



24 September 1998

A4-0325/98

\*\*\*II

## RECOMMENDATION FOR SECOND READING

on the common position established by the Council with a view to the adoption of a European Parliament and Council Directive on the legal protection of services based on, or consisting of, conditional access (C4-0421/98 - 97/0198(COD))

Committee on Legal Affairs and Citizens' Rights

Rapporteur: Mr Georgios Anastassopoulos

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PE 227.829/fin.

- \* Consultation procedure  
simple majority
- \*\*I Cooperation procedure (first reading)  
simple majority
- \*\*II Cooperation procedure (second reading)  
simple majority to approve the common position  
majority of Parliament's component Members to reject or amend the common position
- \*\*\* Assent procedure  
majority of Parliament's component Members to give assent  
but simple majority under Articles 8a, 105, 106, 130d and 228 EC

- \*\*\*I Codecision procedure (first reading)  
simple majority
- \*\*\*II Codecision procedure (second reading)  
simple majority to approve the common position  
majority of Parliament's component Members to adopt a declaration of intended  
rejection of the common position and amend the common position or confirm its rejection
- \*\*\*III Codecision procedure (third reading)  
simple majority to approve the joint text  
majority of Parliament's component Members to reject the Council text

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At its sitting of 30 April 1998 Parliament delivered its opinion at first reading on the proposal for a European Parliament and Council Directive on the legal protection of services based on, or consisting of, conditional access.

At the sitting of 16 July 1998 the President of Parliament announced that the common position had been received and referred to the Committee on Legal Affairs and Citizens' Rights.

The committee had appointed Mr Anastassopoulos rapporteur at its meeting of 14 October 1997.

It considered the common position and the draft recommendation for second reading at its meetings of 21, 22 and 23 July 1998, 2 and 3 September 1998 and 22, 23 and 24 September 1998.

At the last meeting it adopted the draft decision unanimously.

The following were present for the vote: Palacio Vallelersundi, acting chairman; Anastassopoulos, rapporteur, Añoveros Trias de Bes (for Cassidy), Barzanti, Cot, Falconer (for D. Martin), Gebhardt, Janssen van Raay, Medina Ortega, Mosiek-Urbahn, Sierra González, Ullmann and Verde i Aldea.

The recommendation for second reading was tabled on 24 September 1998.

The deadline for tabling amendments to the common position or proposals for declarations of intended rejection will be indicated in the draft agenda for the relevant part-session.

**A**  
**DRAFT DECISION**

**Decision on the common position established by the Council with a view to the adoption of a European Parliament and Council Directive on the legal protection of services based on, or consisting of, conditional access (C4-0421/98 - 97/0198(COD))**

**(Codecision procedure: second reading)**

The European Parliament,

- having regard to the common position of the Council, C4-0421/98 - 97/0198(COD),
  - having regard to its opinion at first reading<sup>(1)</sup> on the Commission proposal to the Council, COM(97) 0356<sup>(2)</sup>,
  - having regard to the amended Commission proposal COM(98)0332<sup>(3)</sup>,
  - having regard to Article 189b(2) of the EC Treaty,
  - having regard to Rule 72 of its Rules of Procedure,
  - having regard to the recommendation for second reading of the Committee on Legal Affairs and Citizens' Rights (A4-0325/98),
1. Amends the common position as follows;
  2. Calls on the Commission to support Parliament's amendments in the opinion it is required to deliver pursuant to Article 189b(2)(d) of the EC Treaty;
  3. Calls on the Council to approve all Parliament's amendments, amend its common position accordingly and definitively adopt the act;
  4. Instructs its President to forward this decision to the Council and the Commission.

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<sup>(1)</sup> OJ C 152, 18.5.1998, p. 59.

<sup>(2)</sup> OJ C 314, 16.10.1997, p. 7.

<sup>(3)</sup> OJ C 203, 30.6.1998, p. 12.

(Amendment 1)  
Recital 12a (new)

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;

(Amendment 2)  
Article 1

Not later than five years after the entry into force 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.

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.

## **B**

### **EXPLANATORY STATEMENT**

1. The purpose of the proposed Directive is to ensure an appropriate level of legal protection for television, radio broadcasting and information society services for which remuneration depends on 'conditional access' techniques such as encryption or electronic locking systems.

2. The Commission submitted its initial proposal on 22 September 1997 (see COM(97)356 final, OJ C 314, 16.10.1997, p. 7, C4-0475/97).

3. The European Parliament delivered its opinion at first reading on 30 April 1998 (Doc. A4-0136/98) on the basis of this rapporteur's report on behalf of the Committee on Legal Affairs and Citizens' Rights (PE 224.322/fin.), approving the proposal with twenty-four amendments. The main amendments tabled by Parliament had the following two goals:

- (a) to extend protection to conditional-access services seeking to protect the 'economic value' of a service and not only to ensure remuneration for it (Amendments 2, 5 and 20), and
- (b) to extend the definition of illicit activities to not only commercial activities but, more generally, to any activities for direct or indirect financial gain (Amendments 9 and 23).

4. The Commission submitted an amended proposal on 18 May 1998 (COM(1998) 332 final, C4-0318/98) incorporating, either verbatim or in essence, 18 of the European Parliament's amendments.

However, the amendments rejected by the Commission include the amendments seeking to broaden the scope of the Directive by extending coverage to all services encrypted with a view to protecting 'economic value' and not only to ensuring remuneration (Amendments 5 and 20). The Commission considered that those amendments went further than the Directive's objectives.

Nor did the Commission incorporate Amendments 9, 18 and 23, regarding them as unclear and as potential sources of legal uncertainty. Such a view on the part of the Commission is surprising, to say the least, given that the Commission entered into no discussion on these amendments at first reading, demonstrating a particularly inflexible position, which suggests that a prior political deal had been done between the Commission and Council before Parliament had even delivered its opinion at first reading.

Nor, furthermore, did the Commission incorporate Parliament's amendments modifying the definition of the terms 'conditional access device' and 'illicit device', which inserted the word 'assembled' (Amendments 21 and 22), on the grounds, according to the Commission, that the addition lacked clarity.

5. In its common position, the Council endorsed the Commission's line, deeming it inappropriate to insert the Parliament amendments seeking to extend the scope of the Directive to the protection of conditional access for reasons other than to protect remuneration (Amendments 5, 9, 11 and 20), extend the definition of illicit activities to activities in pursuit of direct or indirect financial gain (Amendments 9 and 23) or insert the word 'assembled' in the above-mentioned definitions (Amendments 21 and 22). The reason for Amendments 21 and 22, which sought to

introduce the concept of 'assembly' into the two definitions of 'devices', was that, in the opinion of many professionals, the existing definitions were too restrictive and ignored several increasingly sophisticated design and manufacturing techniques. Regrettably, the past participle 'assembled' used in the English translation is a poor rendering of the original Greek term 'συναρμολογούμενοι', the meaning of which covers the French concepts of 'connecting', 'attaching', 'combining', 'adjusting' and 'adapting'. In the light of the translation difficulties and the risk of ambiguity and/or redundancy in some language versions, your rapporteur does not intend to retable those amendments.

The Council also rejected Amendment 14, regarding as inappropriate the reference to the content of the Commission communication, and rejected Amendments 3, 4, 10, 16 and 17, taking the view that those amendments also sought to extend the scope of the Directive to the protection of conditional access for reasons other than the protection of remuneration. Plainly, this reason given by the Council for its rejection of Amendments 3, 4, 10, 16 and 17 is not relevant: the amendments have neither the purpose nor the outcome suggested by the Council. Your rapporteur therefore felt obliged to retable them, but the Committee on Legal Affairs and Citizens' Rights finally opted for an approval which might result in agreement being reached with the Council and the rapid adoption of the proposal for a directive.

Lastly, Amendments 9, 18 and much of 23 were not incorporated by the Council, which regarded them as unclear and as potential sources of legal uncertainty. Amendment 23 does indeed express a line of reasoning rejected by the Council.

In this connection, it is important to spell out the implications of Parliament's Amendment 18. It sought to make reference to Article 2a of Directive 89/552/EEC ('Television without frontiers'), as amended by Directive 97/36/EC, and hence to include cable retransmission in the scope of the Directive. The reference to Article 1(a) of Directive 89/552/EEC has implications for the primary transmission only. There were, therefore, grounds for retable Amendment 18. However, that necessity no longer existed after the adoption, on 20 July 1998, of Directive 98/48/EC amending Directive 83/189/EEC which included a definition of information society service.

Accordingly, in the proposal for a directive at issue, all services are covered:

- primary transmission: Article 2a, first indent
- radio broadcasting: Article 2a, second indent
- all other services such as video-on-demand: among information society services, i.e. Article 2a, third indent.

6. The main changes to the original proposal, set out in the common position, are as follows:

- A new Article 1 has been inserted which makes the scope of the Directive clearer.
- The definitions have been reworked for greater clarity.
- The Council has added 'rental' and 'distribution' of illicit devices to the illicit activities referred to in Article 4. These additions seem to be based on one of the components of the European Parliament's Amendment 23 (point aa), which introduces the notion of 'making available an illicit device' now incorporated into new Recital 19.
- The sanctions and remedies under Article 5 (former Article 4) have been fleshed out in order to cover the different national legal systems. The Council has replaced the words 'seizure of

illicit devices' by 'disposal outside commercial channels of illicit devices' on the ground, according to the Council, that 'seizure' can in some legal systems only be executed under criminal law. The new wording does not appear very apt: the term 'disposal' is much too ambiguous. The term 'seizure', which has a clear general meaning, regardless of its legal sense, seemed infinitely preferable. Accordingly, your rapporteur believes that the fact that a term is dependent to a greater or lesser extent on criminal law in some Member States ought not to constitute an objection, particularly since the Council itself acknowledges in new recital 21, analysed below, that the Directive may require Member States to adopt new provisions of criminal law. There were, therefore, grounds for tabling an amendment to reinstate the text of the original proposal and of Parliament's Amendment 24 as regards the words in question. However, your rapporteur was ultimately convinced by the Council's argument that the change might have prevented the final adoption of the directive and thought it better not to insist.

- In new recital 21, the Council has introduced the element of intent, enabling prosecutions brought under national legislation to be confined to perpetrators of illicit activities, within the meaning of the proposed Directive, who can be shown to have had fraudulent intent. This addition does not seem capable of modifying the scope of the Directive, particularly in view of the fact that it is not designed to reform Member States' criminal law. This new recital plainly relates only to new provisions of criminal law which Member States may think they are obliged to enact in order to comply with Article 5 (sanctions and remedies) of the proposed Directive, given that, in all legal systems, intent has no bearing at all on third-party liability. This change cannot be considered as having anything like the same implications as the amendment tabled by your rapporteur to the draft report (in point c3 of Amendment 12 in PE 224.322/A, but withdrawn when the vote was taken in committee), the aim of which was to include, as an illicit activity, 'any unauthorised access' if such access was gained 'in the knowledge' that it was unauthorised.

7. On behalf of the Commission, Mr Mario MONTI wrote to your rapporteur on 14 July 1998, stating that the Commission had been mindful of the amendments tabled by Parliament to extend protection to conditional-access services seeking to protect the 'economic value' of a service and not only to ensure remuneration for it. In this connection, Mr MONTI stated that the Commission had published<sup>(1)</sup> an invitation to tender with a view to carrying out a study, among the relevant operators, to determine whether or not it would be appropriate to extend legal protection to services using conditional access for reasons other than to ensure remuneration for them.

The Commission would appear, then, to regard the proposal for a Directive under consideration as a step towards more extensive protection.

Under the circumstances, and pending possible Commission proposals further to the study it has commissioned, your rapporteur proposes not to retable Parliament's first-reading amendments which sought to extend protection to conditional-access services seeking to protect the 'economic value' of a service and not only to ensure remuneration for it (Amendments 2, 5 and 20). He notes the Commission's formal undertaking set out in Amendment 2 to Article 7.

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(<sup>1</sup>) OJ S 131, 10.7.1998.