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From: Presidency
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To: Delegations
Subject: Presidency conclusions
- The Charter of Fundamental Rights in the context of Artificial Intelligence and Digital Change

At its meeting on 14 July 2020, the FREMP Working Party had a first exchange of views on the scope of this year's Council conclusions on the Charter of Fundamental Rights. On the basis of the input received at the meeting and subsequent written comments, the Presidency prepared draft Council conclusions on the Charter of Fundamental Rights in the context of Artificial Intelligence and Digital Change. At two informal video conference meetings of the FREMP Working Party on 2 September and 15 September, experts discussed the text of the draft Council conclusions.

Following discussions in the FREMP Working Party, the Presidency submitted the text of the draft Council conclusions to Coreper on 5 October and 7 October. At those meetings, consensus could not be reached on the draft Council conclusions as set out in the Annex to document 11373/19. At the informal video conference of the Ministers of Justice on 9 October 2020 the Presidency informed Ministers on the advanced state of negotiations and announced further work by the Presidency.

However, one Member State continued to object to the use of the term ‘gender equality’ as neither the Treaties nor the EU Charter of Fundamental Rights use the term ‘gender’. Other Member States were opposed to the deletion of this term, in particular because it is commonly used in more recent Union documents, such as the Council conclusions on shaping Europe’s digital future¹ and in ‘Council Conclusions on EU priorities for cooperation with the Council of Europe 2020-2022’², adopted on 13 July 2020.

Thus, at Coreper on 21 October 2020, the Presidency confirmed that further efforts to reach a consensus on this particular point in the draft Council conclusions on the Charter of Fundamental Rights in the context of artificial intelligence and digital change had not been successful. However, the Presidency stressed that the core elements of the conclusions, anchoring the Union’s fundamental rights and values in the age of digitalisation, fostering the EU’s digital sovereignty and actively participating in the global debate on the use of artificial intelligence with a view to shaping the international framework, were shared by all delegations. The Presidency concluded that 26 delegations supported, or did not object to, the text in its entirety as annexed to this document.

¹ OJ C 202 I, 16.6.20, paragraph 20.

² 9283/20, paragraph 12.

CONCLUSIONS ON THE CHARTER OF FUNDAMENTAL RIGHTS**IN THE CONTEXT OF ARTIFICIAL INTELLIGENCE AND DIGITAL CHANGE**

The COVID-19 pandemic has shown more clearly than ever that Europe must achieve digital sovereignty in order to be able to act with self-determination in the digital sphere and to foster the resilience of the European Union. We therefore want to work together on European responses for digital technologies, such as artificial intelligence (AI). We want to ensure that the design, development, deployment and use of new technologies uphold and promote our common values and the fundamental rights guaranteed by the EU Charter of Fundamental Rights (hereinafter ‘the Charter’), while increasing our competitiveness and prosperity. High levels of IT security must be maintained within a framework that is open to innovation.

We are committed to the responsible and human-centric design, development, deployment, use and evaluation of AI. We should harness the potential of this key technology in promoting economic recovery in all sectors in a spirit of European solidarity, uphold and promote fundamental rights, democracy and the rule of law and maintain high legal and ethical standards.

I. Introduction

1. The EU is a ‘union of values’, as enshrined in Article 2 of the Treaty on European Union, founded on respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. All Member States have a responsibility to uphold these values in order to make them a reality in the daily life of all their citizens. We recall in this respect the legally binding nature of the Charter for the EU and for the Member States when they are implementing Union law.

2. Ongoing challenges and developments over the past year have once again highlighted the fact that the protection of fundamental rights is a continuous endeavour. In particular, issues such as racism, domestic violence, violence against children and difficulties in protecting vulnerable groups, the rise in disinformation and the risk of violations of the rule of law and democracy persist. The COVID-19 pandemic has exacerbated many of these challenges and introduced new ones, in particular balancing access to health care with other fundamental rights. Against this background, we take note of the relevant surveys and reports of the FRA, in particular the FRA Fundamental Rights Survey. We reaffirm our commitment to the prohibition of any unlawful discrimination based on any ground as enshrined in Article 21 of the Charter. We also reaffirm our commitment to the accession of the EU to the European Convention on Human Rights and Fundamental Freedoms as enshrined in Article 6(2) of the Treaty on European Union. Moreover, the EU will cooperate with the Council of Europe in the promotion of gender equality and women's rights and on combating violence against women and domestic violence: the Council of Europe's 'Istanbul Convention' has been ratified and is being implemented by 21 EU Member States.
3. The COVID-19 pandemic has also demonstrated the value of digital technologies, including AI, in improving healthcare, reaching citizens and keeping the economy running. In this context it is important to safeguard proper connectivity and inclusion. We reaffirm our commitment to jointly overcome this crisis, to bring the added value of future-oriented technologies and applications to all members of society and to jointly uphold and promote our common principles and values as enshrined in Article 2 of the Treaty on European Union.

4. Digital technologies, including AI, are essential for European digital sovereignty, security, innovations and economic development and can contribute significantly to the protection and promotion of fundamental rights and democracy and the rule of law. To be digitally sovereign, the EU must build a truly digital single market, reinforce its ability to define its own rules, to make autonomous technological choices, and to develop and deploy strategic digital capacities and infrastructure. The digital transition is the EU's most important enabler of sustainable growth and competitiveness. The EU must make full use of and develop its strengths in the digital economy and climate-neutral technologies. Digital technologies have an increasing and largely positive effect on the daily lives of Europeans, for example in industry, services, research, justice and public security. We therefore welcome the European Commission's efforts to establish an AI ecosystem of excellence and trust based on our common principles and values, bringing the benefits of this technology to all European societies and economies.
5. However, while digital technologies, including AI, present increasing opportunities and benefits, their design, development, deployment, and misuse may also entail risks to fundamental rights, democracy and the rule of law. Therefore, efforts are necessary to ensure that the respect for fundamental rights as enshrined in the Charter remains guaranteed. In this context, challenges such as opacity, complexity, bias, a certain degree of unpredictability and partially autonomous behaviour need to be addressed in order to ensure the compatibility of automated systems with fundamental rights and to facilitate the enforcement of legal rules.

6. To address potential risks effectively, specific requirements must be met for the design, development, deployment and use of AI systems. In this regard, developing common technical standards could contribute to addressing these challenges and help to foster trust and confidence in the technology. We welcome the approach proposed by the European Commission in its White Paper ‘On Artificial Intelligence - A European approach to excellence and trust’, of reviewing existing EU legislation to determine whether it adequately addresses the risks and opportunities, as well as the requirements of AI applications, whether it can be effectively enforced and whether any adjustments or new legislation are necessary, also with regard to the protection of our common principles and values.
7. The European Union and its Member States must seize the opportunities of digital change, while also addressing potential risks and benefits. The protection and promotion of fundamental rights is key to ensuring that the EU is a place where people can prosper, enjoy their rights and freedoms and live without discrimination. We emphasise that the European approach to digital transformation and in particular AI should be human-centric and ensure the full respect and promotion of fundamental rights. In the context of the public sector, we acknowledge the ongoing work on the draft text of a joint Member State declaration to be concluded at the ministerial meeting on value-based digitalisation in December 2020.

8. The EU and its Member States must foster their digital sovereignty, while remaining open to all companies complying with European rules and standards. They must actively participate in the global debate on the use of AI with a view to continuing to shape the international framework, the processes and discussions in this field in accordance with our common principles and values, and ensure effective application and implementation of existing norms. In this context, we acknowledge the proposed EU Action Plan for Human Rights and Democracy 2020-2024, which sets the promotion of human rights and democracy in the use of digital technologies, including AI, as a priority in all areas of EU external action.
9. We acknowledge and stress the importance of coherence with the valuable work and initiatives carried out on fundamental and human rights in the context of digitalisation by the European institutions and agencies, in particular the European Commission, the European Parliament, the EU Agency for Fundamental Rights, and in the relevant case-law of the European Court of Justice, as well as in other fora, in particular the Council of Europe and its Ad Hoc Committee on AI, the OSCE, the OECD and the United Nations.

II. A fundamental rights-based approach to AI

10. We underscore that the design, development, deployment and use of AI must fully respect fundamental rights and existing legal rules. The same degree of protection should be applied in the digital and in the physical world. We emphasise that, under Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms laid down by the Charter may only be made if it is necessary and genuinely satisfies an objective of general interest recognised by the EU or the need to protect the rights and freedoms of others, subject to the principle of proportionality, and must be provided for by law and respect the essence of the fundamental rights and freedoms.

11. The relevant legislation giving an effect to fundamental rights may be challenged by the complexity and opacity of certain AI applications, which would require specialised expertise and processes to comprehend and control the outcomes of such applications. Human oversight and transparency are an essential element in ensuring that AI systems are in conformity with the relevant legislation. We support the European Commission's proposal to develop proportionate and evidence-based requirements for the human oversight and transparency of AI systems, e.g. requirements on documentation, testing and accountability that benefit the effective enforcement of existing laws.
12. We call on the EU and its Member States to assess whether existing EU and national legal rules are adequate to take advantage of the opportunities and address potential risks that the use of digital technologies and AI systems in particular may create and to develop them further where necessary. Adequate capacities of supervisory authorities should be ensured to fulfil their mandates where AI applications are used and their cooperation at European level should be enhanced.
13. We highlight the importance of creating awareness about the use of digital technologies and embedded AI capabilities in government institutions, the judiciary, law enforcement, the economy and science, civil society, education and the general public. Digital transformation requires people to develop their competencies and skills in order to engage positively with AI technologies, including through information about existing rights and effective legal remedies. The needs of marginalised individuals and groups and those in vulnerable situations such as persons with a disability, children and the elderly may require special attention. We therefore welcome initiatives to raise citizens' awareness of AI and to increase people's 'AI literacy', including through research, training and education.

a. AI and Dignity

14. Fundamental rights are universal, indivisible, interdependent and interrelated. Protecting and promoting fundamental rights and the underlying idea of human dignity lies at the heart of a human-centric approach to AI.

b. AI and Freedoms

15. We welcome the fact that digital technologies, including AI, can enhance the protection and promotion of fundamental rights and democracy, for example by making public participation easier and more effective, by increasing access to public services, by facilitating the documentation of violations and abuses of fundamental rights, or by using AI analysis to detect and counter hybrid threats.

16. Where necessary and appropriate, the use of AI could facilitate the results of the work of law enforcement authorities, and could thereby contribute to improving people's safety and security in the EU. Areas of particular interest for AI development include data analysis, the understanding of new and previously unknown patterns and links, and the search for reliable evidence in criminal cases. Data protection rules and other legal and ethical norms need to be ensured and appropriate safeguards have to be in place.

17. At the same time, businesses and governments are increasingly using personal data and AI to try to understand and predict group behaviour and target individuals that are categorised as being part of that group. Appropriate safeguards need to be in place to ensure that these applications are in conformity with data protection and privacy laws, in particular the General Data Protection Regulation (Regulation (EU) 2016/679) and national data protection laws, as well as other fundamental rights.

18. We recognise the respective risks and underline the need for safeguards, especially with regard to the use of mass surveillance technology and facial recognition systems and the effects they may have on the exercise of democratic participation, the right to freedom of expression and the right to freedom of assembly and association. We note the ongoing discussion on whether such systems should be used in principle and on possible bans on their use. To the extent that these systems are to be used, we recognise that clear legal requirements need to be formulated beforehand. In particular, the use of AI must respect fundamental rights and freedoms, must be in conformity with data protection and privacy laws and effective legal remedies must be guaranteed.
19. The use of AI is particularly sensitive when online platforms and search engines aggregate, select and prioritise content, as the possibility to freely access information and pluralism in terms of sources of information and diversity can be at stake. A free society needs access to diverse information, a free discourse and the exchange of different perspectives.
20. It is necessary to fight illegal content online, including hate crime, but at the same time to protect the right of freedom of expression and the right of information. There is a need to discuss in which circumstances and to what extent the results delivered by AI systems to delete specific content should require meaningful human intervention. In sensitive areas, service providers should make their AI systems transparent, for example by granting research access to them.

c. AI and Equality

21. AI-based applications present opportunities for assessing fundamental rights compliance, including in the field of equality. Decisions based on algorithmic systems of predefined rules and accurate and adequate data that is fit for purpose could be less prone to biased results than human-made decisions. At the same time, the use of AI may in certain cases also perpetuate and amplify discrimination, including structural inequalities. Equality is of particular concern in this regard. We take note of the opinion on ‘AI – opportunities and challenges for gender equality’ adopted by the Advisory Committee on Equal Opportunities for Women and Men. Safeguards are also needed regarding linguistic diversity and the accessibility of services to citizens in the official languages of the EU.
22. Data used to train AI systems therefore have to be accurate and adequate for their purpose and potential biases have to be addressed while allowing for sufficient flexibility in Research and Development for the further development of these systems. In this respect, we underline the importance of the principles of equality and non-discrimination in the design, development, deployment, use and evaluation of AI, particularly in systems integrating machine learning, and of ensuring that such systems are subject to adequate safeguards and oversight, including market surveillance.

d. AI and Solidarity

23. Digital technologies can enhance the protection of social rights, for example by facilitating access to social security and social systems. We underline that while digital algorithms, including AI-based ones, may allow the development of better-targeted individual assistance and treatments, the application of such technologies should benefit the whole social community, promote the adequate social protection and healthcare of groups in vulnerable situations and should not be used to weaken the principle of solidarity. Also, while these technologies may enhance the market surveillance of product safety on the EU market, they may also pose new challenges to consumer protection rights in the product safety area.
24. AI has great potential for improving the level of human health protection, especially through personalised diagnosis and medicine. In this context, we emphasise the need for suitable, high-quality data sets to train artificial intelligence algorithms. We underline that AI used in the social and health sectors needs to be applied with particular respect for the dignity of human beings, protection of patients' privacy and their physical and mental integrity, and in compliance with all relevant legal provisions regarding protection of personal data, including mechanisms to ensure the confidentiality and safety of such data.

e. AI and Citizens' Rights

25. We recognise the potential of digital technologies, including AI applications, to improve the protection of the right to good administration, the right of access to documents as well as the right to petitions.

26. Direct, universal suffrage and free elections by secret ballot are the basis of the democratic process and a core element of our common values. They need to be preserved in the digital era. Cyber attacks and disinformation targeting electoral processes, campaigns and candidates have the potential to polarise public discourse and undermine the secrecy of the ballot, the integrity and fairness of the electoral process and citizens' trust in elected representatives. In this context, we stress the importance of safeguards and active measures to counter disinformation campaigns, the abuse of private data, hybrid threats and cyberattacks.

f. AI and Justice

27. Access to justice, transparency and explicability of judicial processes and decision-making, an independent judiciary and legal certainty are essential to the proper functioning of the justice system in accordance with the rule of law. Digital technologies, including AI, can contribute to improving access to legal information, possibly reducing the duration of judicial proceedings and to enhancing access to justice in general. However, these developments can also have adverse effects, for example through the use of biased algorithms. Effective legal remedies must be guaranteed to ensure the right to a fair trial, the presumption of innocence and the right of defence. Moreover, non-digital access to law and justice will remain essential. We remain committed to upholding and promoting the rule of law in the Union and its Member States. In this regard, we refer to the Council Conclusions of 9 October 2020 on 'Access to justice – seizing the opportunities of digitalisation'.

III. The way forward

28. In order to ensure that the rights, freedoms and principles as enshrined in the Charter are effectively protected throughout the design, development, deployment and evaluation of AI, we call on the Union and its Member States to follow the guidance provided in these conclusions and invite them to consider effective measures for identifying, predicting and responding to the potential impacts of digital technologies, including AI, on fundamental rights. Legal and regulatory frameworks, such as the European Commission's announced proposal for a future regulatory framework for AI, should strengthen trust, strike a fair balance between the various interests and leave room for research and development and further innovation and technical and socio-technical developments. They should foster an environment in which all actors respect and promote fundamental rights.
29. We invite the Union and its Member States to involve various stakeholders in the discussions around these issues and in the potential development of legal and regulatory frameworks so as to include broad expertise and different perspectives, including from civil society.
30. We welcome the extensive analysis provided by the Fundamental Rights Agency on AI and fundamental rights and encourage the Agency to continue its research on the protection of our fundamental rights and common values in the age of digitalisation.