



COUNCIL OF EUROPE    CONSEIL DE L'EUROPE

Strasbourg, 1 December 2009

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**EUROPEAN CONVENTION ON THE LEGAL PROTECTION OF SERVICES  
BASED ON, OR CONSISTING OF, CONDITIONAL ACCESS**

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**MULTILATERAL CONSULTATION MEETING  
ON THE IMPLEMENTATION OF THE CONVENTION**

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**2nd meeting  
22 October 2009  
Agora Building – Room G.02**

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**REPORT**

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Introduction

1. The second multilateral consultation meeting on the implementation of the Convention took place in Strasbourg on 22 October 2009.
2. The list of participants is set out in Appendix I. The agenda, as adopted, is shown in Appendix II; it also refers to the working documents.

**Items 1 and 2 on the agenda:            Opening of the meeting and information by the Secretariat**

3.     The Secretariat opened the meeting, welcomed the Delegates and Observers and recalled that the previous consultation meeting convoked in December 2007, had been an informal meeting due to the absence of the quorum of a majority of parties. It was noted that the Chairperson and the Vice-Chairperson of the meeting, Mr Hadjipavlou (Cyprus) and Ms Galchovski (Moldova), had reached the end of their four year mandate. According to article 7, paragraph 2 of the Rules of procedure, both could be re-elected for a second term.

**Item 3 on the agenda:            Election of the Chairperson and Vice-chairperson**

4.     Delegates noted with regret that due to a change in his duties, Mr Hadjipavlou, would not be available for a second mandate. Mr Tomislav Jelić, delegate of Croatia, was elected Chairperson and Mrs Vera Beutler, delegate of Switzerland, was elected Vice-Chairperson.

**Item 4 on the agenda:            Adoption of the agenda**

5.     The agenda, as reproduced in Appendix II, was adopted.

**Item 5 on the agenda:            Signatures and ratifications of the Convention**

6.     The Secretariat informed the participants that at present the Convention was ratified by 8 States (Bulgaria, Croatia, Cyprus, France, Moldova, the Netherlands, Romania and Switzerland) and signed by a further 3 States (Luxembourg, Norway and Russia). The observer delegate from Turkey said that his country was considering ratification of the Convention.

7.     The observer delegate from the European Commission explained that accession of the European Community/EU to the Convention required a decision by the Council, on the Commission's proposal. Last year, the Commission had initiated the accession procedure to the Convention by preparing such a proposal. Recently however, the Commission had interrupted the initiative for legal reasons: the difficulty resided in the fact that any amendment to the Convention would require approval by the Committee of Ministers. The Commission's legal service regards this procedure as incompatible with the principle of equality of parties. In this context, the observer delegate of the European Commission doubted that the EU would encourage further ratification of the Convention. Several delegates expressed their surprise and concern about this situation and expressed the hope that a legal solution could be found. It was recalled that the texts of both instruments were very similar.

**Item 6 on the agenda:            Information on the implementation of Directive 98/84/EC by a representative of the European Commission**

8.     The Observer of the European Commission made a presentation on the Directive of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access. Its provisions, similar to the ones in the Convention, had to be implemented by EU member states by 28 May 2000 or upon accession. The first application report, issued in 2003, revealed questions and concerns on the short time for implementation, the protection of copyright, the protection of conditional access services not for remuneration, evolving piracy and the differences, dissuasiveness and application of sanctions.

9. The second application report (COM (2008)593 final from 30 September 2008) had been prepared by a study on the impact of the Directive (by KEA and CERNA in December 2007) as well as by an open consultation conducted from February to April 2008. While the Directive was implemented in all 27 member States, the report revealed 4 main issues of concern:

- *a lack of cross-border offers of conditional services* due to territorial fragmentation of broadcasting rights.
- *different levels of enforcement*: due to differences in sanctions (important variations in fines and prison sanctions, some member states sanction possession of illicit devices for private use) and in the effectiveness of national authorities to act against the perpetual technological evolution of piracy.
- *ever evolving technologies*, including the appearance of new services and distribution platforms (VOD, IPTV, internet, mobile, Digital Rights Management: DRM), new kinds of piracy (blank cards with disclosure of code through internet, card sharing etc.)
- *the international dimension of piracy, the existence of safe havens outside the EU.*

10. With regard to the lack of cross-border offers, the European Commission wishes to find a legal solution for the 9 million EU citizens living in another member state wishing to watch their national TV stations. At present they can only access these channels by a so-called “Grey-Market” (the European Court of Justice is examining a test-case on the subject). The EC is conducting a survey on potential markets represented by the “Grey Markets” and is planning to set up a working group (expert group) to address this issue.

11. An expert group on the protection of conditional access services was created on 30 September 2008 to address the enforcement of the Directive and the effectiveness of national authorities to act against the perpetual technological evolution of piracy. The group had its first meeting in January 2009 and will discuss a questionnaire on the level of sanctions and enforcement during its meeting on 3 December 2009.

12. The international dimension of piracy, and the existence of safe havens outside the EU could, in principle, be effectively counteracted by ratification of the CoE Convention by the EU. However, referring to the legal obstacles to accession as described above (point 6), consideration is given to the creation of association agreements with non-EU countries.

**Item 7 on the agenda:            Exchange of views on the application of the Convention in States Parties**

**a.    Offences as specified in Article 4 of the Convention**

13.        The Croatian delegation informed the meeting that all offences specified in Article 4 were reflected in the law. In addition, the new electronic media act developed in the context of the accession procedure to the EU, also covers protection of information society services. Possession of illegal devices for private purpose is equally prohibited. The delegate from Cyprus reported that 3 court cases involving offences as specified under Article 4 are pending before a court. The possession of illicit devices for personal use is not prohibited in Cyprus. However, the question is under discussion.

**b.    Sanctions for unlawful activities (Article 5 of the Convention)**

14. The delegate from Cyprus recalled that profits from illegal activities are known to be very high, the proportionality of sanctions remains therefore a difficult issue.

**c. Confiscation measures (Article 6 of the Convention)**

15. The delegate from Cyprus highlighted that in practice it was hard to find evidence for profits or gains resulting from unlawful activity.

**d. Civil proceedings (Article 7 of the Convention)**

16. No issues were raised

**e. International co-operation (Article 8 of the Convention)**

17. None of the parties reported examples of international cooperation. It was highlighted that devices found on border-controls were mostly legal.

18. In the light of the informal discussions held in 2007, the Secretariat had carried out an inquiry among Parties to obtain information on their national legislation and concerns having relevance to the implementation of the Convention. It had furthermore been decided to address a questionnaire to member states of the Council of Europe who had not ratified the Convention. The questionnaires and the replies received are set out in Document ECCA(2009)001.

19. The first questionnaire, addressed to the 8 Parties to the Convention, had received 5 replies. In reply to question I on the national legislation of relevance to the Convention, the inquiry gathered comprehensive information of the legal provisions applicable in Croatia, Cyprus, Moldova, Switzerland and the Netherlands. Switzerland indicated that the Swiss Penal Code also prohibited private fraudulent use of protected services. Question II, relating to the efficiency of the measures, revealed that Cyprus, Moldova and the Netherlands considered the measures foreseen in the existing legislation as sufficient. Switzerland indicated that it lacked reliable data to establish whether the level of protection provided by the application of the Convention is sufficient. Parties had no or hardly any information on relevant case-law. Question III, concerned the enforcement of legislation relating to the protection of conditional access services. In their replies all Parties indicated that the development and follow-up of a policy concerning protected services is shared by different State organs/bodies. Consultation between the relevant public authorities and representatives of protected services or other stakeholders is usually held during the preparation of new legislation. Only the Netherlands replied that there were “regularly consultations and meetings between the different parties involved”. There were no examples of international cooperation.

20. The second questionnaire, addressed to the 39 Council of Europe member States that had not yet ratified the Convention, received 22 replies, 13 of which were from EU member States. In reply to Question I, relating to the legal protection of conditional services, 18 States provided information on their legislation to protect conditional access services. Albania, Bosnia Herzegovina, Montenegro and Turkey indicated that legislation on this topic was under preparation. Question II regarding the usefulness and appropriateness of the CoE Convention, received a positive reply by 16 States, 4 had no opinion and 2 were of the opinion that the corresponding EU Directive was/might be sufficient. Question III, regarding existing plans or intentions to ratify the Convention was answered negatively by 11 States; 2

States, Armenia and Turkey, indicated they were considering ratification. The 9 remaining replies contained no clear indication about the willingness to ratify. The answers to question IV relating to the existence of other international instruments/bilateral agreements of relevance to the protection of conditional access services only mentioned the Directive 98/84 EC.

21. The Association of Commercial Television in Europe had also made a contribution to the inquiry with a statement highlighting the importance of the Convention and suggesting, inter alia, that consideration should be given to extend its scope to:

- non paid conditional access services;
- the personal possession, distribution and installation of an illicit device.

22. The delegate from Cyprus indicated that, given the difficulties encountered in implementing the existing convention, it was too early to consider amendments to its text.

**Item 8 on the agenda: Follow-up and future work**

23. The Delegations from Bulgaria and Romania who had not yet replied to the questionnaire agreed to do so as early as possible.

**Item 9 on the agenda: Other business**

24. In the afternoon, the ECCA delegates participated in a hearing organised by the CDMC during which the Chair summarised the outcome of the meeting. The Secretariat gave a summary of the outcome of the inquiry. The CDMC took note of the poor level of ratifications and of the interruption of the accession procedure by the European Union. The observer delegate representing the Association of Commercial Television in Europe (ACT) underlined the importance of the Convention for protected services and indicated its readiness to encourage further ratification.

**Appendix I****List of participants****STATES PARTIES/ ETATS PARTIES****Bulgaria/Bulgarie**

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**INTERPRETERS/INTERPRETES**

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**Appendix II****Agenda**

- 1. Opening of the meeting**
- 2. Information by the Secretariat**
- 3. Election of the Chairperson and Vice-chairperson**
- 4. Adoption of the agenda**
- 5. Signatures and ratifications of the Convention**

***Working document***

- Secretariat Memorandum  
(Document ECCA(2009)002)
- 6. Information on the implementation of Directive 98/84/EC by a representative of the European Commission**
  - 7. Exchange of views on the application of the Convention in States Parties with regard to:**
    - a. Offences as specified in Article 4 of the Convention**
    - b. Sanctions for unlawful activities (Article 5 of the Convention)**
    - c. Confiscation measures (Article 6 of the Convention)**
    - d. Civil proceedings (Article 7 of the Convention)**
    - e. International co-operation (Article 8 of the Convention)**

***Working documents***

- European Convention on the Legal Protection of Services Based on, or Consisting of, Conditional Access and its Explanatory Report
  - Report of the first consultation meeting on the implementation of the Convention, including the Rules of procedure  
(Document ECCA(2004)004)
  - Responses to the questionnaire on the legal protection of broadcasting and information society services based on, or consisting of conditional access (Document ECCA(2009)001)
- 8. Follow-up and future work**
  - 9. Other business**