

The Telecoms Package Amendments

Detailed comments on the FJELLNER proposed amendment:

Access to content, services and applications

Member States shall ensure that any restrictions on the rights of users to access content, services and applications, if such restrictions are necessary,

Mr Harbour's Comment: Who decides, on what basis? Under this test, any government can decide to adopt a new law on restricting access (if it is necessary, in their view).

Comment: The Directive does not impose any restrictions on users' access to content, services and applications. The Universal Services Directive establishes the rights of end-users and the corresponding obligations of providers of electronic communications services. As the EDPS recognised in its report on 16 February 2009, "some stakeholders have been trying to use the telecoms package to enable the systematic monitoring of the Internet and introduce obligations upon ISPs." For that reason, what this Directive can do to protect end-users from such practices is to ensure that such restrictions are implemented in conformity with Community and national law.

are implemented by appropriate measures,

Mr Harbour's Comment: What is appropriate? There is no definition. Under this amendment, any government can implement enforcement provisions by graduated response (if it is appropriate in their view).

Comment: Appropriate measures should be in conformance with the law and therefore the fundamental rights of users.

in accordance with the principles of proportionality, effectiveness and dissuasiveness.

Mr Harbour's Comment: What is the legal base? Who decides? Government's can decide whether their measure is proportionate, effective, and dissuasive. Justifying it on economic grounds.

Comments: The principles of proportionality, effectiveness and dissuasiveness are principles of the Community law. Measures should be first and foremost justified on legal grounds, not economic grounds.

Those measures shall not have the effect of hindering the development of the information society, in compliance with Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce),*

Mr Harbour's Comment: How do you define "hindering the development of the information society"? What criteria could a court apply? Copyright enforcement, in the view of many, supports the development of the information society. Again, this text does not in any way stop any Government from taking action to restrict internet access, if it so wishes.

Comment: Recitals 8 and 9 of the eCommerce Directive set the objective of the Directive to create a legal framework to ensure the free movement of information society. "The free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression as enshrined in Article 10(1) of the Convention of the Protection of Human Rights and Fundamental Freedoms, which has been ratified by all the Member States; for this reason, directives covering the supply of information society services must ensure that this activity may be engaged in freely in the light of that Article, subject only to the restrictions laid down in paragraph 2 of that Article and in Article 46(1) of the Treaty; this Directive is not intended to affect national fundamental rules and principles relating to freedom of expression." Rather it is in the very nature of the development of the Information Society to sufficiently protect the users' freedom of expression and their access to information.

and shall not conflict with the fundamental rights of citizens, including the right to privacy and the right to due process.

Mr Harbour's Comment: Agreed - but covered much better in the redrafted amendment in Article 1 of the Universal Service Directive.

Comments: See my comments below on the Harbour amendment. These are rights provided by both the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms. I do not see how the Harbour amendment protects better the fundamental rights and freedoms with respect to this point, and especially in relation to access to justice and the right to fair trial.

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Conclusion: The Fjellner amendment makes a minimal contribution to securing internet users' rights and actively encourages official intervention.

The strategy behind the HARBOUR amendment:

This Directive neither mandates nor prohibits conditions, imposed by providers of publicly available electronic communications and services, limiting users' access to and/or use of services and applications, where allowed under national law and in conformity with Community law.

Comment: It is not the scope of this Directive to mandate or prohibit restrictions on users' access to content, services and applications. The Universal Services Directive acknowledges the importance of reinforcing end-users' rights within the overall EU regulatory framework for electronic communications services, in order to promote the development of an inclusive information society as described by the European Commission in its i2010 strategy. In particular, the directive establishes the rights of end-users and the corresponding obligations of providers of electronic communications services. Unfortunately, as the EDPS recognised in its report on 16 February 2009, "some stakeholders have been trying to use the telecoms package to enable the systematic monitoring of the Internet and introduce obligations upon ISPs." For that reason, what this Directive can do is to ensure that such restrictions are implemented in conformity with Community and national law.

The Harbour amendment does acknowledge that such restrictions are and can be allowed under national law and does not really clarify the role of the Directive.

Comment: The first part of the amendment deals with the private-law, commercial situation between a provider of a service and the customer. That a provider can choose what service it wants to offer or not offer is a clear statement of fact. If it were not so, everyone would have to offer the same service, and there would be no competition and no consumer choice. No one is suggesting that limitations on users' access should be outlawed. Undertakings can and do shape traffic today, and have always been able to. But limitations are always subject to national law. So far, providers have been able to impose limitations without customers being aware.

but does provide for information regarding such conditions.

Comment: But the package now requires that you must be told about any limitations and then be free to choose another provider if you do not like them.

Comment: So what? Does the provision of information regarding such conditions, imposed by providers of electronic communications services, have the effect of sanitising those conditions? The Harbour amendment attempts to neutralise the position of the Directive on the issue of imposing restrictions on users' right to access information, but then accepts that the provider should provide for information regarding such conditions without really clarifying how and by whom such conditions could be supported.

National measures regarding end-users' access to or use of services and applications through electronic communications networks shall respect the fundamental rights and freedoms of natural persons,

Comment: The question that Harbour poses on the Fjellner amendment applies to Harbour amendment too: who decides? And should only national measures respect end-users' rights? What about measures at Community level?

Comment: The second part addresses the situation between citizens and the Member States. This part reaffirms that Member States have to respect their citizens' fundamental rights and freedoms.

including in relation to privacy and due process, as defined in Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Comment: And this also, and particularly, on ensuring access to justice in the event of any restrictive action. This is not covered in Fjellner's amendment at all.

Comments: The Fjellner amendments also talks about fundamental rights of citizens, including the right to privacy and due process. These fundamental rights are provided by the Charter of Fundamental Rights of the European Union and the European Convention for the Protection of Human Rights and Fundamental Freedoms. Hence, I do not see how the Fjellner amendment does not ensure access to justice or the protection of other fundamental rights, including the right to access information and the freedom of expression provided in the Charter.