The European Political Order and Internet Piracy: Accidental or Paradigmatic Constitution-Shaping?

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Modern age technology spurs legal development – Temporal coincidence of conflicting national and Union legislative processes triggers interdependence between EU and member states – French *Loi Hadopi* cuts Internet without recourse to a court – *Conseil constitutionnel* enshrines Internet as fundamental freedom – EU telecoms reform incorporates several French fundamental rights safeguards

Introduction: Internet piracy as a constitutional spark

In the autumn of 2007 the European Commission (the Commission) initiated a set of complex legislative proposals reforming the telecommunications sector of the European Union (the Union).[1] At that time, the Commission could not have

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[1] The *telecoms reform package* comprises three Commission proposals initiated under Art. 114(1) TFEU (former Art. 95 EC): (1) Proposal COM(2007) 697 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 [Framework Directive], 2002/19/EC on access to, and interconnection of, electronic communications networks and services [Access Directive], and 2002/20/EC on the authorisation of electronic communications networks and services [Authorisation Directive] (Better Regulation Directive); (2) Proposal COM(2007) 698 for a Directive of the European Parliament and of the Council amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks [Universal Service Directive], Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on consumer protection cooperation; and (3) Proposal COM(2007) 699 for a Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority. This legislative package fell within the ambit of the renewed Lisbon strategy for growth and jobs,

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imagined that its telecoms package would develop into a 'fascinating European legislative episode'[2] that could shed some light on 'the dark and most contested continent of European Union scholarship'[3] – the relationship between the Union and its member states. In particular, the provision of the draft Better Regulation Directive[4] seeking to establish end-users' freedom of access to and distribution of any lawful online content elicited a strong response in the Union's only directly elected institution. The European Parliament embarked on a yearlong adamant advocacy in favour of safeguards against excessive and indiscriminate restrictions, without a prior decision by a judicial authority, of Internet access of individuals breaching online intellectual property rights. This scenario would have already been a noteworthy course of action, had it not had a more convoluted plot. Three events stood out.

First, the invisible hand of European politics had it that the European Parliament's reaction did not originate in Brussels but in Paris, as fallout from the French political battle for the enactment of the so-called *Loi Hadopi*, which would install a purely administrative procedure for the sanctioning of illegal downloading of online content qualifying as intellectual property, such as films, music and software. The bone of contention was whether the prohibition of Internet access was the province of administration or judicature, i.e., whether such prohibition could be imposed by an administrative organ or only by a judicial body. The French President, the Government and parliamentary majorities in both Houses of Parliament supported the exclusion of judicial authorities from the sanctioning process, whereas the parliamentary opposition promoted, and, with the assistance of the French *Conseil constitutionnel*, successfully defended, the thesis that Internet access may not be cut off without a prior judicial decision. The French theatre of the battle for 'Internet freedom' spread to the Union plane when the MEPs from the French opposition parties, backed by a somewhat sympathetic Commission, began to further their countrymen's cause in Brussels. In reaction, the French Government garnered support within the Council of Ministers (the Council) to suppress this move.

pursuant to which the Commission drafted in June 2005 the i2010 Initiative for a European Information Society for growth and employment. The main pillar of the i2010 Initiative is the creation of a Single European Information Space, which requires a coherent regulatory framework for the digital economy. Since many elements of the Union's internal market of electronic communications had been regulated at the national level, the Commission undertook to harmonise them.

[2] Editorial, 'Internet Piracy and the European Political and Legal Orders', 5 *European Constitutional Law Review* (2009) p. 169.

[3] Editorial, 'From Confederacy to Convoy: Thoughts About the Finality of the Union and its Member States', 6 *European Constitutional Law Review* (2010) p. 2.

[4] *See supra* n. 1 under (1).

Second, as the June 2009 elections to the European Parliament ended, the new composition of the European Parliament abandoned the hitherto resolve, softened its opposition and, ultimately, gave in to the Council's refusal to designate judicial authority as competent to sanction online infringements of intellectual property.

Third, the finally adopted Better Regulation Directive seemingly incorporated some of the caveats spelled by the *Conseil constitutionnel* about the presumption of innocence and proportionality of restrictions of Internet access. This would not be as surprising if decisions of the *Conseil constitutionnel* were binding on the European legislature, but they are not.[5] However, if pronouncements of national courts vested with the highest adjudicating authority pervade European laws, this then vindicates the Treaty postulate that the constitutional principles and fundamental rights common to the member states lie at the foundation of the European Union.[6] The symbiotic nature of the relationship between the Union and its component parts – member states, their institutions and core principles guiding the organisation of public power – thus becomes more tangible regardless of territorial and functional limitations inherent in their textual guises.

Since the national and European arenas of legislative activity were in direct collision, the EU telecoms reform and French *Hadopi* saga represent fertile soil for the exploration of the non-Treaty development of the European Union's material constitution. Despite subtle variations, most constitutionalists agree that the Union has its own constitution, composed of the founding treaties and the jurisprudence of the European Court of Justice but also of the national constitutions and case-law of highest national courts.[7] What remains opaque is the nature

[5] *See* an insightful analysis of the European role of national courts in M. Claes, *The National Courts' Mandate in the European Constitution* (Oxford, Hart Publishing 2006).

[6] This postulate stems from a joint reading of Arts. 2 and 6(3) EU, as amended by the Lisbon Treaty. Art. 2 reads: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail'. Art. 6(3) reads: 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.' *See* further, A. Bogdandy, 'A Disputed Idea Becomes Law: Remarks on European Democracy as a Legal Principle', in B. Kolher-Koch and B. Rittberger (eds.), *Debating the Democratic Legitimacy of the European Union* (Lanham, Rowman & Littlefield 2007), p. 33-44; A. Bogdandy, 'Founding Principles of EU Law: a Theoretical and Doctrinal Sketch', 16 *European Law Journal* (2010) p. 95-111.

[7] *See* L. Besselink, 'The Notion and Nature of the European Constitution After the Lisbon Treaty', in J. Wouters et al. (eds.), *European Constitutionalism Beyond Lisbon* (Antwerp, Intersentia 2009), p. 261-279; P. Birkinshaw, 'Constitutions, Constitutionalism and the State', 11 *European Public Law* (2005) p. 31-45; P. Craig, 'Constitutions, Constitutionalism, and the European Union', 7 *European Law Journal* (2001) p. 125-150; I. Pernice, 'Multilevel Constitutionalism in the European Union',

of the relationships that bind these constituent units together and whether there is a logically coherent deciphering code that explains the patterns of their mutual interaction. These patterns are not only written in the founding treaties or constitutional texts. Treaty letter is best understood as the *law on politics*, the lowest common denominator of conjugated European interest. It is a bare skeleton, whose living tissue is cast, besides in judicial activity, also in the facts of the incessant political process, that universal and inescapable *perpetuum mobile* of community organisation – the *law of politics*.[8] The legislative dossiers under review lend themselves impeccably to this type of analysis.

This contribution examines cross-level interactions between the national and European actors involved in the legislative processes of the Union's telecoms reform and the French *Loi Hadopi*. The objective is to demonstrate that the underlying inter-institutional interactions within the European Union are not always rooted in the strictly delimited constitutional competences but that political practice, especially in politically salient matters, often moulds their rigid edges and produces unexpected outcomes. This is carried out by delving into the intricacies of the *ex ante* scrutiny by the French and the European Parliament of the legislative clauses of the draft Better Regulation Directive and of the two French *Hadopi* statutes that sanction illegal downloading. We also endeavour to elucidate the reasons for the European Parliament's acceptance of a watered down amendment to this draft Directive and investigate the influence of the *Conseil constitutionnel*'s judgment on the French and European legislative processes. Attention is further paid to the political 'joint venture' of chiefly members of the opposition in the French Parliament and the French MEPs, as well as to the standpoints of the French and other European governments concerning these issues.

27 *European Law Review* (2002) p. 511-529; V. Röben, 'Constitutionalism of the European Union After the Draft Constitutional Treaty: How Much Hierarchy?', 10 *Columbia Journal of European Law* (2004) p. 339-377; N. Walker, 'Big "C" or Small "c"', 12 *European Law Journal* (2006) p. 12-14; J.H.H. Weiler and M. Wind (eds.), *European Constitutionalism Beyond the State* (Cambridge, Cambridge University Press 2003).

[8] Defining public law as practice, Loughlin has rightly argued that public law must be conceived as 'an assemblage of rules, principles, canons, maxims, customs, usages and manners that condition and sustain the activity of governing.' The subject of public law cannot be grasped without understanding informal practices that shape the activity of governing. Therefore, the argument goes, positive law acquires its meaning only within a context of conventional understandings, which themselves cannot be understood without analysing politics. M. Loughlin, *The Idea of Public Law* (Oxford, Oxford University Press 2004), p. 30-31. In the US, the notion of a living constitution might be taken as an ideational parallel. *See* B. Ackerman, 'The Living Constitution', 120 *Harvard Law Review* (2007) p. 1738-1812; W.H. Rehnquist, 'The Notion of a Living Constitution', 29 *Harvard Journal of Law and Public Policy* (2006) p. 401-415.

The Loi Hadopi and EU telecoms: Temporal coincidence as a catalyst of cross-level exchange

On 13 November 2007, the Commission used its legislative initiative to set out a codecision procedure on the reform of European telecommunications. As part of the legislative package, the draft Better Regulation Directive envisaged, *inter alia*, amendments to the 2002 Framework Directive.[9] A general objective of the latter Directive is to contribute to the convergence of telecommunications, media and information technology sectors under a single regulatory framework by harmonising member state regulation of the transmission of content over electronic communications networks.[10] To facilitate its coherent application, the Directive lays down a set of policy objectives and regulatory principles. Besides technology neutrality, competition in providing electronic services and consolidation of the internal market for electronic communications, the Directive obliges national regulatory authorities to ensure a number of benefits for EU citizens, such as: universal access to a minimum set of services of specific quality at an affordable price; the availability of simple and inexpensive dispute resolution procedures; the protection of personal data and privacy; the provision of clear information on the use of electronic communications services; the recognition of the needs of specific social groups; and the maintenance of integrity and security of the services provided. In its proposal, the Commission summarily argued that it complied with the principle of subsidiarity, because the proposal 'concerns an area in which the Community has already exercised its competence', and with the principle of proportionality because 'it proposes a minimum level of harmonisation' and leaves freedom to the national regulatory agencies or the member states to define the implementing measures.[11]

Just ten days later, the French President Sarkozy signed the so-called *Élysée* Agreement for the development and protection of creative works and cultural programmes on the new networks.[12] This agreement was based on the report of the *Commission Olivennes*. This one-off Committee had been formed at the recommendation of the President of the Republic and was named after its chairman

[9] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services, *OJ* [2002] L 108/33, 24.4.2002. *See supra* n. 1 under (1).

[10] A wide range of transmission systems are encompassed, including those conveying signals by wire, radio, optical means, Internet, fixed and mobile terrestrial networks, radio and television broadcasting and cable television networks. *See* Arts. 1 and 2(a) of the Framework Directive.

[11] European Commission, Proposal COM(2007) 697 of 13 Nov. 2007, p. 6-7.

[12] *Accord pour le développement et la protection des œuvres et programmes culturels sur les nouveaux réseaux* <www.armt.fr/spip.php?article70&lang=en>, visited on 5 Aug. 2010.

Denis Olivennes, former chief executive of Fnac[13] and the current director of the French weekly *Nouvel Observateur*, who had been appointed by the Minister of Culture and Communication, Christine Albanel.[14] The Committee's task was to conduct consultations, hearings and negotiations with representatives of the music, film and other audiovisual industries, then Internet service providers, download platforms and content-sharing sites, such as YouTube and DailyMotion, on means to combat illegal and promote legal downloading of content covered by intellectual property rights.[15]

The *Rapport Olivennes* suggested, as one of the options, to enact a three-stage warning and sanction mechanism that would empower a public authority or a court to impose the suspension or termination of the Internet subscription contracts of the breaching users and thereby deter future infringements of intellectual property rights on digital networks. This report also advised obliging Internet users to secure their Internet connections, failing which they would be held responsible for any fraudulent use of these connections.[16] The *Élysée* Agreement endorsed these conclusions and added that the criminal proceedings and the associated penalties foreseen by the French Intellectual Property Code (*Code de la propriété intellectuelle*), ranging from three years imprisonment to a € 300.000 fine,[17] were 'completely disproportionate' given the mass character of illegal downloading. For that reason, the French executive preferred to confide the prevention and punishment of Internet piracy to a non-judicial body.

The EU telecoms procedure had not advanced beyond the drafting of a first-reading report by the European Parliament, when on 18 June 2008 the French Government submitted to the *Sénat* the Proposal for a law promoting the distribution and protection of creation on the Internet.[18] Thus began the shuttle proce-

[13] FNAC stands for *Fédération nationale d'achats* and is an international entertainment retail chain offering a wide range of cultural and electronic products, including music, literature, films, video games, and other products.

[14] *See* the letter of 26 July 2007 reproduced in *Rapport de la mission Olivennes sur la protection des oeuvres culturelles*, p. 38-39 <www.culture.gouv.fr/culture/actualites/conferen/albanel/rapportolivennes231107.pdf>, visited on 5 Aug. 2010.

[15] The essentially President's initiative was prompted by the facts borne out by the statistical data presented in the *Élysée* Agreement, according to which France in 2006 saw a billion illegal exchanges of musical and audiovisual works. Moreover, over the period of five years preceding this Agreement, the market for discs shrank by nearly 50% in volume and value terms. The production companies cut their workforce by 30% and terminated 28% of talent contracts. The number of creative artists signed up every year dropped by 40%.

[16] *Rapport Olivennes, supra* n. 14, p. 19-22.

[17] Art. L335-2(2) thereof.

[18] *Sénat*, Doc. no. 405 of 18 June 2008, *Projet de loi favorisant la diffusion et la protection de la création sur internet* <www.senat.fr/leg/pjl07-405.html>, visited 5 Aug. 2010.

dure (*navette*). This statute would make several key amendments to the Intellectual Property Code.

First, notwithstanding the *Commission Olivennes*' recommendation to the contrary, the Authority for the regulation of technical measures (*Autorité de régulation des mesures techniques*) was to be substituted with a High Authority for the distribution of works and the protection of rights on the Internet (*Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet* or *Hadopi*), after which the bill was dubbed *Loi Hadopi*. The *Hadopi* was envisaged as an independent administrative authority, composed of a college and a commission for the protection of copyright, and charged with protecting the works and objects of intellectual property from electronic attacks.

Second, in fulfilling this task, the *Hadopi's* Commission for the Protection of Copyright was to be assisted by public agents, who would be entitled to obtain from Internet providers documents and data related to the identity, postal address, e-mail address and telephone contacts of the person whose Internet connection had been used to commit acts that infringe copyrighted online content.

Third, the *Loi Hadopi* was to establish a duty for subscribers, i.e., holders of Internet access contracts, to ensure that their Internet connection is not used unlawfully to access online content protected by copyright.

Fourth, infringements of the duty to secure one's own Internet connection could lead to sanctions, applied gradually in three stages (*riposte graduée*). The first step of this 'three-strike' procedure would consist in the sending by the Internet provider of an e-mail recommending the infringing subscriber to cease illegal activity and informing him of the sanctions in case of non-compliance. The second step would be triggered where illegal downloading would recur within six months of the sending of the first recommendation. In such cases, a new e-mail recommendation would be sent, which could be accompanied by a recommended letter. The third step would leave the Commission for the Protection of Copyright the choice between the following two sanctions: (a) the suspension, after a contradictory procedure, of Internet access during a period ranging from three months to one year and the concomitant prohibition of concluding another Internet subscription contract during this period; or (b) an injunction ordering the infringing subscriber to take measures to avoid repeating the infringement and to report it to the *Hadopi*.[19] This last step of the sanctioning procedure was the most controversial, because it did not require a prior decision by a judicial authority. This provision became the object of contestation throughout the World Wide Web and among the French society, intellectual property associations and other similar organisations, such as the particularly active *La Quadrature du Net*. At this phase, there were still

[19] All of these amendments are contained in Arts. 2 and 6 of the *Projet de loi favorisant la diffusion et la protection de la création sur internet*, *see supra* n. 18.

no major discrepancies between the legislative processes at the French and the EU level. Sparks had, however, ignited.

In an early attempt to dissuade the French Government from initiating the *Loi Hadopi*, the European Parliament had on 10 April 2008 adopted a resolution calling on the Commission and the member states 'to recognise that the Internet is a vast platform for cultural expression, access to knowledge, and democratic participation in European creativity' and 'to avoid adopting measures conflicting with civil liberties and human rights and with the principles of proportionality, effectiveness and dissuasiveness, such as the interruption of Internet access'.[20] Rapporteur was Guy Bono, a member of the French *Parti socialiste* (PS) and of the Progressive Alliance of Socialists and Democrats (S&D). During the plenary debate, he announced his determination to fight the *Loi Hadopi*:

> I strongly oppose the position of some member states whose repressive measures are dictated by industries incapable of changing their economic model in line with the needs imposed by the information society. Cutting off Internet access is a disproportionate measure in view of the objectives.[21]

Yet the opposition was neither solely French nor solely Socialist. For Olle Schmidt, a Swedish member of the Alliance of Liberals and Democrats for Europe (ALDE), countering the French *Loi Hadopi* was the sole reason to vote in favour of the resolution:

> Since it has been leaked that President Nicolas Sarkozy wanted to transfer the French experiment to the EU, there is every reason to support a statement to the effect that this, to put it mildly, would not be appreciated. […] I voted in favour of a report which I would otherwise have tried to vote down.[22]

Under the Directive on the provision of information on technical standards and regulations of 1998,[23] the Commission received the *Loi Hadopi* and made sub-

[20] European Parliament, Resolution on cultural industries in Europe, Doc. no. P6_TA(2008)0123 of 10 April 2008, rapporteur Guy Bono, point 23 <www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P6-TA-2008-0123&language=EN>, visited on 18 Aug. 2010.

[21] *OJ* [2008] Debates of the European Parliament, 9.4.2008, p. 65. His party colleague, MEP Vincent Peillon, was equally bitter about the French Government's *Hadopi* plans: 'I supported in particular one amendment – adopted by a margin of 17 votes – contradicting the repressive strategy of a "graduated response" proposed in France […] it would be not only impracticable but dangerous to entrust service providers – private companies – with the role of monitoring and suspending the Internet connections of people suspected of illegal downloading'. *OJ* [2008] Debates of the European Parliament, 10.4.2008, p. 43.

[22] *OJ* [2008] Debates of the European Parliament, 10.4.2008, p. 44.

[23] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998, laying down a procedure for the provision of information in the field of technical standards and regula-

stantive observations on it. The suspension of Internet access for failure to secure one's own Internet connection 'needs to strike the right balance between the need to combat online piracy and other important objectives.' Principally, the Commission cautioned the French Government to take due account of the principles of necessity and proportionality, given that Internet subscribers' unlawful online behaviour could already be punished by criminal sanctions pronounced in criminal proceedings. Further, justification was also requested for entrusting the power to decide on violations of intellectual property rights to an administrative body rather than to a judicial one. Eyebrows were also raised over the lack of a hearing prior to the suspension of Internet access and, notably, over the shifting of the burden of proof.[24]

When legislative dossiers roam across borders, or how a French issue became European

It has become a truism that national executives, in order to circumvent opposition in their member state, frequently use Brussels as a backdoor for introducing legislation. As Herzog and Gerken have argued, this is one of the causes of inappropriate and progressive centralisation of powers away from the member states towards the European Union. Adverse consequences of such practices for democratic government are primarily the lack of adequate deliberation on the national but often also on the EU scale and the pre-emption of any effective participation of national parliaments and various government departments in decision-making processes.[25] As will be shown, the coinciding agendas of the EU telecoms reform and the French *Loi Hadopi* inversed this hypothesis. In this constellation, the French and the European Parliament, or at least important parts of their political groups, fought for the adoption of a certain legislative solution, whereas the French and the European executives opposed it.

On 24 September 2008, slightly more than three months after the French Government had initiated its *Loi Hadopi*, the European Parliament – on the basis of a

tions, *OJ* [1998] L 204/37, 21.7.1998. Art. 8 thereof obliges the member states immediately to communicate to the Commission any draft technical regulation and a statement of the grounds which make its enactment necessary. The Commission then notifies the other member states of these measures. Information supplied by the notifying member state is only confidential at its request. The Commission and the member states may make comments to the notifying member state, which shall take them into account as far as possible in the preparation of the technical regulation in question. Art. 9 specifies the suspensory effects of this communication procedure.

[24] *Observations de la Commission européenne sur le projet de loi Hadopi* <www.anti-hadopi.fr/post/2009/04/04/Observations-de-la-Commission-europeenne-sur-le-projet-de-loi-HADOPI>, visited 19 Aug. 2010.

[25] R. Herzog and L. Gerken, 'The Spirit of the Time: Revise the European Constitution to Protect National Parliamentary Democracy', 3 *European Constitutional Law Review* (2007) p. 211-212.

report drafted on behalf of the Committee on Industry, Research and Energy by Catherine Trautmann (PS and S&D), former French Minister for Culture – adopted its first-reading position amending the Commission's draft Better Regulation Directive.[26] The amendment that gave rise to a fierce pan-European debate was Amendment no. 138 (Bono Amendment). Not featuring in the report itself, this amendment was tabled in the plenary by MEPs Guy Bono,[27] Daniel Cohn-Bendit, co-chair of the Greens-European Free Alliance (the Greens), Zuzana Roithová, a Czech member of the European People's Party (EPP) and others and was later orally amended by rapporteur Trautmann.

This amendment sought to insert into the Framework Directive a new policy objective for national regulatory authorities requiring them to promote the interests of EU citizens, *inter alia*, by:

> applying the principle that no restriction may be imposed on the fundamental rights and freedoms of end-users without a prior ruling of the judicial authorities, notably in accordance with Article 11 of the Charter of Fundamental Rights of the European Union[28] on freedom of expression and information, save when public security is threatened, in which case the ruling may be subsequent.[29]

Since, therefore, the EU telecoms package would now entrust the suspension of Internet access to a court and the *Loi Hadopi* to an administrative organ, and since France would be obliged to transpose this Directive into its legal order, President Sarkozy's plan was eviscerated. Bono quickly confirmed who the true addressee of the amendment was: 'You cannot play with individual liberties like that. The French Government must revise its copy!'[30] In return, Jean-François Copé, leader of the *Union pour un Mouvement Populaire* (UMP) in the *Assemblée nationale* retorted that the adoption of this amendment was a result of 'manipulations of the French Socialists'.[31]

[26] European Parliament, Doc. no. P6_TA(2008)0449 <www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P6-TA-2008-0449>, visited 6 Aug. 2010.

[27] He was not re-elected in 2009 European Parliament elections.

[28] Art. 11 of the Charter of Fundamental Rights of the European Union reads: (1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. (2) The freedom and pluralism of the media shall be respected.

[29] Amendment no. 138 to Art. 8(4) of the Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services. *See supra* n. 1 under (1).

[30] C. Erwan, 'Riposte graduée: Albanel sur la défensive', *Libération*, 26 Sept. 2008 <www.liberation.fr/medias/010133657-riposte-graduee-albanel-sur-la-defensive>, visited 6 Aug. 2010.

[31] 'Jean-François Copé, vous insultez l'Europe', *Libération*, 13 May 2009 <www.liberation.fr/medias/0101566985-jean-francois-cope-vous-insultez-l-europe>, visited 6 Aug. 2010.

The reaction was immediate. Already during the final plenary session adopting the Bono Amendment, Dominique Vlasto (UMP and EPP) expressed her regret of the outcome:

> While it seems perfectly acceptable, in practice this amendment introduces a hierarchy of end-users' fundamental rights by banning all preventative action without a prior court ruling regarding the communication and online distribution of content. Yesterday's events in a Finnish school[32] show more than ever why we should put in place well-thought-out and proportionate prevention mechanisms.[33]

When the ensuing negotiations between Minister Albanel and Commissioner for Information Society and Media, Viviane Reding, failed, President Sarkozy decided to raise the diplomatic level and write directly to Commission President José Durão Barroso and request his personal engagement in the matter. In a letter of 4 October 2008, President Sarkozy urged that it is 'crucial for the Commission to be vigilant of the threats that appeared in the European Parliament' and that it is 'particularly important that Amendment no. 138 adopted by the European Parliament be rejected by the Commission'.[34] The Commission did not honour the request.

The French parliamentary scrutiny of the EU telecoms package

Both Houses of the French Parliament scrutinised the EU telecoms package. Yet neither the *Assemblée nationale* nor the *Sénat* adopted a reasoned opinion that would directly alert European institutions, and especially the European Parliament, of their positions.[35]

[32] On 23 Sept. 2008 in the city of Kauhajoki in West Finland, 22-year-old Matti Juhani Saari shot dead ten people at the Seinäjoki University of Applied Sciences, before shooting himself. He had previously posted videos on YouTube containing threatening messages and footage of him shooting at a local shooting range. N. Allen, 'Finland School Shooting: Gunman Planned Massacre for Six Years', *Telegraph*, 24 Sept. 2008 <www.telegraph.co.uk/news/worldnews/europe/finland/3071235/Finland-school-shooting-Gunman-planned-massacre-for-six-years.html>, visited 6 Aug. 2010.

[33] *OJ* [2008] Debates of the European Parliament, 24.9.2008, p. 47.

[34] A. Girardeau. 'Riposte graduée: les grandes manœuvres de l'Elysée', *Libération*, 6 Oct. 2010 <www.liberation.fr/medias/0101121531-riposte-graduee-les-grandes-man-uvres-de-l-elysee>, visited 6 Aug. 2010.

[35] The right of national parliaments to submit reasoned opinions on the compliance of draft EU initiatives with the principle of subsidiarity to the European Parliament, the Commission and the Council is one of the principal instruments of their *ex ante* participation in EU decision-making. Reasoned opinions could, since Sept. 2006, be sent as part of the informal political dialogue known as 'the Barroso initiative', and since Dec. 2009, as part of the so-called early warning mechanism, a procedure of a narrower scope envisaged in Art. 6(1) of Protocol no. 2 on the Application of the

The *Assemblée nationale*'s Committee for European Affairs, addressing the Bono Amendment, found that '[t]heir clear intention is to frustrate the implementation of the French graduated response' but merely acknowledged the French authorities' appraisal that this amendment would not pose an obstacle for the *Loi Hadopi*.[36] Recalling that the COSAC Chairpersons' meeting, held in Paris on 7 July 2008, raised the question of subsidiarity regarding the competence for deciding the modalities of combating Internet piracy, the Committee assessed that while the Commission did indeed seek to extend its competences in this domain, the subsidiarity problems were solved once the Commission ran into joint opposition by the member states and the European Parliament.[37] During the Committee debate, Christian Paul (PS) considered it inappropriate to assert national solutions for the regulation of downloading, because the problem largely transcended state borders. Furthermore, referring to President Sarkozy's lobbying of the Commission against the Bono Amendment, he inquired why the President did that if this amendment really did not pose any legal problem. He also correctly predicted that the ensuing parliamentary deliberations on the *Loi Hadopi* would, as we will see later, transgress political cleavages.[38] The most important conclusion of the Committee's scrutiny was, however, that along with a necessary coordination at the European level, the combating of illicit downloading remained the competence of the member states.[39]

The *Sénat* adopted a European resolution[40] on the telecoms package on 22 May 2008.[41] Since the Bono Amendment had then still not been proposed, this resolution could not address it.

Principles of Subsidiarity and Proportionality annexed to the Treaty of Lisbon. *See also* G. Bermann, 'The Lisbon Treaty: The Irish "No". National Parliaments and Subsidiarity: An Outsider's View', 4 *European Constitutional Law Review* (2008) p. 453-459; I. Cooper, 'The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU', 44 *Journal of Common Market Studies* (2006) p. 281-304; D. Jančić, 'National Parliaments in the European Union: The Lost and Found of Europe's Democracy', *Paper presented at 5th Graduate Conference on the European Union, EU Center of Excellence, University of Pittsburgh, 20 March 2010*, p. 1-36; J-V. Louis, 'The Lisbon Treaty: The Irish "No". National Parliaments and the Principle of Subsidiarity – Legal Options and Practical Limits', 4 *European Constitutional Law Review* (2008) p. 429-452.

[36] *Assemblée nationale, Rapport d'information* no. 1162 of 15 Oct. 2008, rapporteurs Pierre Lequiller (UMP), Michel Herbillon (UMP) and Didier Quentin (UMP), p. 54-55 <www.assemblee-nationale.fr/13/europe/rap-info/i1162.asp>, visited 10 Aug. 2010.

[37] Ibid., p. 55.

[38] Ibid., p. 60-61.

[39] Ibid., p. 62.

[40] European resolutions are adopted under Art. 88-4(2) of the French Constitution, which reads: 'In the manner laid down by the rules of procedure of each House, European resolutions may be passed, even if Parliament is not in session, on the drafts or proposals referred to in the preceding paragraph, as well as on any document issuing from a European Union institution.'

[41] *Sénat, Résolution européenne* no. 96 of 22 May 2008 <www.senat.fr/leg/tas07-096.html>, visited 10 Aug. 2010.

The Loi Hadopi and its hurdles: A political marathon in sprint mode?

Wishing to secure the deal as soon as possible, the French Government declared urgency on 23 October 2008. Reacting swiftly, and introducing minor amendments, the *Sénat* adopted the *Loi Hadopi* at first reading on 6 November 2008.[42] While the suspension of Internet access by *Hadopi* was maintained, the bill now mitigated the sanction regime to enable the *Hadopi* not only to suspend but also to limit Internet access. Also, the shortest duration of the suspension of Internet access was reduced from three months to one.

During the preparatory phase, the report of the *Sénat*'s Committee for Cultural Affairs had taken due account of the Bono Amendment, but concluded nonetheless that the *Loi Hadopi* did not run counter to it in any respect. In reaching this conclusion, the Committee relied, *inter alia*, on the following two arguments derived from the European level.

First, the Committee referred to a statement by Commissioner Reding's spokesperson of 6 October 2008 on the Bono Amendment:

> The Commission respects this democratic decision of the European Parliament, in our opinion this amendment is an important reaffirmation of the fundamental principles of the legal order of the European Union, especially the citizens' fundamental rights. The amendment leaves *to the member states the freedom to strike a balance between the several related fundamental rights*, particularly the rights to respect for private life and property and effective remedies and information and freedom of expression.[43]

The Committee interpreted the Commission's position as confirming France's competence to balance intellectual property rights with those related to Internet access. The *Sénat* was, therefore, free to proceed with the *Loi Hadopi*.

Second, the Committee invoked the *Promusicae* judgment of the European Court of Justice of January 2008, which tackled 'the question of the need to reconcile the requirements of the protection of different fundamental rights, namely the right to respect for private life on the one hand and the rights to protection of property and to an effective remedy on the other.'[44] The Court of Justice ruled

[42] *Sénat*, Doc. no. 8 of 30 Oct. 2008, *Projet de loi adopté par le Sénat après déclaration d'urgence favorisant la diffusion et la protection de la création sur internet* <www.senat.fr/leg/tas08-008.html>, visited 9 Aug. 2010.

[43] *Sénat, Commission des affaires culturelles, familiales et sociales, Rapport no. 53 sur le projet de loi favorisant la diffusion et la protection de la création sur Internet* of 22 Oct. 2008, rapporteur Michel Thiollière (UMP), p. 41 [emphasis in original] <www.senat.fr/rap/l08-053/l08-053.html>, visited 8 Aug. 2010.

[44] ECJ 29 Jan. 2008, Case C-275/06, *Productores de Música de España (Promusicae)* v. *Telefónica de España SAU*, para. 65.

that, when transposing and implementing directives, the member states must balance fundamental rights fairly, proportionately and in accordance with the general principles of Community law.[45] The *Sénat* utilised these findings of the Court of Justice to claim that the *Loi Hadopi* fulfilled these requirements. On the one hand, the *Sénat* argued that no Community text affirmed that Internet access is a fundamental right, an argument that had also been defended by an MEP, unsurprisingly an MEP from UMP, Jacques Toubon. On the other hand, the principle of proportionality was held to be observed because: (a) the suspension of Internet access would only come after a series of prior notifications and in case of multiple recidivism; (b) an alternative sanction in the form of an injunction was also envisaged; and (c) the suspension of Internet access referred only to the connection or place where the violation has been committed.[46]

In the *Sénat* plenary debate of 29 October 2008, rapporteur Thiollière (UMP) remarked that the Bono Amendment 'provoked numerous reactions, because some are trying to instrumentalise the debate on this draft directive in order to block the French approach.'[47] It should be noted that the insistence on the French approach was also driven by the desire to defend the *exception culturelle française* and thus maintain specificity, prestige and leadership within the Union.[48] After its adoption, the bill was sent to the *Assemblée nationale*.

[45] Ibid., para. 68 reads: 'the member states must, when transposing the directives […], take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality'.

[46] *Sénat, Commission des affaires culturelles, familiales et sociales*, *see supra* n. 43, p. 44-45. According to an oft-invoked Government's illustration, the suspension of Internet access foreseen by the *Loi Hadopi* encroaches on citizens' freedom less than the withdrawal of one's driving licence does, because losing a driving licence prohibits the sanctioned driver from driving any vehicle, whereas the *Loi Hadopi* allows the sanctioned subscriber to access the Internet in all other places except for that where the infringement of intellectual property occurred.

[47] *Sénat, Compte rendu intégral, Séance du mercredi 29 octobre 2008, JORF* [2008] S. (C.R.) 84, 30.10.2008, p. 6347.

[48] Witness the intervention by senator Richard Yung (PS) during the same debate: '[…] the defence of creators must be at the heart of our preoccupations. The respect for their rights is an imperative that constitutes our specificity and our French cultural policy. The stakes are immense, because we must protect this unique system in Europe – and, probably, also in the world – if we do not want to go under the yoke of the Anglo-Saxon culture' (p. 6361). By the same token, Minister Albanel declared that 'the French ambition in [the area of] culture is that Europe watches with great attention what we are going to do regarding illegal downloading, especially because there are other experiences elsewhere. In a very recent letter, Viviane Reding assessed the English experience as an attempt at good practices, which takes place outside state intervention and the French experience' (p. 6364). *Sénat, Compte rendu intégral, see supra* n. 47.

After a protracted period of heated parliamentary discussion at first reading, the *Assemblée nationale* adopted the *Loi Hadopi*, as amended, on 2 April 2009.[49] The sanction of limiting Internet access was deleted and the shortest period of suspension of Internet access extended to two months. The debates of the bill were replete with references to the EU level.

The Committee for Laws rejected the amendment moved by Patrick Bloche (PS) incorporating the Bono Amendment into the *Loi Hadopi*. The main reasons for the rejection were that: (a) under the 1950 European Convention of Human Rights (ECHR)[50] France owes and fulfils the duty to provide fair trial and respect the principle of the presumption of innocence, and the *Loi Hadopi* conforms to it; (b) recourse to a court – albeit *a posteriori* – remains possible; (c) Internet access is not a fundamental right; and (d) it is the competence of the *Conseil constitutionnel* to reconcile the related rights.[51] For Minister Albanel, the thesis that the *Loi Hadopi* is a liberty killer stemmed from a 'bizarre interpretation' of the Bono Amendment.[52]

The Committee for Cultural Affairs, in its opinion supporting the Government's position,[53] argued that the Legal Affairs Committee of the European Parliament itself had advised in favour of a graduated response when it assessed that 'the protection of copyright, other related rights and intellectual property is an important element of the guarantee of economic competitiveness of the European Union.'[54]

[49] *Assemblée nationale*, Doc. no. 249 of 2 Apr. 2009, *Projet de loi favorisant la diffusion et la protection de la création sur internet modifié par l'Assemblée nationale en première lecture* <www.assemblee-nationale.fr/13/ta/ta0249.asp>, visited 9 Aug. 2010.

[50] *See* Art. 6(1), first sentence, and (2) of the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms, concluded in Rome in 1950: (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. […]; (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

[51] *Assemblée nationale, Commission des lois constitutionnelles, de la législation et de l'administration générale de la République, Compte rendu no. 28, Séance de 9h 30, mercredi 18 février 2009*, p. 11 <www.assemblee-nationale.fr/13/cr-cloi/08-09/c0809028.asp>, visited 9 Aug. 2010.

[52] *Assemblée nationale, Commission des lois constitutionnelles, de la législation et de l'administration générale de la République, Compte rendu no. 27, Séance de 16h 15, mardi 17 février 2009*, p. 7 <www.assemblee-nationale.fr/13/cr-cloi/08-09/c0809027.asp>, visited 9 Aug. 2010.

[53] *Assemblée nationale, Commission des affaires culturelles, familiales et sociales, Avis no. 1481 sur le projet de loi, adopté par le Sénat, favorisant la diffusion et la protection de la création sur internet* of 18 Feb. 2009, rapporteur Muriel Marland-Militello (UMP), p. 33 <www.assemblee-nationale.fr/13/rapports/r1481.asp>, visited on 9 Aug. 2010.

[54] *Parlement Européen, Commission des affaires juridiques, Rapport no. 2008/2121(INI) sur le droit d'auteur dans l'Union européenne* of 26 Jan. 2009, rapporteur Manuel Medina Ortega (S&D), point 15.

Conversely, in the plenary session of 11 March 2009, Patrick Bloche (PS) attacked the Government for ignoring the recommendations and positions adopted at the European level:

> Beyond this [Bono] amendment that bothers you so much, the European Commission remains very reticent to the idea of entrusting the power of suspension [of Internet access] to an administrative organ, underlining very justly that 'the reality of the current use of the Internet goes far beyond access to content'. Indeed, the Commission reminded you, as we do today, that a growing number of public services are provided through the Internet, a means that is increasingly replacing the more traditional channels of communication.[55] I invite you to read or re-read the resolution on cultural industries of the European Parliament adopted on 10 April 2008 by 586 votes to 36.[56] […] Until when will the Government pretend that these European recommendations do not exist?[57]

In the plenary session the following day, Martine Millard, member of the *Parti de gauche* (PG) in the *Assemblée nationale*, also complained that 'the sanction chosen by the Government is contrary to the recent positions of the European Parliament.'[58] She emphasised that the European Parliament's Committee for Civil Liberties, Justice and Home Affairs (LIBE) had in February 2009 unanimously adopted a report drafted by Stavros Lambrinidis (PASOK and S&D), in which it warned that governments and private societies should not deny Internet access as a sanction.[59] The European Parliament was, thus, in her eyes, clearly against the graduated response foreseen by the *Loi Hadopi*. The Socialists agreed that this European Parliament's report was remarkable and continued vehemently to defend the Bono Amendment, arguing that those 88% of the MEPs who adopted this amendment 'wanted to send a message not only to national parliaments but more broadly to our fellow citizens of the European Union.'[60] They further considered that, in the

[55] *See supra* n. 24.

[56] *See supra* n. 20.

[57] *Assemblée nationale, Compte rendu intégral, Séance du mercredi 11 mars 2009, 189e séance de la session ordinaire 2008-2009, JORF* [2009] A.N. (C.R.) 34, 12.3.2009, p. 2505. N.B. The Official Journal erroneously states that the plenary took place in 2008, whereas it took place in 2009. The reference in this footnote is correct. His party colleagues, Didier Mathus and Sandrine Mazetier, made the same arguments about the Government's disregard of this European Parliament's resolution.

[58] *Assemblée nationale, Compte rendu intégral, Séance du mercredi 12 mars 2009, 191e séance de la session ordinaire 2008-2009*, *JORF* [2009] A.N. (C.R.) 35, 13.3.2009, p. 2564. N.B. The Official Journal erroneously states that the plenary took place in 2008, whereas it took place in 2009. The reference in this footnote is correct.

[59] *Parlement européen, Commission des libertés civiles, de la justice et des affaires intérieures, Rapport no. 2008/2160(INI) contenant une proposition de recommandation du Parlement européen à l'intention du Conseil sur le renforcement de la sécurité et des libertés fondamentales sur Internet* of 25 Feb. 2009, rapporteur Stavros Lambrinidis (S&D), point Q.

[60] *Assemblée nationale, Compte rendu intégral, see supra* n. 58, p. 2577.

case of the *Loi Hadopi*, developments at the European level should prompt action at the national level. In this sense, Didier Mathus (PS) asserted with regard to the suspension of Internet access that:

> If all democratic states have abandoned this possibility, that is because they had some reasons to do so. These reasons were quite convincingly formulated in various texts of the European Union, such as the Commission's observations or the recent report on education, not to mention the Bono Amendment […].[61]

Rather vivid plenary debates occurred in the *Assemblée nationale* in late March and early April 2009. Deputies Bloche (PS) and Millard (PG) again invoked the Lambrinidis Report to reaffirm the standpoints presented therein that Internet is becoming 'an indispensable tool for the promotion of democratic initiatives' and that its suspension is contrary to the rights to education, culture, freedom of information, job search, and social integration. Minister Albanel laconically discarded this report because 'it has no legal value'. In reply, deputies Lionel Tardy (UMP) and Christian Paul (PS) contended that although the report was indeed not legally binding on France, this did not mean that it was devoid of any effect. In their view, the European Parliament's pronouncements embodied in the Bono Amendment and the Lambrinidis Report were a true barometer of the European public opinion and exhibited this institution's orientation towards recognising Internet access as a fundamental right. Sandrine Mazetier (PS) added that such Government's attitude, in the dawn of European elections, emitted a signal to the candidates intending to run for these elections that their future careers would practically be futile.[62] A representative of *Nouveau Centre* (NC), Jean Dionis du Séjour, argued that the European Parliament's vote was firm proof that the Government's unwavering refusal to reconsider its position juridically isolated France.[63] Even the communists, who are traditionally unenthusiastic towards European integration, were in favour of relaying opinions of the European Union whenever these opinions promoted civic liberties.[64]

[61] *Assemblée nationale, Compte rendu intégral, 2e séance du jeudi 12 mars 2009, 192e séance de la session ordinaire 2008-2009*, *JORF* [2009], A.N. (C.R.) 35[2], 13.3.2009, p. 2601. N.B. The Official Journal erroneously states that the plenary took place in 2008, whereas it took place in 2009. The reference in this footnote is correct.

[62] *Assemblée nationale, Compte rendu intégral, Séance du lundi 30 mars 2009, 207e séance de la session ordinaire 2008-2009, JORF* [2009], A.N. (C.R.) 42, 31.3.2009, p. 3083-3085, 3087 and 3089.

[63] *Assemblée nationale, Compte rendu intégral, 2e séance du mardi 31 mars 2009, 210e séance de la session ordinaire 2008-2009, JORF* [2009], A.N. (C.R.) 43[2], 1.4.2009, p. 3189.

[64] *See* intervention by Jean-Pierre Brard, *Parti communiste français* (PCF) in *Assemblée nationale, Compte rendu intégral, 2e séance du mercredi 1er avril 2009, 212e séance de la session ordinaire 2008-2009, JORF* [2009], A.N. (C.R.) 44[2], 2.4.2009, p. 3259.

The voices of dissent could also be heard from the deputies of the ruling UMP, as the attentive reader will already have noticed. On the one hand, Patrice Martin-Lalande agreed with the opposition wondering why the suspension of Internet access should be retained if the European Parliament had massively outlawed it and if it otherwise diverges from the European developments.[65] On the other hand, the force of the European Commission's arguments had persuaded Lionel Tardy to support an opposition amendment seeking to prevent Internet users from being simultaneously pursued in two proceedings – before the *Hadopi* for illegal downloading and before a criminal court for counterfeiting. As he explained:

> [T]he European Commission had explicitly stated that this bill [*Loi Hadopi*] had to guarantee that the envisaged measures satisfied the criteria of proportionality. It has particularly emphasised the need to exclude the possibility to institute, concomitantly, both a penal and an administrative proceeding for the same offence. Our amendment intends to conform to the observations of the European Commission […][66]

Eventually, this amendment failed. Rapporteur Franck Riester (UMP) encapsulated the Government's stance very well in saying that 'the French Parliament must be able to continue to pass statutes without permanently waiting for what the European Union will decide.'[67] Evidently, therefore, all opposition struggles, whether corroborated with arguments from the European level or not, failed to perturb the Government. After the first reading in both Houses of Parliament, the suspension of Internet access remained one of the sanctions for illegal downloading.

Calling all passengers traveling to the Assemblée: Vote the *Loi Hadopi*!

Since the Government had declared urgency, the *Commission Mixte Paritaire* was convened after the first reading.[68] With regard to the suspension of Internet access, the joint text mirrored that adopted by the *Assemblée nationale* at first read-

[65] *Assemblée nationale, Compte rendu intégral, Séance du mercredi 1er avril 2009, 211e séance de la session ordinaire 2008-2009, JORF* [2009] A.N. (C.R.) 44, 2.4.2009, p. 3226 and 3235.

[66] *Assemblée nationale, Compte rendu intégral, 2e séance du mercredi 1er avril 2009, 212e séance de la session ordinaire 2008-2009, JORF* [2009], A.N. (C.R.) 44[2], 2.4.2009, p. 3258.

[67] *Assemblée nationale, Compte rendu intégral, see supra* n. 65, p. 3226.

[68] Art. 45(2) French Constitution.

ing.[69] The joint text was adopted by the *Sénat* on 7 April 2009. Two days later, in a surprise vote, the *Assemblée nationale* rejected it with 21 votes against and 15 votes in favour, out of a total of 577 deputies, i.e., slightly more than 6% of the members. The Government explained that this '*commedia dell'arte pathétique*' or '*manœuvre dérisoire*' happened because some fifteen Socialist members had hidden themselves in one of the corridors of the *Palais Bourbon* only to rush into the hemicycle at the very moment of the vote.[70] This event further fuelled a debate on the chronic absenteeism in the French Parliament.[71] Yet while the irked *Élysée* and *Matignon* were reining in their party colleagues in the *Assemblée nationale*, the Socialists refused any responsibility claiming, among other things, that the *Loi Hadopi* is 'an already broken and ineffective Maginot Line. Technically, there are means on the Internet to bypass it. Juridically, the evolution of the European legislation contradicts it at its very base.'[72]

Making use of a possibility provided for by Article 45(4) of the Constitution,[73] the Government re-introduced the bill on 11 April 2009 and a new reading began in the *Assemblée nationale*. In the plenary sessions preceding the vote, the Government's party reiterated that 'the French Parliament does not receive any

[69] *Commission Mixte Paritaire, Rapport Assemblée nationale no. 1589 et Sénat no. 327* of 7 April 2009, rapporteurs Franck Riester (UMP, *Assemblée*) and Michel Thiollière (UMP, *Sénat*), p. 68 <www.assemblee-nationale.fr/13/rapports/r1589.asp>, visited 10 Aug. 2010.

[70] C. Alix, 'Hadopi: «Retour le 27 avril», selon le ministère de la Culture', *Écrans*, 9 April 2009 <www.ecrans.fr/Rejet-d-Hadopi-Un-piege-selon-le,6914.html>, visited 11 Aug. 2010; 'Projet de loi Hadopi: pour ses opposants, "le Titanic a coulé"', *Le Monde*, 9 April 2009 <www.lemonde.fr/technologies/article/2009/04/09/projet-de-loi-hadopi-pour-ses-opposants-le-titanic-a-coule_1178869_651865.html>, visited 11 Aug. 2010.

[71] Roger Karoutchi (UMP), Secretary of State for the Relations with the Parliament, pressed for the application of financial sanctions for repeated absenteeism, as laid down in the Rules of Procedure of both Houses of Parliament. 'Copé veut "changer de méthode" pour lutter contre l'absentéisme des députés', *Le Monde*, 15 April 2009 <www.lemonde.fr/politique/article/2009/04/15/cope-veut-changer-de-methode-pour-lutter-contre-l-absenteisme-des-deputes_1180747_823448.html>, visited 11 Aug. 2010. A study carried out on the occasion of this very vote revealed that in the period from July 2007 to April 2009, 142 members of the *Assemblée nationale* made less than 10 interventions either in plenary or in committee. 'Qui sont les fantômes de l'Assemblée?', *Le Monde*, 21 April 2009 <www.lemonde.fr/politique/article/2009/04/21/qui-sont-les-fantomes-de-l-assemblee_1183311_823448.html>, visited 11 Aug. 2010.

[72] J-M. Ayrault et al, 'On ne s'excuse pas d'avoir rejeté Hadopi', *Libération*, 27 April 2009 <www.liberation.fr/medias/0101564207-on-ne-s-excuse-pas-d-avoir-rejete-hadopi>, visited 11 Aug. 2010.

[73] Art. 45(4) of the French Constitution reads: 'If the joint committee [*Commission Mixte Paritaire*] fails to agree on a common text, or if the text is not passed as provided in the foregoing paragraph, the Government may, after a further reading by the National Assembly and by the Senate, ask the National Assembly to reach a final decision. In such an event, the National Assembly may reconsider either the text drafted by the joint committee, or the last text passed by itself, as modified, as the case may be, by any amendment(s) passed by the Senate.'

orders from the European Parliament.'[74] But if the European Parliament's amendments were truly that irrelevant, the opposition pressed the Government to explain why it resisted them so forcefully:

> Madam Minister, your intervention in the beginning of the session will greatly weaken the representatives of France in Brussels. When our permanent ambassador to the European Union says tomorrow morning that the telecoms package should not be adopted as it is and that the procedure should be blocked in the higher interest of culture – nobody doubts that such will be his mandate – what will the European commissioners reply, Madam Reding above all? They will brandish the declarations of Madam Albanel in the French Parliament. 'The Bono Amendment? But your Minister of Culture said yesterday that it is of no importance whatsoever. Is that why you want to block the telecoms package?' Who will be right? Madam Albanel in Paris or the ambassador to the European Union in Brussels?[75]

All the more so given the Commission's warning that 'European institutions should not let themselves be utilised for the attainment of purely national blueprints at the Community level.'[76] However, the questions remained largely unanswered.

Finally, when the opposition, underpinning its reliance on the European Parliament, highlighted in a plenary debate of 7 May 2009, precisely one month before the European election, that the European Parliament enjoys 'the greatest legitimacy in a democracy, that of universal suffrage', Franck Gilard (UMP) derided the argument: 'Who cares about the European Parliament! […] Being an MEP is a knockabout farce!'[77]

The relentless efforts of the opposition, therefore, did not bear fruit. On 12 May 2009, the *Assemblée nationale* adopted the *Loi Hadopi* without amending the suspension of Internet access, followed by the *Sénat*'s approval the next day. The aforesaid surprise rejection of the bill would now have been avenged, had the opposition not taken the matter before the *Conseil constitutionnel*. Meanwhile, the EU debate had set the European Parliament and the Commission against the Council of Ministers.

[74] *See* intervention by Philippe Gosselin (UMP) in *Assemblée nationale, Compte rendu intégral, 2e séance du mercredi 6 mai 2009, 235e séance de la session ordinaire 2008-2009, JORF* [2009] A.N. (C.R.) 55[2], 7.5.2009, p. 4087.

[75] *See* intervention by Christian Paul (PS) in *Assemblée nationale, Compte rendu intégral, see supra* n. 74, p. 4092.

[76] *See* intervention by Patrick Bloche (PS) in *Assemblée nationale, Compte rendu intégral, see supra* n. 74, p. 4095.

[77] *Assemblée nationale, Compte rendu intégral, 2e séance du jeudi 7 mai 2009, 237e séance de la session ordinaire 2008-2009, JORF* [2009] A.N. (C.R.) 56[2], 8.5.2009, p. 4166.

Coalitioning at the Union plane: An unrelenting Council and a flirtatious Commission

On 6 November 2008, the Commission amended its proposal and in principle accepted the Bono Amendment because it:

> serves as a useful restatement of principles applying independently of this provision, and […] leaves member states to ensure that a fair balance is struck between the various fundamental rights protected by the Community legal order, in particular, the right to respect for private life, the right to protection of property, the right to an effective remedy and the right to freedom of expression and information.[78]

The Commission also declared that it 'understands that this issue is of high political importance in the domestic debate in France' and invited the French Government to discuss its views with the other 26 member states.[79]

For its part, the Council, in a public deliberation of 27 November 2008, and with the abstentions of Sweden, the United Kingdom and the Netherlands, reached a political agreement rejecting the Bono Amendment.[80] On the basis of this agreement, the Council, with the same member states abstaining, adopted its common position at first reading on 16 February 2009 rejecting this amendment.[81] Neither of the three abstaining member states did so because of the Bono Amendment, however.[82] The main forces behind the rejection were President Sarkozy and the French Government.

At its second reading, on 6 May 2009, the European Parliament refused to endorse a last chance compromise thrashed out with the Council, and instead reinstated the Bono Amendment verbatim and renumbered it 46.[83] Whereas an

[78] European Commission, Amended proposal COM(2008) 724, p. 15 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0724:FIN:EN:PDF>, visited 12 Aug. 2010.

[79] Press Release, Doc. no. MEMO/08/681 of 7 Nov. 2008.

[80] Press Release, Doc. no. PRES/08/345, 2907th Council meeting 'Transport, Telecommunications and Energy' of 27 Nov. 2008.

[81] Council of the European Union, Common position, Doc. no. 16496/08 of 9 Feb. 2009 <http://register.consilium.europa.eu/pdf/en/08/st16/st16496.en08.pdf>, visited 12 Aug. 2010. *See also* Press Release, Doc. no. PRES/09/33 of 16 Feb. 2009.

[82] Council of the European Union, Doc. no. 5905/09 of 11 Feb. 2009 <http://register.consilium.europa.eu/pdf/en/09/st05/st05905-ad01re02.en09.pdf>, visited 12 Aug. 2010. For example, the Dutch delegation abstained because it had 'great difficulty with the central role of the European Commission in the regulation of telecoms markets. The national regulators should have more latitude to take account of specific market circumstances and not be able to be overruled by the Commission in doing so.'

[83] European Parliament, Doc. no. P6_TA(2009)0361, p. 37 <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2009-0361+0+DOC+PDF+V0//EN>, visited 12 Aug. 2010.

overwhelming majority of the MEPs had, during the plenary debate the day before, opposed the suspension of Internet access without a prior judicial decision, some of them also carped at the *Loi Hadopi*. For instance, Bruno Gollnisch, a non-attached MEP from the French *Front national*, urged the European Parliament to block the *Loi Hadopi*, which for him is 'worthy of communist China or other totalitarian regimes.'[84] However, the criticism of the *Loi Hadopi* did not only come from the French MEPs. David Hammerstein, a Spanish member of the Greens, was also quite vocal in his criticism:

> At this very moment, Mr Sarkozy is challenging the European institutions over the future of the Internet. What is our response going to be? Are we going to remain silent and not answer? What is the position of the European Union and the Commission with regard to the new Hadopi Law on graduated response? […] We should listen to the vast majority of Europeans, particularly young people who have grown up in the digital era […] What the immense majority does not want is for operators to become digital police, spies, both judges and litigators who marginalise the normal legal procedures of a democracy. That must be made clear.[85]

In similar vein, Hanne Dahl, a Danish member of the Independence/Democracy Group, was 'concerned that the French culture minister still believes that it ought to be possible to shut off access to the Internet administratively after "three strikes".'[86]

At last, as the adoption of the *Loi Hadopi* and the European Parliament's decision at second reading practically coincided, Bono exhorted Commissioner Reding to launch infringement proceedings against France. As the EU legislative procedure had not yet ended, Reding could not legally reprimand Paris: 'This is a sovereign decision of the French assembly on a French law. Not everything that I do not like politically is also illegal.'[87] Less than a month before the European elections, the political reason for the Commission's unwillingness to confront France, so Bono believed, lay in Barroso's aspiration for a second term as Commission President and, hence, in his hesitancy to antagonise the French President, who could thwart his ambition within the European Council.[88]

[84] *OJ* [2009] Debates of the European Parliament, 5.5.2009, p. 9.

[85] Ibid., p. 10-11.

[86] Ibid., p. 11.

[87] L. Phillips, 'Commission Gives Paris a Pass Over Piracy Bill', *EUobserver*, 14 May 2009 <http://euobserver.com/?aid=28127>, visited 18 Aug. 2010.

[88] The procedure for appointment of President of the European Commission is laid down in Art. 17(7)(1) EU, as amended by the Lisbon Treaty: 'Taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting

The *Conseil constitutionnel* taming the shrew: Internet as a fundamental right

In its judgment of 10 June 2009,[89] the *Conseil constitutionnel* declared the *Loi Hadopi* partially unconstitutional. Two decisions most relevant for Internet access are as follows.

1. *The duty of Internet subscribers to monitor their Internet connections may be established* in order to ensure that access to these connections is not used for online activities that infringe intellectual property rights.[90] In other words, in order to stay within the boundaries of law, Internet subscribers should secure their Internet connections, for instance by setting passwords or installing security devices, so that neither their household members nor other third persons can use them to illegally download works protected by copyright or other related rights.
2. *The suspension of Internet access may not be established as an administrative penalty* for failure to monitor one's own Internet connection. Therefore, even where an Internet subscriber, intentionally or unintentionally, does not secure his or her connection, he or she must continue to be able to access the Internet using his or her connection.[91] However, an Internet subscriber not complying with the duty to monitor his or her connection can, in principle, suffer another, less strict, sanction. The *Conseil Constitutionnel* gave three reasons for shielding the right to access to the Internet.

First, the suspension of Internet access infringes the freedom of expression and communication laid down in Article 11 of the Declaration of the Rights of Man and the Citizen of 1789.[92] This freedom implies the freedom to Internet access

by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure.'

[89] *Conseil constitutionnel*, Decision no. 2009-580 of 10 June 2009 <www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2009/2009-580-dc/decision-n-2009-580-dc-du-10-juin-2009.42666.html>, visited 13 Aug. 2010.

[90] Ibid., para. 7.

[91] There are other ways to access the Internet, such as at work, in Internet cafés, or using other people's Internet connections. However, both the *Loi Hadopi* and the *Conseil constitutionnel*'s judgment deal with accessing the Internet using one's own Internet connection.

[92] Art. 11 of the Declaration of the Rights of Man and the Citizen of 1789 reads: 'The free communication of ideas and opinions is one of the most precious rights of man. Every citizen may thus speak, write and publish freely, except when such freedom is misused in cases determined by Law.'

not only because of the current state of the means of communication and the generalised development of the public communication services, but also because Internet access is important for the participation in democracy and the expression of ideas and opinions.[93] The freedom of expression and communication, which henceforth encompasses Internet access, is 'all the more precious since it is one of the cornerstones of a democratic society and one of the guarantees of respect for other rights and freedoms.'[94]

Second, although Parliament, under Article 34 of the Constitution, is indeed empowered to reconcile the objective of combating online infringement of intellectual property with that of safeguarding the freedom of expression and communication, any restriction of this freedom must be necessary, suitable and proportionate.[95] The suspension of Internet access does not fulfil this requirement because: (a) an administrative authority, unlike a court of law, may not be entrusted such a far-reaching power of sanction;[96] (b) it does not differentiate the Internet subscriber, i.e., the holder of an Internet access contract, from the actual user; (c) it is not limited to a certain category of persons but refers to the entire population; and (d) it can lead to a restriction of the freedom of expression and communication even in one's home.[97]

Third, the suspension of Internet access violates the principle of the presumption of innocence enshrined in Article 9 of the Declaration of 1789. The burden of proof must not be placed on the Internet subscriber but on the *Hadopi*. It must not be presumed that it was the Internet subscriber who committed an online infringement of intellectual property. In other words, the subscriber must be not

[93] *Conseil constitutionnel, see supra* n. 89, para. 12.

[94] Ibid., para. 15.

[95] Ibid.

[96] Relevant passages of the judgment suggest that the unconstitutionality of the suspension of Internet access did not stem from the nature of the *Hadopi* as an administrative authority, but rather from the extent of the sanctioning power vested in it. According to the *Conseil constitutionnel*, no constitutional principle or rule, including the separation of powers, precludes an administrative authority from imposing penalties aimed at protecting constitutionally guaranteed rights and freedoms (para. 14). Also, on the basis of Art. 34 of the French Constitution, the Parliament is at liberty to reconcile the objectives of safeguarding intellectual property distributed online with the freedom of expression and communication (para. 15). Restrictions on the freedom of expression and communication may thus be established, but only proportionately to the purpose that any such restriction seeks to achieve. This means that the French Constitution does not require the legislature to empower a court of law to sanction Internet subscribers; it can just as well be an administrative authority. In the case of the *Loi Hadopi*, however, the sanction of suspending Internet access was found too harsh and, therefore, disproportional to the goal of protecting online intellectual property. It is, hence, the nature of the sanction rather than that of the sanctioning authority, that was found unconstitutional. As a corollary, only a court of law may hand down such a drastic sanction.

[97] *Conseil constitutionnel, see supra* n. 89, para. 16.

be obliged to prove that the infringement was committed by a third party. Instead, it must be up to the *Hadopi* to prove the subscriber's guilt.[98]

Therefore, the *Conseil constitutionnel* ruled that, in France, Internet access is a fundamental freedom guaranteed by the Constitution and that it can only be restricted by a court. Yet were the reverberations of this ruling felt beyond France?

The *Loi Hadopi II* and the EU telecoms package: An unexpected epilogue

In order to supplement the *Loi Hadopi* and bring it into harmony with the judgment of the *Conseil constitutionnel*, the Government initiated on 24 June 2009 an accelerated legislative procedure of a bill on the penal protection of literary and artistic property on the Internet (*Loi Hadopi II*).[99] This bill sought to introduce in the Intellectual Property Code the suspension of Internet access of up to one year as a supplementary sanction for counterfeiting offences committed online and the prohibition of concluding another Internet access contract during this period.[100] While the *Hadopi* would be permitted to determine these offences, the power to impose the suspension of Internet access was to be entrusted to a court, the *tribunal correctionnel*, composed, by way of exception, of a single judge.[101] Where foreseen by Government regulations, Internet access suspension for up to one month would also be applicable to persons found guilty of committing class five minor offences foreseen by the Intellectual Property Code.[102] Further, the violation of the prohibition of concluding another Internet access contract was to be punishable by imprisonment of two years and a fine of 30.000 euros.[103] Persons suspected of having committed acts of counterfeiting online, who therefore faced the supplementary sanction of the suspension of Internet access, were merely to enjoy the right to send their observations to the *Hadopi*'s Commission for the Protection of Copyright and sworn public agents.[104] The subscriber whose Internet

[98] Ibid., paras. 17 and 18.

[99] *Sénat*, Doc. no. 498 of 24 June 2009, *Projet de loi relatif à la protection pénale de la propriété littéraire et artistique sur internet* <www.senat.fr/leg/pjl08-498.pdf>, visited 16 Aug. 2010.

[100] Art. L335-7(1) of the *Code de la propriété intellectuelle* as amended by Art. 7 of the *Loi Hadopi II*.

[101] Art. 398-1(1), point 10 of the *Code de procédure pénale* as amended by Art. 6(1) of the *Loi Hadopi II*. As a rule, the *tribunal correctionnel* is composed of a president and two judges (Art. 398(3) of the *Code de procédure pénale*).

[102] In French criminal law, offences are typified according to severity. Minor offences are *contraventions*, which are divided into five classes. Class five *contraventions* are the most severe. Offences of intermediate severity are *délits* and the most severe ones *crimes*.

[103] Art. 434-41(1) of the *Code pénal* as amended by Art. 11 of the *Loi Hadopi II*.

[104] These sworn public agents, who assist the *Hadopi*, are appointed by organisations for professional protection or the French National Cinematographic Centre and sworn before a competent judicial authority. Their task is to register online infringements of intellectual property materials and

access would be suspended would nonetheless, as in the *Loi Hadopi*, remain under a duty to honour his or her Internet provision contract and continue to pay the fees to the Internet provider. When the judicial decision would become executable, the *Hadopi* would notify it to the Internet provider for execution.

In the preparatory proceedings, some of the opposition members of both the *Assemblée nationale* and the *Sénat* argued that the *Conseil constitutionnel* had confirmed the Bono Amendment and even made it the very foundation of its decision.[105] The bill was adopted by both Houses of Parliament after the *Commission Mixte Paritaire* had convened. While the described Government's provisions passed, the negotiations in the Parliament had inserted a host of significant amendments.[106]

Above all, the rights of the accused Internet subscriber were strengthened beyond the mere sending of observations to the *Hadopi*. They now included the rights: (a) to be notified of the right to send observations; (b) to request to be heard, in which case the *Hadopi* shall grant this right; (c) to be assisted during the hearing by a counsel of his or her choice; and (d) to receive a copy of the minutes of the hearing.[107] Moreover, in its first e-mail recommendation, the *Hadopi* must inform subscribers of the possibility of having their Internet access suspended as a supplementary sanction should violations be detected. Similarly, the sending of the second e-mail recommendation must, unlike in *Loi Hadopi*, be accompanied by a letter sent by post. In addition, the *Hadopi*'s Commission for the Protection of Copyright was placed under a duty to delete the personal data about the convicted Internet subscriber upon the expiration of the period of the suspension of Internet access. Another novelty is that the Internet access of subscribers who have committed class five minor offences may only be suspended in case of gross negligence and where the *Hadopi* has previously sent the subscriber a letter by post inviting him or her to secure his or her Internet connection. Finally, as a counterbalance to these amendments, which are favourable to Internet subscribers, it was agreed that the decision on the suspension of Internet access may be handed down in a summary procedure in the form of a penal order, during which the accused disposes of less procedural rights. In sum, the *Conseil constitutionnel*'s find-

refer such cases to the *Hadopi* for action to be undertaken against the Internet subscriber identified.

[105] *See* interventions by senator Nicole Borvo Cohen-Seat (PCF) in *Sénat, Compte rendu intégral, Séance du mercredi 8 juillet 2009, session extraordinaire 2008-2009*, *JORF* [2009] S. (C.R.) 81, 9.7.2009, p. 6818; by deputy Brard (PCF) in *Assemblée nationale, Compte rendu intégral, Séance du mardi 21 juillet 2009, 25e séance de la session extraordinaire 2008-2009*, *JORF* [2009] A.N. (C.R.) 94, 22.7.2009, p. 6687; and by Bloche (PS) in *Assemblée nationale, Compte rendu intégral, 2e séance du mardi 21 juillet 2009, 26e séance de la session extraordinaire 2008-2009*, *JORF* [2009], A.N. (C.R.) 94[2], 22.7.2009, p. 6743.

[106] *Assemblée nationale*, Doc. no. 337 of 22 Sept. 2009, *Projet de loi relatif à la protection pénale de la propriété littéraire et artistique sur internet (texte définitif)* <www.assemblee-nationale.fr/13/ta/ta0337.asp>, visited 16 Aug. 2010.

[107] Art. 331-21-1 of the *Code de la propriété intellectuelle* as amended by Art. 1 of the *Loi Hadopi II*.

ings on the obligatory intervention of a court if Internet access is to be suspended and the principle of presumption of innocence had been taken into account. Admittedly, the court proceeding had become simplified and greatly assisted by the work of the *Hadopi*. Yet it is the judicial and not the administrative authorities that are henceforth competent to render the final decision denying Internet access. This did not appease the opposition, which took the *Loi Hadopi II* before the *Conseil constitutionnel*. This time, however, without success. Save for one relatively minor point, the *Conseil constitutionnel*, in its decision of 22 October 2009, approved the *Loi Hadopi II*.[108]

Soon thereafter, the draft Better Regulation Directive entered the last decision-making stage. The Conciliation Committee agreed a joint text on 4 November 2009. The compromise, reached by unanimity, had yielded the following legislative solutions.[109]

First, it was recognised in the Preamble that the Internet was 'essential for education and for the practical exercise of freedom of expression and access to information' and that 'any restriction imposed on the exercise of these fundamental rights should be in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms.'[110] Herewith, access to the Internet is promoted to the level tantamount to that of a fundamental right.

Second, the Framework Directive was amended to oblige the member states, when taking measures regarding end-users' access to or use of the Internet, to respect natural persons' fundamental rights and freedoms as flowing from the ECHR and the general principles of Community law.[111] Compared to the Bono Amendment, reference to the EU Charter on Fundamental Rights had been dropped, which, according to Teresa Riera Madurell (S&D), had a clear advantage because all member states are signatories of the ECHR, whereas Britain and Po-

[108] *Conseil constitutionnel*, Decision no. 2009-590 of 22 Oct. 2009 <www.conseil-constitutionnel.fr/decision//2009/2009-590-dc/decision-n-2009-590-dc-du-22-octobre-2009.45986.html>, visited 16 Aug. 2010. The only provision of the *Loi Hadopi II* that the *Conseil constitutionnel* found unconstitutional was the one allowing the injured party, where offences of intellectual property committed online are tried in the summary procedure by means of a criminal order, to claim damages and, as the case may be, oppose the criminal order. This provision is unconstitutional because the Parliament did not fully exercise the power to lay down rules of criminal procedure, vested in it pursuant to Art. 34 of the French Constitution. Namely, the Parliament did not determine the manner in which a claim for damages may be brought; it did not specify the effects of opposing the criminal order; and it did not establish the right of the accused to limit his or her opposition solely to the civil or solely to the criminal provisions of the criminal order.

[109] Conciliation Committee, Joint Text, Doc. no. PE-CONS 3677/09 of 12 Nov. 2009 <http://register.consilium.europa.eu/pdf/en/09/st03/st03677.en09.pdf>, visited 17 Aug. 2010.

[110] Recital 4 Better Regulation Directive.

[111] Art. 1 Better Regulation Directive inserting para. 3(a) in Art. 1 Framework Directive.

land have opted out from the EU Charter.[112] Yet since the member states are bound by the ECHR and the general principles of Community law irrespective of any express mention thereof in EU legislation, the said opt-outs from the EU Charter and its disappearance from the text of the Directive altogether do not prejudice the gist of this provision.[113]

Third, any member state measure restricting individuals' fundamental rights and freedoms related to the Internet may only be imposed if the following two classes of guarantees are afforded. On the one hand, any such measure must be 'appropriate, proportionate and necessary within a democratic society.' On the other hand, a series of safeguards must be provided: a prior, fair and impartial procedure; the right to be heard; the right to privacy; the presumption of innocence; due process; effective judicial protection; effective and timely judicial review; and, possibly, other adequate procedural safeguards in conformity with the ECHR and with general principles of Community law.[114]

The Council adopted the joint text on 20 November 2009, with the Netherlands abstaining for the same considerations as in the second reading, which, again, did not refer to the right to Internet access.[115] Four days later, the European Parliament followed suit. The European Parliament had, therefore, succumbed to the Council's and the Commission's pressure and agreed that the Bono Amendment's reference to a prior ruling of the judicial authorities be abandoned. But why did

[112] *OJ* [2009] Debates of the European Parliament, 24.11.2009, p. 37. Art. 1(1) Protocol no. 7 on Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom reads: 'The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.' *See* further, C. Barnard, 'The "Opt-Out" for the UK and Poland From the Charter of Fundamental Rights: Triumph of Rhetoric Over Reality?', in S. Griller and J. Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism Without a Constitutional Treaty* (Wien, Springer 2008), p. 257-284. In addition, Czech Republic has secured a political promise that its opt-out from the Charter would be enacted in the next EU accession treaty.

[113] *See* analyses of the status of the EU Charter of Fundamental Rights in different periods of European integration in A. Knook, 'The Court, the Charter, and the Vertical Division of Powers in the European Union', 42 *Common Market Law Review* (2005) p. 367-398; K. Lenaerts and E. de Smijter, 'A "Bill of Rights" for the European Union', 38 *Common Market Law Review* (2001) p. 273-300; I. Pernice, 'The Treaty of Lisbon and Fundamental Rights', in S. Griller and J. Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism Without a Constitutional Treaty* (Wien, Springer 2008), p. 235-256; B. de Witte, 'The Legal Status of the Charter: Vital Question or Non-Issue?', 8 *Maastricht Journal of European and Comparative Law* (2001) p. 81-89.

[114] Art. 1 Better Regulation Directive inserting para. 3(a) in Art. 1 Framework Directive.

[115] Council of the European Union, Doc. no. 16481/09 of 7 Dec. 2009, p. 14 <http://register.consilium.europa.eu/pdf/en/09/st16/st16481-ad01.en09.pdf>, visited 17 Aug. 2010. *See supra* n. 82.

the European Parliament give in? The reasons for the shift revolved around the argument that the Bono Amendment was *ultra vires*, and could, therefore, not be pursued. Perhaps more momentous was the fact that this argument was, as we demonstrate hereunder, not only furthered by the Council, but was, without much contestation and due to the rising sense of political expediency, also espoused by the European Parliament itself.

(a) *Council pressure.* Already at the first conciliation trilogue of 29 September 2009, the Swedish Presidency explained that the member states were opposed to the Bono Amendment because the legal basis for the proposed directive, namely Article 95 EC, which allows harmonisation of the internal market, did not authorise the Union to regulate the structure of national judiciaries, including in matters of criminal law.[116]

(b) *European Parliament's internal endorsement of the compromise.* At the request of the European Parliament's conciliation delegation, the European Parliament's Legal Service issued on 12 October 2009 its opinion on the freshly contentious matter of Community competence. The Legal Service found that the Bono Amendment 'appears to entail a partial harmonisation of the organisation and the remit of the judiciary in the member states' and that it, therefore, falls outside the scope of Article 95 and Community competence. Besides, neither the right to a fair trial nor the right to an effective remedy, as laid down in Articles 6 and 13 of the ECHR respectively, require a prior court ruling.[117] The view of the Legal Service was not isolated. That the Bono Amendment exceeded the European Parliament's Treaty powers was also supported by Siiri Oviir, an Estonian member of ALDE, a lawyer by vocation.[118]

(c) *Responsibility for the reform.* A more orthodox, albeit in this case not impalpable, explanation lies in the reluctance of the European Parliament to bear the brunt of the then looming Union's failure to carry out this comprehensive reform of European telecommunications over a point that was, despite its importance, largely collateral to the already agreed main reform lines. In this respect, the European Parliament resigned itself to the conclusion that 'the agreement reached goes

[116] European Parliament, Report at III reading, Doc. no. A7-0070/2009 of 16 Nov. 2009, rapporteur Catherine Trautmann, p. 6-7 <www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2009-0070&language=EN>, visited 17 Aug. 2010. As reported herein, in some member states a prior court decision is not requisite for action to be taken against an individual. An example is that, in many member states, cases involving online dissemination of child pornography are the competence of a prosecutor, whose decisions are in turn subject to judicial review and the safeguards afforded by the ECHR.

[117] European Parliament, Legal Service, doc. no. SJ-0495/09 of 12 Oct. 2009, paras. 4-7 <www.laquadrature.net/wiki/EP_legal_service_138_analysis>, visited 17 Aug. 2010.

[118] *OJ* [2009] Debates of the European Parliament, 23.11.2009, p. 21.

much further than what was possible at earlier stages of the procedure',[119] and, as rapporteur Trautmann asserted, 'the result obtained was the maximum that Parliament could obtain with the legal basis we had.'[120] Commissioner Reding's reminder corroborates this reasoning: '[…] you know how much time we need in order to set up new legislation – so that by the time we arrive at an agreement, the world has already advanced so much that we should start from the beginning again.'[121]

It is fair to assess the European Parliament's success as partial. The insistence on form, i.e., on a court decision, was dropped in favour of substance, i.e., the incorporation of the aforesaid safeguards.[122] In a plenary session of the European Parliament the day before the vote, Philippe Lamberts, a French member of the Greens, a group that had initiated the Bono Amendment, was actually delighted with the result achieved and assured the House that had the European Parliament not voted twice for this amendment, the compromise would not have been obtained.[123] Some MEPs claimed that history in telecoms had been written.[124] Even the Swedish Pirate Party was satisfied. Their representative, Christian Engström, reckoned that the compromise was a signal to member states not to pursue measures resembling President Sarkozy's *Loi Hadopi* or Lord Mandelson's Digital Economy Act.[125] However, the truth of the matter is that the EU telecoms package, enacted on 25 November 2009, does not, as Gollnisch MEP rightly underlined,[126] forbid *Hadopi*-like laws or authorities to be erected.

Concluding remarks

The tale of the legal enshrinement of the Internet as a fundamental freedom in France and in the European Union is one where neither the national nor the Union institutions refrained from influencing the legislative process unwinding at the 'other' level. The Commission and the European Parliament first admonished the French Government. The French opposition then connived with their counterparts in the European Parliament to obtain the Bono Amendment and then use it

[119] European Parliament, Report at III reading, *see supra* n.116, p. 8.

[120] *OJ* [2009] Debates of the European Parliament, *see supra* n. 118, p. 12.

[121] Ibid., p. 19.

[122] As Jaroslav Paška, a Slovak member of Europe of Freedom and Democracy Group in the European Parliament, pointed out, 'the aims and ideas contained in the original Article 138 were transposed in an acceptable way'. However, his party colleague, MEP Trevor Colman, squarely disagreed. Ibid., p. 15-16.

[123] Ibid., p. 14.

[124] *See* interventions by Lambert van Nistelrooij, a Dutch member of EPP, and his party colleague from Ireland, Seán Kelly. Ibid., p. 17 and 19.

[125] Ibid., p. 16.

[126] *OJ* [2009] Debates of the European Parliament, 24.11.2009, p. 36.

to curb the Government. The Government then lobbied the Commission and the Council. Furthermore, while the French parliamentary majority relied in part on the European Court of Justice's judgment, the opposition turned to the *Conseil constitutionnel* for support. Although the *Conseil constitutionnel*'s key finding on the requirement of a court for the suspension of Internet access was not embraced, its considerations on the principles of the presumption of innocence and necessity and proportionality of Internet access restrictions echoed in the Better Regulation Directive. The very petition to the *Conseil constitutionnel* had in turn echoed the Commission's remarks on the *Loi Hadopi*. Therefore, although the Council refused to entrust the suspension of Internet access to courts, it had not totally ignored the *Conseil constitutionnel*'s and, indirectly, the wishes of the French opposition and the European Parliament. The strings had, thus, become tremendously reticulate.

In the end, the protagonist of this entire legislative episode, President Sarkozy, accomplished his goal in Brussels, but failed in Paris. A Pyrrhic victory it is, for an EU directive does not trump the *Conseil constitutionnel*'s judgments. Regardless of the outcome, it is remarkable that parliaments from different levels of governance, to a certain extent, fought back jointly, even though this is not what one would ordinarily expect. Thus, after the coalition of the French national and European deputies had obtained in Brussels the insertion in draft EU legislation of a judicial procedure for the suspension of citizens' Internet access, these arguments from the EU level were unsparingly employed in the French Parliament, and particularly in the *Assemblée nationale*, to buttress the political pressure on the executive branch. Parliaments, in their French and European seats, have displayed their ability to challenge their executive rivals in multilevel games, albeit not perforce to defeat them. So, what do these cross-level exchanges tell us about the nature of the Union's constitution?

The EU telecoms reform and the *Loi Hadopi* are solid examples of interdependence between the Union and its member states, between their institutions and their respective legislative and judicial processes. George Scelle's famous *dédoublement fonctionnel* is, after all, not the only channel of influence in the Union.[127] Indirect interdependences arise, too, whereby, as I have argued elsewhere, actors within the European constitutional order not only directly interact with but also shape their action in relation to the action performed by or attributable to the institutions legally established outside their own legal system.[128] What qualifies the scope

[127] *See* G. Scelle, *Précis de Droit des Gens: Principes et Systématique* (Paris, Recueil Sirey 1932-1934); H. Thierry, 'The Thought of Georges Scelle', 1 *European Journal of International Law* (1990) p. 193-209.

[128] D. Jančić, 'The French and British Parliaments' Relations with EU Institutions: a Constitutional Rapprochement?', *Paper presented at 8th Biennial ECSA-C Conference "Whither Europe?", Univer-*

of this argument is whether such interdependence materialises casuistically, in isolated cases of temporal coincidence of conflicting legislative processes at the national and EU levels, or whether it reveals a broader and more purposeful phenomenon of cross-level interplay.[129] If the EU telecoms case should appear to be merely incidental, one would not err if he were to consider that such cases, with the augmented powers of the European and national parliaments in EU affairs, might occur more frequently, and become in future perhaps even paradigmatic of the manner in which the Union's unwritten constitution evolves.

Two conclusions are certain, however. It is politics as a process that crosses levels, not its institutional incarnations. And European politics does not only mean EU politics; it is also means, and not to a small extent, national politics.

sity of Victoria, 29 April – 1 May 2010, p. 19 <http://web.uvic.ca/ecsac/biennial2010/Conference_Papers_files/Jancic.pdf>, visited 20 Aug. 2010.

[129] *See*, for example, a statement by Patrick Bloche (PS): 'We repeat and insist that, *regarding these issues*, it is not possible to disconnect the debate that we have here in Parliament from what is happening at the European level and, *in this moment*, in the European Parliament, which will […] pronounce itself on the telecoms package, a telecoms package that the French government had, *for that matter*, taken hostage' [emphases added]. *Assemblée nationale, Compte rendu intégral, Séance du lundi 4 mai 2009, 229e séance de la session ordinaire 2008-2009*, *JORF* [2009] A.N. (C.R.) 53, 5.5.2009, p. 3884.