



Explanatory Report to the European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access *

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Introduction and General considerations

1. The illicit reception of services based on conditional access is a widespread phenomenon throughout Europe which thus requires a response at the wider pan-European level. It was therefore considered that the Council of Europe – given its large membership and its experience and expertise in the area of media law and policy – was the appropriate forum for the preparation of a binding legal instrument aimed at the protection of services based on, or consisting of, conditional access.

2. The existence of illicit activities and devices mainly has an adverse effect on the operators and providers of remunerated conditional access services, who suffer financial losses as a result of the illicit reception of their services. There are an increasing number of illicit devices in circulation in Europe, which deprives conditional access service providers from payments which they are entitled to receive, and can sometimes even threaten their economic viability.

3. This being said, illicit access to conditional access services does not only affect the interests of organisations offering such services. It may also have indirect negative effects on others, such as the creative community, rights holders and the public in general. For instance, this type of piracy may indirectly affect the public – in particular television viewers –, since loss of profits by the organisations concerned may negatively influence programme diversity and service innovation.

4. To prevent illicit access to conditional access services, it is considered that operators should employ "self-protection" technical measures which are available to them. In some European countries, operators are even under the "obligation" of employing the most advanced conditional access techniques available, as a means of protecting their services from unlawful access. However, the authors of the Convention considered that all encryption systems or techniques used by operators, irrespective of their degree of technical advancement, "deserved" protection under the Convention. Furthermore, defining and monitoring compliance by operators with technical standards of encryption could pose practical difficulties. Therefore, whilst acknowledging the importance of "self-protection" technical measures employed by the operators themselves, these will not always be sufficient. It is therefore deemed necessary that legal measures aimed at protecting conditional access services also exist.

(*) The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community entered into force on 1 December 2009. As a consequence, as from that date, any reference to the European Community shall be read as the European Union.

5. The Council of Europe has been promoting measures against different types of sound and audiovisual piracy for a number of years now. Several legal instruments have been adopted by the Organisation, offering guidance to member States on how to combat piracy, in particular with legal or technical measures, or awareness-raising activities.

6. In this respect, particular reference is made to Recommendation No. R (91) 14 on the legal protection of encrypted television services, which was adopted by the Committee of Ministers on 27 September 1991. This Recommendation invites member states to take certain measures to combat illicit access to encrypted television services, but does not deal with all types of conditional access services, such as the emerging information society services.

7. The above Recommendation has had a significant impact at the European level, and several countries have been inspired by the principles enshrined in it when introducing national legislation on the legal protection of encrypted broadcasting services.

8. When adopted, the Recommendation was basically directed at traditional encrypted television programme services (via cable, hertzian waves or satellite), but since then, new broadcasting services (digital television, pay-per-view, near video-on-demand) and information society services (electronic games and other multimedia services) that also require protection against illicit access have appeared. Adequate anti-piracy protection is also needed in these areas to promote the development of information society services and to encourage new entrants to these markets.

9. Furthermore, account should be taken of the adoption within the European Community framework of Directive 98/84/EC on the legal protection of services based on, or consisting of, conditional access (20 November 1998). The Directive deals with the legal protection of technological measures (based on or consisting of conditional access) which are applied to secure the remuneration interests of broadcasting and information society services. It provides for a minimal level of harmonisation of national legislation in this area among the member states of the European Union, and thus ensures legal protection for conditional access service providers throughout the European Union.

10. Among non- European Union countries, the legislative approach to the problem of illicit reception of encrypted services is varied: in certain countries specific legislation to counter this problem is in place, in others there are incomplete regulations that only protect certain services (namely broadcasting services) or only penalise certain activities, and finally, in some countries there is no legal protection against the piracy of conditional access services.

11. In view of the above, and with the aim of ensuring a similar minimum level of protection of conditional access services across Europe, it was decided that a Council of Europe binding legal instrument on this matter would be desirable. In addition, a Convention at the wider European level on the legal protection of services based on, or consisting of, conditional access would be a valuable complement to the above-mentioned EC Directive 98/84/EC.

12. Against this background, the European Convention on the legal protection of services based on, or consisting of, conditional access was adopted by the Committee of Ministers on 6 October 2000 and opened for signature on 24 January 2001.

Comments on the provisions of the Convention

Preamble

13. The preamble succinctly sets out the main reasons which led the member States of the Council of Europe to elaborate a Convention on this matter (see introduction above). It underlines that providers of radio, television and information society services based on conditional access against remuneration are threatened by the existence of a parallel "industry" that manufactures, markets and distributes devices which enable unauthorised access to their services, and therefore highlights the need to pursue a common policy in Europe aimed at the protection of these services. It also stresses the value of criminal and administrative sanctions against unlawful activities, in particular to prevent future offences.

Article 1– Object and purpose

14. This article defines the objective of the Convention, which is primarily to make illegal on the territory of the Parties a number of activities which give unauthorised access to protected broadcasting and information society services.

15. Since the provision on unlawful activities which appears in Article 4 of the Convention will not be directly enforceable in most Parties, depending on their legal and constitutional system, Parties will have to take measures at the national level (for instance, the adoption of a law) to establish such unlawful activities as offences under their domestic law. Given this fact, the Convention also aims at the approximation of national legislation in this area.

Article 2 – Definitions

16. This article defines, for the purposes of the Convention, the scope and meaning of the terms employed therein:

17. "*Protected service*" means any radio, television or information society service which fulfils two basic pre-requisites: (i) it must be offered against remuneration and (ii) on the basis of conditional access (the latter will normally imply that the signals of the service will have been encrypted to ensure payment, but this is not indispensable. A conditional access service can also use other techniques - besides encryption - such as scrambling, electronic locks or passwords, which will also be protected under the Convention).

18. Other reasons for encrypting services and controlling access, such as security, privacy or the protection of rights holders, are not dealt with under the scope of the Convention. Although it was acknowledged by the authors of the Convention that the encryption of services for the purpose of protecting rights holders deserved particular attention, it was considered preferable to deal with this question in a separate legal instrument. In this respect, it should be noted that such is the approach taken in the 1996 WIPO Treaties (WCT and WPPT Treaties) and by the European Community: the Directive on copyright and related rights in the Information Society – under preparation at the time of the elaboration of the Convention – deals, *inter alia*, with the legal protection of technological measures protecting the interests of rights holders.

19. A last category of "protected service" which is established under the Convention is the provision of conditional access as such. This refers to services that provide access to other "protected" services. An example of this would be a telecommunications operator who, for instance, encrypts signals and takes care of the subscriber management system on behalf of a broadcaster.

20. As regards the definition of "*television programme services*", the Convention refers to Article 2 of the European Convention on Transfrontier Television. By reading the different sub-paragraphs of this article, the notion of "television programme service" can be constructed as meaning television programmes intended for direct reception by the public and transmitted or retransmitted by any technical means (terrestrial transmitter, cable system, satellite, etc).

21. "*Radio broadcasting services*" are defined as radio programmes intended for reception by the public, transmitted by wire or over the air, including by satellite.

22. "*Information society services*" are defined as services offered by electronic means, at a distance and at individual request of a recipient of services. These three basic criteria should be met for a service to be considered as an "information society" service.

23. When preparing the definition for "information society service", the authors of the Convention took into account other international instruments, in particular EC Directive 98/48/EC on Transparency for Information Society services.

24. The services covered under this definition for the purposes of the Convention are basically access-controlled online services offered against remuneration (irrespective of whether the receiver uses a television set, a computer screen or any other equipment to access them).

25. The definition encompasses the provision of all kinds of services on individual request, such as online professional services (banking, distance learning, stockbrokers, solicitors, travel agents and health-care services), interactive entertainment (video-on-demand and video games), online information services, electronic databases and electronic newspapers.

26. The definition excludes all services which are not offered at a distance nor via electronic means nor supplied on individual demand, such as services provided in the physical presence of the provider and the recipient, services that do not use electronic processing/inventory systems or services which are transmitted on a point to multipoint basis.

27. Many telecommunications operators now offer value-added interactive services, such as information services (traffic, weather, etc), wake-up calls, platforms for video conferences or hotel reservation. Although these services are offered upon individual request, on a distance and by electronic means, in order to fall under the scope of the Convention they would also have to be paying services and based on a conditional access technique.

28. "*Conditional access*" means any "technical measure" or "arrangement" which provides access to one of the protected services (described above) in an intelligible form, and following prior individual authorisation from the service provider to access the service.

29. "*Conditional access device*" means any "equipment", "software" or "arrangement" which is designed, developed or adapted to give access in an intelligible form to one of the protected services. This broad definition covers all types of decoding equipment, such as set-top boxes (both for analogue and digital television), smart cards or passwords which give access to a protected service.

30. "*Illicit device*" means any conditional access device (see paragraph above) that gives access to a protected service in an intelligible form, but without the authorisation of the service provider. Hence, this definition covers all types of pirate decoding devices, such as pirate set-top boxes, pirate smart cards or the unauthorised use of a password.

Article 3 – Beneficiaries

31. This article indicates that all legal or natural persons that offer a remunerated conditional access service will be protected under the Convention. The provision is based on the principle of "universal protection", which means that any persons or organisations, regardless of their nationality or place of establishment, will be offered protection under the Convention against the unlawful activities listed in Article 4, irrespective of whether reciprocal treatment is offered in the country where that person or operator is established, that is, whether protection against unlawful access is offered to foreign operators in that country.

Article 4 – Offences

32. This article establishes that it shall be unlawful to carry out a number of activities on the territory of a Party. As mentioned above, in countries where international treaties do not require an act of "reception" or "incorporation", this article will be a sufficient legal basis to make the listed activities automatically illegal in that country (in such cases, Article 4 would be a so-called "self-executing" provision).

33. In many other countries, direct applicability of this article will not be the case, and Parties to the Convention will therefore have to take "necessary measures" to prohibit and make unlawful on their territory the activities listed in Article 4. This will normally mean the adoption of legislation to this effect. However, Parties are not under the obligation of taking measures to criminalise or prosecute unlawful acts which are committed outside their territory.

34. The whole range of commercial operations associated to the illicit access to conditional access services are considered unlawful under the Convention. It is considered that particular attention should be given to the prosecution of those offences that facilitate the circulation of illicit devices at the source, such as the manufacture or production of illicit devices. The activities which are considered unlawful are the following:

(i) the manufacture or production of illicit devices for commercial purposes, which means the manufacture or production of "equipment", "software" or an "arrangement" when designed to enable illicit access to a conditional access service. It should be noted that research and development activities aimed at the subsequent manufacturing of illicit devices are not considered unlawful. The authors of the Convention acknowledged the fact that the manufacturing of illicit devices was often closely associated to or preceded by technical research, but considered that the latter type of activity should be excluded from the scope of the Convention since it could have a "stifling" effect on "licit" research as well as on technological improvements related to conditional access systems. Furthermore, determining whether research activities were taking place for a licit or an illicit purpose would be very difficult.

(ii) the importation of illicit devices for commercial purposes, which means the act of importing tangible (decoders) or intangible (software) illicit devices into the territory of a Party.

(iii) the distribution of illicit devices for commercial purposes, which covers all types of activities whereby illicit devices are distributed, for example wholesale distribution of devices.

(iv) the sale or rental of illicit devices for commercial purposes, which covers wholesale, retail sale or the leasing of any illicit device to the public. Penalising such activities is of great importance since pirate organisations generally sell or rent illicit devices at lower prices than that of lawful equipment, and are therefore "tempting" the public to buy or rent such devices.

(v) *the possession of illicit devices for commercial purposes*, which is based on the presumption that the person or organisation holding/possessing illicit devices will gain a financial profit from their subsequent distribution, sale or rental. An example would for instance be the stocking in a warehouse of a large amount of pirate decoders, since it could logically be presumed that such decoders were intended for distribution on the black market.

The existence of an illicit device in a hotel, bar or similar public place, enabling unlawful access to a protected service by a significant number of persons, will also be considered as an offence under this heading. It can be argued that in such situations the possession of an illicit device by the proprietor of the hotel or bar is for commercial purposes, although the financial gain obtained from the illicit device will in such cases be indirect or secondary.

(vi) *the installation, maintenance or replacement of illicit devices for commercial purposes*, which covers all types of commercial activities aimed at enabling the use of illicit equipment (installation) or providing after-sales services (maintenance and replacement).

(vii) *the commercial promotion, marketing or advertising of illicit devices*, which means that all commercial activities -such as advertising, direct marketing, sponsorship, sales promotion or public relations - that promote illicit equipment, software, arrangements or methods, are considered unlawful.

35. No other activities besides those mentioned in letters a. to g. of Article 4 are considered unlawful under the Convention. Parties are therefore under no obligation to take measures against other types of unauthorised access to a protected service. Nevertheless, given that the offences which appear in the Convention are a minimum, Parties are free to go beyond the list of unlawful activities mentioned in Article 4 and may decide that other types of access to a protected service without authorisation of the service provider, for example the use of an illicit device for private purposes, should be considered unlawful and subject to penal, administrative or other sanctions. In the event they do so, the Convention stipulates that the Parties may notify the Secretary General of the Council of Europe thereof. The effect of such a declaration will be that the protection of the Convention by this Party will be extended to any service provider against the additional unlawful activity committed in the Party making the declaration (opting-in clause).

Article 5 – Sanctions for unlawful activities

36. This article requires Parties to adopt measures to make the unlawful activities established in Article 4 punishable by criminal or administrative sanctions. Legislation on the protection of conditional access services against illicit access may be contained in different branches of law, such as broadcasting, telecommunications, penal or intellectual property legislation, but the Convention provides that sanctions for breaking such legislation should be of a criminal or administrative nature.

37. Furthermore, this article provides that sanctions should be "effective, dissuasive and proportionate to the potential impact of the unlawful activity". Such wording gives the national legislator considerable freedom to decide what sanctions are appropriate, but always bearing in mind that these should be proportionate to the infringing activity. Therefore, for instance, it would be disproportionate to impose a penalty of deprivation of liberty for an offence of personal use of an illicit device.

38. Although it is not mentioned in the Convention, the authors considered that for the more serious offences, the sanctions made available could, inter alia, include imprisonment and or pecuniary penalties. This type of penal response is considered justified where big decoder piracy offences entail large financial profits, because a weak response from the criminal justice system in such cases might only have a limited impact on organised crime. The mere imposition of a fine in such cases could be seen as a sort of "tax payment" by the pirate

organisation, and would not be likely to deter it from engaging in further unlawful activities. Experience has shown that an effective application of sanctioning policy by courts for serious offences can have a real dissuasive effect on the commission of illicit activities. In any event, given the fact that it is not the aim of this Convention to give detailed provisions regarding the criminal sanctions to be applied to the different offences mentioned in Article 4, the specific sanctions to be applied to the more serious offences are left to the sole decision of the Parties.

Article 6 – Confiscation measures

39. Given that adequate powers of search and seizure are an essential weapon in the fight against different types of piracy, this article requires the Parties to adopt such appropriate measures as may be necessary to enable the seizure and confiscation of 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 that may be the result of an unlawful activity.

40. The article is based on the belief that confiscation of proceeds is one of the most effective methods in combating crime. Taking into account that the undue advantage gained from most of the offences established in Article 4 is of a material nature, it is clear that measures resulting in the deprivation of property related to or gained by the offence should, in principle, be available. Subject to the domestic legislation in the Parties, such forfeited profits could be awarded to the conditional access service provider injured by the unlawful activity, as a compensation for losses suffered.

Article 7 – Civil Proceedings

41. This article requires Parties to adopt necessary measures to ensure that providers of protected services – whose interests are affected by an unlawful activity – have access to appropriate remedies. It aims at making a number of civil remedies available to persons injured by an unlawful activity, so that they may obtain financial compensation for the losses they have suffered. The remedies to be made available by the Parties should include, as a minimum, civil actions for damages, injunctions or other preventive measures.

Article 8 – International co-operation

42. The principle idea underlying this article is that the implementation of the Convention will be based on co-operation between the Parties. As regards co-operation in criminal matters, it imposes a general obligation on the Parties to afford each other all possible co-operation within the limits of the (bi- and multilateral) agreements to which they have acceded and their national law. The reference made to instruments on international co-operation is formulated in a general way. It includes the Council of Europe Conventions on extradition (ETS 24), mutual assistance in criminal matters (ETS 30), the supervision of conditionally sentenced or conditionally released offenders (ETS 51), the international validity of criminal judgements (ETS 70), the transfer of proceedings in criminal matters (ETS 73), the transfer of sentenced persons (ETS 112), the laundering, search, seizure and confiscation of the proceeds of crime (ETS 141).

43. International co-operation should be also considered where the relevant offence is not a criminal activity in both Parties concerned as well as in case where the relevant offence is made criminal by one Party but not by the other. Taking into account that the instruments on international co-operation in this field have not yet reached the degree of development that exists in the field of criminal offences, it is not feasible to extend the scope of this Convention to obligations concerning administrative offences. Nevertheless, account should be taken of already developed instruments like the Council of Europe Convention on the obtaining abroad of information and evidence in administrative matters (ETS 100).

Article 9 – Multilateral consultations

44. This article provides that the representatives of the Parties shall meet at periodic intervals in the framework of multilateral consultations within the Council of Europe, in order to examine the implementation of the Convention. The first consultation meeting will take place within two years from the entry into force of the Convention. Thereafter, such consultations shall take place every two years and, in any event, whenever a Party so requests.

45. The purpose of multilateral consultation meetings is to enable the Parties to review how the Convention is being implemented and, if it were the case, to discuss and settle any difficulties which might arise as regards such an application. Furthermore, the Parties may use such meetings to discuss whether certain provisions of the Convention should be revised or extended.

46. Multilateral consultations will not be confined to the representatives of the Parties. In accordance with Article 12, representatives of member States of the Council of Europe and the other States Parties to the European Cultural Convention, as well as the European Community, which have not yet signed or ratified the Convention, may participate in the consultations in an observer capacity.

47. The Parties will determine the rules of procedure for the conduct of multilateral consultation meetings.

Article 10 – Amendments

48. Paragraphs 2 – 5 of Article 10 foresee the normal procedure to make amendments to the Convention. In principle, amendments have to be adopted by two-thirds of all the Parties to the Convention (not just two-thirds of the Parties present at a multilateral consultation meeting) and subsequently approved by the Committee of Ministers. Amendments will enter into force on the thirtieth day after all the Parties have informed the Secretary General of the Council of Europe of their acceptance thereof.

49. Paragraph 6 of Article 10 stipulates that the Committee of Ministers may decide in certain circumstances, and on the basis of a recommendation by a multilateral consultation meeting, that amendments shall enter into force following the expiry of a two-year time lapse, unless a Party notifies the Secretary General of an objection. The possibility of having recourse to an opting-out procedure for the entry into force of certain amendments is justified by the fact that the Convention addresses technical matters and the possible need to align it rapidly with any changes in the corresponding community law. The authors of the Convention considered that this procedure, the purpose of which is to speed up the entry into force of amendments while preserving the principle of the consent of all Parties, should primarily be used for minor amendments or changes of a technical or administrative nature, unless decided by a multilateral consultation meeting and backed by the Committee of Ministers, that such a procedure be used for other types of amendments.

Article 11 – Relationship with other conventions or agreements

50. In conformity with the 1969 Vienna Convention on the law of treaties, Article 11 is intended to ensure the co-existence of the Convention with other treaties - multilateral or bilateral - dealing with matters which are also dealt with in the present Convention. Such matters are characterised in paragraph 1 of Article 11 as "special matters". Paragraph 2 of Article 11 expresses in a positive way that Parties may, for certain purposes, conclude bilateral or multilateral agreements relating to matters dealt with in the Convention. The drafting permits to deduct, a contrario, that Parties may not conclude agreements which derogate from the Convention. Paragraph 3 of Article 11 safeguards the continued application of agreements, treaties or relations relating to subjects which are dealt with in the present Convention. The situation of States Parties to the Agreement on the European Economic Area (EEA) will therefore be covered by this paragraph.

51. Paragraph 4 of Article 11 is designed to cover the particular situation of those Parties which are members of the European Community. It provides that, in their mutual relations, those Parties shall apply Community rules and shall not therefore apply the rules arising from the Convention except in so far as there is no Community rule governing the particular subject concerned. Since it governs exclusively the internal relations between Parties which are members of the European Community, this paragraph is without prejudice to the application of this Convention between those Parties which are not members of the European Community, as well as between these and those European Union member States which are Parties to the Convention.

Article 12- Signature and entry into force

52. Since those Parties to the European Cultural Convention which are not members of the Council of Europe share to a large extent the same concerns as the member States of the Organisation with regard to the issues which the Convention addresses, it was decided to open the Convention for signature by those Parties at the same time as the member States. This article also makes provision for the European Community to become a Party to the Convention.

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

53. After the Convention has entered into force, and after having consulted the contracting States, the Committee of Ministers may invite any State which is not referred to in Article 12, paragraph 1, to accede to the Convention.

Article 14 – Territorial application

54. Since this provision is mainly aimed at territories overseas, it was agreed that it would be clearly against the philosophy of the Convention for any Party to exclude from the application of this instrument parts of its main territory.

Article 15 – Reservations

55. In order to ensure a coherent implementation of the Convention and a similar level of protection in all Parties against unauthorised access to conditional access services, no reservations can be made to the Convention when signing or depositing an instrument of ratification, acceptance, approval or accession.

Article 16 – Settlement of disputes

56. This article imposes an obligation on the Parties to seek a friendly settlement of any dispute concerning the interpretation or the application of the Convention. Any procedure for solving disputes should be agreed upon by the Parties concerned. A possibility mentioned is that the dispute is submitted to an arbitral tribunal whose decisions shall be binding on the Parties.