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EN

⁽¹⁾ Text with EEA relevance

III

(Preparatory Acts)

COUNCIL

COMMON POSITION (EC) No 18/2007

adopted by the Council on 15 October 2007

with a view to adopting Directive 2007/.../EC of the European Parliament and of the Council of ... amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities

(Text with EEA relevance)

(2007/C 307 E/01)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 47(2) and 55 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Having regard to the opinion of the Committee of the Regions ⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾,

Whereas:

(1) Council Directive 89/552/EEC ⁽⁴⁾ coordinates certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of broadcasting activities. However, new technologies in the

transmission of audiovisual media services call for adaptation of the regulatory framework to take account of the impact of structural change, the spread of information and communication technologies (ICT) and technological developments on business models, especially the financing of commercial broadcasting, and to ensure optimal conditions of competitiveness and legal certainty for Europe's information technologies and its media industries and services, as well as respect for cultural and linguistic diversity.

(2) The laws, regulations and administrative measures in Member States concerning the pursuit of television broadcasting activities are already coordinated by Directive 89/552/EEC, whereas the rules applicable to activities such as on-demand audiovisual media services contain disparities, some of which may impede the free movement of those services within the European Community and may distort competition within the internal market.

(3) Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy — in particular by ensuring freedom of information, diversity of opinion and media pluralism — education and culture justifies the application of specific rules to these services.

(4) Article 151(4) of the Treaty requires the Community to take cultural aspects into account in its action under other provisions of the Treaty, in particular in order to respect and to promote the diversity of its cultures.

⁽¹⁾ OJ C 318, 23.12.2006, p. 202.

⁽²⁾ OJ C 51, 6.3.2007, p. 7.

⁽³⁾ Opinion of the European Parliament of 13 December 2006 (OJ C 317 E, 23.12.2006), Council Common Position of 15 October 2007, Position of the European Parliament of ... (not yet published in the Official Journal).

⁽⁴⁾ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities. (OJ L 298, 17.10.1989, p. 23). Directive as last amended by Directive 97/36/EC (OJ L 202, 30.7.1997, p. 60).

- (5) In its resolutions of 1 December 2005 ⁽¹⁾ and 4 April 2006 ⁽²⁾ on the Doha Round and on the WTO Ministerial Conferences, the European Parliament called for basic public services, such as audiovisual services, to be excluded from liberalisation under the GATS negotiations. In its resolution of 27 April 2006 ⁽³⁾, the European Parliament supported the Unesco Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which states in particular that 'cultural activities, goods and services have both an economic and a cultural nature, because they convey identities, values and meanings, and must therefore not be treated as solely having commercial value'. The Council Decision of 18 May 2006 on the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions ⁽⁴⁾ approved the Unesco Convention on behalf of the Community. The Convention entered into force on 18 March 2007. This Directive respects the principles of that Convention.
- (6) Traditional audiovisual media services — such as television — and emerging on-demand audiovisual media services offer significant employment opportunities in the Community, particularly in small and medium-sized enterprises, and stimulate economic growth and investment. Bearing in mind the importance of a level playing-field and a true European market for audiovisual media services, the basic principles of the internal market, such as free competition and equal treatment, should be respected in order to ensure transparency and predictability in markets for audiovisual media services and to achieve low barriers to entry.
- (7) Legal uncertainty and a non-level playing-field exist for European companies delivering audiovisual media services as regards the legal regime governing emerging on-demand audiovisual media services. It is therefore necessary, in order to avoid distortions of competition, to improve legal certainty, to help complete the internal market and to facilitate the emergence of a single information area, that at least a basic tier of coordinated rules apply to all audiovisual media services, both television broadcasting (i.e. linear audiovisual media services) and on-demand audiovisual media services (i.e. non-linear audiovisual media services). The basic principles of Directive 89/552/EEC, namely the country of origin principle and common minimum standards, have proved their worth and should therefore be retained.
- (8) On 15 December 2003, the Commission adopted a Communication on the future of European regulatory audiovisual policy, in which it stressed that regulatory policy in that sector has to safeguard certain public interests, such as cultural diversity, the right to information, media pluralism, the protection of minors and consumer protection and to enhance public awareness and media literacy, now and in the future.
- (9) The Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council of 25 January 1999 concerning public service broadcasting ⁽⁵⁾ reaffirmed that the fulfilment of the mission of public service broadcasting requires that it continue to benefit from technological progress. The co-existence of private and public audiovisual media service providers is a feature which distinguishes the European audiovisual media market.
- (10) The Commission has adopted the initiative 'i2010: European Information Society' to foster growth and jobs in the information society and media industries. This is a comprehensive strategy designed to encourage the production of European content, the development of the digital economy and the uptake of ICT, against the background of the convergence of information society services and media services, networks and devices, by modernising and deploying all EU policy instruments: regulatory instruments, research and partnerships with industry. The Commission has committed itself to creating a consistent internal market framework for information society services and media services by modernising the legal framework for audiovisual services, starting with a Commission proposal in 2005 to modernise the Television without Frontiers Directive and transform it into a Directive on Audiovisual Media Services. The goal of the i2010 initiative will in principle be achieved by allowing industries to grow with only the necessary regulation, as well as allowing small start-up businesses, which are the wealth and job creators of the future, to flourish, innovate and create employment in a free market.
- (11) The European Parliament adopted on 4 September 2003 ⁽⁶⁾, 22 April 2004 ⁽⁷⁾ and 6 September 2005 ⁽⁸⁾ resolutions which called for the adaptation of Directive 89/552/EEC to reflect structural changes and technological developments while fully respecting its underlying principles, which remain valid. In addition, it in principle supported the general approach of basic rules for all audiovisual media services and additional rules for television broadcasting.

⁽¹⁾ OJ C 285 E, 1.12.2006, p. 126.

⁽²⁾ OJ C 293 E, 2.12.2006, p. 155.

⁽³⁾ OJ C 296 E, 6.12.2006, p. 104.

⁽⁴⁾ OJ L 201, 25.7.2006, p. 15.

⁽⁵⁾ OJ C 30, 5.2.1999, p. 1.

⁽⁶⁾ European Parliament resolution on Television without Frontiers (OJ C 76 E, 25.3.2004, p. 453).

⁽⁷⁾ European Parliament Resolution on the risks of violation, in the EU and especially in Italy, of freedom of expression and information (Article 11(2) of the Charter of Fundamental Rights) (OJ C 104 E, 30.4.2004, p. 1026).

⁽⁸⁾ European Parliament resolution on the application of Articles 4 and 5 of Directive 89/552/EEC ('Television without Frontiers'), as amended by Directive 97/36/EC, for the period 2001-2002 (OJ C 193 E, 17.8.2006, p. 117).

- (12) This Directive enhances compliance with fundamental rights and is fully in line with the principles recognised by the Charter of Fundamental Rights of the European Union ⁽¹⁾, in particular Article 11 thereof. In this regard, this Directive should not in any way prevent Member States from applying their constitutional rules relating to freedom of the press and freedom of expression in the media.
- (13) This Directive should not affect the obligations on Member States arising from the application of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services ⁽²⁾. Accordingly, draft national measures applicable to on-demand audiovisual media services of a stricter or more detailed nature than those required to simply transpose this Directive should be subject to the procedural obligations established under Article 8 of Directive 98/34/EC.
- (14) Directive 2002/21/EC of the European Parliament and the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) ⁽³⁾ according to its Article 1(3) is without prejudice to measures taken at Community or national level, to pursue general interest objectives, in particular relating to content regulation and audiovisual policy.
- (15) No provision of this Directive should require or encourage Member States to impose new systems of licensing or administrative authorisation on any type of audiovisual media service.
- (16) For the purpose of this Directive, the definition of an audiovisual media service should cover only audiovisual media services, whether television broadcasting or on-demand, which are mass media, that is, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public. Its scope should be limited to services as defined by the Treaty and therefore should cover any form of economic activity, including that of public service enterprises, but should not cover activities which are primarily non-economic and which are not in competition with television broadcasting, such as private websites and services consisting of the provision or distribution of audiovisual content generated by private users for the purposes of sharing and exchange within communities of interest.
- (17) It is characteristic of on-demand audiovisual media services that they are 'television-like', i.e. that they compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection within the scope of this Directive. In the light of this and in order to prevent disparities as regards free movement and competition, the notion of 'programme' should be interpreted in a dynamic way taking into account developments in television broadcasting.
- (18) For the purpose of this Directive, the definition of an audiovisual media service should cover mass media in their function to inform, entertain and educate the general public, and should include audiovisual commercial communication but should exclude any form of private correspondence, such as e-mails sent to a limited number of recipients. That definition should exclude all services whose principal purpose is not the provision of programmes, i.e. where any audiovisual content is merely incidental to the service and not its principal purpose. Examples include websites that contain audiovisual elements only in an ancillary manner, such as animated graphical elements, short advertising spots or information related to a product or non-audiovisual service. For these reasons, games of chance involving a stake representing a sum of money, including lotteries, betting and other forms of gambling services, as well as on-line games and search engines, but not broadcasts devoted to gambling or games of chance, should also be excluded from the scope of this Directive.
- (19) For the purpose of this Directive, the definition of media service provider should exclude natural or legal persons who merely transmit programmes for which the editorial responsibility lies with third parties.
- (20) Television broadcasting, currently includes, in particular, analogue and digital television, live streaming, webcasting and near-video-on-demand, whereas video-on-demand, for example, is an on demand audiovisual media service. In general, for television broadcasting or television programmes which are also offered as on-demand audiovisual media services by the same media service provider, the requirements of this Directive should be deemed to be met by the fulfilment of the requirements applicable to the television broadcast i.e. linear transmission. However, where different kinds of services are offered in parallel, but are clearly separate services, this Directive should apply to each of the services concerned.

⁽¹⁾ OJ C 364, 18.12.2000 p. 1.

⁽²⁾ OJ L 204, 21.7.1998, p. 37. Directive as last amended by Council Directive 2006/96/EC (OJ L 363, 20.12.2006, p. 81).

⁽³⁾ OJ L 108, 24.4.2002, p. 33.

(21) The scope of this Directive should not cover electronic versions of newspapers and magazines.

- (22) For the purpose of this Directive, the term 'audiovisual' should refer to moving images with or without sound, thus including silent films but not covering audio transmission or radio services. While the principal purpose of an audiovisual media service is the provision of programmes, the definition of such a service should also cover text-based content which accompanies programmes, such as subtitling services and electronic programme guides. Stand-alone text-based services should not fall within the scope of this Directive, which should not affect Member States' freedom to regulate such services at national level in accordance with the Treaty.
- (23) The notion of editorial responsibility is essential for defining the role of the media service provider and thereby for the definition of audiovisual media services. Member States may further specify aspects of the definition of editorial responsibility, notably the notion of 'effective control', when adopting measures to implement this Directive. This Directive should be without prejudice to the exemptions from liability established in Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) ⁽¹⁾.
- (24) In the context of television broadcasting, the notion of simultaneous viewing should also cover quasi simultaneous viewing because of the variations in the short time lag which occurs between the transmission and the reception of the broadcast due to technical reasons inherent in the transmission process.
- (25) All the characteristics of an audiovisual media service set out in its definition and explained in Recitals 16 to 23 should be present at the same time.
- (26) In addition to television advertising and teleshopping, a wider definition of audiovisual commercial communication should be introduced in this Directive, which however should not include public service announcements and charity appeals broadcast free of charge.
- (27) The country of origin principle should remain the core of this Directive, as it is essential for the creation of an internal market. This principle should therefore be applied to all audiovisual media services in order to ensure legal certainty for media service providers as the necessary basis for new business models and the deployment of such services. It is also essential in order to ensure the free flow of information and audiovisual programmes in the internal market.
- (28) In order to promote a strong, competitive and integrated European audiovisual industry and enhance media pluralism throughout the European Union, only one Member State should have jurisdiction over an audiovisual media service provider and the pluralism of information should be a fundamental principle of the European Union.
- (29) Technological developments, especially with regard to digital satellite programmes, mean that subsidiary criteria should be adapted in order to ensure suitable regulation and its effective implementation and to give players genuine power over the content of an audiovisual media service.
- (30) As this Directive concerns services offered to the general public in the European Union, it should apply only to audiovisual media services that can be received directly or indirectly by the public in one or more Member States with standard consumer equipment. The definition of 'standard consumer equipment' should be left to the competent national authorities.
- (31) Articles 43 to 48 of the Treaty lay down the fundamental right to the freedom of establishment. Therefore, media service providers should in general be free to choose the Member States in which they establish themselves. The Court of Justice has also emphasised that 'the Treaty does not prohibit an undertaking from exercising the freedom to provide services if it does not offer services in the Member State in which it is established' ⁽²⁾.
- (32) Member States should be able to apply more detailed or stricter rules in the fields coordinated by this Directive to media service providers under their jurisdiction, while ensuring that those rules are consistent with general principles of Community law. In order to deal with situations where a broadcaster under the jurisdiction of one Member State provides a television broadcast which is wholly or mostly directed towards the territory of another Member State, a requirement for Member States to cooperate with one another and, in cases of circumvention, the codification of the case law of the Court of Justice ⁽³⁾, combined with a more efficient procedure, would be an appropriate solution that takes account of Member State concerns without calling into question the proper application of the country of origin principle. The notion of rules of general public interest has been developed by the Court of Justice in its case law in relation to Articles 43 and 49 of the Treaty and includes, *inter alia*, rules on the protection of consumers, the protection of minors and cultural policy. The Member State requesting cooperation should ensure that the specific national rules in question are objectively necessary, applied in a non-discriminatory manner, and proportionate.

⁽¹⁾ OJ L 178, 17.7.2000, p. 1.

⁽²⁾ Case C-56/96 VT4, paragraph 22; Case C-212/97, *Centros v Erhvervs-og Selskabsstyrelsen*; see also: Case C-11/95, *Commission v Kingdom of Belgium* and Case C-14/96, *Paul Denuit*.

⁽³⁾ Case C-212/97, *Centros v Erhvervs-og Selskabsstyrelsen*; Case C-33/74, *Van Binsbergen v Bestuur van de Bedrijfsvereniging*; Case C-23/93, *TV 10 SA v Commissariaat voor de Media*, paragraph 21.

- (33) A Member State, when assessing on a case-by-case basis whether a broadcast by a media service provider established in another Member State is wholly or mostly directed towards its territory, may refer to indicators such as the origin of the television advertising and/or subscription revenues, the main language of the service or the existence of programmes or commercial communications targeted specifically at the public in the Member State where they are received.
- (34) Under this Directive, notwithstanding the application of the country of origin principle, Member States may still take measures that restrict freedom of movement of television broadcasting, but only under the conditions, and following the procedure laid down in this Directive. However, the Court of Justice has consistently held that any restriction of the freedom to provide services, such as any derogation from a fundamental principle of the Treaty, must be interpreted restrictively ⁽¹⁾.
- (35) With respect to on-demand audiovisual media services, restrictions upon their free provision should only be possible in accordance with conditions and procedures replicating those already established by Articles 3(4), (5) and (6) of Directive 2000/31/EC.
- (36) In its Communication to the European Parliament and the Council on Better Regulation for Growth and Jobs in the European Union, the Commission stressed that a careful analysis of the appropriate regulatory approach is necessary, in particular, in order to establish, whether legislation is preferable for the relevant sector and problem, or whether alternatives such as co-regulation or self-regulation should be considered. Furthermore, experience has shown that both co- and self-regulation instruments, implemented in accordance with the different legal traditions of the Member States, can play an important role in delivering a high level of consumer protection. Measures aimed at achieving public interest objectives in the emerging audiovisual media services sector are more effective if they are taken with the active support of the service providers themselves.

Thus self-regulation constitutes a type of voluntary initiative, which enables the economic operators, social partners, non-governmental organisations or associations to adopt common guidelines amongst themselves and for themselves. Member States should, in accordance with their different legal traditions, recognise the role which effective self-regulation can play as a complement to the legislative and judicial and/or administrative mechanisms in place and its useful contribution to the achievement of the objectives of this Directive. However, while self-regulation might be a complementary method of implementing certain provisions of this Directive, it should not constitute a substitute for the obligations of the national legislator.

Co-regulation gives, in its minimal form, a legal link between self-regulation and the national legislator in accordance with the legal traditions of the Member States. Co-regulation should allow for the possibility for State intervention in the event of its objectives not being met. Without prejudice to Member States' formal obligations regarding transposition, this Directive encourages the use of co-regulation and self-regulation. This should neither oblige Member States to set up co- and/or self-regulatory regimes nor disrupt or jeopardise current co- or self-regulatory initiatives which are already in place within Member States and which are working effectively.

- (37) 'Media literacy' refers to skills, knowledge and understanding that allow consumers to use media effectively and safely. Media-literate people are able to exercise informed choices, understand the nature of content and services and take advantage of the full range of opportunities offered by new communications technologies. They are better able to protect themselves and their families from harmful or offensive material. Therefore the development of media literacy in all sections of society should be promoted and its progress followed closely.

The Recommendation of the European Parliament and of the Council of 20 December 2006 on the protection of minors and human dignity and on the right of reply in relation to the competitiveness of the European audiovisual and on-line information services industry ⁽²⁾ already contains a series of possible measures for promoting media literacy such as, for example, continuing education of teachers and trainers, specific Internet training aimed at children from a very early age, including sessions open to parents, or organisation of national campaigns aimed at citizens, involving all communications media, to provide information on using the Internet responsibly.

- (38) Television broadcasting rights for events of high interest to the public may be acquired by broadcasters on an exclusive basis. However, it is essential to promote pluralism through the diversity of news production and programming across the European Union and to respect the principles recognised by Article 11 of the Charter of Fundamental Rights of the European Union.
- (39) In order to safeguard the fundamental freedom to receive information and to ensure that the interests of viewers in the European Union are fully and properly protected, those exercising exclusive television broadcasting rights to an event of high interest to the public should grant other broadcasters the right to use short extracts for the purposes of general news programmes on fair, reasonable and non-discriminatory terms taking due account of exclusive rights. Such terms should be communicated in

⁽¹⁾ Case C-355/98, *Commission v Belgium* [2000] ECR I-1221, paragraph 28; Case C-348/96, *Calfa* [1999] ECR I-0011, paragraph 23.

⁽²⁾ OJ L 378, 27.12.2006, p. 72.

a timely manner before the event of high interest to the public takes place to give others sufficient time to exercise such a right. A broadcaster should be able to exercise this right through an intermediary acting specifically on its behalf on a case-by-case basis. Such short extracts may be used for EU-wide broadcasts by any channel including dedicated sports channels and should not exceed ninety seconds.

The right of access to short extracts should apply on a trans-frontier basis only where it is necessary. Therefore a broadcaster should first seek access from a broadcaster established in the same Member State having exclusive rights to the event of high interest to the public.

The notion of general news programmes should not cover the compilation of short extracts into programmes serving entertainment purposes.

The country of origin principle should apply to both the access to and the transmission of, the short extracts. In a trans-frontier case, this means that the different laws should be applied sequentially. Firstly, for access to the short extracts the law of the Member State where the broadcaster supplying the initial signal (i.e. giving access) is established should apply. This is usually the Member State in which the event concerned takes place. Where a Member State has established an equivalent system of access to the event concerned, the law of that Member State should apply in any case. Secondly, for transmission of the short extracts, the law of the Member State where the broadcaster transmitting the short extracts is established should apply.

- (40) The requirements of this Directive regarding access to events of high interest to the public for the purpose of short news reports should be without prejudice to Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ⁽¹⁾ and the relevant international conventions in the field of copyright and neighbouring rights. Member States should facilitate access to events of high interests to the public by granting access to the broadcaster's signal within the meaning of this Directive. However, they may choose other equivalent means within the meaning of this Directive. Such means include, *inter alia*,

granting access to the venue of these events prior to granting access to the signal. Broadcasters should not be prevented from concluding more detailed contracts.

- (41) It should be ensured that the practice of media service providers of providing their live television broadcast news programmes in the on-demand mode after live transmission is still possible without having to tailor the individual programme by omitting the short extracts. This possibility should be restricted to the on-demand supply of the identical television broadcast programme by the same media service provider, so it may not be used to create new on-demand business models based on short extracts.
- (42) On-demand audiovisual media services are different from television broadcasting with regard to the choice and control the user can exercise, and with regard to the impact they have on society ⁽²⁾. This justifies imposing lighter regulation on on-demand audiovisual media services, which should comply only with the basic rules provided for in this Directive.
- (43) Because of the specific nature of audiovisual media services, especially the impact of these services on the way people form their opinions, it is essential for users to know exactly who is responsible for the content of these services. It is therefore important for Member States to ensure that users have easy and direct access at any time to information about the media service provider. It is for each Member State to decide the practical details as to how this objective can be achieved without prejudice to any other relevant provisions of Community law.
- (44) The availability of harmful content in audiovisual media services continues to be a concern for legislators, the media industry and parents. There will also be new challenges, especially in connection with new platforms and new products. It is therefore necessary to introduce rules to protect the physical, mental and moral development of minors as well as human dignity in all audiovisual media services, including audiovisual commercial communications.
- (45) Measures taken to protect the physical, mental and moral development of minors and human dignity should be carefully balanced with the fundamental right to freedom of expression as laid down in the Charter on Fundamental Rights of the European Union. The aim of those measures, such as the use of personal identification numbers (PIN codes), filtering systems or labelling, should thus be to ensure an adequate level of protection of the physical, mental and moral development of minors and human dignity, especially with regard to on-demand audiovisual media services.

⁽¹⁾ OJ L 167, 22.6.2001, p. 10.

⁽²⁾ Case C-89/04, Mediakabel.

The Recommendation on the protection of minors and human dignity and on the right of reply already recognised the importance of filtering systems and labelling and included a number of possible measures for the benefit of minors, such as systematically supplying users with an effective, updatable and easy-to-use filtering system when they subscribe to an access provider or equipping the access to services specifically intended for children with automatic filtering systems.

- (46) Media service providers under the jurisdiction of the Member States should in any case be subject to a ban on the dissemination of child pornography according to the provisions of Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography ⁽¹⁾.
- (47) None of the provisions introduced by this Directive that concern the protection of physical, mental and moral development of minors and human dignity necessarily requires that the measures taken to protect those interests should be implemented through prior verification of audiovisual media services by public bodies.
- (48) On-demand audiovisual media services have the potential to partially replace television broadcasting. Accordingly, they should, where practicable, promote the production and distribution of European works and thus contribute actively to the promotion of cultural diversity. Such support for European works might, for example, take the form of financial contributions by such services to the production of and acquisition of rights in European works, a minimum share of European works in video-on-demand catalogues, or the attractive presentation of European works in electronic programme guides. It is important to regularly re-examine the application of the provisions relating to the promotion of European works by audiovisual media services. Within the framework of the reports set out under this Directive Member States should also take into account notably the financial contribution by such services to the production and rights acquisition of European works, the share of European works in the catalogue of audiovisual media services, and in the actual consumption of European works offered by such services.
- (49) When defining 'producers who are independent of broadcasters' as referred to in Article 5 of Directive 89/552/EEC, Member States should take appropriate account notably of criteria such as the ownership of the production company, the amount of programmes supplied to the same broadcaster and the ownership of secondary rights.
- (50) When implementing the provisions of Article 4 of Directive 89/552/EEC, Member States should encourage broad-

casters to include an adequate share of co-produced European works or of European works of non-domestic origin.

- (51) It is important to ensure that cinematographic works are transmitted within periods agreed between right holders and media service providers.
- (52) The availability of on-demand audiovisual media services increases the choice of the consumer. Detailed rules governing audiovisual commercial communication for on-demand audiovisual media services thus appear neither to be justified nor to make sense from a technical point of view. Nevertheless, all audiovisual commercial communication should respect not only the identification rules but also a basic tier of qualitative rules in order to meet clear public policy objectives.
- (53) The right of reply is an appropriate legal remedy for television broadcasting and could also be applied in the on-line environment. The Recommendation on the protection of minors and human dignity and on the right of reply already includes appropriate guidelines for the implementation of measures in national law or practice so as to ensure sufficiently the right of reply or equivalent remedies in relation to on-line media.
- (54) As has been recognised by the Commission in its Interpretative Communication on certain aspects of the provisions on advertising in the 'Television without frontiers' Directive ⁽²⁾, the development of new advertising techniques and marketing innovations has created new effective opportunities for audiovisual commercial communications in traditional broadcasting services, potentially enabling them better to compete on a level playing-field with on-demand innovations.
- (55) Commercial and technological developments give users increased choice and responsibility in their use of audiovisual media services. In order to remain proportionate with the goals of general interest, regulation should allow a certain degree of flexibility with regard to television broadcasting. The principle of separation should be limited to television advertising and teleshopping, product placement should be allowed under certain circumstances, unless a Member State decides otherwise, and some quantitative restrictions should be abolished. However, where product placement is surreptitious, it should be prohibited. The principle of separation should not prevent the use of new advertising techniques.
- (56) Apart from the practices that are covered by this Directive, Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the

⁽¹⁾ OJ L 13, 20.1.2004, p. 24.

⁽²⁾ OJ C 102, 28.4.2004, p. 2.

internal market ⁽¹⁾ applies to unfair commercial practices, such as misleading and aggressive practices occurring in audiovisual media services. Moreover, as Directive 2003/33/EC of the European Parliament and of the Council of 26 May 2003 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products ⁽²⁾, which prohibits advertising and sponsorship for cigarettes and other tobacco products in printed media, information society services and radio broadcasting, is without prejudice to Directive 89/552/EEC, in view of the special characteristics of audiovisual media services, the relation between Directive 2003/33/EC and Directive 89/552/EEC should remain the same after the entry into force of this Directive. Article 88(1) of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use ⁽³⁾ which prohibits advertising to the general public of certain medicinal products applies, as provided in paragraph 5 of that Article, without prejudice to Article 14 of Directive 89/552/EEC. The relation between Directive 2001/83/EC and Directive 89/552/EEC should remain the same after the entry into force of this Directive. Furthermore, this Directive should be without prejudice to Regulation (EC) No 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods ⁽⁴⁾.

- (57) Given the increased possibilities for viewers to avoid advertising through use of new technologies such as digital personal video recorders and increased choice of channels, detailed regulation with regard to the insertion of spot advertising with the aim of protecting viewers is no longer justified. While this Directive should not increase the hourly amount of admissible advertising, it should give flexibility to broadcasters with regard to its insertion where this does not unduly impair the integrity of programmes.
- (58) This Directive is intended to safeguard the specific character of European television, where advertising is preferably inserted between programmes, and therefore limits possible interruptions to cinematographic works and films made for television as well as interruptions to some categories of programmes that still need specific protection.
- (59) The limitation that existed on the amount of daily television advertising was largely theoretical. The hourly limit is more important since it also applies during 'prime time'. Therefore the daily limit should be abolished, while the hourly limit should be maintained for television advertising and teleshopping spots. The restrictions on

the time allowed for teleshopping or advertising channels seem no longer justified given increased consumer choice. However, the limit of 20 % of television advertising spots and teleshopping spots per clock hour remains applicable. The notion of a television advertising spot should be understood as television advertising in the sense of Article 1(i) of Directive 89/552/EEC as amended by this Directive having a duration of not more than twelve minutes.

- (60) Surreptitious audiovisual commercial communication is a practice prohibited by this Directive because of its negative effect on consumers. The prohibition of surreptitious audiovisual commercial communication should not cover legitimate product placement within the framework of this Directive, where the viewer is adequately informed of the existence of product placement. This can be done by signalling the fact that product placement is taking place in a given programme, for example by means of a neutral logo.
- (61) Product placement is a reality in cinematographic works and in audiovisual works made for television, but Member States regulate this practice differently. In order to ensure a level playing field, and thus enhance the competitiveness of the European media industry, it is necessary to adopt rules for product placement. The definition of product placement introduced by this Directive should cover any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration. The provision of goods or services free of charge, such as production props or prizes, should only be considered to be product placement if the goods or services involved are of significant value. Product placement should be subject to the same qualitative rules and restrictions applying to audiovisual commercial communication. The decisive criterion distinguishing sponsorship from product placement is the fact that in product placement the reference to a product is built into the action of a programme which is why the definition in Article 1(m) of Directive 89/552/EEC as amended by this Directive contains the word 'within'. In contrast, sponsor references may be shown during a programme but are not part of the plot.
- (62) Product placement should, in principle, be prohibited. However, derogations are appropriate for some kinds of programme, on the basis of a positive list. A Member State should be able to opt-out of these derogations, totally or partially, for example by permitting product placement only in programmes which have not been produced exclusively in that Member State.

⁽¹⁾ OJ L 149, 11.6.2005, p. 22.

⁽²⁾ OJ L 152, 20.6.2003, p. 16.

⁽³⁾ OJ L 311, 28.11.2001, p. 67. Directive as last amended by Regulation (EC) No 1901/2006 (OJ L 378, 27.12.2006, p. 1).

⁽⁴⁾ OJ L 404, 30.12.2006, p. 9. Corrected version in OJ L 12, 18.1.2007, p. 3.

(63) Furthermore, sponsorship and product placement should be prohibited where they influence the content of programmes in such a way as to affect the responsibility and the editorial independence of the media service provider. This is the case with regard to thematic placement.

(64) The right of persons with a disability and of the elderly to participate and be integrated in the social and cultural life of the Community is inextricably linked to the provision of accessible audiovisual media services. The means to achieve accessibility should include, but need not be limited to sign language, subtitling, audio-description and easily understandable menu navigation.

(65) According to the duties conferred upon Member States by the Treaty, they are responsible for the transposition and effective implementation of this Directive. They are free to choose the appropriate instruments according to their legal traditions and established structures, and notably the form of their competent independent regulatory bodies, in order to be able to carry out their work in implementing this Directive impartially and transparently. More specifically, the instruments chosen by Member States should contribute to the promotion of media pluralism.

(66) Close cooperation between competent Member States' regulatory bodies and the Commission is necessary to ensure the correct application of this Directive. Similarly close cooperation between Member States and between Member States' regulatory bodies is particularly important with regard to the impact broadcasters established in one Member State might have on another Member State. Where licensing procedures are provided for in national law and if more than one Member State is concerned, it is desirable that contacts between the respective bodies take place before such licences are granted. This cooperation should cover all fields coordinated by Directive 89/552/EEC as amended by this Directive and in particular Articles 2, 2a and 3 thereof.

(67) Since the objectives of this Directive, namely creation of an area without internal frontiers for audiovisual media services whilst ensuring at the same time a high level of protection of objectives of general interest, in particular the protection of minors and human dignity as well as promoting the rights of persons with disabilities, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, 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 these objectives.

(68) In accordance with point 34 of the Interinstitutional agreement on better law-making ⁽¹⁾, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 89/552/EEC is hereby amended as follows:

1. the title shall be replaced by the following:

'Directive 89/552/EEC of 3 October 1989 of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)';

2. Article 1 shall be replaced by the following:

'Article 1

For the purpose of this Directive:

(a) "audiovisual media service" means:

— a service as defined by Articles 49 and 50 of the Treaty which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes in order to inform, entertain or educate, to the general public by electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC. Such an audiovisual media service is either a television broadcast as defined in point (e) of this Article or an on-demand audiovisual media service as defined in point (g) of this Article,

and/or

— audiovisual commercial communication;

(b) "programme" means a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and whose form and content is comparable to the form and content of television broadcasting. Examples of programmes include feature-length films, sports events, situation comedies, documentaries, children's programmes and original drama;

⁽¹⁾ OJ C 321, 31.12.2003, p. 1.

- (c) “editorial responsibility” means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided;
- (d) “media service provider” means the natural or legal person who has editorial responsibility for the choice of the audiovisual content of the audiovisual media service and determines the manner in which it is organised;
- (e) “television broadcasting” or “television broadcast” (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule;
- (f) “broadcaster” means a media service provider of television broadcasts;
- (g) “on-demand audiovisual media service” (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider;
- (h) “audiovisual commercial communication” means images with or without sound which are designed to promote, directly or indirectly, the goods, services or image of a natural or legal entity pursuing an economic activity. Such images accompany or are included in a programme in return for payment or for similar consideration or for self-promotional purposes. Forms of audiovisual commercial communication include, *inter alia*, television advertising, sponsorship, teleshopping and product placement;
- (i) “television advertising” means any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations, in return for payment;
- (j) “surreptitious audiovisual commercial communication” means the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the media service provider to serve as advertising and might mislead the public as to its nature. Such representation shall, in particular, be considered as intentional if it is done in return for payment or for similar consideration;
- (k) “sponsorship” means any contribution made by a public or private undertaking or natural person not engaged in providing audiovisual media services or in the production of audio-visual works, to the financing of audiovisual media services or programmes with a view to promoting its name, its trade mark, its image, its activities or its products;
- (l) “teleshopping” means direct offers broadcast to the public with a view to the supply of goods or services, including immovable property, rights and obligations, in return for payment;
- (m) “product placement” means any form of audiovisual commercial communication consisting of the inclusion of or reference to a product, a service or the trade mark thereof so that it is featured within a programme, in return for payment or for similar consideration;
- (n) (i) “European works” means the following:
- works originating in Member States,
 - works originating in European third States- party to the European Convention on Transfrontier Television of the Council of Europe and fulfilling the conditions of point (ii),
 - works co-produced within the framework of agreements related to the audiovisual sector concluded between the Community and third countries and fulfilling the conditions defined in each of those agreements.
- Application of the provisions of the second and third indents shall be conditional on works originating in Member States not being the subject of discriminatory measures in the third country concerned;
- (ii) The works referred to in the first and second indents of point (i) are works mainly made with authors and workers residing in one or more of the States referred to in the first and second indents of point (i) provided that they comply with one of the following three conditions:
- they are made by one or more producers established in one or more of those States, or
 - production of the works is supervised and actually controlled by one or more producers established in one or more of those States, or
 - the contribution of co-producers of those States to the total co-production costs is preponderant and the co-production is not controlled by one or more producers established outside those States.

- (iii) Works that are not European works within the meaning of point (i) but that are produced within the framework of bilateral co-production treaties concluded between Member States and third countries shall be deemed to be European works provided that the co-producers from the Community supply a majority share of the total cost of production and that the production is not controlled by one or more producers established outside the territory of the Member States.;

3. Article 2 shall be replaced by the following:

'Article 2

1. Each Member State shall ensure that all audiovisual media services transmitted by media service providers under its jurisdiction comply with the rules of the system of law applicable to audiovisual media services intended for the public in that Member State.

2. For the purposes of this Directive, the media service providers under the jurisdiction of a Member State are those:

(a) established in that Member State in accordance with paragraph 3; or

(b) to whom paragraph 4 applies.

3. For the purposes of this Directive, a media service provider shall be deemed to be established in a Member State in the following cases:

(a) the media service provider has its head office in that Member State and the editorial decisions about the audiovisual media service are taken in that Member State;

(b) if a media service provider has its head office in one Member State but editorial decisions on the audiovisual media service are taken in another Member State, it shall be deemed to be established in the Member State where a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates. If a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in each of those Member States, the media service provider shall be deemed to be established in the Member State where it has its head office. If a significant part of the workforce involved in the pursuit of the audiovisual media service activity operates in neither of those Member States, the media service provider shall be deemed to be established in the Member State where it first began its activity in accordance with the law of that Member State, provided that it maintains a stable and effective link with the economy of that Member State;

(c) if a media service provider has its head office in a Member State but decisions on the audiovisual media service are taken in a third country, or *vice-versa*, it shall be deemed to be established in the Member State concerned, provided that a significant part of the work-

force involved in the pursuit of the audiovisual media service activity operates in that Member State.

4. Media service providers to whom the provisions of paragraph 3 are not applicable shall be deemed to be under the jurisdiction of a Member State in the following cases:

(a) they use a satellite up-link situated in that Member State;

(b) although they do not use a satellite up-link situated in that Member State, they use satellite capacity appertaining to that Member State.

5. If the question as to which Member State has jurisdiction cannot be determined in accordance with paragraphs 3 and 4, the competent Member State shall be that in which the media service provider is established within the meaning of Articles 43 to 48 of the Treaty.

6. This Directive does not apply to audiovisual media services intended exclusively for reception in third countries and which are not received with standard consumer equipment directly or indirectly by the public in one or more Member States.;

4. Article 2a is hereby amended as follows:

(a) paragraph 1 shall be replaced by the following:

'1. Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of audiovisual media services from other Member States for reasons which fall within the fields coordinated by this Directive.;

(b) in paragraph 2 the introductory phrase and point (a) shall be replaced by the following:

'2. In respect of television broadcasting, Member States may, provisionally, derogate from paragraph 1 if the following conditions are fulfilled:

(a) a television broadcast coming from another Member State manifestly, seriously and gravely infringes Article 22(1) or (2) and/or Article 3(b).;

(c) the following paragraphs shall be added:

'4. In respect of on-demand audiovisual media services, Member States may take measures to derogate from paragraph 1 in respect of a given service if the following conditions are fulfilled:

(a) the measures are:

(i) necessary for one of the following reasons:

— public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

- the protection of public health,
- public security, including the safeguarding of national security and defence,
- the protection of consumers, including investors;

(ii) taken against an on-demand audiovisual media service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

(b) before taking the measures in question and without prejudice to court proceedings, including preliminary proceedings and acts carried out in the framework of a criminal investigation, the Member State has:

— asked the Member State under whose jurisdiction the media service provider falls to take measures and the latter did not take such measures, or they were inadequate,

— notified the Commission and the Member State under whose jurisdiction the media service provider falls of its intention to take such measures.

5. Member States may, in the case of urgency, derogate from the conditions stipulated in paragraph 4(b). Where this is the case, the measures shall be notified in the shortest possible time to the Commission and to the Member State under whose jurisdiction the media service provider falls, indicating the reasons for which the Member State considers that there is urgency.

6. Without prejudice to the Member State's possibility of proceeding with the measures referred to in paragraphs 4 and 5, the Commission shall examine the compatibility of the notified measures with Community law in the shortest possible time. Where it comes to the conclusion that the measures are incompatible with Community law, the Commission shall ask the Member State in question to refrain from taking any proposed measures or urgently to put an end to the measures in question.;

5. Article 3 shall be replaced by the following:

'Article 3

1. Member States shall remain free to require media service providers under their jurisdiction to comply with more detailed or stricter rules in the fields coordinated by this Directive provided that such rules are in compliance with Community law.

2. In cases where a Member State:

(a) has exercised its freedom under paragraph 1 to adopt more detailed or stricter rules of general public interest; and

(b) assesses that a broadcaster under the jurisdiction of another Member State provides a television broadcast which is wholly or mostly directed towards its territory;

it may contact the Member State having jurisdiction with a view to achieving a mutually satisfactory solution to any problems posed. On receipt of a substantiated request by the first Member State, the Member State having jurisdiction shall request the broadcaster to comply with the rules of general public interest in question. The Member State having jurisdiction shall inform the first Member State of the results obtained following this request within two months. Either Member State may invite the contact committee established under Article 23a to examine the case.

3. Where the first Member State assesses:

(a) that the results achieved through the application of paragraph 2 are not satisfactory; and

(b) that the broadcaster in question has established itself in the Member State having jurisdiction in order to circumvent the stricter rules, in the fields coordinated by this Directive, which would be applicable to it if it were established within the first Member State,

it may adopt appropriate measures against the broadcaster concerned.

Such measures shall be objectively necessary, applied in a non-discriminatory manner and be proportionate to the objectives which they pursue.

4. A Member State may take measures pursuant to paragraph 3 only if the following conditions are met:

(a) it has notified the Commission and the Member State in which the broadcaster is established of its intention to take such measures while substantiating the grounds on which it bases its assessment; and

(b) the Commission has decided that the measures are compatible with Community law, and in particular that assessments made by the Member State taking these measures under paragraphs 2 and 3 are correctly founded.

5. The Commission shall decide within three months following the notification provided for in paragraph 4(a). If the Commission decides that the measures are incompatible with Community law, the Member State in question shall refrain from taking the proposed measures.

6. Member States shall, by appropriate means, ensure, within the framework of their legislation, that media service providers under their jurisdiction effectively comply with the provisions of this Directive.

7. Member States shall encourage co- and/or self-regulatory regimes at national level in the fields coordinated by this Directive to the extent permitted by their legal systems. These regimes shall be such that they are broadly accepted by the main stakeholders in the Member States concerned and provide for effective enforcement.

8. Directive 2000/31/EC shall apply unless otherwise provided for in this Directive. In the event of a conflict between a provision of Directive 2000/31/EC and a provision of this Directive, the provisions of this Directive shall prevail, unless otherwise provided for in this Directive.’;

6. Article 3a shall be deleted;

7. the following Chapter shall be inserted:

‘CHAPTER IIa

Provisions applicable to all audiovisual media services

Article 3a

Member States shall ensure that audiovisual media service providers under their jurisdiction shall make easily, directly and permanently accessible to the recipients of a service at least the following information:

- (a) the name of the media service provider;
- (b) the geographical address at which the media service provider is established;
- (c) the details of the media service provider, including his electronic mail address or website, which allow him to be contacted rapidly in a direct and effective manner;
- (d) where applicable, the competent regulatory or supervisory bodies.

Article 3b

Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.

Article 3c

Member States shall encourage media service providers under their jurisdiction to ensure that their services are gradually made accessible to people with a visual or hearing disability.

Article 3d

Member States shall ensure that media service providers under their jurisdiction do not transmit cinematographic works outside periods agreed with the rights holders.

Article 3e

1. Member States shall ensure that audiovisual commercial communications provided by media service providers under their jurisdiction comply with the following requirements:

- (a) audiovisual commercial communications shall be readily recognisable as such. Surreptitious audiovisual commercial communication shall be prohibited;

(b) audiovisual commercial communications shall not use subliminal techniques;

(c) audiovisual commercial communications shall not:

- (i) prejudice respect for human dignity;
- (ii) include or promote any discrimination based on sex, racial or ethnic origin, nationality, religion or belief, disability, age or sexual orientation;
- (iii) encourage behaviour prejudicial to health or safety;
- (iv) encourage behaviour grossly prejudicial to the protection of the environment;

(d) all forms of audiovisual commercial communications for cigarettes and other tobacco products shall be prohibited;

(e) audiovisual commercial communications for alcoholic beverages shall not be aimed specifically at minors and shall not encourage immoderate consumption of such beverages;

(f) audiovisual commercial communication for medicinal products and medical treatment available only on prescription in the Member State within whose jurisdiction the media service provider falls shall be prohibited;

(g) audiovisual commercial communications shall not cause physical or moral detriment to minors. Therefore they shall not directly exhort minors to buy or hire a product or service by exploiting their inexperience or credulity, directly encourage them to persuade their parents or others to purchase the goods or services being advertised, exploit the special trust minors place in parents, teachers or other persons, or unreasonably show minors in dangerous situations.

2. Member States and the Commission shall encourage media service providers to develop codes of conduct regarding inappropriate audiovisual commercial communication, accompanying or included in children's programmes, of foods and beverages containing nutrients and substances with a nutritional or physiological effect, in particular those such as fat, trans-fatty acids, salt/sodium and sugars, excessive intakes of which in the overall diet are not recommended.

Article 3f

1. Audiovisual media services or programmes that are sponsored shall meet the following requirements:

- (a) their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;

- (b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;
- (c) viewers shall be clearly informed of the existence of a sponsorship agreement. Sponsored programmes shall be clearly identified as such by the name, logo and/or any other symbol of the sponsor such as a reference to its product(s) or service(s) or a distinctive sign thereof in a appropriate way for programmes at the beginning, during and/or the end of the programmes.

2. Audiovisual media services or programmes shall not be sponsored by undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products.

3. The sponsorship of audiovisual media services or programmes by undertakings whose activities include the manufacture or sale of medicinal products and medical treatment may promote the name or the image of the undertaking, but shall not promote specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the media service provider falls.

4. News and current affairs programmes shall not be sponsored. Member States may choose to prohibit the showing of a sponsorship logo during children's programmes, documentaries and religious programmes.

Article 3g

1. Product placement shall be prohibited.
2. By way of derogation from paragraph 1, product placement shall be admissible, unless a Member State decides otherwise:
 - in cinematographic works, films and series made for audiovisual media services, sports programmes and light entertainment programmes, or
 - where there is no payment but only the provision of certain goods or services free of charge, such as production props and prizes, with a view to their inclusion in a programme.

The derogation provided for in the first indent shall not apply to children's programmes.

Programmes that contain product placement shall meet at least all of the following requirements:

- (a) their content and, in the case of television broadcasting, their scheduling shall in no circumstances be influenced in such a way as to affect the responsibility and editorial independence of the media service provider;
- (b) they shall not directly encourage the purchase or rental of goods or services, in particular by making special promotional references to those goods or services;

- (c) they shall not give undue prominence to the product in question;
- (d) viewers shall be clearly informed of the existence of product placement. Programmes containing product placement shall be appropriately identified at the start and the end of the programme, and when a programme resumes after an advertising break, in order to avoid any confusion on the part of the viewer.

By way of exception, Member States may choose to waive the requirements set out in point (d) provided that the programme in question has neither been produced nor commissioned by the media service provider itself or a company affiliated to the media service provider.

3. In any event programmes shall not contain product placement of:

- tobacco products or cigarettes or product placement from undertakings whose principal activity is the manufacture or sale of cigarettes and other tobacco products, or
- specific medicinal products or medical treatments available only on prescription in the Member State within whose jurisdiction the media service provider falls.

4. The provisions of paragraphs 1, 2 and 3 shall apply only to programmes produced after ... (*);

8. the following Chapter shall be inserted:

CHAPTER IIb

Provisions applicable only to on-demand audiovisual media services

Article 3h

Member States shall take appropriate measures to ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction which might seriously impair the physical, mental or moral development of minors are only made available in such a way that ensures that minors will not normally hear or see such on-demand audiovisual media services.

Article 3i

1. Member States shall ensure that on-demand audiovisual media services provided by media service providers under their jurisdiction promote, where practicable and by appropriate means, production of and access to European works. Such promotion could relate, *inter alia*, to the financial contribution made by such services to the production and rights acquisition of European works or to the share and/or prominence of European works in the catalogue of programmes offered by the on-demand audiovisual media service.

(*) Two years from the date of entry into force of this Directive.

2. Member States shall report to the Commission no later than... (*) and every four years thereafter on the implementation of paragraph 1.

3. The Commission shall, on the basis of the information provided by Member States and of an independent study, report to the European Parliament and the Council on the application of paragraph 1, taking into account the market and technological developments and the objective of cultural diversity.;

9. the following Chapter shall be inserted:

'CHAPTER IIc

Provisions concerning exclusive rights and short news reports in television broadcasting

Article 3j

1. Each Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events by live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society. It shall do so in a clear and transparent manner in due time. In so doing the Member State concerned shall also determine whether these events should be available by whole or partial live coverage, or where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage.

2. Member States shall immediately notify to the Commission any measures taken or to be taken pursuant to paragraph 1. Within a period of three months from the notification, the Commission shall verify that such measures are compatible with Community law and communicate them to the other Member States. It shall seek the opinion of the contact committee established pursuant to Article 23a. It shall forthwith publish the measures taken in the *Official Journal of the European Union* and at least once a year the consolidated list of the measures taken by Member States.

3. Member States shall ensure, by appropriate means within the framework of their legislation, that broadcasters under their jurisdiction do not exercise the exclusive rights purchased by those broadcasters following the date of publication of this Directive in such a way that a substantial proportion of the public in another Member State is deprived of the possibility of following events which are designated by that other Member State in accordance with paragraphs 1 and 2 by whole or partial live coverage or, where necessary or appropriate for objective reasons in the public interest, whole or partial deferred coverage on free television as determined by that other Member State in accordance with paragraph 1.

(*) Four years from the date of entry into force of this Directive.

Article 3k

1. Member States shall ensure that for the purpose of short news reports, any broadcaster established in the Community has access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction.

2. If another broadcaster established in the same Member State as the broadcaster seeking access has acquired exclusive rights to the event of high interest to the public, access shall be sought from that broadcaster.

3. Member States shall ensure that such access is guaranteed by allowing broadcasters to freely choose short extracts from the transmitting broadcaster's signal with, unless impossible for reasons of practicality, at least the identification of their source.

4. As an alternative to paragraph 3, Member States may establish an equivalent system which achieves access on a fair, reasonable and non-discriminatory basis through other means.

5. Short extracts shall be used solely for general news programmes and may be used in on-demand audiovisual media services only if the same programme is offered on a deferred basis by the same media service provider.

6. Without prejudice to paragraphs 1 to 5, Member States shall ensure, in accordance with their legal systems and practices, that the modalities and conditions regarding the provision of such short extracts are defined, in particular, any compensation arrangements, the maximum length of short extracts and time limits regarding their transmission. Where compensation is provided for, it shall not exceed the additional costs directly incurred in providing access.;

10. in Article 4(1), the phrase ' within the meaning of Article 6;' shall be deleted;

11. Articles 6 and 7 shall be deleted;

12. the title of Chapter IV shall be replaced by the following:

'Television advertising and teleshopping';

13. Article 10 shall be replaced by the following:

'Article 10

1. Television advertising and teleshopping shall be readily recognisable and distinguishable from editorial content. Without prejudice to the use of new advertising techniques, television advertising and teleshopping shall be kept quite distinct from other parts of the programme by optical and/or acoustic and/or spatial means.

2. Isolated advertising and teleshopping spots, other than in transmissions of sports events, shall remain the exception.;

14. Article 11 shall be replaced by the following:

'Article 11

1. Member States shall ensure, where television advertising or teleshopping is inserted during programmes, that the integrity of the programmes, taking into account natural breaks in and the duration and the nature of the programme, and the rights of the right holders are not prejudiced.

2. The transmission of films made for television (excluding series, serials and documentaries), cinematographic works and news programmes may be interrupted by television advertising and/or teleshopping once for each scheduled period of at least thirty minutes. The transmission of children's programmes may be interrupted by television advertising and/or teleshopping once for each scheduled period of at least thirty minutes, provided that the scheduled duration of the programme is greater than thirty minutes. No television advertising or teleshopping shall be inserted during religious services.;

15. Articles 12 and 13 shall be deleted;

16. Article 14(1) shall be deleted;

17. Articles 16 and 17 shall be deleted;

18. Article 18 shall be replaced by the following:

'Article 18

1. The proportion of television advertising spots and teleshopping spots within a given clock hour shall not exceed 20 %.

2. Paragraph 1 shall not apply to announcements made by the broadcaster in connection with its own programmes and ancillary products directly derived from those programmes, sponsorship announcements and product placements.;

19. Article 18a shall be replaced by the following:

'Article 18a

Teleshopping windows shall be clearly identified as such by optical and acoustic means and shall be of a minimum uninterrupted duration of fifteen minutes.;

20. Article 19 shall be replaced by the following:

'Article 19

The provisions of this Directive shall apply *mutatis mutandis* to television channels exclusively devoted to advertising and teleshopping as well as to television channels exclusively devoted to self-promotion. Chapter III as well as Article 11 and Article 18 shall not apply to these channels.;

21. Article 19a shall be deleted;

22. Article 20 shall be replaced by the following:

'Article 20

Without prejudice to Article 3, Member States may, with due regard for Community law, lay down conditions other than those laid down in Article 11(2) and Article 18 in respect of television broadcasts intended solely for the national territory which cannot be received, directly or indirectly by the public, in one or more other Member States.;

23. the title of Chapter V shall be replaced by following:

'Protection of minors in television broadcasting';

24. Articles 22a and 22b shall be deleted;

25. the title of Chapter VI shall be replaced by the following:

'Right of reply in television broadcasting';

26. in Article 23a, (2), point (e) shall be replaced by the following:

'(e) to facilitate the exchange of information between the Member States and the Commission on the situation and the development of regulatory activities regarding audiovisual media services, taking account of the Community's audiovisual policy, as well as relevant developments in the technical field;';

27. the following Chapter shall be inserted:

'CHAPTER VIb

Cooperation between Member States' regulatory bodies

Article 23b

Member States shall take appropriate measures to provide each other and the Commission with the information necessary for the application of the provisions of this Directive, in particular Articles 2, 2a and 3 thereof, notably through their competent independent regulatory bodies.;

28. Articles 25 and 25a shall be deleted;

29. Article 26 shall be replaced by the following:

'Article 26

Not later than... (*), and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive and, if necessary, make further proposals to adapt it to developments in the field of audiovisual media services, in particular in the light of recent technological developments, the competitiveness of the sector and levels of media literacy in all Member States.

(*) Four years from the date of entry into force of this Directive.

This report shall also assess the issue of television advertising accompanying or included in children's programmes, and in particular whether the quantitative and qualitative rules contained in this Directive have afforded the level of protection required.'

Article 2

Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws ⁽¹⁾ is hereby amended as follows:

— Point 4 of Annex 'Directives and Regulations covered by Article 3(a)' shall be replaced by the following:

'4. Directive 89/552/EEC of 3 October 1989 of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) ⁽²⁾: Articles 3h and 3i and Articles 10 to 20. Directive as last amended by Directive 2007/.../EC ^(*).

(*) OJ L ...'

Article 3

1. 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 a reference on the occasion of their official publication. The methods of making such references shall be laid down by Member States.

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

Article 4

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

Article 5

This Directive is addressed to the Member States.

Done at ...

For the European Parliament

The President

...

For the Council

The President

...

⁽¹⁾ OJ L 364, 9.12.2004, p. 1. Regulation as amended by Directive 2005/29/EC.

⁽²⁾ OJ L 298, 17.10.1989, p.23.

^(*) Two years from the date of entry into force of this Directive.

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

The Commission adopted its proposal on 13 December 2005.

The European Parliament adopted its opinion in first reading at its plenary session of 11-14 December 2006.

The Commission adopted an amended proposal on 29 March 2007.

On 15 October 2007 the Council adopted its common position in accordance with Article 251 of the Treaty.

In carrying out its work, the Council also took account of the opinions of the European Economic and Social Committee and the Committee of the Regions adopted on 13 September 2006 and 11 October 2006 respectively.

II. ANALYSIS OF THE COMMON POSITION

The common position reflects the outcome of informal contacts between the Parliament, the Commission and the Council as foreseen by paragraphs 16 to 18 of the Joint Declaration on Practical Arrangements for the Co-decision Procedure.

Although the common position contains some significant changes with regard to the Commission's initial proposal, both in structure and substance, the basic approach proposed by the Commission, as well as all the principal elements contained in its proposal, have been retained. The most significant changes are set out in Sections A and B below.

A. STRUCTURAL CHANGES

The Commission proposed a new two-tier regulatory architecture comprising a core of rules applicable to all audiovisual media services and an additional layer of obligations applicable only to television broadcasting. The common position retains this basic philosophy but introduces significant structural changes (introducing new Chapters and reordering certain Articles) to ensure that obligations applicable to all service providers are grouped separately from those applicable only to on-demand services, which are in turn grouped separately from those applicable only to television broadcasting. These structural changes greatly improve the readability and legal clarity of the text.

B. SUBSTANTIVE CHANGES

(i) **Scope (Article 1, points (a) to (e), Article 3(8) ⁽¹⁾, Recitals 2, 13, 14, 16-25)**

Relevant European Parliament amendments: 2, 15, 16, 18, 213, 20, 22, 23, 24, 25, 26, 27, 41, 51, 57, 66, 67, 68, 205, 77, 79, 92

The common position clarifies the extension to the scope of the Directive proposed by the Commission. The underlying philosophy is set out in Recitals 16 to 25. The most significant change to the Commission's proposal in this regard is the introduction of the notion of a 'programme', whilst the notion of 'editorial responsibility' has also been emphasised further. The common position has also sought to bring legal clarity regarding the relationship of the Directive with other legal instruments, in particular Directive 2000/31/EC (the eCommerce Directive).

⁽¹⁾ The Article numbering is that of Directive 89/552/EEC as amended by this Directive.

(ii) ***Jurisdiction and free movement of services (Articles 2, 2a and 3, Recitals 27 to 35)***

Relevant European Parliament amendments: 10, 14, 29, 30, 32, 33, 34, 35, 80, 81, 82, 199, 84, 85, 220, 221, 222, 89, 90

The common position supports the basic approach of the Commission's proposal, i.e. that jurisdiction should continue to be determined on the basis of the establishment of the service provider (country of origin principle) but that there should be a mechanism for dealing with cases where a television broadcast is directed wholly or mostly towards a Member State other than the one where the broadcaster is established. The common position text (Article 3) develops the mechanism proposed by the Commission, creating a first 'cooperation' phase, where mutually acceptable solutions are sought between the Member States involved, followed by a second 'circumvention' phase where in certain well-defined cases binding measures can be taken. This second phase, to which a Community procedure containing a number of conditions is attached, effectively seeks to codify in secondary legislation existing case law of the Court of Justice.

On the related question of free movement of services, and measures derogating from that principle, Article 2a of the common position maintains the legal *status quo*. With regard to on-demand services, the conditions and procedures for derogation (for a number of public policy reasons, including the need to protect minors) are exactly those of the eCommerce Directive 2000/31/EC.

(iii) ***Co- and self-regulation (Article 3(7) and Recital 36)***

Relevant European Parliament amendments: 36, 37, 78, 91

The common position recognises the important role of such 'soft law' by including in Article 3(7) an obligation on Member States to encourage co- and/or self-regulatory regimes to the extent permitted by their legal systems.

(iv) ***Product placement (Article 1(m), Article 3g, Recitals 60 to 63)***

Relevant European Parliament amendments: 56, 219, 61, 62, 72, 75, 76, 227, 133

The common position establishes the principle that product placement be prohibited for all programmes produced after the transposition deadline for the Directive. However, exemptions to this principle are provided for certain types of programme (films, series, sports and light entertainment) subject to certain conditions. These exemptions will apply automatically unless a Member State opts out of them. The requirement to identify product placement at the moment that a programme resumes after an advertising break has also been added, and the specific case of 'thematic placement' has been addressed in Recital 63.

(v) ***Other provisions on advertising, including that aimed at children (Articles 1, points (h) to (l), 3e, 3f, 10, 11, 18, 18a, 19, 20, Recitals 26, 52, 54 to 59)***

Relevant European Parliament amendments: 28, 58, 59, 70, 71, 73, 74, 110, 189, 200, 112, 113, 114, 115, 116, 117, 225, 226, 120, 121, 122, 123, 124, 125, 134, 138, 228, 208, 202, 229, 143, 144

The common position essentially follows the philosophy of the Commission proposal, whereby a core of 'qualitative' rules on audiovisual commercial communication are applied to all audiovisual media services, whilst the 'quantitative' rules, which apply only to television broadcasting, have been simplified and streamlined compared to the rules of the existing Directive, with a view to creating a regulatory environment in which the 'free-to-air' broadcasting model can continue to compete with subscription-based television channels.

The common position ensures additional protection for children. Article 3e(2) requires Member States and the Commission to encourage the development of codes of conduct regarding advertising of 'junk food' aimed at children, whilst the quantitative rules on interruption of programmes in Article 11(2) are stricter for children's programmes.

(vi) **Short news reports (Article 3k, Recitals 38 to 40)**

Relevant European Parliament amendments: 21, 218, 223, 224, 207, 97, 98

The Commission proposed a provision seeking to ensure the non-discriminative application of national systems aimed at guaranteeing, for the purpose of short news reports, broadcasters' access to events of high interest to the public. The common position text is more ambitious, in that it creates an obligation on Member States to establish such a system, thus in effect creating a Community-wide right. The key aspects of this right are harmonised by the text, whilst the detailed modalities and conditions of its application are left to Member States to decide in accordance with the principle of subsidiarity.

(vii) **Regulatory authorities (Article 23b, Recitals 65 and 66)**

Relevant European Parliament amendments: 13, 63, 147, 148, 149

The common position text reflects a sensitive compromise between the European Parliament and the Council on this issue. The heart of this compromise is found in the new Article 23b dealing with cooperation and the exchange of information.

(viii) **Protection of minors (Article 3h, Recitals 44 to 47)**

Relevant European Parliament amendments: 46, 47, 100, 101, 103, 14, 105, 145, 146

Whilst leaving the current provisions applicable to television broadcasting intact, the common position adds an obligation with regard to on-demand audiovisual media services. The obligation envisages that minors are protected by ensuring that are not normally able to access services which might seriously impair their physical, mental or moral development. The recitals refer to filtering systems and PIN codes as examples of measures that could be used. The recitals also draw attention to the Recommendation of the European Parliament and the Council of 20 December 2006 on the protection of minors and human dignity and on the right to reply.

(ix) **European Works (Article 3i and Recitals 48 to 50)**

Relevant European Parliament amendments: 49, 214, 52, 53, 108, 109, 137, 150

The provisions of the existing Directive applicable to television broadcasting are left untouched by the common position, although Recital 49 does recall the content of Recital 31 of the previous revision (Directive 97/36/EC) regarding 'independent producers'. With regard to on-demand audiovisual media services, however, media service providers have a new obligation to promote production of and access to European works.

(x) **Access of disabled persons to services (Article 3c)**

Relevant European Parliament amendments: 43, 65, 135

The common position contains an obligation on Member States to encourage service providers to ensure that their services are gradually made accessible to people with a visual or hearing disability.

(xi) **Media literacy (Article 26, Recitals 37)**

Relevant European Parliament amendments: 5, 8, 39, 45, 54, 93, 150

Recital 37 underlines the vital role of media literacy and also recalls the Recommendation of the European Parliament and the Council of 20 December 2006 which contains significant content relating to media literacy. According to Article 26, the Commission is now required, as part of its reporting obligations and when deciding on future proposals for adaptations of the Directive, to pay particular attention to media literacy levels in Member States.

(xii) **Right of reply (Recital 53)**

Relevant European Parliament amendments: 55, 136

The existing obligations relating to television broadcasting (Article 23) remain untouched. Recital 53 explains that the right of reply could also be applied as a legal remedy in the online environment and recalls the Recommendation on the protection of minors and human dignity and on the right to reply.

III. **CONCLUSION**

The common position, the result of informal negotiations between the European Parliament, the Council and the Commission, maintains the approach and legal architecture proposed by the Commission with a view to adapting the regulation of the audiovisual sector to market and technological change. Important clarifications have been made to the scope of the Directive and to the provisions dealing with jurisdiction, and a number of other important adjustments have been made, including on sensitive questions such as product placement, advertising (particularly to children), extracts for short news reports, regulatory authorities and access of disabled persons to services.

COMMON POSITION (EC) No 19/2007**adopted by the Council on 8 November 2007****with a view to adopting Directive 2007/.../EC of the European Parliament and of the Council of ...
amending Council Directive 97/67/EC with regard to the full accomplishment of the internal market
of Community postal services**

(2007/C 307 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 47(2), Articles 55 and 95 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Having regard to the opinion of the Committee of the Regions ⁽²⁾,

Acting in accordance with the procedure laid down in Article 251 of the Treaty ⁽³⁾,

Whereas:

- (1) The Council in its Resolution of 7 February 1994 on the development of Community Postal Services ⁽⁴⁾ identified as one of the main objectives of Community postal policy the reconciling of the gradual, controlled opening to competition of the postal market with a sustainable guarantee of the provision of the universal service.
- (2) Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service ⁽⁵⁾ established a regulatory framework for the postal sector at Community level, including measures to guarantee a universal service and the setting of maximum limits for the postal services which Member States may reserve to their universal service provider(s) with a view to the maintenance of the universal service, to be reduced in a gradual and progressive manner, and a timetable for decision-making on the further opening of the market to competition, for the purposes of creating an internal market in postal services.
- (3) Article 16 of the Treaty highlights the place occupied by services of general economic interest in the shared values of the European Union as well as their role in promoting social and territorial cohesion. It states that care should be taken that such services operate on the basis of principles and conditions which enable them to fulfil their missions.

- (4) The positive role played by services of general economic interest was emphasised by Special Eurobarometer 219 of October 2005 which indicated that postal services are the most appreciated services of general economic interest according to users throughout the EU, with 77 % of people questioned responding positively.

- (5) Since they constitute an essential instrument for communication and information exchange, postal services fulfil a vital role which contributes to the objectives of social, economic and territorial cohesion in the Union. Postal networks have important territorial and social dimensions which make universal access to essential local services possible.

- (6) The measures in the area of postal services should be designed in such a way that the tasks of the Community pursuant to Article 2 of the Treaty, namely, to promote throughout the Community a harmonious, balanced and sustainable development of economic activities, a high level of employment and of social protection, sustainable and non-inflationary growth, a high degree of competitiveness and convergence of economic performance, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States, are achieved as objectives.

- (7) European postal markets have undergone dramatic change in recent years, a development that has been driven by technological advancements and increased competition resulting from deregulation. Due to globalisation, it is essential to take a pro-active and pro-development stance so as not to deprive Union citizens of the benefits of such change.

- (8) In its Conclusions concerning the mid-term review of the Lisbon Strategy the European Council of 22 and 23 March 2005 re-stated the importance of completing the internal market as an instrument to foster growth and create more and better jobs, and the important role that effective services of general economic interest have to play in a competitive and dynamic economy. These Conclusions remain applicable to postal services as an essential instrument of communication, trade, and social and territorial cohesion.

⁽¹⁾ OJ C 168, 20.7.2007, p. 74.

⁽²⁾ OJ C 197, 24.8.2007, p. 37. Opinion delivered following non-compulsory consultation.

⁽³⁾ Opinion of the European Parliament of 11 July 2007 (not yet published in the Official Journal), Council Common Position of 8 November 2007 and Position of the European Parliament of ... (not yet published in the Official Journal).

⁽⁴⁾ OJ C 48, 16.2.1994, p. 3.

⁽⁵⁾ OJ L 15, 21.1.1998, p. 14. Directive as last amended by Regulation (EC) No 1882/2003 (OJ L 284, 31.10.2003, p. 1).

- (9) The European Parliament Resolution of 2 February 2006 on the application of the Postal Directive ⁽¹⁾ highlighted the social and economic importance of efficient postal services and their important role within the framework of the Lisbon Strategy, indicating that reform measures undertaken so far have brought about significant positive developments in the postal sector, along with increased quality, more efficiency and better user-orientation. In its Resolution, the European Parliament called on the Commission, in view of the sometimes perceptibly divergent developments in universal service obligations in the Member States, to concentrate in particular, when drawing up its prospective study, on the quality of the universal service provided and on its future funding and to propose, in the context of that study, a definition, scope and appropriate financing for the universal service.
- (10) In accordance with Directive 97/67/EC, a prospective study assessing, for each Member State, the impact on universal service of the full accomplishment of the internal market of Community postal services in 2009 has been carried out. The Commission has also undertaken a thorough review of the Community postal sector, including the commissioning of studies on the economic, social and technological developments in the sector, and has consulted extensively with interested parties.
- (11) The prospective study states that the basic aim of ensuring the sustainable provision of a universal service matching the standard of quality defined by the Member States in accordance with Directive 97/67/EC can be secured throughout the Community by 2009 without the need for a reserved area.
- (12) The progressive and gradual opening of postal markets to competition has provided universal service providers with sufficient time to put in place the necessary modernisation and restructuring measures required to ensure their long-term viability under new market conditions, and enabled Member States to adapt their regulatory systems to a more open environment. Furthermore, Member States may avail themselves of the opportunity offered by the transposition period, and the substantial time necessary for the introduction of effective competition, in order to proceed with further modernisation and restructuring of the universal service providers as necessary.
- (13) The prospective study shows that the reserved area should no longer be the preferred solution for the financing of the universal service. This assessment takes into account the interest of the Community and its Member States in the accomplishment of the internal market and its potential for delivering growth and employment, as well as ensuring the availability of an efficient service of general economic interest for all users. It is therefore appropriate to confirm the final date for the accomplishment of the internal market for postal services.
- (14) There are a number of drivers of change within the postal sector, notably demand and changing user needs, organisational change, automation and the introduction of new technologies, substitution by electronic means of communication and the opening of the market. In order to meet competition, cope with new consumer requirements and secure new sources of funding, postal service providers may diversify their activities by providing electronic business services or other information society services.
- (15) Postal service providers, including the designated universal service providers, are being spurred on to improve efficiency as a result of new competitive challenges (such as digitalisation and electronic communications) which differ from the traditional postal services and this will in itself contribute to a major increase in competitiveness.
- (16) Complete market-opening will help to expand the overall size of the postal markets. It will further contribute to maintaining sustainable and quality employment within universal service providers as well as facilitate the creation of new jobs in other operators, new entrants and associated economic sectors. This Directive is without prejudice to the competence of Member States to regulate employment conditions in the postal services sector, which should not, however, lead to unfair competition. Social considerations should be taken into due account when preparing the opening up of the postal market.
- (17) Transport alone should not be considered as a postal service. Direct mail consisting solely of advertising, marketing or publicity material and comprising an identical message, except for the addressee's name, address and identifying number, may be considered as an item of correspondence.
- (18) Increased competitiveness should furthermore enable the postal sector to be integrated with alternative methods of communication and allow the quality of the service provided to evermore demanding users to be improved.
- (19) Rural postal networks, in, *inter alia*, mountain and island regions, play an important role in integrating businesses into the national/global economy and in maintaining cohesion in social and employment terms. Furthermore, rural postal points in remote regions can provide an important infrastructure network for access to new electronic communications services.
- (20) Developments in the neighbouring communications markets have had a varied impact in different regions of the Community and segments of the population and on the use of postal services. Territorial and social cohesion should be maintained, and taking into account that Member States may adapt some specific service features to accommodate local demand by making use of the flexibility provided for in Directive 97/67/EC, it is appropriate to fully maintain the universal service and the associated quality requirements set out in Directive 97/67/EC.

⁽¹⁾ OJ C 288 E, 25.11.2006, p. 77.

It is appropriate to clarify, in line with existing practice, that Member States should provide clearance and delivery of mail only on the working days of the week that are not defined, by national legislation, as public holidays. In order to ensure that the opening of the market continues to benefit all users, in particular consumers and small and medium-sized enterprises, Member States should monitor and supervise market developments. They should take appropriate regulatory measures, available under Directive 97/67/EC, to ensure that accessibility to postal services continues to satisfy the needs of users, including, by ensuring, where appropriate, a minimum number of services at the same access point and, in particular, that there is an appropriate density of access points to postal services in rural and remote regions.

- (21) The universal service guarantees, in principle, one clearance and one delivery to the home or premises of every natural or legal person every working day, even in remote or sparsely populated areas.
- (22) The provision of high-quality postal services contributes significantly to attaining the objective of social and territorial cohesion. E-commerce, in particular, offers new opportunities for remote and sparsely populated areas to participate in economic life for which the provision of good postal services is an important precondition.
- (23) Directive 97/67/EC established a preference for the provision of the universal service through the designation of universal service providers. Member States may require that the universal service be provided throughout the whole of the national territory. Greater competition and choice means that Member States should be given further flexibility to determine the most efficient and appropriate mechanism to guarantee the availability of the universal service, while respecting the principles of objectivity, transparency, non-discrimination, proportionality and least market distortion necessary to ensure the free provision of postal services in the internal market. Member States may apply one or a combination of the following: the provision of the universal service by market forces, the designation of one or several undertakings to provide different elements of the universal service or to cover different parts of the territory and public procurement of services.

In the event that a Member State decides to designate one or more undertakings for the provision of the universal service, or for the provision of the various components of the universal service, it must be ensured that quality requirements pertaining to the universal service are imposed in a transparent and proportionate manner on the universal service providers. Where a Member State designates more than one undertaking, it should ensure that there is no overlap in the universal service obligations.

- (24) It is important that users be fully informed of the universal services provided and that postal service providers be informed of the rights and obligations of

universal service provider(s). Member States should ensure that users remain fully informed of the features and accessibility of the specific services provided. Member States should ensure that all such information is made available. It is however appropriate, in line with the enhanced flexibility given in favour of Member States, to ensure the provision of the universal service in ways other than the designation of the universal service provider(s), in order to give Member States the flexibility to decide how such information is to be made available to the public.

- (25) In the light of the studies carried out and with a view to unlocking the full potential of the internal market for postal services, it is appropriate to end the use of the reserved area and special rights as a means of ensuring that the universal service is financed.
- (26) The external financing of the residual net costs of the universal service may still be necessary for some Member States. It is therefore appropriate to explicitly clarify the alternatives available in order to ensure the financing of the universal service, to the extent that this is needed and is adequately justified, while leaving Member States the choice of the financing mechanisms to be used. These alternatives include the use of public procurement procedures including, as provided for in the public procurement Directives, competitive dialogue or negotiated procedures with or without the publication of a contract notice and, whenever universal service obligations entail net costs of the universal service and represent an unfair burden on the designated universal service provider, public compensation and cost sharing between service providers and/or users in a transparent manner by means of contributions to a compensation fund. Member States may use other means of financing permitted by Community law, such as deciding, where and if necessary, that the profits accruing from other activities of the universal service provider(s) outside the scope of the universal service are to be assigned, in whole or in part, to the financing of the net costs of the universal service, as long as this is in line with the Treaty. Without prejudice to the obligation of Member States to uphold the Treaty rules on State aid, including specific notification requirements in this context, Member States may notify the Commission of the financing mechanisms used to cover any net costs of the universal service, which should be reflected in the regular reports that the Commission should present to the European Parliament and Council on the application of Directive 97/67/EC.
- (27) Postal service providers may be required to contribute to the financing of the universal service in cases where provision is made for a compensation fund. In order to determine which undertakings may be required to contribute to a compensation fund, Member States should consider whether the services provided by such undertakings may, from a user's perspective, be regarded as services falling within the scope of the universal service,

as they display inter-changeability to a sufficient degree with the universal service, taking into account the characteristics of the services, including added value features, as well as the intended use and the pricing. These services do not necessarily have to cover all the features of the universal service, such as daily delivery or complete national coverage.

- (28) In order to comply with the principle of proportionality when determining the contribution to be made to the costs of the provision of the universal service in a Member State required from these undertakings, Member States should use transparent and non-discriminatory criteria such as the share of these undertakings in the activities falling within the scope of the universal service in this Member State. Member States may require those providers which are required to contribute to a compensation fund to introduce appropriate accounting separation in order to ensure the functioning of the fund.
- (29) The principles of transparency, non-discrimination and proportionality, as presently provided for in Directive 97/67/EC, should continue to be applied to any financing mechanism and any decision in this area should be based on transparent, objective and verifiable criteria. In particular, the net cost of the universal service should be calculated, under the supervision of the national regulatory authority, as the difference between the net costs of a designated universal service provider operating under a universal service obligation and not operating under a universal service obligation. The calculation should take into account all other relevant elements, including any market benefits which accrue to a postal service provider designated to provide universal service, the entitlement to a reasonable profit and incentives for cost efficiency.
- (30) In cases where Member States decide to make accessible to the public, on their national territory, additional or complementary services, with the exception of those relating to the universal service obligations, as defined in this Directive, such as pensions and postal orders delivery in rural areas, these services should not be subject to any compensation mechanisms requiring the contribution of specific undertakings. Where appropriate, Member States may grant financing for such additional or complementary services in accordance with the Treaty rules on State aid. Except in the case of universal service provider(s), the authorisations may not be made subject to the obligation to provide such additional services.
- (31) It is appropriate to provide Member States that have acceded to the Union after the entry into force of Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services ⁽¹⁾ and may have faced particular difficulties regarding the smooth adaptation of their postal markets because they joined the postal reform process at a late stage, and certain Member States

with a small population and a limited geographical size having specific characteristics that are particular to postal services or with a particularly difficult topography, with a huge number of islands with the possibility to postpone the implementation of this Directive for a limited period of time, in order to continue to reserve services to their universal service provider(s), subject to notification to the Commission. Taking into account the exceptional nature of such a possibility, it is also appropriate, within this limited period of time and for a limited number of services, to allow those Member States that have completely opened up their markets to refuse monopolies operating in another Member State authorisation to operate in their own territory.

- (32) The Commission should provide assistance to the Member States on the different aspects of the implementation of this Directive, including on the calculation of any net cost. Moreover, cooperation between national regulatory authorities in continuing to develop benchmarks and guidance in this area should contribute to the harmonised application of this Directive.
- (33) Member States should be allowed to use general authorisations and individual licences whenever justified and proportionate to the objective pursued. However, as highlighted by the Third report on the application of Directive 97/67/EC, further harmonisation of the conditions that may be introduced appears necessary in order to reduce unjustified barriers to the provision of services in the internal market. In this context, Member States may for example allow postal service providers to choose between the obligation to provide a service or to contribute financially to the costs of this service provided by another provider, but should no longer be allowed to impose concurrently a requirement to contribute to a sharing mechanism and universal service or quality obligations that are intended to serve the same purpose. It is also appropriate to clarify that some of the provisions on general authorisations and licensing should not apply to designated universal service providers.
- (34) In an environment where several postal undertakings provide services within the universal service area, it is appropriate to require all Member States to assess whether some elements of the postal infrastructure or certain services generally provided by universal service providers should be made accessible to other operators providing similar services, in order to promote effective competition, and/or protect all users by ensuring the overall quality of the postal service. Where several universal service providers with regional postal networks exist, Member States should also assess and, where necessary, ensure their interoperability in order to prevent impediments to the prompt transport of postal items. As the legal and market situation of these elements or services is different among the Member States it is appropriate to only require Member States to adopt an

⁽¹⁾ OJ L 176, 5.7.2002, p. 21.

informed decision on the need, extent and choice of the regulatory instrument, including where appropriate on cost sharing. This provision is without prejudice to the right of Member States to adopt measures to ensure access to the postal network under conditions of transparency and non-discrimination.

- (35) Member States should ensure that postal service providers, when processing personal data pursuant to Directive 97/67/EC, apply Community and national provisions on the protection of personal data, in particular those laid down by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ⁽¹⁾.
- (36) The provisions of this Directive should be without prejudice to national provisions governing the expropriation conditions for organising the universal service provision.
- (37) Given the importance of postal services for blind and partially-sighted persons, it is appropriate to confirm that the opening of the market should not prevent the continuing provision by the universal service provider(s) of certain free services for blind and partially-sighted persons introduced by the Member States in accordance with applicable international obligations.
- (38) In a fully competitive environment, it is important, both for the financial equilibrium of the universal service as well as for limiting market distortions, that the principle that prices reflect normal commercial conditions and costs is only departed from in order to protect public interests. This objective should be achieved by continuing to allow Member States to maintain uniform tariffs for single piece tariff mail, the service most frequently used by consumers, including small and medium-sized enterprises. Member States may also maintain uniform tariffs for some other mail items, such as, for example, newspapers and books, to protect general public interests, such as access to culture, ensuring participation in a democratic society (freedom of press) or regional and social cohesion.
- (39) For the provision of services for all users, including businesses, bulk mailers and consolidators of mail from different users, universal service providers may enjoy more price flexibility in line with the cost-orientation principle. Tariffs should take account of the avoided costs, as compared to the standard service covering the complete range of features offered for the clearance, sorting, transport and distribution of individual postal items.

- (40) In view of the national specificities involved in the regulation of the conditions under which the incumbent universal service provider must operate in a fully competitive environment, it is appropriate to leave Member States the freedom to decide how best to monitor cross-subsidies.

- (41) In view of the transition towards a fully competitive market, and in order to prevent cross-subsidies from adversely affecting competition, it is appropriate to continue to require Member States to maintain the obligation on universal service providers of keeping separate and transparent accounts, subject to necessary adaptations.

This obligation should provide national regulatory authorities, competition authorities and the Commission with the information necessary to adopt decisions related to the universal service and to monitor fair market conditions until competition becomes effective. Cooperation between national regulatory authorities in continuing to develop benchmarks and guidelines in this area should contribute to the harmonised application of these rules.

Keeping separate and transparent accounts should provide Member States and their national regulatory authorities with accounting information of sufficient detail to:

- adopt decisions related to the universal service,
- be used as an input when determining whether the universal service obligations imposed entail a net cost and represent an unfair financial burden on the universal service provider,
- ensure that the tariffs applied to the universal service comply with the principles on tariffs as set out in this Directive,
- ensure compliance with the principles on terminal dues as set out in this Directive, and
- monitor fair market conditions until competition becomes effective.

- (42) In line with existing rules in other service areas and in order to increase consumer protection, it is appropriate to extend the application of minimum principles concerning complaint procedures beyond universal service providers. With a view to increasing the effectiveness of complaint handling procedures, it is appropriate to encourage the use of out-of-court settlement procedures as set out in Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes ⁽²⁾ and Commission Recommendation 2001/310/EC of 4 April 2001 on the principle for out-of-court bodies involved in the consensual resolution

⁽¹⁾ OJ L 281, 23.11.1995, p. 31. Directive as amended by Regulation (EC) No 1882/2003.

⁽²⁾ OJ L 115, 17.4.1998, p. 31.

of consumer disputes ⁽¹⁾. Consumer interests would also be furthered through the enhanced inter-operability between operators resulting from access to certain elements of infrastructure and services, and the requirement for cooperation between national regulatory authorities and consumer protection bodies.

In order to protect the interests of users in the event of theft or loss of, or damage to, postal items, Member States should introduce, where warranted, a system of reimbursement and/or compensation.

- (43) Directive 97/67/EC provides that certain measures are to be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ⁽²⁾.
- (44) Decision 1999/468/EC has been amended by Decision 2006/512/EC, which introduced the regulatory procedure with scrutiny for the adoption of measures of general scope designed to amend non-essential elements of a basic instrument adopted in accordance with the procedure referred to in Article 251 of the Treaty, *inter alia* by deleting some of those elements or by supplementing the instrument with non-essential elements.
- (45) In particular, the Commission should be empowered to adopt measures as regards future adjustment of quality-of-service standards to technical progress or market developments as well as of standardised conditions for independent performance monitoring by external bodies. Since those measures are of general scope and are designed to amend non-essential elements of this Directive and to supplement this Directive by the addition of new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.
- (46) The Committee assisting the Commission in accordance with Directive 97/67/EC should follow developments in the provision of the universal service in Member States.
- (47) The role of national regulatory authorities is likely to remain crucial, in particular in those Member States where the transition to competition still needs to be completed. In accordance with the principle of separation of regulatory and operational functions, Member States should guarantee the independence of the national regulatory authorities, thereby ensuring the impartiality of their decisions. This requirement of independence is without prejudice to the institutional autonomy and constitutional obligations of the Member States and to the principle of neutrality with regard to the rules in Member States governing the system of property ownership laid down in Article 295 of the Treaty. National

regulatory authorities should be provided with all necessary resources, in terms of staffing, expertise and financial means, for the performance of their tasks.

- (48) Due to the frequent involvement of different national bodies in the exercise of regulatory functions, it is appropriate to introduce transparency in the allocation of tasks and require the different relevant bodies charged with sector regulation, the application of competition rules and with dealing with consumer issues to cooperate in order to ensure the effective accomplishment of their tasks.
- (49) Any party which is the subject of a decision by a national regulatory authority should have the right to appeal to a body that is independent of that authority. This body may be a court. This appeal procedure is without prejudice to the division of competences within national judicial systems and to the rights of legal entities or natural persons under national law. Pending the conclusion of these procedures there is a need to ensure the temporary validity of national regulatory authorities' decisions in order to guarantee legal certainty and market security.
- (50) National regulatory authorities should, where necessary, cooperate with other regulatory bodies of Member States and with the Commission in carrying out their tasks under Directive 97/67/EC. This would promote the development of the internal market for postal services and help to ensure the consistent application, in all Member States, of the provisions laid down by the Directive, in particular in areas where national law implementing Community law gives national regulatory authorities considerable discretionary powers in the application of the relevant rules. This cooperation could take place, *inter alia*, within the Committee assisting the Commission in accordance with the Directive or within a group comprising European regulators. Member States should decide which bodies are national regulatory authorities for the purposes of the Directive.
- (51) National regulatory authorities need to gather information from market players in order to carry out their tasks effectively. Requests for information should be proportionate and not impose an undue burden on undertakings. Such information may also need to be gathered by the Commission in order to allow it to fulfil its obligations under Community law. The recipient of information should ensure confidentiality in accordance with the rules in force.
- (52) In order to keep the European Parliament and the Council informed of developments in the internal market for postal services, the Commission should regularly submit reports to those institutions on the application of Directive 97/67/EC.

⁽¹⁾ OJ L 109, 19.4.2001, p. 56.

⁽²⁾ OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).

- (53) This Directive does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which is in conformity with Community law. Equally, this Directive does not affect the social security legislation of the Member States. Where necessary, Member States may reflect working conditions in their authorisation procedures in line with the principles of transparency and proportionality.
- (54) Member States should ensure that sufficient access points are established that take account of the needs of users in rural and sparsely populated areas. Member States should ensure an appropriate density of access points in these areas in order to satisfy the universal service obligation.
- (55) In order to maintain the framework for the regulation of the postal sector, the date of expiry of Directive 97/67/EC should be deleted. The provisions that have not been amended by this Directive continue to apply. The services that Member States may continue to reserve, during the implementation period, are those specified in Directive 97/67/EC.
- (56) Since the objectives of this Directive, namely achieving an internal market of Community postal services, ensuring a common level of universal services for all users and setting harmonised principles for the regulation of postal services, cannot be sufficiently achieved by Member States and can therefore, by reason of the scale and effects, 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 those objectives.
- (57) Directive 97/67/EC should therefore be amended accordingly.
- (58) This Directive is consistent with other Community instruments concerning services. In the event of conflict between a provision of this Directive and a provision of another Community instrument, in particular Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market⁽¹⁾, the provisions of this Directive will prevail and will apply in full to the postal sector.
- (59) This Directive is without prejudice to the application of the Treaty rules on competition and on the freedom to provide services. Insofar as mechanisms for the financing of the universal service involve aid granted by a Member State or through State aid resources in any form

whatsoever within the meaning of Article 87(1) of the Treaty, this Directive is without prejudice to Member States' obligation to respect the Treaty rules on State aid.

- (60) In accordance with point 34 of the Interinstitutional agreement on better law-making⁽²⁾, Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 97/67/EC is hereby amended as follows:

1. Article 1 shall be replaced by the following:

'Article 1

This Directive establishes common rules concerning:

- the conditions governing the provision of postal services,
- the provision of a universal postal service within the Community,
- the financing of universal services under conditions that guarantee the permanent provision of such services,
- tariff principles and transparency of accounts for universal service provision,
- the setting of quality standards for universal service provision and the setting-up of a system to ensure compliance with those standards,
- the harmonisation of technical standards,
- the creation of independent national regulatory authorities.;

2. Article 2 shall be amended as follows:

- (a) point 1 shall be replaced by the following:

'1. postal services: services involving the clearance, sorting, transport and distribution of postal items;'

- (b) the following point shall be inserted:

'1a. postal service provider: undertaking that provides one or more postal services;'

- (c) in point 2 the words 'public postal network' shall be replaced by 'postal network';

- (d) point 3 shall be replaced by the following:

'3. access points: physical facilities, including letter boxes provided for the public either on the public highway or at the premises of the postal service provider(s), where postal items may be deposited with the postal network by senders;'

⁽¹⁾ OJ L 376, 27.12.2006, p. 36.

⁽²⁾ OJ C 321, 31.12.2003, p. 1.

(e) point 4 shall be replaced by the following:

‘4. clearance: the operation of collecting postal items by a postal service provider;’

(f) point 6 shall be replaced by the following:

‘6. postal item: an item addressed in the final form in which it is to be carried by a postal service provider. In addition to items of correspondence, such items also include for instance books, catalogues, newspapers, periodicals and postal parcels containing merchandise with or without commercial value;’

(g) point 8 shall be deleted;

(h) point 12 shall be deleted;

(i) point 13 shall be replaced by the following:

‘13. universal service provider: the public or private postal service provider providing a universal postal service or parts thereof within a Member State, the identity of which has been notified to the Commission in accordance with Article 4;’

(j) point 14 shall be replaced by the following:

‘14. authorisations: any permission setting out rights and obligations specific to the postal sector and allowing undertakings to provide postal services and, where applicable, to establish and/or operate their networks for the provision of such services, in the form of a general authorisation or individual licence as defined below:

— “general authorisation”: an authorisation, regardless of whether it is regulated by a “class licence” or under general law and regardless of whether such regulation requires registration or declaration procedures, which does not require the postal service provider concerned to obtain an explicit decision by the national regulatory authority before exercising the rights stemming from the authorisation,

— “individual licence”: an authorisation which is granted by a national regulatory authority and which gives a postal service provider specific rights, or which subjects that undertaking’s operations to specific obligations supplementing the general authorisation where applicable, where the postal service provider is not entitled to exercise the rights concerned until it has received the decision by the national regulatory authority;’

(k) point 17 shall be replaced by the following:

‘17. user: any natural or legal person benefiting from postal service provision as a sender or an addressee;’

(l) point 19 shall be replaced by the following:

‘19. essential requirements: general non-economic reasons which can induce a Member State to impose conditions on the supply of postal services. These reasons are the confidentiality of correspondence, security of the network as regards the transport of dangerous goods, respect for the terms and conditions of employment, social security schemes, laid down by law, regulation or administrative provision and/or by collective agreement negotiated between national social partners, in accordance with Community and national law and, where justified, data protection, environmental protection and regional planning. Data protection may include personal data protection, the confidentiality of information transmitted or stored and protection of privacy;’

(m) the following point shall be added:

‘20. services provided at single piece tariff: postal services for which the tariff is set in the general terms and conditions of universal service provider (s) for individual postal items;’

3. Article 3 shall be amended as follows:

(a) the first subparagraph of paragraph 3 shall be replaced by the following:

‘3. Member States shall take steps to ensure that the universal service is guaranteed not less than five working days a week, save in circumstances or geographical conditions deemed exceptional, and that it includes as a minimum:

— one clearance,

— one delivery to the home or premises of every natural or legal person or, by way of derogation, under conditions at the discretion of the national regulatory authority, one delivery to appropriate installations;’

(b) paragraph 5 shall be replaced by the following:

‘5. The national regulatory authorities may increase the weight limit of universal service coverage for postal parcels to any weight not exceeding 20 kilograms and may lay down special arrangements for the door-to-door delivery of such parcels.

Notwithstanding the weight limit of universal service coverage for postal parcels established by a given Member State, Member States shall ensure that postal parcels received from other Member States and weighing up to 20 kilograms are delivered within their territory;’

(c) paragraph 6 shall be replaced by the following:

‘6. The minimum and maximum dimensions for the postal items in question shall be those as laid down in the relevant provisions adopted by the Universal Postal Union;’

4. Article 4 shall be replaced by the following:

'Article 4

1. Each Member State shall ensure that the provision of the universal service is guaranteed and shall notify the Commission of the steps it has taken to fulfil this obligation. The Committee referred to in Article 21 shall be informed of the measures established by Member States to ensure the provision of the universal service.

2. Member States may designate one or more undertakings as universal service providers in order that the whole of the national territory can be covered. Member States may designate different undertakings to provide different elements of universal service and/or to cover different parts of the national territory. When they do so, they shall determine in accordance with Community law the obligations and rights assigned to them and shall publish these obligations and rights. In particular, Member States shall take measures to ensure that the conditions under which universal services are entrusted are based on the principles of transparency, non-discrimination and proportionality, thereby guaranteeing the continuity of the universal service provision, by taking into account the important role it plays in social and territorial cohesion.

Member States shall notify the Commission of the identity of the universal service provider(s) they designate. The designation of a universal service provider shall be subject to a periodic review and be examined against the conditions and principles set out in this Article. However, Member States shall ensure that the duration of this designation provides a sufficient period for return on investments.;

5. paragraph 2 of Article 5 shall be replaced by the following:

'2. The provisions of paragraph 1 shall not preclude measures which the Member States take in accordance with requirements relating to the public interest recognised in the Treaty, in particular Articles 30 and 46 thereof, concerning, *inter alia*, public morality, public security, including criminal investigations, and public policy.;

6. Article 6 shall be replaced by the following:

'Article 6

Member States shall take steps to ensure that users and postal service providers are regularly given sufficiently detailed and up-to-date information by the universal service provider(s) regarding the particular features of the universal service offered, with special reference to the general conditions of access to these services as well as to prices and quality standard levels. This information shall be published in an appropriate manner.

Member States shall notify the Commission, of how the information to be published in accordance with the first paragraph is to be made available.;

7. the heading of Chapter 3 shall be replaced by the following:

'Financing of universal services';

8. Article 7 shall be replaced by the following:

'Article 7

1. Member States shall not grant or maintain in force exclusive or special rights for the establishment and provision of postal services. Member States may finance the provision of universal services in accordance with one or more of the means provided for in paragraphs 2, 3 and 4, or in accordance with any other means compatible with the Treaty.

2. Member States may ensure the provision of universal services by procuring such services in accordance with applicable public procurement rules and regulations, including, as provided for in Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services (*), competitive dialogue or negotiated procedures with or without publication of a contract notice.

3. Where a Member State determines that the universal service obligations, as provided for in this Directive, entail a net cost, calculated taking into account Annex I, and represent an unfair financial burden on the universal service provider(s), it may introduce:

(a) a mechanism to compensate the undertaking(s) concerned from public funds; or

(b) a mechanism for the sharing of the net cost of the universal service obligations between providers of services and/or users.

4. Where the net cost is shared in accordance with paragraph 3(b), Member States may establish a compensation fund which may be funded by service providers and/or users' fees, and is administered for this purpose by a body independent of the beneficiary or beneficiaries. Member States may make the granting of authorisations to service providers under Article 9(2) subject to an obligation to make a financial contribution to that fund or to comply with universal service obligations. The universal service obligations of the universal service provider(s) set out in Article 3 may be financed in this manner.

5. Member States shall ensure that the principles of transparency, non-discrimination and proportionality are respected in establishing the compensation fund and when fixing the level of the financial contributions referred to in paragraphs 3 and 4. Decisions taken in accordance with paragraphs 3 and 4 shall be based on objective and verifiable criteria and be made public.

(*) OJ L 134, 30.4.2004, p. 1. Directive as last amended by Council Directive 2006/97/EC (OJ L 363, 20.12.2006, p. 107).;

9. the heading of Chapter 4 shall be replaced by the following:

‘Conditions governing the provision of postal services and access to the network’;

10. Article 9 shall be replaced by the following:

‘Article 9

1. For services which fall outside the scope of the universal service, Member States may introduce general authorisations to the extent necessary to guarantee compliance with the essential requirements.

2. For services which fall within the scope of the universal service, Member States may introduce authorisation procedures, including individual licences, to the extent necessary in order to guarantee compliance with the essential requirements and to ensure the provision of the universal service.

The granting of authorisations may:

- be made subject to universal service obligations,
- if necessary and justified, impose requirements concerning the quality, availability and performance of the relevant services,
- where appropriate, be subject to an obligation to make a financial contribution to the sharing mechanisms referred to in Article 7, if the provision of the universal service entails a net cost and represents an unfair burden on the universal service provider(s), designated in accordance with Article 4,
- where appropriate, be subject to an obligation to make a financial contribution to the national regulatory authority’s operational costs referred to in Article 22,
- where appropriate, be made subject to or impose an obligation to respect working conditions laid down by national legislation.

Obligations and requirements referred to in the first indent and in Article 3 may only be imposed on designated universal service providers.

Except in the case of undertakings that have been designated as universal service providers in accordance with Article 4, authorisations may not:

- be limited in number,
- for the same elements of the universal service or parts of the national territory, impose universal service obligations and, at the same time, financial contributions to a sharing mechanism,
- duplicate conditions which are applicable to undertakings by virtue of other, non-sector-specific national legislation,
- impose technical or operational conditions other than those necessary to fulfil the obligations of this Directive.

3. The procedures, obligations and requirements referred to in paragraphs 1 and 2 shall be transparent, accessible, non-discriminatory, proportionate, precise and unambiguous, made public in advance and based on objective criteria. Member States shall ensure that the reasons for refusing or withdrawing an authorisation in whole or in part are communicated to the applicant and shall establish an appeal procedure.’;

11. paragraph 1 of Article 10 shall be replaced by the following:

‘1. The European Parliament and the Council, acting on a proposal from the Commission and on the basis of Articles 47(2), 55 and 95 of the Treaty, shall adopt the measures necessary for the harmonisation of the procedures referred to in Article 9 governing the commercial provision of postal services to the public.’;

12. Article 11 shall be replaced by the following:

‘Article 11

The European Parliament and the Council, acting on a proposal from the Commission and on the basis of Articles 47(2), 55 and 95 of the Treaty, shall adopt such harmonisation measures as are necessary to ensure that users and the postal service provider(s) have access to the postal network under conditions which are transparent and non-discriminatory.’;

13. the following Article shall be inserted:

‘Article 11a

Whenever necessary to protect the interest of users and/or to promote effective competition, and in the light of national conditions and national legislation, Member States shall ensure that transparent, non-discriminatory access conditions are available to elements of postal infrastructure or services provided within the scope of the universal service, such as postcode system, address database, post office boxes, delivery boxes, information on change of address, re-direction service and return to sender service. This provision shall be without prejudice to the right of Member States to adopt measures to ensure access to the postal network under transparent, proportional and non-discriminatory conditions.’;

14. Article 12 shall be replaced by the following:

‘Article 12

Member States shall take steps to ensure that the tariffs for each of the services forming part of the universal service comply with the following principles:

- prices shall be affordable and must be such that all users, independent of geographical location, and, in the light of specific national conditions, have access to the services provided. Member States may maintain or introduce the provision of a free postal service for the use of blind and partially-sighted persons,

- prices shall be cost-oriented and give incentives for an efficient universal service provision. Whenever necessary for reasons relating to the public interest, Member States may decide that a uniform tariff shall be applied, throughout their national territory and/or cross-border, to services provided at single piece tariff and to other postal items,
- the application of a uniform tariff shall not exclude the right of the universal service provider(s) to conclude individual agreements on prices with users,
- tariffs shall be transparent and non-discriminatory,
- whenever universal service providers apply special tariffs, for example for services for businesses, bulk mailers or consolidators of mail from different users, they shall apply the principles of transparency and non-discrimination with regard both to the tariffs and to the associated conditions. The tariffs, together with the associated conditions, shall apply equally both as between different third parties and as between third parties and universal service providers supplying equivalent services. Any such tariffs shall also be available to users, in particular individual users and small and medium-sized enterprises, who post under similar conditions.;

15. Article 14 shall be amended as follows:

- (a) paragraphs 1, 2 and 3 shall be replaced by the following:

‘1. Member States shall take the measures necessary to ensure that the accounting of the universal service providers is conducted in accordance with the provisions of this Article.

2. The universal service provider(s) shall keep separate accounts within their internal accounting systems in order to clearly distinguish between each of the services and products which are part of the universal service and those which are not. This accounting separation shall be used as an input when Member States calculate the net cost of the universal service. Such internal accounting systems shall operate on the basis of consistently applied and objectively justifiable cost accounting principles.

3. The accounting systems referred to in paragraph 2 shall, without prejudice to paragraph 4, allocate costs in the following manner:

- (a) costs which can be directly assigned to a particular service or product shall be so assigned;
- (b) common costs, that is costs which cannot be directly assigned to a particular service or product, shall be allocated as follows:
 - (i) whenever possible, common costs shall be allocated on the basis of direct analysis of the origin of the costs themselves;

- (ii) when direct analysis is not possible, common cost categories shall be allocated on the basis of an indirect linkage to another cost category or group of cost categories for which a direct assignment or allocation is possible; the indirect linkage shall be based on comparable cost structures;

- (iii) when neither direct nor indirect measures of cost allocation can be found, the cost category shall be allocated on the basis of a general allocator computed by using the ratio of all expenses directly or indirectly assigned or allocated, on the one hand, to each of the universal services and, on the other hand, to the other services;

- (iv) common costs, which are necessary for the provision of both universal services and non-universal services, shall be allocated appropriately; the same cost drivers must be applied to both universal services and non-universal services.;

- (b) paragraph 8 shall be replaced by the following:

‘8. Where a given Member State has not used a financing mechanism for the provision of the universal service, as permitted under Article 7, and where the national regulatory authority is satisfied that none of the designated universal service providers in that Member State is in receipt of State assistance, hidden or otherwise, and that competition in the market is fully effective, the national regulatory authority may decide not to apply the requirements of this Article.’;

- (c) the following paragraphs shall be added:

‘9. This Article may, however, be applied to the universal service provider designated before the final date for Full Market Opening as long as no other universal service provider(s) have been designated. The national regulatory authority shall inform the Commission in advance of any such decision.

10. Member States may require those postal service providers which are obliged to contribute to a compensation fund to introduce an appropriate accounting separation to ensure the functioning of the fund.’;

16. Article 16 shall be amended as follows:

- (a) the second indent of the third paragraph shall be replaced by the following:

‘— the European Parliament and the Council in the case of intra-Community cross-border services (see Annex II). Future adjustment of these standards to technical progress or market developments shall be made in accordance with the regulatory procedure with scrutiny referred to in Article 21(2).’;

(b) the fourth paragraph shall be replaced by the following:

'Independent performance monitoring shall be carried out at least once a year by external bodies having no links with the universal service providers under standardised conditions to be specified in accordance with the regulatory procedure with scrutiny referred to in Article 21(2) and shall be the subject of reports published at least once a year.;

17. paragraphs 1 and 2 of Article 18 shall be replaced by the following:

'1. In accordance with Article 16, quality standards for intra-Community cross-border services are laid down in Annex II.

2. Where exceptional situations relating to infrastructure or geography so require, the national regulatory authorities may determine exemptions from the quality standards provided for in Annex II. Where national regulatory authorities determine exemptions in this manner, they shall notify the Commission forthwith. The Commission shall submit an annual report of the notifications received during the previous 12 months to the Committee referred to in Article 21 for its information.;

18. Article 19 shall be replaced by the following:

'Article 19

1. Member States shall ensure that transparent, simple and inexpensive procedures are made available by all postal service providers for dealing with postal users' complaints, particularly in cases involving loss, theft, damage or non-compliance with service quality standards (including procedures for determining where responsibility lies in cases where more than one operator is involved), without prejudice to relevant international and national provisions on compensation schemes.

Member States shall adopt measures to ensure that the procedures referred to in the first subparagraph enable disputes to be settled fairly and promptly with provision, where warranted, for a system of reimbursement and/or compensation.

Member States shall also encourage the development of independent out-of-court schemes for the resolution of disputes between postal service providers and users.

2. Without prejudice to other possibilities of appeal or means of redress under national and Community legislation, Member States shall ensure that users, acting individually or, where permitted by national law, jointly with organisations representing the interests of users and/or consumers, may bring before the competent national authority cases where users' complaints to undertakings providing postal services within the scope of the universal service have not been satisfactorily resolved.

In accordance with Article 16, Member States shall ensure that the universal service providers and, wherever appro-

priate, undertakings providing services within the scope of the universal service, publish, together with the annual report on the monitoring of their performance, information on the number of complaints and the manner in which they have been dealt with.;

19. Article 21 shall be replaced by the following:

'Article 21

1. The Commission shall be assisted by a committee.

2. Where reference is made to this paragraph, Articles 5a(1) to (4) and Article 7 of Decision 1999/468/EC shall apply, having regard to the provisions of Article 8 thereof.;

20. Article 22 shall be replaced by the following:

'Article 22

1. Each Member State shall designate one or more national regulatory authorities for the postal sector that are legally separate from and operationally independent of the postal operators. Member States that retain ownership or control of postal service providers shall ensure effective structural separation of the regulatory functions from activities associated with ownership or control.

Member States shall inform the Commission which national regulatory authorities they have designated to carry out the tasks arising from this Directive. They shall publish the tasks to be undertaken by national regulatory authorities in an easily accessible form, in particular where those tasks are assigned to more than one body. Member States shall ensure, where appropriate, consultation and cooperation between those authorities and national authorities entrusted with the implementation of competition law and consumer protection law on matters of common interest.

2. The national regulatory authorities shall have as a particular task ensuring compliance with the obligations arising from this Directive, in particular by establishing monitoring and regulatory procedures to ensure the provision of the universal service. They may also be charged with ensuring compliance with competition rules in the postal sector.

The national regulatory authorities shall work in close collaboration and shall provide mutual assistance in order to facilitate the application of this Directive within the appropriate existing bodies.

3. Member States shall ensure that effective mechanisms exist at national level under which any user or postal service provider affected by a decision of a national regulatory authority has the right to appeal against the decision to an appeal body which is independent of the parties involved. Pending the outcome of any such appeal, the decision of the national regulatory authority shall stand, unless the appeal body decides otherwise.;

21. the following Chapter shall be inserted:

‘CHAPTER 9a

Provision of information

Article 22a

1. Member States shall ensure that postal service providers provide all the information, in particular to the national regulatory authorities, including financial information and information concerning the provision of the universal service, namely for the following purposes:

- (a) for national regulatory authorities to ensure conformity with the provisions of, or decisions made in accordance with this Directive;
- (b) for clearly defined statistical purposes.

2. Postal service providers shall provide such information promptly on request and in confidence, where necessary, within the timescales and to the level of detail required by the national regulatory authority. The information requested by the national regulatory authority shall be proportionate to the performance of its tasks. The national regulatory authority shall give the reasons justifying its request for information.

3. Member States shall ensure that national regulatory authorities provide the Commission, upon request, with appropriate and relevant information necessary for it to carry out its tasks under this Directive.

4. Where information is considered confidential by a national regulatory authority, in accordance with Community and national business confidentiality rules, the Commission and the national regulatory authorities concerned shall preserve such confidentiality;

22. Article 23 shall be replaced by the following:

‘Article 23

Every four years, on the first occasion no later than 31 December 2013, the Commission shall submit a report to the European Parliament and the Council on the application of this Directive, including appropriate information on developments in the sector, particularly concerning economic, social, employment patterns and technological aspects, as well as on quality of service. The report shall be accompanied, where appropriate, by proposals to the European Parliament and the Council.’;

23. the following Article shall be inserted:

‘Article 23a

The Commission shall provide assistance to the Member States on the implementation of this Directive, including on the calculation of any net cost of the universal service.’;

24. Articles 24, 25, 26 and 27 shall be deleted;

25. the following text shall be inserted as Annex I:

‘ANNEX I

Guidance on calculating the net cost, if any, of universal service

Part A: Definition of the universal service obligations

Universal service obligations refer to the obligations referred to in Article 3 placed upon a postal service provider by a Member State which concern the provision of a postal service throughout a specified geographical area, including, where required, uniform prices in that geographical area for the provision of that service or provision of certain free services for blind and partially-sighted persons.

Those obligations may include, among others, the following:

- a number of days of delivery, superior to those set in this Directive,
- accessibility to access points, in order to satisfy the universal service obligations,
- the tariffs affordability of the universal service,
- uniform prices for universal service,
- the provision of certain free services for blind and partially-sighted persons.

Part B: Calculation of net cost

National regulatory authorities are to consider all means to ensure appropriate incentives for postal service providers (designated or not) to provide universal service obligations cost efficiently.

The net cost of universal service obligations is any cost related to and necessary for the operation of the universal service provision. The net cost of universal service obligations is to be calculated, as the difference between the net cost for a designated universal service provider of operating with the universal service obligations and the same postal service provider operating without the universal service obligations.

The calculation shall take into account all other relevant elements, including any intangible and market benefits which accrue to a postal service provider designated to provide universal service, the entitlement to a reasonable profit and incentives for cost efficiency.

Due attention is to be given to correctly assessing the costs that any designated universal service provider would have chosen to avoid, had there been no universal service obligation. The net cost calculation should assess the benefits, including intangible benefits, to the universal service operator.

The calculation is to be based upon the costs attributable to:

- (i) elements of the identified services which can only be provided at a loss or provided under cost conditions falling outside normal commercial standards. This category may include service elements such as the services defined in Part A;
- (ii) specific users or groups of users who, taking into account the cost of providing the specified service, the revenue generated and any uniform prices imposed by the Member State, can only be served at a loss or under cost conditions falling outside normal commercial standards.

This category includes those users or groups of users that would not be served by a commercial operator that did not have an obligation to provide universal service.

The calculation of the net cost of specific aspects of universal service obligations is to be made separately and so as to avoid the double counting of any direct or indirect benefits and costs. The overall net cost of universal service obligations to any designated universal service provider is to be calculated as the sum of the net costs arising from the specific components of universal service obligations, taking account of any intangible benefits. The responsibility for verifying the net cost lies with the national regulatory authority. The universal service provider(s) shall cooperate with the national regulatory authority to enable it to verify the net cost.

Part C: Recovery of any net costs of universal service obligations

The recovery or financing of any net costs of universal service obligations may require designated universal service providers to be compensated for the services that they provide under non-commercial conditions. As such compensation involves financial transfers, Member States have to ensure that they are undertaken in an objective, transparent, non-discriminatory and proportionate manner. This means that the transfers result as far as possible in the least distortion to competition and to user demand.

A sharing mechanism based on a fund referred to in Article 7(4) should use a transparent and neutral mechanism for collecting contributions that avoids a double imposition of contributions falling on both outputs and inputs of undertakings.

The independent body administering the fund is to be responsible for collecting contributions from undertakings, which are assessed as liable to contribute to the net cost of universal service obligations in the Member State and is to oversee the transfer of sums due to the undertakings entitled to receive payments from the fund.;

26. the Annex shall become Annex II.

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2010 at the latest. They shall forthwith inform the Commission thereof.

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

2. Member States shall communicate to the Commission the text of their laws, regulations and administrative provisions with regard to the application of this Directive.

Article 3

1. By derogation to Article 2, the following Member States may postpone the implementation of this Directive until 31 December 2012, in order to continue to reserve services to universal service provider(s):

- Czech Republic
- Greece
- Cyprus
- Latvia
- Lithuania
- Luxembourg
- Hungary
- Malta
- Poland
- Romania
- Slovakia

These Member States may decide to implement this Directive at an earlier stage.

2. The relevant Member States shall notify the Commission confirming their intention to make use of the implementation delay set out in paragraph 1 by ... (*).

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

3. Member States that abolish their reserved areas by 31 December 2012 may, between 1 January 2011 and 31 December 2012, refuse to grant the authorisation provided for in Article 9(2) of Directive 97/67/EC for services within the abolished reserved area in question to postal operators providing services within the scope of the universal service, as well as companies controlled by them, which are granted a reserved area in another Member State.

Article 4

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

Article 5

This Directive is addressed to the Member States.

Done at ..., ...

For the European Parliament

The President

...

For the Council

The President

...

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

1. The Commission adopted its proposal for a Directive of the European Parliament and of the Council amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services on 18 October 2006. ⁽¹⁾ The proposal is based on Articles 47(2), 55 and 95 of the Treaty.
2. The European Parliament adopted its First-Reading Opinion at its 9 July to 12 July 2007 plenary session.

In carrying out its work, the Council also took account of the opinions of the Economic and Social Committee and the Committee of the Regions adopted on 26 April and 6 June 2007 respectively ⁽²⁾.

3. On 8 November 2007, the Council adopted its common position in accordance with Article 251 of the Treaty.

II. OBJECTIVES

The proposal for the amending Directive aims to set the 'last step' towards Full Market Opening (FMO) by removing all remaining exclusive or special rights in force for (a) universal service provider(s) and all other obstacles to the postal services provision, as foreseen by the current Postal Services Directive 97/67/EC (as amended by Directive 2002/39/EC). In accordance with the timetable established in its Article 7 and on the basis of several studies and a thorough Impact Assessment, the Commission confirmed that 1 January 2009 would be the final date for the full accomplishment of the postal services internal market. The amending provisions seek to adapt the regulatory framework to the new environment, whilst ensuring the universal service provision and its appropriate financing by suggesting a non-exhaustive list of indicative accompanying measures. Upon entry into force of the new Directive, the 'sunset clause' included in the 2002 Directive ⁽³⁾ would be deleted (Article 1 (point 24), recital 55), thereby ensuring legal continuity beyond the expiration of the current Directive (31 December 2008).

III. ANALYSIS OF THE COMMON POSITION

1. GENERAL

In its 11 July 2007 Plenary, the European Parliament (EP) adopted 64 amendments to the Commission proposal. The Council common position reflects changes to the Commission proposal (see below under 2(a)) by incorporating a considerable number of amendments,

- either *verbatim* or almost *verbatim* (EP amendments 1, 2, 3, 4, 8, 9, 12, 14, 16, 17, 18, 25, 36, 37, 39, 49, 50, 53, 61, 79),
- in part (EP amendments 10, 13, 20, 31, 46, 47, 48, 56, 58), or
- in spirit, by means of similar wording (EP amendments 21 + 65, 22 + 34, 23, 28, 30, 32, 35, 63, 40, 44 + 81, 46, 52, 55).

However, a few amendments are not reflected in the common position because the Council agreed that they were either redundant (as they are covered by other modifications) or because provisions from the original Commission proposal were completed or thoroughly redrafted (see below under 2(b)).

⁽¹⁾ COM(2006) 594 final, OJ C ...

⁽²⁾ OJ C 168, 20.7.2007, p. 74.
OJ C 197, 24.8.2007, p. 37.

⁽³⁾ Article 27 sets out that, unless otherwise decided, the provisions of the existing Directive shall expire on 31 December 2008.

The common position also includes changes other than those envisaged in the European Parliament's First — Reading opinion. A number of drafting changes have been introduced, mostly as a consequence of:

- the insertion of a new Annex I (Guidance on calculating the net cost, if any, of universal service) and the appearance of the existing Annex (Quality of standards for intra-Community cross-border mail) as Annex II to the amending Directive (Article 1, points 16, 17 and 25), and
- the introduction of new terms into the definitions (in Article 1 (point 2) and its further impact on the terminology used throughout the text (e.g. Article 1 (point 18)).

Others seek to ensure the Directive's overall coherence, in particular with respect to:

- the notification of a/the universal service provider(s) to the Commission (Article 1, point 4),
- accountancy separation and transparency rules (Article 1, point 15, in conjunction with recital 41), and
- the new rules on the 'comitology' procedure which are to be applied (regulatory procedure with scrutiny, Article 1 (point 16, 19), recitals 43-46), and
- the Inter-institutional agreement on better law-making (recital 60, on which the Commission made a statement).

2. SPECIFIC ISSUES

(a) **Changes to the Commission's proposal**

The fundamental modification to the Commission's original proposal regards the final date for Full Market Opening. It sets (in Article 2) the end of 2010 as the final date for the amending Directive's implementation that is the full accomplishment of the postal services internal market. An implementation delay until 31 December 2012 is provided under strict conditions for certain Member States (listed in Article 3 of the Directive) which seeks to meet particular difficulties with regard to the postal sector reform process (see below under (x)).

All the above led to a number of other substantial changes to the original proposal (they can be identified under the amending Directive's Article 1), which could be summarized as follows:

(i) ***Rationale and Scope (Article 1 (point 1), Recitals 1-9, 14-15, 19-20, 22, 56)***

Relevant European Parliament amendments: 1-4, 8-9, 11-12, 13, 16

The common position confirms the ultimate goals and the rationale of the Community postal policy and highlights the positive role of postal services as services of general economic interest as well as their contribution to the objectives of social, economic and territorial cohesion in the EU. It mainly clarifies the Directive's scope with regard to the universal service provision, by considering its financing under conditions that guarantee its permanent provision as a key objective of postal reform. This acknowledgment is enshrined in the text and can be used as a guiding principle for the implementation of the amending Directive.

(ii) ***Definitions (Article 1 (point 2), Recitals 17, 27, 42)***

Relevant European Parliament amendments: 15, 21 + 65, 36-37

The common position seeks to update and adapt a significant number of definitions included in the existing Directive to the regulatory changes and new circumstances in the postal markets. The newly inserted term 'postal service provider' and its distinction with the 'universal service provider', as well as the re-definition of 'user', are pivotal and seek to clarify the roles and responsibilities of each of these in a FMO context. In addition, the common position identifies the key elements qualifying the 'services falling within the scope of the universal service' in accordance with the European Court of Justice relevant case law and includes in the list of 'essential requirements' (which can induce a Member State to impose conditions on the supply of postal services), respect for the terms and conditions of employment as well as social security provisions, in accordance with Community and national law. This is in line with the political importance that social considerations maintain within the FMO process.

(iii) **Universal service provision (Article 1 (points 3-6), Recitals 5, 8-12, 20-21, 23-24, 27-30, 36-37, 40-41, 46, 54)**

Relevant European Parliament amendments: 4, 6, 13-14, 17-18, 24-27, 32, 39, 43, 62 + 64, 63

The common position is based on the principle that universal service provision is a key element for the accomplishment of the postal services' internal market and plays a paramount role in terms of social and territorial cohesion. Against this background, the text aims at strengthening the existing Directive's provisions and safeguarding its swift implementation in the new FMO context. It permits Member States a certain flexibility in the designation and operation of the (a) universal service provider(s), whilst on the other hand, ensuring a periodic review of their conformity with the statutory principles set out in the Directive as well as a sufficient period for return on investments.

Furthermore, it makes clear that (a) universal service provider(s) shall provide sufficiently detailed and up-to-date information regarding the particular features of the universal service offered, including the general conditions of access to these services, as well as to prices and quality standard levels. Finally, the common position excludes from the amending Directive's scope the national provisions governing the expropriation conditions for organising the universal service provision and acknowledges that the continuing supply of certain free services for blind and partially-sighted persons introduced by the Member States should not be curtailed.

(iv) **Financing of universal services (Article 1 (points 7-8 and 25), Recitals 13, 25-30, 33, 40-41, 59)**

Relevant European Parliament amendments: 4, 6, 20, 21 + 65, 22, 24, 29-30, 40, 41 + 66, 62 + 64

The common position, based on the principles enshrined in the Commission's proposal, devotes particular attention to the means of guaranteeing the universal service financing. The Council agrees in general on the means proposed by the Commission, as they are fully in line with the subsidiarity principle and devote attention to national market conditions. Member States may choose an appropriate enabling measure for that purpose, depending on the specific national market characteristics. In order to meet concerns expressed by some Member States with regard to the net cost calculation and to ensure guidance on the basis of an indicative common methodology, the common position introduced a new Annex to the Directive. This is largely inspired by Annex IV to the Universal Service Directive ⁽¹⁾.

(v) **Conditions governing the provision of postal services and the access to the networks (Article 1 (points 9-13), Recitals 30, 33)**

Relevant European Parliament amendments: 44 + 81

The common position sets out further detailed conditions governing the provision of postal services and the access to the networks with the dual aim of providing legal certainty for (a) universal service provider(s) and other postal service provider(s), as well as avoiding these being used as concealed barriers to new market entrants. The overall objective is the proper functioning of postal markets and the complementary functioning of different postal networks. The Directive's provisions are without prejudice to the right of Member States to adopt measures to ensure access to the postal network under the conditions of transparency, proportionality and non-discrimination.

The common position includes, where appropriate, among the conditions for granting authorisations, the possible financial contribution to the national regulatory authority operational costs and the respect of working conditions established by national legislation. Clarification is also provided as regards the exclusion of a 'double' imposition (for the same elements of universal service or parts of the national territory) of universal service obligations and, at the same time, of financial contributions to a sharing mechanism (compensation fund).

⁽¹⁾ Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services (OJ L 108, 24.4.2002, p. 51 (73)).

(vi) **Employment and social security provisions (Article 1 (points 2 and 10), Recitals 16, 53)**

Relevant European Parliament amendments: 10, 35, 37

As developed above (under ii), the common position includes in the list of 'essential requirements', respect for the terms and conditions of employment as well as social security provisions, in accordance with Community and national law. Furthermore, social considerations are addressed in the provisions regarding the conditions for granting authorisations, whereby it may, where appropriate, be made subject to or impose the respect of working conditions laid down by national legislation (see also under (v)).

(vii) **Tariff principles and transparency of accounts (accounting separation) (Article 1 (points 14-15), Recitals 26, 28, 37-39, 41)**

Relevant European Parliament amendments: 27-28, 30, 47-49, 50-52, 79

The common position accepts the basic innovations contained in the Commission proposal with regard to the different tariff principles for universal service provision (cost-orientation principle, notwithstanding a certain degree of tariff flexibility under specific conditions). Furthermore, it allows Member States to maintain or introduce the provision of a free postal service for the use of blind and partially-sighted persons.

The/a universal service provider(s) is/are obliged to keep separate accounts in order to clearly distinguish between universal services and other services which are not part of it. Specific provisions allow Member States to apply the transparency rules (set out in Article 1, point 15) to the universal service provider designated before the FMO final date, as long as no other universal service provider(s) have been designated.

(viii) **National regulatory authorities and information provision (Article 1 (points 20-21), Recitals 41-42, 47-51)**

Relevant European Parliament amendments: 18, 33, 55

The common position leaves no doubt about the form of co-operation between the national regulatory authorities, thereby excluding the establishment of new bodies or structures at European level.

National regulatory authorities are focused on postal markets monitoring, including by appropriate information provision by all market players. The general principles governing the information provision and the respect for confidentiality rules are adequately addressed in the text.

(ix) **The Commission's assistance in the Directive's implementation (Article 1 (points 22-23), Recitals 32, 52)**

Relevant European Parliament amendments: 22, 34, 56-58

The Commission assumes enhanced responsibilities in the new FMO environment, as it is entrusted with the general task of providing assistance during the new Directive's implementation, including on the calculation of any universal service net cost and on evaluating, on a regular basis, all relevant developments, particularly concerning economic, social, employment patterns and technological aspects, as well as in quality of service.

(x) **Final date(s) for Full Market Opening (Articles 2 and 3, Recitals 25, 31, 55)**

Relevant European Parliament amendments: 7 + 74, 19, 23, 41 + 66 as well as 59, 61, 62 + 64

With regard to the final date(s) for the accomplishment of the Community postal services internal market, the Council took into serious consideration the approach enshrined in the relevant European Parliament amendments. The European Parliament considered that the Commission's proposed final date of 1 January 2009 was not proven appropriate and suggested therefore a Full Market Opening of the postal sector from 31 December 2010. In addition, it proposed that Member States that acceded to the EU after the entry into force of Directive 2002/39/EC or Member States with a small population and limited geographical size, or Member States with a particularly difficult topography, especially those with a considerable ('huge') number of islands, may continue, until 31 December 2012, to reserve services to (a) universal service provider(s) within certain limits and conditions.

The common position lists a number of Member States which have explicitly requested a maximal implementation delay till 31 December 2012 at the latest. Such a notification shall be addressed to the Commission, without impeding them from terminating it at an earlier stage. For those Member States wishing to apply the above implementation delay, a reciprocity clause towards Member States that opened up their postal markets completely shall apply for a limited time-period.

(b) **European Parliament amendments**

The Council moreover considered a number of amendments, even though maintaining a different position in that respect. In some cases, their acknowledgment however becomes clear from a combined reading of different provisions. In particular,

Recitals:

- Amendment 6 is not accepted, since the prospective study is one of the elements considered by the European Parliament and the Council as a basis for their agreement on the basic aim of the amending Directive (see also recital 13),
- Amendments 7 and 74 have been modified in recital 13, where one specific date is not precisely mentioned, but the idea of a final date for the accomplishment of the internal market for postal services is clearly confirmed,
- Amendment 11 was considered redundant, as it is sufficiently addressed in recitals 14 and 18,
- Amendment 13 is not fully accepted, as part of it due to its normative character was considered as inappropriate for a recital and is better reflected in Article 1 (point 18),
- Amendment 15 has become now part of the wider definition of 'user' (in Article 1, point 2),
- Amendment 19 is addressed in the core provisions of the common position; it becomes clear, in particular from a combined reading of the amending Article 2 and recital 13,
- Amendment 22 has been taken into serious consideration and a new specific Article has been introduced to that purpose into the common position (Article 1, point 23),
- Amendment 24 is considered as unnecessary, as the underlying issue is dealt with in the general principles governing the universal service scope (N.B.: The Commission will also make a relevant statement on the Council's common position),
- Amendment 26: The Council considered that the most appropriate place for this amendment to provide some legal effect would be within its main provisions; therefore, the idea is now considered in Article 12 (Article 1, point 14),
- Amendment 27 was considered as too detailed and prescriptive; Article 12 provisions instead comprise all necessary clarification about the conditions justifying price flexibility and the public interest reasons allowing uniform tariffs; recital 38 provides significant examples for the latter case,
- Amendment 29 was not supported, as the deleted general statement should remain valid throughout the FMO process. However, the Council agreed with the related EP amendment 30,
- Amendment 31 was adapted to the general principles set out in Article 1 (point 18),
- on Amendment 32 the Council maintains its position with respect to the composition of the Postal Committee,
- on Amendment 33, the Council supports the Commission proposal and considers that the co-operation between national regulatory authorities, other regulatory bodies and the Commission shall be under the specific conditions set out in Article 22 (Article 1, point 20).

Articles:

- with regard to Amendments 41 and 66, the Council supports a consistent approach to the financing of universal services; the text of the Commission proposal has been considerably improved, in order to better reflect the different means and ways for guaranteeing its permanent provision. In addition, a new Annex I on the net cost calculation provides an indicative common basis. Member States may provide the Commission with their financing plans as indicated in recital 26,

- Amendments 62 and 64 have constituted the basis for the derogation set out now in Article 3 of the amending Directive; however, the general and unconditional derogation for all Member States that acceded to the EU after the entry into force of the last postal Directive 2002/39/EC has been substituted by a precise list of Member States that have explicitly requested such a derogation,
- Amendment 43 gave rise to concerns and scepticism within the Council, and therefore, the Council agreed to maintain the text of the existing Directive, on the additional grounds that its practice was not so far put into question,
- with regard to Amendments 44 and 81, the Council undertook a thorough examination and re-drafting of the Article dealing with authorisation issues with the ultimate goal of eliminating any obstacles to the unhindered provision of postal services. Regarding the precise references to services falling within the scope of universal service, the Council agreed to maintain the existing provisions and the Commission made a statement thereon. In addition, it has to be noted that the question of the respect for working conditions is appropriately addressed in other parts of the common position (as presented under 2(a)(vi)),
- Amendment 46 is currently addressed partly in recital 35 and partly in Article 1 (point 13),
- Amendment 51 was considered as a superfluous reference to another amending provision of the same Directive,
- Amendment 54 was not accepted by the Council, as being out of the scope of this amending Directive and not in line with the subsidiarity principle,
- Amendment 56 was supported by the Council, although it agreed on the first report being issued no later than 31 December 2013 (instead of 31 December 2011), in order for it to provide a thorough overview of the Directive's implementation in all Member States, including those benefiting from an implementation delay by the end of 2012,
- Amendment 57 is covered by Article 1 (point 22); the Commission shall provide a thorough analysis of employment trends in the postal sector in its regular report,
- Amendment's 58 objective was carefully taken into consideration in the Council common position (Article 1 (point 23)); however, the limitations in time are not taken on board, as the Commission's assistance on the Directive's implementation is to be understood as a general task and a continuous exercise throughout the Directive's implementation. In addition, the Council strongly supports the position that it should not be compulsory for all Member States to submit their financing plans to the Commission (recital 26),
- finally, Amendment 59 is no longer consistent with the overall transposition time-table, as set out in the common position.

IV. CONCLUSIONS

The common position is largely and extensively based on the European Parliament First Reading opinion and reflects the overall balance achieved at the informal negotiations between the European Parliament, the Council and the Commission with a view to concluding an early agreement at the stage of second reading in the European Parliament. The text maintains the approach and the legal architecture proposed by the Commission (and based on the current Directive 97/67/EC, as amended) with a view to adapting the regulation of the postal sector to the new conditions pertaining to the full accomplishment of the internal market by the end of 2010. It provides a certain number of Member States with the possibility of requesting a derogation (by 31 December 2012, at the latest) with regard to the implementation date of the new Directive, in order to meet particular structural needs of their national postal markets.

Against this background, important clarifications and re-adjustments have been made in particular, to the relevant definitions of the proposal, the guarantees for the universal service provision, including its financing, the authorisation regime, the role of the national authorities and the information provision by all postal service providers.

The Council looks forward to the confirmation by the European Parliament of its agreement on the common position with a view to an early adoption of this Directive.
