

[AT] Draft Conditional Access Bill Presented

IRIS 2000-4:1/23

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On 9 March 2000, the Federal Ministry of Justice submitted its draft "Federal Law on the protection of conditional access services" or Zugangskontrollgesetz (Conditional Access Act - ZuKG) for evaluation. Those invited to assess the draft were asked to reply by 4 April 2000.

The current plan is for the Conditional Access Act to enter into force on 20 May 2000, ie before the proposed deadline for transposition of the Conditional Access Directive 98/84/EC (28 May 2000).

The Conditional Access Act will regulate the legal protection of any service provider who offers television or radio programmes or information society services for remuneration and by means of conditional access.

The main legal substance of the draft is found in Article 3: "The service provider has the exclusive right to make access to a protected service in intelligible form conditional upon prior individual authorisation." As far as the background to this regulation is concerned, although it is true that the provider of a protected service may already be entitled to make claims under Bereicherungsrecht ("enrichment law", which covers claims for the recovery of goods obtained without legal cause), compensation law or competition law if that service is used illicitly, he has no comparable rights over intangible assets. In view of the specific regulatory and protective purpose of the Conditional Access Directive, a corresponding regulation is to be drawn up to protect service providers in Austria. The right of conditional access is to be recognised as an absolute right, just like copyright. Particular activities involving devices which allow access to services free of charge (eg the sale or installation of such devices) will be expressly prohibited and a comprehensive legal instrument is to be drawn up to protect providers from such practices.

This instrument makes provision for civil law claims (injunction, abatement of nuisances, compensation and restitution of profits, tendering of accounts and temporary orders) and, depending on the type of offence, penalties under criminal and administrative law. The civil and criminal law measures are modelled on the provisions of copyright law, with a few minor exceptions (eg, no compensation for intangible losses).

In accordance with the Directive, the draft Bill applies only to services provided against remuneration; free services, to which the provider controls access for non-pecuniary reasons, are not covered, at least for the time being.

Also in line with the Directive, the proposed measures do not apply to private, but only to commercial activities (professional piracy). According to the commentary accompanying the draft Bill, this is largely because the main responsibility for circumventing the duty to pay a fee lies with those who provide illicit devices; moreover, private users are often unable to tell whether the device they are being offered is illegal or not.

Other aspects of the Bill are also closely based on the Conditional Access Directive: since the Directive does not stipulate that authors and holders of performance rights should be compensated, the draft Conditional Access Act does not specifically mention this either. However, the commentary clearly states that service providers are at liberty to transfer the right to control access to a third party, in which case the right to make any related legal claims is also transferred.

The Government will bring the Bill before Parliament as soon as the Council of Ministers has reached a decision, which is expected in the near future.

Entwurf für ein Bundesgesetz über den Schutz zugangskontrollierter Dienste (Zugangskontrollgesetz), Geschäftszahl JMZ 7.051A/28-I.2/2000.

<http://www.parlinkom.gv.at/archiv/XXI.pdf/ME/00/00/000018.pdf>

Draft Federal Law on the protection of conditional access services or Zugangskontrollgesetz (Conditional Access Act), file no. JMZ 7.051A/28-I.2/2000.

