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Notice No | Contents | Page

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[1] Text with EEA relevance

III

(Preparatory Acts)

COUNCIL

COMMON POSITION (EC) No 11/2008

adopted by the Council on 28 February 2008

with a view to adopting Directive 2008/…/EC of the European Parliament and of the Council of … on certain aspects of mediation in civil and commercial matter

(2008/C 122 E/01)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission,

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

Acting in accordance with the procedure laid down in Article 251 of the Treaty [2],

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. To that end, the Community has to adopt, *inter alia*, measures in the field of judicial cooperation in civil matters that are necessary for the proper functioning of the internal market.

(2) The principle of access to justice is fundamental and, with a view to facilitating better access to justice, the European Council at its meeting in Tampere on 15 and 16 October 1999 called for alternative, extra-judicial procedures to be created by the Member States.

(3) In May 2000 the Council adopted Conclusions on alternative methods of settling disputes under civil and commercial law, stating that the establishment of basic principles in this area is an essential step towards enabling the appropriate development and operation of extrajudicial procedures for the settlement of disputes in civil and commercial matters so as to simplify and improve access to justice.

(4) In April 2002 the Commission presented a Green Paper on alternative dispute resolution in civil and commercial law, taking stock of the existing situation as concerns alternative dispute resolution methods in the European Union and initiating wide-spread consultations with Member States and interested parties on possible measures to promote the use of mediation.

(5) The objective of securing better access to justice, as part of the policy of the European Union to establish an area of freedom, security and justice, should encompass access to judicial as well as extrajudicial dispute resolution methods. This Directive should contribute to the proper functioning of the internal market, in particular as concerns the availability of mediation services.

(6) Mediation can provide a cost-effective and quick extrajudicial resolution of disputes in civil and commercial matters through processes tailored to the needs of the parties. Agreements resulting from mediation are more likely to be complied with voluntarily and are more likely to preserve an amicable and sustainable relationship between the parties. These benefits become even more pronounced in situations displaying cross-border elements.

(7) In order to promote further the use of mediation and ensure that parties having recourse to mediation can rely on a predictable legal framework, it is necessary to introduce framework legislation addressing, in particular, key aspects of civil procedure.

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[1] OJ C 286, 17.11.2005, p. 1.

[2] Opinion of the European Parliament of 29 March 2007 (OJ C 27 E, 31.1.2008, p. 129), Council Common Position of 28 February 2008 and Position of the European Parliament of … (not yet published in the Official Journal).

(8) The provisions of this Directive should apply only to mediation in cross-border disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.

(9) This Directive should not in any way prevent the use of modern communication technologies in the mediation process.

(10) This Directive should apply to processes whereby two or more parties to a cross-border dispute attempt by themselves, on a voluntary basis, to reach an amicable agreement on the settlement of their dispute with the assistance of a mediator. It should apply in civil and commercial matters. However, it should not apply to rights and obligations on which the parties are not free to decide themselves under the relevant applicable law. Such rights and obligations are particularly frequent in family law and employment law.

(11) This Directive should not apply to pre-contractual negotiations or to processes of an adjudicatory nature such as certain judicial conciliation schemes, consumer complaint schemes, arbitration and expert determination or to processes administered by persons or bodies issuing a formal recommendation, whether or not it be legally binding as to the resolution of the dispute.

(12) This Directive should apply to cases where a court refers parties to mediation or in which national law prescribes mediation. Furthermore, in so far as a judge may act as a mediator under national law, this Directive should also apply to mediation conducted by a judge who is not responsible for any judicial proceedings relating to the matter or matters in dispute. This Directive should not, however, extend to attempts made by the court or judge seised to settle a dispute in the context of judicial proceedings concerning the dispute in question or to cases in which the court or judge seised requests assistance or advice from a competent person.

(13) The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. However, it should be possible under national law for the courts to set time-limits for a mediation process. Moreover, the courts should be able to draw the parties' attention to the possibility of mediation whenever this is appropriate.

(14) Nothing in this Directive should prejudice national legislation making the use of mediation compulsory or subject to incentives or sanctions provided that such legislation does not prevent parties from exercising their right of access to the judicial system. Nor should anything in this Directive prejudice existing self-regulating mediation systems in so far as these deal with aspects which are not covered by this Directive.

(15) In order to provide legal certainty, this Directive should indicate which date should be relevant for determining whether or not a dispute which the parties attempt to settle through mediation is a cross-border dispute. In the absence of a written agreement, the parties should be deemed to agree to use mediation at the point in time when they take specific action to start the mediation process.

(16) To ensure the necessary mutual trust with respect to confidentiality, effect on limitation and prescription periods, and recognition and enforcement of agreements resulting from mediation, Member States should encourage, by any means they consider appropriate, the training of mediators and the introduction of effective quality control mechanisms concerning the provision of mediation services.

(17) Member States should define such mechanisms, which may include having recourse to market-based solutions, and should not be required to provide any funding in that respect. The mechanisms should aim at preserving the flexibility of the mediation process and the autonomy of the parties, and at ensuring that mediation is conducted in an effective, impartial and competent way. Mediators should be made aware of the existence of the European Code of Conduct for Mediators which should also be made available to the general public on the Internet.

(18) In the field of consumer protection, the Commission has adopted a Recommendation [1] establishing minimum quality criteria which out-of-court bodies involved in the consensual resolution of consumer disputes should offer to their users. Any mediators or organisations coming within the scope of that Recommendation should be encouraged to respect its principles. In order to facilitate the dissemination of information concerning such bodies, the Commission should set up a database of out-of-court schemes which Member States consider as respecting the principles of that Recommendation.

(19) Mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. Member States should therefore ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable. It should only be possible

[1] Commission Recommendation 2001/310/EC of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes (OJ L 109, 19.4.2001, p. 56).

for a Member State to refuse to make an agreement enforceable if the content is contrary to its law, including its private international law, or if its law does not provide for the enforceability of the content of the specific agreement. This could be the case if the obligation specified in the agreement was by its nature unenforceable.

(20) The content of an agreement resulting from mediation which has been made enforceable in a Member State should be recognised and declared enforceable in the other Member States in accordance with applicable Community or national law. This could, for example, be on the basis of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ([1]) or Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility ([2]).

(21) Regulation (EC) No 2201/2003 specifically provides that, in order to be enforceable in another Member State, agreements between the parties have to be enforceable in the Member State in which they were concluded. Consequently, if the content of an agreement resulting from mediation in a family law matter is not enforceable in the Member State where the agreement was concluded and where the request for enforceability is made, this Directive should not encourage the parties to circumvent the law of that Member State by having their agreement made enforceable in another Member State.

(22) This Directive should not affect the rules in the Member States concerning enforcement of agreements resulting from mediation.

(23) Confidentiality in the mediation process is important and this Directive should therefore provide for a minimum degree of compatibility of civil procedural rules with regard to how to protect the confidentiality of mediation in any subsequent civil and commercial judicial proceedings or arbitration.

(24) In order to encourage the parties to use mediation, Member States should ensure that their rules on limitation and prescription periods do not prevent the parties from going to court or to arbitration if their mediation attempt fails. Member States should make sure that this result is achieved even though this Directive does not harmonise national rules on limitation and prescription periods. Provisions on limitation and prescription periods in international agreements as implemented in the Member States, for instance in the area of transport law, should not be affected by this Directive.

(25) Member States should encourage the provision of information to the general public on how to contact mediators and organisations providing mediation services. They should also encourage legal practitioners to inform their clients of the possibility of mediation.

(26) In accordance with point 34 of the Interinstitutional agreement on better law-making ([3]), Member States are encouraged to draw up, for themselves and in the interests of the Community, their own tables illustrating, as far as possible, the correlation between this Directive and the transposition measures, and to make them public.

(27) This Directive seeks to promote the fundamental rights, and takes into account the principles, recognised in particular by the Charter of Fundamental Rights of the European Union.

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

(29) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, the United Kingdom and Ireland have given notice of their wish to take part in the adoption and application of this Directive.

(30) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Directive and is not bound by it or subject to its application,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Objective and scope

1. The objective of this Directive is to facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings.

([1]) OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

([2]) OJ L 338, 23.12.2003, p. 1. Regulation as amended by Regulation (EC) No 2116/2004 (OJ L 367, 14.12.2004, p. 1).

([3]) OJ C 321, 31.12.2003, p. 1.

2. This Directive shall apply, in cross-border disputes, to civil and commercial matters except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law. It shall not extend, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*'acta iure imperii'*).

3. In this Directive, the term 'Member State' shall mean Member States with the exception of Denmark.

Article 2

Cross-border disputes

1. For the purposes of this Directive a cross-border dispute shall be one in which at least one of the parties is domiciled or habitually resident in a Member State other than that of any other party on the date on which:

(a) the parties agree to use mediation after the dispute has arisen,

(b) mediation is ordered by a court,

(c) an obligation to use mediation arises under national law, or

(d) for the purposes of Article 5 an invitation is made to the parties.

2. Notwithstanding paragraph 1, for the purposes of Articles 7 and 8 a cross-border dispute shall also be one in which judicial proceedings or arbitration following mediation between the parties are initiated in a Member State other than that in which the parties were domiciled or habitually resident on the date referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraphs 1 and 2, domicile shall be determined in accordance with Articles 59 and 60 of Regulation (EC) No 44/2001.

Article 3

Definitions

For the purposes of this Directive the following definitions shall apply:

(a) 'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law of a Member State.

It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.

(b) 'Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation.

Article 4

Ensuring the quality of mediation

1. Member States shall encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by mediators and organisations providing mediation services, as well as other effective quality control mechanisms concerning the provision of mediation services.

2. Member States shall encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

Article 5

Recourse to mediation

1. A court before which an action is brought may, when appropriate and having regard to all the circumstances of the case, invite the parties to use mediation in order to settle the dispute. The court may also invite the parties to attend an information session on the use of mediation if such sessions are held and are easily available.

2. This Directive is without prejudice to national legislation making the use of mediation compulsory or subject to incentives or sanctions, whether before or after judicial proceedings have started, provided that such legislation does not prevent the parties from exercising their right of access to the judicial system.

Article 6

Enforceability of agreements resulting from mediation

1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.

2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

3. Member States shall inform the Commission of the courts or other authorities competent to receive requests in accordance with paragraphs 1 and 2.

4. Nothing in this Article shall affect the rules applicable to the recognition and enforcement in another Member State of an agreement made enforceable in accordance with paragraph 1.

Article 7

Confidentiality of mediation

1. Given that mediation is intended to take place in a manner which respects confidentiality, Member States shall ensure that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process, except:

(a) where this is necessary for overriding considerations of public policy of the Member State concerned, in particular when required to ensure the protection of the best interests of children or to prevent harm to the physical or psychological integrity of a person; or

(b) where disclosure of the content of the agreement resulting from mediation is necessary in order to implement or enforce that agreement.

2. Nothing in paragraph 1 shall preclude Member States from enacting stricter measures to protect the confidentiality of mediation.

Article 8

Effect of mediation on limitation and prescription periods

1. Member States shall ensure that parties who choose mediation in an attempt to settle a dispute are not subsequently prevented from initiating judicial proceedings or arbitration in relation to that dispute by the expiry of limitation or prescription periods during the mediation process.

2. Paragraph 1 shall be without prejudice to provisions on limitation or prescription periods in international agreements to which Member States are party.

Article 9

Information for the general public

Member States shall encourage, by any means which they consider appropriate, the availability to the general public, in particular on the Internet, of information on how to contact mediators and organisations providing mediation services.

Article 10

Information on competent courts and authorities

The Commission shall make publicly available, by any appropriate means, information on the competent courts or authorities communicated by the Member States pursuant to Article 6(3).

Article 11

Review

Not later than … (*), the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Directive. The report shall consider the development of mediation throughout the European Union and the impact of this Directive in the Member States. If necessary, the report shall be accompanied by proposals to adapt this Directive.

Article 12

Transposition

1. Member States shall bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive before … (**), with the exception of Article 10, for which the date of compliance shall be … (***) at the latest. They shall forthwith inform the Commission thereof.

When they are adopted by Member States, these measures 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.

(*) 8 years after the date of adoption of this Directive.
(**) 3 years after the date of adoption of this Directive.
(***) 30 months after the date of adoption of this Directive.

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

Article 13

Entry into force

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

Article 14

Addressees

This Directive is addressed to the Member States.

Done at …

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

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

1. The Commission submitted its proposal for a Directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters on 22 October 2004.

2. At its meeting on 1 and 2 December 2005 the Council (Justice and Home Affairs) took note of a common understanding reached within the Committee on Civil Law Matters (ADR) ([1]).

3. The European Parliament adopted its first reading opinion on the proposal on 29 March 2007 ([2]).

4. The Committee on Civil Law Matters (ADR) examined the amendments of the European Parliament on 13 April 2007. In the light of that examination a consolidated version of the proposal was prepared which was subsequently discussed at a number of meetings and redrafted on a number of points.

5. On 3 October 2007 Coreper endorsed a compromise text ([3]) resulting from the discussions in the Committee as the starting point for negotiations with the European Parliament with a view to reaching an agreement at second reading.

6. During subsequent contacts with the European Parliament some amendments to the compromise text were agreed. At its meeting on 8 and 9 November 2007 the Council (Justice and Home Affairs) reached political agreement on this new text ([4]). The European Parliament confirmed on this occasion that it could accept the text.

7. The Council adopted its Common Position by unanimity on 28 February 2008.

II. ANALYSIS OF THE COMMON POSITION

8. The Council Common Position corresponds to the text of the political agreement from November 2007 which reflected the outcome of the negotiations between the Council, the Commission and the European Parliament following the adoption of the first reading opinion of the European Parliament.

A. Amendments 1 to 11 concerning the recitals

9. The Council has taken over the substance of amendments 1-11 to the extent possible, but many have been redrafted and inserted in a different order to reflect the final wording and structure of the draft Directive.

10. The Council has not accepted amendment 2, but has maintained in Recital 18 a reference to the Commission Recommendation mentioned in the amendment. Amendment 4 is reflected in Recital 8, but in a more succinct form. The last sentence of amendment 6 has been left out, as the Council has maintained the text of Article 7a of the common understanding from December 2005 (Article 8 of the Common Position). Amendment 10 has been incorporated in substance in Recital 17, but the specific references to Commission Recommendations have been left out and the same applies to the reference to the publishing of the European Code of Conduct for Mediators.

11. The Council has inserted some new recitals in order to explain further certain aspects of the draft Directive. The Council has wanted to acknowledge that modern communication technologies are bound to be used increasingly in the mediation process and has therefore inserted Recital 9 dealing with this aspect. The Council has also wished to make it clear that the draft Directive does not lay down rules on enforcement and that the current rules in the Member States concerning enforcement therefore remain unaffected by the Directive (Recital 22). Finally, in order to abide by the Interinstitutional agreement on better lawmaking the Council has inserted Recital 26 encouraging the Member States to draw up correlation tables when implementing the Directive.

([1]) 15043/05 JUSTCIV 217 CODEC 1102.
([2]) 8117/1/07 REV 1 CODEC 312 JUSTCIV 76.
([3]) 13290/07 JUSTCIV 243 CODEC 1000.
([4]) 14316/07 JUSTCIV 278 CODEC 1130.

B. **Amendments 12 to 34 concerning the Articles**

12. The Council has accepted amendments 12, 13 and 14 concerning Article 1 which to a large extent mirrored the text of the common understanding from December 2005. The suggested deletion of part of the first sentence of paragraph 2 has however not been accepted, but the exception has been worded in a different manner and the text of the Common Position now reads: 'except as regards rights and obligations which are not at the parties' disposal under the relevant applicable law'. Furthermore, a clarification of the provision has been provided in Recital 10.

13. The Council has incorporated the substance of amendment 15 concerning a new Article on the cross-border nature of the Directive, but has redrafted the provision to some extent. It has also inserted a new recital (Recital 15) to clarify paragraph 1 further.

14. Amendments 16 and 17 are reflected in the text of the current Article 3. The Council has accepted to mention specifically in the text that the mediation process is of a voluntary nature and has also stressed this in Recital 13. Therefore the Council has considered it unnecessary to insert a new paragraph on this aspect as suggested by the European Parliament in amendment 21. As for the text of subparagraph (b) of the current Article 3 the Council has decided to maintain the text of its common understanding from December 2005 considering this text to make it sufficiently clear which requirements a mediator has to meet when conducting a mediation.

15. The Council has incorporated amendment 18 in Article 4 of the Common Position with the exception of the suggested paragraph 3 which the Council was unable to accept.

16. Amendments 19 and 20 concerning Article 3 (Article 5 of the Common Position) which corresponded to the text of the common understanding from December 2005 have been accepted in full. The same applies to amendments 22 and 27 which concerned deletion of provisions.

17. Amendments 23 to 26 concerning Article 5 (Article 6 of the Common Position) have been accepted by the Council with a slight redrafting of paragraph 1 to make the text clearer.

18. As for amendment 28 the Council has accepted the substantive part which is reflected in the text of Article 7 of the Common Position. The Council has however decided to maintain the provision as drafted in the common understanding from December 2005. This means that the Council has not accepted that it should also be impossible for parties to a mediation to disclose information concerning the mediation process and that the ban on disclosure should cover also disclosure to third parties. By maintaining the text of the common understanding the Council has also decided not to put the Member States under the obligation to ensure that those involved in a mediation process would not even have the right to give evidence.

19. The Council was unable to accept amendment 29 which in its view contained provisions which were too detailed for a Directive. It has therefore in Article 8 of the Common Position maintained the text of the common understanding from December 2005. However, in order to stress the importance of this provision and to meet the concerns of the European Parliament the Council has inserted a new recital (Recital 24) which makes it make quite clear that Member States are put under an obligation of result by the provision. Amendment 30 concerning paragraph 2 of the same Article was accepted by the Council, but the last part of the provision was deemed unnecessary and therefore left out in the final text.

20. The Council has accepted amendment 31 which is reflected in the new Article 9 of the Common Position and in the corresponding recital (Recital 25).

21. Amendment 32 was rejected by the Council on the ground that it would be impossible to publish the European Code of Conduct for Mediators in the Official Journal since the Code of Conduct is not an officially adopted text. However, as mentioned in paragraph 10 the Council has inserted a reference to the Code of Conduct in Recital 17.

22. Amendment 33 containing a review clause has been accepted in substance by the Council, and such a provision now features in Article 11 of the Common Position, albeit in a different wording. The Council was unable to accept the last part of the suggested review clause concerning a harmonisation of limitation and prescription periods just as it was unable to accept amendment 29 concerning the Article on the same subject. This particular provision was part of the negotiations with the European Parliament and the current text has therefore already been agreed.

23. The Council was unable to accept amendment 34 since the suggested implementation through voluntary agreements would be impossible for legal reasons. However, to make it clear that existing self-regulating mediation systems can be maintained insofar as they deal with aspects which are not covered by the Directive a sentence to this effect was inserted in Recital 14. As for the dates for compliance with the Directive suggested in amendment 34 the Council has set different ones. Member States will now have 36 months from the date of adoption to comply with the Directive, but must communicate information on the competent court or authorities to the Commission within 30 months.

III. **CONCLUSION**

24. The Council considers its Common Position to be a well-balanced text which reflects faithfully the agreement reached with the European Parliament in the negotiations in October 2007.

COMMON POSITION (EC) No 12/2008

adopted by the Council on 3 March 2008

with a view to adopting Directive 2008/…/EC of the European Parliament and of the Council of … amending Directive 2004/49/EC on safety on the Community's railways (Railway Safety Directive)

(Text with EEA relevance)

(2008/C 122 E/02)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 71(1) thereof,

Having regard to the proposal from the Commission,

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

After consulting the Committee of the Regions,

Acting in accordance with the procedure referred to in Article 251 of the Treaty ([2]),

Whereas:

(1) With a view to pursuing the efforts to create a single market in rail transport services, the European Parliament and the Council have adopted Directive 2004/49/EC ([3]) establishing a common regulatory framework for railway safety.

(2) Originally, authorisation procedures for placing in service railway vehicles were dealt with by Council Directive 96/48/EC of 23 July 1996 on the interoperability of the trans-European high-speed rail system ([4]) and Directive 2001/16/EC of the European Parliament and of the Council of 19 March 2001 on the interoperability of the conventional rail system ([5]) for new or upgraded parts of the Community rail system, and Directive 2004/49/EC for vehicles already in use. In accordance with better regulation, and with a view to simplifying and modernising Community legislation, all provisions regarding authorisations for placing railway vehicles in service should be incorporated in a single legal text. Therefore, the current Article 14 of Directive 2004/49/EC should be deleted and a new provision regarding authorisation of placing in service vehicles already in use should be included in Directive 2008/…/EC of the European Parliament and of the Council of … on the interoperability of the rail system within the Community ([6]), hereinafter referred to as the 'Railway Interoperability Directive', that has replaced Directives 96/48/EC and 2001/16/EC.

(3) The entry into force of the 1999 Convention concerning International Carriage by Rail (COTIF) on 1 July 2006 brought in new rules governing contracts for the use of vehicles. According to the CUV (Uniform Rules concerning Contracts of Use of Vehicles in International Rail Traffic) appendix thereto, wagon keepers are no longer obliged to register their wagons with a railway undertaking. The former 'Regolamento Internazionale Veicoli' (RIV) Agreement between railway undertakings has ceased to apply and was partially replaced by a new private and voluntary agreement (General Contract of Use for Wagons, GCU) between railway undertakings and wagon keepers whereby the latter are in charge of the maintenance of their wagons. In order to reflect these changes and to facilitate the implementation of Directive 2004/49/EC as far as safety certification of railway undertakings is concerned, the concept of the 'keeper' and the concept of 'entity in charge of maintenance' should be defined, as well as the specification of the relationship between these entities and railway undertakings.

(4) The definition of the keeper should be as close as possible to the definition used in the 1999 COTIF Convention. Many entities can be identified as a keeper of a vehicle, for example, the owner, a company making business out of a fleet of wagons, a company leasing vehicles to a railway undertaking, a railway undertaking or an infrastructure manager using vehicles for maintaining its infrastructure. These entities have the control over the vehicle with a view to its use as a means of transport by the railway undertakings and the infrastructure managers. In order to avoid any doubt, the keeper should be clearly identified in the National Vehicle Register (NVR) provided for in Article 33 of the Railway Interoperability Directive.

([1]) OJ C 256, 27.10.2007, p. 39.

([2]) Opinion of the European Parliament of 29 November 2007 (not yet published in the Official Journal), Council Common Position of 3 March 2008 and Position of the European Parliament of … (not yet published in the Official Journal).

([3]) Directive 2004/49/EC of the European Parliament and of the Council of 29 April 2004 on safety on the Community's railways and amending Council Directive 95/18/EC on the licensing of railway undertakings and Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure and safety certification (Railway Safety Directive) (OJ L 164, 30.4.2004, p. 44). Corrected version in OJ L 220, 21.6.2004, p. 16.

([4]) OJ L 235, 17.9.1996, p. 6. Directive as last amended by Commission Directive 2007/32/EC (OJ L 141, 2.6.2007, p. 63).

([5]) OJ L 110, 20.4.2001, p. 1. Directive as last amended by Commission Directive 2007/32/EC.

([6]) OJ L …

(5) Before a vehicle is placed in service or used on the network, an entity in charge of its maintenance should be identified in the NVR. The keeper and the entity in charge of maintenance can be the same person or body. However, in exceptional cases, such as, for example, vehicles placed in service for the first time in a third country, vehicles towed with a view to their placing in service in another place of the network or carrying out special transport services, it is not possible or appropriate to identify the entity in charge of maintenance. In such exceptional cases, the relevant national safety authority should be allowed to accept vehicles on the network for which it is competent without an entity in charge of maintenance being assigned to them.

(6) Where this entity in charge of maintenance is a railway undertaking or an infrastructure manager, its safety management system includes the maintenance system and neither of them needs further certification. If the entity in charge of maintenance is not a railway undertaking or an infrastructure manager, it may be certified according to a system to be developed by the European Railway Agency and adopted by the Commission. The certificate delivered to that entity would guarantee that the maintenance requirements of this Directive are met for any vehicle of which it is in charge. This certificate should be valid in the whole Community.

(7) Maintenance requirements are being developed in the context of the Railway Interoperability Directive, in particular as part of the 'rolling stock' technical specifications for interoperability (TSIs). As a result of the entry into force of this Directive there is a need to ensure coherence between these TSIs and the certification requirements for the entity in charge of maintenance to be adopted by the Commission. The Commission will achieve this by modifying, where appropriate, the relevant TSIs using the procedure envisaged by the Railway Interoperability Directive.

(8) Since the objective of this Directive, namely further developing and improving safety on the Community`s railways, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of the action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.

(9) The measures necessary for the implementation of Directive 2004/49/EC should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission [1].

(10) In particular, the Commission should be empowered to revise and adapt the Annexes to Directive 2004/49/EC, to adopt and revise common safety methods and common safety targets, and also to establish a maintenance certification system. Since those measures are of general scope and are designed to amend non-essential elements of Directive 2004/49/EC, inter alia, by supplementing it with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.

(11) A Member State which has no railway system and which does not envisage having one in the near future, would be under a disproportionate and pointless obligation if it had to transpose and implement this Directive. Therefore, such a Member State should be exempted, for as long as it has no railway system, from the obligation to transpose and implement this Directive.

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

(13) Directive 2004/49/EC should therefore be amended accordingly,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments

Directive 2004/49/EC is hereby amended as follows:

1. the following points shall be added to Article 3:

'(s) "keeper" means the person or entity that, being the owner of a vehicle or having the right to use it, exploits the vehicle as a means of transport and is registered as such in the National Vehicle Register (NVR) provided for in Article 33 of Directive 2008/…/EC of the European Parliament and of the Council of … on the interoperability of the rail system within the Community (*), hereinafter referred to as the "Railway Interoperability Directive";

(t) "entity in charge of maintenance" means an entity in charge of maintenance of a vehicle, and registered as such in the NVR;

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

[2] OJ C 321, 31.12.2003, p. 1.

(u) "vehicle" means a railway vehicle suitable to circulate on its own wheels on railway lines, with or without traction. A vehicle is composed of one or more structural and functional subsystems or parts of such subsystems;

(*) OJ L …';

2. in Article 4(4) the term 'wagon keeper' shall be replaced by 'keeper';

3. Article 5(2) shall be replaced by the following:

'2. Before 30 April 2009 Annex I shall be revised, in particular to incorporate therein the common definitions of the CSIs and the common methods for calculating accident costs. This measure, designed to amend non-essential elements of this Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27(2a).';

4. Article 6 shall be amended as follows:

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

'1. An initial series of CSMs covering, as a minimum, the methods described in paragraph 3(a) shall be adopted by the Commission before 30 April 2008. They shall be published in the *Official Journal of the European Union*.

A second series of CSMs covering the remaining methods described in paragraph 3 shall be adopted by the Commission before 30 April 2010. They shall be published in the *Official Journal of the European Union*.

These measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27(2a).';

(b) point (c) of paragraph 3 shall be replaced by the following:

'(c) as far as they are not yet covered by TSIs, methods to check that the structural subsystems of the railway system are operated and maintained in accordance with the relevant essential requirements.';

(c) paragraph 4 shall be replaced by the following:

'4. The CSMs shall be revised at regular intervals, taking into account the experience gained from their application and the global development of railway safety and the obligations on Member States as laid down in Article 4(1). This measure, designed to amend non-essential elements of this Directive, inter alia, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27(2a).';

5. Article 7 shall be amended as follows:

(a) the first and second subparagraphs of paragraph 3 shall be replaced by the following:

'The first set of draft CSTs shall be based on an examination of existing targets and safety performance in the Member States and shall ensure that the current safety performance of the rail system is not reduced in any Member State. It shall be adopted by the Commission before 30 April 2009 and shall be published in the *Official Journal of the European Union*. This measure, designed to amend non-essential elements of this Directive, inter alia, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27(2a).

The second set of draft CSTs shall be based on the experience gained from the first set of CSTs and their implementation. It shall reflect any priority areas where safety needs to be further improved. It shall be adopted by the Commission before 30 April 2011 and shall be published in the *Official Journal of the European Union*. This measure, designed to amend non-essential elements of this Directive, inter alia, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27(2a).';

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

'5. The CSTs shall be revised at regular intervals, taking into account the global development of railway safety. This measure, designed to amend non-essential elements of this Directive, inter alia, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27(2a).';

6. Article 10 shall be amended as follows:

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

'The purpose of the safety certificate is to provide evidence that the railway undertaking has established its safety management system and can meet requirements laid down in TSIs and other relevant Community legislation and in national safety rules in order to control risks and provide transport services safely on the network.';

(b) point (b) of paragraph 2 shall be replaced by the following:

'(b) certification confirming acceptance of the provisions adopted by the railway undertaking to meet specific requirements necessary for the safe supply of its services on the relevant network. These requirements may concern the application of the TSIs and national safety rules, including the network operating rules, acceptance of staff certificates and authorisation to operate vehicles used by railway undertakings. The certification shall be based on documentation submitted by the railway undertaking as described in Annex IV.';

7. Article 14 shall be replaced by the following:

'Article 14

Maintenance of vehicles

1. Before it is placed in service or used on the network, each vehicle shall have an entity in charge of maintenance assigned to it and this entity shall be registered in the NVR in accordance with Article 33 of the Railway Interoperability Directive.

2. The relevant National Safety Authorities may, in exceptional cases and restricted to their respective networks, decide on derogations from the obligation provided for in paragraph 1.

3. Without prejudice to the responsibility of the railway undertakings and infrastructure managers as provided for in Article 4, the entity in charge of maintenance shall ensure that vehicles are in a safe state of running by means of a system for maintenance.

4. Where the entity in charge of maintenance is a railway undertaking or an infrastructure manager the system referred to in paragraph 3 of this Article shall be established through the safety management system set out in Article 9.

5. If the entity in charge of maintenance is not a railway undertaking or an infrastructure manager it may be certified pursuant to paragraph 6.

6. Based on a recommendation by the Agency, the Commission shall, by … (*), adopt a measure establishing certification of the entity in charge of maintenance with regard to its maintenance system. This measure, designed to amend non-essential elements of this Directive, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27(2a). The measure shall include the requirements for the certification of the entity in charge of maintenance based on the approval of its maintenance system, the format and validity of the certificate and the body or bodies responsible for issuing it, and the controls necessary for the functioning of the certification system.

7. The certificates granted in accordance with paragraph 6 of this Article shall confirm compliance with the requirements referred to in paragraph 3 of this Article and shall be valid throughout the Community. If the entity in charge of maintenance is not certified, a railway undertaking or an infrastructure manager shall ensure, through its safety management system set out in Article 9, that all relevant maintenance procedures are adequately applied.';

8. Article 16(2) shall be amended as follows:

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

'(a) authorising the placing in service of the structural subsystems constituting the rail system in accordance with Article 15 of the Railway Interoperability Directive and checking that they are operated and maintained in accordance with the relevant essential requirements;';

(b) point (b) shall be deleted;

(c) point (g) shall be replaced by the following:

'(g) supervising that vehicles are duly registered in the NVR and that safety related information contained therein, is accurate and kept up to date;';

9. the following point shall be added to Article 18:

'(e) the derogations that have been decided in accordance with Article 14(2).';

10. Article 26 shall be replaced by the following:

'Article 26

Adaptation of the Annexes

The Annexes shall be adapted to scientific and technical progress. This measure, designed to amend non-essential elements of this Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 27(2a).';

11. Article 27 shall be amended as follows:

(a) the following paragraph shall be added:

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

(b) paragraph 4 shall be deleted;

12. point 3 of Annex II shall be deleted.

Article 2

Implementation and transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by … (**). They shall forthwith communicate to the Commission the text of those provisions.

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

(*) One year after the entry into force of this Directive.

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

The obligations for transposition and implementation of this Directive shall not apply to the Republic of Cyprus and the Republic of Malta for as long as no railway system is established within their respective territories.

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

Article 3

Entry into force

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

Article 4

Addressees

This Directive is addressed to the Member States.

Done at …

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

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

On 13 December 2006, the Commission submitted three legislative proposals primarily aimed at facilitating the movement of railway vehicles across the European Union:

— a proposal for a Directive amending Directive 2004/49/EC on safety on the Community's railways ([1]) (hereinafter referred to as the Railway Safety Directive);

— a proposal for a Directive on the interoperability of the Community rail system ([2]) (hereinafter referred to as the Railway Interoperability Directive);

— a proposal for a Regulation amending Regulation (EC) No 881/2004 establishing a European Railway Agency ([3]) (hereinafter referred to as the Agency Regulation).

On 29 November 2007, the European Parliament voted its opinion at first reading.

On 3 March 2008, the Council will adopt its Common Position. In carrying out its work, the Council took account of the opinion of the Economic and Social Committee ([4]). The Committee of the Regions decided not to adopt an opinion on the above mentioned proposals.

II. ANALYSIS OF THE COMMON POSITION

1. General

With a view to enabling railways to play its key role with regard to sustainable mobility in the European Union, the Council aims at the gradual development of an integrated European railways area. In this context, the Council considers that the three legislative proposals recasting the interoperability directives for conventional and high-speed rail and amending the Railway Safety Directive and the Agency Regulation can bring important improvements to the technical part of the regulatory framework for European railways.

These proposals lower existing barriers to the free circulation of railway vehicles on the European rail network thereby facilitating cross acceptance of authorisations of railway vehicles amongst Member States.

Council and Parliament succeeded in reaching an agreement at first reading on the proposal for a Railway Interoperability Directive so that Council can adopt the proposed act thus amended. Council and Parliament could however not align their positions at first reading on the proposals amending the Railway Safety Directive and the Agency Regulation. Consequently, Council adopted Common Positions on both proposals, thereby taking due account of the amendments which Parliament adopted at its first reading Opinions.

2. Key policy issues

The three main changes Council made to the Commission proposal are set out below. Furthermore, Council provides for an exemption for Cyprus and Malta.

2.1. *Integration of all provisions on authorisation procedures in one single act*

Both the Railway Safety Directive and the Railway interoperability directives currently in force contain provisions dealing with authorisation procedures for placing railway vehicles in service. The latter deals with new or upgraded parts of the Community rail system and the former concerns vehicles that are already in use. In accordance with Better Regulation, and with a view to simplifying Community legislation, Council incorporates all provisions regarding authorisations for

([1]) OJ C 126, 7.6.2007, p. 7.
([2]) OJ C 126, 7.6.2007, p. 7.
([3]) OJ C 126, 7.6.2007, p. 7.
([4]) OJ C 256, 27.10.2007, p. 39.

placing vehicles in service in a single legal act. Thereto, the existing but amended Article 14, the new Article 14a and the new Annex of the proposal amending the Railway Safety Directive are transferred to the recasted Railway Interoperability Directive. Parliament agreed with this transfer in the context of the first reading agreement on the Railway Interoperability Directive. Consequently, Council can in principle accept the amendments 20, 26 and 27 in full. Furthermore, Council can in principle follow amendment 18 considering that, as a result of the transfer, the legislator can refrain from making any reference to authorisation procedures in the amended Railway Safety Directive.

2.2. *Clarification of roles and responsibilities with regard to maintenance*

As a result of the entry into force on 1 July 2006 of the new 1999 Convention concerning International Carriage by rail (COTIF), keepers of vehicles are no longer obliged to register their wagons with a railway undertaking. In response to this development, and with a view to enabling railway undertakings to provide transport services safely on the network, Council specifies the new constellation of roles and responsibilities with regard to maintenance. Thereto, the Council puts forward a new definition of 'keeper' and introduces the concept of 'entity in charge of maintenance'.

While following as close as possible the definition used in COTIF, Council establishes a clear connection between the keeper and its vehicle through the obligation for keepers to register as such in a National Vehicle Register. Council can accept amendment 8 in full as Council and Parliament agree on the definition of 'keeper'. Moreover, amendment 9, which was introduced with a view to applying the correct terminology, can be accepted in principle.

In the Common Position, it is provided for that entities in charge of maintenance shall ensure that vehicles are in a safe state of running by means of a system for maintenance. Thereto, each vehicle, before it is placed in service or used on the network, needs to have such an entity in charge of maintenance assigned to it. Moreover, each entity in charge of maintenance must be registered in a National Vehicle Register. Only in exceptional cases, and restricted to its respective network, a National Safety Authority may decide to derogate from the obligation to assign an entity in charge of maintenance to a vehicle. Such derogations need to be published by the authority in its annual report. Through this system, Council aims at enabling railway undertakings and infrastructure managers to easily identify who is in charge of the maintenance of the vehicles they operate.

2.3. *Maintenance certification*

With a view to assuring both to the National Safety Authorities and to the participants in the transport chain that the maintenance of wagons is effectively controlled, Council chooses to strengthen the provision in the Commission proposal on maintenance certification. The Commission proposed that, where appropriate, a maintenance certification system for keepers should be established. Conversely, Council agrees on a provision obliging the Commission to adopt, at the latest one year after the entry into force of the proposal amending the Railway Safety Directive, a measure establishing certification of entities in charge of maintenance with regard to their maintenance systems. Both in the Commission proposal and in Council's Common Position, this certification system is based on a Recommendation from the European Railway Agency. The Council ensures that the certificate delivered will be valid throughout the Community, and that it will guarantee the certified entity meeting the maintenance requirements of the Railway Safety Directive for any vehicle of which it is in charge.

Furthermore, entities in charge of maintenance may participate in this certification system on a voluntary basis. Finally, with a view to clarifying that no new requirements are introduced for railway undertakings and infrastructure managers, the Council specifies that the safety management

system, which railway undertakings and infrastructure managers already need to establish under the current Railway Safety Directive, includes the maintenance system.

In amendment 21, Parliament proposes a system of maintenance of railway vehicles that differs in two main ways from the system laid down by the Council. First of all, where Council — in line with Commission Decision of 28 July 2006 adopting the Technical Specification on Interoperability (TSI) on wagons and with Commission Decision of 9 November 2007 adopting a common specification of the National Vehicle Register — introduces the concept of entity in charge of maintenance, Parliament attributes direct responsibility for the maintenance of a vehicle to the keeper. Secondly, Parliament requests a mandatory maintenance certification system, whereas Council — in line with the global approach as outlined by the European Railway Agency — provides for a voluntary system.

Council cannot accept amendment 21 for three reasons. The first reason is that making the keeper responsible for the maintenance of the vehicle does not seem to be coherent with the overall responsibility of railway undertakings and infrastructure managers for a safe operation of transport as arranged for in other key provisions of the Railway Safety Directive, in particular Article 4. As a second reason, Council considers that mandatory participation in a maintenance system is not always appropriate and could lead to unnecessary administrative costs, for instance in the case of wagons coming from third countries or other types of vehicles such as locomotives and passenger cars. As a third reason, Council fears that attributing to keepers a responsibility for maintenance, which requires specific know-how, could burden to the development of their economic activities.

2.4. *Exemption for Cyprus and Malta*

Taking into account the fact that Cyprus and Malta do not have railway systems, the Council provides in its Common Position for an exemption to transpose and implement the Directive amending the Railway Safety Directive as long as no railway system is established on their respective territories.

III. **AMENDMENTS OF THE EUROPEAN PARLIAMENT**

The response of Council to the amendments 8, 9, 18, 20, 21, 26 and 27 is set out above in relation to the key issues.

In addition, Council can accept in full amendment 2 on the correlation tables. Moreover, amendment 16 and 17 concerning correction of a language version are acceptable in principle. However, Council cannot accept for legal or technical reasons the following amendments:

— Amendment 3 because objectives of safety and health of workers fall outside the scope of the Commission proposal;

— The mutually related amendments 4 to 7 because the proposed definition of 'national safety rules' is not compatible with Annex II of the Railway Safety Directive where a description of national safety rules is given, and because the term 'essential requirements' is used in a sense considered too narrow;

— Amendment 14 because the Council holds the opinion that the discussion on developing Common Safety Targets (CSTs) took place at the time of the adoption of the Railway Safety Directive and should not be re-opened. Moreover, the Council notes that, on the basis of Article 6(4) of Agency Regulation, Recommendations of the European Railway Agency, inter alia on CSTs, already require detailed cost-benefit analyses;

— Amendment 19 as it is not compatible with the structure of the Common Position;

— Amendment 22 concerns the question who should be allowed to request a technical opinion from the European Railway Agency. This should however not be contentious anymore as, in the context of the Railway Interoperability Directive, Council and Parliament reached an agreement on the same issue;

— Amendments 1, 10, 11, 12, 13, 15, 23, 24 and 25 on comitology in which Parliament introduces the urgency procedure for several measures. Since these measures are of general scope and designed to amend or supplement non-essential elements of the Railway Safety Directive, Council does agree with the Commission and with the Parliament that, for these measures, the Parliament should be involved through the regulatory with scrutiny procedure. Nevertheless, providing for the possibility to apply the urgency procedure seems disproportionate as all these measures are already linked to a specific deadline or need to be revised at regular intervals.

IV. **CONCLUSION**

The three legislative proposals on interoperability, safety and the European Railway Agency, which aim at facilitating the movement of railway vehicles across the European Union, make an important contribution to the further integration of the European railways area. Council and Parliament already achieved significant progress on these three proposals, in particular by reaching a first reading agreement on the Railway Interoperability Directive. This lays a solid basis for both co-legislators to find compromise solutions on the proposals amending the Railway Safety Directive and the Agency Regulation during their second reading discussions.

COMMON POSITION (EC) No 13/2008

adopted by the Council on 18 April 2008

with a view to adopting Directive 2008/…/EC of the European Parliament and of the Council of … amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emmission allowance trading within the Community

(2008/C 122 E/03)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 175(1) thereof,

Having regard to the proposal from the Commission,

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

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

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

Whereas:

(1) Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community ([4]) established a scheme for greenhouse gas emission allowance trading within the Community in order to promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner.

(2) The ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC), which was approved on behalf of the European Community by Council Decision 94/69/EC ([5]), is to stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.

(3) The European Council meeting in Brussels on 8 and 9 March 2007 underlined the vital importance of achieving the strategic objective of limiting the global average temperature increase to not more than 2 °C above pre-industrial levels. The latest scientific findings reported by the Intergovernmental Panel on Climate Change (IPCC) in its Fourth Assessment Report demonstrate even more clearly that the negative impacts of climate change are increasingly posing a serious risk to ecosystems, food production and the attainment of sustainable development and of the Millennium Development Goals, as well as to human health and security. Keeping the 2 °C objective within reach requires stabilisation of the concentration of greenhouse gases in the atmosphere in line with about 450 ppmv CO_2 equivalent, which requires global greenhouse gas emissions to peak within the next 10 to 15 years and substantial global emission reductions to at least 50 % below 1990 levels by 2050.

(4) The European Council emphasised that the European Union is committed to transforming Europe into a highly energy-efficient and low greenhouse-gas-emitting economy and, until a global and comprehensive post-2012 agreement is concluded, made a firm independent commitment for the EU to reduce its greenhouse gas emissions to at least 20 % below 1990 levels by 2020. The limitation of greenhouse gas emissions from aviation is an essential contribution in line with this commitment.

(5) The European Council emphasised that the EU is committed to a global and comprehensive agreement for reductions in greenhouse gas emissions beyond 2012, providing an effective, efficient and equitable response on the scale required to face climate change challenges. It endorsed a 30 % reduction in the EU's greenhouse gas emissions below 1990 levels by 2020 as its contribution to a global and comprehensive agreement for the period beyond 2012, provided that other developed countries commit themselves to comparable emission reductions and economically more advanced developing countries to contributing adequately according to their responsibilities and respective capabilities. The EU is continuing to take the lead in the negotiation of an ambitious international agreement that will achieve the objective of limiting the global temperature increase to 2 °C and is encouraged by the progress made towards this objective at the 13th Conference of the Parties to the UNFCCC in Bali in December 2007. The EU will seek to ensure that such a global agreement includes measures to reduce greenhouse gas emissions from aviation and, in this event, the Commission should consider which amendments to this Directive as it applies to aircraft operators are necessary.

([1]) OJ C 175, 27.7.2007, p. 47.
([2]) OJ C 305, 15.12.2007, p. 15.
([3]) Opinion of the European Parliament of 13 November 2007 (not yet published in the Official Journal), Council Common Position of 18 April 2008 and Position of the European Parliament of … (not yet published in the Official Journal). Council Decision of …
([4]) OJ L 275, 25.10.2003, p. 32. Directive as amended by Directive 2004/101/EC (OJ L 338, 13.11.2004, p. 18).
([5]) OJ L 33, 7.2.1994, p. 11.

(6) The UNFCCC requires all parties to formulate and implement national and, where appropriate, regional programmes containing measures to mitigate climate change.

(7) The Kyoto Protocol to the UNFCCC, which was approved on behalf of the European Community by Council Decision 2002/358/EC ([1]), requires developed countries to pursue the limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation, working through the International Civil Aviation Organization (ICAO).

(8) While the Community is not a Contracting Party to the 1944 Chicago Convention on International Civil Aviation ('the Chicago Convention'), all Member States are Contracting Parties to that Convention and members of the ICAO. Member States continue to support work with other States in the ICAO on the development of measures, including market-based instruments, to address the climate change impacts of aviation. At the sixth meeting of the ICAO Committee on Aviation Environmental Protection in 2004, it was agreed that an aviation-specific emissions trading system based on a new legal instrument under ICAO auspices seemed sufficiently unattractive that it should not then be pursued further. Consequently, Resolution A35-5 of the ICAO's 35th Assembly held in September 2004 did not propose a new legal instrument but instead endorsed open emissions trading and the possibility for States to incorporate emissions from international aviation into their emissions trading schemes. Appendix L to Resolution A36-22 of the ICAO's 36th Assembly held in September 2007 urges Contracting States not to implement an emissions trading system on other Contracting States' aircraft operators except on the basis of mutual agreement between those States. Recalling that the Chicago Convention recognises expressly the right of each Contracting Party to apply on a non-discriminatory basis its own air laws and regulations to the aircraft of all States, the Member States of the European Community and fifteen other European States placed a reservation on this resolution and reserved the right under the Chicago Convention to enact and apply market-based measures on a non-discriminatory basis to all aircraft operators of all States providing services to, from or within their territory.

(9) The Sixth Community Environment Action Programme established by Decision No 1600/2002/EC of the European Parliament and of the Council ([2]) provided for the Community to identify and undertake specific actions to reduce greenhouse gas emissions from aviation if no such action were agreed within the ICAO by 2002. In its conclusions of October 2002, December 2003 and October 2004, the Council has repeatedly called on the Commission to propose action to reduce the climate change impact of international air transport.

(10) Policies and measures should be implemented at Member State and Community level across all sectors of the Community economy in order to generate the substantial reductions needed. If the climate change impact of the aviation sector continues to grow at the current rate, it would significantly undermine reductions made by other sectors to combat climate change.

(11) In its Communication of 27 September 2005 to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions entitled 'Reducing the Climate Change Impact of Aviation', the Commission outlined a strategy for reducing the climate impact of aviation. As part of a comprehensive package of measures, the strategy proposed the inclusion of aviation in the Community scheme for greenhouse gas emission allowance trading and provided for the creation of a multi-stakeholder working group on aviation as part of the second phase of the European Climate Change Programme to consider ways of including aviation in the Community scheme. In its Conclusions of 2 December 2005, the Council recognised that, from an economic and environmental point of view, the inclusion of the aviation sector in the Community scheme seemed to be the best way forward and called on the Commission to bring forward a legislative proposal by the end of 2006. In its resolution of 4 July 2006 on reducing the climate change impact of aviation ([3]), the European Parliament recognised that emissions trading has the potential to play a role as part of a comprehensive package of measures to address the climate impact of aviation, provided that it is appropriately designed.

(12) The objective of the amendments made to Directive 2003/87/EC by this Directive is to reduce the climate change impact attributable to aviation by including emissions from aviation activities in the Community scheme.

(13) Aircraft operators have the most direct control over the type of aircraft in operation and the way in which they are flown and should therefore be responsible for complying with the obligations imposed by this Directive, including the obligation to prepare a monitoring plan and to monitor and report emissions in accordance with that plan. An aircraft operator may be identified by the use of an ICAO designator or any other recognised designator used in the identification of the flight. If the identity of the aircraft operator is not known, the owner of

([1]) OJ L 130, 15.5.2002, p. 1.
([2]) OJ L 242, 10.9.2002, p. 1.
([3]) OJ C 303 E, 13.12.2006, p. 119.

the aircraft should be regarded as the aircraft operator unless it proves which other person was the aircraft operator.

(14) From 2012, emissions from all flights arriving at and departing from Community aerodromes should be included. The Community scheme may thus serve as a model for the use of emissions trading worldwide. If a third country adopts measures for reducing the climate impact of flights to the Community the Commission should consider the options available in order to provide for optimal interaction between the Community scheme and that country's measures, after consulting with that country.

(15) In line with the principle of better regulation, certain flights should be exempt from the scheme. To further avoid disproportionate administrative burdens, commercial air transport operators operating, for three consecutive four-month periods, fewer than 243 flights per period should be exempt from the scheme. This would benefit airlines operating limited services within the scope of the Community scheme, including airlines from developing countries.

(16) Aviation has an impact on the global climate through releases of carbon dioxide, nitrogen oxides, water vapour and sulphate and soot particles. The IPCC has estimated that the total impact of aviation is currently two to four times higher than the effect of its past carbon dioxide emissions alone. Recent Community research indicates that the total impact of aviation could be around two times higher than the impact of carbon dioxide alone. However, none of these estimates takes into account the highly uncertain cirrus cloud effects. In accordance with Article 174(2) of the Treaty, Community environment policy is to be based on the precautionary principle. Pending scientific progress, all impacts of aviation should be addressed to the extent possible. Emissions of nitrogen oxides will be addressed in other legislation to be proposed by the Commission in 2008.

(17) In order to avoid distortions of competition, a harmonised allocation methodology should be specified for determining the total quantity of allowances to be issued and for distributing allowances to aircraft operators. A proportion of allowances will be allocated by auction in accordance with rules to be developed by the Commission. A special reserve of allowances should be set aside to ensure access to the market for new aircraft operators and to assist aircraft operators which increase sharply the number of tonne-kilometres that they perform. Aircraft operators that cease operations should continue to be issued with allowances until the end of the period for which free allowances have already been allocated.

(18) Full harmonisation of the proportion of allowances issued free of charge to all aircraft operators participating in the scheme is appropriate in order to ensure a level playing field for aircraft operators, given that each aircraft operator will be regulated by a single Member State in respect of all their operations to, from and within the EU and by the non-discrimination provisions of bilateral air service agreements with third countries.

(19) Aviation contributes to the overall climate change impact of human activities and the environmental impact of greenhouse gas emissions from aircraft can be mitigated through measures to tackle climate change in the EU and third countries, and to fund research and development for mitigation and adaptation. Decisions on national public expenditure are a matter for Member States, in line with the principle of subsidiarity. Without prejudice to that position, revenues generated from the auctioning of allowances, or an equivalent amount where required by overriding budgetary principles of the Member States, such as unity and universality, should be used to reduce greenhouse gas emissions, to adapt to the impacts of climate change in the EU and third countries, to fund research and development for mitigation and adaptation and to cover the cost of administering the scheme. This could include measures to encourage environmentally-friendly transport. The proceeds of auctioning should in particular be used to fund contributions to the Global Energy Efficiency and Renewable Energy Fund, and measures to avoid deforestation and facilitate adaptation in developing countries. The provisions of this Directive relating to the use of revenues should not prejudge any decision on the use to be made of revenues generated from the auctioning of allowances in the broader context of the general review of Directive 2003/87/EC.

(20) Provisions for the use of funds from the auctioning should be notified to the Commission. Such notification does not release Member States from the obligation laid down in Article 88(3) of the Treaty to notify certain national measures. This Directive should be without prejudice to the outcome of any future State aid procedures that may be undertaken in accordance with Articles 87 and 88 of the Treaty.

(21) To increase the cost-effectiveness of the scheme, aircraft operators should be able to use certified emission reductions ('CERs') and emission reduction units ('ERUs') from project activities to meet obligations to surrender allowances up to a harmonised limit. The use of CERs and ERUs should be consistent with the criteria for acceptance for use in the trading scheme set out in this Directive.

(22) In order to reduce the administrative burden on aircraft operators, one Member State should be responsible for each aircraft operator. Member States should be required to ensure that aircraft operators which were issued with an operating licence in that State, or aircraft operators without an operating licence or from third countries whose emissions in a base year are mostly attributable to that Member State, comply with the requirements of this Directive. In the event that an aircraft operator fails to comply with the requirements of this Directive and other enforcement measures by the administering Member State have failed to ensure compliance, Member States should act in solidarity. The administering Member State should therefore be able to request the Commission to decide on the imposition of an operating ban at Community level on the aircraft operator concerned, as a last resort.

(23) To maintain the integrity of the accounting system for the Community scheme in view of the fact that emissions from international aviation are not integrated into Member States' commitments under the Kyoto Protocol, allowances allocated to the aviation sector should only be used to meet the obligations placed on aircraft operators to surrender allowances under this Directive.

(24) To safeguard the environmental integrity of the scheme, units surrendered by aircraft operators should only count towards greenhouse gas reduction targets that take these emissions into account.

(25) The European Organisation for the Safety of Air Navigation (Eurocontrol) may possess information which could assist Member States or the Commission in discharging their obligations imposed by this Directive.

(26) The provisions of the Community scheme relating to monitoring, reporting and verifying emissions and to penalties applicable to operators should also apply to aircraft operators.

(27) The Commission should review the functioning of Directive 2003/87/EC in relation to aviation activities in the light of experience of its application and should then report to the European Parliament and the Council.

(28) The review of the functioning of Directive 2003/87/EC in relation to aviation activities should consider the structural dependence on aviation of countries which do not have adequate and comparable alternative modes of transport and which are therefore highly dependent on air transport and in which the tourism sector provides a high contribution to those countries' GDP. Special consideration should be given to mitigating or even eliminating any accessibility and competitiveness problems arising for outermost regions, as specified in Article 299(2) of the Treaty, and problems for public service obligations in connection with the implementation of this Directive.

(29) The Ministerial Statement on Gibraltar Airport, agreed in Cordoba on 18 September 2006, during the first Ministerial meeting of the Forum of Dialogue on Gibraltar, will replace the Joint Declaration on the Airport made in London on 2 December 1987, and full compliance with it will be deemed to constitute compliance with the 1987 Declaration.

(30) The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission ([1]).

(31) In particular, the Commission should be empowered to adopt measures for the auctioning of allowances not required to be issued for free; to adopt detailed rules on the operation of the special reserve for certain aircraft operators and on the procedures in relation to requests for the Commission to decide on the imposition of an operating ban on an aircraft operator; and to amend the aviation activities listed in Annex I where a third country introduces measures to reduce the climate change impact of aviation. Since those measures are of general scope and are designed to amend non-essential elements of this Directive, *inter alia* by supplementing this Directive with new non-essential elements, they must be adopted in accordance with the regulatory procedure with scrutiny provided for in Article 5a of Decision 1999/468/EC.

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

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

(34) Directive 2003/87/EC should therefore be amended accordingly,

([1]) OJ L 184, 17.7.1999, p. 23. Decision as amended by Decision 2006/512/EC (OJ L 200, 22.7.2006, p. 11).
([2]) OJ C 321, 31.12.2003, p. 1.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Amendments to Directive 2003/87/EC

Directive 2003/87/EC is hereby amended as follows:

1. the following title shall be inserted before Article 1:

'*CHAPTER I*

General provisions';

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

'3. The application of this Directive to the airport of Gibraltar is understood to be without prejudice to the respective legal positions of the Kingdom of Spain and the United Kingdom with regard to the dispute over sovereignty over the territory in which the airport is situated.';

3. Article 3 shall be amended as follows:

(a) point (b) shall be replaced by the following:

'(b) "emissions" means the release of greenhouse gases into the atmosphere from sources in an installation or the release from an aircraft performing an aviation activity listed in Annex I of the gases specified in respect of that activity;';

(b) the following points shall be added:

'(o) "aircraft operator" means the person who operates an aircraft at the time it performs an aviation activity listed in Annex I or, where that person is not known or is not identified by the owner of the aircraft, the owner of the aircraft;

(p) "commercial air transport operator" means an operator that, for remuneration, provides scheduled or non-scheduled air transport services to the public for the carriage of passengers, freight or mail;

(q) "administering Member State" means the Member State responsible for administering the Community scheme in respect of an aircraft operator in accordance with Article 18a;

(r) "attributed aviation emissions" means emissions from all flights falling within the aviation activities listed in Annex I which depart from an aerodrome situated in the territory of a Member State and those which arrive in such an aerodrome from a third country;

(s) "historical aviation emissions" means the mean average of the annual emissions in the calendar years 2004, 2005 and 2006 from aircraft performing an aviation activity listed in Annex I.';

4. the following Chapter shall be inserted after Article 3:

'*CHAPTER II*

Aviation

Article 3a

Scope

The provisions of this Chapter shall apply to the allocation and issue of allowances in respect of aviation activities listed in Annex I.

Article 3b

Aviation activities

By … (*), the Commission shall, in accordance with the regulatory procedure referred to in Article 23(2), develop guidelines on the detailed interpretation of the aviation activities in Annex I, in particular flights related to search and rescue, fire-fighting flights, humanitarian flights, emergency medical service flights, and flights performed by commercial air transport operators operating, for three consecutive four-month periods, fewer than 243 flights per period.

Article 3c

Total quantity of allowances for aviation

1. For the period from 1 January 2012 to 31 December 2012, the total quantity of allowances to be allocated to aircraft operators shall be equivalent to 100 % of the historical aviation emissions.

2. For the period referred to in Article 11(2) beginning on 1 January 2013, and, in the absence of any amendments following the review referred to in Article 30(4), for each subsequent period, the total quantity of allowances to be allocated to aircraft operators shall be equivalent to 100 % of the historical aviation emissions multiplied by the number of years in the period.

3. The Commission shall review the total quantity of allowances to be allocated to aircraft operators in accordance with Article 30(4).

4. By … (*), the Commission shall decide on the historical aviation emissions, based on best available data, including estimates based on actual traffic information. That decision shall be considered within the Committee referred to in Article 23(1).

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

Article 3d

Method of allocation of allowances for aviation through auctioning

1. In the period referred to in Article 3c(1), 10 % of allowances shall be auctioned.

2. For subsequent periods, the percentage to be auctioned referred to in paragraph 1 may be increased as part of the general review of this Directive.

3. A Regulation shall be adopted containing detailed provisions for the auctioning by Member States of allowances not required to be issued free of charge in accordance with paragraphs 1 and 2 of this Article or Article 3f(8). The number of allowances to be auctioned in each period by each Member State shall be proportionate to its share of the total attributed aviation emissions for all Member States for the reference year reported pursuant to Article 14(3) and verified pursuant to Article 15. For the period referred to in Article 3c(1), the reference year shall be 2010 and for each subsequent period referred to in Article 3c the reference year shall be the calendar year ending 24 months before the start of the period to which the auction relates.

That Regulation, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

4. It shall be for Member States to determine the use to be made of revenues generated from the auctioning of allowances. Those revenues should be used to tackle climate change in the EU and third countries and to cover the costs of the administering Member State in relation to this Directive.

5. Information provided to the Commission pursuant to this Directive does not free Member States from the notification obligation laid down in Article 88(3) of the Treaty.

Article 3e

Allocation and issue of allowances to aircraft operators

1. For each period referred to in Article 3c, each aircraft operator may apply for an allocation of allowances that are to be allocated free of charge. An application may be made by submitting to the competent authority in the administering Member State verified tonne-kilometre data for the aviation activities listed in Annex I performed by that aircraft operator for the monitoring year. For the purposes of this Article, the monitoring year shall be the calendar year ending 24 months before the start of the period to which it relates in accordance with Annexes IV and V or, in relation to the period referred to in Article 3c(1), 2010. Any application shall be made at least 21 months before the start of the period to which it relates or, in relation to the period referred to in Article 3c(1), by 31 March 2011.

2. At least eighteen months before the start of the period to which the application relates or, in relation to the period referred to in Article 3c(1), by 30 June 2011, Member States shall submit applications received under paragraph 1 to the Commission.

3. At least fifteen months before the start of each period referred to in Article 3c(2) or, in relation to the period referred to in Article 3c(1), by 30 September 2011, the Commission shall calculate and adopt a decision setting out:

(a) the total quantity of allowances to be allocated for that period in accordance with Article 3c;

(b) the number of allowances to be auctioned in that period in accordance with Article 3d;

(c) the number of allowances in the special reserve for aircraft operators in that period in accordance with Article 3f(1);

(d) the number of allowances to be allocated free of charge in that period by subtracting the number of allowances referred to in points (b) and (c) from the total quantity of allowances decided upon under point (a); and

(e) the benchmark to be used to allocate allowances free of charge to aircraft operators whose applications were submitted to the Commission in accordance with paragraph 2.

The benchmark referred to in point (e), expressed as allowances per tonne-kilometre, shall be calculated by dividing the number of allowances referred to in point (d) by the sum of the tonne-kilometre data included in applications submitted to the Commission in accordance with paragraph 2.

4. Within three months from the date on which the Commission adopts a decision under paragraph 3, each administering Member State shall calculate and publish:

(a) the total allocation of allowances for the period to each aircraft operator whose application it submitted to the Commission in accordance with paragraph 2, calculated by multiplying the tonne-kilometre data included in the application by the benchmark referred to in paragraph 3(e); and

(b) the allocation of allowances to each aircraft operator for each year, which shall be determined by dividing its total allocation of allowances for the period calculated under point (a) by the number of years in the period for which that aircraft operator is performing an aviation activity listed in Annex I.

5. By 28 February 2012 and by 28 February of each subsequent year, the competent authority of the administering Member State shall issue to each aircraft operator the number of allowances allocated to that aircraft operator for that year under this Article or Article 3f.

Article 3f

Special reserve for certain aircraft operators

1. In each period referred to in Article 3c(2), 3 % of the total quantity of allowances to be allocated shall be set aside in a special reserve for aircraft operators:

(a) who start performing an aviation activity falling within Annex I after the monitoring year for which tonne-kilometre data was submitted under Article 3e(1) in respect of a period referred to in Article 3c(2); or

(b) whose tonne-kilometre data increases by an average of more than 18 % annually between the monitoring year for which tonne-kilometre data was submitted under Article 3e(1) in respect of a period referred to in Article 3c(2) and the second calendar year of that period;

and whose activity under point (a), or additional activity under point (b), is not in whole or in part a continuation of an aviation activity previously performed by another aircraft operator.

2. An aircraft operator who is eligible under paragraph 1 may apply for a free allocation of allowances from the special reserve by making an application to the competent authority of its administering Member State. Any application shall be made by 30 June in the third year of the period referred to in Article 3c(2) to which it relates.

3. An application under paragraph 2 shall:

(a) include verified tonne-kilometre data in accordance with Annexes IV and V for the aviation activities listed in Annex I performed by the aircraft operator in the second calendar year of the period referred to in Article 3c(2) to which the application relates;

(b) provide evidence that the criteria for eligibility under paragraph 1 are fulfilled; and

(c) in the case of aircraft operators falling within paragraph 1(b), state:

(i) the percentage increase in tonne-kilometres performed by that aircraft operator between the monitoring year for which tonne-kilometre data was submitted under Article 3e(1) in respect of a period referred to in Article 3c(2) and the second calendar year of that period;

(ii) the absolute growth in tonne-kilometres performed by that aircraft operator between the monitoring year for which tonne-kilometre data was submitted under Article 3e(1) in respect of a period referred to in Article 3c(2) and the second calendar year of that period; and

(iii) the absolute growth in tonne-kilometres performed by that aircraft operator between the monitoring year for which tonne-kilometre data was submitted under Article 3e(1) in respect of a period referred to in Article 3c(2) and the second calendar year of that period which exceeds the percentage specified in paragraph 1(b).

4. No later than six months from the deadline for making an application under paragraph 2, Member States shall submit applications received under that paragraph to the Commission.

5. No later than twelve months from the deadline for making an application under paragraph 2, the Commission shall decide on the benchmark to be used to allocate allowances free of charge to aircraft operators whose applications were submitted to the Commission in accordance with paragraph 4.

Subject to paragraph 6, the benchmark shall be calculated by dividing the number of the allowances in the special reserve by the sum of:

(a) the tonne-kilometre data for aircraft operators falling within paragraph 1(a) included in applications submitted to the Commission in accordance with paragraphs 3(a) and 4; and

(b) the absolute growth in tonne-kilometres exceeding the percentage specified in paragraph 1(b) for aircraft operators falling within paragraph 1(b) included in applications submitted to the Commission in accordance with paragraphs 3(c)(iii) and 4.

6. The benchmark referred to in paragraph 5 shall not result in an annual allocation per tonne-kilometre greater than the annual allocation per tonne-kilometre to aircraft operators under Article 3e(4).

7. Within three months from the date on which the Commission adopts a decision under paragraph 5, each administering Member State shall calculate and publish:

(a) the allocation of allowances from the special reserve to each aircraft operator whose application it submitted to the Commission in accordance with paragraph 4. This allocation shall be calculated by multiplying the benchmark referred to in paragraph 5 by:

(i) in the case of an aircraft operator falling within paragraph 1(a), the tonne-kilometre data included in the application submitted to the Commission under paragraphs 3(a) and 4;

(ii) in the case of an aircraft operator falling within paragraph 1(b), the absolute growth in tonne-kilometres exceeding the percentage specified in paragraph 1(b) included in the application submitted to the Commission under paragraphs 3(c)(iii) and 4; and

(b) the allocation of allowances to each aircraft operator for each year, which shall be determined by dividing its allocation of allowances under point (a) by the number of full calendar years remaining in the period referred to in Article 3c(2) to which the allocation relates.

8. Any unallocated allowances in the special reserve shall be auctioned by Member States.

9. The Commission may establish detailed rules on the operation of the special reserve under this Article, including the assessment of compliance with eligibility criteria under paragraph 1. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

Article 3g

Monitoring and reporting plans

The administering Member State shall ensure that each aircraft operator submits to the competent authority in that State a monitoring plan setting out measures to monitor and report emissions and tonne-kilometre data for the purpose of an application under Article 3e and that such plans are approved by the competent authority in accordance with the guidelines adopted pursuant to Article 14.';

5. the following title and Article shall be inserted:

'CHAPTER III

Stationary installations

Article 3h

Scope

The provisions of this Chapter shall apply to greenhouse gas emissions permits and the allocation and issue of allowances in respect of activities listed in Annex I other than aviation activities.';

6. point (e) of Article 6(2) shall be replaced by the following:

'(e) an obligation to surrender allowances, other than allowances issued under Chapter II, equal to the total emissions of the installation in each calendar year, as verified in accordance with Article 15, within four months following the end of that year.';

7. the following title shall be inserted after Article 11:

'CHAPTER IV

Provisions applying to aviation and stationary installations';

8. in Article 11a the following paragraph shall be inserted:

'1a. Subject to paragraph 3, during each period referred to in Article 3c, Member States shall allow each aircraft operator to use CERs and ERUs from project activities. During the period referred to in Article 3c(1), aircraft operators may use CERs and ERUs, up to 15 % of the number of allowances they are required to surrender pursuant to Article 12(2a).

For subsequent periods, the percentage shall be decided in line with the procedure for determining the use of CERs and ERUs from project activities, as part of the review of this Directive and taking into consideration the development of the international climate change regime.

The Commission shall publish this percentage at least six months before the start of each period referred to in Article 3c.';

9. in Article 11b(2), the word 'installations' shall be replaced by the word 'activities';

10. Article 12 shall be amended as follows:

(a) in paragraph 2, after the word 'purpose' the words 'of meeting an aircraft operator's obligations under paragraph 2a or' shall be inserted;

(b) the following paragraph shall be inserted:

'2a. Administering Member States shall ensure that, by 30 April each year, each aircraft operator surrenders a number of allowances equal to the total emissions during the preceding calendar year from aviation activities listed in Annex I for which it is the aircraft operator, as verified in accordance with Article 15. Member States shall ensure that allowances surrendered in accordance with this paragraph are subsequently cancelled.';

(c) paragraph 3 shall be replaced by the following:

'3. Member States shall ensure that, by 30 April each year, the operator of each installation surrenders a number of allowances, other than allowances issued under Chapter II, equal to the total emissions from that installation during the preceding calendar year as verified in accordance with Article 15, and that these are subsequently cancelled.';

11. in Article 13(3), the words 'Article 12(3)' shall be replaced by the words 'Article 12(2a) or (3)';

12. Article 14 shall be amended as follows:

(a) in the first sentence of paragraph 1:

(i) after the words 'those activities' the words 'and of tonne-kilometre data for the purpose of an application under Articles 3e or 3f' shall be inserted;

(ii) the words ', by 30 September 2003' shall be deleted;

(b) paragraph 3 shall be replaced by the following:

'3. Member States shall ensure that each operator or aircraft operator reports the emissions during each calendar year from the installation, or, from 1 January 2010, the aircraft, which it operates to the competent authority after the end of that year in accordance with the guidelines.';

13. Article 15 shall be replaced by the following:

'Article 15

Verification

Member States shall ensure that the reports submitted by operators and aircraft operators pursuant to Article 14(3) are verified in accordance with the criteria set out in Annex V and any detailed provisions adopted by the Commission in accordance with this Article, and that the competent authority is informed thereof.

Member States shall ensure that an operator or aircraft operator whose report has not been verified as satisfactory in accordance with the criteria set out in Annex V and any detailed provisions adopted by the Commission in accordance with this Article by 31 March each year for emissions during the preceding year cannot make further transfers of allowances until a report from that operator or aircraft operator has been verified as satisfactory.

The Commission may adopt detailed provisions for the verification of reports submitted by aircraft operators pursuant to Article 14(3) and applications under Articles 3e and 3f, in accordance with the regulatory procedure referred to in Article 23(2).';

14. Article 16 shall be amended as follows:

(a) in paragraph 1, the words 'by 31 December 2003 at the latest,' shall be deleted;

(b) paragraphs 2 and 3 shall be replaced by the following:

'2. Member States shall ensure publication of the names of operators and aircraft operators who are in breach of requirements to surrender sufficient allowances under this Directive.

3. Member States shall ensure that any operator or aircraft operator who does not surrender sufficient allowances by 30 April of each year to cover its emissions during the preceding year shall be held liable for the payment of an excess emissions penalty. The excess emissions penalty shall be EUR 100 for each tonne of carbon dioxide equivalent emitted for which the operator or aircraft operator has not surrendered allowances. Payment of the excess emissions penalty shall not release the operator or aircraft operator from the obligation to surrender an amount of allowances equal to those excess emissions when surrendering allowances in relation to the following calendar year.';

(c) the following paragraphs shall be added:

'5. In the event that an aircraft operator fails to comply with the requirements of this Directive and where other enforcement measures have failed to ensure compliance, its administering Member State may request the Commission to decide on the imposition of an operating ban on the aircraft operator concerned.

6. Any request by an administering Member State under paragraph 5 shall include:

(a) evidence that the aircraft operator has not complied with its obligations under this Directive;

(b) details of the enforcement action which has been taken by that Member State;

(c) a justification for the imposition of an operating ban at Community level; and

(d) a recommendation for the scope of an operating ban at Community level and any conditions that should be applied.

7. When requests such as those referred to in paragraph 5 are addressed to the Commission, the Commission shall inform the other Member States (through their representatives on the Committee referred to in Article 23(1) in accordance with the Committee's Rules of Procedure).

8. The adoption of a decision following a request pursuant to paragraph 5 shall be preceded, when appropriate and practicable, by consultations with the authorities responsible for regulatory oversight of the aircraft operator concerned. Whenever possible, consultations shall be held jointly by the Commission and the Member States.

9. When the Commission is considering whether to adopt a decision following a request pursuant to paragraph 5, it shall disclose to the aircraft operator concerned the essential facts and considerations which form the basis for such decision. The aircraft operator concerned shall be given an opportunity to submit written comments to the Commission within 10 working days from the date of disclosure.

10. At the request of a Member State, the Commission, in accordance with the regulatory procedure referred to in Article 23(2), may adopt a decision to impose an operating ban on the aircraft operator concerned.

11. Each Member State shall enforce, within its territory, any decisions adopted under paragraph 10. It shall inform the Commission of any measures taken to implement such decisions.

12. Where appropriate, detailed rules shall be established in respect of the procedures referred to in this Article. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).';

15. the following Articles shall be inserted:

'Article 18a

Administering Member State

1. The administering Member State in respect of an aircraft operator shall be:

(a) in the case of an aircraft operator with a valid operating licence granted by a Member State in accordance with the provisions of Council Regulation (EEC) No 2407/92 of 23 July 1992 on licensing of air carriers (*), the Member State which granted the operating licence in respect of that aircraft operator; and

(b) in all other cases, the Member State with the greatest estimated attributed aviation emissions from flights performed by that aircraft operator in the base year.

2. Where in the first two years of any period referred to in Article 3c, none of the attributed aviation emissions from flights performed by an aircraft operator falling within paragraph 1(b) of this Article are attributed to its administering Member State, the aircraft operator shall be transferred to another administering Member State in respect of the next period. The new administering Member State shall be the Member State with the greatest estimated attributed aviation emissions from flights performed by that aircraft operator during the first two years of the previous period.

3. Based on the best available information, the Commission shall:

(a) before 1 February 2009, publish a list of aircraft operators which performed an aviation activity listed in Annex I on or after 1 January 2006 specifying the administering Member State for each aircraft operator in accordance with paragraph 1; and

(b) before 1 February of each subsequent year, update the list to include aircraft operators which have subsequently performed an aviation activity listed in Annex I.

4. For the purposes of paragraph 1, "base year" means, in relation to an aircraft operator which started operating in the Community after 1 January 2006, the first calendar year of operation, and in all other cases, the calendar year starting on 1 January 2006.

Article 18b

Assistance from Eurocontrol

For the purposes of carrying out its obligations under Articles 3c(4) and 18a, the Commission may request the assistance of Eurocontrol and may conclude to that effect any appropriate agreements with that organisation.

(*) OJ L 240, 24.8.1992, p. 1.';

16. in Article 19, paragraph 3 shall be amended as follows:

(a) the last sentence shall be replaced by the following:

'That Regulation shall also include provisions concerning the use and identification of CERs and ERUs in the Community scheme and the monitoring of the level of such use and provisions to take account of the inclusion of aviation activities in the Community scheme.';

(b) the following subparagraph shall be added:

'The Regulation on a standardised and secured system of registries shall ensure that allowances, CERs and ERUs surrendered by aircraft operators are transferred to Member States' retirement accounts for the Kyoto Protocol's first commitment period only to the extent that those allowances, CERs and ERUs correspond to emissions included in the national totals of Member States' national inventories for that period.';

17. in Article 23, paragraph 3 shall be replaced by the following:

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

18. the following Article shall be inserted:

'Article 25a

Third country measures to reduce the climate change impact of aviation

1. Where a third country adopts measures for reducing the climate change impact of flights departing from that country which land in the Community, the Commission, after consulting with that third country, and with Member States within the Committee referred to in Article 23(1), shall consider options available in order to provide for optimal interaction between the Community scheme and that country's measures.

Where necessary, the Commission may adopt amendments to provide for flights arriving from the third country concerned to be excluded from the aviation activities listed in Annex I or to provide for any other amendments to the aviation activities listed in Annex I which are required by an agreement pursuant to the fourth subparagraph. Those measures, designed to amend non-essential elements of this Directive, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 23(3).

The Commission may propose to the European Parliament and the Council any other amendments to this Directive.

The Commission may also, where appropriate, make recommendations to the Council in accordance with Article 300(1) of the Treaty to open negotiations with a view to concluding an agreement with the third country concerned.

2. The Community and its Member States shall continue to seek an agreement on global measures to reduce greenhouse gas emissions from aviation. In the light of any such agreement, the Commission shall consider whether amendments to this Directive as it applies to aircraft operators are necessary.';

19. Article 28 shall be amended as follows:

(a) point (b) of paragraph 3 shall be replaced by the following:

'(b) to be responsible for surrendering allowances, other than allowances issued under Chapter II, equal to the total emissions from installations in the pool, by way of derogation from Articles 6(2)(e) and 12(3); and';

(b) paragraph 4 shall be replaced by the following:

'4. The trustee shall be subject to the penalties applicable for breaches of requirements to surrender sufficient allowances, other than allowances issued under Chapter II, to cover the total emissions from installations in the pool, by way of derogation from Article 16(2), (3) and (4).';

20. the following paragraph shall be added to Article 30:

'4. By 1 June 2015 the Commission shall, on the basis of monitoring and experience of the application of this Directive, review the functioning of this Directive in relation to aviation activities in Annex I and may make proposals as appropriate. The Commission shall give consideration in particular to:

(a) the implications and impacts of this Directive as regards the overall functioning of the Community scheme;

(b) the functioning of the aviation allowance market, covering in particular any possible market disturbances;

(c) the environmental effectiveness of the Community scheme and the extent by which the total quantity of allowances to be allocated to aircraft operators under Article 3c should be reduced in line with overall EU emissions reduction targets;

(d) the impact of the Community scheme on the aviation sector;

(e) continuing with the special reserve for aircraft operators, taking into account the likely convergence of growth rates across the industry;

(f) the impact of the Community scheme on the structural dependency on aviation transport of islands, landlocked regions and peripheral regions of the Community;

(g) whether a gateway system should be included to facilitate the trading of allowances between aircraft operators and operators of installations whilst ensuring that no transactions would result in a net transfer of allowances from aircraft operators to operators of installations;

(h) the implications of the exclusion thresholds as specified in Annex I in terms of certified maximum take-off mass and number of flights per year performed by an aircraft operator; and

(i) the impact of the exemption from the Community scheme of certain flights performed in the framework of public service obligations imposed in accordance with Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes (*).

The Commission shall then report to the European Parliament and the Council.

(*) OJ L 240, 24.8.1992, p. 8. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).';

21. the following title shall be inserted after Article 30:

'*CHAPTER V*

Final provisions';

22. Annexes I, IV and V shall be amended in accordance with the Annex to this Directive.

Article 2

Transposition

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 those 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 main provisions of national law which they adopt in the field covered by this Directive. The Commission shall inform the Member States thereof.

Article 3

Entry into force

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

Article 4

Addressees

This Directive is addressed to the Member States.

Done at …

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

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

ANNEX

Annexes I, IV and V to Directive 2003/87/EC are hereby amended as follows:

1. Annex I shall be amended as follows:

(a) the title shall be replaced by the following:

'CATEGORIES OF ACTIVITIES TO WHICH THIS DIRECTIVE APPLIES';

(b) the following subparagraph shall be inserted in paragraph 2 before the table:

'For the year 2012 all flights which arrive at or depart from an aerodrome situated in the territory of a Member State to which the Treaty applies shall be included.';

(c) the following category of activity shall be added:

'Aviation Flights which depart from or arrive in an aerodrome situated in the territory of a Member State to which the Treaty applies. This activity shall not include: (a) flights performed exclusively for the transport, on official mission, of a reigning Monarch and his immediate family, Heads of State, Heads of Government and Government Ministers, of a country other than a Member State, where this is substantiated by an appropriate status indicator in the flight plan; (b) military flights performed by military aircraft and customs and police flights; (c) flights related to search and rescue, fire-fighting flights, humanitarian flights and emergency medical service flights authorised by the appropriate competent authority; (d) any flights performed exclusively under visual flight rules as defined in Annex 2 to the Chicago Convention; (e) flights terminating at the aerodrome from which the aircraft has taken off and during which no intermediate landing has been made; (f) training flights performed exclusively for the purpose of obtaining a licence, or a rating in the case of cockpit flight crew where this is substantiated by an appropriate remark in the flight plan provided that the flight does not serve for the transport of passengers and/or cargo or for the positioning or ferrying of the aircraft; (g) flights performed exclusively for the purpose of checking, testing or certifying aircraft or equipment whether airborne or ground-based; (h) flights performed by aircraft with a certified maximum take-off mass of less than 5 700 kg; (i) flights performed in the framework of public service obligations imposed in accordance with Regulation (EEC) No 2408/92 on routes within outermost regions as specified in Article 299(2) of the Treaty or on routes where the capacity offered does not exceed 30 000 seats per year; and (j) flights, other than flights performed exclusively for the transport, on official mission, of a reigning Monarch and his immediate family, Heads of State, Heads of Government and Government Ministers, of an EU Member State, performed by a commercial air transport operator operating, for three consecutive four-month periods, fewer than 243 flights per period, which, but for this point, would fall within this activity.	Carbon dioxide'

2. Annex IV shall be amended as follows:

(a) the following title shall be inserted after the title of the Annex:

'PART A — MONITORING AND REPORTING OF EMISSIONS FROM STATIONARY INSTALLATIONS';

(b) the following part shall be added:

'PART B — MONITORING AND REPORTING OF EMISSIONS FROM AVIATION ACTIVITIES

Monitoring of carbon dioxide emissions

Emissions shall be monitored by calculation. Emissions shall be calculated using the formula:

Fuel consumption × emission factor

Fuel consumption shall include fuel consumed by the auxiliary power unit. Actual fuel consumption for each flight shall be used wherever possible and shall be calculated using the formula:

Amount of fuel contained in aircraft tanks once fuel uplift for the flight is complete – amount of fuel contained in aircraft tanks once fuel uplift for subsequent flight is complete + fuel uplift for that subsequent flight.

If actual fuel consumption data are not available, a standardised tiered method shall be used to estimate fuel consumption data based on best available information.

Default IPCC emission factors, taken from the 2006 IPCC Inventory Guidelines or subsequent updates of these Guidelines, shall be used unless activity-specific emission factors identified by independent accredited laboratories using accepted analytical methods are more accurate. The emission factor for biomass shall be zero.

A separate calculation shall be made for each flight and for each fuel.

Reporting of emissions

Each aircraft operator shall include the following information in its report under Article 14(3):

A. Data identifying the aircraft operator, including:

— name of the aircraft operator,

— its administering Member State,

— its address, including postcode and country and, where different, its contact address in the administering Member State,

— the aircraft registration numbers and types of aircraft used in the period covered by the report to perform the aviation activities listed in Annex I for which it is the aircraft operator,

— the number and issuing authority of the air operator certificate and operating licence under which the aviation activities listed in Annex I for which it is the aircraft operator were performed,

— address, telephone, fax and email details for a contact person, and

— name of the aircraft owner.

B. For each type of fuel for which emissions are calculated:

— fuel consumption,

— emission factor,

— total aggregated emissions from all flights performed during the period covered by the report which fall within the aviation activities listed in Annex I for which it is the aircraft operator,

— aggregated emissions from:

— all flights performed during the period covered by the report which fall within the aviation activities listed in Annex I for which it is the aircraft operator and which departed from an aerodrome situated in the territory of a Member State and arrived at an aerodrome situated in the territory of the same Member State,

— all other flights performed during the period covered by the report which fall within the aviation activities listed in Annex I for which it is the aircraft operator,

— aggregated emissions from all flights performed during the period covered by the report which fall within the aviation activities listed in Annex I for which it is the aircraft operator and which:

— departed from each Member State, and

— arrived in each Member State from a third country,

— uncertainty.

Monitoring of tonne-kilometre data for the purpose of Articles 3e and 3f

For the purpose of applying for an allocation of allowances in accordance with Article 3e(1) or Article 3f(2), the amount of aviation activity shall be calculated in tonne-kilometres using the following formula:

tonne kilometres = distance × payload

where:

"distance" means the great circle distance between the aerodrome of departure and the aerodrome of arrival plus an additional fixed factor of 95 km; and

"payload" means the total mass of freight, mail and passengers carried.

For the purposes of calculating the payload:

— the number of passengers shall be the number of persons on-board excluding crew members,

— an aircraft operator may choose to apply either the actual or standard mass for passengers and checked baggage contained in its mass and balance documentation for the relevant flights or a default value of 110 kg for each passenger and his checked baggage.

Reporting of tonne-kilometre data for the purpose of Articles 3e and 3f

Each aircraft operator shall include the following information in its application under Article 3e(1) or Article 3f(2):

A. Data identifying the aircraft operator, including:

— name of the aircraft operator,

— its administering Member State,

— its address, including postcode and country and, where different, its contact address in the administering Member State,

— the aircraft registration numbers and types of aircraft used during the year covered by the application to perform the aviation activities listed in Annex I for which it is the aircraft operator,

— the number and issuing authority of the air operator certificate and operating licence under which the aviation activities listed in Annex I for which it is the aircraft operator were performed,

— address, telephone, fax and email details for a contact person, and

— name of the aircraft owner.

B. Tonne-kilometre data:

— number of flights by aerodrome pair,

— number of passenger-kilometres by aerodrome pair,

— number of tonne-kilometres by aerodrome pair,

— chosen method for calculation of mass for passengers and checked baggage,

— total number of tonne-kilometres for all flights performed during the year to which the report relates falling within the aviation activities listed in Annex I for which it is the aircraft operator.';

3. Annex V shall be amended as follows:

(a) the following title shall be inserted after the title of the Annex:

'PART A — VERIFICATION OF EMISSIONS FROM STATIONARY INSTALLATIONS';

(b) the following part shall be added:

'PART B — VERIFICATION OF EMISSIONS FROM AVIATION ACTIVITIES

13. The general principles and methodology set out in this Annex shall apply to the verification of reports of emissions from flights falling within an aviation activity listed in Annex I.

For this purpose:

(a) in paragraph 3, the reference to operator shall be read as if it were a reference to an aircraft operator, and in point (c) of that paragraph the reference to installation shall be read as if it were a reference to the aircraft used to perform the aviation activities covered by the report;

(b) in paragraph 5, the reference to installation shall be read as if it were a reference to the aircraft operator;

(c) in paragraph 6 the reference to activities carried out in the installation shall be read as a reference to aviation activities covered by the report carried out by the aircraft operator;

(d) in paragraph 7 the reference to the site of the installation shall be read as if it were a reference to the sites used by the aircraft operator to perform the aviation activities covered by the report;

(e) in paragraphs 8 and 9 the references to sources of emissions in the installation shall be read as if they were a reference to the aircraft for which the aircraft operator is responsible; and

(f) in paragraphs 10 and 12 the references to operator shall be read as if they were a reference to an aircraft operator.

Additional provisions for the verification of aviation emission reports

14. The verifier shall in particular ascertain that:

(a) all flights falling within an aviation activity listed in Annex I have been taken into account. In this task the verifier shall be assisted by timetable data and other data on the aircraft operator's traffic including data from Eurocontrol requested by that operator;

(b) there is overall consistency between aggregated fuel consumption data and data on fuel purchased or otherwise supplied to the aircraft performing the aviation activity.

Additional provisions for the verification of tonne-kilometre data submitted for the purposes of Articles 3e and 3f

15. The general principles and methodology for verifying emissions reports under Article 14(3) as set out in this Annex shall, where applicable, also apply correspondingly to the verification of aviation tonne-kilometre data.

16. The verifier shall in particular ascertain that only flights actually performed and falling within an aviation activity listed in Annex I for which the aircraft operator is responsible have been taken into account in that operator's application under Articles 3e(1) and 3f(2). In this task the verifier shall be assisted by data on the aircraft operator's traffic including data from Eurocontrol requested by that operator. In addition, the verifier shall ascertain that the payload reported by the aircraft operator corresponds to records on payloads kept by that operator for safety purposes.'.

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

In December 2006, the Commission adopted its proposal ([1]) for a Directive of the European Parliament and of the Council amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community. This proposal was transmitted to the Council on 22 December 2006.

The European Parliament adopted its first-reading opinion on 13 November 2007.

The Economic and Social Committee adopted its opinion on 30 May 2007 ([2]).

The Committee of the Regions adopted its opinion on 10 October 2007 ([3]).

The Council adopted its Common Position on 18 April 2008.

II. OBJECTIVE

The main objective of the proposed Directive is to reduce the climate change impact attributable to aviation, in view of the growing emissions from the aviation sector, namely by including aviation activities in the general Community scheme for emissions trading (ETS).

The proposal takes the form of an amendment to Directive 2003/87/EC (ETS Directive).

III. ANALYSIS OF THE COMMON POSITION

General

The Common Position incorporates a number of the European Parliament's first-reading amendments, either verbatim, in part or in spirit. These improve or clarify the text of the proposed Directive. However, other amendments are not reflected in the Common Position because the Council agreed that they were either unnecessary and/or impracticable, being insufficiently supported by current scientific knowledge and entailing increased and non-commensurate administrative costs for their implementation.

The Common Position also includes a number of changes other than those envisaged in the European Parliament's first-reading opinion as, in a number of cases, provisions from the original Commission proposal have been supplemented with new elements or entirely redrafted, with some completely new provisions inserted.

In addition, a number of drafting changes merely seek to clarify the text or to ensure the overall coherence of the Directive.

Specific

(1) *Start date and scope of the scheme*

The Council, agreeing with the European Parliament, has rejected the two-stage approach proposed by the Commission and has opted for a **single starting date for all flights** to be included in the scheme. This was deemed necessary to ensure the scheme's enhanced environmental impact whilst minimising distortion of competition. However, the Council, contrary to the Commission and the European Parliament, which both suggested 2011 as the start year, decided that delaying the scheme for one year, i.e. **2012**, would be reasonable in view of the procedural steps involved in the adoption of the legislation, the complexity of the scheme and the need to provide for a number of implementing measures.

([1]) Doc. 5154/07 — COM(2006) 818 final.
([2]) OJ C 206, 27.7.2007, p. 47.
([3]) OJ C 305, 15.12.2007, p. 15.

(2) *Allocation*

The Council, very much like the European Parliament, considers the issue of allocation of allowances of central importance for the functioning of the scheme. In this respect, the Council has introduced a number of changes to the Commission proposal that would bring its contents closer to the spirit of a number of EP amendments, even though it did not incorporate them literally in the text of the Common Position.

Thus, whilst the Council has maintained the **cap** of 100 % of historical emissions, as in the Commission proposal, it has nonetheless pointed towards a possible future reduction as part of a review of the functioning of the Directive in relation to aviation activities, to be carried out by 2015 (Article 30(4)).

The Council agreed with the Commission's choice of **allocation mechanism** that would work partly by allocation of allowances free-of-charge based on a simple benchmark and partly by auctioning.

The Council has nevertheless slightly **adjusted the benchmark** by introducing modifications to the payload (which it increased to 110 kg per passenger and their checked baggage) and to the distance (with 95 km added to the greater circle distance) used to calculate the aviation activity (tonne kilometre) of each aircraft operator.

Concerning the **levels of auctioning**, the Council has rejected the Commission proposal to use a percentage corresponding to the average percentage proposed by the Member States that would include auctioning in their national allocation plans (NAPs), opting instead for a **fixed percentage of 10 %**. Additionally, the Council also introduced the explicit possibility for that percentage to be increased as part of the general review of the ETS Directive. Thus, although not incorporating EP amendment 74, the Common Position shares in fact the general spirit of that amendment as it acknowledges the desirability of providing for a (gradual) increase in the level of auctioning. The choice of an initially lower percentage of auctioning coupled with the possibility of future increases was considered preferable by the Council, as a more cautious approach ensuring, on the one hand, that aviation would not be treated significantly differently from other sectors falling within the ETS, whilst providing, on the other hand, for better adaptation to the overall functioning of the Community scheme.

On the **use of the proceeds generated from auctioning**, the Council adopts a slightly modified position with regard to both Commission and European Parliament. According to the current wording of Article 3d(4), it is for Member States to decide how these revenues are to be used. Nevertheless, Article 3d(4) provides that these proceeds should be used to tackle climate change both in the EU and in third countries and to cover the administrative costs of running the scheme. This modification seeks to ensure respect of the overriding constitutional and/or budgetary principles in the domestic legal orders of a number of Member States.

One of the major new elements that the Council has introduced to the Commission proposal relates to the creation of a **special reserve for new entrants or fast-growing aircraft operators** (i.e. operators that can demonstrate a growth rate of 18 % annually in the years following the base year used for the allocation of allowances). According to Article 3f, a set percentage (3 %) of allowances would be set aside to be distributed to eligible aircraft operators on the basis of a benchmark system similar to the system used for the initial allocation. The introduction of such a provision would ensure that new aircraft operators or aircraft operators in Member States with initially very low (but currently increasing) mobility rates would not be penalised by the scheme. The Council has counterbalanced any possible market distortions by making the distribution of allowances under the special reserve a one-off, alongside a provision that the resulting annual allocation per tonne-kilometre to eligible aircraft operators shall not be greater than the annual allocation per tonne-kilometre to aircraft operators under the main allocation (Article 3f(6)). Thus, the Council is in fact moving in the same direction as EP amendments 22, 28 and 33. Nevertheless, the functioning of the special reserve as envisaged in the Common Position would entail lower administrative costs and would not introduce significant distortions in the market.

(3) *Exemptions*

The Council has **refined** further a number of exemptions from the scheme, taking into consideration the corresponding EP amendments (i.e. amendments 51, 52, 53, 70 and 79). Thus, it has opted not to exclude flights by EU Heads of State from the scheme, but has chosen to include exemptions for flights related to search and rescue, fire-fighting flights, humanitarian flights and emergency medical service flights. Furthermore, flights performed exclusively for the purpose of checking, testing or certifying aircraft or equipment, whether airborne or ground-based, are also excluded.

The Common Position has introduced an additional exemption from the scheme, namely a **'de minimis' clause** entailing the exclusion of flights performed by a commercial air transport operator operating, for three consecutive four-month periods, fewer than 243 flights per period. The Council has coupled this exemption with a corresponding definition of 'commercial air transport operator' and a recital aiming to ensure that operators with very low traffic levels, including many operators from developing countries, would not be faced with disproportionate administrative costs. Thus, a strong political signal is sent to developing countries, whilst at the same time red tape and the general administrative burdens associated with the administering of the scheme are reduced. The possible adverse effects on the market are taken into account by opting for a neutral criterion for the exclusion, based on 'pure' activity.

The Council, very much like the European Parliament, has also taken into consideration the **special needs of outermost regions and the particular status of flights performed under public service obligations (PSOs)**. The Common Position excludes from the scheme flights performed in the framework of public service obligations on routes within outermost regions or on routes where the capacity offered does not exceed 30 000 seats per year, and provides also for the corresponding recital. In this respect, therefore, it goes beyond EP amendment 78.

(4) *Other issues*

A new article is inserted (Article 3g) imposing on Member States an additional obligation to ensure that aircraft operators submit to the relevant competent authority **monitoring and reporting plans** setting out measures to monitor and report emissions and tonne-kilometre data for the purpose of applying for allowances to be issued.

A number of new paragraphs are added to the **enforcement** article of the ETS Directive (Article 16), providing for the possibility for an administering Member State to request the Commission to impose an operating ban at Community level on an aircraft operator that fails to comply with the requirements of the Directive. Whilst the imposition of an operating ban is viewed as an enforcement measure of last resort, its inclusion was considered necessary, in order to guarantee the full compliance of aircraft operators with the scheme, a matter of utmost importance to the Council.

Furthermore, the Council has modified the Commission proposal as regards the **conversion of allowances and their subsequent use towards international commitments**, opting for a 'semi-open' scheme and deleting the provision from the Commission's proposal that would have enabled aircraft operators to convert their allowances into allowances that can be used by other operators. In recognition of the fact that domestic (and not international) aviation is part of Member State's commitments for the first commitment period under the Kyoto Protocol, a new paragraph is added to current Article 19 of the ETS Directive providing for the Regulation on Registries to ensure that allowances, CERs and ERUs are only transferred to Member States' retirement accounts for the first commitment period under the Kyoto Protocol if they correspond to emissions included in the national totals of Member State's national inventories for that period.

The Council has also substantially amended Article 25a, which now seeks to clarify the various institutional procedures available to the Commission for adapting, adjusting or amending the Directive following consultation or conclusion of new agreements with **third countries**. The importance of seeking a global solution to the issue of reducing emissions from aviation activities is emphasised, as is the need to seek the optimal interaction between the Community scheme and equivalent schemes from third countries. In this respect, even though the Council chose not to incorporate verbatim the corresponding EP amendment (amendment 49), the spirit of the Common Position follows very closely its rationale.

Finally, a number of points are added to the current **review clause** of the ETS Directive (Article 30), to serve as a 'check-list' for reviewing the functioning of the Directive in relation to aviation activities and for addressing any problems that might be bound to arise from the inclusion of these activities in the general ETS.

IV. **CONCLUSION**

The Council believes that the Common Position represents a balanced package of measures that would contribute to reducing aviation emissions in a manner consistent with the policies and objectives of the EU, as expressed also within the UNFCCC, whilst ensuring that the scheme is applied to all aircraft operators without distinction as to nationality and, therefore, that the inclusion of aviation in the Community ETS should not lead to distortions of competition.

The Council looks forward to constructive discussions with the European Parliament with a view to the early adoption of the Directive.