

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT**

pursuant to the second subparagraph of Article 189b(2) of the EC Treaty

ON THE COUNCIL COMMON POSITION

ON THE PROPOSAL FOR A EUROPEAN PARLIAMENT AND COUNCIL
DIRECTIVE AMENDING FOR THE THIRD TIME DIRECTIVE 83/189/EEC
LAYING DOWN A PROCEDURE FOR THE PROVISION OF INFORMATION IN
THE FIELD OF TECHNICAL STANDARDS AND REGULATIONS

1. Background

On 24 July 1996 the Commission adopted a proposal for a Directive (together with a communication) designed to introduce a mechanism for the transparency of rules applying to information society services by amending Directive 83/189/EEC¹ for a third time.

The Economic and Social Committee endorsed the proposal on 20 March 1997.

On 16 May 1997 Parliament adopted, on first reading and in accordance with the codecision procedure (Article 189b of the EC Treaty), a legislative resolution approving, subject to amendments contained in the resolution, the Commission's proposal and calling on the Commission to alter its proposal accordingly.

On 17 November, pursuant to Article 189b(2) of the EC treaty, the Commission adopted an amended proposal incorporating, in letter or in spirit, most of the amendments voted by Parliament on first reading.

On ... the Council, acting pursuant to Article 189b(2) of the EC treaty, adopted a common position on the proposal for a Directive.

This communication sets out the Commission's opinion on the Council common position pursuant to Article 189b(2) of the EC treaty.

2. Purpose of the Directive

This proposal for a Directive is designed to introduce a system of information and consultation between the Commission and the Member States on future national regulatory initiatives relating specifically to Information Society services, i.e. services provided "at a distance, by electronic means and on the individual request of a service receiver".

Preservation of the area without internal frontiers constituted by the internal market is an essential precondition for safeguarding and promoting the development of on-line interactive services, which offer great potential for investment, the growth and competitiveness of European industry, job creation and consumers. The information and administrative cooperation mechanism proposed is specifically designed to establish a stable, transparent and cohesive framework for stimulating the development of these "new" services, based in particular on the internal market principles of free movement of services and freedom of establishment.

The content of the proposal is purely procedural: its aim is not to harmonise substantive law at all but simply to extend to future draft national legislation on Information Society services the same rules governing prior notification (with adoption of the national legislation initially postponed for three months) and consultation (i.e. within an ad hoc committee) that currently apply to goods under Directive 83/189/EEC.

¹ COM(96) 392 final, OJ C 307, 16.10.1996.

Given the enormous rule-making activity being prepared in this field in several Member States, it is essential that such a transparency mechanism be adopted and implemented as quickly as possible.

3. Comments on the Council common position

3.1 Summary of the Commission's position

The Commission felt that the Council common position was generally acceptable, since the aim was to achieve adoption by a qualified majority.

Nevertheless, given its commitments towards legislative clarity, the Commission would have preferred a simpler formulation of the drafting of certain definitions foreseen in Article 1.

The Commission would have also preferred for the maintenance of its proposal, supported by the European Parliament, for a six month total status quo period in the event of a detailed opinion being issued by the Commission or by a Member State on notified draft rules, rather than the reduced four month period (Article 9.2 of directive 83/189). The reduction that the Council adopted leads to differing treatment between Information Society services and products. Furthermore, in practise it can be shown that the 6 month delay is useful to appreciate the issue, transmit the reasoned opinion and discuss the issue with the relevant Member State in order to find a solution.

The Commission would also have preferred if financial services and telecommunications services had not been given special treatment in the Council common position compared with the other sectors of the economy. Thus, the scope of the directive would not have been, even marginally limited, nor would have the efficiency referred to above for reasoned opinions.

3.2 Analysis of the Council common position

3.2.1 Parliament's amendments

On first reading, Parliament adopted 17 amendments to the Commission's proposal.

In its amended proposal, the Commission accepted and incorporated, either verbatim or as regards their objective, most of these, i.e. 12 amendments out of 17 (Nos 2, 3, 9, 10, 11, 12, 14, 15, 17, 18, 19 and 20), and in particular all the amendments (bar one) relating to the substantive provisions of the Directive.

3.2.2 Parliament's amendments accepted by the Commission and contained in the common position

Of the 12 amendments accepted by the Commission, the Council can be said to have incorporated five, in whole or in part, at least as regards their spirit (Nos 2, 11, 14 (second part), 19 and 20).

The content of amendment 2 (the requirement that national measures preserving cultural identity and diversity be kept, in accordance with Community law) is reproduced and strengthened not only in recital 4 (amended) but also in the substantive provisions

themselves, at Article 1(5)(a) of the common position (relating to the new, penultimate subparagraph of Article 9(2) of Directive 83/189/EEC).

The updating of the references to the recent Directives in the audiovisual and telecommunications fields, mentioned in amendment 11, appears in recital 21.

The second part of amendment 14 (taking account of the social, societal and cultural objectives pursued by national draft rules) is reflected in the new text of Article 1(5)(a) of the common position (relating to the new, penultimate subparagraph of Article 9(2) of Directive 83/189/EEC).

Similarly, the proposal of both an evaluation report and a revision clause for this Directive, put forward by Parliament in amendment 19, is incorporated in the common position in the new Article 3.

Lastly, the reference to the interpretation of the concept of free provision as developed in the case-law of the Court of Justice (amendment 20) is contained in the new recital 19 approved by the Council.

The table in the Annex shows how these amendments of Parliament's have been incorporated in the text of the Council common position.

3.2.3 Parliament's amendments accepted by the Commission but not contained in the common position

The Council, however, has not incorporated in its common position Parliament's other amendments on first reading contained in the amended proposal. The Commission's position on these amendments is set out above.

It should be remembered, however, that some amendments which were not included in the common position called for subsequent initiatives with regard to new services, which in the meantime have in fact been launched by the Commission (see amendments 3, 9 and 18).

Similarly, the considerations of cultural policy (referred to *inter alia* in amendment 10) have also been highlighted throughout the common position.

In addition, the recital relating to the legal basis of the Directive, deleted by the Council, had already been reworded by Parliament (amendment 12).

To sum up, then, several of the questions raised by Parliament can be said to have produced significant effects in any event, irrespective of the number of amendments formally contained in the common position.

Reminder of the Commission's undertaking to present Green Papers on the new services (amendment 3)

Although not incorporated in the common position, this amendment has in fact had some concrete results, since, following its adoption by Parliament at the May 1997 plenary, the Commission has presented a series of initiatives specific to the new services (a communication and a proposal for a recommendation concerning the protection of minors and human dignity in audiovisual and information services;² a multiannual action plan on promoting safe use of the Internet;³ a communication on ensuring security and trust in

² COM(97) 570 final, 18.11.1997.

³ COM(97) 582 final, 26.11.1997.

electronic communication;⁴ a Green Paper on the convergence of the telecommunications, media and information technology sectors, and the implications for regulation,⁵ etc.).

Reminder of the Commission's undertaking to present a Green Paper on the development of the cultural aspects of the new services (amendment 9)

This amendment, which was retained verbatim in the Commission's amended proposal, does not figure in the common position, which, rather than refer to a specific initiative, has emphasised the cultural aspects of the new services in more general terms, both in recital 4 and in Article 1(5)(a) (new, penultimate subparagraph of Article 9(2) of Directive 83/189/EEC).

Safeguarding cultural aspects in future Community measures (amendment 10)

A similar observation can be made with regard to this amendment, which was contained in the amended proposal but not in the common position: cultural objectives have been stressed to a marked degree in several passages in the common position.

Recital on the legal basis (amendment 12)

This recital, after Parliament had revised it, was deleted by the Council. The Commission is not at all worried by the deletion: the recital served simply as a reminder of the legal basis of the Directive, which had been approved by Parliament and which, in any event, remains unchanged (Articles 100a and 213 of the EC Treaty).

Consultation by the Committee and national authorities of experts from industry and the universities (amendment 14, first part)

The Commission can support Parliament's idea of consultation about rules on services, provided it does not involve too great an outlay in budgetary and organisational terms (i.e. no ad hoc working party to be set up).

The common position reflects the need for specific treatment to be given to future questions on services, as opposed to those on goods, by providing for a change in the composition of the present Committee when it examines questions dealing with Information Society services (Article 1(3) of the common position, relating to Article 6(1) of Directive 83/189/EEC).

Reference to obstacles to freedom of establishment (amendments 15 and 17)

The additions proposed in Parliament's amendments seem necessary for and relevant to clarification of the Directive's substantive provisions, in particular since Article 1 (new point 11) and Article 9 (third indent of the first subparagraph of paragraph 2) of Directive 83/189/EEC already mention possible obstacles to the freedom of establishment.

⁴ COM(97) 503 final, 8.10.1997.

⁵ COM(97) 623 final, 3.12.1997.

Regular examination of the market for Information Society services, in particular from the standpoint of technological convergence (amendment 18)

An initial response to this amendment of Parliament's was given in the recent adoption by the Commission of the Green Paper on convergence (see footnote 5). The requirement for such an examination, which would consist of a discussion of a general nature, could preferably be placed in a recital.

3.2.4 New provisions and other changes introduced by the Council

In the common position, the Council has made certain changes to the substantive provisions of the proposal and a number of clarifications both in the recitals and the substantive provisions.

Two changes are most significant:

1. The first concerns the special arrangements introduced for notifying draft national rules relating specifically to on-line financial services. These are divided into three parts:
 - (a) the total exclusion from the scope of the present Directive of national rules on questions which are already the subject of Community regulations on financial services (third paragraph of Article 1(5) of Directive 83/189/EEC);
 - (b) the partial exclusion of national rules on regulated markets (in particular stock exchanges) and other specific markets and bodies: such rules (which require rapid and continuous adaptation) will not be subject to compulsory prior notification and to "status quo" periods but will simply be notified after they have been adopted (fourth paragraph of Article 1(5) of Directive 83/189);
 - (c) a special emergency procedure for draft national rules on the protection of the security and the integrity of the financial system: given the specificity of the risks inherent in this field, a Member State, while being obliged to notify the Commission of such rules at the draft stage, may adopt them immediately in order to deal with a "serious" situation (Article 9(7) of Directive 83/189, in contrast to the ordinary emergency procedure, which requires that the situation should also be "unforeseeable");
2. The second important change made by the Council concerns the reduction of the total status quo period to four months (instead of the six months proposed by the Commission) if a detailed opinion is delivered by the Commission or by one or more Member States on a notified draft (third indent of Article 9(2) of Directive 83/189)

In addition, the common position has introduced further changes to the text of the proposal for a Directive. These comprise in particular:

- the exclusion of national rules on questions which are already the subject of Community regulations on telecommunications services (in line with what was indicated in the field of financial services; second paragraph of Article 1(5) of Directive 83/189);
- the non-application, with regard only to draft national rules on Information Society services, of the twelve-month status quo period, when the Commission announces that it merely "intends" to propose a directive, regulation or decision in the same field as that covered by the national draft (Article 9(7) of Directive 83/189). On the other hand, such a possibility is still valid of course where goods are concerned.

As already stated, the Commission would have preferred, generally speaking, to keep the substantive provisions which it had proposed and which were approved by Parliament. Nevertheless, it has agreed to accept the changes introduced by the Council so as to arrive at a common position by a qualified majority on the proposal for a Directive.

In addition, the Council has made a number of clarifications to the text (with regard in particular to the determination of the scope of the Directive), which, however, do not change the substance of the provisions. These clarifications can be summarised as follows:

- definition of the criteria for applying the Directive (concept of "service" and of service supplied "at a distance", "by electronic means" and "on his individual request": Article 1, new point 2, of Directive 83/189, see also recital 19; concept of "rule relating to services": recital 18 and first paragraph of Article 1, point 5);
- non-application of the Directive to broadcasting services (including pay-TV and pay-per-view) already covered by the Television without Frontiers Directive (89/552/EEC), as amended by Directive 97/36/EC (last paragraph of Article 1, new point 2);
- criteria making it possible to describe a rule as "relating specifically to information society services", for lack of which a national rule does not fall within the scope of the Directive and need not therefore be notified at the draft stage (last paragraph of Article 1, new point 5; see also recitals 5 and 18);
- provision that the Committee currently operating in the context of Directive 83/189 should meet "in a specific composition" to examine matters relating to Information Society services (new paragraph in Article 6(1); see also recital 25);
- safeguarding, in the event of a detailed opinion from the Commission or from a Member State, of the national cultural policy measures adopted by the notifying Member State, in accordance with Community law (new penultimate paragraph in Article 9(2));
- circumstances justifying the application of the emergency clause (recital 22);

- interpretation whereby the postponement of the adoption of a national rule for twelve months (and possibly eighteen) will apply only where the draft contradicts a proposal already presented by the Commission (recital 23);
- list, of a purely indicative nature, of the services which, as defined by the Directive, are not covered, since they are not supplied "at a distance" or "by electronic means" or "on his individual request" (Annex III);
- list, also of a purely indicative nature, of "financial" services (Annex IV).

While emphasising that some additions to the substantive provisions could make their wording more cumbersome and, hence, impair their readability, the Commission is not opposed to drafting which, in the last analysis, does not change the content of the Commission's proposal as approved by Parliament on first reading.

The Council has also fixed a period of twelve months for the transposal of this Directive (Article 2) and has provided for an evaluation report and a possible review of the Directive two and three years respectively after the end of the transposal period (Article 3).

4. Conclusions

The Commission accepts the Council common position on the proposal for a European Parliament and Council Directive amending for the third time Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations.

Of course, as has already been stated, it would have preferred the Council to confirm the integrity of the proposed provisions on the scope and operation of the Directive and to take more account of certain amendments voted by Parliament.

Nevertheless, at this stage, the Commission welcomes the Council's common position, given the need for definitive adoption and rapid implementation of the legislative information and administrative cooperation procedures contemplated in the proposal and endorsed by Parliament.

Analysis of Parliament's amendments

Recital or article	EP amendment	Content	Accepted by the Commission	Accepted by the Council
Recital 1a	20	Interpretation of "service" in accordance with the case-law of the Court of Justice	Yes	In principle (recital 19 of the common position)
Recital 3a	1	Access to "services" without exclusions	No	No
Recital 4a	2	National measures for preserving cultural identity	Yes	In principle (2nd part amend: recl. 4; Art. 1(5)(a))
Recital 5a	3	Reference to Green Papers on new services	Yes	No
Recital 6	4	Adaptation of rules on on-line services	No	No
Recital 8a	5	Future extensions of Directive 83/189	No	No
Recital 15	8	Definition of the national rules to be notified	No	No
Recital 17a	9	Future Green Paper on cultural aspects	Yes	No
Recital 17b	10	Taking account of cultural aspects in future EC measures	Yes	No
Recital 19	11	References to recent Directives	Yes	Yes (recital 21)
Recital 21	12	Recital relating to legal basis	Yes	No (recital deleted)
Art. 1(2)(a) [Art.6(7)(a) 83/189]	14	- consultation of experts in a WP; - sociocultural aspects	In principle	In principle (2nd part amend: recl. 4; Art. 1(5)(a))
Art. 1(3) [Sixth para Art.1(1)]	15	Reference to obstacle to freedom of establishment	Yes	No
Art. 1(3a) [Art. 8(2)]	16	Greater effect of "observations"	No	No
Art. 1(5)(b) [Sixth indent, Art. 10(1)]	17	Reference to obstacles to freedom of establishment	Yes	No
Art. 2b	18	Regular examination of market for new services	In principle	No
Article 2a	19	Revision clause	Yes	Yes (Art. 3)