

COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT, THE COUNCIL AND THE ECONOMIC AND SOCIAL  
COMMITTEE

concerning the Legal Protection of Services based on, or consisting of, Conditional  
Access

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**Proposal for a  
EUROPEAN PARLIAMENT AND COUNCIL DIRECTIVE  
on the Legal Protection of Services based on, or consisting of, Conditional  
Access**

(presented by the Commission)

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prov. version, 9 july 1997

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## Introduction

In 1994, the Communication of the Commission on “Europe’s Way to the Information Society”<sup>4</sup> announced the preparation of a Green Paper on the legal protection of encrypted services. The need for a Community initiative in this area was already stressed in the “Strategic Programme for the Internal Market”<sup>5</sup> and preliminary studies on the issue had already been carried out for the Commission. In 1995, the Commission held a consultation of the interested parties by way of a questionnaire that was circulated and answered by a number of economic actors. The consultation confirmed that illicit reception of encrypted services and fragmentation of the legal framework pose a real problem for the media industry in the Internal Market.

The Green Paper on the “Legal Protection of Encrypted Services in the Internal Market”<sup>6</sup> was the subject of a wide-ranging process of consultation in 1996. The reactions to the Green Paper confirmed the need for a Community legal instrument the purpose of which should be to harmonise the legal protection of all those services whose remuneration depends on “conditional access” techniques such as encryption and electronic locks. Both the European Parliament<sup>7</sup> and a clear majority of Member States share this view and have called the Commission to present a proposal for a Directive. That proposal for a Directive was announced in the Commission 1997 Work Programme as well as in the Information Society “Rolling Action Plan”<sup>8</sup>.

On 16 April 1997, the Commission adopted a Communication on “A European Initiative in Electronic Commerce”<sup>9</sup>. The aim of this European Initiative is “to encourage the vigorous growth of electronic commerce in Europe”, by implementing a “coherent framework of technological, regulatory and support actions, as a matter of urgency, by the year 2000”<sup>10</sup>. With a view to creating a favourable regulatory framework, the Communication states that:

*“A secure distribution of services will require adequate legal protection of conditional access services across the Single Market. Many services will use some form of encryption or other conditional access system to ensure proper remuneration. Service providers will need to be protected against the piracy of their services by illicit decoders, smart cards or other piracy devices. The Commission will propose a directive to establish an equivalent level of protection for service providers across Europe.”<sup>11</sup>.*

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<sup>4</sup> COM(94) 347 final of 19 July 1994.

<sup>5</sup> COM(93) 632 final of 22 December 1993.

<sup>6</sup> COM(96) 76 final of 6 March 1996.

<sup>7</sup> Resolution of 13 May 1997.

<sup>8</sup> COM(96) 607 final of 27 November 1996.

<sup>9</sup> COM(97) 157 final of 16 April 1997.

<sup>10</sup> Executive Summary, pp. 3 and 5, of the above Communication.

<sup>11</sup> Page 23, Paragraph 55.

# Explanatory Memorandum

## I. Conditional Access in the Internal Market

### I.A. From Encryption to Conditional Access

In the Green Paper, the examples provided by the Commission referred mainly to “encryption” and “encrypted services”. In fact, the protection of broadcasting signals for remuneration purposes (pay-TV and pay-radio) is normally ensured by encryption. However, encryption is a tool that may serve different purposes, some of which are outside the scope of this Community initiative<sup>12</sup>.

Moreover, the legitimate interests of the service provider may also be safeguarded by techniques other than encryption. The Green Paper deals with services that are offered to the public against remuneration, and such remuneration may be ensured by a number of techniques that distinguish between “authorised” and “unauthorised” access<sup>13</sup>.

The responses to the Green Paper confirm that this model (and the related need for legal protection) is common to a wide range of broadcasting and interactive services, regardless of the means of transmission<sup>14</sup>. The common feature is that **access to the service at a distance is made conditional upon a prior authorisation that aims at ensuring the remuneration of the service**. Accordingly, the scope of the proposed directive covers all services that are supplied on a Conditional Access basis: this includes traditional pay-TV (and radio), video-on-demand, audio-on-demand, electronic publishing and a wide range of on-line services, all of which are offered to the public on a subscription or usage-related basis<sup>15</sup>.

Market developments suggest that the provision of conditional access is, more and more frequently, a service in its own right.

At present, numerous different relationships among the parties are found in practice. For example, cable operators are in some cases involved in a chain of services that may be summarised as follows:

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<sup>12</sup> These include the confidentiality of private communications and the security of financial transactions.

<sup>13</sup> Example: passwords and electronic locks.

<sup>14</sup> The same service can be delivered by different means of transmission and to different types of terminal equipment. For example, pay-radio (or music-on-demand services) can be transmitted:

- through the telephone network (to a special radio set);
- “over the air” to a car-radio (narrowcasting);
- by a cable network to a TV-set (as part of a package of digital services);
- on-line, via a multi-media computer.

<sup>15</sup> All these services are “offered to the public” in the sense that a given content is made available to any member of the public who is prepared to “pay the ticket” for the service. Access to theatres and cinemas is based on the same principle (the difference is that “access control” *at a distance* is more difficult and requires different techniques). In both cases, the service may be restricted to certain categories of the public (example: movies that are not appropriate for minors), without affecting the definition of a service “offered to the public”.

- (a) the provision of **content** (channels and/or interactive services) to be delivered by the cable operator to the final consumer;
- (b) the provision of facilities enabling the final consumer to receive the contents of those channels and services which he has been authorised to access;
- (c) the management of subscriptions and/or fees paid by the final consumers (in principle, such revenues are shared between the channels, after deduction of the remuneration due to the access provider)<sup>16</sup>.

To a certain extent, the access provider (e.g. the cable operator in this example) plays the same role as a “tour operator” who sells package holidays (made of several services, none of which he necessarily provides). For a package of channels, the reasoning is similar: the final consumer will sign a single contract (with the access provider, possibly acting as an agent), rather than entering into as many contracts as services included in the package<sup>17</sup>. This means that, in case of unauthorised reception, a loss of revenues is (directly) suffered by the access provider, in addition to the financial harm suffered (indirectly) by the content providers etc. For the purposes of the proposed directive, the provision of conditional access is therefore considered as a service in its own right.

#### I.B. Broadcasting services: pay-TV, pay-per-view and pay-radio

For decades, broadcasting services have been financed by advertising revenues and/or licence fees. TV consumption on a “direct payment” basis was first developed in the US: in 1995, pay-TV reached 54% of the United States TV market (compared to 39% in Europe and 28% in Japan)<sup>18</sup>. However, **pay-TV** grew the fastest in Europe in 1996, with the number of subscribers rising from 13,2 to 16,1 million<sup>19</sup>.

On present trends, it is estimated that pay TV will become the largest medium for consuming movies world-wide within two to three years<sup>20</sup>. In the European Union, this has already been achieved. According to Screen Digest, the EU movie spending breakdown in 1996 was the following (the figures in brackets refer to 1988):

cinema:	31.3%	(41.0%)
video rental:	14.2%	(39.9%)
video sales:	20.4%	(5.1%)
pay TV:	34.0%	(13.9%).

<sup>16</sup> In addition, encryption services may be the subject of a separate contract between a “technology provider” and the broadcaster.

<sup>17</sup> A similar scenario is frequent in the telecommunications business, where one operator may act as the “gatekeeper” for a number of different services.

<sup>18</sup> Source: IDATE. According to the same source, the annual growth of pay-TV in Europe was 23% (compared to 11% for “free TV”).

<sup>19</sup> The highest number of subscribers was reported in the UK (5.57 million), followed by France (4.913) Spain (1.465) and Germany (1.404).

<sup>20</sup> Screen Digest, January 1997.

The competition for broadcasting rights among pay-TV channels has created a substantial market for the audio-visual industry: according to studies carried out for the Commission, the total revenues of the European audio-visual sector increased by 93% in real terms between 1985 and 1994. The main reason was the creation of new sources of revenues such as pay-TV, whose total subscription revenue increased by nearly 400% in real terms over the same period<sup>21</sup>.

Another new market may open in the near future, when films and sport events become available on a **pay-per-view** basis: in 1997, the England-Italy World Cup qualifying match reached 3.8 million UK viewers; in Italy (where the first pay-per-view soccer service attracted 41,173 subscribers in 4 months) a new service is being tested which would allow subscribers to buy matches individually, instead of buying a “season ticket”.

The recent development of **digital audio broadcasting**, meaning that a number of new “thematic” or specialised radio channels can be distributed to subscribers. This is expected to create further opportunities for the media industry<sup>22</sup>.

The common feature of pay-TV, pay-radio and pay-per-view is that the broadcasting signal needs to be protected against unauthorised reception, because the service is run under a subscription arrangement (or, to an increasing extent, according to usage-related tariffs) . . . For all of these services, the viability of the business relies on “Conditional Access” techniques (in particular, scrambling and “encryption”<sup>23</sup> technologies).

Encryption technologies are already used in a wide range of telecommunications systems, both to protect the information carried by the application and to identify the sender and the authorised receiver of this information. Once associated with the diplomatic and military communities, encryption now plays an increasingly important role in supporting several applications used in everyday life. For instance, the introduction of mobile radio networks requires the identification of the terminal making the call for billing purposes, whilst the call requires protection against eavesdropping. For these reasons, GSM<sup>24</sup> provides for both encryption of voice data (although this may not always be implemented) and for encryption to be used in the authentication of the user. This approach has also been used as the basis for the DVB specification<sup>25</sup>.

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<sup>21</sup> KPMG, “Organisation and Performance of Audio-visual Services and Production”, Final Report to the European Commission, December 1996 (Studies on the Effectiveness and Impact of Internal Market Integration). Similar conclusions were recently published as regards the world-wide market: “over the past decade, the development and emergence of new forms of consuming movies has coincided with some dramatic increases in total spending on filmed entertainment. The advent of pay-TV and video has stimulated awareness of and demand for good product, and it is this development that has in part driven the growth of the theatrical market” (Screen Digest, January 1997).

<sup>22</sup> See the “Notification of a partnership agreement to set up and operate a digital pay-radio business for Europe (Music Choice Europe)” in OJ No C 70 of 6 March 1997, p.7.

<sup>23</sup> In general, “encryption” is defined as the process of converting input data (plain text) into cipher text (output data). The opposite process is known as “decryption”.

<sup>24</sup> European standard for digital public access mobile services.

<sup>25</sup> Common scrambling algorithm for Digital Video Broadcasting.

In September 1991 the Council of Europe adopted and addressed to its Member States a “Recommendation on the legal protection of encrypted television services”<sup>26</sup> (later updated, in January 1995, by a “Recommendation on measures against sound and audio-visual piracy”<sup>27</sup>). This text highlights the adverse consequences of piracy and sets out the range of activities that should be the subject of both civil remedies<sup>28</sup> and “penal or administrative sanctions”<sup>29</sup>. The Recommendation defines “encrypted service” as “any television service, transmitted or retransmitted by any technical means, the characteristics of which are modified or altered in order to restrict its access to a specific audience”. At the Community level, the corresponding notion is that of “conditional access” enshrined in Directive 95/47 on the use of standards for the transmission of television signals (Article 4)<sup>30</sup>. **However, market developments suggest that conditional access technology is likely to be used also to control access to digital services other than television broadcasting.** “For example, non-television services transmitted using broadcast networks (...) or, services distributed by switched networks”<sup>31</sup>. In defining the scope of the Community legal instrument, these services should not be ignored.

### I.C. Information Society services

In 1996, 68.4 million computers were sold world-wide<sup>32</sup>. At the end of January 1997, 16.1 million hosts<sup>33</sup> were connected to the Internet; while America still dominates “the Net” (with just under 60% of all hosts<sup>34</sup>) the European Union represents approximately 20% of the global figure (the rest of the world remains at 20%<sup>35</sup>).

In the proposal for a Directive on Regulatory Transparency<sup>36</sup>, Information Society services are defined as “any service provided at a distance, by electronic means and on the individual request of a service receiver”. This definition covers a wide range of services, examples of which can be found in the Communication that accompanies the proposed directive. In their early stage, these services were available “en clair” and “free of charge”. Nevertheless, a growing number of new services are being established on (or evolving towards) a “conditional access” model. Current examples range from

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<sup>26</sup> Recommendation No R (91) 14 of the Committee of Ministers.

<sup>27</sup> Recommendation No R (95) 1 of the Committee of Ministers.

<sup>28</sup> Injunctions and damages (Principle II.2).

<sup>29</sup> Principle II.1.

<sup>30</sup> Directive 95/47/EC of the European Parliament and of the Council of 24 October 1995 (OJ No L 281 of 23 November 1995, p.51).

<sup>31</sup> DTI, “The Regulation of Conditional Access Services for Digital Television” (Final Consultation Paper), 27 November 1996. According to this Paper, “the (UK) Government’s view is that conditional access to such services should be brought within a single unified framework”.

<sup>32</sup> Source: International Data Corp.

<sup>33</sup> Each host counts for between one and several thousand users (when the connection is provided by local communities, universities, companies and so on): as a consequence, the number of Internet users is subject to divergent estimations, ranging between 48 and 60 million.

<sup>34</sup> N.B. It should be noted that the American count includes all hosts ending “.com” and this factor may exaggerate their share (many “commercial” hosts represent in fact European businesses). The same reasoning applies to the hosts ending “.net” and “.org” (included in the American count of the market irrespective of the physical location of their owners).

<sup>35</sup> Source: Network Wizards.

<sup>36</sup> COM(96) 392 final of 30 August 1996.

the electronic version of traditional newspapers<sup>37</sup> to the provision of financial information and “package services”<sup>38</sup>. Conditional access to these services is currently based on electronic locks, while other on-line services make use of encryption.

According to Andersen Consulting<sup>39</sup>, the **electronic** share of the **publishing** market by the Year 2000 will range between 5 and 15% and be worth 8.8 to 12.4 billion ECU. Electronic publishing allows the creation of new low cost sources of information and improve access to the existing ones: a number of publications (such as encyclopaedias and specialised magazines) whose “printed” version would be too expensive for the average consumer, are becoming accessible at a reasonable fee in their electronic version.

On-line applications could similarly improve access to a wide range of data, provided that the viability of such business is ensured by usage-related tariffs implemented by conditional access (and legal protection thereof): unrestricted access is simply not compatible with the investment required in order to create the database. Combined with electronic publishing<sup>40</sup>, **on-line access to databases** is one of the most promising applications of the Information Society revolution: in the words of a recent piece of research<sup>41</sup>, “many business information services, available for many years to professional customers with deep pockets, may become available through consumer interactive services to wider distribution”<sup>42</sup>.

Further developments in the short term include the on-line provision of **music on demand**: recently, the International Federation of the Phonographic Industry<sup>43</sup> estimated at “2 billion dollars the potential turnover of the electronic delivery of music recordings”.

At a later stage, access to video-on-demand services is expected to be available from both TV sets and computer screens. As a consequence, any discrimination between means of transmission (or reception terminals) would be contrary to the equality of treatment principle, and may possibly distort competition.

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<sup>37</sup> The number of on-line newspapers available on the World Wide Web in February 1997 was 1,553 (327 of which in Europe, compared to 880 in the United States).

<sup>38</sup> Example: America on Line (AOL) reached 8 million subscribers in February 1997.

<sup>39</sup> “Strategic Developments for the European Publishing Industry towards the Year 2000”: Study for the European Commission, 1996.

<sup>40</sup> The electronic version of a newspaper implies a number of links (hypertext) and each of them leads the consumer to the archives of the publisher or to other related publications.

<sup>41</sup> Farncombe Technology “The impact of new signal protection methods on interactive services’ business strategies”: Study for the European Commission 1996.

<sup>42</sup> E.g. some financial newspapers offer on-line (on a subscription basis) a “Personal Journal” that includes a custom news page and portfolio as well as customised access to corporate reports and graphical presentation of stock performances.

<sup>43</sup> Quoted by Reuters, 2 December 1996.

## II. The need for Community legislation

### II.A. A market exposed to piracy

The above mentioned business opportunities (and the related effects on job creation in the media industry) will depend both on the availability and the legal protection of conditional access techniques. Since the service is costly to provide, its viability relies on conditional access techniques, but in the absence of legal protection against piracy, the potential publishers are unwilling to expose their products to “unprotected” access.

In fact, the market for services based on conditional Access is rapidly growing as a result of digital technology, but this growth may be jeopardised by the equally rapid development of “piracy”: a parallel and flourishing industry that manufactures and markets devices enabling unauthorised access to such services. Specialised “publications”, and a number of Internet sites, are currently being used to market such devices and an “after-sales services” market has also developed (providing maintenance of these devices).

This kind of “piracy” has several adverse consequences:

- loss of subscription revenues for **the service provider**: the direct cost of piracy for pay-TV operators in 1996 has been estimated to reach 240 million ECU<sup>44</sup> (the indirect costs implied by the need for replacing the pirated system are not included in this figure);
- financial harm to **the conditional access provider**, who may incur additional costs in having to replace the conditional access facilities, and whose potential revenues are affected in case of unauthorised access to protected services ;
- indirect financial harm to **the content provider**: since the fees paid to right-holders generally take into account the potential audience, illicit reception deprives them of the income they would have received from subscription revenue;
- higher prices for **the consumer**: the service provider will necessarily try to recover the losses suffered from piracy by raising the price of (and/or rental charges for) its services and devices;
- less consumer choice: the use of illicit devices to obtain unauthorised access to protected services erodes market confidence in such a manner that content providers are reluctant to make their works available for distribution in the form of broadcasting signals or of on-line services<sup>45</sup>;
- **consumer frauds**: many consumers are misled about the origin of the pirated device they are purchasing and thus believe they are buying an authorised device; if the operator modifies the conditional access system (for security or other reasons), the device purchased will be of no use for the consumer.

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<sup>44</sup> Source: AEPOC (Association Européenne pour la Protection des Oeuvres et services Cryptés).

<sup>45</sup> See “Intellectual Property Protection in Cyberspace” (ITAA Discussion Paper) 1996.

It is for these reasons that the European Parliament and the Council introduced a recital on piracy in Directive 95/47 of 24 October 1995<sup>46</sup>. The recital reads as follows: “Whereas in the European audiovisual digital environment the scope for piracy will increase (...) the introduction and enforcement of efficient anti-piracy legislation at European level will become increasingly necessary”.

## II.B. A market threatened by regulatory fragmentation

The supply of services on a Conditional Access basis has developed to satisfy an increasingly specialised demand (thereby justifying their remuneration by the final user). Their development as viable services requires a market of a certain size: for an identical geographical area a niche-service market will be smaller than a mass-service market and therefore the area may not suffice to ensure the viability of the “targeted” service. The services examined in this Communication often satisfy the demand of “transnational niches” (i.e. demand based on cultural factors other than nationality).

The existing disparities in the level of legal protection against piracy have an adverse effect on the development of these services on a European scale. In this respect, it should be noted that:

1. in a majority of Member States the existing anti-piracy regulations cover only broadcasting services<sup>47</sup>;
2. the legislation of one Member State discriminates between cable and satellite broadcasting so as to deprive the latter of the legal protection accorded to the former;
3. in another Member State the legal protection is limited to those services which are broadcast from the national territory;
4. in several Member States piracy is only sanctioned under the “unfair competition” general provisions, and these will apply only if and insofar as the unlawful practice affects the “national market” (which may not be the case if the pirated decoders produced in those countries are marketed in another Member State);
5. the list of unlawful activities (where existing) differs from one Member State to another (and so does the degree of protection);
6. in some Member States there is no regulation to sanction the illicit reception of services supplied on a Conditional access basis. In this respect it should be noted that the “cable and satellite” Directive<sup>48</sup>, while providing rules on satellite broadcasting and cable retransmission of protected works, does not assist operators in their fight against illicit **reception**. This is because reception does not constitute a relevant “act” for the purposes of copyright law, which traditionally covers communication as opposed to reception<sup>49</sup>.

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<sup>46</sup> See above (footnote No 22).

<sup>47</sup> Green Paper on the legal protection of encrypted services, p.25.

<sup>48</sup> Directive 93/83/EEC.

<sup>49</sup> Green Paper on the legal protection of encrypted services, p. 23.

## II.C. Obstacles to the free movement of services and goods

Regulatory fragmentation can create obstacles to the free movement of goods and services and compromise the proper functioning of the Single Market. For the purposes of legal protection against illicit reception, regulations that make a distinction based on the origin of the service<sup>50</sup> are incompatible with the principles of the Treaty and will therefore need to be removed. Other regulations discriminate between means of transmission, e.g. when terrestrial and cable broadcasting services are protected against illicit reception whilst satellite services (all of which are of foreign origin) do not enjoy such protection<sup>51</sup>. Such regulations do not seem to be justified in the light of the European Court of Justice case-law. Indeed discriminatory measures affecting the freedom to provide services are compatible with Community law only if they can be brought within an express derogation, such as that contained in Article 56 of the Treaty, which refers to grounds of public policy, public security or public health. In these particular cases, it would appear that none of the grounds in question could justify such discrimination<sup>52</sup>.

Obstacles to the free movement of goods and services may also result from the absence of legal protection in certain receiving States. Consultation confirmed that operators consider legal protection against illicit reception of the service to be an important factor in their market strategy. The absence of such legal protection in some Member States (coupled with the loopholes of legal protection as regards the cross-border provision of services) currently makes the Internal Market much less attractive than it could be.

Negotiations with content providers are more difficult in the absence of equivalent protection in every Member State where reception is possible; access providers thus find it more difficult to secure rights at a reasonable price, and this affects their cross-border activities in particular.

Disparities between national regulations can cause obstacles to the free movement of goods. Some of these obstacles are incompatible with Community law and need therefore to be removed; others may be justified<sup>53</sup> by general interest objectives such as consumer protection (against fraud) and intellectual and industrial property rights (against piracy).

**A Community legally binding instrument to establish an equivalent level of protection is necessary** to remove the obstacles identified and to complete the regulatory framework for conditional access services in the Internal Market. **For reasons of proportionality, the Commission considers that the appropriate form for this instrument is a Directive:** a directive will leave Member States free as to the means to achieve such objectives.

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<sup>50</sup> See Chapter II.B point 3.

<sup>51</sup> See Chapter II.B point 2.

<sup>52</sup> Green Paper, page 32.

<sup>53</sup> Where they respect the principle of proportionality.

The proposed Directive does not cover the circumvention of rights management information<sup>54</sup> nor of technological measures used by the authors in connection with the exercise of their rights<sup>55</sup>. These issues were addressed by the Commission in the Green Paper on copyright and related rights in the Information Society and will be the subject of separate measures, as announced in the Commission Communication of 20 November 1996<sup>56</sup>. Nor does the proposed Directive deal with the issue of industrial property rights on decoders, as these rights are the subject of specific Community legislation.

The use of encryption for reasons other than remuneration of a service does not fall within the scope of the proposed Directive: where they relate to the integrity and/or confidentiality of data and communications, they involve different general interest considerations (namely: security of commercial transactions<sup>57</sup>, and the protection of the fundamental right to privacy, including secrecy of communications).

The proposed Directive is intended to apply without prejudice to the possible restrictions on the use of encryption technology and products<sup>58</sup>.

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<sup>54</sup> As defined in Article 12 of the WIPO Copyright Treaty, 1996.

<sup>55</sup> Article 11 of the above Treaty.

<sup>56</sup> COM(96) 568 final: "Follow-up to the Green Paper on copyright and related rights in the Information society".

<sup>57</sup> Example: digital signatures will fall within the scope of the directive if they are used as a "password" to a conditional access service, but not when they serve other objectives.

<sup>58</sup> On 27 March 1997, The OECD Council adopted a Recommendation concerning "Guidelines for cryptography policy". While "**recognising that cryptography has a variety of applications (...) and that each of these uses presents different issues**", the Council highlighted that "the failure to utilise cryptographic methods can adversely affect the protection of privacy, intellectual property (...) and the operation of electronic commerce".

### III. COMMENTARY ON INDIVIDUAL ARTICLES

#### Article 1

##### Paragraph (a)

Paragraph (a), in conjunction with paragraph (b), defines the scope of the proposal. This covers broadcasting (television and radio) and Information Society services, as well as the provision of access to the above mentioned services, insofar as they are provided on the basis of a Conditional Access technique (as defined in Paragraph (b)).

The definition of “*television broadcasting*” is the same as in Directive 89/552/EEC. That of “*radio broadcasting*”, which is based on it, should be understood to include not only sound signals but possibly also data signals within the same channel. These definitions of broadcasting do not include the provision of services on individual demand, which come within the scope of the third indent (“Information society services”).

The definition of “*Information Society services*” is based on the Commission proposal for a Directive amending Directive 83/189/EEC concerning “regulatory transparency in the Internal Market for Information Society services”. According to Article 1 of that proposal, the definition applies to “any service provided at a distance, by electronic means and on the individual request of a service receiver”. Examples of these services include Video on demand and Audio on demand (that are not covered by the definition of “broadcasting”), irrespective of the terminal used by the receiver (television set, computer screen, or any other equipment).

The function of controlling potential end-users’ access to the above-mentioned services is the subject of a distinct operation which may be performed by the service-provider (such as a broadcasting company) itself, but which in an increasing number of cases is being undertaken by a specialist company acting on its behalf.

In this respect, the functional relationships (but not the conditional-access techniques) are similar to those in the case of a series of public concerts forming a ‘season’, where each authorised end-user holds a season ticket representing a contract with the concert management, but not with the members of the various orchestras who perform the concerts under contract. Enforcement of the conditions for access to the concert-hall is relatively easy (by inspecting each concert-goers’ ticket on entry, to detect any unauthorised ones). In the case of broadcasting, the only effective conditional access technique relies on the end-users’ inability to obtain intelligible information from the distributed signal without using suitable equipment and software to process it.

##### Paragraph (b)

The services listed in Paragraph (a) will fall within the scope of the proposed Directive if, and insofar as, they are provided on the basis of a “*Conditional Access*” technique. According to Paragraph (b), this means any technical measure whereby access to the service is made conditional upon a prior individual authorisation, insofar as such authorisation aims at ensuring the remuneration of that service. This is because the subject of legal protection is not the technology as such, but the legitimate interest served by the technology (remuneration of a service): similar techniques may serve different interests (e.g. confidentiality of private communications), that will remain outside the scope of the Directive. In fact, the services listed in Paragraph (a) are made available to any member of the public who is prepared to “pay the ticket”, and the technical measures referred to in Paragraph (b) aim at ensuring the payment of such a “ticket”.

In this field, the available technologies are evolving quite rapidly, and new technologies may emerge. This is one of the reasons why the proposed definition is not expressed in terms of a specific technology, such as encryption, although this is widely used in digital systems.

Some indicative, and not exhaustive, examples of Conditional Access techniques are the following:

- (digital) encryption and (analogue) scrambling of broadcasting signals;
- cryptographic envelopes, holding an encrypted version of a document (text, image, video) as well as rules for determining access possibilities;
- electronic locks, that allow the publisher to “lock” a given content in such a way that access to the service is made conditional upon a prior authorisation (e.g. on a subscription basis).

### **Paragraph (c)**

The definition of “*Conditional Access device*” includes decoders, set-top boxes, smart cards and any other equipment or software which, alone or in conjunction with other devices, is necessary to receive the service in an intelligible form (as opposed to an encoded, unintelligible form).

### **Paragraph (d)**

Even though not eligible for legal protection under Articles 3 and 4, the “*associated services*” shall benefit from the provisions laid down in Article 2, paragraph 2. In fact, the development of an Internal Market in this field requires the free movement of these related activities ( installation, maintenance, replacement and commercial communication services), that shall not be restricted, for reasons which fall within the field co-ordinated by this Directive.

“*Commercial communication*” is meant to cover, in accordance with the Green paper on Commercial Communications in the Internal Market - COM(96) 192 of 8 May 1996 - “*all forms of communication seeking to promote either products, services or the image of a company or organisation to the final consumers and/or distributors*”.

### **Paragraph (e)**

The definition of “*illicit device*” is linked to the list of prohibited activities that is provided in Article 3: all these activities relate to illicit devices, but the mere possession (for private purposes) of such devices is not sanctioned by the proposed Directive, as this aspect is left to the discretion of Member States (15th recital).

#### **Paragraph (f)**

The notion of “*unauthorised access*” flows from the definition given by Paragraph (b) and must be read in accordance with the latter: the refusal of authorisation for reasons other than the remuneration of the service is thus not covered by the proposal.

Unauthorised access, as such, is not sanctioned by the proposed Directive: it is the commercial activities which make it possible (Article 3) that are sanctioned.

#### **Paragraph (g)**

The definition outlines the scope of the approximation of laws, regulations and administrative provisions of the Member States. This approximation relates to the legal protection of services against unauthorised access, which is defined by paragraph (f) as “access to a protected service without the authorisation of the service provider”. As a result, copyright and related rights do not fall within the field co-ordinated by the Directive: the interest protected by the proposed measures is the remuneration of service providers. Even though, from an economic point of view, rightholders will certainly benefit from such measures, this will be an indirect effect, and their interests remain distinct. The same reasoning applies to the issue of industrial property rights for Conditional Access devices.

### **Article 2**

This Article aims at ensuring the free movement of protected services, of associated services and of Conditional Access devices. In order to guarantee the equivalent level of protection needed to achieve these freedoms, Paragraph 1 requires each Member State to take the measures whose object is defined in Articles 3 and 4. To fulfil this obligation, some Member States will have to adapt their legislation in accordance with the definitions given in Article 1. For example, if the existing regulation covers only broadcasting services, it will have to be modified so that it covers all the services defined in Article 1 (a); if legal protection is limited to services that are broadcast from the national territory, this discrimination will have to be removed, and the same applies to any legislation that discriminates between means of transmission (e.g. between cable and satellite) or between terminal equipment (e.g. between television sets and computers). In fact, many services in Europe are being simulcast via satellite, cable and/or terrestrial transmitters, and digital services in the near future will use an integrated platform of cable connections, satellite receivers and decoders, telephone lines etc.

Paragraph 2 is the plain application of Internal Market principles: once a field has been co-ordinated by an harmonising instrument, there is no longer any justification for restricting the free movement of goods and services. With the exception of the

measures laid down in Paragraph 1, Member States shall not restrict the free movement of those goods and services, which are covered by this Directive, for reasons which relate to their legal protection against the illicit activities contained in Article 3.

### **Article 3**

The list of prohibited activities is mainly based on Principle I of Recommendation R(91)14 of the Council of Europe. This Recommendation makes a clear distinction between possession for *commercial* and for private purposes: the former is declared as unlawful, while the latter is not. Moreover, in several Member States, the legal protection of encoded services is ensured by general provisions relating to “*unfair competition*”, which cover only *commercial* activities: unfair competition Law applies solely to activities carried out in the course of trade. Bearing in mind the need for respecting the principle of proportionality laid down in Article 3b of the EC Treaty, which limits Community action to what is necessary to achieve the pursued objective, the proposed Directive follows the Council of Europe Recommendation on this point. As regards point b), the Directive goes further than the Recommendation, but is inspired by the same principle: sanctioning the *commercial* activities that favour the unauthorised reception, and not the unauthorised reception as such.

Article 3.a) envisages the restriction of, inter alia, the importation for commercial purposes of illicit devices. Any import restriction vis-à-vis third countries has to be compatible with the obligations laid down under the relevant provisions of the WTO. Given the fact that this measure will be applied without discrimination between European and third country products, and considering that it fulfils the legitimate aim of controlling deceptive practices, the measure will be in compliance with the WTO.

The notion of “*appropriate*” sanctions and remedies is clarified by the conditions laid down in Article 4.

### **Article 4**

#### **Paragraph 1**

To be effective, any legal provision should be assisted by the appropriate sanctions. As regards Community Law, this principle is enshrined in the Communication of the Commission on the Role of Penalties in implementing Community Legislation: COM (95)162. However, this does not necessarily mean fixing a harmonised level of penalties: Paragraph 1 of Article 4 indicates a set of criteria that should achieve the objective, while leaving enough flexibility to the Member States. In addition, useful elements may be found in the enforcement section of the TRIPS Agreement, which indicates a comprehensive set of measures against piracy.

#### **Paragraph 2**

This Paragraph indicates the usual set of civil remedies that applies to the relevant activities in most Member States; these remedies can be invoked by one or several

service providers. Article 44 of the TRIPS Agreement provides for injunctions, while Article 45 of the same Agreement contains rules about damages. In addition, the seizure of infringing material is laid down in Article 46 of the TRIPS Agreement, as well as in Article 7 of Directive 91/250/EEC, that allows the competent authorities to seize the unauthorised copies of computer software.

### **Articles 5, 6 and 7**

These are standard provisions.

**IV. Proposal for a European Parliament and Council Directive on the Legal  
Protection of Services based on, or consisting of, Conditional Access**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN  
UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 57(2), 66 and 100a thereof,

Having regard to the proposal from the Commission<sup>1</sup>,

Having regard to the opinion of the Economic and Social Committee<sup>2</sup>,

Acting in accordance with the procedure laid down in Article 189b of the Treaty<sup>3</sup>,

Whereas the objectives of the European Community as laid down in the Treaty include establishing an even closer union among the peoples of Europe and ensuring economic and social progress, by eliminating the barriers which divide them;

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

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;

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<sup>1</sup> OJ No ... ..

<sup>2</sup> OJ No ... ..

Whereas the Commission undertook a wide-ranging consultation based on the Green paper “Legal Protection of Encrypted Services in the Internal Market”<sup>4</sup> ; whereas the results of this consultation confirmed the need for a Community legal instrument ensuring the legal protection of all those services whose remuneration relies on Conditional Access ;

Whereas the European Parliament, in its Resolution of 13 May 1997 on the Green Paper, called on the Commission to present a proposal for a Directive covering all encoded services in respect of which encoding is used to ensure the payment of a fee, and agreed that this should include Information Society services, provided at a distance by electronic means and on the individual request of a service receiver, as well as broadcasting services;

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 the importance of this issue was recognised by the Commission Communication on “A European Initiative in Electronic Commerce”<sup>5</sup> , that announced a proposal for a Directive in order to establish an equivalent level of protection for service providers across Europe;

Whereas, in accordance with Article 7A of the Treaty, the Internal Market is to comprise an area without internal frontiers in which the free movement of services and goods is ensured; whereas Article 128(4) of the Treaty requires the Community to take cultural aspects into account in its action under other provisions of the Treaty; whereas by virtue of Article 130(3), the Community must, through the policies and activities it

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<sup>3</sup> Opinion of the European Parliament of .. .. , Common Position of the Council of .. ..

<sup>4</sup> COM(96) 76 final of 6 March 1996.

<sup>5</sup> COM(97) 157 final of 16 April 1997.

pursues, contribute to creating the conditions necessary for the competitiveness of the Community's industry;

Whereas the disparity between national rules concerning the legal protection of services based on, or consisting of, Conditional Access is liable to create obstacles to the free movement of services and goods;

Whereas the application of the Treaty is not sufficient to remove these Internal Market obstacles, and whereas these obstacles should therefore be removed by providing for an equivalent level of protection between Member States; whereas this implies an approximation of the national rules relating to the commercial activities which concern illicit devices;

Whereas these commercial activities are detrimental to consumers that are misled about the origin of illicit devices, and whereas a high level of consumer protection is needed in order to fight against this kind of consumer fraud; whereas Article 129a(1) of the Treaty provides that the Community should contribute to the achievement of a high level of consumer protection by the measures it adopts in applying Article 100a;

Whereas, therefore, the legal framework for the creation of a single audiovisual area laid down in Directive 89/552/EEC, as amended by Directive 97/36/EC of the European Parliament and the Council, must be supplemented with reference to Conditional Access techniques as laid down in the present Directive, also in order to ensure equal treatment of the suppliers of cross-border broadcasts, regardless of their place of establishment;

Whereas, in accordance with the Resolution of the Council of 29 June 1995 on the effective application of Community law and on the penalties applicable for breaches of Community law in the Internal Market, Member States are to take action to ensure that Community law is duly applied with the same effectiveness and thoroughness as national law;

Whereas the approximation of the laws, regulations and administrative provisions of the Member States must be limited to what is needed in order to achieve the objectives of the Internal Market, in accordance with the third paragraph of article 3b of the Treaty;

Whereas this Directive is 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 the 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 the application of national rules which do not fall within the field herewith co-ordinated, such as those adopted for the protection of minors in compliance with Directive 89/552/EEC, as amended by Directive 97/36/EC of the European Parliament and the Council,

HAVE ADOPTED THIS DIRECTIVE:

## **CHAPTER I**

### **Definitions and Scope**

#### **Article 1**

1. For the purposes of this Directive:

(a) “ *Protected Service* ” means any of the following services, where provided on the basis of Conditional Access :

- Television broadcasting, as defined in Article 1 of Directive 89/552/EEC<sup>6</sup>;
- Radio broadcasting, meaning any transmission by wire or over the air, including that by satellite, of radio programmes intended for reception by the public ;
- Information Society services within the meaning of Article 1 point 2 of Directive 83/189/EEC, as amended by Article 1 paragraph (a) of Directive ../. <sup>7</sup> ,

or the provision of Conditional access to the above services as a service in its own right.

(b) “ *Conditional Access* ” means any technical measure and/or arrangement whereby access to the service in an intelligible form is made conditional upon a prior individual authorisation aiming at ensuring the remuneration of that service;

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<sup>6</sup> “ *Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities*”, modified by Directive 97/36/EC (OJ No ... ..).

<sup>7</sup> “ *European Parliament and Council Directive laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services*”.

(c) “*Conditional Access device*” means any equipment or software designed or adapted to enable access to a protected service in an intelligible form;

(d) “*Associated service*” means the installation, maintenance or replacement of Conditional Access devices, as well as the provision of commercial communication services in relation to protected services or devices or other associated services;

(e) “*Illicit device*” means any equipment or software designed or adapted to enable the unauthorised access to a protected service;

(f) “*Unauthorised access*” means access to a protected service in an intelligible form without the authorisation of the service provider.

(g) “*Field co-ordinated by this Directive*” means any provision relating to unauthorised access to protected services.

## **CHAPTER II**

### **Internal Market principles**

#### **Article 2**

1. Each Member State shall take the measures necessary to prohibit on its territory the activities listed in Article 3, and to provide the sanctions and remedies laid down in Article 4.

2. Without prejudice to Paragraph 1, Members States may not, for reasons which fall within the field co-ordinated by this Directive:

a) restrict the provision of protected services, or associated services, that originate in another Member State;

b) restrict the free movement of Conditional Access devices.

### **CHAPTER III**

#### **Measures relating to the Legal Protection of services based on, or consisting of, Conditional Access**

##### **Article 3**

##### **(Infringing activities)**

Member States shall prohibit on their territory , each of the following activities,:

- a) the manufacture, import, sale or possession for commercial purposes of illicit devices;
- b) the installation, maintenance or replacement for commercial purposes, of an illicit device;
- c) the use of commercial communications to promote illicit devices.

##### **Article 4**

##### **(Sanctions and remedies)**

1. The sanctions referred to in Article 2(1) shall be effective, deterrent and proportional to the potential impact of the infringing activity.
  
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.

## **CHAPTER IV**

### **Final provisions**

#### **Article 5**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive within one year of its entry into force and shall communicate them to the Commission.

When Member States adopt these measures, they shall contain a reference to this Directive or shall be accompanied by such reference on the occasion of their official publication. The procedure for such a reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of domestic law which they adopt in the field co-ordinated by this Directive.

#### **Article 6**

Not later than five years after the adoption of this Directive, and every three years thereafter, the Commission shall present a report to the European Parliament, the Council and the Economic and Social Committee concerning the implementation of this Directive accompanied, where appropriate, by proposals for adapting it in light of technical and economic developments.

#### **Article 7**

This Directive is addressed to the Member States.