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

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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

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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; 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(l) 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[(5)] 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[(6)], 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;

(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 be in conformity with their national legislative and judicial systems;