



Legal Service

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LEGAL OPINION

Re: Telecoms – Legal issues on ‘Amendment 138’ to the Trautmann Report (2007/0247 (COD))

1. At the meeting of Parliament’s Delegation to the Conciliation committee on Telecoms of 7 October 2009, the Chair of the Delegation, Vice-President Alejo Vidal-Quadras, sought advice from the Legal Service¹ on three questions, relating to ‘amendment 138’ to the Trautmann Report (also known as the “Better Regulation Directive”),² which will be examined, one by one, below.

QUESTION 1: *In view of the objections raised at the first informal trilogue as to the lack of Community competence to regulate the organisation of the judicial system in the Member States, in particular with regard to the rules of criminal procedure, can amendment 138 safely be adopted on the basis of Article 95 EC?*

2. Amendment 138 reads as follows:

“(h) applying the principle that no restriction may be imposed on the fundamental rights and freedoms of end-users, without a prior ruling by 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”

3. The legal basis of the Better Regulation Directive (to which amendment 138 refers) is Article 95 EC. Article 95 EC empowers the Community institutions (the European Parliament and the Council) to adopt legislation intended to improve the

¹ Request made according to Article 1(1), ninth indent, of the Bureau Decision of 28 January 2004.

² Proposal for a Directive of the European Parliament and of the Council amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services (the ‘Framework Directive’), 2002/19/EC on access to, and interconnection of, electronic communications networks and services (the ‘Access Directive’), and 2002/20/EC on the authorisation of electronic communications networks and services (the ‘Authorisation Directive’) (2007/0247 (COD)).

conditions for the establishment and functioning of the internal market, i.e. to remove barriers to the economic freedoms provided for by the Treaty (free circulation of goods, freedom of establishment, freedom to provide services, free movement of capital). Case law of the European Court of Justice has made it clear that Article 95 EC may only be used for achieving genuine internal market objectives. In contrast, it cannot be used to fill a gap where the Community has no powers to act.³

4. The terms “*without a prior ruling by judicial authorities*” in Amendment 138 are meant to ensure that no measure liable to limit access to or use of electronic communications services (in particular the Internet) is taken in the Member States unless a court, i.e. a body integrated within the structure of the judiciary, has so ordered. This would require the Member States to adapt the organisation of the national judicial system so as to reserve to the judiciary the possibility to take actions that may adversely affect the ability of end-users to access or use electronic communications services. In so doing, Amendment 138 appears to entail a partial harmonisation of the organisation and the remit of the judiciary in the Member States. However, the organisation of the judicial system in the Member States does not fall within the scope of Article 95 EC and, as far as criminal law and procedure are concerned, it does not fall within the scope of the EC Treaty as a whole.⁴
5. It follows from the above that there are serious grounds for considering that, in so far as it requires a “*prior ruling by the judicial authorities*”, Amendment 138 goes beyond the Community competence as defined by Article 95 EC.
6. It may be added that the requirement of a “*prior ruling by the judicial authorities*” as referred to in Amendment 138 does not appear to flow from the need to respect fundamental due process rights of individuals guaranteed under the European Convention of Human Rights, in particular from the right to a fair trial (Article 6 ECHR) and the right to an effective remedy (Article 13 ECHR). According to case-law of the European Court of Human Rights, the right to a fair trial does not necessarily require that the decision-making body is a court of law of the classic kind, i.e. a body integrated in the judicial structure of the State.⁵ Similarly, the right to an effective remedy obviously refers to a subsequent review of a decision already taken, in order to obtain redress. Moreover, according to the European Court of Human Rights, the remedy referred to in Article 13 ECHR need not always be judicial.⁶
7. Neither Article 6 ECHR nor Article 13 ECHR, as interpreted by the European Court of Human Rights establish a requirement of a prior court ruling as referred to in Amendment 138. As a consequence, respect of fundamental due process rights cannot be invoked in support of the adoption of Amendment 138 as it currently stands.

³ See, inter alia, Case C-376/98 *Germany v Parliament and Council (Tobacco Advertising I)* [2000] ECR I-8419, paragraphs 83-84.

⁴ See Case C-176/03 *Commission v Council* [2005] ECR I-7879, paragraph 47, and Case C-440/05 *Commission v Council* [2007] ECR I-9097, paragraph 66.

⁵ See e.g. the judgments of the European Court of Human Rights in the case of *Campbell and Fell v. United Kingdom*, 28 June 1984, § 76; and in the case of *Savino and Others v. Italy*, 28 April 2009, § 73.

⁶ See e.g. the judgment of the European Court of Human Rights in the case of *Silver and Others v. United Kingdom*, 25 March 1983, § 113.

QUESTION 2: Is the compromise drafting suggested by the Commission legally sound in the light of the objections referred to above?

8. The Commission's suggested compromise drafting reads as follows:

“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”.

9. In its first subparagraph, the text emphasizes the need for measures taken by Member States on end-users’ access/use of services to respect fundamental rights and freedoms in compliance with the general principles of Community law.
10. This formula is in line with Article 6(2) EU, which establishes the principle that the rights guaranteed under the European Convention of Human Rights are an integral part of the Community legal order, in the form of general principles of Community law. That provision is clear evidence of the central place of fundamental rights in the Community legal order.
11. The European Court of Justice has consistently held that *“fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect”*.⁷
12. The Commission text sets out a list of fundamental rights to be respected by the measures taken by Member States. It adds that this must be done in compliance with the general principles of Community law. Since, *ex vi* Article 6(2) EU, among these principles are to be found the fundamental rights of the ECHR, the proposed text provides an adequate level of protection of the rights set out therein.

⁷ See, *inter alia*, Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, paragraph 37; Case C-94/00 *Roquette Frères* [2002] ECR I-9011, paragraph 25; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 71; Case C-540/03 *Parliament v Council* [2006] ECR I-5769, paragraph 35; Case C-229/05 P *PKK and KNK v Council* [2007] ECR I-439, paragraph 76; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakat v Council and Commission* [2008] ECR I-6351, paragraph 335.

13. The European Court of Justice has in many occasions dealt with the rights and freedoms referred to in the proposed text. The right to an effective judicial protection, the right to a fair trial, the right to privacy and the freedom of expression are fundamental rights recognised and protected in the Community legal system as general principles of Community law.⁸
14. In comparison to Amendment 138, the Commission's suggested compromise drafting is clearer from a legal point of view, since it refers to the fundamental rights as general principles of Community law, thus placing them directly within the remit of Community law. Likewise, the deletion of the reference to the Charter of Fundamental Rights does not amount to a lesser protection of fundamental rights. The Charter is not part of Community law, and the European Court of Justice has no power to interpret its provisions.⁹
15. The second subparagraph of the Commission's suggested drafting is a manifestation of the principle that while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection.¹⁰ It is for the Member States to establish a system of legal remedies and procedures that ensure respect for that right. However, the detailed procedural rules governing actions for safeguarding an individual's rights under Community law must be no less favourable than those governing similar domestic actions (principle of equivalence) and must not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).¹¹
16. In the use of its power to establish the system of legal remedies, the Member State may include, as a procedural safeguard, a requirement that a judicial decision authorise the measures to be taken. In the use of the same power, the Member State

⁸ See, on the **right to an effective judicial protection**, Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18; Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 14; Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paragraph 39; Case C-263/02 P *Commission v Jégo-Quéré* [2004] ECR I-3425, paragraph 29; Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 37. On the **right to a fair trial**, see e.g. Case C-305/05, *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraphs 29-31 (and the case law of the European Court of Human Rights cited therein) and Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste v UFEX and Others* [2008] ECR I-4777, paragraph 44. On the **right to privacy**, see Case C-73/07 *Satakunnan Markkinapörssi Oy and Satamedia Oy* [2008] not yet reported (regarding the general data protection Directive 95/46/EC) and Case C-275/06 *Promusicae* [2008] ECR I-271 (regarding Directive 2002/58/EC on privacy and electronic communications). Finally, on **freedom of expression** as a fundamental right, see Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 23; Case C-148/91 *Veronica Omroep Organisatie* [1993] ECR I-487, paragraph 10; Case C-23/93 *TV10* [1994] ECR I-4795, paragraph 19; Case C-250/06 *UPC Belgium and Others* [2007] ECR I-11135, paragraph 41; Case C-336/07 *Kabel Deutschland* [2008] not yet reported, paragraph 37; on possible limitations to freedom of expression, see Case C-71/02 *Karner* [2004] ECR I-3025, paragraph 50; Case C-421/07 *Damgaard* [2009] not yet reported, paragraph 26.

⁹ See, to that effect, Order in Case C-328/04 *Vajnav* [2005] ECR I-8577, paragraph 13, Order in Case C-361/07 *Polier* [2008] ECR I-6, paragraph 11; Opinion of Advocate General Trstenjak delivered on 7 May 2009 in Case C-227/08 *Martin Martín*, not yet reported, paragraph 44.

¹⁰ See, inter alia, Joined Cases C-87/90 to C-89/90 *Verholen and Others* [1991] ECR I-3757, paragraph 24; Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 42.

¹¹ See, inter alia, Case 33/76 *Rewe* [1976] ECR 1989, paragraph 5; Case 45/76 *Comet* [1976] ECR 2043, paragraphs 13 to 16; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 12; Case C-432/05 *Unibet* [2007] ECR I-2271, paragraph 43.

may also take into account the need to take urgent measures to safeguard national security, defence, public security, and the prevention, investigation, detection and prosecution of criminal offences. The last corresponds to a large extent to those situations provided for in Article 15 of Directive 2002/58/EC (Directive on privacy and electronic communications).

17. To the extent that the Commission's text refers to fundamental rights recognized as general principles of Community law and provides for a solution that respects the autonomy of Member States in setting up a system of legal remedies to ensure compliance with a right conferred by Community law, as confirmed by the case law, such text complies with Community law and is within the limits of what is allowed under Article 95 EC, the legal basis of the proposed Directive.

QUESTION 3: Is the reference to 'general principles of Community law' in the text of the Commission's compromise equivalent to a direct reference to the European Convention of Human Rights and, if so, for what reasons?

18. Pursuant to Article 6(2) EU the fundamental rights established in the European Convention of Human Rights are an integral part of the Community legal order, in the form of general principles of Community law.¹² Observance of such general principles is guaranteed, as a matter of Community law, by all the national courts of the Member States, and, ultimately, by the European Court of Justice.
19. Protection of fundamental rights afforded by Community law is under several aspects more extensive than that guaranteed under the ECHR. In Community law, the due process rights (inter alia the right to be heard) embodied in Article 6 ECHR are not limited to disputes relating to civil rights and obligations or criminal charges. The European Court of Justice has held that such due process rights apply, as general principles of Community law, to all proceedings, including administrative proceedings, in which sanctions may be imposed.¹³
20. Likewise, the right to an effective remedy is more extensively protected in the Community legal order than in Article 13 ECHR, since in Community law it entails the right to an effective remedy before a judicial body (right to effective judicial review).¹⁴ According to the European Court of Justice, the right to an effective judicial review also implies the right to obtain knowledge of the grounds of the decision to be reviewed.¹⁵
21. It follows that the reference to the "general principles of Community law" in the Commission's suggested drafting affords a level of protection equivalent to, and under some aspects higher than, that guaranteed by a direct reference to the European Convention of Human Rights.

¹² See above, paragraphs 15 ff.

¹³ See e.g. Joined Cases C-322/07 P, C-327/07 P and C-338/07 P, *Koehler and Others v Commission*, not yet reported, paragraph 34.

¹⁴ See e.g. Case 222/84 *Johnston* [1986] ECR 1651, paragraph 19.

¹⁵ See e.g. Case C-249/88 *Commission v Belgium* [1991] ECR I-1275, paragraph 25.

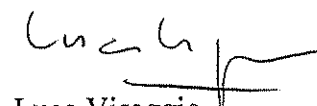
CONCLUSIONS

22. In the light of the above, the Legal Service concludes that the questions raised should be replied as follows:

- 1) There are serious grounds for considering that, in so far as it requires a "*prior ruling by the judicial authorities*", Amendment 138 goes beyond the Community competence as defined by Article 95 EC.
- 2) The Commission's suggested drafting might safely be adopted on the basis of Article 95 EC. Such drafting provides equivalent guarantees in terms of protection of fundamental rights compared to Amendment 138.
- 3) The reference to the "*general principles of Community law*" in the Commission's suggested drafting affords a level of protection of the fundamental rights involved equivalent to, and under some aspects higher than, that guaranteed by a direct reference to the European Convention of Human Rights.


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