

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

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 ⁽¹⁾,

Having regard to the opinion of the Economic and Social Committee ⁽²⁾,

Acting in accordance with the procedure laid down in Article 189b of the Treaty ⁽³⁾,

- (1) Whereas the objectives of the Community as laid down in the Treaty include creating an ever closer union among the peoples of Europe and ensuring economic and social progress, by eliminating the barriers which divide them;
- (2) Whereas the cross-border provision of broadcasting and information society services may contribute, from the individual point of view, to the full effectiveness of freedom of expression as a fundamental right and, from the collective point of view, to the achievement of the objectives laid down in the Treaty;
- (3) Whereas the Treaty provides for the free movement of all services which are normally provided for remuneration; whereas this right, as applied to broadcasting and information society services, is also a specific manifestation in Community law of a more general principle, namely freedom of expression as enshrined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; whereas that Article explicitly recognizes the right of citizens to receive and impart information regardless of frontiers and whereas any restriction of that right must be based on due consideration of other legitimate interests deserving of legal protection;

(4) Whereas the Commission undertook a wide-ranging consultation based on the Green Paper 'Legal Protection of Encrypted Services in the Internal Market'; whereas the results of that consultation confirmed the need for a Community legal instrument ensuring the legal protection of all those services whose remuneration relies on conditional access;

(5) Whereas the European Parliament, in its Resolution of 13 May 1997 on the Green Paper ⁽⁴⁾, called on the Commission to present a proposal for a Directive covering all encoded services in respect of which encoding is used to ensure payment of a fee, and agreed that this should include information society services provided at a distance by electronic means and at the individual request of a service receiver, as well as broadcasting services;

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

(7) Whereas the importance of this issue was recognized by the Commission Communication on 'A European Initiative in Electronic Commerce';

(8) 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;

⁽¹⁾ OJ C 314, 16. 10. 1997, p. 7 and OJ C 203, 30. 6. 1998, p. 12.

⁽²⁾ OJ C 129, 27. 4. 1998, p. 16.

⁽³⁾ Opinion of the European Parliament of 30 April 1998 (OJ C 152, 18. 5. 1998, p. 59), Council Common Position of 29 June 1998 (OJ C 262, 19. 8. 1998, p. 34) and Decision of the European Parliament of 8 October 1998 (OJ C 328, 26. 10. 1998). Council Decision of 9 November 1998.

⁽⁴⁾ OJ C 167, 2. 6. 1997, p. 31.

whereas by virtue of Article 130(3) of the Treaty, the Community must, through the policies and activities it pursues, contribute to creating the conditions necessary for the competitiveness of its industry;

- (9) Whereas this Directive is without prejudice to possible future Community or national provisions meant to ensure that a number of broadcasting services, recognized as being of public interest, are not based on conditional access;
- (10) Whereas this Directive is without prejudice to the cultural aspects of any further Community action concerning new services;
- (11) 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;
- (12) Whereas the application of the Treaty is not sufficient to remove these internal market obstacles; whereas those 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;
- (13) Whereas it seems necessary to ensure that Member States provide appropriate legal protection against the placing on the market, for direct or indirect financial gain, of an illicit device which enables or facilitates without authority the circumvention of any technological measures designed to protect the remuneration of a legally provided service;
- (14) Whereas those commercial activities which concern illicit devices include commercial communications covering all forms of advertising, direct marketing, sponsorship, sales promotion and public relations promoting such products and services;
- (15) Whereas those commercial activities are detrimental to consumers who are misled about the origin of illicit devices; 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 pursuant to Article 100a thereof;
- (16) Whereas, therefore, the legal framework for the creation of a single audiovisual area laid down in Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities⁽¹⁾ should be supplemented with reference to conditional access techniques as laid down in this Directive, in order, not least, to ensure equal treatment of the suppliers of cross-border broadcasts, regardless of their place of establishment;
- (17) Whereas, in accordance with the Council Resolution of 29 June 1995 on the effective uniform application of Community law and on the penalties applicable for breaches of Community law in the internal market⁽²⁾, Member States are required to take action to ensure that Community law is duly applied with the same effectiveness and thoroughness as national law;
- (18) Whereas, in accordance with Article 5 of the Treaty, Member States are required to take all appropriate measures to guarantee the application and effectiveness of Community law, in particular by ensuring that the sanctions chosen are effective, dissuasive and proportionate and the remedies appropriate;
- (19) Whereas the approximation of the laws, regulations and administrative provisions of the Member States should be limited to what is needed in order to achieve the objectives of the internal market, in accordance with the principle of proportionality as set out in the third paragraph of Article 3b of the Treaty;
- (20) Whereas the distribution of illicit devices includes transfer by any means and putting such devices on the market for circulation inside or outside the Community;
- (21) Whereas this Directive is without prejudice to the application of any national provisions which may prohibit the private possession of illicit devices, to the application of Community competition rules and to the application of Community rules concerning intellectual property rights;
- (22) Whereas national law concerning sanctions and remedies for infringing commercial activities may provide that the activities have to be carried out in the knowledge or with reasonable grounds for knowing that the devices in question were illicit;

⁽¹⁾ OJ L 298, 17. 10. 1989, p. 23. Directive as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30. 7. 1997, p. 60).

⁽²⁾ OJ C 188, 22. 7. 1995, p. 1.

- (23) Whereas the sanctions and remedies provided for under this Directive are without prejudice to any other sanction or remedy for which provision may be made under national law, such as preventive measures in general or seizure of illicit devices; whereas Member States are not obliged to provide criminal sanctions for infringing activities covered by this Directive; whereas Member States' provisions for actions for damages are to be in conformity with their national legislative and judicial systems;
- (24) Whereas this Directive is without prejudice to the application of national rules which do not fall within the field herein coordinated, such as those adopted for the protection of minors, including those in compliance with Directive 89/552/EEC, or national provisions concerned with public policy or public security,

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Scope

The objective of this Directive is to approximate provisions in the Member States concerning measures against illicit devices which give unauthorised access to protected services.

Article 2

Definitions

For the purposes of this Directive:

- (a) *protected service* shall mean any of the following services, where provided against remuneration and on the basis of conditional access:
- television broadcasting, as defined in Article 1(a) of Directive 89/552/EEC,
 - radio broadcasting, meaning any transmission by wire or over the air, including by satellite, of radio programmes intended for reception by the public,
 - information society services within the meaning of Article 1(2) of Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on information society services ⁽¹⁾,
- or the provision of conditional access to the above services considered as a service in its own right;

⁽¹⁾ OJ L 204, 21. 7. 1998, p. 37. Directive as amended by Directive 98/48/EC (OJ L 217, 5. 8. 1998, p. 18).

- (b) *conditional access* shall mean any technical measure and/or arrangement whereby access to the protected service in an intelligible form is made conditional upon prior individual authorisation;
- (c) *conditional access device* shall mean any equipment or software designed or adapted to give access to a protected service in an intelligible form;
- (d) *associated service* shall mean the installation, maintenance or replacement of conditional access devices, as well as the provision of commercial communication services in relation to them or to protected services;
- (e) *illicit device* shall mean 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;
- (f) *field coordinated by this Directive* shall mean any provision relating to the infringing activities specified in Article 4.

Article 3

Internal market principles

1. Each Member State shall take the measures necessary to prohibit on its territory the activities listed in Article 4, and to provide for the sanctions and remedies laid down in Article 5.
2. Without prejudice to paragraph 1, Member States may not:
 - (a) restrict the provision of protected services, or associated services, which originate in another Member State; or
 - (b) restrict the free movement of conditional access devices;for reasons falling within the field coordinated by this Directive.

Article 4

Infringing activities

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

- (a) the manufacture, import, distribution, sale, rental 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 5***Sanctions and remedies**

1. The sanctions shall be effective, dissuasive and proportionate to the potential impact of the infringing activity.
2. Member States shall take the necessary measures to ensure that providers of protected services whose interests are affected by an infringing activity as specified in Article 4, carried out on their territory, have access to appropriate remedies, including bringing an action for damages and obtaining an injunction or other preventive measure, and where appropriate, applying for disposal outside commercial channels of illicit devices.

*Article 6***Implementation**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 28 May 2000. They shall notify them to the Commission forthwith.

When Member States adopt such measures, they shall contain a reference to this Directive or shall be accompanied by such reference at the time of their official publication. The methods of making such reference shall be laid down by Member States.

2. Member States shall communicate to the Commission the text of the provisions of national law which they adopt in the field coordinated by this Directive.

*Article 7***Reports**

Not later than three years after the entry into force of this Directive, and every two 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, in particular as regards the definitions under Article 2, for adapting it in light of technical and economic developments and of the consultations carried out by the Commission.

*Article 8***Entry into force**

This Directive shall enter into force on the day of its publication in the *Official Journal of the European Communities*.

*Article 9***Addressees**

This Directive is addressed to the Member States.

Done at Brussels, 20 November 1998.

For the European Parliament

The President

J. M. GIL-ROBLES

For the Council

The President

E. HOSTASCH