Encrypted services: legal protection of services based on or consisting of conditional access

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Ten years after Directive 98/84/EC on the legal protection of services based on, or consisting of, conditional access, the Commission is presenting a second report on its implementation. 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.

This report has addressed various aspects of the implementation of the Directive which pose problems or raise questions. The main elements are as follows:

1) 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.

2) 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.

3) 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.

4) lastly, 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.

The following **actions can be taken to improve its application and address convergence**:

- 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. 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 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.

- 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.

- 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 sport. 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.

- Ratification of the European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access: this 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.