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**POSITION PAPER EUROPEAN COMMISSION**

The European Commission is one of the primary institutions of the European Union, and, as a legislative actor, strives daily for a balanced internal European cooperation and the strengthening of the international and transnational relations of the Union. As a completely independent instance, the EC proposes legislation that takes in consideration the short- and long-terms interests of the individual states as well as the goals and principles of the Union as a whole.

The Commission’s supranational autonomy is directly bound by the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union and, since its establishment in 1958, has been invested in promoting and protecting human rights on a European and national level.

While we do identify the need for the protection of human rights in the 21st century and have reiterated our commitment to apply and promote both the European Convention and the Charter of Fundamental Rights of the Union throughout the digital age, we have full trust in what can be achieved through the correct interpretation and application of the afore-mentioned documents and the establishment of specialized legislation. Therefore the Commission, although it recognizes the noble motives behind and novel ideas expressed in the proposed document with the title “Charter of Digital Fundamental Rights of the European Union”, is sceptical towards its application and efficiency in the real world. Further reason supporting our stance on the matter, as well as possible alternatives to the proposal, shall be discussed below.

In the ***Preamble*** of the proposal, one can recognize a certain level of contemporality. This might, at first, appear to be a positive aspect of the pre-text, since it is in fact required that European legislation takes in consideration the dilemmas and obstacles of the modern age. However, when it comes to corner-stones of our legal framework, it is necessary that the texts remain timeless: Just as fundamental human rights are not “more or less relevant” in different time periods, vague phrases such as “the digital age” or “the 21st century” should not be part of the Preamble of a Human Rights Declaration.

**Article 1** contains many disputable points, including the demand that human dignity (which is already protected by multiple previous conventions) shall be the sole purpose of technical developments and the claim that the use of algorithms constitutes a threat to this human dignity. However, the provision that alarms us the most can be found in Paragraph 3, which foresees that the Charta binds not only states, **but also private individuals.** This clause is problematic on primarily two levels. *Firstly*: Human Rights are conceptualised as fundamental rights of individuals to defend themselves against the dominance of an organised state. And while this is the reason why it is expected that states sign and remain bound by such Declarations, and an immanent part of this obligation includes the provision of protection against other citizens, we do not believe there is no justification for individuals or, even worse, companies, to be directly bound. *Secondly*, on an institutional level, this provision would be impossible to implement, without first foregoing a radical reformation of the EU: What makes Human Rights Declarations binding, is that Member States and EU institutions can be brought to justice. However, according to Article 19 TEU and Article 263 TFEU, only these parties can be brought to the European Court of Justice. Thereby, a private person could not possibly be bound by this Charta, without leading to either inapplicability of the Article or to regulatory obstacles for the European Union.

**Article 2** mentions the right to freedom of information and communication. Unlike other official documents, e.g. the Convention for the Protection of Human Rights and the Charter of Fundamental Rights of the EU[[1]](#footnote-1), this provision doesn’t include any limitations of this right, nor does it specify whether it only refers to the right to *protection of personal information*. This negligence leaves the following two issues unsolved: *On one hand*, the unlimited access of each and every citizen to information is impossible both on a practical and a legal level. *At the same time*, extensively granting the right to freedom of information along with the right to participate in the digital sphere on equal terms (**Article 3 (1))** would signify, that Member States that have not yet achieved the ideal circumstances concerning e.g. internet connection in some regions, can be held legally accountable for this, even if the cause of the issue is lack of resources. We do not believe that such a regulation reflects the goals of the Union, nor does it effectively protect the autonomy of individuals.

While **Article 4** mentions a central point and source of concern for the Union nowadays, that being the internal and external security of the EU and its Member States, we wish to point out that this issue was discussed and resolved with the so-called NIS Directive[[2]](#footnote-2), aimed at strengthening Europe’s cyber resilience, which was adopted in July 2016 and will come into full force in November 2018. We believe that the Directive, by proposing specific measures and providing access to expertise to the Member States, will be significantly more effective in this regard.

Additionally, **Articles 5 and 6,** aimed at protecting the rights to freedom of opinion and protection against profiling, only point out fundamental rights already included in national and European primary legislation, either explicitly or through interpretation. It goes without saying, for example, that the Right to Freedom of expression […] in Article 10 of the Charter of Fundamental Rights of the EU also pertains to expression in the cyberspace. This general applicability of already existing cornerstones of fundamental rights makes the drafting of a substantially identical document unnecessary.

**Article 8** constitutes an effort to address a vital aspect of the recent advancements in technology, i.e. artificial intelligence, fails however to provide a viable answer to the question. The term “ethical implication” is a very subjective term, the interpretation of which varies according to the time period and the people involved. Additionally, the Article contains both requirements that are already foreseen by existing laws, for example the responsibility of the legislator for the use of artificial intelligence, which makes them superfluous, as explained above.

**Article 11, Data protection and data sovereignty:** The right to the protection of personal data is a very important one nowadays. Nevertheless, European Commission has already worked on this theme and has proposed a regulation and a directive which each provide exactly the protection discussed in article 11 of the digital charter proposal.

The regulation and the directive have already entered in force. The regulation [2016/679](http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2016.119.01.0001.01.ENG&toc=OJ:L:2016:119:TOC" \t "_blank) will be applied in 2018, whereas and the member states have until the 8th of May 2018 to transpose the directive 2016/680.

The directive designates the right to the protection of private data as a fundamental right in its preamble. It makes no doubt that the European Council and the European Parliament have made a text which protects the individuals and their data properly.

It is to be noted, that the directive in its Article 39 specifies the importance to protect data that could have a direct impact on an individual’s fundamental rights, such as data related to information on racial or ethnic origins for example.

**Article 12, Informational self-determination:** the article 39 of the regulation 2016/679 ensures this right. In terms that are more precise enough to guarantee that they will be respected.

**Article 13, data security:** Article 39 of the regulation 2016/679 protects the personal data « Personal data should be processed in a manner that ensures appropriate security and confidentiality of the personal data, including for preventing unauthorised access to or use of personal data and the equipment used for the processing. »

At the same time, Article 40 of the regulation 2016/679 ensures data security as it guarantees consent of data processing « In order for processing to be lawful, personal data should be processed on the basis of the consent of the data subject concerned or some other legitimate basis, laid down by law, either in this Regulation or in other Union or Member State law as referred to in this Regulation, including the necessity for compliance with the legal obligation to which the controller is subject or the necessity for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract. »

The scope of **Article 14 of the proposal** is already protected by the Charter of Fundamental Rights (articles 39 and 40 CFR) and the ECHR and is a general principle of European law.

From our point of view, free access to Internet cannot be considered as a fundamental right nor as a fundamental need or a “basic service”. The access to Internet, as important as it might be and as much power as it might give to an individual, is not a primary necessity and is a not a question of life or death. Consequently it has no place in a charter of “fundamental rights”. The word “fundamental” should keep its very first meaning and not be used to designate an economic right like the right to free access to Internet. Consequently, the **Article 15 of the proposal** should not have its place in a Charter for Fundamental Rights.

Moreover, it is the right of the member states to decide which services are basic services. If they are basic services they can be considered as public services and as such, it is the competence of the state to regulate these.

Network neutrality is the principle that all Internet traffic should be treated equally. This means that internet service providers and governments regulating the Internet should treat all data the same, not discriminating or charging differentially by user, content, website, platform, application, type of attached equipment, or mode of communication. **The article 16 of the proposal** aims to guarantee this neutrality for every Internet user in the EU. We agree with the necessity of tending to achieve the implementation of such a principle. Nonetheless, it is already the purpose of the Regulation 2015/2021. Network neutrality is inscribed in the preamble of the regulation and in the Paragraph 3 of its Article 3.

Pluralism and Competition are two fundamental principles of the European Union. The internal market could not function without these principles. The Article 17 of the proposal highlights the importance of pluralism, cultural diversity and competition. Regarding the need to ensure pluralism and cultural diversity, the legal framework of the EU is already furnished with enough norms and principles to protect these principles.

Concerning the right to “competition”: it is clear that the EU norms and the work of the DG Competition of our institution apply to digital service providers and to the activities occurring in the digital area, so that we consider that a further legislative procedure in order to establish this Charta is not necessary.

The necessity to protect vulnerable persons is not to prove anymore. The aim **of Article 19 of the proposal** to extend this right to the digital area is noble-minded. Nevertheless, the directive 2016/680 in its articles 39, 50 and 51 ensures this exact need for protection.

**Article 20, Education**: Article 14 of the CFR ensures the right to education, which includes the right to receiving education that enables every citizen to decide how they live in the digital world. There is no need for a new Charter to protect this right, as the protection in Article 14 can easily be extended.

The protection of workers as set out **in Article 21**, already existing in the different EU norms; e.g. article 15 CFR or the anti-discrimination rules in the treaties, which protect the workers; can be extended to the digital world.

As a conclusion, it makes no doubt that every right evoked in the proposal for a Charter of digital fundamental rights must be protected on the European level and that a proper protection of the individuals in the digital sphere should be guaranteed. However, the institutions of the EU have already worked on several legal initiatives to implement this protection. The directive **95/46/EC on the protection of personal data will stay in force until the 25th of May 2018, the Directive 2016/680 and the Regulation 2016/679 will both enter in force in 2018 and aim to protect most of the rights and principles inscribed in the proposal. Law is a lively material and should be interpreted in the light of the evolution of society. We believe that the Charter of fundamental rights is able to adapt to the modern problematic of the 21th Century. Thus, it is not necessary to put the institutions and the member state through the heavy procedure of producing a Charter of Digital Fundamental Rights.**

**Moreover, as we said during our analysis, the scope of the Charter for fundamental rights does not stop where the «digital sphere» begins. The guarantee provided by this text should apply to every person in every context because the rights that are protected are human rights, fundamental rights.**

**Finally, we must not forget that the EU evolves in an international context and some international institutions have also worked on providing an efficient protection of the personal data. For example, the Council of Europe has generated a «Convention for the protection of individuals with regards to automatic processing of personal data» in 1981. Moreover, the EU has used the principles of the ECHR since the beginning, and this rights are meant to be interpreted in the light of the evolution of society and can protect the individuals today in the digital area.**

**We witness that the protection of individuals in the 21th century is ensured on the European level. The directives and regulations provide an efficient protection in the European Union.**

**Today, through globalization, the real problems will occur in the relationship between the European individuals and the international actors, which are not bounded by European legislation. We think that a proposal for a text protecting the digital rights on an international level through European legislation would be welcome.**

1. Article 10 (2) and Article 27 respectively. [↑](#footnote-ref-1)
2. https://ec.europa.eu/digital-single-market/en/network-and-information-security-nis-directive [↑](#footnote-ref-2)