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Public consultation on piracy protection for services protected by conditional-access systems

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This document comment on the contributions the Commission received during the public consultation held between 11 February and 4 April 2008. The consultation focused on the following themes: development of the single market for conditional access services, effectiveness of the Member States' implementation of the Directive, new services, its contribution to copyright protection, digital rights management, and reasons for using conditional access.

The contributions can be consulted on the single market website at:
http://ec.europa.eu/internal_market/media/elecpay/index_en.htm.

1. CONTENT OF THE DIRECTIVE

Protected services

Since the planning stage, the scope of the Directive has been intended to extend beyond pay-TV alone and also to cover:

- television and radio broadcasting services, and
- information society services

when protected by a conditional access system and provided against payment.

Moreover, conditional access services themselves are included among the services protected. Such services comprise technical protection hardware or software enabling access to the service to be restricted to addressees duly authorised by the service provider, normally upon payment for the service in question.

A number of consultation contributions asked for clarification of what services were protected by virtue of the adoption of the 'Audiovisual Media Services' Directive 2007/65/EC¹ amending the 'Television Without Frontiers' Directive 89/552/EC. Article 2 of Directive 98/84/EC refers to the definition of *television broadcasting* contained in Article 1(a) of Directive 89/552/EEC.

Directive 2007/65/EC extended the scope of the original 'Television Without Frontiers' Directive and added a number of definitions in Article 1. Television broadcasting services² are now defined in Article 1(e) rather than 1(a) of the amended Directive. This is a technical detail which in no way changes the scope of Directive 98/84/EC. There is indeed a difference inasmuch as the new definition no longer refers to the means of transmission but to the characteristics of the television programming; this does not, however, affect the identification of television channel broadcasters.

Directive 2007/65/EC also introduces the definition of an 'on-demand audiovisual media service'³, defining and limiting the information society services which fall

¹ OJ L 332, 18.12.2007, p. 27.

² Article 1(e): 'television broadcasting' or 'television broadcast' (i.e. a linear audiovisual media service) means an audiovisual media service provided by a media service provider for simultaneous viewing of programmes on the basis of a programme schedule.

³ Article 1(g): 'on-demand audiovisual media service' (i.e. a non-linear audiovisual media service) means an audiovisual media service provided by a media service provider for the viewing of programmes at

within the scope of the new Directive. In any case, the definition of the scope of Directive 98/84/EC continues to be a broad one and is unchanged in this respect since it covers *a priori* any information society service by virtue of the fact that it is provided via a conditional access service (regardless of the fact that it may also be an on-demand audiovisual media service).

However, the two Directives govern different fields and the difference in scope, which also existed before 2007, has no bearing on their respective operation.

Illicit devices

Article 2(e) of Directive 98/84/EC defines an illicit device as '*any equipment or software designed or adapted to give access to a protected service in an intelligible form without the authorisation of the service provider*'.

This definition should cover any infringement of a conditional access system over and above the first decoders used by pay-TV. The definition thus covers the act of circumventing the software used for conditional access purposes.

As a result, as far as new forms of pirating are concerned, it should be noted that disclosing decryption keys online or converting cards into pirate cards are covered by the definition of illicit devices. Pirating is only punishable, however, if it is linked to commercial activities, and such links are often difficult to prove (cf. section 3.2).

Infringing activities

Article 4 of the Directive lists the infringing activities. These are any commercial activities associated with the life cycle of illicit devices: manufacture, import, distribution, sale, rental, possession for commercial purposes, installation, maintenance, replacement, and commercial communications of same.

It should be emphasised that the Directive requires that Member States impose sanctions only in the case of commercial activities linked with the illicit devices. Recital 21 of the Directive indicates that national provisions may, nonetheless, prohibit the private possession of illicit devices.

2. COMMUNITY-WIDE HARMONISATION

In March 1996, the Commission published its Green Paper 'Legal protection for encrypted services in the internal market' (COM(96) 76)⁴ justifying the need for Community-wide action. It concluded that differences in legislation were preventing any development in cross-border encrypted services and that harmonisation was needed in order to complete the regulatory framework establishing the single market in television broadcasting services created at the time of Directive 89/552/EEC

the moment chosen by the user and at his individual request on the basis of a catalogue of programmes selected by the media service provider;

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Available at:

http://europa.eu/documents/comm/green_papers/pdf/com96_76_en.pdf.

(Television Without Frontiers) and Directive 93/83/EEC (Cable and Satellite)⁵. This is why Articles 57(2) and 100A of the Treaty (now Articles 47 and 95 of the EC Treaty) were chosen as the basis for the Directive aimed at protecting conditional access services. These Articles deal respectively with the harmonisation of service activities and establishment of the single market.

3. THE 'GREY' MARKET

In the consultation, the subject of the grey market provoked many reactions and troubled the majority of contributors, some of whom even denied that the Directive was in any way aimed at achieving a single market, claiming it was adopted solely to prevent piracy at the European level.

Other responses highlighted practical difficulties: the low level of cross-border demand rendering such services of little economic interest, particularly given the language barriers between Member States, even though the principles of free movement form the very basis of the single market.

Finally, contributors cited examples of pay-TV offers available on a cross-border basis, thus mitigating an excessively negative view of the impact of the Directive on the single market: A German pay-TV channel also broadcasts in Austria, a British channel in Ireland, a Greek channel broadcasts to the entire Greek population throughout Europe, a Polish channel is available in Germany⁶ and several cross-border TV offers cover all the Scandinavian countries.

4. LEVEL OF PENALTIES

Contributors differed in their assessments of the effectiveness of national legislation. While, for example, Danish and French contributors expressed satisfaction with the level of fines imposed, this view was not shared by German and Italian contributors.

It should be noted that the level of satisfaction depends not only on the amount but also on the nature of the sanctions imposed. Operators expressed preference for criminal penalties sufficiently stringent to represent a deterrent in view of the commercial damages incurred. The contributions suggest two approaches: the first involves assessing sanctions in relation to the benefits drawn from piracy, the second adjusting the level of sanctions to those applied in respect of other offences, such as theft, fraud or counterfeiting. On this point, it is interesting to note that German operators prefer to base their actions on the provisions regulating copyright since sanctions laid down in that area are more stringent than those applied for piracy involving conditional access systems.

⁵ Council Directive 93/83/EEC of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15.

⁶ As well as in the United States and Australia.

5. SANCTIONS UPON PRIVATE POSSESSION

Contributions from the sector's stakeholders, service providers and rightholders are in favour of extending restrictions to cover the private domain. They approve the existence of such laws in some States and regret that they are not available in others. Consumers' representatives did not answer this question, focusing rather on the necessary accessibility of services for all consumers.

Sanctioning private possession has two major advantages, according to operators. Firstly, it is a clear indication that participating in piracy, which all too often is not condemned by society, is actually criminal in nature. By deterring consumers from purchasing pirated systems or services, it would thus limit the market for same.

It could, secondly, help sanction new types of piracy based on a combination of different actions, some of which may be private, such as the online disclosure of encryption codes, codes subsequently used directly by the consumer to programme a chip card purchased unprogrammed, whose sale (the commercial transaction) is *a priori* lawful.

6. NEW MODES OF DISTRIBUTION

The protection afforded by the Directive to new forms of content distribution was one of the subjects raised in the consultation.

Virtually all the contributors who responded on this subject considered that the new forms of content distribution are effectively covered by Directive 98/84/EC. A priori, national legislation should reflect this extension in scope, but this should be checked in the Member States.

Some contributions mentioned a need for standardisation in terms of the conditional access systems used to receive services. The development of these new markets may be checked by the lack of equipment interoperability, slowing consumer mobility and the entry of new operators, or by a slowdown in proprietary system innovation following what may be a compulsory standardisation. Nonetheless, some stakeholders are afraid that standardisation would benefit pirates.

This sensitive issue was topical at the time when pay-TV was being developed and has been covered by a number of European acts. Currently Article 6(1) of the 'Access' Directive 2002/19/EC⁷ imposes certain conditions on conditional access systems detailed in Annex 1 of the Directive.

7. NEW FORMS OF PIRACY

Some legal decisions, particularly in Scandinavia, have overcome the problems associated with identifying new forms of piracy thanks to intensive work in compiling evidence and stakeholder cooperation with the national authorities. This

⁷ Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) OJ L 108, 24.4.2002.

example illustrates the importance of working in collaboration with national administrations and the need to train competent staff.

8. EXTENSION OF PROTECTION TO Rightholders

One of the subjects of the consultation was the potential extension of the protection afforded by the Directive to rightholders and holders of rights to sports events.

The latter may be interested in taking action themselves in the event of piracy involving the retransmission of content to which they hold the rights.

Responses clearly differed depending on whether they were from rightholders, most of whom were in favour of extending the protection in their favour, or audiovisual service providers, who tended to be opposed to this. Service providers highlighted the protection already provided by copyrights, which, as indicated above, can in some countries result in more stringent sanctions than those applied to the protection of conditional access.

In the first place, the position of rightholders must be distinguished from that of the holders of rights to sports events. While the former are directly protected by copyright rules, the latter are unable to benefit directly from them and retransmission of a sports event will not be protected by copyright except under rights associated with copyright which are held by the broadcaster, who is the only party that may take action against retransmission piracy. The counter argument of the duplication of protection can therefore be upheld only in the case of the retransmission of sports events in relation to the holders of rights to these events.

9. PROTECTION OF REMUNERATION, THE ONLY CRITERION FOR PROTECTION

The majority of contributions in response to the public consultation launched by the Commission were in favour of extending the protection afforded by the Directive and most often mentioned the objectives of territorial restrictions and the protection of minors. One contribution also mentioned securing the signal transmitted from the network head-end to the local distribution network.

On this subject, a number of contributions were in favour of signal theft being taken into account in the Directive. Thus, interception and decoding of an encrypted signal sent to local distribution networks could – subject to a more detailed legal examination in cooperation with the Member States – be considered to be prohibited by the Directive if the purpose were the commercial use of the content intercepted. However, a general protection under Directive 98/84/EC against any pirating of a signal, even a non-encrypted one, would go far beyond its original scope.

In general, the contributions express some frustration with the fact that protection is limited solely to the objective of ensuring the remuneration of the service provider.