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## REGULATING FAKE NEWS: THE RIGHT TO FREEDOM OF EXPRESSION IN THE ERA OF EMERGENCY\*

### ABSTRACT

Governments around the world are strictly regulating information on social media in the interests of addressing fake news. There is, however, a risk that the uncontrolled spread of information could increase the adverse effects of the Covid-19 health emergency through the influence of false and misleading news. Yet, governments may well use health emergency regulation as a pretext for implementing draconian restrictions on the right to freedom of expression, as well as increasing social media censorship. This article seeks to challenge the stringent legislative and administrative measures governments have recently put in place in order to analyse their negative implications for the right to freedom of expression and suggest different regulatory approaches in the context of public law. These controversial government policies are discussed in order to clarify why freedom of expression cannot be allowed to be jeopardised in the process of trying to manage fake news. Firstly, an analysis of the legal definition of fake news in academia is presented in order to establish the essential characteristics of the phenomenon (Section 2). Secondly, the legislative and administrative measures implemented by governments at both international (Section 3) and EU levels (Section 4) are assessed, showing how they may undermine a core human right by curtailing freedom of expression. Then, starting from the premise of social media as a “watchdog” of democracy, and moving on to the contention that fake news is a phenomenon of “mature” democracy, the article argues that public law already protects freedom of expression and ensures its effectiveness at the international and EU levels through some fundamental rules (Section 5). There follows a discussion of the key regulatory approaches, and, as an alternative to government intervention, self-regulation and especially empowering users are proposed as strategies to

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effectively manage fake news by mitigating the risks of undue interference by regulators in the right to freedom of expression (Section 6). The article concludes by offering some remarks on the proposed solution and in particular by recommending the implementation of reliability ratings on social media platforms (Section 7).

KEYWORDS: Freedom of expression, Fake news, Government intervention, Self-regulation, Empowering users.

SUMMARY: 1. Introduction – 2. What is fake news? A definition – 3. International regulatory responses to fake news – 4. Legislative and administrative measures regulating fake news in the European union – 5. Safeguarding the right of expression in international and EU law – 6. Empowering users, self-regulation, and government intervention – 7. Conclusion.

## **1. Introduction.**

In one of the masterpieces of contemporary literature, *Il cimitero di Praga*,<sup>1</sup> Simone Simonini (and his alter ego the Abbé Dalla Piccola) is a cynical forger who continuously produces and sells fake news. Simonini fakes documents not only for private individuals but also for the police, the secret services, and even the State. He shapes the story to his liking, transforming it with his false documents, often based on the decontextualisation of existing documents and therefore originating from true facts. It is the principle of likelihood that makes this news plausible.

Eco's novel shows how reality can be altered, changed, and even created by words. The protagonist, Simonini, demonstrates this, as does a historical case cited in the text, "The Protocols of the Elders of Zion", a fake that spread throughout Europe, exploited by Hitler and even gaining credence among enlightened men such as Henry Ford. Eco describes the process underlying so-called fake news as a real problem for society. Its presence on the Internet, from the most harmless to the most pernicious, is growing rapidly and is increasingly difficult to recognise.

However, Eco's novel also shows the importance of freedom of expression and opinion as the cornerstone of democratic society. Freedom of expression may come at a price, and perhaps we are paying it now in this time of crisis through the spread of fake news on social media. However, it is one that we should be willing to pay without undue hesitation as the future of the

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<sup>1</sup> U. ECO, *The Prague Cemetery*, tr. Richard Dixon, Harvill Secker, London/Houghton Mifflin, New York 2011.

democracy in which we believe is at stake. Furthermore, is it not true that we would challenge government restrictions on the right to economic freedom, as some are already doing? The same holds true for freedom of movement and other human rights. By contrast, in the context of the current health emergency, we are observing how governments address fake news on social media by adopting regulatory policies that can significantly undermine freedom of expression.

In this article, I seek to challenge the strict emergency legislative and administrative measures governments have recently put in place in order to analyse their negative implications for the right to freedom of expression and suggest a possible solution in the context of public law. I shall discuss these controversial government policies in order to clarify why we cannot allow freedom of expression to be jeopardised in the process of trying to manage the risks of fake news.

I start with an examination of the legal definition of fake news in academia in order to establish the essential characteristics of the phenomenon (Section 2).

Secondly, I assess the legislative and administrative measures implemented by governments at both international and EU levels (Sections 3 and 4 respectively), showing how they may undermine a core human right by curtailing freedom of expression.

Then, starting from the premise of social media as a “watchdog” of democracy, and moving on to the contention that fake news is a phenomenon of “mature” democracy, I will argue that public law already protects freedom of expression and ensures its effectiveness at the international and EU levels through some fundamental rules (Section 5).

Lastly, I explore key regulatory approaches and, as an alternative to government intervention, I propose self-regulation and above all empowering users as strategies to manage fake news by mitigating the risks of undue interference in the right to freedom of expression (Section 6).

In so doing, I conclude the article by offering some remarks on the proposed solution and in particular by recommending the implementation of reliability ratings on social media platforms (Section 7).

## **2. What is fake news? A definition.**

What is fake news? This is quite a challenging question for legal scholars, so a preliminary task is to establish a definition and identify some of the key problems raised by fake news in academic debate and at the institutional level. This first section aims to do just that.

There is no universally agreed-upon definition of fake news. Indeed, as we shall see, scholars have suggested various meanings for the term, and a definition has recently been proposed as “the online publication of intentionally or knowingly false statements of fact”.<sup>2</sup>

Academics have also defined fake news as lies, namely deliberately false statements of fact distributed via news channels.<sup>3</sup> Nevertheless, as has rightly been noted, current usage is not yet settled, and there are clearly different types of fake news that should not be conflated for legal purposes.<sup>4</sup>

For other scholars, fake news should be limited to articles that suggest, through appearance and content, the conveyance of real news but which also knowingly include at least one material factual assertion that is empirically verifiable as false and that is not otherwise protected by the fair report privilege<sup>5</sup>, even if these are often understood as fabricated news stories.<sup>6</sup>

Moreover, according to another definition, fake news is information that has been deliberately fabricated and disseminated with the intention of deceiving and misleading others into believing falsehoods or doubting verifiable facts.<sup>7</sup>

The authors of a well-known article on the US presidential election of 2016 define fake news as news articles that are intentionally and verifiably false, and could mislead readers<sup>8</sup>, as well as

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<sup>2</sup> D. O. KLEIN and J. R. WUELLER, “Fake News: A Legal Perspective” (2017) 20(10) *Journal of Internet Law* 6, also available at SSRN: <https://ssrn.com/abstract=2958790>.

<sup>3</sup> M. VERSTRAETE et al., “Identifying and Countering Fake News” (2017) *Arizona Legal Studies Discussion Paper* no. 17-15, 5-9.

<sup>4</sup> B. BAADE, “Fake News and International Law” (2018) 29(4) *The European Journal of International Law* 1358, <https://doi.org/10.1093/ejil/chy071>.

<sup>5</sup> C. CALVERT, S. MCNEFF, A. Vining and S. Zarate, “Fake News and the First Amendment: Reconciling a Disconnect Between Theory and Doctrine” (2018) 86 (99) *Univ. Cin. L. Rev.* 103, <https://scholarship.law.uc.edu/uclr/vol86/iss1/3>.

<sup>6</sup> A. PARK and K. H. YOUM, “Fake News from a Legal Perspective: The United States and South Korea Compared” (2019) 25 *Sw. J. Int'l L.* 100-119, at 102.

<sup>7</sup> T. MCGONAGLE, “Fake News: False Fears or Real Concerns?” (2017) *Netherlands Quarterly of Human Rights*, 35(4), 203-209. <https://doi.org/10.1177/0924051917738685>.

<sup>8</sup> H. ALLCOTT and M. GENTZKOW, “Social Media and Fake News in the 2016 Election” (2017) 31(2) *Journal of Economic Perspectives* 213. doi:10.1257/jep.31.2.211. However, in defining this concept, they exclude satirical websites such as the Onion (<https://www.theonion.com/>), which uses humour and exaggeration to criticise social and

news stories that have no factual basis but are presented as news.<sup>9</sup> Incidentally, it has also been appropriately noted that fake news is also the presentation of false claims purporting to be about the world in a format and with content that resembles the format and content of legitimate media organisations.<sup>10</sup>

Furthermore, it has been observed that fake news may also purport to describe events in the real world, typically by mimicking the conventions of traditional media reportage, yet is known by its creators to be significantly false and is transmitted with the dual goal of being widely re-transmitted and of deceiving at least some of its audience.<sup>11</sup> Beyond this, it has been argued that fake news is best defined as the deliberate presentation of (typically) false or misleading claims as news, where the claims are misleading by design.<sup>12</sup>

Lastly, from analysis of previous studies that have defined and operationalised the term, other authors have stated that fake news is information constituting viral posts based on fictitious accounts made to look like news reports in contemporary discourse and particularly in media coverage.<sup>13</sup>

Outside academia, the definition of fake news has been discussed at institutional level. In the United States, several important events have been held on the definition of fake news, such as the workshop organised on 7 March 2017 by the Information Society Project at Yale Law School and the Floyd Abrams Institute for Freedom of Expression.<sup>14</sup> During the workshop, news organisations, information intermediaries, data scientists, computer scientists, the practising bar,

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political issue. On this point, for a different opinion, see D. O. KLEIN and J. R. WUELLER, *supra*, note 2, 6. See also A. BOVET, H. A. MAKSE, “Influence of Fake News in Twitter during the 2016 U.S. Presidential Election” (2019) 10 *Nature Communications* 7, <http://dx.doi.org/10.1038/s41467-018-07761-2>.

<sup>9</sup> See H. ALCOTT and M GENTZKOW, *supra*, note 8, 5.

<sup>10</sup> N. LEVY “The Bad News about Fake News”, (2017) 6(8) *Social Epistemology Review and Reply Collective* 20, <http://wp.me/p1Bfg0-3GV>.

<sup>11</sup> R. RINI “Fake news and partisan epistemology”, (2017) 27(2) *Kennedy Institute of Ethics Journal* E43-E64, [10.1353/ken.2017.0025](https://doi.org/10.1353/ken.2017.0025).

<sup>12</sup> A. GELFERT “Fake News: A Definition”, (2018) 38(1) *Informal Logic* 85 and 108, <https://doi.org/10.22329/il.v38i1.5068>, where “the phrase ‘by design’ is intended to reflect that what is novel about fake news – not only, but especially on electronic social media – is its systemic dimension.”

<sup>13</sup> E. C. TANDOC Jr, W. L. ZHENG and R. LING, “Defining ‘fake news’: A Typology of Scholarly Definitions” (2018) 6(2) *Digital Journalism* 2, [doi.org/10.1080/21670811.2017.1360143](https://doi.org/10.1080/21670811.2017.1360143).

<sup>14</sup> “Fighting Fake News Workshop Report”, 3-4, <https://law.yale.edu/isp/initiatives/floyd-abrams-institute-freedom-expression/practitioner-scholar-conferences-first-amendment-topics/fighting-fake-news-workshop>, accessed 9 November 2020.

and sociologists explored efforts to define fake news and discuss the feasibility and desirability of possible solutions.

First of all, the participants determined that the most salient danger associated with fake news is the fact that it devalues and delegitimises the voices of experts, authoritative institutions, and the concept of objective data, all of which undermines society's ability to engage in rational discourse based upon shared facts.

Secondly, some argued that the difficulty of defining fake news raised the attendant risk of overbroad government regulation, while others worried that opening the door to permitting government sanctions against certain kinds of public discourse would grant the government too much power to control speech in areas of public concern.

In general, most participants were reluctant to propose negative State regulations for fake news. The option of using government funding or other economic incentives to indirectly promote legitimate news and information outlets was floated, but this was rightly critiqued on similar grounds to those associated with government intervention to penalise certain kinds of speech, simply by aiming to prevent the government from determining what is true or worthy.

Ultimately, nearly all participants agreed on one overarching conclusion: that re-establishing trust in the basic institutions of a democratic society is critical to combat the systematic efforts being made to devalue truth. In addition to thinking about how to fight different kinds of fake news, it is necessary to think broadly about how to bolster respect for facts.

In Europe, the European Commission promoted a public consultation from 13 November 2017 to 23 February 2018, which, among other things, afforded some criteria for defining fake news.<sup>15</sup> In particular, organisations were asked to suggest different criteria for defining fake news, including from a legal point of view. The responses highlighted a wide range of criteria, with the

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<sup>15</sup> European Commission "Public Consultation on Fake News and Online Disinformation" 26 April 2018, <https://ec.europa.eu/digital-single-market/en/news/public-consultation-fake-news-and-online-disinformation>, accessed 10 November 2020. The consultation will collect information on: (i) definition of fake information and their spread online; (ii) assessment of measures already taken by platforms, news media companies and civil society organisations to counter the spread of fake information online; (iii) scope for future actions to strengthen quality information and prevent the spread of disinformation online.

consensus that fake news could be defined by looking at: (i) the intent and apparent objectives pursued by fake news; (ii) the sources of such news, and (iii) the actual content of news.<sup>16</sup>

Essentially, this consultation reached a definition of fake news based on the pursued objectives of the news. Thus, the concept would mainly cover online news, albeit sometimes disseminated in traditional media too, intentionally created and distributed to mislead readers and influence their thoughts and behaviour.

Moreover, fake news can polarise public opinion, opinion leaders, and media by creating doubts regarding verifiable facts, eventually jeopardising the free and democratic opinion-forming process and undermining trust in democratic processes. Gaining political or other kinds of influence or funds through online advertising (e.g. clickbait), or causing damage to an undertaking or a person can also be a major aim of fake news. The existence of a clear intention behind the fake news would establish the difference between this phenomenon and that of misinformation i.e., where wrong information is provided owing, for instance, to good-faith mistakes or to failure to respect basic journalism standards (e.g. verification of sources, investigation of facts etc.).<sup>17</sup>

Lastly, it should be noted that, in the consultation in question, civil society organisations and news media in particular justifiably criticised the term “fake news” as misleading and with negative connotations i.e. used by those who criticise the work of the media or opposing political views. Hence, since fake news may be a symptom of a wider problem, namely the crisis of information, the use of the term “disinformation” was suggested as a more appropriate expression.

In the United Kingdom, the House of Commons Digital, Culture, Media and Sport (DCMS) Select Committee published its final report on Disinformation and fake news at the end of an 18-month inquiry on 18 February 2019.

In this Final Report, the DCMS stated that fake news is a poorly-defined and misleading term that conflates a variety of false information, from genuine error through to foreign interference in democratic processes. For this reason, the DCMS Committee recommended that the government move away from the term fake news and instead seek to address disinformation

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<sup>16</sup> European Commission “Synopsis Report of the Public Consultation on Fake News and Online Disinformation” 26 April 2018, 6, <https://ec.europa.eu/digital-single-market/en/news/synopsis-report-public-consultation-fake-news-and-online-disinformation>, accessed 10 November 2020.

<sup>17</sup> Ibid, 6.

and wider online manipulation by defining disinformation as the deliberate creation and sharing of false or manipulated information that is intended to deceive and mislead audiences, either for the purposes of causing harm, or for political, personal or financial gain. Conversely, misinformation should refer to the inadvertent sharing of false information.<sup>18</sup>

Starting from the suggested definition of fake news, the DCMS Committee called for a (i) compulsory code of ethics for social media companies overseen by an independent regulator, (ii) additional powers for the regulator to launch legal action against companies breaching the code, and for (iii) a reform of electoral communications laws and rules on overseas involvement in elections. Finally, it also recommended creating an (iv) obligation for social media companies to take down known sources of harmful content, including proven sources of disinformation.

In addition, as regards further institutional actions linked to the aforementioned definition of fake news, the UK government has been committed to maintaining a news environment, both online and offline, where accurate content and high-quality news online can prevail. While mechanisms are in place to enforce accuracy and impartiality in the broadcast and press industries, greater regulation in the online space has been considered. It has developed a range of regulatory and non-regulatory initiatives to improve transparency and accountability in the online environment where information is shared. It has also committed to ensuring that freedom of expression in the UK is protected and enhanced online, and this work will be carried out in partnership with industry, the media, and civil society institutions.

The brief analysis presented so far shows that the definition of fake news is particularly complex and raises some significant issues.

Essentially, we might reasonably argue that fake news is information designed to emulate characteristics of the media in form but not in substance. Fake news sources typically do not have

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<sup>18</sup> House of Commons Digital, Culture, Media and Sport Committee “Disinformation and ‘Fake News’: Government response to the committee’s fifth report of session 2017-19”, hc 1630 (2018), 2, <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1630/1630.pdf>, archived at <https://perma.cc/e92s-4ggc>; accessed 11 November 2020. It should be noted that, to help provide clarity and consistency, the Digital, Culture, Media and Sport Committee recommended that the government not use the term ‘fake news’ and instead use, and define, the words ‘misinformation’ and ‘disinformation’. On this point see C. FEIKERT-AHALT, “Initiatives to Counter Fake News in Selected Countries – United Kingdom” 100-108, <https://www.loc.gov/law/help/fake-news/index.php>, accessed 11 November 2020.



media editorial policies and procedures for ensuring the correctness and reliability of the information. This, in the majority opinion of academics, would likely make them unreliable and harmful to the public. Fake news adds to other information flaws, namely misinformation, meaning false or misleading information, and disinformation, namely false information that is deliberately disseminated to deceive people.

Fake news plays a leading role in several areas, such as politics, health and the economy, which means that governments around the world are called upon to regulate the phenomenon.<sup>19</sup>

In the next two sections I shall consider legislative and administrative policies in order to discuss and criticise the robust measures governments have introduced to address fake news at international and European level (Sections 3 and 4 respectively).

In doing so, the analysis is carried out specifically on States that have adopted particularly stringent policies to address fake news on social media during the COVID-19 pandemic, bearing in mind that policies became more stringent during and after the outbreak of the pandemic. The analysis of the measures implemented by States around the world, therefore, is not based on their policy of freedom of expression nor on their way of guaranteeing it to their citizens. On the contrary, emergency legislative and administrative measures are evaluated in order to understand whether or not they fall foul of international and European rules that protect human rights with regard to freedom of expression.

### **3. International regulatory responses to fake news.**

All over the world, some governments have issued stringent legislative and administrative measures restricting freedom of expression in order to address fake news. In this regard, an important factor to consider is that the pandemic has encouraged strict government policies, which, acting under the threat of loss of life, have passed particularly invasive human rights laws to manage the risks of online disinformation.

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<sup>19</sup> See, for example, M. R. LEISER “Regulating Fake News” (2017), Web, available at <https://openaccess.leidenuniv.nl/handle/1887/72154>.

Amnesty international, in its latest report on “The state of the world’s human rights” has emphasised the relationship between freedom of expression and fake news.<sup>20</sup> The report documented various repressions with criminal sanctions imposed by governments around the world against journalists and social media users.

In a few countries, particularly in Asia and the Middle East and North Africa, authorities prosecuted and even imprisoned human rights defenders and journalists using vaguely worded charges such as spreading misinformation, leaking state secrets and insulting authorities, or labelled them as “terrorists”. Some governments invested in digital surveillance equipment to target them.<sup>21</sup> Moreover, public authorities punished those who criticised government actions on COVID-19, exposed violations in the response to it or questioned the official narrative around it. Many people were detained arbitrarily and, in some cases, charged and prosecuted. In some countries, the government used the pandemic as a pretext to clamp down on unrelated criticism.

In Latin America, disinformation laws that force platforms to decide whether to remove content without judicial orders have been found incompatible with article 13 of the American Convention on Human Rights.<sup>22</sup>

The UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression has recently declared that several States have adopted laws that grant the authorities excessive discretionary powers to compel social media platforms to remove content that they deem illegal, including what they consider to be disinformation or “fake news”. He has also affirmed how failure to comply is sanctioned with significant fines and content blocking.<sup>23</sup> The UN Special Rapporteur has highlighted how such laws lead to the suppression of legitimate online expressions with limited or no due process or without prior court order and contrary to

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<sup>20</sup> Amnesty International, report 2020/21 “The state of the world’s human rights”, <https://www.amnesty.org/en/documents/pol10/3202/2021/en/>, accessed 13 June 2021.

<sup>21</sup> Ibid, 16.

<sup>22</sup> See Mandates of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur for freedom of expression of the Inter-American Commission on Human Rights, OL BRA 6/2020, 3 July 2020, available also online on the website <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=25417>, accessed 16 June 2021.

<sup>23</sup> See UN Special Rapporteur, Report on disinformation, A/HRC/47/25, 13 April 2021, 12, <https://undocs.org/A/HRC/47/25>, accessed 15 June 2021.

requirements of Article 19(3) of the International Covenant on Civil and Political Rights.<sup>24</sup> In addition, it has been shown the trend that sees States delegating to online platforms “speech police” functions that traditionally belong to the courts. The risk with such laws is that intermediaries are likely to err on the side of caution and “over-remove” content for fear of being sanctioned.<sup>25</sup>

As regards private companies, although do not have the same human rights obligations as States, social media platforms expected to respect human rights in their activities and operations in line with the Guiding Principles on Business and Human Rights. In response to the challenges raised by fake news the main social media platforms have adopted a range of policies and tools, generally banning what they consider to be false news and various deceptive practices that undermine authenticity and integrity on their platforms. To this purpose, Social media giants like Twitter<sup>26</sup> and Facebook<sup>27</sup> have adopted specific policies on COVID-19-related disinformation and have also established a third-party fact-checking programme<sup>28</sup> and new community-based approach to fighting misinformation<sup>29</sup> respectively.

Nonetheless, as we shall see, social media policies are still ineffective, counterproductive and in some cases detrimental to users’ rights.

With this in mind, this Section of the article specifically focuses on States around the world that have taken particularly stringent emergency legislative and administrative measures to deal with fake news on social media during the COVID-19 pandemic: China, United States, Russia, United Kingdom, Australia, Canada, Burkina Faso, Singapore and India.<sup>30</sup> Furthermore, in grasping the

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<sup>24</sup> Ibid, 12.

<sup>25</sup> Ibid, 12.

<sup>26</sup> See Twitter, COVID-19 misleading information policy, <https://help.twitter.com/en/rules-and-policies/medical-misinformation-policy>, accessed 16 June 2021.

<sup>27</sup> See Facebook, Advertising Policies related to coronavirus (COVID-19), <https://www.facebook.com/business/help/1123969894625935>, accessed 16 June 2021.

<sup>28</sup> See Facebook, Facebook’s Third-Party Fact-Checking Program, <https://www.facebook.com/journalismproject/programs/third-party-fact-checking>, accessed 16 June 2021.

<sup>29</sup> See Twitter, Introducing Birdwatch, a community-based approach to misinformation, [https://blog.twitter.com/en\\_us/topics/product/2021/introducing-birdwatch-a-community-based-approach-to-misinformation](https://blog.twitter.com/en_us/topics/product/2021/introducing-birdwatch-a-community-based-approach-to-misinformation), accessed 16 June 2021.

<sup>30</sup> For an statistical analysis also extended to criminal measures to combat fake news during the COVID-19 pandemic, see International Press Institute, COVID-19: Number of Media Freedom Violations by Region, <https://ipi.media/covid19-media-freedom-monitoring/>, accessed 14 June 2021.

extent of the legislative and administrative measures on the right to freedom of expression, the analysis will also cover the social media regulation in force.

In Asia, China has passed some of the strictest laws in the world when it comes to fake news.<sup>31</sup> In 2016, the Cybersecurity Law criminalised “any individual or organization (...) that fabricates or disseminates false information to disrupt the economic and social order” (article 12).<sup>32</sup> In particular, China’s Cybersecurity Law requires social media platforms to solely republish and link to news articles from registered news media. Furthermore, in 2018 the Chinese authorities started requiring microblogging sites to highlight and refute rumours on their platforms and launched a platform called Piyao that allows people to report potential fake news. The platform broadcasts real news sourced from state-owned media, party-controlled local newspapers, and various government agencies. The app also uses artificial intelligence to automatically detect rumours of accounts on social media platforms like Weibo and WeChat, on which it broadcasts reports from State-owned media.

As reported in a reliable source, since the spread of the COVID-19 outbreak the Chinese government systematically started checking information on the disease available online and in the media.<sup>33</sup> Indeed, briefings and media reports describe how the government and public authorities delayed releasing information on the coronavirus outbreak to the public.<sup>34</sup> Thus, the Hubei authorities silenced and sanctioned a number of citizens for spreading rumours and disturbing the

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<sup>31</sup> See, for example, B. QIN, D. STRÖMBERG and Y. WU, “Why Does China Allow Freer Social Media? Protests versus Surveillance and Propaganda” (2017) 31(1) *The Journal of Economic Perspectives* 117-140, <https://doi.org/10.1257/jep.31.L117>; L. GUO, “China’s ‘Fake News’ Problem: Exploring the Spread of Online Rumors in the Government-Controlled News Media” (2020) 8(8) *Digital Journalism* 992-1010, <https://doi.org/10.1080/21670811.2020.1766986>.

<sup>32</sup> See Standing Committee of the National People’s Congress, Cybersecurity Law of the People’s Republic of China, Order No. 53 of the President, 11 July 2016, <http://www.lawinfochina.com/display.aspx?lib=law&id=22826#>, accessed 11 November 2020. See S. REEVES, R. ALCALA and E. GREGORY “Fake News! China is a Rule-of-Law Nation and Respects International Law” (2018) 39(4) *Harvard International Review* 42-46.

<sup>33</sup> See, for example, L. KHALIL, “Digital Authoritarianism, China and Covid”, Lowy Institute; [https://www.loyyinstitute.org/publications/digital-authoritarianism-china-and-covid#\\_edn42](https://www.loyyinstitute.org/publications/digital-authoritarianism-china-and-covid#_edn42); accessed 11 November 2020.

<sup>34</sup> Forbes, 2 June 2020, Report: China Delayed Releasing Vital Coronavirus Information, Despite Frustration From WHO; <https://www.forbes.com/sites/isabeltogoh/2020/06/02/report-china-delayed-releasing-vital-coronavirus-information-despite-frustration-from-who/>; accessed 12 November 2020.

social order. Two of the people involved were medical experts who had warned the public of the spread of the coronavirus on social media.<sup>35</sup>

The Cyberspace Administration of China (CAC), the government agency that controls Internet infrastructure and content within the Chinese borders, threatened websites, media platforms and accounts with sanctions for disseminating harmful or alarming news related to COVID-19. Additionally, in a CAC report, Sina Weibo, Tencent and ByteDance were flagged for an inspection of their platforms.<sup>36</sup>

More generally, the authorities warned the public of the legal consequences of fake news. A Chinese police announcement report regarding sanctions for rumours demonstrates that many citizens received a reprimand, fines, and administrative or criminal detention in January 2020.<sup>37</sup>

In the United States, Congress passed the Honest Ads Act in 2017, aiming to regulate online political advertising and countering fake news. Specifically, the law requires social media platforms like Facebook and Google to keep copies of ads, make them public, and keep tabs on who is paying and how much.<sup>38</sup> In addition, the Honest Ads Act compels companies to disclose details such as advertising spending, targeting strategies, buyers, and funding. It also requires online political campaigns to adhere to stringent disclosure conditions for advertising on traditional media.<sup>39</sup>

The US National Defense Authorization Act of 2017 approved the establishment of the Global Engagement Center<sup>40</sup> to lead, synchronise, and coordinate the Federal Government's efforts to deal with foreign State and non-State propaganda and disinformation efforts aimed at

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<sup>35</sup> [https://www.hubei.gov.cn/zxjy/rdhy/202001/t20200101\\_1862068.shtml](https://www.hubei.gov.cn/zxjy/rdhy/202001/t20200101_1862068.shtml); accessed 10 November 2020.

<sup>36</sup> <https://mp.weixin.qq.com/s/YhjV75NwJZO4CyPdepArQw>; accessed 10 November 2020.

<sup>37</sup> Cf. China: Protect Human Rights While Combatting Coronavirus Outbreak; <https://mp.weixin.qq.com/s/3dYMFtlvXS-WuEJcZDytWw>; accessed 12 November 2020.

<sup>38</sup> Cf. S.1989 - Honest Ads Act, 19 October 2017, <https://www.congress.gov/bill/115th-congress/senate-bill/1989/text>, accessed 11 November 2020.

<sup>39</sup> R. KRASKI, "Combating Fake News in Social Media: U.S. and German Legal Approaches" (2017) 91(4) St. John's Law Review 923-955; see also Policy Report by G. HACIYAKUPOGLU, J. YANG HUI, V. S. SUGUNA, D. LEONG and M. RAHMAN, "Countering Fake News: A Survey of Recent Global Initiatives" (2018) S Rajaratnam School of International Studies 3-22, available at [https://www.rsis.edu.sg/wp-content/uploads/2018/03/PR180416\\_Counter-Fake-News.pdf](https://www.rsis.edu.sg/wp-content/uploads/2018/03/PR180416_Counter-Fake-News.pdf).

<sup>40</sup> "Global Engagement Center" US Department of State: Diplomacy in Action, <https://www.state.gov/r/gec/>, accessed 11 November 2020.

jeopardising United States national security interests.<sup>41</sup> By contrast, the Governor of the State of California vetoed a bill that was to create an advisory group meant to monitor the spread of misinformation on social media and find potential solutions.<sup>42</sup>

In 2020, during the COVID-19 pandemic, the United States tightened control over coronavirus messaging by government health officials and scientists, directing them to coordinate all statements and public appearances.<sup>43</sup>

On 31 March 2020, the Russian authorities approved amendments to the Criminal Code and to the Code of Administrative Offences that introduced criminal penalties for public dissemination of knowingly fake news in the context of the COVID-19 emergency, including the social media environment.<sup>44</sup> In particular, the Government established criminal liability for the public dissemination of knowingly fake news regarding circumstances posing a threat to the life and safety of citizens under Article 207.1 of the Criminal Code of the Russian Federation (CCRF),<sup>45</sup> as well as for the public dissemination of knowingly false socially significant information, which entailed grave consequences under Article 207.2 of the CCRF.<sup>46</sup>

Furthermore, the legislative changes extended criminal sanctions for violating sanitary and epidemiological regulations. Amendments to the Russian Code of Administrative Offences introduced hefty fines of up to five million roubles for journalists spreading fake news. In fact, pursuant to Article 13.15 of the Code of Administrative Offences of the Russian Federation, committing the same offence twice could lead to a fine of up to 10 million roubles.

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<sup>41</sup> See S.2943 – National Defense Authorization Act for Fiscal Year 2017, Congress.Gov, <https://www.congress.gov/bill/114th-congress/senatebill/2943/text>, accessed 11 November 2020.

<sup>42</sup> See Senate of the State of California, SB-1424 Internet: social media: advisory group, [https://leginfo.ca.gov/faces/billStatusClient.xhtml?bill\\_id=201720180SB1424](https://leginfo.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180SB1424), accessed 11 November 2020.

<sup>43</sup> New York Times, 27 February 2020, Pence Will Control All Coronavirus Messaging from Health Officials; <https://www.nytimes.com/2020/02/27/us/politics/us-coronavirus-pence.html>; accessed 10 November 2020.

<sup>44</sup> On Russian fake news legislation see O. POLLICINO, “Fundamental Rights as Bycatch - Russia’s Anti-Fake News Legislation VerfBlog, 2019/3/28, <https://verfassungsblog.de/fundamental-rights-as-bycatch-russias-anti-fake-news-legislation/>, doi:10.17176/20190517-144352-0, accessed 12 November 2020.

<sup>45</sup> See The criminal Code of the Russian Federation, Article 207.1 “Public dissemination of knowingly false information about circumstances that pose a threat to the life and safety of citizens”; <https://rulaws.ru/uk/Razdel-IX/Glava-24/Statya-207.1/>.

<sup>46</sup> Ibid, Article 207.2 “Public dissemination of knowingly false socially significant information, which entailed grave consequences”.

In the United Kingdom, the House of Commons Digital, Culture, Media and Sport Committee (DCMS) examined the issue of disinformation and fake news from January 2017, focusing on issues such as the definition, role, and legal liabilities of social media platforms.<sup>47</sup> The DCMS Committee drew up an interim report on 29 July 2018 and a final one in February 2019. A set of recommendations produced by the committee include: (i) a compulsory code of ethics for technology companies overseen by an independent regulator with powers to launch legal action; (ii) changes to electoral communications laws to ensure the transparency of political communications online; (iii) the obligation for social media companies to take down known sources of harmful content, including proven sources of disinformation.<sup>48</sup>

Moreover, the DCMS Committee invited elected representatives from Argentina, Belgium, Brazil, Canada, France, Ireland, Latvia, and Singapore to establish an International Grand Committee on disinformation and fake news (the so-called International Grand Committee), which held its inaugural session in November 2018.<sup>49</sup> Following the session, members of the International Grand Committee signed a declaration on the “Principles of the law governing the internet”, which affirms the Parliamentarians’ commitment to the principles of transparency, accountability and the protection of representative democracy in regard to the internet.<sup>50</sup>

In Australia, the government appointed a taskforce to address fake news threats to electoral integrity through its foreign interference laws, which passed through parliament in June 2018, and which have also had some bearing on the question of disinformation. Later, the Australian Electoral Commission (AEC) commenced a social media literacy campaign and other activities to

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<sup>47</sup> See the UK House of Commons Digital, Culture, Media and Sport Committee, ‘Fake news’ inquiry, 30 January 2017, <https://old.parliament.uk/business/committees/committees-a-z/commons-select/culture-media-and-sport-committee/news-parliament-2015/fake-news-launch-16-17/>, accessed 12 November 2020.

<sup>48</sup> See the House of Commons, Digital, Culture, Media and Sport Committee, Disinformation and ‘fake news’: Interim Report Fifth Report of Session 2017-19, HC 363, 29 July 2018, <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/363/363.pdf>, accessed 13 November 2020.

<sup>49</sup> See the House of Commons, Digital, Culture, Media and Sport International Grand Committee Oral evidence: Disinformation and ‘fake news’, HC 363, 27 November 2018, <http://data.parliament.uk/writtenevidence/committeevidence.svc/evidencedocument/digital-culture-media-and-sport-committee/disinformation-and-fake-news/oral/92923.pdf>, accessed 13 November 2020.

<sup>50</sup> See Members of the ‘International Grand Committee’ on Disinformation and ‘Fake News’, the Declaration on the “Principles of the Law Governing the Internet”, 27 November 2018, <https://old.parliament.uk/business/committees/committees-a-z/commons-select/digital-culture-media-and-sport-committee/news/declaration-internet-17-19/>, accessed 13 November 2020.

coincide with the 2019 federal election. In addition, there have also been several recent parliamentary inquiries and an inquiry by the Australian Competition and Consumer Commission (ACCC) examining issues related to fake news.

It should be noted that prior to the July 2018 federal by-elections<sup>51</sup> held across four states, the Turnbull government established a multi-agency body, the Electoral Integrity Assurance Taskforce,<sup>52</sup> to address risks to the integrity of the electoral system particularly in relation to cyber interference and online disinformation. Agencies involved include the AEC, the Department of Finance, the Department of Home Affairs, and the Australian Cyber Security Centre. According to the Department of Home Affairs, the taskforce's role is to provide the AEC with technical advice and expertise in relation to cyber interference and online disinformation with regard to electoral processes. A media report on the establishment of the taskforce suggested that its central concern is cybersecurity and disinformation, including fake news and interference with the electoral roll or AEC systems. The media report added that the potential use of disinformation and messaging, and any covert operations designed to disrupt the by-elections would also be closely monitored, as the foreign interference "threat environment" had escalated even within the two years since the last federal election in 2016.<sup>53</sup>

Another critical point that should be mentioned is that the National Security Legislation Amendment Act 2018 added new foreign interference offences to the Australian Commonwealth Criminal Code.<sup>54</sup> The elements of these foreign interference offences could arguably be applied to persons who weaponise fake news in certain circumstances. In particular, the offences extend to persons who, on behalf of a foreign government, engage in the deceptive or covert conduct

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<sup>51</sup> See the Parliament of Australia, Australian Electoral Commission, Striving to safeguard election, 2 March 2019, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F6529492%22>, accessed 18 November 2020.

<sup>52</sup> See Australian Electoral Commission (AEC), Electoral Integrity Assurance Taskforce, (last update) 10 July 2020, <https://www.aec.gov.au/elections/electoral-advertising/electoral-integrity.htm>, accessed 18 November 2020.

<sup>53</sup> See the Parliament of Australia, Department of Home Affairs, ASIO, AFP call-up for by-elections, 9 June 2018, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressclp%2F6016585%22>, accessed 18 November 2020.

<sup>54</sup> See the Australian Government, National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018 No. 67, 2018, 10 December 2018, <https://www.legislation.gov.au/Details/C2018C00506>, accessed 18 November 2020.



intended to influence a political or governmental process of the Commonwealth or a State or Territory or influence the exercise of an Australian democratic or political right or duty, whether in Australia or not.

Some positive signs are emerging from the AEC advertising campaign called Stop and Consider. The AEC started this campaign on 15 April 2019 on social media platforms such as Facebook, Twitter, and Instagram to encourage voters to carefully check the source of electoral communication they would see or hear during the 2019 federal election campaign.<sup>55</sup> In effect, Stop and Consider was a media literacy campaign based on empowering users, positively alerting voters to the possibility of disinformation or false information intended to influence their vote and help them check sources of information and thus cast an informed vote.

Since December 2017 the Australian Competition & Consumer Commission (ACCC) has been conducting an inquiry into the impact of online platforms on media competition in Australia, including the implications of this impact for quality news and journalism.<sup>56</sup> The ACCC's preliminary report discusses a range of intersecting factors that pose a risk of increasing audience exposure to fake news.<sup>57</sup> These factors include commercial incentives for media companies to produce sensational "click bait stories" optimised for search engines and news aggregators and designed to go viral. Other potential problems include those associated with news feeds on social media platforms. Such feeds show users a mix of individual news stories with no context regarding source credibility, which makes it difficult for users to discern the quality of the information. In addition, platforms select and prioritise news on the basis of users' past behaviours and preferences, so news stories that share the same perspectives may be repeatedly made available to consumers.

In March 2018, the Canadian House of Commons Standing Committee on Access to Information, Privacy and Ethics (AIPE) began an inquiry into a breach of personal information

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<sup>55</sup> See Australian Electoral Commission (AEC), Encouraging voters to "stop and consider" this federal election, (last update) 15 April 2019, <https://www.aec.gov.au/media/media-releases/2019/04-15.htm>, accessed 18 November 2020.

<sup>56</sup> See the Australian Competition & Consumer Commission (ACCC), Digital platforms inquiry, 4 December 2017, <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platforms-inquiry>, accessed 18 November 2020.

<sup>57</sup> See the Australian Competition & Consumer Commission (ACCC), Digital platforms inquiry, Preliminary Report, 10 December 2018, <https://www.accc.gov.au/focus-areas/inquiries-ongoing/digital-platforms-inquiry/preliminary-report>, accessed 18 November 2020.

involving Cambridge Analytica and Facebook.<sup>58</sup> The AIPE Committee's preliminary report contained a number of recommendations, mostly amendments to the Personal Information Protection and Electronic Documents Act.<sup>59</sup> The AIPE Committee's final report of December 2018 included a number of potential regulatory responses to the problem of misinformation and disinformation on social media.<sup>60</sup> One recommendation was that social media platforms would be required to be more transparent with regard to the processes behind the dissemination of material online, including clear labelling of automated or algorithmically produced content. Other suggestions were that there should be obligations on platforms to take down illegal content, including disinformation and above all fake news, with more investment by platforms and governments in digital literacy programs and public awareness campaigns.

In June 2019, Burkina Faso's parliament adopted the Protection from Online Falsehoods and Manipulation Act that seeks to punish the publication of fake news compromising security operations, false information about rights abuses or destruction of property, or images and audio from a terrorist attack. Parliament specifically amended the country's Penal Code to introduce a series of new offences that aim to fight terrorism and organised crime, fight the spread of fake news, and suppress efforts to demoralise the Burkinabe armed forces.<sup>61</sup> Offenders could face fines of up to £7,000 or a maximum 10 years in jail.

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<sup>58</sup> See Standing Committee on Access to Information, Privacy and Ethics, *Breach of personal information involving Cambridge Analytica and Facebook, Reports and Government Responses*. On this point, two reports can be consulted: (i) Report 16: *Addressing Digital Privacy Vulnerabilities and Potential Threats to Canada's Democratic Electoral Process*, 14 June 2018; (ii) Report 17, *Democracy under Threat: Risks and Solutions in the Era of Disinformation and Data Monopoly*, 6 December 2018, <https://www.ourcommons.ca/Committees/en/ETHI/StudyActivity?studyActivityId=10044891>, accessed 23 November 2020.

<sup>59</sup> See Committee on Access to Information, Privacy and Ethics, *Report 16: Addressing digital privacy vulnerabilities and potential threats to Canada's democratic electoral process*, 14 June 2018, <https://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/report-16/>, accessed 24 November 2020.

<sup>60</sup> See Committee on Access to Information, Privacy and Ethics, *Report 17, Democracy under Threat: Risks and Solutions in the Era of Disinformation and Data Monopoly*, 6 December 2018, <https://www.ourcommons.ca/DocumentViewer/en/42-1/ETHI/report-17>, accessed 25 November 2020.

<sup>61</sup> See Assemblée Nationale, *Modification de la loi 31 Mat 2018 No. 25 (Code Penal)*, <https://perma.cc/LQH4-72W4>, accessed 28 November 2020.

In May 2019, the Singapore Parliament approved a law criminalising the dissemination of fake news online.<sup>62</sup> The law makes it illegal to spread false statements of fact that compromise security, public peace and safety, and the country's relations with other nations. In particular, the law punishes those who post fake news with heavy fines and even jail time. In this regard, if a user shares false information, the penalty is a fine of up to \$37,000 or five years in prison. What is more, the punishment jumps to \$74,000 and a potential 10-year jail term if the falsehood was shared using an inauthentic online account or a bot. A further important aspect is that social media platforms like Facebook and Twitter face fines of up to \$740,000 for their roles in spreading misinformation.

In India, during the nationwide lockdown imposed after the pandemic, more than 50 journalists were arrested under emergency laws for spreading fake news. On 7 April 2020, Uttar Pradesh police lodged a First Information Report (FIR) against journalist Prashant Kanojia for allegedly making "objectionable remarks" about Prime Minister Modi and Chief Minister Yogi Adityanath on social media. Shortly afterwards, the Uttar Pradesh police registered another FIR against The Wire, a daily news website, and its editor Siddharth Varadarajan for reporting that Yogi Adityanath had attended a public religious event after the nationwide lockdown was announced<sup>63</sup>.

#### **4. Legislative and administrative measures regulating fake news in the European union.**

Member States of the European Union have started to regulate fake news by law, and some EU governments have issued administrative measures accordingly. However, the COVID-19 pandemic has considerably increased legislative initiatives and administrative measures imposed by EU governments. Therefore, this Section of the article specifically looks at the Member States that have taken particularly stringent emergency legislative and administrative measures to manage fake

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<sup>62</sup> See Republic of Singapore, Protection from Online Falsehoods and Manipulation Act 2019, 25 June 2019, <https://sso.agc.gov.sg/Acts-Supp/18-2019/Published/20190625?DocDate=20190625>, accessed 28 November 2020. See M. Zastrow, "Singapore Passes 'Fake News' Law Following Researcher Outcry" *Nature* 15 May 2019, <https://doi.org/10.1038/d41586-019-01542-7>. See also, for a comparative law perspective, K Han "Big Brother's regional ripple effect: Singapore's recent 'fake news' law which gives ministers the right to ban content they do not like, may encourage other regimes in south-east Asia to follow suit" (2019) 48(2) *Index on Censorship* 67-69.

<sup>63</sup> Amnesty International, *supra*, note 20 184.

news during the COVID-19 pandemic: Germany, France, Italy, Spain, Hungary and Bulgaria. In addition, the social media regulation in force is analysed to understand the impact of emergency measures on the right to freedom of expression.

In Germany, following the events during the US election campaign, the Network Enforcement Act (*Netzwerkdurchsetzungsgesetz* or NetzDG) was approved on 30 June 2017 with the specific aim of fighting fake news on social networks by improving enforcement of the current laws.<sup>64</sup> Basically, with the Network Enforcement Act (hereinafter the “NEA”), Germany made fighting fake news on social networks a priority. To achieve this goal, the German government implemented law enforcement on social networks in order to promptly remove objectively criminal content, namely incitement to hatred, abuse, defamation, or content that might lead to a breach of the peace by misleading authorities into thinking a crime has been committed.

However, the obligations placed upon private companies to regulate and take down content raises concern with respect to freedom of expression. A prohibition on the dissemination of information based on vague and ambiguous criteria, such as “insult” or “defamation”, could be incompatible with article 19 of the International Covenant on Civil and Political Rights.<sup>65</sup>

The NEA works by requiring social media platforms to provide a mechanism for users to submit complaints about illegal content. Once they receive a complaint, platforms must investigate whether the content is illegal and must remove it within 24 hours only if the content is “manifestly unlawful”. Failing that, public authorities may impose high fines for failing to comply with existing legal obligations. In particular, platforms that do not remove clearly illegal content may be fined up to €50 million.

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<sup>64</sup> Act to Improve the Enforcement of Rights on Social Networks, 1 September 2017, <http://www.gesetze-im-internet.de/netzdg/NetzDG.pdf>, English version archived at <https://perma.cc/BAE2-KAJX>, accessed 29 November 2020. See the report by H. TWOREK and P. LEERSSEN, “An Analysis of Germany’s NetzDG Law” (2019) Transatlantic High Level Working Group on Content Moderation Online and Freedom of Expression, available at <https://dare.uva.nl/search?identifier=3dc07e3e-a988-4f61-bb8c-388d903504a7>. See also the legal report by J. GESLEY, “Initiatives to Counter Fake News: Germany”, available at [https://www.loc.gov/law/help/fake-news/germany.php#\\_ftnref42](https://www.loc.gov/law/help/fake-news/germany.php#_ftnref42), accessed 2 December 2020. In academia, see B. HOLZNAGEL, “Das Compliance-System des Entwurfs des Netzwerk-durchsetzungsgesetzes - Eine kritische Bestandsaufnahme aus internationaler Sicht” [The Compliance System of the Draft Network Enforcement Act - A Critical Review from an International Perspective] (2017) 8/9 Zeitschrift für Urheber- und Medienrecht 615-624

<sup>65</sup> See Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 1 June 2017, OL DEU 1/2017, 4, <https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-DEU-1-2017.pdf>, accessed 16 June 2021.

Nevertheless, the provisions imposing high fines for non-compliance with the obligations set out in the bill raise concerns, as these obligations as mentioned above may represent undue interference with the right to freedom of expression and privacy. The high fines raise proportionality concerns, and may prompt social networks to remove content that may be lawful.<sup>66</sup>

Moreover, the NEA has been cited by other countries seeking to introduce unduly restrictive intermediary laws or social media regulations that would enable the removal of fake news without a judicial or even a quasi-judicial order. Hence, several criticisms have rightly been levelled against the NEA, and some political parties have unsuccessfully presented proposals to modify the law since it is considered unconstitutional, particularly regarding freedom of expression.<sup>67</sup>

In France, a law against the manipulation of information was approved by the National Assembly on 22 December 2018 with the aim of providing further protecting democratic principles from the spread of fake news.<sup>68</sup> In particular, this law targeted the widespread and rapid dissemination of fake news by means of digital tools, especially through the channels of dissemination offered by social media platforms influenced by foreign States.<sup>69</sup>

Thus, the new legislation concentrates especially on election campaigns, just before and during elections, in order to focus available regulation tools on the real risk, namely attempts to influence election results, as occurred during the U.S. presidential elections and the Brexit campaign. Legally speaking, the law provides the administrative measures requiring a transparency obligation for platforms, which must report any sponsored content by publishing the name of the author and the amount paid. Additionally, platforms exceeding a certain number of hits per day must have a legal representative in France and publish their algorithms. There is also a legal injunction that allows the circulation of fake news to be quickly halted.

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<sup>66</sup> Ibid, 4.

<sup>67</sup> See, for example, G. NOLTE, "Hate-Speech, Fake-News, das 'Netzwerkdurchsetzungsgesetz und Vielfaltssicherung durch Suchmaschinen'" (2017) [Hate Speech, Fake News, the "Network Enforcement Act" and Assuring Diversity Through Search Engines] 61 *Zeitschrift für Urheber- und Medienrecht* ZUM 552-554. For the proposals of the parties see, for example, the draft act submitted by the Green Party, BT-Drs. 19/5950, <http://dipbt.bundestag.de/dip21/btd/19/059/1905950.pdf>, archived at <http://perma.cc/FBW8-FJDP>.

<sup>68</sup> See "Law against the Manipulation of Information" which also introduced three new articles (L. 112, L. 163-1 et L. 163-2) to the French Electoral Code, <https://www.legifrance.gouv.fr/loda/id/JORFTEXT000037847559/2020-12-15/>, accessed 3 December 2020.

<sup>69</sup> R. CRAUFURD SMITH, "Fake news, French Law and Democratic Legitimacy: Lessons for the United Kingdom?" (2019) 11(1) *The Journal of Media Law* 52–81.

Last but not least, during the three months preceding an election, an interim judge will qualify the fake news as defined in the 1881 law on the freedom of the press according to three criteria: (i) the news must be manifestly fake, (ii) it must have been disseminated deliberately on a massive scale; (iii) it must be liable to cause a breach of the peace or compromise the outcome of an election.

The French law against the manipulation of information establishes a duty of cooperation on the part of social media platforms in order to encourage them to introduce measures to prevent fake news and make these measures public. In this regard, the French Broadcasting Authority, the Superior Audiovisual Council, is assigned the role of preventing, suspending and stopping the broadcast of television services controlled by, or influenced by, other States, and are harmful to the fundamental interests of the country.

In the midst of the health emergency, in order to fight fake news, on 30 April 2020, the French government created a specific section on COVID-19 on its website.<sup>70</sup> However, this initiative raised issues among journalists who consider that the government should not judge information.<sup>71</sup> Consequently, the French government took down the fake news COVID-19 page after accusations that it had overstepped its constitutional role and infringed press freedoms.<sup>72</sup>

In greater detail, the national assembly approved a controversial law referring to COVID-19 information that gives platforms a one-hour deadline to remove related content after being instructed to do so by the authorities.<sup>73</sup> Critics reasonably claimed that the law limits freedom of expression and is difficult to apply.<sup>74</sup> Indeed, on 18 June 2020, the Constitutional Council judged

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<sup>70</sup> French government “Information Coronavirus,” <https://www.gouvernement.fr/info-coronavirus>, accessed 4 December 2020.

<sup>71</sup> Libération, 3 May 2020, “Désinfox coronavirus”: l’Etat n’est pas l’arbitre de l’information, <https://www.liberation.fr/debats/2020/05/03/desinfox-coronavirus-l-etat-n-est-pas-l-arbitre-de-l-information-1787221>, accessed 4 December 2020.

<sup>72</sup> On the academic debate see, more generally, R. CRAUFURD SMITH, “Fake news, French Law and Democratic Legitimacy: Lessons for the United Kingdom?” 11(1) *Journal of Media Law* 52-81, doi:10.1080/17577632.2019.1679424.

<sup>73</sup> The National Assembly, Bill to fight against hateful content on the internet, 13 May 2020, <https://perma.cc/C7FD-J62S>; accessed 5 December 2020.

<sup>74</sup> F. C. BREMNER, “French Fake News Law ‘Will Censor Free Speech’” (2018) *The Times* (London, England) 27.

that social media obligations to remove illegal content within 24 hours were not compatible with freedom of expression.<sup>75</sup>

In Italy, following the constitutional referendum campaign in December 2016, a huge debate arose, and political actors began calling for new regulations to address the proliferation of fake news online. Thus, a number of proposals were made to prevent it; these could lead to the imposition of strict liability on social media platforms. On 7 February 2017 a Member of Parliament, Senator Adele Gambaro, introduced a particularly controversial bill (the so-called *DDL Gambaro*) proposing fines and criminal penalties for anyone who publishes or spreads “false, exaggerated, or biased” news reports online.<sup>76</sup> However, after severe criticism from public opinion, the bill did not move forward in Parliament and was not adopted.

The Italian Minister of the Interior aimed to combat fake news by promoting a system of reporting manifestly unfounded and biased news, or openly defamatory content. In this regard, on 18 January 2018, the Minister of the Interior introduced the “Red Button operational Protocol” to fight the dissemination of fake news online at the time of the political elections in 2018. The Ministry of the Interior introduced this specific online procedure in order to limit the actions of those who, with the sole intent of conditioning public opinion and tendentiously orienting their thoughts and choices, design and spread news relating to topics or subjects of public interest with no foundation. Specifically, the protocol provided a “red button” signalling service where users can report a possible network of contents linked to the phenomenon of fake news. The unit of the Italian state police that investigates cyber-crime was tasked with reviewing reports and act accordingly.<sup>77</sup>

The Constitutional Affairs Committee of the Senate of the Italian Republic is currently discussing bill No. 1900 aimed at establishing a parliamentary committee of inquiry in order to examine the problem of disinformation and, more precisely, the dissemination of fake news on a

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<sup>75</sup> Decision n. 2020-801 DC of June 18, 2020, Law to combat hate content on the internet, <https://perma.cc/72VE-SMDJ>; accessed 5 December 2020.

<sup>76</sup> See Senate of the Republic, Bill No. 2688 of 7 February 2017, <http://www.senato.it/service/PDF/PDFServer/BGT/01006504.pdf>, accessed 6 December 2020.

<sup>77</sup> See D. KAYE, “Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression” OL ITA 1/2018, 20 March 2018, <https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-ITA-1-2018.pdf>, accessed 7 December 2020.

massive scale.<sup>78</sup> The bill, currently under discussion, does not establish any binding measures to deal with the spread of fake news.

On the contrary, its purpose is to empower a committee with a variety of tasks: (i) investigating the massive dissemination of illegal, false, non-verified or intentionally misleading information and content via traditional and online media; (ii) ascertaining whether such activities are backed by subjects, groups or organisations that receive financial support, including from foreign sources with the specific aim of manipulating information and influencing public opinion, also in the context of electoral or referendum campaigns; (iii) assessing the impact of disinformation on health and in the context of the COVID-19 pandemic; (iv) evaluating whether disinformation activities pursue the goal of inciting hatred, discrimination and violence; (v) exploring whether any connection exists between disinformation and commercial activities, most notably pursued by websites and digital platforms; (vi) verifying the status quo from a legal standpoint, as well as the existence and adequacy of procedures implemented by media platforms and social media service providers for the removal of false pieces of information and illegal content; (vii) assessing the existence of social, educational and literacy measures and best practices or of initiatives aimed at raising the awareness of individuals about the importance of fact-checking and reliable sources of information; (viii) determining whether legal or administrative measures aimed at countering and prevent disinformation, as well as crimes committed via the media, are necessary, also with regard to the negative consequences of disinformation on the development of minors and their learning abilities.<sup>79</sup>

The Italian government further engaged in transparency and debunking actions. On 4 April 2020, it set up the monitoring task force to combat the spread of fake news related to COVID-19 on the web and on social networks. The main goals of the government monitoring task force are to contain the risk that the spread of online disinformation could weaken pandemic containment

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<sup>78</sup> See Senate Act No. 1900 - Establishment of a parliamentary commission of inquiry into the massive dissemination of false information, <http://www.senato.it/leg/18/BGT/Schede/Ddliter/53197.htm>, accessed 7 December 2020.

<sup>79</sup> See E. APA and M. BIANCHINI, "Parliament Considers Establishing an ad-hoc Parliamentary Committee of Inquiry on the Massive Dissemination of Fake News" (2020) 10 *Iris* 1-3 <https://merlin.obs.coe.int/article/9004>.



measures and promote initiatives in order to increase citizens' control over the reliability of social network information.

The Italian Ministry of Health also took action to tackle fake news on COVID-19 on the institutional home page, where it promoted the information campaign “beware of hoaxes” with a collection of the most recurrent fake news on social media.<sup>80</sup> In addition, the Communication Authority (AGCOM) launched an observatory on disinformation online by publishing reports, sending information to ministries, and involving various stakeholders in the design of policies against disinformation.<sup>81</sup>

The actions taken by the Italian government have been rightly criticised as these pose many problems concerning the right to freedom of expression, media freedom, and media pluralism<sup>82</sup> as well as for having adopted a notion of fake news in disagreement with that of the European Commission, which deemed it inadequate and misleading.<sup>83</sup>

In Spain too, the government started monitoring online information in order to contain the spread of fake news regarding COVID-19 by establishing a specific protocol against disinformation campaigns.<sup>84</sup>

On 30 October 2020 the government issued a ministerial order approving the protocol called “Procedure for Intervention against Disinformation” by Spain’s National Security Council in order to prevent, detect, and respond to disinformation campaigns in addition to establishing coordination mechanisms.<sup>85</sup> The document makes provision for the possibility of carrying out

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<sup>80</sup> The Ministry of Health “Beware of Hoaxes,” <http://www.salute.gov.it/portale/nuovocoronavirus/dettaglioContenutiNuovoCoronavirus.jsp?lingua=italiano&id=5387&area=nuovoCoronavirus&menu=vuoto>, accessed 7 December 2020.

<sup>81</sup> AGCOM “Covid-19 for users,” <https://www.agcom.it/covid-19-per-gli-utenti>, accessed 7 December 2020.

<sup>82</sup> See B. PONTI, “The Asymmetries of the Monitoring Unit to Combat Fake News on COVID-19” *La Costituzione.info* 7 April 2020; <https://www.lacostituzione.info/index.php/2020/04/07/le-asimmetrie-dellunita-di-monitoraggio-per-il-contrasto-alle-fake-news-sul-covid-19/#more-6961>, accessed 7 December 2020.

<sup>83</sup> European Commission “Final report of the High Level Expert Group on Fake News and Online Disinformation” 12 March 2018, <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation>, accessed 12 November 2020.

<sup>84</sup> For academic’s debate see, for example, J. MUÑOZ-MACHADO CAÑAS, “Noticias falsas. confianza y configuración de la opinión pública en los tiempos de internet” [Fake News. Confidence and Configuration of Public Opinion in the Times of the Internet] (2020) 86-87 *El Cronista del estado social y democrático de derecho* 122-139.

<sup>85</sup> Order PCM/1030/2020, of October 30, by which the Action procedure against disinformation was approved by the National Security Council; <https://www.boe.es/boe/dias/2020/11/05/pdfs/BOE-A-2020-13663.pdf>, accessed 13 December 2020.

communication campaigns to counter fake news stories without censoring them. It is up to the government to decide what exactly constitutes misinformation, with no representatives from the media or journalist associations involved in the process.<sup>86</sup>

The order passed by the coalition government – led by the Socialist Party (PSOE), with junior partner Unidas Podemos – is based on the concept that the use of fake news to destabilise a country, or interference in public opinion by a third country, constitute a form of attack. However, opposition parties accused the government of creating a “Ministry of Truth” that would allegedly make decisions regarding content and provide media outlets with guidelines to follow. Although the Madrid press association acknowledged that the State needs to fight disinformation, it warned of the risk that the plan would lead the government to act more like a censor than as a guarantor of truth.

In reality, the Spanish plan leaves everything in the hands of the government and calls for the media to be consulted only if needed, but it is the media that should control the government rather than the government controlling the media.

On 30 March 2020, the Hungarian government issued the law making the spread of false or distorted information punishable with up to five years imprisonment<sup>87</sup> and, on 4 May 2020, issued a decree introducing derogations from the principle of the right to information.<sup>88</sup>

Bulgaria’s government used its state of emergency decree to try to amend the criminal code and introduce prison sentences for spreading what it deems fake news about the outbreak with up to three years in prison or a fine of up to €5,000. Furthermore, another bill submitted to Parliament

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<sup>86</sup> *El País*, 9 November 2020, Spain to monitor online fake news and give a ‘political response’ to disinformation campaigns, <https://english.elpais.com/politics/2020-11-09/spain-to-monitor-online-fake-news-and-give-a-political-response-to-disinformation-campaigns.html>, accessed 14 December 2020.

<sup>87</sup> A. GERGELY and V. GULYAS, “Orban Uses Crisis Powers for Detentions Under Fake News Law” Bloomberg.com, May 2020, <http://search.ebscohost.com/login.aspx?direct=true&db=bsu&AN=143195291&site=ehost-live>, accessed 14 December 2020; see also *The Guardian* 30 March 2020 “Hungary passes law that will let Orbán rule by decree,” <https://www.theguardian.com/world/2020/mar/30/hungary-jail-for-coronavirus-misinformation-viktor-orban>, accessed 14 December 2020.

<sup>88</sup> Decree of 4 May 2020. The decree limits the application of data subjects’ rights safeguarded under Articles 15 to 22 of the GDPR in relation to the processing of data conducted by both public and private entities for the purpose fighting the COVID-19 crisis. The Decree of 4 May 2020 is available online at <https://magyarkozlony.hu/dokumentumok/008772a9660e8ff51e7dd1f3d39ec056853ab26c/megtekintes>, accessed 18 December 2020.

by a ruling coalition party on 19 April 2020 would, if approved, give the Bulgarian authorities more powers to suspend websites for spreading internet misinformation beyond the immediate health emergency.

## 5. Safeguarding the right of expression in international and EU law.

The administrative measures governments have recently adopted to regulate fake news may undermine fundamental rights, especially the right to freedom of expression, and the COVID-19 pandemic is emphasising this trend.<sup>89</sup> Indeed, we have seen that by governing disinformation and especially by fighting the spread of fake news<sup>90</sup> on social media platforms,<sup>91</sup> many governments have enacted legislative and administrative measures restricting freedom of expression.<sup>92</sup>

In this section, disputing the government policies in question, I shall argue that some important principles of public law guarantee and protect freedom of expression as a fundamental individual right at international and European level, never subjecting it to conditions contrary to the enjoyment of such right.<sup>93</sup>

Hence, as several scholars have clearly stated, in international public law, the expression of ideas and opinions is considered a basic right of all persons as it is part of the full development of an individual, but this right also represents a milestone for free and democratic society, providing

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<sup>89</sup> See R. RADU, "Fighting the 'Infodemic': Legal Responses to COVID-19 Disinformation" (2020) 6(3) *Social Media + Society* 1-4, <https://doi.org/10.1177%2F2056305120948190>. For a non-legal discussion see S. LAATO, A. N. ISLAM, M. N. ISLAM, E. WHELAN, "What Drives Unverified Information Sharing and Cyberchondria during the COVID-19 Pandemic?" (2020) 29 *European Journal of Information Systems* 288-305. <http://dx.doi.org/10.1080/0960085X.2020.1770632>.

<sup>90</sup> B. BAADE, "Fake News and International Law" *supra*, note 4 1358.

<sup>91</sup> See, for example, the recent C. MARSDEN, T. MEYER and I. BROWN, "Platform Values and Democratic Elections: How can the Law Regulate Digital Disinformation?" (2020) 36 *The Computer Law & Security Report* 1-18 <https://doi.org/10.1016/j.clsr.2019.105373>.

<sup>92</sup> See, for example, E. HOWIE, "Protecting the Human Right to Freedom of Expression in International Law." (2018) 20(1) *International Journal of Speech Language Pathology* 12-15, <https://doi.org/10.1080/17549507.2018.1392612>.

<sup>93</sup> See, for example, E. BARENDT, *Freedom of Speech* (2nd edn., Oxford University Press, Oxford 2005); see also K. GREENAWALT, *Fighting Words: Individuals, Communities, and Liberties of Speech* (Princeton University Press, Princeton 1995).

the vehicle for the exchange and development of opinions.<sup>94</sup> Many important rules of international law safeguard people's freedom of expression, so that we might at least refer to the ones we indicate below.

Firstly, the Universal Declaration of Human Rights (UDHR), proclaimed by the United Nations General Assembly in Paris on 10 December 1948, ensures an effective protection of the freedom of expression pursuant to Article 19 of the UDHR in the following terms: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers."<sup>95</sup>

In particular, the last part of Article 19 of the UDHR provides a legal basis for the dissemination "through any media" of information by establishing that it can be conveyed "without interference".

According to this interpretation of Article 19 of the UDHR, free, uncensored and unhindered media is essential in any society to ensure freedom of opinion and expression as the basis for the full enjoyment of a wide range of other human rights (e.g., rights to freedom of assembly and association, the exercise of the right to vote). In other words, it constitutes one of the cornerstones of a democratic society.<sup>96</sup>

Secondly, the International Covenant on Civil and Political Rights (ICCPR) adopted by the General Assembly on 16 December 1966<sup>97</sup> guarantees freedom of expression and opinion in paragraphs 1 and 2 of Article 19, which read: "1. Everyone shall have the right to hold opinions

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<sup>94</sup> See E. HOWIE, "Protecting the Human Right to Freedom of Expression in International Law", *supra*, note 92, 13. See also Human Rights Committee, communication No. 1173/2003, *Benhadj v. Algeria*, Views adopted on 20 July 2007; [http://www.worldcourts.com/hrc/eng/decisions/2007.07.20\\_Benhadj\\_v\\_Algeria.htm](http://www.worldcourts.com/hrc/eng/decisions/2007.07.20_Benhadj_v_Algeria.htm); No. 628/1995, *Park v. Republic of Korea*, views adopted on 5 July 1996, [http://www.worldcourts.com/hrc/eng/decisions/1996.07.05\\_Park\\_v\\_Republic\\_of\\_Korea.htm](http://www.worldcourts.com/hrc/eng/decisions/1996.07.05_Park_v_Republic_of_Korea.htm), accessed 8 January 2021.

<sup>95</sup> See United Nations General Assembly, Universal Declaration of Human Rights (UDHR), 10 December 1948, Paris, (General Assembly resolution 217 A), <https://www.un.org/en/universal-declaration-human-rights/>, accessed 8 January 2021.

<sup>96</sup> See Human Rights Committee, communication No. 1128/2002, *Marques v. Angola*, Views adopted on 29 March 2005, <http://hrlibrary.umn.edu/undocs/1128-2002.html>, accessed 9 January 2021.

<sup>97</sup> The ICCPR has been widely ratified throughout the world, with 168 States Parties. Notably, the following States have not signed the ICCPR: Myanmar (Burma), Malaysia, Oman, Qatar, Saudi Arabia, Singapore, South Sudan, and the United Arab Emirates.

without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”<sup>98</sup>

In spite of this, paragraph 3 of Article 19 ICCPR imposes certain limitations on the exercise of the right to freedom of expression laid down in paragraph 2 of the same norm involving special duties and responsibilities.<sup>99</sup> Consequently, governments may invoke Article 19(3) ICCPR relating (a) to the respect of the rights or reputations of others, and to ensure (b) the protection of national security and public order, or of public health or morals.

Yet, if we consider the specific terms of Article 19(1) of the ICCPR as well as the relationship between opinion and thought laid down by Article 18 ICCPR, we can affirm that any derogation from paragraph 1 would be incompatible with the object and purpose of the Covenant, even in the event of public health risks such as the COVID-19 pandemic.<sup>100</sup> This argument finds support in the UN Human Rights Committee claim that freedom of opinion is an elements from which “it can never become necessary to derogate (...) during a state of emergency.”<sup>101</sup>

As the free communication of information and ideas about public and political issues is indispensable for democracy, the ICCPR embraces the right for the media to receive information on the basis of which it can fulfil its function.<sup>102</sup> This entails a free media able to comment on

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<sup>98</sup> See, for example, M. O’FLAHERTY, “Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No 34” (2012) 12(4) Human Rights Law Review, 627-654, <https://doi.org/10.1093/hrlr/ngs030>.

<sup>99</sup> It should be noted that Article 19 is also limited by another article, Article 20, which prohibits any propaganda of war or any advocacy of national, racial, or religious hatred that constitutes incitement to discrimination, hostility or violence.

<sup>100</sup> See the UN Human Rights Committee (HRC), *CCPR General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, 4 November 1994, CCPR/C/21/Rev.1/Add.6, <https://www.refworld.org/docid/453883fc11.html>, accessed 10 January 2021.

<sup>101</sup> UN Human Rights Committee 102<sup>nd</sup> session Geneva, 11-29 July 2011 General comment No. 34, Article 19: Freedoms of opinion and expression, at para. 5, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>, accessed 8 January 2021. General Comment No. 34 is a document adopted by the UN Human Rights Committee in July 2011 that gives States more specific guidance on the proper interpretation of Article 19 of the ICCPR.

<sup>102</sup> J. FARKAS and J. SCHOU, *Post-Truth, Fake News and Democracy: Mapping the Politics of Falsehood* (Routledge, New York-London 2020).

public issues without censorship or restraint and to inform public opinion,<sup>103</sup> and the public consequently has a corresponding right to receive media output.<sup>104</sup>

We can consistently note from this perspective that Article 19(2) of the ICCPR explicitly includes in this right the “freedom to seek, receive and impart information and ideas (...) through any other media of (...) choice”. Thus, governments should ensure that legislative and administrative frameworks for the regulation of social media platforms are consistent with the provisions of Article 19 of the ICCPR.

We may further observe, in accordance with the statements of the UN Human Rights Committee,<sup>105</sup> that any restrictions on the operation of websites, blogs or any other internet-based, electronic, or other such information dissemination system, including systems to support such communication, for example, internet service providers or search engines, are only permissible if they comply with paragraphs 1 and 2 of Article 19 of the ICCPR. In addition, permitted restrictions should generally be content-specific, and, on the other hand, generic bans on the operation of certain sites and systems must be considered incompatible with Article 19 of the ICPPR. Likewise, it is also inconsistent with the same rule to forbid a site or information dissemination system to publish material solely because it may be critical of the government or the political social system it espouses.<sup>106</sup>

In international law, other rules enshrine the right to freedom of expression, namely the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>107</sup>, which guarantees

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<sup>103</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, <https://www.refworld.org/docid/453883fc22.html>, accessed 11 January 2021.

<sup>104</sup> See Human Rights Committee, communication No. 1334/2004, *Mavlonov and Sa'di v. Uzbekistan*, [http://www.worldcourts.com/hrc/eng/decisions/2009.03.19\\_Mavlonov\\_v\\_Uzbekistan.htm](http://www.worldcourts.com/hrc/eng/decisions/2009.03.19_Mavlonov_v_Uzbekistan.htm), accessed 11 January 2021.

<sup>105</sup> See supra note 101, at para. 43 <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>, accessed 11 January 2021.

<sup>106</sup> *Ibid.*

<sup>107</sup> International Covenant on Economic, Social and Cultural Rights adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966, entered into force on 3 January 1976, in accordance with article 27, <https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>, accessed 11 January 2021. The ICESCR has been signed and ratified by 163 States parties.

the right to freedom of expression under Article 15(3)<sup>108</sup>, and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>109</sup>, which expresses the right to freedom of expression under Article 5(d)(vii) and (viii), such as the rights to freedom of thought, conscience, religion, and the freedom of opinion and expression, respectively.

As regards the European Union's (EU) legal system, freedom of expression, media freedom, and pluralism are enshrined in the EU Charter of Fundamental Rights, as well as in the European Convention on Human Rights. Furthermore, we might claim more generally that no country can join the EU without guaranteeing freedom of expression as a basic human right according to Article 49 of the Treaty on European Union (TEU).<sup>110</sup>

The European Convention on Human Rights (ECHR)<sup>111</sup> recognises the right to freedom of expression under Article 10(1), which states: 1. "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."<sup>112</sup>

In particular, we can clearly note that Article 10(1) of the ECHR describes several components of the right to freedom of expression, including the freedom to express one's opinion and the freedom to communicate and receive information. As a matter of principle, we therefore claim that the protection given by Article 10 of the ECHR should extend to any expression, regardless of its content, disseminated by any individual, group, or type of media. Therefore, based on what we have seen, we can argue that the right protected by Article 10 of the ECHR entirely

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<sup>108</sup> Article 15(3) of the ICESCR "The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity."

<sup>109</sup> International Convention on the Elimination of All Forms of Racial Discrimination, adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965, entered into force on 4 January 1969, in accordance with Article 19, <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>, accessed 11 January 2021. The ICERD has been ratified by 177 States.

<sup>110</sup> See Article 49 of the TEU, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012M049>, accessed 12 January 2021.

<sup>111</sup> The European Convention on Human Rights was opened for signature in Rome on 4 November 1950 and came into force in 1953, <https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c>, accessed 12 January 2021.

<sup>112</sup> Yet, we should consider some of the "duties and responsibilities" set forth in Article 10(2) of the ECHR. See the seminal work by D. VOORHOOF, "The European Convention on Human Rights: The Right to Freedom of Expression and Information restricted by Duties and Responsibilities in a Democratic Society (2015) 7(2) Human Rights 1-40.

covers freedom of expression on social media as it includes the right to hold opinions and to receive and impart ideas and information without interference regardless of frontiers, which are removed thanks above all to social media platforms.

The Charter of Fundamental Rights of the European Union (CFR)<sup>113</sup> guarantees and promotes the most important freedoms and rights enjoyed by EU citizens into one legally binding document. The CFR under Article 11(1) states that “everyone has the right to freedom of expression” and at the same time ensures that this right includes “freedom to hold opinions and to receive and impart information and ideas without interference by public authorities and regardless of frontiers”.

Moreover, the CFR explicitly requires governments to respect “the freedom and pluralism of the media” in accordance with Article 11(2), thus avoiding any legislative and administrative measures that could undermine or even merely jeopardise human rights, and especially the freedom of expression.

We should bear in mind that, based on the interpretation of the ECHR and CFR Charters, in addition to the other fundamental rules of the EU legal system, the European Court of Human Rights (ECtHR) has repeatedly stated that freedom of expression constitutes “one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual’s self-fulfilment”.<sup>114</sup>

In its decision-making process, the ECtHR has considered national constitutional practices that afford a high level of protection to freedom of expression and has frequently ascribed the protection of freedom of expression to the International Covenant on Civil and Political Rights as well as other international documents.

The Strasbourg Court has consistently underlined some primary tasks that the media must accomplish without having to suffer interference from governments in order to fulfil people’s

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<sup>113</sup> The CFR was declared in 2000 and came into force in December 2009. For the official version of the Charter see [https://eur-lex.europa.eu/eli/treaty/char\\_2012/oj](https://eur-lex.europa.eu/eli/treaty/char_2012/oj), accessed 13 January 2021.

<sup>114</sup> ECtHR, *Lingens v. Austria*, 8 July 1986; *Şener v. Turkey*, 18 July 2000; *Thoma v. Luxembourg*, 29 March 2001; *Marónek v Slovakia*, 19 April 2001; *Dichand and Others v. Austria*, 26 February 2002. See J F Flauss “The European Court of Human Rights and the Freedom of Expression” (2009) 84(3) *Indiana Law Journal* 809. See also G Ilić “Conception, Standards and Limitations of the Right to Freedom of Expression with a Special Review on the Practice of the European Court of Human Rights” (2018) 1 *Godišnjak Fakulteta Bezbednosti* 29-40.



enjoyment of freedom of expression. So, in summary, media should (i) share information and ideas concerning matters of public interest, (ii) perform the leading role of public watchdog, and (iii) meet the need for impartial, independent and balanced news<sup>115</sup>, information and comment.

The ECtHR case law principles on the right to freedom of expression are summarised in the judgment *Bédat v. Switzerland* of 29 March 2016<sup>116</sup>. It can basically be argued that these principles set out in the aforementioned judgment can protect fake news by including it in the exercise of the right of freedom of expression under certain conditions.

Indeed, the ECtHR recognises how the freedom of expression represents one of the basic foundations of a democratic society and one of the essential conditions for its progress and for each individual's self-fulfilment. Indeed, in the *Bédat v. Switzerland* the Strasbourg Court established that, under the Article 10(2) of the ECHR, this right 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 – as it could be for fake news – offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”. As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly.<sup>117</sup>

Furthermore, we can also observe, as regards the level of protection, that there is little scope under Article 10(2) of the ECHR for restrictions on freedom of expression in two fields, namely political speech and matters of public interest.<sup>118</sup> Accordingly, a high level of protection of freedom of expression, with the authorities thus having a particularly narrow margin of appreciation, will normally be accorded where the remarks concern a matter of public interest, as is the case in particular for remarks on the functioning of the judiciary, even in the context of proceedings that

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<sup>115</sup> On this point see M. ELIANTONIO, F. GALLI, M. SCHAPER, “A Balanced Data Protection in the EU: Conflicts and Possible Solutions (2016) 23(3) Maastricht Journal of European and Comparative Law 391-403 <https://doi.org/10.1177/1023263X1602300301>.”

<sup>116</sup> *Bédat v. Switzerland* App no [56925/08](http://hudoc.echr.coe.int/eng?i=001-161898) (ECtHR GC 29 March 2016) para. 48, <http://hudoc.echr.coe.int/eng?i=001-161898>; see also *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* App no [931/13](http://hudoc.echr.coe.int/eng?i=002-11555), (ECtHR GC 27 June 2017), <http://hudoc.echr.coe.int/eng?i=002-11555>.

<sup>117</sup> *Bédat v. Switzerland* supra, note 116, para. 48.

<sup>118</sup> See *Morice v. France* App no [29369/10](http://hudoc.echr.coe.int/eng?i=001-161898) (ECtHR GC 23 April 2015) para.125; see also *Süreç v. Turkey* App no [26682/95](http://hudoc.echr.coe.int/eng?i=001-161898) (ECtHR GC 8 July 1999) para 61; *Lindon, Otchakovsky-Laurens and July v. France* App no [21279/02](http://hudoc.echr.coe.int/eng?i=001-161898) and [36448/02](http://hudoc.echr.coe.int/eng?i=001-161898) (ECtHR GC 22 October 2007) para 46; *Axel Springer AG v. Germany* App no [39954/08](http://hudoc.echr.coe.int/eng?i=001-161898) (ECtHR 7 February 2012) para 90.

are still pending<sup>119</sup>. A degree of hostility<sup>120</sup> and the potential seriousness of certain remarks<sup>121</sup> do not obviate the right to a high level of protection, given the existence of a matter of public interest.<sup>122</sup>

This section has analysed some important rules of international and European law and has argued that freedom of expression is protected and guaranteed as a fundamental human right, never subjecting it to conditions contrary to its enjoyment.

The next part of this paper will discuss the main regulatory approaches, namely empowering users, self-regulation, and government intervention that States around the world might consider when regulating fake news.

## **6. Empowering users, self-regulation, and government intervention.**

Having emphasised the importance of protecting freedom of expression in international and European law, this section surveys regulatory approaches that may be implemented by States in order to govern fake news.

In doing so, I thus I recommend self-regulation and above all empowering users rather than government intervention as regulatory strategies for addressing fake news by minimising undue interference in the right to freedom of expression.

Basically, at least three different regulatory approaches to managing information on social media platforms could be proposed. The first is based on empowering users<sup>123</sup>, leveraging the ability

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<sup>119</sup> See, *mutatis mutandis*, *Roland Dumas v. France* App no 34875/07 (ECtHR 15 July 2010) para 43; *Gouveia Gomes Fernandes and Freitas e Costa v. Portugal* App no 1529/08 (ECtHR 29 March 2011) para 47).

<sup>120</sup> See *E.K. v. Turkey*, App no 28496/95 (ECtHR 7 February 2002) paras 79-80.

<sup>121</sup> See *Thoma v. Luxembourg* App no 38432/97 (ECtHR 29 March 2001) para 57.

<sup>122</sup> See *Paturel v. France* App no 54968/00 (ECtHR 22 December 2005) para 42.

<sup>123</sup> See M. M. MADRA-SAWICKA, J. H. NORD, J. PALISZKIEWICZ AND T.-R. LEE, "Digital Media: Empowerment and Equality" (2020) 11(4) *Information* 225, doi:10.3390/info11040225. The authors argue that empowerment is a process by which powerless people become conscious of their situation, organise collectively to improve it, and access opportunities, as an outcome of which they take control over their own lives, gain skills, and solve problems. See also N. KABEER, "Resources, Agency, Achievements: Reflections on the Measurement of Women's Empowerment" (1999) 30 *Dev. Chang.* 435-464. For this author empowerment means expanding people's ability to make strategic life choices, particularly in the context in which this ability had been denied to them. From another point of view, according to N. WALLERSTEIN E. BERNSTEIN, "Empowerment Education: Freire's Ideas Adapted to Health Education" (1988) 15

of individuals to evaluate and detect fake news.<sup>124</sup> The second and third approach concern the accountability of the social media platforms that can be implemented by either self-regulation or government intervention.

The first approach is essentially based on fact checking by individual websites.<sup>125</sup> Specifically, a number of major organisations in the United States, such as *PolitiFact*, *FactCheck.org*, *The Washington Post* and *Snoopes* fact check rumours, health, and political claims, especially those that often appear on social media.<sup>126</sup> Fact checking is also carried out by reliable sources of information such as newspapers, where news is almost always subject to editorial scrutiny<sup>127</sup>. Moreover, another approach based on empowering users seeks to increase the ability of individuals to assess the quality of sources of information by educating them, although it is unclear whether such efforts can actually improve the ability to assess credibility and, if so, whether this will have long-term effects.<sup>128</sup>

Yet, in many cases this approach inexorably collides with social reality. Recently, the behavioural sciences have demonstrated that people are predictably irrational.<sup>129</sup> This may mean that people are irrational consumers of news as they prefer information that confirms their pre-existing attitudes (*i.e.* selective exposure), view information consistent with their pre-existing beliefs as more persuasive than dissonant information (*i.e.* confirmation bias<sup>130</sup>), and are inclined to accept

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Health Educ. Behav. 379-394, empowerment it is a process that supports the participation of people, organizations, and communities in gaining control over their lives in their community and society.

<sup>124</sup> Recently, for example, see E. K. VRAGA et al., “Empowering Users to Respond to Misinformation About Covid-19” (2020) 8(2) *Media and Communication* (Lisboa) 475-479, doi:10.17645/mac.v8i2.3200. These authors claim that “if much of the misinformation circulating on social media is shared unwittingly, news and scientific literacy that helps people distinguish between good and bad information on Covid-19 could reduce the amount of misinformation shared”.

<sup>125</sup> See, for example, A. L. WINTERSIECK, “Debating the Truth: The Impact of Fact-Checking during Electoral Debates” (2017) 45(2) *American Politics Research* 304-331.

<sup>126</sup> For a list of fact checking websites cf. “Fake News & Misinformation: How to Spot and Verify” available at <https://guides.stlcc.edu/fakenews/factchecking>. For an extend analysis on the methodologies of three major fact-checking organizations in the United States cf. [https://ballotpedia.org/The\\_methodologies\\_of\\_fact-checking](https://ballotpedia.org/The_methodologies_of_fact-checking).

<sup>127</sup> To take just one example, the French newspapers *Le Monde* has identified and corrected nineteen misleading statements made by Marine Le Pen, the rightwing candidate who reached the runoff of the 2017 French presidential election, during her televised debate against Emmanuel Macron; the article is available at [http://www.lemonde.fr/les-decodeurs/article/2017/05/03/des-intox-du-debat-entre-emmanuel-macron-et-marine-le-pen-verifiees\\_5121846\\_4355770.html](http://www.lemonde.fr/les-decodeurs/article/2017/05/03/des-intox-du-debat-entre-emmanuel-macron-et-marine-le-pen-verifiees_5121846_4355770.html), accessed 26 January 2021.

<sup>128</sup> D. LAZER et al., “The Science of Fake News: Addressing Fake News Requires a Multidisciplinary Effort” (2018) 359(6380) *Science* 1094-1096, doi:10.1126/science.aao2998.

<sup>129</sup> D. ARIELY, *Predictably Irrational: The Hidden Forces that Shape our Decisions* (New York, Harper Collins 2009).

<sup>130</sup> See R. S. NICKERSON, “Confirmation Bias: A Ubiquitous Phenomenon in Many Guises (1998) 2(2) *Review of General Psychology* 175-220.

information that satisfies them (*i.e.* desirability bias).<sup>131</sup> By preselecting information that interests them, social media users tend to reinforce their own world views and opinions. These aspects entail social media users tending to aggregate into ideologically homogeneous groups (*i.e.* communities), on which they focus their attention and from which they obtain news. Furthermore, it has been authoritatively argued that people are inclined to remain within these specific communities thus contributing to the emergence of polarisation.<sup>132</sup> Distinct and separate communities that do not interact with each other arise spontaneously creating opposing groups each of which focuses only on a specific narrative – which therefore tends to strengthen and polarise within the group – ignoring the alternatives (*i.e.* echo chamber).<sup>133</sup>

I am persuaded, despite the problems just mentioned, that the approach of empowering users – if properly pursued and implemented by significantly enhancing quality information and actively correcting misinformation – might represent an effective and democratic strategy to address fake news on social media platforms by avoiding undue interference with the right to freedom of expression.<sup>134</sup> The empowerment approach, in essence, can create a sound foundation for dealing with fake news by providing social media users with the tools to detect and share high-quality information.

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<sup>131</sup> D. LAZER et al., *supra*, note 128, at 1095.

<sup>132</sup> C. R. SUNSTEIN, *Republic.com 2.0*. (Princeton University Press, New York 2009) 57-58. According to Sunstein's point of view, the polarisation of a group is a phenomenon whereby individuals, after deliberation with like-minded individuals, are likely to adopt a more extreme position than the one they originally held. From another standpoint, Sunstein also considers fragmentation, arguing that the Internet's ability to reinforce narrow interests encourages self-isolation, which, in turn, leads to group polarisation. For a discussion of fragmentation and the Internet, see C. R. SUNSTEIN, "Deliberative Trouble? Why Groups Go to Extremes (2000) 110 *Yale Law Journal* 71.

<sup>133</sup> See, for example, R. K. GARRETT "Echo Chambers Online? Politically Motivated Selective Exposure among Internet News Users" (2009) 14 *Journal of Computer-Mediated Communication* 265-285. See also S. FLAXMAN, S. GOEL and J. M. RAO, "Filter Echo Chambers, and Online News Consumption" (2016) 80(S1) *Public Opinion Quarterly* 298-320.

<sup>134</sup> See Z. LI, "Psychological Empowerment on Social Media: Who Are the Empowered Users?" (2016) 42(1) *Public Relations Review* 50-52 and the review of the literature described there. In academia, according to the leading scholarship, empowerment is a multi-level, open-ended construct that includes the individual level [see A. SCHNEIDER, G. VON KROGH, P. JÄGER, "What's Coming Next? Epistemic Curiosity and Lurking Behavior in Online Communities" (2013) 29(1) *Computers in Human Behavior* 293-303], the organizational level [see N. A. PETERSON, M. A. ZIMMERMAN, "Beyond the Individual: Toward a Nomological Network of Organizational Empowerment (2004) 34(1-2) *American Journal of Community Psychology* 129-145], and the community level [see M. A. ZIMMERMAN, "Empowerment Theory: Psychological, Organizational and Community Levels of Analysis" in J. RAPPAPORT, E. SEIDMAN (eds.) *Handbook of Community Psychology* (Plenum Press, New York 2000) 43-63].

Empowering users could potentially allow social media platforms to play a leading role in reducing the spread and impact of fake news through algorithms and bots.<sup>135</sup> Major platforms like Google, WhatsApp, Twitter and Facebook may use complex statistical models that predict and maximise engagement with content in order to improve the quality of information. The platforms can therefore signal to users the quality of the information and their relative sources by incorporating these signals in the algorithmic rankings of the contents. They can similarly decrease the personalisation of political information relating to other types of content thus reducing the phenomenon of “echo chambers.”

Likewise, the platforms can effectively minimise the impact of the automated dissemination of content using bots, i.e. users who automatically share news from a set of sources with or without reading them. Some of the major platforms, especially Facebook and Twitter, have recently pursued the aim of managing fake news by modifying their algorithms to improve the quality of content and counteracting bots that disseminate disinformation.

The second and third approaches refer to self-regulation and government intervention, respectively. We will analyse them here by comparing the disadvantages and drawbacks of the latter with the advantages and benefits of self-regulation, bearing in mind that the policies of the States we have discussed were essentially based on government intervention (see *supra* Sections 3 and 4).

Self-regulation generally increases online accountability while providing more flexibility and safeguards than government intervention. Indeed, self-regulation may help preserve the independence of social platforms by safeguarding them from government interference. Fundamentally, self-regulatory mechanisms aim to foster public trust in the media. In fact, through self-regulation, social media platforms understand how they work best and therefore have an

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<sup>135</sup> Cf European Commission, Report of the independent High level Group on fake news and online disinformation, “A multi-dimensional approach to disinformation”. According to this Report the platforms should implement the development of built-in tools/plugin and applications for browsers and smartphones, to empower users to better control access to digital information. In particular, platforms should consider ways to encourage users’ control over the selection of the content to be displayed as results of a search and/or in news feeds. Such system should give to the user the opportunity to have content displayed according to quality signals. Moreover, content recommendation systems that expose different sources and different viewpoints around trending topics should be made available to users in online platforms. Such system should provide a certain degree of control to users.

incentive to provide effective rules over more short-sighted and therefore more invasive government measures.

As social networks have caused considerable concern, States around the world have increasingly called for government intervention in order to protect their citizens from (fake) news considered harmful. Legislative and administrative measures have shown, however, that government intervention pursuing legitimate goals can easily cause negative side effects, including becoming a tool for suppressing opposition and critics (see *supra* Section 3 and Section 4).

By contrast, as little government intervention as possible is required if the media are to continue to fulfil their role as watchdogs of democracy. Thus, the self-regulatory approach can help prevent stringent legislative and administrative measures against social media platforms, which would undermine rather than protect fundamental rights such as the freedom of expression. Moreover, albeit the self-regulation might provide an alternative to courts for resolving media content complaints in this context, members of the public can still choose to take matters to court, as this remains an irrepressible core human right.

The social network environment makes legal supervision difficult and therefore opens up new prospects for social media self-regulation. First of all because at a time of rapid and constant change in media technology, self-regulation offers more flexibility than the government regulation option. Secondly, self-regulation is less costly for States and society in general. However, to avoid the risk of self-regulation benefiting (only) the interests of social media companies, provisions on transparency and efficiency must be reinforced.

A coherent strategy based on self-regulation and empowering users with aim of addressing the spread of fake news across the social networks has recently been implemented in EU law. To this end, the European Commission passed the so-called Code of Practice on Disinformation<sup>136</sup> (CoP).<sup>137</sup> The CoP was warmly welcomed by representatives of leading social media platforms (but also advertisers and the advertising industry) who volunteered to establish self-regulatory standards to fight online disinformation. Indeed, media giants such as Facebook, Google, Twitter, Mozilla,

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<sup>136</sup> The EU Code of Practice of Disinformation, <https://ec.europa.eu/digital-single-market/en/code-practice-disinformation>.

<sup>137</sup> See, for example, M. DANDO and J. KENNEDY, "Combating Fake News: The EU Code of Practice on Disinformation" (2019) 30(2) Entertainment Law Review 44-2.

Microsoft, and TikTok officially signed the CoP and accepted the rules on periodic European Commission monitoring.

In 2019, the European Commission implemented monitoring policies to define the progress of the measures adopted by social media platforms to comply with the commitments envisaged by the CoP. In particular, the European Commission asked platforms to report on a monthly basis on the actions undertaken to improve the scrutiny of ad placements, ensure transparency of political and issue-based advertising, and to tackle fake news and the malicious use of bots. In addition, further monitoring actions have been undertaken to counter the spread of fake news during the COVID-19 pandemic. The platforms that signed the CoP have stepped up their efforts against disinformation and fake news on the Coronavirus by providing specific reports on the actions taken to implement transparency.<sup>138</sup> As a result, a first general study to assess the implementation of the CoP has been released.<sup>139</sup>

As regards the monitoring policies on fake news by social media platforms during the health crisis, signatories effectively joined the *ad hoc* project “Fighting COVID-19 disinformation Monitoring Programme”.<sup>140</sup> Indeed, the COVID-19 disinformation-monitoring programme has provided an in-depth overview of the actions taken by platforms to fight false and misleading information around coronavirus and vaccines. It has proven to be a useful transparency measure to ensure platforms’ public accountability and has put the Code through a stress test.

Specifically, the signatories to the CoP have been requested to provide information regarding *i*) the initiatives to promote authoritative content at EU and at Member State level, *ii*) tools to improve users’ awareness, *iii*) information on manipulative behaviour on their services, and *iv*) data

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<sup>138</sup> The European Commission published “First results of the EU Code of Practice against disinformation” (29 January 2019) available at <https://ec.europa.eu/digital-single-market/en/news/first-results-eu-code-practice-against-disinformation>, accessed 7 March 2021. For more detail, see R Ó Fathaigh “European Union. European Commission: Reports on the Code of Practice on Disinformation” (2019) 3(3) *Iris* 1-5.

<sup>139</sup> See I. PLASHILOVA et al., “Study for the Assessment of the Implementation of the Code of Practice on Disinformation Final Report” Publications Office, 2020, available at <https://op.europa.eu/en/publication-detail/-/publication/37112cb8-e80e-11ea-ad25-01aa75ed71a1/language-en>.

<sup>140</sup> First baseline reports – Fighting COVID-19 disinformation Monitoring Programme, <https://digital-strategy.ec.europa.eu/en/library/first-baseline-reports-fighting-covid-19-disinformation-monitoring-programme>, accessed 19 June 2021.

on flows of advertising linked to COVID-19 disinformation on their services and on third-party websites.

Fundamentally, the baseline reports from Facebook, Google, Microsoft-LinkedIn, TikTok, Twitter and Mozilla summarise the actions taken by these platforms to reduce the spread of false and misleading information on their services, covering a period from the beginning of the health emergency until 31 July 2020. More importantly, these reports offer a comprehensive overview of the relevant actions. Overall, baseline reports demonstrate that the signatories to the CoP have intensified their efforts, compared to the actions taken during the first year of implementation of the Code's commitments.

In general, it can be said that the platforms have enhanced the visibility of authoritative sources by conferring significance to COVID-19 information from the WHO and national health authorities, and by providing new tools and services to facilitate access to relevant and reliable information concerning the health emergency.

Furthermore, the reports show how the platforms have addressed a considerable quantity of content encompassing false or misleading information, especially by removing or degrading content liable to cause physical harm or weaken public health policies. From this perspective, platforms have increased their efforts to detect cases of social media manipulation and damaging influence operations or coordinated inauthentic behaviour. In doing so, platforms did not detect coordinated disinformation operations with specific focus on COVID-19 run on their services, even if they detected a high number of contents including false information related to coronavirus.

In addition, it can be noted that these reports emphasise strong measures implemented in order to reduce the flow of advertising on third-party web pages supplying disinformation about coronavirus, while providing free COVID-related advertising space to government and public health authorities.

In detail, the reports encompass quantitative data exemplifying the impact of social media platforms policies. In particular, we can affirm that Google has placed importance to articles published by EU fact-checking organisations, which generated more than 155m impressions over



the first half of 2020.<sup>141</sup> With regard Mozilla, this platform has enhanced the use of the browser space (Firefox snippets), and features (Pocket), to promote important public health information from the WHO, leading to more than 35.000.000 impressions and 25.000 clicks in Germany and France alone on the snippets, while the curated coronavirus hub in Pocket generated more than 800.000 pageviews from more than 500.000 users around the globe. It has also provided expertise and opened up datasets on Firefox usage in February and March to help researchers investigating social distancing measures.<sup>142</sup>

We can also see how Microsoft-LinkedIn shares with interested members a “European Daily Rundown”, namely a summary of the day’s news written and curated by experienced journalists and distributed to members in all 27 EU Member States. The “European Daily Rundown” has a reach of approximately 9.7 million users in the EU.<sup>143</sup> Regarding Facebook, the platform has referred over 2 billion people globally to resources from the WHO and other public health authorities through its “COVID-19 Information Center”, with over 600 million people clicking through to learn more.<sup>144</sup> Twitter’s COVID-19 information pages were visited by 160 million users. Such pages bring together the latest Tweets from a number of authoritative and trustworthy government, media and civil society sources in local languages.<sup>145</sup> Lastly, we can also note that Tiktok informational page on COVID-19 has been visited over 52m times across their five major European markets (UK, Germany, France, Italy and Spain).<sup>146</sup>

Legally speaking, the CoP aims to achieve the objectives defined by the European Commission in its Communication COM/2018/236, “Tackling online disinformation: a European

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<sup>141</sup> Cfr. Google COVID-19 report - August 2020, <https://digital-strategy.ec.europa.eu/en/library/first-baseline-reports-fighting-covid-19-disinformation-monitoring-programme>, accessed 19 June 2021.

<sup>142</sup> Cfr. Mozilla COVID-19 report - August 2020, <https://digital-strategy.ec.europa.eu/en/library/first-baseline-reports-fighting-covid-19-disinformation-monitoring-programme>, accessed 19 June 2021.

<sup>143</sup> Cfr. Microsoft-LinkedIn COVID-19 report - August 2020, <https://digital-strategy.ec.europa.eu/en/library/first-baseline-reports-fighting-covid-19-disinformation-monitoring-programme>, accessed 19 June 2021.

<sup>144</sup> Cfr. Facebook COVID-19 report - August 2020, <https://digital-strategy.ec.europa.eu/en/library/first-baseline-reports-fighting-covid-19-disinformation-monitoring-programme>, accessed 19 June 2021.

<sup>145</sup> Cfr. Twitter COVID-19 report - August 2020, <https://digital-strategy.ec.europa.eu/en/library/first-baseline-reports-fighting-covid-19-disinformation-monitoring-programme>, accessed 19 June 2021.

<sup>146</sup> Cfr. TikTok COVID-19 report - August 2020, <https://digital-strategy.ec.europa.eu/en/library/first-baseline-reports-fighting-covid-19-disinformation-monitoring-programme>, accessed 19 June 2021.

approach” presented in April 2018<sup>147</sup> by setting a wide range of commitments, from transparency in political advertising to the demonetisation of purveyors of disinformation. Communication COM/2018/236 in fact outlined the key overarching principles and objectives that should guide the actions of Member States to raise public awareness about disinformation and fake news.

I contend that in doing so, the European Union has correctly interpreted self-regulation as a more effective approach than government intervention in addressing fake news as it is more flexible and above all less detrimental to users’ rights than the severe administrative measures that governments might adopt.

But what I wish to emphasise even more strongly is that the European Commission has rightly recommended implementing user empowering. In this regard, Section I point (x) of the CoP seeks directly to promote the empowerment of users through tools enabling a customised and interactive online experience so as to fully grasp the meaning of content and easily access different news sources reflecting alternative viewpoints, also providing appropriate and effective means for them to report disinformation and fake news.

To do so, Section I point (xi) of the CoP fosters “fact checking activities” on social media platforms with reasonable measures to enable privacy-compliant access to data and cooperate by providing relevant data on how their services function, including data for independent investigation by academic researchers and general information on algorithms. A first example that seems to go in this direction is represented by the Facebook Oversight Board. In 2018, the Founder and Chief Executive Officer of Facebook Mark Zuckerberg announced the creation of this board with the aim of ensuring an additional and independent control policy on content removal or account suspensions for alleged violations of Facebook community rules.<sup>148</sup> Indeed, the scope of oversight board, a body of independent experts who review Facebook’s most challenging content decisions

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<sup>147</sup> The Communication from the commission to the European Parliament, the Council, the European economic and social committee and the committee of the regions Tackling online disinformation: a European Approach COM/2018/236 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0236>.

<sup>148</sup> For an in-dept analysis see K. KLONICK, “The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression” (2020) 129(8) Yale L J 2448-2473.

– focusing on important and disputed cases, was to serve as an appellate review system for user content and to make content-moderation policy recommendations to Facebook.<sup>149</sup>

It has been argued that the Oversight Board exemplifies an important innovation, and an appreciated attempt to disperse the enormous power over online discourse held by Facebook. Specifically, it could help to make that power more transparent and legitimate by encouraging dialogues around how and why Facebook's power is exercised in the first place. However, this represents a more modest purpose than becoming an independent source of universally accepted free speech norms, but it is still ambitious for an institution that is breaking new ground.<sup>150</sup>

More importantly, without going into the question of whether it can authoritatively resolve clashing ideas of freedom of expression, the fact of establishing an autonomous board that judges potentially competent rights in the right balance certainly represents a more substantial advantage over Facebook's internal moderation practices that have proved incomplete and largely ineffective. The Facebook Oversight Board might represent the first "platform-scaled moment" of transnational internet adjudication of online speech. Thus, it means a step towards empowering users by involving them in private platform governance and providing them with a minimum of procedural due process.<sup>151</sup>

It should be borne in mind, however, that this goal cannot be effectively achieved by Facebook or other social media platforms in the absence of targeted government policies that facilitate the implementation of user empowerment strategies.

Hence, and more generally, I claim that empowering users could be a crucial task that the Members States of the European Union and other States around the world should take on in the future. Empowering users could become a key challenge, especially in order to avoid or at least limit stringent government interventions and ineffective or counterproductive administrative measures that would undermine fundamental human rights.

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<sup>149</sup> Ibid, 2464.

<sup>150</sup> See E. DOUEK, "Facebook's Oversight Board: Move Fast with Stable Infrastructure and Humility" (2019) 21(1) N.C. J.L. & TECH 76 available at: <https://scholarship.law.unc.edu/ncjolt/vol21/iss1/2>.

<sup>151</sup> K. KLONICK, "The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression" *supra*, note 148 at 2499.

As it is based on a careful combination of self-regulation and empowering users, we can reasonably sustain that the recent regulatory approach applied in the European Commission's CoP might play a role in national policies to face the challenge of fake news. Nevertheless, it is also my opinion that careful adjustments will need to be made to regulatory strategies depending on the social, political, and legal frameworks in which they are to be implemented, so that any measures will be proportionate and adequate to the risks to be managed, the problems to be solved, and ultimately the human rights to be protected.

Theoretically, as I underline here, if we try to look beyond fake news as a negative phenomenon and start considering it a shared concern of "mature" democracies, and at the same time we bear in mind the key role of social media play as a watchdog in democratic society, then we might wonder if we will still be willing to accept government policies that violate our freedom of expression.

Arguably, a first and significant finding in this direction emerges in the European Commission's policy, which seems to take these aspects into due consideration in the legal context of the CoP. As a matter of fact, in line with Article 10 of the ECHR and the principle of freedom of expression, Section I point (*vizi*) of the CoP establishes that social media platforms should not be compelled by governments, nor should they adopt voluntary policies, to delete or prevent access to otherwise lawful content or messages solely on the basis that they are thought to be false.<sup>152</sup>

Lastly, *de jure condendo*, some consideration should be made on the Digital Service Act (hereinafter "DSA"), with particular regard to the empowerment of users.

Indeed, the proposal for a regulation on a Single Market for Digital Services – namely the DSA, represents one of the key measures within the European strategy for digital.<sup>153</sup> In line with what was announced by the European Commission in the Communication "Shaping Europe's

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<sup>152</sup> Recently, see I. KATSIREA, "Fake News?: Reconsidering the Value of Untruthful Expression in the Face of Regulatory Uncertainty" (2019) 10(2) *Journal of Media Law* 159-188, doi: 10.1080/17577632.2019.1573569, that criticised "the restriction of 'fake news' unless if there was a pressing social need".

<sup>153</sup> 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 final, Brussels, 15 December 2020, 2020/0361(COD) <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM:2020:825:FIN>, accessed 20 June 2021.

Digital Future”<sup>154</sup> the initiative was presented with a view to an overall review of the European-based regulatory body. In particular, the DSA aims, on the one hand, to increase and harmonise the responsibilities of social media platforms and information service providers, also by strengthening control over the content policies of platforms in the EU, and, on the other hand, to introduce rules to ensure the fairness and contestability of digital markets.

More specifically, the European Commission has taken into consideration the recent emergence of three fundamental problems. Firstly, the increased exposure of citizens to online risks, with particular regard to damage from illegal activities and violations of fundamental rights. Secondly, the coordination and effectiveness of supervision of platforms, which are considered ineffective due to the limited administrative cooperation framework established by the E-Commerce Directive to address cross-border issues. Thirdly, the fragmented legal landscape due to the first initiatives to regulate digital services at national level – this has resulted in new barriers in the internal market which have produced competitive advantages for already existing very large platforms and digital services.

It should be noted that the DSA aims at the proper functioning of the single market as regards the provision of online intermediation services across borders. It sets out a number of specific objectives such as: *i*) maintaining a secure online environment, *ii*) improving the conditions for innovative cross-border digital services, *iii*) establishing effective supervision of digital services and collaboration between authorities, and especially *iv*) empowering users and protecting their fundamental rights online.

Regarding empowering users, the DSA is functionalised to the general principle that “what is illegal offline must also be illegal online”. With this in mind, the new regulation introduces: *i*) new harmonised procedures for a faster removal of illegal contents, products and/or services; *ii*) more effective protection of online users’ rights and internal complaint management systems – inter alia mechanisms for user reporting and new obligations regarding vendor traceability; *iii*) a general framework of enforcement of the legislation in particular thanks to the coordination

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<sup>154</sup> EC Communication “Shaping Europe’s Digital Future”, 19 February 2020, [https://ec.europa.eu/info/publications/communication-shaping-europes-digital-future\\_it](https://ec.europa.eu/info/publications/communication-shaping-europes-digital-future_it), accessed 20 June 2020.

between the national authorities, and in particular through the designation of the new figure of the “digital services coordinator”.

It must be said that the DSA might have peaks and troughs. The main objective of subjecting social platforms to specific obligations, hitherto substantially not governed by national and European regulatory frameworks, can be advantageous but only if achieved with the aim of promoting people’s freedom of expression and not just the security of the platforms themselves.

To this end, from the perspective of empowering users, transparency policies should be encouraged in order to provide users with tools to fully understand the potential of the digital environment on social media platforms and therefore actively participate in the public debate.

Finally, the motto “what is illegal offline is illegal online” cannot be taken literally. In my opinion, the particular context must be considered – namely the online and digital one, in which the rights and duties of both users and platforms are exercised.

## **7. Conclusion.**

This article seeks to challenge the stringent legislative and administrative measures governments have recently put in place, analysing their negative implications for the right to freedom of expression and suggesting different regulatory approaches in the context of public law.

It began by exploring the legal definition of fake news in academia in order to establish the essential characteristics of the phenomenon (Section 2).

It then went on to assess the legislative and administrative measures implemented by governments at both international and EU levels (Sections 3 and 4 respectively), showing how they risk undermining a core human right by curtailing freedom of expression, but adding that many governments worldwide are regulating the spread of information on social media under the pretext of addressing fake news. I have emphasised how governments are doing this above all to prevent the risk of an uncontrolled dissemination of information that could well increase the adverse effects of the COVID-19 health emergency by exploiting false and misleading news. The paper also claims that there is an equally non-negligible risk that governments might use the health emergency as a

ruse for implementing draconian restrictions on the right to freedom of expression, in addition to increasing social media censorship.

Hence, starting from the premise of social media as a “watchdog” of democracy, and moving on to the contention that fake news is a phenomenon of “mature” democracy, I have argued that public law already protects freedom of expression and ensures its effectiveness at the international and EU levels through some fundamental rules (Section 5).<sup>155</sup>

Lastly, I have explored key regulatory approaches and, as an alternative to government intervention, have proposed empowering users and self-regulation as strategies to manage fake news by mitigating the risks of undue interference in the right to freedom of expression (Section 6).

To conclude, in this section, I have offered some remarks on the proposed solution by recommending the implementation of legal tools such as the reliability ratings of social media platforms in order to enhance the management of information and particularly to minimise the risks related to fake news.

The regulatory approaches proposed to manage fake news phenomena on social media, self-regulation, and especially empowering users (see *supra* Section 6) might be implemented by public policies focused on long-term behavioural incentives rather than stringent short-term legislative and administrative measures.

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<sup>155</sup> Recently, see R. K. HELM, H. NASU, “Regulatory Responses to ‘Fake News’ and Freedom of Expression: Normative and Empirical Evaluation” (2021) 21(2) Human Rights Law Review 302-328 <https://doi.org/10.1093/hrlr/ngaa060>. I do not doubt that there are well-founded reasons why the authors claim to implement criminal sanctions in order to address fake news. However, I am not persuaded by the authors’ argument when they affirm that “criminal sanctions as an effective regulatory response due to their deterrent effect, based on the conventional wisdom of criminal law, against the creation and distribution of such news in the first place” (cf. p. 323, and more generally p. 303, where it has been said that “this article identifies, albeit counter-intuitively, criminal sanction as an effective regulatory response”). Based on what I have argued in this article, the goal should not be to “worship freedom of expression” (p. 326), but to protect it as a fundamental human right. Basically, the use of criminal sanction might undermine people’s rights more than is necessary to protect other interests namely national security, public order, public health - and therefore should be avoided whenever other legal instruments less invasive than human rights can be used. Thus, in my opinion, the implementation of criminal sanctions ought to represent an ‘*extrema ratio*’ for government policies precisely in order not to jeopardise fundamental human rights.

As a matter of fact, behavioural science, and particularly psychology<sup>156</sup>, can play a leading role in public policy.<sup>157</sup> Recent important surveys on the behavioural approach support the long-term effectiveness of active psychological inoculation as a means of building resistance to fake news and misinformation in general.<sup>158</sup>

Overall, these findings might strengthen the argument in favour of introducing legal tools for measuring the trustworthiness of information on social media platforms. To do so, in my opinion, governments could promote policies empowering users through a reliability rating mechanism.

In this regard, governments may set up the management of reliability ratings through independent third-party bodies, namely regulatory agencies or authorities, in order to carry out the various steps of the procedure transparently, checking its correctness and reporting the results to the public.

Specifically, reliability ratings can measure the frequency and percentage of fake news spread on a social media platform over a certain time frame. Thus, based on the frequency and percentage of fake news it disseminates, the platform could be considered statistically reliable or otherwise by those using it.<sup>159</sup>

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<sup>156</sup> See R. GREIFENEDER, M. E. JAFFÉ, E. J. NEWMAN and N. SCHWARZ, *The Psychology of Fake News: Accepting, Sharing, and Correcting Misinformation* (London, Routledge 2021) especially Part II 73-90. See also Z. LI, “Psychological Empowerment on Social Media” supra, note 134 at 51 Section 2.3 “Social media empowerment”. See also J. R. ANDERSON, *Cognitive Science Series. The Architecture of Cognition* (Hillsdale, NJ: Erlbaum Inc. 1983).

<sup>157</sup> See C. R. SUNSTEIN, *Behavioral Science and Public Policy* (Cambridge, Cambridge University Press 2020). See also the seminal book R. H. THALER and C. R. SUNSTEIN, *Nudge: Improving Decisions about Health, Wealth and Happiness* (London, Penguin 2009).

<sup>158</sup> See R. MAERTENS, J. ROOZENBEEK, M. BASOL and S. VAN DER LINDEN, “Long-Term Effectiveness of Inoculation against Misinformation: Three Longitudinal Experiments” *Journal of experimental psychology (Applied)* (October 2020) <https://doi.org/10.1037/xap0000315>. See also S. VAN DER LINDEN and J. ROOZENBEEK, “Psychological Inoculation against Fake News” in R. GREIFENEDER, M. JAFFÉ, E. J. NEWMAN and N. SCHWARZ (eds.) *The Psychology of Fake News: Accepting, Sharing, and Correcting Misinformation* (London, UK: Psychology Press 2020) <http://dx.doi.org/10.4324/9780429295379-11>. In addition, see J. COOK, S. LEWANDOWSKY and U. K. H ECKER, “Neutralizing Misinformation through Inoculation: Exposing Misleading Argumentation Techniques Reduces their Influence” (2017) 12 PLOS ONE e0175799. <http://dx.doi.org/10.1371/journal.pone.0175799>.

<sup>159</sup> Recently, with respect to reliability ratings in social media, see A. KIM, P. MORAVEC and A. R. DENNIS, “Combating Fake News on Social Media with Source Ratings: The Effects of User and Expert Reputation Ratings” (2019) 36(3) *Journal of Management Information Systems* 931-968, also available at SSRN: <https://ssrn.com/abstract=3090355> or <http://dx.doi.org/10.2139/ssrn.3090355>. The authors define and explain some reputation ratings, namely (i) the expert rating where expert fact checkers rate articles, and these ratings are aggregated to provide an overall source rating related to the new articles as they are published, (ii) the user article rating where users rate articles, and these ratings are aggregated to provide the source rating on new articles, and (iii) the user



It might be reasonable to assume that reliability ratings may act as an incentive to enhance the efficient management of fake news among both users and owners of social media. If users can consciously decide whether or not to use a certain platform based on reliability ratings, the owner would probably be induced to adopt more effective measures to deal with fake news in order not to lose users.

At the same time, by maximising its reliability rating, one platform may incentivise another to do so too in order not to lose its reputation and therefore its users. Indeed, the threat of losing users would incentivise a platform to ensure the reliability of information in a better and more effective way. In other words, reliability ratings can stimulate competition among social media platforms to effectively manage information and address fake news.

It should be noted that reliability ratings also reveal the importance of self-regulation. To avoid or at least minimise the risk of losing their reputation and users, the owners of social media platforms will certainly implement effective legal systems to regulate information and mitigate fake news phenomena.

Lastly, it may be reasonable to conclude, from a legal point of view, that empowering users can play a crucial and proactive role in effectively managing fake news on social media in the era of emergency for at least three compelling reasons: (i) to build and maintain the trust of other users; (ii) to ensure and preserve the function of media watchdog in democratic society; (iii) to promote and protect freedom of expression by limiting undue interference by regulators.

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source rating where users directly rate the sources without considering any specific articles from the source. On credibility evaluation online, see M. J. Metzger, A. J. Flanagin and R. B. Medders, "Social and Heuristic Approaches to Credibility Evaluation Online (2010) 60 *Journal of Communication* 413-439, <https://doi.org/10.1111/j.1460-2466.2010.01488.x>. On the same point, see also B. K. KAYE and T. J. JOHNSON, "Strengthening the Core: Examining Interactivity, Credibility, and Reliance as Measures of Social Media Use" (2016) 11(3) *Electronic News* 145-165, <https://doi.org/10.1177/1931243116672262>.