 7	Annex, Point 7
Article 11	10	10
Article 12 (1)	12 (1) + 13	12 (1) + 13
12 (2)	12 (2) + 13	12 (2) + 13
—	—	12 (3)
Article 13 (1)	14 (1)	14 (1)
13 (2)	14 (2)	14 (2)
13 (3)	14 (2)	14 (2)
13 (4)	14 (3)	14 (3)
13 (5)	—	—
Article 14 (1)	15 (1) + (2)	15 (1) + (2)
14 (2)	15 (3)	15 (3)
Article 15	15 (4)	15 (4)
Article 16 (new)	—	—
Article 17	16	16
Annex I	Annex, Point 10.1	Annex, Point 10.1
Annex II	Annex, Points 10.2 and 11	Annex, Points 10.2 and 11
Annex III	7 (1)	7 (1)

COMMON POSITION (EC) No 42/97

adopted by the Council on 9 October 1997

with a view to adopting Council Directive 97/. . ./EC amending Directive 92/14/EEC on the limitation of the operation of aeroplanes covered by Part II, Chapter 2, Volume 1 of Annex 16 to the Convention on International Civil Aviation, Second Edition (1988)

(97/C 375/02)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 84 (2) thereof,

Having regard to the proposal from the Commission [1],

Having regard to the Opinion of the Economic and Social Committee [2],

Acting in accordance with the procedure laid down in Article 189c of the Treaty [3],

(1) Whereas the main purpose of the provisions pursuat to Directive 92/14/EEC [4] is to restrict the operation of certain types of civil subsonic jet aeroplanes;

(2) Whereas a definition of the key elements of the Directive should prevent any ambiguity as to the objective and the scope of the Directive;

(3) Whereas this Directive does not deprive an individual Member State of the possibility of having recourse to the relevant provisions of Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes [5] in accordance with their terms;

(4) Whereas, due to the exceptional historical situation of the airports serving the Berlin conurbation and the location of the airports of Berlin Tegel and Berlin Tempelhof close to the city centre, it is justified to exempt temporarily these two airports from the application of certain provisions of Directive 92/14/EEC;

(5) Whereas it is necessary to respect the initial intention of the exemption for aeroplanes on the registers of developing nations; whereas the relevant provisions of the said Directive should therefore be clarified to that effect;

(6) Whereas an exemption granted for an aeroplane from a developing nation should benefit only that nation;

(7) Whereas it is necessary to clarify the scope for exemptions granted on economic grounds;

(8) Whereas it should be made clear that a Member State can only establish a timetable for the gradual withdrawal of non-compliant aeroplanes in respect of aeroplanes which are on the register of that Member State;

(9) Whereas some Member States have agreements with third country carriers allowing them an exemption for phasing out Chapter 2 aeroplanes similar to that granted to Community air carriers; whereas it is appropriate that these agreements should not be revoked;

(10) Whereas it is essential that the Annex to Directive 92/14/EEC be kept up to date and amended in a timely manner; whereas, therefore, amendments should be drawn up by the Commission assisted by a committee of a regulatory nature;

(11) Whereas Article 3 of Directive 92/14/EEC provides for exemptions for aeroplanes on the registers of developing nations and whereas the aeroplanes so exempted were listed in the Annex to that Directive;

(12) Whereas it is necessary to amend the Annex to Directive 92/14/EEC so as to add certain aeroplanes which qualify for an exemption and were not included when that Directive was adopted; whereas it is also necessary to delete all mention of certain aeroplanes that have been withdrawn from service, destroyed or otherwise no longer qualify for the exemption;

(13) Whereas it is essential to prevent wrong usage of registrations; whereas the Annex to this Directive contains, for each aeroplane, reference to the manufacturers' serial number for the individual aeroplane;

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(1) OJ C 309, 18. 10. 1996, p. 9.
(2) OJ C 66, 3. 3. 1997, p. 4.
(3) Opinion of the European Parliament of 11 March 1997 (OJ C 115, 14. 4. 1997, p. 2), Council Common Position of 9 October 1997 and Decision of the European Parliament of . . . (not y et published in the Official Journal).
(4) OJ L 76, 23. 3. 1992, p. 21.
(5) OJ L 240, 24. 8. 1992, p. 8. Regulation as amended by the 1994 Act of Accession.

(14) Whereas it is important to ensure that infringements of Community law are penalized under conditions which make the penalty effective, proportionate and dissuasive;

(15) Whereas under the 1994 Act of Accession Austria has to comply with the provisions of Directive 92/14/EEC as from 1 April 2002,

HAS ADOPTED THIS DIRECTIVE:

Article 1

Amendments

Directive 92/14/EEC is hereby amended as follows:

1. The following paragraph shall be added to Article 1:

'3. For the purposes of this Directive:

"Air carrier" means an air transport undertaking with a valid operating licence.

"Operating licence" means an authorization granted to an undertaking permitting it to carry out carriage by air of passengers, mail and/or cargo for remuneration and/or hire.

"Community air carrier" means an air carrier with a valid operating licence granted by a Member State in accordance with Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (*).

"Total civil subsonic jet fleet" means the total aircraft fleet of civil subsonic jet aeroplanes at the disposal of the air carrier, through ownership or any form of lease agreement of not less than one year.

(*) OJ L 240, 24. 8. 1992, p. 1.'

2. The following paragraph shall be added to Article 2:

'4. Before the date referred to in paragraph 2, the operation of civil subsonic jet aeroplanes which do not comply with the provision of paragraph 1 (a) may be restricted or excluded at the airports of Berlin Tegel and Berlin Tempelhof.'

3. Article 3 (b) shall be replaced by the following:

'(b) these aeroplanes were on the register of the developing nation shown for that aeroplane in the Annex in the reference year and continue to be used either directly or under any form of lease agreement by natural or legal persons established in that nation.'

4. The following subparagraph shall be added to Article 3:

'The exemption referred to in the preceding subparagraph shall not apply where the aeroplane is leased to a natural or legal person established in a country other than the one mentioned for that aeroplane in the Annex.'

5. In Articles 4, 5 (c) and (d) and 6 'airline' shall be replaced by 'air carrier'.

6. Article 7 shall be replaced by the following:

'*Article 7*

1. Member States may limit deletion from their registers of all mention of aeroplanes which do not comply with the standards of Chapter 3 of Annex 16 to an equivalent annual rate of up to 10 % of the total civil subsonic jet fleet of a Community air carrier.

2. Member States shall not apply the provisions of Article 2 (1) in respect of aeroplanes retained on the register of a Member State in accordance with paragraph 1.

3. Where a Member State has applied an equivalent exemption to that described in paragraphs 1 and 2 to aeroplanes on the register of a third country and operating into that Member State before this Directive enters into force, the exemption may continue to be recognized subject to compliance by the air carrier with the conditions.'

7. The following Articles shall be inserted:

'*Article 9a*

Amendments to the Annex which may prove necessary in order to ensure full conformity with the criteria set out in Article 3 shall be effected according to the procedure defined in Article 9b (2).

Article 9b

1. The Commission shall be assisted by the committee provided for in Council Regulation (EEC) No 3922/91 of 16 December 1991 on the harmonization of technical requirements and administrative procedures in the field of civil aviation (*), which shall act in accordance with the procedure outlined in paragraph 2.

2. The representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down

in Article 148 (2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

3. a) The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the committee.

b) If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority.

If the Council has not acted within 3 months of the date of the referral to it, the Commission shall adopt the measures proposed.

(*) OJ L 373, 31. 12. 1991, p. 4. Regulation as amended by Regulation (EC) No 2176/96 (OJ L 291, 14. 11. 1996, p. 15).'

8. The Annex shall be replaced by the Annex hereto.

Article 2

System of penalties

Member States shall lay down the system of penalties for breaching the national provisions adopted pursuant to this Directive and shall take all the measures necessary to ensure that those penalties are applied. The penalties thus provided for shall be effective, proportionate and dissuasive. Member States shall notify the relevant provisions to the Commission not later than 1 March 1999 and shall notify any subsequent changes as soon as possible.

Article 3

Implementation

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 1 March 1999. They shall immediately inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The procedure for such reference shall be adopted by Member States.

2. In accordance with Article 168 of the 1994 Act of Accession and Annex XIX (III) thereto, Austria shall put into effect the measures necessary to comply with this Directive by 1 April 2002.

Article 4

Entry into force

This Directive shall enter into force on the 20th day following that of its publication in the *Official Journal of the European Communities.*

Article 5

Addressees

This Directive is addressed to the Member States.

Done at . . .

For the Council

The President

ANNEX

'ANNEX

LIST OF AEROPLANES EXEMPTED IN ACCORDANCE WITH ARTICLE 3

Note: Exemptions for aeroplanes in this Annex are granted within the general framework of the United Nations policies and decisions (e.g. sanctions, embargo, etc.)

ALGERIA

Serial No	*Type*	*Registration*	*Operator*
20955	B727-2D6	7T-VEH	Air Algérie
21053	B727-2D6	7T-VEI	Air Algérie
21210	B727-2D6	7T-VEM	Air Algérie
21284	B727-2D6	7T-VEP	Air Algérie
20884	B737-2D6	7T-VEG	Air Algérie
21063	B737-2D6	7T-VEJ	Air Algérie
21064	B737-2D6	7T-VEK	Air Algérie
21065	B737-2D6	7T-VEL	Air Algérie
21211	B737-2D6	7T-VEN	Air Algérie
20650	B737-2D6	7T-VED	Air Algérie
21285	B737-2D6	7T-VEQ	Air Algérie

CONGO, DEMOCRATIC REPUBLIC OF

Serial No	*Type*	*Registration*	*Operator*
20200	B707-329C	9Q-CBW	Scibe Airlift

DOMINICAN REPUBLIC

Serial No	*Type*	*Registration*	*Operator*
19767	B707-399C	HI-442CT	Dominicana de Aviacion

EGYPT

Serial No	*Type*	*Registration*	*Operator*
19843	B707-336-C	SU-PBA	Air Memphis
19916	B707-328-C	SU-PBB	Air Memphis
21194	B737-266	SU-AYK	Egypt Air
21195	B737-266	SU-AYL	Egypt Air
21227	B737-266	SU-AYO	Egypt Air

IRAQ

Serial No	*Type*	*Registration*	*Operator*
20889	B707-370C	YI-AGE	Iraqi Airways
20892	B737-270C	YI-AGH	Iraqi Airways
20893	B737-270C	YI-AGI	Iraqi Airways

LEBANON

Serial No	*Type*	*Registration*	*Operator*
20259	B707-3B4C	OD-AFD	MEA
20260	B707-3B4C	OD-AFE	MEA
19966	B707-347C	OD-AGU	MEA
19967	B707-347C	OD-AGV	MEA

19589	B707-323C	OD-AHC	MEA
19515	B707-323C	OD-AHD	MEA
20170	B707-323B	OD-AHF	MEA
19516	B707-323C	OD-AHE	MEA
19104	B707-327C	OD-AGX	TMA
19105	B707-327C	OD-AGY	TMA
18939	B707-323C	OD-AGD	TMA
19214	B707-331C	OD-AGS	TMA
19269	B707-321C	OD-AGO	TMA
19274	B707-321C	OD-AGP	TMA

LIBERIA

Serial No	*Type*	*Registration*	*Operator*
45683	DC8F-55	EL-AJO	Liberia World Airlines
45686	DC8F-55	EL-AJQ	Liberia World Airlines

LIBYA

Serial No	*Type*	*Registration*	*Operator*
20245	B727-224	5A-DAI	Libyan Arab Airlines
21051	B727-2L5	5A-DIB	Libyan Arab Airlines
21052	B727-2L5	5A-DIC	Libyan Arab Airlines
21229	B727-2L5	5A-DID	Libyan Arab Airlines
21230	B727-2L5	5A-DIE	Libyan Arab Airlines

MAURITANIA

Serial No	*Type*	*Registration*	*Operator*
11093	F28-4000	5T-CLG	Air Mauritanie

MOROCCO

Serial No	*Type*	*Registration*	*Operator*
20471	B727-2B6	CN-CCG	Royal Air Maroc
21214	B737-2B6	CN-RMI	Royal Air Maroc
21215	B737-2B6	CN-RMJ	Royal Air Maroc
21216	B737-2B6	CN-RMK	Royal Air Maroc

NIGERIA

Serial No	*Type*	*Registration*	*Operator*
18809	B707-338C	5N-ARQ	DAS Air Cargo
19664	B707-355C	5N-VRG	Air Tours

SAUDI ARABIA

Serial No	*Type*	*Registration*	*Operator*
20574	B737-268C	HZ-AGA	Saudia
20575	B737-268C	HZ-AGB	Saudia
20576	B737-268	HZ-AGC	Saudia
20577	B737-268	HZ-AGD	Saudia
20578	B737-268	HZ-AGE	Saudia
20882	B737-268	HZ-AGF	Saudia
20883	B737-268	HZ-AGG	Saudia

SWAZILAND

Serial No	*Type*	*Registration*	*Operator*
45802	DC8F-54	3D-AFR	African International Airways
46012	DC8F-54	3D-ADV	African International Airways

TUNISIA

Serial No	*Type*	*Registration*	*Operator*
20545	B727-2H3	TS-JHN	Tunis Air
20948	B727-2H3	TS-JHQ	Tunis Air
21179	B727-2H3	TS-JHR	Tunis Air
21235	B727-2H3	TS-JHT	Tunis Air

UGANDA

Serial No	*Type*	*Registration*	*Operator*
19821	B707-379C	5X-JEF	Dairo Air Services

ZIMBABWE

Serial No	*Type*	*Registration*	*Operator*
18930	B707-330B	Z-WKU	Air Zimbabwe
45821	DC8F-55	Z-WMJ	Affretair'

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

On 4 September 1996, the Commission submitted to the Council a proposal for a Council Directive amending Directive 92/14/EEC on the limitation of the operation of aeroplanes covered by Part II, Chapter 2, Volume I of Annex 16 to the Convention on International Civil Aviation, second edition (1988)[1].

The Economic and Social Committee issued its opinion on 27 November 1996[2]. The European Parliament issued its opinion in the first reading on 11 March 1997[3].

The Commission amended its proposal in the light of these opinions and transmitted it to the Council on 5 June 1997[4].

The Council adopted its common position in accordance with Article 189c of the Treaty on 9 October 1997.

II. PURPOSE OF THE PROPOSAL

This proposal amends Directive 92/14/EEC, the main purpose of which was to restrict the operation of certain civil subsonic jet aeroplanes. In its Annex, that Directive contained a list of aircraft from developing nations which were to be exempted from the non-operation rule until 1 April 2002. However, a number of aircraft from these nations qualifying for an exemption were not notified to the Commission at the time of the adoption of the Directive and, thus, not included in the Annex.

The main purpose of this amending Directive is therefore to update the list of aircraft contained in the Annex to the Directive. Most of the other amendments to Directive 92/14/EEC are aimed at ensuring its uniform interpretation throughout the Community.

III. ANALYSIS OF THE COMMON POSITION

The common position adopted by the Council corresponds largely to the Commission proposal.

The most important part of the Directive is its updated Annex, listing aeroplanes on the registers of developing nations which are exempted from the provisions of Article 2 (1).

Several definitions of the key elements of the Directive were introduced in order to prevent any ambiguity as to the objective and the scope of the Directive (new paragraph 3 of Article 1).

Due to the exceptional historical situation of the airports serving the Berlin conurbation and the location of the airports of Berlin Tegel and Berlin Tempelhof close to the city centre, those two airports were exempted from Article 2 (2) of Directive 92/14/EC, which allows Chapter 2 aircraft to continue operating at Community airports until 1 April 2002 (new paragraph 4 of Article 2).

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[1] OJ C 309, 18. 10. 1996, p. 9.
[2] OJ C 66, 3. 3. 1997, p. 4.
[3] OJ C 115, 14. 4. 1997, p. 24.
[4] OJ C 253, 19. 8. 1997, p. 3.

With regard to the aeroplanes listed in the Annex to the Directive and thus exempted from Article 2 (1), it was clarified that aeroplanes wishing to benefit from that exemption may not be transferred from the register of one developing nation to another (new Article 3b).

While the right of a Member State to establish a timetable for the gradual withdrawal of non-compliant aeroplanes is limited to aeroplanes on its own register, equivalent exemptions to third countries may continue to be recognised if they were granted before this Directive enters into force (new Article 7).

In order to ensure that the Annex can be kept up to date and amended in a timely manner, such amendments can be carried out by the Commission, assisted by a committee of a regulatory nature (new Articles 9a and 9b).

Finally, Member States are required to lay down a system of penalties for infringements of the national provisions adopted in accordance with this Directive (Article 2).

IV. AMENDMENTS BY THE EUROPEAN PARLIAMENT

The Council followed the Commission amended proposal on all points:

1. **Amendments by Parliament, accepted by Council and Commission**

   Amendments 3 and 7 were accepted since they strengthen the conditions under which an exemption granted to an aeroplane registered in a developing nation continues to remain valid.

2. **Amendments by Parliament, not accepted by Council and Commission**

   — Amendments 1, 2 and 6, which would have allowed Member States to restrict the operation of the noisiest aeroplanes at all Community airports, were not accepted since they would be contrary to the balanced approach adopted in Directive 92/14/EEC, which provided for a transitional period until 1 April 2002,

   — Amendments 4 and 8 were not accepted since they would have prevented the use of the Committee procedure for amending the Annex to include a small number of aeroplanes which could still qualify for an exemption under Article 3,

   — Amendments 5 and 9 were not accepted, because Saudi Arabia is included in the official international list of developing nations and its aeroplanes included in the Annex meet the criteria laid down in Article 3.

V. AMENDMENTS BY THE COUNCIL, NOT PROPOSED BY THE PARLIAMENT

Re the recitals

The Council redrafted the preamble in the light of the amendments carried out with regard to the Commission's proposal. The Council also added certain recitals in order to reflect new provisions introduced into the text.

Re new paragraph 3 of Article 1 (definitions)

In the definition of 'total civil subsonic jet fleet' , 'lease agreement' was replaced by 'any form of lease agreement' in order to avoid any uncertainty with regard to the type of lease agreement covered by this definition.

Re new paragraph 4 of Article 2 (airport systems)

The Council did not accept the possibility of airport systems limiting or excluding the operation of certain civil subsonic jet aeroplanes, since such provision would have threatened the balanced approach adopted in Directive 92/14/EEC, which provided for a transitional period until 1 April 2002 and a time table for the gradual withdrawal of non-compliant aeroplanes.

However, such a possibility was granted to the airports of Berlin Tegel and Berlin Tempelhof, taking into account their exceptional historical situation and the fact that they are centrally located.

Re new Article 3b (conditions for exemption)

The Council replaced 'operated' by 'used either directly or under any form of lease agreement', in order to clearly specify the conditions under which an aeroplane registered in a developing nation can benefit from the exemption under Article 3.

Re new Article 7 (phasing-out scheme)

The Council carried out some editorial changes in order to avoid any ambiguity regarding the interpretation of this Article. Moreover, a provision was inserted with regard to existing agreements with third country carriers, because it was felt appropriate that such agreements should not be revoked.

Re new Article 9b (committee)

In view of the significant impact of any amendment to the Annex on the scope of the Directive, the Council replaced the procedure for an advisory committee by that of a regulatory committee, Type IIIa.

Re Annex (list of aeroplanes)

The Council carried out some editorial corrections (to Egypt, Serial No. 19916; and to Nigeria, Serial No. 19664) and deleted the only aeroplane on this list registered in Uruguay, since that aeroplane is no longer in service.

COMMON POSITION (EC) No 43/97

adopted by the Council on 13 October 1997

with a view to adopting Directive 97/. . ./EC of the European Parliament and of the Council on settlement finality in payment and securities settlement systems

(97/C 375/03)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission [1],

Having regard to the opinion of the European Monetary Institute,

Having regard to the Opinion of the Economic and Social Committee [2],

Acting in accordance with the procedure laid down in Article 189b of the Treaty [3],

(1) Whereas the Lamfalussy report of 1990 to the Governors of the central banks of the Group of Ten countries demonstrated the important systemic risk inherent in payment systems which operate on the basis of several legal types of payment netting, in particular multilateral netting; whereas the reduction of legal risks associated with participation in real time gross settlement systems is of paramount importance, given the increasing development of these systems;

(2) Whereas it is also of the utmost importance to reduce the risk associated with participation in securities settlement systems, in particular where there is a close connection between such systems and payment systems;

(3) Whereas this Directive aims at contributing to the efficient and cost effective operation of cross-border payment and securities settlement arrangements in the Community, which reinforces the freedom of movement of capital in the internal market; whereas this Directive thereby follows up the progress made towards completion of the internal market, in particular towards the freedom to provide services and liberalization of capital movements, with a view to the realization of Economic and Monetary Union;

(4) Whereas it is desirable that the laws of the Member States should aim to minimize the disruption to a system caused by insolvency proceedings against a participant in that system;

(5) Whereas a proposal for a Directive on the reorganization and winding-up of credit institutions submitted in 1985 and amended on 8 February 1988 is still pending before the Council; whereas the Convention on Insolvency Proceedings drawn up on 23 November 1995 by the Member States meeting within the Council explicitly excludes insurance undertakings, credit institutions and investment firms;

(6) Whereas this Directive is intended to cover payment and securities settlement systems of a domestic as well as of a cross-border nature; whereas the Directive is applicable to Community systems and to collateral security constituted by their participants, be they Community or third country participants, in connection with participation in these systems;

(7) Whereas Member States may apply the provisions of this Directive to their domestic institutions which participate directly in third country systems and to collateral security provided in connection with participation in such systems;

(8) Whereas Member States should be allowed to designate as a system covered by this Directive a system whose main activity is the settlement of securities even if the system to a limited extent also deals with commodity derivatives;

(9) Whereas the reduction of systemic risk requires in particular the finality of settlement and the

[1] OJ C 207, 18. 7. 1996, p. 13.
[2] OJ C 56, 24. 2. 1997, p. 1.
[3] Opinion of the European Parliament of 9 April 1997 (OJ C 132, 28. 4. 1997, p. 79), Council Common Position of 13 October 1997 and Decision of the European Parliament of . . . (not yet published in the Official Journal).

enforceability of collateral security; whereas collateral security is meant to comprise all means provided by a participant to the other participants in the payment and/or securities settlement systems to secure rights and obligations in connection with that system, including repurchase agreements, statutory liens and fiduciary transfers; whereas regulation in national law of the kind of collateral security which can be used should not be affected by the definition of collateral security in this Directive.

(10) Whereas this Directive, by covering collateral security provided in connection with operations of the central banks of the Member States functioning as central banks, including monetary policy operations, assists the European Monetary Institute in its task of promoting the efficiency of cross-border payments with a view to the preparation of the third stage of Economic and Monetary Union and thereby contributes to developing the necessary legal framework in which the future European central bank may develop its policy;

(11) Whereas transfer orders and their netting should be legally enforceable under all Member States' jurisdictions and binding on third parties;

(12) Whereas rules on finality of netting should not prevent systems testing, before the netting takes place, whether orders that have entered the system comply with the rules of that system and allow the settlement of that system to take place;

(13) Whereas nothing in this Directive should prevent a participant or a third party from exercising any right or claim resulting from the underlying transaction which they may have in law to recovery or restitution in respect of a transfer order which has entered a system, e.g. in case of fraud or technical error, as long as this leads neither to the unwinding of netting nor to the revocation of the transfer order in the system;

(14) Whereas it is necessary to ensure that transfer orders cannot be revoked after a moment defined by the rules of the system;

(15) Whereas it is necessary that a Member State should immediately notify other Member States of the opening of insolvency proceedings against a participant in the system;

(16) Whereas insolvency proceedings should not have a retroactive effect on the rights and obligations of participants in a system;

(17) Whereas, in the event of insolvency proceedings against a participant in a system, this Directive furthermore aims at determining which insolvency law is applicable to the rights and obligations of that participant in connection with its participation in a system;

(18) Whereas collateral security should be insulated from the effects of the insolvency law applicable to the insolvent participant;

(19) Whereas the provisions of Article 9 (2) should only apply to a register, account or centralized deposit system which evidences the existence of proprietary rights in or for the delivery or transfer of the securities concerned;

(20) Whereas the provisions of Article 9 (2) are intended to ensure that if the participant, the central bank of a Member State or the future European central bank has a valid and effective collateral security as determined under the law of the Member State where the relevant register, account or centralized deposit system is located, then the validity and enforceability of that collateral security as against that system (and the operator thereof) and against any other person claiming directly or indirectly through it, should be determined solely under the law of that Member State;

(21) Whereas the provisions of Article 9 (2) are not intended to prejudice the operation and effect of the law of the Member State under which the securities are constituted or of the law of the Member State where the securities may otherwise be located (including, without limitation, the law concerning the creation, ownership or transfer of such securities or of rights in such securities) and should not be interpreted to mean that any such collateral security will be directly enforceable or be capable of being recognized in any such Member State otherwise than in accordance with the law of that Member State;

(22) Whereas it is desirable that Member States endeavour to establish sufficient links between all the securities settlement systems covered by this Directive with a view towards promoting maximum transparency and legal certainty of transactions relating to securities;

(23) Whereas the adoption of this Directive constitutes the most appropriate way of realizing the abovementioned objectives and does not go beyond what is necessary to achieve them,

HAVE ADOPTED THIS DIRECTIVE:

SECTION I

SCOPE AND DEFINITIONS

Article 1

The provisions of this Directive shall apply to:

(a) any system as defined in Article 2 (a), governed by the law of a Member State and operating in any currency, the ecu or in various currencies which the system converts one against another;

(b) any participant in such a system;

(c) collateral security provided in connection with:

— participation in a system, or

— operations of the central banks of the Member States in their functions as central banks.

Article 2

For the purpose of this Directive:

(a) 'system' shall mean a formal arrangement:

— between three or more participants, without counting a possible settlement agent, a possible central counterparty, a possible clearing house or a possible indirect participant, with common rules and standardized arrangements for the execution of transfer orders between the participants,

— governed by the law of a Member State chosen by the participants; the participants may, however, only choose the law of a Member State in which at least one of them has its head office, and

— designated, without prejudice to other more stringent conditions of general application laid down by national law, as a system and notified to the Commission by the Member State whose law is applicable, after that Member State is satisfied as to the adequacy of the rules of the system.

Subject to the conditions in the first subparagraph, a Member State may designate as a system such a formal arrangement whose business consists of the execution of transfer orders as defined in the second indent of (i) below and which to a limited extent executes orders relating to other financial instruments, when that Member State considers that such a designation is warranted on grounds of systemic risk.

A Member State may also on a case-by-case basis designate as a system such a formal arrangement between two participants, without counting a possible settlement agent, a possible central counterparty, a possible clearing house or a possible indirect participant, when that Member State considers that such a designation is warranted on grounds of systemic risk.

(b) 'institution' shall mean:

— a credit institution as defined in the first indent of Article 1 of Directive 77/780/EEC[1] including the institutions set out in the list in Article 2 (2) thereof, or

— an investment firm as defined in point 2 of Article 1 of Directive 93/22/EEC[2] excluding the institutions set out in the list in Article 2 (2) (a) to (k) thereof, or

— public authorities and publicly guaranteed undertakings, or

— any undertaking whose head office is outside the Community and whose functions correspond to those of the Community credit institutions or investment firms as defined in the first and second indent,

which participates in a system and which is responsible for discharging the financial obligations arising from transfer orders within that system.

If a system is supervised in accordance with national legislation and only executes transfer orders as defined in the second indent of (i) below, as well as payments resulting from such orders, a Member State may decide that undertakings which participate in such a system and which have responsibility for discharging the financial obligations arising from transfer orders within this system, can be considered institutions, provided that at least three participants of this system are covered by the categories referred to in the first subparagraph and that such a decision is warranted on grounds of systemic risk;

(c) 'central counterparty' shall mean an entity which is interposed between the institutions in a system and which acts as the exclusive counterparty of these institutions with regard to their transfer orders;

[1] First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions (OJ L 322, 17. 12. 1977, p. 30). Directive as last amended by Directive 96/13/EG (OJ L 66, 16. 3. 1996, p. 15).

[2] Council Directive 93/22/EWG of 10 Mai 1993 on investment services in the securities field (OJ L 141, 11. 6. 1993, p. 27). Directive as last amended by Directive 97/9/EC (OJ L 84, 26. 3. 1997, p. 22).

(d) 'settlement agent' shall mean an entity providing to institutions and/or a central counterparty participating in systems, settlement accounts through which transfer orders within such systems are settled and, as the case may be, extending credit to those institutions and/or central counterparties for settlement purposes;

(e) 'clearing house' shall mean an entity responsible for the calculation of the net positions of institutions, a possible central counterparty and/or a possible settlement agent;

(f) 'participant' shall mean an institution, a central counterparty, a settlement agent or a clearing house.

According to the rules of the system, the same participant may act as a central counterparty, a settlement agent or a clearing house or carry out part or all of these tasks.

A Member State may decide that for the purposes of this Directive an indirect participant may be considered a participant if it is warranted on the grounds of systemic risk and on condition that the indirect participant is known to the system;

(g) 'indirect participant' shall mean a credit institution as defined in the first indent of (b) above with a contractual relationship with an institution participating in a system executing transfer orders as defined in the first indent of (i) below which enables the abovementioned credit institution to pass transfer orders through the system;

(h) 'securities' shall mean all instruments referred to in section B of the Annex to Directive 93/22/EEC;

(i) 'transfer order' shall mean:

— any instruction by a participant to place at the disposal of a recipient an amount of money by means of a book entry on the accounts of a credit institution, a central bank or a settlement agent, or any instruction which results in the assumption or discharge of a payment obligation as defined by the rules of the system, or

— an instruction by a participant to transfer the title to, or interest in, a security or securities by means of a book entry on a register, or otherwise;

(j) 'insolvency proceedings' shall mean any collective measure provided for in the law of a Member State, or a third country, either to wind up the participant or to reorganize it, where such measure involves the suspending of, or imposing limitations on, transfers or payments;

(k) 'netting' shall mean the conversion into one net claim or one net obligation of claims and obligations resulting from transfer orders which a participant or participants either issue to, or receive from, one or more other participants with the result that only a net claim can be demanded or a net obligation be owed;

(l) 'settlement account' shall mean an account at a central bank, a settlement agent or a central counterparty used to hold funds and securities and to settle transactions between participants in a system;

(m) 'collateral security' shall mean all realizable assets provided under a pledge (including money provided under a pledge), a repurchase or similar agreement, or otherwise, for the purpose of securing rights and obligations potentially arising in connection with a system, or provided to central banks of the Member States or to the future European central bank.

SECTION II

NETTING AND TRANSFER ORDERS

Article 3

1. Transfer orders and netting shall be legally enforceable and, even in the event of insolvency proceedings against a participant, shall be binding on third parties, provided that transfer orders were entered into a system before the moment of opening of such insolvency proceedings as defined in Article 6 (1) or if they were carried out on the day of opening of the insolvency proceedings unless the system was aware or should have been aware of the opening of such proceedings.

2. No law, regulation, rule or practice on the setting aside of contracts and transactions concluded before the moment of opening of insolvency proceedings, as defined in Article 6 (1) shall lead to the unwinding of a netting.

3. The moment of entry of a transfer order into a system shall be defined by the rules of that system. If there are conditions laid down in the national law governing the system as to the moment of entry, the rules of that system must be in accordance with such conditions.

Article 4

Member States may provide that the opening of insolvency proceedings against a participant shall not prevent funds or securities available on the settlement account of that participant from being used to fulfil that participant's obligations in the system on the day of the opening of the insolvency proceedings. Furthermore, Member States, may also provide that such a participant's credit facility connected to the system be used against available, existing collateral security to fulfil that participant's obligations in the system.

Article 5

A transfer order may not be revoked by a participant in a system, nor by a third party, from the moment defined by the rules of that system.

SECTION III

PROVISIONS CONCERNING INSOLVENCY PROCEEDINGS

Article 6

1. For the purpose of this Directive, the moment of opening of insolvency proceedings shall be the moment when the relevant judicial or administrative authority handed down its decision.

2. When a decision has been taken in accordance with paragraph 1, the relevant judicial or administrative authority shall immediately notify that decision to the appropriate authority chosen by its Member State.

3. The Member State referred to in paragraph 2 shall immediately notify other Member States.

Article 7

Insolvency proceedings shall not have retroactive effects on the rights and obligations of a participant arising from, or in connection with, its participation in a system earlier than the moment of opening of such proceedings as defined in Article 6 (1).

Article 8

In the event of insolvency proceeding being opened against a participant in a system, the rights and obligations arising from, or in connection with, the participation of that participant shall be determined by the law governing that system.

SECTION IV

INSULATION OF THE RIGHTS OF HOLDERS OF COLLATERAL SECURITY FROM THE EFFECTS OF THE INSOLVENCY OF THE PROVIDER

Article 9

1. The rights of:

— a participant to collateral security provided to it in connection with a system, and

— central banks of the Member States or the furure European central bank to collateral security provided to them,

shall not be affected by insolvency proceedings against the participant or counterparty to central banks of the Member States or the furture European central bank which provided the collateral security. Such collateral security may be realized for the satisfaction of these rights.

2. Where securities (including rights in securities) are provided as collateral security to participants and/or central banks of the Member States or the future European central bank as described in paragraph 1, and their right (or that of any nominee, agent or third party action on their behalf) with respect to the securities is legally recorded on a register, account or centralized deposit system located in a Member State, the determination of the rights of such entities as holders of collateral security in relation to those securities shall be governed by the law of that Member State.

SECTION V

FINAL PROVISIONS

Article 10

Member States shall specify the systems which are to be included in the scope of this Directive and shall notify them to the Commission and inform the Commission of the authorities they have chosen in accordance with Article 6 (2).

The system shall indicate to the Member State whose law is applicable the participants in the system, including any possible indirect participants, as well as any change in them.

Article 11

In order to protect systems, each Member State may impose more stringent conditions on systems than those laid down by this Directive.

Article 12

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before ...(*). They shall forthwirth inform the Commission thereof.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The methods of making such a reference shall be laid down by the Member States.

2. Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field governed by this Directive. In this Communication, Member States shall provide a table of correspondence showing the national provisions which exist or are introduced in respect of each Article of this Directive.

Article 13

No later than three years after the date mentioned in Article 12 (1), the Commission shall present a report to the European Parliament and the Council on the application of this Directive, accompanied where appropriate by proposals for its revision.

Article 14

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities.*

Article 15

This Directive is addressed to the Member States.

Done at ...

For the European Parliament	*For the Council*
The President	*The President*

(*) 18 months after the publication of this Directive in the *Official Journal of the European Communities.*

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

1. On 30 May 1996 the Commission forwarded to the Council a proposal for a Directive on settlement finality and collateral security, based on Article 100a of the EC Treaty.

   The Economic and Social Committee and the European Parliament delivered their Opinions on 31 October 1996 and 9 April 1997 respectively. The European Monetary Institute gave its opinion on 21 November 1996.

   Following these Opinions, the Commission submitted an amended proposal on 4 July 1997.

2. On 13 October 1997, the Council adopted its common position pursuant to Article 189b of the Treaty.

II. OBJECTIVE

The aim of the Directive is to reduce systemic risk in payment and securities settlement systems and to minimize the disruption to a system caused by insolvency proceedings against a participant in a system, by stipulating

— that transfer orders and netting are legally enforceable and binding on third parties in the event of insolvency proceedings against a participant in a system,

— that collateral security provided in connection with participation in a system shall not be affected by insolvency proceedings against the participant which provided the collateral security.

The Directive in addition covers collateral security provided in connection with operations of the central banks of the Member States and the future European Central Bank.

The Directive thus contributes towards improving the efficiency of payment and securities settlement systems in the European Union and the development of the necessary legal framework for the third stage of Economic and Monetary Union.

III. ANALYSIS OF THE COMMON POSITION

A. Title of the Directive

The title of the Directive has been amended to read 'Directive of the European Parliament and of the Council on settlement finality in payment and securities settlement systems'. The new title combines elements from the original Commission proposal: 'settlement finality', with elements from the proposal of the European Parliament: the reference to 'payment and securities settlement systems' and the omission of an explicit reference to collateral security. The common position thus partially incorporates the spirit of amendment No 1 proposed by the European Parliament.

B. Section I — Scope and definitions (Articles 1—2)

(a) *Scope (Article 1)*

In accordance with the amended Commission proposal the common position

— has added securities settlement systems to the scope of this Directive by laying down that a system can mean either a payment system and/or a securities settlement system. Here the common position includes the principle of amendments 1, 4 (partially), 7, 8, 9, 11 (partially), 14, 15, 16, 17 (partially) and 20 (partially) proposed by the European Parliament,

— makes it clear that systems which operate in various currencies which the system converts one against another are also covered by this Directive. An explicit reference to the euro is not included for the same reasons which led the Commission not to include the reference in its amended proposal, namely, that it is superfluous and that mention of the ecu and the euro in the same text could give the impression that the two could co-exist. Here the common position partially includes amendment No 4 proposed by the European Parliament.

Compared to the Commission proposal the common position

— does not cover the participation of Community institutions in third-country systems but limits the scope to systems governed by the law of a Member State. However, it is made clear in Recital 7 that Member States may apply the provisions of the Directive to their domestic institutions which participate in third-country systems and to collateral security provided in connection with participation in such systems. For this reason the common position does not include amendment No 5 proposed by the European Parliament,

— does not make a specific reference to monetary policy operations, in defining the scope for collateral security, but refers to central bank operations where the bank operates in its function as a central bank.

(b) *Definitions (Article 2)*

1. The definitions of the Directive delimit the scope of the Directive in a more precise manner.

   The common position differs on a number of points from the Commission proposal. The differences, which are explained below, concern mainly:

   — the extension of the definitions to take account of the inclusion of securities settlement systems in the scope of the Directive.

     As the provisions of the Directive apply essentially in the same manner to securities settlement systems as to payment systems no distinction is made between the two types of system in the definitions,

   — the fact that third-country payment systems are not included in the scope,

   — the conditions relating to the constitution of a system and its participants.

2. The conditions which have to be fulfilled before an arrangement can be considered a system for the purposes of the Directive are set out in the definition of a 'system', Article 2 (a). The common position is based on the definitions of 'payment system' and 'EC payment system' set out in the Commission proposal, but amends these definitions and adds a number of legal safeguards. In particular

— a system must be a formal arrangement with common rules and standardized arrangements for the execution of transfer orders between the participants. The common position thus partly takes account of the spirit of amendment No 10 proposed by the European Parliament, which requires rules for the execution of payment orders,

— the minimum number of participants is set at three institutions rather than two as proposed by the Commission. Member States may, however, in certain cases designate a system in which only two institutions participate,

— the law which governs the system is defined as the law chosen by the participants, as was the case in the Commission proposal. The Commission proposal further stipulated that if no law was chosen, a payment system should be deemed to be located in the Member State where the settlement takes place. In many cases it can be difficult to determine exactly where a settlement or book entry takes place, and in order to avoid legal uncertainty the common position does not include such a provision. The common position accordingly does not incorporate the part of amendments No 11 of the European Parliament which relates to the location of a settlement or book entry,

— a designation as a system by the Member State whose law is applicable is required,

— the Member State which designates a system must be satisfied as to the adequacy of the rules of that system,

— only systems which execute orders concerning money or securities as defined by the Directive are covered. Member States may, however, in certain cases designate systems which execute orders relating to other financial instruments, in particular commodities.

Amendment No 6 proposed by the European Parliament has not been included since the approach of the common position concerning the requirements as to what constitutes a 'system' differs from that set out in the Commission proposal as well as from that proposed by the European Parliament. In introducing specific requirements as to what constitutes a system, the common position nevertheless takes account of the underlying concerns of the European Parliament.

3. In order to enhance the stability of the systems covered by the Directive the common position introduces certain criteria determining which undertakings can participate in a system.

A new term 'participant' is introduced in Article 2 (f) to cover all entities which participate in a system while at the same time making it possible to distinguish, where necessary, between them. The entities covered are: an institution, defined in Article 2 (b), a central counterparty, defined in Article 2 (c), a settlement agent, defined in Article 2 (d), and/or a clearing house, defined in Article 2 (e). Member States may also in certain cases consider an indirect participant, defined in Article 2 (g), a participant, see point 4 below.

The definition of the term 'institution', Article 2 (b), sets out the conditions which must be met if an undertaking is to be considerad an institution for the purposes of the Direcitve. The definition which is based on the definition of the terms 'institution' and 'direct participation' (Articles 2 (a) and (b) of the Commission proposal) stipulates that an undertaking in order to be covered must

— belong to one of the four core groups of undertakings: credit institutions, investment firms, public authorities or publicly guaranteed undertakings, or third-country undertakings which carry out corresponding functions, and

— participate in a system with responsibility for discharging the financial obligations arising from transfer orders with that system.

However, Member States may decide that undertakings which are not institutions as defined in the Directive can be considered an institution if they participate in a securities settlement system and if at least three of the other participants belong to the 'core' group of institutions set out above. In order to secure a certain degree of control on behalf of the authorities, systems with 'non-core' participants have to be supervised in accordance with national law. The common position takes account of the situation in certain Member States where payments relating to transfers of securities are made separately by stipulating that such systems are covered.

The terms 'central counterparty', Article 2 (c), 'settlement agent', Article 2 (d) and 'clearing house', Article 2 (e), are defined with reference to the specific functions which they carry out in relation to the system.

4. Compared to the Commission proposal the common position adds a new element by granting Member States the option of covering indirect participants in their systems provided the following conditions are met:

(i) the indirect participant is a credit institution;

(ii) only payment systems can have indirect participants;

(iii) the indirect participant must have a contractual relationship with a participant;

(These 3 conditions are set out in the new definition of 'indirect participant' in Article 2 (g).)

(iv) an indirect participant can ce considered a participant only if it is waaranted on the grounds of systemic risk;

(v) the indirect participant must be known to the system in which it participates indirectly.

(These conditions are set out in Article 2 (f), the definition of 'participant'.)

(vi) the indirect participant must also be indicated together with the other particpants to the Member State whose law is applicable;

(This condition is stipulated in Article 10 second sub-paragraph.)

5. Following the introduction of securities settlement systems, as proposed by the Commission in its amended proposal, the definition of 'payment order' in the Commission proposal has been amended and the term has been replaced by the term 'transfer order', Article 2 (i), which now includes transfers of money and

securities. The common position thus incorporates, albeit in a slightly different wording, amendment No 9 proposed by the European Parliament. The term 'securities' has been separately defined in Article 2 (h) by a reference to Directive 93/22/EEC on investment services in the securities field. The part of the definition of 'transfer order' which refers to transfer of an amount of money has been extended to cover all existing arrangements for processing a transfer order through a system.

6. This definitions of 'insolvency proceedings', 'netting' and 'collateral security' have been amended compared to the Commission proposal:

   — the definition of 'insolvency proceedings', article 2 (j), has been made more flexible and concentrates now on the feature which is the essence of this Directive, namely the suspension of, or limitations on, payments or transfers of securities,

   — the definition of 'netting', Article 2 (k), is based on the definition of 'payment netting' but takes account of the inclusion of securities in the scope,

   — the definition of 'collateral security', Article 2 (m), has been amended compared to the Commission proposal and drafted in a more precise manner. It is made clear in recital 9 that the definition does not, however, affect the regulation in national law of the kind of collateral which can be used. As a consequence of the deletion of the reference to monetary policy operations in the scope of the Directive, the definition of collateral security now refers to all assets provided to Central Banks of the Member States or the future European Central Bank.

   A new definition of 'settlement account', Article 2 (l), has been added following the introduction of the new Article 4.

7. Following the modifications of the scope of the Directive compared to the Commission proposal, the definitions of 'EC institution', 'third-country institution', 'third-country payment system' and 'monetary policy operation' have been deleted as unnecessary, and the common position accordingly does not include amendments Nos 12 and 13 proposed by the European Parliament.

C. **Section II — Netting and transfer orders (Articles 3 to 5)**

1. In Article 3 (Article 3 of the Commission proposal) the common position sets out the key element of the Directive, that netting and transfer orders shall be legally enforceable and binding on third parties even in the event of insolvency proceedings against a participant. Without changing the fundamental features of the provisions the wording of Article 3 (1) and (2) has been modified compared to the Commission proposal and now takes into account that the term 'participant' has been defined in Article 2 and that the moment of opening of insolvency proceedings has been defined in Article 6 (see below).

   In order to avoid doubt concerning transactions made in good faith, either by the defaulting institution or by another participant after the opening of insolvency proceedings, the common position introduces a new provision in Article 3 (1). It stipulates that transfer orders carried out after the opening of insolvency proceedings are treated as transfer orders entered before the opening of insolvency procedures, if the system was unaware of the opening of such proceedings. How the system is informed of the opening is left to national law.

It is made clear in recital 12 that rules on finality of netting shall not prevent systems testing whether orders that have entered the system comply with the rules of that system and allow the settlement of that system to take place. In recital 13 it is likewise made clear that nothing in this Directive shall prevent a participant or a third party from exercising any right or claim resulting from the underlying transaction which they may have in law to recovery or restitution in respect of a transfer order which has entered a system, e.g. in case of fraud or technical error, as long as this does not lead to the unwinding of netting nor to the revocation of the transfer order in the system.

2. In Article 3 (3), which is based on the last sentence of Article 3 (1) of the Commission proposal, the common position lays down specific rules relating to the definition of the moment of entry of a transfer order into a system.

3. In order not to preclude the current practice in some Member States, Article 4 of the common position sets out an option for Member States to allow that funds or securities held on the account of the defaulting participant with a settlement agent or an existing credit facility can be used to settle a possible negative balance of the defaulting participant towards the system on the day of opening of insolvency proceedings.

4. Article 5 of the common position maintains the flexibility of the Commission proposal for Article 4, which lets the system define the rules concerning the revocation of a transfer order. This prohibition applies to other participants in a system as well as to third parties. The part of amendment No 17 proposed by the European Parliament which relates to the revocation of a transfer order has thus not been included in the common position.

D. **Section III — Provisions concerning insolvency proceedings (Articles 6 to 8)**

1. As proposed by the European Parliament in amendment no 21, the common position introduces a provision, Article 6 (1), defining the moment of opening of insolvency proceedings. In order to avoid any 'grey area' between the moment when a decision opening insolvency proceedings has been taken and the moment when this decision is deemed to have been taken, the common position defines the moment of opening of insolvency proceedings as the moment when the relevant judicial or administrative authority handed down its decision.

This decision would presumably be known to the market, through the electronic media or otherwise, very soon after it has been handed down, and the common position therefore contains no requirements concerning notification to the public. To ensure, however, that the authorities are always informed immediately of such a decision, Article 6 (2) of the common position requires each Member State to choose an authority which must be informed of the decision by the judicial or administrative authority which took the decision. It is left to Member States to decide which authority is to receive the information and which information procedures, if any, should be introduced at national level.

At the moment the national authority receives such information it will seldom know if the defaulting institution is a member of one or more systems and if so, where. Article 6 (3) of the common position therefore requires the Member State in which the insolvency proceedings have been opened to notify all other Member States. To allow Member States a certain degree of flexibility, the common position leaves

open which institutions must undertake the notification and which are to receive it. The Commission has undertaken to assemble a list based on the information provided by the Member States in order to facilitate the notification.

In order to arrive at legal clarity the common position thus approaches the question of how to determine the moment of opening of insolvency proceedings in a way different from that proposed by the European Parliament in amendment No 21, and this amendment is not included in the common position.

2. In order to protect the system from the effects of provisions which enable the opening of insolvency proceedings to have effect from midnight before the actual opening of the proceedings, Article 7 of the common position follows the approach set out in Article 5 of the Commission proposal and stipulates that insolvency proceedings against a participant of a system do not have retroactive effects on the rights and obligations of a participant arising from its participation in a system. The wording has been amended compared to the Commission proposal with a view to greater precision, and the common position thus takes account of the spirit of amendment No 18 proposed by the European Parliament.

3. Article 8 of the common position which follows Article 6 of the Commission proposal is considered important to avoid doubt concerning the applicable law in the event of insolvency proceedings being opened against a participant in a system. The Commission proposal makes reference to the law of the country where the system is located, but since the common position does not determine where a system is physically located, the applicable law is defined as the law governing that system, which is, according to Article 2 (a) of the common position, the law chosen by the participants.

Hence the common position does not include amendment No 19 proposed by the European Parliament.

E. **Section IV — Collateral security (Article 9)**

Article 9 (1) of the common position (Article 7 of the Commission proposal) concerning the rights to collateral security essentially incorporates amendment No 20 proposed by the European Parliament with only certain modifications in the wording, following the introduction of the definition of a 'participant' and the change in the scope of the Directive which omits the reference to 'monetary policy'.

Article 7 (2) of the Commission proposal has been deleted as proposed by the European Parliament. Instead the common position introduces in Article 9 (2) a new provision defining the applicable law in cases where securities are pledged as collateral and the right of the holder of the collateral is recorded on a register, account or centralized deposit system which evidences the existence of proprietary rights in or for the delivery or transfer of the securities concerned.

F. **Section V — Final provisions (Articles 10 to 15)**

Article 10 of the common position concerns certain notification procedures which are to be seen as the necessary complement to the definition of the terms 'system' and 'indirect participant' in Article 2, and to the notification requirement in Article 6 (3).

Article 11 of the common position makes clear that the present Directive is a minimum directive, and that Member States may, in order to protect the systems, impose more stringent conditions than those laid down by this Directive.

Compared to the Commission proposal, Article 12 of the common position fixes the date of implementation by reference to the date of publication of the Directive, in light of the uncertainty as to the exact date on which the Directive will be finally adopted.

To ensure the monitoring of the Directive, Article 13 of the common position follows Article 9 of the Commission proposal, which places an obligation on the Commission to present a report on the application of the Directive to the European Parliament and the Council, accompanied where appropriate by proposals for its revision.

G. The recitals

The recitals have been adapted following the changes made to the Commission proposal. The common position largely includes amendment No 2 proposed by the European Parliament as recital 5, albeit in a slightly different wording. The Convention on Insolvency Proceedings as well as the proposed Directive on the reorganization and winding up of credit institutions rest on the principle of mutual recognition, not harmonization, of bankruptcy law. The first sentence of amendment No 2 has therefore not been included in the common position in order not to forestall future community legislation. The common position does not include amendment No 3 proposed by the European Parliament since the European Community is not obliged to take account of the recommendations of the Bank for International Settlements.

H. Conclusion

The Council considers that all amendments to the Commission proposal are in accordance with the aims of the Directive, namely to reduce systemic risk in payment and securities settlement systems and to minimize the disruption to a system caused by insolvency proceedings against a participant. The changes to the text of the Commission proposal aim at striking a balance between the need to introduce certain legal safeguards to ensure the rights of all participants and third parties and the need to allow sufficient flexibility in the functioning of the systems covered by the Directive.

COMMON POSITION (EC) No 44/97

adopted by the Council on 16 October 1997

with a view to adopting Directive 97/. . ./EC of the European Parliament and of the Council relating to telecommunications terminal equipment and satellite earth station equipment, including the mutual recognition of their conformity

(97/C 375/04)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 100a thereof;

Having regard to the proposal from the Commission,

Having regard to the Opinion of the Economic and Social Committee [1],

Acting in accordance with the procedure laid down in Article 189b of the Treaty [2],

(1) Whereas Council Directive 91/263/EEC of 29 April 1991 on the approximation of the laws of the Member States concerning telecommunications terminal equipment, including the mutual recognition of their conformity [3], and Council Directive 93/97/EEC of 29 October 1993 supplementing Directive 91/263/EEC in respect of satellite earth station equipment [4] should, for the sake of clarity and rationality be codified in a single text;

(2) Whereas the sector covering telecommunications terminal equipment and satellite earth station equipment is a vital part of the telecommunications industry, which is one of the industrial mainstays of the economy in the Community;

(3) Whereas the Commission, in its Green Paper on the development of the common market for telecommunications services and equipment, has proposed to accelerate the introduction of the full mutual recognition of type approval as the measure vital for the development of a competitive Community-wide terminal market;

(4) Whereas the Commission, in its Green Paper on a common approach in the field of satellite communications in the Community, has proposed the introduction of mutual recognition of type approval for satellite earth station equipment as one of the major preconditions for, *inter alia*, a Community-wide market for satellite earth station equipment;

(5) Whereas the Council, in its Resolution of 30 June 1988 [5] on the development of the common market for telecommunications services and equipment, has confirmed as a major goal in the telecommunications policy the full mutual recognition of type approval for terminal equipment on the basis of the rapid development of common European conformity specifications;

(6) Whereas the Council, in its Resolution of 19 December 1991 on the development of the common market for satellite communications services and equipment [6], has recognized as one of the major goals in satellite telecommunications policy the harmonization and liberalization of appropriate satellite earth station equipment, subject, in particular, to conditions necessary for compliance with essential requirements;

(7) Whereas the Council, in its Decision 87/95/EEC [7], has set out the measures to be implemented for the promotion of standardization in Europe and the preparation and implementation of standards in the field of information technology and telecommunications;

(8) Whereas the Council, in its Resolution of 7 May 1985 [8] has provided for a new approach to technical harmonization and standards;

(9) Whereas the scope of this Directive must be based on a general definition of the terms 'telecommunications terminal equipment' and 'satellite earth station equipment' so as to allow the technical development of products; whereas the scope excludes purpose-built satellite earth station

[1] OJ C 204, 15. 7. 1996, p. 3.
[2] Opinion of the European Parliament of 22 May 1996 (OJ C 166, 10. 6. 1996, p. 60), Council common position of 16 October 1997 and Decision of the European Parliament of . . . (not yet published in the Official Journal).
[3] OJ L 128, 23. 5. 1991, p. 1. Directive as amended by Directive 93/68/EEC (OJ L 220, 30. 8. 1993, p. 1).
[4] OJ L 290, 24. 11. 1993, p. 1.
[5] OJ C 257, 4. 10. 1988, p. 1.
[6] OJ C 8, 14. 1. 1992, p. 1.
[7] OJ L 36, 7. 2. 1987, p. 31.
[8] OJ C 136, 4. 6. 1985, p. 1.

equipment intended for use as part of the public terrestrial telecommunications network; whereas this is intended to exclude, *inter alia*, gateway satellite earth stations for major trunking applications within the context of the infrastructure provision (such as large-diameter stations) and earth stations for satellite tracking and control;

(10) Whereas this Directive does not affect current special or exclusive rights concerning satellite communications which may, in accordance with Community law, be retained by the Member States;

(11) Whereas harmonizing conditions for the placing on the market of telecommunications terminal equipment will create the conditions for an open and unified market; whereas the same applies to the goal of an advanced, open trans-European market for satellite earth stations equipment, which requires effective and efficient harmonized procedures for certification, testing, marking, quality assurance and product surveillance; whereas the alternative to Community legislation is an analogous system of provisions negotiated between Member States, which would involve obvious difficulties because of the number of organisms which would be involved in multiple bilateral negotiations; whereas this is hardly practicable, and would be neither rapid nor efficient; whereas therefore the objectives of the proposed action cannot be sufficiently achieved by the Member States; whereas on the contrary the form of a Community directive has repeatedly shown itself, in the sector of telecommunications among others, to be a practicable, rapid and efficient means; whereas the objectives of the action under consideration can therefore be better achieved at Community level;

(12) Whereas Community law in its present form provides — notwithstanding one of the fundamental rules of the Community, namely the free movement of goods — that obstacles to movement within the Community, resulting from disparities in national legislation on the marketing of products, must be accepted insofar as such requirements can be recognized as being necessary to satisfy imperative requirements; whereas, therefore, the harmonization of laws in this case must be limited only to those requirements necessary to satisfy the essential requirements relating to telecommunications terminal equipment and satellite earth station equipment; whereas these requirements must replace the relevant national requirements because they are essential;

(13) Whereas the essential requirements must be satisfied in order to safeguard the general interest; whereas those requirements must be applied with discernment to take account of the state of the art at the time of manufacture, and economic requirements;

(14) Whereas Council Directive 73/23/EEC of 19 February 1973 on the harmonization of the laws of the Member States relating to electrical equipment designed for use within certain voltage limits [1] and Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations [2], are applicable *inter alia* to the fields of telecommunications and information technology;

(15) Whereas Directive 73/23/EEC in general also covers safety of persons;

(16) Whereas Council Directive 89/336/EEC of 3 May 1989 on the approximation of the laws of the Member States relating to electromagnetic compatibility [3] sets out harmonized procedures for the protection of apparatus from electromagnetic disturbances and defines the protection requirements and inspection procedures relating thereto; whereas the general requirements of Directive 89/336/EEC apply *inter alia* to the fields of telecommunications and information technology and also to satellite earth station equipment; whereas electromagnetic compatibility requirements are covered by this Directive insofar as they are specific to telecommunications terminal equipment and satellite earth station equipment;

(17) Whereas in respect of the essential requirements and in order to help manufacturers to prove conformity to those equirements, it is desirable to have standards harmonized at European level to safeguard the general interest in the design and manufacture of terminal equipment and in order to allow checks as to conformity to those requirements; whereas these standards, harmonized at European level, are drawn up by private-law bodies and must retain their non-binding status; whereas for this purpose the European Committee for Standardization (CEN), the European Committee for Electrotechnical Standardization (Cenelec) and the European Telecommunications Standards Institute (ETSI), are the bodies recognized as competent to adopt harmonized standards; whereas, for the purposes of this Directive, a harmonized standard is a technical specification (European standard or harmonization document) adopted by one of those bodies, on the basis of a remit from the Commission in accordance with the provisions of Directive 83/189/EEC, and in accordance with the general guidelines referred to above;

[1] OJ L 77, 26. 3. 1973, S. 29. Directive as amended by Directive 93/68/EEC (OJ L 220, 30. 8. 1993, p. 1).
[2] OJ L 109, 26. 4. 1983, p. 8. Directive as last amended by Directive 94/10/EC (OJ L 100, 19. 4. 1994, p. 30).
[3] OJ L 139, 23. 5. 1989, p. 19. Directive as last amended by Directive 93/68/EEC (OJ L 220, 30. 8. 1993, p. 1).

(18) Whereas in respect of the essential requirements relating to interworking with public telecommunications networks and, in cases where it is justified, through such networks, it is in general not possible to comply with such requirements other than by the application of unique technical solutions; whereas such solutions should therefore be mandatory;

(19) Whereas the proposals for common technical regulations are, as a general rule, drawn up on the basis of harmonized standards, and in order to ensure appropriate technical coordination on a broad European basis, through additional consultations, in particular with the Telecommunications Regulations Application Committee (TRAC);

(20) Whereas satellite earth station equipment is configured, as far as its interface to the space-based system is concerned, either for the emission of radio-communications signals or for both the emission and reception of radio-communications signals, or for the reception only of radio-communications signals;

(21) Whereas satellite earth station equipment is, as far as the terrestrial interface is concerned, either intended or not intended for terrestrial connection to the public telecommunications network;

(22) Whereas orbits (such as the geo-stationary orbit, low earth orbits and elliptical orbits) are paths in space described by satellites or other space-based systems, and are limited resources determined by nature;

(23) Whereas orbital resources are used in conjunction with the radio frequency spectrum which is also a limited resource determined by nature; whereas transmitting satellite earth station equipment makes use of both those resources;

(24) Whereas the effective use of orbital resources in conjunction with the radio frequency spectrum and avoidance of harmful interference between space-based and terrestrial communications systems and other technical systems is of importance for the development of European satellite communications; whereas the International Telecommunications Union (ITU) establishes criteria for effective use of orbital resources as well as for radio-coordination to enable space and terrestrial systems to co-exist without undue interference;

(25) Whereas harmonizing conditions for the placing on the market of satellite earth station equipment will create conditions permitting an effective use of orbital resources and the radio frequency spectrum and will facilitate avoidance of harmful interference between space-based and terrestrial communication systems and other technical systems;

(26) Whereas in respect of the essential requirements related to effective use of orbital resources and the radio frequency spectrum, and avoiding harmful interference with space-based and terrestrial communications systems and other technical systems, it is in general not possible to comply with such requirements other than by the application of specific technical solutions; whereas common technical regulations are therefore necessary;

(27) Whereas satellite earth station equipment capable of being used for transmission or for transmission and reception of radio-communication signals may be subject to licensing, in addition to the provisions of this Directive;

(28) Whereas satellite earth station equipment, capable only of being used for the reception of radio-communications signals, may not be subject to licensing but only to the provisions of this Directive unless they are intended for terrestrial connection to the public telecommunications network, as proposed in the Green Paper on satellite communications in the Community; whereas the use of such satellite earth station equipment must be in conformity with national regulations compatible with Community law;

(29) Whereas it is essential to ensure that notified bodies are of a high standard throughout the Community and meet minimum criteria of competence, impartiality and financial and other independence from clients;

(30) Whereas the Approvals Committee for Terminal Equipment (ACTE) composed of representatives of the Member States and chaired by the representative of the Commission, should assist the Commission in executing the tasks entrusted to it;

(31) Whereas representatives of the telecommunication organizations, users, consumers, manufacturers, service providers and the trade unions should have the right to be consulted;

(32) Whereas ACTE should work in close cooperation with relevant committees dealing with licence procedures for satellite networks and services;

(33) Whereas the Member States' responsibility for safety, health and the other aspects covered by the essential requirements on their territory must be recognized in a safeguard clause providing for proper Community protection procedures;

(34) Whereas the addressees of any decision taken under this Directive must be informed of the reasons for such a decision and the remedies available to them;

(35) Whereas transitional arrangements are required in order that the manufacturers have the necessary

time to adapt the design and production of satellite earth station equipment to meet the common technical regulations; whereas in order to have the necessary flexibility the transition arrangements must be worked out on a case-by-case basis; whereas the common technical regulations shall lay down the necessary transition arrangements;

(36) Whereas real, comparable access to third country markets, in particular the United States of America and Japan, for European manufacturers should preferably be achieved through multilateral negotiations within the World Trade Organization (WTO), although bilateral talks between the Community and third countries may also contribute to this process;

(37) Whereas this Directive should not affect the obligations on the part of the Member States concerning the deadlines for the transposition of the Directives set out in Annex X, Part B,

HAVE ADOPTED THIS DIRECTIVE:

TABLE OF CONTENTS

Article 1

Scope and definitions

1. This Directive shall apply to terminal equipment and to satellite earth station equipment.

2. For the purpose of this Directive:

— 'public telecommunications network' shall mean the public telecommunications infrastructure which permits the conveyance of signals between defined network termination points by wire, by microwave, by optical means or by other electromagnetic means,

— 'terminal equipment' shall mean equipment intended to be connected to the public telecommunication network, namely:

(a) to be connected directly to the termination of a public telecommunications network; or

(b) to interwork with a public telecommunications network being connected directly or indirectly to the termination of a public telecommunications network

in order to transmit, process or receive information.

The system of connection may be wire, radio, optical or other electromagnetic system,

— 'technical specification' shall mean a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards terminology, symbols, testing and test methods, packaging, marking and labelling,

— 'standard' shall mean a technical specification adopted by a recognized standards body for repeated or continuous application, compliance with which is not compulsory,

— 'satellite earth station equipment' shall mean equipment which is capable of being used either for transmission only, or for transmission and reception (transmission-receive), or for reception only (receive-only), of radio-communication signals by means of satellites or other space-based systems, but excluding satellite earth station equipment intended for use as part of the public telecommunications network of a Member State,

— 'terrestrial connection to the public telecommunications network' shall mean any connection to the public telecommunications network which does not include a space segment.

TITLE I

TELECOMMUNICATIONS TERMINAL EQUIPMENT

Chapter I

Placing on the market and free circulation

Article 2

The intended purpose of the equipment shall be declared by the manufacturer or supplier of the equipment. However, terminal equipment within the meaning of Article 1 (2), second indent, which makes use of a system of communication employing the radio frequency spectrum is presumed to be intended for connection to the public telecommunications network.

Article 3

1. Notwithstanding Articles 1 and 2, equipment which is capable of being connected to the public telecommunications network, but is not intended for such a purpose, shall be accompanied by a manufacturer's or supplier's declaration, the model of which is to be found in Annex VIII and by the operating manual. At the time of placing the equipment on the market for the first time, a copy of such documentation shall be transmitted to the notified body referred to in Article 11 (1) in the Member State where this first placing on the market takes place. In addition, such equipment shall be subject to the provisions of Article 12 (4).

2. The manufacturer or supplier shall be prepared to justify once, at the request of any notified body referred to in Article 11 (1), the intended purpose of such equipment on the basis of its relevant technical characteristics, its functions and indications of the market segment it is intended for.

Article 4

1. Member States shall take all appropriate measures to ensure that terminal equipment may be placed on the market and put into service only if it bears the CE marking provided for in Article 12 attesting to its conformity to the requirements of this Directive, including the conformity assessment procedures laid down in Chapter II and where it is properly installed and maintained and used for its intended purpose.

2. Member States shall also take all appropriate measures to ensure that equipment referred to in Article 3 may be placed and allowed to remain on the market only if it complies with the requirements laid down by this Directive for this equipment and may not

be connected to the public telecommunications network within the meaning of Article 1 (2), first indent.

3. Member States shall also take all appropriate measures to ensure that terminal equipment or equipment referred to in Article 3 is disconnected from the public telecommunications network if it is not used for its intended purpose. Member States may moreover take all appropriate measures, according to their national laws, to prevent connection to the public telecommunications network of terminal equipment that is not used in conformity with its intended purpose.

4. (a) Where the terminal equipment is subject to other Directives concerning other aspects and which also provide for the affixing of the CE marking, the latter shall indicate that the equipment is also presumed to conform to the provisions of those other Directives;

(b) However, where one or more of those Directives allow the manufacturer, during a transitional period, to choose which arrangements to apply, the CE marking shall indicate conformity to the provisions only of those Directives applied by the manufacturer. In such a case, particulars of the Directives applied, as published in the *Official Journal of the European Communities*, must be given in the documents, notices or instructions required by the Directives and accompanying the terminal equipment.

Article 5

Terminal equipment shall satisfy the following essential requirements:

(a) user safety, insofar as this requirement is not covered by Directive 73/23/EEC. For the purposes of this Directive, the essential requirements shall imply the safety of persons in the same way as in Directive 73/23/EEC;

(b) safety of employees of public telecommunications networks operators, insofar as this requirement is not covered by Directive 73/23/EEC;

(c) electromagnetic compatibility requirements insofar as they are specific to terminal equipment;

(d) protection of the public telecommunications network from harm;

(e) effective use of the radio frequency spectrum, where appropriate;

(f) interworking of terminal equipment with public telecommunications network equipment for the purpose of establishing, modifying, charging for, holding and clearing real or virtual connection;

(g) interworking of terminal equipment via the public telecommunications network, in justified cases.

The cases where terminal equipment supports:

(i) reserved service according to Community law; or

(ii) a service for which the Council has decided that there should be Community-wide availability,

are considered as justified cases and the requirements concerning this interworking are determined in accordance with the procedure provided for in Article 29. In addition, after consultation of representatives of the bodies referred to in Article 28 (3) and taking due account of the result of these consultations, the Commission may propose that this essential requirement be recognized as being justified for other terminal equipment in accordance with the procedure provided for in Article 29.

Article 6

Member States shall not impede the placing on the market and the free circulation and use on their territory of terminal equipment which complies with the provisions of this Directive.

Article 7

1. Member States shall presume compliance with the essential requirements referred to in Article 5 (a) and (b) in respect of terminal equipment which is in conformity with the national standards implementing the relevant harmonized standards, the references of which have been published in the Official Journal of the European Communities. Member States shall publish the references of such national standards.

2. The Commission shall, in accordance with the procedure laid down in Article 29, adopt:

— as a first step, the measures identifying the type of terminal equipment for which a common technical regulation is required, as well as the associated scope statement for that regulation, with a view to its transmission to the relevant standardization bodies,

— as a second step, once they have been prepared by the relevant standardization bodies, the corresponding harmonized standards, or parts thereof, implementing

the essential requirements referred to in Article 5 (c) to (g), which shall be transformed into common technical regulations, compliance with which shall be mandatory and the reference of which shall be published in the *Official Journal of the European Communities*.

Article 8

Where a Member State or the Commission considers that the harmonized standards referred to in Article 7 exceed or do not entirely meet the essential requirements referred to in Article 5, the Commission or the Member State concerned shall bring the matter before the Committee referred to in Article 28, giving the reasons therefor. The Committee shall deliver an opinion as soon as possible.

In the light of the Committee's opinion and after consultation of the standing Committee set up by Directive 83/189/EEC, the Commission shall inform the Member States whether or not it is necessary to withdraw reference to those standards and any related technical regulations from the *Official Journal of the European Communities* and shall take the necessary steps to correct the shortcomings noted in the standards.

Article 9

1. Where a Member State finds that terminal equipment bearing the markings under the provision laid down in Chapter III does not comply with the relevant essential requirements when properly used in accordance with the purpose intended by the manufacturer, it shall take all appropriate measures to withdraw such products from the market or to prohibit or restrict their being placed on the market.

The Member State concerned shall immediately inform the Commission of any such measure indicating the reasons for its decision, and in particular whether non-compliance is due to:

(a) incorrect application of the harmonized standards or common technical regulations referred to in Article 7;

(b) shortcomings in the harmonized standards or common technical regulations referred to in Article 7 themselves.

2. The Commission shall enter into consultation with the parties concerned as soon as possible. Where, after such consultation, the Commission finds that any measure as referred to in paragraph 1 is justified it shall immediately so inform the Member State that took the action and the other Member States. Where the decision referred to in paragraph 1 is attributed to shortcomings in the harmonized standards or common technical regulations, the Commission, after consulting the parties concerned, shall bring the matter before the Committee referred to in Article 28 within two months if the Member State which has taken the measure intends to maintain them, and shall initiate the procedure referred to in Article 8.

3. Where terminal equipment which does not comply with the relevant essential requirements bears the CE marking the competent Member State shall take appropriate action against whomsoever has affixed the marking and shall inform the Commission and the other Member States thereof.

4. The Commission shall keep the Member States informed of the progress and outcome of the procedure.

Chapter II

Conformity assessment

Article 10

1. According to the choice of the manufacturer or his authorized representative established within the Community, terminal equipment shall be subject to either the EC type-examination, as described in Annex I, or to the EC declaration of conformity, as described in Annex IV.

2. An EC type-examination, as described in Annex I, shall be accompanied by a declaration issued according to the EC declaration of conformity to type procedure, as described in Annex II or Annex III.

3. The records and correspondence relating to the procedure referred to in this Article shall be in an official language of the Member State where the said procedure will be carried out, or in a language acceptable to the notified body involved.

Article 11

1. Member States shall notify the Commission and the other Member States of the bodies established within the Community which they have designated for carrying out the certification, product checks and associated surveillance tasks pertaining to the procedures referred to in Article 10, together with the identification numbers assigned to them beforehand by the Commission.

Member States shall apply the minimum criteria set out in Annex V for the designation of such bodies. Bodies that satisfy the criteria fixed by the relevant harmonized standards shall be presumed to satisfy the criteria set out in Annex V.

2. Member States shall inform the Commission of test laboratories established in the Community which they have designated for carrying out tests pertaining to the procedures referred to in Article 10. Notified bodies shall apply the criteria fixed by the appropriate parts of the relevant harmonized standards for the designation of such laboratories.

3. The Commission shall publish in the *Official Journal of the European Communities* a list of notified bodies together with their identification numbers and a list of test laboratories, together with the tasks for which they have been designated, and shall ensure that those lists are kept up to date.

4. A Member State having designated a notified body or a test laboratory under paragraph 1 or 2 shall annul the designation if the notified body or the test laboratory no longer meets the relevant criteria for designation.

It shall immediately inform the other Member States and the Commission accordingly and withdraw the notification. Where a Member State or the Commission considers that a notified body or a test laboratory designated by a Member State does not meet the relevant criteria the matter shall be brought before the Committee referred to in Article 28, which shall give its opinion within three months; in the light of the Committee's opinion the Commission shall inform the Member State concerned of any changes needed if that notified body or test laboratory is to retain its recognized status.

5. In order to facilitate the determination of conformity of terminal equipment with technical regulations and standards, the notified bodies shall recognize documentation issued by third country relevant bodies, when agreements between the Community and the third country concerned have been concluded on the basis of a mutually satisfactory understanding.

6. The notified bodies shall, when issuing an EC type-examination certificate as referred to in Annex I, followed by the appropriate document referred to in Annex II or III, or a decision on quality assurance assessment as referred to in Annex IV, issue at the same time an administrative approval for the connection of the concerned terminal equipment to the public telecommunications network.

Chapter III

CE marking of conformity and inscriptions

Article 12

1. The marking of terminal equipment complying with this Directive shall consist of the CE marking consisting of the initials CE, followed by the identification number of the notified body involved in the production control stage and a symbol indicating that the equipment is intended and is suitable to be connected to the public telecommunications network. The form of CE marking to be used, together with the other information, is shown in Annex VI.

2. The affixing of markings on the equipment which are likely to deceive third parties as to the meaning and form of the CE marking specified in Annexes VI and VII shall be prohibited. Any other marking may be affixed to the equipment provided that the visibility and legibility of the CE marking is not thereby reduced.

3. Terminal equipment shall be identified by the manufacturer by means of type, batch number and/or serial number and by the name of the manufacturer and/or supplier responsible for placing it on the market.

4. Equipment manufacturers or supplies who place on the market equipment as referred to in Article 3 shall affix the symbol specified in Annex VII in such a way that it follows the initials CE as shown in Annex VI and visually forms an integral part of the total marking.

Article 13

Without prejudice to Article 9:

(a) where a Member State establishes that the CE marking has been affixed improperly, the manufacturer or his authorized representative established within the Community shall be obliged to make the equipment conform with the provisions concerning the CE marking and to end the infringement under the conditions imposed by the Member State.

(b) where non-conformity continues, the Member State must take all appropriate measures to restrict or prohibit the placing on the market of the equipment in question or to ensure that it is withdrawn from the market in accordance with the procedures laid down in Article 9.

TITLE II

SATELLITE EARTH STATION EQUIPMENT

Chapter I

Placing on the market and free circulation

Article 14

The manufacturer or supplier of satellite earth station equipment shall declare whether the equipment is intended or not intended for terrestrial connection to the public telecommunications network.

Article 15

1. Member States shall take all appropriate measures to ensure that receive-only satellite earth station equipment not intended for terrestrial connection to the public telecommunications network may be placed on the market and put into service and used on their territory, in conformity with national law compatible with Community law, provided that it complies with the requirements of this Directive when it is properly installed and maintained and used for its intended purposes.

Such use must be in conformity with any national law, compatible with Community law, which restricts the use to the reception of services intended for that user.

2. Member States shall take all appropriate measures to ensure that other satellite earth station equipment may be placed on the market only if it complies with the requirements of this Directive when it is properly installed and maintained and used for its intended purposes. The use of such equipment may be subject to licensing in conformity with Community law.

3. Member States shall also take all appropriate measures to ensure that satellite earth station equipment which is not intended for terrestrial connection to the public telecommunications network is not permitted to be connected to the public telecommunications network.

4. Member States shall also take all appropriate measures to ensure that satellite earth station equipment which is not intended for terrestrial connection to the public telecommunications network is disconnected from the public telecommunications network.

Member States shall moreover take all appropriate measures, according to their national laws, to prevent terrestrial connection to the public telecommunications network of such equipment.

Article 16

Member States shall not impede the free circulation and the placing on the market of satellite earth station equipment conforming to the provisions of this Directive.

Article 17

1. Satellite earth station equipment shall satisfy the same essential requirements as those set out in Article 5.

2. For the purpose of this Directive, the essential requirements of Article 5 (a) shall imply the safety of persons in the same way as in Directive 73/23/EEC.

3. In the context of transmission or transmission-receive satellite earth station equipment, the essential requirement set out in Article 5 (e) concerning effective use of the radio frequency spectrum shall include the effective use of orbital resources and the avoidance of harmful interference between space-based and terrestrial communications systems and other technical systems.

4. In the context of satellite earth station equipment, electromagnetic compatibility requirements insofar as they are specific to satellite earth station equipment shall be subject to the essential requirement set out in Article 5 (c).

5. Satellite earth station equipment shall satisfy the essential requirement set out in Article 5 (f) regarding the interworking of satellite earth station equipment with the public telecommunications network.

6. Satellite earth station equipment shall satisfy the essential requirement set out in Article 5 (g) regarding the interworking of satellite earth station equipment via the public telecommunications network in justified cases.

Cases where satellite earth station equipment is capable of supporting and intended to support a service for which the Council has decided that there should be Community-wide availability are considered as justified cases and the requirements concerning this interworking shall be determined in accordance with the procedure laid down in Article 29.

7. Notwithstanding paragraphs 1, 5 and 6, satellite earth station equipment which is not intended for connection to the public telecommunications network shall not be required to satisfy the essential requirements set out in Article 5 (b), (d), (f) and (g).

Article 18

1. Member States shall presume compliance with the essential requirements referred to in Article 5 (a) and (b) in respect of satellite earth station equipment which is in conformity with the national standards implementing the relevant harmonized standards, the references of which have been published in the *Official Journal of the European Communities*. Member States shall publish the references of such national standards.

2. The Commission shall, in accordance with the procedure laid down in Article 29, adopt:

— as a first step, the measures identifying the type of satellite earth station equipment for which a common technical regulation is required, as well as the associated scope statement for that regulation, with a view to its transmission to the relevant standardization bodies,

— as a second step, once they have been prepared by the relevant standardization bodies, the corresponding harmonized standards, or parts thereof, implementing the essential requirements referred to in Article 17 (3) to (6), which shall be transformed into common technical regulations, compliance with which shall be

mandatory and the reference of which shall be published in the *Official Journal of the European Communities*.

Article 19

Where a Member State or the Commission considers that the harmonized standards referred to in Article 18 exceed or do not entirely meet the relevant essential requirements referred to in Article 17, the same enquiry and notification procedures shall apply as those set out in Article 8.

Article 20

1. Where a Member State finds that satellite earth station equipment bearing the marking under the provisions laid down in Chapter III of this Title does not comply with the relevant essential requirements when properly used in accordance with the purpose intended by the manufacturer, the same measures, information and consultation procedures shall apply as those set out in Article 9 (1), (2) and (4).

2. Where satellite earth station equipment which does not comply with the relevant essential requirements bears the CE marking, the competent Member State shall take appropriate action against whomsoever has affixed the marking. The same notification procedures shall apply as those set out in Article 9 (3) and (4).

Chapter II

Conformity assessment

Article 21

1. All transmission or transmission-receive satellite earth station equipment shall, according to the choice of the manufacturer or his authorized representative established with the Community, be subject to all the provisions of Article 10 (1) and (2) concerning conformity assessment.

2. The same procedures regarding language requirements shall apply as those set out in Article 10 (3).

Article 22

Receive-only satellite earth station equipment which is intended for terrestrial connection to the public telecommunications network shall, as far as its terrestrial interface is concerned, be subject to the provisions of Article 21 (1) concerning conformity assessment while, as far as other elements are concerned, they shall be subject either to the provisions of Article 21 (1) or to the Community internal production control procedure set out in Annex IX.

Article 23

Receive-only satellite earth station equipment which is not intended for terrestrial connection to the public telecommunications network shall be subject either to the provisions of Article 21 (1) or to the Community internal production control procedure set out in Annex IX.

Article 24

In addition to the provisions of Articles 21, 22 and 23, satellite earth station equipment which is not intended for connection to the public telecommunications network shall be accompanied by a manufacturer's or supplier's declaration made and transmitted in accordance with the same procedures as those set out in Article 3 and Annex VIII.

Article 25

In relation to satellite earth station equipment, the same procedures for notified bodies and test laboratories shall apply as those set out in Article 11 and Annex V.

Chapter III

CE marking of conformity and inscriptions

Article 26

1. The marking of satellite earth station equipment complying with this Directive shall consist of the CE marking consisting of the initials 'CE', followed by the identification number of the notified body responsible and, where relevant, by a symbol indicating that the equipment is intended and is suitable to be connected through a terrestrial connection to the public telecommunications network. The 'CE' symbol, the identification number and the symbol of suitability shall be the same as those shown in Annex VI.

2. The affixing of marks which are likely to be confused with the CE marking referred to in paragraph 1 above shall be prohibited.

3. Satellite earth station equipment shall be identified by the manufacturer by means of type, batch number and/or serial number and by the name of the manufacturer and/or supplier responsible for placing it on the market.

4. Notwithstanding paragraph 1, the marking of receive-only satellite earth station equipment which is not intended for terrestrial connection to the public telecommunications network and which has been subject to the Community internal production control procedure set out in Annex IX shall consist of the CE marking, consisting of the initials 'CE'.

Article 27

Where it is established that the marking referred to in Article 26 (1) of this Directive has been affixed to satellite earth station equipment which:

— does not conform to an approved type, or

— conforms to an approved type which does not meet the essential requirements applicable to it,

or where the manufacturer has failed to fulfil his obligations under the relevant Community declaration of conformity, the same procedures shall apply as those set out in Article 13.

TITLE III

COMMON PROVISIONS

Chapter I

Committee

Article 28

1. The Commission shall be assisted by a Committee of an advisory nature composed of the representatives of the Member States and chaired by the representative of the Commission. The Committee shall be called the Approvals Committee for Terminal Equipment (ACTE).

2. The representative of the Commission shall submit to the Committee a draft of the measure to be taken. The Committee shall deliver its opinion on the draft, within a time limit which the chairman may lay down according to the urgency of the matter, if necessary by taking a vote.

The opinion shall be recorded in the minutes; in addition, each Member State shall have the right to ask to have its position recorded in the minutes.

The Commission shall take the utmost account of the opinion delivered by the Committee. It shall inform the Committee of the manner in which its opinion has been taken into account.

3. The Commission shall periodically consult the representative of the telecommunications organizations, the users, the consumers, the manufacturers, the service providers and trade unions and shall inform the Committee on the outcome of such consultations, with a view to taking due account of the outcome.

Article 29

1. Notwithstandig Article 28 (1) and (2), the following procedure shall apply for matters covered by Articles 5 (g), 7 (2), 17 (6) and 18 (2).

2. The representative of the Commission shall submit to the Committee referred to in Article 28a draft of the measures to be taken as referred to in Articles 5 (g), 7 (2), 17 (6) and 18 (2). The Committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148 (2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the Committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

3. (a) The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the Committee.

(b) If the measures envisaged are not in accordance with the opinion of the Committee, or if no opinion is delivered, the Commission shall, without delay, submit to the Council a proposal relating to the measure to be taken. The Council shall act by qualified majority.

If, within three months from the date of referral to it, the Council has not acted, the proposed measure shall be adopted by the Commission.

Chapter II

Final and transitional provisions

Article 30

1. The Commission shall draw up every second year a report on the implementation of this Directive, including progress on drawing up the relevant harmonized standards and on transforming them into technical regulations, as well as any problems that have arisen in the course of implementation. The report will also outline the activities of the Committee, and assess progress in achieving an open competitive market for terminal equipment at Community level consistent with the essential requirements referred to in Article 5.

2. The Commission shall, when submitting those draft measures referred to in Article 18 (2) dealing with common technical regulations, ensure that transition arrangements, where appropriate, form part of the draft measures.

Article 31

Article 10 (5) of Directive 89/336/EEC shall not apply to equipment falling within the scope of this Directive.

Article 32

1. Any type approval granted by Member States in accordance with Directive 86/361/EEC(1) may remain valid under the legislation of the Member States within the criteria of validity appropriate to the orginal approval.

2. Measures adopted under Directive 86/361/EEC shall be submitted to the Committee under the procedure of Article 29 for possible transposition into common technical regulations.

Article 33

Member States shall inform the Commission of the main provisions of domestic law which they adopt in the field governed by this Directive.

Article 34

1. The Directives and provisions listed in Annex X, Part A, are hereby repealed without prejudice to the obligations of the Member States concerning the deadlines for transposition of the said Directives set out in Annex X, Part B.

2. References to the repealed Directives shall be construed as references to this Directive and should be read in accordance with the correlation table in Annex XI.

Article 35

This Directive shall enter into force the 20th day following that of its publication in the *Official Journal of the European Communities*.

Article 36

This Directive is addressed to the Member States.

Done at . . .

For the Parliament	*For the Council*
The President	*The President*

(1) OJ L 217, 5. 8. 1986, p. 21. Directive repealed by Directive 91/263/EEC.

ANNEX I

EC TYPE-EXAMINATION

1. EC type-examination is that part of the procedure whereby a notified body ascertains and attests that a specimen, representative of the production envisaged, meets the provisions of the Directive that apply to it.

2. The application for the EC type-examination shall be lodged by the manufacturer or his authorized representative established within the Community with a notified body of his choice.

   The application shall include:

   — the name and address of the manufacturer and, if the application is lodged by the authorized representative, his name and address in addition,

   — a written declaration that the same application has not been lodged with any other notified body,

   — the technical documentation, as described in point 3.

   The applicant shall place at the disposal of the notified body a specimen, representative of the production envisaged and hereinafter called 'type'(1). The notified body may request further specimens if needed for carrying out the test programme.

3. The technical documentation shall enable the conformity of the product with the essential requirements of the Directive to be assessed. It shall, as far as relevant for such assessment, cover the design, manufacture and operation of the product.

   For example, the documentation shall contain as far as is relevant for assessment:

   — a general type-description sufficient to identify the product preferably by provision of photographs,

   — design and manufacturing drawings and lists of components, sub-assemblies, circuits, etc.,

   — descriptions and explanations necessary for the understanding of the said drawings and lists and the operation of the product,

   — a list of the standards referred to in Article 7, applied in full or in part, and descriptions of the solutions adopted to meet the essential requirements of the Directive when the standards referred to in Article 7 have not been applied,

   — results of examinations carried out, etc.,

   — test reports,

   — proposed user information or handbook.

4. *The notified body shall:*

4.1. examine the technical documentation, verify that the type has been manufactured in conformity with it and identify the elements which have been designed in accordance with the relevant provisions of the standards referred to in Article 7 (1), as well as the components of those standards;

4.2. perform, or have performed, the appropriate examinations and necessary tests to check whether the solutions adopted by the manufacturer meet the essential requirements of the Directive which are specified in Article 5 (a) and (b);

4.3. perform, or have performed, the appropriate examinations and necessary tests to check that the type meets the relevant common technical regulations specified in Article 7 (2);

(1) A type may cover several versions of the product provided that the differences between the versions do not affect the level of safety and the other requirements concerning the performance of the product.

4.4. agree with the applicant on the location where the examinations and necessary tests are to be carried out.

5. Where the type meets the provisions of the Directive, the notified body shall issue an EC type-examination certificate to the applicant. The certificate shall contain the name and address of the manufacturer, conclusions of the examination, conditions for its validity and the necessary data for identification of the approved type.

A list of the relevant parts of the technical documentation shall be annexed to the certificate and a copy kept by the notified body.

6. The applicant shall inform the notified body that holds the technical documentation concerning the EC type-examination certificate of all modifications to the approved product which must receive additional approval where such changes may affect the conformity with the essential requirements or the prescribed conditions for use of the product. This additional approval is given in the form of an addition to the original EC type-examination certificate.

7. Each notified body shall communicate to the other notified bodies the relevant information concerning the EC type-examination certificates and additions issued and withdrawn.

8. The other notified bodies may request copies of the EC type-examination certificates and/or their additions. The Annexes to the certificate shall be kept at the disposal of the other notified bodies.

9. The manufacturer or his authorized representative shall keep with the technical documentation copies of EC type-examination certificates and their additions for a period ending at least 10 years after the last product has been manufactured.

Where neither the manufacturer nor his authorized representative is established within the Community, the obligation to keep the technical documentation available shall be the responsibility of the person who places the product on the Community market.

ANNEX II

CONFORMITY TO TYPE

1. Conformity to type is that part of the procedure whereby the manufacturer or his authorized representative established within the Community ensures and declares that the products concerned are in conformity with the type as described in the EC type-examination certificate and satisfy the requirements of the Directive that applies to them. The manufacturer or his authorized representative established within the Community shall affix the markings provided for in Article 12 (1) to each product and draw up a written declaration of conformity to type.

2. The manufacturer shall take all measures necessary to ensure that the manufacturing process assures compliance of the manufactured products with the type as described in the EC type-examination certificate and with the requirements of the Directive that apply to them.

3. The manufacturer or his authorized representative shall keep a copy of the declaration of conformity for a period ending at least 10 years after the last product has been manufactured.

   Where neither the manufacturer nor his authorized representative is established within the Community, the obligation to keep the declaration of conforming to type available shall be the responsibility of the person who places the product on the Community market.

4. A notified body chosen by the manufacturer shall carry out, or have carried out, product checks at random intervals. An adequate sample of the final products, which may be taken on site by the notified body or on its behalf, shall be examined and appropriate tests shall be carried out to check the conformity of products with the relevant requirements of the Directive. In those cases where one or more of the products checked do not conform, the notified body shall take appropriate measures.

ANNEX III

PRODUCTION QUALITY ASSURANCE

1. Production quality assurance is the procedure whereby the manufacturer who satisfies the obligations of point 2 ensures and declares that the products concerned are in conformity with the type as described in the EC type-examination certificate and satisfy the requirements of the Directive that apply to them. The manufacturer or his authorized representative established with the Community shall affix the markings provided for in Article 12 (1) to each product and draw up a written declaration of conformity to type.

2. The manufacturer shall operate an approved quality system for production, final product inspection and testing as specified in point 3 and shall be subject to monitoring as specified in point 4.

3. *Quality system*

3.1. The manufacturer shall lodge an application for assessment of his quality system with a notified body of his choice, for the products concerned.

The application shall include:

— all relevant information for the product category envisaged,

— the documentation concerning the quality system,

— if applicable, the technical documentation of the approved type and a copy of the EC type-examination certificate.

3.2. The quality system shall ensure compliance of the products with the type as described in the EC type-examination certificate and with the requirements of the Directive that apply to them.

All the elements, requirements and provisions adopted by the manufacturer shall be documented in a systematic and orderly manner in the form of written policies, procedures and instructions. The quality system documentation must permit a consistent interpretation of the quality programmes, plans, manuals and records.

It shall contain in particular an adequate description of:

— the quality objectives and the organizational structure, responsibilities and powers of the management with regard to product quality,

— the manufacturing, quality control and quality assurance techniques, processes and systematic actions that will be used,

— the examinations and tests which will be carried out before, during and after manufacture, and the frequency with which they will be carried out,

— the quality records, such as inspection reports and test data, calibration data, qualification reports of the personnel concerned, etc.,

— the means to monitor the achievement of the required product quality and the effective operation of the quality system.

3.3. The notified body shall assess the quality system to determine whether it satisfies the requirements referred to in point 3.2. It shall presume conformity with these requirements in respect of quality systems that implement the relevant harmonized standard (1).

The auditing team shall have at least one member with experience of evaluation in the product technology concerned. The evaluation procedure shall include an inspection visit to the manufacturer's premises.

The decision shall be notified to the manufacturer. The notification shall contain the conclusions of the examination and the reasoned assessment decision.

3.4. The manufacturer shall undertake to fulfil the obligations arising out of the quality system as approved and to uphold it so that it remains adequate and efficient.

(1) This harmonized standard shall be EN ISO 9002, supplemented, if necessary, to take into account the specific nature of the procedure for which it is implemented.

The manufacturer or his authorized representative shall keep the notified body that has approved the quality system informed of any intended updating of the quality system.

The notified body shall evaluate the modifications proposed and decide whether the amended quality system will still satisfy the requirements referred to in point 3.2 or whether a re-assessment is required.

It shall notify its decision to the manufacturer. The notification shall contain the conclusions of the examinations and the reasoned assessment decision.

4. *Surveillance under the responsibility of the notified body.*

4.1. The purpose of surveillance is to make sure that the manufacturer duly fulfils the obligations arising out of the approved quality system.

4.2. The manufacturer shall allow the notified body access for inspection purposes to the locations of manufacture, inspection and testing, and storage and shall provide it with all necessary information, in particular:

— the quality system documentation,

— the quality records, such as inspection reports and test data, calibration data, qualification reports of the personnel concerned, etc.

4.3. The notified body shall carry out audits at reasonable intervals to make sure that the manufacturer maintains and applies the quality system and shall provide an audit report to the manufacturer.

4.4. Additionally, the notified body may pay unexpected visits to the manufacturer. During such visits the notified body may carry out, or cause to be carried out, tests to verify that the quality system is functioning correctly, if necessary. The notified body shall provide the manufacturer with a visit report and, if a test has taken place, with a report.

5. The manufacturer shall, for a period ending at least 10 years after the last product has been manufactured, keep at the disposal of the national authorities:

— the documentation referred to in the second indent of point 3.1,

— the updating referred to in the second paragraph of point 3.4,

— the decisions and reports from the notified body which are referred to in the final paragraph of points 3.4, 4.3 and 4.4.

6. Each notified body referred to in Article 11 (1) shall make available to the other notified bodies referred to in that Article the relevant information concerning the quality system approvals issued and withdrawn.

ANNEX IV

FULL QUALITY ASSURANCE

1. Full quality assurance is the procedure whereby the manufacturer who satisfies the obligations of point 2 ensures and declares that the products concerned satisfy the requirements of the Directive that apply to them. The manufacturer or his authorized representative shall affix the markings provided for in Article 12 (1) to each product and draw up a written declaration of conformity.

2. The manufacturer shall operate an approved quality system for design, manufacture and final product inspection and testing as specified in point 3 and shall be subject to surveillance as specified in point 4.

3. *Quality system*

3.1. The manufacturer shall lodge an application for assessment of his quality system with a notified body.

The application shall include:

— all relevant information for the products envisaged,

— the quality system documentation.

3.2. The quality system shall ensure compliance of the products with the requirements of the Directive that apply to them.

All the elements, requirements and provisions adopted by the manufacturer shall be documented in a systematic and orderly manner in the form of written policies, procedures and instructions. This quality system documentation shall ensure a common understanding of the quality policies and procedures such as quality programmes, plans, manuals and records.

It shall contain in particular an adequate description of:

— the quality objectives and the organizational structure, responsibilities and powers of the management with regard to design and product quality,

— the technical specifications, including the harmonized standards and technical regulations as well as relevant test specifications that will be applied and, where the standards referred to in Article 7 (1) will not be applied in full, the means will be used to ensure that the essential requirements of the Directive that apply to the products will be met,

— the design control and design verification techniques, processes and systematic actions that will be used when designing the products pertaining to the product category covered,

— the corresponding manufacturing, quality control and quality assurance techniques, processes and systematic actions that will be used,

— the examinations and tests which will be carried out before, during and after manufacture, and the frequency with which they will be carried out; as well as the results of the tests carried out before manufacture where appropriate,

— the means by which it is ensured that the test and examination facilities respect the appropriate requirements for the performance of the necessary test,

— the quality records, such as inspection reports and test data, calibration data, qualification reports of the personnel concerned, etc.,

— the means to monitor the achievement of the required design and product quality and the effective operation of the quality system.

3.3. The notified body shall assess the quality system to determine whether it satisfies the requirements referred to in point 3.2. It shall presume compliance with these requirements in respect of quality systems that implement the relevant harmonized standard [1].

[1] This harmonized standard shall be EN ISO 9001, supplemented, if necessary, to take into account the specific nature of the products for which it is implemented.

The notified body shall assess in particular whether the quality control system ensures conformity of the products with the requirements of the Directive in the light of the relevant documentation supplied in respect of points 3.1 and 3.2 including, where relevant, test results supplied by the manufacturer.

The auditing team shall have at least one member experienced as an assessor in the product technology concerned. The evaluation procedure shall include an assessment visit to the manufacturer's premises.

The decision shall be notified to the manufacturer. The notification shall contain the conclusions of the examination and the reasoned assessment decision.

3.4. The manufacturer shall undertake to fulfil the obligations arising out of the quality system as approved and to uphold it so that it remains adequate and efficient.

The manufacturer or his authorized representative shall keep the notified body that has approved the quality system informed of any intended updating of the quality system.

The notified body shall evaluate the modifications proposed and decide whether the amended quality system still will satisfy the requirements referred to in point 3.2 or whether a re-assessment is required.

It shall notify its decision to the manufacturer. The notification shall contain the conclusions of the examination and the reasoned assessment decision.

4. *EC surveillance under the responsibility of the notified body*

4.1. The purpose of surveillance is to make sure that the manufacturer duly fulfils the obligations arising out of the approved quality system.

4.2. The manufacturer shall allow the notified body access for inspection purposes to the locations of design, manufacture, inspection and testing, and storage and shall provide it with all necessary information, in particular:

— the quality system documentation,

— the quality records as foreseen by the design part of the quality system, such as results of analyses, calculations, tests, etc.,

— the quality records as foreseen by the manufacturing part of the quality system, such as inspection reports and test data, calibration data, qualification reports of the personnel concerned, etc.

4.3. The notified body shall carry out audits at reasonable intervals to make sure that the manufacturer maintains and applies the quality system and shall provide an audit report to the manufacturer.

4.4. Additionally, the notified body may pay unexpected visits to the manufacturer. At the time of such visits, the notified body may carry out tests or have them carried out in order to check the proper functioning of the quality system where necessary; it shall provide the manufacturer with a visit report and, if a test has been carried out, with a test report.

5. The manufacturer shall, for a period ending at least 10 years after the last product has been manufactured, keep at the disposal of the national authorities:

— the documentation referred to in the second indent of point 3.1,

— the updating referred to in the second paragraph of point 3.4,

— the decisions and reports from the notified body which are referred to in the final paragraph of points 3.4, 4.3 and 4.4.

6. Each notified body referred to in Article 11 (1) shall make available to the other notified bodies referred to in that Article the relevant information concerning quality system approvals including references to the product(s) concerned, issued and withdrawn.

ANNEX V

MINIMUM CRITERIA TO BE TAKEN INTO ACCOUNT BY MEMBER STATES WHEN DESIGNATING NOTIFIED BODIES IN ACCORDANCE WITH ARTICLE 11 (1)

1. The notified body, its director and the staff responsible for carrying out the tasks for which the notified body has been designated shall not be a designer, manufacturer, supplier or installer of terminal equipment, or a network operator or a service provider, nor the authorized representative of any of such parties. They shall not become directly involved in the design, construction, marketing or maintenance of terminal equipment, nor represent the parties engaged in these activities. This does not preclude the possibility of exchanges of technical information between the manufacturer and the notified body.

2. The notified body and its staff must carry out the tasks for which the notified body has been designated with the highest degree of professional integrity and technical competence and must be free from all pressures and inducements, particularly financial, which might influence their judgment or the results of any inspection, especially from persons or groups of persons with an interest in such results.

3. The notified body must have at its disposal the necessary staff and facilities to enable it to perform properly the administrative and technical work associated with the tasks for which it has been designated.

4. The staff responsible for inspections must have:

   — sound technical and professional training,

   — satisfactory knowledge of the requirements of the tests or inspections that are carried out and adequate experience of such tests or inspections,

   — the ability to draw up the certificates, records and reports required to authenticate the performance of the inspections.

5. The impartiality of inspection staff must be guaranteed. Their remuneration must not depend on the number of tests or inspections carried out nor on the results of such inspections.

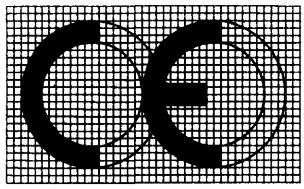
6. The notified body must take out liability insurance unless its liability is assumed by the State in accordance with national law, or the Member State itself is directly responsible.

7. The staff of the notified body is bound to observe professional secrecy with regard to all information gained in carrying out its tasks (except *vis-à-vis* the competent administrative authorities of the State in which its activities are carried out) pursuant to this Directive or any provision of national law giving effect thereto.

ANNEX VI

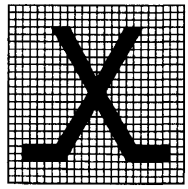
MARKING FOR THE TERMINAL EQUIMENT REFERRED TO IN ARTICLE 12 (1)

— The CE conformity marking shall consist of the initials 'CE' taking the following form, followed by the additional information referred to in Article 12 (1):



CE initials

Identification number of the notified body



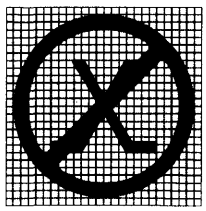
Symbol of suitability for connection to the public telecommunications network

— If the CE marking is reduced or enlarged the proportions given in the above graduated drawing must be respected.

— The various components of the CE marking must have substantially the same vertical dimension, which may not be less than 5 mm.

ANNEX VII

MARKING FOR THE EQUIMENT REFERRED TO IN ARTICLE 12 (4)



— If the CE marking is reduced or enlarged the proportions given in the above graduated drawing must be respected.

— The various components of the CE marking must have substantially the same vertical dimension, which may not be less than 5 mm.

ANNEX VIII

MODEL OF A DECLARATION REFERRED TO IN ARTICLE 3 (1) OF DIRECTIVE 97/. . ./EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF ... RELATING TO TELECOMMUNICATIONS TERMINAL EQUIPMENT AND SATELLITE EARTH STATION EQUIPMENT, INCLUDING THE MUTUAL RECOGNITION OF THEIR CONFORMITY

The manufacturer/supplier [1] .....

.....

.....

Declares that [2] .....

.....

is not intended to be connected to a public telecommunications network.

The connection of such equipment to a public telecommunications network in the Community Member State will be in violation of the national law implementing Directive 97/. . ./EC of the European Parliament and of the Council of ... relating to telecommunications terminal equipment and satellite earth station equipment, including the mutual recognition of their conformity. (OJ L . . .).

PLACE, DATE AND SIGNATURE

---

[1] Name and address.
[2] Equipment identification.

ANNEX IX

COMMUNITY INTERNAL PRODUCTION CONTROL PROCEDURE

1. This Annex describes the procedure whereby the manufacturer or his authorized representative established within the Community, who carries out the obligations laid down in 2, ensures and declares that the products concerned satisfy the requirements of this Directive that apply to them.

   The manufacturer must affix the CE marking to each product and draw up a written declaration of conformity.

2. The manufacturer must establish the technical documentation described in 3 and he or his authorized representative established within the Community must keep it, for a period ending at least 10 years after the last product has been manufactured, at the disposal of the relevant national authorities for inspection purposes.

   Where neither the manufacturer nor his authorized representative is established within the Community, the obligation to keep the technical documentation available shall be the responsibility of the person who places the product on the Community market.

3. Technical documentation must enable the conformity of the products to be assessed against the requirements of this Directive that apply to them. It must contain, so far as relevant for assessment:

   — a general description of the product,

   — conceptual design and manufacturing drawings and lists of components, sub-assemblies, circuits, etc.,

   — descriptions and explanations necessary for the understanding of the said drawings and lists and the operation of the product,

   — a list of the standards mentioned in Article 18 of this Directive applied in full or as far as is relevant or, in the absence of such standards, the technical construction file, and descriptions of the solutions adopted to meet those requirements of this Directive that apply to the products,

   — results of design calculations made, examinations carried out, etc.,

   — test reports.

4. The manufacturer or his authorized representative must keep a copy of the declaration of conformity with the technical documentation.

5. The manufacturer must take all measures necessary to ensure that the manufacturing process ensures compliance by the manufactured products with the technical documentation referred to in point 2 and with those requirements of this Directive that apply to them.

ANNEX X

PART A

Repealed Directives and provisions

(referred to in Article 34)

Directive 91/263/EEC

Article 11 of Directive 93/68/EEC

Directive 93/97/EEC

PART B

Deadlines for transposition into national law

(referred to in Article 34)

Directive	*Deadline for transposition*
Directive 91/263/EEC	6 November 1992
Directive 93/68/EEC	1 July 1994 [1]
Directive 93/97/EEC	1 May 1995

[1] Until 1 January 1997, Member States shall allow the placing on the market and the bringing into service of telecommunications terminal equipment which comply with the marking arrangements in force before 1 January 1995.

ANNEX XI

CORRELATION TABLE

This Directive	Directive 91/263/EEC	Directive 93/97/EWG
Article 1 (1)	Article 1 (1)	Article 1 (1)
Article 1 (2)	Article 1 (2)	Article 1 (2)
Article 2	Article 1 (3)	
Article 3	Article 2	
Article 4	Article 3	
Article 5 (a)	Article 4, first subparagraph, point (a)	Article 4 (2)
Article 5 (b) to (g)	Article 4, first subparagraph, points (b) to (g) and second subparagraph	
Article 6	Article 5	
Article 7	Article 6	
Article 8	Article 7	
Article 9	Article 8	
Article 10	Article 9	
Article 11	Article 10	
Article 12	Article 11	
Article 13	Article 12	
Article 14		Article 1 (3)
Article 15		Article 2
Article 16		Article 3
Article 17		Article 4
Article 18		Article 5
Article 19		Article 6
Article 20		Article 7
Article 21		Article 8 (1) and (2)
Article 22		Article 9
Article 23		Article 10
Article 24		Article 11
Article 25		Article 12
Article 26		Article 13
Article 27		Article 14
Article 28	Article 13	
Article 29	Article 14	
Article 30 (1)	Article 15	Article 17 (1)
Article 30 (2)		Article 17 (2)
Article 31		Article 8 (3)
Article 32 (1)	Article 16 (3)	
Article 32 (2)	Article 16 (4)	
Article 33	Article 17 (2)	Article 18 (2)
Article 34		
Article 35		
Article 36		

This Directive	Directive 91/263/EEC	Directive 93/97/EWG
Annex I	Annex I	
Annex II	Annex II	
Annex III	Annex III	
Annex IV	Annex IV	
Annex V	Annex V	
Annex VI	Annex VI	
Annex VII	Annex VII	
Annex VIII	Annex VIII	
Annex IX		Annex
Annex X		
Annex XI		

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

1. On 7 December 1995 the Commission submitted a proposal, based on Article 100a of the EC Treaty, relating to telecommunications terminal equipment and satellite earth station equipment, including the mutual recognition of conformity [1].

2. The European Parliament and the Economic and Social Committee delivered their Opinions on 22 May 1996 [2] and 24 April 1996 [3] respectively.

3. The Council adopted its common position in accordance with Article 189b of the Treaty on 16 October 1997.

II. OBJECTIVE

4. The purpose of the Commission proposal is official consolidation of the current rules relating to telecommunications terminal equipment and satellite earth station equipment, including the mutual recognition of conformity, with the new Directive superceding the various Directives consolidated (Directives 91/263/EEC and 93/97/EEC and Article 11 of Directive 93/68/EEC).

III. ANALYSIS OF THE COMMON POSITION

5. As this involves official consolidation under the Interinstitutional Agreement of 20 December 1994, i.e. straightforward consolidation of existing texts without substantive changes, the Council has followed that Agreement by not making any substantive amendments to the Commission proposal.

6. With the Commission's agreement, however, the Council has corrected some errors in the text of the consolidation proposal as follows:

   (a) in the last clause of the 16th recital, a reference to 'telecommunications terminal equipment' has been included along with that to satellite earth station equipment, so that the end of the recital now reads '... insofar as they are specific to telecommunications terminal equipment and satellite earth station equipment';

   (b) in Article 5 (a), the following sentence has been added: 'For the purposes of this Directive, the essential requirements shall imply the safety of persons in the same way as in Directive 73/23/EEC;'. The reason for this addition lies in the need also to include in Title I for telecommunications terminal equipment the rule included in Title II for satellite earth station equipment (see Article 17 (2)), the rule in question being applicable to both fields (as is clear from Article 4 (2) of Directive 93/97/EEC);

   (c) in the final paragraph of Article 5, beginning 'are considered as justified cases ...', the left-hand margin has been widened to match that of point (g);

   (d) in the French, Spanish and Swedish versions of Annex VII, the symbol has been reversed so that it is now the right way up;

[1] COM(95) 612 final 95/0309 COD.
[2] OJ C 166, 10. 9. 1996, p. 60.
[3] OJ C 204, 15. 7. 1996, p. 3.

e) in Annex XI:

— in the 'This Directive' column, the reference to Article 5 has been subdivided into references to Article 5 (a) and Article 5 (b) to (g) respectively;

— in the 'Directive 91/263/EEC' column, the reference to Article 4 (a) has been subdivided into references to Article 4, first paragraph, point (a), and Article 4, first paragraph, points (b) to (g), and second paragraph, respectively;

— in the 'Directive 93/97/EEC' column, against the reference to Article 5 (a) in the 'This Directive' column, a reference to 'Article 4 (2)' has been inserted. In the same column, the reference to Article 8 has been followed by '(1) and (2)'.