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EUROPEAN COMMISSION

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2010/0360 (NLE)

Proposal for a

COUNCIL DECISION

**concerning the signing of the European Convention on the legal protection of services
based on, or consisting of, conditional access**

SEC(2010) 1559 final

EXPLANATORY MEMORANDUM

1. On 20 November 1998, the Council and the European Parliament adopted Directive 98/84/EC on the legal protection of services based on, or consisting of, conditional access¹.
2. The Directive created a common legal framework applicable throughout the European Union for combating illicit devices which allow unauthorised access to television services offered against payment and effectively protecting such services. This protection covers both television and radio broadcasting services and transmission by Internet.
3. The primary objective of the Directive was to provide legal protection to all services for which payment depends on *conditional access*, i.e. access to the protected service is made conditional upon prior individual authorisation². More specifically, the protection consists of declaring as unlawful all commercial activity relating to equipment which allows or facilitates access to services without authorisation or payment to the provider, and establishing sanctions.
4. The services are thus legally offered by providers by means of a *conditional access device*, in other words equipment or software designed or adapted to give access to a protected service in an intelligible form³. Conversely, an *illicit device* refers to any equipment or software designed or adapted to give access to a protected service in an intelligible form without the authorisation of the service provider⁴.
5. The Directive defines the *unlawful activities* linked to illicit devices in this context. These relate primarily to their manufacture, import, distribution, sale, rental or possession, and secondly to their installation, maintenance or replacement. Lastly, the use of commercial communications to promote hacking devices is also declared to constitute an unlawful activity. It should be noted that only the above-mentioned activities carried out in a commercial context are declared to be unlawful.
6. The sanctions imposed for an unlawful activity are left entirely to the discretion of the Member States, which must respect the general principles of Community law. They must be "effective, dissuasive and proportionate"⁵ to the infringements committed.
7. Furthermore, the Member States must allow all providers of services based on, or consisting of, conditional access appropriate remedies to stop an unlawful threat to their activity (by means of injunctions for instance) and to obtain compensation for any prejudice suffered due to an unlawful activity.
8. In 1999, the Council of Europe started to draft a European convention on the legal protection of services based on, or consisting of, conditional access.

¹ OJ L 320, 28.11.1998, p. 54.

² Article 2(b) of Directive 98/84/EC.

³ Article 2(c) of Directive 98/84/EC.

⁴ Article 2(e) of Directive 98/84/EC.

⁵ Article 5 of Directive 98/84/EC.

9. Extensive, effective protection for services based on, or consisting of, conditional access appeared to be particularly necessary. In fact, many European states which are not members of the European Union may provide havens for the development or distribution of devices for hacking into conditional access services if their legal system does not provide for sanctions against this very specific hacking activity. It was therefore necessary to extend the provisions of Directive 98/84/EC and to create a common and effective framework at European level for the protection of these services.
10. The Council therefore authorised the Commission by Decision of 22 June 1999⁶ to represent the European Community in the negotiations on the Convention.
11. The negotiation instructions to the Commission were intended to ensure that the European Convention included definitions and measures which matched those of Directive 98/84/EC, and that there would be maximum compatibility between the two legal instruments.
12. The negotiations were successful and the Convention, adopted on 24 January 2001, is fully compatible with Directive 98/84/EC.
13. Indeed, the Convention mainly takes over the provisions of Directive 98/84/EC, thereby protecting systems based on, or consisting of, conditional access from the unlawful activities listed in Directive 98/84/EC.
14. The wording of the two texts differs slightly in places. For instance, the Convention not only defines as a criminal offence the manufacture of illicit devices but also their production. It also gives a clearer definition of the sanctions established for activities defined as unlawful, since it describes them as penal, administrative or other. However, as in Directive 98/84/EC, the sanctions must be proportionate, dissuasive and effective. In short, the different wording of the Convention of the Council of Europe by no means differs in terms of content or scope from the Community Directive.
15. The Convention is open for signature by the European Union. Furthermore, Article 11(4) explicitly provides that, in their mutual relations, Parties which are members of the European Community shall apply Community rules and shall therefore not apply the rules arising from the Convention unless there is no Community rule governing the particular subject concerned. This disconnection clause in favour of the Member States of the European Union ensures the primacy of EU rules.
16. In its second evaluation report on Directive 98/84/EC adopted on 30 September 2008⁷, the Commission indicated that the signing of the Convention by the European Union should encourage broader ratification by the Member States of the Council of Europe and thus make it possible to extend legal protection for services based on conditional access beyond the borders of the EU.
17. Consequently, the Commission recommends that the Council sign the Convention, as it will make it possible to widen the scope of the legal framework established by Directive 98/84/EC and thus make it easier to effectively combat threats to protected services.

⁶ Not published in the OJ. Ref.: 9556/99.

⁷ COM(2008) 593 final, not published in the OJ.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union and in particular Article 207(4) thereof, in conjunction with Article 218(5) thereof,

Having regard to the proposal by the Commission⁸,

Whereas:

- (1) On (...), the Council authorised the Commission to negotiate within the Council of Europe, on behalf of the European Community, a convention concerning the legal protection of services based on, or consisting of, conditional access.
- (2) The European Convention on the legal protection of services based on, or consisting of, conditional access was adopted on 24 January 2001.
- (3) The Convention establishes a regulatory framework which is virtually identical to 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 access⁹.
- (4) Signing the Convention would send a strong signal in favour of the Convention and thus help to extend the provisions of Directive 98/84/EC beyond the borders of the EU and establish a law on services based on conditional access which would be applicable all over the European continent.
- (5) The Convention entered into force on 1 July 2003 and is open for signature by the Community.
- (6) Subject to its conclusion at a later date, the Convention should be signed on behalf of the EU,

⁸ OJ C, [date], p. ...

⁹ OJ L 320, 28.11.1998, p. 54.

HAS ADOPTED THIS DECISION:

Article 1

The President of the Council shall be authorised to appoint the person(s) empowered to sign, on behalf of the EU, the European Convention on the legal protection of services based on, or consisting of, conditional access.

The text of the Convention is attached to this Decision.

Article 2

This Decision shall enter into force on the day of its adoption.

Done at Brussels,

For the Council

The President

ANNEX

European Convention on the legal protection of services based on, or consisting of, conditional access

Preamble

The member states of the Council of Europe, other States and the European Community signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Bearing in mind Recommendation No R (91) 14 of the Committee of Ministers on the legal protection of encrypted television services;

Considering that piracy of decoding equipment for encrypted services is still a problem throughout Europe;

Noting that new types of conditional access services and devices, as well as new forms of unlawful access to these, have appeared since the adoption of the above recommendation;

Noting that there is great disparity among European States on legislation aimed at protecting services based on, or consisting of, conditional access;

Noting that unlawful access threatens the economic viability of the organisations providing broadcasting and information society services and, in consequence, may affect the diversity of programmes and services offered to the public;

Convinced of the need to pursue a common policy aimed at the protection of services based on, or consisting of, conditional access;

Convinced that criminal, administrative or other sanctions can play an effective role in the prevention of unlawful activities against conditional access services;

Believing that particular attention should be given to illicit activities that are undertaken for commercial purposes;

Taking account of existing legal instruments which contain provisions aiming at the protection of services based on, or consisting of, conditional access,

Have agreed as follows:

Section I – General provisions

Article 1 – Object and purpose

This Convention is concerned with broadcasting and information society services offered against payment and based on, or which consist of, conditional access. The purpose of this Convention is to make illegal on the territory of the Parties a number of activities which give unauthorised access to protected services, and to approximate the legislation of Parties in this area.

Article 2 – Definitions

For the purposes of this Convention:

- a) "protected service" means any of the following services, when provided against remuneration and on the basis of conditional access:
- television programme services, as defined in Article 2 of the amended European Convention on Transfrontier Television;
 - radio broadcasting services, meaning radio programmes intended for reception by the public, transmitted by wire or over the air, including by satellite;
 - information society services, understood as those offered by electronic means, at a distance and at the individual request of a recipient of services;

or the provision of conditional access to the above services, considered as a service in its own right;

- b) "conditional access" means any technical measure and/or arrangement permitting access in an intelligible form, and subject to prior individual authorisation, to one of the services mentioned in paragraph a. of this Article;
- c) "conditional access device" means any equipment, software and/or arrangement designed or adapted to give access in an intelligible form to one of the services mentioned in paragraph a. of this article;
- d) "illicit device" means any equipment, software and/or arrangement designed or adapted to give access in an intelligible form to one of the services mentioned in paragraph of this article, without the prior authorisation of the service provider.

Article 3 – Beneficiaries

This Convention shall apply to any legal or natural persons offering a protected service as defined in Article 2.a above, regardless of their nationality and whether or not they come under the jurisdiction of a Party.

Section II – Illicit activities

Article 4 – Offences

It shall be unlawful to carry out one of the following activities on the territory of a Party:

- a) the manufacture or production of illicit devices for commercial purposes;
- b) the importation of illicit devices for commercial purposes;
- c) the distribution of illicit devices for commercial purposes;
- d) the sale or rental of illicit devices for commercial purposes;
- e) the possession of illicit devices for commercial purposes;

- f) the installation, maintenance or replacement of illicit devices for commercial purposes;
- g) the commercial promotion, marketing or advertising of illicit devices.

Each Party may, at any time, in a declaration addressed to the Secretary General of the Council of Europe, declare that it will also make unlawful other activities than those referred to in paragraph 1 of this article.

Section III – Sanctions and remedies

Article 5 – Sanctions for unlawful activities

The Parties shall adopt measures to make the unlawful activities established in Article 4 above punishable by criminal, administrative or other sanctions. Such measures shall be effective, dissuasive and proportionate to the potential impact of the unlawful activity.

Article 6 – Confiscation measures

The Parties shall adopt such appropriate measures as may be necessary to enable it to seize and confiscate illicit devices or the promotional, marketing or advertising material used in the commission of an offence, as well as the forfeiture of any profits or financial gains resulting from the unlawful activity.

Article 7 – Civil proceedings

The Parties shall adopt the necessary measures to ensure that providers of protected services whose interests are affected by an unlawful activity established in Article 4 above have access to appropriate remedies, including bringing an action for damages and obtaining an injunction or other preventive measure, and where appropriate, applying for the elimination of illicit devices from commercial channels.

Section IV – Implementation and amendments

Article 8 – International cooperation

The Parties undertake to render each other mutual assistance in order to implement this Convention. The Parties shall afford each other, in accordance with the provisions of relevant international instruments on international co-operation in criminal or administrative matters and with their domestic law, the widest measure of cooperation in investigations and judicial proceedings relating to criminal or administrative offences established in accordance with this Convention.

Article 9 – Multilateral consultations

1. The Parties shall, within two years from the entry into force of this Convention and every two years thereafter, and, in any event, whenever a Party so requests, hold multilateral consultations within the Council of Europe to examine the application of this Convention and the advisability of extending or revising any of its provisions, in particular as regards the definitions under Article 2. These consultations shall take place at meetings convened by the Secretary General of the Council of Europe.

2. Each Party may be represented at multilateral consultation meetings by one or more delegates. Each Party shall have the right to vote. Each State Party to this Convention shall have one vote. Concerning questions within its competence, the European Community shall exercise its right to vote and cast a number of votes equal to the number of its member States that are Parties to the Convention. The European Community shall not exercise its right to vote when the vote concerns a question which does not fall within its competence.
3. Any State referred to in Article 12, paragraph 1, or the European Community, which is not a Party to this Convention, may be represented in the consultation meetings by an observer.
4. After each consultation, the Parties shall forward to the Committee of Ministers of the Council of Europe a report on the consultation and on the functioning of the Convention, including, if it is considered necessary, proposals for the amendment of the Convention.
5. Subject to the provisions of this Convention, the Parties shall lay down rules of procedure for the consultation meetings.

Article 10 – Amendments

1. Any Party may propose amendments to this Convention.
2. Any proposal for amendment shall be notified to the Secretary General of the Council of Europe who shall communicate it to the member States of the Council of Europe, to the other States Party to the European Cultural Convention, to the European Community and to any non-member State which has acceded to or has been invited to accede to this Convention in accordance with the provisions of Article 13.
3. Any amendment proposed in accordance with the provisions of the previous paragraph shall be examined, within six months from the date on which it is communicated by the Secretary General, at a multilateral consultation meeting, where that amendment can be adopted by a majority of two-thirds of the States which have ratified the Convention.
4. The text adopted by the multilateral consultation meeting shall be submitted to the Committee of Ministers for approval. Once it has been approved, the text of the amendment shall be forwarded to the Parties for acceptance.
5. All the amendments shall enter into force on the thirtieth day after all the Parties have informed the Secretary General of their acceptance thereof.
6. On the basis of a recommendation by a multilateral consultation meeting, the Committee of Ministers may decide, by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Parties entitled to sit on the Committee, that a particular amendment shall enter into force following the expiry of a period of two years after the date on which it has been forwarded for acceptance, unless a Party has notified the Secretary General of the Council of Europe of an objection to its entry into force. Should such an objection be notified, the amendment shall enter into force on the

first day of the month following the date on which the Party to the Convention which has notified the objection has deposited its instrument of acceptance with the Secretary General of the Council of Europe.

7. If an amendment has been approved by the Committee of Ministers, but has not yet entered into force in accordance with paragraphs 5 or 6 above, a State or the European Community may not express their consent to be bound by the Convention without accepting at the same time the amendment.

Article 11 – Relationship with other conventions or agreements

1. This Convention does not affect the rights and undertakings derived from international multilateral conventions concerning special matters.
2. The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.
3. If two or more Parties have already concluded an agreement or treaty in respect of a subject which is dealt with in this Convention or otherwise have established their relations in respect of that subject, they shall be entitled to apply that agreement or treaty or to regulate those relations accordingly, in lieu of the present Convention, if it facilitates international co-operation.
4. In their mutual relations, Parties which are members of the European Community shall apply Community rules and shall not therefore apply the rules arising from this Convention except in so far as there is no Community rule governing the particular subject concerned.

Section V – Final clauses

Article 12 – Signature and entry into force

1. This Convention shall be open for signature by the member States of the Council of Europe and the other States party to the European Cultural Convention, and by the European Community. Such States and the European Community may express their consent to be bound by:
 - (a) signature without reservation as to ratification, acceptance or approval; or
 - (b) signature subject to ratification, acceptance or approval followed by ratification, acceptance or approval.
2. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.
3. This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which three States have expressed their consent to be bound by the Convention in accordance with the provisions of the preceding paragraph.

4. In respect of any signatory State or the European Community which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the expression of its consent to be bound by the Convention in accordance with the provisions of paragraph 1.

Article 13 – Accession to the Convention by non-member States

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe, after consulting the Parties to the Convention, may invite any State which is not referred to in Article 12, paragraph 1, to accede to this Convention, by a decision taken by the majority provided for in Article 20.d of the Statute of the Council of Europe and by the unanimous vote of the representatives of the Contracting States entitled to sit on the Committee.
2. In respect of any acceding State, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

Article 14 – Territorial application

1. Any State or the European Community may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.
2. Any State or the European Community may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration. In respect of such territory the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.
3. Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 15 – Reservations

No reservations may be made to this Convention.

Article 16 – Settlement of disputes

In case of a dispute between Parties as to the interpretation or application of this Convention, the Parties concerned shall seek to achieve a friendly settlement of the dispute through negotiation or any other peaceful means of their choice, including submission of the dispute to an arbitral tribunal whose decisions shall be binding upon the Parties.

Article 17 – Denunciation

1. Any Party may, at any time, denunciate this Convention by means of a notification addressed to the Secretary General of the Council of Europe.
2. Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General.

Article 18 – Notifications

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, the other States party to the European Cultural Convention, the European Community and any other State which has acceded to this Convention of:

- a) any signature in accordance with Article 12;
- b) the deposit of any instrument of ratification, acceptance, approval or accession in accordance with Articles 12 or 13;
- c) any date of entry into force of this Convention in accordance with Articles 12 and 13;
- d) any declaration made in accordance with Article 4;
- e) any proposal for amendment made under Article 10;
- f) any other act, notification or communication relating to this Convention.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Strasbourg, the 24th January 2001, in English and French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, to the other States party to the European Cultural Convention, to the European Community and to any State invited to accede to it.