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**REPORT FROM THE COMMISSION TO THE COUNCIL, THE EUROPEAN
PARLIAMENT, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND
THE COMMITTEE OF THE REGIONS**

**Second report on the implementation of Directive 98/84/EC of the European Parliament
and of the Council of 20 November 1998 on the legal protection of services based on, or
consisting of, conditional access**

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1. INTRODUCTION

In 1998 the European Parliament and the Council adopted Directive 98/84/EC¹ on the legal protection of services based on, or consisting of, conditional access to enable development within the single pay-TV services market. In 2003, the Commission presented the first report on the implementation of the Directive.²

Ten years after the Directive was adopted, the Commission is presenting a second report on its implementation. The revolution the market has undergone is described in the Study on the impact of the Conditional Access Directive compiled by KEA and Cerna on behalf of the Commission in 2007.³

The question now is whether the Directive as it currently stands is still useful and appropriate. The present context is characterised by market potential for new content distribution platforms: Web TV, IP-TV, mobile TV, video-on-demand. Do these markets need to be protected in the same way as pay-TV? Is the protection afforded by the Directive useful to them, or even necessary? Such questions only arise, of course, if the response to the opening question is that the Directive is indeed effective.

One is forced to acknowledge that the piracy which the Directive seeks to combat adapts extremely well to technological progress and even thrives on the new possibilities available.

In order to obtain the information needed to analyse the implementation of the Directive to date, in addition to the aforementioned study, the Commission conducted a public consultation between 11 February and 4 April 2008, receiving 54 contributions.⁴ Appended to this report is a Commission working document outlining the positions reflected in these contributions. The Commission services also met the sector's stakeholders directly at a number of meetings.

2. IMPLEMENTATION OF THE DIRECTIVE

2.1. Transposition into national legislation

2.1.1. *Content*

To enable the development of services based on conditional access through the single market, the Directive defines the services protected and draws up a list of illicit commercial activities punishable by the Member States, who are responsible for establishing penalties for offenders as well as legal redress for injured parties.

¹ OJ L 320, 28.11.1998, p.54-57, see:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0084:en:NOT>.

² COM(2003) 198 final, 24.4.2003, see:
http://ec.europa.eu/internal_market/media/docs/elecpay/com-2003-198_en.pdf.

³ http://ec.europa.eu/internal_market/media/elecpay/index_en.htm.

⁴ http://ec.europa.eu/internal_market/media/elecpay/index_en.htm.

2.1.2. *Transposition by the Member States*

All the Member States have now transposed the Directive into their national legislation.⁵ The new Member States were required to transpose the Directive – as part of the *acquis* – before they joined the European Union.

2.2. **Scope of the Directive: The "grey" market**

Despite the Directive and the associated Community-wide harmonisation, European citizens exercising the right to free movement within the European Union have been refused legal access to the TV channels of their State of origin. A "grey" market has developed, whereby lawful subscriptions are obtained by means of letter-box addresses. This cannot be said to be an entirely "black market" given that the subscriptions are paid for. On the other hand, it is not entirely above board since certain broadcasting rights obtained by TV channels are valid only within the territory of the country in question and not that of other Member States.

Some pay-TV services, however, are available on a cross-border basis, thus mitigating an excessively negative view of the impact of the Directive on the single market. These examples follow the usual model governing the use of broadcasting rights and exclusive rights: television channels purchase such rights for all the national territories concerned, as characterised by a common language, and only rarely target a linguistic diaspora present in several or in all Member States.

Outside this conventional structure, the possibility of legalising the grey market is disturbing to most market stakeholders since it necessarily challenges the organisation of the sale of rights (copyrights or sports events broadcasting rights) according to national territory. Rightholders naturally wish to maximise revenue by selling the rights for each individual territory, and audiovisual services providers fear that their offer would be less attractive should it cease to be exclusive, e.g. if competitors with a comparable offer were to penetrate their territory.

It is important to note, in this respect, that the only cross-border market which the Commission would like to see being developed is that for services catering to the mobility and legitimate expectations of European citizens and, as such, legally available in their mother tongue and the language of their native country.

Developing such an offer would require a flexible approach to the sale of rights, in terms of the number of consumers identified in the State in question, for example, a development possible only with the active collaboration of all the sector's stakeholders, which at present seems difficult to achieve given the observed lack of motivation. It would also require an examination of the different national regulatory systems governing the windows for the distribution of cinematographic works, since differences could help to block the multi-territorial distribution of works.

A solution could be found in the advent of new types of services such as web TV or mobile TV, which are associated with distribution and conditional access systems that are relatively less costly than those linked to the use of decoders. Again, these new services should not be restricted on the basis of territory at the request of

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http://ec.europa.eu/internal_market/media/elecpay/natimpl/index-map_en.htm.

rightholders: the fact that the programmes of certain television channels cannot be viewed on computers located in other Member States has already been raised in a number of complaints received by the Commission.

It is worth pointing out that currently more than 8.7 million European citizens⁶ are resident in a Member State other than their native country and that this number is constantly rising. The free movement of persons and services are among the fundamental principles of European integration and guaranteeing every European citizen access to an audiovisual offer in their native language and culture would facilitate movement of this kind⁷.

To continue the examination of the subject, it is important to obtain the maximum amount of information on a range of subjects, such as the potential of the new types of services in terms of targeted cross-border audiovisual offer and the potential market generated by the mobility of European citizens.

2.3. Differences in implementation at national level

The Directive requires Member States to apply sanctions that are "*effective, dissuasive and proportionate*" and to ensure that service providers have appropriate legal recourse.

Although the KEA and Cerna study examined in detail the legislation of only 11 Member States and the consultation responses did not cover all 27 Member States, these two information sources give some idea of the trends in terms of national transposition. While some contributors express satisfaction with the implementation at national level, many more underscore the limits of their national legislation.

2.3.1. Level of sanctions at national level

As long as they complied with the three aforementioned criteria, the Member States were quite free to select the type and level of sanctions applied. The ranges of sanctions are very broad and for the pecuniary fines vary between minima of EUR 25 to EUR 7 500 and maxima of EUR 1 158 to EUR 50 000 and for prison sentences, where applicable, between eight days and five years.

Such marked differences explain the range of views of operators in the various Member States on the effectiveness of sanctions. Differences in the standard of living within the European Union must certainly be taken into account and Europe-wide harmonisation of sanctions does not appear to be desirable. However, it may be necessary to re-examine the deterrent effect of sanctions in each Member State.

⁶ Eurostat – table pages 18-19:
<http://www.interculturaldialogue2008.eu/fileadmin/downloads/documents/630-factsfigures/KS-EP-07-001-EN.PDF>.

⁷ See also the Communication on satellite dishes:
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001DC0351:EN:NOT>.

2.3.2. *Sanction on private possession*

Only commercial activities involving illicit devices are subject to Community-wide harmonisation, and the Member States remain free to decide whether or not to sanction the private ownership of such devices. This highly sensitive aspect of the fight against piracy continues to be intensely debated, as it has been since before adoption of the Directive.

The sanction for private possession is favoured by the operators who see it as instructive for consumers who may be tempted by illicit services. It may, moreover, help with sanctions for new types of piracy which are based on a combination of different actions, some of which may be private, such as the online disclosure of encryption codes, codes subsequently used by the consumer directly to programme a chip card purchased without programming and whose sale (the commercial transaction) is therefore *a priori* lawful.

Sanctioning private possession seems to have come back into favour with the Member States. Italy re-established it in 2003 and Sweden is currently studying the possibility of introducing it for the purchase and use of illicit devices.

Further consideration of this subject would therefore be of interest, with the possibility of the Member States exchanging their experience on the subject.

2.3.3. *Effectiveness of the action of national authorities*

The study and the contributions submitted mention the general problem of a lack of technical knowledge on the part of the authorities responsible for implementing the legislation.

They also mention particular difficulties due to the high technical level of the new pirating methods which require an excellent command of the new technologies.

In this respect, setting up an expert group bringing together the competent authorities in the Member States would be a particularly appropriate method likely to disseminate technical information on piracy as well as best practices.

2.4. **The international dimension**

Various rounds of enlargement of the European Union have changed the geographical landscape in terms of piracy, which formerly flourished in certain Eastern European countries. These countries are now EU Member States and transposition of the Directive governs the fight against piracy.

In addition, accession candidates (the former Yugoslav Republic of Macedonia), those involved in accession negotiations (Croatia and Turkey) and potential candidates (Albania, Bosnia and Herzegovina, Montenegro, Serbia and Kosovo) are all bringing their legislation into line with the Community *acquis*. Lastly negotiations leading to a free trade agreement are under way with Ukraine, which has to bring its legislation into line in the relevant areas.

Apart from enlargement of the European Union, Decision of the EEA Joint Committee No 17/2001 of 28 February 2001 incorporated Directive 98/84/EC into the EEA agreement, so that it is applied in Iceland, Liechtenstein and Norway.

Beyond this, the Commission has little scope for action. However, the European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access⁸ adopted by the Council of Europe on 24 January 2001 establishes protection similar to that of the Directive and is due to be ratified by the 47 countries that are members of the Council of Europe as well as Belarus and the Vatican.

At present, it has been signed by 11 countries⁹ and ratified by eight. Ratification of the Convention is open to the European Community. EC ratification may help give new impetus to ratification by other countries and thus extend the protection of relevant service providers outside the EU.

3. ADJUSTMENT OF THE DIRECTIVE IN THE LIGHT OF CONVERGENCE

3.1. New modes of distribution

The new technological landscape can be summed up in a single word: convergence. This is the label given to the capacity to access content via a range of platforms. Since the Directive was first planned, the European legislator sought to frame technologically neutral terms that would prevent the act becoming obsolete in the light of innovations already anticipated at that stage. This original intention explains why the definition of "protected services" includes television and radio broadcasting services and information society services. Nor does the definition adopted take account of the mode in which the relevant services are distributed.

In this way, any television or radio broadcasting service, whatever the mode of distribution (ADSL, web, mobile) is covered by the definition of "protected services", as is any service accessible at a distance at the request of the consumer, which thus meets the definition of an information society service¹⁰, such as video-on-demand. The only limit to this protection stems from the condition of use of a conditional access system to ensure payment for the service.

3.2. New forms of piracy

The increasing use of smart cards for decrypting signals presaged a diversification in pirating activities. Decoders and blank smart cards are sold openly as they can also have perfectly legal applications. Independently, card programming codes are disclosed online, in particular by pirates who derive economic advantage from this,

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<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=178&CM=8&DF=8/12/2008&CL=ENG>.

⁹ Bulgaria, Cyprus, Croatia, France, Luxembourg, Moldavia, Norway, Netherlands, Romania, Russia, Switzerland, with Luxembourg, Norway and Russia yet to ratify.

¹⁰ Definition of information society service given in Article 1 of Directive 98/34/EC, as amended by Directive 98/48/EC: "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services".

leaving to the purchaser of the decoder and the blank smart card the task of programming the card so as to be able to gain unlawful access to services.

This division of activities has led to a new way of gaining illegal access to the services concerned and is an action that is difficult to prosecute in law. This is mainly due to the fact that the commercial activities concern products which can be used in a lawful manner and that it is difficult to link the disclosure of codes online with such sales. Lastly, the blank smart card is programmed directly by the consumer and not by the vendor.

In this context, the terms of the Directive do not appear to be directly applicable as it is difficult to find proof of illicit commercial activity. It is true that operators can maintain that the smart cards used in this traffic are not appropriate for any legal use, since the complexity of their components and hence their price make them uncompetitive for the most common purposes (e.g. security badges).

In that case, however, courts have to make a technical assessment which often exceeds the knowledge of the competent officials.

Operators pinpoint the need to be able to penalise the online disclosure of codes by a third party without remuneration. The terms of the Directive do not appear to be applicable on account of the non-commercial nature of such activity: it is virtually impossible to establish proof of a link between the sale of a blank smart card and the disclosure of codes via the internet. Even the sanction against the private possession of an illicit device, while making it possible to sentence the consumer using such procedures, would not provide a direct solution to the existence of the codes on the internet.

On this point, only unfair competition actions seem able to resolve the problem which can nonetheless come up against a stumbling block due to the extra-territorial nature of the infringement. It would therefore be worthwhile examining the question in order to explore the legal options for countering such practices.

Other forms of piracy have emerged too. One example is card sharing, whereby a legally obtained card is used to enable redistribution of a service to other consumers, e.g. via a wireless network or WiMAX access technology. Generally this is commercial redistribution and, as such, covered by the provisions of the Directive. The problem with this form of piracy is the difficulty of detecting infringements, an area in which police personnel need to be trained.

It is hence worth encouraging the improved exchange of information between national administrations.

3.3. Contribution to the protection of copyrights

Directive 98/84/EC does not enable the holders of rights pertaining to content to make use of its provisions. The matter of extending such protection was debated at length when the Directive was adopted, only to be rejected given the prospect of a specific text being adopted on copyright protection in the information society.

Directive 2001/29/EC of 22 May 2001¹¹ on the harmonisation of certain aspects of copyright and related rights in the information society supplemented the protection afforded by Directive 98/84/EC three years after the adoption of the latter.

Directive 98/84/EC nevertheless makes a significant, albeit indirect, contribution to protecting copyrights by protecting the content covered by the copyright and hence the revenue of the holders of such rights against piracy.

3.3.1. Extension of protection to rightholders

Rightholders, entitled persons and persons holding rights to sports events showed interest in being covered by the Directive.

However, some appear to have misunderstood the nature of the protection provided by the Directive. The sanctions established under the Directive can concern only actions relating to the use of illicit devices. They cannot, therefore, apply to other actions, such as the use of lawful devices without respect for territorial restrictions, for example, as in the case of the grey market described above.

It is important to draw this distinction because contributions from rightholders (holders of copyrights or analogous broadcasting rights to sports event coverage) focus on compliance with the territorial aspect of the rights and the risks of loss of the value of such rights if territorial limitations are not adhered to.

In this context, it would be of no practical use to extend the scope of the Directive to cover other stakeholders. The Directive effectively defines piracy as based on the use of illicit devices, i.e. the use of equipment not approved by the content distributor. For example, the decoders used in the context of the grey market are approved by the broadcaster, who receives regular remuneration for same.

One of the proposed solutions to resolve the problem of the rightholders is to move towards greater integration and incorporation of the potential revenue from the grey market. This avenue does, however, need to be explored more carefully and more information on the potential of the cross-border markets should be gathered.

The fact remains that sports events rightholders seem perfectly entitled to demand better protection in the absence of provisions directly covering them, taking into account the legitimate expectations of consumers to have legal access to services on a cross-border basis and the need to ensure broad access to events of major importance to society. The Commission proposes to initiate work to assess the need for additional measures to close this loophole. The proposed study on the financing of sport announced by the Commission in its White Paper on sport¹² should make it possible to bring together the rudiments for such an evaluation.

3.3.2. Digital rights management systems

The start of the distribution of content online has been accompanied by the use of new content protection systems: digital rights management systems (or DRM).

¹¹ OJ L 167, 22.6.2001, p. 10.

¹² http://ec.europa.eu/sport/whitepaper/wp_on_sport_en.pdf.

These technical protection measures are aimed in particular at ensuring respect for copyright in the context of online distribution of content. The overall objective covers a wide range of configuration and use measures, establishing different types of restriction: quantitative restrictions on the number of readings, geographical access restrictions, restrictions in terms of the hardware or software needed to read it, transfers between devices, digital extraction (the list is far from exhaustive).

Some measures may therefore tally with the definition of conditional access systems, "*any technical measure and/or arrangement whereby access to the protected service in an intelligible form is made conditional upon prior individual authorisation*" (Article 2(b) of the Directive). As such, the measures used to ensure the remuneration of the work, chiefly those enabling tariff differences according to the use made of it by the consumer (single or multiple viewing, variation in quality of recording) certainly benefit from the protection afforded by Directive 98/84/EC.

It is true that Article 6 of the aforementioned Directive 2001/29/EC (copyright and related rights in the information society) expressly provides for the legal protection of technical measures. However, such protection is due under the copyright law, and the Member States' transposing legislation may restrict legal actions solely to the rightholders and not to the content distributors. In this sense, Directive 98/84/EC continues to be useful for digital distributors, who thereby enjoy a means of taking action against piracy against the protection measures they use to distribute content online.

3.4. Protection of remuneration, the only criterion for protection

The Directive restricts protection of conditional access services against piracy strictly to those used for the purposes of remuneration: payment for the service (subscription or individual purchase price) necessarily being the condition for access to the content.

However, conditional access systems may be used for purposes other than the protection of the remuneration of the service provider, in particular to comply with contractual or legislative obligations (such as limitation of the potential audience – be it territorially, in accordance with the rights ceded, or according to an age restriction to protect minors from content intended only for adults), commercial and advertising strategies, security matters or to draw indirect remuneration¹³. Various operators therefore expressed interest in extending the protection.

It should however be clarified that the concept of remuneration goes beyond mere direct payment. Information society services can use technical means to limit the distribution of content which is accessible free of cost but financed indirectly by advertising or sponsorship. Such services also fall within the scope of the Directive.

In conclusion, there is an undeniable demand for protection to be extended. Questions remain, however, as to the usefulness of extending protection, entailing as it would a reworking of the Directive. The scope of the Directive at present is

¹³ See the study of April 2000 carried out by the *Institute for Information Law (IVR)* of the University of Amsterdam on behalf of the Commission:
http://ec.europa.eu/internal_market/media/elecpay/background_en.htm.

confined to acts of piracy for commercial purposes. Can commercial piracy be said to exist with regard to conditional access used for these other purposes? Furthermore, use of conditional access systems motivated by the legal provisions should be protected through legislation which is properly enforced. This applies to the provisions on the protection of minors, on cybercrime and on data protection and privacy. These questions must be examined in further detail and one first step could be a debate within a group of experts to be set up.

4. CONCLUSIONS AND FUTURE ACTIONS

4.1. Assessment of Directive 98/84/EC

This report has addressed various aspects of the implementation of the Directive which pose problems or raise questions. This examination has been a vital first step before assessing the impact of the Directive in its various fields of application as input for the Commission's conclusions on its effectiveness from adoption to the present day.

The first point to note is that the Directive has been transposed by the Member States in general and this has made it possible to curb piracy in the European Union and, thanks to the entry into the EU of certain countries previously affected by piracy, to change its geographical pattern, pushing the centres of piracy outside the Directive's sphere of influence.

The second point is that the efficiency of its implementation occasionally seems questionable, thus reducing the legal security of audiovisual service providers. In particular, implementation at national level suffers, depending on the circumstances, either from sanctions which are too light or from a lack of command of the technical nature of the field on the part of the national authorities. On this latter point, it should be pointed out that the ongoing technological evolution continually increases the complexity of this subject area, with the emergence of new types of piracy, new distribution platforms or new conditional access systems such as certain digital rights management systems.

Thirdly, with regard to free movement, despite the deployment of a Community framework intended to promote the development of the single market in these services, there has been only limited development of completely legal cross-border services. The grey market is the cross-border mechanism which seems the most developed, but this is only tolerated by the operators, while the availability of audiovisual services of the State of origin is an important factor in the welfare of European citizens exercising their right to free movement within the European Union.

Lastly, the Commission notes that certain restrictions upon the implementation of the protection afforded by the Directive require more in-depth analysis. This may concern, firstly, the possibility of imposing sanctions for the private possession of illicit systems, a proposal from the operators but one which is not easy to implement, and secondly, the situation of the operators who do not benefit from adequate protection, such as holders of rights in respect of sports events.

4.2. Future action to improve its application and address convergence

4.2.1. *Establishment of a group of experts*

The Commission proposes to set up an expert group on conditional access made up of experts from the Member States. The group will operate following the model of the e-commerce expert group and with a similar mandate.

Specifically, the conditional access group will have to take action to bolster and facilitate administrative cooperation between Member States as well as between the Member States and the Commission, discuss problems related to the application of the "Conditional Access" Directive 98/84/EC and discuss topical problems associated with the use of conditional access systems.

The subjects to be tackled as priorities are those outlined in this report, chiefly: new forms of piracy, assessment of the deterrent nature of the sanctions in place, scope for a sanction on private possession within the protection of conditional access systems, links with legislative provisions on copyright protection, the inclusion of DRM (digital rights management) as a conditional access system, and the protection of the use of conditional access systems for purposes other than protecting remuneration.

The group should also take account of the potential advantages of the use of innovative conditional access systems and DRM systems, making a particular assessment of their potential to limit the need for sanctions of a more deterrent nature. In this context, the group will also take into account all aspects which can contribute to personal data and privacy protection.

By adopting this report, the Commission is taking the decision to establish such a group by the end of the year 2008.

4.2.2. *Working group on the grey market*

The Commission will also propose that the expert group mandate a specific working party to tackle the subject of the grey market.

In the first instance, this working party should strive to compile as much information as possible on the intra-Community movements of European citizens and on their audiovisual service consumption habits. It could go on to explore various avenues that might offer solutions enabling interested citizens to access services provided from their Member State of origin.

4.2.3. *Gathering information*

The report highlights a certain lack of information, in particular concerning the exercise by European citizens of the right to free movement and the supply and demand situation for audiovisual services abroad. Such information should help to establish the potential of the cross-border markets and contribute to deliberations on copyright and rights to sports events.

The Commission proposes to launch a survey on the subject at the beginning of 2009.

In another field, information on the sale of rights to sports events will be gathered as part of the study on sports financing announced by the Commission in its White Paper on sport¹⁴. This information should constitute the first phase in gathering information on the situation of holders of rights to sports events when faced with piracy involving the retransmission of events.

4.2.4. *Ratification of the European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access*

This European Convention has considerable potential to extend the protection of conditional access services internationally, beyond the territory of the European Union. The European Community's ratification of the Convention would enable new impetus to be given to international action among the 47 members of the Council of Europe.

The Commission will therefore shortly propose to the Council that it ratify the Convention on behalf of the European Community.

¹⁴ http://ec.europa.eu/sport/whitepaper/wp_on_sport_en.pdf.