

DIRECTIVE 98/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**of 20 July 1998****amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 100a and 213 thereof,

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

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

Acting in accordance with the procedure laid down in Article 189b of the Treaty ⁽³⁾,

- (1) Whereas, in order to promote the smooth functioning of the internal market, as much transparency as possible should be ensured as regards the future national rules and regulations applying to Information Society services, by amending Directive 98/34/EC ⁽⁴⁾;
- (2) Whereas a wide variety of services within the meaning of Articles 59 and 60 of the Treaty will benefit by the opportunities afforded by the Information Society of being provided at a distance, electronically and at the individual request of a recipient of services;
- (3) Whereas the area without internal frontiers comprising the internal market enables providers of such services to develop their cross-border activities with a view to increasing their competitiveness, and thus affords citizens new opportunities to transmit and receive information regardless of frontiers, and consumers new forms of access to goods and services;
- (4) Whereas the extension of the scope of Directive 98/34/EC should not prevent Member States from taking account of the different social, societal and cultural implications inherent in the advent of the Information Society; whereas, in particular, the use of the procedural rules laid down in that Directive for

Information Society services should not affect cultural policy measures, particularly in the audio-visual field, which Member States might adopt in accordance with Community law, taking account of their linguistic diversity, their specific national and regional characteristics and their cultural heritage; whereas the development of the Information Society should ensure, in any event, proper access of European citizens to the European cultural heritage supplied in a digital environment;

- (5) Whereas Directive 98/34/EC is not intended to apply to national rules relating to fundamental rights, such as constitutional provisions concerning freedom of expression and, more particularly, freedom of the press; whereas it is not intended to apply to the general criminal law either; whereas, furthermore, it does not apply to agreements governed by private law between credit institutions, in particular, to agreements on the execution of payments between credit institutions;
- (6) Whereas the European Council has stressed the need to create a clear and stable legal framework at Community level in order to foster the development of the Information Society; whereas Community law and the rules governing the internal market in particular, including both the principles enshrined in the Treaty and secondary legislation, already constitute a basic legal framework for the development of such services;
- (7) Whereas it should be possible to adapt the existing national rules and regulations applicable to services available at the present so as to take account of new Information Society services, either with a view to ensuring that the general interest is better protected or, on the other hand, with a view to simplifying such rules and regulations where their application is disproportionate to the objectives they pursue;
- (8) Whereas, without coordination at Community level, this foreseeable regulatory activity at national level might give rise to restrictions on the free movement of services and the freedom of establishment, leading in turn to a refragmentation of the internal market, over-regulation and regulatory inconsistencies;
- (9) Whereas, in order to ensure real and effective protection of the general-interest objectives involved in the development of the Information Society, there is a

⁽¹⁾ OJ C 307, 16. 10. 1996, p. 11, and

OJ C 65, 28. 2. 1998, p. 12.

⁽²⁾ OJ C 158, 26. 5. 1997, p. 1.

⁽³⁾ Opinion of the European Parliament of 16 May 1997 (OJ C 167, 2. 6. 1997, p. 238), Council Common Position of 26 January 1998 (OJ C 62, 26. 2. 1998, p. 48) and Decision of the European Parliament of 14 May 1998 (OJ C 167, 1. 6. 1998). Council Decision of 29 June 1998.

⁽⁴⁾ OJ L 204, 21. 7. 1998, p. 37.

need for a coordinated approach at Community level when questions relating to activities with such highly transnational connotations as those of the new services are dealt with;

- (10) Whereas, in the case of telecommunications services, there is already harmonisation at Community level or, in some cases, arrangements for mutual recognition, and whereas the existing Community legislation provides for adaptations to take account of technological developments and the supply of new services and, as a result, the majority of national regulations concerning telecommunications services will not be subject to notification under this Directive since they will come under the exemptions set out in Article 10(1) or Article 1 point 5 of Directive 98/34/EC; whereas, nevertheless, certain national provisions specifically aimed at matters which are not subject to Community legislation may affect the free movement of Information Society services and to that extent they must be notified;
- (11) Whereas, for the other still little known fields of the Information Society, it would, however, be premature to coordinate national rules and regulations by means of extensive or exhaustive harmonisation at Community level of the substantive law, given that enough is not yet known about the form the new services will take or their nature, that there is as yet at national level no specific regulatory activity in this field, and that the need for, and content of, such harmonisation in the light of the internal market cannot be defined at this stage;
- (12) Whereas it is therefore necessary to preserve the smooth functioning of the internal market and to avert the risks of refragmentation by providing for a procedure for the provision of information, the holding of consultations, and administrative cooperation in respect of new draft rules and regulations; whereas such a procedure will help, *inter alia*, to ensure that the Treaty, in particular Articles 52 and 59 thereof, is effectively applied and, where necessary, to detect any need to protect the general interest at Community level; whereas, moreover, the improved application of the Treaty made possible by such an information procedure will have the effect of reducing the need for Community rules to what is strictly necessary and proportional in the light of the internal market and the protection of general-interest objectives; whereas, lastly, such a procedure will enable businesses to exploit the advantages of the internal market more effectively;
- (13) Whereas Directive 98/34/EC pursues the same objectives and whereas this procedure is effective, being the most comprehensive one for attaining these objectives; whereas the experience that has been gained in implementing that Directive and the procedures provided for therein can be applied to draft rules on Information Society services; whereas the procedure it lays down is now well established among national authorities;
- (14) Whereas, moreover, in accordance with Article 7a of the Treaty, the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured and whereas Directive 98/34/EC provides only for an administrative cooperation procedure and not for any harmonisation of substantive rules;
- (15) Whereas, therefore, amendment of Directive 98/34/EC with a view to applying it to draft rules and regulations on Information Society services is the approach best suited, with regard to the legal framework of the said services, to meeting effectively the need for transparency in the internal market;
- (16) Whereas notification should be provided for notably in the case of rules which are likely to evolve in future; whereas services which are provided at a distance, electronically, and at the individual request of a recipient of services (Information Society services) are likely, in view of their diversity and their future growth, to necessitate and generate the largest number of new rules and regulations; whereas provision must accordingly be made for the notification of draft rules and regulations relating to such services;
- (17) Whereas specific rules on the taking-up and pursuit of service activities which are capable of being carried on in the manner described above should thus be communicated even where they are included in rules and regulations with a more general purpose; whereas, however, general regulations which do not contain any provision specifically aimed at such services need not be notified;
- (18) Whereas 'rules on the taking-up and pursuit of service activities' means rules laying down requirements concerning Information Society services, such as those relating to service providers, services and recipients of services and to economic activities capable of being provided electronically, at a distance and at the individual request of the recipient of the services; whereas, for example, rules on the establishment of service providers, in particular those on authorisation or licensing arrangements, are accordingly covered; whereas a provision specifically aimed at Information Society services must be con-

sidered as being such a rule even if part of a more general regulation; whereas, on the other hand, measures of direct and individual concern to certain specific recipients (such as, for example, telecommunications licences) would not be covered;

- (19) Whereas, under Article 60 of the Treaty as interpreted by the case-law of the Court of Justice, 'services' means those normally provided for remuneration; whereas that characteristic is absent in the case of activities which a State carries out without economic consideration in the context of its duties in particular in the social, cultural, educational and judicial fields; whereas national provisions concerning such activities are not covered by the definition given in Article 60 of the Treaty and therefore do not fall within the scope of this Directive;
- (20) Whereas this Directive is without prejudice to the scope of Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities⁽¹⁾, as amended by Directive 97/36/EC of the European Parliament and of the Council⁽²⁾, or any future amendments;
- (21) Whereas, in any event, this Directive does not cover draft national provisions aimed at transposing the content of Community directives in force or awaiting adoption inasmuch as they are already subject to specific examination; whereas it accordingly covers neither national rules and regulations transposing Directive 89/552/EEC, as amended by Directive 97/36/EC, or any future amendments, nor national rules and regulations transposing, or adopted subsequently within the context of, Directive 97/13/EC of the European Parliament and of the Council of 10 April 1997 on a common framework for general authorisations and individual licences for telecommunications services⁽³⁾;
- (22) Whereas, moreover, provision should be made for exceptional cases in which national rules and regulations concerning Information Society services might be adopted immediately and whereas it is also important to allow this possibility solely for urgent reasons linked to serious and unforeseeable circumstances, such as circumstances of which there was no previous knowledge and the origin of which is not attributable to any action on the part of the authorities of the Member State concerned, so as not to jeopardize the objective of prior consultation and administrative cooperation inherent in this Directive;
- (23) Whereas it is appropriate for a Member State to postpone for twelve months — or possibly eighteen months in the case of a common position of the Council — the adoption of a draft rule on services only where the draft rule relates to a matter which falls within the scope of a proposal for a directive, regulation or decision which the Commission has already submitted to the Council; whereas this standstill obligation may be imposed by the Commission on the relevant Member State only if the draft national rule contains provisions which are not substantively consistent with the proposal submitted by the Commission;
- (24) Whereas definition of the framework for the provision of information and the holding of consultations at Community level as established by this Directive is a precondition for consistent and effective participation by the Community in work involving matters relating to the regulatory aspects of Information Society services in the international context;
- (25) Whereas it is appropriate that, in the context of the functioning of Directive 98/34/EC, the Committee provided for in Article 5 thereof should meet specifically to examine questions relating to Information Society services;
- (26) Whereas, by the same token, it should be noted that whenever a national measure is required also to be notified at the draft stage under another Community act, the Member State concerned may make a single communication under that other act, by indicating that that communication constitutes a communication also for the purpose of this Directive;
- (27) Whereas the Commission will at regular intervals investigate developments in the market for new services in the field of the Information Society, especially in the framework of the convergence between telecommunications, information technology and media and, where necessary, take initiatives in order to adapt rules promptly in order to encourage the European development of new services,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 98/34/EC is amended as follows:

1. the title shall be replaced by the following:

'Directive of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services';

⁽¹⁾ OJ L 298, 17. 10. 1989, p. 23.

⁽²⁾ OJ L 202, 30. 7. 1997, p. 1.

⁽³⁾ OJ L 117, 7. 5. 1997, p. 15.

2. Article 1 is amended as follows:

(a) the following new point shall be inserted:

- ‘2. “service”, any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

For the purposes of this definition:

- “at a distance” means that the service is provided without the parties being simultaneously present,
- “by electronic means” means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means,
- “at the individual request of a recipient of services” means that the service is provided through the transmission of data on individual request.

An indicative list of services not covered by this definition is set out in Annex V.

This Directive shall not apply to:

- radio broadcasting services,
- television broadcasting services covered by point (a) of Article 1 of Directive 89/552/EEC (*).

(*) OJ L 298, 17.10.1989, p. 23. Directive as last amended by Directive 97/36/EC (OJ L 202, 30.7.1997, p. 1);

(b) points 2 and 3 shall become points 3 and 4 respectively;

(c) the following new point shall be inserted:

- ‘5. “rule on services”, requirement of a general nature relating to the taking-up and pursuit of service activities within the meaning of point 2, in particular provisions concerning the service provider, the services and the recipient of services, excluding any rules which are not specifically aimed at the services defined in that point.

This Directive shall not apply to rules relating to matters which are covered by Community legislation in the field of telecommunications services, as defined by Directive 90/387/EEC (*).

This Directive shall not apply to rules relating to matters which are covered by Community

legislation in the field of financial services, as listed non-exhaustively in Annex VI to this Directive.

With the exception of Article 8(3), this Directive shall not apply to rules enacted by or for regulated markets within the meaning of Directive 93/22/EEC or by or for other markets or bodies carrying out clearing or settlement functions for those markets.

For the purposes of this definition:

- a rule shall be considered to be specifically aimed at Information Society services where, having regard to its statement of reasons and its operative part, the specific aim and object of all or some of its individual provisions is to regulate such services in an explicit and targeted manner,
- a rule shall not be considered to be specifically aimed at Information Society services if it affects such services only in an implicit or incidental manner.

(*) OJ L 192, 24.7.1990, p. 1. Directive as amended by Directive 97/51/EC (OJ L 295, 29.10.1997, p. 23).;

(d) points 4 to 8 shall become points 6 to 10;

(e) point 9 shall be renumbered 11 and shall read as follows:

- ‘11. “technical regulation”, technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, *de jure* or *de facto*, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except those provided for in Article 10, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider.

De facto technical regulations include:

- laws, regulations or administrative provisions of a Member State which refer either to technical specifications or to other requirements or to rules on services, or to professional codes or codes of practice which in turn refer to technical specifications or to other requirements or to rules on services, compliance with which confers a presumption of conformity with the obligations imposed by the aforementioned laws, regulations or administrative provisions,