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I. Introduction

According to Google Trends, the frequency of misinformation has risen significantly since the 2016 US presidential elections (Figure 1). Disinformation and misinformation are not new phenomenon but, as many authors explain, as old as time old as time. However, distribution has been propagated by social media with most sharing taking place on Facebook (Marchal et al, 2019:2). This has been furthered by the practice of astroturfing and the creation of bots (Bernal, 2018:242; Marsden and Meyer, 2019). Bastos and Mercea found that a ‘network of Twitterbots comprising 13,493 accounts that tweeted the United Kingdom European Union membership referendum, only to disappear from Twitter shortly after the ballot’ (2017:1). The increase in social media manipulation is on the increase globally particular in relation to state engineered interference (Bradshaw and Howard, 2019). Many authors point to ownership structures and the lack of transparency and accountability in the media for the exacerbation of disinformation and ‘fake news’ inquiry, coupled with a lack of sustainability of journalism and lack of trust in the media.

Stakeholders have called on governments and the European Union to take action. Two states, Germany and France, have introduced laws to tackle disinformation. Germany introduced its *Netzwerkdurchsetzungsgesetz*¹ law in 2017 which polices social media websites following a number of high profile national court cases concerning fake news and the spread of racist material. It enables the reporting and take-down of online content. France passed a law on the Manipulation of Information² in 2018 under which similarly obliges social media networks to takedown content upon request from a judge. Candidates and political parties can also appeal to a judge to stem the spread of "false information" under the control or influence of a state foreign media during elections. The UK has taken a more self-regulative approach after a UK Commons committee investigation into fake news by the Digital, Culture, Media and Sport Committee concluded that Facebook’s founder Mark Zuckerberg failed to show "leadership or personal responsibility" over fake news (2017). The two part inquiry focused on the business practices of Facebook particularly in response to the Cambridge Analytica scandal. The UK’s resulting 2019 Online Harms White Paper³ proposes a self-regulatory framework under which firms should take responsibility for user safety under duty of care. The European Union (EU) has flanked national efforts with a 2016 Conduct on Countering Illegal Hate Speech Online and 2018 action plan. This culminated in Codes of Practise in 2018 and 2019 which have been voluntarily adopted by social media platforms and news associations.

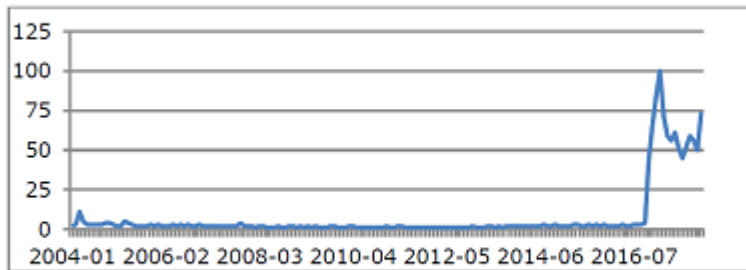
This chapter will outline different responses with case studies on Germany, France and the UK. This is explained through existing legal instruments namely, hate speech and strong privacy laws and right of reply in France and Germany (Richter, 2018; Heldt, 2019; Katsirea, 2019), whereas the UK takes a more self-regulated approach as supported by recent case law (Craufurd-Smith, 2019; Woods, 2019).

¹ Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (*Netzwerkdurchsetzungsgesetz*).

² LOI n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information www.legifrance.gouv.fr/affichLoiPreparation.do?idDocument=JORFDOLE000037151987&type=general&typeLoi=prop&legislature=15.

³ Online Harms White Paper www.gov.uk/government/consultations/online-harms-white-paper.

Figure 1: The frequency of "fake news" in Google Trends (2004-2018)



Source: Google Trends

Source: Google Trends cited in Martens et al (2018:8)

II. national definitions

Misinformation is defined differently in different national contexts. The French law refers to ‘nouvelles fausses’ (false information) in reference to Article 27 of the 1881 French Press Law⁴ and French Electoral Code⁵. This was based upon recommendations from the Conseil d’Etat (Council of State)⁶ for reasons of conformity with existing laws and judicial review (Craufurd-Smith, 2019:56). The German NetzDG refers to ‘unlawful content’ (‘Rechtswidrige Inhalte’) as defined under provisions in the German criminal code (Strafgesetzbuch – StGB) which includes insult (§185), defamation (§186) intentional defamation (§187)⁷, public incitement to crime (§111) incitement to hatred (§130) and dissemination of depictions of violence (§131). The law also stipulates that social networks define ‘hate speech’ within their terms of service⁸.

⁴ Loi du 29 juillet 1881 sur la liberté de la presse <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006070722&dateTexte=vig> Article 27 was last amended by Ordinance No. 2000-916 of September 19, 2000 - art. 3 (V) JORF September 22, 2000 effective January 1, 2002.

⁵ For English translation of the Electoral Code see: [http://europam.eu/data/mechanisms/PF/PF%20Laws/France/France_Electoral_Code_legislative_part_primary_1eg_am2013_fr%20\(1\).pdf](http://europam.eu/data/mechanisms/PF/PF%20Laws/France/France_Electoral_Code_legislative_part_primary_1eg_am2013_fr%20(1).pdf).

⁶ <https://www.conseil-etat.fr>.

⁷ Article 19 translates Sections 186 and 187 of the StGB as “Defamation – Section 186 of the Criminal Code reads: “Whoever intentionally and knowingly asserts or disseminates an untrue fact related to another person, which may defame him or negatively affect public opinion about him or endanger his creditworthiness shall be liable to imprisonment not exceeding two years or a fine, and, if the act was committed publicly, in a meeting 60 or through dissemination of written materials (section 11(3)) to imprisonment not exceeding five years or a fine;” and • Intentional defamation – Section 187 reads: “(1) If an offence of defamation (section 186) is committed publicly, in a meeting or through dissemination of written materials (section 11(3)) against a person involved in the popular political life based on the position of that person in public life, and if the offence may make his public activities substantially more difficult the penalty shall be imprisonment from three months to five years. (2) An intentional defamation (section 187) under the same conditions shall entail imprisonment from six months to five years.”” <https://www.article19.org/wp-content/uploads/2018/07/Germany-Responding-to-%E2%80%98hate-speech%E2%80%99-v3-WEB.pdf>.

⁸ See Facebook’s definition of hate speech here: https://www.facebook.com/communitystandards/hate_speech

The UK 2019 Online Harms White Paper uses the word ‘disinformation’ which is defined as the “created or disseminated with the deliberate intent to mislead; this could be to cause harm, or for personal, political or financial gain”. The White Paper also refers to the Digital, Culture, Media and Sport (DCMS) Committee Commons Select Committee definition of disinformation is “the deliberate creation and sharing of false and/or manipulated information that is intended to deceive and mislead audiences, either for the purposes of causing harm, or for political, personal or financial gain” (2018, 2019)⁹.

The European Commission ‘High level Group on fake news and online disinformation’ also uses the term ‘disinformation’ which is defined as “all forms of false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit” (European Commission, 2018:1). The term ‘disinformation’ was adopted in turn by the United Nations, OSCE, OAS and AU (OSCE, 2017) and also by the Council of Europe (Council of Europe, 2017). These efforts avoiding the term “fake news” were aimed at disassociating it from the meaning of ‘news’. This is because ‘disinformation’ cannot be legally defined as ‘news’ as such.

III. policy approaches within Europe

Germany

Germany’s Netzwerkdurchsetzungsgesetz – NetzDG (Law Improving Enforcement in Social Networks) was enacted in November 2017 and came into force in January 2018. It was introduced to the Bundestag by Heiki Maas, the Minister of Justice and is largely based upon hate speech provisions enshrined in the German Constitution. It obliges social networks with more than 2 million registered users in Germany such as Facebook, Twitter and YouTube to remove "offensichtlich rechtswidrige Inhalte" (manifestly unlawful content)¹⁰ within 24 hours of receiving a complaint and within 7 days if the content is not ‘manifestly’ illegal.

The NetzDG is based on subsection 1 of the Strafgesetzbuch (StGB) under sections 86, 86a, 89a, 91, 100a, 111, 126, 129 to 129b, 130, 131, 140, 166, 184b in relation to 184d, 185 to 187, 241 and also under 269 of the German Criminal Code. As translated by Article 19, these relate to “Section 86 “dissemination of propaganda material of unconstitutional organisations,” Section 86a “using symbols of unconstitutional organisations,” Section 89a “preparation of a serious violence offence endangering the state,” Section 91 “encouraging the commission of a serious violence offence endangering the state,” Section 100(a) “treasonous forgery,” Section 111 “public incitement to crime,” Section 126 “breach of the public peace by threatening to commit offences,” Section 129 “forming criminal organisations,” Section 129a “forming terrorist organisations,” Section 129b “criminal and terrorist organisations abroad,” Section 130 “incitement to hatred,” Section 131 “dissemination of depictions of violence,” Section 140 “rewarding and approving of offences,” Section 166 “defamation of religions, religious and ideological associations,” Section 184b “distribution, acquisition and possession of child pornography” in conjunction with Section 184(d) “distribution of pornographic performances by broadcasting, media services or telecommunications services,” Section 185 “insult,” Section 186 “defamation,”

⁹ Disinformation and ‘fake news’: Government Response to the Committee’s Fifth Report of Session 2017–19, 23 October 2018, HC 1630 Government response to Interim Report, page 2.

¹⁰Official translation to be found at https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf;jsessionid=D9F4B816F91A21413A3E9512204ED293.1_cid334?__blob=publicationFile&v=2.

Section 187 “intentional defamation,” Section 201(a) “violation of intimate privacy by taking photographs,” Section 241 “threatening the commission of a felony,” and Section 269 “forgery of data intended to provide proof.”¹¹

The law shifts primary responsibility for user-generated content to social media platforms. The Minister cannot issue a takedown order but content must be removed on a self-regulatory basis by platforms when faced with complaints¹². A decision post-seven days is referred to a self-regulatory body approved by the Ministry of Justice. Germany requires platforms to establish a clear complaints system for the reporting of unlawful content. The German law has more teeth than the French law in the form of heavy fines which can be issued between 5 and 50 million euros. It is applicable to social media networks with over 2 million users. However, unlike in France, fines are only issued to platforms and not to their users.

Due to Germany’s highly legalistic culture, laws are highly detailed with little flexibility as to implementation. As Theil explains “reporting obligations are quite detailed and include provisions that set out reviewer training and oversight requirements” (2019:46). For this reason, he reports a sharp rise in the hiring of content moderators by Facebook and Twitter due to the law with German speakers accounting for one sixth of Twitter’s content team in 2018 (2019:49). The NetzDG obliges social media networks to produce biannual reports on content moderation for platforms with over 100 complaints per year (for analysis see Heldt, 2019). Facebook was the first social media platform to be fined under the NetzDG in 2019 with a fine of 2 million Euros¹³. A new Bill was proposed to update the NetzDG in April 2020 which recommends increased transparency from social media networks and reference to the updated Audiomedien Services Directive¹⁴.

France

In 2018, the French National Assembly passed a law entitled to combat the manipulation of information. The 2018 law is three pronged. Firstly, it enables citizens, regulatory bodies and political parties to report misinformation, which permits a judge to issue take down orders. Implicitly, as in Germany, the law obliges social media platforms to take responsibility for user content published on their pages. Secondly, it demands increased financial transparency from social media platforms on sponsored content and political advertising. Political sponsorship and the amount paid for it should be reported. Thirdly, the law grants powers to the Conseil supérieur de l’audiovisuel (CSA) to temporarily suspend licences for television and radio channels which show evidence of disinformation propagated by foreign states. As Craufurd-Smith points out, the French approach has been focused on the threat of disinformation to democracy (2019:63).

¹¹ <https://www.article19.org/wp-content/uploads/2018/07/Germany-Responding-to-%E2%80%98hate-speech%E2%80%99-v3-WEB.pdf>.

¹² “Das Bundesamt für Justiz kann rechtswidrige Inhalte (z. B. Hasskriminalität) nicht selbst löschen oder sperren bzw. die Löschung oder Sperrung anordnen. Es hat die Aufgabe, Verstöße gegen Pflichten, die nach dem Netz-werk-durch-setzungsgesetz zu beachten sind, im Wege eines Bußgeldverfahrens zu verfolgen, darunter den Umgang mit Beschwerden über rechtswidrige Inhalte. Bitte beschweren Sie sich daher in jedem Fall zunächst bei dem betreffenden sozialen Netzwerk über die unterlassene Löschung oder Sperrung von rechtswidrigen Inhalten.”

https://www.bundesjustizamt.de/DE/Themen/Buergerdienste/NetzDG/Fragen/FAQ_node.html.

¹³ www.bundesjustizamt.de/DE/Presse/Archiv/2019/20190702_EN.html;jsessionid=AE3371DA35E5EEFEEB5A8BFF7F52AFCA.1_cid392?nn=3449818.

¹⁴ <https://dip21.bundestag.de/dip21/btd/19/187/1918792.pdf>.

France's Manipulation of Information law was adopted in December 2018 following scrutiny and approval by the Conseil Constitutionnel¹⁵. The law is underpinned by existing measures, most significantly Article 27 of the 1881 French Press Law which prohibits "'false news' or 'articles fabricated, falsified or falsely attributed to others', where this is done in bad faith and undermines, or could undermine, public order" (Craufurd-Smith, 2019:55). It also draws on applicable provisions on genocide denial and crimes against humanity (Article 24) and defamation (Articles 29-35 of the 1881 Press Law) and the Electoral Code¹⁶ under which (Article 97) 'false news, calumnies, or other fraudulent means' and commercial electoral advertising are prohibited (Dossier in Craufurd-Smith, 2019:55).

In addition to the above, the 2018 law stipulated changes to the 1977 Law on election to the European Parliament¹⁷, 1986 Law on the freedom of communication (Léotard Law)¹⁸, the 2004 Law on confidence in the digital economy¹⁹, the Electoral Code²⁰, a decree from the Ministry of Culture on Article L111-7 of the Consumer Code the Consumer Code²¹, Education Code²², the 2018 Law on filing candidacy for election²³, and Public order code overseas²⁴. Due to its different legal bases, implementation is conducted by judges for take down orders, the Conseil supérieur de l'audiovisuel (CSA) for license suspension and the Autorité des Marchés Financiers (AMF) for the issue of fines respectively. Decisions are subject to judicial review.

The key target is political advertising and political party campaigning. Three months prior to election, social media platforms are required to provide citizens access to 'fair, clear and transparent' information on the purpose as well as the identity (natural persons or corporate name and registered office) of those paying to promote political debate; use of their personal data; and the amount paid (over a given threshold). This will be made available to the public

¹⁵ Decision no. 2018-773 DC of 20 December 2018 <https://www.conseil-constitutionnel.fr/en/decision/2018/2018773DC.htm>.

¹⁶ Electoral law in France consists of a series of Acts, namely Law No. 62-1292 of November 6, 1962, relating to the election of the President of the Republic by universal suffrage; Organic law n° 2017-1338 of September 15, 2017 for confidence in political life; and the Electoral Code. The 2018 Law on the fight against the manipulation of information is also considered to be encompassed within electoral law, along with the Decision of the Constitutional Council n° 2018-773 DC of December 20, 2018.

¹⁷ Article 26 of Law n° 77-729 of July 7, 1977 relating to the election of representatives to the European Parliament. Consolidated version as of April 29, 2020 <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=LEGITEXT000006068600>.

¹⁸ Law 86-1067 of September 30, 1986 <https://www.legifrance.gouv.fr/affichTexteArticle.do?idArticle=LEGIARTI000037855721&cidTexte=JORFTEXT000000512205&dateTexte=20181224>.

¹⁹ Law n° 2004-575 of June 21, 2004 for confidence in the digital economy. <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000801164>

²⁰ Electoral code Consolidated version as of March 1, 2020 www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070239.

²¹ 2000 Ministry decree Consumer Code <https://www.csa.fr/Arbitrer/Espace-juridique/Les-textes-reglementaires-du-CSA/Les-deliberations-et-recommandations-du-CSA/Recommandations-et-deliberations-du-CSA-relatives-a-d-autres-sujets/Recommandation-n-2019-03-du-15-mai-2019-du-Conseil-superieur-de-l-audiovisuel-aux-operateurs-de-plateforme-en-ligne-dans-le-cadre-du-devoir-de-cooperation-en-matiere-de-lutte-contre-la-diffusion-de-fausses-informations>. For translation see: <http://ec.europa.eu/growth/tools-databases/tris/en/index.cfm/search/?trisaction=search.detail&year=2019&num=2&dLang=EN..>

²² Specifically Articles 332-5, 771, 773 and 774 of the Code of Education have been updated <https://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006071191>.

²³ Law n° 2018-51 of 31 January 2018 relating to the procedures for filing a candidacy for elections <https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000036559728&categorieLien=id>.

²⁴ Overseas provisions Public order code www.code-commande-publique.com/dispositions-relatives-a-loutre-mer/.

in an aggregated public register. Platforms are required to establish a notification mechanism for users to alert them to false information. There are also requirements on platforms regarding transparency on algorithms which organise content related to ‘a debate of national interest’ and publication on their functioning, the promotion of news publishers and agencies providing impartial, accurate information and the deletion of disinformation accounts. Social media platforms must provide the CSA with annual reports. In particular, under Article 14 of the Act, information on content, access to content (how often and when based upon platform recommendations), and the referencing by algorithms must be provided. In turn the CSA publishes regular reports on measures implemented by platforms²⁵. During periods of election, fines of up to 75,000 Euros and a possible prison sentence of one year can be imposed on social media platforms²⁶ and their users if content is not removed within 48 hours.

The UK

In the UK, inquiries into fake news began in 2017 firstly with a Digital, Culture, Media and Sport Committee commenced in January 2017 finalised in June 2017 when the UK general election took place²⁷. This was followed by the Disinformation and ‘fake news’ conducted by the House of Commons Digital, Culture, Media and Sport Committee (DCMS) launched in September 2017.²⁸ This culminated in two reports on Disinformation and ‘fake news’, the first an interim report in July 2018 with the final report published in February 2019²⁹. After initial luke-warm government response to the interim report, the committee held three oral evidence sessions and received 23 written submissions from national stakeholders in July 2018 and conducted an ‘international grand committee’ in November 2018 with parliamentary representatives from nine different countries³⁰. This fed into the UK government’s 2019 Online Harms White Paper (OHWP) authored by the Department for Digital, Culture, Media and Sport and the Home Office. At the time of writing, the OHWP is still undergoing consultation with a Sub-Committee on Disinformation was established by the Commons Select Committee in April 2020.

As in France, the key concern of both UK inquiries was inaccuracy and political bias in the news, particularly during election times. Fake news is identified in the report as a political problem as it creates a “polarising effect and reduces the common ground on which reasoned debate polarising effect and reduces the common ground on which reasoned debate, based on objective facts, can take place” and thereby a threat to democracy. Both the interim and final reports highlight seven main legal issues relating to social media platforms³¹. Interestingly, as Craufurd-Smith points out, the UK approach differs from that of continental Europe in that English courts may be unwilling to take into consideration Article 10 of the European Convention on Human Rights, which grants the right to freedom of expression and

²⁵ See also the ‘Facebook experiment’ Mission report by the French Secretary of State for Digital Affairs https://www.numerique.gouv.fr/uploads/Regulation-of-social-networks_Mission-report_ENG.pdf

²⁶ The legal representative of a social media platforms can face a prison sentence.

²⁷ www.parliament.uk/business/committees/committees-a-z/commons-select/culture-media-and-sport-committee/inquiries/parliament-2015/inquiry2/publications/.

²⁸ www.parliament.uk/business/committees/committees-a-z/commons-select/digital-culture-media-and-sport-committee/inquiries/parliament-2017/fake-news-17-19/.

²⁹ <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1791/1791.pdf>.

³⁰ Argentina, Belgium, Brazil, Canada, France, Ireland, Latvia, Singapore and the UK.

³¹ These are the definition, role and legal liabilities of social media platforms; data misuse and targeting, Facebook’s knowledge of and participation in data-sharing; political campaigning; Russian influence in political campaigns; SCL influence in foreign elections; and digital literacy.

information. Craufurd-Smith notes that “the High Court in the judicial review case of Woolas held that the dishonest publication of false information prior to elections would not be protected by Article 10(1) ECHR” (Craufurd-Smith, 2019:80).

The UK approach focuses on enforcing greater transparency about the source of news, its funding and how news is reaching citizens. In particular, the proposal addresses social media reach. As in France and Germany, the UK draws on existing regulatory instruments in application to the problem of disinformation. However, the basis is different. The main proposal resulting from the inquiries is the 2019 Online Harms White Paper (OHWP) which is, at the time of writing is under going consultation³². Unlike in Germany and France, the main statutory legal instruments are the obligation of duty of care, the adoption of technical measures and codes of practice. Woods explains, this is based upon common law practise (2016). ‘Duty of care’ derives from “common law doctrine of negligence developed from *Donoghue v Stephenson*” which has been initially developed within national case law but later implemented in statutory law beginning with the 1974 Health and Safety at Work Act (Woods, 2016:7-9).

Lack of implementation of Codes of Practice could meet with fines from the regulator. The government announced in February 2020 that the communication regulator OFCOM would be given responsibility for Online Harms implementation but this proposal has met with a great deal of push-back to date.³³ One reason for pushback is that OFCOM is funded by regulatees and it is seen as a potential additional tax on social media platforms. The proposal innovates from the earlier French and German laws in that algorithmic measures are viewed as having a high level of potential to locate and identify content for take-down. A project has been established at the Turing Institute in London to “use a mix of natural language processing techniques and qualitative analyses to create tools which identify and categorise different strengths and types of online hate speech”³⁴.

According to the White Paper, the UK regulator (yet to be created or assigned) will coordinate with social media platforms to create a Code of Practise to “minimise the spread of misleading and harmful disinformation and to increase the accessibility of trustworthy and varied news content”. This includes making “less visible” content which has been flagged by reputable fact-checking services, the promotion of ‘authoritative news sources’ and ‘diverse news content’; improving the ‘transparency of political advertising’, enabling mechanisms for users to flag false content known; and transparency on company policies. Lastly, the White Paper states that it seeks to maintain “a news environment where accurate content can prevail and high quality news has a sustainable future”. Related to this, the White Paper supports proposals of the 2019 Cairncross Review into the sustainability of high quality journalism which recommended that a ‘news quality obligation’ be required from social media companies, which would “require these companies to improve how their users understand the origin of a news article and the trustworthiness of its source”.

There are other UK proposals which flank the Online Harms proposal including changes to the Broadcasting Code which his undergoing consultation by OFCOM in 2020³⁵, potential

³²<https://www.gov.uk/government/consultations/online-harms-white-paper>²⁰<https://www.gov.uk/government/consultations/online-harms-white-paper>.

³³ <https://www.gov.uk/government/news/government-minded-to-appoint-ofcom-as-online-harms-regulator>.

³⁴ <https://www.turing.ac.uk/research/research-projects/hate-speech-measures-and-counter-measures>.

³⁵ https://www.ofcom.org.uk/__data/assets/pdf_file/0025/192580/further-consultation-protecting-participants-tv-radio.pdf.

changes to the Advertising Standards Authority (ASA)'s Code of Non-Broadcast Advertising and Direct & Promotional Marketing (CAP code), and development of “formal coordination mechanisms to ensure regulation is coherent, consistent, and avoids duplication” by the new regulator in coordination with the Competition and Markets Authority (CMA) and Information Commissioner's Office's (ICO).³⁶ Future changes to codes and practise in regulatory approach could be seen at the Financial Conduct Authority (FCA), the Gambling Commission the Electoral Commission and the Equality and Human Rights Commission (EHRC). Similar to France and Germany, the UK assigns responsibility for users' content to social media platforms.

EU approach

The European Commission began tackling disinformation online with a Code of Conduct on Countering Illegal Hate Speech Online in 2016³⁷. The Commission signed a 'code of conduct' with Facebook, Microsoft, Twitter and YouTube to address hate speech online in 2016. This was followed by the establishment of a high level group of experts (HLEG) to address disinformation online in 2018. The HLEG produced a report identifying best practise in 2018.³⁸ The report requested that social media platforms adopt a number of measures by July 2018.

The 2018 measures were quite expansive reflecting wider EU policy goals. They included enhancing the transparency of online news including transparency on data sharing; promoting media and information literacy; developing tools for empowering users and journalists; safeguarding the diversity and sustainability of the European news media ecosystem; promoting research on disinformation; adapting social media advertising policies to a follow-the-money” principle based on clear, transparent, and non-discriminatory criteria; ensuring transparency on the processing of users' data for advertisement placements; and distinguishing sponsored content, including political advertising from other content. There were also voluntary requirements on fact checking. These included referencing ‘cooperation with public and private European news outlets’, making news suggestions and fact checking sites (where appropriate) and providing a role to Press Councils and the European level association, the Alliance of Independent Press Councils of Europe (AIPCE) in the creation of a Code of Conduct.

In 2018, the European Commission published its Communication on Tackling online disinformation: a European Approach.³⁹ This was followed by an updated Code of Practice on Disinformation⁴⁰ published in September 2018. The Code was signed in October 2018 by a number of social media platforms, namely Facebook, Twitter, Mozilla and Google, and associations, namely the European Association of Communication Agencies, the Interactive

³⁶ www.gov.uk/government/publications/cdei-review-of-online-targeting/online-targeting-final-report-and-recommendations.

³⁷ https://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf.

³⁸ A multi-dimensional approach to disinformation Report of the independent High level Group on fake news and online disinformation http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=50271.

³⁹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling online disinformation: a European Approach COM(2018) 236 final. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0236>

⁴⁰ https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=54454.

Advertising Bureau and the World Federation of Advertisers.⁴¹ This was mostly in anticipation of the May 2019 European Parliament elections.

The 2019 Code differs slightly from the 2018 Code in that it no longer includes voluntary obligations to cooperate with European press councils and promote European publisher content. Its main focus is on factchecking and disinformation. It commits signatories to: ‘improve the scrutiny of advertisement placements to reduce revenues of the purveyors of disinformation’; ‘ensure transparency about political and issue-based advertising’; ‘implement and promote reasonable policies against misrepresentation’, ‘close fake accounts and establish clear marking systems and rules for bots to ensure their activities cannot be confused with human interactions’, ‘communicate on the effectiveness of efforts’; ‘invest in technological means to prioritize relevant, authentic, and accurate and authoritative information where appropriate in search, feeds, or other automatically ranked distribution channels’; ‘signatories should not be compelled by governments, ... to delete or prevent access to otherwise lawful content’; enable ‘users to understand why they have been targeted by a given political or issue-based advertisement’; ‘dilute .. disinformation by improving the findability of trustworthy content’; empower ‘users with tools ... to facilitate content discovery and access to different news sources representing alternative viewpoints’; provide ‘tools to report Disinformation’ by users; enable ‘factchecking and research activities ... including data for independent investigation by academic researchers and general information on algorithms’. The UK decided to participate post-Brexit in 2019 initiative as the then Minister for Digital, Culture, Media and Sport, Margot James, decided that it was non-legislative and did not require implementation of EU law. As such the UK was “broadly supportive of the EU’s actions in this area, and do[es] not believe that such action will prevent the UK taking action in this area”⁴².

From January 2019, signatories began to submit monthly reports on Code implementation to the European Commission⁴³. A number of initiatives to limit disinformation have been realised since this time, notably to handle the rise in disinformation during election periods. Google funded a \$300 million project to support journalism in 2019 and introduced a database of stories with fact checking tools⁴⁴. Twitter decided to ban all political advertising from November 2019⁴⁵. Google similarly limited political advertising by political affiliation or public voter records. from December 2019 in the run up to the US presentation election⁴⁶. Political advertising is still permitted via Google but only by age, gender and location (by post code). Facebook is coming under increasing pressure to implement more stringent measures particularly after it removed a ban on advertising containing “deceptive, false or misleading content” in October 2019 replacing it with a ban only on “include claims debunked by third-party fact-checkers, or, in certain circumstances, claims debunked by organisations with particular expertise”⁴⁷.

⁴¹ https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_19_6166.

⁴² Explanatory Memorandum from the Government (tackling online disinformation) (21 May 2018). http://europeanmemoranda.cabinetoffice.gov.uk/files/2018/07/Scan_Les_Saunders_20180709-141252_0465_001.pdf.

⁴³ <https://ec.europa.eu/digital-single-market/en/news/first-results-eu-code-practice-against-disinformation>.

⁴⁴ <https://developers.google.com/fact-check/tools/api>.

⁴⁵ Twitter to ban all political advertising <https://www.bbc.co.uk/news/world-us-canada-50243306>.

⁴⁶ The UK has an existing ban on targeting by political affiliation.

⁴⁷ See the Irish regulator BAI report on compliance with the EU Code of Practice on Disinformation <https://www.bai.ie/en/new-report-highlights-inconsistencies-across-digital-platforms-in-tackling-disinformation/>.

As Marsden and Meyer point out, other EU initiatives have been promoting artificial intelligence for the removal of illegal content including a 2020 proposal for the EU Regulation on the Prevention of Dissemination of Terrorist Content Online and Article 13 of the proposed Copyright in the Digital Single Market Directive (2020). Both initiatives recommend the use of algorithms and filtering technologies. However, as Marsden, Meyer and Brown argue “Automated technologies such as AI are not a silver bullet for identifying illegal or “harmful” content. They are limited in their accuracy, especially for expression where cultural or contextual cues are necessary” (2020:7).

V. Conclusion

There has been a clear shift in regulatory approach in all three states. All initiatives are self-regulatory in nature and moves responsibility for content to the social network or platform carrying content away from content providers and users. This is because platforms act as gateway providers for communication, whereas market provision for digital content (whether traditional or user generated) is increasingly fragmented and difficult to regulate. There are increasing technical solutions which enable the filtering of content. Search engines such as Google steer users towards content. Whereas social networks can apply software to focus user attention. Post-Brexit, greater EU coordination is expected once the UK is removed from the equation given the greater appetite for more interventionist measures in France and Germany. Indeed, a May 2020 study released by the European Commission recommends the introduction of “sanctions and redress mechanisms” under the EU’s 2019 Code of Disinformation.⁴⁸

Legal basis for statutory action within the EU (in the form of Directives or Regulations) is however tenuous. A mix of measures are emerging, thus far based upon existing security and copyright legislation. Article 17(9) of the EU 2019 Copyright Directive which is, at the time of writing, being implemented into national legislations includes a complaint and redress mechanism which may be applied to social networks. Further action might arise out of competition law⁴⁹ and company law⁵⁰. Indeed, beginnings of this can be seen in the June 2020 proposal for a Regulation on the ex ante regulatory instrument of very large online platforms acting as gatekeepers under the EU’s Digital Services Act package⁵¹. This is flanked with Court decisions such as the 2014 Google Spain case decided by the European Court of Justice⁵² which grants the ‘right to be forgotten’ to citizens requesting result links relating their names be removed from public search engines upon request. More activity is expected on the self-regulatory front from ERGA. An ERGA sub-group is, at the time of writing, developing advice for the European Commission on the transposition of the Audiovisual Media Services Directive and the new Digital Services Act.

⁴⁸ Study for the assessment of the implementation of the Code of Practice on Disinformation <https://ec.europa.eu/digital-single-market/en/news/study-assessment-implementation-code-practice-disinformation> <https://ec.europa.eu/digital-single-market/en/news/study-assessment-implementation-code-practice-disinformation>.

⁴⁹ However competition law stipulates subsidiarity the area of media pluralism protected by Article 21 (4) of the EU Merger.

⁵⁰ The 5th Anti-Money Laundering Directive mandates that beneficial owners are registered which is similar to requirements laid down in the French 2018 Disinformation Law during elections.

⁵¹ <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers>.

⁵² Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González (2014) <http://curia.europa.eu/juris/liste.jsf?num=C-131/12>.

One marked problem with the introduction of any statutory at national or European levels is the mismatch between application of rules to traditional and online media. In the UK, television channels need to adhere to OFCOM's Broadcasting Code and newspapers with IPSO's Editors' Code or Practice or IMPRESS' standards code. However, as shown by the Leveson Inquiry, there is an imbalance between requirements on the different sectors and print media have largely gone unchallenged in the UK. The takedown of disinformation might of course be applied to articles appearing in online news media editions. Continental Europe has historically applied much stricter rules on the press so disinformation in traditional media has been less prevalent. There has however been a rise in fake news stories in the German traditional press since their move on-line (Heldt, 2019).

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