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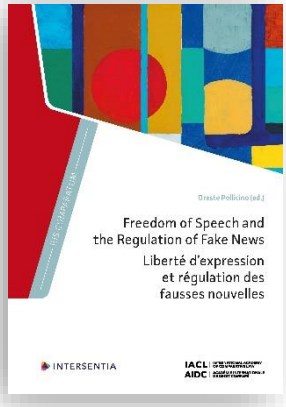

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FREEDOM OF SPEECH AND THE REGULATION OF FAKE NEWS IN THE EUROPEAN UNION

The EU Policy to Tackle Disinformation

Giuseppe B. Abbamonte and Paula Gori

1. INTRODUCTION: THE EU PATH AND FREEDOM OF EXPRESSION

1.1. A RECAP OF THE EU POLICY PATH

Disinformation has always existed. What has changed in recent years is the speed and the reach of its spread. The 2016 US elections and the 2019 UK elections brought the disinformation phenomenon to the attention of policymakers, researchers, experts and civil society organisations, but also to that of citizens.

During the last few years, the COVID-19 pandemic and the war in Ukraine have confirmed, on a large scale, what was being said by the expert community, namely that the disinformation phenomenon is not confined to elections. To mention another example, the 2022 summer heatwaves were also a fertile field for disinformation narratives around climate change.

The challenge in tackling online disinformation is that it is a policy exercise that needs to protect the democratic process, respect freedom of expression and information, and avoid a 'Ministry of Truth': all this in a fast-evolving dimension where technology, tools, actors, vectors and disinformation strategies develop quickly.

In 2015 the European Council recognised the threat of online disinformation campaigns when it asked the High Representative to address the disinformation campaigns organised by Russia. This is when the East Strategic Communication Task Force was set, followed by communication on hybrid threats. Further action was then also taken in light of the 2019 EU elections, and around 50 presidential, national or regional elections that were due to take place in 2020.

Following the 2018 report by the High-Level Group on fake news and online disinformation, the first self-regulatory Code of Practice on Disinformation was signed by various private actors. This was the first time worldwide that online platforms and players in the advertising industry had agreed, on a voluntary basis, to self-regulatory standards to tackle disinformation. It aims to achieve the objectives set out by the Commission's Communication on Tackling Online Disinformation: a European Approach, presented in April 2018, by setting a wide range of commitments, from transparency in political advertising to the closure of fake accounts and demonetisation of purveyors of disinformation.

Following the EC Communication on Tackling Online Disinformation: a European Approach, in December 2018 the Action Plan against Disinformation (EC-EEAS) was published, with the aim of 'protecting the EU democratic systems and combat[ting] disinformation, including in the context of the upcoming elections'. It builds on the work of the East Strategic Communication Task Force of the European External Actions Service, and sets out action to be taken by the European Commission and the High Representative, with the assistance of the European External Actions Service, and in cooperation with Member States and the European Parliament.

On 1 June 2020, the European Digital Media Observatory was established, and on 10 June of the same year, following the outbreak of the COVID-19 pandemic, Vice-President for Values and Transparency Věra Jourová and High Representative/Vice-President Josep Borrel issued a joint Communication on Tackling COVID-19 disinformation – Getting the facts right.

In 2020, the European Commission published the Regulation Proposal for the Digital Services Act (DSA) and the Digital Markets Act (DMA), as well as the European Democracy Action Plan (EDAP). In the same year, it carried out an assessment of the implementation of the Code of Practice on Disinformation. It acknowledged that the Code of Practice has proven a very valuable instrument, but also identified further areas for improvement. This led, in June 2022, to the signature of the Strengthened Code of Practice on Disinformation. The DSA was adopted in 2022, and, in the same year, the proposal for a European Media Freedom Act was published.

1.2. THE NON-LIABILITY PRINCIPLE

The liability of digital service providers was first regulated by the E-commerce Directive (ECD).[1]

Article 14 ECD harmonises the conditions under which a digital service provider may escape liability for the illegal material it hosts. Under Article 14(1), a digital service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

> (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

Therefore, a digital service provider hosting illegal content, which may have been uploaded on its website by a user, escapes national liability rules if it was unaware of the existence of such illegal content or, when it becomes aware, acts expeditiously to remove or block access to it. This exemption is horizontal and covers all types of illegal material, be this terrorism content, hate speech, counterfeit products or copyrighted content. It applies to disinformation only to the extent it is illegal (for example, defamatory disinformation).

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1 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on Electronic Commerce').

In *L'Oreal v. eBay*,[2] the Court of Justice of the European Union (CJEU) drew an important distinction between services that are purely passive, and can benefit from the exemption of liability, and services that play an active role and cannot benefit from the exemption. The Court clarified that:

> 115. … the mere fact that the operator of an online marketplace stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers cannot have the effect of denying it the exemptions from liability provided for by Directive 2000/31 …
>
> 116. Where, by contrast, the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale. It cannot then rely, in the case of those data, on the exemption from liability referred to in Article 14(1) of Directive 2000/31.[3]

On the level of knowledge leading to the loss of the exemption when the provider is not acting expeditiously, the Court of Justice considered that,

> it is sufficient, in order for the provider of an information society service to be denied entitlement to the exemption from liability provided for in Article 14 of Directive 2000/31, for it to have been aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality in question and acted.[4]

The Court of Justice, in interpreting the ECD, thus relies on the standard of professional diligence, to determine whether the level of knowledge would lead to loss of the exemption when not followed by action.

In *YouTube Cyando*,[5] the Court has clarified that an operator of online platforms may benefit from the exemption from liability under ECD, provided that it does not play an active role of such a kind as to give it knowledge of, or control over, the content uploaded to its platform. On that point, the Court specified that, for such an operator to be excluded from the exemption from liability provided for in that directive, it must have knowledge or awareness of specific illegal acts committed by its users relating to protected content that was uploaded to its platform.

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2 Case C-324/09, *L'Oreal et al. v. eBay*, ECLI:EU:C:2011:474.
3 Ibid., points 115–16.
4 Ibid., point 120.
5 Joined Cases C-682/18 *YouTube*, C-683/18 *Cyando*, ECLI:EU:C:2021:503.

As indicated above, the Digital Services Act complements the e-commerce Directive by setting out a modern set of rules on content moderation. It also ensures harmonisation within the EU, as this is now a Regulation. The conditional exemption from liability of providers of intermediary service is confirmed and updated, including an EU-wide prohibition of generalised monitoring obligations (Chapter II of the Regulation).

1.3. FREEDOM OF EXPRESSION

Any policy to tackle disinformation needs to respect the values on which the EU is based, including freedom of expression and, more broadly, fundamental rights.

When dealing with fundamental rights in the EU, the three main references are the Charter of Fundamental Rights of the European Union (Charter),[6] the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[7] and the common constitutional traditions of the Member States.

Article 11.1 of the Charter states that:

> (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.

The Treaty of Lisbon[8] introduced the Charter into European primary law, thus making it enforceable by EU courts and Member State national courts. With regard to its application, the Charter is:

> addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law … The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties (Art. 51).

Article F.2 of the Treaty of Maastricht[9] explicitly affirmed that '[t]he Union shall respect fundamental rights, as guaranteed by the European Convention for the

6 Charter of Fundamental Rights of the European Union, (2000/C 364/01).

7 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950.

8 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, (2007/C 306/01).

9 Treaty on European Union, OJ C 191, 29.7.1992.

Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.'

In particular, Article 10 ECHR states that:

> 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.
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Considering again the connection between the ECHR and the Charter, it is worth mentioning what is stated in Article 52(3) of the latter, namely:

> In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Moreover, Article 11 ECHR also needs to be read in light of Article 53 of the Charter, according to which:

> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

This reinforces the cooperation between the EU institutions and the Council of Europe. In the words of Keller, the EU 'has joined the Council of Europe in setting and interpreting human rights standards for an expanding European regional sphere'.[10]

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[10] P. Keller, *European and International Media Law: Liberal Democracy, Trade, and the New Media*, OUP, Oxford 2011, p. 121.

2. THE DEFINITION OF DISINFORMATION, AND ITS LEGALITY

Definitions play a crucial role, and the very fact of having agreed definitions in dealing with disinformation is still an open element in the debate. Even disinformation and misinformation are still defined differently by scholars and policy makers as well as in different geographic regions. In parallel, the definitions of the tactics and techniques used to spread disinformation are also evolving.

At EU policy level, there are two main definitions of disinformation, which are contained, respectively, in the 2018 Report of the High-Level Group on Fake News and Disinformation,[11] and in the EC Communication on Tacking Online Disinformation.[12] In the Report of the High Level Group, 'disinformation' is defined as 'all forms of false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit'. A similar definition is then used by the following Communication on Tackling Online Disinformation, where disinformation is defined as 'verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and [which] may cause public harm'. Public harm, it is stated, 'comprises threats to democratic political and policy-making processes as well as public goods such as the protection of EU citizens' health, the environment or security'. This definition is the one used in the Code of Practice on Disinformation.[13] For the purposes of its application, the 2022 Strengthened Code of Practice on Disinformation includes misinformation, disinformation, information influence operations and foreign interference in the information space, as defined in the EDAP.[14]

Disinformation is to be distinguished from misinformation, where there is no intention to harm, as 'misinformation' describes misleading or inaccurate information which is shared by people who do not recognise it as such.[15]

In the EDAP[16] of December 2020, the European Commission (hereinafter 'the Commission') clarified that the so-called 'infodemic' around COVID-19 demonstrated that false or misleading information spread without malicious

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11 European Commission, A multi-dimensional approach to disinformation: Report of the independent High level Group on fake news and online disinformation, [2018], p. 3.

12 Commission Communication, 'Tackling online disinformation: a European approach', COM(2018) 236 final of 26 April 2018.

13 The 2022 Code of Practice on Disinformation, https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation.

14 Ibid., p. 1.

15 See, e.g. European Commission, A multi-dimensional approach to disinformation: Report of the independent High level Group on fake news and online disinformation, [2018], p. 3.

16 Commission Communication on the European democracy action plan, COM/2020/790 final of 3 December 2020.

intent ('misinformation') can also cause substantial public harm when it becomes viral, for example information on 'miracle cures' and potentially dangerous cures, shared in good faith with friends. The Commission thus believes there is also a need to have appropriate policies in place to mitigate the risks and nefarious effects of misinformation.[17]

While the two definitions mentioned above are those used at EU policy level, it might also be worth mentioning the definition of disinformation given by Wardle and Derakhshan, in their Report on the disinformation disorder for the Council of Europe,[18] which is when 'false information is knowingly shared to cause harm'.

Literature on the definitions of disinformation is not, so far, extensive. According to Pollicino and Bietti, as a way to differentiate between different types of manipulative information, one could apply an analytical approach and focus on three parameters: the content's factual truth; the intent and strategic goals associated with the content's generation and initial sharing; and the harm caused by the content's release into the public sphere.[19]

Recently, Ó Fathaigh and others have presented a comparative analysis of the definitions used at EU policy level, and have evaluated the impact of having policy definitions at EU level in parallel with legal definitions in some Member States' national orders.[20] By taking, as elements of the analysis, the three definitions mentioned above, and building on the work of Van Hoboken and others,[21] and Bayer and others,[22] five features are considered, namely: incorrect or misleading information; social harm; the intention of the actor; economic gain; and dissemination. The work of the authors has a broader scope that also includes the proposal for the DSA,[23] and discusses the perils of having a definition in EU legislation, including provisions on the removal of illegal content (DSA), and the Member States-level definition where, in some cases, disinformation is

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17 The concept 'disinformation' is hereinafter to be understood as including misinformation, unless indicated otherwise.

18 C. Wardle and H. Derakhshan, *Information Disorder: Toward an interdisciplinary framework for research and policy making*, Council of Europe report DGI(2017)09, [2017], p. 5.

19 O. Pollicino and E. Bietti, 'Truth and Deception across the Atlantic: Roadmap of Disinformation in the US and Europe', *Italian Journal of Public Law*, 11(1), [2019], p. 49.

20 R. Ó Fathaigh, N. Helberger and N. Appelman, 'The Perils of Legally Defining Disinformation', *Internet Policy Review*, 10(4), [2021].

21 J. Van Hoboken and others, *The legal framework on the dissemination of disinformation through Internet services and the regulation of political advertising (Report)*, Dutch Ministry of Interior and Kingdom Relations, [2019], p. 17.

22 J. Bayer, N. Bitiukova, P. Bárd, J. Szakács, A. Alemanno and E. Uszkiewicz., Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States, 2019.

23 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.

considered illegal. The authors conclude that, by being quite broad, the three definitions fit within a policy domain, but less well within a legal one, leaving space for EU Member States to interpret the terms with an extensive approach.[24]

The dissemination of fake news and online disinformation is not, per se, illegal.[25]

The debate on online content and its moderation is usually structured around illegal content, harmful content and disinformation. A clear definition of 'harmful content' is still lacking, and the proposal in the above-mentioned DSA states that:

> There is a general agreement among stakeholders that 'harmful' (yet not, or at least not necessarily, illegal) content should not be defined in the Digital Services Act and should not be subject to removal obligations, as this is a delicate area with severe implications for the protection of freedom of expression.[26]

It is worth mentioning in this context that the Unfair Commercial Practices Directive (UCPD),[27] which protects consumers, amongst others, from misleading commercial practices.[28] Disinformation and misleading commercial practices often go hand in hand. For example, during the COVID-19 pandemic disinformation was often spread to sell bogus products aimed at preventing or even healing COVID-19.

The purpose of the UCPD is to 'contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair commercial practices harming consumers' economic interests'. Within the

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24 R. Ó Fathaigh, N. Helberger and N. Appelman, 'The Perils of Legally Defining Disinformation', *Internet Policy Review*, 10(4), [2021].

25 European Commission, Factsheet on Tackling online disinformation, 16 October 2018, https://digital-strategy.ec.europa.eu/en/library/factsheet-tackling-online-disinformation.

26 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.

27 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Text with EEA relevance) OJ L 149, 11.6.2005, p. 22–39.

28 Recital 33 of the Directive 2019/2161 of the European Parliament and of the Council of 27 November 2019, amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rule OJ L 328, 18.12.2019, p. 7–28, affirms that 'the scope of Directive 2011/83/EU should be extended to cover also contracts under which the trader supplies or undertakes to supply a digital service to the consumer, and the consumer provides or undertakes to provide personal data'.

UCPD, a product is defined as 'any good or service including immovable property, digital service and digital content, as well as rights and obligations'. In its Article 6(1), it is stated that:

> A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise:
>
> (a) the existence or nature of the product;
> (b) the main characteristics of the product, such as its availability, benefits, risks, execution, composition, accessories, after-sale customer assistance and complaint handling, method and date of manufacture or provision, delivery, fitness for purpose, usage, quantity, specification, geographical or commercial origin or the results to be expected from its use, or the results and material features of tests or checks carried out on the product;
> (c) the extent of the trader's commitments, the motives for the commercial practice and the nature of the sales process, any statement or symbol in relation to direct or indirect sponsorship or approval of the trader or the product; …
> (f) the nature, attributes and rights of the trader or his agent, such as his identity and assets, his qualifications, status, approval, affiliation or connection and ownership of industrial, commercial or intellectual property rights or his awards and distinctions.

3. THE EU POLICY STRATEGY TO TACKLE DISINFORMATION: FROM SELF-REGULATION TO CO-REGULATION

As mentioned above, in 2015 the European Council formally acknowledged the threat of online disinformation, and the High Representative created the East Strategic Communication Task Force, with the view to countering disinformation and strengthening the overall media environment in certain risky regions, through fact-based communication and narrative positioning.

A High-Level Group on fake news and online disinformation was convened in 2017 by the Commission, to formulate strategic recommendations in this field. In early 2018, it issued a report based on five pillars: (1) enhancing transparency of online news, involving an adequate and privacy-compliant sharing of data about the systems that enable its circulation online; (2) promoting media and information literacy to counter disinformation, and help users navigate the digital media environment; (3) developing tools for empowering users and journalists to tackle disinformation and foster a positive engagement with fast-evolving information technologies; (4) safeguarding the diversity and sustainability of the

European news media ecosystem; and (5) promoting continued research on the impact of disinformation in Europe, to evaluate the measures taken by different actors and constantly adjust the necessary responses.

These recommendations were largely followed by the Commission's Communication, 'Tackling online disinformation: a European Approach', presented in April 2018, which was the first European attempt at a holistic strategy.

In December 2018, the joint Action Plan against Disinformation (European Commission and the High Representative of the Union for Foreign Affairs and Security Policy)[29] was published, with the aim of 'protecting the EU democratic systems and combat[ting] disinformation, including in the context of the upcoming elections'. It builds on the work of the East Strategic Communication Task Force of the European External Actions Service, and sets out action to be taken by the European Commission and the High Representative, with the assistance of the European External Actions Service, and in cooperation with Member States and the European Parliament.

A very important aspect of the strategy is to counter online disinformation, notably on social media, through which disinformation, hatred, and irresponsible and violent behaviour and content are spread. Rather than criminalising or prohibiting disinformation as such, the strategy pursues the objectives of making the online environment more transparent and the main players more accountable, and empowering citizens, with the ultimate aim of creating a resilient society.

The Action Plan is based on four pillars:

1. Improving the capabilities of EU institutions to detect, analyse and expose disinformation (for example, reinforcing the Strategic Communication Task Forces of the European External Action Service, the Union Delegations and the EU Hybrid Fusion Cell, by providing them with additional specialised staff, such as experts in data mining and analysis, to process the relevant data).
2. Strengthening coordinated and joint responses to disinformation (for example, establishment of the Rapid Alert System to provide alerts on disinformation campaigns in real time, through a dedicated technological infrastructure, and based on information sharing and common learning between Member States and EU institutions).
3. Mobilising the private sector to tackle disinformation (for example, the Code of Practice on Disinformation, as a self-regulatory tool signed by relevant private stakeholders, including online platforms and advertisers).

[29] Joint Communication by the Commission and European External Action Service setting out an Action Plan Against Disinformation', [2018], Brussels, 05.12.2018, JOIN(2018) 36 final.

4. Raising awareness and improving societal resilience (for example, fact-checkers and researchers playing a key role in furthering the understanding of the structures that sustain disinformation, and the mechanisms that shape how it is disseminated online).

The main outcome of the Strategy has been a self-regulatory Code of Practice on Disinformation[30] (hereinafter the 'Code'), which has been signed by the main online platforms and advertising associations. With this Code of Practice this industry agreed, for the first time worldwide, on a voluntary basis, to self-regulatory standards to tackle online disinformation. It aims to achieve the objectives set out by the Commission's Communication on Tackling Online Disinformation: a European Approach.[31]

On 1 June 2020, the European Digital Media Observatory was established, and on 10 June 2020, following the outbreak of the COVID-19 pandemic, Vice-President for Values and Transparency Věra Jourová and High Representative/Vice-President Josep Borrel issued a joint Communication on Tackling COVID-19 disinformation – Getting the facts right.

Within the latter Communication, pillars identified as being key for a stronger and more resilient EU are: understand; communicate; cooperation; transparency; ensuring freedom of expression and pluralistic democratic debate; empowering citizens, raising citizens' awareness, and increasing societal resilience.

According to the Monitoring Programme set by the joint Communication, signatories of the Code of Practice are asked by the European Commission to provide monthly reports on their efforts to counter online disinformation on COVID-19.[32]

In December 2020, the European Commission published the EDAP, the proposals for the DSA[33] and the DMA,[34] and the Media and Audiovisual Action Plan.[35] In particular, on 15 December 2020, the Commission proposed

30 The 2022 Code of Practice on Disinformation, https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation.

31 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Tackling online disinformation: a European Approach, COM/2018/236 final, of 28 April 2018.

32 The European Commission also published the following page on disinformation and COVID-19: https://ec.europa.eu/info/live-work-travel-eu/coronavirus-response/fighting-disinformation_en.

33 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.

34 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final.

35 European Media and Audiovisual Action Plan, https://digital-strategy.ec.europa.eu/en/policies/media-and-audiovisual-action-plan.

the DSA,[36] which aims to reshape the regulation of digital services and modernise the 20-year-old ECD. The DSA reflects the effort to ensure harmonisation within the EU and was signed into law in October 2022.

The EU Strategy and Action Plan are set out in Communications, which are policy statements indicating the approach the Commission and the European External Action Service intend to follow on disinformation. Communications are not legally binding, and do not contain any legal obligations.

The legal basis of the DSA is Article 114 of the Treaty on the Functioning of the European Union.[37] This provision gives the EU legislator the power to enact measures to approximate the rules of the Member States having as their objective the establishment and functioning of the internal market. The DSA, in the words of the Commission, aims to create a safer digital space in which fundamental rights of all users of digital services are protected.[38] Its scope thus goes beyond online disinformation.

The DSA[39] differentiates between small and big players, and imposes asymmetric due diligence obligations on digital service providers, depending on the nature of their services, as well as on their size. The rules specified in the DSA primarily concern online intermediaries and platforms, such as online marketplaces, social networks, search engines, content-sharing platforms, app stores, and online travel and accommodation platforms.

Certain substantive requirements are limited only to very large online platforms that have a central role in facilitating the public debate and economic transactions. Very small platforms are exempt from the majority of the obligations. Under Article 33, very large platforms are defined as those reaching 45 million users in the EU or more.

The DSA lays out content moderation rules for very large platforms, and aims to fix their vulnerabilities, which may be manipulated to amplify harmful practices such as disinformation. Under Article 34 of the DSA, very large platforms are required to identify and assess systemic risks presented by their services, such as dissemination of illegal content; negative effects of exercising

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36 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.

37 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union – Consolidated version of the Treaty on the Functioning of the European Union – Protocols – Annexes – Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 – Tables of equivalences – OJ C 326, 26/10/2012.

38 The Digital Services Act package: https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package.

39 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, https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/IMCO/DV/2022/06-15/DSA_2020_0361COD_EN.pdf.

fundamental rights (including freedom of expression and information, and the freedom and pluralism of the media); and negative effects on civic discourse, on electoral processes, on public security, and in relation to gender-based violence, protection of public health, minors, and persons' physical and mental well-being. The assessment and mitigation measures taken by such platforms will then be subject to an independent audit.

The DSA sets out a co-regulatory framework where service providers can draw up and/or join voluntary codes of conduct, to address harmful, manipulative and abusive activities carried out on their services. Under Article 45 thereof, the Commission and an independent advisory group, called the European Board for Digital Services, should encourage and facilitate the drawing up of such codes of conduct at Union level.

Where significant systemic risks emerge, the Commission may invite the relevant large online platforms, and any other interested parties, to participate in the drawing up of codes of conduct to mitigate such risks. The codes should also provide for regular reporting mechanisms on the actions taken, and their impact. The Commission and the Board should ensure that the codes of conduct contain clear objectives and key performance indicators. The key performance indicators are necessary to measure the effectiveness of the measures and their impact. The Commission and the Board should monitor the codes regularly and evaluate the achievement of their objectives. Very large online platforms will be subject to audits to assess compliance with the commitments undertaken under the codes of conduct.

The fight against disinformation is included in the DSA, which has drawn from the experience of monitoring the Code of Practice on Disinformation. According to Recital 95:

> Advertising systems used by very large online platforms and very large online search engines pose particular risks and require further public and regulatory supervision on account of their scale and ability to target and reach recipients of the service based on their behaviour within and outside that platform's or search engine's online interface. Very large online platforms or very large online search engines should ensure public access to repositories of advertisements presented on their online interfaces to facilitate supervision and research into emerging risks brought about by the distribution of advertising online, for example in relation to illegal advertisements or manipulative techniques and disinformation with a real and foreseeable negative impact on public health, public security, civil discourse, political participation and equality. Repositories should include the content of advertisements, including the name of the product, service or brand and the subject matter of the advertisement, and related data on the advertiser, and, if different, the natural or legal person who paid for the advertisement, and the delivery of the advertisement, in particular where targeted advertising is concerned. This information should include both information about targeting criteria and delivery criteria, in particular when advertisements are delivered to persons in vulnerable situations, such as minors.

On risk mitigation measures, Recital 104 of the DSA clarifies that:

> It is appropriate that this Regulation identify certain areas of consideration for such codes of conduct. In particular, risk mitigation measures concerning specific types of illegal content should be explored via self- and co-regulatory agreements. Another area for consideration is the possible negative impacts of systemic risks on society and democracy, such as disinformation or manipulative and abusive activities or any adverse effects on minors. This includes coordinated operations aimed at amplifying information, including disinformation, such as the use of bots or fake accounts for the creation of intentionally inaccurate or misleading information, sometimes with a purpose of obtaining economic gain, which are particularly harmful for vulnerable recipients of the service, such as minors. In relation to such areas, adherence to and compliance with a given code of conduct by a very large online platform or a very large online search engine may be considered as an appropriate risk mitigating measure. The refusal without proper explanations by a provider of an online platform or of an online search engine of the Commission's invitation to participate in the application of such a code of conduct could be taken into account, where relevant, when determining whether the online platform or the online search engine has infringed the obligations laid down by this Regulation. The mere fact of participating in and implementing a given code of conduct should not in itself presume compliance with this Regulation.

According to Recital 88 of DSA, the rules on codes of conduct may serve as a basis for other self-regulatory initiatives, such as the Code of Practice on Disinformation.

According to Recital 91:

> In times of crisis, there might be a need for certain specific measures to be taken urgently by providers of very large online platforms, in addition to measures they would be taking in view of their other obligations under this Regulation. In that regard, a crisis should be considered to occur when extraordinary circumstances occur that can lead to a serious threat to public security or public health in the Union or significant parts thereof. Such crises could result from armed conflicts or acts of terrorism, including emerging conflicts or acts of terrorism, natural disasters such as earthquakes and hurricanes, as well as from pandemics and other serious cross-border threats to public health. The Commission should be able to require, upon recommendation by the European Board for Digital Services ('the Board'), providers of very large online platforms and providers of very large search engines to initiate a crisis response as a matter of urgency. Measures that those providers may identify and consider applying may include, for example, adapting content moderation processes and increasing the resources dedicated to content moderation, adapting terms and conditions, relevant algorithmic systems and advertising systems, further intensifying cooperation with trusted flaggers, taking awareness-raising measures and promoting trusted information and adapting the design of their online interfaces. The necessary requirements should be provided for to ensure that such measures are taken within a very short time frame and that the crisis response mechanism is only used where,

> and to the extent that, this is strictly necessary and any measures taken under this mechanism are effective and proportionate, taking due account of the rights and legitimate interests of all parties concerned. The use of the mechanism should be without prejudice to the other provisions of this Regulation, such as those on risk assessments and mitigation measures and the enforcement thereof and those on crisis protocols.

The DSA foresees a far-reaching enforcement mechanism, consisting of national and EU-level cooperation, which will supervise how online intermediaries and platforms adapt their systems to the new requirements. Under Article 49, each Member State will need to appoint a Digital Services Coordinator, an independent authority which will be responsible for supervising the intermediary services established in their Member State and/or for coordinating with specialist sectoral authorities. The Digital Services Coordinators may impose penalties, including financial fines for non-compliance with the DSA. Each Member State will clearly specify the penalties in their national laws, in line with the requirements set out in the Regulation, ensuring that these are proportionate to the nature and gravity of the infringement, yet are dissuasive enough to ensure compliance.

Under Article 52 of the DSA, the Commission may impose on the provider of Very Large Online Platforms (VLOPs), or very large search engines, fines of up to 6% of its worldwide annual turnover during the preceding financial year.[40]

The enforcement mechanism is not limited to fines: the Digital Services Coordinator and the Commission will have the power to require immediate actions, where necessary, to address very serious harms, and platforms may offer commitments on how they will remedy these.

Because of the key role played by the media in the democratic process, and because the debate around disinformation involves various fields (for example, political science, journalism, engineering, psychology, anthropology, economics, law, etc.), literature in the field is composed of different contributions from different sectors.

While the literature focuses on a large number of different elements (for example, definitions, roles, actors, policy and regulations, instruments, strategies, motivations, impacts, etc.), there is consensus about the importance of accessing the data of the online platforms which allows the carrying out of a comprehensive analysis of the online disinformation phenomenon (which is also at the basis of an evidence-based policy approach).[41] In order to tackle

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40 'Where it finds that the provider, intentionally or negligently: (a) infringes the relevant provisions of this Regulation; (b) fails to comply with a decision ordering interim measures under Article 55; or (c) fails to comply with a commitment made binding by a decision pursuant to Article 56'.

41 In this regard, the European Digital Media Observatory set up a working group on researcher access to platform data. Chaired by Dr Rebekah Tromble, the working group released a report that includes a draft Code of Conduct on how platforms can share data with independent

online disinformation more effectively, the Commission has moved from a self-regulatory approach (i.e. the Code of Practice on Disinformation, which may be regarded as a first step) towards a co-regulatory one (i.e. the rules on codes of conduct in the DSA).

In a recent paper, Helberger suggests looking at social media not as mere intermediaries, but as political actors and wielders of considerable systemic opinion power,[42] with the latter being defined as 'the ability of the media to influence processes of individual and public opinion formation'.[43] Social media, it is said, increasingly determine the conditions under which the 'legacy' media function, with the risk for the latter of not being able to act independently of platforms.[44] According to the author, the EU policy approach, by giving a stronger role to social media, further reinforces their opinion power, and thereby their political power.

The so-called COVID-19 infodemic[45] forms the basis of a recent publication by Bechmann. According to the author, the soft-law EU policy approach to online disinformation, by focusing primarily on the content level, is missing the bigger picture, where disinformation is only a symptom of something more important on a media infrastructure level.[46]

Nielsen and others, acknowledging the policy approach of the European Commission, highlight the importance of incentivising collaboration among stakeholders, and ensuring the independent monitoring of performance and progress.[47]

4. THE CODE OF PRACTICE ON DISINFORMATION: THE FIRST OF ITS KIND

As mentioned above, the first Code of Practice on Disinformation was signed by its signatories in 2018. This is a self-regulatory tool with which signatories (mainly online platforms and some advertisers) have committed to a number

researchers while protecting users' rights: https://edmo.eu/2022/05/31/edmo-releases-report-on-researcher-access-to-platform-data/.

42 R. Ó Fathaigh, N. Helberger and N. Appelman, 'The Perils of Legally Defining Disinformation', *Internet Policy Review*, 10(4), [2021].

43 C. Neuberger, 'Meinungsmacht im Internet aus Kommunikationswissenschaftlicher Perspektive', *UFITA*, 82(1), [2018], pp. 53–68.

44 R. Ó Fathaigh, N. Helberger and N. Appelman, 'The Perils of Legally Defining Disinformation', *Internet Policy Review*, 10(4), [2021].

45 Munich Security Conference, 15 February 2020, https://www.who.int/dg/speeches/detail/munich-security-conference.

46 A. Bechmann, 'Tackling Disinformation and Infodemics Demands Media Policy Changes', *Digital Journalism*, 8(6), [2020], pp. 855–63.

47 R. Kleis Nielsen, R. Gorwa and M. de Cock Buning, *What can be done? Digital Media Policy Options for Europe (and beyond)*, Reuters Institute, Oxford University, Oxford 2019.

of measures. The code is a self-regulatory tool, as defined in the 2017 EU better regulation toolbox, which also reserves a role for the European Commission. In particular, in the toolbox it is said that,

> [s]elf-regulation is where business or industry sectors formulate codes of conduct or operating constraints on their own initiative for which they are responsible for enforcing. However, pure self-regulation is uncommon and at the EU level it generally involves the Commission in instigating or facilitating the drawing up of the voluntary agreement.[48]

The Code of Practice on Disinformation was the first of its kind, and a similar approach has been followed by other countries, such as Australia.

The first Code set a list of 15 commitments, organised under 5 pillars covering: (1) scrutiny of advertisement placement; (2) political advertising and issue-based advertising; (3) integrity of services; (4) empowering users; and (5) empowering the research community.

The signatories have endorsed only the commitments that are relevant for them, given their respective roles and responsibilities. For example, the demonetisation objective might be relevant for advertisers and advertising networks, while the commitments on political advertisement might be relevant for social media. Large online platforms, such as Facebook, Google and Twitter, have signed all commitments.

The Code has ensured greater transparency by setting out a structured framework for monitoring and improving signatories' policies on online disinformation. The Commission published an assessment of the Code in September 2020, based on: (1) the self-assessment reports submitted by the Code's signatories; (2) the monitoring report provided by the European Regulators Group for Audiovisual Media Services;[49] (3) a study procured by the Commission from an independent consultancy – Valdani, Vicari and Associates;[50] and (4) the Commission's Report on the 2019 elections to the European Parliament.[51]

The assessment of the Code by the Commission has, however, revealed a number of shortcomings, including lack of commonly-shared definitions, transparent key performance indicators (KPIs), data granularity at Member

48 Better regulation toolbox: https://ec.europa.eu/info/sites/default/files/better-regulation-toolbox.pdf.

49 ERGA Report on Disinformation: Assessment of the Implementation of the Code of Practice: https://erga-online.eu/wp-content/uploads/2020/05/ERGA-2019-report-published-2020-LQ.pdf.

50 https://digital-strategy.ec.europa.eu/en/library/study-assessment-implementation-code-practice-disinformation.

51 Commission reports on 2019 European elections: fostering European debates and securing free and fair elections: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1123.

State level, monitoring, and lack of access to data allowing for an independent evaluation of emerging trends, and threats posed by online disinformation. The Commission also called for additional signatories, including from the advertising sector, to sign up to the Code.

The EDAP[52] made the case for new legislation on greater transparency of political advertising in the online environment, and announced an overhaul of the Code of Practice on the basis of a guidance document to be issued by the Commission. In accordance with the EDAP, the Commission issued Guidance on Strengthening the Code of Practice on Online Disinformation[53] (hereinafter the 'Guidance') in May 2021. The Guidance aimed at steering the endeavours of the signatories in strengthening the Code, contributing to broadening participation and creating a robust monitoring framework. It called on stakeholders to address the shortcomings of the Code of Practice, such as: (1) the absence of relevant key KPIs for measuring success or failure when assessing the effectiveness of the commitments and signatories' endeavours; (2) the lack of precise definitions and requirements; (3) insufficient incentives for platforms to give access to data allowing for an independent evaluation of emerging trends and threats, and to cooperate with the research community; (4) the need to involve other stakeholders, such as individual advertisers and private messaging services. The latter may be effective vectors enabling chains of disinformation; (5) the lack of sufficient safeguards to ensure protection of freedom of expression in practice, and avoid risks of private censorship. The Code does not provide for adequate complaint and redress mechanisms for erroneous content demotion; and (6) the lack of a serious monitoring mechanism which does not rely solely on self-reporting from signatories, which is associated with the absence of real sanctions in the event of non-compliance.

This led to the signature of the Strengthened Code of Practice in June 2022, which includes additional players, such as advertisers, fact-checkers and civil society organisations. The new code's main pillars are: demonetisation; transparency of political advertising; ensuring the integrity of services; empowering users; empowering researchers; empowering the fact-checking community; a transparency centre and task force; and a strengthened monitoring framework. For signatories who are Very Large Online Platforms, the Code aims to become a code of conduct recognised as a risk mitigation measure under the DSA (Art. 35).

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52 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European democracy Action Plan, COM(2020) 790 final, of 3 December 2020.

53 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Commission Guidance on Strengthening the Code of Practice on Disinformation, COM(2021) 262 final, of 26 May 2021.

In recent years, and before the adoption of the Code of Practice, during debates about the introduction of self-regulation in the media sector, concerns were expressed in the literature about so-called 'privatised censorship'. In particular, if, on the one hand, public opinion tends to support self-regulation as opposed to state regulation, on the other hand this approach can raise issues about 'privatised censorship', where responsibility for fundamental rights is given to private actors.[54]

The issue of privatisation of censorship was raised once again when the Code of Practice was adopted.[55] Overall, this shows the delicate balancing exercise that is required when dealing with disinformation, as any 'Ministry of Truth' needs to be avoided. As the Code was the outcome of a multi-stakeholder meeting, it should not be public or private actors deciding what is true and what is not, but well-informed citizens, with a key role for independent fact-checkers and journalists, who should be guaranteed to be in a position to do their fact-checking and editorial work.[56]

In its Guidance on Strengthening the Code of Practice on Disinformation,[57] the European Commission called on the signatories to provide users with follow-up information about reported content, and to implement an appropriate and transparent appeal mechanism, and an overall call for transparency was expressed.

5. MEDIA PLURALISM AND MEDIA FREEDOM

Media freedom and pluralism, and the upholding of freedom of expression, are enshrined in Article 11 of the EU's Charter of Fundamental Rights, which was inspired by Article 10 of the ECHR. Considering the importance of these principles to a democratic society, they are also included among the focuses of the European Commission's reporting on the rule of law.

The EU has no explicit competence, as such, on media pluralism. While this has often been asked for at European Parliament level, competence on

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54 D. Tambini, D. Leonardi and C. Marsden, 'The privatisation of censorship' in D. Tambini, D. Leonardi and C. Marsden (eds), *Codifying Cyberspace: Communications Self-Regulation in the Age of Internet Convergence*, Routledge/UCL Press, Abingdon 2008, p. 399.

55 See, e.g. M. Monti, 'The EU Code of Practice on Disinformation and the Risk of the Privatisation of Censorship' in S. Giusti and E. Piras, *Democracy and Fake News Information Manipulation and Post-Truth Politics*, Routledge, London 2020, p. 214.

56 M. de Cock Buning and L. Ginsborg, S.A. Luca, 'Online disinformation ahead of the European Parliament elections: towards societal resilience', *STG Policy Briefs*, 2019/03, [2019], p. 5.

57 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, European Commission Guidance on Strengthening the Code of Practice on Disinformation, COM(2021) 262 final, of 26 May 2021.

media pluralism remains at Member State level. Despite this, media pluralism is a principle that is implemented at various levels within the EU system.[58] In particular, competition law, CJEU case law, and the internal market argument (free flow of services) are the main instruments used, at EU level, to deal with media pluralism.

Media pluralism is among the principles forming the basis of the Audiovisual Media Services Directive (AVMSD).[59] The core of the Directive is the country of origin principle, which is seen as fundamental for the creation of the internal market. According to Recital 34 of the 2010 version of the Directive,[60] this is 'in order to promote a strong, competitive and integrated European audiovisual industry and enhance media pluralism throughout the Union'.

In this regard, it is worth noting that the latest revised version of the Directive[61] includes media pluralism in the new version of Article 30, by clearly mentioning it as one of the objectives of the Directive. In particular, the Article states that,

> [m]ember States shall ensure that national regulatory authorities or bodies exercise their powers impartially and transparently and in accordance with the objectives of this Directive, in particular media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, the proper functioning of the internal market and the promotion of fair competition.

The European Commission is also co-funding the Media Pluralism Monitor (MPM),[62] run by the Centre for Media Pluralism and Media Freedom, which assesses the risks faced by media pluralism, based on a set of 25 key indicators under four different areas. The MPM has also served as source of information for the media freedom aspect of the Commission's annual rule of law report.

The 2020 EDAP[63] is structured around three pillars, one of which is 'strengthening media pluralism and media freedom'. Within the EDAP,

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58 E. Brogi and others, Centre for Media Pluralism and Media Freedom, *European Union competencies in respect of media pluralism and media freedom*, [2013], EUI RSCAS PP; 2013/01.

59 Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, PE/33/2018/REV/1,OJ L 303, 28.11.2018, pp. 69–92.

60 Ibid.

61 Ibid.

62 Media Pluralism Monitor, https://cmpf.eui.eu/media-pluralism-monitor/.

63 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European democracy Action Plan, COM(2020) 790, final of 3 December 2020.

transparency of media ownership is mentioned as being essential for assessing the plurality of media markets. In particular, it is recalled that the revised AVMSD encourages national legislation requiring the transparency of ownership of media service providers.[64] The European Commission, it is said in the EDAP, will also co-finance the new Media Ownership Monitor, a pilot project setting up a publicly available database containing relevant information on media outlets. Building on the results of that project, and on the revised AVMSD, the European Regulators Group for Audiovisual Media Services (ERGA) could then develop further guidance in this area.

As stated in the EDAP:

> Given the serious impact of the COVID-19 pandemic, the Commission calls on Member States to support media in a way that respects and promotes media independence, freedom and pluralism. The responsibility for ensuring that the news media sector can continue to offer products and services promoting pluralistic information, while competing in open and efficient markets, lies primarily with the Member States. Existing State aid rules clarify the conditions under which public support may be granted by Member States. In order to facilitate support from national authorities, the Council has invited the Commission to evaluate the application of State aid rules to the press sector. The Commission is assessing the need for appropriate action. In addition, the State aid Temporary Framework of 19 March 2020 also applies to sector specific measures, such as aid to the press, music, and audiovisual sectors.
>
> State financial support through public interest advertising can be crucial, especially for non-profit, community media and other less commercial forms of journalism. Nevertheless, without appropriate safeguards to protect media independence, state advertising can be used to put indirect political pressure on the media. Transparent rules and fair criteria for the allocation of advertising can mitigate the risks in this area. In particular, setting up publicly accessible contract registers that publish awarded contracts and their amendments (as supported by the Commission's 2017 public procurement strategy) can help.

In addition, the European Commission also committed in the EDAP to mapping options to further support media diversity.

In December 2020, the Commission adopted an Action Plan to Support Recovery and Transformation of Europe's media,[65] which states that, '[i]n the

64 https://www.obs.coe.int/en/web/observatoire/home/-/asset_publisher/9iKCxBYgiO6S/content/which-eu-countries-have-transposed-the-avmsd-into-national-legislation-.

65 Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions Europe's Media in the Digital Decade: An Action Plan to Support Recovery and Transformation, COM/2020/784 final.

news media sector, companies should be able to find enough viable and sustainable funding models to ensure citizens' access to a pluralistic, diverse, and independent media environment, including at regional and local levels'.

In this Action Plan, it is also affirmed that:

> The economic recovery and competitiveness of the media sector is a precondition for a healthy, independent and pluralistic media environment, which in turn is fundamental for our democracy. This Communication complements the European Democracy Action Plan. This addresses risks to European democratic systems in the area of disinformation, integrity of elections and media freedom and pluralism. It includes a series of initiatives to create a safer and better environment for journalists to do their work, as well as to promote media literacy.

In September 2022, the European Commission published a proposal for the European Media Freedom Act. This Act, in words of the Commission, proposes 'a new set of rules to protect media pluralism and independence in the EU. It aims at ensuring that media – public and private – can operate more easily across borders in the EU internal market, without undue pressure and taking into account the digital transformation of the media space.'[66] The Media Freedom Act aims to: (1) prevent undue interference in the daily editorial decisions of the media. Public service media should be independent and be equipped with adequate and stable funding for future operations, in accordance with their public service mission; (2) protect journalists and the confidentiality of their sources; (3) ensure that media are transparent about their ownership. Media should also take the measures that they deem appropriate to guarantee the independence of individual editorial decisions and should disclose any actual or potential conflict of interest; (4) harmonise some national rules and processes for the assessment of media market concentrations, in order to protect media pluralism and independence. (5) ensure the transparency and fairness of the online audience measurement systems and allocation of state advertising to media companies; and (6) ensure better protection for the media against unjustified online content removal by very large platforms.

The Media Freedom Act sets up a new independent European Board for Media Services, comprising national media authorities. The Board, which will replace ERGA, will promote the effective and consistent application of the EU media law framework.

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66 https://ec.europa.eu/info/strategy/priorities-2019-2024/new-push-european-democracy/european-democracy-action-plan/european-media-freedom-act_en.

6. SOCIETAL RESILIENCE, MEDIA AND INFORMATION LITERACY AND QUALITY JOURNALISM

6.1. MEDIA AND INFORMATION LITERACY

According to the Media Literacy Expert Group chaired by the European Commission, media literacy includes all technical, cognitive, social, civic and creative capacities that allow citizens to access the media, to have a critical understanding of it, and to interact with it.[67]

Media literacy is key to building a resilient society, to providing it with the tools to navigate the news environment, and to taking informed decisions. As such, its focus is quite broad, and does not just include disinformation. The recent pandemic, and the related infodemic, showed clearly how important it is for citizens to have the right skills to handle the online news sphere, and also to be aware of how media and the online platforms work.

Because of their aims, media literacy initiatives and policies are linked to a number of specific elements, such as the age and level of education of the target audience, the role of the target audience (for example, teachers or citizens), the average level of media literacy, the percentage of news accessed online and offline, the structure of the given media sector, the national and language peculiarities, and the actors implementing media literacy initiatives (for example, ministries, national authorities, NGOs, CSOs and private companies).

The overall policy of the EU in this field is to support and promote media literacy initiatives, and to foster national initiatives. In this regard, mapping these initiatives is important for gaining an understanding of what the Media and Information Literacy offers to EU citizens, and to allow for more harmonisation and coordination. Mapping such activities is not an easy exercise, as it has to take into consideration, as mentioned above, a large number of different variables, and it involves setting standards for best practices. Such a mapping exercise has been done at an academic level, for example by Frau-Meigs and others.[68] With the collaboration of its hubs, the European Digital Media Observatory has also started such a mapping exercise.

In this regard, the EU has launched, for example, the European Media Literacy Week,[69] the European Media Literacy Awards[70] and the Media

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67 Register of Commission Expert Groups and Other Similar Entities, https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?do=groupDetail.groupDetail&groupID=2541.

68 D. Frau-Meigs, I. Velez and J. Flores Michel, *Public Policies in Media and Information Literacy in Europe: Cross-Country Comparisons*, Routledge, London 2017.

69 European Media Literacy Week: https://digital-strategy.ec.europa.eu/en/events/european-media-literacy-week.

70 The winners of the European Media Literacy Awards: https://digital-strategy.ec.europa.eu/en/news/winners-european-media-literacy-awards.

Literacy for All[71] initiatives. The Commission has also established a High-Level Group on Media Literacy[72] that meets to: (1) identify, document and extend good practices in the field of media literacy; (2) facilitate networking between different stakeholders; and (3) explore ways of coordinating EU policies, support programmes and media literacy initiatives. The EC has also established a High-Level Group that will focus on tackling disinformation and promoting digital literacy through education and training,[73] and in October 2022 it published the Guidelines for teachers and educators on tackling disinformation and promoting digital literacy through education and training.[74]

Media literacy was also included in the revised AVMSD. In particular, Member States are asked to promote measures that develop media literacy skills (Art. 33a). In addition, video-sharing platforms are required to provide effective media literacy measures and tools, and to raise users' awareness of these measures and tools (Art. 28b).

Empowering users and, in particular, media literacy, are also focuses of the strengthened Code of Practice on Disinformation.[75] In particular, '[s]ignatories commit to continue and strengthen their efforts in the area of media literacy and critical thinking, also with the aim to include vulnerable groups'.

According to the Guidance of the Commission, these efforts could also be aligned with the Commission's initiatives in the area of media literacy, including the new Digital Education Action Plan (2021–27), to exploit relevant synergies. To this end, the Commission's Media Literacy Expert Group and the European Digital Media Observatory (EDMO) can provide support to establish a permanent framework for discussion. Besides this, EU policy in this field comes primarily in the form of recommendations, and commitment at national level is rather less harmonised.[76]

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71 2018–2019 Call for proposals for Preparatory Action on Media Literacy for All: https://digital-strategy.ec.europa.eu/en/news/2018-2019-call-proposals-preparatory-action-media-literacy-all.

72 Register of Commission Expert Groups and Other Similar Entities, https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?do=groupDetail.groupDetail&groupID=2541.

73 https://ec.europa.eu/education/news/call-for-experts-tackling-disinformation-promoting-digital-literacy_en.

74 Guidelines for teachers and educators on tackling disinformation and promoting digital literacy through education and training: https://op.europa.eu/en/publication-detail/-/publication/a224c235-4843-11ed-92ed-01aa75ed71a1/language-en.

75 The 2022 Code of Practice on Disinformation: https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation.

76 I. Nenadic and L. Steinberg, *Media Literacy Policies in the EU*, Factsheet, January 2019: https://cmpf.eui.eu/wp-content/uploads/2019/01/infographics_COMMS_PROJECT_media-literacy-policy-EU.pdf.

Also considering the important role that media literacy has on society and its resilience, Livingstone recently recalled the key role of measuring the impact of media literacy initiatives.[77]

6.2. QUALITY JOURNALISM

Journalism is a key pillar of a democratic society. Without going into details and losing focus, it is worth recalling that the media sector, including its business models, was strongly impacted by the digital revolution. Such impacts relate to a number of factors, a few examples being the introduction of user-generated content; the speed at which information is produced, shared and accessed; new tools and methodologies for producing news (for example, data journalism); the economic losses of media outlets due to free access to content online, and to new distribution channels, with the consequent loss in advertisement; and new content verification tools.

The above-mentioned 2018 Communication on Tackling Online Disinformation[78] introduces four main objectives and principles, one of which is 'to promote diversity of information, in order to enable citizens to make informed decisions based on critical thinking, through support to high quality journalism, media literacy, and the rebalancing of the relation between information creators and distributors'.

In particular, in the words of the Commission, 'there is a need to invest in high quality journalism, reinforce trust in the key societal and democratic role of quality journalism both offline and online, and encourage quality news media to explore innovative forms of journalism'.

Within the Communication, among other things, the European Commission encourages Member States to consider horizontal aid schemes to address market failures that are hampering the sustainability of quality journalism, as well as support measures for specific activities, such as training for journalists, and service and product innovation.

In its 2018 Action Plan Against Online Disinformation,[79] the European Commission recalled the importance of the role played by independent media in a democratic society, and their contribution to the exposure of disinformation,

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77 S. Livingstone, 'The vital role of measuring impact in media literacy initiatives', blog post, EDMO, 5 July 2022: https://edmo.eu/2022/07/05/the-vital-role-of-measuring-impact-in-media-literacy-initiatives/.

78 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Tackling online disinformation: a European Approach, COM/2018/236 final, of 28 April 2018.

79 Joint Communication by the Commission and European External Action Service setting out an Action Plan Against Disinformation', [2018], Brussels, 05.12.2018, JOIN(2018) 36 final.

and confirmed its support for independent media and investigative journalists. It also confirmed that it will continue carrying out specific programmes relating to media support, including financial support, and professionalisation in EU neighbour countries.

In 2019, Kleis Nielsen and others identified some policy options available to the European Commission and EU Member States for creating a more enabling environment for independent professional journalism. In particular, calling for a more holistic approach, the authors suggest three media policy needs. In order of priority, these are:

> (a) to protect journalists and media from threats to their independence and to freedom of expression, (b) to provide a level playing field and support for a sustainable business of news, and (c) to be oriented towards the digital, mobile, and platform dominated future that people are demonstrably embracing – not towards defending the broadcast and print-dominated past.[80]

In the above-mentioned EDAP,[81] the Commission mentions the following actions in support of journalists, including action against strategic lawsuits against public participation (SLAPPs):

> (i) Recommendation on the safety of journalists in 2021, taking into account new online threats faced in particular by women journalists;[82] (ii) Structured dialogue, under the European News Media Forum, with Member States, stakeholders and international organisations to prepare and implement the recommendation; (iii) Sustainable funding for projects with a focus on legal and practical assistance to journalists in the EU and elsewhere, including safety and cybersecurity training for journalists and diplomatic support; (iv) Set up expert group on SLAPPs in early 2021; (v) Present initiative to protect journalists and civil society against SLAPPs in late 2021;[83] (vi) Support EU cooperation between national media councils, other media self-regulatory bodies, independent media regulators and networks of journalists, and initiatives fostering journalistic partnerships and standards.

The above-mentioned European Media Freedom Act is articulated around four main objectives, which all go into the direction of enhancing independent

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80 R. Kleis Nielsen, R. Gorwa and M. de Cock Buning, *What can be done? Digital Media Policy Options for Europe (and beyond)*, Reuters Institute, Oxford University, Oxford 2019.

81 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European democracy action Plan, COM(2020) 790 final, of 3 December 2020.

82 Recommendation on the protection, safety and empowerment of journalists – factsheet: https://digital-strategy.ec.europa.eu/en/library/recommendation-protection-safety-and-empowerment-journalists-factsheet.

83 'Commission tackles abusive lawsuits against journalists and human rights defenders "SLAPPs"', press release, 27 April 2022: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_2652.

quality journalism. These are: (1) fostering cross-border activity and investment in media services; (2) increasing regulatory cooperation and convergence; (3) facilitating provision of quality media services; and (4) ensuring transparent and fair allocation of economic resources.

As indicated above, the Act also aims to underline that the use of spyware against media, journalists and their families is, in principle, prohibited. The Act aims to restrict any possible exceptions to this rule to the grounds of national security, or the investigation of a restricted list of crimes, such as terrorism, child abuse or murder. In such cases, the Act makes it very clear that the use of spyware should be duly justified, on a case-by-case basis, in compliance with the Charter of Fundamental Rights, in circumstances where no other investigative tool would be adequate. In the same vein, the proposed rules clarify that journalists should not be prosecuted for protecting the confidentiality of their sources.

In 2022, the European Commission funded a project called the European Newsroom. This is a cooperation project between news agencies from all over Europe, which, among other things, provides opportunities for training, further education and the joint development of journalistic standards. Tools such as fact-checks and verification help to uphold quality journalism by counteracting the growing dissemination of disinformation and propaganda.[84]

6.3. PUBLIC SERVICE BROADCASTING

When dealing with the spread of online disinformation, it is, as we know, important to take into consideration a number of elements, such as: the psychological components (such as trust in the source and, for example, emotions such as fear and anger that make messages more shareable and less checked); the technological ones (both in terms of algorithms and echo chambers, but also in terms of tools used); the motivational ones (for example, financial, political, social, etc.), and the level of media literacy and education.

According to a 2020 Report by the European Broadcasting Union, '[s]coring as most trusted news brands in more than 60% of markets, public broadcasters are relied on by citizens for credible information. Globally seen, trust in news has increased since the beginning of the COVID-19 pandemic.' Moreover, 'the more citizens perceive Public Service Media (PSM) in their country to be free from political pressure, the higher the level of trust in the information provided by national media in general. Moreover, the more citizens think that their national PSM are independent, the more they trust PSM news'.[85]

84 https://europeannewsroom.com/it/.

85 https://www.ebu.ch/publications/research/login_only/report/trust-in-media.

As mentioned in the Report of the High-Level Group on Fake News and Online Disinformation, most responses to online disinformation have had a non-regulatory character and a multi-stakeholder approach. Among other things, the Report mentions that:

> Public authorities should provide an enabling environment for substantial media pluralism through a combination of de facto and de jure protection of basic rights to free expression and diverse information, including appropriate forms of support for private sector media, and support for demonstrably independent public service media who can help produce quality information, counter disinformation, and increase media and information literacy (public authorities). Together such responses can help enhance media pluralism and diversification of the digital landscape/environment.

In line with this, the above-mentioned 2018 Communication by the Commission states that:

> public support to media and public service media are very important to the provision of high quality information and the protection of journalism in the public interest. Member State support measures in view of achieving objectives of common EU interest, such as media freedom and pluralism, have been declared compatible with EU State aid rules, as demonstrated by Commission Decisions on media aid.

It should be noted that it is important that independent public service media deliver public service where the public is (meaning through the media it uses), including online, so as to avoid public service media becoming services funded by everyone but enjoyed primarily by older people (television and broadcast media).[86]

6.4. INDEPENDENT FACT-CHECKING

The role of independent fact-checkers has become more and more relevant in recent years. While source-checking and fact-checking should also happen *ex ante*, by journalists before publishing, the work done by fact-checkers happens *ex post*. Their work is to verify whether a given piece of news or political discourse is based on facts. In so doing, fact-checkers research and gather data to see whether that news or discourse is based on verifiable evidence. This is a feature of fact-checkers' articles, which not only state whether or not something is based on facts, but also offer the reader the possibility of being guided through the verification process.

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86 R. Kleis Nielsen, R. Gorwa and M. de Cock Buning, *What can be done? Digital Media Policy Options for Europe (and beyond)*, Reuters Institute, Oxford University, Oxford 2019.

The impact of fact-checking is pretty much related to speed, in the sense that the quicker an article or political speech can be fact-checked, the more fact-checking can be effective, and any lack of fact-based evidence can be identified.[87]

Research is ongoing on the effectiveness of fact-checking. According to a study by Barrera and others (based on the 2017 French elections), fact-checking improves the factual knowledge of voters, but exposure to facts alone does not decrease support for candidates, even though voters have improved their knowledge.[88]

The impact of independent fact-checking should, however, be seen more broadly, by also considering the role of fact-checkers in the accountability of politicians and public discourses, the diffusion of a verification and critical thinking culture, their role (as has been seen in the war in Ukraine) in publishing and archiving verification of information, and their overall contribution to the democratic process.

Fact-checkers have started collaborating with online platforms for content verification, and some fact-checking organisations have also joined the Strengthened Code of Practice, where fact-checking plays an important role.

The work of independent fact-checkers is key to getting facts right. As with any new realities, there are also some challenges, such as their business models, and the ethical standards they adhere to. The International Fact-Checking Network (IFCN)[89] was the first organisation aiming to establish such standards. At EU level, the European Commission has recently funded the creation of the European Fact-Checking Standards Network.[90]

7. THE ROLE OF ERGA, THE EEAS AND EDMO WITHIN THE EU POLICY TO TACKLE DISINFORMATION

7.1. THE EUROPEAN REGULATORS GROUP FOR AUDIOVISUAL MEDIA SERVICES

The European Regulators Group for Audiovisual Media Services (ERGA) brings together the representatives of the national regulatory authorities or bodies with primary responsibility for overseeing audiovisual media services. ERGA is

87 H. Matatov, M. Naaman and O. Amir, 'Stop the [Image] Steal: The Role and Dynamics of Visual Content in the 2020 U.S. Election Misinformation Campaign', *Proceedings of the ACM on Human-Computer Interaction*, vol. 6, No. CSCW2, Article 541 (November 2022).

88 O. Barrera and others, 'Facts, alternative facts, and fact checking in times of post-truth politics', *Journal of Public Economics*, [2020], p. 3.

89 https://www.poynter.org/ifcn/.

90 https://eufactcheckingproject.com/.

required to advise the Commission on the implementation of the AVMSD.[91] ERGA promotes common regulatory approaches and effective cooperation between its members, as well as between members and stakeholders.[92] The responsibilities of ERGA members vary significantly. In some cases, its members have considerable experience with self- and co-regulation deriving from their involvement in the development of industry codes of practice, or conduct at national level. The Action Plan against Disinformation[93] required ERGA to assist the Commission in monitoring the implementation of the Code of Practice on Disinformation and assessing its effectiveness. ERGA carried out this task in two phases, in 2019. In the first phase, it monitored the implementation of the Code's commitments that were of particular relevance to protecting the integrity of the European Parliament elections in 2019 (for example, political advertising and issue-based advertising). In the second phase, it assessed the implementation and effectiveness of the Code at large, over its first year of operation (i.e. until October 2019).

As regards the first phase, ERGA sought to monitor, in as many Member States as possible, the implementation, by the signatories, of their commitments in the Code of Practice relating to Pillar B, focusing on 'transparency of political advertising' during the European Parliament elections in May 2019. Between January and May 2019, the signatories issued monthly reports on the implementation of their actions under the Code that were most pertinent to the European Parliament elections. These monthly reports were published regularly by the Commission, and were examined by ERGA.

The outcome of ERGA monitoring activities in the first phase was summarised in a report addressed to the Commission.[94] The findings of ERGA monitoring in the second phase were illustrated in another report, which also contains recommendations for improving the Code, and making its monitoring more effective.[95]

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91 See Art. 30(b) of Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, PE/33/2018/REV/1 OJ L 303, 28.11.2018, p. 69–92.

92 https://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-02_Statement-of-Purpose adopted.pdf.

93 Joint Communication by the Commission and European External Action Service setting out an Action Plan Against Disinformation, [2018], Brussels, 05.12.2018, JOIN(2018) 36 final.

94 Report of the activities carried out to assist the European Commission in the intermediate monitoring of the Code of practice on disinformation: http://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-06_Report-intermediate-monitoring-Code-of-Practice-on-disinformation.pdf.

95 ERGA Report on disinformation: assessment of the implementation of the Code of Practice: https://erga-online.eu/wp-content/uploads/2020/05/ERGA-2019-report-published-2020-LQ.pdf.

The Strengthened Code of Practice foresees a leading role for ERGA in relation to the service level indicators, and also includes ERGA in the permanent task force of the Code, which aims to evolve and adapt the Code in view of technological, societal, market and legislative developments.

Finally, it is worth mentioning that the DSA foresees the establishment of national Digital Services Coordinators, for whom Member States will need to ensure adequate financial, technical and human resources to carry out their tasks. These Digital Services Coordinators, who should act independently from platforms and governments, will very likely be the current national media regulatory authorities. As such, this will have an impact on the work of ERGA as well.

7.2. THE EUROPEAN EXTERNAL ACTION SERVICE

Disinformation might originate from within or outside the EU, and be sponsored by foreign governments or non-governmental bodies. The European Council first recognised the threat of online disinformation campaigns in 2015, when it asked the High Representative of the Union for Foreign Affairs and Security Policy (hereinafter the 'High Representative') to address disinformation campaigns coming from Russia. The East Strategic Communication Task Force was set up to address and raise awareness of this issue. In addition, the Hybrid Fusion Cell within the European External Action Service (EEAS) was set up to analyse hybrid threats (disinformation campaigns from third countries are deemed to be part of hybrid warfare). It also led to the setting up of the European Centre of Excellence for Countering Hybrid Threats, which shares best practices with, and supports the activities of, the EU and the North Atlantic Treaty Organization (NATO) in this field.

Since it was established, the East Strategic Communication Task Force has communicated effectively on the policies of the Union, in the Union's Eastern neighbourhood, mainly through information campaigns. In addition, the East Strategic Communication Task Force has catalogued, analysed and highlighted several cases of disinformation coming from Russia, uncovering numerous disinformation narratives, and raising awareness of and exposing the tools, techniques and intentions of disinformation campaigns. Its focus is on the Eastern Partnership countries, and on Russian domestic and international media, and its approach is to expose, on the basis of the evidence collected, the trends, narratives, methods and channels used in disinformation campaigns, and to raise awareness of them.

Further to the Joint Action Plan against Disinformation, the strategic communication teams of the EEAS have been strengthened. Its strategic Communication Task Forces, the Union Delegations and the EU Hybrid Fusion Cell have been provided with additional specialised staff, such as experts in data

mining and analysis, to process the relevant data. Additional media monitoring services have also been procured, to cover a wider range of sources and languages, as well as additional research and studies on the reach and impact of disinformation.

The High Representative and the Commission, in cooperation with Member States, have established a Rapid Alert System for addressing disinformation campaigns, working closely with existing networks and the European Parliament, as well as NATO, and the G7's Rapid Response Mechanism.

The Commission and the High Representative, in cooperation with Member States, have also strengthened strategic communication in the EU's neighbourhood.

7.3. THE EUROPEAN DIGITAL MEDIA OBSERVATORY

The European Digital Media Observatory (EDMO),[96] funded by the European Commission, started its activities in June 2020, and its establishment is part of the EU strategy to tackle online disinformation.[97] EDMO serves as an independent platform for fact-checkers, academics and other relevant stakeholders to collaborate with each other, actively link with media organisations and media literacy experts, and provide academic policy analysis that can be useful for evidence based policy decisions. The underlying idea is that, to

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96 The EDMO consortium is led by the European University Institute (in particular by the School of Transnational Governance, and with the involvement of the Centre for Media Pluralism and Media Freedom), Athens Technology Center, Aarhus University and Pagella Politica: https://edmo.eu/.

97 As mentioned in the call for tenders for the establishment of EDMO, a key element of the strategy outlined in the Commission Communication 'Tackling online disinformation: a European approach' was the creation of a solid body of facts and evidence regarding the creation and diffusion dynamics of disinformation on social media and other digital media. Disinformation is an evolving threat which requires continuous research efforts to address the relevant actors, vectors, tools, methods, prioritised targets and its impact on society. Generating such knowledge requires the creation of a European multidisciplinary community composed of representatives of independent fact-checking organisations and academic researchers with expertise in the field of online disinformation, and open to collaborations with media organisations and media literacy practitioners. As set out in the Action Plan against disinformation such joint efforts need support and coordination at national level in order to capture specific knowledge about national and regional information environments. While close cooperation between relevant stakeholders has the potential to improve detection and analysis of disinformation dissemination patterns, privacy-compliant access to online platforms' data is a key enabler for such cooperative research. The work of the above-mentioned multidisciplinary community will also provide the necessary evidence and specific knowledge to public authorities in charge of monitoring and assessing platforms' policies under the Code of Practice on disinformation. Moreover, it will provide relevant and updated material to media literacy practitioners, to improve their initiatives aimed at enhancing critical thinking of digital media users.

tackle disinformation, a coordinated multi-stakeholder and multidisciplinary approach is needed.

As clearly emerged from the Report of the High Level Group on Fake News and Online Disinformation,[98] the fight against online disinformation involves a number of different actions, led by different actors, and this is why a centralised platform: (1) gathering stakeholders; (2) collecting relevant evidence; and (3) providing relevant tools is key.

The main pillars of EDMO are: (1) Act as a multistakeholders and multi-disciplinary platform and act as forum for debate and collaboration; (2) Support and coordinate fact-checking activities; (3) Support and coordinate academic research activities; (4) Support and coordinate of Media Literacy activities; (5) Support the creation for a framework for online platforms' data access; (6) Carry-out academic policy analysis.

EDMO works with 14 EDMO national/multinational hubs that cover all Member States,[99] which play a fundamental role in feeding the EDMO platform and in running hands on activities to tackle disinformation in their respective countries. In particular, at their national level, these hubs: (1) detect, analyse and disclose disinformation campaigns at national, multinational and EU level; (2) analyse the impact of disinformation campaigns on society and democracy; (3) promote media literacy activities; and (4) monitor online platforms' policies and the digital media ecosystem, in cooperation with national authorities.

8. INTEGRITY OF ELECTIONS

The EDAP[100] builds on the work of the European Cooperation Network on Elections, and the experience obtained in the European Parliament elections in 2019, as well as in other national elections since then, and during the coronavirus pandemic. EDAP has also announced legislation on the transparency of political advertising and the adoption of supporting measures and guidance for political parties and Member States.

Responding to a proposal from the Member States, the Commission will propose a new operational EU mechanism to support resilient electoral processes. It will be organised and coordinated through the European Cooperation Network on Elections, to support deployment of joint expert teams and exchanges on issues such as the cybersecurity of elections and online forensics.

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98 European Commission, A multi-dimensional approach to disinformation: Report of the independent High level Group on fake news and online disinformation, [2018].

99 EDMO, 'National EDMO hubs announced', 26 May 2021: https://edmo.eu/2021/05/26/national-edmo-hubs-announced/.

100 Commission Communication on the European democracy action plan, COM/2020/790 final, of 3 December 2020.

The Commission will also continue to facilitate enhanced cooperation among Member States' competent authorities. Options for mutual support, including an online forum, joint training, pooled resources and expertise, as well as online monitoring capabilities, will be explored.

In September 2018, the Commission adopted a package of measures to protect the integrity and freedom of the European Parliament elections of May 2019.[101] This included guidance on the application of EU data protection rules, a legislative amendment tightening the rules on European political party funding, and recommendations, to the Member States and national and European political parties, on transparency, cybersecurity, disinformation and national electoral networks. Since then, the Commission has worked with the Member States, within the framework of the European Cooperation Network on Elections, to implement these recommendations, and to exchange best practices and other practical information to promote free and fair elections in the EU. This network brings together representatives of Member States' authorities with competence in electoral matters.

On 25 November 2021, the European Commission presented a proposal for a Regulation on transparency and targeting of political advertising,[102] as part of measures aimed at protecting election integrity and open democratic debate. The proposed Regulation covers political advertisements by, for, or on behalf of, a political actor, as well as so-called issue-based advertisements, which are liable to influence the outcome of an election or referendum, a legislative or regulatory process, or voting behaviour. Paid political advertising must be clearly labelled as such, and provide certain key information. This includes the name of the sponsor prominently displayed, and an easily retrievable transparency notice with: (1) the amount spent on the political advertisement; (2) the sources of the funds used; and (3) an indication of the link between the advertisement and the relevant elections or referenda.

Political targeting and amplification techniques which use or infer sensitive personal data, such as ethnic origin, religious beliefs or sexual orientation, will be banned. Such techniques will be allowed only after explicit consent has been received from the person concerned. Targeting could also be allowed in the context of the legitimate activities of foundations, associations or not-for-profit bodies with political, philosophical, religious or trade union aims, where the targets are their own members. For the first time, it will be mandatory to include, within advertisements, clear information on the basis on which the person is being targeted, and to publish details of which groups of individuals have been

101 European Commission, 'State of the Union 2018: European Commission proposes measures for securing free and fair European elections', press release, 12 September 2018: https://ec.europa.eu/commission/presscorner/detail/en/IP_18_5681.

102 Proposal for a Regulation of The European Parliament and of the Council on the Transparency and Targeting of Political Advertising, COM(2021) 731 final.

targeted, on the basis of what criteria, and with what amplification tools or methods, among other things. Organisations making use of political targeting and amplification will need to adopt, apply and make public an internal policy on the use of such techniques. If all transparency requirements cannot be met, a political advertisement cannot be published.

Member States will be required to introduce effective, proportionate and dissuasive fines when the rules on the transparency of political advertising are breached. Under the proposed Regulation, National data protection authorities will specifically monitor the use of personal data in political targeting, and will have the power to impose fines in line with EU data protection rules.

The proposed rules would require any political advert to be clearly labelled as such, and to include information such as who paid for it and how much they paid. Political targeting and amplification techniques would need to be explained publicly in unprecedented detail, and would be banned when using sensitive personal data without the explicit consent of the individual concerned.

The proposal will now be discussed by the European Parliament and the Council. To ensure that the 2024 European Parliament elections take place under the highest democratic standards, the aim is for the new rules to enter into force and be fully implemented by Member States by spring 2023, i.e. one year before the elections.

In addition to the election package, the Action Plan against Disinformation urged signatories to ensure a timely and effective implementation of the Code before the European Parliament elections of May 2019. The Commission closely monitored the Code of Practice, with the help of the Group for Independent Audiovisual Regulators (ERGA), in the context of the elections to the European Parliament in 2019, and after the start of the COVID-19 pandemic in 2020. The Commission published the reports and analysis of the progress that had been made by April 2019, by Facebook, Google and Twitter, in fighting disinformation. These three online platforms are signatories to the Code of Practice on Disinformation, and committed to monthly reporting on measures taken, ahead of the European Parliament elections in May 2019. Finally, it is worth recalling that one of the pillars of the Strengthened Code of Practice is Transparency of Political Advertising, which includes commitments on political and issue advertising, labelling of political or issue adverts, verification systems for sponsors and advertisers and transparency and political or issue advert repositories and access to political or issue advert data.

9. DISINFORMATION AND THE COVID-19 PANDEMIC

From the very beginning of the COVID-19 pandemic, it was acknowledged that related disinformation was representing a serious threat for the health and safety of citizens, as well as for the development and implementation of the strategies

to fight the pandemic. Not by chance had the World Health Organization already started talking about an 'infodemic' by February 2020.

In June 2020, a joint Communication by Vice-President Jourova and High Representative/Vice-President Josep Borrell, on 'Tackling COVID-19 disinformation – Getting the facts right'[103] was published. This communication was based on the following pillars: (1) understand (for example, distinguishing between illegal content and content that is harmful but not illegal); (2) communicate (for example, publishing web pages rebutting myths about the coronavirus); (3) cooperation (between the European Parliament and the Council, and between EU institutions and Member States, but also with international partners, citizens, consumers, and civil society actors, and with independent media and journalists in third countries); (4) transparency (for example, monthly reporting by online platforms); (5) ensuring freedom of expression and pluralistic democratic debate (for example, strengthening support for independent media and journalists in the EU, and around the world); and (6) empowering citizens, raising citizens' awareness and increasing societal resilience (for example, media literacy projects and support for civil society organisations). Within this Communication, the fundamental roles played by bodies such as the European External Action Service (including the Rapid Alert System), ERGA and the EDMO were acknowledged.

More recently, in its June 2021 Communication on 'Drawing the early lessons from the COVID-19 pandemic',[104] the European Commission concluded, among the lessons learned during the COVID-19 pandemic, that '[a] more coordinated and sophisticated approach to misinformation and disinformation should be developed', and committed to further expanding the tools for better coordination of detecting and reacting to disinformation campaigns at EU level.

Among other sources, the above-mentioned 2020 Joint Communication on 'Tackling COVID-19 disinformation – Getting the facts right' called on the online platforms to implement additional efforts, for example ensuring data access or giving due prominence to fact-checks on their services in all Member States, to enhance information-sharing, and to increase transparency and accountability. In particular, the signatories of the Code of Practice on Online Disinformation were asked to enhance their cooperation through the use of fact-checkers and researchers, and to be more transparent about implementation of their policies, and to inform users that interacted with disinformation that they were doing so.

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103 Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Tackling Covid-19 Disinformation – Getting The Facts Right, JOIN/2020/8 Final, of 10 June 2020.

104 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Drawing The Early Lessons from the Covid-19 Pandemic, COM/2021/380 Final, of 15 June 2021.

Signatories were also asked to provide monthly reports on their policies and actions taken to address COVID-19 disinformation, and four main focuses were identified: (1) initiatives to promote authoritative content at EU and Member State levels; (2) initiatives and tools to improve users' awareness about interaction with disinformation; (3) manipulative behaviour of their services; and (4) data on flows of advertising linked to COVID-19 disinformation.

The monthly reports, which are public, and can be accessed on the European Commission's website, did, however, show some limits, which reflected those identified by the Commission when assessing the overall implementation of the first Code of Practice. In this case, too, it was quite difficult to assess the policies and actions put in place by the platforms. These difficulties related to issues such as the lack of a standardised reporting methodology (reports differed in their structure, style and type of information provided); lack of granularity of data (which made it difficult, in some cases, to understand in which Member States given actions had been put in place); and lack of detailed information on the policies put in place, for example when it came to removal or labelling of disinformation.[105]

[105] For a comparative analysis of the reports, see, e.g. T. Meyer, A. Alaphilippe and C. Pershan, *The good, the bad and the ugly: how platforms are prioritising some EU member states in their COVID-19 disinformation responses* (2021), https://www.disinfo.eu/publications/the-good-the-bad-and-the-ugly-how-platforms-are-prioritising-some-eu-member-states-in-their-covid-19-disinformation-responses/.