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EN

[1] Text with EEA relevance

I

(Information)

COUNCIL

COMMON POSITION (EC) No 30/2002

adopted by the Council on 18 February 2002

with a view to adopting Directive 2002/. . ./EC of the European Parliament and of the Council of . . . amending Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer

(2002/C 119 E/01)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 137(2) thereof,

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

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

Having consulted the Committee of the Regions,

Acting in accordance with the procedure laid down in Article 251 of the Treaty [3],

Whereas:

(1) The Community Charter of Fundamental Social Rights for Workers adopted on 9 December 1989 states, in point 7, that the completion of the internal market must lead to an improvement in the living and working conditions of workers in the European Community and that this improvement must cover, where necessary, the development of certain aspects of employment regulations such as procedures for collective redundancies and those regarding bankruptcies.

(2) Directive 80/987/EEC [4] aims to provide a minimum degree of protection for employees in the event of the insolvency of their employer. To this end, it obliges the Member States to establish a body which guarantees payment of the outstanding claims of the employees concerned.

(3) Changes in insolvency law in the Member States and the development of the internal market mean that certain provisions of that Directive must be adapted.

(4) Legal certainty and transparency also require clarification with regard to the scope and certain definitions of Directive 80/987/EEC. In particular the possible exclusions granted to the Member States should be indicated in the enacting provisions of the Directive and consequently the Annex thereto should be deleted.

(5) In order to ensure equitable protection for the employees concerned, the definition of the state of insolvency should be adapted to new legislative trends in the Member States and should also include within this concept insolvency proceedings other than liquidation. In this context, Member States should, in order to determine the liability of the guarantee institution, be able to lay down that where an insolvency situation results in several insolvency proceedings, the situation be treated as a single insolvency procedure.

(6) It should be ensured that the employees referred to in Directive 97/81/EC of 15 December 1997 concerning the framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [5], Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by the ETUC, UNICE and CEEP [6] and Council Directive 91/383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship [7] are not excluded from the scope of this Directive.

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[1] OJ C 154 E, 29.5.2001, p. 109.

[2] OJ C 221, 7.8.2001, p. 110.

[3] Opinion of the European Parliament of 29 November 2001 (not yet published in the Official Journal), Council Common Position of 18 February 2002 and European Parliament Decision of . . . (not yet published in the Official Journal).

[4] OJ L 283, 28.10.1980, p. 23. Directive as last amended by the 1994 Act of Accession.

[5] OJ L 14, 20.1.1998, p. 9. Directive as last amended by Directive 98/23/EC (OJ L 131, 5.5.1998, p. 10).

[6] OJ L 175, 10.7.1999, p. 43.

[7] OJ L 206, 29.7.1991, p. 19.

(7) In order to ensure legal certainty for employees in the event of insolvency of undertakings pursuing their activities in a number of Member States, and to strengthen workers' rights in line with the established case law of the Court of Justice, provisions should be introduced which expressly state which institution is responsible for meeting pay claims in these cases and establishes as the aim of cooperation between the competent administrative authorities of the Member States the early settlement of employees' outstanding claims. Furthermore it is necessary to ensure that the relevant arrangements are properly implemented by making provision for collaboration between the competent administrative authorities in the Member States.

(8) In order to make it easier to identify insolvency proceedings in particular in situations with a cross-border dimension, provision should be made for the Member States to notify the Commission and the other Member States about the types of insolvency proceedings which give rise to intervention by the guarantee institution.

(9) Directive 80/987/EEC should be amended accordingly.

(10) Since the objectives of the proposed action, namely the amendment of certain provisions of Directive 80/987/EEC to take account of changes in the activities of undertakings in the Community, cannot be sufficiently achieved by the Member States and can therefore be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 80/987/EEC is amended as follows:

1. The title shall be replaced by the following:

'Council Directive 80/987/EEC of 20 October 1980 on the protection of employees in the event of the insolvency of their employer.'

2. Section I shall be replaced by the following:

'SECTION I

SCOPE AND DEFINITIONS

Article 1

1. This Directive shall apply to employees' claims arising from contracts of employment or employment relationships and existing against employers who are in a state of insolvency within the meaning of Article 2(1).

2. Member States may, by way of exception, exclude claims by certain categories of employee from the scope of this Directive, by virtue of the existence of other forms of guarantee if it is established that these offer the persons concerned a degree of protection equivalent to that resulting from this Directive.

3. Where such provision already applies in their national legislation, Member States may continue to exclude from the scope of this Directive:

(a) domestic servants employed by a natural person;

(b) share-fishermen.

Article 2

1. For the purposes of this Directive, an employer shall be deemed to be in a state of insolvency where a request has been made for the opening of collective proceedings based on insolvency of the employer, as provided for under the laws, regulations and administrative provisions of a Member State, and involving the partial or total divestment of the employer's assets and the appointment of a liquidator or a person performing a similar task, and the authority which is competent pursuant to the said provisions has:

(a) either decided to open the proceedings, or

(b) established that the employer's undertaking or business has been definitively closed down and that the available assets are insufficient to warrant the opening of the proceedings.

2. This Directive is without prejudice to national law as regards the definition of the terms "employee", "employer", "pay", "right conferring immediate entitlement" and "right conferring prospective entitlement".

However, the Member States may not exclude from the scope of this Directive

(a) part-time employees within the meaning of Directive 97/81/EC;

(b) workers with a fixed-term contract within the meaning of Directive 1999/70/EC;

(c) workers with a temporary employment relationship within the meaning of Article 1(2) of Directive 91/383/EEC.

3. Member States may not set a minimum duration for the contract of employment or the employment relationship in order for workers to qualify for claims under this Directive.

4. This Directive does not prevent Member States from extending workers' protection to other situations of insolvency established by proceedings different from those mentioned in paragraph 1 as provided for under national law.

Such procedures shall not however create a guarantee obligation for the institutions of the other Member States in the cases referred to in Section IIIa.'

3. Articles 3 and 4 shall be replaced by the following:

'*Article 3*

Member States shall take the measures necessary to ensure that guarantee institutions guarantee, subject to Article 4, payment of employees' outstanding claims resulting from contracts of employment or employment relationships.

The claims taken over by the guarantee institution shall be the outstanding pay claims relating to a period prior to and/or, as applicable, after a given date determined by the Member States.

Article 4

1. Member States shall have the option to limit the liability of the guarantee institutions referred to in Article 3.

2. When Member States exercise the option referred to in paragraph 1, they shall specify the length of the period for which outstanding claims are to be met by the guarantee institution. However, this may not be shorter than a period covering the remuneration of the last three months of the employment relationship prior to and/or after the date referred to in Article 3. Member States may include this minimum period of three months in a reference period with a duration of not less than six months.

Member States having a reference period of not less than 18 months may limit the period for which outstanding claims are met by the guarantee institution to eight weeks. In this case, those periods which are most favourable to the employee are used for the calculation of the minimum period.

3. Furthermore, Member States may set a ceiling on the payments made by the guarantee institution. This ceiling must not fall below a level which is socially compatible with the social objective of the Directive.

When Member States exercise this option, they shall inform the Commission of the methods used to set the ceiling.'

4. The following Section IIIa shall be inserted:

'SECTION IIIa

PROVISIONS CONCERNING TRANSNATIONAL SITUATIONS

Article 8a

1. When an undertaking with activities in the territories of at least two Member States is in a state of insolvency within the meaning of Article 2(l), the institution responsible for meeting employees' outstanding claims shall be that in the Member State in whose territory they work or habitually work.

2. The extent of employees' rights shall be determined by the law governing the competent guarantee institution.

3. Member States shall take the measures necessary to ensure that, in the cases referred to in paragraph 1, decisions taken in the context of insolvency proceedings referred to in Article 2(1), which have been requested in another Member State, are taken into account when determining the employer's state of insolvency within the meaning of this Directive.

Article 8b

1. For the purposes of implementing Article 8a, Member States shall make provision for the sharing of relevant information between their competent administrative authorities and/or the guarantee institutions mentioned in Article 3, making it possible in particular to inform the guarantee institution responsible for meeting the employees' outstanding claims.

2. Member States shall notify the Commission and the other Member States of the contact details of their competent administrative authorities and/or guarantee institutions. The Commission shall make these communications publicly accessible.'

5. In Article 9 the following paragraph shall be added:

'Implementation of this Directive shall not under any circumstances be sufficient grounds for a regression in relation to the current situation in the Member States and in relation to the general level of protection of workers in the area covered by it.'

6. In Article 10 the following point shall be added:

'(c) to refuse or reduce the liability referred to in Article 3 or the guarantee obligation referred to in Article 7 in cases where the employee, on his or her own, or together with his or her close relatives, was the owner of an essential part of the employer's undertaking or business and had a considerable influence on its activities.'

7. The following Article shall be inserted:

'*Article 10a*

Member States shall notify the Commission and the other Member States of the types of national insolvency proceedings falling within the scope of this Directive, and of any amendments relating thereto. The Commission shall publish these communications in the *Official Journal of the European Communities*.'

8. The Annex shall be deleted.

Article 2

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

They shall apply the provisions referred to in the first subparagraph to any state of insolvency of an employer occurring after the date of entry into force of those provisions.

When Member States adopt these provisions, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field covered by this Directive.

Article 3

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

Article 4

This Directive is addressed to the Member States.

Done at . . .

For the European Parliament
The President

For the Council
The President

(*) Three years after the date of entry into force of this Directive.

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

1. On 15 January 2001, the Commission submitted a proposal for a Directive amending Directive 80/987/EEC.

2. Acting in accordance with Article 251 of the Treaty, the European Parliament adopted its opinion at first reading on 29 November 2001.

3. The Economic and Social Committee delivered its opinion on 31 May 2001. The Committee of the Regions indicated in a letter dated 13 February 2002 that it would not be delivering an opinion on the matter.

4. The Commission orally submitted an amended proposal before the Permanent Representatives Committee on 30 November 2001, and this position was confirmed by Mrs Diamantopoulou at the Council meeting on 3 December 2001.

5. On 3 December 2001, the Council expressed its unanimous political agreement on a draft Common Position.

6. In accordance with Article 251 of the Treaty, the Council adopted its Common Position on 18 February 2002.

II. OBJECTIVE

The proposal aims to amend the 1980 Directive relating to the protection of employees in the event of the insolvency of their employer, in order to take account of changes in national legislation and recent Court of Justice case-law.

III. ANALYSIS OF THE COMMON POSITION

1. GENERAL OBSERVATIONS

The main objectives of the amendment of the Directive are to adapt developments on the employment market and changes in national insolvency legislation, in conjunction with the entry into force of Regulation (EC) No 1346/2000 on insolvency proceedings. The amendment also aims to clarify the definition of the scope and to introduce rules to determine the relevant guarantee institution in transnational situations.

2. AMENDMENTS MADE BY THE EUROPEAN PARLIAMENT

The European Parliament adopted 16 amendments.

2.1. Amendments by the European Parliament not taken on board by the Commission

In its amended proposal, the Commission did not accept nine of Parliament's amendments, namely amendments 3, 5, 7, 8, 10, 12, 13, 17 and 19.

2.2. Amendments by the European Parliament accepted by the Commission

The Commission indicated it was able to accept three of Parliament's amendments in their entirety, namely amendments 2, 4 and 9.

Moreover, the Commission accepted four other amendments, either in part or in spirit, namely amendments 6, 11, 14, and 15.

3. CHANGES MADE BY THE COUNCIL TO THE COMMISSION'S AMENDED PROPOSAL

The Council accepted the same amendments as the Commission, with the exception of amendment 11. This amendment relates to Article 1(2) ([1]) (first paragraph of Article 3 of Directive 80/987/EEC) and aims to add the obligation of paying indemnities on termination of the employment relationship. The Commission indicated that it was able to accept the amendment if the phrase 'where appropriate' was added.

The Council did not accept the amendment as it did not consider that this addition brought any extra element of protection in so far as the indemnities are employee's outstanding claims resulting from contracts of employment or employment relationships and are therefore covered by the first paragraph of Article 3.

IV. **CONCLUSIONS**

The Council accepted all the amendments by the European Parliament that the Commission accepted, with the exception of one for the aforementioned reasons.

The Council therefore considers that on the whole the text of the Common Position meets the fundamental objectives of the Commission's proposal and those the European Parliament had in mind when proposing its amendments.

([1]) Article 1(3) of the Common Position.

COMMON POSITION (EC) No 31/2002

adopted by the Council on 18 February 2002

with a view to adopting Directive 2002/. . ./EC of the European Parliament and of the Council of . . . amending for the 19th time Council Directive 76/769/EEC relating to restrictions on the marketing and use of certain dangerous substances and preparations (azocolourants)

(2002/C 119 E/02)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

Having regard to the proposals 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 251 of the Treaty [3],

Whereas:

(1) Work on the internal market should gradually improve the quality of life, health protection and consumer safety. The measures provided for in this Directive ensure a high level of health and consumer protection.

(2) Textile and leather articles containing certain azodyes have the capacity to release certain arylamines, which may pose cancer risks.

(3) Limitations already adopted or planned by certain Member States on the use of azodyed textile and leather articles concern the completion and functioning of the internal market. It is therefore necessary to approximate the laws of the Member States in this field and, consequently, to amend Annex I to Council Directive 76/769/EEC of 27 July 1976 on the approximation of the laws, regulations and administrative provisions of the Member States relating to restrictions on the marketing and use of certain dangerous substances and preparations [4].

(4) The Scientific Committee on Toxicity, Ecotoxicity and the Environment (CSTEE), after being consulted by the Commission, has confirmed that cancer risks posed by textile and leather goods coloured by certain azodyes, give cause for concern.

(5) In order to protect human health, the use of dangerous azodyes and the placing on the market of some articles coloured with such dyes should be prohibited.

(6) For textile articles made of recycled fibres, a maximum concentration of 70 ppm for the amines listed in point 43 in the Appendix to Directive 76/769/EEC should be applied. This should be the case for a transitional period until 1 January 2005 if the amines are released by the residues deriving from the previous dyeing of the same fibres. This will allow for the recycling of textiles, which has overall benefits for the environment.

(7) Harmonised testing methods are necessary for the application of this Directive. The Commission, in accordance with Article 2a of Directive 76/769/EEC, should establish such methods. The testing methods should preferably be developed at European level, if appropriate by the European Committee for Standardisation (CEN).

(8) In the light of new scientific knowledge, testing methods should be reviewed, including testing methods for analysing 4-amino azobenzene.

(9) In the light of new scientific knowledge, the provisions on certain azocolourants should be reviewed, in particular with regard to the need to include other materials not covered by this Directive, as well as other aromatic amines. Special attention should be paid to possible risks to children.

(10) This Directive applies without prejudice to Community legislation laying down minimum requirements for the protection of workers contained in Council Directive 89/391/EEC [5] and in individual Directives based thereon, in particular Council Directive 90/394/EEC [6] and Directive 98/24/EC of the European Parliament and of the Council [7],

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[1] OJ C 89 E, 28.3.2000, p. 67 and OJ C 96 E, 27.3.2001, p. 269.

[2] OJ C 204, 18.7.2000, p. 90.

[3] Opinion of the European Parliament of 7 September 2000 (OJ C 135, 7.5.2001, p. 257), Council Common Position of 18 February 2002 and Decision of the European Parliament of . . . (not yet published in the Official Journal).

[4] OJ L 262, 27.9.1976, p. 201. Directive as last amended by Commission Directive 2001/91/EC (OJ L 286, 30.10.2001, p. 27).

[5] OJ L 183, 29.6.1989, p. 1.

[6] OJ L 196, 26.7.1990, p. 1. Directive as last amended by Directive 1999/38/EC (OJ L 138, 1.6.1999, p. 66).

[7] OJ L 131, 5.5.1998, p. 11.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Annex I to Directive 76/769/EEC is amended as set out in the Annex to this Directive.

Article 2

Testing methods for the application of point 43 of Annex I to Directive 76/769/EEC shall be adopted by the Commission in accordance with the procedure laid down in Article 2a of that Directive.

Article 3

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

They shall apply these provisions from . . . (*).

2. 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 reference shall be laid down by Member States.

Article 4

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

Article 5

This Directive is addressed to the Member States.

Done at . . .

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

(*) Twelve months after the date of entry into force of this Directive.

ANNEX

Annex I to Directive 76/769/EEC is amended as follows:

1. The following point shall be added:

'43. Azocolourants	1. Azodyes which, by reductive cleavage of one or more azo groups, may release one or more of the aromatic amines listed in the Appendix, in detectable concentrations, i.e. above 30 ppm in the finished articles or in the dyed parts thereof, according to the testing method established in accordance with Article 2a of this Directive, may not be used in textile and leather articles which may come into direct and prolonged contact with the human skin or oral cavity, such as: — clothing, bedding, towels, hairpieces, wigs, hats, nappies and other sanitary items, sleeping bags, — footwear, gloves, wristwatch straps, handbags, purses/wallets, briefcases, chair covers, purses worn round the neck, — textile or leather toys and toys which include textile or leather garments, — yarn and fabrics intended for use by the final consumer. 2. Furthermore, the textile and leather Articles referred to in point 1 above may not be placed on the market unless they conform to the requirements set out in that point. By way of derogation, until 1 January 2005, this provision shall not apply to textile articles made of recycled fibres if the amines are released by residues deriving from previous dyeing of the same fibres and if the listed amines are released in concentrations below 70 ppm. 3. Not later than . . . (*) the Commission shall, in the light of new scientific knowledge, review the provisions on azocolourants.
(*) Thirty-six months after the date of entry into force of this Directive.'	

2. The following point shall be added to the Appendix:

'Point 43 Azocolourants

List of aromatic amines

	CAS No	Index No	EC No	Substances
1	92-67-1	612-072-00-6	202-177-1	biphenyl-4-ylamine 4-aminobiphenyl xenylamine
2	92-87-5	612-042-00-2	202-199-1	benzidine
3	95-69-2		202-441-6	4-chloro-o-toluidine
4	91-59-8	612-022-00-3	202-080-4	2-naphthylamine
5	97-56-3	611-006-00-3	202-591-2	o-aminoazotoluene 4-amino-2',3-dimethylazobenzene 4-o-tolylazo-o-toluidine
6	99-55-8		202-765-8	5-nitro-o-toluidine
7	106-47-8	612-137-00-9	203-401-0	4-chloroaniline
8	615-05-4		210-406-1	4-methoxy-m-phenylenediamine
9	101-77-9	612-051-00-1	202-974-4	4,4'-methylenedianiline 4,4'-diaminodiphenylmethane

	CAS No	Index No	EC No	Substances
10	91-94-1	612-068-00-4	202-109-0	3,3'-dichlorobenzidine 3,3'-dichlorobiphenyl-4,4'-ylenediamine
11	119-90-4	612-036-00-X	204-355-4	3,3'-dimethoxybenzidine o-dianisidine
12	119-93-7	612-041-00-7	204-358-0	3,3'-dimethylbenzidine 4,4'-bi-o-toluidine
13	838-88-0	612-085-00-7	212-658-8	4,4'-methylenedi-o-toluidine
14	120-71-8		204-419-1	6-methoxy-m-toluidine p-cresidine
15	101-14-4	612-078-00-9	202-918-9	4,4'-methylene-bis-(2-chloro-aniline) 2,2'-dichloro-4,4'-methylene-dianiline
16	101-80-4		202-977-0	4,4'-oxydianiline
17	139-65-1		205-370-9	4,4'-thiodianiline
18	95-53-4	612-091-00-X	202-429-0	o-toluidine 2-aminotoluene
19	95-80-7	612-099-00-3	202-453-1	4-methyl-m-phenylenediamine
20	137-17-7		205-282-0	2,4,5-trimethylaniline
21	90-04-0	612-035-00-4	201-963-1	o-anisidine 2-methoxyaniline
22	60-09-3	611-008-00-4	200-453-6	4-amino azobenzene'

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

1. On 10 December 1999 the Commission submitted a proposal for a Directive based on Article 95 of the Treaty relating to restrictions on the marketing and use of certain dangerous substances and preparations (azocolourants) ([1]).

2. The European Parliament adopted its opinion at first reading on 7 September 2000 ([2]). Following this opinion, the Commission presented an amended proposal on 29 November 2000 ([3]).

3. The Economic and Social Committee delivered its opinion on 25 May 2000 ([4]).

4. On 18 February 2002 the Council adopted its Common Position in accordance with Article 251 of the Treaty.

II. AIM

The aim of the Commission's proposal is to ban the use and marketing of textile and leather articles containing certain azodyes.

III. ANALYSIS OF THE COMMON POSITION

1. The Council has been examining the proposal since the middle of 2000. The Council's Common Position is generally consistent with the Commission's amended proposal.

2. The Council incorporated one European Parliament amendment and part of two others.

3. The Council welcomed amendment 1 on the need to take technical progress in testing methods into account.

4. The Council incorporated partly amendments 3 and 6 by removing carpets from the non-exhaustive list of product categories covered by the provisions and by adding two more products to the non-exhaustive list.

5. The Council considers that the risk assessment procedures should be completed before extending the scope of the Directive to other articles and substances. Consequently, the Council rejected amendment 4 as well as part of amendment 3.

6. As regards testing methods, the Council has opted for a solution which guarantees that the most widely used and accepted methods are always applied, and the Council therefore rejected amendment 5 on inclusion of a particular testing method.

IV. CONCLUSION

By incorporating wholly or partly the European Parliament amendments that improve and clarify the provisions on testing methods and articles to be covered by the Directive, the Council has endeavoured to achieve a balanced solution which takes account of the risk-assessment procedure and which guarantees a high level of health and consumer protection.

([1]) OJ C 89 E, 28.3.2000, p. 67.

([2]) OJ C 135, 7.5.2001, p. 257.

([3]) OJ C 96 E, 27.3.2001, p. 269.

([4]) OJ C 204, 18.7.2000, p. 90.

COMMON POSITION (EC) No 32/2002

adopted by the Council on 5 March 2002

with a view to adopting Directive 2002/. . ./EC of the European Parliament and of the Council of . . . on financial collateral arrangements

(2002/C 119 E/03)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 95 thereof,

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

Having regard to the opinion of the European Central Bank [2],

Having regard to the opinion of the Economic and Social Committee [3],

Acting in accordance with the procedure laid down in Article 251 of the Treaty [4],

Whereas:

(1) Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems [5] constituted a milestone in establishing a sound legal framework for payment and securities settlement systems. Implementation of that Directive has demonstrated the importance of limiting systemic risk inherent in such systems stemming from the different influence of several jurisdictions, and the benefits of common rules in relation to collateral constituted to such systems.

(2) In its communication of 11 May 1999 to the European Parliament and to the Council on financial services: implementing the framework for financial markets: action plan, the Commission undertook, after consultation with market experts and national authorities, to work on further proposals for legislative action on collateral urging further progress in the field of collateral, beyond Directive 98/26/EC.

(3) A Community regime should be created for the provision of securities and cash as collateral under both security interest and title transfer structures including repurchase agreements (repos). This will contribute to the integration and cost-efficiency of the financial market as well as to the stability of the financial system in the Community, thereby supporting the freedom to provide services and the free movement of capital in the single market in financial services. This Directive focuses on bilateral financial collateral arrangements.

(4) This Directive is adopted in a European legal context which consists in particular of the said Directive 98/26/EC as well as Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions [6], Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings [7] and Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings [8]. This Directive is in line with the general pattern of these previous legal acts and is not opposed to it. Indeed, this Directive complements these existing legal acts by dealing with further issues and going beyond them in connection with particular matters already dealt with by these legal acts.

(5) In order to improve the legal certainty of financial collateral arrangements, Member States should ensure that certain provisions of insolvency law do not apply to such arrangements, in particular, those that would inhibit the effective realisation of financial collateral or cast doubt on the validity of current techniques such as bilateral close-out netting, the provision of additional collateral in the form of top-up collateral and substitution of collateral.

(6) This Directive does not address rights which any person may have in respect of assets provided as financial collateral, and which arise otherwise than under the terms of the financial collateral arrangement and otherwise than on the basis of any legal provision or rule of law arising by reason of the commencement or continuation of winding-up proceedings or reorganisation measures, such as restitution arising from mistake, error or lack of capacity.

(7) The principle in Directive 98/26/EC, whereby the law applicable to book entry securities provided as collateral is the law of the jurisdiction where the relevant register, account or centralised deposit system is located, should be extended in order to create legal certainty regarding the use of such securities held in a cross-border context and used as financial collateral under the scope of this Directive.

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[1] OJ C 180 E, 26.6.2001, p. 312.

[2] OJ C 196, 12.7.2001, p. 10.

[3] OJ C 48, 21.2.2002, p. 1.

[4] Opinion of the European Parliament of 13 December 2001 (not yet published in the Official Journal), Council Common Position of 5 March 2002 and Decision of the European Parliament of . . . (not yet published in the Official Journal).

[5] OJ L 166, 11.6.1998, p. 45.

[6] OJ L 125, 5.5.2001, p. 15.

[7] OJ L 110, 20.4.2001, p. 28.

[8] OJ L 160, 30.6.2000, p. 1.

(8) The *lex rei sitae* rule, according to which the applicable law for determining whether a financial collateral arrangement is properly perfected and therefore good against third parties is the law of the country where the financial collateral is located, is currently recognised by all Member States. Without affecting the application of this Directive to directly-held securities, the location of book entry securities provided as financial collateral and held through one or more intermediaries should be determined. If the collateral-taker has a valid and effective collateral arrangement according to the governing law of the country in which the relevant account is maintained, then the validity against any competing title or interest and the enforceability of the collateral should be governed solely by the law of that country, thus preventing legal uncertainty as a result of other unforeseen legislation.

(9) In order to limit the administrative burdens for parties using financial collateral under the scope of this Directive, the only perfection requirement which national law may impose as respects financial collateral should be that the financial collateral is delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral-taker or of a person acting on the collateral-taker's behalf while not excluding collateral techniques where the collateral-provider is allowed to substitute collateral or to withdraw excess collateral.

(10) For the same reasons, the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement, or the provision of financial collateral under a financial collateral arrangement, should not be made dependent on the performance of any formal act such as the execution of any document in a specific form or in a particular manner, the making of any filing with an official or public body or registration in a public register, advertisement in a newspaper or journal, in an official register or publication or in any other matter, notification to a public officer or the provision of evidence in a particular form as to the date of execution of a document or instrument, the amount of the relevant financial obligations or any other matter. This Directive must however provide a balance between market efficiency and the safety of the parties to the arrangement and third parties, thereby avoiding, *inter alia*, the risk of fraud. This balance should be achieved through the scope of this Directive covering only those financial collateral arrangements which provide for some form of dispossession, i.e. the provision of the financial collateral, and where the provision of the financial collateral can be evidenced in writing or in a durable medium, ensuring thereby the traceability of that collateral. For the purpose of this Directive, acts required under the law of a Member State as conditions for transferring or creating a security interest on financial instruments, other than book entry securities, such as endorsement in the case of instruments to order, or recording on the issuer's register in the case of registered instruments, should not be considered as formal acts.

(11) Moreover this Directive should protect only financial collateral arrangements which can be evidenced. Such evidence can be given in writing or in any other legally enforceable manner provided by the law which is applicable to the financial collateral arrangement.

(12) The simplification of the use of financial collateral through the limitation of administrative burdens promotes the efficiency of the cross-border operations of the European Central Bank and the national central banks of Member States participating in economic and monetary union, necessary for the implementation of the common monetary policy. Furthermore, the provision of limited protection of financial collateral arrangements from some rules of insolvency law in addition supports the wider aspect of the common monetary policy, where the participants in the money market balance the overall amount of liquidity in the market among themselves, by cross-border transactions backed by collateral.

(13) This Directive seeks to protect the validity of financial collateral arrangements which are based on the transfer of the full ownership of the financial collateral, such as by eliminating the 'recharacterisation' of such financial collateral arrangements (including repurchase agreements) as security interests.

(14) The enforceability of bilateral close-out netting should be protected, not only as an enforcement mechanism for title transfer financial collateral arrangements including repurchase agreements but more widely, where close-out netting forms part of a financial collateral arrangement. Sound risk management practices commonly used in the financial market should be protected by enabling participants to manage and reduce their credit exposures arising from all kinds of financial transactions on a net basis, where the credit exposure is calculated by combining the estimated current exposures under all outstanding transactions with a counterparty, setting off reciprocal items to produce a single aggregated amount that is compared with the current value of the collateral.

(15) This Directive should be without prejudice to any restrictions or requirements under national law on bringing into account claims, on obligations to set-off, or on netting, for example relating to their reciprocity or the fact that they have been concluded prior to when the collateral-taker knew or ought to have known of the commencement (or of any mandatory legal act leading to the commencement) of winding-up proceedings or reorganisation measures in respect of the collateral-provider.

(16) The sound market practice favoured by regulators whereby participants in the financial market use top-up financial collateral arrangements to manage and limit their credit risk to each other by mark-to-market calculations of the current market value of the credit exposure and the value of the financial collateral and accordingly ask for top-up financial collateral or return the surplus of financial collateral should be protected against certain automatic avoidance rules. The same applies to the possibility of substituting for assets provided as financial collateral other assets of the same value. The intention is merely that the provision of top-up or substitution financial collateral cannot be questioned on the sole basis that the relevant financial obligations existed before that financial collateral was provided, or that the financial collateral was provided during a prescribed period. However, this does not prejudice the possibility of questioning under national law the financial collateral arrangement and the provision of financial collateral as part of the initial provision, top-up or substitution of financial collateral, for example where this has been intentionally done to the detriment of the other creditors (this covers, *inter alia*, actions based on fraud or similar avoidance rules which may apply in a prescribed period).

(17) This Directive provides for rapid and non-formalistic enforcement procedures in order to safeguard financial stability and limit contagion effects in case of a default of a party to a financial collateral arrangement. However, this Directive balances the latter objectives with the protection of the collateral-provider and third parties by explicitly confirming the possibility for Member States to keep or introduce in their national legislation an *a posteriori* control which the Courts can exercise in relation to the realisation or valuation of financial collateral and the calculation of the relevant financial obligations. Such control should allow for the judicial authorities to verify that the realisation or valuation has been conducted in a commercially reasonable manner.

(18) It should be possible to provide cash as collateral under both title transfer and secured structures respectively protected by the recognition of netting or by the pledge of cash collateral. Cash refers only to money which is represented by a credit to an account, or similar claims on repayment of money (such as money market deposits), thus explicitly excluding banknotes.

(19) This Directive provides for a right of use in case of security financial collateral arrangements, which increases liquidity in the financial market stemming from such reuse of 'pledged' securities. This reuse however should be without prejudice to national legislation about separation of assets and unfair treatment of creditors.

(20) This Directive does not prejudice the operation and effect of the contractual terms of financial instruments provided as financial collateral, such as rights and obligations and other conditions contained in the terms of issue and any other rights and obligations and other conditions which apply between the issuers and holders of such instruments.

(21) This Act complies with the fundamental rights and follows the principles laid down in particular in the Charter of fundamental rights of the European Union.

(22) Since the objective of the proposed action, namely to create a minimum regime relating to the use of financial collateral, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter and scope

1. This Directive lays down a Community regime applicable to financial collateral arrangements which satisfy the requirements set out in paragraphs 2 and 5 and to financial collateral in accordance with the conditions set out in paragraphs 4 and 5.

2. The collateral-taker and the collateral-provider must each belong to one of the following categories:

(a) a public authority (excluding publicly guaranteed undertakings unless they fall under points (b) to (e)) including:

(i) public sector bodies of Member States charged with or intervening in the management of public debt, and

(ii) public sector bodies of Member States authorised to hold accounts for customers;

(b) a central bank, the European Central Bank, the Bank for International Settlements, a multilateral development bank as defined in Article 1(19) of Directive 2000/12/EC of the European Parliament and of the Council of 20 March 2000 relating to the taking up and pursuit of the business of credit institution [1], the International Monetary Fund and the European Investment Bank;

(c) a financial institution subject to prudential supervision including:

(i) a credit institution as defined in Article 1(1) of Directive 2000/12/EC, including the institutions listed in Article 2(3) of that Directive;

(ii) an investment firm as defined in Article 1(2) of Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field [2],

(iii) a financial institution as defined in Article 1(5) of Directive 2000/12/EC;

(iv) an insurance undertaking as defined in Article 1(a) of Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance [3] and a life assurance undertaking as defined in Article 1(a) of Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance [4];

(v) an undertaking for collective investment in transferable securities (UCITS) as defined in Article 1(2) of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) [5],

(vi) a management company as defined in Article 1a(2) of Directive 85/611/EEC;

(d) a central counterparty, settlement agent or clearing house, as defined respectively in Article 2(c), (d) and (e) of Directive 98/26/EC, including similar institutions regulated under national law acting in the futures, options and derivatives markets to the extent not covered by that Directive, and a person, other than a natural person, who acts in a trust or representative capacity on behalf of any one or more persons that includes any bond-holders or holders of other forms of securitised debt or any institution as defined in points (a) to (d);

(e) a person other than a natural person, including unincorporated firms and partnerships, provided that the other party is an institution as defined in points (a) to (d).

3. Member States may exclude from the scope of this Directive financial collateral arrangements where one of the parties is a person mentioned in paragraph 2(e).

If they make use of this option Member States shall inform the Commission which shall inform the other Member States thereof.

4. (a) The financial collateral to be provided must consist of cash or financial instruments;

(b) Member States may exclude from the scope of this Directive financial collateral consisting of the collateral-provider's own shares, shares in affiliated undertakings within the meaning of the seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts [6], and shares in undertakings whose exclusive purpose is to own means of production that are essential for the collateral-provider's business or to own real estate.

5. This Directive applies to financial collateral once it has been provided and if that provision can be evidenced in writing.

The evidencing of the provision of financial collateral must allow for the identification of the financial collateral to which it applies. For this purpose, it is sufficient to prove that the book entry securities collateral has been credited to, or forms a credit in, the relevant account and that the cash collateral has been credited to, or forms a credit in, a designated account.

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[1] OJ L 126, 26.5.2000, p. 1. Directive as amended by Directive 2000/28/EC (OJ L 275, 27.10.2000, p. 37).

[2] OJ L 141, 11.6.1993, p. 27. Directive as last amended by Directive 2000/64/EC of the European Parliament and of the Council (OJ L 290, 17.11.2000, p. 27).

[3] OJ L 228, 11.8.1992, p. 1. Directive as last amended by Directive 2000/64/EC of the European Parliament and of the Council.

[4] OJ L 360, 9.12.1992, p. 1. Directive as last amended by Directive 2000/64/EC of the European Parliament and of the Council.

[5] OJ L 375, 31.12.1985, p. 3. Directive as last amended by Directive 2001/108/EC of the European Parliament and of the Council (OJ L 41, 13.2.2002, p. 35).

[6] OJ L 193, 18.7.1983, p. 1. Directive as last amended by Directive 2001/65/EC of the European Parliament and of the Council (OJ L 283, 27.10.2001, p. 28).

This Directive applies to financial collateral arrangements if that arrangement can be evidenced in writing or in a legally equivalent manner.

Article 2

Definitions

1. For the purpose of this Directive:

(a) 'financial collateral arrangement' means a title transfer financial collateral arrangement or a security financial collateral arrangement whether or not these are covered by a master agreement or general terms and conditions;

(b) 'title transfer financial collateral arrangement' means an arrangement, including repurchase agreements, under which a collateral-provider transfers full ownership of financial collateral to a collateral-taker for the purpose of securing or otherwise covering the performance of relevant financial obligations;

(c) 'security financial collateral arrangement' means an arrangement under which a collateral-provider provides financial collateral by way of security in favour of, or to, a collateral-taker, and where the full ownership of the financial collateral remains with the collateral-provider when the security right is established;

(d) 'cash' means money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits;

(e) 'financial instruments' means shares in companies and other securities equivalent to shares in companies and bonds and other forms of debt instruments if these are negotiable on the capital market, and any other securities which are normally dealt in and which give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment), including units in collective investment undertakings, money market instruments and claims relating to or rights in or in respect of any of the foregoing;

(f) 'relevant financial obligations' means the obligations which are secured by a financial collateral arrangement and which give a right to cash settlement and/or delivery of financial instruments.

Relevant financial obligations may consist of or include:

(i) present or future, actual or contingent or prospective obligations (including such obligations arising under a master agreement or similar arrangement);

(ii) obligations owed to the collateral-taker by a person other than the collateral-provider; or

(iii) obligations of a specified class or kind arising from time to time;

(g) 'book entry securities collateral' means financial collateral provided under a financial collateral arrangement which consists of financial instruments, title to which is evidenced by entries in a register or account maintained by or on behalf of an intermediary;

(h) 'relevant account' means in relation to book entry securities collateral which is subject to a financial collateral arrangement, the register or account, which may be maintained by the collateral-taker, in which the entries are made by which that book entry securities collateral is provided to the collateral-taker;

(i) 'equivalent collateral':

(i) in relation to cash, means a payment of the same amount and in the same currency;

(ii) in relation to financial instruments, means financial instruments of the same issuer or debtor, forming part of the same issue or class and of the same nominal amount, currency and description or, where a financial collateral arrangement provides for the transfer of other assets following the occurrence of any event relating to or affecting any financial instruments provided as financial collateral, those other assets;

(j) 'winding-up proceedings' means collective proceedings involving realisation of the assets and distribution of the proceeds among the creditors, shareholders or members as appropriate, which involve any intervention by administrative or judicial authorities, including where the collective proceedings are terminated by a composition or other analogous measure, whether or not they are founded on insolvency or are voluntary or compulsory;

(k) 'reorganisation measures' means measures which involve any intervention by administrative or judicial authorities which are intended to preserve or restore the financial situation and which affect pre-existing rights of third parties, including but not limited to measures involving a suspension of payments, suspension of enforcement measures or reduction of claims;

(l) 'enforcement event' means an event of default or any similar event as agreed between the parties on the occurrence of which, under the terms of a financial collateral arrangement or by operation of law, the collateral-taker is entitled to realise or appropriate financial collateral or a close-out netting provision comes into effect;

(m) 'right of use' means the right of the collateral-taker to use and dispose of financial collateral provided under a security financial collateral arrangement as the owner of it in accordance with the terms of the security financial collateral arrangement;

(n) 'close-out netting provision' means a provision of a financial collateral arrangement, or of an arrangement of which a financial collateral arrangement forms part, or, in the absence of any such provision, any statutory rule by which, on the occurrence of an enforcement event, whether through the operation of netting or set-off or otherwise:

(i) the obligations of the parties are accelerated so as to be immediately due and expressed as an obligation to pay an amount representing their estimated current value, or are terminated and replaced by an obligation to pay such an amount; and/or

(ii) an account is taken of what is due from each party to the other in respect of such obligations, and a net sum equal to the balance of the account is payable by the party from whom the larger amount is due to the other party.

2. References in this Directive to financial collateral being 'provided', or to the 'provision' of financial collateral, are to the financial collateral being delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral-taker or of a person acting on the collateral-taker's behalf. Any right of substitution or to withdraw excess financial collateral in favour of the collateral-provider shall not prejudice the financial collateral having been provided to the collateral-taker as mentioned in this Directive.

3. References in this Directive to 'writing' include recording by electronic means and any other durable medium.

Article 3

Formal requirements

1. Member States shall not require that the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement or the provision of financial collateral under a financial collateral arrangement be dependent on the performance of any formal act.

2. Paragraph 1 is without prejudice to the application of this Directive to financial collateral only once it has been provided and if that provision can be evidenced in writing and where the financial collateral arrangement can be evidenced in writing or in a legally equivalent manner.

Article 4

Enforcement of financial collateral arrangements

1. Member States shall ensure that on the occurrence of an enforcement event, the collateral-taker shall be able to realise in the following manners, any financial collateral provided under, and subject to the terms agreed in, a security financial collateral arrangement:

(a) financial instruments by sale or appropriation and by setting off their value against, or applying their value in discharge of, the relevant financial obligations;

(b) cash by setting off the amount against or applying it in discharge of the relevant financial obligations.

2. Appropriation is possible only if:

(a) this has been agreed by the parties in the security financial collateral arrangement; and

(b) the parties have agreed in the security financial collateral arrangement on the valuation of the financial instruments.

3. Member States which do not allow appropriation on . . . (*) are not obliged to recognise it.

If they make use of this option, Member States shall inform the Commission which in turn shall inform the other Member States thereof.

4. The manners of realising the financial collateral referred to in paragraph 1 shall, subject to the terms agreed in the security financial collateral arrangement, be without any requirement to the effect that:

(a) prior notice of the intention to realise must have been given;

(b) the terms of the realisation be approved by any court, public officer or other person;

(c) the realisation be conducted by public auction or in any other prescribed manner; or

(d) any additional time period must have elapsed.

5. Member States shall ensure that a financial collateral arrangement can take effect in accordance with its terms notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral-provider or collateral-taker.

(*) Date of entry into force of this Directive.

6. This Article and Articles 5, 6 and 7 shall be without prejudice to any requirements under national law to the effect that the realisation or valuation of financial collateral and the calculation of the relevant financial obligations must be conducted in a commercially reasonable manner.

Article 5

Right of use of financial collateral under security financial collateral arrangements

1. If and to the extent that the terms of a security financial collateral arrangement so provide, Member States shall ensure that the collateral-taker is entitled to exercise a right of use in relation to financial collateral provided under the security financial collateral arrangement.

2. Where a collateral-taker exercises a right of use, he thereby incurs an obligation to transfer equivalent collateral to replace the original financial collateral at the latest on the due date for the performance of the relevant financial obligations covered by the security financial collateral arrangement.

Alternatively, the collateral-taker shall, on the due date for the performance of the relevant financial obligations, either transfer equivalent collateral, or, if and to the extent that the terms of a security financial collateral arrangement so provide, set-off the value of the equivalent collateral against or apply it in discharge of the relevant financial obligations.

3. The equivalent collateral transferred in discharge of an obligation as described in paragraph 2, first subparagraph, shall be subject to the same security financial collateral agreement to which the original financial collateral was subject and shall be treated as having been provided under the security financial collateral arrangement at the same time as the original financial collateral was first provided.

4. Member States shall ensure that the use of financial collateral by the collateral-taker according to this Article does not render invalid or unenforceable the rights of the collateral-taker under the security financial collateral arrangement in relation to the financial collateral transferred by the collateral-taker in discharge of an obligation as described in paragraph 2, first subparagraph.

5. If an enforcement event occurs while an obligation as described in paragraph 2 first subparagraph remains outstanding, the obligation may be the subject of a close-out netting provision.

Article 6

Recognition of title transfer financial collateral arrangements

1. Member States shall ensure that a title transfer financial collateral arrangement can take effect in accordance with its terms.

2. If an enforcement event occurs while any obligation of the collateral-taker to transfer equivalent collateral under a title transfer financial collateral arrangement remains outstanding, the obligation may be the subject of a close-out netting provision.

Article 7

Recognition of close-out netting provisions

1. Member States shall ensure that a close-out netting provision can take effect in accordance with its terms:

(a) notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral-provider and/or the collateral-taker; and/or

(b) notwithstanding any purported assignment, judicial or other attachment or other disposition of or in respect of such rights.

2. Member States shall ensure that the operation of a close-out netting provision may not be subject to any of the requirements that are mentioned in Article 4(4), unless otherwise agreed by the parties.

Article 8

Certain insolvency provisions disapplied

1. Member States shall ensure that a financial collateral arrangement, as well as the provision of financial collateral under such arrangement, may not be declared invalid or void or be reversed on the sole basis that the financial collateral arrangement has come into existence, or the financial collateral has been provided:

(a) on the day of the commencement of winding-up proceedings or reorganisation measures, but prior to the order or decree making that commencement; or

(b) in a prescribed period prior to, and defined by reference to, the commencement of such proceedings or measures or by reference to the making of any order or decree or the taking of any other action or occurrence of any other event in the course of such proceedings or measures.

2. Member States shall ensure that where a financial collateral arrangement or a relevant financial obligation has come into existence, or financial collateral has been provided on the day of, but after the moment of the commencement of, winding-up proceedings or reorganisation measures, it shall be legally enforceable and binding on third parties if the collateral-taker can prove that he was not aware, nor should have been aware, of the commencement of such proceedings or measures.

3. Where a financial collateral arrangement contains:

(a) an obligation to provide financial collateral or additional financial collateral in order to take account of changes in the value of the financial collateral or in the amount of the relevant financial obligations; or

(b) a right to withdraw financial collateral on providing, by way of substitution or exchange, financial collateral of substantially the same value.

Member States shall ensure that the provision of financial collateral, additional financial collateral or substitute or replacement financial collateral under such an obligation or right shall not be treated as invalid or reversed or declared void on the sole basis that:

(i) such provision was made on the day of the commencement of winding-up proceedings or reorganisation measures, but prior to the order or decree making that commencement or in a prescribed period prior to, and defined by reference to, the commencement of winding-up proceedings or reorganisation measures or by reference to the making of any order or decree or the taking of any other action or occurrence of any other event in the course of such proceedings or measures; and/or

(ii) the relevant financial obligations were incurred prior to the date of the provision of the financial collateral, additional financial collateral or substitute or replacement financial collateral.

4. Without prejudice to paragraphs 1, 2 and 3, this Directive leaves unaffected the general rules of national insolvency law in relation to the voidance of transactions entered into during the prescribed period referred to in paragraph 1(b) and in paragraph 3(i).

Article 9

Conflict of laws

1. Any question with respect to any of the matters specified in paragraph 2 arising in relation to book entry securities collateral shall be governed by the law of the country in which the relevant account is maintained. The reference to the law of a country is a reference to its domestic law, disregarding any rule under which, in deciding the relevant question, reference should be made to the law of another country.

2. The matters referred to in paragraph 1 are:

(a) the legal nature and proprietary effects of book-entry securities collateral;

(b) the requirements for perfecting a financial collateral arrangement relating to book-entry securities collateral and the provision of book-entry securities collateral under such an arrangement, and more generally the completion of the steps necessary to render such an arrangement and provision effective against third parties;

(c) whether a person's title to or interest in such book-entry securities collateral is overridden by or subordinated to a competing title or interest, or a good faith acquisition has occurred;

(d) the steps required for the realisation of book-entry securities collateral following the occurrence of an enforcement event.

Article 10

Report by the Commission

Not later than . . . (*), the Commission shall present a report to the European Parliament and the Council on the application of this Directive, in particular on the application of Article 1(3), Article 4(3) and Article 5, accompanied where appropriate by proposals for its revision.

Article 11

Implementation

Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by . . . (**) at the latest. They shall forthwith inform the Commission thereof.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

Article 12

Entry into force

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

Article 13

Addressees

This Directive is addressed to the Member States.

Done at . . .

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

(*) Four and a half years after the date of entry into force of this Directive.

(**) Eighteen months after the date of entry into force of this Directive.

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

On 28 March 2001 the Commission sent to the Council a proposal for a Directive of the European Parliament and of the Council on financial collateral arrangements, based on the Treaty establishing the European Community, and in particular Article 95 thereof ([1]). The European Central Bank gave its opinion on 13 June 2001 ([2]). The Economic and Social Committee delivered its opinion on 28 November 2001 ([3]). The European Parliament delivered its opinion on the first reading of the proposal on 13 December 2001 ([4]).

On 5 March 2002, the Council adopted its Common Position pursuant to Article 251 of the Treaty.

II. OBJECTIVE

The aim of the Directive is to create a Community regime for the provision of securities and cash as collateral under both security interest and title transfer structures, including repurchase agreements (repos), in order to increase legal certainty for these arrangements. In order to achieve this objective the Directive requires Member States to ensure that certain provisions of insolvency law do not apply to such arrangements; in particular, those that would inhibit the effective realisation of financial collateral or cast doubt on the validity of current techniques such as bilateral close-out netting, the provision of additional collateral in the form of top-up collateral and substitution of collateral.

The creation of such a regime will contribute to the integration and cost-efficiency of the financial market as well as to the stability of the financial system within the Community, an aim which has been further highlighted by the turbulence in the markets in the autumn of 2001.

The Directive must be seen in the European legal context, comprising, in particular the Directive on settlement finality in payment and securities settlement systems (Directive 98/26/EC) ([5]) as well as the Directives relating to the reorganisation and winding up of credit institutions (2001/24/EC) ([6]) and insurance undertakings (2001/17/EC) ([7]) and Regulation (EC) No 1346/2000 on insolvency proceedings ([8]). The Directive is in line with the general pattern of these previous legal acts, which it complements and goes beyond on some issues.

III. ANALYSIS OF THE COMMON POSITION

1. General issues

The Common Position follows the approach of the Commission proposal, with some amendments to the substance and to the presentation of the text. The main changes to the Commission proposal reflect the amendments proposed by the European Parliament and concern:

— the persons and institutions covered by the scope of the Directive (Article 1(2)),

— the evidencing of a financial collateral arrangement (Article 1(5)),

— the introduction of the legal technique of 'appropriation' (Article 4),

— the conflict of laws provision (Article 9).

The changes to each article of the Commission proposal are explained below.

([1]) OJ C 180 E, 26.6.2001, p. 312.
([2]) OJ C 196, 12.7.2001, p. 10.
([3]) OJ C 48, 21.2.2002, p. 1.
([4]) Not yet published in the Official Journal.
([5]) OJ L 166, 11.6.1998, p. 45.
([6]) OJ L 125, 5.5.2001, p. 15.
([7]) OJ L 110, 20.4.2001, p. 28.
([8]) OJ L 160, 30.6.2000, p. 1.

2. **Scope** (Article 1)

Articles 1 and 2 of the Commission proposal have been merged into a new Article 1 to make it clear that the Community regime laid down in the Directive covers only the financial collateral arrangements and the financial collateral included in the scope, which the Article goes on to define. The structure of Article 1, now incorporating the corresponding Article 2 of the Commission proposal has been changed as explained below, in order to set out the relevant provisions in a clearer and more structured manner and to take account of the amendments proposed by the European Parliament. *Inter alia*, the new structure takes account of the need for precision expressed in amendment 4 of the European Parliament, the spirit of which is thus included.

The scope is defined with respect to the parties to the financial collateral arrangements, Article 1(2), (3) and (5), and with respect to the financial collateral provided under the arrangement, Article 1(4) and (5).

The scope concerning the persons covered closely reflect the approach proposed by the European Parliament in amendments 5, 6, 7, 8 and 9. The substance of amendment 5 has been included, albeit with different wording, in so far as the Common Position stipulates that both the collateral-taker and the collateral-provider must belong to one of the categories listed in the Directive, with the added provision in Article 1(2)(e) that if one of the parties is a person other than a natural person, the other party must belong to one of the categories set out in Article 1(2)(a) to (d). In other words, as long as one of the parties is an institution of a financial nature as set out in subparagraphs (a) to (d), the other party can be either an institution of a financial nature as set out in subparagraphs (a) to (d), or any of the persons set out in subparagraph (e).

Amendments 6, 7, 8 and 9 have all been included with the following changes to the wording:

— in Article 1(2)(a) (amendment 6) it has been made clear that the exclusion of publicly guaranteed undertakings applies to both categories of institutions covered by the provision;

— the wording of subparagraph (c) relating to financial institutions is as proposed by the European Parliament in amendment 8, except that the references to a central counterparty, a settlement agent or a clearing house have been set out in a separate subparagraph (d) since these institutions are not necessarily financial institutions under prudential supervision. A reference to similar institutions acting in the futures, options and derivatives markets has also been added,

— subparagraph (e) relating to all legal persons is included as proposed by the European Parliament in amendment 9, except that the reference to a person other than a natural person acting in trust on behalf of bondholders has been included in subparagraph (d), which was considered a more appropriate place.

In order to strike the right balance between the need not to enlarge the scope of the Directive unduly to the detriment of the other creditors in an insolvency situation on the one hand and, on the other hand, the need to ensure that the aims of the Directive can be achieved, the Council has found it necessary to introduce in Article 1(3) an option for Member States to limit the scope of the special regime laid down by the Directive to financial collateral arrangements where both parties belong to the institutions of a financial nature set out in Article 1(2)(a) to (d). Since the exercising this option will be an exception to the general regime laid down in the Directive, a special notification procedure is provided for in the event of a Member State making use of it.

Article 1(4) sets out what the financial collateral must consist of. Subparagraph (a) corresponds to the definition of financial collateral set out in Article 3(g) of the Commission proposal. Subparagraph (b) has been introduced to make sure that Member States may exclude from the scope certain financial collateral which, although it might fall under the definition of financial instruments, is directly linked to the means of production of the collateral-provider.

The first subparagraph of Article 1(5) makes it clear that the Directive does not apply to financial collateral until it has been provided. Amendment 3 of the European Parliament is included with slightly modified wording, as is amendment 10 proposed by the European Parliament, which deletes Article 2(5) of the Commission proposal. What is covered by the term 'provided' is set out in Article 2(2), see below.

Paragraph 5 also deals with the question of evidence relating to the provision of financial collateral as well as the financial collateral arrangement itself, and covers the same issues as those set out in Article 2(3)(a) of the Commission proposal. The provision of the financial collateral must be evidenced in writing and must allow for the identification of the financial collateral to which it applies. The financial collateral arrangement must be evidenced in writing or in any other legally enforceable manner provided for by the law applicable to the financial collateral arrangement, for example taped telephone conversations.

These latter requirements relating to evidence must not be confused with the requirement set out in Article 3 that a financial collateral arrangement or the provision of financial collateral must not be dependent on the performance of any formal act, see below.

3. **Definitions — Article 2** (Article 3 of the Commission proposal)

The definitions in Article 2(1) largely correspond to those proposed by the Commission. The definitions of the terms 'collateral-provider', 'collateral-taker' and 'sale and repurchase agreement' have been deleted as unnecessary. The definition of 'financial collateral' has been included in the new wording of Article 1(4)(a). The term 'securities collateral account' has been deleted as unnecessary following the recasting of Article 1, and the term 'relevant intermediary' has been deleted since it no longer appears in the text following the redrafting of Article 9.

A new definition of 'cash' has been introduced, covering money credited to an account and claims on the restitution of money such as money market deposits, but excluding physical notes and coins, which it was thought unnecessary to include in the scope of the Directive.

Some amendments have been made in order to make the text clearer without changing the essential thrust of the definitions. In particular:

— the term 'relevant financial obligations' has been amended to include the substance of Article 2(6) of the Commission proposal, which defined what relevant financial obligations could consist of or include,

— the definition of 'enforcement event' has been amended to highlight default as an element that may trigger the realisation of financial collateral.

Article 2(2) sets out what is meant by financial collateral being provided, and includes amendment 11 proposed by the European Parliament in almost identical wording. It further makes it clear that any right of substitution and right to withdraw does not prejudice the provision, as such, of the financial collateral. The Council finds that this provision replaces Article 2(2)(c), (d), (e), (f) and (g) of the Commission proposal, which are not maintained in the Common Position.

Article 2(3), which defines the references to 'writing', incorporates amendment 12 proposed by the European Parliament.

4. **Formal acts — Article 3** (Article 4 of the Commission proposal)

The Common Position preserves the thrust of Article 4 of the Commission proposal, and extends it also to the provision of the financial collateral. It stipulates that Member States shall not require that the creation, validity, perfection, enforceability or admissibility in evidence of a financial collateral arrangement or the provision of financial collateral under a financial collateral arrangement is dependent on the performance of any formal act.

Examples of what is meant by a formal act are not set out in the enacting provisions, and Article 4(2) of the Commission proposal is deleted. Recital 10, which sets out the reasons behind Article 3, does, however, give some indications, such as the execution of any document in a specific form or in a particular manner, filing with any official or public body or registration in a public register, advertisement in a newspaper or journal, in an official register or publication or in any other manner, notification to a public officer or the provision of evidence in a particular form.

In order to avoid confusion between Article 3(1), the provision relating to evidence set out in Article 1(5) and the definition of 'provided' in Article 2(2), the Common Position introduces a new Article 3(2) which makes it clear that paragraph 1 is without prejudice to these provisions.

In this respect it should be noted that the Common Position aims at providing a balance between market efficiency, which is the reason behind the exclusion of formal acts, and the safety of the parties to the arrangement and third parties, thereby avoiding, *inter alia*, the risk of fraud. This balance is achieved by the fact that the scope of the Directive only covers those financial collateral arrangements which provide for some form of dispossession, as set out in Articles 1(5) and 2(2), and where the provision of the financial collateral can be evidenced in writing or in a durable medium, as set out in Articles 1(5) and 2(3), ensuring thereby the traceability of that collateral. For the purpose of this Directive, acts required under the law of a Member State as conditions for transferring or creating a security interest on financial instruments other than book entry securities, such as endorsement in the case of instruments to order, or recording on the issuer's register in the case of registered instruments, are not considered as formal acts.

5. **Enforcement — Article 4** (Article 5 of the Commission proposal)

Article 4 of the Common Position maintains the substance of Article 5 of the Commission proposal, which complements Article 3 by precluding the imposition of formal and procedural requirements on the enforcement of a financial collateral arrangement and ensures enforcement in event of insolvency of the collateral-provider or the collateral-taker. The structure is amended to make the text clearer and in a manner which includes amendments 13 and 14 proposed by the European Parliament.

Article 4(1) follows closely Article 5(1) of the Commission proposal, but the reference to the realisation requirements is set out in a separate paragraph, Article 4(4), and it states that set-off is recognised as a manner of realisation.

The Common Position includes the legal technique of appropriation as proposed by the European Parliament and Article 4(2) incorporates, almost verbatim, amendment 14 proposed by the European Parliament. However, since this technique is unknown in some Member States and it was feared that its introduction solely in respect of financial collateral arrangements could give rise to legal uncertainty in those parts of the Community where it has never been used, the Council has found it necessary to introduce in Article 4(3) of the Common Position an option which allows Member States where appropriation is not permitted on the date this Directive enters into force not to recognise this technique. Since the exercise of this option will be an exception to the general regime laid down in the Directive, provision is made for a special notification procedure where a Member State makes use of it.

Article 4(4) sets out the references to the realisation requirements, which were set out in Article 5(1) of the Commission proposal and includes amendment 13 proposed by the European Parliament. The substance of Article 5(2) of the Commission proposal has been moved to Article 7, which concerns close-out netting. The substance of Article 5(3) of the Commission proposal is set out in Article 4(5) of the Common Position in a clearer form. The Council deemed it unnecessary to include examples of what can constitute an enforcement event since the term 'enforcement event' is defined in Article 2.

Article 4(6) corresponds to Article 5(5) of the Commission proposal, but is extended to cover the calculation of the relevant financial obligation.

6. **Right of use — Article 5** (Article 6 of the Commission proposal)

Article 5(1) and (2) of the Common Position fully includes amendment 15 proposed by the European Parliament, in a slightly amended form. Article 5(2) further makes it clear that the collateral-taker may, if the terms of the security financial collateral arrangement so provide, choose to set off the value of the equivalent collateral against the relevant financial obligation or apply it in discharge thereof.

Article 5(3) combines the substance of Article 6 2) and (3) of the Commission proposal, in an amended form which takes account of the new wording of Article 5(1) and (2).

Article 5(4) aims to make it clear that when a collateral-taker exercises the right of reuse he does not thereby lose his rights to the financial collateral under the financial collateral arrangement.

Article 5(5) maintains Article 6(5) as proposed by the Commission in its original proposal.

7. **Title transfer and close-out netting — Articles 6 and 7** (Articles 7 and 8 of the Commission proposal)

Article 6(1) concerning the recognition of title transfer financial collateral arrangements maintains the essence of Article 7 of the Commission proposal. The Council has found it useful to add a second paragraph making it clear that a title transfer arrangement can be terminated by close-out netting if an enforcement event occurs.

Article 7(1) of the Common Position, on the recognition of close-out netting provisions, combines Article 8(1) and (2) of the Commission proposal with more specific wording which does not change the substance of these provisions. Article 7(2) replaces Article 5(2) of the Commission proposal and ensures that Article 4(4) applies to close-out netting as well, unless the parties have explictly agreed otherwise.

8. **The non-application of certain insolvency provisions — Article 8** (Article 9 of the Commission proposal)

Article 8 of the Common Position maintains the substance of Article 9 of the Commission proposal, but with different wording.

The aim is to protect a financial collateral arrangement, as well as the provision of financial collateral under such an arrangement, against certain automatic avoidance rules which would render an arrangement or the provision of collateral void on the sole basis that the collateral was provided on the day of, but before the commencement of, insolvency proceedings or in a prescribed period prior to such proceedings. This is set out in Article 8(1) of the Common Position.

The Common Position introduces a new rule in Article 8(2), not contained in the Commission proposal, protecting a collateral-taker who has acted in good faith on the day of, but after the opening of, insolvency procedures.

The second aim of this article is to protect the market practices of 'top up', whereby participants in the financial market use top-up financial collateral arrangements to manage and limit their credit risk to each other by mark-to-market calculations of the current market value of the credit exposure and the value of the financial collateral and accordingly ask for top-up financial collateral or return the surplus of financial collateral, and the market practice of substituting other assets of the same value for assets provided as financial collateral. Article 8(3) provides that these two practices should be protected against invalidation on the basis of the sole fact that the collateral was provided on the day of, but before the commencement of, insolvency proceedings or in a prescribed period prior to such proceedings, or on the basis of the sole fact that the relevant financial obligations were incurred prior to the provision of the top-up or substitute collateral.

However, this Article does not prejudice the possibility of questioning the financial collateral arrangement and the provision of financial collateral as part of the initial provision, top-up or substitution of financial collateral, under national law for other reasons, for example where this has been done intentionally to the detriment of the other creditors (this covers, *inter alia*, actions based on fraud or similar avoidance rules which may apply in a prescribed period).

9. **Conflict of laws — Article 9** (Article 10 of the Commission proposal)

Article 9 of the Common Position covers the substance of Article 10 of the Commission proposal and introduces a provision regarding conflict of laws in relation to book entry securities. The Common Position does not include Article 9(2) of the Commission proposal since the question of conflict of laws is currently subject to ongoing international discussions in the Hague Conference, which is negotiating a Convention on the law applicable to certain rights in respect of securities held with an intermediary. In order not to bind the hands of Member States and the Commission in these discussions it is preferable simply to establish the place of the relevant intermediary (PRIMA) principle in the Directive, without going into further details at this stage. The Common Position thus includes amendment 17 proposed by the European Parliament.

The Council takes the view that it is, in principle, desirable that provisions with regard to the applicable law are in line with the ongoing discussions at the Hague Conference, but taking into account the importance of the Directive for the EU financial market, the Council nevertheless finds it impossible to postpone the passing of the Directive until the discussions in the Hague Conference have been completed. Therefore it must be kept in mind that, when the Conference has been finalised, Article 9 may have to be reviewed in the light of the outcome of the Convention.

The wording of Article 9(1) has been amended slightly to take account of the new structure, and the wording of Article 9(2) has been changed from that of Article 10(3) of the Commission proposal, to reflect more closely the current state of negotiations within the framework of the Hague conference.

10. **Final provisions — Articles 10, 11, 12 and 13**

The Council feels that the new regime introduced by the Directive should be evaluated and has therefore introduced in Article 10 an obligation for the Commission to present a report on the application of the Directive three years after the date of implementation. The report should focus, *inter alia*, on the use of the option to limit the scope set out in Article 1(3), the option not to introduce the legal technique of appropriation set out in Article 4(3), and the right of reuse of financial collateral laid down in Article 5.

Since the new drafting of Article 1(2) renders Articles 11 and 12 of the Commission proposal redundant, the Common Position incorporates amendments 18 and 19 proposed by the European Parliament, which delete these two articles.

Implementation has been set at 18 months after entry into force, which is the minimum period required in some Member States to implement the new regime laid down by the Directive. The actual date of implementation will thus depend on the final adoption of the Directive. So, while the Council shares the concerns of the European Parliament concerning early implementation of the Directive, the Common Position does not include amendment 20 as proposed by the European Parliament.

11. **The recitals**

The recitals have been adapted to reflect the amendments to the Commission proposal set out above, and includes amendments 1 and 2 proposed by the European Parliament.

IV. **CONCLUSION**

The Council considers that all the amendments made to the Commission proposal are fully in line with the objectives of the Directive. The main changes to the text of the Commission have been made following the amendments proposed by the European Parliament, almost all of which are included in the Common Position. While the amendment relating to the date of implementation has not been introduced as proposed by the European Parliament, it cannot be considered to have been rejected either, since early adoption of the Directive would entail a date of implementation close to that proposed by the European Parliament.

COMMON POSITION (EC) No 33/2002

adopted by the Council on 7 March 2002

with a view to adopting Regulation (EC) No .../2002 of the European Parliament and of the Council of ... establishing a European Maritime Safety Agency

(2002/C 119 E/04)

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 80(2) thereof,

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

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

Having regard to the opinion of the Committee of the Regions [3],

Acting in accordance with the procedure referred to in Article 251 of the Treaty [4],

Whereas:

(1) A large number of legislative measures have been adopted in the Community in order to enhance safety and prevent pollution in maritime transport. In order to be effective, such legislation must be applied in a proper and uniform manner throughout the Community. This will ensure a level playing field, reduce the distortion of competition resulting from the economic advantages enjoyed by non-complying ships and will reward the serious maritime players.

(2) Certain tasks currently done at Community or national level could be executed by a specialised expert body. Indeed, there is a need for technical and scientific support and a high level of stable expertise to properly apply the Community legislation in the fields of maritime safety and ship pollution prevention, to monitor its implementation and to evaluate the effectiveness of the measures in place. There is a need therefore, within the Community's existing institutional structure and balance of powers, to establish a European Maritime Safety Agency ('the Agency').

(3) In general terms, the Agency should represent the technical body providing the Community with the necessary means to act effectively to enhance overall maritime safety and ship pollution prevention rules. The Agency should assist the Commission in the continuous process of updating and developing Community legislation in the field of maritime safety and prevention of pollution by ships and should provide the necessary support to ensure the convergent and effective implementation of such legislation throughout the Community by assisting the Commission in performing the tasks assigned to the latter by existing and future Community legislation on maritime safety and ship pollution prevention.

(4) For the proper achievement of the purposes for which the Agency is established, it is appropriate that the Agency carries out a number of other important tasks aimed at enhancing maritime safety and ship pollution prevention in the waters of the Member States. In this respect, the Agency should work with Member States to organise appropriate training activities on port State control and flag State related issues and to provide technical assistance related to the implementation of Community legislation. It should facilitate cooperation between the Member States and the Commission as provided for in Directive 2002/.../EC of the European Parliament and of the Council of ... establishing a Community vessel traffic monitoring and information system [5], namely by developing and operating any information system necessary for the objectives of that Directive, and in the activities concerning the investigations related to serious maritime accidents. It should provide the Commission and the Member States with objective, reliable and comparable information and data on maritime safety and on ship pollution prevention to enable them to take any necessary initiatives to enhance the measures in place and to evaluate their effectiveness. It should place the Community maritime safety know-how at the disposal of the States applying for accession. It should be open to the participation of these States and to other non-member countries which have concluded agreements with the Community whereby they adopt and implement Community legislation in the field of maritime safety and prevention of pollution by ships.

[1] OJ C 120 E, 24.4.2001, p. 83.

[2] OJ C 221, 7.8.2001, p. 54.

[3] OJ C 357, 14.12.2001, p. 1.

[4] Opinion of the European Parliament of 14 June 2001 (OJ C 53 E, 28.2.2002), Council Common Position of 7 March 2002 and Decision of the European Parliament of ... (not yet published in the Official Journal).

[5] OJ L ...

(5) The Agency should favour the establishment of better cooperation between the Member States and should develop and disseminate best practices in the Community. This in turn should contribute to enhancing the overall maritime safety system in the Community as well as reducing the risk of maritime accidents, marine pollution and the loss of human lives at sea.

(6) In order properly to carry out the tasks entrusted to the Agency, it is appropriate that its officials carry out visits to the Member States in order to monitor the overall functioning of the Community maritime safety and ship pollution prevention system. The visits should be carried out in accordance with a policy to be established by the Agency's Administrative Board and should be facilitated by the authorities of the Member States.

(7) The Agency should apply the relevant Community legislation concerning public access to documents and the protection of individuals with regard to the processing of personal data. It should give the public and any interested party objective, reliable and easily understandable information with regard to its work.

(8) For the contractual liability of the Agency, which is governed by the law applicable to the contracts concluded by the Agency, the Court of Justice should have jurisdiction to give judgment pursuant to any arbitration clause contained in the contract. The Court of Justice should also have jurisdiction in disputes relating to compensation for any damage arising from the non-contractual liability of the Agency.

(9) In order to ensure effectively the accomplishment of the functions of the Agency, the Member States and the Commission should be represented on an Administrative Board entrusted with the necessary powers to establish the budget, verify its execution, adopt the appropriate financial rules, establish transparent working procedures for decision-making by the Agency, approve its work programme, examine requests for technical assistance from Member States, define a policy for visits to the Member States and appoint the Executive Director. In the light of the highly technical and scientific mission and tasks of the Agency, it is appropriate for the Administrative Board to consist of one representative of each Member State and four representatives of the Commission, being members with a high level of expertise. In order further to ensure the highest level of expertise and experience in the Administrative Board and with a view to involving the sectors most closely concerned in the tasks of the Agency, the Commission should nominate independent professionals from these sectors as Board members without the right to vote, on the basis of their personal merit and experience in the field of maritime safety and prevention of pollution by ships and not as representatives of particular professional organisations.

(10) The good functioning of the Agency requires that its Executive Director be appointed on the grounds of merit and documented administrative and managerial skills, as well as competence and experience relevant for maritime safety and prevention of pollution by ships and that he/she performs his/her duties with complete independence and flexibility as to the organisation of the internal functioning of the Agency. To this end, the Executive Director should prepare and take all steps necessary to ensure the proper accomplishment of the working programme of the Agency, should prepare each year a draft general report to be submitted to the Administrative Board, should draw up estimates of the revenues and expenditure of the Agency and should implement the budget.

(11) In order to guarantee the full autonomy and independence of the Agency, it is considered necessary to grant it an autonomous budget whose revenue comes essentially from a contribution from the Community.

(12) Over the past years, as more decentralised agencies have been created, the budgetary authority has looked to improve transparency and control over the management of the Community funding allocated to them, in particular concerning the budgetisation of the fees, financial control, power of discharge, pension scheme contributions and the internal budgetary procedure (code of conduct). In a similar way, Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-fraud Office (OLAF) [1] should apply without restriction to the Agency, which should accede to the Interinstitutional Agreement of 25 May 1999 between the European Parliament, the Council of the European Union and the Commission of the European Communities concerning internal investigations by the European Anti-fraud Office (OLAF) [2].

(13) Within five years from the date of the Agency having taken up its responsibilities, the Administrative Board should commission an independent external evaluation in order to assess the impact of this Regulation, the Agency and its working practices on establishing a high level of maritime safety and prevention of pollution by ships,

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[1] OJ L 136, 31.5.1999, p. 1.

[2] OJ L 136, 31.5.1999, p. 15.

HAVE ADOPTED THIS REGULATION:

CHAPTER I

OBJECTIVES AND TASKS

Article 1

Objectives

1. This Regulation establishes a European Maritime Safety Agency (the 'Agency') for the purpose of ensuring a high, uniform and effective level of maritime safety and prevention of pollution by ships within the Community.

2. The Agency shall provide the Member States and the Commission with the technical and scientific assistance needed and with a high level of expertise, in order to help them to apply Community legislation properly in the field of maritime safety and prevention of pollution by ships, to monitor its implementation and to evaluate the effectiveness of the measures in place.

Article 2

Tasks

In order to ensure that the objectives set out in Article 1 are met in the appropriate manner, the Agency shall perform the following tasks:

(a) it shall assist the Commission, where appropriate, in the preparatory works for updating and developing Community legislation in the field of maritime safety and prevention of pollution by ships, in particular in line with the development of international legislation in that field. That task shall include the analysis of research projects carried out in the field of maritime safety and prevention of pollution by ships;

(b) it shall assist the Commission in the effective implementation of Community legislation on maritime safety and prevention of pollution by ships throughout the Community. In particular, the Agency shall:

(i) monitor the overall functioning of the Community port State control regime, which may include visits to the Member States, and suggest to the Commission any possible improvements in that field;

(ii) provide the Commission with the technical assistance necessary to take part in the work of the technical bodies of the Paris Memorandum of Understanding on port State control;

(iii) assist the Commission in the performance of any task assigned to the Commission by existing and future Community legislation on maritime safety and ship pollution prevention, notably legislation applicable to classification societies, the safety of passenger ships, as well as that applicable to the safety, training, certification and watchkeeping of ships' crews;

(c) it shall work with the Member States:

(i) to organise, where appropriate, relevant training activities in fields which are the responsibility of the port State and flag State;

(ii) to develop technical solutions and provide technical assistance related to the implementation of Community legislation;

(d) it shall facilitate cooperation between the Member States and the Commission in the field covered by Directive 2002/. . ./EC. In particular the Agency shall:

(i) promote cooperation between riparian States in the shipping areas concerned in the fields covered by that Directive;

(ii) develop and operate any information system necessary for attaining the objectives of that Directive;

(e) it shall facilitate cooperation between the Member States and the Commission in the development, with due regard to the different legal systems in the Member States, of a common methodology for investigating maritime accidents according to agreed international principles, in the provision of the support of the Member States in activities concerning investigations related to serious maritime accidents, and in the carrying out of an analysis of existing accident investigation reports;

(f) it shall provide the Commission and the Member States with objective, reliable and comparable information and data on maritime safety and on pollution by ships to enable them to take the necessary steps to improve maritime safety and prevention of pollution by ships and to evaluate the effectiveness of existing measures. Such tasks shall include the collection, recording and evaluation of technical data in the fields of maritime safety and maritime traffic, as well as in the field of marine pollution, both accidental and deliberate, the systematic exploitation of existing databases, including their cross-fertilisation, and, where appropriate, the development of additional databases. On the basis of the data collected, the Agency shall assist the Commission in the publication, every six months, of information relating to ships that have been refused access to Community ports pursuant to Council Directive 95/21/EC of 19 June 1995 concerning the enforcement, in respect of shipping using Community ports and sailing in the waters under the jurisdiction of the Member States, of international standards for ship safety, pollution prevention and shipboard living and working conditions (port State control) [1]. The Agency will also assist the Commission and the Member States in their activities to improve the identification and pursuit of ships making unlawful discharges;

[1] OJ L 157, 7.7.1995, p. 1. Directive as last amended by Directive 2001/106/EC of the European Parliament and of the Council (OJ L 19, 22.1.2002, p. 17).

(g) in the course of negotiations with States applying for accession the Agency may provide technical assistance as regards the implementation of Community legislation in the field of maritime safety and prevention of pollution by ships. That task shall be coordinated with the existing regional cooperation programmes and shall include, where appropriate, the organisation of relevant training activities.

Article 3

Visits to Member States

1. In order to perform the tasks entrusted to it, the Agency may carry out visits to the Member States in accordance with the policy defined by the Administrative Board. The national authorities of the Member States shall facilitate the work of the Agency's staff.

2. The Agency shall inform the Member State concerned of the planned visit, the names of the delegated officials, and the date on which the visit starts. The Agency officials delegated to carry out such visits shall do so on presentation of a decision from the Executive Director of the Agency specifying the purpose and the aims of their mission.

3. At the end of each visit, the Agency shall draw up a report and send it to the Commission and to the Member State concerned.

Article 4

Transparency and protection of information

1. The Agency shall apply the principles of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [1], when handling applications for access to documents held by it.

2. The Agency may communicate on its own initiative in the fields within its mission. It shall ensure in particular that the public and any interested party are rapidly given objective, reliable and easily understandable information with regard to its work.

3. The Administrative Board shall lay down the necessary internal rules for the application of paragraphs 1 and 2.

4. The information collected in accordance with this Regulation by the Commission and the Agency shall be subject to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [2].

[1] OJ L 145, 31.5.2001, p. 43.

[2] OJ L 8, 12.1.2001, p. 1.

CHAPTER II

INTERNAL STRUCTURE AND FUNCTIONING

Article 5

Legal status, regional centres

1. The Agency shall be a body of the Community. It shall have legal personality.

2. In each of the Member States, the Agency shall enjoy the most extensive legal capacity accorded to legal persons under their laws. It may in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings.

3. At the request of the Commission, the Administrative Board may decide, with the agreement of the Member States concerned, to establish the regional centres necessary in order to carry out tasks related to the monitoring of navigation and maritime traffic, as provided for in Directive 2002/. . ./EC.

4. The Agency shall be represented by its Executive Director.

Article 6

Staff

1. The Staff Regulations of Officials of the European Communities, the Conditions of Employment of Other Servants of the European Communities and the rules adopted jointly by the institutions of the European Communities for the purposes of the application of those Staff Regulations and Conditions of Employment shall apply to the staff of the Agency. The Administrative Board, in agreement with the Commission, shall adopt the necessary detailed rules of application.

2. Without prejudice to Article 16, the powers conferred on the appointing authority by the Staff Regulations and the Conditions of Employment of Other Servants shall be exercised by the Agency in respect of its own staff.

3. The Agency's staff shall consist of officials assigned or seconded by the Commission or Member States on a temporary basis and of other servants recruited by the Agency as necessary to carry out its tasks.

Article 7

Privileges and immunities

The Protocol on the Privileges and Immunities of the European Communities shall apply to the Agency and to its staff.

Article 8

Liability

1. The contractual liability of the Agency shall be governed by the law applicable to the contract in question.

2. The Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by the Agency.

3. In the case of non-contractual liability, the Agency shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its departments or by its servants in the performance of their duties.

4. The Court of Justice shall have jurisdiction in disputes relating to the compensation for damage referred to in paragraph 3.

5. The personal liability of its servants towards the Agency shall be governed by the provisions laid down in the Staff Regulations or Conditions of Employment applicable to them.

Article 9

Languages

1. The provisions laid down in Regulation No 1 of 15 April 1958 determining the languages to be used in the European Economic Community [1] shall apply to the Agency.

2. The translation services required for the functioning of the Agency shall be provided by the Translation Centre for the bodies of the European Union.

Article 10

Creation and powers of the Administrative Board

1. An Administrative Board is hereby set up.

2. The Administrative Board shall:

(a) appoint the Executive Director pursuant to Article 16;

(b) adopt, by 30 April each year, the general report of the Agency for the previous year and forward it to the Member States, the European Parliament, the Council and the Commission;

(c) examine, in the framework of the preparation of the work programme, requests from Member States for technical assistance, as referred to in Article 2(c)(ii);

(d) adopt, by 31 October each year, and taking the opinion of the Commission into account, the work programme of the Agency for the coming year and forward it to the Member States, the European Parliament, the Council and the Commission.

This work programme shall be adopted without prejudice to the annual Community budgetary procedure. If the Commission expresses, within 15 days of the date of adoption of the work programme its disagreement with the said programme, the Administrative Board shall re-examine the programme and adopt it, possibly amended, at second reading either with a two-thirds majority, including the Commission representatives, or by unanimity of the representatives of the Member States;

(e) adopt the final budget of the Agency before the beginning of the financial year, adjusting it, where necessary, according to the Community contribution and any other revenue of the Agency;

(f) establish procedures for decision-making by the Executive Director;

(g) define a policy for the visits to be carried out pursuant to Article 3;

(h) perform its duties in relation to the Agency's budget pursuant to Articles 18, 19 and 21;

(i) exercise disciplinary authority over the Executive Director and the Heads of Unit referred to in Article 15(3).

(j) establish its rules of procedure.

Article 11

Composition of the Administrative Board

1. The Administrative Board shall be composed of one representative of each Member State and four representatives of the Commission, as well as of four professionals from the sectors most concerned, nominated by the Commission, without the right to vote.

Board members shall be appointed on the basis of their degree of relevant experience and expertise in the field of maritime safety and prevention of pollution by ships.

2. Each Member State and the Commission shall appoint their members of the Administrative Board as well as an alternate who will represent the member in his/her absence.

3. The duration of the term of office shall be five years. The term of office may be renewed once.

4. When appropriate, the participation of representatives of non-member countries and the conditions thereof shall be established in the arrangements referred to in Article 17(2).

[1] OJ 17, 6.10.1958, p. 385/58. Regulation as last amended by the 1994 Act of Accession.

Article 12

Chairmanship of the Administrative Board

1. The Administrative Board shall elect a chairperson and a deputy chairperson from among its members. The deputy chairperson shall automatically take the place of the chairperson if he/she is prevented from attending to his/her duties.

2. The terms of office of the chairperson and deputy chairperson shall be three years and shall expire when they cease to be members of the Administrative Board. The terms of office shall be renewable once.

Article 13

Meetings

1. The meetings of the Administrative Board shall be convened by its chairperson.

2. The Executive Director of the Agency shall take part in the deliberations.

3. The Administrative Board shall hold an ordinary meeting twice a year. In addition, it shall meet on the initiative of the chairperson or at the request of the Commission or of one third of the Member States.

4. On proposal of the chairperson, when there is a matter of confidentiality or conflict of interest, the Administrative Board may decide to examine specific items of its agenda without the presence of the members nominated in their capacity as professionals from the sectors most concerned. Detailed rules for the application of this provision may be laid down in the rules of procedure.

5. The Administrative Board may invite any person whose opinion can be of interest to attend its meetings as an observer.

6. The members of the Administrative Board may, subject to the provisions of its rules of procedure, be assisted by advisers or experts.

7. The secretariat for the Administrative Board shall be provided by the Agency.

Article 14

Voting

1. The Administrative Board shall take its decisions by a two-thirds majority of all members with the right to vote.

2. Each member shall have one vote. The Executive Director of the Agency shall not vote.

In the absence of a member, his/her alternate shall be entitled to exercise his/her right to vote.

3. The rules of procedure shall establish the more detailed voting arrangements, in particular, the conditions for a member to act on behalf of another member.

Article 15

Duties and powers of the Executive Director

1. The Agency shall be managed by its Executive Director, who shall be completely independent in the performance of his/her duties. Without prejudice to the respective competencies of the Commission and the Administrative Board, the Executive Director shall neither seek nor take instructions from any government nor from any other body.

2. The Executive Director shall have the following duties and powers:

(a) he/she shall prepare the work programme and submit it to the Administrative Board after consultation of the Commission. He/she shall take the steps necessary for its implementation. He/she shall respond to any requests for assistance from the Commission or from a Member State in accordance with Article 10(2)(c);

(b) he/she shall decide to carry out the visits provided for in Article 3, after consultation of the Commission and following the policy established by the Administrative Board according to Article 10(2)(g);

(c) he/she shall take all necessary steps, including the adoption of internal administrative instructions and the publication of notices, to ensure the functioning of the Agency in accordance with the provisions of this Regulation;

(d) he/she shall organise an effective monitoring system in order to be able to compare the Agency's achievements with its operational objectives. On this basis the Executive Director shall prepare a draft general report each year and submit it to the Administrative Board. He/she shall establish regular evaluation procedures that meet recognised professional standards;

(e) he/she shall exercise in respect of the staff the powers laid down in Article 6(2);

(f) he/she shall draw up estimates of the Agency's revenue and expenditure, in accordance with Article 18, and shall implement the budget in accordance with Article 19.

3. The Executive Director may be assisted by one or more heads of unit. If the Executive Director is absent or indisposed, one of the heads of unit shall take his place.

Article 16

Appointment of the Executive Director

1. The Executive Director of the Agency shall be appointed by the Administrative Board on the grounds of merit and documented administrative and managerial skills, as well as competence and experience relevant for maritime safety and prevention of pollution by ships. The Administrative Board shall take its decision by a four-fifths majority of all members with the right to vote. The Commission may propose a candidate or candidates.

Power to dismiss the Executive Director shall lie with the Administrative Board, according to the same procedure.

2. The term of office of the Executive Director shall be five years. This term of office is renewable once.

Article 17

Participation of non-member countries

1. The Agency shall be open to the participation of non-member countries, which have entered into agreements with the European Community, whereby they have adopted and are applying Community law in the field of maritime safety and prevention of pollution by ships.

2. Under the relevant provisions of these agreements, arrangements will be developed which shall, *inter alia*, specify the nature and the extent of the detailed rules for the participation by these countries in the work of the Agency, including provisions on financial contributions and staff.

CHAPTER III

FINANCIAL REQUIREMENTS

Article 18

Budget

1. The Agency's revenues shall consist of:

(a) a contribution from the Community;

(b) possible contributions from any non-member country which participates in the work of the Agency in accordance with Article 17;

(c) charges for publications, training and/or any other services provided by the Agency.

2. The Agency's expenditure shall cover staff and administrative, infrastructure and operational expenses.

3. The Executive Director shall draw up an estimate of the Agency's revenues and expenditure for the following financial year and shall forward it to the Administrative Board together with an establishment plan.

4. Revenue and expenditure shall be in balance.

5. The Administrative Board shall each year, by 30 April at the latest, adopt the draft budget, accompanied by the preliminary work programme, and forward them to the Commission and to the non-member countries which participate in the work of the Agency in accordance with Article 17.

On the basis of that draft budget, the Commission shall establish the relevant estimates in the preliminary draft general budget of the European Union, which it shall put before the Council pursuant to Article 272 of the Treaty. The scope of the approved budget outlook of the Community for the coming years has to be observed.

6. After the adoption of the general budget of the European Union, the Administrative Board shall adopt the Agency's budget and final work programme, adjusting them where necessary to the Community contribution. It shall forward them without delay to the Commission, to the budgetary authority and to the non-member countries which participate in the work of the Agency.

Article 19

Implementation and control of the budget

1. The Executive Director shall implement the Agency's budget.

2. Control of commitment, payment of all expenditure and control of the existence and recovery of all Agency revenue shall be carried out by the Financial Controller of the Commission.

3. By 31 March each year at the latest, the Executive Director shall submit to the Commission, the Administrative Board and the Court of Auditors the detailed accounts of all revenue and expenditure from the previous year.

The Court of Auditors shall examine these accounts in accordance with Article 248 of the Treaty. They shall publish a report on the Agency's activities each year.

4. The European Parliament shall, on a recommendation from the Administrative Board, give a discharge to the Executive Director of the Agency in respect of the implementation of the budget.

Article 20

Combating fraud

1. In order to combat fraud, corruption and other unlawful activities the provisions of Regulation (EC) No 1073/1999 shall apply without restriction to the Agency.

2. The Agency shall accede to the Interinstitutional Agreement of 25 May 1999 concerning internal investigations by OLAF and shall issue, without delay, the appropriate provisions applicable to all of its staff.

3. The decisions concerning funding and the implementing agreements and instruments resulting from them shall explicitly stipulate that the Court of Auditors and OLAF may carry out, if necessary, on-the-spot checks of the recipients of the Agency's funding and the agents responsible for allocating it.

Article 21

Financial provisions

The Administrative Board, having received the agreement of the Commission and the opinion of the Court of Auditors, shall adopt the Agency's Financial Regulation. This Financial Regulation shall in particular specify the procedure to be used for drawing up and implementing the Agency's budget, in accordance with Article 142 of the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities [1].

CHAPTER IV

FINAL PROVISIONS

Article 22

Evaluation

1. Within five years of the date of the Agency having taken up its responsibilities, the Administrative Board shall commission an independent external evaluation on the implementation of this Regulation. The Commission shall make available to the Agency any information the latter considers relevant to that evaluation.

2. The evaluation shall assess the impact of this Regulation, the Agency and its working practices on establishing a high level of maritime safety and prevention of pollution by ships. The Administrative Board shall issue specific terms of reference in agreement with the Commission, following consultations with the parties involved.

3. The Administrative Board shall receive the evaluation and issue recommendations regarding changes to this Regulation, the Agency and its working practices to the Commission. Both the evaluation findings and recommendations shall be forwarded by the Commission to the European Parliament and the Council and shall be made public.

Article 23

Start of the Agency's activities

The Agency shall be operational within 12 months of the entry into force of this Regulation.

Article 24

Entry into force

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

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at . . .

For the European Parliament
The President

For the Council
The President

[1] OJ L 356, 31.12.1977, p. 1. Regulation as last amended by Regulation (EC, ECSC, Euratom) No 762/2001 (OJ L 111, 20.4.2001, p. 1).

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

Within the framework of the co-decision procedure (Article 251(TEC)), on 7 December 2001, the Council reached a political agreement on the proposal for the Regulation establishing a European Maritime Safety Agency on the basis of the Commission proposal [1] and the results of the first reading by the European Parliament on 14 June 2001 [2]. Following legal/linguistic revision, the Council adopted its Common Position on 7 March 2002.

The Regulation proposed by the Commission is part of the second set of measures presented in the aftermath of the *Erika* incident. The objective of the Regulation is to establish a specialised maritime safety agency that will provide Member States and the Commission with the necessary expertise and technical and scientific assistance to ensure that Community legislation in the field of maritime safety and the prevention of pollution by ships is properly implemented.

In taking its position, the Council took account of the opinions of the Economic and Social Committee [3] and of the Committee of Regions [4].

II. ANALYSIS OF THE COMMON POSITION

The Council agrees with the general idea of creating a specialised agency that would assist Member States and the Commission in the implementation of Community legislation on maritime safety and the prevention of pollution by ships. By supporting the efficient application of Community legislation in this field, monitoring its implementation and evaluating the effectiveness of the measures adopted, the Agency would make a valuable contribution to the objective of ensuring high and uniform standards of maritime safety and prevention of pollution throughout the Community.

For this purpose, the Agency should work with the Commission and with Member States and facilitate cooperation between both. As regards the Commission, the Agency should assist in preparing the updating and developing of future Community legislation in the field of maritime safety and the prevention of pollution by ships, as well as in the effective implementation of existing rules. In its cooperation with Member States, the Agency should concentrate on the organisation of training activities and the provision of technical assistance related to the implementation of Community legislation.

The Agency would also have an important role as facilitator in the cooperation between Member States and the Commission, particularly with regard to the monitoring of vessel traffic and the exchange of information and the investigation of maritime accidents. Both the Member States and the Commission should be provided by the Agency with information and data on maritime safety. Finally, the accession of non-member countries that have adopted relevant Community legislation in the field of maritime safety and the prevention of pollution by ships should be facilitated in order to allow for technical assistance as regards the implementation of the legislation.

The Council has attached great importance to the direct involvement of the Member States in the administration of the Agency and to ensure its support for the Member States in the application of Community maritime safety legislation. At the same time, in view of the highly technical and scientific character of the Agency, it is important to guarantee its autonomy and independence. Bearing in mind these considerations, the Council has introduced some modifications to the Commission proposal, particularly concerning the composition of the Agency's Administrative Board and the provision of technical assistance to Member States.

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[1] OJ C 120 E, 24.4.2001, p. 83.

[2] 9787/01 CODEC 581 MAR 39 ENV 322 (OJ C 53 E 28.2.2002).
To be noted that, following the first European Parliament reading, the Commission modified its proposal: Doc. 15411/01 MAR 124 CODEC 1376, COM(2001) 676 final (not yet published in the Official Journal).

[3] OJ C 221, 7.8.2001, p. 64.

[4] OJ C 357, 14.12.2001, p. 1.

III. **AMENDMENTS**

The Council's Common Position in general follows the European Parliament's approach at first reading, accepting in whole or in substance most of its amendments. One can highlight, for instance:

— the prevention of pollution by ships has systematically been taken in as one of the Agency's overall objectives, together with the promotion of maritime safety (various articles),

— reflecting Parliament's concern that visits to Member States shall take place in understanding with Member States, the Common Position suggests that these will be carried out in accordance with the policy defined the Administrative Board. The reports that will be drawn up after each visit shall also be sent to the Member State concerned. However, the Council has chosen to follow the Commission's view as regards unannounced visits (Article 3),

— the adoption of the work programme shall not require the approval of the Commission, although its opinion shall be taken into account (Article 10),

— a possibility for Member States, and not only the Commission, to request technical assistance from the Agency has been introduced. The Executive Director should respond to these requests, in accordance with the availability of resources and the preparation of the work programme (Articles 10 and 15),

— the competences of the Administrative Board in relation to the appointment and dismissal of the Executive Director are increased, removing the requirement of a Commission proposal in this respect (Article 16),

— the inclusion of a provision concerning the fight against fraud (Article 20),

— the importance of a proper evaluation of the activities of the Agency. It is thus provided that the evaluation should be carried out by an external body, that the Commission should make available all information relevant for the evaluation and that it shall take place after consultations with all parties involved. On the other hand, given the time it will take for the Agency to become fully operational, the Council preferred to maintain the five year deadline set out in the Commission's proposal for the carrying out of the evaluation (Article 22).

Finally, the Council has introduced some amendments into the text of the Directive in line with the principles outlined in Part II of this document. These amendments relate mainly to the following points:

— description of the Agency's tasks (Article 2). The Council has introduced some modifications to improve and clarify the description of the tasks that the Agency will have to perform vis-à-vis the Commission, the Member States and non-member countries,

— composition of the Administrative Board (Article 11). The Council amended the Commission's original proposal in order to give each Member State one representative on the Board. Furthermore, following Parliaments suggestion, the Council has also incorporated the reference to the Board members' relevant experience and expertise in the field of maritime safety.

While maintaining that the presence of representatives from the professional sectors most concerned would help to further ensure the highest level of expertise and experience in the Board, the Council has wished to stress the independent status of these professionals and give them consultative status,

— transparency (Article 4). The Council has substantially amended and broadened the proposal's provisions on the dissemination of information in order to outline a general policy on transparency and the protection of data. The provisions in the amended proposal now refer to the most recent Community legislation in this field.