# PROPOSAL FOR A FOURTEENTH EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE ON THE TRANSFER OF THE REGISTERED OFFICE OF A COMPANY FROM ONE MEMBER STATE TO ANOTHER WITH A CHANGE OF APPLICABLE LAW

# EXPLANATORY MEMORANDUM

## I. INTRODUCTION - NEED FOR A COMMUNITY MEASURE

1. Article 58 of the Treaty of Rome provides that "companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall ..... be treated in the same way as natural persons who are nationals of Member States" for the purposes of applying the Treaty's rules on the right of establishment.

   The rationale of this provision is that the single market demands that companies which have been set up in one of the Member States be able to enjoy full freedom of establishment, including the right to transfer their registered office in the event of their activities becoming centred over time on a Member State other than that in which they were set up.

2. Industry has repeatedly expressed a desire that companies be able to transfer their registered office within the Community, most recently in the context of the consultations on company law which the Commission carried out during 1997. In replies to the questionnaire used in this context, European businesses demonstrated an undeniable interest in having at their disposal the means necessary to ensure their mobility within the single market.[1]

3. Nevertheless, transferring a company's registered office within the Community remains a complex process, and is indeed impossible in most cases. This is because Member States' laws do not provide the necessary means and, when it is possible by virtue of simultaneously applying national laws, there are frequent conflicts between those laws because of the different connecting criteria obtaining in the Member States.

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[1] Those consultations were carried out by sending out a questionnaire ("Commission consultation paper on company law", doc. XV/D2/6016/96 of 17 December 1996) to the Member States and to various economic operators and company-law specialists.

4. As the Court of Justice ruled in its *Daily Mail* judgment,[2] making companies equivalent to natural persons for the purposes of freedom of establishment cannot be achieved simply by applying Articles 52 and 58 of the Treaty precisely because of the differences which exist between Member States' laws; as the Court itself concluded, a legislative effort is needed in this field in order to implement freedom of establishment in the manner intended by the Treaty.[3]

## II. COMPARATIVE LAW ELEMENTS

### 1. The connecting criteria obtaining in the Member States

*(i)* Member States applying the "registered office" criterion

Some Member States[4] consider as coming under their law all companies establishing their registered office in their territory at the time of formation. The criterion applied is that of the "registered office", i.e. the place where the company was registered when it was formed.

*(ii)* Member States applying the "*de facto* head office" criterion

According to the other Member States' laws, a company's "registered office" is the place where the actual management of the company takes place (the "*de facto*, or real head office" approach). These countries consider themselves to have jurisdiction over any company which has its central administration in their territory.

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2 Case 81/87 [1988] ECR 5483.

3 More precisely a legislative effort or an international convention: as the Court stated in *Daily Mail* (paragraph 23), "*It must therefore be held that the Treaty regards the differences in national legislation concerning the required connecting factor and the question whether - and if so how - the registered office or real head office of a company incorporated under national law may be transferred from one Member State to another as problems which are not resolved by the rules concerning the right of establishment but must be dealt with by future legislation or conventions*".

4 Finland, Ireland, the Netherlands, Sweden and the United Kingdom.

## 2. Transfer of registered office

These differences in approach are also reflected in the terminology used, which often gives rise to misunderstandings. In order to avoid this and to enable the scope of the proposed legislation to be properly understood, it is necessary to be clear about what is generally meant by "transfer of a company's registered office":

*(i)* a transfer involving the company being deleted from the register of Member State A in which it is registered and its entry in the register of Member State B ("transfer of registered office" proper);

*(ii)* the mere transfer of the company's central administration from one Member State to another, the company remaining registered in the Member State in which it was formed.

Neither of these operations is simple within the Community.

### 2(a) Transfer of registered office proper

Only very rarely does the law of a Member State expressly provide for companies registered in its territory to be able to transfer their registered office to another country. "Transfer" means that the company is not required to be wound up prior to establishing a new registered office abroad. A "transfer" takes place when it is the **same** legal person which is registered in the new country.

The Member States which provide for this possibility are few in number and in any case impose a condition of reciprocity (Italy) or require that the operation be possible under the law of the host Member State (Portugal). French law makes it subject to the conclusion of specific international agreements; such agreements do not exist, however. German law excludes the possibility outright, while the laws of the other Member States do not as much as consider it.

Hence it may be concluded that Member States' laws lack the means of allowing a company's registered office to be transferred from one Member State to another.

**2(b) Transfer of central administration**

The possibility of transferring the central administration alone is strictly linked to the application of the criteria obtaining in the Member States:

*(i)* this type of operation is possible between Member States applying the "registered office" criterion; for example, a company registered in Ireland can transfer its central administration to the Netherlands and still remain subject to Irish law, and vice versa.[5]

*(ii)* Where a Member State applying the "real head office" criterion is involved, this type of operation is very difficult and, in most cases, impossible. To take one extreme example, a foreign company setting up its central administration in Germany without registering there would no longer be considered a "company", and a German company wishing to move its central administration abroad would be wound up.

In cases where it is possible, the mere fact of transferring a company's central administration to or from a Member State applying the "real head office" criterion may give rise to a whole range of conflicts of laws. Member States applying the "registered office" criterion consider any company registered in their territory to be subject to their law even if the company in question has its central administration in another country, while Member States applying the "real head office" criterion normally consider themselves to have jurisdiction over any company having its central administration in their territory: it may therefore be the case that a company registered in a Member State applying the "registered office" criterion but having its central administration in a Member State applying the "real head office" criterion is subject to the law applicable in both countries.

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5 This is an operation merely involving the actual management of the company being moved without the registered office being transferred. It was an operation of this type which gave rise to the above-mentioned *Daily Mail* case.

In the opposite case, i.e. that of a company set up in a Member State applying the "real head office" criterion but having moved its central administration to a Member State applying the "registered office" criterion, no law may be applicable since most Member States applying the "real head office" criterion require a company's effective management to be situated in their territory for their law to apply, whereas the mere presence of the central administration in a Member State applying the "registered office" criterion does not render that country's law applicable.

## III. SUBSIDIARITY - PROPORTIONALITY - LEGAL BASIS

1. The situation outlined above shows the differences which exist between the systems operated by the Member States and also the lack of legal means of making company mobility possible. In order to guarantee mobility within the Community on the **same** terms as within a Member State, extensive harmonisation is necessary, particularly with regard to the connecting criteria. This would require a choice to be made at Community level between the "real head office" criterion and the "registered office" criterion. Community legislation would therefore have a significant effect on existing legislation, which Member States are minded to retain.

2. However, strict application of the principle of subsidiarity would suggest that no attempt should be made at present to harmonise the connecting criteria and that Articles 52 and 58 of the Treaty should be implemented by means of coordination through the introduction into Member States' laws of a **common legal device** which would enable a company to delete its registration in the home Member State without being wound up and to register in the host Member State on the basis of that Member State's law.

3. The Treaty (Article 220) requires Member States to enter into negotiations with each other in order to ensure "*the retention of [the] legal personality [of companies or firms] in the event of transfer of their seat from one country to another*". Since such negotiations have never taken place, a Community measure is the only means of organising the entire operation of transferring a registered office across national frontiers, concerning as it does both the home and the host Member State.

4. The proposed measure comprises a transfer procedure which will be common to all Member States, ensuring maximum transparency of transfers and providing guarantees - which are again common to all Member States - to members and creditors in line with Article 54(3)(g) of the Treaty, which is the legal basis for this initiative.

## IV. DESCRIPTION OF THE PROPOSED COMMUNITY MEASURE

1. Field covered by the proposed legislation

The proposal for a Directive aims to enable a company with share capital formed in one Member State to transfer its registered office to another Member State while retaining its legal personality (i.e. without being wound up) but with a change in the law applicable to the company. To this end, the Directive would create a Community "bridge" between the various laws in force in the Member States. An instrument of this nature would also reduce the interest in transferring only a company's central administration since that might lead to the conflicts of laws referred to in paragraph II.2(b) above.

2. Field not covered by the proposed legislation

As indicated in Section III.2 above, the proposed measure does not involve harmonising the connecting criteria: Member States which apply the "registered office" criterion will continue to do so, and Member States which apply the "real head office" criterion will also continue to do so.

As a result, transfers of a company's central administration alone will remain possible in all cases in which they are so at present under the applicable national laws: they are not covered by this proposal for a Directive and remain outside the scope of "transfer of registered office" as defined by Article 3.

3. Content of the proposal

The proposed text is broadly similar to Article 8 of the amended proposal for a Council Regulation on the Statute for a European company (SE) as it emerged from negotiations within the Council.

However, this Directive will cover not only public limited companies but also other companies with share capital.

First, such companies always have corporate personality; second, they are subject to legislation which is sufficiently harmonised and homogeneous in the Member States, and this fact simplifies, if not resolves, the essential issue of correspondence between the form of the company in the home and in the host Member State.

The proposed text provides for a specific procedure which ensures the transparency of transfers and provides guarantees to members and creditors. This procedure requires the company to register in the host country and to delete its entry in the register of the home country. The company thus transfers its registered office while retaining its legal personality.

The transfer will inevitably have consequences for taxation, particularly in the home Member State. The proposal for a Directive does not resolve this issue. It will be for the Commission departments concerned with taxation to find appropriate solutions in conjunction with the Member States, as has already been done for cross-border mergers.

After the transfer, the company will be subject to the legal provisions of the host country in the same way as any other company registered in that country. To this end, it will have to adapt its statutes to the new legislation and, in countries applying the "real head office" criterion, transfer its central administration before being able to register.

## VIII. COMMENTS CONCERNING THE INDIVIDUAL ARTICLES

### Article 1

The purpose of the Directive is to make freedom of establishment effective for companies by making it possible for them to transfer their registered office from one Member State to another. Its scope coincides with that of the proposal for a Tenth Directive on cross-border mergers, the purpose of which is also to improve company mobility within the single market.

When a company transfers its registered office to another country, one of the main issues to be resolved is that of correspondence between its existing form and the form which will be used after the transfer in the host country (see comments on Article 4 below).

In some - fairly rare - cases, it is impossible to establish such correspondence: this might happen in the case of very special types of company provided for by national legislation for specific purposes, e.g. the UK charitable companies or the Finnish fisheries companies (Kalatuskunta), which are nevertheless similar to limited companies. Such companies should be excluded from the scope of the Directive, although they should not in any case be interested, from an economic viewpoint, in transferring their registered office to another Member State. A list of companies excluded from the Directive's scope will be drawn up when this proposal is examined by the Council on the basis of information supplied by Member States.

In addition, requiring a company to wind itself up or go into liquidation on account of a cessation of payments is not compatible with the procedure laid down by this Directive, the aim of which is to make it easier to transfer a registered office across the internal frontiers of the Union. This is why companies in liquidation are not allowed to transfer their head office.

## Article 2

This Article defines the term "transfer of registered office" according to the law applicable to the company: in Member States applying the "registered office" criterion, this will simply be the transfer of the place where the company is registered, while in Member States applying the "real head office" criterion the place of registration and the place where the company has its central administration will have to be situated in the same country.

The "transfer of registered office" covered by the Directive may be a transfer of registered office proper, whether or not accompanied by a transfer of central administration, in cases where only Member States applying the "registered office" criterion are involved. By contrast, where the host Member State applies the "real head office" criterion, the company's central administration will necessarily have to be transferred at the same time as its registered office. As indicated, simply moving the company's central administration is not considered under the terms of the Directive as a "transfer of registered office", and it will consequently remain subject to the application of the national laws of the Member States which allow it.

## Article 3

This Article contains the basic principle of the Directive: to make operational the right of establishment with regard to the transfer by a company of its registered office from one Member State to another. Member States are required to allow a company's registered office to be transferred to and from another Member State without the continuity and legal personality of the company being affected. The purpose of the Directive is to allow the transfer of the *same* legal person, without it being wound up in the home Member State and re-formed in the new Member State, but with a change in the law

applicable to the company with effect from the time it is entered in the register for the new registered office.

## Article 4

This provision, which is based on the outcome of the discussions within the Council on the transfer of the registered office of an SE from one Member State to another (Article 8), lays down the first stage of the procedure introduced by the Directive.

This first stage sets out to meet the vital requirement of transparency: the management of the company must publish a transfer proposal covering the main details of the transfer, such as the new registered office, amendments to the company's statutes required by the legislation of the host country, the new name, where this is changed, and the timetable for the transfer. The transfer proposal must also indicate the company form which will be used in the host Member State.

The substantive correspondence between the company form used in the home Member State and the form used in the host Member State is an essential aspect of the transfer; where such correspondence is lacking, members will be faced with a transfer accompanied by a transformation of the company. It is up to the company's managing body to find an appropriate solution to this problem and to indicate it in the transfer proposal.

The transfer proposal must be disclosed in the manner required by the laws of each Member State, in accordance with Council Directive 68/151/EEC (the First Company Law Directive).

For the purposes of disclosure, the IT media currently available, provided they are widely enough used, are capable of ensuring that information circulates quickly and efficiently.

Moreover, in order to make it easier for interested parties to learn of the transfer proposal, provision is also made for it to be published in a national newspaper.

## Article 5

Once all potential interested parties have been informed of the management's intention to transfer the company's registered office, members, creditors and employees should be made aware of the practical consequences of the transfer from a legal, economic and social point of view.

The management or administrative organ must therefore draw up a report on the transfer explaining and justifying all aspects of it and indicating the consequences for the company's members and employees.

Members must be given at least a month to examine the transfer proposal and the transfer report before being called upon to decide on the transfer itself at a general meeting. The company's creditors and employee representatives also have the right to examine these documents and obtain a copy of them free of charge.

## Article 6

The first paragraph of this Article lays down a minimum period of reflection for the benefit of members. A general-meeting decision on the transfer may not be taken for two months after publication of the transfer proposal drawn up in accordance with Article 4. Members will thus have at least two months to study the proposal and one month to examine the management's report on the various aspects of the transfer and its consequences.

As was envisaged for the transfer of an SE, this proposal for a Directive lays down that the decision on a transfer must be taken by a large majority: at least two thirds of the votes cast, with Member States being allowed to determine an even larger majority if they so wish (Article 6(2)). If national legislation lays down a quorum of not less than half the company's capital, it may stipulate that a simple majority is enough for the transfer to be adopted (Article 6(3)).

It may be the case that a company has several categories of shareholder and that provision is not made, in respect of the corresponding company model in the host Member State, for the same categories or that such provision is made but shareholders do not have the same rights. If these rights are affected, the Directive requires a vote by categories of shareholder (paragraph 4).

**Article 7**

This provision, which is based on the second paragraph of Article 8 of the proposal for a Directive on cross-border mergers, allows Member States to require specific protection for members opposed to the transfer. The transfer results in a change of law governing the company, and the home Member State might, for example, give members not wishing to be subject to the law of the host Member State the right to withdraw from the company.

**Article 8**

The purpose of this provision is to provide creditors with protection at Community level: Member States must give creditors the right to require the company to provide an adequate guarantee of their debts prior to the transfer. The debts covered by this guarantee are those incurred before publication of the transfer proposal. However, Member States may extend this arrangement to a company's debts to public authorities (e.g. tax debts, amounts owed to social-security bodies, etc.) incurred up to the date of the actual transfer.

**Article 9**

As was envisaged for cross-border mergers and the transfer of the registered office of an SE, this provision requires Member States to appoint a public authority with powers of certification to issue a document certifying that the formalities required before a transfer takes place - the drawing-up of a transfer proposal and a report to members, disclosure of these documents, discussion by a general meeting and, where appropriate, the provision of guarantees to creditors - have been completed.

This will ensure that the completion of these formalities is beyond dispute. The concepts of "registration" and "register" are taken from Council Directive 68/151/EEC, Article 3(2) of which provides that "in each Member State a file shall be opened in a central register, commercial register or companies register, for each of the companies registered therein".

**Article 10**

This provision makes registration in the host country conditional on the certificate referred to in Article 9 having been issued and presented to the registration authority or body in the host country.

Member States may object to a company being registered if its central administration has not been transferred to their territory. This provision is for the benefit of countries applying the "real head office" criterion, which do not allow companies registered in their territory to have their central administration in another country.

**Article 11**

Any amendments to the company's statutes required by the legislation of the host country take effect on the date of the transfer.

Once the transfer has been carried out, the company must request that the entry in its regard be deleted from the register of the country in which it was previously registered. In order to do so, it must produce evidence that it has been re-registered in the host country. Both the new registration and the deletion must be disclosed in the two Member States concerned in the manner required by their respective laws, in accordance with Directive 68/151/EEC.

**Article 12**

Once the company has been registered in the host country and has been deleted from the register in its home country, any interested party must deal with the company at its new registered office. Nevertheless, until such time as the company's deletion from the register of its home country is disclosed as required by the Directive, third parties may

continue to rely on the previous registered office unless the company proves that they were aware of the transfer.

# PROPOSAL FOR A FOURTEENTH EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE ON THE TRANSFER OF THE REGISTERED OFFICE OF A COMPANY FROM ONE MEMBER STATE TO ANOTHER WITH A CHANGE OF APPLICABLE LAW

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 54 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the Economic and Social Committee,

Acting in accordance with the procedure laid down in Article 189b of the Treaty establishing the European Community,

Whereas, under Article 58 of the Treaty, companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community must, for the purposes of the rules of the Treaty governing the right of establishment, be treated in the same way as natural persons who are nationals of other Member States;

Whereas, as Community law stands, such equal treatment is thwarted by major differences between Member States' national laws, in particular with regard to the criteria connecting companies with the laws under which they fall;

Whereas, moreover, Member States' laws do not provide the means whereby companies can retain their legal personality when they transfer their registered office across borders within the Community;

Whereas the possibility of transferring a company's registered office from one Member State to another involves the exercise of the right of establishment, which it is for Community law to make possible in practice;

Whereas only companies with share capital have legal personality in all the Member States; whereas they are subject to sufficiently homogeneous legislation within the Community; whereas the application of this Directive should therefore be limited to this type of company;

Whereas the objective of making it possible for a registered office to be transferred cannot be satisfactorily achieved by the Member States acting in isolation; whereas Member States are not in a position to organise the entire operation in question since it transcends national frontiers; whereas this objective can therefore be achieved only through action at Community level;

Whereas this objective is being pursued by means of Community coordination which is limited to the establishment of a common legal structure; whereas this does not affect the connecting criteria obtaining in the Member States;

Whereas the fact that Article 220 of the Treaty requires Member States to enter into negotiations with each other regarding the retention of the legal personality of companies or firms in the event of a transfer of their registered office from one country to another does not prevent this matter from being dealt with by a directive;

Whereas Article 54(3)(g) of the Treaty requires coordination "to the necessary extent" of the safeguards "which, for the protection of the interests of members and others, are required by Member States of companies or firms ... with a view to making such safeguards equivalent throughout the Community";

Whereas such safeguards are necessary in the event of the transfer of a company's registered office involving a change in the applicable law,

HAVE ADOPTED THIS DIRECTIVE:

## Article 1

1. This Directive shall apply to transfers of registered office from one Member State to another by companies with share capital formed in accordance with the law of a Member State and having their registered office and central administration within the Community.

2. The companies covered by this Directive shall have legal personality and their assets shall be available to cover solely their own debts.

3. This Directive shall not apply to those companies listed in Annex 1 because of their specific characteristics which would prevent a corresponding form from being identified in their respect in the host country.

4. A company may not transfer its registered office pursuant to this Directive if proceedings for winding-up, liquidation, insolvency or suspension of payments or other similar proceedings have been brought against it.

## Article 2

For the purposes of this Directive, the registered office of a company shall mean, depending on the law applicable to it,

(a) the place where the company is registered, or

(b) the place where the company has its central administration and is registered.

## Article 3

Member States shall take all measures necessary to allow a company to transfer its registered office to another Member State. Such transfer shall not result in the winding-up of the company or in the creation of a new legal person but shall involve a change in the law applicable to the company from the date on which it is registered in the register for its new registered office in accordance with Article 10.

## Article 4

1. The management or administrative body shall draw up a transfer proposal and disclose it in accordance with paragraph 2. The proposal shall cover:

   (a) the name of the company;

   (b) the proposed registered office of the company;

   (c) the corresponding company form in the country in which the new registered office will be situated;

   (d) the proposed statutes of the company including, where appropriate, its new name;

   (e) the proposed transfer timetable.

   [(f) where the company is subject to employee-participation arrangements before or after the transfer, the method proposed for complying with those arrangements (*this issue will be finalised in the light of the outcome of the discussions on the Davignon Group Report*).]

2. The transfer proposal shall be disclosed in the manner required by the laws of the Member State to whose jurisdiction the company is subject before the transfer, in accordance with Council Directive 68/151/EEC,[6] and in particular Articles 2 and 3 thereof, and shall be published in a national daily newspaper.

## Article 5

1. The management or administrative organ shall draw up a report explaining and justifying the legal and economic aspects of the transfer and indicating the implications of the transfer for members and employees.

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6 OJ No L 65, 14.3.1968, p. 8.

2. The company's members, creditors and employee representatives shall be entitled, at least one month before the general meeting called upon to decide on the transfer, to examine at the company's registered office the transfer proposal and the report drawn up pursuant to paragraph 1 and, on request, to obtain copies of those documents free of charge.

**Article 6**

1. No decision to transfer may be taken for two months after publication of the proposal.

2. A decision to transfer and the new statutes shall be adopted by a majority of not less than two thirds of the votes cast at a general meeting.

3. A Member State may, however, provide that, where at least half of the company's capital is represented, a simple majority of the votes referred to in paragraph 2 shall suffice.

4. Where a company has two or more classes of shares, the decision to transfer shall be subject to a separate vote by each class of shareholder whose class rights are significantly affected thereby.

**Article 7**

A Member State may, in respect of companies subject to its law, adopt provisions designed to ensure appropriate protection for minority members who oppose a transfer.

## Article 8

1. Creditors and holders of other rights in respect of a company which predate publication of the transfer proposal shall be entitled to require the company to provide adequate security on their behalf. The exercise of such rights shall be governed by the law applicable to the company before the transfer.

2. A Member State may extend the application of paragraph 1 to those of a company's debts to public bodies which arose prior to the date of the transfer, determined in accordance with Article 11.

## Article 9

In the Member State in which a company has its registered office before the transfer, a court, notary or other competent authority shall be appointed to issue a certificate attesting to the completion of the pre-transfer acts and formalities.

## Article 10

1. Registration at the place of the new registered office shall be effected on presentation of the certificate referred to in Article 9 within thirty days of the date on which it is issued and on production of evidence that the formalities required for registration in the country in which the new registered office is situated have been completed.

2. A Member State may refuse to register a company in accordance with paragraph 1 where the company's central administration is not situated in that Member State.

3. The authority competent for the said register shall immediately inform the authority competent for the old register of the new registration.

## Article 11

1. The transfer of the company's registered office shall take effect and the new statutes shall enter into force on the date on which the company is registered, in accordance with Article 10, in the register for its new registered office.

2. The deletion of a company's registration from the register for its previous registered office may not be effected until evidence has been produced that the company has been registered in the register for its new registered office.

3. The new registration and the deletion of the old registration shall be disclosed in each of the Member States concerned in the manner required by their respective laws, in accordance with Council Directive 68/151/EEC.

## Article 12

On publication of a company's new registration, the new registered office may be relied on as against third parties. However, as long as the deletion of the company's registration from the register for its previous registered office has not been disclosed, third parties may continue to rely on the previous registered office unless the company proves that such third parties were aware of the new registered office.

## Article 13

Each Member State shall designate the competent register for the purposes of Article 10 and shall inform the Commission and the other Member States thereof.

## Article 14

1. Member States shall bring into force not later than 1 January 2000 the laws, regulations and administrative provisions necessary to comply with this Directive. They shall forthwith inform the Commission thereof. When Member States adopt these provisions, the latter shall contain a reference to this Directive or shall be accompanied by such a reference on the occasion of their official publication. The methods for making such reference shall be laid down by the Member States.

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

## Article 15

This Directive is addressed to the Member States.

Done at .....

For the European Parliament
The President

For the Council
The President