*European Review of Digital Administration & Law – Erdal*
2022, Volume 3, Issue 1, pp. 125-129
ISSN 2724-5969 – ISBN 979-12-218-0078-4 DOI 10.53136/9791221800784 10

# *Is the European Union Thinking About a Charter of (Fundamental) Digital Rights?**

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**ABSTRACT Even if certain situations concerning the digital society may fall within the scope of rights recognised by the CFREU, given their broad formulation, the approval of an "European Union Charter of Digital Rights" seems the best solution to protect digital rights nowadays. This Charter would be a useful tool to define the system of rights protection in a more sophisticated and up-to-date way, offering the Court of Justice a precise benchmark.**

## 1. *Introduction*

The constant acceleration to which technological evolution is subject and its unpredictable nature call into question the adequacy of the traditional instruments to protect digital rights. An assessment of the level of guarantees provided by the European Union and a reflection on the important role that the Charter of Fundamental Rights (henceforth "the Charter" or "CFREU") is called upon to play in this context therefore seems necessary. On the contrary, it seems appropriate to ask whether a broad reading of the Charter is sufficient to guarantee full protection of these rights, in view of the rapidity with which new technological breakthroughs are taking place and the peculiar situations that determine.[1]

In fact, the adoption of the recent Communication on establishing a European Declaration on Digital Rights and Principles casts doubt on the suitability of the CFREU alone to cover the (expanding and in many ways unknown) universe of such rights.[2]

It seems that the Commission is moving towards the elaboration of a catalogue of digital rights, starting to test the ground and, therefore, the willingness of Member States to proceed in that direction, through acts of soft law. In fact, it is expressly stated in the Communication that the Declaration is without prejudice to the protection of the rights of persons online ensured by the Union's legal framework through the well-known judicial remedies. Nevertheless, "other [rights] may require further action, at the appropriate level".[3]

Indeed, certain situations concerning the digital society may fall within the scope of rights recognised by the CFREU, given their broad formulation - think, for instance, of the protection ensured to dignity, health and family life, which can be included without too much effort in the rights of the digital age[4] - but others will have to find an appropriate place in the EU's primary provisions in order to avoid a mere hermeneutic operation turning into a *deminutio capitis*.

The drafting of further legislative instruments could create excessive confusion in coordination and interpretation, but the

* Article submitted to double-blind peer review.

[1] See A. Adinolfi, *L'Unione europea dinnanzi allo sviluppo dell'intelligenza artificiale: la costruzione di uno schema di regolamentazione europeo tra mercato unico digitale e tutela dei diritti fondamentali*, in S. Dorigo (ed.), *Il ragionamento giuridico nell'era dell'intelligenza artificiale*, Pisa, Pacini Giuridica, 2020, 13.

[2] 26 January 2022, COM/2022/27; for the text of the Declaration, see European Declaration on Digital Rights and Principles for the Digital Decade, 2023/C 23/01, PUB/2023/89, 23 January 2023, available in eur-lex.europa.eu. For an early comment, see E. Celeste, *Towards a European Declaration on Digital Rights and Principles: Guidelines for the Digital Decade*, in *dcubrexitinstitute.eu*, 7 February 2022.

[3] COM/2022/27, cit., para 4.

[4] The Court of Justice has already been able to assess the impact of internet use on certain rights, albeit not strictly "digital". For example, it has recognised and protected the right to be forgotten and, with two judgments in 2019, set territorial limits to its exercise or rather "de-indexing" (judgments of 8 April 2014, joined cases C-293/12 and C-594/12, *Digital Rights Ireland Ltd*; 13 May 2014, case C-131/12, *Google Spain*; 6 October 2015, case C-362/14, *Schrems (Facebook)*; 24 September 2019, case C-507/17, *Google CNIL*; 3 October 2019, case C-18/18, *Glawischnig-Piesczek*. See O. Pollicino, *L'"autunno caldo" della Corte di giustizia in tema di tutela dei diritti fondamentali in rete e le sfide del costituzionalismo alle prese con i nuovi poteri privati in ambito digitale*, in *federalismi.it*, No. 19, 2019, 2.

absence of *ad hoc* provisions would have even more serious consequences, resulting in a failure to recognise the complexity of the "digital world" and in extremely serious discriminatory situations.

The simplest solution, at least theoretically, is obvious: approve a "European Union Charter of Digital Rights" that would constitute a parameter of legitimacy of Union acts and guarantee effective protection of these rights. Alternatively, and only if this option were not feasible, then some substantial amendments to the existing Charter could be introduced, adding to the various articles a precise reference to the "digital" and its implications for the specific right covered.

However, the path taken by the Union with regard to digital rights is no less arduous than the one it took at the time to arrive at the approval of the Charter of Fundamental Rights and which - as is well known - involved a series of intermediate stages.[5] The need for a Union Charter of Digital Rights, however, clashes with Member States' resistance to its contents.

In fact, also at the national level, the great revolution induced by the Internet in everyday life is at the center of the debate and has led to the adoption of a plethora of provisions, which see the public administration as the main protagonist and which find in the internal dimension the easiest place to plan strategies to govern such phenomena.

Hence, the EU Charter of Digital Rights - as has already happened with its counterpart - would be born as a "superstructure" with respect to the national rules, stratified over time; to which would be added the rights that, at the time of its adoption, will be brand new. More precisely, its function would not only be to innovate, but also to make explicit a series of principles and rights that, in the meantime, the Court of Justice will have already guaranteed in case law, thanks to a complex operation based mainly on analogy juris.

Beyond the difficulties connected with the coordination of similar rules, this catalogue would, in any case, give an acceleration towards European digital citizenship, providing Union citizens with easy access to digital public services, on the basis of a universal digital identity, as well as to digital health services. In other words, it would send a clear signal towards the full recognition of a Union legal space in which rights and duties can be exercised both in the real physical context and in the virtual one.

## 2. *The Communication on the definition of a European declaration on digital rights and principles: general aspects*

The Communication complements the proposed Declaration - which the Commission intends to sign solemnly and jointly with the European Parliament and the Council - setting out the digital rights and principles that should inform the activities of businesses, public administrations, policy-makers and individual citizens.

The two documents, as recalled, are only the last step (at least for the time being) of a path that the Union has been taking for some time in this field[6] and which, in its essential lines, is directed towards full respect for the fundamental rights of users in the digital environment, technological and net neutrality and inclusiveness, through the improvement of digital skills and competences.[7]

In particular, the common thread that binds the six chapters of the Declaration, but which, more generally, can be found in all legislation concerning the virtual environment, is the

[5] From the proclamation in Nice in 2000, to the *Laeken Declaration* of 2001, to the consecration in the *Lisbon Treaty* of 2009; in legal literature, for all, G. Tesauro, *Manuale di diritto dell'Unione europea*, edited by P. De Pasquale and F. Ferraro, III ed., Naples, Editoriale Scientifica, 2021, 151; A. Tizzano, *L'application de la Charte des droits fondamentaux dans les États membres à la lumière de son article 51, paragraphe 1*, in *Il diritto dell'Unione europea*, No. 3, 2014, 429; B. Nascimbene, *Carta dei diritti fondamentali, applicabilità e rapporti fra giudici: la necessità di una tutela integrata*, in *europeanpapers.eu*, Vol. 6, No. 1, 2021, 81.

[6] In addition to the 2030 Digital Compass: the European way for the Digital Decade (COM/2021/118 final), see the Berlin Declaration on Digital Society and Value-based Digital Government, 8 December 2020, and the Lisbon Declaration – Digital Democracy with a Purpose, launched during the Leading the Digital Decade event on the 1 June 2021.

[7] As the *Communication* reads: "Between 12 May and 6 September 2021, the Commission carried out a public consultation to gather views on the formulation of European digital principles to promote and uphold EU values in the digital space. […] Overall, the consultations showed broad support for a European Declaration on Digital Rights and Principles as well as on the first set of principles outlined in the open public consultation, highlighting the importance of some of them over the others and with some respondents stressing the need for additional principles. The responses to the different consultation activities have guided the design of the Declaration presented today" (para 3).

need to ensure a fair, neutral and open online environment that respects the values on which the Union is founded. With this in mind, the Declaration places people at the centre of the digital transition, in addition to the values of the Union, and proposes a model that contributes to climate change and environmental protection.

The ambitious goal is governed by principles and rights that, while not yet formally defined, can be easily enucleated, given the level of detail of the "content" established and also in view of the fact that, in many Member States, "digital" regulation is at an advanced stage and can provide a valuable source to draw on.

Indeed, Article 6(3) TEU states that "the fundamental rights resulting from the constitutional traditions common to the Member States" are part of Union law, as general principles. These are, as is well known, principles that are proper to European Union law, to all intents and purposes and in their original form, even if they are the result of a mere recognition by the EU judge and do not find express enunciation in the Treaties.

In essence, the Declaration, which expressly states that it is based on the Union's primary law and, therefore, on the principles contemplated therein, represents in itself an expansive force for some of them and, at the same time, the formal container of the new generation principles, albeit - at the moment - broadly contemplated.

Among the classic principles destined to be shaped to the needs related to the digital transition, it is worth mentioning that of solidarity and inclusion, which should translate into the possibility of offering digital services to all, so that "no one is left behind".[8]

Closely linked to this principle is the one that envisages free participation in online democratic debate, considering the network's role in "orienting" public opinion and political confrontation.

Of particular relevance is then the principle of the sustainability of digital systems and devices, as there is now a widespread awareness that even information and digital technologies have an environmental impact.[9] The acceptance of this risk, in direct correlation with the shift in priorities, is well evident in the statement, which, in order to avoid significant damage to the environment and promote the circular economy, requires that digital products and services "should be designed, produced, used, disposed of and recycled in a way that minimises their negative environmental and social impact". And, adding that "everyone should have access to accurate, easy-to-understand information on the environmental impact and energy consumption of digital products and services, allowing them to make responsible choices".[10]

Among the so-called "new generation" principles, however, one should not forget the ethical ones that must inform the use of algorithms and artificial intelligence.

As is well known, the problem concerns above all the social policy sector because of the rapid spread of software and platforms used in a predictive function (release of benefits and performance), but also in a control function (verification and surveillance to prevent or sanction).

In fact, the risks of discrimination and violation of fundamental rights linked to the use of digital welfare state systems that make use of algorithms and big data are well known and can spread like wildfire to other sectors, since there are numerous projects that envisage the establishment of jurisdictional data sets and the creation of prediction models capable of representing the judge's reasoning.[11]

Precisely to address these dangers, the Declaration guarantees transparency and equality in the use of algorithms and artificial intelligence and prevents the predetermination of choices. And, consequently, states that "Everyone should be empowered to benefit

[8] On the topic, see G. Scotti, *Alla ricerca di un nuovo costituzionalismo globale e digitale: il principio di solidarietà "digitale"*, in *forumcostituzionale.it*, No. 2, 2021, 399.

[9] See *An SME Strategy for a sustainable and digital Europe*, 10 March 2020, COM/2020/103. For example, 1.7 tonnes of materials are used to manufacture a computer, including 240 kilos of fossil fuels; the internet alone consumes 10 per cent of the world's electricity and pollutes six times more than it did ten years ago, with emissions equalling international air traffic today; half an hour of streaming emits as much as ten kilometres travelled by car; mining a dollar of Bitcoin requires four times more energy than making one in copper and three times one in gold, etc.

[10] C. Gratorp, *The materiality of the cloud. On the hard conditions of soft digitization*, in *eurozine.com*, 24 September 2020.

[11] E.g., see the FRA report, European Union Agency for Fundamental Rights, *Getting the future right – Artificial intelligence and fundamental rights*, in *fra.europa.eu*, 14 December 2020.

from the advantages of artificial intelligence by making their own, informed choices in the digital environment, while being protected against risks and harm to one's health, safety and fundamental rights".[12]

### 3. *The content of the digital rights envisaged by the Declaration*

Even with regard to the rights that must be respected throughout the Union, the Declaration draws a complex system that intersects traditional rights and new digital rights, many of them from the principles briefly examined.

It is necessary to reiterate that, in their "consolidated" scope, some rights are already guaranteed by the CFREU, and the interpreter, not without some difficulty, can limit himself to extrapolating them and adapting them to cases involving the use of digital technologies. On closer inspection, in fact, the primary objective of the Declaration, to ensure offline rights and freedoms also online, leads most situations in the digital world to the application of the principle of equality, read in conjunction with the relevant sectoral provisions.

The spread of digital systems has already revealed (and the trend is growing) special situations that do not find adequate forms of guarantee in the current regulation.

First of all, access to the digital system (internet) should be considered a true and proper autonomous right and, consequently, high-speed digital connectivity at affordable prices, everywhere and for everyone, should be protected by the competent authorities, thus properly implementing the principle of solidarity and inclusiveness. The right to access (or connection) should also be declined as a right preparatory to other rights, such as the right to education, the right to work, the right to information and freedom of expression.

Once again, the line between the present and the future becomes blurred, since some rights are already enshrined in the Charter of Fundamental Rights and are the subject of a granitic case law that ensures their broad protection; yet there is no doubt some that they must necessarily be "modernised".

Moreover, the right to disconnection should be expressly provided for, in close correlation with the social pillar referred to in the Communication and the proposed Declaration. Therefore, every EU citizen should be guaranteed adequate protection in the digital environment as well as in the physical workplace, irrespective of his or her employment status, mode or duration of activity.

Similarly, reference should be made to the rights of citizenship, starting with those to a protected digital identity, a digital domicile, to make electronic payments, to receive online public services, and to online transparency. Not forgetting, of course, the right to the security of one's own data, which, although the subject of a specific regulation, could not be left out of a Charter expressly dedicated to digital rights.

### 4. *Conclusions: horizons for a "digital constitutionalism" of the European Union*

The role that the Union is called upon to play in this area is unquestionably important. It is almost trivial to emphasise that, due to its supranational nature, it can intercept and protect the rights of the individual in cyberspace better than the Member States, where the absence of borders can become a determining factor for the acquisition of rights and freedoms, spontaneously allowing people to establish contacts beyond specific territories and offering new possibilities for learning and working beyond national borders.

With regard to this phenomenon, there has already been talk of "digital constitutionalism", which, while representing a further and inevitable weakening of national sovereignty, could guarantee a single, high standard of protection through a harmonisation of digital rights in the European Union.[13]

Furthermore, a priority intervention by the Union, in the protection of digital rights, finds legitimacy in technical self-regulation which, if at the origin of the phenomenon justified and favoured the use of IT tools, then gradually turned into a boomerang with regard to the mechanisms put in place to safeguard virtual life, its contents and values.[14] That is, the digital world has led to a fragmentation of constituted power, which in some cases and in

[12] European Declaration, cit., Chapter III, para 9.

[13] For a general overview, G. De Gregorio, *The rise of digital constitutionalism in the European Union*, in *International Journal of Constitutional Law*, vol. 19, No. 1, 2021, 41.

[14] M. Betzu, *Poteri pubblici e poteri privati nel mondo digitale*, in *La Rivista "Gruppo di Pisa"*, No. 2, 2021, 166.

some respects now belongs to private corporations (the digital platforms). The difficulty in tracing these patterns of power back to the classic vertical State-citizen relationship makes the protection of rights in the relevant legal situations more complicated (the citizen has no knowledge of how to protect himself, from whom to protect himself, who to protect himself against).

As has been observed, in a global digital environment, the risks to the Rule of Law principles do not come primarily from the ability of transnational private actors to develop and enforce private standards in competition with public values.[15]

The invisible but constant threat to its values has prompted the Union to emphasise several times in the proposed Declaration that they, like the rights of individuals, should be respected online as well as offline. Also from this perspective, an EU Charter of Digital Rights would be a useful tool to define the system of rights protection in a more sophisticated and up-to-date way, offering the Court of Justice a precise benchmark. In other words, it would enable the Court to respond to the demands for effective guarantees from the digital society, which will not fail to question it on issues that go far beyond the dynamics of the online economy and marketplace, as has been the case so far.

Finally, it should be noted that the "codification" of digital rights will follow a partially inverted process compared to the one that led to the Charter of Fundamental Rights, in that it will not be completely borrowed from the legal traditions of the Member States, but will also include rights that the Union itself will have "created" and then "cast" into individual legal systems. And, trying to be a bit visionary, it is hoped that, unlike the CFREU, the new Charter will be a uniform standard in the European legal space, irrespective of the shadow cone of the Treaties and the presence or absence of a situation of implementation of EU law. Also because, while discussing how to regulate these rights, cyberspace continues to evolve, creating virtual worlds in the digital world (the so-called metaverse). And people, through their avatars, live a real parallel life, in which we are already discussing how the related subjective rights, which we could call meta-digital, can be protected in the same way as in real life.

[15] O. Pollicino, *Costituzionalismo, privacy e neurodiritti*, in *medialaws.eu*, No. 2, 2021, 10.