Analysis of some “telecom package” amendments

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## Summary

Following my first “*Note on the flexible response and the telecom package*”, which addressed the historical and political context of several dangerous amendments to the “telecom package”, this note aims at developing why these amendments should be rejected as is, and how to amend some of them.

These amendments will be referred to as “content oriented” amendments, as most of them contain the “lawful content” term (which in itself is an illogical concept from a communications point of view, as will be seen below).

## Digital vs. traditional highways

The “telecom package” is about harmonization and liberalization of telecommunication networks, including privacy issues related to the handling of private data by telecommunication operators in the context of their mission. To take an analogy in the physical world, it is a set of regulations about automobile highways, so that people can safely drive from one point to another, under the same driving rules and with the same roadsigns, and such that their car number plates and names will not be kept for purposes other than road security matters.

No European regulation on highways make mention of what people have in their trunks; this is not the place for such matters. **Consequently, discussions on content-oriented matters should not take place in this framework**, but on some other “copyright-oriented” text, if ever necessary. This is a first, major, reason for which any mention to “content oriented” matters should be removed and left to a specific text: once adopted, all new such amendments to the “telecom package”, spread in five different directives, would be hard to rework *en bloc* in the future.

Leaving aside this formal reason, it is interesting to understand what all of these amendments aim at. Basically, their purpose is to allow to turn the Internet into a privatized distribution and advertising network for the benefit of a few players, to allow national regulation authorities to implement, without any democratic control, automated tools to monitor the behavior of Internet users, even from within their own computers (a practice sometimes advocated as “trusted computing”), and to ban them without any judicial decision from this worldwide resource (in accordance to the so-called “graduated response” or “three-strikes” approach).

## “Lawful content” is a flying hippopotamus

All of the amendments at stake create a distinction between “lawful” and “unlawful” content, such that users possessing or circulating “unlawful contents” would be denied any right to fair access and service.

Making such a distinction is impossible at the communication level. For instance, a user sending a copyrighted audio file from one of his e-mail address to another may just be exercising its right to private copying, by transferring such files from his home computer to his business computer. Even two people possessing and sending child pornography pictures (an emotional argument most often serving as camouflage for the interests of big content industry players) can do it rightfully if they are policemen and judges sharing findings on investigations.

No people, and even more no automated device, can infer the “lawfulness” of content on the mere basis of the data themselves. Therefore, discrimination on access and quality of service based on these terms is just nonsense, like discussing the merits of a “flying hippopotamus”. Both words have meaning separately, but are a chimera together. Saying that the definition of “lawful content” will be left to the Member States amounts to placing each of them in an impossible position, which can only lead to confusion and lack of legal certainty: 27 people, each defining alone what a flying hippopotamus is, may surely bring diverging answers.

## A private censor in citizens' computers

These amendments were drafted and pushed forward by large content industry players in an attempt to track down Internet users who share works without the consent of their right holders. Since the phenomenon is widespread and human investigations take time, they fantasized they could rely on automated systems to do the job, and rely on access providers to filter out such “unlawful” traffic.
The only two ways to do this are either to perform filtering *a priori* by discriminating against some technologies and communication protocols such as peer-to-peer systems without considering their use (as if all SUVs were banned because some can be used to break into shops) and therefore breaking Internet neutrality, or on the fly by spying on the contents of exchanged data, breaking laws on private correspondance.
Both are useless: encrypted communications prevent intermediate agents from analyzing the contents of exchanged data, and data transfer systems can be built on top of, for instance, e-mail systems, such that fragments of files can be sent when specific e-mail headers are used. The monitoring of these exchanges, all the more when performed by private entities, will necessarily frontally conflict with the right to private correspondance and be disproportionate.
Most users, once aware that their traffic is monitored by private entities, will resort to encrypted communication. Filtering out or slowing down encrypted communication, or banning encryption software by considering it a priori an “unlawful application”, will pose high privacy, economy and security threats to businesses which need such encryption to deal with their partners (as I do).
The next step in monitoring is therefore to monitor from within the users' computers, before any encryption takes place. As we will see just below, this big-brother-like scheme is considered very seriously by the content industry.

## Analysis of the content-oriented amendments

Basing on the above, here is a short analysis of the content-oriented amendments. In order to ease the understanding of the problems, these amendments are not presented according to their place in directives or to their number.

## *Amendment 134, Harbour report (2002/58/EC, Article 2 – point 5 a (new))*

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| | (5a) Article 14(1) shall be replaced by the following:<br>"**1. In implementing the provisions of this Directive, Member States shall ensure, subject to paragraphs 2 and 3, that no mandatory requirements for specific technical features,** ***including, without limitation, for the purpose of detecting, intercepting or preventing infringements of intellectual property rights by users,*** **are imposed on terminal or other electronic communication equipment which could impede the placing of equipment on the market and the free circulation of such equipment in and between Member States.**" |

## Analysis

This amendment concentrates all the fantasies of the content industry. While it has been advocated so as to prevent filtering and censorship, it clearly aims at allowing them.

The first point to note is that it deals with "*technical features*" which may be "*imposed*" on "*terminal* [...] *equipment*", "*for the purpose of detecting, intercepting and preventing infringements of intellectual property rights by users*". According to the previous discussion on the nonsense of determining what is "lawful content", one can wonder by what means any "technical feature" (that is, basically, software) imposed to run on user's computers could "detect", "intercept" or event "prevent infringements of intellectual property rights" without preventing in the same time any legitimate copy or transmission action of the user involving his audio and video files.

Indeed, in order to perform their intended task, such software must monitor user's traffic, hard disk data, and software execution to filter out (by "intercepting" and "preventing") contents and traffic, just as did the infamous XCP "anti-copy" malware placed by SonyBMG on some of its CDs two years ago, and which compromised the integrity and security of tens of thousands of computers, offering backdoors for viruses.

Would you think normal to have a private detective (not even a policeman) in every citizens' homes, looking in their belongings and monitoring their actions to see that people do not copy books, eventually phoning their boss to ask if some book is legal or not? Funnily enough, all of this totalitarian monitoring is not targeted against child pornography; too bad for the camouflage...

The only condition to the implementation of this monitoring is the fact that equipment can freely circulate on the market. Of course, computers can already freely circulate, and mandatory software can be installed afterwards in each Member State when setting up the local connection with the access provider.

## *Proposed action*

Since its proponents swear that this amendment aims at preventing filtering, they should welcome a

split vote to remove the second part of it and have it just say: "*In implementing the provisions of this Directive, Member States shall ensure, subject to paragraphs 2 and 3, that no mandatory requirements for specific technical features, including, without limitation, for the purpose of detecting, intercepting or preventing infringements of intellectual property rights by users, are imposed on terminal or other electronic communication equipment*"**.**

If the removal of the second part is not voted, then the amendment as a whole should be rejected. For the sake of simplicity, this latter action can also be the only one to be taken.

## *Amendment 148, Harbour report (Appendix I – Part B – point b b (new))*

(only relevant fragment of text shown)

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| [...] | (bb) Protection software<br>Member States shall ensure that national regulatory authorities are able to require operators to make available free of charge to their subscribers reliable and easy-to-use protection and/or filtering software to control access by children or vulnerable people to unlawful or dangerous content. |

## Analysis

Taking the pretext of child pornography, this article also wishes that users make use of filtering software aimed at filtering "unlawful content". Like for "unlawfulness", "dangerousness" cannot be determined on an automatic basis. Most filtering software for children are based on a "white listing" basis: only websites listed in an externally maintained "white list" are accessible, all of the rest of the Internet being inaccessible.

This technology is mostly applicable to websites, and most often not to individual content within websites (such as individual video pages in a website like YouTube), making most community-oriented websites out of reach. White lists are consequently very limited in size, compared to the breadth of the Internet, and possess implicit biases on the accessible content (not all websites of the same kind are accessible). These systems should therefore by no means be mandatory for the general population.

In order for citizens to exercise their freedom of choice, and to prevent any anti-competitive bias, the contents of such lists should be under the full control of the subscribers themselves, according to the needs and wishes of their vulnerable family members.

## Proposed action

This amendment should be reworded in the following way: "*Member States shall ensure that national regulatory authorities are able to require operators to make available free of charge to their subscribers reliable and easy-to-use protection and/or filtering software to limit access by children or vulnerable people to content suitable to them, on a freely and fully configurable basis"*.

Else, the amendment should be rejected.

## *Amendment 81, Harbour report (2002/22/EC, Article 22 – paragraph 3)*

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| 3. In order to prevent degradation of service and slowing of traffic over networks, ***the Commission may, having consulted the Authority, adopt technical implementing measures concerning minimum quality of service requirements to be set by the national regulatory authority on undertakings providing public communications networks.*** | 3. ***A national regulatory authority may issue guidelines setting minimum quality of service requirements, and, if appropriate, take other measures,*** in order to prevent degradation of service and slowing of traffic over networks, ***and to ensure that the ability of users to access or distribute lawful content or to run lawful applications and services of their choice is not unreasonably restricted. Those guidelines or measures shall take due account of any standards issued under Article 17 of Directive 2002/21/EC (Framework Directive).*** |
| These measures designed to amend nonessential elements of this Directive by supplementing it shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 37(2). ***On imperative grounds of urgency, the Commission may use the urgency procedure referred to in Article 37(3).*** | ***The Commission may, having examined such guidelines or measures and consulted [xxx], adopt technical implementing measures in that regard if it considers that the guidelines or measures may create a barrier to the internal market. Those*** measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 37(2). |

## Analysis

This amendment doubly weakens consumer rights. Basing on the "lawfulness" of contents, it states that:

1. When the content or the service is assumed to be "unlawful", users cannot expect any guarantee of service and consequently cannot complain to their provider,
2. Even in the case of "lawful" content or service, "reasonable restrictions" can occur.

This amendment aims at legalizing all filtering measures that the content industry could impose to access providers through national regulation authorities according to the "three-strikes approach", or that access providers might implement themselves.

Indeed, several users who use peer-to-peer software to download their Linux distributions have evidenced deliberate slowing down of peer-to-peer traffic, compared to other types of traffic, performed by access providers in violation to their obligations. According to the terms of this amendment, this could be seen as a "reasonable restriction" compared to the interests of the content industry in limiting peer-to-peer sharing of their copyrighted works. All such filtering measures are likely to slow down "lawful" traffic, which would create battalions of infuriated users who could dare to sue their providers.

### Proposed action

As tying iron balls to the feet of all citizens to prevent theft can be seen as disproportionate, so is slowing down or degrading traffic of all users to hinder copyright infringement. According to the principle of Net neutrality, users' rights to unfiltered and full-speed traffic should be guaranteed,

irrespective of its type.

The sentence "***to ensure that the ability of users to access or distribute lawful content or to run lawful applications and services of their choice is not unreasonably restricted"*** should therefore be amended as: "***to ensure that the ability of users to access or distribute content or to run applications and services of their choice is guaranteed***".

If this sentence is not voted in a competing amendment, then all of this amendment should be rejected.

Not mentioning that users must only perform legal actions with their Internet access does not at all mean that illegal actions are encouraged. As it is not up to highway regulations to deal with the origin of goods people have in their trunks, because other regulations specifically address this problem, content-oriented matters should belong to an other regulation. Else, all laws would be crippled by references to all of the illegal things that people should not do in the course of their life.

## *Amendment 12, Harbour report (2002/22/EC, Recital 14 a (new))*

### Proposed action

Like for the above Amendment 81, the "to ensure that users' access to particular types of content or applications is not unreasonably restricted" sentence should be amended into "to ensure that users' access to particular types of content or applications is guaranteed".

## *Amendment 19 of CULT opinion, Trautmann report (2002/21/EC, Article 1 – point 8 e amending point g a (new))*

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| **(g) applying the principle that end-users** should be able to access *and distribute* any lawful applications and/or services of their choice. | **(g) applying the principle that end-users** should be able to access any lawful applications and/or services of their choice. |

## Analysis

The justification for deleting the "*and distribute*" mention is very interesting: "*The mention to distribution is confusing as far as it may be interpreted as if the Directive provision creates a new right for the users to publicly communicate legal content, right which according to the law of intellectual property belongs exclusively to rights owner or a third party authorised by him*".
**This is a perfect example of how content-oriented amendments should not mix with a communication-oriented directive**. The "*and distribute*" term means that any user of some communication network is entitled to be a source of information in the network, and to diffuse information to other.
As understood by the content-oriented industry, it is a threat to their monopoly of diffusion, hence their will to remove the term although the Internet is now the place of much user-generated content. Note also the assumption that such user-generated content could not possibly be itself "legal" content.

### Proposed action

Vote against.

## *Amendment 61, Trautmann report (2002/21/EC, Article 8 – paragraph 4)*

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| (g) applying the principle that end-users should be able to access and distribute any lawful content and use any lawful applications and/or services of their choice. | ***(g) applying the principle that end-users*** should be able to access and distribute any lawful content and use any lawful applications and/or services of their choice **and for this purpose contributing to the promotion of lawful content in accordance with Article 33 of Directive 2002/22/EC (Universal Service Directive)**. |

## Analysis

According to this amendment, not only should users have their access not guaranteed if they were to distribute "unlawful content" or run "unlawful applications", but they should also see part of their monies be used to "promote lawful content". No doubt that, because of reduced message length, most of such messages would encourage users to download their songs from paying sites, and forget to say that peer-to-peer systems allow one to access free, creative-commons licensed, content. This measure can therefore be seen as adding potential distortion in competition.

### Proposed action

All references to "lawful" versus "unlawful" should be removed, as well as the last part of the sentence. It should be amended as: "(g) applying the principle that end-users should be able to access and distribute any content and use any applications and/or services of their choice".

Else, the amendment should be rejected.

## *Amendment 20 of CULT opinion, Trautmann report (2002/21/EC, paragraph 4 point g a (new))*

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| | ***(ga) ensuring the cooperation of undertakings providing electronic communications networks and services with the sectors concerned for the purposes of the protection and the promotion of lawful content over electronic communications networks and services.*** |

## Analysis

As for the aforementioned one, this amendment also wishes to compel access providers to be the advertisers and private police of the content industry.

**Proposed action**

**Vote against.**

## *Amendment 9, Harbour report (Recital 12 c (new))*

| | |
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| | ***(12c) In order to address public interest issues with respect to the use of communications services, and to encourage protection of the rights and freedoms of others, the relevant national authorities should be able to produce and have disseminated, with the aid of providers, information related to the use of communications services. This information should include warnings regarding copyright infringement, other unlawful uses and dissemination of harmful content, and advice and means of protection against risks to personal security, which may for example arise from disclosure of personal information in certain circumstances, privacy and personal data. The information could be coordinated by way of the cooperation procedure established in Article 33(2a) of Directive 2002/22/EC. Such public interest information should be produced either as a preventative measure or in response to particular problems, should be updated whenever necessary and should be presented in easily comprehensible printed and electronic formats, as determined by each Member State, and on national public authority websites. National regulatory authorities should be able to oblige providers to disseminate this information to their customers in a manner deemed appropriate by the national regulatory authorities. Significant additional costs incurred by service providers for dissemination of such information, for example if the provider is obliged to send the information by post and thereby incurs additional postage costs, should be agreed between the providers and the relevant authorities and met by those authorities. The information should also be included in contracts.*** |

## Analysis

**This is not only another amendment inciting on advertising on "lawful content" and "lawful uses", as well as on the "*rights and freedoms of others*". It also contains the frame of the "three-strikes approach", by enabling "*relevant national authorities*" to issue, inter alia, "*warnings regarding copyright infringement*", information which could be produced "*in response to particular problems*" and "*be sent by post*". So many similarities with the "three-strikes approach" are not coincidental.**

### Proposed action

**Content-oriented phraseology is so intricated in the amendment that it is almost impossible to extract it. As it is just a recital, vote against.**

## *Amendment 76, Harbour report (Article 1 – point 12 – paragraph 4 a (new))*

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| | ***4a. Member States shall ensure that national regulatory authorities oblige the undertakings referred to in paragraph 4 to distribute public interest information to existing and new subscribers where appropriate. Such information shall be produced by the relevant public authorities in a standardised format and shall inter alia cover the following topics:***<br>***(a) the most common uses of electronic communications services to engage in unlawful activities or to disseminate harmful content, particularly where it may prejudice respect for the rights and freedoms of others, including infringements of copyright and related right, and their consequences; and***<br>***(b) means of protection against risks to personal security, privacy and personal data in using electronic communications services. Significant additional costs incurred by an undertaking in complying with these obligations shall be reimbursed by the relevant public authorities.*** |

## Analysis

Item a) of the above amendment is likely to be used in a way to bias the cultural market in favor of dominant players and at the detriment of self-produced small groups seeking publicity over the Internet my means of tools such as peer-to-peer systems, which are most often depicted as tools used solely in the purpose of copyright infringement.

## Proposed action

Ask for a split vote removing item a).

### *Amendment 67, Harbour report (Article 1 – point 12)*

## Analysis

Another advertising amendment.

## Proposed action

Vote against.

### *Amendment 70, Harbour report (Article 1 – point 12)*

## Analysis

Provisions of the original text exist elsewhere, and mentions to “lawful” content had to be deleted.

## Proposed action

Vote for.

### *Amendment 71, Harbour report (Article 1 – point 12)*

## Analysis

Same as above.

## Proposed action

Vote for.

### *Amendment 62, Harbour report (Article 1 – point 12)*

(only relevant fragment of text shown)

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| [...] | [...]<br>***- information on any restrictions imposed by the provider regarding a subscriber's ability to access, use or distribute lawful content or run lawful applications and services,***<br>[...] |

## Analysis

Mentions on “lawfulness” should be removed.

## Proposed action

Ask for a split vote removing the two “lawful” mentions. If they are not removed, vote against.

## *Amendment 75, Harbour report (Article 1 – point 12)*

(only relevant fragment of text shown)

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| [...] | [...]<br>***(c) inform subscribers of any change to any restrictions imposed by the undertaking on their ability to access, use or distribute lawful content or run lawful applications and services of their choice;***<br>[...] |

## Analysis

Mentions on “lawfulness” should be removed.

## Proposed action

Ask for a split vote removing the two “lawful” mentions. If they are not removed, vote against.

## *Amendment 11, Harbour report (Recital 14 (new))*

| | |
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| (14) A competitive market should ensure that end-users are able to access and distribute any lawful content and to use any lawful applications and/or services of their choice, as stated in Article 8 of Directive 2002/21/EC. Given the increasing importance of electronic communications for consumers and businesses, users should in any case be fully informed of any restrictions and/or limitations imposed on the use of electronic communications services by the service and/or network provider. ***Where there is a lack of effective competition, national regulatory authorities should use the remedies available to them in Directive 2002/19/EC to ensure that users' access to particular types of content or applications is not unreasonably restricted.*** | ***(14) End-users should decide what lawful content they want to be able to send and receive, and which services, applications, hardware and software they want to use for such purposes, without prejudice to the need to preserve the integrity and security of networks and services.*** A competitive market ***with transparent offerings as provided for in Directive 2002/22/EC*** should ensure that end-users are able to access and distribute any lawful content and to use any lawful applications and/or services of their choice, as stated in Article 8 of Directive 2002/21/EC. Given the increasing importance of electronic communications for consumers and businesses, users should in any case be fully informed of any restrictions and/or limitations imposed on the use of electronic communications services by the service and/or network provider. ***Such information should, at the option of the provider, specify either the type of content, application or service concerned, or individual applications or services, or both. Depending on the technology used and the type of restriction and/or limitation, such restrictions and/or limitations may require user consent under Directive 2002/58/EC (Privacy Directive).*** |

## Analysis

In spite of what the beginning of the amendment claims, this amendment deprives users from the ability to use any software application of their choice to exchange data. The "*without prejudice to the need to preserve the integrity and security of networks and services*" clause may be understood in a way that using software to access some service, different from the one recommended by the provider of this service, could be seen by the provider as a threat to the integrity of this service.

### Proposed action

Vote against.

Also, a specific amendment should be drafted so as to remove all "lawful" mentions in the original text of the Commission.

## *Amendment 81, Harbour report (Article 1 – point 13 b)*

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| 3. In order to prevent degradation of service and slowing of traffic over networks, ***the Commission may, having consulted the Authority, adopt technical implementing measures concerning minimum quality of service requirements to be set by the national regulatory authority on undertakings providing public communications networks.*** | ***3. A national regulatory authority may issue guidelines setting minimum quality of service requirements, and, if appropriate, take other measures,*** in order to prevent degradation of service and slowing of traffic over networks, ***and to ensure that the ability of users to access or distribute lawful content or to run lawful applications and services of their choice is not unreasonably restricted. Those guidelines or measures shall take due account of any standards issued under Article 17 of Directive 2002/21/EC (Framework Directive).*** |
| ***These*** measures designed to amend nonessential elements of this Directive by supplementing it shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 37(2). On imperative grounds of urgency, the Commission may use the urgency ***procedure referred to in Article 37(3).*** | ***The Commission may, having examined such guidelines or measures and consulted [xxx], adopt technical implementing measures in that regard if it considers that the guidelines or measures may create a barrier to the internal*** market. Those measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 37(2). |

## Analysis

As for the above amendment, quality of service is no longer guaranteed to users.

### Proposed action

Vote against.

## *Amendment 120, Trautmann report (2002/20/EC, Appendix I – Part A – point 19)*

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| ***19. Compliance with national measures implementing Directive 2001/29/EC of the European Parliament and of the Council and Directive 2004/48/EC of the European Parliament and of the Council.*** | ***deleted.*** |

## Analysis

The justification of the amendment perfectly matches our analysis: "*It would be more efficient and welcome if discussion on the protection of copyright and related issues on electronic communications networks would be dealt with within the Content Online consultation. This initiative intends to create the right environment for a dialogue where all stakeholders from across the electronic value chain can work together to find solutions that are based on self-regulation and*

*will be supported by all stakeholders*".

### Proposed action

Vote for.

## Conclusion

This note has shown that all "content-oriented" amendments inserted into the five directives of the "telecom package" should not belong to them, all the more they aim at surrogating the Internet to the interests of very limited, albeit highly vocal, private interests.

Great care should be taken that amendments of this kind, whether compromise or even oral, do not sneak into the directive at the final stages of voting. As a rule of thumb, all amendments mentioning "unlawful content" or "copyright infringement", all actions which cannot be determined in the due course of transmission, should be rejected.