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Debunking the Council's Arguments Against Amendment 138

The European Parliament's second reading version of the Telecoms Package has yet to be formally rejected by the Council of the European Union, but closed-door negotiations are already taking place as a run-up to the upcoming conciliation procedure. On September 29th, representatives of the Council gave hints about possible justifications for opposing an amendment that protects basic freedoms in the digital age. The contentious amendment – said amendment 138 - only states:

> ***"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."***[1].

But **the arguments put forward by the Council to reject this amendment cannot mask its lack of political will to protect European citizens.**

1) "Amendment 138 is too prescriptive regarding the judicial procedures that member States should follow. The Parliament lacks competence to adopt this provision"

This argument questions the relevance of amendment 138 on the ground of the European Union institutional architecture. While **telecoms regulation (and therefore the Telecoms Package) pertains to the Community's area of competence,** amendment 138 refers to judicial procedures. Under the current version of the Treaty on European Union (TEU), judiciary affairs are an intergovernmental area, for which the Parliament has usually little powers.

It should first be noticed that the argument that the amendment would interfere with national competences in judicial matters is not credible in the light of, for instance, the copyright directive's provisions, which oblige member States to ensure that right-holders can bring actions before national courts. In this case, the Parliament has the undeniable right to adopt amendment 138, which actually directly relates to the regulation of telecommunications. It is located in Article 8.4 of the Framework directive that lists the **different principles that national regulatory authorities should follow in order to promote the interests of EU citizens**. Amendment 138 thereby protects consumers against commercial malpractices or abusive administrative sanctions. Its aim is simply to avoid discretionary restrictions of end-users' internet access that could be unilaterally decided by telecoms operators or administrative authorities. The European Union should not loose an opportunity for safeguarding the basic rights and freedoms of all Internet users[2], especially in a package that contains a directive specifically aimed at protecting consumers' rights.

Another, more political counter-argument is that when the Lisbon treaty enters into effect, the Parliament will be granted much more powers regarding civil rights and freedoms within the

1 An analysis of why the original amendment 138 matters:http://www.laquadrature.net/en/telecoms-package-why-european-parliament-must-fight-for-amendment-138
2 See counter-argument 2)

European Union. Indeed, as a consequence of article 69 E and 69 D of the TUE as resulting from the modifying treaty, **the Parliament will soon be on an equal footing with the Council with regard to judiciary affairs.** Therefore, even if it there were doubts about the Parliament's competence to pass amendment 138, this will not be true much longer and it would be futile for the Council to undermine the Parliament's power for such a reason.

2) "Amendment 138 is not clearly limited to the field of electronic communications, and seems to proclaim a general principle which would have its place not in a directive but in a treaty."

Some consider that the amendment is too broad. It does refer to "*any restrictions to fundamental rights and freedoms*", not just to Internet access. This argument is nonetheless abusive. The reason is that **it is extremely doubtful that any European court would use amendment 138 to generally object to non-judiciary infringements on fundamental rights.** Considering the article where it is located and given the general scope of the legislative text it belongs to, this amendment obviously refers to Internet access, which is implicitly - and for very good reasons - assimilated to a fundamental right. After all, **amendment 138 refers to "end-users" of electronic communications and is therefore sufficiently contextualized**.

It is also argued that a directive is not the right place for the principle embedded in amendment 138. However, as it should be clear by now, **the Telecoms Package is exactly the proper framework for asserting Internet users' rights.** A treaty is at best a long term option that would not effectively protect citizens in the face of fast-evolving commercial malpractices and dangerous national regulations.

Moreover, **amendment 138 is only a useful restatement of existing provisions.** It helps to clarify how the Internet should be regulated but, as suggested above, does not have any sweeping consequence on national legal frameworks. Fundamental rights form part of the general principles of Community law and are analogous to primary law in the Community legal hierarchy. The origin of these general legal principles is found in **Article 6 of the EU Treaty**, which **commits the Union to respect fundamental rights**, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms (EHRC) and as they result from the constitutional traditions common to the member States, as general principles of Community law. It follows that amendment 138, by reasserting the principle of exclusive competence of the judiciary authority in matter relating to fundamental freedoms, only invokes a core component of the rule of Law that member States are already obliged to comply with.

This is all the more obvious when one considers the decision rendered on June 10th, 2009 by the French Constitutional Council, which refers to long existing texts. The Council stated that:

> *"Article 11 of the Declaration of the Rights of Man and the Citizen of 1789 proclaims: '**The free communication of ideas and opinions is one of the most precious rights of man**. Every citizen may thus speak, write and publish freely, except when such freedom is misused in cases determined by Law'. I**n the current state of the means of communication and given the generalized development of public online communication services and the importance of the latter for the participation in democracy and the expression of ideas and opinions, this right implies freedom to access such services.** [...] Freedom of expression and communication are all the more precious since they are one of the cornerstones of a democratic society and one of the guarantees of respect for other rights and freedoms. Any restrictions placed on the exercising of such freedom must necessarily be*

adapted and proportionate to the purpose it is sought to achieve." (Emphasis added).

What is most striking about the Council of the European Union's refusal of amendment 138 is that the Council itself seems to share this point of view: recital 3a) of the Framework directive, which it has accepted, actually recognizes that "*the internet is essential for education and for the practical exercise of freedom of expression and access to information* (...)"[3]. Internet access is now clearly acknowledged as instrumental to freedom of expression and communication. Yet, **there is nothing radically new in the affirmation, emphasized by amendment 138, that in a country that obeys the rule of Law any restriction to fundamental rights falls under the regime of a judicial due process**. Indeed, no one other than the judicial authority can guarantee that the basic rights of the suspect - most notably the right to a due process - will be protected, and that the sentence will be proportionate to the original offense.

This principle arguably already applies to all member States by virtue of Community law, and so it is rightly reasserted in the Telecoms package. **The Commission also concurred, saying that "[*amendment 138*] *is an important restatement of key legal principles inherent in the legal order of the European Union, especially of citizens' fundamental rights*[4]". On that account, there is no reason for the Council to be reluctant to amendment 138.

3) "Amendment 138 could be (ab)used by people who don't pay their bills."

This argument suggests that, on the grounds of amendment 138, Internet users could take their Internet Service Provider to court for restricting their Internet access in the event where they had failed to pay their regular Internet subscription fees. However, **this analysis completely disregards the subtle balance stroke by amendment 138, which perfectly accommodate contract law.**

If an ISP disconnects one of its clients for default of payment, the latter has violated the contractual obligations to which he or she was bound. Whether is it is through the definitive termination of contract of the temporary suspension of their Internet connections, such a restriction to end users' access would be the result of a an anterior, legally binding agreement between the ISP and the subscriber. Such a termination is implicitly approved by users, since they have agreed to the general conditions of sale and therefore to the possibility of being disconnected in case of default of payment.

Accordingly, **such disconnections should be interpreted as the expression of the users' freedom – contractual freedom** – but by no means as an imposed restriction of their freedom of expression and communication. Likewise, thanks to that same contractual freedom, an ISP has all the rights to provide an Internet access to a deadbeat customer disconnected by one of its competitors. However, the disposition in the French "three-strikes law" that allowed an administrative body to prohibit all ISPs to reconnect alleged copyright infringers would fall under the scope of amendment 138 for disrespecting the ISPs' contractual freedom.

The rights and freedoms protected by amendment 138 include the freedom of expression and communication and contractual freedom. **The amendment as it stands guarantees a fine-drawn balance between both of them.**

3 See: http://www.laquadrature.net/wiki/Telecoms_Package_Framework_Parliament_Second_Reading#Article_8

4 See the press release, dated November 7th, 2008: http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/681&format=HTML&aged=0&language=EN&guiLanguage=fr

4) "Amendment 138 could hamper efforts against child pornography on the Internet."

This argument suggests that amendment 138 would not allow member States to take adequate measures to preserve public order and public security. It ignores that specific exceptions are typically taken into account by human rights instruments. **Rights and freedoms are always counterbalanced by the need to respect other rights and freedoms with which they may conflict**, and it would of course not go differently for the right of accessing the Internet free of arbitrary restrictions.

For example, the European Convention for the Protection of Human Rights and Fundamental Freedoms (**EHRC**) - which could and should be introduced in amendment 138 [5] - **contains an article prohibiting the "abuse of rights"**. Article 17 of the Convention provides that:

> *"Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention. "*

Furthermore, in the light of the French Constitutional Council's above-mentioned decision, it can be said that amendment 138 mostly serves to protect the freedom of expression and communication, which is protected by Article 10 of the European Convention[6]. To be sure, the article's second paragraph lays down **specific exceptions to the freedom of expression, particularly to protect "*the interests of national security, territorial integrity or public safety*".** In such cases, it will perfectly possible to deviate from the principle that only the judiciary can restrict fundamental rights and freedoms.

In the end, **it will be up to the courts - not lawmakers - to determine the fine-tuning between the different rights and freedoms at stake** in the particular cases that will be brought before them. But it is false to argue that amendment 138 illegitimately limits the powers of public authorities in their fight against cybercrime.

The Council has no valid legal reason for refusing the adoption of amendment 138. The Telecoms Package is the right place to safeguard freedoms in the 21st century, and European lawmakers should embrace the possibility of giving a clear framework to the nascent regulation of the Internet by protecting citizens' rights.

We urge the European Parliament to stand strong in favor of the original amendment 138, until the Council expresses officially its eaxct motives for refusing the text. We are then convinced that there will be ways to address their good faith concerns by adapting the wording without altering the core of this essential safeguard for Europeans citizens' fundamental rights and freedoms.

5 As a matter of fact, amendment 138 could and should probably be reworded to take into account the protests on the part of the United Kingdom and Poland, who pointed out that the Charter of Fundamental Rights of the European Union mentioned in the current redaction did not apply to their country. Hence, it would be reasonable to replace the latter by the ERCH, of which all member States are signatories.

6 Its first paragraphs provides that: "*Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*"