

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,

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).

are implemented by appropriate measures,

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).

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

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.

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),*

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.

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

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

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: 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.

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 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.