



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 18.05.1998
COM(1998) 332 final

97/0198 (COD)

**Amended proposal for a European Parliament and Council Directive on the
Protection of Services based on, or consisting of, Conditional Access**

(presented by the Commission pursuant to Article 189 a (2)
of the EC-Treaty)

EXPLANATORY MEMORANDUM

1. The initial proposal

1.1 Content

Following the publication of the Green Paper on the Legal Protection of encrypted services which has launched a wide consultation process in 1996, and the Resolution adopted by the European Parliament on 13 May 1997, the Proposal for a European Parliament and Council Directive on the Legal Protection of Services based on, or consisting of, Conditional Access, was adopted by the Commission on 9 July 1997.

This proposal aims at ensuring an adequate level of legal protection to television and radio broadcasting and information society services that are provided against remuneration and on the basis of conditional access.

The proposed Directive will require Member States to prohibit and provide appropriate sanctions against a wide range of commercial piracy activities that relate to illicit (pirate) decoders, smart cards and software which allow the circumvention of conditional access systems and the receipt of a service free of charge.

The proposed protection is limited to commercial piracy activities against services which use conditional access techniques to ensure their remuneration.

- Protected service is defined under Article 1a) as a television or radio broadcasting or information society service as well as the provision of conditional access as a service in its own right. Consequently, the proposal does not only cover services such as pay-television, or pay-radio but also services such as video-on-demand, music-on-demand, electronic publishing and a wide range of other on-line services. However to be covered by the proposal these services need to be offered under two conditions:
 - they must be provided on the basis of a conditional access device which is defined as any equipment or software designed or adapted to give access to a protected service in an intelligible form
 - the use of conditional access must aim be to ensure the remuneration of the service.
- Infringing activities listed under Article 3 envisage solely commercial activities related to illicit devices, the latter being defined as equipment or software designed or adapted to give unauthorised access to a protected service, As a matter of proportionality and subsidiarity, it is left to the Member States to take measures against the private possession and use of illicit devices.

1.2 Institutional procedure:

The Commission adopted the proposal for a Directive on 9 July 1997¹.

The proposal was transmitted to the European Parliament, the Council and the Economic and Social Committee on 22 September 1997.

The Economic and Social Committee adopted its opinion on 25 February 1998.

On 30 April 1998, the European Parliament adopted, on first reading and in accordance with the codecision procedure (Article 189b), a legislative resolution approving, subject to amendments contained in this resolution, the Commission's proposal and calling on the Commission to alter its proposal accordingly.

2. The amended proposal

2.1 The European Parliament's amendments

The initial proposal has been amended to incorporate those amendments which are acceptable for the Commission. In this respect, the Commission has accepted as many amendments as possible to take account of the European Parliament's aim to clarify and strengthen the proposal. Accordingly, amendments 1, 2, 3, 4, 6, 7, 8, 10, 12, 13, 14, 15, 16, 17, 19, 23, 24 and 25, which are designed to clarify the initial text and to strengthen the objectives of the Directive, have been incorporated into the amended proposal, either in their integrity or at least in spirit.

However, the Commission is unable to accept:

- Amendments 5 and 20 which go beyond the objectives of the Directive by extending its scope of application.
- Amendments 9, 11, 18, 21, 22 and part of 23, which are not entirely clear and could create legal insecurity.

¹ Com (97) 356 final published in the OJ n° C314 of 16.10.1997

2.2 The amendments incorporated in the proposal

The Commission's amended proposal is set out in the right hand column, with the amendments to the initial proposal underlined.

For ease of understanding and comparison, the left-hand column shows the wording of the Commission's initial proposal. Only amended Recitals and Articles figure on this list.

Recital 2 fully incorporates Parliament's amendment 1.

Recital 3 adopts Parliament's amendment 2 in spirit but replaces the text by the exact wording of the Treaty

Recital 3 a) new corresponds exactly to Parliament's amendment 3

Recital 3 b) new corresponds exactly to Parliament's amendment 4

Recital 5b) new corresponds exactly to Parliament's amendment 25

Recital 6 corresponds exactly to Parliament's amendment 6

Recital 8 a) new adopts Parliament's amendment 7 in spirit but adds the words "possible future" before Community or national provisions since no such legislation exists so far

Recital 8 b) corresponds exactly to Parliament's amendment 8

Recital 10 a) adopts partially Parliament's amendment 23 but in the more appropriate format of a recital instead of an addition to Article 3c

Recital 10 b) adopts Parliament's amendment 10 but replaces the words "legally provided service", a notion which is not defined in the Directive by "protected service" as defined in Article 1a)

Recital 13 a) corresponds exactly to Parliament's amendment 12

Recital 14 a) new corresponds exactly to Parliament's amendment 13

Recital 14 b) new adopts Parliament's amendment 14 in spirit without the quote of the Commission's Communication on the role of penalties in implementing Community Internal Market legislation

Recital 15 corresponds exactly to Parliament's amendment 15

Recital 15 a) new adopts Parliament's amendment 16 but replaces the word "right" by "ability" because legally speaking viewers do not have such a "right" of access

Recital 16 a). corresponds exactly to Parliament's amendment 17

Article 1 a) corresponds exactly to Parliament's amendment 19

Article 4.2 also corresponds exactly to Parliament's amendment 24

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Initial Proposal

Amended Proposal

Recital 2:

Whereas the cross-border provision of broadcasting and Information Society services may contribute significantly to the achievement of these objectives;

Whereas the cross-border provision of broadcasting and Information Society services may contribute, from the individual point of view, to the full effectiveness of freedom of expression as a fundamental right and, from the collective point of view, significantly to the achievement of the objectives laid down in the Treaty

Recital 3:

Whereas the Treaty provides for the free movement of all services provided against remuneration ; whereas this right, as applied to broadcasting and Information Society services, is also a specific manifestation in Community law of a more general principle, namely the freedom of expression as enshrined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms;

Whereas the Treaty provides for the free movement of services which are normally provided for remuneration ; whereas this right, as applied to broadcasting and Information Society services, is also a specific manifestation in Community law of a more general principle, namely the freedom of expression as enshrined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas this Article explicitly recognises the right of the citizens to receive and impart information regardless of frontiers and whereas any restriction of that right must be based on due consideration of other legitimate interests deserving of legal protection;

Recital 3a) new

Whereas conditional access systems should not be used for the sole purpose of refusing access for consumers in some Member States to services which are freely available in other Member States,

Recital 3 b) new

Whereas this Directive should grant protection against illicit (pirated) devices i.e. devices which are explicitly designed or technically adapted for unauthorised reception;

Recital 5b) new

Whereas the encryption of broadcasting services must not inconsiderately deprive the average viewer of these services if they were originally available without charge;

Recital 6

Whereas the opportunities offered by digital technologies provide the potential to increase consumer choice and contributing to cultural pluralism, by developing an even wider range of services within the meaning of Articles 59 and 60 of the Treaty; whereas the viability of those services will often depend on the use of Conditional Access in order to obtain the remuneration of the service provider;

Whereas the opportunities offered by digital technologies provide the potential to increase consumer choice and contribute to cultural pluralism, by developing an even wider range of services within the meaning of Articles 59 and 60 of the Treaty; whereas the viability of these services will often depend on the use of Conditional Access in order to ensure remuneration of the service provider; whereas accordingly the legal protection of service providers against illicit devices which allow access to these services free of charge seems necessary in order to ensure the economic viability of the services

Recital 8 a) new

Whereas this Directive is without prejudice of possible future Community or national provisions meant to ensure that a number of broadcasting services, recognised as being of public interest, are not based on conditional access;

Recital 8 b) new

Whereas this Directive is without prejudice of the cultural aspects of any further Community action concerning new services,

Recital 10 a) new

Whereas these commercial activities which concern illicit devices include commercial communications covering all forms of advertising, sponsorship, sales promotion and public relations promoting such products and services;

Recital 10 b) new

Whereas it seems necessary to ensure that Member States shall provide adequate legal protection against any individual or group using an illicit device for direct or indirect profit, knowingly or with reasonable grounds to know that they will enable or facilitate without authority the circumvention of any effective, technological measure designed to protect the remuneration of a protected service

Recital 13 a) new

Whereas the sanctions and remedies provided for under this Directive are without prejudice to any other sanction or remedy for which provisions may be made under national law, such as preventive measures in general or seizure of illicit devices;

Recital 14 a) new

Whereas in accordance with Article 5 of the Treaty, the Member States are required to take all measures necessary to guarantee the application and effectiveness of Community law, in particular by making the penalty chosen effective, proportionate and dissuasive,

Recital 14 b) new

Whereas when adopting the provisions laid out by this Directive, Member States should be in accordance with the Communication from the Commission to the Council and the European Parliament on the role of penalties in implementing Community Internal Market legislation;

Recital 15:

Whereas this Directive should be without prejudice to the application of national provisions which may prohibit the private possession of illicit devices; whereas this Directive is without prejudice to the application of Community competition rules; whereas this Directive is without prejudice to the application of Community rules concerning intellectual property rights

Whereas this Directive is without prejudice to any measures by Member States seeking to prohibit the private possession of illicit devices; whereas this Directive is without prejudice to the application of the Community competition rules; whereas this Directive is without prejudice to the application of Community rules concerning intellectual property rights

Recital 15 a) new

Whereas this Directive is without prejudice to the ability of the viewer to have access to free-to-air channels within a conditional access service platform without being required to pay an additional fee beyond the normal charge for accessing the platform;

Recital 16 a) new

Whereas a balance must be secured between the interest of the service providers and copyright holders to be remunerated for their services (by encryption) on the one hand and the interest of the general public not to be excluded more and more from information and cultural events;

Article 1 a):

....or the provision of conditional access to the above service in its own right

This term also covers the provision of conditional access to the above services, considered as a service in its own right.

Article 4.2

Each Member State shall take the measures necessary to ensure that service providers, whose interests are affected by an infringing activity carried out on its territory, can bring an action for damages and/ apply for an injunction and, where appropriate, for the seizure of illicit devices

Each Member State shall take the measures necessary, pursuant to its legislation, to ensure that service providers, whose interests are affected by an infringing activity carried out on its territory, can bring an action for damages and/ apply for an injunction and, where appropriate, for the seizure of illicit devices

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