**EESC Fundamental Rights and Rule of Law Group and European Commission DG JUST**

# Safeguarding fundamental rights in the digital age

## 11 February 2022

ONLINE EVENT

European Commission

European Economic and Social Committee

**EESC Fundamental Rights and Rule of Law Group and the European Commission's DG JUST**

**Report on the conference on**
***Safeguarding fundamental rights in the digital age***
***- 11 February 2022 -***

The conference was a joint European Commission-EESC event to discuss the annual report on the application of the Charter of Fundamental Rights of the European Union, issued by the Commission in December 2021.

The 2021 report takes a thematic look at fundamental rights in the digital age. In addition to providing a general overview of the Commission's report, the conference also aimed at examining more closely the fundamental rights implications of the use of artificial intelligence (AI) systems in high-risk situations and of managing content moderation on social media platforms.

## 1. Opening session

### Welcome

**Christa Schweng, president of the European Economic and Social Committee**, explained that the conference had been organised jointly with the European Commission to offer an opportunity for stakeholders to discuss the latest annual report on the application of the Charter of Fundamental Rights of the European Union, which focused on the topic of "safeguarding fundamental rights in the digital age". This event was timely given the increasing role played by digitalisation in the daily lives of Europeans, as had become obvious during the COVID-19 crisis. Ms Schweng noted that the EESC had been a forerunner, having started working on artificial intelligence in 2017, and adopting nine opinions on the topic since then. The EESC was fully supportive of the European Commission in developing a human-centric approach to prevent artificial intelligence being misused to harm fundamental rights, democracy and the rule of law. She encouraged the EU to increase its leadership role towards ensuring that law applying in the offline world be also enforced in the digital world, and to avoid letting a parallel world develop that would reproduce and amplify societal biases, leading to violations of human rights. Ms Schweng felt that the issue of content moderation put forward a human rights dilemma as it was necessary to combine the fight against illegal or harmful content with respect for freedom of expression and other rights. In conclusion, she called the objective of safeguarding fundamental rights in the digital world a "race against time between technology and law", a race which the EU had previously been losing, and in which it had now started running faster.

**Ana Gallego, director general, DG Justice and Consumers**, **European Commission**, felt that there were many different benefits and risks brought about by digitalisation, and that it was a highly political task to decide which benefits were to be pursued and how to minimise the risks. To do this, it was important to understand who benefited and how, as well as who was facing the risks and why. Ms Gallego welcomed the EESC's key role in the EU's decision-making process and the importance it devoted to the digital transition. She then presented the latest annual report on the EU Charter of Fundamental Rights, which aimed to provide an overview of the challenges and opportunities that existed in the EU, and also to make the way different developments influenced each other more visible. The report covered best practices and challenges in the Member States in the digital area, including in areas such as work and employment situations, for which she gave examples. In April 2021, the European Commission had proposed a Regulation to help ensure the protection of fundamental rights and safety where AI is used. She explained that regulation of high-risk AI systems needed to be complemented by training of AI system operators so that they acquired the proper skills needed to ensure respect for fundamental rights. She referred to the Digital Education Action Plan for 2021-2027, which aimed at promoting digital skills, including in relation to AI. As far as platform work was concerned, Ms Gallego

stressed that, despite the economic opportunities it had created, it was clear that platform work also posed challenges to fundamental rights, such as the protection of privacy, workers' rights to information and consultation, and the right to fair and just working conditions. To meet these challenges, the European Commission had proposed a Directive to improve working conditions for platform workers at the EU level.

**Discussion on fundamental rights in the digital age**

**Dragoş Tudorache MEP (Renew Europe, Romania), chair of the Special Committee on Artificial Intelligence in a Digital Age (AIDA)**, underlined the importance of artificial intelligence in the transformation of society. Through the AI Act, the EU would seek to be the first regulator of artificial intelligence at global level. This move should not be seen as a purely legalistic development: it was also a political statement on the relation between AI and the tryptic of values at the heart of the EU project – democracy, the rule of law, and fundamental rights. Mr Tudorache referred to the EU Declaration on Digital Rights and Principles recently proposed by the European Commission and to the Bill of Rights for an AI-Powered World proposed by the USA, and he pointed to the need to further spread an alliance of technological democracy all over the world. He considered it essential that actions be taken to prevent the importation of discrimination and bias in the digital world, as well as disinformation and manipulation through AI means. Mr Tudorache pointed to other challenges such as threats to the right to privacy, the digital divide, and systemic societal risks stemming from technology uses, such as mass surveillance and mass manipulation. He concluded by referring to the need to set the right model now for our future society.

**Michael O'Flaherty, director of the European Union Agency for Fundamental Rights (FRA)**, shared his experience of participating in a series of expert reflections in the recent years concerning technology. They highlighted the need for the widest possible inclusion of stakeholders (from the private and public sphere, and from various fields) and the advantages of trying to develop a common language amongst them, so that, for instance, engineers, ethicists and economists can communicate effectively. Agreeing on the importance of safeguarding fundamental rights in the digital age was a good thing, but a key question was how to achieve this objective. Mr O'Flaherty therefore highlighted the main implications of a human-rights-based approach to technology. Taking the EU Charter of Fundamental Rights as the normative pathway implied that all rights should be protected in the digital world, not only freedom of expression and privacy, but also the right to non-discrimination and socio-economic rights. The involvement of the rights holders, the users of digital technology, was essential and so was the central role of civil society in proposing and monitoring developments. A rights-based approach was a continuous learning exercise and requires the ongoing clarification of the application of norms to the changing human and technological reality. Accountability was of central importance in the digital world as in the offline one. This requires the transparency of algorithms and effective regulatory oversight. Finally, Mr O'Flaherty pointed to the need to pay attention to the environment in which humans experienced digital activities, that is to say the need to ensure equal digital literacy and access.

**Pauline Dubarry, justice advisor, Permanent Representation of France to the European Union**, pointed out that digital sovereignty and transition was one of the priorities of the French presidency of the Council of the EU. The objective was the defence of a European model based on law, such as the General Data Protection Regulation (GDPR), taking into account that digitalisation could threaten but also serve to promote fundamental rights. The fight against online hatred required platforms to bear responsibility and called for a balance between protection, freedom of expression, and the interests of the business sector. It also required the reinforcement of the role of judicial authorities so that they were able to prosecute abusers and protect victims. The French presidency was therefore working on adding "hate speech and hate crimes" to the list of "EU crimes" covered by Article 83 of the Treaty on the Functioning of the EU (TFEU). The French presidency also insisted on the protection of children's' rights online, including through the Digital Service Act (DSA), as well as on the fight against racism and

antisemitism or violence against women, which took place online as much as offline. Ms Dubarry also explained that the French presidency was supporting a balanced approach to the Artificial Intelligence Act proposed by the European Commission, and the objective that AI be useful for judicial purposes. She also insisted on the need for an inclusive approach to these topics, gathering expertise from the technology, legal, and social communities. Ms Dubarry concluded by referring to the French presidency's objective to stimulate both business innovation and fundamental rights, and to reinforce a European model against anti-democratic models.

**Max Schrems, honorary chair, None of Your Business (European Centre for Digital Rights)**, explained that litigation was still difficult to operationalise based on the GDPR. The procedure which had led to the "Schrems II" decision by the European Court of Justice had cost around EUR 10 million, showing that the European Court was still not genuinely accessible. Mr Schrems therefore considered that more efforts were needed to ensure that EU legislation offered proper protection of Europeans' rights in the digital environment. He also regretted the fact that legalistic debates on which authority would have the lead on the implementation of certain areas of EU law on digital matters could take several years. Against the risk that digital systems retained a position of superiority over law, he called for a reversal of the burden of proof, whereby companies should be the ones proving that their systems complied with regulations such as the GDPR. Mr Schrems also highlighted the lack of reciprocal knowledge between the digital community and the legal community, and called for more GDPR and fundamental rights training for code writers and more digital training for law practitioners. He concluded by considering that the lack of legal clarity on the operationalisation of digital regulations was particularly hitting small and medium enterprises and consumers.

## 2. An in-depth presentation of the 2021 European Commission Fundamental Rights Report "Fundamental Rights in the Digital Age"

**Louisa Klingvall, team leader, Unit C.2: Fundamental rights policy, DG Justice and Consumers, European Commission, and Eike Gräf, policy officer, Unit C.2: Fundamental rights policy, DG Justice and Consumers, European Commission, provided an in-depth presentation of the European Commission report.**

Since 2009, the Charter of Fundamental Rights had been part of EU primarily law, on an equal footing with the Treaties, and was therefore binding on the EU and on Member States acting in the area of EU law. The 2021 annual report had been the first one to adopt a thematic approach, to highlight best practices and challenges in the Member States. This approach had followed the New Strategy for the Implementation of the Charter of Fundamental Rights published in 2020, which had laid the ground for more funding for the mainstreaming of fundamental rights by the Member States, training of legal professionals, and citizen awareness raising campaign such as #RightHereRightNow.

More details were provided on the five chapters of the report concerning the protection of fundamental rights in the digital age:

Concerning **online content moderation**, the report took into consideration the fact that some digital platforms were now so big that they played an important role in the democratic debate, in particular towards young people. Content moderation raised several dilemmas, for example the treatment of harmful but not illegal content such as disinformation, the limits of freedom of expression, and the approaches of regulation vs self-regulation. Approaches to content moderation should in any case consider the fundamental rights of all stakeholders. It was important to find the right policy mix to both respect platforms' freedom to conduct a business, including the determination of their business models and their preferred approach to moderation and the protection of other fundamental rights, including through removal of illegal content. While big platforms had the means to ensure the

structural removal of illegal content, this process might be harder for smaller entities. This economic reality should be considered, as should the possibilities and limits of automated moderation. The rights-based approach set out in the Digital Service Act (DSA) proposed an effective way forward by imposing action on illegal content removal while protecting users from arbitrary content moderation.

On **artificial intelligence**, the report acknowledged the challenge of implementing fundamental rights in the "black box" context. It can for example be difficult to ensure transparency of automated decisions, or to find out when fundamental rights had been breached due to the use of automated tools. Most Member States had national AI strategies, and a number of voluntary guidelines existed, but nothing yet of a binding nature. Therefore, the European Commission had chosen to propose legislation with obligations such as the requirement to test and document high risk AI systems, for example in areas like education, employment, lending, law enforcement, including as regards the use of remote biometric identification systems, migration and asylum management, or justice. The proposed rules to ensure proper design and documentation from the outset. Supervisory authorities should have access to all necessary documentation resulting from the new rules, to reinforce the effective enforcement of fundamental rights by the different authorities in charge, such as data protection or consumer authorities.

The report also tackled the question of the **digital divide**. While digital connection could foster participation in many social activities, its absence could also lead to the exclusion of those left behind. Two main reasons for the digital divide were a lack of access to technology and a lack of skills. The COVID-19 pandemic had highlighted and increased this challenge, at a moment when more and more services, including public services, were provided online. The report showed various Member States' approaches and good examples of actions through education, assistance with the use of technology for those with low digital skills, support for women entrepreneurs, young people, etc.

The report had highlighted opportunities and challenges concerning **platform workers**. The European Commission proposed a Directive to improve the conditions of people working through digital labour platforms. In a context where COVID-19 had increased the prevalence of this business model, the European Parliament had also adopted positions on aspects such as precariousness, the lack of social protection, and unpredictable income. A central aspect of the question was the status of workers as employees or self-employed, as the lack of clarity prevented full protection of workers and collective bargaining on working conditions. Therefore, the European Commission had proposed legislation to improve these working conditions through criteria for the determination of employment status, and measures to improve the transparency, fairness, and accountability of algorithms used to manage work. The AI Act would further reinforce the understanding of how digital systems work, easing the identification of breaches of rights thanks to more transparency.

Finally, the report had touched upon **surveillance**. Some forms of surveillance were legitimate, and needed to be carried out in a lawful way in all cases. Data protection and privacy, in addition to being important fundamental rights, also served to protect fundamental rights such as freedom of expression and freedom of assembly. Consumer and civil society organisations had often deplored a lack of enforcement of the GDPR, despite some recent important judgments at Member State level. COVID-19 had led to a transfer of a big part of education online, which had raised concern about the quick design of data processing tools used in relation to students. The proposed European Digital Education Hub had been one of the responses to this challenge, through cross-sectoral collaboration of the technology and education communities towards improving the skills of users. In the health sector, data processing had also strongly increased, for example through digital applications to fight COVID-19. The EU had acted to improve interoperability and ensure the necessary legal and technological safeguards. Surveillance needed to be subject to effective public and private supervision and data retention needed to be limited to what was proportionate and necessary.

## 3. Expert panel on artificial intelligence and the right to non-discrimination

**Sarah Chander, senior policy advisor at European Digital Rights (EDRi)**, focused on the need to counter structural discrimination insofar as it was exacerbated by the deployment of AI systems. She gave the examples of facial recognition and biometric systems, and the use of AI systems to predict crime or control migration. She considered that such systems fundamentally targeted poor or working class people, codifying a presumed link between certain social or economic behaviour and crime. Ms Chander appreciated the fact that the AI Act proposal recognised how AI systems perpetuated historical patterns of discrimination and purported to minimise the risk of algorithmic discrimination. However, she regretted the fact that the response narrowly focused on the techno-centric solution of debiasing algorithms and datasets. She found that such an approach entailed the risk of simply encouraging the perfection of surveillance categorisation and control, instead of recognising that these systems would by nature be used in discriminatory ways and against already discriminated groups. She concluded by summarising the main recommendations by EDRi to improve the AI Act, which included a focus on harm prevention, accountability of companies and institutions, in particular those deploying high-risk AI systems, democratic legitimacy, and the empowerment of affected people and groups so that they could demand redress. She called for the AI Act to explicitly prohibit unacceptable forms of AI that challenged human dignity and undermine human rights.

**Théodore Christakis, professor of Law and Chair on the Legal and Regulatory Implications of Artificial Intelligence (AI-Regulation.com), University of Grenoble-Alpes**, focused on the specific challenge of the discriminatory use of facial recognition. He first tackled the technical aspect, i.e. discrimination bias enshrined in facial recognition softwares. This for example concerned accuracy issues linked to some ethnic groups or with gender. He then observed that this technical aspect was not the major issue in the light of the fast technological improvements of such systems. In any case, the draft EU AI act, through its pre-market requirements, should bring satisfactory solutions to the question of systems biases. He stressed that the Chair's current study "Mapping the Use of Facial Recognition/Analysis in Public Spaces in Europe" has shown that issues regarding discrimination and bias are rarely the main concern for Data Protection Authorities or judicial bodies when they examine cases of deployment of facial recognition systems. These authorities mainly focus on other issues such as the lack of legal basis, necessity or proportionality. However, some exceptions can be noted, for instance in the *Bridges* Case, in the UK, the Court of Appeal considered that the South Wales Police should have ensured that the system they used was not biased to fulfill the requirements under the public sector equality duty. The key question, said Professor Christakis, was not the AI system itself, but *how it was used in practice*. Concretely, he explained that discrimination issues could be related to the way databases were constituted. Some NGOs claimed that law enforcement databases could sometimes over-represent a part of the population or people from ethnic minorities. Furthermore, even the best facial recognition software would lead to discriminatory results if deployed in a way that mostly targeted specific groups.

**Laura Nurski, research fellow, Bruegel Think Tank**, pointed out that artificial intelligence was a tool designed by people, which was therefore not inherently good or bad. Society could shape the development of this tool and guide its implementation in workplaces. On the research and development side, she questioned the ability of Big Tech companies to foster an ethical development of AI, and she instead advocated for government-funded independent AI research institutes. On the implementation side, Ms Nurski considered that social dialogue was the best way to regulate workplace AI in a way that balanced workers' and firms' interests. She insisted on workers being involved in the design and implementation of workplace AI as a way to decrease the risk of undesirable outcomes such as discrimination. She regretted the lack of any mention of social dialogue as a crucial gap in the AI Act. Ms Nurski then focused on the difficulty of assessing the risks of AI systems, because of their "black-box" nature. She supported education and transparency as important tools to address this challenge, and she insisted on the importance of a comprehensive approach whereby workplace

managers and regulators of AI would be educated on AI literacy, while AI developers would be educated on ethics and human rights. Finally, Ms Nurski regretted the fact that the AI Act was too vague in specifying the risks to be assessed and mitigated. To specify these risks more concretely, policy needs a shared vision of the desired societal outcomes from the digital transition, which is currently mainly driven by private interests.

## 4. Expert panel on the fundamental rights Impact of online content moderation

**Asha Allen, advocacy director for Europe Centre for Democracy and Technology (CDT)**, considered that it was essential to make fundamental rights the foundations of any legislative framework on moderation. She shared her main recommendations on the draft of the Digital Services Act (DSA), backing the European Parliament position, which largely drew on civil society expertise, but also calling for the remaining gaps in the text to be closed. She considered that due diligence was vital for content moderation and that the current draft was a step in the right direction, with important additions on transparency and data protection frameworks, removing mention of automated content moderation. She welcomed the fact that the UN Guiding Principles on Business and Human Rights were mentioned in the Council negotiation mandate, and she called for stakeholders to be involved in developing a tool to check the implementation of due diligence in relation with the Digital Service Act. Ms Allen regretted the fact that the text entrusted non-judicial authorities with the power to determine the legality of content and to request sensitive information without appropriate safeguards. She called for further reflection on the mechanisms needed to ensure the proper implementation of the DSA, and for civil society expertise to play a key role in the design and implementation phases.

**Prof Joris van Hoboken, Professor of Law appointed to the "Fundamental Rights and Digital Transformation" chair, Vrije Universiteit Brussel**, welcomed the DSA's emphasis on the horizontal effect of fundamental rights when platform operations were regulated. He highlighted the complexities of the application of fundamental rights to content moderation. While in the 1990s it had been clear that the main right at stake online was freedom of expression, it had since become clear that many other rights were concerned by online activities, such as the right to privacy, to confidentiality, freedom of assembly, freedom to conduct a business, the right to property, etc. A second complexity was that what was at stake with fundamental rights also came from context, knowing that the DSA would cover online activities as varied as social media, online media, search engines, etc. Professor van Hoboken then presented the *DSA Observatory* project run by the University of Amsterdam, which covered the questions of oversight, enforcement, implementation, and access to justice. The DSA had brought new forms of regulatory oversight, moving from self-regulation to a clearer and codified set of rules. The key question would be whether the new regulatory authorities that would emerge from the DSA would have the sufficient means and capabilities to make the new regulatory framework work in practice. Professor van Hoboken concluded by stating that the EU should better ensure people's access to justice in real life, beyond what was generally provided in the DSA.

**Eliska Pirkova, Europe policy analyst and lead on global freedom of expression, Access Now**, considered that the DSA was proposing a real shift in content moderation. She felt that it was a key moment to develop a new model of platform governance entailing safeguards that were missing in previous related regulations. Ms Pirkova particularly insisted on due diligence and on risk assessment. She gave the example of content moderation tools reinforcing the stereotypes against groups they were supposed to protect. She mentioned the new criteria of meaningful transparency in content moderation and curation, which was an interesting development but was not enough per se – independent audit was also needed, for example. Another novelty were data access frameworks, which were essential to understand how data management could affect certain groups. Ms Pirkova concluded by explaining that the EU was at a crossroad, where it had become clear that self-regulation by platforms was not enough anymore. Ms Nurski considered that platforms had concentrated power by specifically designing their business models using techniques such as micro-targeting that were

abusive from the fundamental rights perspective. She felt that the DSA could mitigate such situations but that it could not do it on its own. She hoped that the DSA would have a spill over effect on various jurisdictions globally, in the same way as the GDPR had had.

## 5. Concluding session

**Rasha Abdul Rahim, director of Amnesty Tech**, concluded the conference. She considered that the outcome of the legislative negotiations on the Digital Markets Act and Digitals Services Act, as well as the Artificial Intelligence Act, were of vital importance in shaping how human rights protection would look in practice in the EU and beyond. She explained the opportunities represented by the DSA, which – in its version reviewed by the European Parliament – would restrict the use of data for targeted advertising, and would require Big Tech companies to assess and mitigate human rights risks, including with regard to their choice of business model. Ms Abdul Rahim, however, regretted that the EP had missed a historic opportunity to fully outlaw the intrusive practice of targeting ads based on people's personal data in the form of a ban on "surveillance advertising". Ms Abdul Rahim then welcomed the Artificial Intelligence Act as a significant turning point, being the world's first binding legal framework on AI. Still, she criticised the fact that the AI Act fell short of essential measures in the area of facial recognition technology, emotion recognition, and automated decision-making systems in the public sector. She notably recommended a full ban on facial recognition and remote biometric recognition technologies that enabled mass surveillance and discriminatory targeted surveillance, and the inclusion of complaint and redress mechanisms for organisations and citizens that had suffered harm from the use of any AI-system. Ms Abdul Rahim concluded her intervention by sketching two key challenges for the future. The first one, unlawful targeted surveillance, was illustrated by the Pegasus spyware scandal used to target hundreds of human rights defenders, journalists, lawyers, politicians and activists worldwide. She called for an immediate moratorium on the sale, transfer, and use of such spyware technology, as well as the immediate, independent, transparent and impartial investigation of any cases of unlawful surveillance revealed by the Pegasus project. The other challenge she presented was the "Metaverse" or "Web3", a virtual-reality space in which users could interact with a computer-generated environment and other users. She considered that this represented another way for platforms to keep people engaged for as long as possible, representing a massive new source of personal data open for collection and selling. Such developments called for an update of the GDPR-like processes governing informed consent in order to adapt them to new categories of our personal data for processing, such as facial expressions, gestures and other types of reactions an avatar could produce during interactions in the Metaverse.

**Cristian Pîrvulescu, president of the EESC FRRL Group**, closed the conference by thanking all institutions and civil society representatives which had offered excellent food for thought on the important area of fundamental right in the digital age. The participation of the European Commission, the European Parliament, the FRA, and the French presidency was particularly important in order to ensure the implementation of the main recommendations. Mr Pîrvulescu announced that the next conference of the FRRL Group would take place on 26 September to discuss the upcoming EU Rule of Law Report.

**END**