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Disinformation and Freedom of Expression

**A Study on the Regulation of 'Fake News' in the European
Union**

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Abstract

This work analyses the regulatory approaches taken within the European Union to tackle the phenomenon on 'fake news', focusing on the freedom of expression implications of the systems analysed. The purpose of the study is to assess the regulatory state of the art regarding 'fake news' and to detect the freedom of expression situations stemming from those systems. A theory on 'fake news' is developed, suggesting that disinformation is the main issue; while freedom of expression and democracy are identified as fundamental values at stake when regulating this phenomenon. Considering freedom of expression as the evaluative standard, three regulatory approaches, namely France, Germany and the EU, are assessed and the suitability of each approach to address 'fake news' is explained.

Key words: fake news, disinformation, freedom of expression, democracy, European Union.

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1. Introduction

In 2017, Collins Dictionaries declared 'fake news' Word of the Year. Following the Brexit referendum and the United States 2016 Presidential Elections, the use of the term increased by 365% from 2016 to 2017¹. The dictionary defines *'fake news'* as *'false, often sensational, information disseminated under the guise of news'*². Although 'fake news' as such has always existed, the boost in the use of the term reflects both the raise in the creation and spread of false news, and its use as an umbrella term to describe a wide range of problematic content. Disinformation has also become relevant within the political debate: accusations of internationally orchestrated disinformation campaigns and manipulation of topics into the public debate have become common in the past years because of 'fake news'. The phenomenon has attracted the attention of the political sphere, governments and legislators. Concerned about democracy, several countries have developed legislative measures for tackling 'fake news' and the risk they pose for democratic societies; regulating 'fake news' has this way become a reality. However, even though such legal texts are bound to protect democracy, they may entail a risk for freedom of expression by disturbing the spread of news, raising new and critical concerns for democracy.

This work analyses the regulatory approaches taken within the European Union to tackle the phenomenon of 'fake news', focusing on the freedom of expression implications of the systems analysed. This issue is addressed because of its legal and societal relevance: while policymakers endeavour to find a solution to 'fake news', concerns are raised regarding fundamental freedoms, especially freedom of expression. Moreover, in the current information society, the legal system surrounding online news is more important than ever as it shapes the norms of our relational and communicational process. Thus, democracy and freedom of expression concerns in this area are all the more relevant because of the online environment in which they develop.

¹ Data provided by Collins Dictionary: Collins Word of the Year 2017. Retrieved from <https://www.collinsdictionary.com/es/woty>

² As defined by Collins Dictionary.

The main objective of this work is to describe the regulatory approaches developed in member States of the European Union and in the EU itself so far, in order to detect and compare their freedom of expression implications. For that matter, the research problem and design will be further explained in the methodology section. The substantive section of the work will then be developed, structured in three parts. Firstly, a theory on ‘fake news’ will be constructed by defining and characterising the phenomenon and establishing its relationship with freedom of expression. Secondly, the two regulatory approaches developed so far in EU member States (France and Germany) and the approach taken by the EU will be described and explained. Finally, the main insights of each approach will be summarized, compared and put against the ‘fake news’ theory developed in the first chapter in order to reach conclusions on the topic, presented in the last section.

2. Methodology

The spread of ‘fake news’ entails a risk for the normal development of democratic societies, and regulating them leads to an interference into the free market of ideas and news within the Internet which may hinder freedom of expression³. There is thus a ‘value clash’ when approaching the ‘fake news’ regulative issue where democracy itself is at stake; such is the main research problem. To a certain extent, assessments of the possible solutions to the ‘fake news’ regulatory issue have been developed in academic literature. The topic has been extensively addressed in American literature, with general studies⁴ and specialized ones defining, classifying and identifying possible legal solutions⁵, developing governance theories⁶ and corporate systems⁷. However, it is within the

³ The use of term ‘freedom of expression’ in this work has been chosen instead of other terms such as ‘freedom of speech’ because of its wider scope of application: ‘expression’ covers a range of forms, not just speech. It includes the right not to speak, the form in which ideas and information are expressed and conveyed, and it applies whether the communication is effected orally or in written, printed or electronic form.

⁴ For example: Klein, D. O., & Wueller, J. R. (2017). Fake News: a legal perspective. *Journal of Internet Law*, 20(10), 5-13.

⁵ Verstraete, M., Bambauer, D. E., & Bambauer, J. R. (2017). Identifying and Countering Fake News. *Arizona Legal Studies Discussion Paper*, 17-15.

⁶ Syed, N. (2017-2018). Real Talk about Fake News: Towards a Better Theory for Platform Governance. *Yale Law Journal Forum*, 127, 337-357.

European Union that specific regulatory and legislative documents have been, or are currently being, developed. In the EU the specific regulatory approaches to 'fake news' in relation to online freedom of speech have not yet been academically addressed. The research gap is thus clear: studies on the freedom of speech implication of 'fake news' regulation are lacking in European academic literature. Further, the debate on 'fake news' is still ongoing at an academic, political and legislative level. In this context of research gap and novelty of the topic, my research problem is to be addressed through the following research question:

How are 'fake news' being regulated within the European Union and to what extent is freedom of expression online affected by those regulatory regimes?

My objective with this question is to establish the regulatory and freedom of expression state-of-the-art regarding 'fake news'. Within this work, the term *regulated* is understood as any control by means of rules from the part of a State or the European Union as a supranational organisation with the competence to develop rules. Therefore, any hard or soft law measure falls within the term 'regulated'. Other regulatory options such as platform self-regulation and code will be mentioned but not further developed because of time and content limitations. The territorial scope of my work is the European Union because the topic of 'fake news' in relation to fundamental rights online has not been analysed in-depth at European level. There is a regulatory urge of 'fake news' in most EU Member States, which has been materialised in the cases of Germany and France; these two States have developed laws aiming at regulating 'fake news' and disinformation, which will be studied in this work. On top of this, the European Commission has put forward a 'fake news' initiative for tackling online disinformation with the objective of developing an EU-wide Code of Practice. These initiatives prove the regulatory interest within the EU which justifies the choice of jurisdiction. As to the meaning of the term 'fake news', it will be explained in the substantive part of the thesis, because of the importance of such definition as to the rest of this work.

⁷ Gonzalez, A., & Schulz, D. (2017-2018). Helping Truth with Its Boots: Accreditation as an Antidote to Fake News. *Yale Law Journal Forum*, 127, 315-336.

To answer the research question, a traditional doctrinal method is used: three regulatory approaches of ‘fake news’ within the EU, namely the French, German and European Union approaches, are described and evaluated against a higher legal standard, in this case freedom of expression standards. Firstly, a theory of ‘fake news’ is presented. On the one hand, the concept, characteristics and legal issues it poses are explained on the basis of existing academic literature. On the other hand, the European theory of freedom of expression is presented, assessing its suitability for its application towards ‘fake news’. This is done using legal academic sources, mainly, and case law from the Court of Justice of the EU and the European Court of Human Rights as secondary support, in an attempt to construct a coherent legal theory which is the normative framework of my work⁸. Secondly, the three legal arrangements are described in order to understand the state of the art of the regulatory approaches. A French legislative proposal, a German Act and a European Strategy are depicted and analysed through critical comments. Because of the novelty of the legal arrangements, there is no academic literature or comment on them, and therefore their description and analysis is based on the author’s observations, although some reports and journalistic articles have been used for orientation purposes. Thirdly, the legal arrangements are assessed against the theoretical framework explained in the first Section of the thesis. This is the evaluative section, where, after a broad comparison of the three regulatory approaches, they will be examined against the ‘fake news’ theory in order to conclude on their suitability for addressing ‘fake news’, considering freedom of expression as the evaluative standard.

Although analysed through a legal viewpoint, ‘fake news’ is a multidisciplinary topic on which social, behavioural, and computational sciences are involved. The sources used for the development of this work are therefore not exclusively legal; such approach was necessary for a correct and wide understanding and assessment of the subject. Nevertheless, a legal perspective has always been taken in order to provide a coherent and sound juridical argumentation.

⁸ Taekema, S. (2018). Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice. *Law and Method*, 02.

3. A Theory on Fake News

3.1. What is ‘fake news’? Definition and characterisation

‘Fake news’ is information that is designed to deceive. Sometimes used as a catch-all term for designating information with which one disagrees, its definition and categorisation have proved difficult⁹. For the purpose of this work, ‘fake news’ will be understood as

“information that has been deliberately fabricated and disseminated with the intention to deceive and mislead others into believing falsehoods or doubting verifiable facts; it is disinformation that is presented as, or is likely to be perceived as, news”¹⁰.

Following this definition, the term ‘fake news’ could potentially cover any kind of information and behaviour which is not totally true or which harms others. In this sense, its apparent simplicity is highly problematic from a legal perspective¹¹ because of the uncertainty and lack of clarity that goes with it, which can in turn lead to discretion in the use of the term.

The cornerstone of the publication of ‘fake news’ is its falsity and its intention: it is intentionally or knowingly false and its purpose is to deceive the reader¹². Fabricated content spread intentionally to misinform, motivated either by (ad) revenue, political influence or both, is ‘fake news’: for instance, fabricated accounts that are meant to spread virally online. On the contrary, misleading information, clickbait, erroneous news, satire, and conspiracy theory information do not constitute fake news *per se*¹³. As to unlawful content, such as hate speech, racism, defamation,

⁹ See, for example: Baron, S. & Crootof, R. (2017) Fighting Fake News Workshop Report. *The Information Society Project & The Floyd Abrams Institute for Freedom of Expression, Yale University*; McGonagle, T. (2017). “Fake news”: False fears or real concerns? *Netherlands Quarterly of Human Rights*, 35(4), 203-209.

¹⁰ Definition borrowed from McGonagle, T. (2017). “Fake news”: False fears or real concerns? *Netherlands Quarterly of Human Rights*, 35(4), p. 203.

¹¹ *Ibid*, p. 204.

¹² Klein, D. O., & Wueller, J. R. (2017). Fake News: a legal perspective. *Journal of Internet Law*, 20(10), p. 6; Burshtein, S. (2017). The true story on fake news. *Intellectual Property Journal*, 29, p. 397; Understanding The Fake News Universe: A Guide To Fake News Terminology. (2016, December 15). *Media Matters*.

¹³ See, for example: Understanding The Fake News Universe: A Guide To Fake News Terminology. (2016, December 15). *Media Matters*.

etc., it is not a defining characteristic of 'fake news'. Although sometimes false information may contain illegal speech, their legal treatment must be different because of the major differences in their content and intention.

The majority of 'fake news' is disseminated online¹⁴, an aspect in which the current information ecosystem, an utterly changed and still evolving media system, driven by the rapid development of the Internet and its central place in our everyday lives¹⁵, plays a vital role. In the past decades, the information age¹⁶ and the huge expansion in the use of Internet have led to a society where there is more information available than ever before. This defining characteristic does not necessarily entail an improvement for our society: the problem of information overload has brought along issues such as 'garbage information', 'amnesia of audiences locked into an internet loop', inability to concentrate, and lack of comprehension¹⁷. Citizens find it difficult to distinguish between 'good' and 'bad' information. In this information society context, disinformation and 'fake news' have become a recurring issue. The main factors that promote the increase of such online-disseminated phenomenon¹⁸ are: the scale and sophistication with which information is produced, the speed and effectiveness of its dissemination, the anonymity provided by social media¹⁹, algorithms, and advertising, all of them intrinsically related to the Internet²⁰. It is therefore evident that 'fake news' is a consequence of the information society: in the big picture, the problem is the entire information ecosystem²¹. 'Fake news' is a concrete manifestation of the broad

¹⁴ Guess, A., Nyhan, B., & Reifler, J. (2018). *Selective exposure to misinformation: Evidence from the consumption of fake news during the 2016 US presidential campaign*. European Research Council.

¹⁵ McGonagle, T. (2017). "Fake news": False fears or real concerns? *Netherlands Quarterly of Human Rights*, 35(4), 206.

¹⁶ Although information age and information society are concepts difficult to define, they have been characterised as a global economy 'characterized by the almost instantaneous flow and exchange of information, capital, and cultural communication', which order and condition both consumption and production, reflecting and creating distinctive cultures. For a detailed and systematic look into the topic, see the extensive sociological work of Manuel Castells. See, for example: Castells, M. (2009). *The rise of the network society*. Oxford: Wiley-Blackwell.

¹⁷ Webster, F. (2014). *Theories of the information society*. Abingdon, Oxon: Routledge. P. 32-34.

¹⁸ Guess, A., Nyhan, B., & Reifler, J. (2018). *Selective exposure to misinformation: Evidence from the consumption of fake news during the 2016 US presidential campaign*. European Research Council.

¹⁹ See, for example: Syed, N. (2017-2018). Real Talk about Fake News: Towards a Better Theory for Platform Governance. *Yale Law Journal Forum*, 127, p. 345-353; McGonagle, T. (2017). "Fake news": False fears or real concerns? *Netherlands Quarterly of Human Rights*, 35(4), p. 206.

²⁰ The distribution and impact of 'fake news' is directly linked with social media: Burshtein, S. (2017). The true story on fake news. *Intellectual Property Journal*, 29, p. 3-4.

²¹ Wardle, C. (2017, February 16). Fake News. It's Complicated. *First Draft News*.

issue of disinformation, and therefore any regulatory initiative willing to tackle 'fake news' should rather be focused on disinformation and the information society²².

3.2. The problem and responses to it: regulating 'fake news'

What is the problem of 'fake news'? This question is vital for understanding the 'fake news' issue as the specific harm(s) it poses for society are the reason of its consideration as a *problem* and not as a mere *phenomenon*. 'Fake news' spread at high speed and scale create important disinformation campaigns with high potential to harm citizens by hindering their possibilities to make informed choices and to harm society by disrupting democratic debate²³. Further, 'fake news' spread in the context of disinformation campaigns has the potential to reach a critical mass large enough to dominate the public discourse and alter public opinion²⁴, which may steer the public's attention away from facts and redirect it towards manufactured and fabricated information. News is a core element of democratic systems inasmuch as it is a key source of accurate information about political and societal affairs, which informs public opinion-making and deliberative processes. If news is 'fake', it misinforms the public and democratic debate is polluted at the source²⁵. Moreover, it devaluates and delegitimizes voices of expertise, authoritative institutions, and the concept of objective data, undermining society's ability to engage in rational discourse based upon shared facts²⁶. In brief, the spread of disinformation in general, and of 'fake news' in particular, can damage democracy, and entails a risk for the normal development of democratic societies.

In light of the increase of 'fake news', its spread, and the challenge it poses for democracy, it has become a topic perceived as an issue by the majority of the public

²² Accordingly, the terms 'fake news' and disinformation should not be used interchangeably, although they do refer to the same phenomenon in different levels of manifestation. Such approach will be followed in this work, where they will be used for designating different realities.

²³ EU Commission Communication on *Fake news and online disinformation* initiative, 9 November 2017. Ref. Ares (2017) 5489364 – 10/11/2017.

²⁴ Ferrara, E. (2017). Disinformation and social bot operations in the run up to the 2017 French presidential election. *SSRN Electronic Journal*, (2017). P. 2.

²⁵ McGonagle, T. (2017). "Fake news": False fears or real concerns? *Netherlands Quarterly of Human Rights*, 35(4), p. 204.

²⁶ Baron, S. & Crootof, R. (2017) Fighting Fake News Workshop Report. *The Information Society Project & The Floyd Abrams Institute for Freedom of Expression, Yale University*. P. 3-4.

Other harms produced by the spread of 'fake news' and disinformation include: increase of the fragmentation and politicization of society, and promotion of 'safe news' at the expense of difficult or challenging news stories.

opinion. It has been transferred to the political and legislative level: a regulatory urge has appeared in a number of countries, such as the United States and several Member States of the EU²⁷. In this sense, the rationale for regulating ‘fake news’ is its abovementioned potential to harm citizens by hindering their possibilities to make informed choices and to harm society by disrupting democratic debate. There are a number of regulatory options for dealing with the ‘fake news’ issue, each presenting several drawbacks: law, whose main disadvantage is its ineffectiveness due to the extraterritorial nature of ‘fake news’ and to the huge amount and scale of online information²⁸; platform self-regulation, which entails risks as to the standards against which platforms build those regulatory frameworks, inasmuch as they are private actors whose main motivation is commercial goals²⁹; and code, whose modification through ‘algorithm improvement’ can also lead to negative outcomes such as the introduction of biases and search engine optimization³⁰. These regulatory options entail measures such as community guidelines and standards, fact-checking, content moderation, and content blocking or removal, among others³¹.

Legislating on ‘fake news’ may lead to freedom of expression violations, and ‘fake news’ may go directly against democracy. When talking about such conflict, freedom of expression and democracy must be analysed considering the online sphere in which they take place regarding ‘fake news’. The notable free speech and internet scholar Jack Balkin argues that the features of the digital age have changed the social conditions of freedom of speech³² by fostering interactivity and empowering individuals, and this way a social conflict is created: *‘technological change creates new forms of social conflict because it allows human power to be*

²⁷ See sections 4 and 5 of this work.

²⁸ Rowland, D., Kohl, U. & Charlesworth, A. (2017). *Information technology law*. Abingdon, Oxon: Routledge. P. 82.

²⁹ Leerssen, P. (2015). Cut Out By The Middle Man: The Free Speech Implications Of Social Network Blocking and Banning In The EU. *JIPITEC*, 6, p. 100-101, 111.

³⁰ Baron, S. & Crootof, R. (2017) Fighting Fake News Workshop Report. *The Information Society Project & The Floyd Abrams Institute for Freedom of Expression, Yale University*. P. 10.

³¹ All regulatory options must deal with intermediaries. As ‘entities which enable the communication of information from one party to another’, they play a major role within ‘fake news’ by providing the network through which they are disseminated. Their legal treatment, and especially their liability regime, are topics currently under discussion, and which the CJEU has confronted in a number of cases, mainly in relation to intellectual property law and commercial speech (see, for example: Case C-70/10, *Scarlet v SABAM*; Case 314/12, *UPC Telekabel Wien*). To what extent are intermediaries to be held liable of wrongful activities committed by users through their services is indeed a question which matters for the ‘fake news’ issue. The topic will not be addressed in this work because of time and word limitations.

³² Balkin, J. M. (2004). How rights change : freedom of speech in the digital era. *Sydney Law Review*, 26(1), 5-16.

*exercised and distributed in new ways*³³. One of those social conflicts is ‘fake news’. The very same technology that creates new possibilities for general democratic cultural participation, in this case the Internet and social media, clashes with the desire to exploit new markets and accumulate wealth, in this case the desire to influence politics and to get ad revenue. Such social conflict is fought out in politics and in law, affecting the (content of the) right of freedom of expression: the way this right changes is at stake when discussing the regulatory and legislative approaches to ‘fake news’. The ‘fake news’ issue is thus a consequence of the digital age to which law is bound to react: the information society and digital age force us to ‘fundamentally re-evaluate law and regulation in our society’³⁴.

3.3. Freedom of expression

With the development of legislative measures targeting ‘fake news’, freedom of expression is at stake. On the one hand, as any information originated and spread in the public sphere, ‘fake news’ is in principle protected by the fundamental right of freedom of expression; on the other hand, it is deemed to damage the correct functioning of the news system. A conflict appears where democracy is in the centre of debate: regulating ‘fake news’ may lead to freedom of expression violations, while the phenomenon itself may directly damage the democratic debate. Let us analyse whether and to what extent may freedom of expression, as understood within the EU legal system, be called upon in the ‘fake news’ debate. The protection of freedom of expression in the EU is recognised in Article 11 of the EU Charter of Fundamental Rights³⁵, and has been enshrined by the Court of Justice of the EU as a ‘general principle of law, the observance of which is ensured by the Court’³⁶.

³³ *Ibid.*, p. 10.

³⁴ Rowland, D., Kohl, U. & Charlesworth, A. (2017). *Information technology law*. Abingdon, Oxon: Routledge.

³⁵ EU Charter of Fundamental Rights, Article 11 – Freedom of Expression and Information: 1. *Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.* 2. *The freedom and pluralism of the media shall be respected.*

³⁶ See, for example: Case C-260/89, *Ellinki*. Paragraph 44.

a. Content

Freedom of expression has been characterised as a broad right, which protects commercial, political, cultural and artistic speech; the shocking as well as the acceptable³⁷, ‘the frivolous and humorous, as well as the serious’³⁸. It covers the right to hold an opinion, to receive information, to access infrastructure or dissemination networks, and to seek information. Freedom of expression does protect unpopular or offensive speech, including that expressed in strong terms, save to the extent that such speech falls foul of restrictions on hate speech or incitement to violence³⁹. Indeed, it does not protect hate speech and racism, incitement to violence, and Holocaust denial and references to Nazi ideology, which are excluded from the scope of protection in the interests of protecting tolerance and pluralism⁴⁰.

Hate speech does not fall within the scope of freedom of expression, but what about false information? Does freedom of expression cover the creation and spread of information which is knowingly and deliberately false, and which is spread for deceiving the public? Although neither Court has been confronted with such issue yet, the ECtHR’s makes a distinction between (defamatory) allegations of fact and value judgments, which provides for guidance on the treatment of ‘fake news’. The Court has stated that ‘the existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof’⁴¹. On the one hand, information that can be verified, and, on the other, opinions, criticism or speculation which cannot be subjected to the ‘truth proof’, are protected under the freedom of expression provision⁴². Consequently, if factual information is proven to be untrue, it will not be covered by Art. 11 of the Charter. Strasbourg has also recognised the defence of

³⁷ See, for example: *Feldek v Slovakia*, no. 32686/96, paragraph 72: the right ‘is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb’.

³⁸ Woods, L. (2014). Article 11 – Freedom of Expression and Information. In Peers, S., Hervey, T., Kenner, J., & Ward, A. (Eds.). (2014). *The EU Charter of Fundamental Rights: A commentary*. Oxford: Hart Publishing. P. 322.

³⁹ See, for example: Opinion of Advocate General in Joined Cases C-244/10 and C-245/10, *Mesopotamia Broadcast*. Paragraph 68.

⁴⁰ Voorhoof, D. & Cannie, H. (2010). Freedom of expression and information in a democratic society: The added but fragile value of the European Convention on Human Rights. *International Communication Gazette*, 72(4), p. 417.

⁴¹ See, for example: *Ukrainian Media Group v. Ukraine*, no. 72713/01; *Jerusalem v. Austria*, no. 26958/95; *Dichand and Others v. Austria*, no. 29271/95.

⁴² Bychawska-Siniarska, D. (2017) Protecting the right to freedom of expression under the European Convention on Human Rights. A handbook for legal practitioners. *Council of Europe*. P. 78.

good faith with regards to facts⁴³. Moreover, it has considered that the media's reporting on stories or rumours is protected, by accepting allegations or statements with a slim factual basis or based on unconfirmed allegations or rumours, or with no proof that the description of events given in the articles was totally untrue⁴⁴.

Therefore, following Strasbourg's jurisprudence in the sphere of freedom of expression and reputation, factual information proven to be untrue is not covered by freedom of expression. However, if the information reports stories or rumours with a slim factual basis, based on unconfirmed allegations, or without evidence that it is totally untrue, it is covered by the protection of Art. 11 EUCFR. When assessing 'fake news' in this ambit, it is thus essential to establish whether the news presents information already present in the public opinion, even in small amounts, or whether the information is totally new. In the former situation, the information will be covered by freedom of expression if there is no evidence that it is totally untrue, while in the latter it will only be covered if the information proves to be true. The defence of good faith is not to be considered within the assessment of 'fake news', as one of its defining characteristics is its intent to deceive and its knowingly false nature.

Freedom of expression in the EU is a double-sided right: it provides for a speaker's right as well as for an audience's right, namely the right to receive information. This aspect is generally limited to the information that a speaker wishes to make available and does not constitute a right to force someone to speak⁴⁵; it has mainly been developed regarding some specific rights to seek public information⁴⁶ and the right to receive information for free within broadcasting services⁴⁷. It has not developed towards a positive obligation for public authorities to guarantee the access of all information to all citizens. Therefore, the right to receive information cannot be invoked to preclude anti 'fake news' measures, although it should be considered as

⁴³ *Ibid.*

⁴⁴ Voorhoof, D. & Cannie, H. (2010). Freedom of expression and information in a democratic society: The added but fragile value of the European Convention on Human Rights. *International Communication Gazette*, 72(4), p. 417.

⁴⁵ Woods, L. (2014). Article 11 – Freedom of Expression and Information. In Peers, S., Hervey, T., Kenner, J., & Ward, A. (Eds.). (2014). *The EU Charter of Fundamental Rights: A commentary*. Oxford: Hart Publishing. P. 323.

⁴⁶ Opinion of Advocate General in Case C-139/07P, *Commission v. Technische Glaswerke Ilmenau*.

⁴⁷ See, for example: Case C-283/11, *Sky Österreich*.

an important element when assessing the lawfulness of freedom of expression restrictions concerning this phenomenon.

The second indent of Art. 11 EUCFR expressly deals with media, making the media freedoms independent of the general right to freedom of expression. Technological changes are leading to a dynamic interpretation of the term ‘expression’, which now includes freedom of communication⁴⁸ and a separate right to transmit information⁴⁹. In this sense, media freedoms, even when connected to pluralism, cannot be invoked for protecting ‘fake news’ by using freedom of expression: false information shall not be included into the content of ‘pluralism’ because of its defining characteristics of falsity and intention to deceive.

b. Limitations

However, freedom of expression is not an absolute right: Art. 52(1) of the Charter⁵⁰ provides for lawfulness restrictions to its exercise, which are to be interpreted restrictively and taking into account the type of speech and its context⁵¹. The assessment of limitation on the exercise of freedom of expression is to be done following two criteria.

Firstly, the restriction must be prescribed by law. A norm must be ‘formulated with sufficient precision to enable the citizen to regulate his conduct and foresee the consequences which a given action may entail’; absolute certainty is not required⁵². A law has to be public, accessible, predictable and foreseeable and must not leave the authorities implementing the law with too much latitude⁵³. Therefore, any provision of a ‘fake news’ law which entails a limitation for freedom of expression should be sufficiently precise.

⁴⁸ Opinion of Advocate General in Case C-73/07, *Satamedia*. Paragraph 39.

⁴⁹ Opinion of Advocate General in Case C-316/09, *MSD Sharp*. Paragraph 81.

⁵⁰ EUCFR, Article 52 – Scope of guaranteed rights: 1. *Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*

⁵¹ See, for example: Case C-163/10, *Patriciello*. Paragraph 32.

⁵² See, for example: *Sunday Times v UK*, no. 6538/74. Paragraph 49.

⁵³ *Petra v Romania*, no. 27273/95. Paragraph 37.

Secondly, it must be proportional. The proportionality test of the means chosen to achieve the ends must take into account the importance of any countervailing interests. On the one hand, there must be a 'pressing social need'. Matters of public concern or public interest relevant for 'fake news' include: the public interest in the transparency of political life; information on the ideas, attitudes or conduct of prominent politicians; and public debate which is currently being conducted⁵⁴. On the other hand, the interference must be 'proportionate to the legitimate aim pursued'⁵⁵ and 'the reasons adduced by the national authorities to justify it' must be 'relevant and sufficient'⁵⁶. The margin of appreciation doctrine is not consistently used by the CJEU, whose decisions focus on the question of proportionality itself⁵⁷. 'Fake news' measures limiting freedom of expression should be weighed against the (legitimate) aim of the interference, which should result in a proportional outcome of such test.

In conclusion, any regulatory regime and/or measure challenged on the grounds of violating freedom of expression is to be assessed following such criteria, and therefore be, mainly, necessary and proportionate. In general, freedom of expression precludes 'fake news' when the factual information is proved to be false and when it includes hate speech. However, even if the information is not covered by freedom of expression, the restrictions imposed should be assessed against the criteria of Art. 52(1) EUCFR, inasmuch as the determination of falsity, which is part of the regulation, may contravene the guarantee to freedom of expression by setting up un-legitimate or non-proportional standards.

⁵⁴ Opinion of Advocate General in Case C-73/07, *Satamedia*. Paragraph 73.

⁵⁵ While the CJEU has defined the overriding interests for the Treaty freedoms as an open class, it is suggested that acceptable grounds in relation to Art. 11 EUCFR cannot be wider than those in art. 10(2) ECHR, given the terms of Art. 52(3) EUCR and the clear wording of the Explanations in relation to Art. 52(3) EUCFR.

⁵⁶ Criteria developed by the ECHR and accepted by the CJEU in Case C-274-99P, *Connolly*. Paragraph 41.

⁵⁷ Woods, L. (2014). Article 11 – Freedom of Expression and Information. In Peers, S., Hervey, T., Kenner, J., & Ward, A. (Eds.). (2014). *The EU Charter of Fundamental Rights: A commentary*. Oxford: Hart Publishing. P. 330.

4. National legislative approaches

In the past years, the production, consumption and dissemination of ‘fake news’ and online disinformation has become a concern in Europe, entering the political debate. ‘Fake news’ are common in the *European cyberspace* and, although their reach and impact varies, sometimes they become relevant within the public sphere and social media, altering the development of the public debate. Furthermore, disinformation campaigns are common when elections approach: the Brexit campaign, the Catalan independence voting, and the French elections are the most prominent examples of such developments. Face to such reality, legislators have turned their attention to the issue of ‘fake news’, and a number of legislative proposals are being discussed or have already been approved within several member states of the European Union.

In the Czech Republic, the Centre Against Terrorism and Hybrid Threats⁵⁸ has been operating since January 2017, and its main activity is to dispel disinformation campaigns. When such campaigns are identified, the Centre informs the public on its website and Twitter account. Likewise, the creation of an anti-fake news unit was announced by the government of the United Kingdom in January 2018, although no further developments have been reported⁵⁹. In Italy, a high school programme has been launched in order to foster media literacy. Operating since October 2017, the experimental project aims to teach students how to identify suspect URLs, and how to verify new stories by reaching out to experts^{60,61}.

As to legislative measures, laws have been proposed both in Italy⁶² and in Spain, although in the former the proposal has been waiting for legislative assessment and discussion in the Senate since February 2017, and in the latter it was rejected in the Parliament⁶³. More importantly, in France a legislative proposal fighting disinformation is under parliamentary examination for becoming an effective

⁵⁸ Website of the Centre: <http://www.mvcr.cz/cthh/clanek/centre-against-terrorism-and-hybrid-threats.aspx>

⁵⁹ Government announces anti-fake news unit. (2018, January 23) *BBC News*.

⁶⁰ Serhan, Y. (2018, February 24). Italy Scrambles to Fight Misinformation Ahead of Its Elections. *The Atlantic*.

⁶¹ Scuola, Boldrini e Fedeli presentano decálogo anti-bufale. Il progetto riguarderà 4,2 milioni di ragazzi. (2017, October 31). Ministero dell’Istruzione dell’Università e della Ricerca.

⁶² Apa, E. & Bassini, M. (2017). Italy: Legislative proposal on fake news. *IRIS*.

⁶³ El Congreso rechaza la iniciativa del PP para censurar las ‘fake news’ en internet (2018, March 13). *Público*.

law, while in Germany an Act for law enforcement in social media entered into force in January 2018. These developments in such leading member states of the EU show the increasing importance that EU governments and politicians are giving to the topic, as well as a line of action with the potential to be followed by other States. The following analysis will be useful for understanding the orientation of the two main legislative texts currently fighting against disinformation within the EU, namely the French and the German legal approaches to ‘fake news’ and disinformation.

4.1. France

a. Context

From April to May 2017, the French Presidential election campaign took place, in a context of ‘war against terrorism’, unstable Europe, and emergence of a new political party. ‘Fake news’ had had an important role in the US presidential election the previous year, and they appeared as well in the French campaign in the form of fake stories⁶⁴ and disinformation campaigns⁶⁵⁶⁶. Seven months after the election, President Macron announced, on January 3rd, 2018, a law to fight the spread of ‘fake news’ on social media “in order to protect democracy”⁶⁷. In March 2018, several members of the President’s party presented a legislative proposal for improving the civil and criminal response for the spread of ‘fake news’, entitled ‘*Legislative proposal regarding the fight against information manipulation*’⁶⁸. After being assessed at commission level⁶⁹ and publicly discussed⁷⁰, the proposal was voted and adopted on July 3rd at the *Assemblée Nationale*. As a second step, the legislative proposal was

⁶⁴ For good examples of fake stories published and spread during the French electoral campaign, see, for example: Fake news: Five French election stories debunked. (2017, March 15). *BBC News*.

⁶⁵ More than 20000 emails related to Macron’s campaign were leaked two days before the final vote. Powered by bots and spammers, the campaign drew notable amounts of media attention. For a technical study of the *Macronleaks* disinformation campaign, see: Ferrara, E. (2017). Disinformation and social bot operations in the run up to the 2017 French presidential election. *SSRN Electronic Journal*, (2017).

⁶⁶ For an empirical research on the content of ‘fake news’ during the French presidential election, see Desigaud, C., Howards, O. N., Bradshaw, S., Kollanyi, B. & Bolsolver, G. (2017) *Junk News and Bots during the French Presidential Election: What Are French Voters Sharing Over Twitter In Round Two?*

⁶⁷ The announcement was made during the President’s New Year’s speech to journalists at the Élysée palace. See: Chrisafis, A. (2018, January 3). Emmanuel Macron promises ban on fake news during elections. *The Guardian*.

⁶⁸ The terms of the French proposal have been translated by the author.

⁶⁹ The assessment was developed by three Commissions: Commission of Cultural Affairs and Education, Commission of Constitutional laws, of the legislation and the general administration of the Republic, and Commission of European Affairs.

⁷⁰ Public discussions at the National Assembly were held on June 1st and 7th, and July 3rd, 2018.

sent to the Senate for assessment, discussion and voting; after a negative assessment by the Commission of Culture, education and communication, the proposal was rejected on July 26th. It is now to be examined and discussed by a Joint Committee (Commission Mixte Paritaire), who will draft a compromise text which will eventually be presented to the Chambers for voting⁷¹.

b. Analysis

The most relevant measures introduced by this legislative proposal⁷² are the creation of a judge ad hoc whose mission is to stop the dissemination of ‘fake news’, and the introduction of the Audiovisual Council’s (*the Council*) prerogative to reject, suspend and remove the emission agreement of a media service on the grounds of it being controlled by a foreign State and spreading ‘fake news’. They are as well the most problematic provisions regarding freedom of speech.

The issue of the former, contained in Article 1 and modifying the Electoral Code, lies firstly on the definition of ‘fake news’ provided in the proposal. Such definition (‘any allegation or imputation of an inaccurate or misleading fact’) is vague, subjective, and likely to produce ‘false positives’. Considering ‘fake news’ an *allegation* or *imputation* entails a high risk of legal uncertainty inasmuch as no evidence of a news being fake has to be shown in order for it to be declared ‘fake’; alleging or imputing an information to be false is enough for its potential consideration as ‘fake’. Further, the terms *inaccurate* and *misleading* are not defined or explained, which can as well lead to legal uncertainty and arbitrary application of the terms. The proposed definition is thus likely to produce declarations of ‘fake news’ which in the end are not fake⁷³; of course such risk does always exist, no matter how ‘fake news’ is defined, but with this unprecise and un-technical definition the risk is much higher because of the above explained uncertainties. Secondly, a problem arises in relation to the power allocated to the judge, who is to determine

⁷¹ Special thanks to Mr François-Bernard Huyghe for the explanations provided regarding current legislative developments and the biggest criticisms of the French proposal, key for the correct understanding of the state of the art and for writing this Section.

⁷² For a descriptive analysis of the legislative proposal, go to Annex I of this work.

⁷³ Example: ‘Passenger allowed onto flight after security confiscate his bomb’. This is the headline of a news which can seem false, but which was actually true. Although this is a rather irrelevant example in terms of political influence, it illustrates the ‘fake positive’ possibility.

both the nature of the news within 48 hours, and whether it is liable to disrupt the upcoming election. How to assess the influence of a piece of information on an election which has not yet taken place? Legal uncertainty appears again at this stage. On top of this, the short amount of time available for the judge to decide puts at risk the quality of the judgment. 48 hours is an insufficient time lapse for a judge to analyse the amount of information needed to understand a 'fake news', and therefore insufficient as well to decide on it.

As to the latter, the Audiovisual Council has the jurisdiction to deny the emission of a media service if it is controlled by a foreign State and tries to influence the political debate through the diffusion of 'fake news'; these provisions (Arts. 4 to 6 of the proposal, modifying the Law on the Freedom of Communication) consist, in short, in the subordination of the emission authorisation to 'non-influence conditions'. They are one of the most controversial ones: the critics of the proposal argue that such measures were developed with the media agencies Russia Today and Sputnik News in mind⁷⁴, while its advocates argue that it is necessary to control foreign media in order to protect national politics. Be it as it may, these provisions, in their current version, do not contain specific guidelines or standards for a certain and transparent development of the measures by the Council. They may therefore lead to State censorship of foreign media if the terms 'controlled by, or under the influence of, a foreign State' and 'go against national interests' are not further clarified.

Through the introduction of media literacy in the educational system (Title III bis), the legislative proposal provides for a different approach to 'fake news', consisting in raising in young people a critical approach towards information obtained in internet. It is a long-term solution which needs more work from the legislators than a brief modification in the Education Code; however, it is a necessary and important step. Together with the establishment of the cooperation duty for online platforms, the media literacy provision outlines a multi-stakeholder approach by involving

⁷⁴ As explained at the beginning of this section, this legislative proposal was developed by Macron's party as a consequence of the 'fake news' and disinformation campaign that took place during his electoral campaign; the leading media responsible for the disinformation campaign are said to be Russia Today and Sputnik News, news agencies deemed to manipulate information for Russia's interests.

different actors of society, in this case online platforms and users, in the path towards finding a solution to disinformation.

With subjective and legally uncertain measures such as the ones just described, freedom of expression is at stake. A vague definition of ‘fake news’, enormous responsibilities allocated to judges, and censorship of foreign media can lead to an excessive control of media, especially during electoral time, which would negatively affect public debate and democracy. Although the freedom of expression interferences would be provided by law, they may not be proportional and necessary for the general interest. Accordingly, further attention should be put in a more specific definition of ‘fake news’, as well as in the powers conferred to judges and to the Council.

As mentioned above, the legislative proposal was rejected in the Senate’s first reading within the comitology examination by the Commission of Culture, Education and Communication. The rejection was based on the following arguments⁷⁵: the lack of clarity of the definition of ‘fake news’, which is said to ‘not allow to distinguish ‘fake news’ from simple errors, approximation or true information whose source cannot be revealed’; the ‘*dangerous*’ powers conferred to judges, perceived as risks for freedom of expression; and the powers given to the Council, ‘*of a delicate use and uncertain effects*’. In general, the measures established in the proposal are said to be not operational in the sense that they do not entail relevant measures for solving the ‘fake news’ issue: the proposal misses its aim by making believe that the problem will be solved with the proposed measures, while the disinformation issue is not tackled at its source, and by targeting a topic with important implications for public freedoms without reaching a minimum consensus, and thus potentially altering trust towards public authorities.

On top of this, France already has legislative texts which may be sufficient to cover the problems posed by ‘fake news’, a fact that has been highlighted by critics of the current proposal as well as by the Commission of Culture, Education and

⁷⁵ The Report is available at <http://www.senat.fr/rap/l17-677/l17-677.html>

Communication, and other commentators⁷⁶. The Electoral Code, the Law on Freedom of Freedom of the Press, the Criminal Code, the Monetary and Financial Code, the Consumer Code, and the Commercial Code include provisions concerning ‘fake news’ and its effects, such as libel, defamation, false information spread for influencing financial markets, ‘montage’, and false information regarding damages or accidents. The most notable existing provision is Article 27 of the Law on Freedom of the Press, which punishes with fines the publication, dissemination or reproduction of ‘fake news’, defined as ‘*news fabricated, forged or falsely attributed to a third party, having disturbed, or likely to have disturbed, public order*’. Indeed, if the existing legislation was strictly applied, ‘fake news’ would most probably be enough regulated. With a specific provision punishing ‘fake news’, a new law should only be introduced if the existing regime proved insufficient or inaccurate.

The proposal is currently being discussed by a Joint Committee (*Commission Mixte Paritaire*) which will try to draft a compromise text; let us wait and see what the developments bring to this legislative proposal, how the most problematic provisions for public freedoms are solved, and which is the final outcome of the procedure.

4.2. Germany

a. Context

In Germany, the growing dissemination of hate crime and other criminal content in social networks, showed by official statistics in 2016, the experience of the US 2016 presidential elections and the spread of ‘fake news’ with xenophobic content spreading rumours and false alarms, triggered a legislative proposal after the Ministry of Justice concluded that hate crimes and ‘fake news’ had to be combated properly⁷⁷. Brought to the Bundestag in April 2017 by the Federal Government, the

⁷⁶ For a good illustration of the existing laws applicable to ‘fake news’, see Le Point’s article (in French): Neuer, L. (2018, February 6). Fake news: appliquons nos lois!. *Le Point*.

⁷⁷ The information about the context of the NetzDG was obtained from news articles and official documents in English, due to the lack of understanding of the German language. A reliable report explaining the origins of the Act and statistics on illegal content online and ‘fake news’ in Germany, used for this specific section, is: Holznagel, B. (2017) *Legal Review of the Draft Law on Better Law Enforcement in Social Networks*. Organization for Security and Co-operation in Europe, Office of the Representative on Freedom of the Media.

Act to Improve Enforcement of the Law in Social Networks⁷⁸ (Network Enforcement Act, NetzDG or *the Act*) was approved in June of that same year, entering partially into force in October 2017, and fully on the 1st January 2018. It addresses ‘hate crime’ and ‘fake news’ in social networks.

b. Analysis

The Network Enforcement Act tackles unlawful content in social media through a system based on the providers of social networks themselves, who are responsible for the establishment of a complaints procedure, and for the handling of those complaints⁷⁹. The most relevant provisions of the Act, namely Sections 3 and 4, lay down a procedure for the examination of the unlawful content complaints where the provider of the social network is to assess the lawfulness of that content, deciding on its removal or blockage from the network. If such procedure is not followed, or it is not followed correctly, the provider may face fines of up to 50 million euros. Law enforcement is essential for the fight against ‘fake news’; however, the system enshrined in the German law endangers public freedoms. The legal issues regarding fundamental rights and freedoms posed by the Network Enforcement Act will now be explained and assessed⁸⁰.

The definition of ‘social network’ (Section 1: *‘telemedia service providers which, for profit-making purposes, operate internet platforms which are designed to enable users to share any content with other users or to make such content available to the public’*), on which the rest of the Act is built on, is very broad. Two terms are especially problematic: ‘for profit-making purposes’, and ‘sharing any content with other users’ or ‘making content available to the public’. The former is not further explained and therefore it remains unclear which criteria applies and how profit and non-profit-making platforms are distinguished. As to the latter, it is unclear what constitutes ‘making content available’: the content is not required to be publicly

⁷⁸ Original title in German: *‘Netzwerkdurchsetzungsgesetz’*.

⁷⁹ For a descriptive analysis of the Act, go to Annex II of this work.

⁸⁰ The Network Enforcement Act has also raised concerns on its compliance with European law, in particular the E-Commerce Directive and related data protection provisions, which will not be assessed in this work for they fall outside the scope of this research. For a study on such aspects, see, for example: Spindler, G. (2017). Internet Intermediary Liability Reloaded – The New German Act on Responsibility of Social Networks and its (In-) Compatibility with European Law. *Jipitec*, 8(2), 166-179.

available, and therefore emailing and cloud-sharing may fall within the scope of the NetzDG. This term potentially brings a wide range of platforms under the sphere of the Act: email, instant messaging, gaming, and file storage providers, as well as 'traditional' social media websites are bound to fall under the umbrella of 'social network' as defined in the Network Enforcement Act. Further, the reference to 'two million registered users' as a minimum number for the application of the main provisions of the law does not specify the measurement of those users: no guidance is provided as to when will a user be considered 'registered' or which standards will be used for that matter. This ambiguous and imprecise definition of 'social network' creates significant legal uncertainty as to the personal scope of the Act; furthermore, its broadness may entail a profound impact on users' privacy and freedom of expression and opinion inasmuch as the majority of social networks used by the general public on a daily basis fall within the definition provided in the law.

Section 3 places an obligation upon social network providers to assess and take down unlawful content. The list of unlawful content covered by the NetzDG, consisting in twenty criminal offences, is very large. While it includes offences that demand different levels of protection, all of them are equally treated in the Act, which raises concerns about the adequacy and proportionality of the measure. As to the process for complaining about unlawful content, it is remarkable that no means to challenge content removal decisions is foreseen: the network's resolution is final and not subject to appeal. Regarding the removal and blocking provisions, the question is: How will a social network assess the (un)lawfulness of content, and under which standards will the distinction between 'manifestly unlawful' and simply 'unlawful' content be made? Again, legal uncertainty comes back at this point, and the liability threshold is unclear as the assessment of those terms is imprecise. The short deadlines for social networks providers to determine the (un)lawfulness of content in either 24 hours or 7 days entails another difficulty within the procedure, as it is complicated to examine all the aspects to be considered in such assessment within such a short period of time.

The procedural regime chosen by the German legislator is based on a private enterprise, the social network provider, being the arbiter of legality and controlling

online content. On the one hand, the assessment of potentially unlawful content takes place on the basis of a notice provided by any party, without a court order or the involvement of any public authority. On the other hand, it is the provider of the social network who analyses, assesses and decides on the (un)lawfulness of the content in order to decide on its blockage or removal. Having a private actor decide on the content of public speech entails risks for freedom of speech and for democracy, inasmuch as decisions on a public freedom are left in the hands of an entity whose actions are not guided by ‘the common good’, and whose values and standards may not be beneficial for the society as a whole. The NetzDG provides for the outsourcing of content control, entailing undue interference by private enterprises as to the right to freedom of expression and privacy.

The sanctions imposed to social network providers for failing to fulfil the requirements of the Act, or for fulfilling them wrongly, consist in fines of up to 500,000, 5 million or 50 million euros. These high fines raise proportionality concerns: is it reasonable and necessary for the economic sanctions to be that high? This aspect of the Act is indeed one of the most widely criticized⁸¹. Such amounts of money would represent a relevant economic burden for all social networks, even the biggest ones, which, in turn, may lead to over-compliance and arbitrary censorship in order to avoid those fines. In this regard, it is remarkable that only ‘under-blocking’ of content is to be fined, while ‘over-blocking’ remains unsanctioned.

The Network Enforcement Act does not provide an appeal procedure: there is no mechanism for users whose content is removed to assert their rights. Considering the risk of over-compliance and the dangers to freedom of speech introduced by this law, the lack of opportunity for appealing a content removal decision is worrying and may go against the right to an effective remedy. In the same line, the procedure for failure to remove or block content does require intervention of public authorities, but

⁸¹ For some illustrative critiques, see, for example: Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. (2017). *High Commissioner for Human Rights*; Radsch, C. (2017, April 20); Proposed German legislation threatens broad internet censorship. Committee to Protect Journalists; Proposed German Legislation threatens free expression around the world. (2017, April 20). Global Network Initiative; Greenfield, H. (2017, May 22). European Civil Society and Technology Industry Associations ask European Commission to act on German Hate Speech Law. Computer & Communications Industry Association.

the possibility for any oral hearing and for appealing the Court's decision is specifically excluded. This way, the Act incurs in omission of fundamental procedural rights by not granting an appeal procedure. Furthermore, no sanctions are foreseen for the persons or organisations who committed the online offence: there is no individual responsibility regime for the creation or dissemination of the unlawful content. While the sanction is the removal or blocking of the content by the service provider, the lack of an individual responsibility regime does not address the problem at its source as the producers of that unlawful content, who are ultimately responsible for it, are not judicially persecuted.

The NetzDG has been widely criticised by fundamental rights organisations, academics, public opinion and public authorities themselves. Although legislative efforts to increase transparency through user notification and reporting by social media providers are laudable, the Act entails a number of shortcomings difficult to overcome, which make it complicated for the text to comply with fundamental right standards. The NetzDG outsources the problem of dealing with hate speech to the providers of social networks. Such private companies would rather be too careful and delete more than necessary in order to avoid fines and streamline the process. In short, the main issues stemming from the NetzDG are: proportionality as regards the material scope of the Act and the system of regulatory fines, risk of censorship because of the system of content control, outsourcing of law enforcement, and lack of appeal procedure, which in turn cause problems to the fundamental right of freedom of speech. On top of all these remarks, we must keep in mind that the NetzDG is not a 'fake news' law but one punishing unlawful content. Even though the content of 'fake news' sometimes incurs into illegality, its characteristic feature is its falsity and intention to deceive, and not its unlawfulness. The Act may be useful for tackling illegal speech online, and, when the content of a 'fake news' is unlawful, consequently prove appropriate for taking measures against that specific piece of information. However, it does not provide an adequate legal response to deal with disinformation.

5. European Union

At EU level, the European Commission is addressing ‘fake news’ in the context of its Digital Single Market strategy and, more specifically, within the policy fields ‘supporting media and digital culture’ and ‘fake news’; the major action on our topic is the ‘Communication on Online Disinformation’. Released in April 2018, this document was preceded by a High Level Expert Group on Fake News and Online Disinformation, who delivered a Report⁸² where the disinformation phenomenon is analysed; a public consultation process⁸³; a ‘Study on the digital transformation of news media and the rise of disinformation’ by the Joint Research Centre⁸⁴; dialogues with stakeholders⁸⁵; and a Eurobarometer opinion poll⁸⁶. The Communication builds on that expertise to put forward an action plan and self-regulatory tools to tackle the ‘fake news’ issue.

As a Commission Communication, it is a mere policy document with no legal effect⁸⁷. However, it does show the will of the Commission to address ‘fake news’, and explains the institution’s view on the topic. Above all, the use of phrase ‘fake news’ is rejected, using instead the term ‘disinformation’, defined as ‘*verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm*’. After an assessment of the context, causes and consequences of the spread of disinformation, a number of specific measures to tackle disinformation online are proposed, such as the development of an EU-wide Code of Practice on Disinformation, the creation of an independent European network of fact-checkers, the launch of a European Online Platform on Disinformation, the promotion of

⁸² European Union (2018): European Commission, A multi-dimensional approach to disinformation. *Report of the independent High Level Group on fake news and online disinformation*.

⁸³ European Union (2018): European Commission, *Summary report of the public consultation on fake news and online disinformation*.

⁸⁴ Martens, B., Aguiar, L., Gómez-Herrera, E., & Mueller-Langer, F. (2018). *The digital transformation of news media and the rise of disinformation and fake news – An economic perspective*. Digital Economy Working Paper 2018-02, JRC Technical Reports.

⁸⁵ European Union (2017): European Commission, *Recordings of the multi-stakeholder conference on fake news*; European Union (2018): European Commission, *Recordings and presentations of the colloquium on Fake News and Disinformation Online*.

⁸⁶ European Union (2018): European Commission, *Final results of the Eurobarometer on fake news and online disinformation*.

⁸⁷ For a descriptive analysis of the regulatory approach, go to Annex III of this work.

voluntary online identification systems, supporting Member States during election processes, promotion of media literacy, of quality journalism, and the draft of a Coordinated Strategic Communication Policy.

Freedom of expression is emphasized throughout the document, reminding all actors of the need to observe this fundamental freedom in all measures and actions involving online disinformation. Despite being a soft law measure, it provides clear guidance as to the path the EU is to follow in its fight against disinformation. A multi-stakeholder approach is defined, rejecting any attempt to censor content, while actors are called for efforts to counter interference in elections, tech platforms to share data, emphasis to be put in media literacy campaigns, as well as in cross-border research on disinformation. The Commission's roadmap is clear: it is about governance, not regulation, and about developing tools for society to be able to face disinformation in a critical and active way. However, although no specific risks for freedom of speech stem from the Communication, two measures are to be taken with precaution, namely ensuring secure election processes and supporting high quality journalism. The former should be carefully developed, as the danger of creating a non-existing social alarm is high if the assessment of the electoral risk is not properly assessed. As to the latter, inclusive and country-specific standards should be established for ensuring a journalistic variety; otherwise, 'fostering quality journalism' may mean promoting specific views or opinions, which would in turn damage democracy as well as freedom of opinion.

Following the Commission's mandate, the multi-stakeholder forum on online disinformation, composed of online platforms, leading social networks, advertising industry and academics, delivered a draft Code of Practice to Tackle Online Disinformation on July 2018⁸⁸. Considering the Commission's Communication, the Code sets out specific commitments within five main areas:

- Scrutiny and improvement of ad placements through the implementation of policies to demonetize disinformation accounts;

⁸⁸ European Union (2018): European Commission, *EU Code of Practice on Disinformation*.

- Political advertising and issue based advertising: the transparency of these types of advertising will be promoted to enable users to clearly distinguish and identify promoted content, while upholding fundamental rights;
- Integrity of services: it will be guaranteed by including safeguards against disinformation such as account identification and mechanisms to signal bot-driven interactions;
- Empowering consumers: content removal or blocking is rejected, prioritizing instead investment in products, technologies, programs, features and tools which facilitate discovering and accessing different news sources representing alternative points of view;
- Empowering the research community by granting access to platforms' data which are necessary to continuously monitor online disinformation.

The Code is being assessed by the Sounding Board of the forum, who will deliver its opinion by early September; a final Code of Practice will be adopted by the end of September. The current version of the code establishes specific commitments for the Signatories, and as such translates the theoretical proposals of the Communication into practical measures. Once again, the respect towards freedom of expression is guaranteed. However, certain terms, such as 'transparency', 'rules for bots', and 'quality content', remain unclear and should be further defined in the final version of the document in order to avoid uncertainty. This is the EU's approach so far. The path opened by the Communication will continue to be developed, implemented and monitored, while other institutions may as well decide to take part in the fight against disinformation.

6. Theory in practice

So far, three regulatory approaches to disinformation have been assessed. Now their main aspects will be broadly compared and assessed against the theory developed in the first chapter in order to reach a conclusion on the suitability of each approach to address 'fake news', considering freedom of expression as the evaluative standard.

6.1. Comparison

Both France and Germany take a traditional legal approach to the ‘fake news’ phenomenon by developing national laws focused on content blocking and removal. The two laws are however extremely different. While the French proposal is a specific ‘fake news’ law which targets the spread of disinformation, especially in electoral periods, through control by the judiciary and other public authorities, the German Act addresses illegal content online by enhancing the application of criminal law within online platforms through a system of content control where the responsibility lies on the social network providers, bound to be sanctioned with administrative fines in case of breach of the content control mechanisms. In turn, both approaches entail risks for fundamental freedoms, such as freedom of expression, by inducing to censorship and establishing legally uncertain provisions. The EU, for its part, takes a multi-stakeholder approach focusing on the different sources of the issue, namely online platforms as disseminating networks, anonymity of users, and quality journalism as the cornerstone of a diversified and qualified news system. The three approaches provide for the improvement of media literacy through education and awareness campaigns, as well as for social media and algorithmic transparency.

Although the European system provides for a more complete ‘solution’ to disinformation, the national laws may approach it in a more effective way in the short-term by directly tackling the ‘fake news’ published online. However, their effectiveness may be invalidated by the risks they pose to freedom of expression. Such risks will now be assessed using the theory explained in the first section of this work.

6.2. Regulatory approaches and ‘fake news’ theory

a. France

Under the French legislative proposal, a judge may order the removal of a piece of information after deciding, within 48 hours, it constitutes false information likely to alter the fairness of the forthcoming election. The Audiovisual Council may

suspend an emission agreement because a media agency is under the influence of a foreign State, who is deliberately spreading false information bound to distort the fairness of such election. These two situations are covered by the protection of the right to freedom of expression inasmuch as it is proven that the factual content of the piece of information is true. In the first case the content may be true or false. However, in the second case, all the information spread by a news agency is taken into consideration. It is possible for a certain news to be untrue, but a blanket ban on the emission of a media agency builds on the idea that *all* the information spread by it are false, which is quite unlikely. In this sense, the content of the second case would be covered by the protection of the right to freedom of expression; it also falls within the scope of the second indent of Art. 11 EUCFR on media freedom.

As to the content restrictions themselves, although they are prescribed by law, the norm is not 'formulated with sufficient precision to enable the citizen to regulate his conduct and foresee the consequences which a given action may entail'. The 'fake news' definition provided by the French legislative proposal is too vague and uncertain. This uncertainty keeps 'fake news' protected by freedom of expression in France under the current legislative proposal. Regarding the proportionality test, transparency of political life and electoral public debate can be identified as 'pressing social need' in both situations. Nevertheless, the proportionality of the interferences raises doubts. In the first case, there may be less intrusive and more adequate measures than the removal of information; the specific content is to be assessed on a case by case basis, taking into consideration all its characteristics and further details. In the second case, the interference is disproportionate: neither the transparency of political life nor the public electoral debate justifies the means of rejecting the emission of a whole news agency.

The measures set up by the French legislative proposal are not proportional to the objective of guaranteeing a proper development of the electoral debate. The tackled content falls within the protective scope of the right to freedom of expression as developed by the CJEU unless specific factual information is proven to be false. While the suspension of emission agreements is disproportionate, the measures taken by judges on a specific piece of information are to be analysed on a case by

case basis taking into consideration all the characteristics and circumstances of the case. On top of this, as explained in Section 2 of this work, the material scope of the proposal is too vague and broad, while the procedural system based on judicial power provides for an important degree of legal uncertainty.

b. Germany

With the German Network Enforcement Act, a social network provider who receives a complaint about a post containing xenophobic, racist and sexist remarks about a certain group of people, may remove it within 24 hours because of its manifest unlawfulness. In this case, the content is unlawful and therefore not covered by freedom of expression. No further assessment of the restrictions established by the NetzDG is required as the Act deals with criminal offences which are, *per se*, outside the scope of freedom of expression. Indeed, the German approach falls outside the scope of freedom of expression and thus cannot be analysed with freedom of expression standards. However, as explained in Section 3.3.b, even if the information that falls under the scope of the NetzDG is not covered by freedom of expression, the restrictions imposed should be assessed against the criteria of Art. 52(1) EUCFR. The determination of illegality of the content may contravene freedom of expression by setting up illegitimate or unproportioned standards.

In that sense, the determination of the (un)lawfulness of the content under the Network Enforcement Act lies on the social network provider, and guidelines for its assessment are not provided other than the Criminal Code specifications. The personal scope of the Act is also not precise. Therefore, the content restrictions go against freedom of expression because the law is not formulated with sufficient precision, and leaves the authorities implementing the law with too much latitude. The NetzDG is not sufficiently precise to guarantee a sound respect for freedom of expression.

c. European Union

As to the Commission's approach, the documents which compose the anti-disinformation strategy expressly emphasize their respect to freedom of expression

and, as such, do not pose any risk to such fundamental freedom. However, certain terms of the Code of Practice remain unclear and should be further clarified in the final version of the document in order to avoid legal uncertainty. Accordingly, the compliance of future regulatory arrangements with freedom of expression standards is to be assessed when the documents are made public.

d. Outcome

Only France and the EU provide an appropriate approach to regulating 'fake news' from a legislative point of view. The German NetzDG tackles unlawful online content, and is therefore by no means an accurate law for fighting against disinformation, although the fight against 'fake news' is one of its objectives. However, the Act is not respectful towards freedom of expression even if its aim is the fight against illegal speech online. The French legislative proposal entails important hindrances for freedom of expression, which in turn endangers democracy, especially by allowing the suspension of emission agreements. Finally, the EU strategy provides for a multi-stakeholder approach which doesn't entail, so far, obstacles for freedom of expression as it is based on soft law measures which do not directly tackle content but rather establish a long-term system for the improvement of the news quality and citizens' critical skills.

Although the three systems are different in their approach to 'fake news' and in the solutions they propose, all deal with the same reality, namely disinformation within the information society. As a phenomenon stemming from the Internet, its cross-border element provides for the importance of an equally cross-border approach, and therefore coordination and complementarity of regulatory systems at EU level is crucial. While the EU strategy for tackling disinformation does take a cross-border approach, the two national legislative pieces are appropriate for dealing with specific pieces of information, although respect towards freedom of expression is to be reconsidered in the French proposal, and the German Act is to be perceived as a complementary legislative measure inasmuch as it tackles illegal content but not 'fake news' as such. The EU system should also be considered at national level in order to implement the multi-stakeholder, long-term approach at different governance

levels, not only supranationally, and to tackle the disinformation problem at its source, not only the 'fake news' specific phenomenon.

7. Conclusion

This work has found that 'fake news' is information characterised by its falsity and its intention to deceive, whose spread is promoted by the specific aspects of virtual communication, information society and post-truth reality. While EU Member States are dealing with 'fake news' through different approaches, France and Germany have developed legislation aimed at fighting against 'fake news'. The EU, on its part, is addressing disinformation through a broad, multi-stakeholder and cross-border strategy. As the phenomenon involves online content, the main concern of a direct legal intervention tackling 'fake news' is the restriction of freedom of expression, which the two national legislations put at risk to different extents.

This public freedom is certainly at stake with the current version of the French legislative proposal, which sets up disproportionate content control mechanisms built on a vague, uncertain, and incorrect definition of false information. Freedom of expression is in principle not at risk with the German Act inasmuch as it tackles illegal content, which is not covered by the protection awarded by freedom of expression; however, the content restrictions it provides for are imprecise, which in turn make the NetzDG breach the freedom of expression provision. As to the EU approach, the documents which compose the anti-disinformation strategy expressly emphasize their respect to freedom of expression and, as such, do not pose any risk to such fundamental freedom. Nevertheless, the compliance of future regulatory arrangements with freedom of expression standards is to be assessed when the documents are made public.

Freedom of expression does neither protect false information nor illegal content online. It is the factual content of news which determines its coverage by the protection of freedom of expression, a defining line which can be complicated to determine, especially regarding information which is difficult to be proven, allegations

or statements with a slim factual basis or based on unconfirmed allegations or rumours. The precision and accuracy of the legislation plays a key role for freedom of expression, inasmuch as any restriction must be prescribed by a sufficiently precise law; a condition which has proven to be difficult to fulfil by policy makers when legislating about 'fake news'. Finally, it is proportionality that poses most freedom of expression problems for these laws: in general, the analysed measures involving content control are not relevant, sufficient, and proportionate to the legitimate aim pursued.

The current state of the regulation of 'fake news' is therefore nationally fragmented, while the EU is trying to establish a cross-border approach based on media literacy, involvement of multiple actors, and other long-term actions. Any legislation aiming at content control through any means has so far proved to put at risk fundamental freedoms such as freedom of expression. The novelty and 'popularity' of 'fake news' explains the multiplicity of regulatory approaches and their conflict with freedom of expression: law is trying to respond, but legislators are not used to the challenging characteristics of the information society and digital age. Legislative design is not, yet, adapted to virtual phenomena such as 'fake news'. We are currently witnessing a trial-and-error period where fundamental freedoms are at stake and should be defended more than ever in order to obtain regulatory systems where such freedoms are respected and guaranteed.

When regulating 'fake news', it should be kept in mind that it is not about good or bad information, it is about false information. The real problem is disinformation. 'Fake news' is created, spread, and believed because of the current characteristics of society and the information system. It is a *bad* consequence of our use of technology because reality is being based on false factual information or lies. Further, anti-disinformation laws should not tackle illegal speech, and *vice versa*: false information does not mean unlawful content and therefore different regulatory approaches are needed for such different issues. While law may be an appropriate short-term approach for tackling specific pieces of false information, traditionally conceived law cannot address disinformation. A governance and cross-border approach is necessary for answering the challenge of disinformation, and thus the role of the EU

as a regulatory actor will be key for the correct articulation of an information system where freedom of expression and the development of a democratic culture are respected and ensured.

The current problem of disinformation is yet another challenge posed by technological developments and materialised through 'fake news'. Rather than establishing detailed legislation aimed at specific pieces of legislation, which, as we have seen, may fall short of legal certainty because of the novelty of the topic, regulatory reactions should focus on the enforcement of already existing legal provisions, on the one hand, and on the reinforcement of fundamental rights and values such as freedom of expression and democracy. Such approach would consolidate the democratic system at all its levels and establish strong foundations for the information society to develop on the basis of respect and understanding towards fundamental rights, freedoms and values, and the phenomena that come with technological developments. The importance of fundamental rights should be emphasized in any regulatory approach related to new technologies: the future of our society lies in our capacity to adapt such values to new challenges, and freedom of expression is a high value which must be always protected.

Bibliography

1. Primary sources

1.1. Legislation

European Union (2017): European Commission, *Communication on Fake news and online disinformation* initiative, 9 November 2017. Ref. Ares (2017) 5489364 – 10/11/2017. Available at https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5489364_en

European Union (2017): European Commission, *Recordings of the multi-stakeholder conference on fake news*. Available at <https://ec.europa.eu/digital-single-market/en/news/recordings-multi-stakeholder-conference-fake-news>

European Union (2018): European Commission, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Tackling online disinformation: a European Approach*, 26 April 2018, COM(2018) 236 final. Available at <https://ec.europa.eu/digital-single-market/en/news/communication-tackling-online-disinformation-european-approach>

European Union (2018): European Commission, *A multi-dimensional approach to disinformation. Report of the independent High Level Group on fake news and online disinformation*. doi:10.2759/739290

European Union (2018): European Commission, *Summary report of the public consultation on fake news and online disinformation*. Available at <https://ec.europa.eu/digital-single-market/en/news/summary-report-public-consultation-fake-news-and-online-disinformation>

European Union (2018): European Commission, *Recordings and presentations of the colloquium on Fake News and Disinformation Online*. Available at

<https://ec.europa.eu/digital-single-market/en/news/recordings-and-presentations-colloquium-fake-news-and-disinformation-online>

European Union (2018): European Commission, *Final results of the Eurobarometer on fake news and online disinformation*. Available at <https://ec.europa.eu/digital-single-market/en/news/final-results-eurobarometer-fake-news-and-online-disinformation>

European Union (2018): European Commission, *EU Code of Practice on Disinformation*. Available at http://ec.europa.eu/information_society/newsroom/image/document/2018-29/msf_on_disinformation_17_07_2018_-_proofread_99F78DB7-9133-1655-990805803CDCCB67_53545.pdf

Netzwerkdurchsetzungsgesetz (Act to Improve Enforcement of the Law in Social Networks). Official English version available at https://www.bmfv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?__blob=publicationFile&v=2

Proposition de loi relative à la lutte contre la manipulation de l'information (legislative proposal regarding the fight against information manipulation) adoptée par l'Assemblée Nationale en première lecture. Available at <http://www.assemblee-nationale.fr/15/ta/ta0151.asp>

Strafgesetzbuch (German Criminal Code). Official English version available at https://www.gesetze-im-internet.de/englisch_stgb/

1.2. Case-law

Court of Justice of the EU

Judgment of 18 June 1991, *Ellinki*, C-260/89, EU:C:1991:254.

Judgment of 6 March 2001, *Connolly*, C-274/99P, EU:C:2001:127.

Opinion of Advocate General of 8 May 2008, *Satamedia*, C-73/07, EU:C:2008:266.

Opinion of Advocate General of 8 September 2009, *Commission v. Technische Glaswerke Ilmenau*. C-139/07P, EU:C:2009:520.

Opinion of Advocate General of 24 November 2010, *MSD Sharp*, C-316/09, EU:C:2010:712.

Opinion of Advocate General of 5 May 2011, *Mesopotamia Broadcast*, C-244/10 and C-245/10, EU:C:2011:284.

Judgment of 6 September 2011, *Patriciello*, C-163/10, EU:C:2011:543.

Judgment of 24 November 2011, *Scarlet v. SABAM*, C-70/10, EU:C:2011:771.

Judgment of 22 January 2013, *Sky Österreich*, C-283/11, EU:C:2013:280.

Judgment of 27 March 2014, *UPC Telekabel Wien*, C-314/12, EU:C:2014:192.

[European Court of Human Rights](#)

Sunday Times v. UK, no. 6538/74, ECHR 1979.

Petra v. Romania, no. 27273/95, ECHR 1998.

Feldek v. Slovakia, no. 32686/96, ECHR 2001.

Jerusalem v. Austria, no. 26958/95, ECHR 2001.

Dichand and otheers v. Austria, no. 29271/95, ECHR 2002.

Ukrainian Media Group v. Ukraine, no. 72713/01, ECHR 2005.

2. Secondary sources

2.1. Books

Castells, M. (2009). *The rise of the network society*. Oxford: Wiley-Blackwell.
doi:10.1002/9781444319514

Huyghe, F. (2018) *Fake news: la grande peur* (Influences & conflits). Versailles : VA Press.

Mangan, D., & Gillies, L. (Eds.). (2017). *The legal challenges of social media* (Elgar law, technology and society). Cheltenham, UK: Edward Elgar Publishing.

Pollicino, O. & Bassini, M. (2014). Free speech, defamation and the limits to freedom of expression in the EU: a comparative analysis. In Savin, A. & Trzaskowski, J. (Eds.), *Research Handbook on EU Internet Law*. Cheltenham, UK: Edward Elgar Publishing. doi:10.4337/9781782544173.00032

Rowland, D., Kohl, U. & Charlesworth, A. (2017). *Information technology law*. Abingdon, Oxon: Routledge.

Savin, A., & Trzaskowski, J. (Eds.). (2014). *Research handbook on EU Internet Law* (Research handbooks in European law). Cheltenham, UK: Edward Elgar.

Webster, F. (2014). *Theories of the information society*. Abingdon, Oxon: Routledge.

Woods, L. (2014). Article 11 – Freedom of Expression and Information. In Peers, S., Hervey, T., Kenner, J., & Ward, A. (Eds.). (2014). *The EU Charter of Fundamental Rights: A commentary*. Oxford: Hart Publishing.

2.2. Academic Articles

Balkin, J. M. (2004). Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society. *New York University Law Review*, 79(1), 1-58.

- Balkin, J. M. (2004). How rights change: freedom of speech in the digital era. *Sydney Law Review*, 26(1), 5-16.
- Burshtein, S. (2017). The true story on fake news. *Intellectual Property Journal*, 29, 397-439.
- Cavaliere, P. (2012). An easter egg in the charter of fundamental rights: The European Union and the rising right to pluralism. *International Journal of Public Law and Policy*, 2(4), 357-396. doi:10.1504/IJPLAP.2012.049333
- Ferrara, E. (2017). Disinformation and social bot operations in the run up to the 2017 French presidential election. *SSRN Electronic Journal*, (2017). doi:10.2139/ssrn.2995809
- Francis, C. (2018). Trial of Truth: Law and Fake News. *Edinburgh Student Law Review*, 3, 100-113.
- Gillen, M. (2012). Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace. *International Journal of Law and Information Technology*, 20(2), 147-149.
- Gonzalez, A., & Schulz, D. (2017-2018). Helping Truth with Its Boots: Accreditation as an Antidote to Fake News. *Yale Law Journal Forum*, 127, 315-336.
- Guess, A., Nyhan, B., & Reifler, J. (2018). *Selective exposure to misinformation: Evidence from the consumption of fake news during the 2016 US presidential campaign*. European Research Council. Retrieved from <https://www.dartmouth.edu/~nyhan/fake-news-2016.pdf>
- Hill, R. (2014). The internet, its governance, and the multi-stakeholder model. *Info*, 16(2), 16-46. doi:10.1108/info-05-2013-0031
- Iglezakis, I. (2016). The Legal Regulation of Hate Speech on the Internet and its Conflict with Freedom of Expression. *SSRN Electronic Journal*, (2016). DOI:10.2139/ssrn.2890337

- Klein, D. O., & Wueller, J. R. (2017). Fake News: a legal perspective. *Journal of Internet Law*, 20(10), 5-13.
- Klonick, K. (2018). The New Governors: the People, Rules, and Processes Governing Online Speech. *Harvard Law Review*, 131(6), 1598-1670.
- Leerssen, P. (2015). Cut Out By The Middle Man: The Free Speech Implications Of Social Network Blocking and Banning In The EU. *JIPITEC*, 6, 99-119.
- McGonagle, T. (2017). "Fake news": False fears or real concerns? *Netherlands Quarterly of Human Rights*, 35(4), 203-209. doi:10.1177/0924051917738685
- Solum, L. B. (2008). Models of Internet Governance. *Illinois Public Law Research Paper No. 07-25; U Illinois Law & Economics Research Paper No. LE08-027*. Available at SSRN: <https://ssrn.com/abstract=1136825>
- Spindler, G. (2017). Internet Intermediary Liability Reloaded – The New German Act on Responsibility of Social Networks and its (In-) Compatibility with European Law. *Jipitec*, 8(2), 166-179. Retrieved from <https://www.jipitec.eu/issues/jipitec-8-2-2017/4567>
- Syed, N. (2017-2018). Real Talk about Fake News: Towards a Better Theory for Platform Governance. *Yale Law Journal Forum*, 127, 337-357.
- Taekema, S. (2018). Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice. *Law and Method*, 02. doi:10.5553/REM/000031
- Verstraete, M., Bambauer, D. E., & Bambauer, J. R. (2017). Identifying and Countering Fake News. *Arizona Legal Studies Discussion Paper*, 17-15. doi:10.2139/ssrn.3007971
- Voorhoof, D. & Cannie, H. (2010). Freedom of expression and information in a democratic society: The added but fragile value of the European Convention on Human Rights. *International Communication Gazette*, 72(4), 407-423. doi:10.1177/1748048510362711

2.3. Reports

Baron, S. & Crootof, R. (2017) Fighting Fake News Workshop Report. *The Information Society Project & The Floyd Abrams Institute for Freedom of Expression*, Yale University. Retrieved from https://law.yale.edu/system/files/area/center/isp/documents/fighting_fake_news_-_workshop_report.pdf

Bychawska-Siniarksa, D. (2017) Protecting the right to freedom of expression under the European Convention on Human Rights. A handbook for legal practitioners. *Council of Europe*. Retrieved from: <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>

Desigaud, C., Howards, O. N., Bradshaw, S., Kollanyi, B. & Bolsolver, G. (2017) *Junk News and Bots during the French Presidential Election: What Are French Voters Sharing Over Twitter In Round Two?* Retrieved from <http://comprop.oii.ox.ac.uk/wp-content/uploads/sites/93/2017/05/What-Are-French-Voters-Sharing-Over-Twitter-Between-the-Two-Rounds-v9-1.pdf>

Germany: The Act to Improve Enforcement of the Law in Social Networks. Legal Analysis (2017), Article 19. Retrieved from <https://www.article19.org/wp-content/uploads/2017/09/170901-Legal-Analysis-German-NetzDG-Act.pdf>

Holznagel, B. (2017) *Legal Review of the Draft Law on Better Law Enforcement in Social Networks*. Organization for Security and Co-operation in Europe, Office of the Representative on Freedom of the Media. Retrieved from <https://www.osce.org/fom/333541?download=true>

Martens, B., Aguiar, L., Gómez-Herrera, E., & Mueller-Langer, F. (2018). *The digital transformation of news media and the rise of disinformation and fake news – An economic perspective*. Digital Economy Working Paper 2018-02, JRC Technical Reports. Retrieved from <https://ec.europa.eu/jrc/sites/jrcsh/files/jrc111529.pdf>

Mandate of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. (2017). *High Commissioner for Human Rights*. Retrieved from <https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-DEU-1-2017.pdf>

2.4. Non-academic sources

Media Articles

Apa, E. & Bassini, M. (2017). Italy: Legislative proposal on fake news. *IRIS*. Available at <http://merlin.obs.coe.int/iris/2017/5/article27.en.html>

Chrisafis, A. (2018, January 3). Emmanuel Macron promises ban on fake news during elections. *The Guardian*. Available at <https://www.theguardian.com/world/2018/jan/03/emmanuel-macron-ban-fake-news-french-president>

Greenfield, H. (2017, May 22). European Civil Society and Technology Industry Associations ask European Commission to act on German Hate Speech Law. Computer & Communications Industry Association. Available at <http://www.cciainet.org/2017/05/european-civil-society-and-technology-industry-associations-ask-european-commission-to-act-on-german-hate-speech-law/>

Neuer, L. (2018, February 6). Fake news: appliquons nos lois!. *Le Point*. Available at http://www.lepoint.fr/chroniqueurs-du-point/laurence-neuer/fake-news-appliquons-nos-lois-06-02-2018-2192655_56.php

Radsch, C. (2017, April 20). Proposed German legislation threatens broad internet censorship. *Committee to Protect Journalists*. Available at <https://cpj.org/blog/2017/04/proposed-german-legislation-threatens-broad-intern.php>

Scuola, Boldrini e Fedeli presentano decálogo anti-bufale. Il progetto riguarderà 4,2 milioni di ragazzi. (2017, October 31). Ministero dell'Istruzione dell'Università e della Ricerca. Available at <http://www.miur.gov.it/-/scuola-boldrini-e-fedeli-presentano-decalogo-anti-bufale-il-progetto-riguardera-4-2-milioni-di-ragazzi>

Serhan, Y. (2018, February 24). Italy Scrambles to Fight Misinformation Ahead of Its Elections. *The Atlantic*. Available at <https://www.theatlantic.com/international/archive/2018/02/europe-fake-news/551972/>

Wardle, C. (2017, February 16). Fake News. It's Complicated. *First Draft News*. Available at <https://medium.com/1st-draft/fake-news-its-complicated-d0f773766c79>

El Congreso rechaza la iniciativa del PP para censurar las 'fake news' en internet (2018, March 13). *Público*. Available at <https://www.publico.es/politica/congreso-rechaza-iniciativa-del-pp.html>

Fake news: Five French election stories debunked. (2017, March 15). *BBC News*. Available at <https://www.bbc.com/news/world-europe-39265777>

Government announces anti-fake news unit. (2018, January 23) *BBC News*. Available at <https://www.bbc.com/news/uk-politics-42791218>

Proposed German Legislation threatens free expression around the world. (2017, April 20). Global Network Initiative. Available at <https://globalnetworkinitiative.org/proposed-german-legislation-threatens-free-expression-around-the-world/>

Understanding The Fake News Universe: A Guide To Fake News Terminology. (2016, December 15). *Media Matters*. Available at <https://www.mediamatters.org/research/2016/12/15/understanding-fake-news-universe/214819>

ANNEX I

French legislative proposal ‘regarding the fight against information manipulation’

Law description

The legislative proposal consists in the introduction of new articles and the modification of others within existing laws. The Electoral Code, the Law on the Freedom of the Press, and the Law on Confidence in the Digital Economy are modified. It also includes a specific provision on the cooperation duty of online platforms. The main features of each section will be now explained and assessed⁸⁹:

Modifications of the Electoral Code:

Article 1 - Legal tools for fighting against the spread of ‘fake news’ during electoral time are established:

- ‘Fake news’ is defined as ‘any allegation or imputation of an inaccurate or misleading fact’. This definition will be included in the Electoral Code;

- The transparency obligations of online platforms are strengthened: in order to preserve the ‘general interest’ attached to reliable and accurate information provided to citizens during elections, the operators of online platforms are to provide faithful, clear and transparent information concerning the forthcoming elections;

- During the electoral period, a judge will be able to take ‘any proportionate and necessary measures for stopping the diffusion’ of *‘false information likely to alter the fairness of the forthcoming election which is disseminated in a deliberate, artificial or automated and massive manner through a service of public online communication’*. For such objective, a new *voie de référé civil* aimed at ceasing the spread of ‘fake news’ is to be created. The judge will not act on her own motion, but

⁸⁹ Only the articles introducing relevant provisions for ‘fake news’ will be analysed. Those deemed ‘not relevant’ consist mainly on the introduction of words and references necessary at a technical and legislative level but not substantively important for this work.

on a referral from either the public ministry, or any candidate, political party or group, or any person with an interest to act. The judge will decide within 48 hours since the referral, and may decide to take any useful measure, '*proportionate and necessary*'. Referrals on this matter are to be brought before a high instance Court.

Modifications of the Law on the Freedom of Communication:

Article 4 – The High Audiovisual Council (*the Council*, from now onwards) can reject the request for an emission agreement if the diffusion of the media service entails a serious risk for, inter alia, the pluralism of freedom of opinion and thought, public order, and national defence or national interests. If a media is controlled by, or under the influence of, a foreign State and goes against national interests through the diffusion of false information, the Council will be able to unilaterally terminate the agreement authorising its emission;

Article 5 – The Council can suspend the diffusion of an audiovisual service controlled by, or under the influence of, a foreign State which is deliberately spreading false information bound to distort the fairness of the elections. The suspension of the emission agreement is to take place until the end of the electoral period.

Article 6 – The Council can remove the emission agreement of an audiovisual service controlled by, or under the influence of, a foreign State which undermines national interests.

Others

Article 8 bis – The cooperation duty of online platforms regarding the fight against the spread of 'fake news' is explained. They are to set up accessible and visible mechanisms for users to inform about false information, as well as other measures consisting in algorithm transparency, the fight against accounts massively disseminating false information, information on the identity of account holders, and on the nature, origin and methods of content dissemination, among others. The measures taken by online platforms are to be public.

Article 9 – The Council is bound to contribute to the fight against the spread of ‘fake news’. For such mission, it can issue recommendations for online platforms, and supervise the application and effectivity of their anti ‘fake news’ measures.

Article 9 bis B – Online platforms are to publish data on the functioning of their ‘recommendation algorithms’.

Article 9 bis – Online platforms, press agencies and other organisations liable to contribute to the fight against ‘fake news’ can conclude cooperation agreements on the matter.

Title III BIS – Modifies de Education Code introducing media and information into the education system.

ANNEX II

German ‘Act to Improve Enforcement of the Law in Social Networks’

Law Description

The objective of the law is to enhance the application of criminal law within the social media world. It is therefore not a specific ‘fake news’ law, but it is bound to tackle the ‘fake news’ issue by addressing the dissemination of content incurring into certain criminal offences, as exposed in the explanatory statement of the Act. The main features of the NetzDG will be now explained.

Scope (Section 1). The law applies to social networks, defined as ‘telemedia service providers which, for profit-making purposes, operate internet platforms which are designed to enable users to share any content with other users or to make such content available to the public’; the main provisions of the Act are only applicable to social networks with more than 2 million users in Germany. Platforms offering journalistic or editorial content as well as those enabling individual communication or the dissemination of specific content fall outside the scope of the Act. As to the material scope, shared or published content which fulfils the requirements of twenty criminal offences as defined in the Criminal Code is considered unlawful content. The list includes crimes against the State, the honour, and sexual self-determination, mainly⁹⁰.

⁹⁰ Exhaustive list of the criminal offences considered unlawful under the NetzDG: dissemination of propaganda material of unconstitutional organisations (Section 86 of the German Criminal Code); using symbols of unconstitutional organisations (Section 86a); preparation of a serious violent offence endangering the State (Section 89a); encouraging the commission of a serious violent offence endangering the state (Section 91); treasonous forgery (Section 100a); public incitement to crime (Section 111); breach of the public peace by threatening to commit offences (Section 126); forming criminal organisations (Section 129); forming terrorist organisations (Section 129a); criminal and terrorist organisations abroad, extended confiscation and deprivation (Section 129b); incitement to hatred (Section 130); dissemination of depictions of violence (Section 131); rewarding and approving of offences (Section 140); defamation of religions, religious and ideological associations (Section 166); distribution, acquisition and possession of child pornography, and distribution of pornographic performances by broadcasting, media services or telecommunication services (Section 184b in connection with 184d); insult (Section 185); defamation (Section 186); intentional defamation (Section 187); threatening the commission of a felony (Section 241); forgery of data intended to provide proof (Section 269).

Reporting obligation (Section 2, only applicable to social networks with more than 2 million users). Providers of social networks which receive more than 100 complaints per year about unlawful content are obliged to produce a bi-annual report on the handling of such complaints. The report has to include quantitative and qualitative data on the organization of the complaint management system and the measures taken as a response to complaints.

Handling of complaints about unlawful content (Section 3, only applicable to social networks with more than 2 million users). Social networks are required to set up procedures for submitting and handling complaints about the unlawful content mentioned above. The procedure must ensure that the provider of the social network takes immediate note of the complaint and checks whether the content reported in the complaint is unlawful and subject to removal or whether access to the content must be blocked. If the content is manifestly unlawful, the social network provider shall remove or block it within 24 hours to the reception of the complaint. The access to other unlawful (not *manifestly* unlawful) content shall be removed or blocked 'immediately and generally within 7 days of receiving the complaint'. This time limit may be exceeded (1) if the decision regarding the unlawfulness of the content is dependent on the falsity of a factual allegation or is clearly dependent on other factual circumstances, when the user can be given an opportunity to respond to the complaint before the decision is rendered, or (2) if the social network is allowed to refer the decision regarding unlawfulness to a recognised self-regulation institution within seven days of receiving the complaint, agreeing to accept the decision of that institution. In case of removal, the content is to be retained and stored. Furthermore, the person submitting the complaint and the user are to be notified about any decision, and monthly checks on the procedure are to be established.

Provisions on regulatory fines (Section 4). Fines are to be imposed to social networks which fail to fulfil the provisions of Sections 2, 3 or 5:

- Fines of up to 500,000€ may be imposed if the provider fails to name a person authorised to receive service in the Federal Republic of Germany or fails to name a person in the Federal Republic of Germany authorised to receive information requests from German law enforcement authorities or

fails to respond to requests for information while acting as the person authorised to receive service.

- Fines of up to 5 million € may be imposed for failing to produce the yearly report stipulated in Section 2 of the Act, for the incorrect, incomplete or untimely preparation or publication of this report, or for breaches of the procedural obligations regarding the procedure for handling complaints (Section 3). Moreover, Section 30(2), third sentence, of the Ordnungswidrigkeitengesetz (Act on Regulatory Offences) applies, which means that the violation of the bill is classified as a regulatory offence that can justify a fine up to ten times the maximum fine. Under this provision, social networks that violate the bill may therefore be subject to a maximum fine of 50 million euros.

Person authorised to receive service in the Federal Republic of Germany (Section 5). The provider of social networks shall appoint a person within Germany who is authorised to receive service of process in regulatory fine and civil proceedings, and publish details of this person on their website. They must as well name a person in Germany authorised to receive information requests from law enforcement authorities. Violations of the duty to name a person authorised to receive service or information requests can also result in a fine.

ANNEX III

Communication from the Commission – Tackling online disinformation: a European Approach

Description

Basic points of the Communication, outlining the specific measures which the Commission intends to take for tackling online disinformation:

1. Development of an EU-wide Code of Practice on Disinformation in order to ensure the transparency of sponsored content, intensify the efforts to close fake accounts, clarify the functioning of algorithms and enable third-party verification, among other objectives. The Commission will call for a multi-stakeholder forum on disinformation, which should develop the Code by July 2018;

2. Creation of an independent European network of fact-checkers for the establishment of common working methods, exchange of best practices and participation in the multi-stakeholder forum;

3. Launch of a European Online Platform on Disinformation, which will offer cross-border data collection, analysis tools and access to EU-wide open data on the topic;

4. Promotion of voluntary online identification systems for suppliers of information, based on trustworthy electronic identification and authentication means;

5. Support of Member States in ensuring secure and resilient election processes through continuous dialogue, cybersecurity assistance and the celebration of a high-level conference by the end of the year;

6. Enhancement of media literacy: among other measures, fact-checkers and civil society organisations will be encouraged to provide educational material to schools and educators, and a European Week of Media Literacy will be organised;

7. Support for a quality and diversified information system by fostering investment in high quality journalism and specific training activities for journalists, supporting initiatives promoting media freedom and pluralism, quality new media and journalism, and other ongoing and future projects;

8. Draft of a Coordinated Strategic Communication Policy combining current and future EU initiatives on online disinformation, and tackling disinformation within and outside Europe.