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Striking a balance between disinformation on social media platforms and freedom of expression in the European Union

Bachelor Thesis

AUTHOR:

Paula Kellija

LL.B 2021/2022 year student

student number B019025

SUPERVISOR:

Edvijs Zandars

LL.M

DECLARATION OF HONOUR:

I declare that this thesis is my own work and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed)

RIGA, 2022

ABSTRACT

The growing influence and adverse effects of disinformation on social media platforms have already presented challenges not only to the European Union and its Member States but also to social media platforms and human rights activists. One of the most crucial challenges from a legal perspective has been finding the appropriate tools to regulate disinformation while preserving the right to freedom of speech, bearing in mind that there is no uniform definition of disinformation on a global level. While there are notable attempts to limit the spread of disinformation on social media platforms from the European Commission and the various Member States, this thesis aims to analyse their effectiveness and compliance with human rights standards. The non-existence of a uniform definition of disinformation has resulted in these mechanisms being too broad, not effective as predicted, and notably endangering the freedom of speech.

Keywords: disinformation, ECHR, freedom of expression, social media platforms, EU, self-regulation

SUMMARY

With the advanced developments in technologies and the growing role of social media platforms, disinformation has recently become a vital topic of concern and discussion in the EU.

The core objective of the following thesis, “*Striking a balance between disinformation on social media platforms and freedom of expression in the European Union,*” is to identify existing and future tools at the European Union that regulate disinformation, their effectiveness, and their compliance with freedom of expression standards enshrined in Article 10 of the European Convention on Human Rights. An answer is provided by conducting doctrinal and comparative legal research to study existing laws, Regulation, and policy framework relevant to the notion of disinformation and freedom of expression. Secondary sources are to review legal academics and scholarly opinions regarding the shortcomings, uncertainties, and areas of improvement regarding disinformation regulation. Furthermore, case analysis is performed to analyse case law of the European Court of Human Rights to determine the limitations of freedom of expression.

The thesis is divided into three main chapters. The first chapter addresses the various definitions of disinformation, the role of social media platforms in disseminating disinformation, the impacts of disinformation on European Member States democracies, Article 10 of the European Convention on Human Rights, and the line between disinformation and freedom of expression. The main issues of the existing definition of disinformation and its relation to human rights standards are then identified. The most significant one is the lack of an appropriate definition of the notion of disinformation.

In the second chapter, the current legal and policy mechanisms in the European Union and its Member States on disinformation are looked at from a practical perspective. The second chapter aims to reflect the impact of these mechanisms on limiting the spread of disinformation on social media platforms and areas where improvement can be made.

In the third chapter, the legal and policy mechanisms addressed in the second chapter are analysed through the lens of their compliance with the freedom of expression standards to address the main necessary elements from the human rights perspective that need to be better looked at.

The final pages of this theses are devoted to providing conclusions and answering the research question and suggesting what areas of this topic of disinformation and freedom of expression should be explored in the near future.

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LIST OF ABBREVIATIONS

Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
Code	Code of Practice on Disinformation
CoE	Council of Europe
COM/2018/236	Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the regions, Tackling online disinformation: a European approach, 26 April 2018, COM (2018) 236 final
Communication law	Electronic Communication law
Directive	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 (Electronic Commerce Directive)
DSA	Digital Services Act
EC	European Commission
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EP	European Parliament
Media law	Electronic Mass Media law
EU	European Union
HLEG	High Level Expert Group
ITU	International Telecommunication Union
MS	Member States
NEPLP	National Electronic Mass Media Council
KPI	Key Performance Indicators
ERGA	European Regulators Group for Audiovisual Media Services
NetzDG	Network Enforcement Act
StGB	Strafgesetzbuch (German Criminal Code)
UN	The United Nations
UNESCO	United Nations Educational, Scientific, Cultural Organization
VLOP	Very large online platforms
WHO	World Health Organization

INTRODUCTION

Social media platforms, such as Meta (formerly known as Facebook), Twitter, and Instagram, are great tools to connect with other people, share ideas, and follow politicians and celebrities. Many people aged 13 – to 65+¹ use these channels quite frequently. To illustrate, Meta's daily active users in March 2022 were 1.96 billion on average, and in the first quarter of 2022, Meta experienced an increase in daily active users of four percent year-over-year.² It can be associated with technological developments and the fact that these media platforms are nowadays accessible to anyone twenty-four hours a day.

According to a recent report from the Reuters Institute, social media for news around the world is popular, particularly among younger people and those with lower levels of education.³ However, some individuals or groups of individuals exploit social media's popularity by using these tools to spread false and inaccurate information, namely disinformation.

Although disinformation and related phenomena, propaganda, and fake news are nothing novel, with the rapid growth and influence of social media platforms, the amount of disinformation displayed on them is an issue that generates a significant amount of discussion and concern in the European Union (hereinafter – **EU**). Recent examples, such as aggressive protests in Austria, France, and the Netherlands⁴, which arose due to disbelief in the COVID-19 pandemic, demonstrate the dangerous side effects of the freedom of speech under Article 10 of the European Convention on Human Rights (hereinafter – **ECHR**) in the age of disinformation and social media platforms.

Thus, the EU is presented with a challenging yet fundamental question: “Where does one's freedom of expression end and disinformation begin, and how to fight against the disinformation virus?” While freedom of expression is regarded as one of the most crucial pillars of a democratic society, on the other hand, disinformation poses a significant threat to democracy and democratic processes.

This leads to the research question of this Bachelor thesis what are the current and envisaged tools at the European Union's disposal to regulate disinformation on social media platforms, their effectiveness, and compliance with standards of freedom of expression under Article 10 of the ECHR? To answer the presented research question, the author of this Thesis will use two legal research methods. The first is the doctrinal legal research method, as the research will be conducted on the basis of various EU official documents, scholarly opinions, academic works, and case-law of the European Court of Human Rights (hereinafter – **ECtHR**). The aim of this thesis is to determine how effective are the existing and future mechanisms in addressing the disinformation and their compliance with Article 10 ECHR.

¹ Statista.com., Distribution of Facebook users worldwide as of October 2021, by age and gender, available on: <https://www.statista.com/statistics/376128/facebook-global-user-age-distribution/>, accessed on January 2, 2022.

² Meta. Meta Reports First Quarter 2022 Results. p.1. Available on: https://s21.q4cdn.com/399680738/files/doc_financials/2022/q1/Meta-03.31.2022-Exhibit-99.1_Final.pdf. Accessed May 6, 2022.

³ Reuters Institute for the Study of Journalism. Reuters Institute Digital News Report 2021 10th edition. p. 9. Available on: https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2021-06/Digital_News_Report_2021_FINAL.pdf. Accessed May 7, 2022.

⁴ BBC News, Huge protests across Europe over new restrictions, available on: <https://www.bbc.com/news/world-europe-59363256>; BBC News, Covid protests: Hundreds fined and dozens arrested as convoy enters Paris, available on: <https://www.bbc.com/news/world-europe-60359061>, accessed February 16, 2022.

While the general scope of this work is legislative and policy mechanisms adopted by the EU bodies, the author will also analyse legal mechanisms on disinformation employed in MS - Germany and Latvia. The first Chapter will address: i) the notion of disinformation by exploring the various and existing definitions of disinformation in the EU and United Nations (hereinafter – **UN**) documents; ii) the role of social media platforms in the dissemination of disinformation; iii) adverse effects of the disinformation on MS democratic societies iv) the material scope of Article 10 ECHR and limitations on the freedom of expression by taking a look at ECtHR cases; and v) the line between disinformation and freedom of expression by analysing the three-tier test, established by the ECtHR, a) prescribed by law; b) legitimacy of the aim pursued and c) necessity of the interference in a democratic society.

The second Chapter introduces i) the current legislative and policy responses adopted by the EU, namely, the Code of Practice on Disinformation (hereinafter – **Code**) and Digital Services Act (hereinafter – **DSA**); ii) legislative mechanisms adopted by Germany and Latvia. Furthermore, this Chapter discusses the effectiveness of the adopted measures.

Chapter three will discuss separately i) the Code and DSA's compliance with international human rights standards and compare Germany's and Latvia's adopted measures to determine and compare their compliance with international human rights standards.

1. DISINFORMATION V. FREEDOM OF EXPRESSION

While the ECHR has been around and discussed since the first half of the 20th century, disinformation as currently understood appears not to have been a vital research topic before 2017. Such factors drive the particular interest in disinformation in the 21st century as the popularity of participatory media and rising distrust in scientific, medical, and governmental authorities.⁵ Therefore, regarding the freedom of expression, the topic of disinformation is not as researched.

Consequently, this chapter will address the existing definitions of disinformation on the international and EU level, the role of social media platforms, and the effects of disinformation on MS democratic societies. Moreover, this chapter aims to determine what type of information falls within the scope of Article 10 ECHR and thus is protected and how the respective right can be limited.

1.1. Defining disinformation

There is not yet a precise, uniform, and approved legal definition of this term in any legal document. This creates unprecedented challenges for lawmakers, national governments, social media platforms, and the average person. It also highlights the complex, political, and contested nature of the notion of disinformation.⁶ Even though there are several definitions of disinformation, there are arguments that these explanations are too general, broad, different in their nature and ill-defined, and most certainly not in line with international legal standards.⁷

On an international level, two slightly different definitions of disinformation exist parallel.

The UN Special Rapporteur has defined disinformation as “false information disseminated intentionally to cause serious social harm.”⁸ By contrast, The Broadband Commission for Sustainable Development, co-founded by the UNESCO and ITU, has taken a different view concerning the intent of the subject matter of the spread of disinformation and has defined disinformation as “as false or misleading content with potential consequences, irrespective of the underlying intention or behaviours producing and circulating messages.”⁹

On an international level, there is an unequal opinion on whether the scope of disinformation includes information expressed with or without the intent to cause harm. It can be misjudged and understood not as disinformation but as misinformation without clear guidance. The notion of misinformation is characterized as false information shared without the intent to cause harm¹⁰.

⁵ Deen Freelon, Chris Wells, “Beyond Fake News: The Politics of Disinformation,” *Political Communication* (2020, Issue 2, Volume 37), p. 148, available on: Taylor and Francis Online database, doi.org/10.1080/10584609.2020.1723755. Accessed January 10, 2022.

⁶ United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Irene Khan. *Disinformation and freedom of opinion and expression*. (2021) p. 3, para. 9. Available on: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/085/64/PDF/G2108564.pdf?OpenElement>. Accessed January 11, 2022.

⁷ *Ibid.*, p. 3, para. 11.

⁸ *Ibid.*, p. 4, para. 15.

⁹ *Ibid.*, p. 3, para. 11.

¹⁰ *Ibid.*, p. 3, para. 12.

On the European level, there does seem to be a confluence towards three influential definitions that play a role in harmonizing and standardizing the academic and policy debate on disinformation.¹¹

In a report for the Council of Europe (hereinafter - **CoE**), Wardle and Derakhshan analysed disinformation in the broader context of information disorder by using the dimensions of harm and falseness.¹² The authors indicate that disinformation is “information that is false and deliberately created to harm a person, social group, organization or country.”¹³

The High-Level Expert Group (hereinafter – **HLEG**) on fake news and online disinformation has further expanded the scope of disinformation by adding economic gain to the definition. In the HLEG definition, economic profit is regarded as an alternative motive or aim of spreading disinformation.¹⁴ Therefore, stating that disinformation is “all forms of false, inaccurate, or misleading information designed, presented, and promoted to cause public harm or for profit intentionally.”¹⁵ This significantly widens the scope of disinformation to any type of false information in a commercial context.¹⁶

Finally, the European Commission (hereinafter – **EC**), in its 2018 “Communication on tackling online disinformation,” has considered a different notion with regards to the factual nature of information by addressing that the term disinformation is understood as “verifiably false or misleading information, which cumulatively, a) “is created, presented and disseminated for economic gain or to deceive the public intentionally”; and b) “may cause public harm, intended as threats to democratic political and policymaking processes as well as public goods such as the protection of the EU citizens’ health, the environment or security.”¹⁷

Where Wardle and Derakhshan mention that disinformation is “information that is false,” the EC specifies this by referring to “verifiably false information” and expands the definition by including “misleading information.” Similarly, the HLEG expands the scope of the definition by including “inaccurate information.” It is also important to note that the definition delivered by the EC is the current policy definition implemented in the Code¹⁸

Further, EC has stated that the concept of disinformation does not include misleading advertising, reporting errors, satire, parody, or identified partisan news and commentary and is without prejudice to binding legal obligations, self-regulatory advertising codes, and standards regarding misleading advertising.¹⁹

¹¹ Ronan Ó Fathaigh, Natali Helberger and Naomi Appelman, “The perils of legally defining disinformation.” *Internet Policy Review*. (2021), Volume 10, Issue 4: p.4., available on: SSRN database, DOI: [10.14763/2021.4.1584](https://doi.org/10.14763/2021.4.1584). Accessed February 16, 2021

¹² *Ibid.*, p. 4.

¹³ Claire Wardle and Hossein Derakhshan. *Information Disorder: Toward an interdisciplinary framework for research and policy making*. (2017), p. 20, Available on: <http://tverezo.info/wp-content/uploads/2017/11/PREMS-162317-GBR-2018-Report-desinformation-A4-BAT.pdf>, Accessed January 11, 2022

¹⁴ Fathaigh, Helberger and Appelman, *supra note* 11, p. 6.

¹⁵ High Level Expert Group on fake news and online disinformation, *A multi-dimensional approach to disinformation*. (2018), p.3., Available on: <https://www.ecsite.eu/sites/default/files/amulti-dimensionalapproachtodisinformation-reportoftheindependenthighlevelgrouponfakenewsandonlinedisinformation.pdf>, Accessed February 16, 2022.

¹⁶ Fathaigh, Helberger and Appelman, *supra note* 11, p. 6.

¹⁷ European Commission: Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the regions, *Tackling online disinformation: a European approach*, 26 April 2018, COM (2018) 236 final, para. 2.1. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0236>. Accessed February 16, 2022.

¹⁸ Fathaigh, Helberger and Appelman, *supra note* 11, p. 4.

¹⁹ COM (2018) 236 final, *supra note* 17, para. 2.1.

As to disinformation definitions on the EU level, they are inadequate and misleading because they demonstrate that disinformation consists of false information only, but disinformation can include correct information.²⁰ For example, data can be supplemented by data. While data can be accurate and objective, the data itself may be structured falsely, creating information disorder. Twitter's post may contain data from a scientific report, but how this post is structured might lead to questioning the whole credibility of the post. Thus, it can be said that disinformation also contains accurate information, such as manipulated content.²¹ Due to this, it is difficult to differentiate between accurate and false information online.

There is also a presumption that EU institutions use the term disinformation as a catchall label for many activities vaguely related to misleading information. The term disinformation should not merge with related activities such as misinformation, foreign interference, or influence operations.²² The definitions of disinformation should be limited to the extent necessary for a general description of disinformation. Further, it is evident that all three definitions of the EU level are broad, insufficiently specified, and therefore not fit to function as a legal category.²³

Hence, for the purposes of this thesis, the author will accept the definition proposed by the EC; namely, disinformation is “verifiably false or misleading information, which is created, presented, disseminated for economic gain or to intentionally deceive the public” and “may cause public harm, intended as threats to democratic political and policymaking processes as well as public goods such as the protection of EU citizens' health, the environment or security.”²⁴

1.2. The role of online media platforms

The rationale why disinformation has become a topic of interest and concern only in recent years is due to the growing power of social media platforms. Meta, Twitter, or Instagram allow any individual to publish anything without the need to check the relevant facts in the post or editorial judgment.²⁵ Moreover, the research from Allcott and Gentzkow showed that the largest share (41.8%) of traffic to disinformation sites comes from social networks.²⁶

Nowadays, social media platforms are manipulated to spread false information through a series of sequential steps: a) creation, b) amplification through social and other online media and c) dissemination by its users.²⁷

Disinformation is a powerful, rather inexpensive, and economically profitable tool of influence for social media companies. At the core of today's social media platforms is the aim to create an environment in which users engage, not only with the platform itself but also with different users. The phenomena of surveillance capitalism, a new form of information

²⁰ Tomoko Nagasko, “Global disinformation campaigns and legal challenges”, *Int. Cybersecurity. Law Review* (2020), p. 127, available on: Springer Link database, doi.org/10.1365/s43439-020-00010-7. Accessed February 17, 2022.

²¹ *Ibid.*, p. 28.

²² James Pamment. *The EU's Role in Fighting Disinformation: Crafting A Disinformation Framework*, (Carnegie Endowment for International Peace, Washington, 2020), p. 3. Available on: https://carnegieendowment.org/files/Pamment_-_Crafting_Disinformation_1.pdf, Accessed January 11, 2022.

²³ Fathaigh, Helberger and Appelmann, *supra* note 11, p. 7.

²⁴ COM (2018) 236 final, *supra* note 17, para. 2.1.

²⁵ Hunt Allcott and Matthew Gentzkow, “Social media and fake news in the 2016 election”, *Journal of Economic Perspectives*, Volume 31, Number 2 (2017), p. 212. Available on: <https://web.stanford.edu/~gentzkow/research/fakenews.pdf>. Accessed January 12, 2022.

²⁶ *Ibid.*, p. 222.

²⁷ COM (2018) 236 final, *supra* note 17. para. 2.2.

capitalism that aims to forecast and alter human behaviour as a means to make a profit and market control,²⁸ has led social media platforms to capture a large users pool by exploiting network effects and maximizing the time individuals spend on their gadgets by prioritizing quantity of information over its quality, regardless of its negative impact.²⁹ Arguably the most significant Meta whistle-blower case by former Meta product manager Frances Haugen also highlights this concern. When presented with the dilemma of choosing between what is suitable for the public and what is good for the Meta, the company will decide to optimize for their own interests, such as increasing their profits.³⁰

Amplification of disinformation through social media has become more trouble-free these days as a variety of different mechanisms provide a fertile environment for the spread of disinformation. Some of these mechanics are i) algorithm based; ii) advertising-driven, such as the phenomenon of click-based commercials; and iii) technology enabled, such as automated services (bots) that artificially amplify the spread of falsehood.³¹

One of the most harmful mechanisms is the social media algorithms, as they fuel the dissemination of disinformation. The main aim of social media platforms nowadays is to keep their users longer engaged with the platform in order to be sold as commodities to advertisers.³² Social media algorithms feed users with a personalized experience because such content is most likely to gain attention and be shared among users. Marketers have been able to design sophisticated psychological and technological methods of understanding the platform's users' preferences in detail, categorizing them into defined groups and targeting these groups with precisely designed communication practices, and creating tailored manipulative campaigns.³³

Unless so marked, these algorithms do not differentiate authentic content from false content. In the case of Meta, algorithm-driven feed curation prioritizes content on the basis of popularity, not the truth itself.³⁴ Therefore, social media algorithms are extremely dangerous as they do not distinguish content and indirectly heighten polarisation amongst different groups of society and strengthen the effects of disinformation.³⁵

However, social media platform users' also play a vital role in spreading disinformation online. Even though Meta work with third-party fact-checking organizations to identify, review and take action on false content³⁶, it does not stop the inaccurate information from travelling rapidly with ever-increasing volume.³⁷ Recent studies demonstrate that spread of disinformation through messaging apps, such as WhatsApp and Messenger, has grown

²⁸ Shoshana Zuboff, "Big other: surveillance capitalism and the prospects of an information civilization" in *Journal of Information Technology* (2015) 30, p. 76. Available on: <https://journals-sagepub-com.databazes.lanet.lv/doi/pdf/10.1057/jit.2015.5>. Accessed March 7, 2022.

²⁹ COM (2018) 236 final, *supra* note 17. para. 2.2.

³⁰ 60 minutes. Facebook Whistleblower Frances Haugen: The 60 Minutes Interview, available on: <https://www.youtube.com/watch?v=Lx5VmAdZSI>. Accessed March 7, 2022.

³¹ COM (2018) 236 final, *supra* note 17. para. 2.2.

³² Nicholas Nicoli and Petros Iosifidis, *Digital Democracy, Social Media and Disinformation*, (1st Edition, Routledge, London 2020) p. 7. Available on: <http://lib.lemhannas.go.id/public/media/catalog/0010-02220000000002/swf/7060/Digital%20Democracy.%20Social%20Media%20and%20Disinformation.pdf>. Accessed March 7, 2022.

³³ European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs Study, *Disinformation and Propaganda: impact on the functioning of the rule of law and democratic processes in the EU and Member States*, 28 February 2019, p. 59, para. 2.1.2. Available on: [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/608864/IPOL_STU\(2019\)608864_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/608864/IPOL_STU(2019)608864_EN.pdf). Accessed March 7, 2022.

³⁴ *Ibid.*, p. 38, Table 6.

³⁵ Nicoli and Iosifidis, *supra* note p. 7.

³⁶ Meta Business Help Center. About fact-checking on Facebook. Available on: <https://www.facebook.com/business/help/2593586717571940>. Accessed March 7, 2022.

³⁷ European Commission, *supra* note 17, para. 2.2.

exponentially as the number of users of these messaging platforms has quadrupled globally since 2014.³⁸ Due to the fact that these platforms are considered to be private spaces, trending content often evades detection and fact-checking. Consequently, some users might find this to their advantage to transmit inaccurate or shocking information undetected.

1.3. Negative impacts of disinformation on Member State democratic societies

In the existing digital environment, the consumption of online media content has created a society where contradiction, conflict, and falsehoods exist.³⁹ Domestically produced disinformation has primarily come from far-right politicians and extremist groups.⁴⁰ These actors now focus much less on constructing a false story, to the contrary, they tend to amplify existing ideas and present emotional and personal sources of truth as superior to knowledge gained from science, academic inquiry, or discussions. Emphasizing emotions and personal experience creates solidarity and empathy within the target group, but this feeling of inclusiveness is dependent on the clear exclusion of a demonized other⁴¹— usually the government. This kind of approach has found fertile ground in the existing political climate.

Our times are associated with a growing dissatisfaction with and lack of trust in government institutions⁴². Disinformation, in this case, is like fuel to the fire. This, without a doubt, affects the democratic processes and, to some extent, endangers the fundamental rights in MS.

Not only disinformation further enhances distrust in government institutions, but also further discredits science, academics, national news sites, and journalists to whom the government usually makes a reference. Moreover, misinformation can lead to manipulation of elections by using microtargeted ads to polarize society further and reduce democratic public discourse.⁴³ This would be contrary to Article Three of Protocol No. 1 ECHR – right to free elections.

Disinformation also has direct effects on other human rights. Before the Covid-19, the direct impact on fundamental human rights was not so evident, yet since 2020 the effect of disinformation on fundamental human rights has become more significant. The World Health Organization (hereinafter - **WHO**) has announced that the Covid-19 pandemic was accompanied by an infodemic of misinformation and disinformation that, in itself, posed a severe risk to public health action.⁴⁴ The spread of false information about the virus, which

³⁸ Vernise Tantuco. On Facebook's messaging apps, false information spreads undetected, unchecked. Available on: <https://www.disinfo.eu/publications/on-facebooks-private-messaging-apps-harmful-misinformation-spreads-largely-undetected-and-unchecked/>. Accessed March 7, 2022.

³⁹ Nicoli and Iosifidis, *supra* note p. 7

⁴⁰ European Parliament Coordinator: Policy Department for External Relations Directorate General for External Policies of the Union, Disinformation and Propaganda: impact on the functioning of the rule of law and democratic processes in the EU and Member States, 27 April 2021, p. 113. Available on: [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653633/EXPO_STU\(2021\)653633_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/653633/EXPO_STU(2021)653633_EN.pdf) Accessed March 7, 2022.

⁴¹ Leonie Haiden, "Tell me lies, tell me sweet little lies", Fake News a Roadmap, ed. Jente Althuis and Leonie Haiden (Riga, King's Centre for Strategic Communications and NATO Strategic Communications Centre of Excellence, 2018), p. 12.

⁴² *Ibid.*, p. 12.

⁴³ European Parliament Coordinator, *supra* note 40, p. 115.

⁴⁴ Peter Noorlander. The impact of COVID-19 and ensuing measures on freedom of expression in Council of Europe member states. (Cyprus, 2020) p. 7. Available on: <https://rm.coe.int/covid-and-free-speech-en/1680a03f3a>. Accessed March 7, 2022.

denied facts about its seriousness, ease of spread, and treatment, impacted individuals who trusted this disinformation as they caught the virus or even died from it. Due to this infodemic, individuals right to life stipulated in Article. 2 ECHR was endangered and continues to be in danger.⁴⁵

Nevertheless, there were also false accusations and conspiracy theories about certain ethnic groups, namely, Asians deliberately creating this virus. This resulted in discrimination and hostility against this ethnic group⁴⁶ and thus is contrary to Article. 9 ECHR under which respect must be made to individuals' freedom of thought, conscience, and religion. In line with this, disinformation has also led to discrimination against migrants, refugees, and elderly and black people by creating a false portrayal of these minority groups.⁴⁷

For example, when in 2019 the fire broke out in Notre Dame de Paris cathedral in Paris, which destroyed most of the cathedral, the far-right activists in France, Spain, Germany, and Italy pretty quickly instrumentalized the incident to spread false accusations about muslim's causing the fire, thus resulting in anti-muslim hate.⁴⁸

Moreover, the impact of disinformation differs from one society to another, depending on democratic culture, trust in institutions, education level, and social and economic inequalities⁴⁹. In essence, MS, where there are already gaps in the society, is at a greater risk of suffering from graver consequences of disinformation.

Democratic processes, the rule of law, and human rights serve the purpose of keeping liberal democracy alive. These values ensure that all actors within a State, including authorities in power, respect the law and arbitrariness is prevented.⁵⁰ Not only does disinformation endangers the democratic processes and the rule of law by polarizing the society and affecting voters' behaviour, but it also leaves a negative impact on fundamental human rights such as the right to free elections, the right to life, and the right to freedom of thought, conscience, and religion.

1.4. Article 10 ECHR: Freedom of expression

Disinformation is created through the exercise of the right to freedom of expression. One cannot think about democracy without thinking first about the right to freedom of expression. ECtHR in *Handyside v. the United Kingdom* has expressed that the right of freedom of expression constitutes one of the essential foundations of a democratic society, which is one of the basic conditions for its progress and for the development of every man⁵¹ as the freedom of expression enables individuals to engage in public discussion by participating in the governance of their community.⁵²

⁴⁵ European Parliament Coordinator, *supra* note 40, p. 113.

⁴⁶ *Ibid.*, p. 113.

⁴⁷ *Ibid.*, p. 113

⁴⁸ Chloe Colliver. Click Here for Outrage: Disinformation in the European Parliamentary Elections 2019, Institute for Strategic Dialogue, London, June 26, 2020. p. 12. Available on: https://www.isdglobal.org/wp-content/uploads/2020/06/isd_Click-for-Outrage.pdf. Accessed March 20, 2022.

⁴⁹ COM (2018) 236 final, *supra* note 17. para. 2.2.

⁵⁰ European Parliament Coordinator, *supra* note 40, p. 112.

⁵¹ *Handyside v. the United Kingdom*, no. 5493/72, para. 49 (7 December 1976). Available on: <https://hudoc.echr.coe.int/eng?i=001-57499>. Accessed March 7, 2022

⁵² European Parliament: Policy Department for Citizen's Rights and Constitutional Affairs Directorate-General for Internal Policies, Study. The fight against disinformation and the right to freedom of expression, July 2021. p. 18, para. 2.1.1. Available on:

Article 10 ECHR is one of the most important legal sources in the EU, which grants the right of freedom of expression. ECHR is a living instrument; thus, it must be interpreted in the light of present-day conditions.⁵³ In essence, this means that the ECHR evolves and develops along with the society, and it must be interpreted accordingly. Due to this, the ECtHR has recognized the important role of the internet nowadays by stating that the internet enhances the public's access to news and it facilitates the dissemination of information in general and regards it as an unprecedented platform where the right to freedom of expression can be exercised.⁵⁴

The right to freedom of expression is also enshrined in the Charter of Fundamental Rights of the European Union (hereinafter – **Charter**) Article 11. The legal text of Article 11 of the Charter parallels Article 10 ECHR with regards to their exception clauses and substantive scope of application.⁵⁵

The wording of Article 10 ECHR is as follows: “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.”⁵⁶

In the context of disinformation, Article 10 ECHR has a broad scope of application. It does not only apply to certain types of information or ideas or forms of expression,⁵⁷ mainly those of political nature. It also includes information that has commercial nature.⁵⁸ Statements made by individuals in correspondence⁵⁹ or during a private meeting⁶⁰ may also fall within Article 10 ECHR. Further, Article 10 ECHR is applicable irrespective of the setting⁶¹; thus, it has no boundaries where this right can be exercised, whether it is on the internet, on the street, or in prison.

The ECtHR has also, on a few occasions, noted that the great importance of the right to freedom of expression also protects information and ideas, which might shock or disturb, are negatively received by the society, are offensive to an individual or groups of individuals, and on which opinions may differ.⁶² Protection is needed because, without these types of information or ideas contrary to the majority's, a democratic society will not be possible. In a democratic society, the opinions of the minority must also be protected and valued equally.

In line with this broad conception of the Article 10 ECHR, the Court in *Salov v. Ukraine* further expanded the scope of Article 10 ECHR to such information that might be inaccurate. The Court ruled that this article does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might be untruthful. Otherwise, individuals would be deprived of their right to express their opinions and views about statements made in the mass media, which would set an unreasonable restriction on the freedom

[https://www.europarl.europa.eu/RegData/etudes/STUD/2021/695445/IPOL_STU\(2021\)695445_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/695445/IPOL_STU(2021)695445_EN.pdf)

Accessed March 7, 2022

⁵³ *Ibid*, p. 20, para. 2.1.3.

⁵⁴ *Ibid*.

⁵⁵ *Ibid*.

⁵⁶ European Convention on Human Rights (Entered into force on 3 September 1953). Article 10. Available on: https://www.echr.coe.int/documents/convention_eng.pdf. Accessed March 7, 2022.

⁵⁷ *Markt Intern Verlag GmbH and Klaus Beermann v. Germany*, no. 10572/83 (20 November 1989) para. 26. Available on: <https://hudoc.echr.coe.int/eng?i=001-57648>. Accessed March 8, 2022.

⁵⁸ *Ibid*.

⁵⁹ *Roman Zakharov v. Russia*, no. 47143/06 (4 December 2015) para. 23. Available on: <https://hudoc.echr.coe.int/eng?i=001-159324>. Accessed March 8, 2022.

⁶⁰ *Raichinov v. Bulgaria*, no. 47579/99 (20 April 2006) para. 45. Available on: <https://hudoc.echr.coe.int/eng?i=001-75104>. Accessed March 7, 2022.

⁶¹ *Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland*, no. 34124/06 (21 June 2012) para. 22. Available on: <https://hudoc.echr.coe.int/eng?i=001-111536>. Accessed March 8, 2022.

⁶² Handyside, *supra* note 5.

of expression.⁶³ Thus, international human rights law grants individuals the right to express ill-founded statements and opinions or indulge in parody or satire⁶⁴.

Because diversity of opinions and views is welcomed in a democratic society, even those that might disturb or are inaccurate, the Court, through its case law, has also stressed that MS have a positive obligation to protect the exercise of the right to freedom of expression.⁶⁵ These positive obligations, among other things, require MS to preserve this right by ensuring a reasonable opportunity to exercise this right. Moreover, the MS must create a favourable environment for participation in the public debate of all sides, enabling all sides to express their opinions and ideas without fear.⁶⁶

1.5. The line between disinformation and freedom of expression in a Democratic Society

Even though the right to freedom of expression is of particular importance in a democratic society, the exercise of this freedom carries specific duties and responsibilities, and it might be subject to certain formalities, conditions, restrictions, or penalties as stated by Article 10 (2) ECHR.⁶⁷

Thus, the right to freedom of expression is not absolute, and the MS can impose restrictions on this right if it meets the criteria established in Article 10 (2) ECHR. Interference with the right to freedom of expression is justified if a) it is prescribed by law, b) pursues one of the legitimate aims, and c) is necessary for a democratic society.⁶⁸ The same logic applies to MS's positive obligations to ensure the protection of the right to freedom of speech regard must be had to the kind of expression rights at stake; their capability to contribute to public debates; the nature and scope of restrictions on expression rights; the ability of alternative venues for expression; and the weight of countervailing rights of others or the public.⁶⁹

1.3.1. Lawfulness of the restriction

The first element of the criteria under Article 10 ECHR is that the respective interference must be prescribed by law. The ECtHR has noted that it should be formulated with sufficient precision for the norm to be regarded as law. To enable the individual to regulate their personal conduct, the individual must be able to foresee, to the degree that is reasonable in the given circumstances, the consequences of their activity.⁷⁰ Thus, the normative framework in MS under which disinformation can be limited or deleted must be formulated clearly for the individual to understand the legal consequences which might dawn upon him.

In assessing the foreseeability of the law, the ECtHR also pays attention to the quality of the law, concerning clarity, precision, and accessibility, and that it should have some basis

⁶³ *Salov v. Ukraine*, no. 65518/01 (6 September 2005) para. 113. Available on: <https://hudoc.echr.coe.int/eng?i=001-70096>. Accessed March 8, 2022.

⁶⁴ United Nations, *supra* note 6, p. 38.

⁶⁵ European Court of Human Rights research report. Positive obligations on member States under Article 10 to protect journalists and prevent impunity. December 2011, p. 5. Available on: https://www.echr.coe.int/documents/research_report_article_10_eng.pdf. Accessed on March 8, 2022.

⁶⁶ *Ibid.*, p. 5.

⁶⁷ European Convention on Human Rights, *supra* note 56, Article 10(2).

⁶⁸ European Convention on Human Rights. Guide on Article 10 of the European Convention on Human Rights. - Freedom of expression. 30 April 2021. p. 19, para. 56. Available on: https://www.echr.coe.int/documents/guide_art_10_eng.pdf. Accessed on March 9, 2022.

⁶⁹ *Appleby and Others v. the United Kingdom*, no. 44306/98, (6 May 2003) para. 42-43 and 47 – 49. Available on: <https://hudoc.echr.coe.int/eng?i=001-61080>. Accessed on March 9, 2022.

⁷⁰ Guide on Article 10, *supra* note 68, p. 19, para. 58.

in MS domestic law.⁷¹ However, this might be challenging to some extent as the definitions of what type of information constitutes disinformation are currently very broad in the international arena. Introducing such a broad concept in the MS regulatory framework based on which individuals could be fined or their right to freedom of expression could be limited would not be reasonable.

Moreover, for MS domestic law to meet the criteria prescribed by law, it should afford a measure of legal protection against arbitrary interference by public authorities so that the public authorities do not operate with unfettered power.⁷² The legislative body should indicate the discretion granted to law enforcement authorities and their implementation. Otherwise, law enforcement authorities will not have the necessary tools to apply the law consistently.

1.3.2. Legitimacy of the aim pursued by the interference

Secondly, the interference with the right to freedom of expression in a democratic society can be justified if it pursues a legitimate aim. The legitimate aims on whose basis the right to freedom of expression can be restricted are set in Article 10 (2) ECHR, and they are the following:

“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.”⁷³

According to ECtHR, this is an exhaustive list,⁷⁴ and only the aims covered in Article 10 (2) ECHR can be referred to as justifiable. However, a problematic area with successfully complying with this element of criteria is the EC proposed definition of disinformation, which includes false information that might “cause public harm” and “threats to democratic political and policymaking processes.”⁷⁵

In *Perinçek v. Switzerland*, the Court stressed that Article 10 (2) ECHR must be interpreted restrictively. Exceptions to a general rule cannot be afforded a broad interpretation.⁷⁶ The Court concluded that the scope of Article 10 (2) ECHR does not extend to situations where the maintenance or protection of public order is at stake. The term “prevention of disorder” meant preventing forms of public disturbance.⁷⁷ Therefore, content-based restrictions on disinformation, which aims to protect public order, will not pass the test under Article 10(2) ECHR.⁷⁸ Any normative framework of disinformation would need to be only targeted at

⁷¹ *Ibid.*, p. 20, para. 63

⁷² *Hasan and Chaush v. Bulgaria*, no. 30985/96 (26 October 200) para. 84. Available on: <https://hudoc.echr.coe.int/eng?i=001-58921>; *Vladimir Kharitonov v. Russia*, no. 10795/14 (23 June 2020) para. 37. Available on: <https://hudoc.echr.coe.int/fre?i=001-203177>. Accessed on March 9, 2022.

⁷³ ECHR, *supra* note 67.

⁷⁴ *Bayev and Others v. Russia*, no. 67667/09 (13 November 2017) para. 64.; Guide to Article 10, *supra* note 68, para. 77.

⁷⁵ Institute for Information Law (IViR), University of Amsterdam. *The legal framework on the dissemination of disinformation through Internet services and the regulation on political advertising*. December 2019. p. 42. Available on: https://www.ivir.nl/publicaties/download/Report_Disinformation_Dec2019-1.pdf. Accessed March 10, 2022.

⁷⁶ *Perinçek v. Switzerland*, no. 27510/08 (15 October 2015) para. 151. Available on: <https://hudoc.echr.coe.int/eng?i=001-158235>. Accessed on March 10, 2022.

⁷⁷ *Ibid.*, para. 152

⁷⁸ EP Study - July 2021, *supra* note 52, p. 25.

information based on safeguarding other individuals' rights or a legitimate public authority interest⁷⁹, such as the interests of national security.

1.3.3. Necessity of the interference in a democratic society

The final element of the criteria established in Article 10 (2) ECHR is whether the restriction is necessary for a democratic society. The ECtHR has developed the autonomous concept of whether a restriction is "proportionate to the legitimate aim pursued." This is determined by taking into account all the circumstances of the respective case, by using the criteria established in the ECtHR case law and with the assistance of several principles, such as the existence of "pressing social need," assessment of the nature of the restrictions and severity of the sanctions.⁸⁰

Lastly, for a measure to be regarded proportionate and necessary in a democratic society, the least restrictive measure of several possible measures should be applied to interfere with the right to freedom of expression.⁸¹ Moreover, MS is given a margin of appreciation in evaluating what is "necessary" to protect the competing interests stated as valid reasons for limiting freedom of expression.⁸² Thus, in each MS, different morals prevail over others, and their protection of them differs. If an MS is historically more conservative, it might be more prone to protect conservative values.

Concerning disinformation, the ECtHR does not protect all types of speech the same. The category of the speech involved, whether of political nature or commercial nature, influences the margin of appreciation that is afforded by national authorities and the concomitant intensity review by the Court. The ECtHR has recognized a hierarchy of expression with a political speech at the top.⁸³

In deciding whether the restriction was necessary for a democratic society, attention must be paid to the motive of the individual producing or sharing the false content, whether their motive is political or financial gain.⁸⁴ Consequently, the protection afforded will vary. Another relevant factor in determining the proportionality of restrictive measures against lawful information spread on a massive scale that includes false information is the method of dissemination.⁸⁵ Whether the information is spread on online platforms where individual engagement is high, such as Meta, or on platforms where the engagement is much lower, will determine whether the restriction was proportionate. Notwithstanding that, the ECtHR's motive to restrict the quantity and scale of disinformation would depend on the type of speech in question.⁸⁶

If the individual aim is to mislead for political gain, the speech in question will most likely be considered a political speech since freedom of political expression and free elections work in tandem and form a basis for a democratic society.⁸⁷ However, with regards to the

⁷⁹ IViR, *supra* note 75, p. 42.

⁸⁰ Guide on Article 10, *supra* note 68, p. 22, para. 80

⁸¹ *Glor v. Switzerland*, no. 13444/04 (30 April 2009) para. 94. Available on: <https://hudoc.echr.coe.int/eng?i=001-92525>. Accessed on March 10, 2022.

⁸² *Lindon, Otchakovsky-Laurens and July v. France*, no. 21279/02 and no. 36448/02 (22 October 2007) para. 45. Available on: <https://hudoc.echr.coe.int/eng?i=001-82846>; *Hertel v. Switzerland*, no. 59/1997/843/1049 (25 August 1998) para. 46. Available on: <https://hudoc.echr.coe.int/eng?i=001-59366>. Accessed on March 10, 2022

⁸³ *Lingens v. Austria*, no. 9815/82 (8 July 1986) para. 407. Available on: <https://hudoc.echr.coe.int/eng?i=001-57523>. Accessed on March 10, 2022.

⁸⁴ EP Study – July 2021, *supra* note 52, p. 26.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ *Bowman v. United Kingdom*, no. 141/1996/760/961 (19 February 1998) para. 42. Available on: <https://hudoc.echr.coe.int/eng?i=001-58134>. Accessed March 10, 2022.

content at the core of the false information spread, a distinction needs to be drawn between simply incorrect information and information that either supports or opposes a political party or tendency generally and is not spread with the intent to promote or harm the electoral chances of any particular candidate.⁸⁸ Therefore, information that is disseminated without the intent to deceive voters would be protected by Article 10 ECHR. As to political advertising, the same logic applies; however other media types available for transmitting political messages would also need to be considered.

With regards to the information of commercial nature, the ECtHR has particularly held that Article 10 ECHR applies independently whether the aim pursued is profit-making or not⁸⁹. Thus, regulating disinformation on the basis that it is being distributed for economic gain might be challenging and, without one of the legitimate aims in Article 10 (2), would not comply with international freedom of expression standards.⁹⁰

It can be argued that the scope of Article 10 ECHR is rather broad than narrow, and disinformation as such cannot be limited solely on the basis of its grave negative effects. The limitation on the freedom of expression must meet the criteria established in the ECtHR case law.

Firstly, the restriction must be prescribed by law with sufficient precision in order for the individual to foresee the consequences of their failure to obey the law. Secondly, the restriction must be based on one of the legitimate aims of the Article 10 ECHR, as it is an exhaustive list, no other aims prescribed by the national authorities would pass the test. Lastly, the restriction must be necessary for a democratic society; thus, the benefit that the society will gain from the restriction must be greater than the benefit that the actor of the disinformation will receive. Moreover, for restriction to be regarded as necessary, it also needs to be proportionate to the legitimate aim pursued; thus, it needs to be ensured that no other least restrictive measure would successfully protect the legitimate aim.

At the moment, not only the EC has issued legal and policy mechanisms to address the issue of disinformation, but also several MS. In the next chapter, the author will address a few of these mechanisms and will analyse their effectiveness in combating disinformation.

⁸⁸ *Ibid.*, para. 22.

⁸⁹ *Casado Coca v. Spain*, no. 15450/89 (24 February 1994) para. 35. Available on: <https://hudoc.echr.coe.int/fre?i=001-62423>. Accessed April 2, 2022.

⁹⁰ IViR, *supra* note 75, p. 43.

2. EXISTING AND FUTURE FRAMEWORK IN THE EU AND MS ON DISINFORMATION IN THE CONTEXT OF SOCIAL MEDIA PLATFORMS

It is evident that the tools and tactics used to spread false information are changing rapidly - the response from the EU needs to evolve just as rapidly.⁹¹ Therefore, at first, it is very crucial to ensure an updated and evidence-based understanding of the scale, scope, and precise nature of the problems with regards to disinformation to design necessary responses which take into account that.⁹²

Thus, this chapter will analyse the existing and future framework on disinformation in the EU and MS - Germany and France. The author will also analyse their effectiveness in combating disinformation. Since the focus of this research is on social media platforms, the author will discuss the Code, legislative provisions of Germany and Latvia, and the DSA as all these frameworks concern the functioning of the social media platforms.

2.1. Code of Practice on Disinformation

The EC 2018 delivered a Communication on “tackling online disinformation: a European approach” (hereinafter - **COM/2018/236**) where it called upon the social media platforms to increase their individual efforts to tackle disinformation and suggested that self-regulation could assist in achieving this if effectively implemented and monitored.⁹³

Subsequently, in the aftermath of the COM/2018/236 as well as the Report of HLEG on fake news and online disinformation, the Council Conclusions of June 28, 2018, and in the light of different initiatives taking place across the EU, social media companies and the advertising industry agreed on a Code unveiled by the EC to address the flaws created in the EU by the disinformation.⁹⁴

The Code has been in operation since October 2018⁹⁵, and some of the largest media and advertising companies, including Meta, Google, Twitter, Microsoft, and TikTok, have signed it.⁹⁶ Even though the Code is not imposing any legal obligations to the signatories as it is a mere agreement, the signing of the Code represents a commitment by the parties to introduce a range of voluntary measures to counter disinformation within the EU.⁹⁷

The aim of the Code is to establish a multi-stakeholder approach⁹⁸ to contribute to the dissemination of disinformation while safeguarding the right to freedom of expression and open internet.⁹⁹ In essence, the Code reflects the main priorities of the EU approach in ensuring

⁹¹ European Commission. Joint Communication to the European Parliament, The European Council, the Council, the European Economic and Social Committee and the Committee of the Regions. *Action plan against Disinformation*. Brussels, December 5, 2018. JOIN(2018) 36 final. p. 4. Available on: https://www.eeas.europa.eu/sites/default/files/action_plan_against_disinformation.pdf. Accessed April 10, 2022.

⁹² HLEG on fake news and online disinformation, *supra* note 15, p. 12.

⁹³ COM (2018) 236 final, *supra* note 17, p. 7.

⁹⁴ European Commission. (2018b). *EU Code of Practice on Disinformation*. Preamble. Available on: <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation>. Accessed on April 14, 2022.

⁹⁵ European Commission. *Code of Practice on Disinformation*. Available on: <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation>. Accessed on April 14, 2022.

⁹⁶ *Ibid.*

⁹⁷ IRIS Merlin. *Online platforms and the advertising industry deliver EU Code of Practice on Disinformation*. Available on: <https://merlin.obs.coe.int/article/8438>. Accessed April 14, 2022.

⁹⁸ HLEG on fake news and online disinformation, *supra* note 15, p. 31.

⁹⁹ EP Study – February 2019, *supra* note 33, p. 106.

transparent, fair, and trustworthy online campaign activities by self-regulation.¹⁰⁰ As a self-regulatory framework, Signatories are not obliged to implement any specific practice but agree to report their activities to the Commission.¹⁰¹ The Signatories recognized the objectives set forward by the COM/2018/236 by incorporating them under five main pillars:

1. Need to scrutinize ad placements,
2. Need to increase the transparency of political and issue-based advertising,
3. Need to ensure the integrity of the services provided by online platforms,
4. Need to empower consumers;
5. We need to empower researchers.¹⁰²

The Code then sets out commitments within the pillar structure that the Signatories have agreed to materialize.¹⁰³ In essence, the Code divided commitments into six sections:

1. Improved scrutiny of advert placements as well as avoiding the promotion of websites or advertisements that spread disinformation
2. Ensuring that political advertising and issue-based advertising are appropriately distinguished from such forms as editorial content and news and improving transparency on the sponsors of the ads
3. Get a grip on fake accounts and improve transparency around the use of automated bots
4. Empowering consumers by easing them to find trustworthy and diverse sources of news
5. Empowering the research community by encouraging independent efforts to detect false information and assist research into disinformation and political advertising
6. Progress made with regards to the commitments will be evaluated through annual reports conducted by the Signatories and reviewed by a third-party organization.¹⁰⁴

Due to the fact that each Signatory operates with different purposes, technologies and audiences, the Code permits different approaches to achieve its provisions.¹⁰⁵ Furthermore, the objectives outlined by the Code should be reflected in roadmaps and action plans produced by each individual Signatory and in the current best practices from Signatories on Annex.¹⁰⁶

Lastly, the Signatories commit to periodic monitoring of the effectiveness of their progress to counter disinformation in the form of a publicly available report reviewable by an objective third party selected by the Signatories.¹⁰⁷ Moreover, the Signatories commit to assessing the effectiveness of the Code after twelve months. During this period, the Signatories ought to meet to discuss the progress, implementation, and functioning of the Code, and at the end of this period, Signatories should meet to evaluate the effectiveness of the Code in connection with each of the commitments set in the Code. In assessing the functioning of the Code, the Signatories have agreed to cooperate with the EC, for example, by inviting the EC to

¹⁰⁰ EP Study – February 2019, *supra* note 33, p. 106.

¹⁰¹ Ethan Shattock, “Self Regulation 2.0? A critical reflection of the European fight against disinformation”, *Harvard Kennedy School (HKS), Misinformation Review*, 2(3), May 31st 2021, p. 2. Available on: DOI: <https://doi.org/10.37016/mr-2020-73>. Accessed April 15, 2022.

¹⁰² European Commission Directorate-General for Communications Networks, Content and Technology Final Report. Study for the “Assessment of the implementation of the Code of Practice on Disinformation. May 2020. p. 26 Available on: <https://imap-migration.org/sites/default/files/Publications/2020-07/Studyfortheassessmentofthecodeofpracticeagainstdisinformation.pdf>. Access April 15, 2022.

¹⁰³ *Ibid.*, p. 29.

¹⁰⁴ EP Study – February 2019, *supra* note 33, pp. 105 -106.

¹⁰⁵ Code, *supra* note 95.

¹⁰⁶ Commission Study – May 2020, *supra* note 103, p. 27.

¹⁰⁷ Code, *supra* note 95.

their regular meetings, making available information upon request, and responding to questions.¹⁰⁸

2.1.1. The problem with self-regulation

Even though the commitments outlined in the Code are certainly ambiguous, there has been criticism. Before the Code was even presented, the Sounding Board established by the EC to assess the Code stated that it is “by no means self-regulation.” The Signatories have not delivered a Code of practice because it does not contain a common approach, clear and meaningful commitments, or measurable objective or key performance indicators (hereinafter - **KPI**); therefore, no possibility to monitor the process; and no compliance and enforcement tool.”¹⁰⁹

Indeed, the first Code's assessment reports in 2020 by the EC and the European Regulators Group for Audiovisual Media Services (hereinafter – **ERGA**), that is, monitoring the implementation of the Code, both indicate the problem with common approach and uniformity. Reports highlight that among the platforms, there is a lack of common understanding of some of the key concepts in the Code, such as there is no common definition of issue-based advertising.¹¹⁰ This leads to uneven application of the commitments across platform services. For example, measures adopted on political advertising have experienced greater development than measures on issue-based advertising due to a lack of common definition and confusion by the platforms.¹¹¹

The commitments are also often too broad and general, which does not lead to concrete nor measurable actions. The more definite the commitment agreed upon, the more easily it can be measured to be effective.¹¹² There is also a significant problem of lack of uniformity in the implementation of the procedures. To illustrate, the procedures with which the Signatories react to platform users flagging are diverse and not transparent in their nature.¹¹³ Even though to some extent, this is understandable as a different type of platform is a part of the Code with different resources available, it is, however, necessary to achieve at least some type of common standard of uniformity between the platforms.

Furthermore, one of the key criticisms of the Code is its self-regulatory nature, thus effective enforcement of the Code.¹¹⁴ According to the ERGA report, not all the measures of the Code's five pillars have been implemented by the Signatories. For example, there was a lack of data with regards to activities carried out on a national level by the platforms.¹¹⁵ Moreover, the EC also highlights that due to its non-binding nature, it has led to the fragmented implementation of its provisions across the platforms and MS.¹¹⁶ Since the Code is a voluntary agreement, it does not impose any legal obligations on social media platforms. As such, platforms are not exposed to material or legal sanctions, such as monetary fines. The most damaging effect could be the expulsion from the Codes or a negative reputation for failing to

¹⁰⁸ *Ibid.*

¹⁰⁹ Joris Van Hoboken and Ronan O Fathaigh, “Regulating Disinformation in Europe: Implications for Speech and Privacy” *6 UC Irvine Journal of International, Transnational, and Comparative Law* 9 (2021) p. 15. Available on: <https://www.ivir.nl/publicaties/download/Regulating-Disinformation-in-Europe.pdf>. Accessed April 20, 2022.

¹¹⁰ Commission Study – May 2020, *supra* note 103, p. 97.

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ ERGA. ERGA report on disinformation: Assessment of the implementation of the Code of Practice. P. 46. Available on: <https://erga-online.eu/wp-content/uploads/2020/05/ERGA-2019-report-published-2020-LQ.pdf>. Accessed April 22, 2022.

¹¹⁴ Commission Study – May 2020, *supra* note 103, p. 96.

¹¹⁵ ERGA Report, *supra* note 114, p. 42.

¹¹⁶ Commission Study – May 2020, *supra* note 103, p. 5.

live up to the commitments.¹¹⁷ This is a crucial element because effective enforcement determines its overall effectiveness. Without it, the Code is simply beautiful on paper but empty-handed in practice.

However, despite the criticism, the overall stance on the achievements of the Code by the EC is positive.¹¹⁸ Indeed, it is significant that for the first time, the industry itself has voluntarily agreed to solve a common threat within their own platforms; nowhere else does such an innovative instrument exist¹¹⁹.

Because disinformation is such a multidimensional problem, the best responses to combat it are likely to be those implemented by the multi-stakeholder collaboration.¹²⁰ The Code of practice is a crucial first step toward this. Not only does it encourage dialogue between the EC and ERGA but also between the platforms themselves, and it can be viewed as a driving force for these platforms to reassess their business practices. Thus, it has set a solid basis on which further activities can be taken.

Indeed, the EC has recognized this. In May 2021, it presented guidance on strengthening the Code that addresses the above-mentioned shortcomings of the Code.¹²¹ While it was hoped that the revised version would be available by the end of March, the events in Ukraine have slowed down this process, and now it is delayed until the end of May.¹²²

2.2. Legislative responses to disinformation by MS

While the voluntary-cooperation and self-regulation have presented some success, it remains insufficient on their own. Certain MS have been adopting national measures to address disinformation on the grounds of an insufficient framework in the EU.¹²³ Based on the results of the ERGA survey responses in 2021, many MS have legislation on the notion of disinformation. In some cases, even criminal law provisions that even include imprisonment, particularly in Hungary.¹²⁴

However, in this thesis, the author will pay closer attention to Germany and Latvia. The author has selected these countries because Germany was the first MS in the EU who introduce a striking legislative response to disinformation¹²⁵ and Latvia because its legal system is similar to Germany's since both of these countries are civil law countries.

¹¹⁷ Shattock, *supra* note 102, p.2.

¹¹⁸ Commission Study – May 2020, *supra* note 103, p. 3.

¹¹⁹ ERGA Report, *supra* note 114, p. 63.

¹²⁰ HLEG on fake news and online disinformation, *supra* note 15, p. 20.

¹²¹ European Commission. Guidance on Strengthening the Code of Practice on Disinformation. Available on: <https://digital-strategy.ec.europa.eu/en/node/9928>. Accessed April 22, 2022.

¹²² EU Disinfo Lab. Disinfo Update 05/04/2022. Available on: <https://www.disinfo.eu/outreach/our-newsletter/disinfo-update-05-04-2022/>. Accessed April 22, 2022.

¹²³ Fathaigh, Helberger and Appelman, *supra* note 11, p. 2.

¹²⁴ Fathaigh, Helberger and Appelman, *supra* note 11, p. 8.

¹²⁵ Institute Montaigne. Disinformation: The German approach and what to learn from it. Available on: <https://www.institutmontaigne.org/en/blog/disinformation-german-approach-and-what-learn-it>. Accessed April 29, 2022.

2.2.1. Germany - Network Enforcement Act

In January 2018, Germany passed a law on illegal information, including disinformation - the Network Enforcement Act (hereinafter - **NetzDG**) due to a lack of effective mechanisms in the EU on unlawful content.¹²⁶

Pursuant to Section 1(1), NetzDG its provisions are only applicable to social network platforms¹²⁷, such as Facebook, Twitter, or Instagram, particularly those where disinformation has found fertile ground.

To ensure a narrow interpretation of the notion of “unlawful content,” Section 1(3) NetzDG lists several offences pursuant to the *Strafgesetzbuch* (German Criminal Code) (hereinafter - **StGB**), which amount to the definition of unlawful content in light of NetzDG. It includes disinformation as well. Section 187 StGB states that “offences that resemble the spreading of fake news are intentional defamation.”¹²⁸ Thus pursuant to NetzDG, disinformation is regarded as unlawful or illegal speech.

Section 3 NetzDG grants the users the power to report illegal speech online in the format of a complaint. The procedure to file a complaint needs to be “recognizable, directly accessible, and permanently available.”¹²⁹ Section 3 (2)(1) then imposes a comprehensive list of obligations to social network providers to regulate the procedure for handling such complaints.¹³⁰

First of all, the social platforms must take “immediate note” after receiving a complaint and check whether the subject matter of the complaint is unlawful and thus subject to removal or whether the access to this content needs to be blocked.¹³¹ If respective content is “manifestly” illegal, it needs to be removed, or the access needs to be blocked within 24 hours of receiving the complaint.¹³² Thus the content may not be classifiable as unlawful, but it might be strongly suggested to be unlawful for it to be removed or restricted.

However, if the content is declared unlawful pursuant to Section 1(3), it needs to be removed, or all the access needs to be blocked immediately within the 7-day time limit.¹³³ The decision regarding the unlawfulness depends on the falsity of a factual allegation or is clearly dependent on other factual circumstances. In such cases, the platforms are not obliged, but they can give the respective user who posted such content the opportunity to respond to the claim before the decision.¹³⁴ Moreover, this 7-day time period may be exceeded if the company decides to refer the decision regarding the unlawfulness of the content to a recognized self-regulation institution within seven days.¹³⁵ Yet, this is a voluntary action to refer to such institutions.

Finally, if companies refuse to adhere to their reporting obligations or the processes for handling complaints about illegal information, NetzDG can levy monetary penalties. The

¹²⁶ Victor Claussen, “Fighting hate speech and fake news. The Network Enforcement Act (NetzDG) in Germany in the context of European Legislation”. October 24, 2018. p. 117. Available on: <https://www.medialaws.eu/wp-content/uploads/2019/05/6.-Claussen.pdf>. Accessed April 29, 2022.

¹²⁷ Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzdurchsetzungsgesetz) 1.10.2017. (Federal Law Gazette I, p. 3352 ff.) (the Network Enforcement Act)(NetzDG) Art. 1. Available on: https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?__blob=publicationFile&v=2. Accessed April 29, 2022.

¹²⁸ Claussen, *supra* note 127, p. 118.

¹²⁹ NetzDG, *supra* note 128, Section 3(1).

¹³⁰ Claussen, *supra* note 127, p. 117.

¹³¹ NetzDG, *supra* note 128, Section 3(2)(1).

¹³² *Ibid.*, Section 3(2)(2).

¹³³ NetzDG, *supra* note 128, Section 3(2)(3).

¹³⁴ *Ibid.*, Section 3(2)(3)(a).

¹³⁵ *Ibid.*, Section 3(2)(3)(b).

regulatory offence may be sanctioned with a monetary fine of up to five hundred thousand euros and, in other cases, up to five million euros. According to Section 4 NetzDG, it is considered an administrative offence.¹³⁶

On June 28, 2021, the Act to Amend the Network Enforcement Act entered into force in Germany, thus the amended version of the NetzDG. While it merely extended the existing provisions, such as improving the accessibility of the reporting channels, the new amendments introduced an appeal procedure; thus, individuals are able to request the platform to review its decision within two weeks of the information on the original decision.¹³⁷ Moreover, platforms are obliged to install an internal complaint-handling system and determine stricter rules on report submission.¹³⁸

2.2.2. Latvia - Electronic Communication Law

On 11 March 2022 Latvian government amended its Electronic Communication Law (hereinafter - **Communication law**)¹³⁹, granting broader powers National Electronic Mass Media Council (hereinafter - **NEPLP**) to oversee the content on media channels that operate in Latvia. A reason for such an amendment is the rapid change of dissemination and acquisition of information online and how such dissemination is used to spread disinformation and content that threatens Latvian national security and public order.¹⁴⁰ Moreover, a recent Latvian study revealed that 85% of Latvians had encountered false information.¹⁴¹ This is a significant number.¹⁴²

These new competencies also apply to social media networks according to Electronic Mass Media Law (hereinafter - **Media law**) Section 2(1); such networks are subject to Latvian jurisdiction.¹⁴³

Pursuant to Media law Section 26 (1)(7)¹⁴⁴ and Section 21¹, 3¹, NEPLP¹⁴⁵ has the competence to decide on a ban on media distribution when a program under EU jurisdiction "seriously and substantially" violates programming limitations – for example, when it contains calls that endanger national security, or it poses a threat to public policy or security.

¹³⁶ *Ibid.*, Section 4.

¹³⁷ Library of Congress. Germany: Network Enforcement Act Amended to better fight online hate speech. Available on: <https://www.loc.gov/item/global-legal-monitor/2021-07-06/germany-network-enforcement-act-amended-to-better-fight-online-hate-speech/>. Accessed May 1, 2022.

¹³⁸ Dominik Steiger, "Protecting Democratic elections against online influence via "Fake News" and Hate Speech - The French Loi Avia and Loi No. 2018–1202, the German Network Enforcement Act and the EU's Digital Services Act in Light of the Right to Freedom of Expression", in *Theory and Practice of the European Convention on Human Rights*, eds. S. Schiedermaier, A. Schwarz and D. Steiger (Germany, 1st Edition, 2022) p. 179. Available on: <https://www.nomos-elibrary.de/10.5771/9783748923503.pdf#page=165>. Accessed May 13, 2022.

¹³⁹ Grozījumi Elektronisko sakaru likumā (Amendments to the Electronic Communications Law) (10 March 2022). Available on: <https://likumi.lv/ta/id/330742>. Accessed May 2, 2022.

¹⁴⁰ Likumprojekta "Grozījumi Elektronisko sakaru likumā" anotācija (Annotation of the Amendments to the Electronic Communications Law) (8 March 2022) para. 1. Available on: <http://titania.saeima.lv/LIVS13/SaeimaLIVS13.nsf/0/E35CC6D4A6D6FA18C225880002686FC?OpenDocument>. Accessed May 2, 2022.

¹⁴¹ Tīrgus un sociālo pētījumu centrs "Latvijas Fakti". (Market and Social Research Centre "Latvian Facts") Pētījums par Latvijas iedzīvotāju medijpratību un mediju satura lietošanas paradumiem. (A study on the mediumability of Latvian residents and the habits of using media content). 2021, p. 14. Available on: https://www.nepplpadome.lv/lv/assets/documents/Petijumi/Petijums_par_Latvijas_iedzivotaju_medijpratibu_un_mediju_satura_lietošanas_paradumiem_2021.pdf. Accessed May 2, 2022.

¹⁴² Annotation, *supra* note 141.

¹⁴³ Elektronisko plašsaziņas līdzekļu likums (Electronic Media Law) (12 July 2010). Section 2(1), Available on: <https://likumi.lv/ta/id/214039-elektronisko-plassazinas-lidyzeklu-likums>. Accessed May 2, 2022.

¹⁴⁴ *Ibid.*, Section 26(1)(7)

¹⁴⁵ *Ibid.*, Section Section 21¹, 3¹

The new amendments to Communication law firstly grant the NEPLP the right, not the obligation per se, to decide by assessing the information provided by national authorities to restrict access to such content that is disseminated in the territory of Latvia, which endangers or could endanger national security or public order and security by denying access to the domain name of these websites or to the Internet Protocol (IP) address.¹⁴⁶

Secondly, because the decision of the NEPLP is an administrative act, an individual whose rights or legal interests are restricted because of such a decision is entitled to challenge and appeal the relevant decision within 30 days time of the entry into force of the Act according to Administrative Procedure Law.¹⁴⁷ However, the appeal procedure itself does not suspend the execution of the administrative act.¹⁴⁸

Lastly, the amendments do not contain any reference to a monetary fine in the case of non-compliance with the NEPLP decision. A reference is only made to the fact that if the merchant has not fulfilled the decision voluntarily, it can be enforced without a written notice regarding the compulsory enforcement.¹⁴⁹

Moreover, the draft law acknowledges that any restriction on access to information should be assessed in terms of limiting the freedom of expression, which is a fundamental value of a democratic and legal state. In order to ensure non-arbitrary interference with the right to freedom of expression, at least two institutions shall be involved in the restriction process of any website- NEPLP together with, for example, National Health Ministry, the National police, or State Security Service.

2.3. Digital Services Act

Ever since the adoption of the NetzDG, the EU has experienced a diverse approach on national levels to regulate disinformation on media platforms.¹⁵⁰ For more than 20 years, the media platforms in the EU have been regulated under the Electronic Commerce Directive (hereinafter - **Directive**)¹⁵¹. A report in 2020 by the European Parliament (hereinafter - **EP**) recognized that the Directive is obsolete in the light of technological advancements-

As a response, the EC proposed reforms of the Directive known as the DSA. While it builds on key principles of the Directive, it aims to further contribute to online safety, harmonize the different national approaches to regulating disinformation while protecting fundamental rights, and set efficient governance and effective supervision of the online intermediaries.¹⁵²

DSA will directly apply to all 27 MS to intermediary services provided to natural or legal persons who have their place of establishment or residence in the EU.¹⁵³ Yet, DSA differences obligation between intermediary services, hosts, online platforms, and very large online platforms (hereinafter - **VLOP**). Pursuant to DSA, VLOP is such platform that reaches more than 10% of 450 million monthly European consumers, thus social media sites. Due to their high individual outreach, VLOP has been presented with a higher standard of transparency

¹⁴⁶ Communication Law, *supra* note 140, Section 13.⁵(1).

¹⁴⁷ *Ibid.*, Section 13.⁵(2).

¹⁴⁸ *Ibid.*, Section 13.⁵(3).

¹⁴⁹ *Ibid.*

¹⁵⁰ Fathaigh, Helberger and Appelman, *supra* note 11, p. 13.

¹⁵¹ Shattock, *supra* note 102, p. 2.

¹⁵² 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, 2020/0361 (COD), p. 2. Available on: <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM:2020:825:FIN>. Accessed May 2, 2022.

¹⁵³ *Ibid.*, Article 1(3).

and accountability on how these moderate platforms' content, advertising, and algorithmic processes are in comparison to others.¹⁵⁴

One of the aims of the DSA is to ensure a safer and more transparent online environment and harmonize the existing legislative framework on disinformation and further strengthen the Code¹⁵⁵. However, interestingly, the notion of disinformation is not defined in the DSA. However, the notion of “illegal content” is defined as “information, which in itself is or by its reference to an activity illegal is not in compliance with EU law or the law of MS, irrespective of the precise subject matter or nature of that law.”¹⁵⁶ In essence, what is illegal offline should be illegal online as well. For example, hate speech or terrorist content.¹⁵⁷ If the content is illegal, it needs to be taken down, yet disinformation is not subject to the same rules.¹⁵⁸ This raises some questions as disinformation can also take the form of illegal content if, for example, the content manipulates content in such a way that it incites hatred or defames another individual. In such cases, the disinformation would be subject to removal, pursuant to Article 14 DSA.

In the DSA, the notion of disinformation is regarded as “systematic risk” and is described as “intentional manipulation of a respective service, including by means of inauthentic use or automated exploitation of the service that has and can have negative consequences on the protection of public health, minors, civic discourse, electoral processes, and public security.”¹⁵⁹ Such risks may occur through the creation of fake accounts use of bots that could lead to the widespread of information that is illegal or contrary to platforms terms and conditions.¹⁶⁰ VLOP pursuant to Article 26, DSA must assess in-depth and report on such content at least once a year and adopt their moderation and recommendation systems to encounter these risks and avoid the widespread dissemination of such content. VLOP must put in place effective mitigation measures that are tailored to the specific systemic risks pursuant to Article 26 DSA. However, the DSA is silent on how exactly VLOP should address such content.

Moreover, DSA establishes an independent advisory group - European Board for Digital Services (hereinafter - **Board**). One of the Board's main objectives is to assist in the supervision of the VLOP and contribute to the consistent application of the DSA.¹⁶¹ Furthermore, the Board with the EC should facilitate the drawing up of codes, which would include commitments to take specific “risk mitigation measures,” and they would be subject to evaluation by the Board and EC. These Codes can serve as a basis for already existing codes of conduct, such as the Code.

As a result, DSA's harsh requirements are mostly used to deal with illegal content, while disinformation is dealt with through self- and co-regulation.

Notably, on 22 April 2022, the text of the DSA was agreed on. Next, the DSA has to be formally passed by the EP and CoE. Once passed, it will come into force on 1 January 2024,

¹⁵⁴ *Ibid.*, p. 2.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*, Article 2.

¹⁵⁷ European Parliament, *Amendments adopted by the European Parliament on 20 January 2022 on the 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)0825 – C9-0418/2020 – 2020/0361(COD))* (20 January 2022). Recital 12. Available on: https://www.europarl.europa.eu/doceo/document/TA-9-2022-0014_EN.html. Accessed May 2, 2022.

¹⁵⁸ Miriam Buiten, “Combating disinformation and ensuring diversity on online platforms: Goals and limits of EU platform (January 14, 2022). p. 18. Available on: <http://dx.doi.org/10.2139/ssrn.4009079>. Accessed May 2, 2022.

¹⁵⁹ Digital Services Act, *supra* note 153, Article. 26(1)(c).

¹⁶⁰ *Supra* note 158, Recital 57.

¹⁶¹ Digital Services Act, *supra* note 153, Article 47.

yet the requirements for the VLOP will come into force earlier - four months after the DSA is passed.¹⁶²

2.3.1. Liability of the online media platforms

Since the DSA has not yet been enforced in the EU, it is difficult now to measure its effectiveness in addressing and limiting the spread of disinformation. While on paper, the substantive provision seems to be making a difference, in practice, it might not be so self-evident as it was experienced with the Code.

In the context of disinformation, the DSA remains focused on self-regulation. For example, VLOP must conduct an independent audit on their achievements of the obligations in the DSA. As discussed, self-regulation has its problems, but they can be strengthened by sanctions for non-compliance with the provisions or uniform definitions, especially on the notion of disinformation.¹⁶³

However, perhaps the greatest question is why the DSA did not alter the provisions of the Directive that refer to the liability of these channels. Under the Directive, social media platforms are exempt from liability when the platform user had uploaded illegal material in cases when the intermediary had no knowledge of the illegal content in question or they removed it after they had become aware of it.¹⁶⁴

Case-law of the European Court of Justice (hereinafter – **CJEU**) suggests that such platforms can be found liable for third-party content if they play an active role.¹⁶⁵ Thus, as long as platforms remain a neutral role, they are exempted from liability.

In a significant and recent judgment on this topic, the CJEU, in joined cases *C-682/18 YouTube*, *C-683/18 Cyando*, proposed a similar opinion. The Court noted that unless the content-sharing platform contributes, beyond merely making the respective platform available, to giving access to such content to the public, they should not be held liable. In their reasoning, the Court argued that the platform did not communicate to the public. Content sharing platforms can, however, be exempted if they pose an active role, the kind of one that gives them knowledge of or control over the content that is uploaded on their platforms.¹⁶⁶ The limited liability also applies to content containing discrimination.¹⁶⁷

However, the continuous growth of the social media platforms, as well as the interaction possibilities inside these platforms, brings the application of the liability privilege rooted in the Directive into serious doubt.

Taking into account the capability of these platforms to monitor the content, it's worth discussing whether such platforms as Twitter or Meta should not be recognized as publishers and thus be subject to stricter liability. It seems that EC, on some level, is aware of this as some

¹⁶² European Commission. Digital Services Act: Commission welcomes political agreement on rules ensuring a safe and accountable online environment. Available on: https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2545. Accessed May 2, 2022.

¹⁶³ Buiten, *supra* note, p. 20.

¹⁶⁴ Digital Services Act, *supra* note 153, Article 14.

¹⁶⁵ Judgment in *L'Oréal SA and Others v eBay International AG and others*, C-324/09, EU:C:2011:474. Available on: <https://curia.europa.eu/juris/document/document.jsf?docid=107261&text=&dir=&doclang=LV&part=1&occ=first&mode=lst&pageIndex=0&cid=6633390>. Accessed May 8, 2022.

¹⁶⁶ Opinion of Advocate General in Joined Cases C-682/18 and C-683/18 *Frank Peterson v. Google LLC, Youtube LLC, Youtube Inc., Google Germany GmbH* (C-682/18) and *Elsvier Inc. v. Cyando AG* (C-683/18), EU:C:2020:586. para. 137. Available on: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:62018CC0682>. Accessed May 2, 2022.

¹⁶⁷ Buiten, *supra* note, p. 12.

legislative proposals may be expected with regards to platform liability in the 2019-2024 legislative period as the EC has recognized the uncertain platform liability position.¹⁶⁸

Overall, it can be concluded that in the EU at the moment, there is no single uniform formula established by the EU on how to approach disinformation and limit its negative consequences. While there exists in parallel the Code and national legislations on disinformation, such as the NetzDG and the amended provisions of Latvian Communication Law and soon, the newly proposed DSA, whose aim is to harmonize different national approaches to regulating disinformation and further strengthen the Code, the effectiveness of these responses is debatable. But what about their compliance with international human rights standards? In the next Chapter, the interaction between these responses adopted and the freedom of expression will be analysed.

¹⁶⁸ Chris Marsden, Trisha Meyer and Ian Brown, “Platform values and democratic elections: How can the law regulate digital disinformation” in *Computer Law & Security Review* Volume 36, April 2020, 105373, p. 5. Available on: Science Direct database, <https://doi.org/10.1016/j.clsr.2019.105373>. Accessed May 2, 2022.

3. FROM THEORY TO PRACTICE: DO EU AND MS RESPONSES ON DISINFORMATION SAFEGUARD THE FREEDOM OF EXPRESSION?

As discussed in the previous Chapter, responses taken by the EU and MS must adapt effectively to a rapidly changing phenomenon - disinformation. However, these responses must also be in line with freedom of expression. The lack of compliance can lead to an even more polarised society, abrupt censorship, and national courts and ECtHR flooded with cases on this matter. Therefore, it is crucially important that, in practice, these new measures respect individuals' right to hold an opinion and share information. Even the CEO of Meta, Mark Zuckerberg, has indicated that in light of the content moderation, Meta must continue to uphold a broad definition of the freedom of expression while removing content that may cause danger.¹⁶⁹

Certainly, on some level, this freedom will be restricted as platforms and institutions will pay more attention to what type of content is being produced.

Therefore the aim of this Chapter is to address the compliance of the Code, NetzDG, Communication Law, and DSA with Article 10 ECHR and, lastly, to discuss some possible solutions on how to address further grey areas in the responses adopted by the EU.

3.1. The flaw within the Code of Practice of Disinformation

The Code acknowledges the importance of the freedom of expression and the fragile line which any efforts to limit the spread of somewhat lawful content must strike.¹⁷⁰ Even though the Code does not advocate censorship. Yet the implementation of the Code has voiced some concerns in relation to the right to freedom of expression. While the Code itself is a soft-law instrument and thus without legal consequences, it has implications perhaps not as direct on the freedom of expression, which entails the freedom to receive and share information.

3.1.1. Social media platforms as the arbiters of truth

One of the objectives of the Code is to “empower consumers.”¹⁷¹ The Code stipulates that this can be achieved by investing in technological tools that favor relevant, legitimate, and authoritative material in search feeds and other automatically rated distribution channels.¹⁷²

While the Code does not impose the obligation to remove the false but lawful content, the incentive to favour relevant, legitimate and authoritative information has adverse effects. “Favouring” is to be understood as displaying desired content higher and making it easier to discover it by downgrading inauthentic content.

By displaying content that lives up to the standard mentioned above enshrined in Code, there is a risk that information that can be regarded as untrustworthy is buried somewhere deep in the platform. Since individuals usually read the information that is at the top of the page, later mentioned information will be left unfound. By removing profiles that engage in inauthentic behaviour, the platform removes all the content, which can interfere with the right to receive and impart information as enshrined in Article 10 ECHR.

¹⁶⁹ Jenna Hensel, "How a New Standard of Care Can Make Social Media Companies Better "Good Samaritans"," *Minnesota Law Review* 105, no. 3 (2021), p. 1457. Available on: https://minnesotalawreview.org/wp-content/uploads/2021/02/Hensel_MLR.pdf. Accessed May 2, 2022.

¹⁷⁰ Code, *supra* note 95;

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*

Meta's report on the implementation of the Code indicates content classification is done by a combination of technology and human review to detect and downgrade inaccurate content.¹⁷³

However, a pending case concerning Meta fact-checkers, *Stossel v. Meta Platforms, Inc. et al.*, revealed disturbing inside the fact-checking process. Namely, a document submitted by the Meta attorneys revealed that Meta's fact-checks are merely opinions or opinion assertions and not factual at all.¹⁷⁴

This discovery questions the absolute integrity of the fact-checking processes at Meta and indicates that perhaps it is not entirely in line with the freedom of expression and can lead to arbitrary decisions taken by the platform.

Furthermore, there is no effective right to appeal the decisions of the media platforms. Decisions cannot be checked before a judicial an independent authority. Some scholars suggest that the EU is leaning towards private censorship as the media platforms can be the ones that act as arbiters of truth as they are vested with the power to decide which content is to be left untouched. As a legal academic, Jeffrey Rossen has expressed: "Facebook today wields more power in determining who can speak than any Supreme Court judge, king or president."¹⁷⁵

Scholar Marvin Ammori has noted that Meta's terms of services are made in such a way that they can be applied by hundreds of Meta employees without the need to make a judgment call regarding the value of a particular speech.¹⁷⁶ This is alarming in relation to protecting the freedom of expression since media platforms' terms of services are often broad and vague and are applied by such dominant companies, which often lack transparency and most certainly clear guidance on how to appeal such decisions.

Thus, even if the Code does not strictly impose the obligation to remove disinformation content, it ends up increasing the company's position as the one who decides the truth and thus increasing private censorship. Since the safeguards afforded by human rights instruments do not apply to private corporations generally¹⁷⁷, the introduced measures by the companies under the Code may, in fact, interfere with the fundamental rights of its users.

Furthermore, Meta has even acknowledged the fact that it does not consider human rights documents to be regarded as a roadmap but merely a guidance tool, while content moderation in practice continues to be ad hoc and non-transparent. In fact, Meta has failed to adopt any real test at all on whose basis to determine whether respective content removal would not infringe human rights. The analysis that Meta follows is whether a particular restriction of speech is necessary to prevent harm.¹⁷⁸

¹⁷³ Facebook. Facebook Baseline Report on Implementation of the Code of Practice of Disinformation. para 4.1. Available on: https://ec.europa.eu/information_society/newsroom/image/document/2019-5/facebook_baseline_report_on_implementation_of_the_code_of_practice_on_disinformation_CF161D11-9A54-3E27-65D58168CAC40050_56991.pdf. Accessed May 8, 2022.

¹⁷⁴ *Stossel v. Meta Platforms Inc. et al.*, 5:2021cv07385, N.D. Cal. (2022)

¹⁷⁵ Marjorie Heins, "The Brave New World of Social Media Censorship," *Harvard Law Review Forum* 127 (2013-2014): p. 325. Available on: https://cdn.harvardlawreview.org/wp-content/uploads/2014/06/vol127_Heins.pdf. Accessed May 7, 2022.

¹⁷⁶ Marvin Ammori, "The New York Times: Free speech and lawyering in the age of Google and Twitter", *Harvard Law Review* 127, no. 8 (2014) p. 2278, Available on: <http://www.jstor.org/stable/23742037>. Accessed May 8, 2022.

¹⁷⁷ C. Angelopoulos et al., "Study of fundamental rights limitations for online enforcement through self-regulation", *Institute for Information Law (IViR)*, 2016, p. 61. Available on: https://pure.uva.nl/ws/files/8763808/IVIR_Study_Online_enforcement_through_self_regulation.pdf. Accessed May 8, 2022.

¹⁷⁸ Michael Lwin, "Applying International Human Rights Law for Use by Facebook," in *Yale Journal on Regulation Bulletin* 38 (2020-2021), p. 60. Available on: https://openyls.law.yale.edu/bitstream/handle/20.500.13051/5441/Lwin_Bulletin_Macro_Final.pdf?sequence=2&isAllowed=y. Accessed May 8, 2022.

The Court, in its case law, has explicitly noted that States cannot avoid their responsibility simply by delegating their obligations to private actors.¹⁷⁹ Since the MS has the positive obligation to protect the exercise of the right to freedom of expression, they should uphold this obligation. In line with this, MS should define the boundaries of the assigned decision-making authority and most certainly ensure some mechanism in place under which decisions taken by the Code's signatories can be contested as this would in some way decrease the role of the media companies as acting arbiters of truth.

Moreover, while the world awaits the strengthened version of the Code, it is crucial to mention that there should be at least some type of enforcement, even if the Code is a voluntary agreement.

From the business perspective, it is logical to conclude that the companies will do their absolute minimum in order to comply with the rules or demonstrate good behaviour if there is no actual enforcement or penalty. For example, in 2018, Meta and Google announced that they would hire approximately 50,000 people as content moderators. Companies subcontracted "Mechanical Turks" to execute these activities.¹⁸⁰ While the majority of the workers on Mechanical Turks are located in the United States (at least 60%), the rest are located in India.¹⁸¹ Certainly, employing individuals on low wages in locations outside the EU is much cheaper than actually employing a team of qualified human rights lawyers. After all, social media companies are businesses at the end of the day, and profit is very important to them. However, this does not mean that they should neglect European standards' and if the change does not come within them, it should come from the EU institutions themselves.

Therefore, the author of this thesis strongly believes that there should be enforcement mechanisms in place. However, these mechanisms need to advocate compliance with international human rights standards strongly. They should not be directed at content removal as such but rather at procedures that govern this action.

3.2. Network Enforcement Act and Electronic Communication Law - proportionality analysis.

Since NetzDG and Communication Law both contain the obligation to remove content that corresponds to its substantive provisions, the interference with the Article 10 ECHR is more evident than, for example, is considered under the Code. Therefore, to determine whether or not the NetzDG and Communication Law is in violation of Article 10 ECHR, it is important to weigh the proportionality of the legislation. Namely, a legitimate aim and whether the consequences of the legislation outweigh the interference itself.

3.2.1. Legitimate aim

Section 1(3) of NetzDG lists the offences in StGB to which the NetzDG applies¹⁸². To determine the legitimate aim on whose basis the German legislative authority can interfere with Article 10 (2), respective articles of StGB need to be examined as they declare what pursuant to German criminal law is unlawful content.

For example, in Sections 89a and S91 StGB, the legitimate aim is regarded as national security. Section 111 relates to public order and security, and Section 131 relates to the

¹⁷⁹ *Costello-Roberts v. the United Kingdom*, no. 13134/78 (15 March 1993) para. 27. Available on: <https://hudoc.echr.coe.int/tur?i=001-57804>. Accessed May 8, 2022.

¹⁸⁰ Marsden, Meyer and Brown, *supra* note 169, p. 7.

¹⁸¹ Mturk tracker. Available on: <https://demographics.mturk-tracker.com/#/countries/all>. Accessed May 6, 2022.

¹⁸² NetzDG, *supra* note 128, Section 1(3).

protection of the reputation or rights of others. Even falsified news would be considered illegal. NetzDG promises to provide a solution for disinformation as it defends against fake news that is intended to hurt minorities.¹⁸³ Thus, under the NetzDG, national security, public order, and security, the protection of the reputation or rights of others, and defamation are considered legitimate aims.

With regards to Latvia, Article 13.⁵ of the amended Communication Law stipulates that the access can be restricted to “such websites available on the territory of Latvia, whose content threatens or threatens national security or public order and security.”¹⁸⁴

By analysing NEPLP decisions on blocking access to internet portals, the NEPLP assesses the need for an administrative act to achieve a legitimate objective¹⁸⁵, and in most cases, the legitimate aim is noted as national and public security (including information room security), the preservation of a democratic state facility.¹⁸⁶

Pursuant to Article 10 (2) ECHR, the interests of national security, public safety, and the protection of the reputation or rights of others are listed as legitimate aims based on which the right to freedom of expression can be limited. While the “public order” is not explicitly mentioned in Article 10 (2) ECHR, the Court, in its case law, has established that public order can be as well regarded as one of the legitimate aims if the type of speech at question presents a clear and imminent danger to public order.¹⁸⁷

In cases of national security, the ECtHR has reiterated that a certain margin of appreciation should be left to the national authorities.¹⁸⁸ Thus, it allows MS to have a measure of diversity in their interpretation of ECHR obligations.¹⁸⁹ Since one of the reasons why Germany adopted NetzDG is due to racist comments on the Internet in relation to the refugee crisis in Germany and Latvia's reasoning for amending its Communication Law is because of the current geopolitical situation between Russia and Ukraine, national security can be interpreted more broadly by these MS, because of their knowledge of their MS processes and these MS have a responsibility towards their citizens.

Thus, to this extent, the NetzDG and Latvia's Communication Law are equipped with legitimate aims to interfere with Article 10 ECHR. However, Latvia's Communication is clearer on legitimate aims on whose basis freedom of expression could be limited. Since one of the components of the three-tier test by the ECtHR is “prescribed by law,” the NetzDG raises serious doubts about whether the law is precise and foreseeable enough. The NetzDG is not accurate or foreseeable enough. Arguably, if a case will ever be brought to the ECtHR, the

¹⁸³ Rebecca Zipursky, “Nuts about NETZ: The Network Enforcement Act and Freedom of Expression,” in *Fordham International Law Journal* 42, no. 4 (April 2019) p. 1346. Available on: <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2753&context=ilj>. Accessed May 8, 2022.

¹⁸⁴ Communication Law, *supra* note 140, Section 13.⁵ (1).

¹⁸⁵ Nacionālo elektronisko plašsaziņas līdzekļu padome. (National Electronic Mass Media Council of Latvia) Lēmums Nr. 184/1-2 (Decision Nr. 184/1-2) (7 April, 2022) para. 8.1. Available on: https://www.neplpadome.lv/lv/assets/documents/Normativie%20Akti/Lemums_Nr.184_1_2_timekla_vietnes_07_04.2022..pdf. Accessed May 8, 2022.

¹⁸⁶ *Ibid.*; Nacionālo elektronisko plašsaziņas līdzekļu padome. (National Electronic Mass Media Council of Latvia) Lēmums Nr. 175/1-2 (Decision Nr. 175/1-2) para. 7.1. Available on: https://www.neplpadome.lv/lv/assets/documents/Normativie%20Akti/Lemums_Nr.175_1_2_putlex_31.03.2022..pdf. Accessed on May 8, 2022.

¹⁸⁷ *Gül and Others v. Turkey*, no. 4870/02 (8 September 2010), para. 42. Available on: <https://hudoc.echr.coe.int/eng?i=001-99186>. Accessed May 8, 2022.

¹⁸⁸ *Faber v. Hungary*, no. 26005/08 and no. 26160/08 (12 June 2012) para. 45. Available on: <https://hudoc.echr.coe.int/eng?i=001-111421>. Accessed May 8, 2022.

¹⁸⁹ Andreas von Staden, Andrew Legg, “The Margin of Appreciation in International Human Rights Law: Deference and Proportionality”, *Human Rights Law Review*, Volume 13, Issue 4, December 2013, Pages 795–797, Available on: <https://doi.org/10.1093/hrlr/ngt026>. Accessed May 8, 2022.

Court would most likely find a violation of the Convention. Certainly, this would also largely depend on the circumstances and facts of the case.

3.2.2. Proportionality

Whether the interference with the right to freedom of expression is proportionate to the legitimate aim pursued, thus whether the benefit of the society is greater than that of an individual is the most important aspect to determine whether the interference was in line with human rights law or not.

Under NetzDG, social media platforms must remove “manifestly unlawful” content within the 24-hour period. In the case of Meta, every reported content is analysed under Meta's community standards. If reported content only violates German law but not Meta’s terms of service, then the content is blocked only in Germany.¹⁹⁰ Similar to the Code situation, this indicates private censorship.

Freedom of speech is enshrined in Germany's Constitution - Basic Law Article 5 “Every person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures and to inform himself without hindrance from generally accessible sources.”

Moreover, human dignity is also established in the German Constitution Article 1. While disinformation does not pose direct threats to human dignities, such as hate speech does, it can have indirect effects. For example, an article created by a far-right politician containing false accusations of sexual assault about its opponent can violate the opponent's personal dignity.

The difficult question is how do we balance these rights, especially taking into account that the definition “manifestly unlawful” is very broad and gives platforms wide discretion.

In the author's opinion, to determine the proportionality, each restriction must be analysed by its individual facts of the interference. Thus, the content in question, whether political or commercial speech, the aim of the actor, the distribution channel, the number of people the content has reached or can reach, and the characteristics of the actor.

However, when assessing the proportionality, it is also necessary to take into account its “chilling effect” and its consequences on the possibilities for exercising fundamental rights.¹⁹¹ The NetzDG imposes monetary fines upon platforms for non complying with its sections, ranging from five thousand euros to five million euros. Since these fines are somewhat extreme, it may lead those with unpopular opinions to refrain from posting by observing that the content is being taken down. Germany has gone even so far as to raid posters' homes with its law authorities.¹⁹² On the one hand, platforms are forced to delete information or face hefty fines; on the other hand, they stand the possibility of being sued for deleting legal content. From the logical perspective, the platform will choose to pursue the most economically efficient choice.

In the case of Latvia, the freedom of expression is also enshrined in Satversme (Constitution) Article 100, stating that “Everyone has the right to freedom of expression, which includes the right to obtain, keep and disseminate information freely, and express their views.

¹⁹⁰ William Echikson and Olivia Knodt. Germany’s NetzDG: A key test for combatting online hate. No. 2018/09, November 2018, p. 10. Available on: http://wp.ceps.eu/wp-content/uploads/2018/11/RR%20No2018-09_Germany's%20NetzDG.pdf. Accessed May 8, 2022.

¹⁹¹ *Cisse v. France*, no. 51346/99 (9 July 2002) para. 50. Available on: <https://hudoc.echr.coe.int/eng?i=001-60413>; *Oya Ataman v. Turkey*, no. 74552/01 (5 December 2006) paras. 37-39. Available on: <https://hudoc.echr.coe.int/eng?i=001-78330>; *Gafgaz Mammadov v. Azerbaijan*, no. 60259/11 (14 March 2016) para. 59. Available on: <https://hudoc.echr.coe.int/eng?i=001-157705>. Accessed May 8, 2022.

¹⁹² Zipursky, *supra* note 184, p. 1361

Censorship is banned.”¹⁹³ By analysing the content of Germany's Basic Law Article 5 and Latvian Satversme's Article 100 it is similar to Article 10 ECHR.

As the Judge of the Latvian Constitutional Court has noted, freedom of expression cannot exist without responsibility. It can have a huge impact on a sovereign and its decisions and on the lives of every individual.¹⁹⁴ The Communication Law was amended in the context of the Russia-Ukraine war, and one of its aims of it was to safeguard the sovereign by protecting national security.

The NEPLP, in its decisions where it blocks certain Russian Internet sites, has recognized that the benefits which the society will gain are significantly greater than the restriction on freedom of expression. The public will no longer be reached by information that threatens the security of Latvia and Ukraine, statements calling for war, or military conflict.¹⁹⁵ While the ECtHR will analyse each NEPLP decision on an individual basis, in general, the Court might accept the proportionality of the interference.

Analysing the proportionality, the Court might also take into account the historical political context between Russia and Latvia as it did in the case *Ždanoka v. Latvia*¹⁹⁶ The Court remarked in this decision that Latvia's legislative and judicial bodies are better equipped to assess the challenges of building and maintaining the democratic order. As a result, authorities should be given enough leeway to assess their society's demands and determine whether the restrictive measure is appropriate.¹⁹⁷

Since disinformation has effects on the democratic processes, the Court may recognize, in the context of historical relations between Russia and Latvia and current tragic events in Ukraine, the need for NEPLP to block access to certain Russian platforms. The interesting question lies in the fact whether the NEPLP will continue to use these competencies after the situation is stabilized in the EU.

In general, the ECtHR regards the measure to block access to Internet sites as an extreme measure.¹⁹⁸ To justify the blocking measure, the measure must form a part of a strict legal framework that ensures tight control over the scope and ban, is foreseeable, and ensures effective judicial review to prevent abuses.¹⁹⁹

The novel NEPLP competencies are a part of Latvian Communication Law, and NEPLP decisions on blocking Internet access aren't taken unilaterally and can be appealed under Administrative Procedure Law. Thus the interference is prescribed by law, and there exists judicial review. For example, on April 29, the Administrative District Court decided to apply interim measures and return four Russian media channels, which were blocked by the NEPLP decision.²⁰⁰ This certainly indicates that Latvian authorities are not abusing these new competencies but are indeed analysing each situation individually.

¹⁹³ Latvijas Republikas Satversme. (The Constitution of the Republic of Latvia) (15 February 1922. Section 100. Available on: <https://likumi.lv/ta/en/en/id/57980-the-constitution-of-the-republic-of-latvia>. Accessed May 8, 2022.

¹⁹⁴ Artūrs Kučs. Vārda brīvība. (Freedom of speech) in *Jurista Vārds*, 15 February 2022, Nr. 7(1221). Available on: <https://juristavards.lv/doc/280646-varda-briviba/>. Accessed May 8, 2022.

¹⁹⁵ Decision Nr. 184/1-2, *supra* note 186, para. 8.4.

¹⁹⁶ *Ždanoka v. Latvia*, no. 58278/00, (16 March 2006) para. 133. Available on: <https://hudoc.echr.coe.int/eng?i=001-72794>. Accessed May 8, 2022.

¹⁹⁷ *Ibid.*, para. 134.

¹⁹⁸ *OOO Flavus and Others v. Russia*, no. 12468/15 (23 June 2020) para 37., Available on: <https://hudoc.echr.coe.int/eng?i=001-203178>.; *Bulgakov v. Russia*, no. 20159/15 (23 June 2020) para 34. Available on: <https://hudoc.echr.coe.int/eng?i=001-20318>. Accessed May 8, 2022.

¹⁹⁹ *OOO Flavus and Others*, *supra* note , para. 40-43.

²⁰⁰ Diena. Tiesa uzdod atbloķēt vairākus Krievijas izklaides kanālus (Court asks to unlock several Russian entertainment channels). Available on: <https://www.diena.lv/raksts/latvija/zinas/tiesa-uzdod-atbloket-vairakus-krievijas-izklaides-telekanalus-14279589>. Accessed May 8, 2022.

With regards to proportionality, the interferences prescribed in the Latvian Communication Law are more proportional to the legitimate aim pursued. Firstly, legitimate aims are more definite in the Latvian law, which is an important precondition. Thus the law itself is more foreseeable than the NetzDG. Secondly, while the amended version of the NetzDG introduces appeal opportunities to individuals whose right to freedom of expression is restricted, in Communication Law, this opportunity was there in the first place. Lastly, NetzDG introduces extreme monetary fines upon platforms, which might lead them to remove more content than necessary, and this undoubtedly has chilling effects on the freedom of expression.

In the author's opinion, to improve the NetzDG, it should be clearer, especially with its definition - "manifestly unlawful." Not having a clear definition leaves room for interpretation on social media platforms. Taking into account the monetary fines it may lead companies to remove content that does not need to be removed. Ever since the adoption of the NetzDG, German Courts have been presented with questions over content removal. Since then, Judges have issued a series of contradictory rulings, as in some cases, they ruled in favor of protecting the freedom of expression, while in other cases Court's noted Meta's right to enforce its community guidelines.²⁰¹ These decisions put companies at crossroads because there is no one correct precedent in how to apply the provisions of the NetzDG. This indicates that there needs to be a more serious step taken by the German authorities to improve the clarity and foreseeability of the NetzDG.

3.3. The impact of the DSA vis-a-vis the right to freedom of expression

DSA is regarded as a response to the fragmentation of national laws on disinformation across MS and is an important tool to ensure the respect for the freedom of expression as the DSA un doubt, recognizes the importance for EU citizens to freely exercise their freedom of expression.²⁰²

In the context of DSA ensuring the safeguard to freedom of expression, there are shared thoughts. On the one hand, the DSA shifts away the power of social media platforms to unilaterally decide on the validity of the content without ensuring transparency during such a process; on the other hand, some of the obligations in the DSA produce a disproportionate impact on the right to freedom of expression.

3.3.1. Disproportionate effects on freedom of expression of VLOP obligations under Articles 25 and 26 DSA

As noted, disinformation as such is not defined in the DSA but, as such, is described in Article 25 and 26 of DSA. Pursuant to these Articles, VLOP has an obligation to at least once a year analyse and assess such risks stemming from their platforms and ensure effective mitigation measures.

Even if, according to EC, disinformation is not regarded as illegal content but rather as harmful content.²⁰³ Some MS national legislation already has provisions, including of criminal nature, related to disinformation.²⁰⁴ Article 2 DSA states that illegal content within the meaning of DSA is also such content that is not in compliance with the law of MS.²⁰⁵ Hence, this

²⁰¹ Echikson and Knodt, *supra* note 191, p. 11.

²⁰² Digital Services Act, *supra* note 153, p. 6.

²⁰³ Fathaigh, Helberger and Appelman, *supra* note 11, p. 2.

²⁰⁴ *Ibid.*

²⁰⁵ Digital Services Act, *supra* note 153, Article 2.

definition encompasses all forms ²⁰⁶ of disinformation as specified by national legislation. Yet rather than harmonizing approaches to disinformation, such reference to national legislation may even further accentuate differences.

In the context of Article 26, there is no specific reference to specific types of information that would require action by the platforms pursuant to Article 27 DSA. According to Dr. Joan Barata, an international expert in freedom of expression, the most problematic part of this provision is the complete absence of clarity surrounding the interpretation and execution of a range of critical and freedom of expression-sensitive elements by platforms.²⁰⁷

In particular, Article 26 remains silent on specific categories of illegal content. Therefore, there is no gradual approach recommended on the basis of different types of illegality. Illegal content can be further distinguished, such as manifestly illegal content or content that is illegal under criminal laws, such as child pornography, or content can be regarded as illegal by a reference to illegal advertising products, such as marihuana, or content that is declared illegal by a judicial authority, such as hate speech.²⁰⁸

Furthermore, Article 26 does not include any indication of potential safeguards that aim to avoid disproportionate and excessive impacts on the right to freedom of expression, which is one of the positive obligations of any MS. Nor does the provision take into account that identifying illegal content is reliant on several areas of national legislation that aren't always harmonized, resulting in significant disparities between MS. To illustrate, even horizontal categories such as hate speech are at the moment being interpreted differently across the EU MS by both national law enforcement and judicial authorities.

The above mentioned not only might result in negative consequences in terms of the assessment pursuant to Article 26 but also will make it more difficult for platforms to ensure effective mitigation measures in accordance with Article 27.

Moreover, taking into account the complex nature of the obligations imposed to VLOP in accordance with Article 26, the necessity to put in place “reasonable, proportionate and effective” mitigation measures does not provide general clarity nor foreseeability with regards to correct practices implemented.

Since Article 27 leaves it to the competencies of the VLOP to decide which mitigation measures may be adopted to address the systemic risks, there is a risk that due to lack of clarity within the substantive provisions of the Article 26, the VLOP will decide to employ such measures that do not necessarily result in the most effective response to the problem but rather result in the most cost-efficient response as at the end of the day, VLOP platforms in reality value higher their profits rather than ensuring correct implementation and safeguarding of freedom of expression.

Moreover, an important question is how in practice, the provisions of Article 27 DSA on how to mitigate the risks by the functioning of their platforms will interplay with MS national provisions that, for example, criminalize disinformation and state that it should be immediately removed. This will have effects on the freedom of expression as VLOP could, in essence, follow already established practices in respective MS with regards to combating disinformation and will be persuaded or even targeted by national enforcement authorities. Particularly in the light that DSA does not indicate how exactly VLOP must address such scenarios.

²⁰⁶ Joan Barata. “The Digital Services Act and its impact on the right to freedom of expression: special focus on risk mitigation obligation” p. 17. Available on: <https://libertadinformacion.cc/wp-content/uploads/2021/06/DSA-AND-ITS-IMPACT-ON-FREEDOM-OF-EXPRESSION-JOAN-BARATA-PDLI.pdf>. Accessed May 8, 2022.

²⁰⁷ *Ibid.*, p. 21.

²⁰⁸ *Ibid.*

To sum up, the greatest threat to the freedom of expression of online users' is the broadly defined notion of illegal content under DSA. Mainly due to the fact that DSA's definition of this term refers to national legislation in the EU. Thus, it might be the case that instead of harmonizing the diverse MS approaches to disinformation, DSA may end up deepening national disparities.

The question of how to move forward and address the above-mentioned flaw within the DSA is certainly a difficult one.

One of the possibilities could be to narrow the “illegal content” definition stipulated in Article 2 DSA by excluding the reference to the MS national laws, and thus if the respective content is regarded as illegal pursuant to MS law, the content is regarded as illegal also under DSA. Such narrowing would also resonate with the EU policy, namely, that disinformation is not regarded as illegal content but rather as harmful content.²⁰⁹ By placing the notion of disinformation in the same box as illegal content, the EU comes into conflict with its own policy.

²⁰⁹ Fathaigh, Helberger and Appelman, *supra* note 11, p. 2 .

CONCLUSION

Disinformation on social media platforms is certainly a global issue that only relatively recently has gotten more attention, as the issue's crucial importance continues to be on the rise. The issue of how to approach the notion of disinformation and limit its effects is rather difficult than straightforward. On the one hand, it poses a significant threat to democratic processes in the EU and the fundamental freedoms of the individuals; on the other hand, disproportionate restrictions on disinformation will violate one's freedom of expression, which is one of the cornerstones of a democratic society according to ECtHR case-law.

The conducted analysis demonstrates several weaknesses within existing EU and MS mechanisms on disinformation in relation to their accuracy, effectiveness, and compliance with Article 10 ECHR - freedom of expression.

Firstly, the common characteristic that the Code, the NetzDG, Communication Law, and DSA have is their lack of common understanding of what precisely disinformation is and what type of content would be considered as such. The different approaches to defining the issue at its core have negative consequences in providing a comprehensive response to the disinformation virus, and it endangers the right to freedom of expression as restrictions cannot be based on vague or broad assumptions. Perhaps, the most common issue with regards to this is differencing disinformation from illegal content. Disinformation as such is not illegal as it is understood under the NetzDG and DSA framework. Understood as such, it creates a dangerous precedent for EU and national legislative authorities as well as the future frameworks because disproportionate effects on the freedom of expression will most likely occur from the national authorities and social media companies' side.

The root cause of this issue lies in the non-existence of the definition of the notion of disinformation in the EU and elsewhere. All three current definitions on the EU level are insufficiently specified, somewhat different in their scope, and certainly are not fit to be viewed as legal definitions. Before constructing a binding or non-binding mechanism on disinformation, the EU should take one step backward and begin by ensuring that a proper definition of this issue is delivered.

Secondly, it seems that the EU is trying to shift the responsibility to address the scope of disinformation towards the social media platforms themselves. While it might be accurate to conclude that social media companies must analyse the processes inside their platforms and determine adequate steps to be taken to ensure that their platforms are not becoming the hotspot of disinformation, the EU institutions must pay a lot of attention to how these platforms follow the newly established rules and national authorities must also pay close scrutiny in ensuring that platforms do not overreach their competencies and restrict content that does not need to be restricted. This can be achieved by ensuring effective appeal procedures, which in the case of the analysed frameworks has been done.

Hence, the answer to the first part of the research question is that the effectiveness of the existing and future mechanisms for regulating disinformation goes as far as these mechanisms provide a solid basis on which future research can be done, and responses by the EU can be taken and highlight the complex nature of the notion of disinformation. The main priority of the EU approach to regulating disinformation through company self-regulation is not as effective in practice as on paper. Companies lack adequate guidance. Social media platforms are businesses that prioritize profit; thus, they will strive to cut corners at every possible option; at least, this is what Meta has demonstrated. In light of the national legislation, the legislative bodies should strive to avoid criminalizing disinformation as this creates a chilling effect on the

freedom of expression because it discourages individuals from expressing their opinions on social media platforms.

With regards to the second part of the research question, in relation to standards of freedom of expression, the responses cannot be regarded as effective in combating the effects of disinformation without interfering on some level with the freedom of expression. The balance to which this interference can be regarded as justifiable varies in different political, cultural, and legal contexts due to the margin of appreciation doctrine. However, it is advised that the least restrictive measure, for example, flagging false content but not immediately removing it, is employed to restrict disinformation, saving the most drastic approach - blocking access or removing content in most critical situations when it is without reasonable doubt evident that the legitimate interests of the society as a whole outweigh the interests of the individual.

Further research on the complex issue of how to ensure a fair balance between regulating disinformation and respecting the freedom of expression is necessary. In particular, the author identifies two future points which can be further explored i) how the social media company's terms of services will be regarded from the ECtHR point of view, whether they comply with the element "prescribed by law"; and ii) is it proportionate to block access to such platform wherein between disinformation also accurate information exists.

However, it can be doubted to what extent the DSA will be able to remove obstacles to the free flow of information as a result of the disparate national approaches to tackling disinformation.

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