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(Information)

COUNCIL

COMMON POSITION (EC) No 48/2000

adopted by the Council on 28 September 2000

**with a view to adopting Directive 2000/.../EC of the European Parliament and of the Council of ...
on the harmonisation of certain aspects of copyright and related rights in the information society**

(2000/C 344/01)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE
EUROPEAN UNION,

Having regard to the Treaty establishing the European Com-
munity, and in particular Articles 47(2), 55 and 95 thereof,

Having regard to the proposal from the Commission⁽¹⁾,

Having regard to the opinion of the Economic and Social
Committee⁽²⁾,

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

Whereas:

(1) The Treaty provides for the establishment of an internal
market and the institution of a system ensuring that
competition in the internal market is not distorted.
Harmonisation of the laws of the Member States on
copyright and related rights contributes to the achieve-
ment of these objectives.

(2) The European Council, meeting at Corfu on 24 and
25 June 1994, stressed the need to create a general and

flexible legal framework at Community level in order to
foster the development of the information society in
Europe. This requires, *inter alia*, the existence of an
internal market for new products and services. Important
Community legislation to ensure such a regulatory
framework is already in place or its adoption is well
under way. Copyright and related rights play an
important role in this context as they protect and
stimulate the development and marketing of new prod-
ucts and services and the creation and exploitation of
their creative content.

(3) The proposed harmonisation will help to implement the
four freedoms of the internal market and relates to
compliance with the fundamental principles of law and
especially of property, including intellectual property,
and freedom of expression and the public interest.

(4) A harmonised legal framework on copyright and related
rights, through increased legal certainty and while
providing for a high level of protection of intellectual
property, will foster substantial investment in creativity
and innovation, including network infrastructure, and
lead in turn to growth and increased competitiveness of
European industry, both in the area of content provision
and information technology and more generally across
a wide range of industrial and cultural sectors. This will
safeguard employment and encourage new job creation.

(1) OJ C 108, 7.4.1998, p. 6 and OJ C 180, 25.6.1999, p. 6.

(2) OJ C 407, 28.12.1998, p. 30.

(3) Opinion of the European Parliament of 10 February 1999 (OJ
C 150, 28.5.1999, p. 171), Council Common Position of 28 Sep-
tember 2000 and Decision of the European Parliament of ... (not
yet published in the Official Journal).

- (5) Technological development has multiplied and diversified the vectors for creation, production and exploitation. While no new concepts for the protection of intellectual property are needed, the current law on copyright and related rights should be adapted and supplemented to respond adequately to economic realities such as new forms of exploitation.
- (6) Without harmonisation at Community level, legislative activities at national level which have already been initiated in a number of Member States in order to respond to the technological challenges might result in significant differences in protection and thereby in restrictions on the free movement of services and products incorporating, or based on, intellectual property, leading to a refragmentation of the internal market and legislative inconsistency. The impact of such legislative differences and uncertainties will become more significant with the further development of the information society, which has already greatly increased transborder exploitation of intellectual property. This development will and should further increase. Significant legal differences and uncertainties in protection may hinder economies of scale for new products and services containing copyright and related rights.
- (7) The Community legal framework for the protection of copyright and related rights must, therefore, also be adapted and supplemented as far as is necessary for the smooth functioning of the internal market. To that end, those national provisions on copyright and related rights which vary considerably from one Member State to another or which cause legal uncertainties hindering the smooth functioning of the internal market and the proper development of the information society in Europe should be adjusted, and inconsistent national responses to the technological developments should be avoided, while differences not adversely affecting the functioning of the internal market need not be removed or prevented.
- (8) The various social, societal and cultural implications of the information society require that account be taken of the specific features of the content of products and services.
- (9) Any harmonisation of copyright and related rights must take as a basis a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property.
- (10) If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as 'on-demand' services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.
- (11) A rigorous, effective system for the protection of copyright and related rights is one of the main ways of ensuring that European cultural creativity and production receive the necessary resources and of safeguarding the independence and dignity of artistic creators and performers.
- (12) Adequate protection of copyright works and subject-matter of related rights is also of great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action.
- (13) A common search for, and consistent application at European level of, technical measures to protect works and other subject-matter and to provide the necessary information on rights are essential in so far as the ultimate aim of these measures is to give effect to the principles and guarantees laid down in law.
- (14) This Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching.
- (15) The Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of two new Treaties, the 'WIPO Copyright Treaty' and the 'WIPO Performances and Phonograms Treaty', dealing respectively with the protection of authors and the protection of performers and phonogram producers. Those Treaties update the international protection for copyright and related rights significantly, not least with regard to the 'digital agenda' and improve the means to fight piracy worldwide. The Community and a majority of Member States have already signed the Treaties and the process of making arrangements for the ratification of the Treaties by the Community and the Member States is under way. This Directive also serves to implement a number of the new international obligations.

- (16) Liability for activities in the network environment concerns not only copyright and related rights but also other areas, such as defamation, misleading advertising, or infringement of trade marks, and is addressed horizontally 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⁾, which clarifies and harmonises various legal issues relating to information society services including electronic commerce. This Directive should be implemented within a timescale similar to that for the implementation of the Directive on electronic commerce, since that Directive provides a harmonised framework of principles and provisions relevant, *inter alia*, to important parts of this Directive. This Directive is without prejudice to provisions relating to liability in that Directive.
- (17) It is necessary, especially in the light of the requirements arising out of the digital environment, to ensure that collecting societies achieve a higher level of rationalisation and transparency with regard to compliance with competition rules.
- (18) This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences.
- (19) The moral rights of rightholders should be exercised according to the legislation of the Member States and the provisions of the Berne Convention for the Protection of Literary and Artistic Works, of the WIPO Copyright Treaty and of the WIPO Performances and Phonograms Treaty. Such moral rights remain outside the scope of this Directive.
- (20) This Directive is based on principles and rules already laid down in the Directives currently in force in this area, in particular Directives 91/250/EEC⁽²⁾, 92/100/EEC⁽³⁾, 93/83/EEC⁽⁴⁾, 93/98/EEC⁽⁵⁾ and 96/9/EC⁽⁶⁾, and it develops those principles and rules and places them in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, unless otherwise provided in this Directive.
- (21) This Directive should define the scope of the acts covered by the reproduction right with regard to the different beneficiaries. This should be done in conformity with the *acquis communautaire*. A broad definition of these acts is needed to ensure legal certainty within the internal market.
- (22) The objective of proper support for the dissemination of culture must not be achieved by sacrificing strict protection of rights or by tolerating illegal forms of distribution of counterfeited or pirated works.
- (23) This Directive should harmonise further the author's right of communication to the public. This right should be understood in a broad sense covering all communication to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting. This right should not cover any other acts.
- (24) The right to make available to the public subject-matter referred to in Article 3(2) should be understood as covering all acts of making available such subject-matter to members of the public not present at the place where the act of making available originates, and as not covering any other acts.
- (25) The legal uncertainty regarding the nature and the level of protection of acts of on-demand transmission of copyright works and subject-matter protected by related rights over networks should be overcome by providing for harmonised protection at Community level. It should be made clear that all rightholders recognised by this Directive should have an exclusive right to make available to the public copyright works or any other subject-matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterised by the fact that members of the public may access them from a place and at a time individually chosen by them.
- (26) With regard to the making available in on-demand services by broadcasters of their radio or television productions incorporating music from commercial phonograms as an integral part thereof, collective licensing arrangements are to be encouraged in order to facilitate the clearance of the rights concerned.
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- (1) OJ L 178, 17.7.2000, p. 1.
- (2) Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs (OJ L 122, 17.5.1991, p. 42). Directive as amended by Directive 93/98/EEC.
- (3) Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 346, 27.11.1992, p. 61). Directive as amended by Directive 93/98/EEC.
- (4) Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ L 248, 6.10.1993, p. 15).
- (5) Council Directive 93/98/EEC of 29 October 1993 harmonising the term of protection of copyright and certain related rights (OJ L 290, 24.11.1993, p. 9).
- (6) Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20).

- (27) The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.
- (28) Copyright protection under this Directive includes the exclusive right to control distribution of the work incorporated in a tangible article. The first sale in the Community of the original of a work or copies thereof by the rightholder or with his consent exhausts the right to control resale of that object in the Community. This right should not be exhausted in respect of the original or of copies thereof sold by the rightholder or with his consent outside the Community. Rental and lending rights for authors have been established in Directive 92/100/EEC. The distribution right provided for in this Directive is without prejudice to the provisions relating to the rental and lending rights contained in Chapter I of that Directive.
- (29) The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.
- (30) The rights referred to in this Directive may be transferred, assigned or subject to the granting of contractual licences, without prejudice to the relevant national legislation on copyright and related rights.
- (31) A fair balance of rights and interests between the different categories of rightholders, as well as between the different categories of rightholders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of transborder exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market.
- (32) This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. Some exceptions or limitations only apply to the reproduction right, where appropriate. This list takes due account of the different legal traditions in Member States, while, at the same time, aiming to ensure a functioning internal market. Member States should arrive at a coherent application of these exceptions and limitations, which will be assessed when reviewing implementing legislation in the future.
- (33) The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognised and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorised by the rightholder or not restricted by law.
- (34) Member States should be given the option of providing for certain exceptions or limitations for cases such as educational and scientific purposes, for the benefit of public institutions such as libraries and archives, for purposes of news reporting, for quotations, for use by people with disabilities, for public security uses and for uses in administrative and judicial proceedings.
- (35) In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair

compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.

- (36) The Member States may provide for fair compensation for rightholders also when applying the optional provisions on exceptions or limitations which do not require such compensation.
- (37) Existing national schemes on reprography, where they exist, do not create major barriers to the internal market. Member States should be allowed to provide for an exception or limitation in respect of reprography.
- (38) Member States should be allowed to provide for an exception or limitation to the reproduction right for certain types of reproduction of audio, visual and audiovisual material for private use, accompanied by fair compensation. This may include the introduction or continuation of remuneration schemes to compensate for the prejudice to rightholders. Although differences between those remuneration schemes affect the functioning of the internal market, those differences, with respect to analogue private reproduction, should not have a significant impact on the development of the information society. Digital private copying is likely to be more widespread and have a greater economic impact. Due account should therefore be taken of the differences between digital and analogue private copying and a distinction should be made in certain respects between them.
- (39) When applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available. Such exceptions or limitations should not inhibit the use of technological measures or their enforcement against circumvention.
- (40) Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives. However, this should be limited to certain special cases covered by the reproduction right. Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter. This Directive should be without prejudice to the Member States' option to derogate from the exclusive public lending right in accordance with Article 5 of Directive 92/100/EEC. Therefore, specific contracts or licences should be promoted which, without creating imbalances, favour such establishments and the disseminative purposes they serve.
- (41) When applying the exception or limitation in respect of ephemeral recordings made by broadcasting organisations it is understood that a broadcaster's own facilities include those of a person acting on behalf of and under the responsibility of the broadcasting organisation.
- (42) When applying the exception or limitation for non-commercial educational and scientific research purposes, including distance learning, the non-commercial nature of the activity in question should be determined by that activity as such. The organisational structure and the means of funding of the establishment concerned are not the decisive factors in this respect.
- (43) It is in any case important for the Member States to adopt all necessary measures to facilitate access to works by persons suffering from a disability which constitutes an obstacle to the use of the works themselves, and to pay particular attention to accessible formats.
- (44) When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.

- (45) The exceptions and limitations referred to in Article 5(2), (3) and (4) should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders in so far as permitted by national law.
- (46) Recourse to mediation could help users and rightholders to settle disputes. The Commission, in cooperation with the Member States within the Contact Committee, should undertake a study to consider new legal ways of settling disputes concerning copyright and related rights.
- (47) Technological development will allow rightholders to make use of technological measures designed to prevent or restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the *sui generis* right in databases. The danger, however, exists that illegal activities might be carried out in order to enable or facilitate the circumvention of the technical protection provided by these measures. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against circumvention of effective technological measures and against provision of devices and products or services to this effect.
- (48) Such legal protection should be provided in respect of technological measures that effectively restrict acts not authorised by the rightholders of any copyright, rights related to copyright or the *sui generis* right in databases without, however, preventing the normal operation of electronic equipment and its technological development. Such legal protection implies no obligation to design devices, products, components or services to correspond to technological measures, so long as such device, product, component or service does not otherwise fall under the prohibition of Article 6. Such legal protection should respect proportionality and should not prohibit those devices or activities which have a commercially significant purpose or use other than to circumvent the technical protection. In particular, this protection should not hinder research into cryptography.
- (49) The legal protection of technological measures is without prejudice to the application of any national provisions which may prohibit the private possession of devices, products or components for the circumvention of technological measures.
- (50) Such a harmonised legal protection does not affect the specific provisions on protection provided for by Directive 91/250/EEC. In particular, it should not apply to the protection of technological measures used in connection with computer programs, which is exclusively addressed in that Directive. It should neither inhibit nor prevent the development or use of any means of circumventing a technological measure that is necessary to enable acts to be undertaken in accordance with the terms of Article 5(3) or Article 6 of Directive 91/250/EEC. Articles 5 and 6 of that Directive exclusively determine exceptions to the exclusive rights applicable to computer programs.
- (51) The legal protection of technological measures applies without prejudice to public policy, as reflected in Article 5, or public security. Member States should promote voluntary measures taken by rightholders, including the conclusion and implementation of agreements between rightholders and other parties concerned, to accommodate achieving the objectives of certain exceptions or limitations provided for in national law in accordance with this Directive. In the absence of such voluntary measures or agreements within a reasonable period of time, Member States should take appropriate measures to ensure that rightholders provide beneficiaries of such exceptions or limitations with appropriate means of benefiting from them, by modifying an implemented technological measure or by other means. However, in order to prevent abuse of such measures taken by rightholders, including within the framework of agreements, or taken by a Member State, any technological measures applied in implementation of such measures should enjoy legal protection.
- (52) When implementing an exception or limitation for private copying in accordance with Article 5(2)(b), Member States should likewise promote the use of voluntary measures to accommodate achieving the objectives of such exception or limitation. If, within a reasonable period of time, no such voluntary measures to make reproduction for private use possible have been taken, Member States may take measures to enable beneficiaries of the exception or limitation concerned to benefit from it. Voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, as well as measures taken by Member States, do not prevent rightholders from using technological measures which are consistent with the exceptions or limitations on private copying in national law in accordance with Article 5(2)(b), taking account of the condition of fair compensation under that provision and

the possible differentiation between various conditions of use in accordance with Article 5(5), such as controlling the number of reproductions. In order to prevent abuse of such measures, any technological measures applied in their implementation should enjoy legal protection.

- (53) Important progress has been made in the international standardisation of technical systems of identification of works and protected subject-matter in digital format. In an increasingly networked environment, differences between technological measures could lead to an incompatibility of systems within the Community. Compatibility and interoperability of the different systems should be encouraged. It would be highly desirable to encourage the development of global systems.
- (54) Technological development will facilitate the distribution of works, notably on networks, and this will entail the need for rightholders to identify better the work or other subject-matter, the author or any other rightholder, and to provide information about the terms and conditions of use of the work or other subject-matter in order to render easier the management of rights attached to them. Rightholders should be encouraged to use markings indicating, in addition to the information referred to above, *inter alia*, their authorisation when putting works or other subject-matter on networks.
- (55) There is, however, the danger that illegal activities might be carried out in order to remove or alter the electronic copyright-management information attached to it, or otherwise to distribute, import for distribution, broadcast, communicate to the public or make available to the public works or other protected subject-matter from which such information has been removed without authority. In order to avoid fragmented legal approaches that could potentially hinder the functioning of the internal market, there is a need to provide for harmonised legal protection against any of these activities.
- (56) Any such rights-management information systems referred to above may, depending on their design, at the same time process personal data about the consumption patterns of protected subject-matter by individuals and allow for tracing of on-line behaviour. These technical means, in their technical functions, should incorporate privacy safeguards in accordance with 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 the free movement of such data⁽¹⁾.
- (57) Member States should provide for effective sanctions and remedies for infringements of rights and obligations as set out in this Directive. They should take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for should be effective, proportionate and dissuasive and should include the possibility of seeking damages and/or injunctive relief and, where appropriate, of applying for seizure of infringing material.
- (58) In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject-matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States.
- (59) The protection provided under this Directive should be without prejudice to national or Community legal provisions in other areas, such as industrial property, data protection, conditional access, access to public documents, and the rule of media exploitation chronology, which may affect the protection of copyright or related rights.
- (60) In order to comply with the WIPO Performances and Phonograms Treaty, Directives 92/100/EEC and 93/98/EEC should be amended.

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

OBJECTIVE AND SCOPE

Article 1

Scope

1. This Directive concerns the legal protection of copyright and related rights in the framework of the internal market, with particular emphasis on the information society.

⁽¹⁾ OJ L 281, 23.11.1995, p. 31.

2. Except in the cases referred to in Article 11, this Directive shall leave intact and shall in no way affect existing Community provisions relating to:

- (a) the legal protection of computer programs;
- (b) rental right, lending right and certain rights related to copyright in the field of intellectual property;
- (c) copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission;
- (d) the term of protection of copyright and certain related rights;
- (e) the legal protection of databases.

CHAPTER II

RIGHTS AND EXCEPTIONS

Article 2

Reproduction right

Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:

- (a) for authors, of their works;
- (b) for performers, of fixations of their performances;
- (c) for phonogram producers, of their phonograms;
- (d) for the producers of the first fixations of films, in respect of the original and copies of their films;
- (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite.

Article 3

Right of communication to the public of works and right of making available to the public other subject-matter

1. Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

2. Member States shall provide for the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them:

- (a) for performers, of fixations of their performances;
- (b) for phonogram producers, of their phonograms;
- (c) for the producers of the first fixations of films, of the original and copies of their films;
- (d) for broadcasting organisations, of fixations of their broadcasts, whether these broadcasts are transmitted by wire or over the air, including by cable or satellite.

3. The rights referred to in paragraphs 1 and 2 shall not be exhausted by any act of communication to the public or making available to the public as set out in this Article.

Article 4

Distribution right

1. Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise.

2. The distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.

Article 5

Exceptions and limitations

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental, which are an integral and essential part of a technological process whose sole purpose is to enable:

- (a) a transmission in a network between third parties by an intermediary or
- (b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

- (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;
- (b) in respect of reproductions on any medium made for the private use of a natural person and for non-commercial ends, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;
- (c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;
- (d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be permitted;
- (e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

- (a) use for the sole purpose of illustration for teaching or scientific research, as long as, whenever possible, the source, including the author's name, is indicated and to the extent justified by the non-commercial purpose to be achieved;
- (b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;
- (c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the

extent justified by the informatory purpose and as long as, whenever possible the source, including the author's name, is indicated;

- (d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, whenever possible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;
- (e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;
- (f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that, whenever possible, the source, including the author's name, is indicated;
- (g) use during religious celebrations or official celebrations organised by a public authority;
- (h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;
- (i) incidental inclusion of a work or other subject-matter in other material;
- (j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event;
- (k) use for the purpose of caricature, parody or pastiche;
- (l) use in connection with the demonstration or repair of equipment;
- (m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;
- (n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

- (o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

CHAPTER III

PROTECTION OF TECHNOLOGICAL MEASURES AND RIGHTS-MANAGEMENT INFORMATION

Article 6

Obligations as to technological measures

1. Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.

2. Member States shall provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which:

- (a) are promoted, advertised or marketed for the purpose of circumvention of, or
- (b) have only a limited commercially significant purpose or use other than to circumvent, or
- (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of

any effective technological measures.

3. For the purposes of this Directive, the expression 'technological measures' means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the *sui generis* right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed 'effective' where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

4. Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (c), (d) and (e) and Article 5(3)(a), (b) or (e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.

A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and Article 5(5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.

The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.

The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.

When this Article is applied in the context of Directives 92/100/EEC and 96/9/EC, this paragraph shall apply *mutatis mutandis*.

*Article 7***Obligations concerning rights-management information**

1. Member States shall provide for adequate legal protection against any person knowingly performing without authority any of the following acts:

- (a) the removal or alteration of any electronic rights-management information;
- (b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under this Directive or under Chapter III of Directive 96/9/EC from which electronic rights-management information has been removed or altered without authority, if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

2. For the purposes of this Directive, the expression 'rights-management information' means any information provided by rightholders which identifies the work or other subject-matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.

The first subparagraph shall apply when any of these items of information is associated with a copy of, or appears in connection with the communication to the public of, a work or other subject-matter referred to in this Directive or covered by the *sui generis* right provided for in Chapter III of Directive 96/9/EC.

CHAPTER IV

COMMON PROVISIONS*Article 8***Sanctions and remedies**

1. Member States shall provide appropriate sanctions and remedies in respect of infringements of the rights and obligations set out in this Directive and shall take all the measures necessary to ensure that those sanctions and remedies are applied. The sanctions thus provided for shall be effective, proportionate and dissuasive.

2. Each Member State shall take the measures necessary to ensure that rightholders whose interests are affected by an infringing activity carried out on its territory can bring an action for damages and/or apply for an injunction and, where appropriate, for the seizure of infringing material as well as of devices, products or components referred to in Article 6(2).

3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

*Article 9***Continued application of other legal provisions**

This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, legal deposit requirements, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract.

*Article 10***Application over time**

1. The provisions of this Directive shall apply in respect of all works and other subject-matter referred to in this Directive which are, on ... (*), protected by the Member States' legislation in the field of copyright and related rights, or which meet the criteria for protection under the provisions of this Directive or the provisions referred to in Article 1(2).

2. This Directive shall apply without prejudice to any acts concluded and rights acquired before ... (*).

*Article 11***Technical adaptations**

1. Directive 92/100/EEC is hereby amended as follows:

- (a) Article 7 shall be deleted;

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

(b) Article 10(3) shall be replaced by the following:

‘3. The limitations shall only be applied in certain special cases which do not conflict with a normal exploitation of the subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.’

2. Article 3(2) of Directive 93/98/EEC shall be replaced by the following:

‘2. The rights of producers of phonograms shall expire 50 years after the fixation is made. However, if the phonogram has been lawfully published within this period, the said rights shall expire 50 years from the date of the first lawful publication. If no lawful publication has taken place within the period mentioned in the first sentence, and if the phonogram has been lawfully communicated to the public within this period, the said rights shall expire 50 years from the date of the first lawful communication to the public.

However, where through the expiry of the term of protection granted pursuant to this paragraph in its version before amendment by Directive 2000/.../EC of the European Parliament and of the Council of ... on the harmonisation of certain aspects of copyright and related rights in the information society(*) the rights of producers of phonograms are no longer protected on ...(**), this paragraph shall not have the effect of protecting those rights anew.

(*) OJ L

(**) Two years after the entry into force of this Directive.’

Article 12

Final provisions

1. Not later than ...(*) and every three years thereafter, the Commission shall submit to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Directive, in which, *inter alia*, on the basis of specific information supplied by the Member States, it shall examine in particular the application of Articles 5, 6 and 8 in the light of the development of the digital market. In the case of Article 6, it shall examine in particular whether that Article confers a sufficient level of protection and whether acts which are permitted by law are being adversely affected by the use of effective technological measures. Where necessary, in particular to ensure the functioning of the internal market pursuant to Article 14 of the Treaty, it shall submit proposals for amendments to this Directive.

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

2. Protection of rights related to copyright under this Directive shall leave intact and shall in no way affect the protection of copyright.

3. A contact committee is hereby established. It shall be composed of representatives of the competent authorities of the Member States. It shall be chaired by a representative of the Commission and shall meet either on the initiative of the chairman or at the request of the delegation of a Member State.

4. The tasks of the committee shall be as follows:

- (a) to organise consultations on all questions deriving from the application of this Directive;
- (b) to facilitate the exchange of information on relevant developments in legislation and case-law, as well as relevant economic, social, cultural and technological developments;
- (c) to act as a forum for the assessment of the digital market in works and other items, including private copying and the use of technological measures.

Article 13

Implementation

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

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 the provisions of domestic law which they adopt in the field governed by this Directive.

Article 14

Entry into force

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

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

Article 15

Done at ...

Addressees*For the European Parliament**For the Council*

This Directive is addressed to the Member States.

*The President**The President*

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

1. On 21 January 1998, the Commission submitted a proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the information society⁽¹⁾, based on Articles 47(2), 55 and 95 of the EC Treaty.
2. The Economic and Social Committee delivered its opinion on 9 September 1998⁽²⁾.
3. The European Parliament delivered its opinion at first reading on 10 February 1999⁽³⁾.
4. The Commission submitted an amended proposal on 25 May 1999⁽⁴⁾.
5. The Council adopted its Common Position according to Article 251 of the EC Treaty on 28 September 2000.

II. AIM

6. The aim of the Commission's proposal is to provide a harmonised and appropriate legal framework for copyright and related rights in the information society. It adjusts and complements the existing framework so as to ensure the smooth functioning of the internal market and bring about a favourable environment which protects and stimulates creativity and innovative activities within the Community. The proposal is also intended to implement the new international obligations resulting from the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) concluded in Geneva on 20 December 1996.

III. COMMON POSITION

Recitals

7. The Council has amended, deleted or merged a number of recitals appearing in the Commission's amended proposal and has adopted a few additional ones. Reference to the main changes in the recitals is made below under the relevant Articles.

Articles

Article 1 (scope)

8. The Council has taken on board the new wording of this Article, as proposed by the Commission in its amended proposal, apart from the term 'specific', which was considered unnecessary and capable of creating confusion as regards the relationship between the provisions of this Directive and those provided by existing Community Directives in the field of copyright or related rights. At the end of recital 20, the Council has adopted additional wording making it clear that, unless otherwise provided in this Directive, provisions in existing, Community Directives in the field of copyright or related rights prevail.

⁽¹⁾ OJ C 108, 7.4.1998, p. 6.

⁽²⁾ OJ C 407, 28.12.1998, p. 30.

⁽³⁾ OJ C 150, 28.5.1999, p. 171.

⁽⁴⁾ OJ C 180, 25.6.1999, p. 6.

Article 2 (reproduction right)

9. In its amendment 29, the European Parliament had suggested the deletion of the terms 'of the original and copies' in Article 2(a). Both the Commission and the Council have accepted this suggestion.

Article 3 (right of communication to the public of works and right of making available to the public other subject matter)

10. The Council has slightly reworded both the title and paragraph 2 of this Article with a view to making clear that, with respect to subject matter other than works, the present Directive will regulate only the right of making available to the public and not the right of communication to the public, which has already been dealt with in Article 8 of Council Directive 92/100/EEC of 19 November 1992⁽¹⁾.
11. In line with the provision of Article 2(a) (see point 9), the Council decided to delete the terms 'originals and copies of' in Article 3(1).
12. With its amendment 13, the European Parliament had suggested, *inter alia*, that the term 'private communication' in recital 16 (now recital 25) be replaced by 'direct representation or performance'. In its amended proposal, the Commission took on board this suggestion. The Council, however, considered that, in the absence of an accepted Community-wide definition thereof, these terms risked creating legal uncertainty. Therefore, in an attempt to delineate in a clear and positive manner which acts fall within the scope of the rights dealt with in Article 3, the Council preferred to delete these terms and to clarify the issue in recitals 23 and 24.
13. In its amendment 31, the European Parliament had suggested an additional paragraph to Article 3 along the lines of the agreed statement concerning Article 8 of WCT. In its amended proposal the Commission had taken on board this suggestion. Since, however, a corresponding statement already appeared in recital 17 of the Commission's amended proposal, the Council preferred to include this statement in the recitals only (see recital 27), considering that as a clarifying statement this did not belong in the main body of the Directive.

Article 4 (distribution right)

14. While accepting in substance Article 4 as set out in the Commission's amended proposal, the Council has amended slightly the wording of the first paragraph of this Article with a view to aligning it with the wording of the definitions contained in Articles 2 and 3, as well as in existing Community Directives in the field of copyright and related rights.
15. The Council has also inserted additional text in recital 28 in order to make clear that the right of distribution for authors, provided for in Article 4(1) of the present Directive, is without prejudice to authors' rental and lending rights, dealt with in Directive 92/100/EEC.
16. Furthermore, the Council specified in recital 29 that the principle of exhaustion, set out in Article 4(2) of the present Directive, would not apply to the rental and lending rights provided for in Directive 92/100/EEC (see also Article 1(4) of that Directive).

⁽¹⁾ OJ L 346, 27.11.1992, p. 61.

*Article 5 (exceptions to Articles 2, 3 and 4)***Paragraph 1**

17. Paragraph 1 sets out the only mandatory exception to any of the rights provided for in Articles 2, 3 and 4. In its amended proposal, the Commission had taken on board part of the European Parliament's amendment 33 concerning the first paragraph of Article 5. In its Common Position, the Council has further amended this provision in order to strike a fair balance between the interests of rightholders and those of intermediaries (such as Internet service providers) and users. According to the Council's text, the conditions 'transient' and 'incidental' are no longer cumulative, but alternative. The Council's provision also distinguishes between purely technical acts, the sole purpose of which is to enable the mere transmission in a network between third parties by an intermediary of a work or other subject matter, irrespective of the use to be made of it by the recipient of the transmission, and acts, the sole purpose of which is to enable a use to be made, which must be lawful, of a work or other subject matter. In both cases, the other conditions of this provision must also be fulfilled in order to benefit from the exemption. In recital 33, the Council has added a definition of the term 'lawful use', largely inspired by the European Parliament's amendment 33. The Council has also included in recital 33 wording used in the Directive on electronic commerce⁽¹⁾ and has adopted technical adjustments to recital 16 which take into consideration the fact that that Directive has been adopted in the mean time.

Paragraph 2

18. Paragraphs 2, 3 and 4 contain optional exceptions to the rights provided for in Articles 2, 3 and 4.
19. With its amendments 34, 36, 37 and 41 the European Parliament had introduced the notion of 'fair compensation' as a condition for a number of exceptions. In its amended proposal, the Commission had taken on board the abovementioned amendments, albeit without providing any definition of the term 'fair compensation'. The Council decided to provide in recital 35 guidance on the application of this new concept. Finally, the Council specified in the new recital 36 that nothing prevented Member States from applying the condition of fair compensation to exceptions not explicitly required by the Directive.
20. With its amendment 34, the European Parliament had suggested that sheet music be excluded from the exception for reprographic reproduction and that the latter be made conditional on fair compensation for the rightholders. Both the Commission and the Council have been able to accept these suggestions.
21. The European Parliament had suggested, in its amendments 36 and 37, that analogue and digital private copying be dealt with in two separate subparagraphs. The Commission had followed this suggestion in its amended proposal. The Council, however, considered that such a differentiation between analogue and digital private copying should not be made in Article 5; therefore, it decided to merge subparagraphs (b) and (b)(a) of Article 5(2) of the Commission's amended proposal in one single subparagraph (b), while acknowledging in recitals 38 and 44 the need of distinguishing between analogue and digital private copying in certain respects (see also point 44, second indent).

⁽¹⁾ OJ L 178, 17.7.2000, p. 1.

22. With its amendments 36 and 37, the European Parliament further suggested that the exception for private copying be made conditional on fair compensation for the rightholders. Both the Commission and the Council have accepted this suggestion.
23. With the same amendments, the European Parliament had also suggested the addition to 'private use' of the terms 'and purely personal'. The Commission had accepted to use the terms 'and strictly personal' in its amended proposal. The Council deleted these terms, considering that they were either redundant or unduly restrictive.
24. Furthermore, the Council:
 - replaced the reference to 'audio, visual or audiovisual analogue/digital recording media' in the Commission's amended proposal with 'any medium' in order to simplify the wording,
 - used the expression 'made for the private use of a natural person' to cover not only reproductions made by a natural person but also reproductions made on behalf of such a person,
 - provided that Member States, when assessing what compensation would be fair for private copying, should take account of the application or non-application of technological measures referred to in Article 6.
25. With its amendment 38, the European Parliament had suggested specifying in Article 5(2)(c) that only acts of reproduction done for documentation or conservation purposes could be exempted. The Commission took on board this suggestion. The Council, however, preferred a more flexible formulation, which would allow Member States to clear also acts of reproduction made by the establishments concerned for a purpose different from the ones mentioned above, as long as these acts do not confer any economic or commercial advantage.
26. The European Parliament had also suggested, and the Commission had accepted, that Article 5(2)(c) provide an open list of the categories of establishments which could qualify as beneficiaries of the exception concerned. The Council, however, opted for an exhaustive list.
27. The provision of Article 5(2)(d) had been added to the list of exceptions in the Commission's amended proposal following a suggestion from the European Parliament (amendment 39). The Council has replaced 'fixations' by 'recording' and has added a second clause to this subparagraph in order to align the wording with Article 11bis of the Berne Convention. The Council also clarified the notion 'by means of their own facilities' in the new recital 41 in order to provide Member States with sufficient flexibility to adapt their law to market changes.
28. The exception contained in Article 5(2)(e) has been added by the Council in order to allow persons resident in certain non-commercial social institutions for health or other equally compelling reasons to watch and/or listen to their favourite programmes even where the latter are broadcast at a time which is not compatible with the smooth functioning of the institutions concerned.

Paragraph 3

29. In its amendments 43 and 44, the European Parliament had suggested that the terms 'and if possible the author's name' complete the obligation of source acknowledgement in the exceptions of Article 5(3)(c) and (d). The Commission took these suggestions on board in its amended proposal. The Council, in order to harmonise the wording used in various clauses when it comes to source acknowledgement, has decided to use the terms 'whenever possible, the source, including the author's name' in Article 5(3)(a), (c), (d) and (f).

30. With its amendment 41, the European Parliament had suggested making the exception of Article 95(3)(a) conditional on fair compensation. The Commission had taken on board this suggestion. The Council, however, considered that this was not necessary, taking into account the non-commercial purpose of the activities concerned, and the possibility open to Member States of imposing such a condition (see recital 36).
31. As regards Article 5(3)(b), the Council has taken on board practically unchanged the wording of the Commission's amended proposal, which was based on Parliament's amendment 42.
32. In the Commission's amended proposal (see also Parliament's amendment 43), Article 5(3)(c) had been inspired by the exception provided for in Article 10bis(2) of the Berne Convention. The Council, however, decided to incorporate in this clause both of the exceptions provided for in Article 10bis of the Berne Convention and to follow more closely the language used in the latter.
33. In Article 5(3)(d), the Council accepted practically unchanged the wording of the Commission's amended proposal, which had followed Parliament's amendment 44.
34. In Article 5(3)(e), the Council accepted the Commission's amended proposal, which had followed Parliament's amendment 45.
35. In the provisions (f) to (n) of Article 5(3), the Council has accepted taking on board a number of additional, narrowly-defined exceptions to accommodate requests from Member States.
36. Furthermore, the Council has adopted the new provision of Article 5(3)(o), which allows Member States to maintain exceptions of minor importance, which already exist under their national law at the time the Directive enters into force, provided these exceptions relate to analogue uses only and do not affect the free circulation of goods and services within the Community. This provision, together with the additional exceptions in Article 5(3)(f) to (n), constitutes a reasonable compromise between the positions of those who would have preferred a completely open list of optional exceptions and those who would have preferred a much shorter list of purely mandatory exceptions.

Paragraph 4

37. In Article 5(4), the Council accepted unchanged the wording of the Commission's amended proposal, which was based on Parliament's amendment 46.

Paragraph 5

38. In Article 5(5), the Council preferred aligning the wording with that of Article 10 of the WCT and Article 16 of the WPPT. The additional issue concerning the relationship between exceptions and technological measures, raised in this context by the European Parliament with its amendment 47, has been addressed by the Council in the context of Article 6 (see points 43 and 44).
39. The Commission did not include in its amended proposal a provision corresponding to Parliament amendment 48. The Council has followed the Commission in this respect.

Article 6 (obligations as to technological measures)

40. The Council has followed the structure of Article 6 proposed in Parliament amendments 49 to 54 and taken on board by the Commission in its amended proposal.
41. With a view to simplifying the drafting, the Council deleted the terms 'designed to protect any copyright or... Directive 96/9/EC' and 'without authority' in the first two paragraphs of Article 6, on the grounds that these were covered by the definition of technological measures provided in paragraph 3.
42. In Article 6(2), the Council preferred to delineate more precisely the scope of the provision by making exhaustive the list of the various activities against which Member States are bound to provide adequate legal protection if the other conditions of this paragraph are met.
43. In its amendment 47, the European Parliament had suggested that it be stipulated in Article 5(4) (current Article 5(5)) that the legal protection of technological measures prevailed over the exceptions listed in Article 5. The Commission had addressed this issue under Article 6(3) of its amended proposal, providing that only technological measures preventing or inhibiting the infringement of copyright were protected under Article 6. This meant that technological measures designed to prevent or inhibit acts allowed by law (e.g. by virtue of an exception) were not protectable under Article 6. In other words, under the Commission's amended proposal, the exceptions provided for in Article 5 prevailed over the legal protection of technological measures provided for in Article 6.

The Council has taken a different approach, which it considers strikes a reasonable balance between the interests of rightholders and those of beneficiaries of exceptions. It has adopted in Article 6(3) first sentence of its Common Position a definition of the protectable technological measures which is broader than the one provided for in the Commission's amended proposal or the one set out in Parliament's amendment 54. The terms '... designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the rightholder of any copyright ...' in the Council's definition make it clear that Article 6(1) protects against circumvention of all technological measures designed to prevent or restrict acts not authorised by the rightholder, regardless of whether the person performing the circumvention is a beneficiary of one of the exceptions provided for in Article 5.

44. On the other hand, the Council has provided safeguards for the protection of the legitimate interests of beneficiaries of exceptions by adding a new paragraph 4 to Article 6, accompanied by new explanatory recitals 51 and 52. In Article 6(4), the Council:
- lays down an obligation on Member States, in the absence of voluntary measures taken by rightholders, to take appropriate measures to ensure that rightholders make available to beneficiaries of the exceptions/limitations listed in subparagraph 1 the means of benefiting from these exceptions or limitations,
 - provides Member States with the option, in the absence of voluntary measures taken by rightholders, of taking appropriate measures under certain conditions to ensure that rightholders make available to users the means of benefiting from the exception of private copying (subparagraph 2),
 - extends the legal protection provided for in Article 6(1) to technological measures designed to ensure the availability of the means of benefiting from the exceptions/limitations (subparagraph 3),

- provides that agreed contractual terms for on-demand supply of works or other subject matter will prevail over the provisions of subparagraphs 1 and 2 of Article 6(4),
- extends the application of this paragraph to technological measures applied in the context of two of the existing Community Directives in the field of copyright and/or related rights.

45. In Article 6(3) second sentence, the Council deleted the term 'access to' considering that questions relating to access to works or other subject matter fell outside the field of copyright. The Council also adopted a number of technical changes to the wording of this paragraph with a view to simplifying it further.

Article 7 (obligations concerning rights-management information)

46. In Article 7(1), the Council has brought the wording closer to that of Article 12(1) of the WCT and Article 19(1) of the WPPT. Furthermore, the Council has split recital 33 of the Commission's amended proposal in two (see recitals 54 and 55), adding at the end of recital 54 a sentence on the use by rightholders of markings indicating their authorisation for the putting of the works or other subject matter concerned on the network.

Article 8 (sanctions and remedies)

47. In Article 8(1), the Council retained the term 'dissuasive', which is the term normally used in Community legislation in relation to sanctions and remedies, but deleted the words 'act as a deterrent to further infringement', considering that the latter were redundant.

48. In Article 8(2), the Council has added the obligation of Member States to provide for the possibility of seizing the illegal devices, products or components referred to in Article 6(2). The Council has added similar language in recital 57.

49. The Council also added a new paragraph 3 to Article 8, which calls on Member States to provide for the possibility of rightholders to apply for an injunction against intermediaries carrying third parties' infringements, even where the relevant intermediaries' acts fall under the exception provided for in Article 5(1). This new paragraph is accompanied by new recital 58.

Article 9 (continued application of other legal provisions)

50. The European Parliament had suggested by its amendment 11 a new recital 13a to the effect of excluding the application of the present Directive to designs. In its amended proposal, the Commission had taken on board this suggestion, albeit with a slightly amended wording. For the sake of legal certainty, the Council preferred inserting a broader 'without prejudice' clause in the main body of the Directive under the new Article 9, which also covers legal provisions in other areas.

Article 10 (application over time)

51. In Article 10, the Council preferred to merge part of paragraph 3 of Article 9 of the Commission's amended proposal with paragraph 2 and to delete the rest of paragraph 3, as well as the whole of paragraph 4, as it was felt that issues relating to the interpretation of contracts should rather be left to national law.

Article 11 (technical adaptations)

52. In Article 11(1)(b), the Council aligned the wording of Article 10(3) of Directive 92/100/EEC with the new wording of Article 5(5) of the present Directive.
53. In Article 11(2), the Council modified Article 3(2) of Directive 93/98/EEC by adding:
- to the first subparagraph of that Article a second sentence, aimed at aligning this provision with Article 17 of the WPPT,
 - a second subparagraph, which excludes this modification resulting in the revival of protection of phonograms which had fallen into the public domain under the present text of Article 3(2) of Directive 93/98/EEC before this modification took effect.

Article 12 (final provisions)

54. The Council moved the provisions dealing with implementation issues (Article 11(1) of the Commission's amended proposal) to a new separate Article (see Article 13).
55. In Article 12(1), the Council inserted additional language in the review clause with a view to rendering it more precise and targeted. Thus, the Council has agreed that particular attention should be given to issues such as developments in the digital market or the delicate balance of interests between rightholders and beneficiaries of exceptions during the appraisal of the application of Articles 5, 6 and 8.
56. In Article 12(2), the Council accepted the wording of Article 11(3) of the Commission's amended proposal, which had been suggested by the European Parliament in amendment 57.
57. In Article 12(3) and (4), the Council followed the substance of Article 11(4a) and (4b) of the Commission's amended proposal, while bringing several drafting changes to the text.

Article 13 (implementation)

58. In Article 13(1), the Council deleted the terms 'by 30 June 2000' which had become obsolete and decided that the length of the implementation period should be two years from the entry into force of the Directive.

Article 14 (entry into force)

59. In Article 14, the Council stipulated, in accordance with current practice, that the date of entry into force of the Directive will be the day of its publication in the Official Journal.

Article 15 (addressees)

60. Article 15 was accepted as in the Commission's amended proposal.

IV. CONCLUSIONS

61. In its Common Position, the Council has taken over a considerable number of amendments proposed by the European Parliament. Throughout the Common Position, the Council has sought to strike a reasonable and workable balance between the interests of rightholders and those of other parties concerned. In this context, the Commission is able to accept the Council's Common Position.
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COMMON POSITION (EC) No 49/2000**adopted by the Council on 10 October 2000****with a view to adopting Directive 2000/.../EC of the European Parliament and of the Council of
... on the reorganisation and winding-up of insurance undertakings**

(2000/C 344/02)

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⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee⁽²⁾,

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

Whereas:

- (1) First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance⁽⁴⁾, as supplemented by Directive 92/49/EEC⁽⁵⁾, and first Council Directive 79/267/EEC of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct life assurance⁽⁶⁾, as supplemented by Directive 92/96/EEC⁽⁷⁾, provide for a single authoris-

ation of the insurance undertakings granted by the home Member State supervisory authority. This single authorisation allows the insurance undertaking to carry out its activities in the Community by means of establishment or free provision of services without any further authorisation by the host Member State and under the sole prudential supervision of the home Member State supervisory authorities.

- (2) The insurance directives providing a single authorisation with Community scope for the insurance undertakings do not contain coordination rules in the event of winding-up proceedings. Insurance undertakings as well as other financial institutions are expressly excluded from the scope of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings⁽⁸⁾. It is in the interest of the proper functioning of the internal market and of the protection of creditors that coordinated rules are established at Community level for winding-up proceedings in respect of insurance undertakings.

- (3) Coordination rules should also be established to ensure that the reorganisation measures, adopted by the competent authority of a Member State in order to preserve or restore the financial soundness of an insurance undertaking and to prevent as much as possible a winding-up situation, produce full effects throughout the Community. The reorganisation measures covered by this Directive are those affecting pre-existing rights of parties other than the insurance undertaking itself. The measures provided for in Article 20 of Directive 73/239/EEC and Article 24 of Directive 79/267/EEC should be included within the scope of this Directive provided that they comply with the conditions contained in the definition of reorganisation measures.

(1) OJ C 71, 19.3.1987, p. 5 and OJ C 253, 6.10.1989, p. 3.

(2) OJ C 319, 30.11.1987, p. 10.

(3) Opinion of the European Parliament of 15 March 1989 (OJ C 96, 17.4.1989, p. 99), confirmed on 2 December 1993, Council Common Position of 10 October 2000 and Decision of the European Parliament of ... (not yet published in the Official Journal).

(4) OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 95/26/EC of the European Parliament and of the Council (OJ L 168, 18.7.1995, p. 7).

(5) Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC (third non-life insurance Directive) (OJ L 228, 11.8.1992, p. 1).

(6) OJ L 63, 13.3.1979, p. 1. Directive as last amended by Directive 95/26/EC.

(7) Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive) (OJ L 360, 9.12.1992, p. 1).

(8) OJ L 160, 30.6.2000, p. 1.

- (4) This Directive has a Community scope which affects insurance undertakings as defined in Directives 73/239/EEC and 79/267/EEC which have their head office in the Community, Community branches of insurance undertakings which have their head office in third countries and creditors resident in the Community. This Directive should not regulate the effects of the reorganisation measures and winding-up proceedings vis-à-vis third countries.
- (5) This Directive should concern winding-up proceedings whether or not they are founded on insolvency and whether they are voluntary or compulsory. It should apply to collective proceedings as defined by the home Member State's legislation in accordance with Article 9 involving the realisation of the assets of an insurance undertaking and the distribution of their proceeds. Winding-up proceedings which, without being founded on insolvency, involve for the payment of insurance claims a priority order in accordance with Article 10 should also be included in the scope of this Directive. Claims by the employees of an insurance undertaking arising from employment contracts and employment relationships should be capable of being subrogated to a national wage guarantee scheme; such subrogated claims should benefit from the treatment determined by the home Member State's law (*lex concursus*) according to the principles of this Directive. The provisions of this Directive should apply to the different cases of winding-up proceedings as appropriate.
- (6) The adoption of reorganisation measures does not preclude the opening of winding-up proceedings. Winding-up proceedings may be opened in the absence of, or following, the adoption of reorganisation measures and they may terminate with composition or other analogous measures, including reorganisation measures.
- (7) The definition of branch, in accordance with existing insolvency principles, should take account of the single legal personality of the insurance undertaking. The home Member State's legislation should determine the way in which the assets and liabilities held by independent persons who have a permanent authority to act as agent for an insurance undertaking should be treated in the winding-up of an insurance undertaking.
- (8) A distinction should be made between the competent authorities for the purposes of reorganisation measures and winding-up proceedings and the supervisory authorities of the insurance undertakings. The competent authorities may be administrative or judicial authorities depending on the Member State's legislation. This Directive does not purport to harmonise national legislation concerning the allocation of competences between such authorities.
- (9) This Directive does not seek to harmonise national legislation concerning reorganisation measures and winding-up proceedings but aims at ensuring mutual recognition of Member States' reorganisation measures and winding-up legislation concerning insurance undertakings as well as the necessary cooperation. Such mutual recognition is implemented in this Directive through the principles of unity, universality, coordination, publicity, equivalent treatment and protection of insurance creditors.
- (10) Only the competent authorities of the home Member State should be empowered to take decisions on winding-up proceedings concerning insurance undertakings (principle of unity). These proceedings should produce their effects throughout the Community and should be recognised by all Member States. All the assets and liabilities of the insurance undertaking should, as a general rule, be taken into consideration in the winding-up proceedings (principle of universality).
- (11) The home Member State's law should govern the winding-up decision concerning an insurance undertaking, the winding-up proceedings themselves and their effects, both substantive and procedural, on the persons and legal relations concerned, except where this Directive provides otherwise. Therefore all the conditions for the opening, conduct and closure of winding-up proceedings should in general be governed by the home Member State's law. In order to facilitate its application, this Directive should include a non-exhaustive list of aspects which, in particular, are subject to the general rule of the home Member State's legislation.
- (12) The supervisory authorities of the home Member State and those of all the other Member States should be informed as a matter of urgency of the opening of winding-up proceedings (principle of coordination).
- (13) It is of utmost importance that insured persons, policy holders, beneficiaries and any injured party having a direct right of action against the insurance undertaking on a claim arising from insurance operations be protected in winding-up proceedings. Such protection should not include claims which arise not from obligations under insurance contracts or insurance operations but from civil liability caused by an agent in negotiations for which, according to the law applicable to the insurance contract or operation, the agent himself is not responsible under such insurance contract or operation. In order to achieve this objective Member States should ensure special treatment for insurance creditors according to one of two optional methods provided for in this

Directive. Member States may choose between granting insurance claims absolute precedence over any other claim with respect to assets representing the technical provisions or granting insurance claims a special rank which may only be preceded by claims on salaries, social security, taxes and rights in rem over the whole assets of the insurance undertaking. Neither of the two methods provided for in this Directive impedes a Member State from establishing a ranking between different categories of insurance claims.

- (14) This Directive should ensure an appropriate balance between the protection of insurance creditors and other privileged creditors protected by the Member State's legislation and not harmonise the different systems of privileged creditors existing in the Member States.
- (15) The two optional methods for treatment of insurance claims are considered substantially equivalent. The first method ensures the affectation of assets representing the technical provisions to insurance claims, the second method ensures insurance claims a position in the ranking of creditors which not only affects the assets representing the technical provisions but all the assets of the insurance undertaking.
- (16) Member States which, in order to protect insurance creditors, opt for the method of granting insurance claims absolute precedence with respect to the assets representing the technical provisions should require their insurance undertakings to establish and keep up to date a special register of such assets. Such a register is a useful instrument for identifying the assets affected to such claims.
- (17) In order to strengthen equivalence between both methods of treatment of insurance claims, this Directive should oblige the Member States which apply the method set out in Article 10(1)(b) to require every insurance undertaking to represent, at any moment and independently of a possible winding-up, claims, which according to that method may have precedence over insurance claims and which are registered in the insurance undertaking's accounts, by assets allowed by the insurance directives in force to represent the technical provisions.
- (18) The home Member State should be able to provide that, where the rights of insurance creditors have been subrogated to a guarantee scheme established in such home Member State, claims by that scheme should not benefit from the treatment of insurance claims under this Directive.
- (19) The opening of winding-up proceedings should involve the withdrawal of the authorisation to conduct business granted to the insurance undertaking unless such authorisation has previously been withdrawn.
- (20) The decision to open winding-up proceedings, which may produce effects throughout the Community according to the principle of universality, should have appropriate publicity within the Community. In order to protect interested parties, the decision should be published in accordance with the home Member State's procedures and in the *Official Journal of the European Communities* and, further, by any other means decided by the other Member States' supervisory authorities within their respective territories. In addition to publication of the decision, known creditors who are resident in the Community should be individually informed of the decision and this information should contain at least the elements specified in this Directive. Liquidators should also keep creditors regularly informed of the progress of the winding-up proceedings.
- (21) Creditors should have the right to lodge claims or to submit written observations in winding-up proceedings. Claims by creditors resident in a Member State other than the home Member State should be treated in the same way as equivalent claims in the home Member State without any discrimination on the grounds of nationality or residence (principle of equivalent treatment).
- (22) This Directive should apply to reorganisation measures adopted by a competent authority of a Member State principles which are similar *mutatis mutandis* to those provided for in winding-up proceedings. The publication of such reorganisation measures should be limited to the case in which an appeal in the home Member State is possible by parties other than the insurance undertaking itself. When reorganisation measures affect exclusively the rights of shareholders, members or employees of the insurance undertaking considered in those capacities, the competent authorities should determine the manner in which the parties affected should be informed in accordance with relevant legislation.

- (23) This Directive provides for coordinated rules to determine the law applicable to reorganisation measures and winding-up proceedings of insurance undertakings. This Directive does not seek to establish rules of private international law determining the law applicable to contracts and other legal relations. In particular, this Directive does not seek to govern the applicable rules on the existence of a contract, the rights and obligations of parties and the evaluation of debts.
- (24) The general rule of this Directive, according to which reorganisation measures and the winding-up proceedings are governed by the law of the home Member State, should have a series of exceptions in order to protect legitimate expectations and the certainty of certain transactions in Member States other than the home Member State. Such exceptions should concern the effects of such reorganisation measures or winding-up proceedings on certain contracts and rights, third parties' rights in rem, reservations of title, set-off, regulated markets, detrimental acts, third party purchasers and lawsuits pending.
- (25) The exception concerning the effects of reorganisation measures and winding-up proceedings on certain contracts and rights provided for in Article 19 should be limited to the effects specified therein and should not include any other issues related to reorganisation measures and winding-up proceedings such as the lodging, verification, admission and ranking of claims regarding such contracts and rights, which should be governed by the home Member State's legislation.
- (26) The effects of reorganisation measures or winding-up proceedings on a lawsuit pending should be governed by the law of the Member States in which the lawsuit is pending concerning an asset or a right of which the insurance undertaking has been divested as an exception to the application of the law of the home Member State. The effects of such measures and proceedings on individual enforcement actions arising from these lawsuits should be governed by the home Member State's legislation, according to the general rule of this Directive.
- (27) All persons required to receive or divulge information connected with the procedures of communication provided for in this Directive should be bound by professional secrecy in the same manner as that established in Article 16 of Directive 92/49/EEC and Article 15 of Directive 92/96/EC, with the exception of any judicial authority to which specific national legislation applies.
- (28) For the sole purpose of applying the provisions of this Directive to reorganisation measures and winding-up proceedings concerning branches situated in the Community of an insurance undertaking whose head office is located in a third country, the home Member State should be defined as the Member State in which the branch is located and the supervisory authorities and competent authorities as the authorities of that Member State.
- (29) Where there are branches in more than one Member State of an insurance undertaking whose head office is located outside the Community, each branch should be treated independently with regard to the application of this Directive. In that case the competent authorities, supervisory authorities, administrators and liquidators should endeavour to coordinate their actions,

HAVE ADOPTED THIS DIRECTIVE:

TITLE I

SCOPE AND DEFINITIONS

Article 1

Scope

1. This Directive applies to reorganisation measures and winding-up proceedings concerning insurance undertakings.
2. This Directive also applies, to the extent provided for in Article 30, to reorganisation measures and winding-up proceedings concerning branches in the territory of the Community of insurance undertakings having their head office outside the Community.

Article 2

Definitions

For the purpose of this Directive:

- (a) 'insurance undertaking' means an undertaking which has received official authorisation in accordance with Article 6 of Directive 73/239/EEC or Article 6 of Directive 79/267/EEC;
- (b) 'branch' means any permanent presence of an insurance undertaking in the territory of a Member State other than the home Member State which carries out insurance business;

- (c) 'reorganisation measures' means measures involving any intervention by administrative bodies or judicial authorities which are intended to preserve or restore the financial situation of an insurance undertaking and which affect pre-existing rights of parties other than the insurance undertaking itself, including but not limited to measures involving the possibility of a suspension of payments, suspension of enforcement measures or reduction of claims;
- (d) 'winding-up proceedings' means collective proceedings involving realising the assets of an insurance undertaking and distributing the proceeds among the creditors, shareholders or members as appropriate, which necessarily involve any intervention by the administrative or the judicial authorities of a Member State, including where the collective proceedings are terminated by a composition or other analogous measure, whether or not they are founded on insolvency or are voluntary or compulsory;
- (e) 'home Member State' means the Member State in which an insurance undertaking has been authorised in accordance with Article 6 of Directive 73/239/EEC or Article 6 of Directive 79/267/EEC;
- (f) 'host Member State' means the Member State other than the home Member State in which an insurance undertaking has a branch;
- (g) 'competent authorities' means the administrative or judicial authorities of the Member States which are competent for the purposes of the reorganisation measures or the winding-up proceedings;
- (h) 'supervisory authorities' means the competent authorities within the meaning of Article 1(k) of Directive 92/49/EEC and of Article 1(l) of Directive 92/96/EEC;
- (i) 'administrator' means any person or body appointed by the competent authorities for the purpose of administering reorganisation measures;
- (j) 'liquidator' means any person or body appointed by the competent authorities or by the governing bodies of an insurance undertaking, as appropriate, for the purpose of administering winding-up proceedings;
- (k) 'insurance claims' means any amount which is owed by an insurance undertaking to insured persons, policy holders, beneficiaries or to any injured party having direct right of action against the insurance undertaking and which arises from an insurance contract or from any operation provided for in Article 1(2) and (3), of Directive 79/267/EC in direct insurance business, including amounts set aside for the aforementioned persons, when some elements of the debt are not yet known. The premiums owed by an insurance undertaking as a result of the non-conclusion or cancellation of these insurance contracts and operations in accordance with the law applicable to such contracts or operations before the opening of the winding-up proceedings shall also be considered insurance claims.

TITLE II

REORGANISATION MEASURES

Article 3

Scope

This title applies to the reorganisation measures defined in Article 2(c).

Article 4

Adoption of reorganisation measures — Applicable law

1. Only the competent authorities of the home Member State shall be entitled to decide on the reorganisation measures with respect to an insurance undertaking, including its branches in other Member States. The reorganisation measures shall not preclude the opening of winding-up proceedings by the home Member State.
2. The reorganisation measures shall be governed by the laws, regulations and procedures applicable in the home Member State, unless otherwise provided in Articles 19 to 26.
3. The reorganisation measures shall be fully effective throughout the Community in accordance with the legislation of the home Member State without any further formalities, including against third parties in other Member States, even if the legislation of those other Member States does not provide for such reorganisation measures or alternatively makes their implementation subject to conditions which are not fulfilled.
4. The reorganisation measures shall be effective throughout the Community once they become effective in the Member State where they have been taken.

Article 5

Information to the supervisory authorities

The competent authorities of the home Member State shall inform as a matter of urgency the home Member State's supervisory authorities of their decision on any reorganisation measure, where possible before the adoption of such a measure and failing that immediately thereafter. The supervisory authorities of the home Member State shall inform as a matter of urgency the supervisory authorities of all other Member States of the decision to adopt reorganisation measures including the possible practical effects of such measures.

Article 6

Publication

1. Where an appeal is possible in the home Member State against a reorganisation measure, the competent authorities of the home Member State, the administrator or any person entitled to do so in the home Member State shall make public its decision on a reorganisation measure in accordance with the publication procedures provided for in the home Member State and, furthermore, publish in the *Official Journal of the European Communities* at the earliest opportunity an extract from the document establishing the reorganisation measure. The supervisory authorities of all the other Member States which have been informed of the decision on a reorganisation measure pursuant to Article 5 may ensure the publication of such decision within their territory in the manner they consider appropriate.

2. The publications provided for in paragraph 1 shall also specify the competent authority of the home Member State, the applicable law as provided in Article 4(2) and the administrator appointed, if any. They shall be carried out in the official language or in one of the official languages of the Member State in which the information is published.

3. The reorganisation measures shall apply regardless of the provisions concerning publication set out in paragraphs 1 and 2 and shall be fully effective as against creditors, unless the competent authorities of the home Member State or the law of that State provide otherwise.

4. When reorganisation measures affect exclusively the rights of shareholders, members or employees of an insurance undertaking, considered in those capacities, this Article shall not apply unless the law applicable to these reorganisation measures provides otherwise. The competent authorities shall determine the manner in which the interested parties affected by such reorganisation measures shall be informed in accordance with the relevant legislation.

Article 7

Information to known creditors — Right to lodge claims

1. Where the legislation of the home Member State requires lodgement of a claim with a view to its recognition or provides for compulsory notification of a reorganisation measure to creditors who have their normal place of residence, domicile or head office in that State, the competent authorities of the home Member State or the administrator shall also inform known creditors who have their normal place of residence, domicile or head office in another Member State, in accordance with the procedures laid down in Articles 15 and 17(1).

2. Where the legislation of the home Member State provides for the right of creditors who have their normal place of residence, domicile or head office in that State to lodge claims or to submit observations concerning their claims, creditors who have their normal place of residence, domicile or head office in another Member State shall have the same right to lodge claims or submit observations in accordance with the procedures laid down in Articles 16 and 17(2).

TITLE III

WINDING-UP PROCEEDINGS

Article 8

Opening of winding-up proceedings — Information to the supervisory authorities

1. Only the competent authorities of the home Member State shall be entitled to take a decision concerning the opening of winding-up proceedings with regard to an insurance undertaking, including its branches in other Member States. This decision may be taken in the absence, or following the adoption, of reorganisation measures.

2. A decision adopted according to the home Member State's legislation concerning the opening of winding-up proceedings of an insurance undertaking, including its branches in other Member States, shall be recognised without further formality within the territory of all other Member States and shall be effective there as soon as the decision is effective in the Member State in which the proceedings are opened.

3. The supervisory authorities of the home Member State shall be informed as a matter of urgency of the decision to open winding-up proceedings, if possible before the proceedings are opened and failing that immediately thereafter. The supervisory authorities of the home Member State shall inform as a matter of urgency the supervisory authorities of all other Member States of the decision to open winding-up proceedings including the possible practical effects of such proceedings.

Article 9

Applicable law

1. The decision to open winding-up proceedings with regard to an insurance undertaking, the winding-up proceedings and their effects shall be governed by the laws, regulations and administrative provisions applicable in its home Member State unless otherwise provided in Articles 19 to 26.

2. The law of the home Member State shall determine in particular:

- (a) the assets which form part of the estate and the treatment of assets acquired by, or devolving on, the insurance undertaking after the opening of the winding-up proceedings;
- (b) the respective powers of the insurance undertaking and the liquidator;
- (c) the conditions under which set-off may be invoked;
- (d) the effects of the winding-up proceedings on current contracts to which the insurance undertaking is party;
- (e) the effects of the winding-up proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending as provided for in Article 26;
- (f) the claims which are to be lodged against the insurance undertaking's estate and the treatment of claims arising after the opening of winding-up proceedings;
- (g) the rules governing the lodging, verification and admission of claims;
- (h) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims, and the rights of creditors who have obtained partial satisfaction after the opening of winding-up proceedings by virtue of a right in rem or through a set-off;
- (i) the conditions for and the effects of closure of winding-up proceedings, in particular by composition;
- (j) creditors' rights after the closure of winding-up proceedings;
- (k) who is to bear the cost and expenses incurred in the winding-up proceedings;
- (l) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

Article 10

Treatment of insurance claims

1. Member States shall ensure that insurance claims take precedence over other claims on the insurance undertaking according to one or both of the following methods:

- (a) insurance claims shall, with respect to assets representing the technical provisions, take absolute precedence over any other claim on the insurance undertaking;

(b) insurance claims shall, with respect to the whole of the insurance undertaking's assets, take precedence over any other claim on the insurance undertaking with the only possible exception of:

- (i) claims by employees arising from employment contracts and employment relationships;
- (ii) claims by public bodies on taxes;
- (iii) claims by social security systems;
- (iv) claims on assets subject to rights in rem.

2. Without prejudice to paragraph 1, Member States may provide that the whole or a part of the expenses arising from the winding-up procedure, as defined by their national legislation, shall take precedence over insurance claims.

3. Member States which have opted for the method provided for in paragraph 1(a) shall require that insurance undertakings establish and keep up to date a special register in line with the provisions set out in the Annex.

Article 11

Subrogation to a guarantee scheme

The home Member State may provide that, where the rights of insurance creditors have been subrogated to a guarantee scheme established in that Member State, claims by that scheme shall not benefit from the provisions of Article 10(1).

Article 12

Representation of preferential claims by assets

By way of derogation from Article 18 of Directive 73/239/EEC and Article 21 of Directive 79/267/EEC, Member States which apply the method set out in Article 10(1)(b) of this Directive shall require every insurance undertaking to represent, at any moment and independently from a possible winding-up, the claims which may take precedence over insurance claims pursuant to Article 10(1)(b) and which are registered in the insurance undertaking's accounts, by assets mentioned in Article 21 of Directive 92/49/EEC and Article 21 of Directive 92/96/EEC.

*Article 13***Withdrawal of the authorisation**

1. Where the opening of winding-up proceedings is decided in respect of an insurance undertaking, the authorisation of the insurance undertaking shall be withdrawn, except to the extent necessary for the purposes of paragraph 2, in accordance with the procedure laid down in Article 22 of Directive 73/239/EEC and Article 26 of Directive 79/267/EEC, if the authorisation has not been previously withdrawn.

2. The withdrawal of authorisation pursuant to paragraph 1 shall not prevent the liquidator or any other person entrusted by the competent authorities from carrying on some of the insurance undertakings' activities in so far as that is necessary or appropriate for the purposes of winding-up. The home Member State may provide that such activities shall be carried on with the consent and under the supervision of the supervisory authorities of the home Member State.

*Article 14***Publication**

1. The competent authority, the liquidator or any person appointed for that purpose by the competent authority shall publish the decision to open winding-up proceedings in accordance with the publication procedures provided for in the home Member State and also publish an extract from the winding-up decision in the *Official Journal of the European Communities*. The supervisory authorities of all the other Member States which have been informed of the decision to open winding-up proceedings in accordance with Article 8(3) may ensure the publication of such decision within their territories in the manner they consider appropriate.

2. The publication of the decision to open winding-up proceedings provided for in paragraph 1 shall also specify the competent authority of the home Member State, the applicable law and the liquidator appointed. It shall be in the official language or in one of the official languages of the Member State in which the information is published.

*Article 15***Information to known creditors**

1. When winding-up proceedings are opened, the competent authorities of the home Member State, the liquidator or any person appointed for that purpose by the competent authorities shall without delay individually inform by written notice each known creditor who has his normal place of residence, domicile or head office in another Member State thereof.

2. The notice referred to in paragraph 1 shall in particular deal with time limits, the penalties laid down with regard to those time limits, the body or authority empowered to accept the lodgement of claims or observations relating to claims and the other measures laid down. The notice shall also indicate whether creditors whose claims are preferential or secured in rem need to lodge their claims. In the case of insurance claims, the notice shall further indicate the general effects of the winding-up proceedings on the insurance contracts, in particular, the date on which the insurance contracts or the operations will cease to produce effects and the rights and duties of insured persons with regard to the contract or operation.

*Article 16***Right to lodge claims**

1. Any creditor who has his normal place of residence, domicile or head office in a Member State other than the home Member State, including Member States' public authorities, shall have the right to lodge claims or to submit written observations relating to claims.

2. The claims of all creditors who have their normal place of residence, domicile or head office in a Member State other than the home Member State, including the aforementioned authorities, shall be treated in the same way and accorded the same ranking as claims of an equivalent nature lodgeable by creditors who have their normal place of residence, domicile or head office in the home Member State.

3. Except in cases where the law of the home Member State allows otherwise, a creditor shall send copies of supporting documents, if any, and shall indicate the nature of the claim, the date on which it arose and the amount, whether he alleges preference, security in rem or reservation of title in respect of the claim and what assets are covered by his security. The precedence granted to insurance claims by Article 10 need not be indicated.

*Article 17***Languages and form**

1. The information in the notice referred to in Article 15 shall be provided in the official language or one of the official languages of the home Member State. For that purpose a form shall be used bearing the heading 'Invitation to lodge a claim; time limits to be observed' or, where the law of the home Member State provides for the submission of observations relating to claims, 'Invitation to submit observations relating to a claim; time limits to be observed', in all the official languages of the European Union.

However, where a known creditor is a holder of an insurance claim, the information in the notice referred to in Article 15 shall be provided in the official language or one of the official languages of the Member State in which the creditor has his normal place of residence, domicile or head office.

2. Any creditor who has his normal place of residence, domicile or head office in a Member State other than the home Member State may lodge his claim or submit observations relating to his claim in the official language or one of the official languages of that other Member State. However, in that event the lodgement of his claim or the submission of observations on his claim, as appropriate, shall bear the heading 'Lodgement of claim' or 'Submission of observations relating to claims', as appropriate, in the official language or one of the official languages of the home Member State.

Article 18

Regular information to the creditors

1. Liquidators shall keep creditors regularly informed, in an appropriate manner, in particular regarding the progress of the winding-up.

2. The supervisory authorities of the Member States may request information on developments in the winding-up procedure from the supervisory authorities of the home Member State.

TITLE IV

PROVISIONS COMMON TO REORGANISATION MEASURES AND WINDING-UP PROCEEDINGS

Article 19

Effects on certain contracts and rights

By way of derogation from Articles 4 and 9, the effects of the opening of reorganisation measures or of winding-up proceedings on the contracts and rights specified below shall be governed by the following rules:

- (a) employment contracts and employment relationships shall be governed solely by the law of the Member State applicable to the employment contract or employment relationship;
- (b) a contract conferring the right to make use of or acquire immovable property shall be governed solely by the law of the Member State in whose territory the immovable property is situated;
- (c) rights of the insurance undertaking with respect to immovable property, a ship or an aircraft subject to registration in a public register shall be governed by the law of the Member State under whose authority the register is kept.

Article 20

Third parties' rights in rem

1. The opening of reorganisation measures or winding-up proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, movable or immovable assets — both specific assets and collections of indefinite assets as a whole which change from time to time — belonging to the insurance undertaking which are situated within the territory of another Member State at the time of the opening of such measures or proceedings.

2. The rights referred to in paragraph 1 shall in particular mean:

- (a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
- (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
- (c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
- (d) a right in rem to the beneficial use of assets.

3. The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem.

4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability referred to in Article 9(2)(l).

Article 21

Reservation of title

1. The opening of reorganisation measures or winding-up proceedings against an insurance undertaking purchasing an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of such measures or proceedings the asset is situated within the territory of a Member State other than the State in which such measures or proceedings were opened.

2. The opening of reorganisation measures or winding-up proceedings against an insurance undertaking selling an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of such measures or proceedings the asset sold is situated within the territory of a Member State other than the State in which such measures or proceedings were opened.

3. Paragraphs 1 and 2 shall not preclude actions for voidness, voidability or unenforceability referred to in Article 9(2)(l).

Article 22

Set-off

1. The opening of reorganisation measures or winding-up proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the insurance undertaking, where such a set-off is permitted by the law applicable to the insurance undertaking's claim.

2. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability referred to in Article 9(2)(l).

Article 23

Regulated markets

1. Without prejudice to Article 20 the effects of a reorganisation measure or the opening of winding-up proceedings on the rights and obligations of the parties to a regulated market shall be governed solely by the law applicable to that market.

2. Paragraph 1 shall not preclude any action for voidness, voidability, or unenforceability referred to in Article 9(2)(l) which may be taken to set aside payments or transactions under the law applicable to that market.

Article 24

Detrimental acts

Article 9(2)(l) shall not apply, where a person who has benefited from a legal act detrimental to all the creditors provides proof that:

- (a) the said act is subject to the law of a Member State other than the home Member State; and

- (b) that law does not allow any means of challenging that act in the relevant case.

Article 25

Protection of third-party purchasers

Where, by an act concluded after the adoption of a reorganisation measure or the opening of winding-up proceedings, an insurance undertaking disposes, for a consideration, of:

- (a) an immovable asset;
- (b) a ship or an aircraft subject to registration in a public register; or
- (c) transferable or other securities whose existence or transfer presupposes entry in a register or account laid down by law or which are placed in a central deposit system governed by the law of a Member State,

the validity of that act shall be governed by the law of the Member State within whose territory the immovable asset is situated or under whose authority the register, account or system is kept.

Article 26

Lawsuits pending

The effects of reorganisation measures or winding-up proceedings on a pending lawsuit concerning an asset or a right of which the insurance undertaking has been divested shall be governed solely by the law of the Member State in which the lawsuit is pending.

Article 27

Administrators and liquidators

1. The administrator's or liquidator's appointment shall be evidenced by a certified copy of the original decision appointing him or by any other certificate issued by the competent authorities of the home Member State.

A translation into the official language or one of the official languages of the Member State within the territory of which the administrator or liquidator wishes to act may be required. No legalisation or other similar formality shall be required.

2. Administrators and liquidators shall be entitled to exercise within the territory of all the Member States all the powers which they are entitled to exercise within the territory of the home Member State. Persons to assist or, where appropriate, represent administrators and liquidators may be appointed, according to the home Member State's legislation, in the course of the reorganisation measure or winding-up proceedings, in particular in host Member States and, specifically, in order to help overcome any difficulties encountered by creditors in the host Member State.

3. In exercising his powers according to the home Member State's legislation, an administrator or liquidator shall comply with the law of the Member States within whose territory he wishes to take action, in particular with regard to procedures for the realisation of assets and the informing of employees. Those powers may not include the use of force or the right to rule on legal proceedings or disputes.

Article 28

Registration in a public register

1. The administrator, liquidator or any other authority or person duly empowered in the home Member State may request that a reorganisation measure or the decision to open winding-up proceedings be registered in the land register, the trade register and any other public register kept in the other Member States.

However, if a Member State prescribes mandatory registration, the authority or person referred to in subparagraph 1 shall take all the measures necessary to ensure such registration.

2. The costs of registration shall be regarded as costs and expenses incurred in the proceedings.

Article 29

Professional secrecy

All persons required to receive or divulge information in connection with the procedures of communication laid down in Articles 5, 8 and 30 shall be bound by professional secrecy, in the same manner as laid down in Article 16 of Directive 92/49/EEC and Article 15 of Directive 92/96/EEC, with the exception of any judicial authorities to which existing national provisions apply.

Article 30

Branches of third country insurance undertakings

1. Notwithstanding the definitions laid down in Article 2(e), (f) and (g) and for the purpose of applying the provisions of this Directive to the reorganisation measures and winding-up proceedings concerning a branch situated in a Member State of an insurance undertaking whose head office is located outside the Community:

- (a) 'home Member State' means the Member State in which the branch has been granted authorisation according to Article 23 of Directive 73/239/EEC and Article 27 of Directive 79/267/EEC; and
- (b) 'supervisory authorities' and 'competent authorities' mean such authorities of the Member State in which the branch was authorised.

2. When an insurance undertaking whose head office is outside the Community has branches established in more than one Member State, each branch shall be treated independently with regard to the application of this Directive. The competent authorities and the supervisory authorities of these Member States shall endeavour to coordinate their actions. Any administrators or liquidators shall likewise endeavour to coordinate their actions.

Article 31

Implementation of this Directive

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

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. National provisions adopted in application of this Directive shall apply only to reorganisation measures or winding-up proceedings adopted or opened after the date referred to in paragraph 1. Reorganisation measures adopted or winding-up proceedings opened before that date shall continue to be governed by the law that was applicable to them at the time of adoption or opening.

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

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

Article 33

Addressees

Article 32

This Directive is addressed to the Member States.

Done at ...

Entry into force

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

For the European Parliament

For the Council

The President

The President

ANNEX

SPECIAL REGISTER REFERRED TO IN ARTICLE 10(3)

1. Every insurance undertaking must keep at its head office a special register of the assets used to cover the technical provisions calculated and invested in accordance with the home Member State's rules.
 2. Where an insurance undertaking transacts both non-life and life business, it must keep at its head office separate registers for each type of business. However, where a Member State authorises insurance undertakings to cover life and the risks listed in points 1 and 2 of Annex A to Directive 73/239/EEC, it may provide that those insurance undertakings must keep a single register for the whole of their activities.
 3. The total value of the assets entered, valued in accordance with the rules applicable in the home Member State, must at no time be less than the value of the technical provisions.
 4. Where an asset entered in the register is subject to a right in rem in favour of a creditor or a third party, with the result that part of the value of the asset is not available for the purpose of covering commitments, that fact is recorded in the register and the amount not available is not included in the total value referred to in point 3.
 5. Where an asset employed to cover technical provisions is subject to a right in rem in favour of a creditor or a third party, without meeting the conditions of point 4, or where such an asset is subject to a reservation of title in favour of a creditor or of a third party or where a creditor has a right to demand the set-off of his claim against the claim of the insurance undertaking, the treatment of such asset in case of the winding-up of the insurance undertaking with respect to the method provided for in Article 10(1)(a) shall be determined by the legislation of the home Member State except where Articles 20, 21 or 22 apply to that asset.
 6. The composition of the assets entered in the register in accordance with points 1 to 5, at the time when winding-up proceedings are opened, must not thereafter be changed and no alteration other than the correction of purely clerical errors must be made in the registers, except with the authorisation of the competent authority.
 7. Notwithstanding point 6, the liquidators must add to the said assets the yield therefrom and the value of the pure premiums received in respect of the class of business concerned between the opening of the winding-up proceedings and the time of payment of the insurance claims or until any transfer of portfolio is effected.
 8. If the product of the realisation of assets is less than their estimated value in the registers, the liquidators must be required to justify this to the home Member States' competent authorities.
 9. The supervisory authorities of the Member States must take appropriate measures to ensure full application by the insurance undertakings of the provisions of this Annex.
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STATEMENT OF REASONS

I. INTRODUCTION

1. On 23 January 1987, the Commission forwarded to the Council a proposal for a Directive on the reorganisation and winding-up of insurance undertakings based on Article 47(2) of the EC Treaty.

The European Parliament gave its opinion at first reading on 14 March 1989. The Economic and Social Committee gave its opinion on 23 September 1987. Taking into account these opinions, the Commission presented an amended proposal on 18 September 1989.

2. On 10 October 2000, the Council adopted its Common Position pursuant to Article 251 of the Treaty.

II. OBJECTIVE

The purpose of the Directive is to establish, for the proper functioning of the internal market and the protection of the creditors:

- coordination rules to ensure that the reorganisation measures adopted by the competent authority of the home Member State in order to preserve or restore the financial soundness of an insurance undertaking, as well as the measures adopted by persons or bodies appointed by those authorities to administer the reorganisation measures, are recognised and implemented throughout the Community, and
- coordination rules for winding-up proceedings in order to ensure that these proceedings commenced in the home Member State are recognised and have full effects throughout the Community, in accordance with the principles of unity and universality.

The Commission proposal and amended proposal had as their objective the regulation of compulsory winding-up proceedings. The Common Position adopted by the Council has a wider scope since it also covers reorganisation measures and voluntary winding-up proceedings. The Council has not maintained the terminological division between special and normal compulsory winding-up proceedings but covers, nevertheless, winding-up proceedings based and not based on insolvency. In the view of the Council, this extension of the scope is justified taking into consideration the overall objective of the proposed Directive of protecting the interests of creditors and ensuring the proper functioning of the insurance industry within the common market.

The changes made by the Council are also justified by the obvious changes in the legislative environment during the extended examination of the amended proposal, most notably the third Directives, which are referred to in recital 1. The Council has also taken into account the developments in the parallel related legislative processes for the Insolvency Regulation⁽¹⁾ as well as the Common Position for a Directive on the reorganisation and winding-up of credit institutions⁽²⁾. Credit institutions and insurance companies were both exempted from the Insolvency Regulation because they are subject to special arrangements and because the national supervisory authorities often have extremely wide-ranging powers of intervention. The proposal for a Directive on the reorganisation and winding-up of credit institutions has been examined in parallel with this proposal concerning insurance undertakings, and similar provisions have been introduced to the extent sector-specific circumstances have made it possible.

⁽¹⁾ Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.

⁽²⁾ Common Position (EC) No 43/2000 adopted by the Council on 17 July 2000 with a view to adopting a Directive of the European Parliament and of the Council on the reorganisation and winding-up of credit institutions (OJ C 300, 20.10.2000, p. 13).

III. ANALYSIS OF THE COMMON POSITION

III.1. *Taking account of Parliament's amendments*

The Council has accepted, in substance, all three Amendments by the European Parliament, which were also taken into account in substance by the Commission in its amended proposal.

- Article 6 dealing with the publication requirements for reorganisation measures and Article 14 dealing with the same for winding-up proceedings take account of the concern of the European Parliament for adequate publicity for the decision, in addition to the publication in the *Official Journal of the European Communities*. However, these provisions as amended by the Council refer to the publication procedures of the home Member State and, as regards other Member States, their supervisory authorities, having been informed of the reorganisation measure or winding-up proceedings, may ensure the publication of such decision within their respective territories in the way they consider appropriate. Recital 20 of the Common Position underlines the need for publicity respectively.
- Article 4(2) dealing with the effects of reorganisation measures and Article 8(2) dealing with the effects of winding-up proceedings in other Member States have been redrafted in the same spirit as Articles 8 and 10 of the Commission's amended proposal and Amendments 2 and 3 of the European Parliament. The Council considers its wordings in Articles 4(2) and 8(2) to be adequate and producing the same results as aimed at by the Commission and the European Parliament.

III.2. *Structure*

Due to changes in the scope and in the terminological approach, the body of the Common Position consists of four new titles. Title I defines the scope of the Directive (Article 1) and contains the definitions of the terms used in the Directive (Article 2). Title II deals with reorganisation measures while Title III deals with winding-up proceedings. Finally, Title IV contains provisions common to reorganisation measures and winding-up proceedings.

A special register referred to in Article 10(3) is given in the Annex to this Directive.

The Common Position applies to the branches of non-Community insurance undertakings as well, but, unlike the amended proposal, these matters have not been treated in a separate title, but in Article 30 to which reference is made in Article 1(2)

III.3. *Recitals*

The Council has amended the recitals of the Directive in accordance with the redrafting of the Articles by introducing new recitals and replacing the recitals contained in the amended proposal by new ones. The new recitals include, *inter alia*, the following:

- Recitals 1 and 2 take account of the introduction of the third Insurance Directives,
- Recital 3 relates to the provisions for reorganisation measures, while recital 22 concerns the relationship between the principles applying to reorganisation measures on the one hand and winding-up proceedings on the other,

- Recital 5 concerns the provisions for winding-up proceedings within the meaning of this Directive as well as to the treatment of certain subrogated claims,
- Recitals 9 and 10 define the objective of the Directive and the principles on which it is based,
- Recitals 23, 24, 25 and 26 relate to the law applicable taken that the Common Position follows the example of the Insolvency Regulation by containing some conflict-of-laws provisions.

III.4. *Title 1 — Scope and definitions*

Article 1 provides for the scope of the Directive. As compared to the amended proposal, the scope includes reorganisation measures and voluntary winding-up proceedings. This Article also states the extent of the application of the Directive to reorganisation measures and winding-up proceedings concerning branches in the territory of the Community of insurance undertakings having their head office outside the Community.

A separate Article 2 on definitions for the purposes of this Directive has been added by the Council.

III.5. *Title II — Reorganisation measures*

This title has been added by the Council to provide coordination rules for the preservation and restoration of the financial soundness of an insurance undertaking as well as in order to make the decisions adopted by persons or bodies appointed by the authorities to administer the reorganisation measures recognised and implemented throughout the Community. The main features of the articles of this title are as follows.

Article 3 has been added to restrict the scope of Directive to those reorganisation measures which are defined in Article 2(c) to be those affecting the pre-existing rights of parties other than the insurance undertaking itself. Recital 3 explains, furthermore, that the measures provided for in Article 20 of Directive 73/239/EEC and Article 24 of Directive 79/267/EEC should be included within the scope of the Directive provided that they comply with the conditions contained in the definition of reorganisation measures.

Article 4 lays down the principles of unity and universality as regards reorganisation measures. Only the competent authorities of the home Member State shall be entitled to decide on the measures, which shall be fully effective throughout the Community. This Article also provides for the application of the home Member State laws, regulations and procedures, exceptions to which are provided for in Articles 19 to 26.

Articles 5, 6 and 7 introduce information requirements between the authorities as well as publication and communication requirements vis-à-vis creditors and other interested parties. The Council has attached a lot of attention in providing that the interested parties will receive information about the reorganisation measures, however, also leaving discretion to national authorities in some situations.

Article 6 creates an obligation for the relevant authority or person to make public a decision on a reorganisation measure according to the publication procedures of the home Member State and to publish an extract of the document establishing the measure in the *Official Journal of the European Communities*. Paragraph 1 leaves it to the supervisory authorities of the Member State other than the home Member State to determine the manner in which these ensure the publication of a decision after having been informed of it pursuant to Article 5.

When reorganisation measures affect exclusively the rights of shareholders, members or employees of an insurance undertaking, considered in those capacities, the publication requirements envisaged in Article 6 apply only to the extent provided for by the law applicable to the reorganisation measures (the law of the home Member State). The competent authorities shall determine the manner in which the interested parties affected by such reorganisation measures shall be informed in accordance with the relevant legislation.

Article 7 creates an obligation for the authorities of the home Member State to inform the known creditors in other Member States in cases where the home Member State legislation requires the lodgement of a claim for its recognition or where it requires the compulsory notification of a reorganisation measure to domestic creditors. This Article places creditors in other Member States on equal footing as regards their right to lodge claims or submit observations. Reference is made to the procedures set out in Articles 15 to 17 for winding-up proceedings.

III.6. *Title III — Winding-up proceedings*

Unlike the Commission's amended proposal, the Common Position applies to both voluntary and compulsory winding-up proceedings as well as to winding-up proceedings based or not based on insolvency. The Council has not maintained the division between normal and special compulsory winding-up proceedings and has not included in the Common Position any provisions on the actual procedure of the winding-up proceedings. The main features of this title are as follows.

Article 8 lays down the principles of unity and universality as regards winding-up proceedings. It also provides for information requirements to the supervisory authorities.

Article 9 provides for the application of the laws, regulations and administrative provisions applicable in the home Member State, except where Articles 19 to 26 provide otherwise. Following the example of the Insolvency Regulation, a non-exhaustive list of matters determined by the home Member State law is given in paragraph 2.

It should be noted that, although Article 9(2)(h) submits the ranking of claims to be determined by the home Member State law, the Common Position requires that insurance claims shall be given precedence in accordance with Article 10.

Article 10 lays down two optional methods for the Member States to ensure that insurance claims take precedence over other claims. Member States shall either require that insurance claims take absolute precedence over any other claims, but only with respect to assets representing the technical provisions, or it may be provided that one or more of the four categories of claims defined in Article 10(1)(b) are given higher priority than all insurance claims have.

For those Member States that opt for an absolute priority for insurance claims, Article 10(3) sets out a requirement to maintain a register, provided for in the Annex to this Directive, of the assets representing the technical provisions. For the Member States that opt for giving the listed other claims precedence, Article 12 lays down a requirement to represent the claims which may take precedence over insurance claims by assets mentioned in the third Directives (Article 21).

Article 11 gives the home Member State an opportunity to deny the claims presented by guarantee schemes, which are established in the home Member State and to which insurance claims have been subrogated, the possibility to enjoy a preferential treatment for insurance claims that is provided for in Article 10(1).

Article 13 provides that where the opening of winding-up proceedings is decided in respect of an insurance undertaking, the authorisation of the insurance undertaking shall be withdrawn unless it is necessary for the purposes of winding-up. The amended proposal of the Commission contained a provision (Article 4) whereby an undertaking whose authorisation is withdrawn shall be automatically wound-up. This provision has not been included in the Common Position since it leaves the winding-up proceedings to be regulated by the home Member State.

Article 14 creates an obligation for the relevant authority or person to publish a decision to open winding-up proceedings in accordance with the publication procedures of the home Member State and to publish an extract of the decision in the *Official Journal of the European Communities*. The supervisory authorities of other Member States, after having been informed of the winding-up proceedings, may ensure the publication of the decision in the manner they consider appropriate (like Article 6 for reorganisation measures).

Article 15 lays down an obligation for the competent authorities of the home Member State, the liquidator or any person appointed for the purpose of winding-up proceedings, to inform known creditors in other Member States than the home Member State. Paragraph 2 contains detailed requirements for the contents of the notice while the questions of language and forms used in giving the notice are dealt with in Article 17. These requirements are also applied for informing creditors in other Member States of reorganisation measures pursuant to Article 7(1).

Article 16 puts creditors having their normal place of residence, domicile or head office in a Member State other than the home Member State on an equal footing with the creditors in the home Member State in respect of lodging claims and submitting written observations thereon. The Article also lays down, in its paragraph 3, provisions for the procedure of making a claim.

Article 17 sets out, in paragraph 1, requirements as to the language and forms used in providing the notice referred to in Article 15. The main rule is that the information in the notice shall be given in the official language(s) of the home Member State, but a form with a common heading in all Community languages has to be used. For creditors holding insurance claims, however, the information has to be provided in one of the official languages of the Member State in which the creditor has his normal place of residence, domicile or head office.

Article 17 provides further, in paragraph 2, that a creditor in another Member State than the home Member State may use one of the official languages of his country in making the claim or submitting his observations. The document has to bear, however, a relevant heading in one of the official languages of the home Member State.

Article 18 contains an obligation for the liquidators to keep creditors regularly informed in particular regarding the progress of the winding-up proceedings. There is also a provision pointing out a possibility for the supervisory authorities of a Member State to request information from the supervisory authorities of the home Member State.

III.7. Title IV — Provisions common to reorganisation measures and winding-up proceedings

This title deals partly with choice-of-law issues and partly with administrative and definitional matters that are common to reorganisation measures and winding-up proceedings.

Articles 19 to 26 contain derogations to the general principle of applying the home Member State legislation provided for in Article 4 in the case of reorganisation measures and in Article 9 in the case of winding-up proceedings. In drafting these derogations, the Council found it appropriate to incorporate the approach of the relevant provisions of the Insolvency Convention since there is no compelling reason, in determining the law applicable in the cases envisaged in these Articles, to treat insurance undertakings in a way different from other enterprises.

Article 19 provides that the effects of the reorganisation measures and winding-up proceedings on employment contracts, on contracts conferring the right to make use or acquire immovable property and on the rights on immovable property, ships or aircraft shall be governed by the Member State law applicable to these contracts and rights. Other issues such as the lodging, verification, admission and ranking of claims regarding such contracts and rights should be governed by the law of the home Member State, as has been stated in the corresponding recital 25.

Article 20 makes third parties' (and creditors') rights in rem in respect of the assets of the insurance undertaking situated within the territory of another Member State at the time of the opening of winding-up proceedings or reorganisation measures unaffected. The Article contains a non-exhaustive list of rights in rem within the meaning of the Article and mentions expressly, in order to cover also 'floating charges', the rights enforceable against third parties and recorded in a public register under which a right in rem within the meaning of the Article may be obtained.

Article 21 provides that the opening of reorganisation measures or winding-up proceedings against an insurance undertaking does not affect the seller's reservation of title in a case where the insurance company is purchasing an asset, and shall not prevent the purchaser from obtaining title in a case where the insurance company is selling property (and where the delivery has taken place) when at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State in which the proceedings were opened.

Article 22 states that the opening of reorganisation measures or winding-up proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the insurance undertaking, where set-off is permitted by the law applicable to the insurance undertaking's claim.

Article 23 provides a further derogation to the home Member State legislation by making the rights and obligations of the parties to a regulated market (with the possible exception of rights in rem) subject to the law applicable to that market.

Articles 20 to 23 all contain a provision according to which they do not preclude actions for voidness, voidability or unenforceability referred to in Article 9(2)(l). This means that home Member State legislation will apply to these actions. Article 24, however, sets limits to the application of home Member State legislation pursuant to Article 9(2)(l). Thus, the said provision does not apply, where a person who has benefited from a legal act detrimental to all the creditors provides proof that the said act is subject to the law of a Member State other than the home Member State and that law does not allow any means of challenging that act in the relevant case. This means that challenging the act must also be possible under the law applicable to it.

It should be noted, despite the fact that this Article is for practical reasons presented under Title IV, that Article 24 as well as the provisions of Articles 20 to 23 referred to in the preceding paragraph deal only with winding-up proceedings, since Article 9(2)(l) deals only with them.

Article 25 is aimed to protect third-party purchasers of immovable property, ship, aircraft or securities in a situation where an insurance undertaking disposes of these assets after the opening of winding-up proceedings or the adoption of reorganisation measures. The Article stipulates that the validity of the act shall be governed by the law of the Member State within whose territory the immovable asset is situated or under whose authority the register, account or system is kept.

Article 26 makes the effects of reorganisation measures or winding-up proceedings on a lawsuit pending concerning an asset or a right of which the insurance undertaking has been divested solely subject to the law of the Member State in which the lawsuit is pending.

Article 27 contains provisions regarding administrators and liquidators. Their appointment shall be evidenced by a certified copy of the original decision to appoint him or by any other certificate issued by the competent authorities of the home Member State. The principle of universality is equally applied to the powers of administrators and liquidators so that these shall be entitled to exercise throughout the Community the same powers that they are entitled to exercise in their home Member State. However, an administrator or liquidator has to comply with the laws of the Member State within the territory of which he wishes to take action, particularly as regards the realisation of assets and the informing of employees, although his powers are generally determined by the home Member State legislation. It has been especially stated that the powers cannot include any use of force or judiciary powers.

Article 28 gives the administrator, liquidator or any other authority or person duly empowered by the home Member State a right to request the registration of the winding-up proceedings or reorganisation measures in the relevant registries. The costs arising from the registration shall be regarded as costs incurred in the proceedings.

Article 29 lays down a requirement of professional secrecy, which applies to all persons required to receive or divulge information in connection with the procedures of communication laid down in Articles 5, 8 and 30, by referring to the relevant provisions of the third Directives, but making an exception concerning any judicial authorities subject to existing national provisions.

Article 30 contains special provisions on branches of third-country insurance undertakings within the Community. In the amended proposal, these branches are dealt with by a separate title containing parallel provisions identical to those applicable to Community undertakings. In the Common Position, however, the Community branches of third-country insurance undertakings are directly subject, by virtue of Article 1(2), to the same provisions as Community insurance undertakings. The purpose of Article 30 is, therefore, to lay down interpretation rules for some relevant definitions set out in Article 2. Thus, 'home Member State' is stated to mean the Member State in which the branch has been granted authorisation according to Article 23 of Directive 73/239/EEC and Article 27 of Directive 79/267/EEC and 'supervisory authorities' and 'competent authorities' mean such authorities of the Member State in which the branch was authorised.

Article 30 states further that, if an insurance undertaking whose head office is outside the Community has branches established in more than one Member State, each branch shall be treated independently with regard to the application of the Directive. Should there be, for instance, concurrent winding-up proceedings or reorganisation measures for the branches, the competent authorities and supervisory authorities of these Member States are requested to endeavour to coordinate their actions. A similar provision applies to any administrators or liquidators.

Articles 31 to 33 are normal implementation provisions. The Council has stipulated that the Directive should apply only to those winding-up proceedings and reorganisation measures which have been opened or taken after the date set out for the Member States to implement this Directive. Hence there would be no retroactive application of the Directive.

IV. CONCLUSION

The Council considers that the Common Position fully complies with the objectives of the Commission's amended proposal in creating a regime based principally on the principles of unity and universality, as well as with the spirit of Parliament's amendments, *inter alia*, in strengthening the creditors possibilities to obtain information. The changes introduced by the Council, fully supported by the Commission, go even further in promoting the objectives of the amended proposal and take duly account of the developments in the related legislative environment during the extended examination time used by the Council.
