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Improving Amendment 138 While Preserving its Core Principles

The Council of the European Union opposes amendment 138 for reasons that are still unclear. However, the Commission has come up with a new proposal, supposedly backed by the Council, which could allow for worrying exceptions to the fundamental rights guaranteed by Community law. However, there are good-faith concerned about the current wording of amendment 138. Although its core principles need to be preserved, amendment 138 can and should be improved to better respect the Community legal order.

This memo aims to:

i) point out the dangerous elements of the Commission's new proposal;
ii) outline various aspects of amendment 138 that could be improved to better fit Community law;
iii) explains how a reworded provision that would preserve the core principles of amendment 138

Amendment 138	**Commission's new compromise proposal**
Article 8.4.g of the Framework Directive.	Article 1.3.a of the Framework directive.
(...) 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 in which case the ruling may be subsequent.	*Measures taken by the Member States regarding end-users' access to and use of services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons, including in relation to privacy, freedom of expression and access to information and due process and the right to effective judicial protection in compliance with the general principles of Community law. Any such measure shall in particular respect the principle of a fair and impartial procedure, including the right to be heard.* *This paragraph is without prejudice to the competence of a Member State to determine in line with its own constitutional order and with fundamental rights appropriate procedural safeguards assuring due process. These may include a requirement of a judicial decision authorising the measures to be taken and may take account of the need to adopt urgent measures in order to assure national security, defence, public security and the prevention, investigation, detection and prosecution of criminal offences".*

1) The dangerous elements in the Commission's new proposal

The Commission's proposal reduces the scope of the guarantees granted to end-users

The first paragraph of the Commission's proposal stresses the need for **measures taken by Member States** on end-users' access and use of services to respect a specific set of fundamental rights and freedoms in compliance with the general principles of Community law.

Although it is totally acceptable to clearly acknowledge the specific rights and freedoms that my be adversely affected by certain measures restricting people's Internet access, the Commission's proposal is more restrictive when compared to the field of actual measures that fall under the scope of amendment 138.

To be sure, the guarantees provided by **amendment 138 cover all restriction** that may be imposed on the fundamental rights and freedoms of Internet end-users. Therefore, it goes beyond measures taken by public authorities and covers also that of, say, private actors. For instance, discriminatory practices by network operators' exceeding reasonable network management practices would be forbidden without a judge's approval. **Amendment 138 thereby ensure Net neutrality, and protects users against both commercial malpractices and abusive administrative sanctions**.

It follows that the Commission's reference to "measures taken by Member-States" is not satisfactory. **This wording represents a significant drawback compared to wide reach of amendment 138**. On that account, **the Parliament should seek to re-introduce the principle that any restriction to people's Internet access falls under the regime of fundamental rights protection**.

The Commission's proposal includes dangerous exceptions that disrespect Community law

The second paragraph of the Commission's proposal **lists specific exception to the protection of fundamental rights** laid down in the first paragraph. Namely, Members States would be allowed to infringe on fundamental rights in order to take "*urgent measures to safeguard national security, defence, public security, and the prevention, investigation, detection and prosecution of criminal offences*".

Clearly, **the list of exceptions to the general principle of complete protections of human rights is much more extensive than that voted by the Parliament in second reading**. Amendment 138 provides that restrictions to end-users' fundamental rights cannot be imposed without a prior ruling of judiciary authorities, "*save when public security is threatened in which case the ruling may be subsequent*". The set of exceptions mentioned in the amendment is therefore much narrower than in the Commission's proposed wording.

Moreover, the Commission's proposal falls under the scope of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), which **already provides general and specific exceptions to the rights and freedoms it aims at protecting**. The European Court of Human Rights gives Member States the possibility to derogate from certain right guaranteed by the Convention on **compelling public-interest grounds**. Moreover, article 10 ECHR, which defines the freedom of expression's protection, lays down **specific exceptions to the freedom of expression**, which are the only situations where an interference is allowed, under certain conditions (as the respect of other principles as the assessment of the pressing social need or the proportionality of the interference). Interferences are particularly permitted to protect "*the interests of national*

security, territorial integrity or public safety (...)"[1]. Clearly, t**he Commission's proposal violates the ECHR given that the reach of the exceptions is substantially wider than what is allowed by the Convention**. It also allows for exceptions to the protection of the freedom of expression, which go against the very **conditions** of the protection of the freedom of expression as prescribed by the ECHR. In these respects, the proposal seems to contradict Community law.

In the end, except in case of public emergency, **it will be up to the judge - not administrative authorities - to determine whether the specific exceptions to fundamental rights are legitimate and proportionate** considering the goal they pursue. What is for sure it that there is no need to include a specific list of exceptions to the guarantees regarding access to the Internet offered in the Telecoms Package. Existing texts and case law already provide such exceptions.

2) Improving amendment 138

Referring to Community law and the European Convention of Human Rights rather than the Charter of Fundamental Rights of the European Union

Amendment 138 mentions the Charter of Fundamental Rights of the European Union. This has been a source of concern for Member States, and especially the United Kingdom and Poland since neither country is subjected to the Charter. In addition, so far the Charter is not part of Community law and the European Court of Justice is not competent to interpret its provisions. **There is consequently quite a lot of uncertainty as to whether the Charter offers sound protections of the rights and freedoms at stake in amendment 138**.

In that respect, t**he Commission's proposal is more appropriate since it refers explicitly to the general principles of the whole European Union law**. 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 ECHR and as they result from the constitutional traditions common to the member States.

In that regard, the Commission's provision gives clear evidence of the central place of fundamental rights in the Community legal order, and puts the protection of rights and freedoms on the Internet under the umbrella of the ECHR, to which all Member States are subjected. **The final text should therefore mention the ECHR and other general principles of Community law rather than the Charter of Fundamental Rights of the European Union.**

Restricting the scope of amendment 138 to the sole access to the Internet

Some consider that the amendment is too broad. It does refer to "*any restrictions to fundamental rights and freedoms*", not just to Internet access. The argument is nonetheless abusive. The reason is that **it is very dubious that any European court would use this amendment to generally object to non-judiciary infringement 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

1 Article 10 ECHR §2: "*The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.*"

for good reasons - assimilated to a fundamental right. After all, amendment 138 refers to "end-users" and is therefore sufficiently contextualized.

Nevertheless, **if this point proved to be a stalemate for the Council, the amendment could be reworded in order to specify that it only addresses "access and usage of the Internet"**. It would make even more clear that amendment 138 is legal under article 95 CE (see infra).

3) Preserving the core principles of Amendment 138

Referring to the judiciary authorities

More surprisingly, the mention of "judiciary authorities" has also raised a lot of questions among Member States. This reference was intended to compel national lawmakers to **make sure that declaration of illegality and/or penalties leading to a restriction of people's Internet access – most especially in the case of "three strikes" repressive schemes – would not abusively infringe on end-users' rights**. By doing so, the Members of the Parliament demonstrated their understanding that, given the many implications of sanctions like Internet cut-off on fundamental rights, only a prior judiciary ruling could guarantee the proportionality of such sentences (see infra).

In a country that respects the separation of powers, it is the judiciary who is in charge of protecting people from arbitrary limitations of their fundamental rights and freedoms. **In some countries, non-judiciaries but nonetheless independent courts may have sanctions powers, but these remain quite limited by national courts, especially with regards to the freedoms that can be limited and of the possible extent of these limitations,** in order to maintain a adequate separation of powers. For instance, in its decision[2] against the "three strikes" law in France, the Constitutional Council refused to give to an independent administrative agency the power to order the suspension of suspect's Internet access[3]. The decision echoes the conditions set by France's highest jurisdiction the sanction powers of all administrative agencies. More specifically, in its decision on July 28th, 1989[4], the French Constitutional Council has imposed three general conditions to the constitutional validity of the sanctioning power of independent administrative agencies:

1. that these agencies are in actual fact independent from the executive branch;
2. that their sanctioning power are restricted by "appropriate safeguards to ensure the rights and freedoms that are constitutionally guaranteed" (due process);
3. that the sanctions they adopt do not constitute a deprivation of liberty.

Because the Internet is now widely recognized as essential to the practical exercise of the freedom of expression and communication[5], **restrictions to a free Internet access**

2 Decision n° 2009-580 of June 10th 2009: *http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/2009/decisions-par-date/2009/2009-580-dc/version-en-anglais.45883.html*

3 According the Council, "*The powers to impose penalties created by the challenged provisions vest the Committee for the protection of copyright, which is not a court of law, with the power to restrict or deny access to the internet by access holders and those persons whom the latter allow to access the internet (...) The powers of this Committee may thus lead to restricting the right of any person to exercise his right to express himself and communicate freely, in particular from his own home. In these conditions, in view of the freedom guaranteed by Article 11 of the Declaration of 1789, Parliament was not at liberty, irrespective of the guarantees accompanying the imposition of penalties, to vest an administrative authority with such powers for the purpose of protecting holders of copyright and related rights.*"

4 See Decision n° 89-260 DC of July 28th, 1989: *http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-par-date/1989/89-260-dc/decision-n-89-260-dc-du-28-juillet-1989.8652.html*

5 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 (...).*" See: *http://www.laquadrature.net/wiki/Telecoms_Package_Framework_Parliament_Second_Reading#Article_8*.
See also, Recommendation CM/Rec(2008)6 of the Committee of Ministers of the Council of Europe to member states on measures to promote the respect for freedom of expression and information with regard to Internet filters, adopted by the Committee of Ministers on 26 March 2008 on the 1022nd Meeting of the Ministers' Deputies where the Committee of Ministers sates that "*any intervention by member states that forbids access to specific Internet content may constitute a restriction on freedom of expression and access to information in the online environment and that such a restriction would have to fulfill the conditions in Article 10, paragraph 2, of the*

equate to a deprivation of this freedom. In countries that respect the separation of powers, domestic legal systems grants the judiciary branch the exclusive power to declare a given sentence to be proportionate to the original offense and to guarantee the proper assessment of illegality[6].

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 (see infra).

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*[7]"**. On that account, there is no reason for the Council to be reluctant to amendment 138.

Yet, although the intervention of the judiciary authorities in matters relating to **citizens' fundamental rights and freedoms is arguably a common tradition across the European Union**, representatives of the Council as well as the Parliament's legal services[8] have argued that the Community had no powers on the Member States judicial system[9]. It is true that the Telecoms Package falls under the Community's competence by virtue of article 95 CE, which describes the procedures for all legislation relating to the internal market. However, even though judicial procedures are not explicitly covered by this article, the European Court of Justice (ECJ) makes a rather broad interpretation of article 95 CE. Interestingly, **the Court accepts that harmonizing measures pursuant to article 95 CE can have an impact on other Treaty provisions that do not pertain to the Community's filed of competence**[10], and so amendment 138 as it stands seems to fit current Community case law.

In this case, the Parliament has the undeniable right to adopt amendment 138, since it actually directly relates to the regulation of telecommunications by ensuring that users will not suffer from restrictions to their Internet access. 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 helps avoid discretionary restrictions of end-users' Internet access that could be unilaterally decided by telecoms operators or administrative authorities.

The requirement of a prior ruling

The most fundamental aspects of amendment 138 lies in the **requirement of a "prior ruling" to ensure the legality of any imposed restriction of one's Internet access**. This is this idea of prior ruling that makes amendment 138 so important. This core principle is

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European Convention on Human Rights and the relevant case law of the European Court of Human Rights" and further stressed *"the public service value of the Interns people's significant reliance on the Internet as an essential tool for their everyday activities (communication, et, understood ainformation, knowledge, commercial transactions, entertainment) (...)."*
http://wcd.coe.int/ViewDoc.jsp?
id=1266285&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75

6 The intervention of the judiciary is all the more necessary when one considers how difficult it is to asses the proportionality of sanctions relating to activities carried on in the cybserpace.

7 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*

8 See the services' legal opinion: *http://www.laquadrature.net/wiki/EP_legal_service_138_analysis*

9 This argument might not be accurate. Many directives entail consequences on national judicial procedures. See for instance the directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Article 8

10 See an analysis of the judgement of the Court on Tobacco Advertising Ban, December 12th, 2006: *http://merlin.obs.coe.int/iris/2007/2/article4.en.html*

absolutely necessary for two main reasons.

First, any restriction of end-users' Internet access is a **deprivation of liberty**. Even when they are not criminal sentences instituted by law, such restrictions undermine people's freedom of expression and communication and right to protection of their privacy in the digital environment, especially because of the collateral damages that are inherent to any technical means that allow such restrictions. This means that **these restrictions represent very severe measures, which should carry the most important safeguards**, except in case of compelling public-interest motives.

Second, to respect general principles of Community law, any such restrictions should be proportional to the aim pursued. **A prior judgement is thus necessary to ensure that the restrictions are proportionate and legitimate**, which is extremely complex to establish in the case of online activities. Again, the **technical complexity** of the online world challenge traditional legal principles, and considering the fundamental rights at stake it is indispensable that a careful examination by a competent authority be the only one entitled to order restrictions to individual's Internet access.

The **right to an effective remedy**, guaranteed by Community law and which refers to a subsequent review of a decision already taken, describes the **possibility to challenge a decision that limits one's fundamental right**. But if the original decision does not properly assesses the proportionality of restrictions to one's Internet access and is nevertheless put into effect, then it means that **a deprivation of one's liberty would be inflicted in possible violation a basic principle of interpretation of the ECHR**[11]. Indeed, the principle of a prior judgement reflects the guarantees usually required by the European Court of Human Rights in similar situations, within the framework of its assessment of the proportionality of an interference with a fundamental freedom. In that respect, the sole right to an effective remedy does not appear to be in itself sufficiently protective of the freedoms of Internet-users.

Therefore, **the final text should ensure that any restriction to end-users' access to the Internet are applied subsequently to a the competent authority's ruling, provided that such authority is the one which is traditionally in charge of the assessment of proportionality in balancing freedoms in the given county, in respect of the procedural safeguards described in article 6 ECHR**. In most countries, if not all, it will mean that the judiciary authority will be the only one empowered to impose restrictions to one's access to the Internet, or at least that citizens will be able to file a suspensive appeal before the judiciary to challenge the implementation of these restrictions.

11 In its assessment of the principle of proportionality, the European Court pays "*close attention (…) to the width of powers whereby restrictions on rights and freedoms are imposed". "Objections are likely to be raised where they are not subjected to close supervision and there is, therefore, much scope for possible abuse*". For instance, the European Court has condemned search powers "*where these could be exercised without the need for a judicial warrant and were seen as subject to restrictions appearing too lax and full of loopholes; the police could decide upon the expediency, number, length and scale of searches and seizures and the interference with the applicant's right to respect for his private life could not be regarded as strictly proportionate to the legitimate aim of tackling tax evasion*". Jeremy McBride, "Proportionality and the European Convention on Human Rights*",* in *The principle of Proportionality in the Laws of Europe*, edited by Evelyn Ellis, 1999.