



Brussels, 18.5.2017  
COM(2017) 239 final

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN  
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL  
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

**2016 Report on the Application of the EU Charter of Fundamental Rights**

{SWD(2017) 162 final}

# 1. Introduction

Fundamental rights and the values on which the European Union is founded were put to the test in 2016. Developments in the Member States showed that respect for the values and rights enshrined in the EU Charter for Fundamental Rights should not be taken for granted.

The EU faced multiple challenges: the consequences of an unprecedented arrival of refugees at its external borders, economic imbalances and a series of terrorist attacks. People hit by multiple crises are not confident that their children will be better off than themselves. They question whether institutions are still able to protect them from the challenges and threats of migration, financial turmoil and terrorism. In this context, nationalism, populism and intolerance find a fertile ground to prosper and to advocate exclusion and isolationism as the only way to overcome the current challenges.

In a context of rising intolerance, it is also important that the EU strongly reaffirms and promotes equal rights for all. The third Annual Colloquium on Fundamental Rights in 2017 will be devoted to the promotion of women's rights and gender equality. This will be an opportunity to address the economic and political empowerment of women, women's rights in public and private spheres of life and the fight against violence against women in all its forms, the latter being also the topic of focused actions throughout the year.

The overall landscape impacts on fundamental rights in the EU. The EU must make a determined effort to defend its common values of democracy, fundamental rights and the rule of law against the forces that seek to polarise our societies and jeopardise our model of openness and solidarity. European and national institutions must regain people's trust by showing that they are able to guarantee freedom, security and prosperity. Success in protecting and promoting people's fundamental rights and the EU's common values will be central in this endeavour and the EU Institutions should lead by example. The Charter is an invaluable tool in this respect and should be used to its full potential.

## 2. Application of the Charter of the EU

### *2.1 Promoting and protecting fundamental rights*

#### *Delivering fundamental rights for all in the European Union*

In 2016, the EU took several initiatives to give substance to Charter rights for the benefit of people in the EU. A number of those aimed at ensuring fairness and social justice. The Commission engaged, for instance, in a public consultation for the development of a European **'pillar of social rights'**<sup>1</sup>.

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<sup>1</sup> The results of the consultation, which took place between March and December 2016 are currently being reviewed and will feed into the Commission proposal on the European Pillar of Social Rights. Further

Drawing on the social rights under the Charter, the pillar will support well-functioning and fair labour markets and welfare systems. It will address issues of key importance for individuals such as equal opportunities and access to the labour market, fair working conditions and adequate and sustainable social protection.

Also, a European platform was set up to enhance cooperation in tackling undeclared work<sup>2</sup> and thus help ensure the respect of the **right to fair and just working conditions** (Article 31 of the Charter).

Steps were taken in 2016 to promote the **right to family life** (Article 7 of the Charter):

- The Commission proposed new rules under the Brussels IIa Regulation which, once adopted, will improve the protection of children in cross-border parental responsibility disputes related to custody<sup>3</sup>;
- two new regulations were adopted to help international couples, whether in a marriage or a registered partnership, to manage their property on a daily basis and to divide it in the event of divorce or one of them dying<sup>4</sup>.

**The right to a fair trial** (Articles 47 and 48 of the Charter) was given concrete effect through the adoption of a set of directives: on the presumption of innocence and the right to be present at the trial<sup>5</sup>; on legal aid<sup>6</sup> and procedural safeguards for children<sup>7</sup>. The latter, and the new Brussels IIa rules will also have a positive impact on the **rights of the child** (Article 24 of the Charter).

The Commission launched an online dispute resolution platform<sup>8</sup>, which helps consumers resolve their disputes with EU traders about online purchases out-of-court, cheaply, simply, quickly and in any EU official language, thereby strengthening **consumer protection** (Article 38 of the Charter).

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information available at: [https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/towards-european-pillar-social-rights\\_en](https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/towards-european-pillar-social-rights_en)

<sup>2</sup> Decision (EU) 2016/344 of the European Parliament and of the Council of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work, OJ L 65, 11.3.2016, p. 12–20.

<sup>3</sup> Proposal for a Council Regulation on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), COM/2016/0411 final, 30.06.2016.

<sup>4</sup> Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, OJ L 183, 8.7.2016, p. 1–29; Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships, OJ L 183, 8.7.2016, p. 30–56.

<sup>5</sup> Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, p. 1–11

<sup>6</sup> Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, OJ L 297, 4.11.2016, p. 1–8.

<sup>7</sup> Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, OJ L 132, 21.5.2016, p. 1–20.

<sup>8</sup> Available at: <https://webgate.ec.europa.eu/odr/main/index.cfm?event=main.home.chooseLanguage>

### *Protecting peoples' personal data in the EU and elsewhere*

A further key area of focus in 2016 was **the protection of personal data** (Article 8 of the Charter). The adoption of the General Data Protection Regulation (GDPR)<sup>9</sup> and the Data Protection Directive for Police and Criminal Justice Authorities<sup>10</sup> was a big step forward in this respect.

The GDPR strengthens and modernises the existing rules: people will have easier access to their own personal data, a right to data portability, a clarified "right to be forgotten" and certain rights applicable in case of personal data breach. The GDPR also obliges companies and organisations to swiftly notify the national supervisory authority about serious data breaches, so that users can take appropriate measures. The GDPR, furthermore, as a single EU legal instrument establishes one single set of rules so that individuals will have the same protection, no matter where they are in the EU.

Directive (EU) 2016/680 aims to establish efficient information exchange between national enforcement authorities and ensure that the data of victims, witnesses, and suspects of crimes are duly protected in the context of a criminal investigation or a law enforcement action. All law enforcement processing in the EU will have to comply with the principles of necessity, proportionality and legality, and offer appropriate safeguards for the individuals.

Along this reinforced protection within the EU, the Commission also ensured adequate data protection outside the EU. In July 2016, it adopted the EU-US **Privacy Shield** adequacy decision, which ensures the free flow of personal data for commercial purposes between the EU and U.S. companies certified under the Privacy Shield, while securing the fundamental right to the protection of the data.

Another milestone was the conclusion, in December, of the **Umbrella Agreement**<sup>11</sup> between the EU and the US, which provides for a high level of data protection for any transfer of personal data between the EU and the United States in the context of police or judicial cooperation in criminal matters.

### *Protecting the rights of the most vulnerable*

In troubled times, it is often the most vulnerable that are hit the hardest. Addressing the migration situation, ensuring in particular the protection of the **right to asylum** (Article 18 of the Charter) and

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<sup>9</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1–88.

<sup>10</sup> Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119, 4.5.2016, p. 89–131.

<sup>11</sup> Agreement between the United States of America and the European Union on the protection of personal information relating to the prevention, investigation, detection, and prosecution of criminal offences; [http://ec.europa.eu/justice/data-protection/files/dp-umbrella-agreement\\_en.pdf](http://ec.europa.eu/justice/data-protection/files/dp-umbrella-agreement_en.pdf).

the respect of the **principle of non-refoulement** (Article 19 of the Charter) was another major area of focus for the EU in 2016. Following its Communication on a **reform of the Common European Asylum System (CEAS)**<sup>12</sup> in April 2016, the Commission proposed amendments to the existing rules aiming at:

- (i) establishing a fairer and more sustainable system for allocating asylum applicants among Member States (proposal for recast Dublin Regulation)<sup>13</sup> and ensuring its effective implementation (proposal for recast Eurodac Regulation)<sup>14</sup>;
- (ii) greater harmonisation of asylum procedures and international protection standards to ensure high levels of protection and reception and adequate safeguards for asylum seekers throughout the EU and to reduce irregular secondary movements (proposal for an Asylum Procedures Regulation<sup>15</sup>, a Qualification Regulation<sup>16</sup> and a recast Reception Conditions Directive<sup>17</sup>);
- (iii) facilitating a common approach to safe and legal arrival in the EU for people in need of international protection, in solidarity with countries hosting a large number of displaced persons (proposal for a regulation establishing the Union Resettlement Framework<sup>18</sup>);
- (iv) converting the European Asylum Support Office into a fully-fledged EU agency with an enhanced mandate to address any structural weaknesses of the EU's asylum system (proposal for a regulation on the European Union Agency for Asylum<sup>19</sup>).

The promotion and protection of the **rights of the child** (Article 24 of the Charter) were at the heart of this legislative action. Particular attention was given to unaccompanied children in key areas such as assessing the best interests of the child, the child's right to be heard in asylum procedures and ensuring adequate reception conditions and effective guardianship.<sup>20</sup> The Commission's comprehensive approach to protect all children in migration was the focus of the 10<sup>th</sup> Annual European Forum on the rights of the child in November<sup>21</sup>. In December 2016, the Commission proposed that the Schengen

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<sup>12</sup> Communication from the Commission to the European Parliament and the Council towards a reform of the Common European Asylum System and enhancing legal avenues to Europe, COM(2016) 197 final, 6.4.2016.

<sup>13</sup> COM(2016) 270

<sup>14</sup> [COM\(2016\) 272](#)

<sup>15</sup> [COM\(2016\) 467](#)

<sup>16</sup> [COM\(2016\) 466](#)

<sup>17</sup> COM(2016) 465

<sup>18</sup> COM(2016) 468

<sup>19</sup> COM(2016) 271

<sup>20</sup> An overview of the amended and proposed child protection provisions in the legislative proposals cited above can be found at: [http://ec.europa.eu/justice/fundamental-rights/files/rights\\_child/ceas\\_provision\\_on\\_children\\_table\\_updated.pdf](http://ec.europa.eu/justice/fundamental-rights/files/rights_child/ceas_provision_on_children_table_updated.pdf).

<sup>21</sup> [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=34456](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=34456). This work was followed up with the adoption of the Communication on "The protection of children in migration" on 12 April 2017 (COM(2017) 211 final)

Information System be reinforced<sup>22</sup>, which will improve the ability of law enforcement officials and border guards to find missing children, including in the context of migration.

### ***Promoting open and tolerant societies, free from racism***

The current climate has led to an increase of **racism and intolerance against ethnic, religious and other minorities** across Europe.<sup>23</sup> This affects many fundamental rights under the Charter, including the right to non-discrimination (Article 21), the right to dignity (Article 1), the right to integrity of the person (Article 3) and the right to life (Article 2)

The Commission provided a platform for Member States, civil society, EU agencies and international organisations<sup>24</sup> to work on improved responses to hate crime and hate speech. The focus was put on

- recording and collecting data on hate-crime incidents in all Member States;
- strengthening support to victims; and
- countering illegal hate speech online.

Along this policy support, the Commission also continued bilateral dialogues with Member States on major gaps in their transposition of EU law<sup>25</sup>. A number amended their criminal laws as a result.

To contain the spread of hate speech online and empower the new media actors, the Commission reached an agreement with Facebook, Twitter, YouTube and Microsoft on 31 May on a **code of conduct on countering illegal hate speech online**<sup>26</sup>. The companies undertook, *inter alia*, to:

- review in less than 24 hours the majority of valid notifications received from citizens and civil society for removal of illegal content publicly inciting violence and hatred; and
- assess them also in the light of national criminal laws transposing EU law.

The Commission is closely monitoring progress in cooperation with civil society, Member States and IT companies and presented initial results in December.<sup>27</sup>

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<sup>22</sup> [http://europa.eu/rapid/press-release\\_IP-16-4402\\_en.htm](http://europa.eu/rapid/press-release_IP-16-4402_en.htm).

<sup>23</sup> A 2013 survey carried out by the FRA revealed that in countries like Hungary, France and Belgium up to 48 % of respondents considered emigrating because they did no longer feel safe as Jews <http://fra.europa.eu/en/publication/2013/discrimination-and-hate-crime-against-jews-eu-member-states-experiences-and>. Mosques began to receive police protection in several Member States while a steep increase in anti-Muslim incidents was reported by civil society organisations in 2014 and 2015 in countries such as France, UK, Sweden and Belgium, including violent attacks on Muslim women wearing headscarves. Assaults and hate speech incidents targeting asylum seekers and migrants are on the rise, as are attacks and arson attempts against refugee shelters. Following the UK referendum in June 2016, a wave of hatred targeting individuals and groups on grounds of their national or ethnic origin was observed, while civil society organisations report increasing hostility against Roma and people of African descent in a number of Member States. In 2017, FRA will publish its EU MIDIS2 Survey which will allow comparing trends in the experiences of various minority groups.

<sup>24</sup> EU High Level Group on Combating Racism, Xenophobia and other forms of intolerance; see: [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=51025](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=51025).

<sup>25</sup> Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

<sup>26</sup> Available at: [http://ec.europa.eu/justice/fundamental-rights/files/hate\\_speech\\_code\\_of\\_conduct\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf).

Promoting media literacy, critical thinking and balanced narratives at grassroots level are further key actions the EU is supporting to counter intolerance off and online, alongside education (see section 4).

## ***2.2. Ensuring the respect of fundamental rights***

Union institutions, bodies, offices and agencies must comply with the Charter in all their actions; any case of non-compliance can be brought before the Court of Justice of the European Union (CJEU). The Commission puts a lot of effort into mainstreaming fundamental rights, i.e. ensuring that they are fully respected in all its legislative and policy proposals.

The new **Directive on combating terrorism**, on which the European Parliament and the Council reached an agreement in December 2016,<sup>28</sup> is a good example of this mainstreaming. It includes an explicit – first for its kind – fundamental rights clause whilst several fundamental rights aspects were taken into account in the drafting and negotiation process, including the necessity and proportionality of interferences with the rights to freedom of movement, data protection and freedom of expression (Articles 45, 8 and 11 of the Charter). Due account was also taken of the principles of legality and proportionality of criminal offences and penalties (Article 49 of the Charter) and the rights of victims, including the right to an effective remedy (Article 47 of the Charter). The *ex post* assessment of the Directive will also cover its impact on fundamental rights and freedoms.

A proposal to update the **EU Export Control Regulation** for sensitive (dual-use) items was adopted by the Commission in 2016<sup>29</sup>. The regulation provides a robust framework for controlling exports of cyber-surveillance technology where there is a risk that it will be misused in order to commit serious violations of human rights or of international humanitarian law. Moreover, on the basis of a Commission proposal, EU rules banning exports and imports of goods that could be used for capital punishment or torture in other countries were strengthened through the adoption in November of an amendment to the **Anti-Torture Regulation**<sup>30</sup>.

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<sup>27</sup> The first assessment of the new code of conduct is available at: [http://ec.europa.eu/information\\_society/newsroom/image/document/2016-50/factsheet-code-conduct-8\\_40573.pdf](http://ec.europa.eu/information_society/newsroom/image/document/2016-50/factsheet-code-conduct-8_40573.pdf)

<sup>28</sup> Directive (EU) 2017/541 of 15 March 2017.

<sup>29</sup> Proposal for a Regulation of the European Parliament and of the Council of 28 September 2016 setting up a Union regime for the control of exports, transfer, brokering, technical assistance and transit of dual-use items, COM(2016) 616 final.

<sup>30</sup> Regulation (EU) 2016/2134 of the European Parliament and of the Council of 23 November 2016 amending Council Regulation (EC) N° 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, OJ L 338, 13.12.2016, p.1.

Mainstreaming extends to other areas such as the use of EU funding. In 2016, the Commission adopted guidance on ensuring the respect for the Charter when Member States are implementing **the European Structural and Investment Funds**<sup>31</sup>.

As regards **migration**, in the context of the joint inquiry by the European Ombudsman concerning a human rights impact assessment of the EU-Turkey Statement of 18 March 2016, the Commission stated that it would continue to closely monitor the implementation of the Statement, including as regards respect for human rights, both in the EU and in Turkey.<sup>32</sup>

**The EU's accession to the European Convention on Human Rights remains a priority for the Commission**, not least in view of its legal obligation under the Treaty. Accession will reinforce our common values, improve effectiveness of EU law and enhance the coherence of fundamental rights protection in the EU. Yet, the CJEU's December 2014 opinion (declaring the 2013 draft Accession Agreement incompatible with the Treaties) raised a number of significant and complex questions which require re-negotiating the draft on a series of points. The Commission in, its capacity of EU negotiator, is exploring solutions to address the various issues raised by the Court in the relevant Council working party.

### ***2.3. Raising awareness of the Charter***

In order to enjoy their fundamental rights to the full, citizens need to know what their fundamental rights are. They also need to know who to turn to when their rights are being violated. In October 2016, the Commission launched **the fundamental rights wizard**<sup>33</sup>, an online tool that helps people in this respect.

At a conference organised by the Dutch Presidency in February 2016 on "The national policy application of the EU Charter of Fundamental Rights", a number of best practices and tools were put forward to help national authorities assess when and how to apply the Charter when developing national policies and legislation.

Furthermore, the Commission uses EU funding to support projects and networks analysing national case-law referring to the Charter and providing legal professionals with training on its application.

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<sup>31</sup> OJ C 269 of 23.7.2016, p. 1

<sup>32</sup> In a judgment (28 February 2017) in Cases T-192/16, T-193/16 and T-257/16, the General Court held that 'the EU-Turkey Statement cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union' (para. 71).

<sup>33</sup> This tool, built on the "Clarity" tool developed by the EU Agency for Fundamental Rights, is now part of the e-justice portal, [https://e-justice.europa.eu/content\\_where\\_to\\_turn\\_for\\_help-459-en.do](https://e-justice.europa.eu/content_where_to_turn_for_help-459-en.do)

As a follow-up to the Commission's 2015 *Charter Report*, the Council adopted conclusions on the Charter's application in June 34 and the European Parliament adopted a resolution on the situation of fundamental rights in the European Union in December<sup>35</sup>. Discussions in the Council and the European Parliament contributed to further awareness of fundamental rights development and challenges in the EU.

## ***2.4 Court of Justice scrutiny of EU institutions***

In joint cases *Ledra Advertising* and *Mallis and Malli*<sup>36</sup> the Court dismissed, on appeal, actions for annulment and compensation lodged by citizens and businesses against the value reduction of their deposits in two banks in Cyprus. This had been agreed under the 2013 memorandum of understanding between the Cypriot authorities and the European Stability Mechanism. The Court stressed that the Charter applies to the EU institutions even when they act outside the EU legal framework. It pointed out that the Commission must ensure that a memorandum of understanding is consistent with the fundamental rights under the Charter. The restriction on the right to property (Article 17 of the Charter) was justified in view of the objective pursued, i.e. ensuring the stability of the euro-area banking system as a whole, and the imminent risk of financial loss to which depositors would have been exposed if the two banks had failed. It thus concluded that the Commission could not be considered as having contributed to a breach of the Charter.

## **3. Charter application in and by Member States**

### ***3.1 Fundamental rights and rule of law developments***

The Charter applies to Member States only when they are implementing EU law. Infringement procedures against Member States regarding breaches of the Charter can therefore only be triggered when a sufficient link to EU law is established.

However, even when acting outside the implementation of the EU law, Member States are obliged to respect the values on which the Union is founded. In particular, the rule of law is a precondition for the protection of fundamental rights. In 2014, the Commission introduced a Framework aimed at addressing situations of emerging systemic threats to the rule of law which cannot be effectively tackled by safeguards at national level or existing instruments (in particular infringement procedures) at EU level<sup>37</sup>.

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<sup>34</sup> Available at: <http://data.consilium.europa.eu/doc/document/ST-10005-2016-INIT/en/pdf>

<sup>35</sup> European Parliament resolution of 13 December 2016 on the situation of fundamental rights in the European Union in 2015 (2016/2009(INI)).

<sup>36</sup> Cases C-8-10/15P and C-105-109/15P.

<sup>37</sup> Communication "A new EU Framework to Strengthen the Rule of Law", COM(2014) 158 final, 19.3.2014.

Events in Poland concerning in particular the Constitutional Tribunal led the Commission to issue a Recommendation in July 2016<sup>38</sup> and a complementary Recommendation in December 2016<sup>39</sup> under this Framework. The fact that the legitimacy, integrity and proper functioning of the Constitutional Tribunal are adversely affected prevents an effective constitutional review. Addressing this situation is a matter of common interest. The very functioning of the Union is endangered if the rule of law is no longer respected in one of its Member States.

In October 2016, the European Parliament adopted a Resolution on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights<sup>40</sup>. The Commission welcomed the overall objective of the resolution, which is to ensure that the EU common values are respected and enforced<sup>41</sup>. The Commission considers however that the best possible use should be made of existing instruments, while avoiding duplication. A range of existing tools and actors already provide a set of complementary and effective means to promote and uphold common values. The Commission will continue to value and build upon these means. One of the Parliament's underlying ideas was to make the variety of existing data and reports on the situation of fundamental rights in the Member States more accessible and visible, also at national level. The Commission welcomed this, as numerous other actors -including the Council of Europe and its Venice Commission, the EU Agency for Fundamental Rights (FRA) and NGOs - collect information on the rule of law, democracy and fundamental rights in the Member States.

### ***3.2 Court of Justice guidance to Member States***

The CJEU continued (under the system of referrals for preliminary rulings) to give guidance to national judges on the Charter's applicability and interpretation.

In joint cases *Tele2 Sverige AB*<sup>42</sup> and *Tom Watson e.a.*<sup>43</sup>, the Court examined laws in two Member States that required general and indiscriminate retention of traffic and location data of all subscribers and registered users relating to all means of electronic communication. It found that these laws restricted the fundamental rights to private life and the protection of personal data (Articles 7 and 8 of the Charter). Given their broad range and limited safeguards, none of those restrictions were considered justified, even where the objective was to fight serious crime. However, such an objective may justify targeted retention of traffic and location data, provided that it is limited to what is strictly

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<sup>38</sup> Commission Recommendation (EU) 2016/1374 of 27 July 2016 regarding the rule of law in Poland; C/2016/570; OJ L 217, 12.8.2016, p. 53–68.

<sup>39</sup> Commission Recommendation (EU) 2017/146 of 21 December 2016 regarding the rule of law in Poland complementary to Commission Recommendation (EU) 2016/1374; C/2016/ 8950; OJ L 22, 27.1.2017, p. 65–81.

<sup>40</sup> European Parliament Resolution of 25 October 2016 on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights.

<sup>41</sup> European Parliament plenary debate of 25 October 2016.

<sup>42</sup> C-203/15.

<sup>43</sup> C-698/15.

necessary in respect to the categories of data to be retained, the means of communication affected, the persons concerned and the retention period.

In *GS Media BV*<sup>44</sup> the Court ruled on the **posting of hyperlinks** in the context of the fundamental right to freedom of expression (Article 11 of the Charter). A media company had posted on its website a hyperlink directing viewers to websites where photos of a celebrity taken by *Playboy* magazine were made available. As the copyright holder had not authorised the publication of the photos on these websites, the magazine's editor claimed that the posting infringed copyrights. The media company continued to make available the hyperlinks or similar ones, where some of the former ones became unavailable. In the light of the applicable EU copyright Directive<sup>45</sup> the Court ruled that any communication to the public of any work had to be authorised by the copyright holder. It held that the distribution, without the copyright owner's authorisation, of hyperlinks to works on the websites in question did constitute "communication to the public". It conceded however that, in individual cases, it could be difficult for the person posting the link to assess whether there was an authorisation. In this context, a fair balance had to be struck between the copyright holder's right and the right to freedom of expression of the person posting the link. However, where the latter was or should have been aware of the copyright infringements, as in the case at hand, its actions constituted 'communication to the public' without consent of the copyright holder.

The judgment in the joint cases *Aranyosi* and *Caldararu*<sup>46</sup> concerned the Member States' obligation to respect fundamental rights under the Charter, in particular the **prohibition of torture and inhuman or degrading treatment or punishment**, when executing a **European Arrest Warrant (EAW)**. The Court ruled that, under Article 4 (which enshrines an absolute right), if the executing authorities have information pointing at a real risk of inhumane or degrading treatment because of the detention conditions in the issuing state, they must evaluate the risk with respect to the person in question when deciding whether to execute the EAW. Where the existence of risk is established in relation to that person, the execution of the EAW must be reported and may be abandoned if within a reasonable time it is still not possible to discount it. When assessing the risk, the authority responsible for the execution shall take due account of the person's fundamental **right to liberty** and the principle of **presumption of innocence** (Articles 6 and 48 of the Charter).

### ***3.3. National case law quoting the Charter***

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<sup>44</sup> C-160/15.

<sup>45</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10–19.

<sup>46</sup> C-404/15, C-659/15.

National judges continue to play a key role in upholding fundamental rights and the rule of law. The EU Agency for Fundamental Rights<sup>47</sup> found that national courts continued referring to the Charter for guidance and inspiration in 2016, even in a substantial number of cases falling outside the scope of EU law.

The **rights of the child** (Article 24 of the Charter) were particularly central. A case before a UK tribunal<sup>48</sup> concerned a Nigerian national who had resided in the UK for 25 years. His daughters (aged 13 and 11) were British citizens. He appealed against a deportation order made on grounds of public policy. The tribunal reversed the decision of the first instance court, considering that it had failed to acknowledge the existence of the children's right to maintain on a regular basis a personal relationship and direct contact with both parents, unless that is contrary to their interests (Article 24). This Charter provision was interpreted as a 'self-standing right' in the context of immigration law.

In another case, a Swedish court used Article 24 of the Charter as the only legal source to interpret national criminal law in a child-friendly manner<sup>49</sup>. The standard sentence for persons assisting any foreigner's entry into Sweden in return for payment amounts to three to four months in prison. However, in this case, the court acknowledged that the person concerned was motivated by the desire to help children. It imposed a solely conditional sentence, coupled with community service, in the light of Article 24 of the Charter and the obligation of state authorities to consider the child's best interest.

## **4. Focus section: 2016 Annual Colloquium on Fundamental rights "Media pluralism and democracy"**

The Annual Colloquium on Fundamental Rights is a unique space for dialogue which fosters mutual cooperation and political engagement for the promotion and protection of fundamental rights in the EU. It is a chance to identify and deliver concrete policy actions on topical fundamental rights issues.

The second Annual Colloquium (17-18 November 2016) explored, from a fundamental rights perspective, the multiple links between a free and pluralistic media and democracy<sup>50</sup>. National and EU policy makers, international and civil society organisations, editors-in-chief, journalists, national regulators, representatives of different journalists' and media associations and of IT companies, academics, judges and other legal practitioners came up with suggestions for key actions for all

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<sup>47</sup> FRA 2016 Annual Report, to be published in May 2017.

<sup>48</sup> Upper Tribunal (Immigration and Asylum Chamber) *Adebayo Abdul v. Secretary of State for the Home Department*, [2016] UKUT 106 (IAC).

<sup>49</sup> *Skåne and Blekinge*, Court of Appeal, case B 7426-15 decision of 5 December 2016.

<sup>50</sup> [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=31198](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=31198)

involved which were reflected in the Colloquium conclusions published by the Commission shortly after the event.<sup>51</sup>

One topic was the protection of media freedom and independence from political and financial pressure. Participants underlined the importance of the independence of media regulators and called for swift adoption of the Commission's legislative proposal amending the Audiovisual Media Services Directive<sup>52</sup>.

Another area for discussion was empowering journalists and protecting them from pressure, threats, physical violence and hate speech. Participants underlined the importance of combating the impunity for crimes and expressions of hatred against journalists, in particular women. Follow-up action includes EU funding for projects on media pluralism, protecting journalists and combating hate speech on line. In November 2016, the Commission launched an EU-wide campaign and year of focused action to combat and prevent violence against women,<sup>53</sup> including those in the media.

Participants also looked at challenges and opportunities arising in the converged media environment. The role of ethical journalism and media literacy was discussed, as was the financial sustainability of quality press and investigative journalism. The impact that the use of algorithms or the dissemination of fake news can have on media pluralism and on an informed democratic debate was also covered. Follow up action includes funding for media literacy, supporting the identification of ethical good practices to promote quality information and the launch of a Commission impact assessment and a public consultation<sup>54</sup> on the protection of whistleblowers.

## 5. Conclusion

Recent developments in the EU and elsewhere pose serious threats to fundamental rights. The Commission remains vigilant and committed to a high level of protection of fundamental rights in the EU. It will step up its action to ensure that all EU legislative proposals and actions are fully compatible with the Charter. It intends to guarantee that all bodies bound by the Charter will continue to respect it.

The importance of the system of checks and balances in democratic societies, in particular the key role of supreme courts and constitutional courts in upholding the EU's common values cannot be overstated; this role needs to be supported, in full respect of the independence of the judiciary.

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<sup>51</sup>[http://ec.europa.eu/information\\_society/newsroom/image/document/2016-50/2016-fundamental-colloquium-conclusions\\_40602.pdf](http://ec.europa.eu/information_society/newsroom/image/document/2016-50/2016-fundamental-colloquium-conclusions_40602.pdf)

<sup>52</sup> Proposal for a Directive of the European Parliament and the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, COM/2016/0287 final, 25.5.2016.

<sup>53</sup> [http://europa.eu/rapid/press-release\\_MEMO-16-3946\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-3946_en.htm).

<sup>54</sup> [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=54254](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=54254).

External independent oversight (including under the European Convention on Human Rights) is essential in democratic societies. The key role of civil society organisations in renewing engagement for democracy, rule of law and fundamental rights should be cherished and preserved.