

The fight against disinformation and the right to freedom of expression



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Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, aims at finding the balance between regulatory measures to tackle disinformation and the protection of freedom of expression. It explores the European legal framework and analyses the roles of all stakeholders in the information landscape. The study offers recommendations to reform the attention-based, data-driven information landscape and regulate platforms' rights and duties relating to content moderation.

This document was requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs.

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Original: EN

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Manuscript completed in July 2021

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LIST OF ABBREVIATIONS

AIA	Artificial Intelligence Act
AVMSD	Audiovisual Media Services Directive
BfJ	Bundesamt für Justiz (Germany's Federal Office of Justice)
BLM	Black Lives Matter
CJEU	Court of Justice of the European Union
DMA	Digital Markets Act
DSA	Digital Services Act
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EDPB	European Data Protection Board
EDAP	European Democracy Action Plan
EDMO	European Digital Media Observatory
EEAS	European External Action Service
EU	European Union
GFCC	German Federal Constitutional Court
GDPR	General Data Protection Regulation
LGBT	Lesbian, gay, bisexual, transgender
MStV	Medienstaatsvertrag (Media State Treaty)
NetzDG	Netzwerkdurchsetzungsgesetz (Network Enforcement Act)
NGO	Non-governmental organisation
SIN	Spółeczna Inicjatywa Narkopolityki (Civil Society Drug Policy Initiative)
TEU	Treaty on European Union

UK	United Kingdom
UN	United Nations
USA	United States of America
VoD	Video on demand

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EXECUTIVE SUMMARY

Background

Disinformation has become a constant feature of the attention-based, data-driven information landscape. This study aims at introducing how the operating mechanism of this information system fosters disinformation by creating an optimal environment for its creation, dissemination and proliferation. The result of this malfunction is a reduced functionality of the discursive social space, which interferes with citizens' right to receive accurate information, which would be the passive side of freedom of expression, and a cornerstone of democracies. This study discusses the responses to disinformation from this perspective.

Building on a wide range of recent research on various aspects of disinformation, this study keeps its focus on the legal and theoretical analysis of the responses to disinformation from the perspective of freedom of expression.

International case law on freedom of expression did not yet come to address specifically disinformation-related legal questions. Still, the conclusions from existing case law are obvious. On the one hand, imparting information, even false facts, is protected unless it violates the rights of others or concrete public interests such as public health, morals, or security. The press enjoys a specific privilege and currently, even bloggers and other unofficial authors may be regarded as public watchdogs for the purposes of protection. The European Convention on Human Rights also requires states to protect human rights from being restricted by private actors. Measures that limit the spread of disinformation, such as deprioritising and labelling rather than removing or blocking it, are regarded as more proportionate in the practice of the Court of Justice of the EU and the European Court of Human Rights.

The European Democracy Action Plan (EDAP) presented a diverse set of strategies to improve the anomalies of the new information landscape, with all of its suggested tools being relevant for the fight against disinformation. The Commission in 2020 issued two prominent draft legislative actions envisaged in the EDAP, the draft of the Digital Markets Act (DMA) and the Digital Services Act (DSA). The DMA suggests basic structural rules to set the scene for fairer market behaviour by defining the category of gatekeepers and setting out enforcement. The DSA sets forth more detailed provisions for the regulation of online platforms. Its provisions best apply to social media actors and are not necessarily relevant for all online platforms. There might be even stricter rules for social media platforms because they engage users not only as consumers but also as citizens and private individuals. In serving people as citizens, social media platforms gained relevance in democratic processes, and through serving people in their private matters, they gained unprecedented information power over them.

Disinformation, in most of the cases, does not fall into any category of illegal content; therefore the DSA's removal duties and the relating safeguards to protect users' procedural rights and freedom of expression rights do not apply. Harmful and manipulative content is referred to self-regulation and this is to be detailed in the renewed Code of Practice on Disinformation. The Code is drawn up by industry stakeholders, together with the Commission and the Board, which regularly evaluate its fulfilment. However, consequences of a negative audit are omitted from the DSA. For platforms, this could be a signal that the process is ongoing: should they disappoint the Commission, there may be stricter legislative intervention. This, however, would come too late to mitigate the risks left untreated by social media platforms. Digital Services Coordinators have considerable power to impose orders in other cases. This power is regarded as legitimate in all states where the conduct of authorities is governed by the rule of law. Whereas in other states, platforms may share the fate of other large media actors within that state: the choice to either serve the particular political interests of a captured state or be harassed.

The COVID-19 health crisis has been marked by insufficient access to trustworthy information. The diffused fear from the invisible threat and restrictive social measures caused an elevated level of anxiety among people. Trust in the media and governments became a key component of social stability and defending against the epidemic. Like most other human rights, freedom of expression and media freedom suffered a decline during this crisis. As a silver lining, the crisis was an impetus for research into the causes, mechanisms of, and resilience against disinformation that led to a proliferation of research projects, including in medical and computational sciences.

Roles and responsibilities of actors

In an effort to define the roles and responsibilities of the various actors as precisely as possible, the authors offer a theoretical analysis of the terms 'responsibility', 'liability', and 'accountability' to clarify their meaning and to inform of the academic discussion regarding the allocation of responsibilities.

The role that platforms, states and citizens play in the new information environment was extensively analysed in this study. It found that while the attention-based business model was dominant since the advent of the commercial media, technology has made exploitation of attention significantly more efficient. The data-driven algorithmic targeting of advertisements leads to a spiral generating ever more precise data about the individual and leading to his or her maximised engagement with the content and generating new data again. The maximisation of engagement leads to higher advertisement revenues for the platform, rewarding the delivery of more data and thereby optimising content. However, being 'engaged' is not necessarily beneficial for the user; it is not the result of a conscious decision but one of manipulation. The issue of social media addiction is a large area of psychological research and one secretly acknowledged by certain platform providers.

The attention-based business model has been criticised from the second part of the twentieth century. Critiques state that it failed to deliver 'merit goods' to the audience, i.e., high-quality content with a social or cultural value. The public service media was meant to correct what this so-called 'market failure'. This leads us to the other problem of the data-driven advertising sector: social media platforms stepped in between media content providers and users, with their aggregating and redistributing function acting as an exchange of content and advertisements. Media content providers have lost their gatekeeping function channelling advertisements to the users. It is becoming clear that news media content providers could do a great service in the fight for trustworthy information. Their financial crisis needs to be solved which requires intervention into the advertising value chain.

In addition to the support for commercial quality media, the idea of a European public service media provider is also extensively discussed. Several innovative concepts of a digital, transnational media service providers are described, followed by an assessment of the main challenges of creating a European public service media provider, such as ownership, supervision and financing.

Discussion of the states' roles and responsibilities yielded a conclusion that states have an obligation to protect the fundamental rights of the citizens. In the relationship between platforms and citizens, the state's duty is to represent the citizens, based on the idea of people's sovereignty and its obligation under international law to protect fundamental rights. Moreover, one major doubt about states is their alleged influence through corporations, including by way of party financing. What is regarded as a major malfunction of democracy assists disinformants by increasing mistrust in the democratic institutions.

To a certain extent, the restriction of individual rights to protect the rights of other citizens and the community is also accepted, such as restrictions on driving, smoking, or food labels. The authors have found that disseminating disinformation harms the community of users. Social media connects people on a scale unprecedented in human history. This, along with other attributes of globalisation, shows

that all human actions affect other humans. This begins with the online platform environment. Individual rights of freedom of expression need to be safeguarded; however, it should not be used as a shield to prevent interventions aimed at creating and defending a safer social discursive space.

The European Union is in a better position than its Member States to tackle the discussed issues because of the global interconnectedness of actors. What is more, transatlantic cooperation on the regulation of social media platforms would be particularly beneficial and is highly recommended.

Within the European Union, the EU has strong competences in the field of economic competition and consumer protection. Besides, tackling financial disinformation and health-related disinformation could be an entry point for EU regulation given that in these areas the EU already has parallel competences.

Recommendations

The recommendations are separated into two categories: first, addressing the advertisement-based, attention- and data-driven ecosystem, and second, defining the scope of content management duties for platforms.

To break the vicious cycle of the ever-increasing attention harvesting and the consequent data-harvesting, it is recommended that **advertising regulation**, as applied in the Audiovisual Media Services Directive, is adapted to the online environment. Further, the lucrative advertising branch should contribute to financing a more plural information environment. Large companies should be obliged to spend a portion of their advertisement budget directly at news companies (**media ad quota**) and at the same time, be obliged to ensure that they do not sponsor websites or content that carries disinformation or is manipulative with their advertisements (**ad integrity obligation**). Companies should withdraw advertising and sponsorship that supports such content (**demonetisation**).

Diversity of the social media content recommendations should be ensured by an extension of Article 29 of the DSA (**diversity through algorithms**). To further improve the diversity of quality content and media pluralism, it is recommended to examine the possibilities of developing a common **European public service media**. This work-intensive project offers immense opportunities for the future of European stability and democracy.

In order to strengthen and stabilise the positions of media outlets, a **trust network of media companies** should be created, with the task of mutual support in fact-checking and **verifying authenticity and credibility**.

Affirmative information networks should be applied to prevent disinformation from taking root in societies. A centrally coordinated node should signal and give the raw information to the local network nodes (for example, election authorities, academic institutions, other authorities, trusted NGOs), translating those into short, appealing content pieces like memes or videos and dispersing them among various social groups.

The principles of **data protection** should be reviewed to prepare the regime for the AI-dominated economy. The principle '**data protection by default**' should be enforced because currently, it is violated by most online consent forms.

The second set of recommendations briefly addresses social media platforms' content moderation issues that have already been addressed in academic discourse or previous studies. The authors framed these issues as the dilemma between platforms receiving more rights and responsibilities, on the one

hand, and **being limited in their content-moderation decisions and therefore maintaining their immunity** for third-party content, on the other.

The platforms' should stick to their intermediary role and empower users to develop the information landscape through their choices. In this sense, platforms should ensure ideological neutrality of their content moderation and refrain from discriminating, while respecting human rights. They should employ **Freedom of Expression Officers** to take content moderation decisions responsibly. Algorithms which affect masses of people should be **transparent, tested, and elective**.

Finally, influential users should enjoy a **privilege of speech** that should be quickly **removed** if used to the detriment of the community, such as disseminating hate speech or disinformation.

1. INTRODUCTION

1.1. Problem setting

Recent years have seen a rapid increase in the creation and spread of disinformation. While disinformation takes place both online and offline, the online environment seems to be especially fruitful for these types of communication, allowing it to grow exponentially over short periods and gain enormous geographic reach. Recent research shows that disinformation is becoming an organic part of our information ecosystem, and the fight against it needs to be more nuanced.

Disinformation can have devastating effects on democracy, public discourse and human rights. It undermines trust in public institutions, democracy and science, erodes democratic values of diversity, tolerance and openness, and endangers individual and public health, especially in the time of the pandemic.

The dangers of disinformation are grave and significant and the fight against it is complicated, and sometimes controversial, not only because it is difficult to find an effective counter-weapon, but primarily because opinions and information (even false facts) enjoy strong protection of the freedom of expression. Freedom of expression, freedom of information, media freedom and pluralism are cornerstones of a democratic society, and measures to tackle the disinformation problem are by necessity restrictive on these fundamental rights.

The policy responses to disinformation include the adaptation of existing laws and policy measures, as well as the drafting of new ones. Both contain risks to freedom of expression. There is, however, a third scenario: social media platforms engaging in self-regulation and interfering with the rights of users more than necessary, without safeguards and judicial oversight. This logic leads to the conclusion that clear, well-designed state regulation is necessary to find the careful balance between the risk of disinformation and the risk of suppression, and between state and private censorship. This study aims to offer an interpretation of freedom of expression which could serve this balance and to make proposals for an adequate transformation of the informational ecosystem.

1.2. Objectives, approach and structure

The study's objective is to analyse the balancing of the need to counter disinformation, on the one hand, and the protection of freedom of information, freedom of expression, democratic discourse and independence of the media, on the other.

The primary approach of this study has been to unfold the mechanisms between the various players: states, platforms, citizens, and media companies. The study analyses the roles and responsibilities of the said actors and their mutual relationships in the business model that governs the information landscape. It provides an overview of the academic discussion and a normative assessment of the ongoing cycles and how they could be opened up to achieve a new balance.

Against this backdrop, this study looks at whether and how the EU and different Member States rise to the challenge of balancing the need to counter disinformation with the protection of freedom of information, expression and democratic discourse. Building on a widening range of in-depth studies in the field of disinformation, this study was able to focus specifically on these aspects. The ultimate purpose of the study is to provide innovative, research-based policy recommendations to policymakers on how to transform the information landscape with the aim of defeating disinformation, and reinforcing fundamental rights and democracy.

The study begins with an overview of how the European and national courts find the balance between freedom of expression and information in the context of false information (Chapter 2). Following this, the study describes relevant legislative and policy measures adopted at the EU and national levels to fight disinformation in general, and the infodemic in particular (Chapter 3). Chapter 4 provides an assessment of the outlined measures from the perspective of protection of freedom of expression and information, media freedom and pluralism. Chapter 5 discusses the responsibilities of various actors (i.e., states, civil society and citizens, social media platforms, and the EU) in the fight against disinformation from the normative perspective. The report ends with a summary of main conclusions and formulates recommendations for the EU and its Member States.

1.3. Definitions

In this study, freedom of expression is understood in accordance with Article 11 of the Charter of Fundamental Rights of the European Union. It includes not only the individuals' right to free expression, but also the right to receive and impart information, and extends to the corollary values of media freedom and pluralism. Freedom of expression is also an instrument to maintain democratic public discourse, without which no democracy can function.

While keeping its focus on European perspectives, the study also makes some references to US law. This is to provide a wider perspective and for the reason that the giant corporations which are the main vehicle for horizontal communication - and among that disinformation - are American companies. Their self-regulatory approaches are ingrained in American legal traditions, and this might be regarded as a 'raw material' that the European legislators are working with. A faint but promising perspective can be observed from recent months, however; new discussions between the United States and the European Union signal the possibility of transatlantic cooperation that may result in commonly-developed principles, including within the field of platform communications.

1.4. Methodology

The approach of this study is to analyse the attention-based, data-driven business model that drives the current information ecosystem which leads to a failure of the information marketplace. While generating and spreading disinformation may have many incentives (hybrid warfare, fraud schemes, domestic influence operations, etc.), dissemination and user exposure patterns are dominantly governed by this business model, which gives preference to sensational content to the detriment of quality content. In the bigger context, this is also a cause for the growing digital inequalities.¹

The study was conducted using mixed methods. The desk-based research was conducted to complement, validate and enhance the large volume of existing and recent information and analysis on adjacent topics. The study builds on secondary literature (scholarly research, studies and reports for and by EU institutions) and on primary sources referencing the most recent developments, closing research gaps, in particular, those surrounding selected Member States' legislative policies from the perspective of freedom of expression.

The selection of EU Member States for closer examination of their national policies and legislation was based on the following criteria:

- geographic representation,

¹ Bayer, J., ['The illusion of pluralism. Regulatory aspects of equality in the new media'](#), Trappel, J. (ed), *Digital Media Inequalities. Policies against divides, distrust and discrimination*. Nordicom, Göteborg, pp. 127-140, 2019.

- development of effective responses to disinformation in general and the COVID-19 infodemic in particular, and
- illustration of findings with the best and clearest examples that could be scaled up and/or replicated.

For the examination of legislation and case law, methods of legal analysis and comparative legal analysis were employed.

1.5. Limitations of the study

Finding court cases related to disinformation needed some creativity as disinformation is not a legal category. The authors searched for court proceedings that addressed freedom of expression and false information but without the element of violating the reputation, as that would be consumed by the category of defamation. This approach was used to select relevant decisions relating to false information, both of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), as well as national courts. Finding national court decisions was particularly challenging for the aforementioned reason and because of the low prevalence of such cases. This limited mapping exercise resulted in a shortlist of countries from which we selected those with the highest number of relevant cases. There was also a linguistic limitation; apart from Poland, the research was limited to judgements and cases translated into English.

The study was conducted with the COVID-19 pandemic and its accompanying infodemic still ongoing. Online technologies are rapidly developing in response to many recent legislative efforts, political measures, and turbulent political situations. As is the European legislative framework in the process of development. The study assesses draft regulations and makes its recommendations in light of the content of those drafts. Should the content of those drafts change in the process of legislating, some recommendations may need to be adjusted.

1.6. State of play

Research in the field of disinformation has been proliferating in recent years, generating a growing knowledge base and deeper understanding of its processes. Election periods have been under increased scrutiny and have been completed with the soothing feeling that no major information disruption occurred. At the same time, the Capitol Hill attack on the 6th of January in the aftermath of the US elections demonstrated that disinformation and conspiracy theories can indeed cost lives and might be capable of inducing violent attacks on a democratically elected government. In the period since this event, the underlying disinformation and conspiracy theory, as well as platforms' responses, have been extensively discussed by the media and academia.²

The COVID-19 pandemic has brought another challenge: the global infodemic. The silver lining has been the enhanced interest by other disciplines (especially science) and investment of further resources into researching the spreading of health-related disinformation, its impact, root causes and mechanisms, and the potential avenues of defence.

European institutions have also been striving to tackle the issue of disinformation. In its resolution of 25 November 2020 on strengthening media freedom: the protection of journalists in Europe, hate speech, disinformation and the role of platforms, the European Parliament stressed that the spread of misinformation and disinformation, as well as disproportionate actions to tackle it on digital platforms,

² Bayer, J., [The Power of Softness – The Trump Decision of the Facebook Oversight Board](#), 2021.

poses a threat to freedom of information, democratic discourse and independence of the media.³ In the same Resolution, the European Parliament also called for an ambitious EU media action plan in the context of public service media.⁴ Furthermore, it was stressed that measures combating disinformation should focus on fostering a plurality of opinions through the promotion of high-quality journalism to deliver reliable, fact-based and verified information.⁵

The European Commission has funded a series of projects in the field of media freedom and pluralism, investigative journalism and projects to assist journalists in need. The Commission issued significant draft regulations in 2020: the Digital Markets Act,⁶ which addresses the fairness of market behaviour in the context of online platforms, especially of gatekeepers, and the Digital Services Act,⁷ which seeks to replace the E-Commerce Directive⁸ and is of relevance in the context of disinformation.

Earlier in 2020, the Commission issued the European Democracy Action Plan (EDAP). This comprehensive document contains several aspects of how to strengthen European democratic resilience. The plan envisaged several legislative actions in fields where regulation is desirable to ensure the exercise of human rights and the operation of the democratic process, including, among others, transparency of political advertising and communication, financing of political parties, and media pluralism and the protection of journalists. Practically all the topics raised by EDAP are directly or indirectly relevant to the fight against disinformation, which was also explicitly mentioned.

The General Data Protection Regulation (GDPR), which has been in effect for three years, should be an area providing some satisfaction; however, its enforcement leaves significant loopholes which can be exploited by 'targeters'. The European Data Protection Board (EDPB) has issued several guidelines for interpretation, but these do not directly address the most sensitive issues around consenting (addressed in this study) and targeting.⁹ The most complete review of the relevant data protection issues is still the 2018 Opinion of the European Data Protection Supervisor on online manipulation and personal data.¹⁰ At the same time, civil society reports document that the level of data harvesting exceeds what would be justified and necessary for fair marketing purposes.¹¹

Researchers have produced numerous informative and revealing studies in the field. It was established that disinformation is now a million-dollar industry organised by more than 80 governments globally in partnership with private enterprises.¹² These findings support the assumption that chasing and removing content is a Sisyphean task. There have been meaningful research outputs focusing on the

³ [European Parliament resolution of 25 November 2020 on strengthening media freedom: the protection of journalists in Europe, hate speech, disinformation and the role of platforms](#) (2020/2009(INI)), 25 November 2020.

⁴ Ibid, at 7.

⁵ Ibid, at 34.

⁶ Proposal for a [regulation of the European Parliament and of the Council on contestable and fair markets](#) in the digital sector (Digital Markets Act) COM/2020/842 of 15 December 2020.

⁷ Proposal for a [regulation of the European Parliament and of the Council on a single market for digital services \(Digital Services Act\)](#) and amending Directive 2000/31/EC, COM (2020) 825 of 15 December 2020.

⁸ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('[Directive on electronic commerce](#)'), OJ L 178 of 17 July 2020.

⁹ EDPB, [Guidelines 08/2020 on the targeting of social media users](#), 2020.

¹⁰ [Opinion of the European Data Protection Supervisor on online manipulation and personal data](#), 3/2018.

¹¹ Panoptykon Foundation, [Submission in the consultations of the European Data Protection Board Guidelines 8/2020 on the targeting of social media users](#), 15 October 2020.

¹² Bradshaw, S., Bailey, H. and Howard, P.N., [Industrialized Disinformation: 2020 Global Inventory of Organized Social Media Manipulation](#), 2021.

use of artificial intelligence in disseminating disinformation and in the fight against it,¹³ examining with interdisciplinary methods the impact of disinformation.¹⁴ Other outputs comprehensively assessed the situation and policies.¹⁵ It would be impossible to list all the scientific results which have enriched our knowledge about disinformation, its root causes, mechanisms and impact.

Building on this considerable knowledge base, this study takes the opportunity to focus on the angle of freedom of expression without examining other aspects of the disinformation problem. It is nevertheless largely built on the said papers and other referenced research material.

¹³ Meyer, T. and Marsden, C., [Regulating disinformation with artificial intelligence: Effects of disinformation initiatives on freedom of expression and media pluralism](#), Study for the European Parliament, 2019.

¹⁴ Frischlich, L. and Humprecht, E., [Trust, Democratic Resilience and the Infodemic](#), Israel Public Policy Institute: Policy Paper Series, 2021.

¹⁵ Bontcheva, K. et al., [Balancing Act: Countering Digital Disinformation While Respecting Freedom of Expression](#), Geneva and Paris: International Telecommunication Union and United Nations Educational, Scientific and Cultural Organization, 2020.

2. DISINFORMATION IN THE LIGHT OF FREEDOM OF EXPRESSION

2.1. Freedom of expression: theory and legal framework

2.1.1. Social discourse as a vital element of democracy

Public opinion is formed through a constant confrontation between the opposing social forces and interests.¹⁶ Everyone tries to assert their views in the battle of opinions in order to be able to translate them into public opinion and political action.¹⁷ The battle of opinions thus becomes a 'life element' of democracy.¹⁸ The social purpose of freedom of expression is to enable citizens to engage in public discussion and thereby participate in the governance of their community.¹⁹

This discourse model of the democratic public sphere is based on the idea that the 'best guarantee for a (relatively) correct political line as a resultant and balance between the forces effective in the state' requires constant mutual control and criticism.²⁰ The legal system guards that the dispute is conducted by means of an argument. Economic pressure, threats and untrue information are therefore not compatible with the free formation of opinion.²¹ In civil and criminal law, many legal consequences are linked to the distinguishability of truth and falsity, facts and opinions.²²

At the same time, freedom of expression serves the goal of self-realisation; that people can realise their potential through expressing themselves.²³ This allows individuals to become responsible moral agents of political society.²⁴ Therefore, even falsehoods and mistakes should be tolerated because they are part of the process of discovering the truth.²⁵ Of course, nothing guarantees that truth will prevail in the battle of ideas: *'History teems with instances of truth put down by persecution. If not suppressed forever, it may be thrown back for centuries.'*²⁶ This battle should be fair and guided by the 'equality of arms' principle, so that truth stands a chance against more enticing 'alternative facts'.²⁷ If political disinformation receives support from an organised minority group that gains dominance and subsequently obtains a status that can define politics, then 'truth' has lost the battle for the time being. If this battle is lost and democracy is overthrown by an authoritarian political entity that relies on populist lies and propaganda, then it will take time to develop a new knowledge base and a new political constituency to rebuild democracy. If one could foresee the point at which falsity gains more followers than truth, they could introduce only the necessary preventative measures at only the

¹⁶ Bundesverfassungsgericht, [BVerfG 5, 85](#), Judgement of 17 August 1956, para. 135.

¹⁷ Gerhards, J. and Neidhardt, F., *Strukturen und Funktionen moderner Öffentlichkeit*, Berlin, 1990, p. 11.

¹⁸ Bundesverfassungsgericht, [BVerfGE 7, 198](#), Judgement of 15 January 1958, para. 208.

¹⁹ Barendt E, *Freedom of Speech*, Oxford University Press, 2005, p. 19-20.

²⁰ Bundesverfassungsgericht, [BVerfG 5, 85](#), Judgement of 17 August 1956, para. 135.

²¹ Ibid., para. 205; Bundesverfassungsgericht, [BVerfGE 7, 198](#), Judgement of 15 January 1958, para. 212, 219; Bundesverfassungsgericht, [BVerfGE 20, 162](#), Judgement of 5 August 1966, para. 174 ff.; Bundesverfassungsgericht, [BVerfGE 25, 256](#), Judgement of 26 February 1969, para. 265.

²² Accordingly, deliberately untrue statements of fact are not covered by freedom of expression: Bundesverfassungsgericht, [BVerfGE 99, 197](#), Judgement of 10 November 1998; Bundesverfassungsgericht, [BVerfGE 90, 241](#), Judgement of 13 April 1994, and; § 6 LPG NRW e.g. imposes a duty of truth on the press.

²³ Dworkin, R., *Freedom's Law: The Moral Reading of the American Constitution*, OUP, 1999, p. 200.

²⁴ Ibid.

²⁵ Mill, J.S., *On Liberty*, Boston, 1863, p. 50-58.

²⁶ Ibid., p. 56.

²⁷ The expression was used by Kellyanne Conway, Counsellor to the US President, during an interview on 22 January 2017, in which she defended White House Press Secretary Sean Spicer's false statement.

necessary point. Without this capability, the precautionary principle is reasonably used to defend democracy against disinformation and hybrid attacks.

2.1.2. Media freedom

Throughout the past century, the media has decisively shaped information gathering and processing. The media still plays an essential role in identifying politically relevant issues (agenda setting), disseminating information about them, and placing them in context (framing). Journalists have traditionally delivered this intellectual work.

Social media platforms took the role of aggregating, organising and redistributing information, offering almost equal opportunities for all speakers to access a potentially unlimited audience. This robbed the media of its traditional information gatekeeper role and diverted its advertising revenues as well. Social media platforms, although facilitating and impacting discourse, do not perform the same role as editors. They are not expected, and not even allowed, to tailor content on their own.²⁸

Therefore, the media's role remains key in the post-truth age. Its value is its infrastructure and capacity to provide verified facts. In this context, the requirement of truthfulness has high relevance for guaranteeing democracy. The media can only fulfil this function if citizens have confidence in their performance, including that all news in the media be checked for content, origin and truthfulness with the due diligence required by the circumstances before dissemination.²⁹ Additionally, there are strict precautions to ensure that reporting is distinguished from opinion commentary.³⁰ Ethical rules of journalism and legal requirements to separate and label advertisements from journalistic (organic) content provide for this.

These are the arguments that grant the media a special place within the right to freedom of expression (freedom of the press) and lay the groundwork for a prospective privileged status within social media content. Such a role, however, also highlights a heightened risk if media is captured and have lost its independence. Alarming, disinformation has been observed to counterfeit media appearances by engaging genuine, unsuspecting journalists and experts, and consciously creating pseudo-media companies, think tanks and civil organisations. Well-organised verification schemes are recommended to protect the credibility of the media (see Chapter 7 on Recommendations).

2.1.3. Legal framework

The right to freedom of expression, enshrined in Art. 11 of the Charter of Fundamental Rights of the European Union (Charter), includes the 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'. Furthermore, the right to freedom of expression extends to the corollary values of 'freedom and pluralism of the media'.³¹ Art. 6(1) TEU confers binding force on the Charter and states that 'it shall have the same legal value as the Treaties'. However, overambitious expectations for the independent development of media freedom and freedom of expression under Art. 11 of the Charter largely remains unfulfilled. The Court of Justice of the European Union (CJEU)'s media jurisprudence is underdeveloped

²⁸ Even though their content selection decisions are taken along the same criteria as that of the traditional, commercial media actors to attract the maximum user attention and sell advertisement space at the highest possible price. Read more on this in Chapter 5.

²⁹ This is, for example, a legal requirement under German Broadcasting law, § 10, section 1 and § 54 section 2 MStV.

³⁰ Iris Special, [Media reporting: facts, nothing but facts?](#), 2018.

³¹ Art. 11 (2) Charter.

and relies on ECHR case law.³² The text of Art. 11 of the Charter parallels Art. 10 ECHR regarding both their exception clauses and substantive scope of application.³³

The European Court of Human Rights (ECtHR) interprets the Convention as a 'living instrument', in the light of present-day conditions.³⁴ Thus, it has recognised the important role of the internet 'in enhancing the public's access to news and facilitating the dissemination of information in general' and of user-generated expressive activity online as 'an unprecedented platform for the exercise of freedom of expression'.³⁵ At the same time, the Court has acknowledged the risk of defamatory allegations and hate speech or other unlawful speech spreading like wildfire and leaving an indelible mark online.³⁶ Despite this heightened risk of harm, the ECtHR opined that the internet 'is not and potentially will never be subject to the same regulations and control' as the printed media.³⁷

Indeed, the press is accorded a special role in the Art. 10 ECHR jurisprudence in light of its vital role as a 'public watchdog'.³⁸ Journalists who report on matters of public interest need to act 'in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism'.³⁹ The duties to verify and comply with journalistic ethics do not extend to ordinary internet users. However, the categories of journalists, bloggers, civil society actors and ordinary users are blurred in the current information ecosystem. This was reflected in the Grand Chamber's dictum that 'the function of bloggers and popular users of the social media may also be assimilated to that of 'public watchdogs' in so far as the protection afforded by Article 10 is concerned'.⁴⁰ The conditions under which the privileges and concomitant obligations - not least that of verification - which are incumbent on the press could be extended to journalist-like actors still need to be fleshed out.

Art. 10 ECHR is, in the first place, a negative liberty that grants protection from interference by the state. In its negative dimension, Art. 10 would apply to state laws targeting disinformation.⁴¹

³² See C-70/10, *Scarlet Extended* [2011] ECLI:EU:C:2011:771, para. 50; C-360/10, *SABAM* [2012] ECLI:EU:C:2012:85, para. 48; C-283/11, *Sky Österreich* [2013] ECLI:EU:C:2013:28, para. 51; C-293/12, *Digital Rights Ireland* [2014] ECLI:EU:C:2014:238, para. 28; C-345/17, *Sergejs Buivids v. the Datu valsts inspekcija* [2019] ECLI:EU:C:2019:122, para. 66.

³³ C-547/14, *Philip Morris Brands and Others*, [2016] EU:C:2016:325, para. 147; C-345/17, *Sergejs Buivids v. the Datu valsts inspekcija* [2019] ECLI:EU:C:2019:122, para. 65; Cornils M, '§1 LPG Freiheit der Presse', *Löffler, Presserecht*, 6th edn, Beck, 2015.

³⁴ *Tyrer v. the United Kingdom*, App. No. [5856/72](#), 25 April 1978, para. 31.

³⁵ *Cengiz and Others v. Turkey*, App. No. [48226/10](#), 1 December 2015, para. 52; *Ahmet Yildirim v. Turkey*, App. No. [3111/10](#), 18 December 2012, para. 48; *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, App. Nos. [3002/03](#) and [23676/03](#), 10 March 2009, para. 27.

³⁶ *Delfi AS v. Estonia*, App. No. [64569/09](#), 16 June 2015, para. 110.

³⁷ *Editorial Board of Pravoye Delo and Shtetel v. Ukraine*, App. No. [33014/05](#), 5 May 2011, para. 63.

³⁸ *Observer and Guardian v. UK*, App. No. [13585/88](#), 26 November 1991, para. 59.

³⁹ *McVicar v. the United Kingdom*, App. No. [46311/99](#), 2 May 2002, para. 73.

⁴⁰ *Magyar Helsinki Bizottság v. Hungary*, App. No. [18030/11](#), 8 November 2016, para. 168.

⁴¹ See e.g. [Act to Improve Enforcement of the Law in Social Networks](#) (Network Enforcement Act) (Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz – NetzDG)) of 1 September 2017, BGBl 2017 Teil I Nr. 61; [LOI no 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information](#).

Box 1: States' positive obligation to protect rights

State responsibility to positively protect rights arises from a failure in the legal order, one that fails to protect an individual against violation, for example, due to the absence of legal intervention or inadequate intervention, or a lack of measure designed to change a legal situation contrary to the Convention. Clearly, states must also grant protection against violations of freedom of expression by private persons.

These positive obligations exist primarily in relation to the right to life, prohibition of torture, slavery, and forced labour, and the right to private life. While in the field of freedom of expression this has not been explicitly recognised, the ECtHR has emphasised the importance of media pluralism in several of its decisions. Otherwise, the state's obligations mainly consist of sanctioning or warding off violations of this right. Where there are known threats to the freedom, such as threats against journalists, the state is obliged to take all necessary steps to protect endangered persons. However, the state's obligation does not extend to safeguarding the exercise of right of freedom of expression on private premises open to the public.

Sources: *VgT Verein gegen Tierfabriken v. Switzerland*, App. No. [24699/94](#), 28 June 2001; *Fuentes Bobo v. Spain*, App. No. [39293/98](#), 29 February 2000; *Hannover v. Germany*, App. No. [59320/00](#), 24 June 2004; *Informationsverein Lentia v. Austria*, App. Nos. [13914/88](#), [15041/89](#), [15717/89](#), [15779/89](#) and [17207/90](#), 24 November 1993; *Tele 1 Privatfernsehgesellschaft mbH v. Austria*, App. No. [32240/96](#), 21 September 2000; *Centro Europa 7 s.r.l. and Di Stefano v. Italy*, App. No. [38433/09](#), 7 June 2012; *Manole v. Moldova*, App. No. [13936/02](#), 17 September 2009; *Özgür Gündem v. Turkey*, App. No. [23144/93](#), 16 May 2000; *Appleby and others v. the United Kingdom*, App. No. [44306/98](#), 24 June 2004.

Further, Art. 10 ECHR may also require a state to positively protect the right to freedom of expression from horizontal restrictions and 'to create a favourable environment for participation in public debate by all the persons concerned, enabling them to express their opinions and ideas without fear'.⁴² In its positive dimension, it could, first, require state measures to foster media pluralism, protect the freedom of newsgathering, and rebalance the relationship between news media and online platforms.⁴³ Second, the state's positive obligations could involve oversight mechanisms to regulate the moderation of disinformation by social media platforms.⁴⁴

Disinformation can potentially undermine trust in the media and adversely affect the quality of public debate. The state needs to create conditions that allow reliable sources of news to inform public debate. At the same time, it needs to ensure that moderation decisions by social media platforms do not unduly restrict the marketplace of ideas by crowding out unpopular views.

2.2. Relevant case law of the Court of Justice of the EU

The Court of Justice of the European Union (CJEU) has recognised the importance of the right to freedom of expression as an essential foundation of a democratic society, applicable to all information and ideas, including those that 'offend, shock or disturb'.⁴⁵ In *Connolly v. the United Kingdom*, a case concerning the right to freedom of expression of a European civil servant, the CJEU held, in close alignment with the European Court of Human Rights (ECtHR) case law, that any limitations to this right

⁴² *Dink v. Turkey*, App. No. [2668/07](#), [6102/08](#), [30079/08](#), [7072/09](#) and [7124/09](#), 14 September 2010, para. 137.

⁴³ Cairncross, F., '[Cairncross Review: A sustainable future for journalism](#)', 12 February 2019, p. 90.

⁴⁴ See Facebook, '[Fake news](#)', Facebook Community standards; Twitter, '[Covid-19 misleading information policy](#)', Twitter General guidelines and policies.

⁴⁵ C-274/99, *Connolly v. Commission* [2001] ECLI:EU:C:2001:127, para. 39.

must be interpreted restrictively and measures of prior restraint require particular consideration.⁴⁶ This broad protection of the right to freedom of expression suggests that the CJEU would be reluctant to uphold responses to mis- and disinformation that could have chilling effects, such as censorship or online surveillance.⁴⁷ The following discussion will consider the proportionality of less draconian measures which fall short of content removal. Content governance measures that affect the ranking and findability of content can still have an incisive impact on the free flow of information, even without taking it down.⁴⁸ Recently, however, the CJEU has arguably lessened the protection afforded to freedom of expression and its corollary, the right to information, tilting the balance towards the rights to privacy and data protection.⁴⁹

2.2.1. No longer accurate information

In its landmark judgement in *Google Spain*, the CJEU held that, as a general rule, the data subject's rights under Arts. 7 and 8 of the Charter override the interest of internet users in having access to information. The exact balance 'may, however, depend in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life'.⁵⁰ This represents a departure from the ECtHR approach, which holds that the rights under Arts. 8 and 10 ECHR deserve equal respect.⁵¹ It also lessens the importance of the rights to freedom of expression and information by demoting them to the status of mere interests.

The 'right to be forgotten' was held by the CJEU to apply not only to incomplete or inaccurate information but also to that which, although initially lawfully processed, appears over time 'inadequate, irrelevant or no longer relevant, or excessive' in the light of the purposes for which they were collected or processed, and time that has elapsed.⁵² This case law suggests that the balance between freedom of expression and other vulnerable interests shifts with the passage of time. Accurate personal information of public interest distributed online may be most newsworthy close to its publication but lose its relevance as time goes by. Where this is the case, while the benefit to the public initially outweighs the loss to privacy, a point comes at which the balance is reversed. The loss to privacy is at such a point greater than the value of the information in question.⁵³

By the same token, information that is initially accurate may become less so over time because events supersede it or because new information has come to light. This is relevant when thinking about the contextual integrity of search results. It has been suggested that a 'reordering' of such results would be more equitable than the delisting remedy established in *Google Spain*.⁵⁴ Supposedly this applies to information that has become incomplete with the passage of time. In such a case, it could be argued that it should also apply, *a fortiori*, to information that is inaccurate from the beginning. Demotion was

⁴⁶ Ibid, para. 41.

⁴⁷ See High Level Expert Group on Fake News and Online Disinformation, '[A multi-dimensional approach to disinformation](#)', Final report of 12 March 2018.

⁴⁸ Cavaliere, P., 'From journalistic ethics to fact-checking practices: defining the standards of content governance in the fight against disinformation', *Journal of Media Law* 12 (2), 2020.

⁴⁹ See the observation by AG Szpunar in his Opinion to Case C-136/17, *GC and Others v. CNIL* [2019] ECLI:EU:C:2019:7733, para. 68, to the effect that the primary sources' right to freedom of expression should have expressly been mentioned.

⁵⁰ C-131/12, *Google Spain v. AEPD and Mario Costeja González* [2014] ECLI:EU:2014:317, para. 81.

⁵¹ *Delfi AS v. Estonia*, App. No. 64569/09, 16 June 2015, para. 110.

⁵² C-131/12, *Google Spain v. AEPD and Mario Costeja González* [2014] ECLI:EU:2014:317, para. 93.

⁵³ Korenhof, P. et al., 'Timing the right to be forgotten: A study into 'time' as a factor in deciding about retention or erasure of data', in Gutwirth, S., Leenes, R. and de Hert P. (eds), *Reforming European Data Protection Law*, Springer, 2015, p. 171.

⁵⁴ de Mars, S. and O' Callaghan, P., 'Privacy and search engines: Forgetting or contextualising?', *J. Law & Soc.* 43 (2), 2016, p. 280.

one of the steps taken by Facebook in response to what its systems detected as inaccurate claims about the US presidential election.⁵⁵ Similarly, one way Twitter tackles COVID-19 misinformation is by reducing the visibility of tweets and/or by preventing them from being recommended.⁵⁶ However, such measures, often referred to as ‘shadow banning’, raise questions about the transparency and possible bias of platforms’ algorithms and content reviewers.⁵⁷ Greater transparency of the rules that govern the indexing, searching, prioritising, and demotion of search results would help alleviate these concerns.⁵⁸

In an interesting *obiter dictum* concerning the de-referencing of data relating to a criminal procedure, the CJEU subscribed to the view that search results need to provide an accurate picture of the current situation. The CJEU held that even if not de-referenced, the search engine would be obliged ‘to adjust the list of results in such a way that the overall picture it gives the internet user reflects the current legal position, which means in particular that links to web pages containing information on that point must appear in first place on the list’.⁵⁹ The notion that search results should as far as possible be up to date is hardly contentious. It does, however, potentially conflict with the practice of ordering search results based on their perceived relevance for the user.⁶⁰ Further, situations are conceivable where chronological ordering may be inimical to conveying an accurate picture, for instance, when more recent results are erroneous in a different way. Determining what information best conveys the complete picture, and the arbiter who is competent to decide this point, are vexed issues. One could raise the question whether this *obiter dictum* could also apply to other internal types of search results, including those provided by online news archives.⁶¹ If so, online news archives might need to meet the onerous obligation of continuously updating their entries to reflect the most current legal position. However, the added value of news archives in not primarily capturing a snapshot of the present but conveying information about the past would need to be taken into account.⁶²

2.2.2. Political propaganda

The CJEU had the opportunity to explicitly pass verdict on the legality of measures to curb the spread of disinformation in a case on the cross-border audiovisual transmission of political propaganda.⁶³ Case C-622/17, *Baltic Media Alliance* concerned the decision of the Lithuanian Radio and Television Commission to require that NTV Mir Lithuania, a channel licensed by Ofcom and targeting the Russian-speaking minority in Lithuania, only be broadcast in pay-TV-packages.⁶⁴ This distribution measure intended to combat the active dissemination of information aimed at destabilising the Lithuanian state, spurring hostility against the Baltic countries by spreading false information about their alleged neo-Nazi policies and their collaboration with the Holocaust, and sowing societal discord and polarisation. The CJEU held that such technical arrangements were apt to limit to a certain extent the

⁵⁵ Sandler, R., ‘Facebook will temporarily demote posts that spread election misinformation’, *Forbes*, 5 November 2020.

⁵⁶ Twitter, ‘Covid-19 misleading information policy’, Twitter General guidelines and policies.

⁵⁷ Ranttila, K., ‘Social media and monopoly’, *Ohio N.U. L. Rev.* 46(1), 2020, pp. 162ff.

⁵⁸ Haynes Stuart, A., ‘Google search results: Buried if not forgotten’, *NC JOLT* 35 (3), 2013, pp. 472; Pasquale, F., ‘Restoring transparency to automated authority’, *J. on Telecomm. & High Tech. L.* 9(1), 2011, pp. 244ff.

⁵⁹ Case C-136/17, *GC and Others v. CNIL* [2019] ECLI:EU:C:2019:773, para. 78.

⁶⁰ Google, ‘How search algorithms work’.

⁶¹ Globocnik, J., ‘The right to be forgotten is taking shape: CJEU judgements in *GC and Others* (C-136/17) and *Google v CNIL* (C-507/17)’, *GRUR International* 69 (4), 2020, p. 385.

⁶² *Węgrzynowski and Smolczewski v. Poland*, App. No. 33846/07, 16 July 2013.

⁶³ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (*AVMSD*), OJ L 95 of 15 April 2010.

⁶⁴ C-622/17, *Baltic Media Alliance v. Lietuvos radijo* [2019] ECLI:EU:C:2019:566.

accessibility of the channel in question, as was indeed their very purpose, but did not amount to the channel's actual suspension.⁶⁵ Given the contested measure did not affect the retransmission of that channel, the CJEU concluded that it did not fall within the remit of Art. 3 (1) and (2) of AVMSD concerning the conditions for derogation from the country of origin principle.

This judgement did not specifically address freedom of expression. However, the freedom of reception and retransmission of audiovisual media services gives specific expression to the right to freedom of expression.⁶⁶ The CJEU's reasoning suggests that measures that aim to limit the spread of disinformation rather than effect its outright removal are more likely to meet the test of proportionality. Together with the definitional difficulties around the concept of 'false news', this is presumably part of the rationale behind Facebook's decision to significantly reduce the distribution of such news by showing it lower on the News Feed as opposed to removing it altogether.⁶⁷ The General Court has also underlined the need not to impair the substance of the right to freedom of expression in a case concerning the adoption of restrictive measures against the head of the Russian Federal State news agency, 'Rossiya Segodnya', on account of his participation in programmes which contained war propaganda justifying Russian military intervention in Ukraine. The General Court held that the measures taken by the Council of the European Union against the applicant were proportionate to the objective of exerting pressure on the Russian government and justified in light of the fact that the applicant had provided active support to policies aimed at destabilising Ukraine.⁶⁸

2.3. Case law of the European Court of Human Rights

The ECtHR construes freedom of expression broadly and the exceptions to which it is subject, narrowly. In its early case of *Handyside v. the UK*, the court proclaimed that the right to freedom of expression 'is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'".⁶⁹ In line with this broad conception of the right to freedom of expression, the protection under Art. 10 ECHR also extends to the sharing of information that is strongly suspected to be untruthful. In *Salov v. Ukraine*, the ECtHR held that:

'Article 10 of the Convention as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention.'⁷⁰

It follows that laws that generally prohibit the dissemination of disinformation merely on the ground of its falsity, without regard for additional factors such as the harm caused to personal rights, are likely to fall foul of the right to freedom of expression under Art. 10 ECHR.⁷¹ *Salov v Ukraine* concerned the sharing of a limited number of forged copies of a newspaper containing incorrect information about

⁶⁵ Ibid, para. 81.

⁶⁶ Opinion of Advocate General Saugmansgaard Øe, C-622/17, *Baltic Media Alliance v. Lietuvos radijo* [2019] ECLI:EU:C:2019:566, para. 70.

⁶⁷ Facebook, '[False news](#)', Facebook Community standards.

⁶⁸ T-262/15, *Kiselev v. Council* [2017] ECLI:EU:T:2017:392, para. 112-113.

⁶⁹ *Handyside v. UK*, App. No. [5493/72](#), 7 December 1976, para. 49.

⁷⁰ *Salov v. Ukraine*, App. No. [65518/01](#), 6 September 2005, para. 113.

⁷¹ van Hoboken, J. et al., '[The legal framework on the dissemination of disinformation through internet services and the regulation of political advertising](#)', IViR, December 2019, p. 39.

the death of the incumbent President and an alleged coup d'état. The applicant was not the author of the false information but merely referred to it in conversations with a limited number of persons, all the while doubting its veracity. An important difference between this case and the spread of online disinformation is that the latter mostly takes place in an organised manner, on an unprecedented scale and speed due to the widespread dissemination of news through social interaction.⁷² Having said that, a certain initial credulity about social media as a source of news has given place to a waning trust in the platforms and prevalent concerns about the issue of mis- and disinformation.⁷³

There is only one particular case of untruthful expression in which the ECtHR has taken a zero-tolerance stance, namely the falsification of history by way of Holocaust denial claims.⁷⁴ The ECtHR dealt with such expression by way of the 'abuse clause' under Art. 17 ECHR which outlaws any activity aimed at the destruction of the rights and freedoms set forth in the Convention or at their limitation to a greater extent than is provided for in the Convention. The effect of the reliance on Art. 17 ECHR is that those found guilty of Holocaust denial cannot rely on Art. 10 ECHR. In the *Garaudy* case, the ECtHR held that the real aim pursued by Holocaust deniers was to rehabilitate the National Socialist regime and to accuse the victims of falsifying history, thus defaming them and inciting racial hatred against them in a manner that would run counter to the very values which the Convention sought to promote.⁷⁵ The ECtHR has been prepared to accept the criminal prosecution of this particular form of disinformation on the ground of its pernicious effects on the reputation and rights of the Jewish community.

The ECtHR has distinguished Holocaust denial from historical revisionism relating to other instances of genocide, such as the Armenian genocide. While it recognised the Holocaust as a 'clearly established historical fact', it refrained from passing verdict on the legal qualification of the atrocities committed against the Armenians in 1915 as genocide. In *Perinçek v. Switzerland*, the ECtHR controversially held that the comments of a Turkish lawyer who disputed the legal characterisation of these events as genocide and branded Armenians as aggressors, were political speech made in the public interest and not an incitement to hatred against the Armenian community in Switzerland. The ECtHR took particular issue with the fact that the Swiss courts 'censured the applicant for voicing an opinion that diverged from the established ones in Switzerland, and that the interference took the serious form of a criminal conviction'.⁷⁶ Notably, the ECtHR stressed that Art. 10 ECHR does not allow for restrictions aimed at the maintenance or protection of 'public order' at large. The wording of the English text of Art. 10 (2) ECHR, allowing for restriction on the ground of 'prevention of disorder', was deemed to be the definitive one, narrowly construed in the sense of the avoidance of public disturbances.⁷⁷

It follows from the above that a content-based restriction on disinformation aimed at the protection of 'public order' at large would unlikely pass scrutiny under Art. 10 ECHR.⁷⁸ A restrictive measure would

⁷² Hermida, A., Fletcher, F., Korell, D. and Logan, D., 'Share, like, recommend. Decoding the social media news consumer', *Journalism Studies*, 13 (5-6), 2012, p. 815.

⁷³ Newman, N., 'Executive summary and key findings of the 2020 Report', *Reuters Institute for the Study of Journalism*, 2020; Ofcom, 'News consumption in the UK: 2020', p. 3.

⁷⁴ Fenwick, H. and Philipson, G., *Media freedom under the Human Rights Act*, OUP, 2006, p. 46.

⁷⁵ *Garaudy v. France*, App. No. [65831/01](#), 24 June 2003.

⁷⁶ *Perinçek v. Switzerland*, App. No. [27510/08](#), 15 October 2015, para. 280.

⁷⁷ *Perinçek v. Switzerland*, App. No. [27510/08](#), 15 October 2015, paras. 146-151; *Kablis v. Russia*, App. No. [48310/16 and 59663/17](#), 30 April 2019, para. 87.

⁷⁸ The idea of 'content neutrality' is most commonly associated with US First Amendment jurisprudence (*R.A.V. v. St. Paul*, 505 U.S. 377 (1992)). However, it also informs the interpretation of Article 5 of the German Constitution under the 'general laws' ('Allgemeine Gesetze') doctrine (Bundesverfassungsgericht, [BVerfGE 113, 63](#), Judgement of 24 May 2005, para. 79). It is also implicit in the ECtHR's approach to balancing, which is very similar to that adopted by the BVerfG and the US Supreme Court (see Arendt E, *Freedom of Speech*, Oxford University Press, 2005, 159, and; e.g. *Pentikäinen v. Finland*, App. No. [11882/10](#), 20

need to be shaped in a content-neutral way and be targeted at the protection of one of the legitimate aims set out in Art. 10 (2) ECHR, such as the prevention of disorder or crime, the protection of health or morals, or the protection of reputation or rights of others. The heavy presumption in favour of freedom of expression in the ECtHR's case law suggests that it would be very reluctant to act as the arbiter of truth and to agree to the existence of a 'pressing social need'.

Even though falsity alone would unlikely justify the adoption of restrictive measures against disinformation, it is worth considering whether such measures might be condoned if used against organised and aggressive dissemination and amplification methods. In *Satakunnan and Satamedia v. Finland*, the ECtHR held that the mass dissemination of raw taxation data through a newspaper and a text-messaging service could legitimately be restricted. Despite the fact that the information in question was not obtained by illicit means and was publicly accessible, the ECtHR found 'the layout of the publication, its form, content and the extent of the data disclosed' meant that it did not contribute to a debate in the public interest, and could not be assimilated to political speech.⁷⁹ This case law suggests that the method of dissemination might be a relevant factor in assessing the proportionality of restrictive measures against lawful information disseminated on a massive scale, including intentionally untruthful information. Notwithstanding that, the Court's preparedness to restrict the scale and quantity of disinformation would depend on the type of speech in question.

The ECtHR does not protect all types of speech to the same extent. The category of speech involved influences the margin of appreciation that is afforded national authorities and the concomitant intensity of review by the ECtHR. The ECtHR recognises a hierarchy of expression with political speech at the apex.⁸⁰ Artistic speech receives less protection, while commercial speech receives the lowest level of protection, though still higher than, say, gratuitous insults or hate speech. The ECtHR considers that a wide margin of appreciation is essential in 'commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition'.⁸¹ This raises the question as to the level of protection that would be accorded to disinformation on this sliding scale. The level of protection may differ depending on the motive of the agent producing or sharing the inaccurate content in question - usually as a means to obtain a political or a financial gain.⁸² In the following Subsection, a distinction will be made on the basis of the prime motives for disseminating disinformation, bearing in mind that an overlap of motives is conceivable.

2.3.1. Protection of political speech

If the aim is to mislead for political advantage, including at election time, the speech in question would likely be classified as political speech. The ECtHR has recognised that free elections and freedom of political expression work in tandem to form the 'bedrock of any democratic system'.⁸³ However, the two rights may occasionally conflict, resulting in the need for certain restrictions, particularly in the period preceding or during an election.⁸⁴ For instance, this is the case when candidates submit

October 2015, para. 108: 'the conduct sanctioned by the criminal conviction was not the applicant's journalistic activity as such').

⁷⁹ *Satakunnan and Satamedia v. Finland*, App. No. [931/13](#), 27 June 2017, para. 178.

⁸⁰ *Sunday Times v. the United Kingdom*, App. No. [6538/74](#), 29 April 1979, para. 245; *Lingens v. Austria*, App. No. [9882](#), 8 July 1986, para. 407; *Thorgeir Thorgeirson v. Iceland*, App. No. [13778/88](#), 25 June 1992, para. 843.

⁸¹ *Markt Intern and Beermann v. Germany*, App. No. [10572/83](#), 20 November 1989, para. 161; see also *Sekmadienis v. Lithuania*, App. No. [69317/14](#), 30 January 2018, para. 73.

⁸² See Posetti, J. and Bontcheva, K., '[Disinfodemic: Deciphering Covid-19 disinformation](#)', Policy brief 1, UNESCO, 2020, p. 2.

⁸³ *Bowman v. the United Kingdom*, App. No. [24839/94](#), 19 February 1998, para. 42.

⁸⁴ *Ibid*, para. 43.

inaccurate information about themselves, thus risking misleading voters by false representations.⁸⁵ A distinction needs to be drawn between plainly incorrect information, and such that is 'in support or opposition to a political party or tendency generally, at national or regional level, provided that there is no intention to promote or prejudice the electoral chances of any particular candidate in any particular constituency'.⁸⁶ It follows that tendentious information not intended to deceive voters or impede their ability to vote would be protected by Art. 10 ECHR.

The ECtHR has ruled in a series of judgements on the compatibility of election campaign material targeting specific candidates with Art. 10 ECHR.⁸⁷ In the cases in question, the election material was held by national courts to lack factual bases and sanctions were imposed by way of summary proceedings. The proceedings were conducted under s. 72 of the Polish Local Election Act, which allows publication of campaign statements to be restrained within 24 hours on the basis that they contain 'untrue data or information'. In all three cases, the ECtHR unanimously found that the proceedings violated Art. 10 ECHR. In *Brzeziński*, the most recent of these judgements, the ECtHR criticised the Polish courts for rushing to characterise the applicant's statements as lies without adequately examining them. Moreover, by requiring the applicant to prove the veracity of his allegations, the domestic courts effectively deprived him of Art. 10 ECHR protection. This was the more unacceptable in view of the fact that the statements at issue contributed to a public debate on an important issue.⁸⁸ It follows that the bar for classifying election-time expression as disinformation is set high by the ECtHR. Also, the burden of proof that there has been a harm to candidates' reputation would need to be borne by the national authorities, not the applicant. Regarding the summary nature of the proceedings, the ECtHR recognised the need to rectify 'fake news' likely to distort the result of the vote as quickly as possible. At the same time, it stressed the importance of the free circulation of opinions and information in the pre-election period.⁸⁹ These observations raise questions over the compatibility of laws that require online platforms to remove or block 'manifestly unlawful' expression within 24 hours of receiving a complaint, with Art. 10 ECHR.⁹⁰ The ECtHR noted that such speedy proceedings should not unduly curtail procedural guarantees of fairness, and the same should apply to platforms' *modus operandi*.⁹¹

An alternative basis on which political disinformation might be curtailed is the means used for online dissemination. Art. 10 ECHR protects not only the 'content of information', but also the 'means of transmission or reception'.⁹² Methods of online dissemination of political ads carrying disinformation, such as micro-targeting or the use of bots, might hence enjoy the highest level of protection afforded to political speech. However, in its case law on paid political advertising, the ECtHR has ruled that a somewhat wider margin of appreciation needs to be afforded than would normally be allowed given the lack of consensus in this area.⁹³ Nonetheless, the ECtHR found in its earlier case law that a blanket ban on paid political advertising contravened Art. 10 ECHR given that the applicant groups/parties

⁸⁵ *Krasnov and Skuratov v. Russia*, App. No. [17864/04 and 21396/04](#), 19 July 2007.

⁸⁶ *Bowman v. the United Kingdom*, App. No. [24839/94](#), 19 February 1998, para. 22.

⁸⁷ *Brzeziński v. Poland*, App. No. [47542/07](#), 25 July 2019; *Kita v. Poland*, App. No. [57659/00](#), 8 July 2008; *Kwiecień v. Poland*, App. No. [51744/99](#), 9 January 2007.

⁸⁸ *Brzeziński v. Poland*, App. No. [47542/07](#), 25 July 2019, paras 57, 58.

⁸⁹ *Ibid*, para. 55.

⁹⁰ See [Act to Improve Enforcement of the Law in Social Networks](#) (NetzDG).

⁹¹ *Brzeziński v. Poland*, App. No. [47542/07](#), 25 July 2019, para. 35.

⁹² *Autronic AG v. Switzerland*, App. No. [12726/87](#), 22 May 1990, para. 47.

⁹³ *TV Vest AS and Rogalandpensjonistparti v. Norway*, App. No. [21132/05](#), 11 December 2008, para. 67; *Animal Defenders International v. the United Kingdom*, App. No. [48876/08](#), 22 April 2013, para. 123.

were not financially powerful, would not distort political debate, and access to national television was the only means by which they could reach the entire population.⁹⁴

The ECtHR reached a different conclusion concerning the UK ban on paid political advertising. In *Animal Defenders*, it held that the ban was consistent with Art. 10 ECHR in view of the quality of the parliamentary and judicial review of the necessity of the measure, the risk of abuse posed by a relaxation of the ban, and the possible use of other media by the applicant.⁹⁵ It is unclear whether *Animal Defenders* could be considered the leading judgement in the area of political advertising in future, given the earlier *TV Vest* ruling has not been explicitly overturned.⁹⁶ Further, at the time of the Grand Chamber's ruling in *Animal Defenders*, the ECtHR held fast to the notion of the uniquely 'immediate and powerful effect of the broadcast media' in the intimacy of the home, which justified the need for special measures for it.⁹⁷ At the same time, it incoherently recognised that the internet and social media were 'powerful communication tools', which gave the applicant alternative effective means to put their message across.⁹⁸

It is conceivable that the ECtHR would now be more prepared to accept a 'sufficiently serious shift in the respective influences of the new and of the broadcast media' in light of the increasing number of people accessing news online rather than on linear TV.⁹⁹ If so, regulation of online political disinformation would require proof of: the risk of distortion of public debate, especially on account of unequal access based on wealth, the narrow circumscription of the envisaged measure, the availability of other means of advertising, the quality of pre-legislative scrutiny, and the risk of abuse if measures were relaxed.¹⁰⁰ Depending on the severity of the attested harm to the democratic process as a result of specific methods of online political manipulation, possible regulatory options could consist of transparency requirements or spending caps and could be limited to election periods. A total ban might be found disproportionate.

The cited ECtHR's case law suggests that a restriction of micro-targeted political advertising could be in harmony with Art. 10. This restriction would serve to preserve a shared and sound informational environment, the pluralism of views, and ultimately the democratic process.¹⁰¹ The legitimate aim of such restriction is to protect the passive side of freedom of expression, i.e. access to public information for all members of society. The related case law on the right to access to public information has shown signs of expansion; this passive role was found to be 'particularly important in political [...] discussion, given its role in helping to determine people's choices'.¹⁰² In addition, micro-targeted political advertising would cause competitive advantages for certain political parties, based on their financial

⁹⁴ *VgT Verein gegen Tierfabriken v. Switzerland*, App. No. [24699/94](#), 28 June 2001, paras. 75 et seq.; *TV Vest AS and Rogalandpensjonistparti v. Norway*, App. No. [21132/05](#), 11 December 2008, paras. 73 et seq.

⁹⁵ *Animal Defenders International v. the United Kingdom*, App. No. [48876/08](#), 22 April 2013, paras. 115 et seq.

⁹⁶ Borgesius, F.J.Z. et al., 'Online political microtargeting: Promises and threats for democracy', *Utrecht Law Review* 14 (1), 2018; see van Hoboken, J. et al., '[The legal framework on the dissemination of disinformation through internet services and the regulation of political advertising](#)', IViR, December 2019, p. 46.

⁹⁷ *Animal Defenders International v. the United Kingdom*, App. No. [48876/08](#), 22 April 2013, para. 119.

⁹⁸ *Ibid*, para. 124.

⁹⁹ See Newman, N., '[United Kingdom](#)', Reuters Institute Digital News Report, 2020.

¹⁰⁰ See Bayer, J., '[Double harm to voters: data-driven micro-targeting and democratic public discourse](#)', *Internet Policy Review* 9 (1), 2020; Borgesius, F.J.Z. et al., 'Online political microtargeting: Promises and threats for democracy', *Utrecht Law Review* 14 (1), 2018; see van Hoboken, J. et al., '[The legal framework on the dissemination of disinformation through internet services and the regulation of political advertising](#)', IViR, December 2019, p. 46.

¹⁰¹ See more in Bayer, J., '[Double harm to voters: data-driven micro-targeting and democratic public discourse](#)', *Internet Policy Review* 9 (1), 2020.

¹⁰² *Kenedi v. Hungary*, App. No. [31475/05](#), 26 May 2009, *Sdružení Jihočeské Matky v. Czech Republic*, App. No. [19101/03](#), 10 July 2006; *Társaság a Szabadságjogokért v. Hungary*, App. No. [37374/05](#), 14 April 2009.

capacities. To decide on the proportionality of the restriction, other media types available for transmitting political messages would need to be considered.

2.3.2. Protection of commercial speech

Where the spread of disinformation is primarily motivated by the desire to reap financial profit, the speech in question could be regarded as commercial speech, attracting a lower level of protection. An important incentive for creating disinformation for commercial gain is the promise of increased attention by readers, rewarded with a greater share of the programmatic, algorithm-generated advertising pie.¹⁰³ In other words, these commercially motivated types of false news stories refer only incidentally to pretend social or political issues, while their main aim is to draw advertisers to their sites. Yet profit-making bodies are equally covered by Art. 10 ECHR.¹⁰⁴ If the freedom of expression were restricted to non-profit journalism organisations, this would deprive a large proportion of the press of any protection.¹⁰⁵

The extent to which speech could be characterised as commercial is uncertain. In the *Hertel* case, the ECtHR declined to label statements made in a scientific paper on the health effects of consumption of food prepared in microwave ovens as 'purely' commercial, given that the said publication touched upon a debate over public health and hence affected the general interest.¹⁰⁶ The fact that the scientific opinion about the harmful effects of microwave ovens was a minority one and appeared devoid of merit was held to be immaterial. The Court emphasised that it would be particularly unreasonable to restrict freedom of expression to generally accepted ideas in a sphere in which uncertainty reigns.¹⁰⁷ Such a scientific and political uncertainty also exists around the optimum response to the COVID-19 pandemic.¹⁰⁸ Consequently, caution is called for as regards the removal of false claims and conspiracy theories. In the context of a pandemic, it is especially important that individuals feel empowered to discuss their concerns and criticise public authorities' response. Restrictions need to be motivated by legitimate public health goals and be proportionate, not used as a means to quash dissent.¹⁰⁹

The Member State (Switzerland) complied with the ECtHR's decision by issuing a new judgement which obliged Hertel to refer to current differences of opinion next to his publication. The applicant, again, submitted a complaint to the ECtHR. This time, the Court dismissed it as inadmissible on the ground that the applicant now enjoyed complete freedom in making any statement on the dangerous effects of the use of microwave ovens with only the limitation that he could not present them as scientifically proven results without also referring 'to current differences of opinion'. In the Court's view, this limitation was a minor one.¹¹⁰ This decision indicates that current practices applied by platforms to label mis- and disinformation are proportionate.

The ECtHR seemed more willing to classify speech as commercial in the *Raëlien Suisse* case. This case concerned the ban on a poster campaign intended to attract people to the cause of the Raëlien

¹⁰³ ITN, '[Written evidence submitted by Ofcom to the 'Fake news' inquiry](#)', March 2017.

¹⁰⁴ *Autronic AG v. Switzerland*, App. No. [12726/87](#), 22 May 1990, para. 47; *Casado Coca v. Spain*, App. No. [15450/89](#), 24 February 1994, para. 35.

¹⁰⁵ *Markt Intern and Beermann v. Germany*, App. No. [10572/83](#), 20 November 1989, para. 25.

¹⁰⁶ *Hertel v. Switzerland*, App. No. [25181/94](#), 25 August 1998, para. 47.

¹⁰⁷ *Ibid.*

¹⁰⁸ See Sumption, J., '[Lord Sumption: the only correct position is locking down without limit – or not locking down at all](#)', Prospect Magazine, 26 May 2020.

¹⁰⁹ See UN Human Rights Council, '[Disease pandemics and the freedom of opinion and expression](#)', Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN General Assembly, 23 April 2020, p. 7.

¹¹⁰ *Hertel v. Switzerland*, App. No. [25181/94](#), 25 August 1998.

Movement, an association that believed *inter alia* in the creation of life on Earth by extraterrestrials. The ECtHR held that their campaign was closer to commercial speech than to political speech *per se*; it did not seek to address matters of political debate but had a certain proselytising function.¹¹¹ It countenanced the ban on the poster campaign on the ground of the protection of health and morals and the prevention of crime. Public health is indeed one of the narrow grounds for the restriction of freedom of expression. However, behind the principle of proportionality is the imperative that there is a direct and immediate link between the expression of a 'false' view and the alleged threat, and that the chosen method to restrict expression is necessary and proportionate.

The comparison between *Hertel* and *Raëlien Suisse* suggests that the ECtHR might be more prepared to accord a wider margin of appreciation and classify as quasi-commercial, false claims that make no contribution to debate in the public interest and pose a risk of harm to the rights of others. Such a classification of disinformation as quasi-commercial speech is not devoid of risk as it could easily spill over to other types of protected political expression. Regulation of misleading advertising is acceptable as such speech is generally easier to verify.¹¹² The same does not apply to the news media that is not based on unassailable truth claims but on socially negotiated truth-finding processes.¹¹³

2.4. Case law of national courts

Freedom of expression is recognised as an essential foundation of a democratic society by all EU Member States. Yet, the attitude of national courts towards potential restrictions on the freedom of expression differs from country to country. While the research conducted in this study did not reveal disinformation cases *per se*, Member States' courts have ruled on numerous occasions on the freedom of expression and its potential limitations. The Subsection below presents a selection of these cases to illustrate how national courts approach the dissemination of dubious information and illegal social media content. While none of the cases relate to disinformation *per se*, they address issues closely related to the problem, such as hate speech, dissemination of false facts, or the role of social media platforms in fighting illegal content.

2.4.1. Germany

In January 2018, Germany enacted the Network Enforcement Act (Netzwerkdurchsetzungsgesetz, NetzDG), which compels social media platforms to remove content deemed unlawful.¹¹⁴ It is yet to be seen how the courts interpret the law; however, it is already visible that they apply a rather rigorous standard regarding platforms' obligations. In July 2019, Germany's Federal Office of Justice (Bundesamt für Justiz – BfJ) issued a €2 million fine against Facebook Ireland Limited for violating the provisions of the NetzDG by not complying with reporting standards.¹¹⁵ In the order imposing the fine, the Federal Office of Justice admonished the incomplete information provided in the report on the number of complaints received about unlawful content.¹¹⁶ This, as pointed out by the BfJ, has serious consequences in terms of creating a distorted image both of the amount of unlawful content and the social network's response to it. Moreover, it makes it impossible to assess the actual effectiveness of

¹¹¹ *Mouvement Raëlien Suisse v. Switzerland*, App. No. [16254/06](#), 13 July 2012, para 62.

¹¹² Hertig Randall, M., 'Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?', *European Human Rights Law Review* 6 (1), 2006, p. 80; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 US 748 (1976), para. 771 n 24.

¹¹³ LSE Commission on Truth, Trust and Technology, '[Tackling the information crisis: A policy framework for media system resilience](#)', November 2018, p. 9.

¹¹⁴ Finnegan, B., '[The Cost of Free Speech: Combating Fake News or Upholding the First Amendment?](#)', 75 *U. Miami L. Rev.*, 2021.

¹¹⁵ Bundesverfassungsgericht, '[Federal Office of Justice Issues Fine against Facebook](#)', Press release of 3 July 2019.

¹¹⁶ *Ibid.*

the complaints mechanism foreseen by NetzDG.¹¹⁷ At the time of closing this study, Facebook has not appealed against the decision.

When it comes to balancing the freedom of expression with other rights, the German Federal Constitutional Court (GFCC) has not ruled explicitly on the fundamental rights implications of online monitoring yet.¹¹⁸ It has, however, had the chance to do so in *Der Dritte Weg v. Facebook Ireland Ltd.*¹¹⁹ The proceedings were initiated by Der Dritte Weg (The Third Path), a small right-wing political party whose account was banned by Facebook as the platform classified its post as hate speech.¹²⁰ The Regional Court Frankenthal (Pfalz) of the first instance held that the post is unlawful under the NetzDG because it attacked human dignity (the post included, inter alia, a saying that 'asylum seekers sometimes express their gratitude by violence and criminal offenses'¹²¹) and that, consequently, disabling the Facebook account and deletion of the post was proportionate. According to the Court, although Facebook plays an important role in forming opinions, the applicant could use other ways to express its opinions, such as websites, e-mail or other social networks. As the Court stated, even though Der Dritte Weg is a political party and shall enjoy the freedom of expression typical for political debate, such freedom is not guaranteed without restrictions.¹²² Der Dritte Weg applied to the Federal Constitutional Court for a preliminary injunction to suspend the lower courts' decision and pursue its application to oblige Facebook to grant the party access to its Facebook profile and restore its post. During the injunction proceedings, the GFCC¹²³ gave heavier weight to the freedom of (political) expression having regard to the coming 2019 European Parliament elections, as it found that Facebook was the party's main channel of communication with voters and therefore allowed Der Dritte Weg to retain access to its Facebook account until the elections.¹²⁴ The main proceedings on the merits are still pending at the time of closing this study. The Court's reasoning behind the decision was, thus, the following: 'The consequences that would occur if Der Dritte Weg were denied the use of Facebook, but Facebook was later obliged to restore the access to its platform, outweighed the consequences that would occur if Facebook was temporarily obliged to restore the access, but it later turns out that the refusal of access was lawful'.¹²⁵

Germany has a rich case law balancing the right to freedom of expression with other constitutional rights, such as the right to human dignity or the preservation of democratic order.¹²⁶ As stated by the GFCC in the *Lüth case*, 'This system of values, centering on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit. [...] After all, if provisions of criminal law designed to protect honour or other essential aspects of

¹¹⁷ Library of Congress, Global Legal Monitor, [Germany: Facebook Found in Violation of 'Anti-Fake News' Law](#), 2019.

¹¹⁸ Finnegan, B., [The Cost of Free Speech: Combating Fake News or Upholding the First Amendment?](#), 75 *U. Miami L. Rev.*, 2021.

¹¹⁹ Bundesverfassungsgericht, [Verpflichtung zur Entsperrung eines Facebook-Accounts im einstweiligen Rechtsschutz](#), Press release of 23 May 2019; Bundesverfassungsgericht, [1 BvQ 42/19](#), Judgement of 22 May 2019.

¹²⁰ Bundesverfassungsgericht, [1 BvQ 42/19](#), Judgement of 22 May 2019.

¹²¹ Ibid.

¹²² Columbia University, Global Freedom of Expression, [Der Dritte Weg v. Facebook Ireland Ltd.](#)

¹²³ Bundesverfassungsgericht, [Verpflichtung zur Entsperrung eines Facebook-Accounts im einstweiligen Rechtsschutz](#), Press release of 23 May 2019; Bundesverfassungsgericht, [1 BvQ 42/19](#), Judgement of 22 May 2019.

¹²⁴ Bundesverfassungsgericht, [1 BvQ 42/19](#), Judgement of 22 May 2019.

¹²⁵ Bundesverfassungsgericht, [1 BvQ 42/19](#), Judgement of 22 May 2019.

¹²⁶ Bundesverfassungsgericht, [BVerfGE 7, 198](#), Judgement of 15 January 1958.

human personality can set limits to the exercise of the fundamental right to freedom of expression, it is not obvious why similar provisions of private law should not equally do so.¹²⁷

Consequently, while it is possible to restrict the fundamental right to freedom of expression, this may happen only on specific, well-justified grounds, taking into account the special significance that the basic right to freedom of expression has in a free democratic state. As stated by the Court, 'these general laws have to be examined in light of the constitutional significance of the basic right they are restricting, meaning the limitations must themselves be interpreted restrictively in order to preserve the substance of the basic right, thus balancing these interests'.¹²⁸

Regarding the scope of protection, the GFCC has established that opinions are protected, regardless of their content.¹²⁹ These, however, shall be distinguished from statements of fact. The distinction was addressed by the Court in the *Auschwitz Lie* case,¹³⁰ where the Court stated that the freedom of expression does not cover dissemination of factual claims that are demonstrably untrue and deliberately false. According to the GFCC, the complainant could benefit from freedom of expression protection only to the extent that she bases the denial of the Nazi genocide on subjective conclusions and appraisals.¹³¹

2.4.2. Poland

This distinction between opinions and false facts seems typical for states that follow the German model of the civil law system. Polish courts have taken a similar direction while assessing the limits of freedom of expression. As stated by the Polish Supreme Court, the freedom of expression granted in the Polish Constitution and European Convention on Human Rights is not absolute, i.e., it is not unlimited.¹³² Similar to the German approach, the scope of protection of the freedom of expression is drawn along the division between facts and opinions. According to the Court, facts that can be assessed based on the criteria of truth vs falsity shall benefit from the protection under the freedom of expression only as long as they reflect the truth.¹³³ The dissemination of untrue facts is not covered by freedom of expression if it violates the personal rights of others.¹³⁴ The Court also noted that, in the course of verifying truthfulness, a holistic approach shall be applied, taking into account the full context of the case – a selective choice of true facts leading to false impressions shall not benefit from protection.¹³⁵ Nevertheless, the Court held that this rigorous standard to verify facts applies to every sphere of life, including political debate.¹³⁶ The Polish Supreme Court noted that it is in the public interest to have public debate based on factual information and, hence, everyone who enters the debate should apply specific rigour to the verification of the facts she/he wants to introduce to the debate, or otherwise to add a disclaimer that facts presented are not yet confirmed.¹³⁷ On another occasion, the Court stated that the requirement to cite only true information in public debate is by no means excessive in nature and may only positively upgrade the quality of public debate, mobilizing speakers to verify the

¹²⁷ Ibid.

¹²⁸ Ibid.

¹²⁹ Bundesverfassungsgericht, [1 BvR 673/18](#), Judgement of 22 June 2018, paras. 1-37; Bundesverfassungsgericht, [Unsuccessful constitutional complaint against criminal conviction for denial of the Nazi genocide](#), Press Release of 3 August 2018.

¹³⁰ Bundesverfassungsgericht, [1 BvR 673/18](#), Judgement of 22 June 2018.

¹³¹ Ibid.

¹³² Polish Supreme Court, [IV CSK 683/18](#), Judgement of 17 January 2020.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Polish Supreme Court, [I CSK 754/10](#), Judgement of 21 September 2011.

¹³⁷ Ibid.

information they present.¹³⁸ Moreover, when analysing the process of ‘facts’ verification’, the Court will assess whether it was conducted with the due diligence expected of certain occupations or functions.¹³⁹ The standard applied to private individuals differs from that applied to journalists, politicians or public figures taking an active role in public debate.¹⁴⁰

The Polish Regional Administrative Court in Lublin, on the occasion of ‘LGBT-free zones’¹⁴¹ held that opinions are granted full protection as long as they are presented as opinions of private individuals and not an opinion of a state entity, such as a municipal council – as was the case in the ‘LGBT-free zones’ proceedings. In this infamous case, the Municipal Council of a small town enacted a resolution stating that the town is an LGBT-free zone. This was found to violate freedom of expression by the Court because the way state authorities exercised their right to freedom of expression could curtail the public debate and, in consequence, violate the right to freedom of expression of others. In a similar case, the Regional Administrative Court in Gliwice held the expression of another ‘LGBT-free zone’ violated the freedom of expression of others, declaring the resolution of the Municipal Council null and void. The Court, in its argumentation, noted that the right to freedom of expression shall be granted to everyone, regardless of whether they are homosexuals or heterosexuals who wish to support the LGBT community. Consequently, the issuance of a resolution condemning the LGBT community restricts the right to freedom of expression as people cannot freely state their opinions on this subject.¹⁴²

The LGBT context has been a canvas of yet another two cases relating to disinformation and freedom of expression. Both concern false statements regarding the LGBT community.¹⁴³ In the first one, false statements were disseminated in the form of slogans on trucks parked on the main streets of Poland stating that gay people are paedophiles. A civic society organization called ‘Tolerado’ issued a claim against the Foundation ‘Prawo do życia’¹⁴⁴ who owned one of the trucks. The Regional Court of Gdańsk stated that ‘Tolerado’ did not have a legitimate interest in issuing a claim, and hence the claim was dismissed.¹⁴⁵ The reason was that dissemination of untrue information is illegal only when it violates personal rights, such as the dignity or feelings of another person. ‘Tolerado’, however, is a legal entity and, as such, it does not have personal rights, hence its claim had no legal basis.¹⁴⁶

The case of *Brzezinski* has reached the ECtHR and is also discussed above. Below, the national circumstances of the case are described. In 2006, Mr Brzezinski, one of the candidates in local elections in Częstochowa, published an election booklet criticizing local government members, claiming, inter alia, that mayor J.S. mismanaged contracts with a water company and councillor J.K. used her public position for personal benefits. Brzezinski gave out the booklets on a Sunday in front of church and J.S. and J.K. sued Brzezinski for the dissemination of false information. The trial was held on October 27, 2006. Brzezinski was summoned by phone at 10:30 AM for a trial scheduled for 1:30 PM. He did not attend the trial, as later stated, due to poor health and inability to drive with no means of transportation to be found within the three hours (Brzezinski lived in a village located outside the city, around 35 km from the court). The court held the trial in absentia and found that the booklet was malicious, harmed

¹³⁸ Polish Supreme Court, [ICSK 220/09](#), Judgement of 25 February 2010.

¹³⁹ Polish Supreme Court, [ICSK 724/14](#), Judgement of 18 September 2015.

¹⁴⁰ Ibid.

¹⁴¹ Regional Administrative Court of Lublin, [III SA/Lu 7/20](#), Judgement of 6 August 2020.

¹⁴² Regional Administrative Court of Gliwice, [III SA/GI 15/20](#), Judgement of 14 July 2020.

¹⁴³ Regional Court of Gdańsk, [IC 1134/19](#), Judgement of 26 September 2019; District Court of Warsaw Praga-Północ, [Private prosecution](#) of 5 July 2019.

¹⁴⁴ In English: ‘For a Right to Life’

¹⁴⁵ Regional Court of Gdańsk, [IC 1134/19](#), Judgement of 26 September 2019.

¹⁴⁶ Ibid.

J.S.'s and J.K.'s reputation without any factual basis, and exceeded the limits of permissible campaign speech. Brzezinski appealed but his claim was dismissed.

The following case study illustrates how giant online platforms abuse their power in the absence of regulation. In May 2019, Civil Society Drug Policy Initiative ('Społeczna Inicjatywa Narkopolityki', or SIN), a Polish NGO active in the field of evidence-based drug policy, filed a lawsuit against Facebook Ireland Ltd.¹⁴⁷ For many years, the SIN has been conducting educational activities concerning the harmful consequences of drug use and assisting people with drug abuse problems. In 2018, Facebook removed fan pages and groups run by SIN without any warning or explanation. The platform had characterized them as violating its Community Standards and, as groups possibly selling drugs. Deleting fan pages and assistance groups severely hindered the organisation's work for whom and whose beneficiaries Facebook was the main channel of communication. After numerous unsuccessful attempts to solve the matter with Facebook, in May 2019, SIN filed a lawsuit against Facebook demanding the restoration of access to the removed pages and accounts, as well as a public apology. In its interim measures ruling, the District Court in Warsaw temporarily prohibited Facebook from removing fan pages, profiles and groups run by SIN on Facebook,¹⁴⁸ and blocking individual posts.¹⁴⁹ Furthermore, the court obliged Facebook to store profiles, fan pages and groups deleted in 2018 and 2019 so that if SIN wins the case, they can be restored together with the entire published content, including comments and followers.¹⁵⁰ Facebook rejected the suit on the ground of inability to understand the language of proceedings, i.e. Polish. In July 2020, the Warsaw District Court ordered SIN to provide a sworn English translation of the court files.¹⁵¹ As the NGO did not have enough resources to cover the expense of this (approximately €2000), it started a crowd-funding campaign to collect the funds needed.¹⁵² The case awaits trial and is yet to be addressed by the Court; nevertheless, it stirs the imagination and is a vivid example of the powers vested in social platforms and tech giants.

2.4.3. Austria

Austrian courts have also been a scene of an interesting case on freedom of expression concerning online defamation.¹⁵³ On 3 April 2016, an anonymous Facebook user shared an article from the Austrian online news magazine oe24.at titled 'Greens: Minimum income for refugees should stay'. With it, they published a comment calling Glawischnig-Piesczek (former federal chairperson of the Austrian parliamentary party 'die Grünen' (the Greens) and member of the Nationalrat (National Council in Austria)) 'miese Volksverräterin' (lousy traitor), 'korrupten Trampel' (corrupt bumpkin) and her party a 'Faschistenpartei' (fascist party). This generated a thumbnail on Facebook containing the title of the article and a photograph of Glawischnig-Piesczek. Both the post and comment could be seen by any Facebook user. Glawischnig-Piesczek requested Facebook to delete the posts and reveal the user's identity. As Facebook did neither, Glawischnig-Piesczek sought an injunction in the Commercial Court in Vienna (Handelsgericht Wien). She argued that Facebook, in not taking any actions, violated her right to control the use of her image and infringed the Austrian Civil Code, which protects people from hate speech. She successfully obtained an injunction to remove the infringing content. In compliance, Facebook disabled access to the impugned content in Austria. Both parties appealed the decision to

¹⁴⁷ Panoptikon Foundation, [SIN vs Facebook – Press release](#).

¹⁴⁸ After deletion of the initial account, the NGO has opened a new Facebook account.

¹⁴⁹ Panoptikon Foundation, [First court decision in SIN vs Facebook](#), 2019; District Court of Warsaw, [IV C 608/19](#), Judgement of 11 June 2019.

¹⁵⁰ Ibid.

¹⁵¹ Panoptikon Foundation, [SIN vs Facebook – Press release](#).

¹⁵² [Crowd-funding campaign for SIN vs Facebook](#).

¹⁵³ Columbia University, Global Freedom of Expression, [Glawischnig-Piesczek v. Facebook Ireland Limited](#).

the Austrian Supreme Court, which turned to the Court of Justice of the European Union with a question of the scope of content to be removed and the territorial scope of the removal. The CJEU found that ‘monitoring for identical content to that which was declared illegal, would fall within the allowance for monitoring in a ‘specific case’ and thus not violate the Directive’s general monitoring prohibition’.¹⁵⁴ This allowance could also extend to equivalent content, provided the host was not required to ‘carry out an independent assessment of that content’ and could employ automated search tools for the ‘elements specified in the injunction’.¹⁵⁵

2.4.4. France

While balancing the freedom of expression and other rights, French courts seem to apply a rather rigorous standard and narrow the scope of protection granted under the freedom of expression. In the case of prominent French satirist and comedian Dieudonné M’bala M’bala, the Regional Court of Paris analysed the scope of freedom of expression in the context of public order and safety and a state of public emergency. Shortly after the terrorist attacks on the Charlie Hebdo office, humourist M’bala M’bala posted a comment on his Facebook page saying, ‘tonight I feel like Charlie Coulibaly’ – referring to the slogan promoting freedom of expression ‘Je suis Charlie’ - and at the same time invoking Amedy Coulibaly, a terrorist responsible for killing a policewoman and four Jewish individuals in the days following the Charlie Hebdo attacks. Despite extensive explanations made by M’bala M’bala, the Court arrived at the conclusion that he made an impression that he was self-identifying with terrorist acts and contributed to trivializing the acts of terror that had just taken place. The Regional Court of Paris held that whilst such a provocative amalgam could fall under the category of satire, an artistic form of expression, here it did not because it came at a very sensitive time when public opinion was still shocked; victims haven’t even been buried yet.¹⁵⁶

2.4.5. Switzerland

Swiss courts have ruled on freedom of expression in the context of disinformation several times. One example is the *Hertel case* already discussed in Section 2 as part of the case law of the ECtHR.¹⁵⁷ In 1992, Mr Hertel, retired and holding a degree in technical sciences from the Zürich Federal Institute of Technology, conducted private research in his personal laboratory and wrote an extensive article on the negative impact of microwaves on human health. The paper was published in the quarterly Journal, Franz Weber. In his work, Mr Hertel stated that food prepared in microwave ovens was a danger to health to such an extent that it causes, in those who consume it, a change in the blood and leads to anaemia and a precancerous stage. The Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances issued an application before the Vevey District Court. The President of the Court noted that there has been no scientific evidence that food prepared in a microwave oven constitutes a danger to health or is carcinogenic. The research conducted by Mr Hertel cannot be treated as such evidence because it does not meet the generally accepted scientific standards. On the contrary, there had been evidence of the opposite in the form of observations of the World Health Organisation and the Federal Office of Public Health. Consequently, the court held that Hertel’s statements ‘are manifestly false and untrue and consequently inaccurate’.¹⁵⁸ When Mr Hertel argued that he had

¹⁵⁴ C-18/18, [Eva Glawischnig-Piesczek v. Facebook](#) [2019] ECLI:EU:C:2019:821.

¹⁵⁵ C-18/18, [Eva Glawischnig-Piesczek v. Facebook](#) [2019] ECLI:EU:C:2019:821.

¹⁵⁶ Tribunal de grande instance de Paris, [jugement correctionnel](#) du 18 mars 2015; Columbia University, Global Freedom of Expression, [TGI Tribunal de grande instance de Paris, jugement correctionnel du 18 mars 2015](#).

¹⁵⁷ *Hertel v. Switzerland*, App. No. [25181/94](#), 25 August 1998.

¹⁵⁸ Judgement of the Commercial Court of 19 March 1993 cited in *Hertel v. Switzerland*, App. No. [25181/94](#), 25 August 1998, para. 22, point 2.

exercised his freedom to carry out scientific research, which can be considered a fundamental right, the Court held that he was and remains free to pursue his research. The court noted, however, that: 'An essential feature is how the language is used to communicate a scientific opinion when knowledge is still uncertain and, for example, is based solely on sample surveys or experiments involving small numbers of people (only eight in this instance) who do not represent a cross-section of the population. The more clear-cut the reports of opinions, the stricter are the requirements to be made of the linguistically correct representation of the opinions concerned'.¹⁵⁹ Further details of the ongoing proceedings at the ECtHR are discussed above in Section 2.3.

On another occasion, Swiss Courts ruled on disseminating dubious information through a public campaign. On March 7 2001, the Raël Movement, a Swiss NGO claiming to have established contact with extraterrestrials, sought permission from Swiss authorities in the city of Neuchâtel to put up posters for its April campaign. The organisation was known for its controversial beliefs such as support for human cloning, advocating for the cloning-related services of company Clonaid, and promoting the idea of 'geniocracy' - a belief that only the most intelligent should be given the power to govern society.¹⁶⁰ On March 29 2001, the Neuchâtel police denied Raël Movement's request for permission to do a poster campaign. While justifying the decision, it referred to two previous denials the police had issued the Movement - a 1995 French parliamentary report on sects and a judgement of the Civil Court for the La Sarine district (Canton of Fribourg) that stated the Movement engaged in activities contrary to public order and morality. The Raël Movement appealed and, after a lengthy process, the case concluded in the Federal Court, which upheld the initial denial of the freedom of expression, stating that it was justified based on Neuchâtel city regulations and concerns for public safety. As stated by the Court, 'citizens do not have an unconditional right to an extended use of public space, in particular when a means of advertising on the public highway involves activity of a certain scale and duration and excludes any similar use by third parties [...]. When it wishes to grant authorization for the extended or private use of public space, the State must nevertheless take into account, in balancing the interests at stake, the substantive content of the right to freedom of expression'.¹⁶¹ Interestingly, the Court analysed not only the content of the poster in question but the Raël Movement activity as an organisation and the values it promotes. When the Movement argued that if found illegal by authorities, they would have already been dissolved, the Court stated that 'an association may be criticized for opinions or activities which, without constituting grounds for dissolution within the meaning of the Civil Code, nevertheless justify a restriction on advertising'.¹⁶² The Federal Court decided that the activities of the NGO, and its previous criminal records, constitute a sufficient threat to the public interest and hence, the restriction on the freedom of expression and denial of permission were lawful,¹⁶³ particularly in light of the judgement of 24 January 2002 of the Lyons Court of Appeal finding leaders of the movement guilty for acts of sexual abuse against minors.

In another case concerning an ultranationalist political activist, Doğu Perinçek, a Swiss court convicted Perinçek for publicly denying the Armenian genocide¹⁶⁴ (see also in Section 2.3). During a few public

¹⁵⁹ Ibid.

¹⁶⁰ *Mouvement Raëlien Suisse v. Switzerland*, App. No. [16254/06](#), 13 July 2012; Vallabhaneni, R., [Case of Mouvement Raëlien Suisse v. Switzerland: A Blow to Freedom of Expression in the Internet Age](#), 39 B.C. Int'l & Comp. L. Rev. E. Supp., 2016.

¹⁶¹ Federal Court judgement 100 Ia 392 point 5 p. 402 cited in *Mouvement Raëlien Suisse v. Switzerland*, App. No. [16254/06](#), 13 July 2012, para. 21.

¹⁶² Federal Court judgement 100 Ia 392 point 5 p. 402 cited in *Mouvement Raëlien Suisse v. Switzerland*, App. No. [16254/06](#), 13 July 2012, para. 21.

¹⁶³ *Mouvement Raëlien Suisse v. Switzerland*, App. No. [16254/06](#), 13 July 2012; Vallabhaneni, R., [Case of Mouvement Raëlien Suisse v. Switzerland: A Blow to Freedom of Expression in the Internet Age](#), 39 B.C. Int'l & Comp. L. Rev. E. Supp., 2016.

¹⁶⁴ *Perinçek v. Switzerland*, App. No. [27510/08](#), 15 October 2015.

events held in Switzerland, Perinçek voiced statements such as: 'Let me say to European public opinion from Bern and Lausanne: the allegations of the 'Armenian genocide' are an international lie', and 'The lie of the 'Armenian genocide' was first invented in 1915 by the imperialists of England, France and Tsarist Russia, who wanted to divide the Ottoman Empire during the First World War'.¹⁶⁵ On 15 July 2005, the Switzerland-Armenia Association lodged a criminal complaint against Perinçek on account of the abovementioned statements. The trial took place before the Lausanne District Police Court on 6 and 8 March 2007. The court also heard professional historians – one American, three French, one German and one British – and one sociologist that the parties had called to give evidence regarding Armenian genocide. Perinçek's motion for further evidence gathering was dismissed as the Court stated that it was dilatory and would lead to an adjournment of the proceedings. The court also stated that it was unnecessary to take more evidence on this point given these events had been analysed by 'hundreds of historians for decades' and were the 'object of innumerable publications'.¹⁶⁶ Although Mr Perinçek argued that Armenian genocide had not been recognized by an international court of justice, the court held that the Armenian genocide is a well-known fact, whether or not it has been recognised by an international court of justice and that 'it is not for the Court to write history'.¹⁶⁷ After citing numerous historical and international sources, the court stated that it must be acknowledged that the Armenian genocide is an established historical fact. Then, the court turned to the question of whether Mr Perinçek acted intentionally while disseminating his opinions. The Court noted that Mr Perinçek was a doctor of laws, a politician and a historian. Hence, he was capable of analysing the facts in front of him. Moreover, he had formally stated that he would never change his position, even if a neutral panel should one day conclude that the Armenian genocide did indeed occur. He is also a follower of Talaat Pasha, who, together with his two brothers, was historically the initiator, instigator and driving force of the Armenian genocide. All of these considerations led the court to the following conclusions: 'It is clear that Doğu Perinçek's motives appear to be racist and nationalistic. [...] As noted by the prosecution, Doğu Perinçek speaks of an imperialist plot to undermine Turkey's greatness. To justify the massacres, he resorts to the laws of war. He has described the Armenians as being the aggressors of the Turkish people. [...] He must be found guilty of racial discrimination'.¹⁶⁸ Mr Perinçek appealed to the Criminal Cassation Division of the Vaud Cantonal Court, but the court dismissed his appeal and held that the grounds were ill-founded. However, the decision was overturned by the ECtHR (see Section 2.3).

¹⁶⁵ Facts as cited in *Perinçek v. Switzerland*, App. No. [27510/08](#), 15 October 2015.

¹⁶⁶ Judgement of the Lausanne District Police Court cited in *Perinçek v. Switzerland*, App. No. [27510/08](#), 15 October 2015, para. 22.

¹⁶⁷ Ibid.

¹⁶⁸ Judgement of the Lausanne District Police Court cited in *Perinçek v. Switzerland*, App. No. [27510/08](#), 15 October 2015, para. 2.

3. LEGISLATIVE AND POLICY ACTIONS BY THE EU AND ITS MEMBER STATES

This Chapter gives an account of the latest laws, legal policies, soft law instruments, and measurements that have been developed by Member States and the European Union by legislative and executive authorities, including draft laws and policies which address the digital platform environment.

3.1. Measures at the EU level

The EU's approach to tackling disinformation goes back to the recommendations of the High Level Group on Fake News and Online Disinformation of March 2018 to have a 'multi-dimensional' two-step strategy.¹⁶⁹ First, self-regulatory measures – the Code of Practice against Disinformation – were agreed by the industry and approved by the European Commission.¹⁷⁰ The Code lists 15 commitments organised under five pillars for action: scrutiny of advertisement placement, political advertising and issue-based advertising, integrity of services, empowering consumers, and empowering the research community. Signatories to the Code – social networks operators and the advertising industry – are encouraged to select the commitments they undertake to respect while maintaining freedom of expression and an open internet.

The self-regulation has been supported by policy initiatives to strengthen the media and information literacy of European citizens and the diversity and sustainability of the digital information ecosystem. The European Cooperation Network on Elections of competent national authorities was created in 2019 to strengthen the protection of democratic elections, safeguard fairness and transparency, and exchange information about disinformation campaigns and hate speech.¹⁷¹ This network is supposed to cooperate with two entities responsible for cybersecurity – the Network and Information Systems Cooperation Group and the Rapid Alert System – to support a resilient electoral process.¹⁷²

In addition to several grants for research and investigative journalism, a complex set of initiatives aim to increase media and information literacy from 2020 onwards, including the Digital Education Action Plan,¹⁷³ the Media and Audiovisual Action Plan,¹⁷⁴ the Media Literacy Expert Group, the European Digital Media Observatory (EDMO),¹⁷⁵ and the revised Audiovisual Media Services Directive.¹⁷⁶ The European Parliament has also improved its analysis and assessment of disinformation risks and engaged in awareness-raising and resilience building, including through its news site.¹⁷⁷

¹⁶⁹ High Level Expert Group on Fake News and Online Disinformation, '[A multi-dimensional approach to disinformation](#)', Final report of 12 March 2018.

¹⁷⁰ European Commission, '[Tackling online disinformation: a European Approach](#)', COM (2018) 236 of 26 April 2018.

¹⁷¹ European Cooperation Network, '[Terms of Reference, European cooperation network on elections](#)'.

¹⁷² See [Network and Information Systems Cooperation Group](#) and Stolton S, [EU Rapid Alert System used amid coronavirus disinformation campaign](#), EurActiv, 4 March 2020.

¹⁷³ European Commission, '[Digital Education Action Plan 2021-2027 Resetting education and training for the digital age](#)', COM(2020) 624.

¹⁷⁴ European Commission, '[Europe's Media in the Digital Decade: An Action Plan to Support Recovery and Transformation](#)', COM(2020) 784 of 03 December 2020.

¹⁷⁵ [European Digital Media Observatory \(EDMO\)](#): A hub for fact-checkers, academics, and other relevant stakeholders to collaborate with each other and actively link with media organisations, media literacy experts, and provide support to policymakers.

¹⁷⁶ [Directive 2010/13/EU](#) of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, OJ L 95 of 15 April 2020.

¹⁷⁷ '[Disinformation: how to recognise and tackle COVID-19 myths](#)', European Parliament, 30 March 2021.

Two years after the implementation of the EU's strategy on disinformation, the European Commission evaluated the effects of the Code¹⁷⁸ and found it insufficient to tackle the problem sufficiently due to, among other things, its fragmented implementation, limited participation, and lack of safeguards for freedom of expression. This recognition of the failure of the self-regulatory solution triggered the second step in the EU's approach: a move towards co-regulation. The Code of Practice is to be strengthened in the fourth quarter of 2021 in line with the Commission's guidelines.¹⁷⁹ The guidelines address the shortcomings and aim to create a robust framework for taking responsibility and monitoring the Code. The main areas to be strengthened are demonetising and other measures relating to advertising and safer platform designs to minimise the risk of manipulation, among others. They provide more detailed instructions for transparency, labelling, and providing data access for the research and fact-checking community. The Guidelines also call for the creation of a permanent task force to comprise of, beyond signatories, representatives of the European Digital Media Observatory, the European Regulators Group for Audiovisual Media Services, the European External Action Service (EEAS), and the Commission as chair. The role of the task force is to evolve the Code and enhance its effectiveness with its inputs.

The European Democracy Action Plan (EDAP)¹⁸⁰ defined various strategies to address different types of disinformation. These include developing the 'toolbox' by sanctioning against opportunities for foreign interference, increasing awareness about commonly used techniques, reinforcing existing cooperation structures, and investing in a robust media and information ecosystem. The EDAP foresees the issuing of guidance to revise and strengthen the Code to rectify its identified shortcomings, including establishing a permanent monitoring framework.

The EDAP is flanked by the proposal for the Digital Services Act (DSA).¹⁸¹ The DSA primarily regulates the timely and effective removal of illegal online content and provides instruments for tackling harmful online content, such as disinformation. In particular, the DSA suggests due diligence requirements for 'very large online platforms' (defined in Article 25 DSA, e.g., transparency of content ranking and advertising algorithms); the possibility for the Commission to invite very large online platforms and other stakeholders to subscribe to codes of conduct when necessary to mitigate systemic risks, and; independent oversight and public scrutiny mechanisms. The current wording of the DSA suggests that the penalties apply only to the legal obligations of platforms, and no hard consequences are attached to a violation of their codes of conduct (Article 42). An independent audit shall be drawn up in regular intervals; however, if the result of the audit is not positive and platforms do not implement the subsequent operational recommendations, they must justify their reasons for not doing so and set out any alternative measures they may have taken to address the instances of non-compliance identified (Article 28.4).

¹⁷⁸ Commission Staff Working Document, '[Assessment of the Code of Practice on Disinformation - Achievements and areas for further improvement](#)', SWD(2020) 180 of 10 September 2020.

¹⁷⁹ European Commission [Guidance on Strengthening the Code of Practice on Disinformation](#), Brussels, COM(2021) 262 of 26 May 2021.

¹⁸⁰ European Commission, '[European democracy action plan \(EDAP\)](#)', COM (2020) 790 of 03 December 2020.

¹⁸¹ Proposal for a [Regulation of the European Parliament and of the Council on a Single Market for Digital Services \(Digital Services Act\)](#) and amending Directive 2000/31/EC, COM (2020) 825 of 15 December 2020.

Based on the EDAP, the European Commission is preparing a proposal on greater transparency in paid political advertising and revising the statute and funding of European political parties and European political foundations.¹⁸²

On 21 April 2021, the European Commission issued the draft regulation for an Artificial Intelligence Act (AIA).¹⁸³ Annex I lists the techniques and approaches subject to the Act, including machine learning approaches, methods including deep learning, and search and optimisation methods. At this stage, it is unclear whether this Act would apply to social media content management systems in any way. If it does, then proposals that relate to content management algorithms could positively impact the information ecosystem. The strict provisions of the Act would apply exclusively to high-risk AI systems, and social media platforms do not count as such (Annex III of AIA). Considering the academic discussion regarding the public utility status of social media platforms, this service might find its future place among the systems of critical infrastructure, like the supply of water, gas and electricity. As a minimum, electronic communication systems should be included.¹⁸⁴

Nevertheless, actors other than high-risk system operators are encouraged (and facilitated) to draw up codes of conduct and voluntarily take on responsibilities that are compulsory for high-risk artificial intelligence systems (Article 69 AIA). For social media platforms, several of these responsibilities would improve the level of protection against disinformation campaigns. In particular, the transparency of AI enables users to interpret the output of the system (Article 13), completing Article 29 of the DSA, which provides for offering options for users to choose between various recommendation systems. Article 52 provides for the transparency of bots and deep fakes. Finally, industry actors should commit to using only AI solutions for services which are used by large number of people which are adequately tested, quality controlled and their documentation drawn up before released on the market (Article 11).

3.2. Measures at the Member States level

While many EU Member States have recently encountered problems related to disinformation, including in the context of national elections, only some of them have specific/targeted legislation. Others rely on – at times ad hoc – policy measures. Below, we provide brief examples of various approaches.¹⁸⁵ A more detailed assessment of these approaches from the perspective of their impact on freedom of expression will follow in Chapter 4.

For a long time, **France** relied on the general provisions of the Law on the Freedom of the Press prohibiting the spreading of fake news that 'could disturb public peace'¹⁸⁶ and on the Electoral Code prohibiting disinformation that may influence election results. However, a more targeted measure – the Law on the Fight Against Information Manipulation – was adopted in 2018 to make algorithms more transparent, fight entities that disseminate false information, make people more aware of online

¹⁸² European Commission, [Annexes to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Commission Work Programme 2021, A Union of vitality in a world of fragility](#), COM(2020) 690 of 19 October 2020.

¹⁸³ European Commission, [Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules On Artificial Intelligence](#) (Artificial Intelligence Act) And Amending Certain Union Legislative Acts, Brussels, COM(2021)206 final of 21 April 2021.

¹⁸⁴ Guggenberger, N., 'Essential Platforms', *Stanford Technology Law Review*, Forthcoming; Bagnoli V., 'Digital Platforms as Public Utilities', *IIC - International Review of Intellectual Property and Competition Law*, Vol. 51, 2020.

¹⁸⁵ Based on Bayer, J. et al., 'Disinformation and propaganda – impact on the functioning of the rule of law and democratic processes in the EU and its Member States: 2021 update', Study for the European Parliament, 2021.

¹⁸⁶ Boring, N., 'France', *Government Responses to Disinformation on Social Media Platforms*, Report for Congress, LL File No. 2019-017919, 2019, p. 74.

information, and tackle disinformation in electoral campaigns.¹⁸⁷ For instance, the law orders online platforms to take measures to avoid the spreading of disinformation that could alter the validity of an election. Social media platforms are required to submit annual reports to a competent authority on their activities in fighting fake news.¹⁸⁸ Platform users should be able to flag content that is considered manipulative disinformation. In addition to this targeted law, the Law on Education was amended to oblige public schools to create courses on navigating online information, developing skills of 'critical analysis of available information', and evaluating the reliability of information'.¹⁸⁹

In **Germany**, the most recent version of the Media State Treaty (Medienstaatsvertrag, MStV) of 2020¹⁹⁰ addressed misinformation and disinformation by extending journalistic due diligence obligations to all commercially offered journalistic-editorial Telemedia that regularly contains news or political information. Political, ideological and religious advertising content in Telemedia and content or messages created automatically by a computer program (social bots) must be marked. Public service broadcasters must provide 'authentic, carefully researched information that distinguishes between facts and opinions, does not distort reality, and does not focus on the sensational'.¹⁹¹ The offerings by public service broadcasters must be made easy to find for users, for example, by preinstalling their apps on different devices.¹⁹²

In **Sweden**, the dissemination of false information has been criminalised, and private actors can report content considered misleading or deceptive on social media platforms. The state actors are not allowed to block media content as it would violate the freedom of expression.¹⁹³

Spain is one of the countries that started with ad hoc policy measures but soon moved to regulation. It was reported that Spain tried diplomatic measures in 2018, signing an agreement with Russia aimed at analysing the spread of fake news and preventing misinformation from affecting relations between the two countries.¹⁹⁴ Before the general elections in 2019, Spain set up a special team to monitor social media platforms for misleading political information. In November 2020, the National Security Council adopted a regulation on preventing the dissemination of disinformation. Competent government bodies shall monitor the information environment and can issue warnings and launch communication campaigns to fight fake news.¹⁹⁵

Finland addresses disinformation through its Cyber Security Strategy for 2017–2020¹⁹⁶ and national media policy programme for 2018–2023.¹⁹⁷ The media policy relies on self-regulation by media outlets and journalists, high-quality news-delivering practices, the improvement of media literacy, awareness-

¹⁸⁷ [LOI No 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information](#).

¹⁸⁸ Boring, N., '[France](#)', *Government Responses to Disinformation on Social Media Platforms*, Report for Congress, LL File No. 2019-017919, 2019.

¹⁸⁹ Boring, N., '[Initiatives to Counter Fake News: France](#)', Library of Congress, 2019, pp. 77-81.

¹⁹⁰ [Medienstaatsvertrag](#) vom 14/28 April 2020.

¹⁹¹ Bundesverfassungsgericht, [BverfGE 149, 222](#), Judgement of 18 July 2018.

¹⁹² § 84 [Medienstaatsvertrag](#) vom 14/28 April 2020; Explanatory Memorandum to the Medienstaatsvertrag, April 2020, LT-Drs. Nordrhein-Westfalen 17/9052, 126.

¹⁹³ Hofverberg, E., '[Sweden](#)', *Government Responses to Disinformation on Social Media Platforms*, Report for Congress, LL File No. 2019-017919, 2019.

¹⁹⁴ La Razon, '[España y Rusia pactan crear un grupo de seguridad contra las noticias falsas](#)', 07 November 2018.

¹⁹⁵ [Orden PCM/1030/2020](#), de 30 de octubre, por la que se publica el Procedimiento de actuación contra la desinformación aprobado por el Consejo de Seguridad Nacional.

¹⁹⁶ 'Implementation Programme for Finland's Cyber Security Strategy for 2017–2020', [Turvallisuuskomitea Puolustusministeriö](#), The Security Committee, 2017.

¹⁹⁷ '[Valtioneuvoston periaatepäätös mediapoliittisesta ohjelmasta](#)', Ministry of Transport and Communications, Finland, 5 July 2018; Harrie, E., '[New Media Policy Guidelines in Finland](#)', *Nordicom*, 13 September 2018.

raising awareness and countermeasures to combat the spread of disinformation (e.g. through fact-checking and the provision of news in several languages).¹⁹⁸

Slovakia considers the fight against disinformation a political priority. The government has committed to preparing an action plan for coordinating the fight against hybrid threats and spread of disinformation, and building adequate centralised capacities to carry it out'.¹⁹⁹ An initial concrete step was the creation of the Office for Hybrid Threats and Disinformation at the National Security Authority in July 2020. This Office systematically monitors, evaluates, analyses, and responds to activities that 'have the potential to polarise society, bring uncertainty and undermine the legitimacy, credibility, action of state institutions and democratic constitutional order and thus have a negative impact on the realization of the security interests of the Slovak Republic'.²⁰⁰

While there is no silver bullet against disinformation, some government measures can be considered best practices that can be replicated across the EU.²⁰¹

One of the best practices to counter disinformation is to educate the audience by strengthening media literacy and developing skills of working with information. This practice needs time and considerable effort to be developed but pays off if done persistently. Studies suggest that the Finnish educational system nurturing critical thinking skills from kindergarten onwards and integrating them as a core component of the curriculum may be pertinent to Finnish resilience to disinformation.²⁰² Estonia developed an online disinformation handbook ('A Guide to Dealing with Information Attacks') for citizens providing basic tips for recognising and responding to disinformation.²⁰³ The Estonian Ministry of Education and Research is designing a curriculum that would develop students' digital competencies and critical thinking. Estonia's election communication task force developed a 35-hour course on Media and Manipulation²⁰⁴ for high school students to increase their ability to separate fact from fiction.²⁰⁵

Another best practice targeting disinformation and its sources is the establishment of dedicated resources and institutions tasked with debunking fake news and hoaxes that appear in media. At the EU level, the East StratCom Task Force was established by the EEAS to respond to disinformation campaigns from Russia as early as 2015.²⁰⁶ Through its platform EUvsDisinfo, it identifies, compiles and exposes cases of disinformation.²⁰⁷ The European Digital Media Observatory (EDMO)²⁰⁸ was created as a hub for fact-checkers, academics and other stakeholders to collaborate and actively connect with media organisations, media literacy experts and provide support to policymakers. Some EU Member States set up similar units. For instance, in 2017, **Czechia** established a 20-person Centre Against Terrorism and Hybrid Threats at the Interior Ministry that monitors 'disinformation campaigns related

¹⁹⁸ Harrie, E., '[New Media Policy Guidelines in Finland](#)', *Nordicom*, 13 September 2018.

¹⁹⁹ Sirotnikova, M.G., '[Pandemic Pushes Slovakia to Finally Target Disinformation](#)', *Balkan Insight*, 20 October 2020.

²⁰⁰ For more information see the website of the [Office Hybridné hrozby a dezinformácie](#).

²⁰¹ Based on Bayer, J. et al., '[Disinformation and propaganda – impact on the functioning of the rule of law and democratic processes in the EU and its Member States: 2021 update](#)', Study for the European Parliament, 2021.

²⁰² Horn, S. and Veermans K., 'Critical Thinking Efficacy and Transfer Skills Defend against 'Fake News' at an International School in Finland', *Journal of Research in International Education*, Vol. 18, No. 1, 2019; Lessenski, M., '[Just Think about It! Findings of the Media Literacy Index 2019](#)', Policy Brief 55, Open Society Institute Sofia, November 2019.

²⁰³ McBrien, T., '[Defending the vote: Estonia creates a network to combat disinformation, 2016–2020](#)', Princeton University, 2020.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ EEAS, [Questions and Answers about the East StratCom Task Force](#).

²⁰⁷ See the official website [EUvsDisinfo](#).

²⁰⁸ [European Digital Media Observatory \(EDMO\)](#).

to internal security' and runs a Twitter account to call out untrue information.²⁰⁹ **Denmark** created an interministerial task force to coordinate efforts against disinformation, which seems to be considered a part of cybersecurity efforts.²¹⁰ Among the participating authorities are the Ministry of Defence, Ministry of Justice and Ministry of Foreign Affairs, including diplomats, the Police Intelligence Service and the Danish Defence Intelligence Service. Perhaps the most comprehensive and unusual authority is being set up in **Sweden**. There, a Psychological Defence Authority will become operational on 1 January 2022.²¹¹ This Authority will be responsible for identifying and responding to information influences and other dissemination of misleading information directed at Sweden, and support the collaboration and preparedness of other authorities and relevant actors (e.g. media companies, NGOs, volunteers) in this regard. The authority should also conduct research and training and cooperate and financially support such activities by academics and NGOs. It is foreseen that the authority will become the primary information and communication authority in crises.

As an example of a unique resource, the **Belgian** government set up a special website²¹² to inform citizens about disinformation and government measures taken against it. The website will be a tool for participative democracy as citizens can register on this website and then upvote or downvote suggested government measures on disinformation and fake news.

A potentially effective ad hoc measure is an awareness campaign about disinformation before an important event, such as a national election. Finland conducted such a campaign before its 2019 parliamentary elections. The subsequent evaluation of the campaign showed that most people were aware of a possibility of electoral influence through disinformation but did not themselves observe any.²¹³ Only 11% of respondents said they had detected efforts by an outside party to try and influence voting behaviour.²¹⁴

3.3. COVID-19 infodemic and policy responses

The implications of COVID-19 on all aspects of our lives have been disastrous. Not only has it caused a pandemic, but it has also resulted in an infodemic.²¹⁵ The WHO and other international organisations define 'infodemic' as 'an overabundance of information' on a specific topic online and offline that includes, in addition to correct useful data and information, rumours, inaccurate information, misinformation, and deliberate disinformation. The information on COVID-19 has been constantly changing and growing exponentially over a relatively short period, amplified by communication technology and spreading faster than the virus itself. All of this makes it hard for people to find and identify trustworthy sources of information, stay informed and, ultimately, stay safe.²¹⁶

²⁰⁹ [Centre Against Terrorism and Hybrid Threats](#).

²¹⁰ Baumann, A. and Hansen, A.R., '[Danmark får ny kommandocentral mod misinformation](#)'. *MandagMorgen*, 10 September 2017.

²¹¹ Official website: [MSB's arbete inom ramen för psykologiskt försvar](#).

²¹² Initially, the site was called [www.stopfakenews.be](#) but now functions under the name [monopinion.belgium.be](#).

²¹³ Borg, S., Kestilä-Kekkonen, E. and Wass, H., [Politiikan ilmastonmuutos. Eduskuntavaalitutkimus 2019](#), 2020.

²¹⁴ Jääskeläinen A, Toivanen J, Sillanpää A, Valtonen V, and Huotari H, '[Vaali vaikuttamisen koulutushankkeen loppuraportti](#)', *Valtioneuvoston julkaisu* 2019:22, 2019.

²¹⁵ Joint statement by WHO, UN, UNICEF, UNDP, UNESCO, UNAIDS, ITU, UN Global Pulse, and IFRC, [Managing the COVID-19 infodemic: Promoting healthy behaviours and mitigating the harm from misinformation and disinformation](#), 23 September 2020.

²¹⁶ Zarocostas, J., '[How to fight an infodemic](#)', *The Lancet*, 395:10225, 2020.

Various EU institutions and bodies identified the threats of the infodemic early on. Already in March 2020, the EU Consumer Centres Network (ECC Net)²¹⁷ issued warnings about false information and scams related to products and services that could cure or prevent infections, how to recognise them, and what to do about them.²¹⁸ In June 2020, the EU institutions released a Joint Communication on 'Tackling the COVID-19 infodemic – getting the facts right'.²¹⁹ The Communication warned of the 'severe consequences' of disinformation, including risky behaviour, ignoring health advice, endangering democracy, and exacerbating the economic crisis. It called for more cooperation between Member States, international organisations and third countries, including via established channels like the Rapid Alert System, and strategic communications countering disinformation. The Communication also called on social media platforms to step up their efforts, join the Code of Practice on Disinformation, and report monthly. The European Commission set up a dedicated Coronavirus response website²²⁰ that provides real-time information on the COVID-19 pandemic, the EU response to it, and rebuttals to disinformation. In December 2020, the Council adopted conclusions²²¹ calling to further enhance the EU's responses to hybrid threats, including disinformation. It suggests strengthening the EEAS StratCom Task Force and developing the Rapid Alert System into a comprehensive platform for national authorities. Alongside further diplomatic efforts, the Council invites the Commission to develop and implement additional transparency requirements for social media platforms.

A variety of specific responses to the infodemic can be observed on the national level. Many Member States created special resources to dispel false information on COVID-19. The **Italian** Ministry of Health set up a webpage, 'Attenti alle bufale' (Beware of hoaxes), which disproves Coronavirus hoaxes circulating on social media.²²² The **Polish** Press Agency and GovTech Polska launched the FakeHunter app for verifying information on COVID-19, vaccines and other issues related to the pandemic.²²³ **Finnish** government cooperated with social media influencers whose role is to disseminate fact-based information on COVID-19 via their channels to reach a larger audience.²²⁴

At the same time, some other Member States have more reserved approaches. For example, the **Netherlands** published a policy letter outlining the government's position on disinformation in May 2020.²²⁵ According to that, countering disinformation is the task of journalists, scientists and internet service providers. The policy letter states that citizens are capable of assessing the trustworthiness or accuracy of information for themselves. The state respects freedom of opinion. However, the government will provide reliable information about COVID-19 and policy measures via its websites to ensure the protection of public health and social stability.

²¹⁷ The ECC Net was established by the European Commission in 2005 to provide free information to consumers about cross-border products and services and to assist with out-of-court dispute resolution between consumers and traders. For more information, see ECC Net, [15 years of ECC-Net: Help and advice for consumers in Europe](#), Anniversary report, 2020.

²¹⁸ See [Scams related to COVID-19: Actions of the Consumer Protection Cooperation Network \(CPC\) on rogue traders during the COVID-19 outbreak](#).

²¹⁹ [Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Tackling COVID-19 disinformation – Getting the facts right'](#).

²²⁰ Official website: [Coronavirus response](#).

²²¹ [Council conclusions on strengthening resilience and countering hybrid threats, including disinformation in the context of the COVID-19 pandemic](#), 15 December 2020.

²²² Lovari, A., 'Spreading (Dis)Trust: Covid-19 Misinformation and Government Intervention in Italy', *Media and Communication*, Volume 8, Issue 2, p. 458–461, 2020.

²²³ Official website: <https://fakehunter.pap.pl>.

²²⁴ Heikkilä, M., 'Finland taps social media influencers during coronavirus crisis', *Politico*, 31 March 2020.

²²⁵ Minister van Binnenlandse Zaken en Koninkrijksrelaties, Nederland, '[Nieuwe ontwikkelingen beleidsinzet bescherming democratie tegen desinformatie](#)', Letter to the House of Representatives, 13 May 2020.

4. IMPACTS ON FREEDOM OF EXPRESSION AND INFORMATION, MEDIA FREEDOM AND PLURALISM

Both disinformation and the responses to it impact freedom of expression, media freedom and pluralism. Democracy is a demanding and presuppositional form of government because its central idea presupposes the exchange of information in a fair manner and discussion based on reason.²²⁶ The central act of legitimisation of all state power is recurrent parliamentary elections. The democratic process and source of coercive power are even more important than the outcome, as it forms the 'postmetaphysical source of legitimacy'.²²⁷

However, citizens can only make a responsible choice among the candidates and parties standing for election if they are fully informed about their views and the issues they represent to weigh them against each other.²²⁸ Between elections and referenda, citizens can influence the formation of public opinion and thus the political process.²²⁹ Even where the procedure does not lead to a consensus or truth, if the procedure is fair and open, it will lead to results that are also fair and reasonable and can be subject to revision if new information emerges.²³⁰

Under the aegis of the European Convention of Human Rights, freedom of expression is integral to discovering the truth. Further, the passive side of freedom of expression covers the right to receive information.²³¹

While individual users may enjoy the right to freedom of expression without limitations in the new information ecosystem, the ultimate goal of freedom of expression, i.e., to generate and maintain a diverse and lively public discussion of various ideas, may get lost. To protect the collective interest of the society, individual rights may have to be restricted; however, as it turns out, the disinformative content and their speakers are difficult to tackle directly and individually. Therefore, the entire ecosystem consisting of the relevant actors like online platforms, advertisers, media companies, and the processes and mechanisms that govern their relationships, must be addressed by regulation.

Until this time, Member States have not applied interventions that would induce systematic changes, and quite possibly they alone could not have sufficient impact on the ecosystem to achieve change. Such an endeavour should be started by the European Union. Even better, in cooperation with prominent allies such as the United States.

The draft regulations issued by the European Union in 2020 and 2021 address the ecosystem, albeit with somewhat cautious steps.

The following Section will evaluate the policies, measures and good practices applied by Member States and these new EU draft regulations from the perspective of freedom of expression and information, media freedom and pluralism. It will also introduce emerging concepts of a common European public service platform or public service media.

²²⁶ Rawls, J., 'The idea of public reason revisited', *The University of Chicago Law Review* 64:3, pp. 765-807.

²²⁷ Habermas, J., *Between facts and norms: contributions to a discourse theory of law and democracy*, Cambridge, MIT Press, 1996, pp. 447-448.

²²⁸ Bundesverfassungsgericht, [BVerfGE 20, 162](#), Judgement of 5 August 1966, para. 174.

²²⁹ Bundesverfassungsgericht, [BVerfGE 7, 198](#), Judgement of 15 January 1958, para. 68.

²³⁰ Gutmann, A. and Thompson, D., *Democracy and disagreement*, Cambridge, Harvard, 1996.

²³¹ *Bladet Tromsø and Stensaas v. Norway*, App. No. [21980/93](#), 9 July 1998, paras. 59 and 62, *Sdružení Jihočeské Matky v. Czech Republic*, App. No. [19101/03](#), 10 July 2006; *Társaság a Szabadságjogokért v. Hungary*, App. No. [37374/05](#), 14 April 2009; *Youth Initiative for Human Rights v. Serbia*, App. No. [48135/06](#), 25 June 2013 *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria*, App. No. [39534/07](#), 28 November 2013.

4.1. Analysis of national legal rules from the perspective of freedom of expression and information, media and pluralism

The **German** legal system has only recently introduced new rules to tackle the problem of disinformation by attempting to apply minor corrections to the information ecosystem. The NetzDG applies only to a specific segment of illegal hate speech and is therefore not discussed here. The recently amended Media State Treaty obliged journalists of commercially-offered online journals that regularly publish news or political information to abide by the ethical rules of journalism (Section 19 (1) sentence 2).²³² The media authorities (of German states (Lands)) enforce this rule. This restriction of freedom of expression has a legitimate aim; however it will be seen on a case by case basis of balancing whether it is necessary and proportionate. The amendment to the Media State Treaty also prescribes that social bots should be marked (Section 18(3) and § 93(4)). Political, public issue and religious advertisements should also be labelled as such (22(1) sentence 3).²³³

Germany is also the first country to prohibit discrimination of media content on social media platforms (Article 94 MStV).²³⁴ Moreover, public service broadcasters enjoy priority access, but only for media distribution services (Article 84 MStV). Both provisions aim for media pluralism. They may attract disagreement by powerful market actors who may consider these provisions to put them in a disadvantageous position in the market competition. This debate first arose in the 1990s when commercial broadcasters objected to state funding of public service broadcasters, claiming a violation of the principles of fair competition. This controversy led to a Protocol attached to the Treaty of Amsterdam²³⁵ and the passing of the Communication of the Commission on state aid to public service broadcasting in 2001 (and its later reform in 2009).²³⁶

Some Member States have introduced or strengthened their criminalisation of disseminating false information (Sweden, Spain and Hungary). Falsity alone is not a sufficient basis to criminalise speech unless other contextual circumstances make its dissemination dangerous to society.²³⁷ Such contextual circumstance can be, for example, the harm caused due to or as a consequence of the dissemination techniques, intent, reach, or intensity of the published content.

In **Hungary**, the criminal law's 'fearmongering' section was extended to cover dissemination of false or misrepresented facts in front of a large audience during the period of a special legal order in a way

²³² Lent, W., 'Paradigmenwechsel bei den publizistischen Sorgfaltspflichten im Online-Journalismus – Zur Neuregelung des § 19 Medienstaatsvertrag', *ZUM*, 593, 2020. However, there are 'hardly any cases of application' for § 19 Abs. 1 Satz 2 MStV.

²³³ The use of social bots during state elections has been analysed by Neudert, L.-M., '[Computational Propaganda in Germany: A Cautionary Tale](#)', Woolley, S. and Howard, P. N. (eds.), *Computational Propaganda Research Project*, Working Paper 2017 1, Oxford, 2017.

²³⁴ This rule has already been referred to in a case against Google where information from the Ministry of Health was given priority by Google. A commercial provider of trustworthy health information, 'Netzdoktor.de', sued the search engine claiming the violation of the prohibition of discrimination and of competition rules.

²³⁵ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Protocol annexed to the Treaty of the European Community - [Protocol on the system of public broadcasting in the Member States](#), OJ C 340, 10 November 1997, p. 109.

²³⁶ [Communication of the Commission on the application of state aid rules to public service broadcasting](#), 2009/C 257/01. See also: Donders, K., 'State Aid and Public Service Broadcasting', in Pauwels, C., Kalimo, H., Donders, K. and Van Rompuy, B. (eds.), *Rethinking European Media and Communications Policy*, VUB Press, 2009; Wheeler, M., '[Supranational Regulation: Television and the European Union](#)', *European Journal of Communication*, 19(3), pp. 349–369, 2009.

²³⁷ Bayer, J. et al., '[Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States](#)', Study for the Policy Department C: Citizens' Rights And Constitutional Affairs, 2019; Bayer, J. et al., '[Disinformation and propaganda – impact on the functioning of the rule of law and democratic processes in the EU and its Member States: 2021 update](#)', Study for the European Parliament, 2021.

capable of hindering or preventing the efficiency of protection.²³⁸ The opposition heavily criticised this rule. Indeed, it was abused to silence political criticism of the prime minister on social media platforms.²³⁹

Despite criminalisation, incriminating content will not be blocked in **Sweden**²⁴⁰. Ordering the blocking of lawful content would be regarded as state interference in freedom of expression. However, platforms and private entities in general are entitled to block any content considered misleading.

The **Spanish** law was criticised by Article 19 for criminalising jokes and misinformation, thereby disproportionately restricting freedom of expression.²⁴¹ In November 2020, a Spanish governmental policy to monitor and proactively disseminate true information (called 'affirmative information') was criticised by the opposition for lack of consultation with the journalists' associations and civil society representatives and the ambiguity of the wording. Critiques feared it would provide undue and uncontrolled power to the government over media.²⁴² A representative of Reporters' Without Frontiers said, 'we ask the Spanish government to revise all of this procedure's measures in a spirit of precision, and to reconsider its power to decide what is and is not disinformation'.²⁴³

The said policy – also applied in the **Czech Republic** – shows some similarities with the Taiwanese policy called 'meme engineering'.²⁴⁴ As the state most exposed to Chinese disinformation, Taiwan launched a comprehensive policy to tackle that. A 'rapid handling team for false information' was established²⁴⁵ to identify and debunk false messages with humorous, entertaining short messages within an hour. When thinking about transplanting this technique into Europe, the government's role in this process needs to be reconsidered to avoid protests like in Spain. While central coordination (and access to covert resources) clearly has its advantages, proactive dissemination of governmental messages is not widely accepted within the European culture. However, it is not against any human right, as long as it does not distort the pluralism of the media landscape. A route of communicating such messages is the public interest advertisements usually published in the media to educate the citizens about public matters (see also in Section 5.2.4, on nudging).

A somewhat similar technique is the enrolment of social media influencers to spread such messages, as applied in the **Netherlands**. However, the Dutch initiative resulted in some influencers beginning to support dubious anti-government groups.²⁴⁶

French legislators in 2018 enacted a law to protect the honesty of the elections by tackling online disinformation and manipulation.²⁴⁷ The honesty of elections was given constitutional value in a

²³⁸ Act C of 2012 on the [Criminal Code](#) of the Republic of Hungary, 2012.

²³⁹ Bárd, P. and Carrera, S., '[Showing true illiberal colours – Rule of law vs Orbán's pandemic politics](#)', *CEPS Policy Insights*, 2020: 10, 1-17, 2020.

²⁴⁰ Hofverberg, E., '[Sweden](#)', *Government Responses to Disinformation on Social Media Platforms*, Report for Congress, LL File No. 2019-017919, 2019.

²⁴¹ Article 19, '[Spain: Concerns as Penal Code used to criminalise jokes and misinformation about coronavirus](#)', Statement of 17 April 2020.

²⁴² González, M. and Junquera, N., '[Spain to monitor online fake news and give a 'political response' to disinformation campaigns](#)', *El País*, 9 November 2020.

²⁴³ RSF, '[Government's anti-fake news policy potentially threatens press freedom in Spain](#)', 13 November 2020.

²⁴⁴ Blanchette, J., Livingston, S., Glaser, B. and Kennedy, S., '[Protecting Democracy in an Age of Disinformation: Lessons from Taiwan](#)', Center for Strategic and International Studies (CSIS), 2021, pp. 16-19.

²⁴⁵ Blanchette, J., Livingston, S., Glaser, B. and Kennedy, S., '[Protecting Democracy in an Age of Disinformation: Lessons from Taiwan](#)', Center for Strategic and International Studies (CSIS), 2021, p.17.

²⁴⁶ van Dijck, J. and Alinejad, D., '[Social Media and Trust in Scientific Expertise: Debating the Covid-19 Pandemic in The Netherlands](#)', *Social Media + Society*, 2020.

²⁴⁷ LOI n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information.

decision of the French Constitutional Council that reviewed the law and defined guidelines for its interpretation, in particular, that measures applied by the authorities should be necessary, proportionate and as narrow as possible.²⁴⁸ The first pillar of the law is an interim injunction procedure where a judge should decide and prescribe any measure within 48 hours, including suspending or deleting the user account or, blocking access to a website. The disinformation must be false and meet further conditions: it must be intentionally disseminated, artificial or automated, sponsored, and massively transmitted by an online platform with a large reach to a large number of people.²⁴⁹ The second pillar is the power of the Audiovisual Council to suspend, interrupt or prevent authorisation to broadcast to a media company controlled or influenced by a foreign state. Alternatively, it could terminate its licence if it harms the nation's fundamental interests, including the regular functioning of its institutions, particularly by disseminating false information before elections or referenda. It should be noted that such a move entails the diplomatic response of the other state.²⁵⁰ The third pillar of the law is the transparency of political and public issue advertising, transparency reporting (yearly reporting to the Audiovisual Council) and a corresponding database under the threat of a €75,000 fine, one-year imprisonment or a ban on professional activity. There is also a 'duty of care' approach in the fourth pillar: platforms need to define their own measures to tackle false information that effects public order or the honesty of elections (Article 11) and must designate a legal representative who is the relevant interlocutor on French territory for the application of that law (Article 13).²⁵¹

The French regulation provides an example of a comprehensive regulation which, however, is not seen as effective. Restriction of freedom of expression appears to be legitimate, proportionate and necessary because the basis of restriction is not falsity alone, but also the complex set of additional qualifying circumstances - namely intentional dissemination, sponsorship, artificiality or automation, causing harm to the democratic process, and high reach. Another limitation is that the law is applicable only during the three months preceding the month of general elections or referenda.

One of the law's application and enforcement difficulties is that not all circumstances can be objectively defined. For example, intention cannot be proved; it can only be inferred, although often on a solid basis. Whether a post is automated is not known at first examination. The causal relation between the harm to the democratic process and the disinformation cannot be proved with sufficient certainty even after the harm is done, because the process could have been influenced by several other factors as well. Another pitfall has been the lack of notifications: only one case has been reported and this was initiated as a test case against an exaggerated tweet of the Interior Minister. The minister tweeted that a hospital had been attacked in connection with the May Day demonstration. The court found that while the terms 'attack and injuries' were exaggerations, they related to facts as the demonstrators had intruded hospital territory. Therefore, the statements were not manifestly inaccurate or misleading. Neither was

²⁴⁸ Couzigou, I., '[The French Legislation against Digital Information Manipulation in Electoral Campaigns: A Scope Limited by Freedom of Expression](#)', *Election Law Journal*, 20(1), pp. 98-115, 2021.

²⁴⁹ 'Reach' means the number of users who see the content. The term originates in media market analysis and is taken over by social media market analysis.

²⁵⁰ The formal notice to the RT France channel for lacking honesty and diversity of opinions was immediately followed by a formal notice adopted by the Russian media regulatory authority, Roskomnadzor, against the France 24 channel. See Morin-Desailly, C., [Proposition de loi relative à la lutte contre les fausses informations](#), Rapport n° 677 (2017-2018) fait au nom de la commission de la culture, de l'éducation et de la communication, Senat, 18 July 2018, p. 38.

²⁵¹ Craufurd Smith, R., '[Fake news, French Law and democratic legitimacy: lessons for the United Kingdom?](#)', *Journal of Media Law*, 11:1, pp. 52-81, 2019.

the dissemination artificial or automated. Thus, the tweet failed to satisfy all additional conditions and the court declared the claim inadmissible.²⁵²

In sum, the French law is sufficiently narrowly tailored to avoid over-restriction, but perhaps too narrow to be effective.²⁵³ The relevance of the removal process and Audiovisual Council's powers may be questioned. However, the Capitol Hill events showed us that unexpected, violent events occur and it might be helpful to have a strong response prepared for such cases.²⁵⁴ At the same time, this might also have a chilling effect on other legitimate expressions. Therefore, the applicability of such strict measurements should be the exception and constrained to a limited time period where crisis looms, for example, before elections.

4.2. Assessment of EU policies (DSA, DMA, EDAP)

The draft Digital Markets Act²⁵⁵ is relevant for regulating the market on which platforms operate and compete. Platforms as gatekeepers in digital markets will have obligations to allow interoperability and transparency, which will improve the information ecosystem. Various content services that are regarded as public service content could be used as a tool in the fight against disinformation and to improve the diversity of the information environment. These services will need to be exempted from the strict anti-competition rules, similarly to the exemptions granted to public service broadcasting from state aid.²⁵⁶

The DSA has a two-tier nature: first, it repeats the provisions of the E-Commerce Directive²⁵⁷ regarding liability for the content of service providers, retaining the three levels of liability (Articles 12-15 E-Commerce Directive, largely repeating Articles 3-7 DSA). Second, it defines a broad duty of care, leaving open the details for self-regulation (Article 26 DSA). The legacy of the E-Commerce Directive has two crucial consequences for platform providers. First, they are regarded as hosting providers even though their services are different from classic hosting services ('a 'hosting' service that consists of the storage of information provided by and at the request of a recipient of the service', Article 2 (f), third paragraph, DSA), where 'online platform' is defined as a specific subcategory of hosting service - one that 'stores and disseminates to the public information' (Article 2 (h) DSA). However, the words 'store and disseminate' do not fully express the activity of platforms. Their core activity is significantly more than that of hosting providers. Hosting providers do not change how the content provider presents the information. Platforms disseminate third-party content, but by setting the rules of dissemination, including the rules of ranking, ordering, prioritising and deprioritising, they shape the informational experience of users and thereby have a formative impact on public discourse.²⁵⁸ They are governors of

²⁵² Couzigou, I., 'The French Legislation against Digital Information Manipulation in Electoral Campaigns: A Scope Limited by Freedom of Expression', *Election Law Journal*, 20(1), pp. 98-115, 2021. See also: Mounier, J.-L., 'Inefficace ou mal comprise, la loi contre les "fake news" toujours en question', *France24*, 19 June 2019.

²⁵³ Ibid.

²⁵⁴ Nevertheless, Donald Trump's incriminate posts on 7 January 2021 would not have fallen within this law because they were not 'sponsored, artificial or automated'.

²⁵⁵ Proposal for a [Regulation of the European Parliament and of the Council on contestable and fair markets](#) in the digital sector (Digital Markets Act) COM/2020/842 of 15 December 2020.

²⁵⁶ [Communication of the Commission on the application of state aid rules to public service broadcasting](#), 2009/C 257/01.

²⁵⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('[Directive on electronic commerce](#)'), OJ L 178 of 17 July 2000.

²⁵⁸ Gillespie, T., *Custodians of the Internet: Platforms, content moderation, and the hidden decisions that shape social media*, New Haven, Connecticut, Yale University Press, 2018. See also: Klonick, K., 'The new governors: The people, rules, and processes governing online speech', *Harvard Law Review*, 131(6), 2018, pp. 1598-1670.

the informational landscape.²⁵⁹ The DSA's recitals do not give reasons why no genuine category has been created to cover these specific, *sui-generis* service features of platforms. Providing platforms with a new basic definition rather than defining 'platform services' as a subcategory of hosting providers would make it easier to set a specific liability structure for online platforms. This change would allow nuances within the liability scheme.

Hosting providers are exempt from liability if they do not have actual knowledge of illegal activity or illegal content, or if they have knowledge and act expeditiously to remove or disable access to that content (Article 2 (f), third paragraph, DSA). Per previously published commentaries that criticise the notice-and-takedown regime,²⁶⁰ this regime creates one-sided pressure on service providers to remove the content (or block access to it). If service providers obtain knowledge of a suspicious piece of content and they cannot easily determine whether it is illegal or not, they are on the safe side if they remove such content. If the content is not illegal but harmful (like certain types of hate speech), less restrictive measures could achieve the same, for example, by labelling, deprioritising, and/or notifying the content provider to ask for its removal.²⁶¹ In this respect, the DSA is over-restrictive in regard to its notice-and-takedown obligations.

Nevertheless, the DSA also informs the recipient about the action taken and other procedural safeguards (Article 15). Further, 'due diligence obligations' within the DSA protect the fair procedure for users of online platforms. Articles 10-15 of the DSA apply both to 'ordinary' hosting providers and online platforms, whereas all other obligations apply to online platforms only. The latter are also obliged to put in place additional mechanisms for the protection of user rights (Articles 17-18 and 20) and fulfil transparency obligations (Articles 23-24). All these obligations are enforceable by the Digital Services Coordinator, who has the right to issue orders and impose sanctions.

The obligations apply exclusively to illegal content. Disinformation overwhelmingly falls outside of that category. If platforms have to decide on the lawfulness of disinformative content, however, they may err on the side of caution and find it illegal. This makes due diligence and transparency rules relevant also to the issue of disinformation.

Very large online platforms²⁶² have an additional set of obligations to assess and mitigate the risks that emerge in the context of their services, among them systemic risks such as disinformation or manipulative and abusive activities. The instruments for assessing and mitigating risks are their codes of conduct. Codes are supposed to be drawn up together with the European Commission and the Board (Article 35 (2)). This is their main co-regulative feature. Even though there is an independent audit, and the Commission and the Board 'regularly monitor and evaluate the achievement of their objectives', codes are not enforceable; audits, monitoring and evaluation do not have legal consequences. In the case of a negative audit, the platform receives operational recommendations on specific measures. Within one month, they shall adopt an audit implementation report. Where they do not implement the operational recommendations, they shall justify in the audit implementation report the reasons for not doing so and set out any alternative measures they may have taken to address any instances of non-compliance identified (Article 28 (4) DSA). This significant push for collaboration is not

²⁵⁹ Suzor, N. P., *Lawless: The secret rules that govern our digital lives*, Cambridge, Cambridge University Press, 2019.

²⁶⁰ Article 19, '[Internet intermediaries: Dilemma of liability](#)', 2013; Kuczerawy, A., [From 'Notice and Take Down' to 'Notice and Stay Down': Risks and Safeguards for Freedom of Expression](#), 2018. See also: Bayer, J., https://www.researchgate.net/publication/301560115_Liability_of_Internet_Service_Providers_for_Third_Party_Content 'Law Report Special Edition, Wellington, New Zealand, 2007.

²⁶¹ The latter method is applied by the Defamation Act UK and the Copyright Act of Canada (notice-and-notice system). Labelling and deprioritising of disinformation have been used by platforms under their self-regulatory regimes.

²⁶² The term is defined in Article 25 DSA.

followed up by either the auditor or the Board (the DSA does not mention this). The conclusions of the monitoring and evaluation must be published, but no further consequence result (Articles 35 (4)).

The DSA lists three categories of systemic risks. The third refers to intentional manipulation of platform services. Rather than calling it disinformation or false information (Article 26 (1) (c)), dissemination methods are listed: inauthentic use, automated exploitation of services, or actual or foreseeable negative social effects. Among the suggested measurements to mitigate the risks, two measurements are assumed to address disinformation. First, adapting content moderation or recommender systems, and second, limiting the display of advertisements in association with the service they provide (Article 27 (1) (a)-(b)). Both provisions address the information ecosystem in the hope of tackling the content on offer and empowering the user to consume content conscientiously. User empowerment is also reflected in Article 29 which obliges platforms to publish the main parameters of their recommender systems in a manner accessible for the users and to provide options, at least one of which should be something other than profiling (Article 29). This appears to be an enforceable rule as the Digital Services Coordinator may impose a fine for failing to fulfil this obligation (Article (41) (2) (c)). However, the wording is ambiguous as to the extent of the obligation: 'parameters that they *may* have made available', '*Where several options* are available pursuant to paragraph 1' (italics added). Different opinions in leading academic commentary also highlight the unclear scope of the rule.²⁶³

Neither the enforceable measures nor the suggested measures for self-regulation interfere with freedom of expression in a disproportionate manner (see Table 1). As said above, there is still a risk of over-removal in cases where the illegality of the content is difficult to decide. Limiting the display of advertisements may be regarded as a restriction of the advertiser's commercial speech. However, commercial speech is generally less protected than organic speech, especially if the latter discusses a topic of public interest. The suggested rules shift the power imbalance slightly in favour of end-users and their rights to freedom of expression.

One further circumstance may interfere with the expected benefits of the DSA's regulation: the status of the rule of law within Member States, closely connected to the independence of regulatory authorities. Digital Services Coordinators are appointed by the Member States and have strong powers of enforcing the DSA. In certain Member States, the government was a primary source of disinformation²⁶⁴ and media authorities lacked independence.²⁶⁵ Granting wide competences to a Coordinator even in the social media sector carries the risk that freedom of expression is stifled even on a thriving, free and unregulated forum. To mitigate the risk of exploitation of such power, regular supervision by the Digital Services Board is recommended.²⁶⁶

²⁶³ What the draft Art. 29 of the DSA does not do, is to oblige platforms to offer users the possibility to choose between, modify or implement parameters, including the ability to choose an option not based on profiling.' In: Helberger, N., van Drunen, M., Vrijenhoek, S., Mörunen, M. and Möller, J., '[Regulation of news recommenders in the Digital Services Act: empowering David against the Very Large Online Goliath](#)', *Internet Policy Review*, 2021.

²⁶⁴ Bradshaw, S. and Howard, P.N., '[The Global Disinformation Order: 2019 Global Inventory of Organised Social Media Manipulation](#)', 2019.

²⁶⁵ The European Parliament's Resolution has deplored this fact, [European Parliament resolution of 25 November 2020 on strengthening media freedom: the protection of journalists in Europe, hate speech, disinformation and the role of platforms](#) (2020/2009(INI)), 25 November 2020, at p. 17.

²⁶⁶ The Digital Services Coordinators must send a yearly Activity Report to the Commission and the Board, but no action by these fora is prescribed specifically in relation to this report comment - not clear what kind of action is missing (Article 44 DSA). However, the Board has issued comment - linguistic problems opinions, recommendations and advice to Digital Services Coordinators (Article 49 (1) (c)) and when Coordinators do not follow the opinions, requests or recommendations addressed to them by the Board, they shall provide the reasons for this choice (Article 49 (2)).

Table 1: Potential risks of various possible measures and mitigation strategies

Measure	Risk to freedom of expression	Other risks	Mitigation of risks
Criminalisation	High	-	To tailor the law sufficiently narrow, only for organised crimes
Takedown	High	Platforms' untransparent decision-making	To limit to exceptionally harmful content, to safeguard and to have judicial oversight
Deprioritisation of harmful content	Mild	Platforms' untransparent decision-making	To allow appeal, to safeguards and to remedy
Transparency	-	Complacency with no change occurring	To react to the results, to take further steps
Demonetisation	Mild	False positives harming innocent actors	To allow appeal, to remedy
Due process (users' rights)	-	Overload for platforms	To review regularly, to adapt
Duty of care/ Security obligations/ Risk management	Mild	Platforms' power over users	To review regularly, to adapt, to have judicial oversight
Prioritisation of public interest content	Mild	-	To respect minority opinions
Anti-competition rules	-	Stifle innovation	To exempt small enterprises
Ads repository	-	-	-
Data access for researchers	-	-	-
User options for recommender algorithms	-	Users opting for filter bubbles	To combine with pro-active information and media literacy
Powers of the Digital Services Coordinator	High	-	To have routine Board supervision

Source: Authors of the study

However, disinformation is overwhelmingly dealt with by self-regulation. At this stage, the prospected measurements that the platforms will apply cannot be evaluated from the perspective of freedom of expression. Therefore, Table 1 also lists the most common known measures that platforms have applied to divert disinformation from their services. Information presented in Table 2 shows that most measures mildly interfere with the freedom of expression. Classic interventions were listed as 'high' interference, such as removing information and prior prohibition of publication. Prioritising, deprioritising, labelling and demonetising were listed as 'mild' interferences. The interference still exists, partly because the listed measures continue to influence the perception and plurality of content, partly because there are no safeguards to adequately distinguish between 'good' and 'bad' content. Even if platforms in their Community Standards require disinformation to be labelled or removed, their designation of content as disinformation lacks official authority and is considered 'private censorship'.

Table 2: Risks of platforms' self-regulatory measures against disinformation

Level of interference with the freedom of expression ²⁶⁷		
Zero	Mild	Strong
Offering fact-checking/cooperating with fact-checking organisations	Prioritising 'authoritative' information	Removing non-verifiable medical information
Cooperating with health authorities, news organisations, governmental authorities	Deprioritising harmful misinformation/rating as 'false'	Prior prohibiting/preventing of misinformation or disinformation
Emoji and slogan campaigns	Highlighting information that reflects scientific consensus	
Donating to fact-checkers, journalism, research projects	Marking synthetic and manipulated media	
Cybersecurity solutions, elections toolkit	Labelling/linking to add context	
	Curating pages of authoritative content (e.g., Information Center, Facebook News, Pocket)	
	Granting Ads	
	Verifying influencers/high reach users	
	Prioritising trusted users	
	Demonetising harmful content	

Source: Authors of the study

²⁶⁷ The level of interference is not informed by legitimate aim, necessity and proportionality. These depend on factors such as national regulation and context.

4.3. Public service media: ideas and concepts

The idea of a European, transnational public service medium is not new.²⁶⁸ This has been viewed as a political instrument to foster the closer integration of the Union, increase solidarity between citizens of all Member States and strengthen the sovereignty of the Union.

The public funding of public service media has been on the defensive since the adoption of the Television Without Frontiers Directive in 1989²⁶⁹ wherein broadcasting was defined as a commercial service. After technological development and the proliferation of commercial audiovisual services, they seemed able to ensure a diverse and plural information landscape without spending state aid on public service media, which commercial actors deemed an interference in the competition.²⁷⁰ The impression that private commercial media providers can fully cover the informational needs of society only strengthened in the first years of ubiquitous diversity that the internet provided. However, the domination of social media platforms and the consequent dramatic underfinancing of professional media companies such as quality journals, brought about a new situation of fragmented public discourse, a post-truth age and low competitiveness on the media market. Social cohesion and security were shattered in the past years' disinformation campaigns and hybrid warfare.

Today's informational environment and geopolitical context makes public service media content less a luxury and more a necessity. It would fulfil a task which is practical as opposed to ideological: to offer trustworthy information that can become shared knowledge of EU citizens. The common narratives²⁷¹ would represent the values of the EU, including of national diversity, and would improve social cohesion and public discourse.

As a result of the digital transition and consequential declining role of broadcasting in information consumption, the public service media struggle with challenges of legitimacy, financing and other problems in several Member States.²⁷² This could be an opportunity to take account of European cooperation in the reform process and renew the public service media by incorporating synergies at the European level.

4.3.1. Establishment of a platform for the public good

In Europe, public service broadcasting has long traditions. Transferring the basic idea of public service broadcasting to platforms has been discussed regarding different models. First, TV operators launched a joint platform to make it possible to access films, series', documentaries and news programs. One example of this is the 'Germanys Gold' project.²⁷³ Public service broadcasters and private TV broadcasters wanted to work together to meet US-sourced challenges posed by Netflix and Amazon

²⁶⁸ Gripsrud, J., 'Television and the European Public Sphere', *European Journal of Communication*, 22(4), pp. 479–492, 2007; Eriksen, E.O., 'An Emerging European Public Sphere', *European Journal of Social Theory*, 8(3), pp. 341–363, 2005; Brüggemann, M. and Schulz-Forberg, H., 'Becoming Pan-European? Transnational Media and the European Public Sphere', *International Communication Gazette*, 71(8), pp. 693–712, 2009.

²⁶⁹ Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. This is no longer effective and precedes the AVMSD.

²⁷⁰ This dispute yielded the Amsterdam Treaty Protocol in 1997 and the Communication on State Aid to public service broadcasting in 2001 and 2009. See: Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts - Protocol annexed to the Treaty of the European Community - [Protocol on the system of public broadcasting in the Member States](#), OJ C 340, 10 November 1997. See also: [Communication of the Commission on the application of state aid rules to public service broadcasting](#), 2009/C 257/01.

²⁷¹ Stories told, whether fiction or more elaborate news items.

²⁷² Donders, K., *Public Service Media in Europe: Law, Theory and Practice*, Routledge, 2021.

²⁷³ ZDF enterprises, [Germany's Gold GmbH mit Sitz in Berlin gegründet](#), press release of 25 April 2021.

Prime. The project failed because the German Federal Cartel Office prohibited it as it would violate the ban on cartels. In the UK, the BBC and ITV set up the curated VoD platform BritBox as a joint venture at the end of 2019.²⁷⁴ This assumed the need for high-quality domestic content. There seems to be no objection from regulators against this venture.

Second, there is discussion about whether it might make sense to build a European competitor platform to American companies such as Netflix, Facebook and Google. A notable step towards this is the GAIA-X project²⁷⁵ which aims at designing the next generation of a European data infrastructure that meets the highest standards of digital sovereignty and promotes innovation. The project is being driven jointly by business, science and politics at the European level, with the objective to create a technical infrastructure that can then be made available to European service providers. In Germany, Bayerischer Rundfunk (Bavarian regional television) has proposed building a digital platform for quality content.²⁷⁶ The platform will bring together the media libraries of public and commercial broadcasters, portals of publishers and cultural institutions such as universities, museums and archives. In addition to this curated part, the platform should also perform various aggregating functions. Besides operating as a search engine, these functions could include 'citizens' accounts' for mutual exchange. It should promote social cohesion and be committed to a citizen-friendly approach to Big Data. On the content side, competition must prevail.

The platform could also be used to provide content on the functioning of the European Union. A European news offering could also be developed. Such a project could additionally raise awareness of disinformation. In particular it could provide carefully researched information to counterbalance disinformation on the Internet and social media.

The director of Bavarian broadcasting and current chairman of the public service media company ARD, Ulrich Wilhelm, has plans for a European Public Sphere.²⁷⁷ The idea of the European Public Sphere is to offer an alternative to existing monopoly providers Facebook and Google and to establish a complex and comprehensive European information ecosystem from the basic infrastructural level (enabling technology) to the level of various services and products, including content offers, e-governments, e-schooling and smart cities. It builds on the GAIA-X concept, emphasising the advantages of the modular and decentralised construction of material infrastructure and services. The state should play an acute coordinating and enabling role, including coordinating the establishment of technological and organisational standards, aspects of participation and supervision, and innovation in the digital public sphere. The modular structure can contain commercial products and content, allowing for a wide variety of business models based on European Public Sphere technology and products.²⁷⁸ Thus, this concept does not emphasise public service content but instead highlights the importance of coordination and diversity. Nevertheless, it pays attention to the inherent synergies that a coordinated combination of national content offers creates. Currently, national TV content, media libraries, film archives, digital museums, and theatres are 'content silos that are not connected to each other at European level'.²⁷⁹

²⁷⁴ DTVKit, [Launch of BritBox in joint venture between ITV and the BBC](#), press release, n.d.; Competition and Consumer Protection Commission of Ireland, [BritBox Joint Venture BBC & ITV](#), Case M/16/064.

²⁷⁵ Official page [GAIA-X](#).

²⁷⁶ Medienkorrespondenz, [Umbauprozess: Der BR reduziert seine Direktionen von sechs auf fünf](#), 06 September 2019.

²⁷⁷ Kagermann, H. and Wilhelm, U. (eds), [European Public Sphere](#). Towards Digital Sovereignty for Europe, Acatech. National Academy for Science and Engineering, 2020.

²⁷⁸ Ibid, p. 17

²⁷⁹ Ibid, p. 20.

The developers envisaged a common European content platform where all European content is accessible (with immediate translation) in all Member States and from any device. Clearing intellectual property rights is a minor step towards further integration compared to the advantages that this may bring to Europe both at the commercial and the cultural level.²⁸⁰ The concept also provides recommendations as to the governance and supervision of this information ecosystem.

Political consultant Johannes Hillje joined the debate with his idea for a common digital platform (Platform Europe).²⁸¹ He recommended creating a European public sphere and 'free it from the constraints of the attention economy'. Because democracy is now European and the public sphere is digital, he proposes the Europeanisation and digitalisation of broadcasting. The 'Platform Europe' should be digitally oriented and equipped with a pan-European editorial team. It should produce a European news programme, European political talk shows, an entertainment programme with European cooking shows, and a 'House of Cards from Brussels'. These are elements of a curated platform. In addition, citizens should be able to exchange views on the platform, which is a typical element of aggregation platforms. Both the programme and the exchange should reflect Europe's multilingualism, which will be easily possible with machine translation anticipated in the near future.

4.3.2. Special features of public service broadcasting participation

The models presented in the previous Subsection have one thing in common; they all identify public service broadcasting as an inspiration for their platforms. The intriguing novel concepts, especially those which envisage a transnational actor, each have their promises and challenges. The usual pitfalls of public service broadcasters are further complicated by the complexity of the platform's structure and transborder nature. Below, the main hurdles that must be cleared in order to begin the process for a European common public service platform are listed.

First of all, the supervision of a public service entity is a thorny question. Among the well-functioning solutions, there are boards with social and corporate representation. These boards indirectly get their power from parliaments, governments or the monarch.

Second, the financing of public service entities is no less of an issue. Variations range from central budget financing to community financing through subscription fees, the amount being defined by parliament. The question of dual funding is an ongoing issue: should public service media rely on advertising revenues? At least in the context discussed here, where the primary objective is to break the spiral (and vicious cycle) of attention harvesting, there are strong arguments against selling advertising time, however other means of commercial income may be possible.

Third, the issue of public service media can hardly be separated from politics. Its operation, financing and content are often subject to political disagreement. Several states globally, among them some Member States of the European Union, still foster the tradition that public service media supports government policies instead of having a watchdog role. With fierce political disagreements between Member States, talks about the construction and remit of a public service entity is expected to attract vivid debates.

Fourth, public service entities in the European Union also need to comply with the strict guidelines set by the Commission in the 2009 Communication on state aid to public service broadcasting.

²⁸⁰ Ibid, p. 18-20.

²⁸¹ Hillje, J., *Plattform Europa. Warum wir schlecht über die EU reden und wie wir den Nationalismus mit einem neuen digitalen Netzwerk überwinden können*, Dietz, 2019.

Finally, what would ensure the success of such an endeavour to create a common European public platform? Without orientation on click rates and intensive data evaluation, the platform's economic success and tools to boost its popularity may remain limited.

4.4. Impact of responses to the infodemic

Section 3.3 described the nature of the infodemic and the commendable governmental approaches that focused on providing – or encouraging to provide – true information from verified sources. However, more than half of the UN Member States (more than 90 countries worldwide), including 14 Member States of the European Union, reported violations of press freedom²⁸² which included violence against journalists covering the pandemic.²⁸³ Journalists, civil society organisations and academics have been restricted in their access to information, or their access was significantly delayed.

It is a challenge to find a careful balance between respecting the dignity of patients, victims and health personnel, and ensuring a credible depiction of the crisis for the media. In certain Member States, hospitals were prohibited from sharing any information with journalists, including data on the number of patients or deaths. In Hungary, the government retained its information monopoly with a ministerial decree.²⁸⁴ The press struggled with insufficient relevant information and lacked the possibility to verify governmental information from other sources. This situation led to general mistrust and speculations about the truth in Hungary.

The International Press Institute registered 16 countries worldwide where restrictive laws were passed or used against false information to remove online content about the virus.²⁸⁵ Two of these were in the European Union.²⁸⁶ In Romania, a presidential decree on the state of emergency permitted the takedown of false content.²⁸⁷ The Decree also set limits on access to information by doubling the 30-day deadline for official information requests.²⁸⁸ In Hungary, the previous criminal prohibition of 'fearmongering' was extended to apply to 'a person who, during the period of a special legal order and in front of a large audience, states or disseminates any untrue fact or any misrepresented true fact that is capable of hindering or preventing the efficiency of protection.' Such a person 'is guilty of a felony and shall be punished by imprisonment for one to five years'.²⁸⁹ The provision was immediately used to arrest ordinary people for expressing critical opinions on social media about the government's policy.²⁹⁰

It should be noted that the insecurities, diffuse fear of the invisible threat and challenge of tolerating restrictions greatly contributed to susceptibilities to disinformation and propaganda. Some of the pandemic-disinformation directly related to defences against the virus, treatment and vaccination.

²⁸² RSF, ['Nearly half of UN member countries have obstructed coronavirus coverage'](#), 29 June 2020.

²⁸³ RSF, [Tracker-19](#).

²⁸⁴ Instruction of the Hungarian Human Resources Ministry to hospitals EMMI IV/3733/2020/EAT (not publicly accessible online).

²⁸⁵ International Press Institute, ['WPF 2020: COVID-19 accelerating a global decline in media freedom'](#), 1 May 2020. See also: Article 19, ['Spain: Concerns as Penal Code used to criminalise jokes and misinformation about coronavirus'](#), Statement of 17 April 2020.

²⁸⁶ For Hungary and Romania, see: International Press Institute, ['Rush to pass 'fake news' laws during Covid-19 intensifying global media freedom challenges'](#), 22 October 2020.

²⁸⁷ Holdis, D., ['Romania: Coronavirus and the media'](#), European Journalism Observatory, 26 May 2020.

²⁸⁸ European Federation of Journalists, ['COVID-19: restrictions on access to information in Romania'](#), 29 March 2020.

²⁸⁹ Section 337 of the [Criminal Code](#) of the Republic of Hungary, 2012.

²⁹⁰ Bayer, L., ['Orbán critics fall foul of Hungary's controversial corona law'](#), *Politico*, 14 May 2020. See more on Hungary's pandemic politics: Bárd, P. and Carrera, S., ['Showing true illiberal colours – Rule of law vs Orbán's pandemic politics'](#), *CEPS Policy Insights*, 2020: 10, 1-17, 2020.

Other disinformation was political, trying to seed distrust in domestic or foreign governments or incite hostility between racial and social groups.²⁹¹ At the same time, trust in the government would have been key to the population accepting restrictive measures against something not directly perceivable. Indirectly, social trust and cohesion were critical elements of successful measures against the spreading of the virus.

In summary, the pandemic as a global event caused wide restrictions of human rights, including to free movement, education and others.²⁹² Some of the governmental responses added to the violation of freedom of the press, opinion and access to information. The press and journalistic profession faced difficulties because of the enormous pressure and unsafe working conditions even before governmental obstacles designed to hinder their access to information. Consequently, the level of press freedom in general was bound to decline globally, whereas public interest in media coverage elevated during the crisis.²⁹³

²⁹¹ Chini, M., '[Belgians with Asian roots report increased racism amid coronavirus fears](#)', *The Brussels Times*, 13 February 2020; Yle, '[Coronavirus discrimination targets Asians in Finland](#)', 7 February 2020.

²⁹² [Council conclusions on a human-rights-based post-COVID-19 recovery](#), 22 February 2021. See also: HRW, '[Covid-19 Pandemic Sparked Year of Rights Crises](#)', 4 March 2021.

²⁹³ J.P. Morgan, '[Media consumption in the age of COVID-19](#)', 1 May 2020.

5. ROLES AND RESPONSIBILITIES OF DIFFERENT ACTORS

5.1. Who is the ultimate judge? The responsibilities of platforms and states and the need for regulatory oversight

Information disorders in online platforms have adequately been identified as an instance of the ‘problem of many hands’,²⁹⁴ where actions of many different entities cumulate and contribute to a larger issue.²⁹⁵ Among the participants in the spread of disinformation are authors or professional organisers of individual falsehoods, other users engaging with or intentionally amplifying that content, and platforms hosting the content and facilitating its dissemination. State authorities and courts may get involved in the effort to remove individual content from platforms or contest platforms’ removal decisions. Turning to the question of responsibility requires differentiation between these contributions to the spread of disinformation.

5.1.1. Responsibility, liability and accountability

Although the terms responsibility, accountability and liability are often used interchangeably in policy debates,²⁹⁶ their legal implications must be distinguished from one another. Online platforms do not have default liability for individual information provided by users as third parties. The current EU legal framework provides liability exceptions to hosting services under certain conditions.²⁹⁷ These are similarly incorporated into the proposal for the Digital Services Act.²⁹⁸ Responsibility, however, is not synonymous with mere liability²⁹⁹ for damages or illegal content.³⁰⁰ Whereas civil or criminal legal liability is the consequence of a violation of laws or individual rights,³⁰¹ legal responsibility is the prior positive obligation to take certain actions or prevent certain harms.³⁰² Responsibility is the premise for liability,³⁰³ but liability is not the necessary conclusion of failed responsibility. Finally, legal accountability refers to the implementation of consequences of non-compliance with obligations imposed by public authorities, such as sanctions and administrative fines. This distinction is incorporated in European legal acts. The General Data Protection Regulation (GDPR), for example,

²⁹⁴ Thompson, D., ‘[Responsibility for Failures of Government: the Problem of Many Hands](#)’, *The American Review of Public Administration* 44 (3), pp. 259-273, 2014.

²⁹⁵ Helberger, N., Pierson, J. and Poell, T., ‘[Governing online platforms: From contested to cooperative responsibility](#)’, *The Information Society*, 34 (1), pp. 1-14, 2018.

²⁹⁶ EPRS, [Liability of Online Platforms](#), 2021, p. 24.

²⁹⁷ Art. 14 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ([‘Directive on electronic commerce’](#)); see also Bayer, J. et al., ‘[Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States](#)’, Study for the Policy Department C: Citizens’ Rights And Constitutional Affairs, 2019, p. 81; EPRS, [Liability of Online Platforms](#), 2021, p. 79.

²⁹⁸ Article 5 DSA. Liability is excluded if ‘the information stored at the request of a recipient’ and the hosting provider ‘does not have actual knowledge of illegal activity or illegal content’.

²⁹⁹ Frosio, G. and Husovec, M., [Accountability and responsibility of Online Intermediaries](#), Frosio, G. (ed), *The Oxford Handbook of Online Intermediary Liability*, OUP, pp. 613-630, 2020, pp. 613 ff.

³⁰⁰ EPRS, [Liability of Online Platforms](#), 2021, p. 24.

³⁰¹ *Ibid.*, p. 25; Riordan, J., ‘A Theoretical Taxonomy of intermediary Liability’, Frosio, G. (ed), *The Oxford Handbook of Online Intermediary Liability*, 2020, p. 58.

³⁰² Naughton, J., Platform Power and Responsibility in the Attention Economy, Moore, M. and Tambini, D. (eds.), *Digital Dominance – The Power of Google, Amazon, Facebook, and Apple*, 2018, p. 390.

³⁰³ Riordan, J., ‘A Theoretical Taxonomy of intermediary Liability’, Frosio, G. (ed), *The Oxford Handbook of Online Intermediary Liability*, 2020, p. 59.

defines a general responsibility of the data controller³⁰⁴ to ensure that personal data is processed in accordance with Art. 24 (1) GDPR, whereby the controller is obligated to 'implement appropriate technical and organisational measures' to this end. The GDPR also endows data subjects with a right to compensation for damages caused by infringements of the Regulation and explicitly addresses the controller's liability for these damages.³⁰⁵ However, not every infringement of the rules laid down by the GDPR will necessarily result in material or non-material damages for individuals. If, for example, the data controller fails to designate a data protection officer in contradiction of Art. 37 (1) GDPR, this constitutes a violation of the Regulation but does not, in itself, cause specific damages to data subjects. According to Art. 83 (4)(a), the infringement is, however, subject to an administrative fine. In contrast to liability, the imposition of an administrative fine does not require specific damages but is instead a direct consequence of the infringement itself.

The obligation to designate a data protection officer is one organisational measure required by Art. 24 (1) GDPR intended to ensure lawful processing following the GDPR. Hence, the controller is obligated to appoint a data protection officer as part of its responsibility but is not liable for failing to comply in the absence of damage. Still, the GDPR holds the controller accountable for fulfilling its responsibilities by linking the obligation to sanctions.³⁰⁶ Besides financial sanctions, the accountability of controllers also includes the corrective powers of supervisory authorities which could reprimand the controller for its failure to designate a data protection officer and order the controller to rectify the situation within a specified time.³⁰⁷

The recent Digital Services Act proposal also distinguishes between liability, responsibility and accountability. Chapter II (Art. 3 ff.) provides liability exceptions for intermediary services. Neither the DSA proposal nor the E-Commerce Directive establishes immediate liability, however. Even if the conditions for liability exceptions are not met, the statutory basis for claims must be provided for in separate (national or European) law.³⁰⁸ The following Chapter III (Art. 10 ff.) in the DSA proposal establishes obligations of intermediary services. These responsibilities of the service providers are not directly linked to liability but subject to enforcement and monetary penalties in cases of non-compliance (accountability).³⁰⁹

5.1.2. Platform responsibility as a 'security obligation'

The policy discourse on disinformation is less focused on liability for individual content because inaccurate information is not necessarily illegal. It is more concerned with platforms' roles and responsibilities for dealing with disinformation as a larger phenomenon.³¹⁰ Responsibility for individual content removal decisions must be distinguished from responsibility for setting policies and guidelines for those decisions and a platform's overall design and accountability. The current legal framework

³⁰⁴ See: the definition in Art. 4 No. 7 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons regarding the processing of personal data and the free movement of such data, and repealing Directive 95/46/EC ([General Data Protection Regulation](#)).

³⁰⁵ Art. 82 (1) - (2) GDPR.

³⁰⁶ Art. 83 - 84 GDPR.

³⁰⁷ Art. 58 (2) lit. b, d GDPR.

³⁰⁸ Rec. 17 DSA.

³⁰⁹ Art. 42 DSA.

³¹⁰ EPRS, [Liability of Online Platforms](#), 2021, p. 73; Frosio, G. and Husovec, M., '[Accountability and responsibility of Online Intermediaries](#)', Frosio, G. (ed), *The Oxford Handbook of Online Intermediary Liability*, OUP, 2020, p. 630; McGonagle, T., 'Free Expression and Internet Intermediaries: the changing Geometry of European Regulation', Frosio, G. (ed), *The Oxford Handbook of Online Intermediary Liability*, 2020, p. 481.

does not assign any responsibility for mitigating disinformation to platform providers.³¹¹ Establishing such responsibility would require a link between their obligation and the addressed behaviour or its effect. A possible source of responsibility for platforms could be the relationship between the platform and its users as recipients of the content. The provider has an obligation to protect its users, for example, by dealing with infringements of individual rights. The provider is also bound by the framework of its terms of use and must thereby refrain from interfering with or deleting content in line with community guidelines.³¹² However, neither of these obligations genuinely apply to the handling of disinformation. Disinformation does not typically infringe individual rights of platform users; however, platforms have an obligation to designate a data protection officer even absent of damages, similar to that of GDPR controllers.

Because the platform provider does not act as the author or publisher of third-party content, its contribution is not sufficiently direct to warrant its treatment as a generator of risks. However, a platform provider's position grants it direct access to and a degree of control over the content on its platform in practice.³¹³ This position justifies a different kind of responsibility – not for actual or potential damage caused by their own actions, but rather a responsibility to prevent harm being caused by others who take advantage of platform vulnerabilities ('obligation responsibility').³¹⁴

The constellation of assigning private actors' responsibility for mitigating risks caused by third parties in an environment they control is known in German law as the 'security obligation' (Eigensicherungspflicht). Security obligations usually pertain to protecting endangered objects or infrastructure facilities, such as nuclear power plants or airports, against interferences by third parties and serve public safety interests.³¹⁵ The concept of security obligations has already been applied to online platforms, where the task of removing illegal content has been described as the 'digital equivalent of property security'.³¹⁶ Security obligations are generally appropriate in situations where the preventive measures can be integrated into the usual operations and the private actor is more proficient at providing security due to its proximity and superior knowledge of the environment.³¹⁷ Private actors profiting from sources of hazards should also be obligated to share the burden of precautions against those hazards, although they originate outside of their control. Operators must be capable of securing objects using private law without resorting to sovereign authority.³¹⁸ In other words, private actors are now being obligated to use powers that were previously discretionary.³¹⁹

5.1.3. Allocation of responsibility and ensuring regulatory oversight

Platforms' security obligations must reflect the indirect and abstract nature of their link to the addressed problem of disinformation and their role as intermediaries. They may be obligated to

³¹¹ Art. 26 (1) lit. c and Art. 27 DSA include obligations of 'very large online platforms' to perform risk assessments and put in place mitigating measures against use of their services with negative effects on, i.e., 'civic discourse'.

³¹² The term 'community guidelines' refers to internal rules of online platforms.

³¹³ Helberger, N., Pierson, J. and Poell, T., '[Governing online platforms: From contested to cooperative responsibility](#)', *The Information Society* 34 (1), p. 1-14, 2018.

³¹⁴ Naughton, J., 'Platform Power and Responsibility in the Attention Economy', Moore, M. and Tambini, D. (eds.), *Digital Dominance – The Power of Google, Amazon, Facebook, and Apple*, pp. 371-392, 2018.

³¹⁵ Lennartz, J., 'Verfassungsrechtliche Grenzen der Indienstnahme Privater', *Die Öffentliche Verwaltung*, 2019, p. 438.

³¹⁶ Lennartz, J., 'Verfassungsrechtliche Grenzen der Indienstnahme Privater', *Die Öffentliche Verwaltung*, 2019, p. 438.

³¹⁷ Ossenbühl, F., '[Die Erfüllung von Verwaltungsaufgaben durch Private](#)', *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* Vol. 29, p. 181, 1971.

³¹⁸ Verwaltungsgericht Düsseldorf, [6 K 254/11](#), Judgement of 8 March 2012, para. 47.

³¹⁹ Böger, M., *Vom Eigensicherungsrecht zur Eigensicherungspflicht: Zum Wandel der Eigensicherungspflicht infolge des Resilienzgedankens mit besonderem Fokus auf das Telekommunikationsrecht*, Peter Lang, 2018, p. 33.

provide suitable conditions³²⁰ for counteracting disinformation by adapting the platform's design but can ultimately not be held responsible for achieving a specified outcome,³²¹ i.e. successfully preventing or detecting every piece of content that constitutes disinformation. This 'systemic'³²² approach is reflected in the Digital Services Act's 'due diligence obligation' of intermediary services,³²³ establishing positive duties for platforms.

There are already examples of comparable³²⁴ content management obligations for intermediaries in the European legal framework, specifically in the Audiovisual Media Services Directive (AVMSD). Providers of Video-Sharing Platform Services that exercise no editorial control over the content on their platforms have a responsibility to take appropriate measures to comply with the Directive's provisions on the protection of minors³²⁵ and its qualitative requirements³²⁶ for advertising.³²⁷ The AVMSD establishes a systemic obligation for Video-Sharing Platform Services to provide specific tools for labelling and reporting content.³²⁸

Designating responsibility in the form of security obligations is the competence of legislators. If disinformation is perceived as a threat to public welfare and democratic discourse,³²⁹ the state is required to countermeasure this. Those measures must also take into account conflicting individual rights and the public good, such as the safeguarding of freedom of expression. It has been argued that the intricate balancing of rights should not be left to platforms³³⁰ and conditions for public speech should be determined by the relevant political communities.³³¹ However, this does not mean that public authorities have to enforce and carry out the task themselves. States have the option to delegate part of their duties to private actors. The state's principal responsibility in fulfilling the delegated task is transformed into a responsibility of providing a guarantee and ensuring fulfilment, as is often the case for privatisation of previously state-owned infrastructures like communication or transport networks.³³² The responsibility to provide guidelines, benchmarks and an overall robust governance framework remains with the legislators.³³³

³²⁰ Helberger, N., Pierson, J. and Poell, T., '[Governing online platforms: From contested to cooperative responsibility](#)', *The Information Society*, 34 (1), 2018, p. 4.

³²¹ Naughton, J., 'Platform Power and Responsibility in the Attention Economy', Moore, M. and Tambini, D. (eds.), *Digital Dominance – The Power of Google, Amazon, Facebook, and Apple*, 2018, p. 390; Thompson, D., '[Responsibility for Failures of Government: the Problem of Many Hands](#)', *The American Review of Public Administration*, 44 (3), 2014, p. 261.

³²² See also: Woods, L. and Perrin, W., '[Online harm reduction – a statutory duty of care and regulator](#)', 2019.

³²³ Art. 10 ff. DSA.

³²⁴ For a comparison of disinformation content and subliminal advertising techniques, see: Jones, K., '[Online Disinformation and Political Discourse – applying a Human rights Framework](#)', 2019, p. 53.

³²⁵ Art. 6a (1) AVMSD.

³²⁶ Art. 9 (1) AVMSD.

³²⁷ Art. 28b (1) lit. a, (2) AVMSD.

³²⁸ See also: EPRS, [Liability of Online Platforms](#), 2021, pp. 35ff.

³²⁹ See: Bayer, J. et al., '[Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States](#)', Study for the Policy Department C: Citizens' Rights And Constitutional Affairs, 2019, p. 65 ff.

³³⁰ Jones, K., '[Online Disinformation and Political Discourse – applying a Human rights Framework](#)', 2019, p. 56.

³³¹ Kaye, D., '[A New Constitution for Content Moderation](#)', *OneZero*, 2019.

³³² The 'guarantee responsibility' of the state for the German rail infrastructure is explicitly provided in Art. 87e (4) of the Basic Law of the Federal Republic of Germany ([english version](#)).

³³³ Helberger, N., Pierson, J. and Poell, T., '[Governing online platforms: From contested to cooperative responsibility](#)', *The Information Society*, 34 (1), 2018, p.4.

There is hesitation in having platforms, as private actors,³³⁴ or governments, as state authority, determine material guidelines for disinformation. Neither seems an adequate arbiter of free speech.³³⁵ It has been suggested that the task of setting guidelines or establishing codes of conduct be outsourced to civil society councils or self-regulatory institutions.³³⁶ The DSA proposal, for example, includes two versions of codes of conduct that divide responsibility between the stakeholders and the Commission. Both shall be drawn up by online platforms and facilitated by the Commission. The first, general Code of Conduct includes online platforms. In contrast, the other is specifically for online advertising and may include other stakeholders such as providers of online advertising intermediary services, civil society organisations and relevant authorities.³³⁷

Part of the legislator's responsibility of ensuring the fulfilment of this delegated task is to implement oversight and accountability mechanisms.³³⁸ The regulatory agency should be independent and endowed with sufficient investigative and enforcement powers, including the power to impose corrective measures and financial sanctions. Regulatory oversight could also be complemented by independent civil society organisations³³⁹ acting as auditors. This decreases the risk of undue political influence. For example, the DSA proposal mandates external, non-governmental audits for very large platforms in addition to oversight by the supervisory authority.³⁴⁰ In the GDPR system, certified external organisations can carry out the monitoring of compliance with codes of conduct that the controller is subject to.³⁴¹

Finally, platform providers, as subjects of the regulation, must be provided with the option of judicial review of regulatory decisions. Judicial redress against platform providers should also be granted to users affected by the handling of individual content. Ultimately, the judicial system should act as an arbiter in disputed cases instead of government agencies or platforms.³⁴²

5.2. Analysis of the responsibilities of different relevant actors

5.2.1. The need for a multi-stakeholder approach

In Western democracies, it is not up to the state to decide which opinions receive the support of the majority in society. Instead, it must fundamentally be a result of an argumentative dispute of opinions and left to the social sphere. The legislature and courts only come into play when there are compelling reasons to do so. Therefore, measures against the spread and impact of disinformation should be aimed at empowering civil society to recognise and deal with disinformation. Civil society can ally with social

³³⁴ Frosio, G. and Husovec, M., [Accountability and responsibility of Online Intermediaries](#), Frosio, G. (ed), *The Oxford Handbook of Online Intermediary Liability*, OUP, 2020, p.630; Jones, K., ['Online Disinformation and Political Discourse – applying a Human rights Framework'](#), 2019, p. 45.

³³⁵ Helberger, N., Pierson, J. and Poell, T., ['Governing online platforms: From contested to cooperative responsibility'](#), *The Information Society*, 34 (1), 2018, p. 8.

³³⁶ Ibid.; Kaye, D., ['A New Constitution for Content Moderation'](#), *OneZero*, 2019.

³³⁷ Art. 35-36 DSA.

³³⁸ Jones, K., ['Online Disinformation and Political Discourse – applying a Human rights Framework'](#), 2019, p. 47.

³³⁹ Kaye, D., ['A New Constitution for Content Moderation'](#), *OneZero*, 2019.

³⁴⁰ Art. 28 DSA.

³⁴¹ Art. 41 GDPR.

³⁴² United Nations, [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), A/HRC/38/35, 2018, p.20.

media platforms to fight disinformation through self-regulation, as demonstrated by social campaigns like Stop Hate for Profit³⁴³ and Stop Funding Hate.³⁴⁴

However, the state cannot remain passive when democracy, fundamental rights and the rule of law are at stake. Disinformation is a threat to these values but primarily to democracy by hijacking the public discourse, weakening social cohesion and eroding trust in the institutions.³⁴⁵ Building resilience against attacks on the values of democracy must follow a thin line between imposing excessive constraints on individual political freedoms and tolerating strategic threats against democracy. While disinformation is partly an organic dysfunction of the information ecosystem, it is also generated consciously with the strategic intention to weaken democratic European societies.³⁴⁶ Previous studies have shown that the menace is not entirely external but, for several reasons, is embedded now in the societies of EU Member States.³⁴⁷ In order to become resilient, precautionary logic needs to be followed. This also means that all branches of power can legitimately take action against disinformation both in justified individual cases and at the systemic level. This can affect not only the content providers but also the platform operators who aggregate, select and present third-party content in a generally accessible way. As a result, an approach that addresses all relevant stakeholders is needed. This requires a combination of possible solutions.³⁴⁸

5.2.2. The role of platforms

In recent years, more and more people are turning to platforms such as Facebook and YouTube for information and news. In this respect, journalist-based communication is gradually being supplemented or even replaced by algorithm-based communication. Almost every other adult in Germany (48 %) has informed himself about the Coronavirus via social media. In the group of 18 to 24 year-olds, the figure is 72 %. Among 25 to 34 year-olds, the figure is 63 %. 41 % of all respondents have informed themselves with the help of search engines. Facebook was most frequently consulted for COVID-19 information (25 %), followed by WhatsApp (22 %) and YouTube (21 %). Every tenth person finds information on Instagram.³⁴⁹

However, communication scientists observe that social debates on the internet, especially in social media, are less and less based on sober, factual arguments. Instead, the online social and political discussions are shaped by those algorithms that prioritise divisive and polarising content,³⁵⁰ play on emotions and exploit vulnerabilities to maximise user engagement. The strive for user attention and time is fuelled by the advertising industry that finances social media platforms. The same business model has moved commercial print and broadcast media since the beginning of the 20th century.

³⁴³ Campaign [Stop Hate for Profit](#).

³⁴⁴ Campaign [Stop Funding Hate](#).

³⁴⁵ Bayer, J. et al., '[Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States](#)', Study for the Policy Department C: Citizens' Rights And Constitutional Affairs, 2019.

³⁴⁶ See, for example: Garcia, J.P. et al., '[Strategic communications as a key factor in countering hybrid threats](#)', Study for the STOA, 2021; Splidsboel Hansen, F., 'Russian hybrid warfare: A study of disinformation', Danish Institute for International Studies (DIIS) Report, No. 2017:06, 2017.

³⁴⁷ Bayer, J. et al., '[Disinformation and propaganda – impact on the functioning of the rule of law and democratic processes in the EU and its Member States: 2021 update](#)', Study for the European Parliament, 2021.

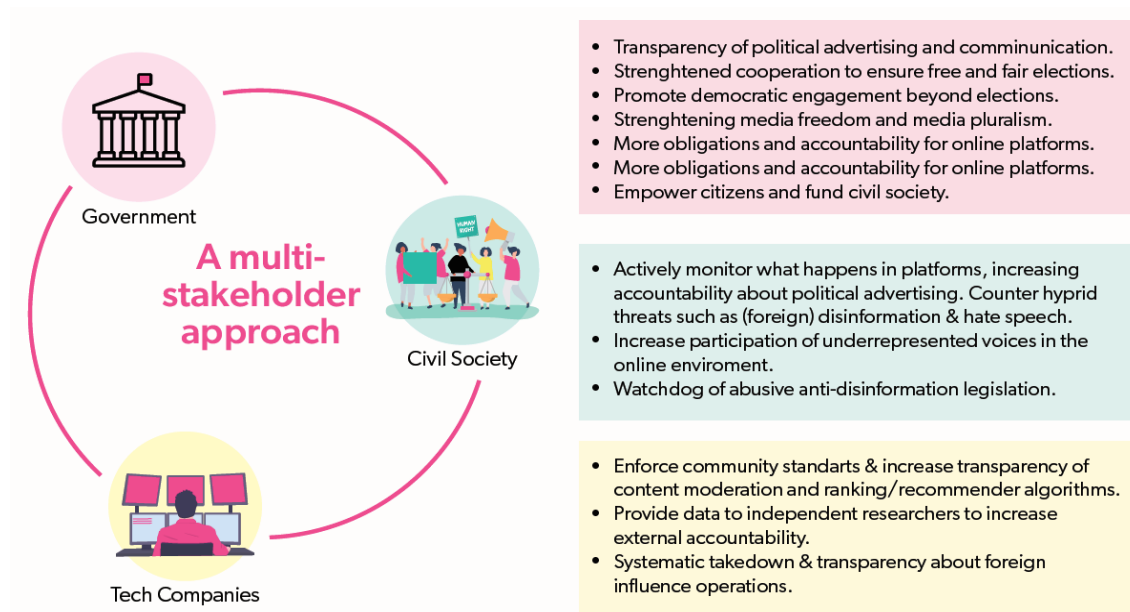
³⁴⁸ Goldzweig, R., '[Disrupted Democracies: A multistakeholder approach to fight disinformation](#)', 2021, p. 19; Humprecht, E., Esser, F. and Van Aelst, P., '[Resilience to Online Disinformation: A framework for cross-national comparative research](#)', *The International Journal of Press/Politics*, 2020; Frischlich, L. and Humprecht, E., '[Trust, Democratic Resilience and the Infodemic](#)', Israel Public Policy Institute: Policy Paper Series, 2021, p. 20 ff.

³⁴⁹ Hölig, S., Hasebring, U. and Behre, J., '[Reuters Institute Digital News Report 2020 – Ergebnisse für Deutschland](#)', 2020, p. 71.

³⁵⁰ 'Our algorithms exploit the human brain's attraction to divisiveness' in: Horwitz, J. and Seetharaman, D., '[Facebook executives shut down efforts to make the site less divisive](#)', *The Wall Street Journal*, 26 May 2020.

However, there are important differences in the current ecosystem. First, actors below a certain financial and educational status are prevented from entering the market. Content was developed by journalists who were subject to laws and ethical rules and had professional associations, while publishers had legal liability. This professionalisation and industrialisation of actors provided a guarantee against manipulation and other harms. These filters do not exist in the platform economy similarly driven by advertising revenues – the higher the reach, the higher the revenues.³⁵¹

Figure 1: Recommendations for lawmakers, civil society and tech companies



Source: Goldzweig, R., '[Disrupted Democracies: A multistakeholder approach to fight disinformation](#)', 2021, p. 19.

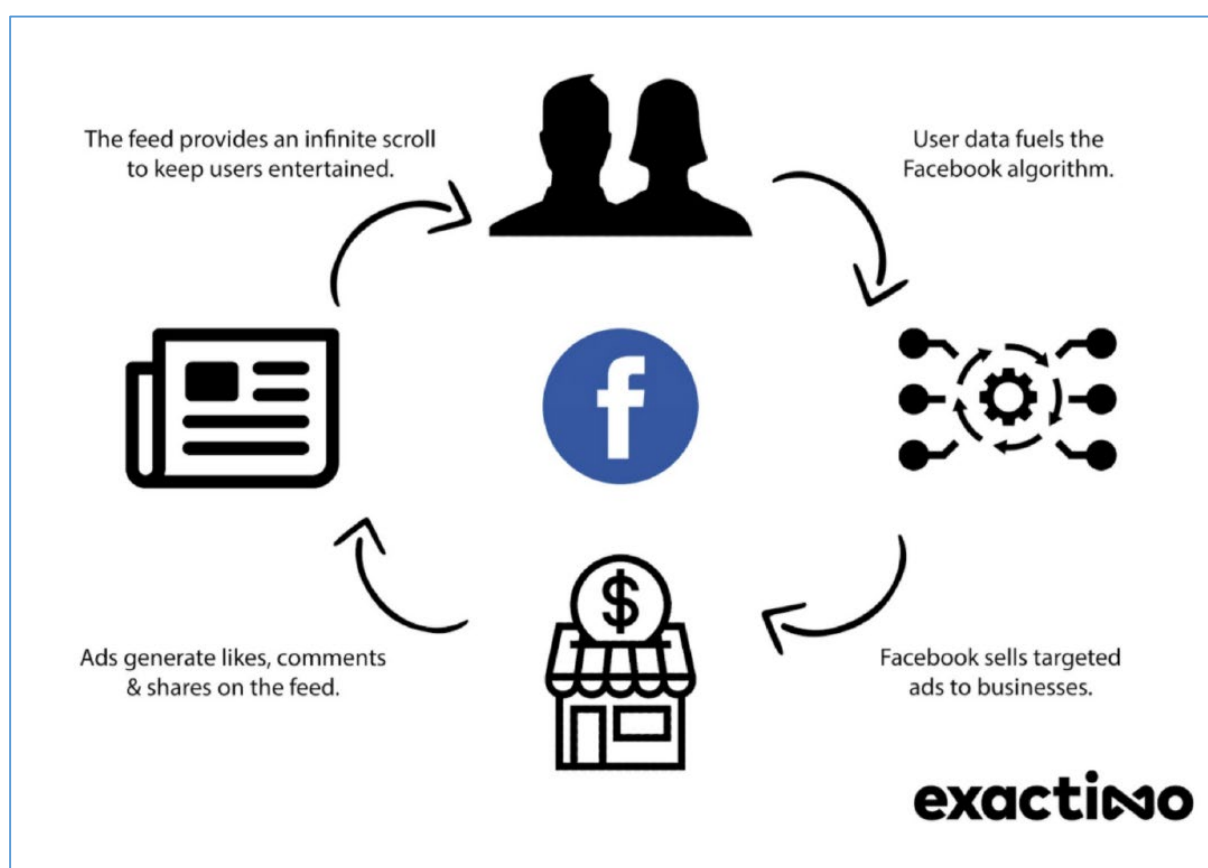
Second, new technology makes the exploitation of attention drastically more efficient. Algorithmic content ranking is much more effective in delivering content according to the user's taste. Algorithms tailor content specifically to the attitudes of the users, reinforcing their opinions. The more a user engages with the social media platform, the more data is collected about him or her, and the better the personalised recommendations will be, ensuring the user engages even further. This vicious cycle turns into a spiral that leads to more and more consumption of media content that is not particularly informative or educational, but is most capable of capturing the specific user's attention based on his/her characteristics. In economic terms, this harvests maximum user attention and attention is the most precious asset that citizens have in the information industry. From the user's perspective, overconsumption of social media causes issues with health, social life and work. Facebook addiction is a health concern and has become a field of medical research.³⁵² It was also revealed that Facebook and other social sites were designed to be addictive.³⁵³

³⁵¹ Bundesverfassungsgericht, [BverfGE 149, 222](#), Judgement of 18 July 2018.

³⁵² Humanetech, [Together, we can align technology with humanity's best interests](#). See also: Rachubirńska, K., Cybulska, A.M. and Grochans, E., 'The relationship between loneliness, depression, internet and social media addiction among young Polish women', *Eur Rev Med Pharmacol Sci*. 25(4), 2021.

³⁵³ Schwär, H. and Moynihan, Q., '[Instagram and Facebook are intentionally conditioning you to treat your phone like a drug](#)', *Business Insider*, 5 April 2020; Solon, O., '[Ex-Facebook president Sean Parker: site made to exploit human 'vulnerability'](#)', *The Guardian*, 9 November 2017.

Figure 2: Facebook business model



Source: www.exactimo.com

Whether this cycle is truly advantageous for advertisers is already debated.³⁵⁴ Even the effects of political advertising are challenged,³⁵⁵ but more research is needed on the effectiveness of political versus commercial advertising and the effects of micro-targeting.

While content-related advertising expenditures are steadily growing,³⁵⁶ traditional media companies are losing their revenues. In the traditional media system, advertisers pay media companies directly for users' attention. Social media platforms aggregate and redistribute content and offer more precise information about users' attention and preferences, allowing the optimisation of advertisement placements. Their activity is regarded as a service by both advertisers and users, but media companies are shielded from direct access to both. At the same time, the rules of redistribution and optimisation are opaque. Despite expectations, platforms have been reluctant to reveal these rules voluntarily: they play the 'shell game' with content providers and end-users.

The consequences for democratic discourse are serious. Verified facts get conflated with comments, opinions and advertising. Traditional pillars of trust are dissolving as users place their trust in the recommendations of their social network. People's tendency to receive content that confirms their world view (confirmation bias) is strengthened if their previous search interest on Google or their past usage behaviour on YouTube or Facebook are central selection and sorting criteria of the algorithms used by social media platforms. In such an environment, dissenting views have less and less room. In

³⁵⁴ Hwang, T., *The Subprime Attention Crisis*, Fsg Originals, 2020.

³⁵⁵ Coppock, A., Hill, S.J. and Vavreck, L., 'The small effects of political advertising are small regardless of context, message, sender, or receiver: Evidence from 59 real-time randomized experiments', *Science Advances*, Vol. 6. No. 36, 2020.

³⁵⁶ Statista, *Growth of advertising spending worldwide from 2000 to 2022*, 28 September 2020.

the view of some communication scientists, such filter bubbles can quickly solidify into echo chambers if an opinion is repeatedly shared and confirmed by others. This can easily create the impression that the majority opinion is represented (looking-glass effect, or false consensus-effect).³⁵⁷ Many fear that these mechanisms will further undermine trust in the media and the efficiency of the social discourse model. This process launches a 'downward spiral of mistrust' in the media, promoting the rise of conspiracy theories and increasing social polarisation.³⁵⁸ This, in turn, could promote further loss of trust in the media and the efficiency of social discourse. In times of great uncertainty, such as a pandemic, this can damage the reputation of democratic institutions.³⁵⁹ The resulting loss of trust in democratic institutions has been documented in recent years.³⁶⁰

The dissolving trust in the establishment and media have been described by theorists of the risk society concept as the consequence of diffuse fear of manmade risks. Traditional relations of trust have vanished; the guiding knowledge is expected not from the community of elders but from trained experts who are not present in time and space. Trust is formalised through institutions and processes. Informal and emotional communication is able to successfully challenge this abstract trust if a solid social network does not feed it. The erosion of expert consensus adds to public distrust.³⁶¹ Sustainability and risk management become essential policy tools to decrease the levels of perceived risk. The global pandemic has escalated the symptoms of a risk society with all its attributes, described as a 'late modern complex mega risk'.³⁶²

5.2.3. The limits of platforms' intervention with freedom of expression

a. Community standards as a basis for moderation

Traditionally, fact-checking and critical reporting is a core task of the media itself. Today, major social media platforms also fact check to curb disinformation in the social discourse. Facebook, for example, strives to 'build a better-informed community and reduce the spread of false news using a variety of methods'.³⁶³ To do this, Facebook identifies possible false reports in a partially automated process and then submits these to an external service provider for fact-checking. This provider can then classify the truthfulness of the content on six levels from 'false' to 'lacking context' to 'true'. 'False reports' can be deleted as a measure of last resort if other community standards are violated at the same time and therefore require deletion as a legal consequence.³⁶⁴ Such a procedure is foreseen, for example, in the case of hate speech. According to paragraph 12 of the Facebook Community Standards, direct attacks 'on persons based on protected characteristics: ethnicity, national origin, religious affiliation, sexual orientation, caste, gender, gender identity, serious illness or serious disability' can be deleted as hate speech.³⁶⁵

³⁵⁷ Ross, L., David, G. and Pamela, H., 'The 'False Consensus Effect': An Egocentric Bias in Social Perception and Attribution Processes', *Journal of Experimental Social Psychology* Vol: 13(3), pp. 279–301, 1976; Wojcieszak, M., 'False Consensus Goes Online: Impact of Ideologically Homogeneous Groups on False Consensus', *The Public Opinion Quarterly*, 72(4), pp. 781-791, 2008.

³⁵⁸ Lamberty, P., Verschwörungserzählungen, *Infoaktuell*, Issue 35, 2020.

³⁵⁹ Frischlich, L. and Humprecht, E., 'Trust, Democratic Resilience and the Infodemic', Israel Public Policy Institute: Policy Paper Series, 2021.

³⁶⁰ Decker, F., Best, V., Fischer, S. and Küppers, A., 'Vertrauen in die Demokratie', Friedrich-Ebert-Stiftung, 2019.

³⁶¹ Giddens, A., *The consequences of modernity*, Stanford University Press, 1990.

³⁶² Giritli Nygren, K. and Olofsson, A., 'Managing the Covid-19 pandemic through individual responsibility: the consequences of a world risk society and enhanced ethopolitics', *Journal of Risk Research*, 23:7-8, pp. 1031-1035, 2020.

³⁶³ Paraphrased from: Facebook: 'Working to Stop Misinformation and False News'.

³⁶⁴ Facebook, [Business Help Center](#).

³⁶⁵ Facebook, [Objectionable Content](#), Facebook Community standards.

Box 2 Legal classification of the deletion practice in Germany

Due to the extent of Facebook's measures, it is not surprising that its community standards have been repeatedly reviewed by the national courts, for example, in Germany. German case law is by no means uniform in its approach. The Appeal Court (OLG) of Munich, for example, requires that 'the defendant's community standards must ensure that posts covered by the fundamental right of freedom of expression are not removed from the platform'. Section 12 of the Community Standards was declared void because it constituted an unreasonable restriction of the freedom of speech of users. The deletion of 'hate speech' can only be considered if the content is not protected by Article 5 (1) of the German Constitution and, for example, violates criminal law, copyright, or the protection of minors. Thus, an operator of a public information marketplace must ensure that lawful expressions of opinion are not deleted/blocked. With this, the OLG Munich positioned social media platforms as neutral intermediaries that have no right to interfere with the content they carry unless it is unlawful. The question remains whether ranking, prioritising and deprioritising decisions comply with this neutrality, or whether those choices should be left to the user as well, for example, by giving them options to choose among the various content selection algorithms.

However, the majority of courts do not consider Section 12 of the Community Standards unreasonable discrimination. Facebook's entrepreneurial interest includes ensuring that people with different backgrounds and different values and morals feel as comfortable as possible. In part, this is justified by the 'virtual domiciliary rights' of the platforms. In this light, even content deletion is, in principle, possible according to Section 12 of the Community Standards.

Sources: OLG München, Judgement of 18 February 2020, [18 U 3465/19 Pre](#); OLG München, Judgement of 7 January 2020, [18 U 1491/19 Pre](#); OLG Rostock GRUR-RW 2021, 5617 Rn. 6; OVG Bautzen BeckRS 2020, 26143 Rn. 46; OLG Hamm GRUR-RS 2020, 25382 Rn. 114; OLG München MMR 2021, 79 Rn. 74.

Deletions are now happening *en masse*. Facebook took action against approximately 26.9 million pieces of content globally for hate speech under the Community Guidelines in the fourth quarter of 2020.³⁶⁶ In comparison, under the German Network Enforcement Act, Facebook deleted or blocked 1,276 pieces of content in Germany in the 2nd half of 2020.³⁶⁷ With these numbers, it is not surprising that, in addition to the use of human 'cleaners' which check the content and delete it or restrict its visibility as necessary, automatic filtering systems are also used. Such filtering systems have long been used systematically to prevent copyright infringements. However, they are also increasingly used for other problems, such as removing terrorist propaganda or violent content. Facebook took action against 8.6 million pieces of content that contained terrorist propaganda in 2019.³⁶⁸ Facebook now achieves a proactive detection rate of 97.1% in the area of hate speech.³⁶⁹ This figure indicates the proportion of measures taken against content automatically recognised and not reported by a user.

b. Three interpretations of platforms' rights and duties

There are various narratives on platforms' powers, rights and competencies. In European legal cultures, private entities are not supposed to restrict the rights of other private individuals because the state,

³⁶⁶ Facebook, [Community Standards Enforcement Report](#), 4th Quarter 2020.

³⁶⁷ Facebook, [NetzDG Transparenzbericht](#), January 2021, p. 11.

³⁶⁸ Facebook, [Community Standards Enforcement Report](#), 1st Quarter 2021. Algorithms do not recognise the content directly but match images with those that have previously been marked as harmful. Images marked as malicious, so-called 'hashes', are compiled in a database forming the basis for the matching. The database is sometimes open to other companies in order to make the filtering as efficient as possible.

³⁶⁹ Facebook, [Community Standards Enforcement Report](#), 1st Quarter 2021.

has mandate to do so, in the appropriate legal procedure with judicial supervision.³⁷⁰ To the contrary, in the United States, the federal state is not allowed to restrict freedom of expression but private entities can (see the discussion on the Facebook Oversight Board's decision in Subsection 5.2.4). A third approach is for private entities to conclude a contract in which the contractual parties may mutually stipulate to restrict themselves in exercising certain fundamental rights. The Terms of Services is a collection of these contractual terms offered by the online platforms which users accept when they register. The contractual terms provide the entitlement of the platform to remove content even beyond that which would be illegal, for example, nudity or lawful forms of hate speech and depiction of violence, as well as disinformation. However, the statuses of users and platforms are not equal; users do not have any actual possibility to negotiate the terms. There have even been instances when the platform changed the terms without notification.³⁷¹ It is logical to handle platforms' Terms and Conditions under consumer protection law which has been harmonised in the EU by the Consumer Rights Directive and by the Directive on unfair terms in consumer contracts.³⁷² This approach has been applied by some German courts, albeit inconsistently. For example, the Munich High Court declared a section of Facebook Community Standards null and void and required posts protected by freedom of expression not be removed from the platform.³⁷³ Moreover, a legislative concept has been published in Germany to enact 'model Terms and Conditions' to address freedom of expression and its limits. Platforms should insert these into their Terms and Conditions. The model would protect platforms from liability for removing (or not removing) content. The subject matter of judicial supervision would extend only to whether the terms have been appropriately applied.

Deprioritising and prioritising, as well as the various types of labelling, are considered more minor interferences than removal. This is supported by the case law of the ECtHR (see above in Section 2.3), which found that labelling is an acceptable limitation on the freedom of expression because it does not prevent the speaker from conveying his or her ideas.

Adding trusted content has also been regarded as lesser interference than removal, although it can raise questions of fair competition and journalistic independence.

c. Demonetising

Organisations like Sleeping Giants and Check my ads proactively involve advertisers (the companies on whose behalf the advertisements are placed) and inform them that their products or services are advertised on pages disseminating disinformation. Advertisers are then aware and have the opportunity to approve or disapprove of the use of their adverts in such spaces. These 'brand safety' organisations claim that their activities led the Breitbart right radical portal to lose 90% of its revenues.³⁷⁴ They initiated the #StopHateForProfit campaign.³⁷⁵ Meanwhile, the pitfalls of this initiative have come to light: automatic ad placement is using keywords to avoid controversial material. This deprives not only socially harmful but also socially responsible content from funding.³⁷⁶ YouTube

³⁷⁰ By way of laws that have gone through the transparent legislative procedure, ensure foreseeability, have a legitimate aim, and constitute necessary and proportionate interference.

³⁷¹ Oremus, W., '[Facebook changed 14 million people's privacy settings to 'public' without warning](#)', *Slate*, 7 June 2018.

³⁷² Directive [2011/83/EU](#) of the European Parliament and of the Council of 25 October 2011 on consumer rights, OJ L 304 of 22.11.2011; Council Directive [93/13/EEC](#) of 5 April 1993 on unfair terms in consumer contracts, OJ L 95 of 21 April 1993.

³⁷³ OLG München, Judgement of 18 February 2020, MMR 2021, 71; OLG München, Judgement of 7 January 2020, MMR 2021, 79.

³⁷⁴ Jammi, N., '[I'm leaving Sleeping Giants, but not because I want to](#)', *Medium*, 11 July 2020.

³⁷⁵ Campaign [Stop Hate for Profit](#).

³⁷⁶ McCarty, J., '[Why brands aren't running ads on Black Lives Matter content](#)', *The Drum*, 22 June 2020.

encountered repeated turmoils when advertisers withdrew from the site for the same reason. YouTube tried to 'clean' its offer and deleted several channels, disappointing many of its content creators.³⁷⁷

Demonetisation is a powerful tool influencing the content on offer. Demonetised videos cannot generate income for the platform and would therefore be suppressed from viewership and get caught in a downward spiral of diminishing visibility. While this is the whole purpose of demonetising harmful content, the algorithmic selection system of 'problematic' content also excludes innocent videos from attracting advertising revenues.³⁷⁸

5.2.4. The extent of state responsibility

As discussed in Section 2.3, the European Convention on Human Rights holds that states have a positive obligation to ensure that individuals can exercise their human rights.³⁷⁹ This means that in addition to refraining from interfering with individuals' human rights, states are expected to: a) pass necessary measures enabling individuals to practically exercise their rights, and b) take steps to protect human rights if they are violated by another individual (or authority).

The latter brings us to the 'horizontal effect' of human rights, in other words, the Convention's scope to relationships between private individuals.³⁸⁰ Horizontal effect means that private actors have to respect the fundamental rights of each other. Ultimately, this obligation can be enforced by the courts. This is therefore a triangular relationship between the state and two private actors.

The European Charter of Fundamental Rights also seems to have horizontal effect, as shown by a CJEU decision³⁸¹ and academic authors.³⁸²

In the **United States**, this horizontal effect of human rights is not applied. Private entities are not bound by the First Amendment and may therefore restrict the rights of other private entities. Although, in some cases, the right to exercise free speech on public premises was granted.³⁸³ **German** courts have explicitly recognised this right and there is extensive case law relating to freedom of expression (Article 5 (1), sentence 1, German Constitution). According to established case law of the German Federal Constitutional Court, fundamental rights can have horizontal effect by way of the indirect third-party effect. This means that civil law norms that use broad language are interpreted in the light of fundamental rights.³⁸⁴ If there are two possibilities to interpret a norm, the most favourable to fundamental rights should be chosen. In Germany, this view has become established in the fundamental rights doctrine. The exact extent of the legal requirements of social network operators in the context of binding contracts vis-à-vis users which affect their fundamental rights, has not yet been

³⁷⁷ Alexander, J., 'YouTubers fear looming 'apocalypse' after child exploitation controversy', *The Verge*, 20 February 2019.

³⁷⁸ Kumar, S., 'The algorithmic dance: YouTube's Adpocalypse and the gatekeeping of cultural content on digital platforms', *Internet Policy Review*, Vol. 8, Iss. 2, pp. 1-21, 2019.

³⁷⁹ Feld, H., *The Case for the Digital Platform Act*, Roosevelt Institute, May 2019; Thierer, A., 'The Perils of Classifying Social Media Platforms as Public Utilities', *CommLaw Conspectus - Journal of Communications Law and Policy*, Vol. 21, No. 2, 2013.

³⁸⁰ Akandji-Kombe, J.-F., 'Positive obligations under the European Convention of Human Rights: A guide to the implementation of the European Convention on Human Rights', *Human Rights Handbooks*, No.7, 2007.

³⁸¹ Joined cases C-569/16 and C-570/16 *Stadt Wuppertal v. Maria Elisabeth Bauer and Volker Willmeroth v. Martina Broßonn*, Judgement of 6 November 2018, discussed by Leczykiewicz, D., 'The Judgement in Bauer and the Effect of the EU Charter of Fundamental Rights in Horizontal Situations', *European Review of Contract Law*, 16(2), pp. 323-333, 2020.

³⁸² Frantziou, E., 'The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality', *European Law Journal*, pp. 657-679, 2015.

³⁸³ *Marsh v. Alabama*, 326 U.S. 501 (1946); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980).

³⁸⁴ Bundesverfassungsgericht, *BVerfGE 7, 198*, Judgement of 15 January 1958.

conclusively discussed.³⁸⁵ In parts of **French** jurisprudence, however, there is a tendency to directly apply ECHR rights.³⁸⁶ The **Hungarian** Constitutional Court held that the state has a positive obligation to ensure the necessary conditions for democratic public opinion remain operative,³⁸⁷ for example, through the public service media.³⁸⁸ The **Swedish** Supreme Court found that human rights rules may, in some circumstances, affect the assessment of a private party's obligation to compensate for pure economic loss.³⁸⁹

In the ECtHR's interpretation of human rights, companies can also benefit from certain human rights, but this is by no means obvious.³⁹⁰ Social media platforms provide not their own content but user-generated content. Even though they organise and moderate, the content selection is not a result of editorial decisions but guided by their practical and financial interests to 'maximise user satisfaction' or rather user engagement for 'advertiser satisfaction'. In sum, social media platforms' activity does not fall under the protection of press freedom or freedom of expression because they are not the 'speaker' of the content. At the same time, social media platforms are obligated to respect the human rights of individuals and states are obligated to step up against human rights violations caused by social media platforms, including illegitimate restrictions of freedom of expression. In contrast, in the US, private actors are allowed to restrict the free speech rights of individuals. By restricting the speech of some of their customers, private actors can effectively form the content that they convey into the outside world.³⁹¹

In other parts of the world, the horizontal effect of human rights is not as accepted as in the European Union. However, an often-cited United Nations instrument, the 'Guiding Principles on Business and Human Rights', recommends that corporations respect human rights.³⁹² Facebook has stipulated adherence to these principles in its Corporate Human Rights Policy.³⁹³ The recently issued decision of the Facebook Oversight Board also based its arguments on global international human rights instruments.³⁹⁴ The Board's recommendations on how to amend the Community Standards of Facebook are not binding on Facebook, but it nevertheless has to react to them.³⁹⁵ The decision approved Facebook's earlier resolution to suspend the account of Donald Trump, outgoing President

³⁸⁵ Reinhardt, J. and Yazicioglu, M., 'Grundrechtsbindung und Transparenzpflichten sozialer Netzwerke', Taeger, J. (Hrsg.), *Den Wandel begleiten – IT-rechtliche Herausforderungen der Digitalisierung*, 2020, p. 819.

³⁸⁶ For example, decisions relating to controlling the content of contracts: Cass. Civ. 3e 6.3. 1996, D 19 96, 167; Cass. soc. 12.01.1999, D 1999, 645; Exercise of religious freedom relating to the exercise of the contractual rights, arising from a rental contract: Cass. Civ. 3e 18 December 2002, Bull. Civ. III, no. 262.

³⁸⁷ Hungarian Constitutional Court, [30/1992. \(V. 26.\)](#).

³⁸⁸ EKINT, [Alkotmányjog](#), 2005.

³⁸⁹ Stockholm District Court, [NJA 2015](#), Judgement of 17 December 201, p. 899. See also: Andersson, H., *Ansvarsproblem i skadeståndsrätten*, Uppsala, 2013, p. 618 ff.; Kleineman, J., Konstitutionell skadeståndsrätt, *Juridisk Tidskrift*, 2018-19, p. 23 ff.; and Schultz, M., 'Nya argumentationslinjer i förmögenhetsrätten: Rättighetsargument', *Svensk Juristtidning*, 2011, p. 996 ff. (All discussing the horizontal application of the European Convention of Human Rights and Fundamental Freedoms.)

³⁹⁰ Emberland, M., [The Human Rights of Companies: Exploring the Structure of ECHR Protection](#), Oxford Scholarship Online, 2012.

³⁹¹ Heldt, A., [Trump's very own platform? Two scenarios and their legal implications](#), *JuWissBlog* Nr. 3/2021 of 11 January 2021.

³⁹² II.a. United Nations, [Guiding Principles on Business and Human Rights](#), 2011.

³⁹³ Facebook, [Corporate Human Rights Policy](#), 2021.

³⁹⁴ Facebook Oversight Board, ['Oversight Board upholds former President Trump's suspension, finds Facebook failed to impose proper penalty'](#), May 2021. The Board's is not a public authority but its decision may be relevant as an opinion of scholars and experts. It also might influence policies of Facebook.

³⁹⁵ Article 4, Charter of the [Facebook Oversight Board](#).

of the United States. The decision was based on the Community Standards of the platform but also expressed that they were not a basis for indefinite suspension.³⁹⁶

In sum, the Member States of the European Convention on Human Rights have an obligation to protect freedom of expression even against interference from private corporations or individuals. This has been a requirement set out in ECtHR jurisprudence and supported by that of the Member States, as examined in Section 2. Besides the Council of Europe's jurisprudence, public international law also acknowledged that private corporations could have human rights obligations.³⁹⁷ However, private corporations are generally not obliged to create a rule or an institution for this purpose (as no 'positive obligation' explicitly applies). If they were to, it would have the benefit of promoting pluralism and thus generally better serve the freedom of expression.

a. Nudging and public interest advertising

It is generally acceptable under international law for states to restrict the liberty of its citizens to protect life and health, for example, by ordering compulsory vaccination,³⁹⁸ the use of the safety belt, or restricting smoking, etc. In the realm of speech, setting compulsory rules would violate individual freedoms. However, a friendly reminder to avoid harmful activities by state-sponsored communication or state-induced social media nudging, would remain within the limits of proportionality. Public interest advertisements have historically been used in legacy media, including billboards and television advertisements, and still are.

Using new technology tools might make public interest advertising particularly effective (based on the assumption that micro-targeting is effective, but more research needs to be done in this area). Micro-targeting, based on an individual's personal characteristics and circumstances, can address only those people to whom the information is relevant and thus spare other citizens the 'superfluous' information. But micro-targeting is also regarded as an intrusive and polarising method of persuasion that carries a high risk of undercover manipulation.³⁹⁹ Still, the current draft of the DSA does not prohibit or even restrict any type of micro-targeting. It merely sets broad expectations for advertising transparency (Article 24 (c) and 30 (2) (c) DSA). Provided that micro-targeting remains a legitimate instrument for market actors, states should undoubtedly use or invoke it for educational purposes.

Nudges are somewhat similar but smaller information prompts to users to influence their decision on taking a specified action or not, such as posting. In their seminal book, Thaler and Sunstein defined a 'nudge' as 'any aspect of the choice architecture that has the capacity to change people's behaviour in a predictable manner but without preventing any other alternatives or altering their economic incentives'.⁴⁰⁰ Platforms have long been using nudges to support users in making better decisions. For example, Twitter discourages abusive tweets by analysing and identifying crude language in a user's posts and then re-asking the user if they were sure they wanted to publish it.⁴⁰¹ Researchers found that

³⁹⁶ See an analysis of the decision: Bayer, J., ['The Power of Softness – The Trump Decision of the Facebook Oversight Board'](#), 2021.

³⁹⁷ See, for instance: Clapham, A., *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006; Knox, J.H., ['Horizontal Human Rights Law'](#), 102 *American Journal of International Law*, 2008.

³⁹⁸ E.g. childhood vaccination against polio, hepatitis. See: *Vavříčka and Others v. the Czech Republic*, App. No. [47621/13](#), 8 April 2021.

³⁹⁹ Bayer, J., ['Double harm to voters: data-driven micro-targeting and democratic public discourse'](#), *Internet Policy Review*, 9 (1), 2020.

⁴⁰⁰ Thaler, R.H. and Sunstein, C., *Nudge*, Yale University Press, 2008.

⁴⁰¹ Hern, A., ['Twitter launches prompt asking users to rethink abusive tweets'](#), *The Guardian*, 6 May 2021. See further research on nudges by: Acquisti, A., Adjerid, I., Balebako, R., Brandimarte, L., Cranor, L.F., Komanduri, S. et al., ['Nudges for privacy and security: understanding and assisting users' choices online'](#), *ACM Comput. Surv.* 50:44, 2017.

a simple accuracy reminder nearly tripled the level of discern for truthfulness of content and influenced participants' sharing intentions.⁴⁰² Still, more research is needed on the efficacy of nudges.

5.2.5. The role of civil society

Communication platforms could not operate without the active contribution of users. Platforms build upon user-generated content and the liking, sharing and commenting activity of users. One cause of the disinformation crisis is the inclusiveness of social media platforms allowing anyone to publish and interact without entry barriers. Regulation of traditional broadcasting and the press previously addressed media content providers. Today, all users are content providers yet are not subject to the enhanced responsibility of broadcasters.

Should this active stake of citizens in (de)forming the post-truth information landscape be translated into legal responsibility or liability? Sharing illegal content is prohibited but can citizens have obligations relating to their online behaviour beyond the existing legal framework? The draft AIA regulation⁴⁰³ provided certain obligations for users of high-risk AI systems to divert and minimise risks (Article 29), including ensuring that input data is relevant, monitoring the system operation and reporting serious incidents. It is also unclear whether a social media platform is an AI system and if so, who are its users - the platform users or the platform operators?

Even though social research has found that fake, divisive, sensational content or information about antisocial behaviour is more likely to be shared than other types of content,⁴⁰⁴ users nevertheless have the right to express false information, to believe in conspiracy theories, to like and share them, as long as their actions are not illegal.⁴⁰⁵ Therefore, the fundamental right to freedom of expression limits the possibility of users having legal responsibility for online content so far as the content is lawful.

Reliance on people's self-regulation also presupposes that an overwhelming majority of people are well-informed and capable of following moral commands. This leads us to question whether users can be obliged to undertake media and information literacy education to become equipped with the necessary knowledge. For example, if somebody repeatedly shares disinformation or hate speech, should that person receive targeted information to inform them of the threats of disinformation and the scientific or true facts debunking their misbeliefs?⁴⁰⁶ By using micro-targeting, disinformants will receive targeted educational information about the falsity they sought to spread. This turns their weapon (of micro-targeting) on its head. However, if micro-targeting is regarded as too intrusive, then its application should be restricted both for the purposes of political advertising and for education.

Nevertheless, nudging for educational purposes might legitimately be used for health literacy, diversity of news consumption, financial literacy and informational literacy without being linked to political issues.

⁴⁰² Pennycook, G., McPhetres, J., Zhang, Y., Lu, J. G. and Rand, D. G., '[Fighting COVID-19 Misinformation on Social Media: Experimental Evidence for a Scalable Accuracy-Nudge Intervention](#)', *Psychological Science*, 31(7), pp. 770–780, 2020.

⁴⁰³ [Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules On Artificial Intelligence](#) (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, Brussels, COM(2021)206 of 21 April 2021.

⁴⁰⁴ Bøggild, T., Aarøe, L. and Petersen, M., '[Citizens as Complicits: Distrust in Politicians and Biased Social Dissemination of Political Information](#)', *American Political Science Review*, 115(1), pp. 269-285, 2021.

⁴⁰⁵ Belief in conspiracy theories and other irrational, disinforming concepts fall under the protection of freedom of conscience and protection of privacy. Discussion of these is beyond the scope of this paper.

⁴⁰⁶ For example, platforms are able to identify persons who are likely to share disinformation and conspiracy theories even if their social network indicates that these are not their core beliefs. (Targeted information cannot change core beliefs but may cause minor changes in attitude).

A further question is how protective state regulation can be in safeguarding the right to personal data of its citizens? The spread of disinformation is partly a consequence of personalised targeting made possible by the generous use of personal data. The current consent rules do not provide adequate protection against personalisation. Habitual consenting due to a lack of relevant information and consenting 'fatigue' feed the vicious cycle of the attention-harvesting business model. The collection and monetisation of personal data could be more restricted by law rather than dependant on the consent of data subjects, similar to the obligations of using the safety belt, compulsory vaccination, or restrictions on smoking.

5.2.6. Citizens as a community

The individual right to freedom of expression can be understood only in the context of an audience. Suppose someone sings and there is nobody around to hear it or they write but nobody reads it; the right to freedom of expression will not have been activated. Communication presupposes at least two persons: a sender and a receiver.⁴⁰⁷ Therefore, the right to freedom of expression is a civil and political right; it is a right of social or civic participation. The limits of one's freedom of expression lie where another's starts. Still, content that shocks, offends or disturbs is protected.⁴⁰⁸ Content that decreases others' freedom to participate in social life⁴⁰⁹ or aims to deny others their enjoyment of the same rights, is not. Such statements would be an abuse of the right to freedom of expression.⁴¹⁰

Social media platforms connect people and communities to an extent not known in the history of humankind. It brings together communities that have not met before and re-organises traditional community structures. With the help of algorithms, people form new groups and networks, crossing traditional community boundaries. The variations of groups that may form are unlimited, based on interests, values or any other characteristics. This is a fantastic achievement and opportunity for humanity: every individual has several options to find communities that fits their interests and needs. The opportunity to connect people from different social groups gave a voice to suppressed minorities including gender minorities and victims of abuse. But the same feature also amplified the voice and opened up organisation of their oppressors and abusers.⁴¹¹

While individual freedoms should be utmost protected, communication rights are exercised in the context of a community. In this age of online platforms, especially in the light of global social media networks, all users are interconnected. Their behaviour influences other users' experiences. There are no longer walled communities – the pandemic is the best demonstration of this.⁴¹²

According to a corresponding constitutional principle of South Africa, called Ubuntu, a person can only be a person through others.⁴¹³ This ancient African tradition has been explicitly included in the interim Constitution of 1993 to set the tone for socio-political transformation in South Africa. The aim was to

⁴⁰⁷ Nöth, W., 'Human Communication from the Semiotic Perspective', Ibekwe-SanJuan, F. and Dousa, T.M. (eds.), *Theories of Information, Communication and Knowledge. A Multidisciplinary Approach*, 2014, pp. 97-119.

⁴⁰⁸ *Handyside v. UK*, App. No. [5493/72](#), 7 December 1976.

⁴⁰⁹ Waldron, J., *The Harm in Hate Speech*, Cambridge, Massachusetts; London, England: Harvard University Press, 2012.

⁴¹⁰ ECtHR, [Guide on Article 17 of the European Convention on Human Rights – Prohibition of abuse of rights](#), 2020.

⁴¹¹ Bayer, J. et al., '[Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States](#)'. Study for the Policy Department C: Citizens' Rights And Constitutional Affairs, 2019.

⁴¹² Technically, communities can still exclude that other possibilities have access to them, for example, China does not allow Facebook and Google to operate in its territory.

⁴¹³ Literally translated from '*motho ke motho ba batho ba bangwe/umuntu ngumuntu ngabantu*'. Bennett, T.W., [Ubuntu: an African equity](#). *Potchefstroom Electronic Law Journal (PELJ)*, 14(4), 29-61, 2011.

build a bridge in a deeply divided society to bring reconciliation and immediate peace.⁴¹⁴ The values of ubuntu mean respect for others, inclusivity and compassion.⁴¹⁵ While one might assume this favours the collective as opposed to the individual, it also means tolerance of and respect for those with whom one disagrees.⁴¹⁶

The 'ubuntu' as a constitutional understanding of individual and community rights conveniently fits the context of the social media environment. Social media fulfils a community-generating function and places communication into the setting of a 'global village'.⁴¹⁷ Social media users seek feedback from their communities and a connection to a familiar narrative about their world.⁴¹⁸ From the criminal law perspective, ubuntu corresponds to restorative justice, the opposite of the retributive justice system. Restorative justice seeks to promote social cohesion by inducing reconciliation between the offender, victim and community at large.⁴¹⁹

In the context of the social media environment, ubuntu teaches that the rights of individuals are not fully enjoyed without respect for the right of all other individuals in the community. It also shows that a community can self-regulate, enforce respect for the rights of its members and maintain social cohesion, without punishing offenders. The instruments of discipline are restoration, apology and temporary exclusion from the community.

In other words, defending communities against disinformation and manipulative or discriminative content should be regarded as legitimate aim if such content distorts the information environment, divides societies and threatens the democracy. The purpose of interference would be, ultimately, to defend individual rights. This attitude may urge policymakers to find appropriate, inclusive ways of amending anti-social behaviour rather than striving for its criminalisation.

At the same time, this approach may have its limits against the industrial-scale, financially-motivated disinformation campaigns. However, reinforcing online communities and treating disinformants, especially influencers, according to these principles might make our societies more resilient to disinformation, manipulation and propaganda.

In sum, disinformation is 'censorship through noise'.⁴²⁰ It does not violate the freedom of expression - its actors may even invoke their right to freedom of expression to post or spread it - but does violate the right of others to access informative social discourse.

⁴¹⁴ [Azanian People's Organisation \(AZAPO\) & Others v. President of the Republic of South Africa](#), 1996, (4) SA 671 (CC) (Short citation: (2005) 20 SAPL 335).

⁴¹⁵ Bennett, T.W., [Ubuntu: an African equity](#), *Potchefstroom Electronic Law Journal (PELJ)*, 14(4), 29-61, 2011, p. 9.

⁴¹⁶ [Masetlha v. President of the RSA](#), 2008, 1 SA 566 (CC).

⁴¹⁷ McLuhan, M., *Understanding Media. The extensions of Man*, MIT Press, 1994. See also: McLuhan M, *The Gutenberg Galaxy*, Toronto, 2011.

⁴¹⁸ Wardle, C. and Derakhshan, H., '[Information Disorder: Toward an interdisciplinary framework for research and policy making](#)', Council of Europe report, DGI (2017) 09, 2017.

⁴¹⁹ Bennett, T.W., [Ubuntu: an African equity](#), *Potchefstroom Electronic Law Journal (PELJ)*, 14(4), 29-61, 2011.

⁴²⁰ Pomerantsev, P., Nagy-Mohácsi, P. and Grazda, B., '[A new policy paradigm from the LSE Maryam Forum: 5. Treat disinformation as a systemic risk to democracy](#)', 19 January 2021.

Table 3: Risks of non-interference

Risks of non-interference	Risk to public discourse	Risk to democracy	Risk to individual human rights
Platforms apply too many bold restrictions against disinformation which do not respect users' rights	✓	✓	✓
Due to uneven application of the platform standards, national islands of disinformation and propaganda remain	✓	✓	
Microtargeted political ads polarise societies and reduce democratic public discourse	✓	✓	✓
Algorithms dominate users' choices. Users cannot develop critical thinking	✓	✓	✓
The European common public information space does not develop and help EU democracy and integration	✓	✓	
Changes in the management of online platforms cause changes in the value choices of platforms which are reflected in their content moderation decisions	✓	✓	✓
The network of populist leaders becomes stronger and builds alliances with Chinese, Russian and Trumpist political forces	✓	✓	
Captured media lets disinformation and populist propaganda thrive among national and regional boundaries	✓	✓	✓
Manipulation of elections and cyber-attacks, especially in the post-soviet zone		✓	

Source: Authors of the study

5.2.7. The role of the EU

The European Union is founded on 'the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'.⁴²¹ The Union celebrates the diversity of its citizens and nations. Sound public discourse is the cornerstone of democracy and the basis for Europe's internal and geopolitical stability. Disinformation threatens social cohesion, security, fundamental rights, democracy, and the rule of law within the Union.

Social media platforms enjoy the freedom to conduct business⁴²² but they are not subject to individual fundamental rights. Therefore, restrictions of their freedom are subject to less scrutiny than restrictions of the rights and freedoms of individuals. The listed threats posed by disinformation are legitimate bases for an intervention proportionate with entrepreneurial freedom, but this must be on a rational

⁴²¹ Article 2, Treaty on European Union: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.'

⁴²² Article 16, [Charter of Fundamental Rights of the European Union](#), 2012/C 326/02.

basis (rather than based on strict scrutiny). The EU has strong competences in the fairness of economic competition and protection of its consumers.⁴²³

In particular, financial disinformation may be a convenient entry point for EU regulation to protect EU markets. Algorithm developers of financial institutions share an interest in preventing abusive bots from misleading market predictions and spreading disinformation among potential customers.⁴²⁴ In the field of health literacy, the EU also has explicit competences parallel with Member States.⁴²⁵

The EU aims at creating a digital society, including creating, supporting and facilitating a common European information landscape. Because of the typically transborder (even global) services of social media platforms, this goal is better achieved at the transnational level than the Member state level, even if there are differences between the Member States in their values and regulations. States with smaller populations and less widely spoken languages have expressed concerns that Facebook is less cooperative with their requests.⁴²⁶ An EU-wide regulation may better shield against such loopholes.

Disinformation campaigns often directly target the credibility of the European Union as a whole. This is another basis for tackling disinformation at the transnational level.

The European Union is in a position to negotiate with other global powers, particularly the United States, to reach a transatlantic agreement on regulatory issues. In addition to being an item on the EU agenda,⁴²⁷ transnational negotiations are also on the table of American experts.⁴²⁸ Despite the wider boundaries that the American tradition grants freedom of speech, a number of recent legislative initiatives were taken to regulate online platforms within the United States.⁴²⁹

⁴²³ Articles 3 and 4 of the Treaty on the Functioning of the European Union.

⁴²⁴ Tardelli, S., Avvenuti, M., Tesconi, M. and Cresci, S., 'Characterizing Social Bots Spreading Financial Disinformation', Meiselwitz, G. (eds), *Social Computing and Social Media. Design, Ethics, User Behavior, and Social Network Analysis*, HCII 2020, Lecture Notes in Computer Science, vol 12194, Springer, 2020.

⁴²⁵ Article 168 of the Treaty on the Functioning of the European Union.

⁴²⁶ Written reports relate to Spanish language disinformation within the US: Bergengruen, V., "Ya Basta." *A New Coalition Calls on Facebook to Tackle the Spanish Misinformation Crisis*, *Time*, 16 March 2021. The referenced oral evidence was expressed during the first panel of a [workshop on Hate Speech and Platform Regulation](#).

⁴²⁷ Joint Communication to the European Parliament, the European Council and the Council, [A new EU-US agenda for global change](#), 02 December 2020.

⁴²⁸ Wheeler, T., 'Time for a U.S.—EU digital alliance', Report of Brookings, 2021.

⁴²⁹ McCabe, D. and Kang, C., 'As Congress dithers, States step in to set rules for the internet', *The New York Times*, 14 May 2021.

6. CONCLUSIONS

6.1. The information ecosystem

Previous research found that disinformation campaigns are becoming more organic and better embedded into the societies of EU Member States.⁴³⁰ The campaigns have partly been based in radical social groups within the European Union and the mainstream media of some authoritarian Member States.

Ideas, opinions and even false facts are protected by the right to freedom of expression, even if they are disturbing, shocking or other people find them ridiculous. These expressions are signs of processes going on in societies, syndromes of social tensions, and systemic problems in the informational landscape. Fighting the content would be like treating the symptoms while letting the disease worsen. Previous studies⁴³¹ discussed the need to address social tensions as a root cause of susceptibility to disinformation and its dissemination, as well as the psychological mechanism of these.⁴³² This study has focused on the deeper structural level of public discourse and explored alternative ways to amend it to achieve an informational landscape that fulfils the needs of democratic societies and realises the social goal of freedom of expression, i.e. to maintain a diverse, inclusive and informative democratic public discourse.

6.1.1. The structure of the online communication sphere

As opposed to the legacy media environment, no entry barriers hinder publication on the internet. All users can have access to masses of other users, especially through social media platforms. However, the openness of the internet has become significantly clustered in recent decades in the following ways:

- a) **Content** is being ranked, prioritised or deprioritised according to criteria defined by platform providers. Some content is removed based on their Community Standards and a fraction of that is removed based on legal requirements.
- b) **Users** are also clustered based on personal characteristics known to social media platforms, partly for the purposes of content ranking and advertisement targeting. In order to increase transparency of the informational environment, political figures and influencers are subject to enhanced responsibilities by some platforms now.

As to a), labelling, deprioritising or prioritising content is significantly more compatible with the freedom of expression than content removal. Currently, the commitment to label and deprioritise or prioritise harmful but not illegal content is self-regulated, and the DSA would maintain this position. Given that labelling, prioritising and deprioritising interfere with freedom of expression to a lesser extent than removal, the former could also become legal obligations provided by DSA, as a content-friendly form of notice-and-action. The pitfall of enforcement would be, similar to that of content blocking or removal, judging the appropriateness of the action: how should platforms establish whether the content was indeed harmful? In order to protect users' rights to freedom of expression

⁴³⁰ Bradshaw, S., Bailey, H. and Howard, P.N., '[Industrialized Disinformation: 2020 Global Inventory of Organized Social Media Manipulation](#)', 2021, p.11. See also: Bayer, J. et al., '[Disinformation and propaganda – impact on the functioning of the rule of law and democratic processes in the EU and its Member States: 2021 update](#)', Study for the European Parliament, 2021.

⁴³¹ Bayer, J. et al., '[Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States](#)', Study for the European Parliament, 2019.

⁴³² Bayer, J. et al., '[Disinformation and propaganda – impact on the functioning of the rule of law and democratic processes in the EU and its Member States: 2021 update](#)'. Study for the European Parliament, 2021.

and access to information as well as procedural rights, efforts should be made to ensure the accuracy of the decision and availability of judicial review. The protection of users' procedural rights and a requirement for judicial review in cases of illegal content blocking and removal are provided for in the draft DSA. It is crucial that the DSA's provisions are not diluted in the legislative process; rather, even more safeguards should be added (see recommendations in Chapter 7). To ensure accuracy of the decision at the point when it is taken (as opposed to later in a review process), it is recommended that platforms employ 'Freedom of Information Officers' to supervise content moderation decisions and prevent violations. At least very large online platforms, whose primary service conveys content that falls under the freedom of expression and may form part of public discourse,⁴³³ should be subject to this requirement.

Regarding the clustering of users (see point b) above), some online platforms have complex systems for the verification of identities. Facebook uses such a system even for its ordinary users. Combining their email address and telephone number but not going through real identification process, users must display a high likelihood of being a natural person. An authentic identification process is, however, required from influencers, who also regard this as an opportunity to be able to develop a credible brand. Ironically, the desire to be a 'verified user' has generated fraud schemes specialised for Instagram⁴³⁴ offering to buy false 'likes' and 'followers' as an apparently lawful service.⁴³⁵ Identifying advertisers, especially political ones, is already a practice of Facebook and Google.

6.1.2. The business model

The structure of the platform-centred content environment is evolving around a specific business model of the information ecosystem. Advertisements have driven the commercial media industry since its birth, but technology has made advertising significantly more efficient. Advertising spaces are sold for the highest bidder based on the user's assumed preferences. The users' reactions feed the personalisation system with further information to better place the next advertisement. In order to increase the value of their advertising spots, online platforms seek to maximise user engagement, for which, again, personalised recommendations are used by the ever-improving self-learning algorithms. The more information known about the user, the better the personalisation can be and the higher the user engagement will be, with the result of greater advertising revenues and further data collection. This infinite cycle preys on users' attention and fallibility without serving users' genuine interest in receiving trustworthy, credible and high-quality information. The attention of users is a precious and scarce asset and a prerequisite for productivity and happiness. Media overconsumption is a health risk with potential to cause complications in school and work life.

Advertising in the traditional media is restricted by law in several ways to protect consumers as television viewers.⁴³⁶ The table below shows EU rules on advertising (Member States were free to lay down more detailed or stricter rules) and how they could apply to online platforms, as well as whether there is already a regulatory draft provision with a similar purpose.

⁴³³ Excluding, among others, platforms exclusively devoted to music, but including YouTube.

⁴³⁴ Big Think, ['How to get verified on all major social channels'](#), 11 February 2021.

⁴³⁵ Likes.io, [Buy Instagram followers with instant delivery](#); Likes.io, [Buy Instagram views with instant delivery](#).

⁴³⁶ Articles 19-23 AVMSD.

Table 4: Legal restrictions in EU advertising law and their possible transplantation to a platform environment

Principles	Legacy media	Means Application/Transplantation of Platform media to	Platform regulation
Separation principle	Art 19 AVMSD	To clearly distinguish ads from organic content	Art 24 DSA
	Art 19 (2) AVMSD	To prohibit or manipulate subliminal techniques	Art 5 (1) (a) AIA - narrowed to AI systems causing harm
Respect for authors' rights and content perception	Art 20, limitation of interruptions	To prohibit ads between the lines in an article, just above and below	-
Advertising prohibition or restriction of certain products and services	Arts 21-22	To prohibit medicine, drugs, alcohol, dangerous goods To restrict political and public issue content	-
Limiting advertising to proportion in time	Art 23, max 20%	To limit ad proportion, e.g., % of space on the screen at any point of scrolling	-
Targeting limitations	Art 21, minors	To limit targeting criteria for micro-targeters, protecting vulnerabilities	-
Transparency of advertiser	Sponsorship	To require advertiser transparency	Art 24 DSA
Transparency	-	To require transparency of targeting criteria	Art 24 DSA
Responsibility cross-value-chain	-	To hold ad agencies and creative contributors responsible for manipulative ads	-
Transparency of ad spending	-	To require transparency of the price paid by the advertiser and the remuneration paid to the publisher	Art 5 (g) DMA – only upon request

Source: Authors of the study

Facebook's staggering 35% profit margin⁴³⁷ is an invitation for regulatory interference with the advertising market. Timid initiatives have emerged in past years about changing the advertising-based business model or at least amending to how it works, such as restricting behavioural advertising targeting children⁴³⁸ or restricting targeted advertising generally.⁴³⁹ Facebook replaced its opening message 'It's free and always will be' with 'It's quick and easy' in August 2019. This may be a sign that they have recognised the unsustainability of the advertisement-based revenue system.

The authors have found that the attention-based model is partly responsible for spreading sensational, anti-scientific and anti-establishment disinformation. Demonetising disinformation would be a crucial step in 'cleaning' the ecosystem from the harmful effects of automatic, targeted advertising (described in Chapter 5). It has proved to be a tool with high potential, as shown by the 'Adpocalypses' on YouTube.⁴⁴⁰ However, applying automatic filtering against ad placement has suppressed legitimate content such as BLM or LGBT videos. Assuming there will be more sophisticated differentiation, including human oversight, the demonetisation tool may oblige large companies to attach advertisements only to trustworthy content.

The same tool may support professional media which has lost its former direct relationship with advertisers. Social media platforms' aggregating, organising and redistributing activity has put a wall between media content and advertisers, and traditional (professional) media's advertising revenue has dramatically fallen.⁴⁴¹ European newspapers are somewhat adapting to the new media economy by attracting a stable online subscriber basis.⁴⁴² Among the plans to support professional media companies, an online platforms' solidarity 'tax' has been extensively discussed in the past year.⁴⁴³ Several EU Member States have already introduced various forms of taxes on digital services, among them on digital advertising.⁴⁴⁴ A tax on Facebook and Google for their sale of advertisements was passed in Maryland, US.⁴⁴⁵ Alternatively, advertisers could 'chip in' by spending a certain quota of their advertising budget directly at news media companies such as newspapers.⁴⁴⁶

Summarily, the attention-based, data-driven business model relies on the availability of personal data, liberal advertising possibilities and the power of platforms to define algorithmic ranking without restrictions. Regulation should tackle each of these conditions to create a sustainable media environment that serves the public.

6.1.3. Ways of providing trusted information: creating pillars of trust

One way of correcting the informational environment without unjustified restriction of the individual's right to freedom of expression is to organise a robust network of trusted content providers. In this study, three pillars are recommended to support the architecture of public discourse.

⁴³⁷ MacroTrends, '[Facebook profit margin 2009-2021](#)', 31 March 2021.

⁴³⁸ Global Action Plan, '[End surveillance advertising to kids](#)'.

⁴³⁹ Edelman, G., '[Why don't we just ban targeted advertising?](#)', *The Wired*, 22 March 2020.

⁴⁴⁰ YouTube Fandom, '[YouTube Adpocalypse](#)'.

⁴⁴¹ Pew Research Center, '[Newspapers Fact Sheet](#)', 9 July 2019.

⁴⁴² Jenkins, J., '[Publish less, but publish better: pivoting to paid in local news](#)', Reuters Institute for Study of Journalism, 24 September 2020.

⁴⁴³ BBC, '[Australia news code: What's this row with Facebook and Google all about?](#)', 18 February 2020.

⁴⁴⁴ Asen, E., 'What European OECD Countries Are Doing about Digital Services Taxes', 25 March 2021.

⁴⁴⁵ McCabe, D. and Kang, C., '[As Congress dithers, States step in to set rules for the internet](#)', *The New York Times*, 14 May 2021.

⁴⁴⁶ This would allow the 'solidarity tax' to be directly channelled into the European Public Service Media system. See Recommendations in Section 7.

a. European Public Service Media

To move towards quality information, it is highly recommended to organise transnational, European public service media services. The 'market failure' argument was traditionally cited as a justification for public service media, meaning that the market mechanisms will not produce quality content (merit goods). However, there are several innovative ways to achieve this. Chapter 5 described some emerging concepts and crucial questions concerning how to achieve a quality European Public Service Media. The issues to be addressed are:

- a) Supervision of public service media. Powers should be divided between the Member States and social interest groups.
- b) Financing of public service media (reliance on advertising is contraindicated).
- c) Ownership of the public service media. Private ownership with a public mandate and funding is also an option. A network of national media institutions with a central, operative, editorial room should also be considered.

Chapter 7 on Recommendations details the alternatives and assesses the risks and opportunities.

b. Media networks

Disinformation actors are increasingly organised with horizontal and vertical networks and tentacles infiltrating democratic societies. The European news media landscape is fragmented, and competitive and media companies struggle to make ends meet (with the exception of some successful market segments).

As an enhanced fact-checking and source-verification scheme, news media companies should be urged to create professional networks which, similar to guilds, provide certificates of authenticity to authentic news companies and their content.

'Increased cooperative behaviour in response to threats decreases the effectiveness of authoritarian pressure tactics. A purely competitive approach to the information system allows malign actors to divide and rule.'⁴⁴⁷

The network might also support media companies with further services, including responding to strategic lawsuits against public participation (SLAPPs) and harassment of journalists.⁴⁴⁸ The self-regulative network's potential might extend to cooperation with journalistic associations.

An easily recognisable label on the website and attached to the content of network members (to remain also when shared) would guide readers. Beyond helping users to distinguish disinformation from factual information, this organised manner of presenting information has potential to rebuild trust in the established media system.

c. Affirmative information networks

Once disinformation has spread and is being discussed, it is difficult to debunk it and convince people of the contrary. It would be significantly more effective to plant seeds of truth before disinformation gets disseminated.

⁴⁴⁷ Lucas, E., [Firming up democracy's soft underbelly](#), National Endowment for Democracy, 2020.

⁴⁴⁸ These goals are also prioritised in the European Democracy Action Plan.

As soon as signs of foreign interference are shown, short and likeable information packages should be rapidly and pro-actively communicated through various channels, targeting various audiences, to pre-bunk disinformation (i.e. prevent its mental impact) before it is spread.⁴⁴⁹

Given the diversity and size of the European Union, the communication packages would be best prepared nationally. However, early signs of disinformation campaigns may be better identified by a central node specialised in this regard, such as the EEAS. Nevertheless, national hubs can also feed information into this network if they are the first to receive signals.

The authors of this study call this method 'affirmative information system'. The local nodes should be publicly trusted agencies capable of designing information packages (e.g. appealing short videos and memes) within a short time. In some states, these could be ministries or authorities (e.g. the Ministry of Health on vaccinations). In other states, NGOs or scientific institutions might be preferred.

d. Diversity through algorithms

Personalised content recommendation systems are indispensable in creating a pleasant user experience amongst the vast sea of content. When it comes to commercial content services such as music, movies or shopping, users are offered a variety of filtering options to manage their recommendations and find the content that best fits their taste. The same diversity should be offered by social media companies that convey content subject to the freedom of expression and can influence the social discourse (e.g. Facebook).

Article 29 DSA states that online platforms should provide at least one algorithmic ranking not based on profiling. It is not currently clear whether this provision is compulsory and enforceable by the Digital Services Coordinator or self-regulated. Neither is the scope of the obligation entirely clear (as the provision contains permissive language like 'may have made', 'where several options') (see more above in Section 4.2).

e. The need for reform of the consent-based system

The authors of this study found that the data-driven advertising model violates the fundamental rights to protection of personal data and privacy. Furthermore, this business model is unsustainable both from the perspective of the climate crisis - as it provokes an ever-growing consumption - and from the social perspective - because new AI solutions will exploit data even more frequently and with even less transparency.

Therefore, the habit of relying on personal data should be re-worked considerably. Similar to doctors and lawyers, access to personal data should not entitle their processors to monetise it.

Two possibilities for reforming the attention-based, data-driven economy are apparent:

- a) To spare the attention of the users by limiting their exposure to targeted advertisements.
- b) To raise costs of targeted advertising by limiting access to personal data.

The current widely used consenting practice violates the GDPR requirements. 'Silence, pre-ticked boxes or inactivity should not therefore constitute consent'.⁴⁵⁰ In practice, cookie preference options often do not satisfy this condition. Users can choose either to click 'okay' and consent to accepting all cookies

⁴⁴⁹ The word 'prebunk' has been used in this context since 2019. See: Van Der Linden, S., and Roozenbeek, J., ' [The new science of prebunking: how to inoculate against the spread of misinformation](#)', *Biomedcentral Blog*, 7 October 2019, see also: Lewandowsky, S., - Van Der Linden, S. [Countering Misinformation and Fake News Through Inoculation and Prebunking](#), *European Review of Social Psychology*, 22 February 2021.

⁴⁵⁰ Recital 32 GDPR.

or, to click 'options' and scroll down a list before selecting a small 'accept settings' button beside a large, red 'accept all' button. This is an intentional misrepresentation to mislead users and trick them into consenting. Yet their fundamental right would call for rejecting consent with just one click, as required by Article 25 of the GDPR (data protection by default). The Opinion of the European Data Protection Supervisor addressed this problem before it even emerged but has been ignored. He suggested a requirement for browsers to offer by default controls making it easy to express or withhold consent to tracking.⁴⁵¹

At the same time, the personalisation of services creates useful and convenient opportunities for users, enhancing the user experience. The willingness of users to use these convenience services varies. Some users are willing to expose their data in exchange for personalised recommendations, others less so. Their interest in the subject area is a decisive factor and their attitude may differ according to industry and topic (e.g. music, shopping, medical advice, etc.). Thus, users should be offered options to select their desired level of personalisation. Further, a clearer distinction should be made between the usage of data for personalisation and for marketing.

6.2. Freedom of expression from the community's perspective

Communication is an individual right but also a function of the human community. The social purpose of public communication is to connect people and invite them to reflect on matters common to them. Social media is an excellent vehicle to create communities, but communities can also become isolated from each other, leading to division and polarisation. Individuals can enjoy their rights fully only if other individuals respect their rights. It was found that the South-African constitutional principle of ubuntu is relevant in the social media environment where users define their identities through the reciprocal reactions and feedback of other users. Ubuntu's core idea is that one cannot be a content human being without the reflections of other human beings and the community.⁴⁵² We observe this interconnectedness in the effects of social media communication; for example, if someone gets misled about vaccinations or votes on the basis of misinformation, then the whole society suffers.⁴⁵³ Ubuntu further promotes restorative justice; rather than prohibition and punishment, mediation and redress are applied to maintain peace in a divided community. In the context of disinformation and propaganda, this encourages thinking in terms of community rather than isolated individuals. The route to freedom includes accepting certain restrictions. Thus, softer tools may lead to better results than hard legal prohibitions do.

After careful assessment of the risks of regulation and non-regulation in the current information ecosystem, it appears that the social risks of non-regulation to the informational landscape are greater (see Table 3 on the risks of non-interference).⁴⁵⁴

Freedom of expression is of paramount importance in public communication but it can only be ensured if the informational landscape remains free, open and diverse. In order to ensure lively public discourse - one of the social purposes of the right to freedom of expression - measures protecting this informational environment from intentional harms are necessary. Causing intentional harm is not a

⁴⁵¹ [Opinion of the European Data Protection Supervisor on online manipulation and personal data](#), 3/2018.

⁴⁵² Clayton, P., *The New Possible: Visions of Our World beyond Crisis*, Cascade Books, an Imprint of Wipf and Stock Publishers, Kindle Edition, p. 47.

⁴⁵³ Lucas, E., [Firming up democracy's soft underbelly](#), National Endowment for Democracy, 2020.

⁴⁵⁴ See: Bayer, J. et al., ['Disinformation and propaganda – impact on the functioning of the rule of law and democratic processes in the EU and its Member States: 2021 update'](#), Study for the European Parliament, 2021.

legitimate use of freedom of expression; it is, in fact, an abuse of the right. The difficulty is separating abuse from legitimate use (for example, misinformation honestly distributed by users).

Theoretically, content removal should take place only on the bases of a court order. However, this faces enormous difficulties in the current ubiquitous information environment, and this requirement has been largely ignored. Acknowledging this fact, a requirement for platforms to base their removal decisions on a legal ground would be a minimum expectation. Similar to the data protection officers required by GDPR, very large online platforms should employ Freedom of Expression Officers to oversee platforms' content decisions. The draft DSA provides for procedural safeguards and judicial overview of decisions about illegal content. Problematically, those safeguards come after the harm is already done. Further, platforms also decide on deprioritising and demonetising⁴⁵⁵ but these decisions are not subject to the same obligatory safeguards. Nevertheless, individual freedom of expression should not be used as a justification to avoid responsibility for disinformation that actively undermines the freedom of the press.

6.3. The role of platforms

Social media platforms play a defining role in public discourse and the entire information environment. Media companies, advertisers and politicians all depend on the disseminating role of these platforms. Even without providing their own content, their ranking, prioritising and deprioritising decisions mean social media platforms define the communication agenda and essentially exercise an opinion power.⁴⁵⁶ One way to deal with this is to give platforms the power and responsibility to define their standards. This means their power in shaping public opinion is acknowledged. Such an acceptance may lead to further growth of this power and should entail more accountability, as well. Another route is to limit platforms' freedom to govern public discourse and set clear limits to their content moderation decisions. The latter option leads to a stronger governmental control. A careful balance must be found between empowering state authorities to control platforms, or empowering platforms to control individual freedom. In democratic states, more transparency and accountability can be attributed to governmental power than to the power of private entities. However, in less democratic states the same private entities may be regarded as outposts of individual liberties. At the same time, this liberty may be illusory, as the authoritarian state may interfere with the companies' data and operation.

As both the state and platforms are powerful entities, their mission should be to serve the interests of human individuals as citizens on the one hand, and consumers on the other. Ideally, both should have limited powers. The platforms' power over citizens should be limited by the state, for example, by competition rules. A way to furnish social media platforms with responsibility but not legal liability would be to mandate Freedom of Expression Officers for sizeable platforms, similar to the Data Protection Officers required by GDPR. Social media platforms should remain neutral and transparent to maintain a democratic public discourse and enable media and user control of state power.

⁴⁵⁵ Prioritising should take place on the basis of pre-defined labels rather than be a discretionary platform decision.

⁴⁵⁶ Helberger, N., [The Political Power of Platforms: How Current Attempts to Regulate Misinformation Amplify Opinion Power](#), *Digital Journalism*, 8:6, pp. 842-854, 2020.

7. RECOMMENDATIONS

The following recommendations focus on responding to the following question: how can disinformation be tackled without restricting rights to freedom of expression and media freedom and pluralism? Moreover, how can this be done while maintaining or enhancing these rights? Rather than addressing individual pieces of disinformation, it is recommended that the entire ecosystem is addressed as a whole and specifically online platforms as key actors which are not yet regulated. Consequently, the precise scope of platforms' powers and obligations are continuing to develop. Ample room and freedom were allowed to develop their services and their own rules with the aim of respecting the freedom to conduct business and foster innovation. However, the protection of fundamental rights of individuals, democracy and public discourse should be the primary goals of states as elected representatives of its citizens. As the services in question are transnational and even global, regulation at the European Union level is justified in order to avoid an uneven and fragmented information landscape.

7.1. Reforming the advertisement-based, data-driven information ecosystem

The mechanisms which run the ecosystem produce an information landscape where falsity and manipulation enjoy advantages over truth and quality information.

7.1.1. Advertising regulation in the platform economy

Data-driven advertisements drive the content ranking algorithms. This harvests and exploits human attention and generates stellar profits for certain big platforms, leaving content media out of the value chain. To break this cycle, it is recommended:⁴⁵⁷

1. General rules of advertising. General rules of advertising shall be extended to also apply to the platform environment. These are:
 - a) Advertisements should not interrupt a content unit, e.g. should not appear between the lines of an article or during a video (respect for authors' rights and users' attention).
 - b) The proportion of ads should not exceed a certain percentage of the space on a page or time of a video at any one point of scrolling or viewing (e.g. 20%).
 - c) Targeting criteria may not involve vulnerabilities, e.g. minors, minorities.
 - d) Advertising agencies and creative contributors shall bear joint and severable liability for harms caused by their ads where the ad is false and/or manipulative.
 - e) The price paid for advertisements should be publicly available.
 - f) Certain products and services may not be advertised, including medicine, drugs, alcohol, dangerous goods. Political and public issue content may be restricted.
2. 'Media Ad Quota': Large companies should be obliged to spend a certain ratio of their advertisement budget at news media companies rather than platform companies (e.g. 20%). The ratio could progressively grow depending on the size of the company.

⁴⁵⁷ Only those rules are listed here which are not already mentioned in the draft DSA or the draft AIA, in particular, Article 24 DSA, Article 5 (1) (a) AIA and Article 5(g) DMA. For details, please see Table 4 showing the legal restrictions of advertising in EU law. It is, however, highly recommended to keep these provisions in the final version of the draft acts.

3. 'Ad Integrity Obligation': Large companies should be obliged to inquire and respect 'brand safety' principles and not sponsor their advertising websites or content that carries disinformation or is manipulative. Online platforms should be obliged to cooperate to enable this.
4. Demonetise disinformation and manipulation: if harmful content is discovered, online platforms should be obliged to withdraw advertising and sponsorship. With safeguards, allowing appeal and redress in cases of mistake.

Risks: recommendations 1 a-b-c do not carry significant risk to the freedom of expression or media pluralism. Online platforms and advertisers are expected to dislike the primarily administrative burden. Demonetisation carries the risk of falsely identifying content as harmful and unjustly demonetising it. To mitigate this risk, it is recommended to introduce safeguards and a redress mechanism, similar to that which exists for the removal of content.

Opportunities: the recommended measures may improve the perception of the information by limiting the intrusiveness of online advertisements. It introduces an integrity requirement to advertising, partly by prohibiting the targeting of vulnerable groups (based on their vulnerability criteria), making advertising transparent, adding the obligation to avoid sponsoring disinformation and manipulation, and filling the gap of income for news media.

7.1.2. Diversity through algorithms

Article 29 DSA on recommender systems⁴⁵⁸ should be clarified and extended:

1. Clarification is needed to ensure that it is a compulsory obligation of very large online platforms to ensure various algorithmic settings as easily available options for the user.
2. Extension is needed to offer at least one option which is aimed at increasing diversity of content and at least one further option to prioritise content that is found to be trustworthy by independent news organisations (applying for social media companies conveying content that is subject to the freedom of expression and has a chance to influence the social discourse).
3. The development of innovative ranking logics should be encouraged, both in the research field and by online platforms themselves.
4. Platforms shall provide users with clearly visible, easily accessible information regarding their options and be prompted to adjust their settings in regular intervals, e.g. biweekly.

Risks: No significant risks to freedoms can be identified. Online platform companies are expected to dislike the burden, which diminishes the optimisation of ad placement. Some users may not employ this opportunity and choose to remain in their filter bubble.

Opportunities: Users who prefer to set their preferences themselves get an enhanced level of service. The perceived diversity of content increases with all its informational benefits for the individual and the society.

⁴⁵⁸ The current wording of Article 29 is: (1) Very large online platforms that use recommender systems shall set out in their terms and conditions, in a clear, accessible and easily comprehensible manner, the main parameters used in their recommender systems, as well as any options for the recipients of the service to modify or influence those main parameters that they may have made available, including at least one option which is not based on profiling, within the meaning of Article 4 (4) of Regulation (EU) 2016/679.

(2) Where several options are available pursuant to paragraph 1, very large online platforms shall provide an easily accessible functionality on their online interface allowing the recipient of the service to select and to modify at any time their preferred option for each of the recommender systems that determines the relative order of information presented to them.

Limitations: The recommendation is primarily relevant to social media platforms. Other online platforms have already developed a higher diversity of user-governed, transparent ranking settings, e.g. music platforms, online retailers.

7.1.3. European Public Service media

Reform of the public service idea should take place to further 'the European Project',⁴⁵⁹ relying on automatic translation services and creating synergies of other forms of digitalisation.

What is understood under the name public service media? A media service, the primary driver of which is other than market success, aims to fulfil the informational needs of society. In addition to providing trustworthy information at a high quality, it also generates an emblematic cultural experience and fulfils the social need for shared narratives. The topical efforts to increase media pluralism in Europe, also embraced by EDAP, would be well served and completed by a European public service media.

To defend and further develop European democracy and social cohesion, particularly considering the current level of globalisation and transnational communication, having a transnational public service media is timely and highly recommended.

Ownership, financing and supervision are thorny questions that are likely to generate long discussions. However, several alternative solutions exist to accomplish this idea.

Recommendation: A Working Group may be created to explore the best route for a common European public service media. The European Broadcasting Union⁴⁶⁰ may be invited to provide ideas and solutions. Below, some alternatives are offered for initiating a complex planning project.

Ownership and structure of a common public service media:

1. Based on a European telecommunication platform infrastructure.
2. Based on a European telecommunication platform infrastructure and combined with a European transnational informational platform for e-learning, e-governance, etc.
3. Based on existing infrastructure and in the form of a public body specifically created for the purpose.
4. As an umbrella organisation of existing public service media institutions.
5. As a European Online News Agency that generates a pool of public service content and distributes it in all EU languages.

As a minimum, a non-profit media project funded and facilitated by the Commission with the necessary mandate.

⁴⁵⁹ 'The European project' is a non-legal term to address the complex endeavour of European integration since its foundation, usually with reference to the future.

⁴⁶⁰ The European alliance of public service media organisations, <http://www.ebu.ch/>, broadcasted, among others, the Eurovision Festival and Playing Without Frontiers.

Table 5: Risks and mitigations for the European Public Service policy option

Risks	Mitigation of risks
Member States not willing or able to make a financial sacrifice to make this happen.	To tax social media advertising as an income source that has not been exhausted yet.
Some Member States might regard this as a compromise to their sovereignty.	To maintain national public service media institutions.
Illiberal Member States with a different concept on the role of public service media may prefer to follow their preferences of remit and supervision.	To ensure representation of all Member States in the Boards and staff.

Source: Authors of the study

Opportunities:

1. A common, trusted media would be an effective response to the disinformation crisis.
2. The sharing of programmes between Member States on a common platform could unleash fascinating synergies. For example, the operation of a common, trusted platform alone would enable Member States to share some of their best programmes with the platform, thereby filling it up with content.
3. The rapid improvement of automatic translation services offers new avenues in sharing content without linguistic boundaries.
4. A newly created organisation can benefit from all the lessons learned from the struggles of PSM in the past century.
5. As a newly created organisation, it can make optimal and creative use of digital solutions and target young citizens in particular.

7.1.4. Create trust networks of media and journalism

European news media companies should be urged to create one or more professional network with the aim of support and verification. The primary function of this network would be fact-checking to verify the authenticity of the media firm and attest that the content of the firm is regularly truthful and free of disinformation and manipulation.

These networks may operate at the national level with cooperation at the European level. This should be realised entirely within the frame of self-regulation of the media industry, as another example of 'induced self-regulation'.

There are plenty of national, European and international journalists associations.⁴⁶¹ However, the envisaged new function would connect media outlets and not journalists at the individual level. Cooperation with fact-checking organisations and journalists associations is advisable:

- Verification of content: network members jointly develop a technological trust protocol that labels verified content as authentic throughout the sharing and distribution chain.

⁴⁶¹ [Association of European Journalists](#), [European Federation of Journalists](#).

- Verification of actors: certificate authentic media as such, featuring an easily recognisable label to certificate.

Table 6: Risks and mitigations for the trust networks policy option

Risks	Mitigation of the risks
Network hinders market entry.	To regularly review new applicants and creating an 'entry-level' certificate.
One bad apple (a media outlet that proved untrustworthy) harms the entire network.	To regularly quality review existing members' performance.
If the conditions are too soft, manipulative sites become members and distort the functioning and brand.	To ensure the conditions of authentication are reasonably firm and represent quality journalism.
Network becomes rejected by anti-establishment believers of disinformation theories.	To ensure people who are 'hesitant', insecure and young or elderly best benefit from this function. To establish other methods to reach followers of extremist or conspiracy theories.
Some media sources, while authentic, prefer sensational journalism.	To separate labels for authenticity of the media outlet and quality/trustworthiness of the content.

Source: Authors of the study

Opportunities:

1. The certified presentation of news has a good chance of rebuilding trust in the established media system.
2. The label would provide information to advertisers and readers alike. In combination with recommendation 3 in Subsection 7.1.1. (Ad Integrity Obligation), possession of the label can provide a significant advantage to media companies.
3. Extended cooperation can support the media in other issues and strengthen the market position of European news media.

7.1.5. Affirmative information system

In order to prevent the viral spread of disinformation, new disinformation actions and campaigns should be responded to with rapid dissemination of truthful, relevant and engaging content EU-wide. Ideally, this would precede the dissemination of the disinformation.

A centrally coordinated network should signal and give the raw information to local network nodes (for example, election authorities, academic institutions, other authorities, trusted NGOs). Local network nodes shall be designated by the Member States and mandated, staffed and equipped for the task. This network can build synergies with the Trust Network described in Subsection 7.1.4.

While the decentralised local network endpoints could well be non-governmental institutions, the central network node would need sufficient competences to access confidential information regarding disinformation actions and react rapidly. As the European External Action Service collects and

processes firsthand disinformation actions directed against the EU, it may take a role in serving as a central node, or contributing to that.

The task of the local nodes is to transform the raw, authentic information into short messages addressing various social groups through diverse style and communication channels (for example, humorous memes and short videos disseminated in social media).

Table 7: Risks and mitigations for the affirmative action system policy option

Risks	Mitigation of the risks
Communication is viewed as governmental propaganda.	To focus on facts rather than opinions.
The system cannot work rapidly enough.	To increase coverage and facts in the event of delayed reactions.
Authoritarian states also start to impart memes.	To proceed with its own, humorous content.

Source: Authors of the study

7.1.6. Robust protection of personal data

The General Data Protection Regulation should be amended with the aim of better protecting users' personal data. The consent-based data self-management system has proved insufficient to protect against the exploitation of personal data and building profiles. This system violates the fundamental rights to data protection and privacy and is unsustainable.

1. Default settings should provide maximum protection of personal data. Therefore not clicking on the consent declaration should be equal to rejection of consent.
2. Active rejection of consent should take just one click and be foolproof⁴⁶² (opt-in system).
3. Consent to monetising personal data (rather than only using it for the personalised recommendations) should require a further click (opt-in system).

Separate analysis and policy research is recommended to find a solution to revolutionise the data-driven economy in preparation for an AI-defined future.

7.2. Defining the scope of duties of platforms

The primary question is whether platforms should receive more rights and, therefore, responsibilities, or rather be limited in their content-moderation decisions and maintain their immunity for third-party content. Given that some very large platforms are already more influential in social discourse than any media conglomerate ever, it seems reasonable to opt for the limitation of their role.

The following principles are recommended for inclusion in the Digital Services Act among its obligatory provisions:

1. All platforms should be obligated to maintain and enforce the principle of neutrality in their content moderation decisions. Algorithms should not systematically favour any political,

⁴⁶² The button which leads to consent cannot be more conspicuous than the button which leads to rejection of consent.

ideological or religious opinion or prioritise content that is the platforms' own or of an affiliated company.

2. Very large online platforms whose core activity is to mediate opinions or content that falls within the realm of freedom of expression should employ Freedom of Expression Officers to supervise content moderation decisions, including removal, blocking, demonetising and deprioritising.
3. All platforms should be required to respect human rights, in particular, to avoid discrimination between users or their content based on protected characteristics such as race, gender, political opinion or other.
4. Content ranking algorithm systems should be offered with wider diversity and more transparency than they are currently (see recommendation I.2.) and empower users to make independent choices.
5. Any change or experimenting with content recommending algorithms that affect users in the masses should be transparent and provide easily accessible information to users in plain language.
6. Very large online platforms should apply only transparent and tested algorithms for manoeuvres that affect masses of users.
7. Political expression should enjoy privileged protection against removal or blocking for minor violations of law or community standards. However, in cases of repeatedly disseminating disinformation, discriminative speech or incitement to hatred or violence, its privileged status should be removed and the appropriate consequences applied without delay.

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This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, aims at finding the balance between regulatory measures to tackle disinformation and the protection of freedom of expression. It explores the European legal framework and analyses the roles of all stakeholders in the information landscape. The study offers recommendations to reform the attention-based, data-driven information landscape and regulate platforms' rights and duties relating to content moderation.
