LA QUADRATURE DU NET

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Amendment 138
Legalese for Progress, not political weakness

Tonight, a conciliation committee meeting will take place between the Council of the European Union and the European Parliament. Both institutions will try to resolve their year-long dispute over amendment 138 by considering a worthless compromise proposal.

In the past days, some Members of the Parliament have been convinced to depart from the strong protection for the freedom of expression and communication granted by amendment 138. They bought the arguments put forward by the Council, as well as the Parliament's own legal services who conducted a biased analysis at the request of rapporteurs Catherine Trautmann and Alejo Vidal-Quadras. **According to amendment 138 opponents, the European treaties do not allow the Parliament to require that Member States adapt their judicial system to better protect European citizens. However, case law seems to indicate that this is just an abusive argument aimed at concealing their political timidity.**

Amendment 138, provides that *"no restriction may be imposed on the fundamental rights and freedoms of end-users, without a prior ruling by the judicial authorities"*.

Can the Community deal with judicial matters?

In general, the European Community – and therefore the Parliament - has no power regarding judicial affairs. By virtue of the Maastricht treaty, judicial affairs remain the direct competence of Member States, which may be required to consult the Parliament before agreeing on harmonizing measures regarding judicial cooperation and criminal matters.

In the case of amendement 138, the Parliament's status of co-legislator on the Telecoms Package is based on article 95 EC that provides that measures related to the internal market should be subjected to the codecision procedure.

However, **the European Court of Justice have given the Community indirect competence in certain fields that are no part of its normal field of competence**. Let's consider two examples:

In 2005, the ECJ had to decide whether the Community was competent to prescribe criminal penalties in order to enforce environmental norms adopted under article 175 EC. The Court ruled that the Community was competent in criminal matter *"when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective."*[1]

Another case is even more closely related to amendment 138. In 2006, Germany challenged the directive on tobacco advertising before the ECJ. The German government argued that under article 95 EC, which was the legal basis for this directive as well, the Community was not competent to impose a ban on tobacco advertising to all Member States since such provision had been adopted to protect public health, which is not a direct competence of the Community. But the Court found that *"the contested articles of the directive do in fact have as their object the improvement of the conditions for the functioning of the internal market*", and thus fell under article 95 EC. For the judges, *"the selection of that legal basis cannot be called into question by the fact that public health protection may have prompted the choices made by the Community legislature when adopting the directive"*[2].

From these two examples, the assertion that under current Treaties the Parliament has no competence regarding the judicial order in Member States is at best abusive. In the view of such case law, **the question that remains to determine the lawfulness of amendement 138 is whether it contributes to the well-functioning of the Internal market.**

Amendment 138 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 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, in violation of general principles of Community law such as that of proportionality. It also provides a level playing field for Telecom operators who, in the absence of a strong protection of their consumers, would face different legal contexts depending on the country in which they operate. With such a disparity, some of them would be unfairly put at disadvantage as a result of the costs associated with repressive schemes like three-strikes policies.

Another, more political 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 European Union**. Indeed, as a consequence of article 81 and 82 of the TFEU[3] 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. **There is no reason for the Council to cling to a competence that will soon be shared between both institutions.**

1 ECJ, Case C-176/03, Commission Vs. Council (13 September 2005)
2 ECJ, Case C-380/03, Germany Vs. Parliament and Council (12 December 2006)
3 Treaty on the functionning of the European Union: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0001:01:EN:HTML

Can the Community require a prior ruling?

It is true that the principle of a "prior ruling by a judicial authority" is not found in European treaties.
However, General principles community law are comprised of the European Treaties, but also of the ECHR as well as the constitutional traditions common to the member States.

The rights to a fair trial and a timely judicial review, protected by, respectively, article 6 ECHR and article 13 ECHR have long been recognized by the European Court of Justice[4].

But what is at stake with amendment 138 are not these procedural safeguards per se, but the idea that **only a prior decision by a competent tribunal can ensure that restrictions to the fundamental freedom of expression – protected by article 10 ECHR and now enabled by the free access to the Internet – will be proportionate.** In other words, what should be considered in this debate about the lawfulness of amendement 138 is not the traditional procedural safeguards (i.e the rights to a fair trial and a timely judicial review) , but whether general principles of Community law can justify that a prior judicial decision be required by the Community.

Interestingly, the **European Court of Human Rights have asserted that a prior judicial decision was needed to ensure the proportionality of administrative measures infringing on people's right to privacy**, protected by article 8 ECHR. The European Court has condemned police forces' 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 Court held that *"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"*[5] . In a 2002 ruling, the European Court of Justice has rendered a similar decision[6].

In the face of such case law, the idea that a "prior decision by judicial authorities" is nowhere to be found in European law is extremely dubious. **If a prior decision is needed in the case of significant infringements on privacy, why should it go differently with the freedom of expression and communication?**

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[7]. These restrictions represent very severe measures, which should carry the most important safeguards, except in case of compelling public interest motives.

In order to respect general principles of Community law, any such restrictions should be proportionate to the aim they pursue. 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.

It follows that opponents to amendment 138 make a questionable interpretation of Community law. Such legal arguments seeks to hide the real motives on the part of big Member States, which would to be able to police the Net without interference of the judicial authorities. In fact, their opposition makes clear that the protections laid down by amendment 138 are highly necessary for the rule of Law to survive in the digital age.

4 See, for instance, ECJ, Case 222/84 M. Johnston Vs. Chief Constable of the Royal Ulster Constabulary (15 May 1986)
5 ECHR, n. 37971/97 Stés Colas Est and others Vs. France (16 july 2002)
6 ECJ, Case C-94/00 Roquette Frères Vs. Directeur Général de la DGCCRF (22 October 2002)
7 The right to protection of their privacy in the digital environment is also at stake here, especially because of the collateral damages that are inherent to any technical means that allow such restrictions, in a more or lesser extent