



La Quadrature du Net
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Dear Member,

On November 27th, the EU Council has reached a political agreement on the telecommunication regulation reform (“Telecoms Package”). On this respect, we would like to bring to your attention some provisions that were agreed by the Council.

We do not understand the reasons that led the Council to keep article 33 (2a), recitals 12c and 14a, and the two last sentences of recital 25 in directive 2002/22 (Universal Service) related to cooperation between content industry and Internet service providers, for the purpose of “promotion of lawful content”.

First, this article and its related recitals **open the door to implementing the graduated response in Europe**: article 33(2a) allows Member States to force Internet Service Providers to collaborate with entertainment industries without limiting the definition of the actions that might be taken in the context of this cooperation. **If article 33 references information procedures allowed by articles 21(4a) and 20(2), it does not limit the cooperation to generic information.**

Second, and as we also suggested during the first reading, **the term “promotion of lawful content” is meaningless.** An ID photo, a message on a forum or any posting on a blog are lawful content. Everything that has not been judged unlawful is lawful. Thus, who will determine what lawful content shall be promoted in the proposed cooperation? The few corporations that dominate the music and the film market, Member States or the many independent creators using Internet?

Finally, **the Telecoms Package is not the place for such a provision as everybody** (MEPs, Commission, French Presidency) has reminded us : **The Telecoms Package is not about content, but about containers.**

As a matter of fact, as shown by documents available to us¹, these provisions – as well as the term “promotion of lawful content” – **come directly from amendments written by the movie industry lobbies.** These lobbies want Member States to be able to impose the ISPs to collaborate well beyond subscriber's general purpose information. In the current state of the Telecoms Package, this would be allowed.

Therefore we ask you to **withdraw article 33(2a), recitals 12c and 14a, and the two last sentences of recital 25 of directive 2002/22** (Universal Service) that do not fit in the Telecoms Package. Their wording, purposely vague, opens the door to the “graduated response” and harms free competition as well as cultural diversity.

¹ <http://www.laquadrature.net/en/privacy-film-industry-pirates-european-law>

On the other hand, we deplore the withdrawal of amendment 138 by the Council. This amendment, adopted in first reading by more than 85% of the MEPs, recalls that *"no restriction may be imposed on the fundamental rights and freedoms of end-users, without a prior ruling by the judicial authorities, notably in accordance with Article 11 of the Charter of Fundamental Rights of the European Union on freedom of expression and information, save when public security is threatened where the ruling may be subsequent."*

Council deleted it under the pretext that *"telecoms package doesn't deal with content but with containers"*. **Such an argument is inconsistent with maintaining article 33(2a) and the above mentioned recitals** – that explicitly deal with content.

Furthermore, claiming that amendment 138 deals with content is a fallacy. As noticed by the Commission, this amendment is to be *"an important restatement of key legal principles of the Community legal order, especially of citizens' fundamental rights. It leaves Member States sufficient scope for reaching a fair balance between different fundamental rights, in particular the right to respect for private life, the right to protection of property, the right to an effective remedy and the right to freedom of expression and information."*

It is not a provision aiming at regulating content, but an **essential reminder of the acquis communautaire regarding the protection of fundamental rights** at a time when, everywhere in Europe, projects aim to transfer judicial powers to administrative authorities, if not to private actors, are being considered. This amendment will not prevent their implementations if they are justified by preventing harm to individuals (child pornography, terrorism, incitement to murder...), but will prevent drifts in regulating freedom of speech, right to information, or the processing of personal data.

Finally, as a symbol, the final withdrawal of this amendment would give a despicable image of European institutions, unable to defend what should unite them, and for the sole purpose of allowing a Member State (France in this case) to knowingly violate its citizens' rights. It is not acceptable for the legislative power to surrender to a Member State willing to adopt a law harmful for civil liberties, knowing that it will be invalidated by European courts. Such a relaxed attitude would not help MEP's image. The Parliament must protect all European citizens.

We therefore ask you to **reintroduce amendment 138 in the Telecoms Package.**

Finally we deplore that the Council has adopted a new version of article 6(6a) of directive 2002/58 (ePrivacy), that does not take into account the European Data Protection Supervisor's (EDPS) recommendations.

The EDPS' wording, adopted by the European Parliament, that emphasizes that **general principles of personal data protection also apply to their processing for security purpose**, was deleted by the Council

As a result, private actors with no contractual relationship with an Internet user, acting without a mandate from the public authorities, will be allowed to store and process his connection data, outside the protection of existing safeguards, supposedly in the name of security.

This modification is a **major breach for European citizen's privacy** and a **major regression**. As is, the Telecoms Package authorises companies to store and process personal data for arbitrary purposes and duration. These companies actually want more leeway than public authorities.

We therefore ask you to **defend article 6(6a) of directive 2002/58 as adopted by the European Parliament** in first reading, according to the EDPS recommendation, thus preserving the level of privacy protection currently in force in the EU.

According to every actor, the Telecoms Package represents a “real opportunity for Europe and an important lever for growth in the context of current crisis”. As explained above, content-related questions must not be part of it. Thus, we insist in asking for their early withdrawal, in order to allow serene work towards an inter-institutional compromise on the real stakes of the Telecoms Package.

Hoping that you will be able to take on these crucial issues, sincerely.

Jérémie Zimmermann for La Quadrature du Net