

# NOTIONS OF DISINFORMATION AND RELATED CONCEPTS (ERGA REPORT)



## ABOUT ERGA

The members of the European Regulators Group for Audiovisual Media Services (ERGA)<sup>1</sup> wholeheartedly endorse the core democratic, economic, social and cultural values and objectives enshrined in the Audiovisual Media Services Directive (EU) 2018/1808 (AVMS Directive)<sup>2</sup>, whose territorial scope includes the Member States of the European Economic Area<sup>3</sup>:

- Guaranteeing the freedom of expression, the freedom of reception, and accessibility of these services across the Member States;
- Upholding a level playing field for all audiovisual media and video sharing platform services operating in the European audiovisual media market;
- Combating any form of incitement to hatred or violence;
- Protecting minors from harmful content;
- Safeguarding media pluralism and promoting citizens' right to information;
- Supporting cultural and language diversity;
- Preserving the independence of National Regulatory Authorities (NRAs);
- Protecting consumers against inappropriate commercial communications.

ERGA does so by supporting an independent and consistent implementation of the EU audiovisual regulatory framework, first and foremost the AVMS Directive, to the benefit of Europe and its citizens. ERGA believes that effective regulation is based on high-quality standards applied by independent NRAs.

To that end, ERGA promotes common regulatory approaches and effective cooperation between its members as well as with stakeholders. It also facilitates the development of an integrated 'regulatory culture', where knowledge, best practices, and experiences are judiciously disseminated to inspire NRAs in the achievement of their duties at the national level.

Furthermore, ERGA assists the European Commission in implementing the EU audiovisual regulatory framework. It provides opinions on the request of the Commission and sheds light on upcoming regulatory issues. By doing so, ERGA contributes to the better functioning of the internal market for audiovisual media and guarantees that the abovementioned values can continue to be safeguarded, particularly in the online environment.

In order to ensure that it takes relevant and well-informed opinions or actions, ERGA is in touch with audiovisual market players (particularly those with a cross-border outreach), academics, and other relevant entities. Based on its members' expertise and experience with the

<sup>1</sup> ERGA Members are also referred to as "NRAs" or "regulators" within this document, as the context requires.

<sup>2</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), as amended by Directive (EU) 2018/1808. Referred to as the "AVMS Directive", or the "revised AVMS Directive" within this document as appropriate.

<sup>3</sup> European Economic Area Member States are the EU Member States + Liechtenstein, Norway, and Iceland.

implementation of the audiovisual regulatory framework, ERGA is also active in public debates on media policy with the aim to be perceived as a relevant discussion partner in Europe.

#### ERGA's TASKS AND OPERATING PRINCIPLES

The role of ERGA has been enhanced by the revised AVMS Directive, which provides the following list of tasks (Article 30b, paragraph 3):

- To provide technical expertise to the European Commission both with regard to its task to ensure a consistent implementation of the Directive in all Member States and on matters related to audiovisual media services within its competence;
- To exchange experience and best practices on the application of the regulatory framework for audiovisual media services, including on accessibility and media literacy;
- To cooperate and provide its members with the information necessary for the application of this Directive, in particular as regards Articles 3, 4, and 7;
- To give opinions, when requested by the Commission, on the technical and factual aspects of the issues pursuant to Article 2(5c), Article 3(2) and (3), point (c) of Article 4(4) and Article 28a(7).

To fulfil these tasks, ERGA issues documents such as opinions, reports, statements, and recommendations. Such documents represent ERGA's independent opinion, not the European Commission's point of view. Once adopted, they are made publicly available without undue delay, in accordance with ERGA's requirement to ensure transparency of its activities. ERGA promotes active and independent participation by all its members, regardless of their size. To that end, ERGA documents are thoroughly prepared by trusted experts who are appointed by NRAs. With a view to reach consensus and fairly represent their views, all ERGA members are duly consulted through transparent procedures before any document is adopted. They are nonetheless given the possibility to publicly express dissenting opinions.



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# 1. EXECUTIVE SUMMARY

## ***Current research on disinformation and related concepts***

The Report starts with identifying the different notions of disinformation and related concepts in current research and relating these to the way the different concepts are used and interpreted in EU member states, fundamental rights frameworks, and policy standards. There is no commonly shared definition of disinformation, and a number of other notions (such as fake news, false information, misinformation, malinformation, propaganda, foreign influence) are routinely used as different ways to indicate the same concept. Chapter 2, which is focused on current research teases out a number of these notions in order to assist in coming to clearer definitions and ensure more consistency and uniformity. Importantly, it also examines related concepts that are not strictly speaking direct forms of disinformation, but assist in fully understanding the notion and distribution of disinformation (including fake accounts, social bots, coordinated inauthentic behaviour, political advertising, and issue-based advertising).

## ***COVID-19 pandemic and disinformation***

The COVID-19 pandemic has brought about a particular focus on measures targeting disinformation, and a recognition that a number of European Union (EU) Member States now have specific legislation. In its *Joint Communication on Tackling COVID-19 disinformation – Getting the facts right* of June 2020 the European Commission recognised that several Member States “already had provisions, including of criminal nature, related to disinformation and one Member State introduced a specific new criminal offence for spreading of disinformation during the state of emergency”. The Commission warned that laws applicable to concepts of disinformation which are “too broad” raise particular concerns for freedom of expression. These concerns are also echoed by experts, as disinformation is an “extraordinarily elusive concept to define in law” and is “susceptible to providing executive authorities with excessive discretion to determine what is disinformation, what is a mistake, what is truth”. Indeed, measures to combat disinformation “must never prevent journalists and media actors from carrying out their work or lead to content being unduly blocked on the Internet”. As such, any definition of disinformation must take account of the implications for freedom of expression and media freedom. Furthermore, there are concerns that “too broad” (legislative) provisions could affect the free flow of services within the EU. Substantial divergences in national regulations but also overly broad definitions that might deter media providers from other countries with less restrictive rules can constitute serious obstacles for the EU harmonisation project and internal market. As such, any definition of disinformation must take account of the implications for freedom of expression and media freedom. At the same time, the realisation of digital single market freedoms calls for more harmonised approaches to defining disinformation. This also demonstrates the importance of trying to arrive at more unified concepts and can fit within the remit of ERGA.

### ***Common elements and key definitions***

Chapter 2 also discusses the considerable research on disinformation and related concepts; and seeks to identify the common elements to the definitions that have been identified, including that: the information must be incorrect or misleading; there is an element of harm; the intention of the actor, or whether something was deliberate, plays a role in each definition; and the economic gain of the actor may play a role. Further, other research has identified some additional common elements to disinformation definitions, including that content is on matters of public interest; and strategically disseminated. Importantly, Wardle and Derakhshan's study for the Council of Europe, *Information Disorder: Toward an interdisciplinary framework for research and policymaking*, is a helpful framework for understanding disinformation and related concepts, with three key definitions:

1. disinformation is information that is false and deliberately created to harm a person, social group, organisation, or country;
2. misinformation is information that is false, but not created with the intention of causing harm; and
3. malinformation is information that is based on reality, used to inflict harm on a person, organisation, or country.

### ***Current definitions in national legislation***

Chapter 2 uses the conceptual framework of disinformation, misinformation, and malinformation, and the various definitions contained in EU Member States' legislation are discussed and sorted under this framework. This approach is designed to achieve two aims: first, to bring more conceptual clarity and show how the definitional categories are evolving; and second, to help demonstrate in which category there is currently most regulatory activity taking place. The Chapter discusses how only one EU Member State has a statutory definition of the specific term "disinformation" (Lithuania). Importantly, while other EU Member States' legislation may not use the term disinformation, a number of Member States have legislation that aligns with the definitions of disinformation but is not specifically termed disinformation. Instead, the most common legislative terms for disinformation (i.e. information that is false and deliberately created to harm a person, social group, organisation, or country) are laws on "false news" and "false information". Notable, most regulatory activity at the national level concerns disinformation, rather than misinformation or malinformation.

Further, the research on definitions of the related concepts of fake news, propaganda, and foreign influence, are also discussed in relation to disinformation. Scholars are quite critical of the term fake news, and similar to disinformation, scholars have noted the difficulties and dangers of defining propaganda. The report also examines how the notion of hate speech, and other forms of illegal content, is used in relation to disinformation, misinformation, and malinformation.

### ***Methods of disseminating disinformation***

Building on the discussion of the various notions and definitions of disinformation, it is also important to take into account the methods of disseminating disinformation, namely the use of fake accounts, social bots, and coordinated inauthentic behaviour. The Report analyses the scholarship on the definitions of these concepts, and how disinformation campaigns use a range of amplification and dissemination techniques, such as creating fake accounts on social media to influence public opinion and using social-media bot software to amplify fabricated stories. In addition to the use of automated and amplification techniques for the dissemination of disinformation, two particular features of the social media environment can further exacerbate disinformation, namely filter bubbles and echo chambers. Therefore, the Report also examines these concepts and points to how some regulatory measures seek to limit the influence of filter bubbles and echo chambers. In that respect, it's interesting to note that so far only one Member State has explicitly included forms of algorithmic amplification in its conceptualisation of disinformation. The analysis has also shown that the main thrust of regulation or regulatory guidance on disinformation concerns those disseminating disinformation (e.g. social media platforms), with only a few national regulations paying attention to those creating it.

### ***Notions of political advertising and issue-based advertising***

The Report also aims to assist in coming to clearer definitions and ensure more consistency and uniformity regarding the notions of political advertising and issue-based advertising. Similar to disinformation and the related concepts, there is a great deal of ambiguity around these terms. Notably, scholars have been examining the definitions of political and issue-based advertising in Europe. Scholars such as Van Hoboken et al. point to the approach of the European Court of Human Rights being quite helpful for a definitional framework for political advertising and has also helpfully defined commercial advertising. It is discussed how the European Court takes a “broad view” of what constitutes political advertising, which includes not only paid advertisements concerning political parties and candidates during elections but also issue-based advertising, such as paid advertisements on “matters of broader public interest” from campaign groups and NGOs. The Chapter finally relates these definitions to the definitions contained in Member State’s legislation on political advertising.

### ***The views of different actors and stakeholders dealing with disinformation: media practitioners***

Chapter 3 of the Report describes how different actors and stakeholders dealing in different ways, with information disorders issues, apply and interpret notions of disinformation and related concepts. Through a survey, it has been investigated whether ethical codes, guidelines, or codes of conduct on journalistic behaviour contain guidance on definitions or interpretations of disinformation, political advertising, propaganda, information operations, and related concepts. Media outlets’ internal codes usually provide ethical rules about objectivity and impartiality in news creating, truthful presentation of facts and events, correct use of



sources, and unauthorised sources, e.g. Italian PSB RAI (IT), PSB RTV Slovenija (SI), newspaper Público (PT). On the other hand, some self-regulatory bodies for journalists (e.g. the Belgian Flemish one) and press (e.g. the Dutch one) have recently reviewed their own ethical codes including guidelines about rectifications in online reporting or image manipulation. This while some others such as professional associations of journalists, e.g. AJP (BE) or API (PT) have provided definitions of disinformation in their own guidelines for the journalists working on media literacy campaigns. The issue of journalistic trustability has been specifically addressed, with the help of the Chairman of the Journalism Trust Initiative Mr. Claudio Cappon.

***The views of different actors and stakeholders dealing with disinformation: media literacy awareness campaigns and fact-checkers***

Furthermore, the Report's Chapter 3 looks into definitions or interpretations of disinformation provided by different actors dealing with disinformation issues in a different context such as media awareness campaigns and fact-checking activities. In many countries, important definitions have been developed in media literacy campaigns (e.g. PT and NO) or conceptual elements related to disinformation have been provided from other similar sources (BE and LU). Some fact-checking organisations (e.g. SL) have provided definitions of disinformation, misinformation, and malinformation too, while other similar actors have tried to define slippery concepts such as click-bait and hoax.

***The views of different actors and stakeholders dealing with disinformation: civil society organisations***

Finally, based on interviews conducted with stakeholders the Report describes in Chapter 3 how some civil society organisations apply and consider definitions and understandings of disinformation and related concepts. While some organisations look at this issue as a specific topic in the digital eco-system (e.g. AlgorithmWatch, specifically concerned about the access to online platforms data), other ones have investigated the connection between information disorders and human rights (FIDU). Even if only one organisation, mainly looking at the relevance of these issues in the formation of the public opinion (Avaaz), has provided a working definition of disinformation, extremely focused on the notion of “public harm”, most stakeholders we have interviewed stress the importance and added value of clearer and more uniform definitions of disinformation and related concepts.

***Mapping of national media and press legislation and regulation***

Chapter 4 of the Report maps provisions in national media and press legislation and regulation in the different European countries that can contain guidance for more common understandings and uniform definitions of disinformation, political and issue-based advertising. This mapping exercise, which describes in a more detailed manner the national measures already addressed in Chapter 2 shows, that at the moment disinformation is typically regulated by non-legislative tools in the vast majority of national jurisdictions. It is not very common that disinformation

has led to separate legislation and in only a few countries legislation that explicitly deals with disinformation has been identified (HR, FR, LT). Conceptual elements related to disinformation and related concepts are mainly delivered from non-legislative to state-coordinated sources. Although the documents have no legal binding force, the state plays an integral role in preventing the spread of disinformation. Contrary to disinformation, with regard to political advertising, most responding states have some form of electoral or media law. But only six countries (AT, FR, HU, CY, LT, SK) have been identified where conceptual elements for the notion of political advertising are being used.

### ***Disinformation in relation to false news and veracity of information***

An essential element of the concepts that can be identified from the responses to the survey is the ban on the dissemination of false news. Usually, a distinction is made between false news that has the potential to mislead the audience, although this is not intended and deliberate false news that forms another category. In many cases, false news comes from uncontrolled, unofficial sources and thereby can confuse and mislead citizens. When disinformation is understood as a collective term it includes also other forms of inaccurate or misleading information. Usually, two types are linked to disinformation: misinformation, which is false or inaccurate information but without malicious intent; and malinformation that is based on real information and is distributed with intentional harm in a way that damages the other party or someone's reputation.

### ***Mapping of legislation and regulation dealing with political and issue-based advertising***

As far as political advertising is concerned the type of content of advertisements, messages, and other information forms an important element of the definitions and understandings of this concept. In most countries, a message presented during the election period for the benefit of political actors is included, but it is interesting to note that there is also a much broader approach to the political message (NO). Here it applies not only to strictly party-political issues in connection with elections, but also to statements aimed at influencing public opinion in general about political messages. One responding country (FR) reported the use of different concepts such as campaigns based on geographical location among communities interested in voting. In addition to the above, it is important to mention that the survey also collected information on the conceptual elements of propaganda, information warfare, information operations, and hybrid influencing.

### ***Disinformation from a criminal law perspective***

In addition to the mapping and examination of media and press regulation and legislation dealing with political and issue-based advertising the Report also looks into the rules regarding hate speech and defamation. Because hate speech and similar crimes can accompany disinformation it is important to look at whether the (regulatory) measures contain elements that can be used for a more consistent approach of disinformation and provide guidance for clearer and more uniform definitions. It can be assumed that in some form hate speech and

defamation are punishable in all countries. However, it is very difficult to compare the criminal law rules of different nations, as this area of law is significantly influenced by the legal history of the given country, which can develop different regulatory models. There are also significant differences in how these norms have been formulated in penal codes or other legal acts. In order to gather the conceptual elements of disinformation among the responding countries, those regulation models, which constitute an explicit crime for such conduct were most helpful (6 countries belong to this group: GR, RO, SK, HU, CYP, CZ). Some of the respondents reported rules in criminal law that could cover disinformation, however, all of them use different terminology. At the same time, many respondents reported criminal law rules regulating hate speech and defamation. However, in these norms usually one or more of the currently known features of disinformation are lacking due to the fact that depending on the specific nature of the different crimes, the substantive elements of each offence obviously differ as well

Based on the answers to the survey the following common features of disinformation as criminal conduct can be observed: (1) the communicated information must be false at the time of communication; (2) assumes publishing and/or disseminating information; (3) the untrue facts are communicated to the general public or through the media; (4) the perpetrator knows that the statement is not true, so the conduct should be intentional; (5) it aims to harm public order/peace but real harm is not always required; (6) and opinions are excluded from criminal liability. However, there are still some features that are not uniform, so they may need further consideration, such as negligent conduct, forwarding or reposting of false content, a requirement of a concrete harming result, and the issue of later changing the truth of the statement.

### ***National measures regarding disinformation and COVID-19***

Many countries have reported measures related to disinformation connected to COVID-19, although unique legislation addressing disinformation in relation to the crisis, also often referred to as an infodemic, has not been enacted (yet). On the other hand, in most countries, new legislative processes, guidelines, and awareness programmes have been initiated or previous efforts have been accelerated due to the pandemic disinformation issues. These efforts mostly included guidelines for the public and broadcasters in connection with responsible, accurate, and correct information spreading regarding COVID-19 and special working group activity to decrease disinformation. Criminal code legislation was implemented only in Hungary as a part of the pandemic situation as described before, which was formulated as a case of Scaremongering. All the other processes (e.g. PT, IS, IT, NO, and CY) were also connected to the phenomenon of disinformation, and these intended the improvement of fair and trustworthy communication but were not strictly created due to the COVID-19 crisis. Countries like Germany, Iceland, and Norway also conducted state surveys regarding disinformation at that time. However, these researches were not centred around the definition of disinformation, but the perception of such material.

### ***Case law and jurisprudence***

Searching for definitions of disinformation and related concepts in the case law and jurisprudence resulted in a rather short list of core elements of the definition that can contribute to the overall aim of this report. In decisions of courts across the EU Member States dealing with cases related to penal code and media regulation, some relevant and useful trends can be witnessed. The core elements of the definition of disinformation or related concepts are 1.) intention to cause harm, 2.) capacity to disrupt the public order, 3.) lack of any added value for the society, and 4.) the perception of the recipient that is key in determining whether the information is misleading or not.

When it comes to the definitions and understandings of the concepts of political and issue-based advertising national case law also provides useful conceptual elements sometimes even specifically mentioning the role of social media. The timing of publication of such content, particularly on the day of the election, is apparently a crucial part of defining the political propaganda. Reference to social justice is, according to some court decisions, a clear indication that the content is of a political nature.

### ***Future plans and activities addressing disinformation***

Around half (14) of the countries that have responded to the survey referred to some kind of future legislative initiatives regarding disinformation. In most of these countries, there are political actions to regulate disinformation specifically, but concrete suggestions dealing with the definition of disinformation are almost nowhere present (yet). In many countries, the need for regulation has been on the agenda for a considerable time but no concrete steps have yet been taken. It appears common practice that the countries ask a committee of experts to assess the particular regulatory environment and future regulatory options of disinformation. These committees generally assess the current status of disinformation and other manipulative trends, the roles of online platforms in the media market, and regulatory options (self-regulation, co-regulation, or legislative measures) regarding disinformation. Other possibilities are legislative support for professional journalism or the possibility of a media/press regulation regarding accurate and credible reporting. In addition, many countries responded that the transposition of the new rules of the AVMS Directive and the consultation of the DSA and the European Democratic Action Plan brought forward the question of disinformation. But also here: no definite steps have been made yet.

### ***Conclusions***

A number of conclusions can be drawn in relation to the various definitions of disinformation and related notions. First, many Member States have adhered to, in one way or another, the conceptual framework of disinformation and misinformation, as developed by both the High-Level Expert Group on disinformation (HLEG), and the work of Wardle and Derakhshan. Second, only one EU Member State has a legislative definition that specifically uses the term disinformation. Third, a number of EU Member States have legislation that applies to the



concept of disinformation, but is not specifically termed disinformation, and instead concerns prohibitions on false news and false information. Thus, most regulatory activity at the national level concerns disinformation, rather than misinformation or malinformation. Further, other concepts, such as fake news, propaganda, foreign influence, were also seen to fit within the notions of disinformation. Fourth, three key elements emerge in relation to the definitions relating to disinformation: disinformation concerns (a) false information, (b) disseminated with a specific intention (malicious or bad faith) (c) and causes certain harms. In this regard, many definitions focus on the act of communication to the public, rather than on the creator of the content. Fifth, where there is a lack of malicious intent (i.e. in good faith), it is not considered disinformation but misinformation, with only a few Member States covering this concept.

In addition, while most of the definitions contain some core common elements they differ widely in detail. There are varying specific harms mentioned, including economic harm, public harm, personal harm, personal dignity, harm to elections, and affecting measures against COVID-19. Some national laws or guidelines address exclusively the communication of disinformation to the public, while others also include the creation. One Member State, France, explicitly mentioned forms of algorithmic amplification. Those laws or regulations that refer to intent, differ on whether they (also) require commercial intent or for-profit elements. If there are legal rules, they can be adopted in varying legal areas, from criminal law to defamation or media law. Some countries have adopted formal laws, others have issued external or even only internal guidelines. This diversity of divergent approaches displays a highly unharmonised approach, creating challenges for transborder services from an internal market perspective.

Crucially, national legislation applicable to disinformation is in many instances of a criminal nature. Coupled with this, having provisions in criminal law, without clear definitions, creates risks of even more serious interferences with freedom of expression. This finding aligns with the European Commission's Communication Tackling COVID-19 disinformation - Getting the facts right of June 2020 that "The several Member States already had provisions, including of criminal nature, related to disinformation and one Member State introduced a specific new criminal offence for spreading of disinformation during the state of emergency." Importantly, the Commission emphasises that laws which define these crimes in "too broad terms" and with "disproportionate penalties attached" can lead to "self-censorship, raising particular concerns as regards freedom of expression." Indeed, such laws may also raise obstacles to the free flow of information, and freedom to provide services.

In terms of definitions of political advertising and issue-based advertising, three main conclusions emerge. First, it still remains the case that EU Member States adopt, if, at all, different definitions of political advertising, which may be limited to merely election-related advertisements, and prohibitions can be limited to election-time. Second, EU Member States still do not specifically define issue-based advertising. Third, and notably, a number of EU Member States adopt an approach to political advertising which aligns with the European Court of Human Rights' approach. Rather than specifically define political advertising, political

advertising applies in a broad sense to paid advertising on matters of broad public interest and is not limited to election-related ads.

### **Recommendations**

1) Any definition of disinformation in legislation or other regulation, such as regulatory guidance, must take into account the **serious implications for freedom of expression and media freedom**. Particularly to the extent that provisions on disinformation have been adopted in criminal law, a precise definition is paramount. This is even more important following the basic principle of criminal law, which prescribes that penalties only may be imposed when the criminal behaviour and the applicable penal sanctions within the upper and lower limits are precisely formulated in the law. Scholars and fundamental rights experts have warned that disinformation is an “extraordinarily elusive concept to define in law” and is “susceptible to providing executive authorities with excessive discretion to determine what is disinformation, what is a mistake, what is truth”. Further, measures to combat disinformation “must never prevent journalists and media actors from carrying out their work or lead to content being unduly blocked on the Internet.” Indeed, the European Commission has warned that laws on disinformation which are “too broad” raise particular concerns as regards freedom of expression, and can lead to self-censorship. Given the dangers associated with defining disinformation in legislation, great caution should be exercised in enacting a definition.

2) Current national approaches are very divergent, which from a Digital Single Market and market freedom perspective can create problems for the freedom of the media to disseminate information across borders. This clearly demonstrates a further need for considering all options of handling **more unified concepts**.

3) Where disinformation is sought to be defined, common elements of a more unified approach to defining disinformation should be: (a) **false or misleading information**, (b) disseminated with a specific intention (**malicious or bad faith**) (c) and has the ability to cause certain **public harms**. Importantly and additionally, a number of **other considerations** should apply:

- a) Clarify if only the act of public dissemination is covered, or also the creation.
- b) Describe clearly the object of the definition: a definition that refers to an objective standard like objectively wrong or factually wrong will offer more legal certainty and predictability than definitions that refer to vague notions such as false information. The latter category offers considerable room for interpretation and little predictability, which seems particularly problematic where provisions are implemented in a criminal law context.
- c) When there is a lack of malicious intent (i.e. in good faith), it should not be considered as disinformation but misinformation. Accordingly, different measures should be considered, which are proportionate and strike the right balance with securing the freedom of expression, taking into account that misinformation can be harmful but is not illegal. Relatedly, given the risks of disproportionate sanctions for freedom of expression,

and given that there is a lack of intention, misinformation should not attract sanctions for those creating or disseminating it. However, measures aimed at the disseminators such as platforms (i.e. fact-checking initiatives) would keep their relevance to alleviate the potentially negative societal effects of disinformation or misinformation.

- d) To the extent that a reference to public values (public order, peace, public opinion) is included and made part of the definition, this again risks overly broad application and a lack of legal certainty. Instead, it should be clarified as specific as possible what kind of harm the provision seeks to protect from, and above all: the powers granted by the law to interfere as a public authority should be clearly formulated and carefully framed.
  - e) The aim of impacting public opinion itself does not refer to concrete enough harm. All media content, and more generally, all public communication is intended to impact public opinion in one way or another. Broad definitions like these risks ruling out all publication communication.
  - f) Given the wide range of parties that can play a role in the dissemination of disinformation references to specific actors in a definition should be avoided.
  - g) When defining disinformation and related concepts the act of automatic amplification techniques, should be addressed to acknowledge the role of online platforms in the dissemination of disinformation and mitigate the risks
  - h) When references are made in provisions to related concepts such as propaganda, hate speech, etc. these should be fitted into existing categories in order to increase the overall conceptual clarity and comparability.
- 4) As is already confirmed in the 2018 Communication of the European Commission a definition of disinformation should include the elements of either false or misleading information and malicious intent. It is important to **avoid any subjective notions** when determining whether the information is misleading, in order to reduce the (potential) risks to the freedom of expression.
- 5) Given the criticism that has been levelled at the use of the term **fake news**, there is a strong argument for discontinuing its use as a concept (in policy debates) in relation to disinformation. As two reports for the Council of Europe and EU have emphasised, the term is “woefully inadequate” to take account of the complexity of disinformation, and has been “appropriated by politicians around the world to describe news organisations whose coverage they find disagreeable”. The term is also “misleading”, and has become “a weapon with which powerful actors can interfere in the circulation of information and attack and undermine independent news media”.
- 6) There are two types of political advertising that need to be addressed separately. In relation to defining the first type of political advertising and also issue-based advertising, it is recommended that the **framework adopted by the European Court of Human Rights** should be

followed. Political advertising would apply in a broad sense to *targeted and paid advertising on matters of public interest*, and would not be limited to election-related advertising. This broad definitional approach would also capture issue-based advertising, and also obviates the need for defining issue-based advertising in legislation. This would remove additional ambiguity over the differences between election-related advertising and issue-based advertising. Thus, the essential elements defining political advertising would be (a) that it is targeted at specific audiences (b) that it is paid-for (i.e. in return for payment or similar consideration; or offered freely by platforms for a specific purpose), and (c) that it is not commercial advertising (i.e. marketing, product, or service related). The other type of political advertising is the content propagating a political message (i.e. support for a political party or a candidate), but posted by users (whether for payment from a political party or a candidate to supporters or out of genuine support for a political party or a candidate). Users uploading such content should have to acknowledge that it includes political advertising.

7) In the event that content of political advertising is being shared organically this could avoid such content being labelled by online platforms as political advertising; a point that could need further consideration. However, when this would happen on a mass-scale or in another artificial way by circumventing labelling mechanisms this could indicate **inauthentic behaviour**. Hence this could be addressed by platforms under their general commitments to ensure transparency and/or implement other proportional remedies against such inauthentic behaviour.



# 1. INTRODUCTION

## 1.1 ERGA'S INVOLVEMENT IN THE AREA OF DISINFORMATION

On 26 April 2018, the European Commission adopted the Communication *Tackling Online Disinformation: a European Approach*<sup>4</sup>. The Communication, which has been developed after extensive consultations with citizens and stakeholders, describes the key overarching principles and objectives which should guide actions to raise public awareness about disinformation and tackle the phenomenon effectively. Furthermore, the Communication maps the specific measures which the European Commission intends to take in this regard. In May 2018 the Commission convened the *Multistakeholder Forum on Disinformation*<sup>5</sup> to draft a self-regulatory *Code of Practice on Disinformation*<sup>6</sup>. The Forum consisted of a *Working Group* composed of the major online platforms and representatives of the advertising industry and major advertisers, as well as a *Sounding Board* composed of representatives of the media, academia, and civil society. The Working Group was tasked with drafting the Code, and the Sounding Board was entrusted with providing advice and issuing an Opinion on the Code. The Code was published on 26 September 2018, along with the *Opinion of the Sounding Board*.<sup>7</sup>

The Code consists of a preamble, a statement of purposes, and a set of 15 commitments prefaced by explanatory comments that reference the Communication's objectives, detail the commitments' scope and purposes, and provide context. The commitments are organised under five fields:

1. Scrutiny of ad placements (aimed at demonetising online purveyors of disinformation)
2. Political advertising and issue-based advertising (aimed at making sure that political adverts are clearly identified by the users)
3. Integrity of services (aimed at identifying and closing fake accounts and using appropriate mechanisms to signal bot-driven interactions)
4. Empowering consumers (aimed at diluting the visibility of disinformation by improving the findability of trustworthy content and by making it easier for users to discover and access different news sources representing alternative viewpoints)
5. Empowering the research community (aimed at granting researchers access to platforms' data that are necessary to continuously monitor online disinformation)

<sup>4</sup> European Commission, Communication Tackling online disinformation: a European Approach, COM(2018) 236 final, 26 April 2018, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0236>.

<sup>5</sup> EU, Multi-stakeholder Forum on Disinformation, 11 July 2018, <https://ec.europa.eu/digital-single-market/en/news/meeting-multistakeholder-forum-disinformation>.

<sup>6</sup> EU, Code of Practice on Disinformation, 26 September 2018, <https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation>.

<sup>7</sup> EU, Opinion of the Sounding board of the Multi-stakeholder forum on the Code of Practice, 24 September 2018, <https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation>.

Signatories to the Code are required to identify which of these commitments they adhere to, in light of their relevance to the products or services they provide. The signatories also commit to cooperating with the Commission in assessing the Code, including providing information upon request and responding to questions.

The *Joint Communication* adopted on 5 December 2018 by the European Commission and the European External Action Service, also known as the *Action Plan against Disinformation*<sup>8</sup>, assigned to the European Commission, with the help of ERGA, the task to monitor the implementation of the five commitment areas of the Code of Practice.

The *Action Plan against Disinformation* was accompanied by the European Commission's Report on the implementation of the Communication *Tackling online disinformation: a European Approach*<sup>9</sup>, which also refers to the role of ERGA in the monitoring of the implementation of the Code in the various Member States.

The monitoring of the implementation of the Code has been carried out in two phases: the first phase between January and May 2019 was aimed at monitoring the implementation of the Code's commitments that are of particular pertinence to the integrity of the European elections. The outcomes of the assessment during the first phase have been laid down in the *Report of the activities carried out to assist the European Commission in the intermediate monitoring of the Code of practice on disinformation*<sup>10</sup>, which was published in June 2018.

The report stated that overall, the monitoring confirmed that archives of political advertising were made available by the platforms in all the relevant Countries during the period May 5th to May 25th, 2019. Some information was provided in the archives in relation to the identity of the relevant political actors, the sponsors, the volume of advertising, and the overall amount spent. However, the monitoring indicates that the information in the online archives is not complete and that not all the political advertising carried on the platforms was correctly labelled as such. Consequently, and, in general terms, these archives do not provide a clear, comprehensive, and fully credible picture of the nature and scale of political advertising on these platforms during the monitoring period. In addition, the different definitions of what constitutes political advertising being applied by the different platforms, and the extent to which these deviate from existing definitional frameworks at a Member State level, have the potential to create some confusion.

In the second phase, ERGA assisted in a comprehensive assessment of the implementation of the commitments of all the five pillars of the Code after an initial 12-month period (i.e. in October

<sup>8</sup> European Commission, Joint Communication of the European Commission and the European External Action Service, also known as the Action Plan against Disinformation, JOIN(2018) 36 final, 5 December 2018, [https://ec.europa.eu/commission/sites/beta-political/files/eu-communication-disinformation-euco-05122018\\_en.pdf](https://ec.europa.eu/commission/sites/beta-political/files/eu-communication-disinformation-euco-05122018_en.pdf).

<sup>9</sup> European Commission, Report on the implementation of the Communication "Tackling online disinformation: a European Approach", COM(2018) 794 final, 5 December 2018, <https://ec.europa.eu/digital-single-market/en/news/report-implementation-communication-tackling-online-disinformation-european-approach>.

<sup>10</sup> ERGA, Report of the activities carried out to assist the European Commission in the intermediate monitoring of the Code of practice on disinformation (June 2019), [https://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-06\\_Report-intermediate-monitoring-Code-of-Practice-on-disinformation.pdf](https://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-06_Report-intermediate-monitoring-Code-of-Practice-on-disinformation.pdf).

2019). On 29 April 2020, ERGA adopted the Report *Assessment of the Implementation of the Code of Practice*<sup>11</sup>, which evaluates the implementation of the Code's five pillars and summarises the results of 2019 monitoring activities carried out by ERGA members in 13 Member States.

The report stated that the Code is an important step to tackle online disinformation, as it has contributed to building a new relationship between its signatories, the EU, and the NRA's. While some platforms have made clear efforts to comply with its measures, ERGA nevertheless identified significant weaknesses that need to be addressed to ensure the Code can achieve its goals in the future. In that regard ERGA identified concrete recommendations as a way forward:

- The current self-regulatory model demonstrated to be an important and necessary first step, but there is a need to be more effective to counter disinformation online. Therefore, ERGA proposed to move from the current flexible self-regulatory approach to a co-regulatory one and proposes to assist the Commission, during 2020, in view of the identification of specific measures and Key Performance Indicators (KPIs) for the platforms and the definition of necessary tools for the NRA's monitoring and enforcement activities.
- The number of signatories of the Code is limited and does not include all important platforms, information and communication services, and actors from the advertising industry that are active in the EU. Therefore, ERGA recommended further efforts to increase the number of platforms signing the Code, in order to avoid regulatory asymmetries.
- There is a need for greater transparency, including much more detailed data (especially country-specific data) about how the signatories are implementing the Code; furthermore, some of the measures under the Code are too general in nature and are not uniformly enacted by all signatories. Therefore, ERGA suggested that platforms make datasets, data monitoring tools, and country-specific information allowing independent monitoring by NRAs available.

In addition, ERGA proposed to assist the Commission in setting out relevant definitions (including on political advertising) as well as guidelines to ensure a more consistent approach. In ERGA's *Work Programme 2020*<sup>12</sup> and the *Terms of Reference of its Subgroup Media Plurality - Disinformation*<sup>13</sup>, it has been further detailed on how to address this.

## 1.2 ERGA'S MEMBERS (CURRENT) INVOLVEMENT IN THE AREA OF DISINFORMATION

Apart from ERGA's assistance of the European Commission during the monitoring of the implementation of the Code of Practice, it can be witnessed that on the national country-level several ERGA members have become increasingly active in the area of fighting disinformation. The new challenges of the infodemic caused by the COVID-19 crisis are addressed as well in

<sup>11</sup> ERGA, Report on disinformation: Assessment of the implementation of the Code of Practice (2020), <https://erga-online.eu/wp-content/uploads/2020/05/ERGA-2019-report-published-2020-LQ.pdf>.

<sup>12</sup> [https://erga-online.eu/wp-content/uploads/2020/01/ERGA\\_2019\\_WorkProgramme-2020.pdf](https://erga-online.eu/wp-content/uploads/2020/01/ERGA_2019_WorkProgramme-2020.pdf).

<sup>13</sup> [https://erga-online.eu/wp-content/uploads/2020/05/ERGA-2020\\_SG-2-ToR\\_Adopted\\_4-05-2020.pdf](https://erga-online.eu/wp-content/uploads/2020/05/ERGA-2020_SG-2-ToR_Adopted_4-05-2020.pdf).

many actions on the national level, including new research or media literacy campaigns.

In France, the *Law on the fight against the manipulation of information*<sup>14</sup> created a new range of responsibilities for online platforms. This includes the obligation to cooperate with the regulator, to develop an easily accessible and visible reporting system as well as the incentive to implement complementary measures such as the transparency of algorithms and media literacy. The Law has entrusted the French CSA with monitoring the compliance with the above-mentioned obligations. On this basis, the CSA has issued a *Recommendation*<sup>15</sup> and released its first assessment report based on the year 2019 in July 2020.<sup>16</sup> While the French audiovisual regulator welcomes the willingness of operators to cooperate and the development of fruitful dialogue, the CSA urges the platforms to provide more information - especially with regard to the human and financial means dedicated to information disorder and the comprehensibility and accountability of algorithms - to allow an effective assessment of the measures undertaken by the online operators.

In Germany the *German Network Enforcement Act (NetzDG)*,<sup>17</sup> which entered into force on 1 January 2018, and aims to prevent and remove online hate speech according to criminal law. The law introduces a supervisory and regulatory power of the Federal Office of Justice, which is responsible for the enforcement of the NetzDG. If, for example, a provider of a social network makes the so-called reporting channels for the transmission of complaints about illegal content too complicated, the Federal office of Justice can in future order that this deficit is remedied. However, the Federal Office of Justice will still not be able to order the deletion of content or the blocking of accounts. Orders in individual cases continue to be issued by the authorities specified in the law, usually the Media Authorities. As a principle, the NetzDG covers only illegal content but since such content can go hand in hand with disinformation the German media authorities are also exploring options on how to deal with the latter phenomenon to ensure a coherent approach. In that respect, the Media Authorities also commissioned new research on the issue of online disinformation and related issues, which resulted in the report “Types of Disinformation and Misinformation”,<sup>18</sup> published in September 2020.

In Italy, the national media authority AGCOM initiated a self-regulation initiative to combat online disinformation. In February 2018, ahead of the general elections, the Italian Communications Authority (AGCOM) set up a working group, comprising of representatives from both social platforms and Italian newspapers and published a *Technical Roundtable for safeguarding*

<sup>14</sup> ELOI n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information.

<sup>15</sup> Recommendation no. 2019-03 of 15 May 2019 of the Conseil supérieur de l'audiovisuel to online platform operators in the context of the duty to cooperate to fight the dissemination of false information.

<sup>16</sup> CSA, Combating the dissemination of false information on online platforms - An evaluation of the application and effectiveness of the measures implemented by operators in 2019, <https://www.csa.fr/Informer/Toutes-les-actualites/Actualites/Lutte-contre-les-Infox-le-CSA-publie-son-premier-bilan>.

<sup>17</sup> Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act), consolidated English version, [http://www.bmfv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG\\_engl.pdf?\\_\\_blob=publicationFile&v=2](http://www.bmfv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf?__blob=publicationFile&v=2).

<sup>18</sup> Die medienanstalten, Typen von Desinformation und Misinformation, September 2020, [https://www.die-medienanstalten.de/publikationen/weitere-veroeffentlichungen/artikel?tx\\_news\\_pi1%5Bnews%5D=4859&cHash=97354e7f535acb7ffc8b058839960131](https://www.die-medienanstalten.de/publikationen/weitere-veroeffentlichungen/artikel?tx_news_pi1%5Bnews%5D=4859&cHash=97354e7f535acb7ffc8b058839960131).



*News-Media Pluralism and Fairness in the online Platforms*<sup>19</sup>. The initiative led to a set of AGCOM Guidelines<sup>20</sup> that digital platforms and other actors can voluntarily adopt to ensure equal treatment of all political parties. The guidelines call for equal access to exposure on the platforms for all parties; transparency about election advertisements; sharing of methods on how to identify illegal content on the platforms; expanding existing rules for public communication during elections and expanding the electoral silence rules to capture social media, and finally, recommending enforcement of the already existing online fact-checking tools on platforms like Google and Facebook.

While fighting disinformation might (still) not be in the (legal) mandate and scope of many media regulatory authorities in Europe they have a long-standing tradition of regulating issues which are linked such as ensuring plurality and cultural diversity, accuracy, and impartiality of information, supervising rules for commercial communication including political advertising and protecting minors and citizens against harmful media content.

ERGA noted already in its report *Internal Media Plurality in Audiovisual Media Services in the EU: Rules & Practices*<sup>21</sup>, adopted in December 2018, that when there is indeed a relevant legal framework that connects the past and present regulatory experience to the current information crisis, it lies precisely in this area. The vibrant patchwork of existing standards, regulations, and legal provisions dealing with plurality and other public objectives will not fit the new situation seamlessly, but there is much to learn from these frameworks and from the experience of the NRA's in applying them.<sup>22</sup>

### 1.3 DISINFORMATION AND RELATED CONCEPTS

Given the experience of NRA's to protect audiences against harmful content and safeguard plurality but also taking into account the multifaced characteristics of disinformation a broad approach is necessary when exploring possible remedies. As the *Terms of Reference of ERGA subgroup 2 Disinformation - Plurality*<sup>23</sup> also points out there are many concepts related to the phenomenon, be it directly or indirectly. First of all, there are the concepts that are traditionally linked because they are considered to be different types (with gradual differences) of the same problem, such as misinformation, malinformation, fake news, false news, propaganda, and foreign influence operations. More context-related factors such as filter bubbles and echo chambers or techniques used for dissemination such as fake accounts, social bots, and coordinated inauthentic behaviour are often linked to the issue of disinformation as well. They

<sup>19</sup> AGCOM, Technical Roundtable for safeguarding News-Media Pluralism and Fairness in the online Platforms (Deliberation No. 423/17/CONS), <https://www.agcom.it/documents/10179/13325831/Pubblicazione+20-12-2018/7db41746-11e8-43d4-824b-003d80a6284d?version=1.0>.

<sup>20</sup> AGCOM, Guidelines for equal access to online platforms during the election campaign for the 2018 political elections, <https://www.agcom.it/documents/10179/9478149/Documento+generico+01-02-2018/45429524-3f31-4195-bf46-4f2863af0ff6?version=1.0>.

<sup>21</sup> <https://erga-online.eu/wp-content/uploads/2019/01/ERGA-2018-07-SG1-Report-on-internal-plurality-LQ.pdf>.

<sup>22</sup> ERGA, *Internal Media Plurality in Audiovisual Media Services in the EU: Rules & Practices*, page 2, <https://erga-online.eu/wp-content/uploads/2019/01/ERGA-2018-07-SG1-Report-on-internal-plurality-LQ.pdf>

<sup>23</sup> Subgroup 2 Terms of Reference for 2020, p. 3.

can differ a lot since some are more of an instrumental nature than others but they have in common that they can amplify the speed at which disinformation is disseminated and increase significantly its impact. Traditionally, but even more in the current online environment, there are numerous examples of inauthentic journalistic behaviour, hate speech, or other illegal accompanying disinformation. Also, this requires a coherent approach and legitimates a broad focus when exploring the issue of disinformation and related concepts and identifying possible remedies.

## 1.4 AIM OF THE REPORT

The *Terms of Reference of ERGA Subgroup 2 Media Plurality – Disinformation* state that “Based on the permanent monitoring of national legislation in the Member States, the ERGA authorities shall analyse the notion of disinformation by summarizing and sorting the different kinds of understandings and definitions of the phenomenon.” As elaborated in section 1.1 of the report the background of this lies in the previous work of ERGA showed that “the definitions used by the European Commission, Member States and platforms for the different phenomena of disinformation deviate and should be further clarified in order to ensure a consistent approach”. Furthermore, a recent report of the European Commission, the Commission Staff Working Document *Assessment of the Code of Practice on Disinformation - Achievements and areas for further improvement*, published on 10 September 2020, addresses the lack of uniform definitions and states that the Code of Practice would benefit from further scoping of certain key concepts and more precise definitions of certain operational terms.<sup>24</sup> According to the European Commission, this would need to be well articulated with the existing regulatory framework and legal requirements applicable in the Member States.

The work of Workstream 1 of Subgroup 2 aims to identify relevant elements and characteristics of notions of disinformation and related concepts and will comprise several steps such as but not necessarily limited to a description of the different potential forms of disinformation and differentiation between these different concepts. The ultimate aim is to provide for clearer and more uniform definitions to ensure optimal guidance to all actors involved and contribute to more consistency within the national approaches.

## 1.5 WORKING METHOD AND INFORMATION SOURCES

The information for this report is collected through various means including an examination of existing academic research, interviews with relevant stakeholders, particularly from the civil society and media practitioners’ domains, and a questionnaire distributed amongst all ERGA members and observers. The scope of the survey was not limited to the single notion of disinformation but also covered concepts that are usually associated with disinformation such as misinformation, mal information, fake news, false news, false information, and foreign influence operations. Information was collected on definitions, interpretations, and

<sup>24</sup> Assessment of the Code of Practice on Disinformation - Achievements and areas for further improvement, Commission Staff Working Document, SWD(2020) 180 final, 10 September 2020, p. 12.

understandings of disinformation and related concepts available in the legislation and other regulation including (self-regulatory) codes and guidelines in the ERGA Member States. In addition, the survey questions also zoomed into how relevant actors define, interpret, and understand disinformation in daily practice. The questionnaire also collected relevant information about national approaches regarding more context-related (online) issues such as fake accounts, coordinated inauthentic behaviour, social bots, echo chambers, and filter bubbles since these can affect the dissemination speed and impact of disinformation. With the aim to deliver a report that is as up-to-date as possible the survey also included questions on recent or planned legislative and other measures that tackle the special challenges of the current COVID-19 crisis in relation to disinformation and related concepts. Furthermore, in order to obtain actual information on the national context respondents were asked to provide information on (recent) national research and pending (political) discussions on disinformation and related concepts.

Moreover, the report also collected information on legislative and other measures dealing with issues that are of a general nature and often have a long tradition in regulation such as measures to regulate political advertising, political microtargeting, and issue-based advertising, to ensure accuracy, objectivity, and impartiality of information, to combat defamation, incitement to hatred, and other illegal content. The regulation and measures in place for such issues can also provide helpful input for definitions and understanding of disinformation (and related concepts). Also, the survey tried to get further insight into the currently available definitions and understandings of political advertising and issue-based advertising since recent reports of ERGA and the European Commission demonstrated that different definitions, interpretations, and understandings of the notions of political and issue-based advertising can hinder the effectiveness of measures tackling disinformation. Given the broad scope and multi-faced nature of the issues at stake, it was important to keep focus and only collect and map information that can provide guidance for definitions, interpretations, and understandings of disinformation and related concepts. In any case, we should not lose sight of the overall purpose of Workstream 1 of Subgroup 2 which is to identify relevant elements and characteristics of notions of disinformation and related concepts with the ultimate aim to contribute to clearer and more uniform definitions and achieve more common understandings of the key notions at stake. For an exhaustive overview of (legislative) measures dealing with ensuring internal plurality within and outside elections periods which are also linked to issues around disinformation, it is recommended to consult ERGA's *Report Internal Media Plurality in Audiovisual Media Services in the EU: Rules & Practices*<sup>25</sup>.

<sup>25</sup> ERGA, Internal Media Plurality in Audiovisual Media Services in the EU: Rules & Practices, <https://erga-online.eu/wp-content/uploads/2019/01/ERGA-2018-07-SG1-Report-on-internal-plurality-LQ.pdf>.

## 1.6 STRUCTURE OF THE REPORT

Chapter 2 of the report *Current research on disinformation and related concepts* has a special focus on academic research, and aims to identify the different notions of disinformation and related concepts addressed in this research, and relate these to the way the different concepts are used and interpreted in EU member states, fundamental rights frameworks, and policy standards. The Chapter will tease out several notions and identify what are their main and distinctive characteristics and what could be regarded as useful elements to feed in clearer and more uniform definitions with the aim to reduce deviations, provide for more clarity and achieve more consistency and common approaches.

Chapter 3 of the report *What disinformation and related concepts mean for different actors* is dedicated to the definitions and understandings of disinformation and related concepts according to media practitioners such as professional associations of journalists, self-regulatory bodies for press, and journalists and media outlets (in particular public service media). In this regard is also examined whether ethical codes, guidelines, or codes of conduct on journalistic behaviour contain guidance on definitions or interpretations of disinformation, political advertising, propaganda, information operations, and related concepts, or rather focus on which values and news standards journalists should respect. Other approaches that can be found in media literacy-awareness campaigns or notions used by fact-checker organisations are addressed as well in Chapter 3. Furthermore, the Chapter points out the societal relevance of the issues at stake and examines whether definitions and understandings of disinformation and related concepts by civil society organisations can provide helpful guidance and contribute to more common approaches.

The main purpose of Chapter 4 *Legislation and regulation relating to disinformation and related concepts* is to provide for a detailed overview of the national legislative and other tools to regulate disinformation and related concepts, as well as legislation dealing with political and issue-based advertising. This mapping exercise is mainly based on the replies of ERGAs members of observers to the questionnaire and is divided into two clusters. In the first group are listed legislative acts with statutory regulations containing a specific definition of disinformation and related concepts, political advertising, and issue-based advertising. To the second group belong non-legislative, but state coordinated approaches where the documents have no legal binding force, but the state played an integral part in the creation of the conceptual elements. Last but not least, Chapter 4 refers also to relevant case law including court decisions, and jurisprudence referring in any way to the definitions and interpretations of the studied concepts.

It cannot be stressed enough that none of the chapters has the aim to provide an exhaustive overview. The aim of the report is to identify and examine useful elements for uniform definitions and common understandings of the notions of disinformation and related concepts, political advertising, and issue-based advertising. Therefore, the focus is always on legislation and other measures that can provide such helpful input and guidance in order to contribute to a more consistent approach in the application of the key notions at stake.



## 2. CURRENT RESEARCH ON DISINFORMATION AND RELATED CONCEPTS

The purpose of Chapter 2 is to identify the different notions of disinformation and related concepts in current research and relate these to the way the different concepts are used and interpreted in the EU Member States, fundamental rights frameworks, and policy standards. As previous ERGA reports have highlighted, there is no “commonly shared definition” of disinformation, and a number of other notions, such as fake news and false information, are routinely used as “different ways to indicate the same concept”.<sup>26</sup> As such, the Chapter will tease out a number of these notions, in order to assist in coming to clearer definitions to ensure more consistency and uniformity.<sup>27</sup> Importantly, the Chapter will also examine related concepts that are not strictly speaking direct forms of disinformation, but assist in fully understanding the notion and *distribution* of disinformation (such as fake accounts, social bots, coordinated inauthentic behaviour, propaganda, political advertising, issue-based advertising, and journalistic due diligence).<sup>28</sup> For ease of reading, the Chapter is divided into two main sections, with section 1 examining disinformation and closely-related concepts, while section 2 will examine political advertising and issue-based advertising. The Chapter is based on desk research and the responses to an ERGA questionnaire circulated to national regulatory authorities (NRAs) in the EU Member States.

### 2.1 DISINFORMATION AND RELATED CONCEPTS

First, the previous work of ERGA on disinformation must be noted. The 2018 ERGA *Report on Internal Media Plurality in Audiovisual Media Services in the EU: Rules & Practices* highlighted the specific challenge of there being no commonly shared definition of disinformation, and many national stakeholders and institutions still using the widespread expression of fake news.<sup>29</sup> Similarly, in the 2019 ERGA *Report of the activities carried out to assist the European Commission in the intermediate monitoring of the Code of practice on disinformation*, the issue of a lack of commonly shared definition was again emphasised.<sup>30</sup> Indeed, in the ERGA *Work Programme 2020*, it was noted that the definitions used by the European Commission, EU Member States, and online platforms for the different phenomena of disinformation “deviate and should be clarified in order to ensure a consistent approach”.<sup>31</sup> Finally, in relation to political advertising and issue-based advertising, the 2020 ERGA *Report on disinformation: Assessment of the implementation of the Code of Practice*, emphasised a “key difficulty” that

<sup>26</sup> ERGA, Report of the activities carried out to assist the European Commission in the intermediate monitoring of the Code of practice on disinformation (June 2019), [https://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-06\\_Report-intermediate-monitoring-Code-of-Practice-on-disinformation.pdf](https://erga-online.eu/wp-content/uploads/2019/06/ERGA-2019-06_Report-intermediate-monitoring-Code-of-Practice-on-disinformation.pdf).

<sup>27</sup> Subgroup 2 Terms of Reference for 2020, p. 3.

<sup>28</sup> Subgroup 2 Terms of Reference for 2020, p. 3.

<sup>29</sup> ERGA, Internal Media Plurality in Audiovisual Media Services in the EU: Rules & Practices (2018), p. 83, <https://erga-online.eu/wp-content/uploads/2019/01/ERGA-2018-07-SG1-Report-on-internal-plurality-LQ.pdf>.

<sup>30</sup> ERGA, Report of the activities carried out to assist the European Commission in the intermediate monitoring of the Code of practice on disinformation (June 2019), p. 4.

<sup>31</sup> ERGA, Protecting freedom, safeguarding European law and values: ERGA Work Programme 2020 (2020), p. 4, [https://erga-online.eu/wp-content/uploads/2020/01/ERGA\\_2019\\_WorkProgramme-2020.pdf](https://erga-online.eu/wp-content/uploads/2020/01/ERGA_2019_WorkProgramme-2020.pdf).

the EU Member States have different definitions of political advertising, and most do not define issue-based advertising.<sup>32</sup>

While disinformation continues to be an elusive concept, it should be noted that the COVID-19 pandemic has brought about a particular focus on legislation targeting disinformation, and a recognition that a number of EU Member States now have specific legislation. Indeed, the European Commission, in its *Joint Communication on Tackling COVID-19 disinformation – Getting the facts right*, published in June 2020, recognised that the several Member States “already had provisions, including of criminal nature, related to disinformation and one Member State introduced a specific new criminal offence for spreading of disinformation during the state of emergency”.<sup>33</sup> As such, the Commission warned that laws on disinformation which are “too broad” raise particular concerns as regards freedom of expression.<sup>34</sup> This concern has been echoed by David Kaye, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, who noted in 2020, that disinformation is an “extraordinarily elusive concept to define in law”, and is “susceptible to providing executive authorities with excessive discretion to determine what is disinformation, what is a mistake, what is truth”.<sup>35</sup> As such, any definition of disinformation must take account of this new dynamic of the implication for freedom of expression, and media freedom. Indeed, Dunja Mijatović, the Council of Europe’s Commissioner for Human Rights has voiced concern over certain measures to tackle disinformation having been used as a “pretext to introduce disproportionate restrictions to press freedom,” and measures to combat disinformation “must never prevent journalists and media actors from carrying out their work or lead to content being unduly blocked on the Internet”<sup>36</sup>. Similarly, the European Parliament adopted a Resolution in April 2020, stressing that disinformation about COVID-19 was a major public health problem, and also condemned “censorship”, and the “arrests and intimidation of journalists” for criticising governments.<sup>37</sup>

Finally, it must also be taken into account that national laws on disinformation may not only be applicable to national media but also applicable to media and other services in other countries. Thus, such measures must be consistent with the free flow of information, and the freedom to provide services. As the European Parliament underlined in September 2020, a specific piece of content may be deemed illegal in one Member State but is covered by the right to freedom

<sup>32</sup> ERGA, Report on disinformation: Assessment of the implementation of the Code of Practice (2020), p. 18, <https://erga-online.eu/wp-content/uploads/2020/05/ERGA-2019-report-published-2020-LQ.pdf>.

<sup>33</sup> European Commission, Joint Communication on Tackling COVID-19 disinformation - Getting the facts right, JOIN(2020) 8 final, 10 June 2020, p. 11, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020JC0008&from=EN>.

<sup>34</sup> Ibid.

<sup>35</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Disease pandemics and the freedom of opinion and expression, A/HRC/44/49, 23 April 2020, at para. 42, <https://undocs.org/A/HRC/44/49>.

<sup>36</sup> Council of Europe Commissioner for Human Rights, Press freedom must not be undermined by measures to counter disinformation about COVID-19, 3 April 2020, <https://www.coe.int/en/web/commissioner/-/press-freedom-must-not-be-undermined-by-measures-to-counter-disinformation-about-covid-19>.

<sup>37</sup> European Parliament resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences, para. 57, [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0054\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0054_EN.html).

of expression in another,” and “hosting service providers should not be required to remove or disable access to information that is legal in the Member State that they are established in, or where their designated legal representative resides or is established”<sup>38</sup>. This is in order to “protect freedom of speech, to avoid conflicts of laws, to avert unjustified and ineffective geo-blocking and to aim for a harmonised digital single market”<sup>39</sup>.

## 2.1.1 DISINFORMATION

It must be recognised at the outset that there has been an enormous amount of research on disinformation and related concepts. For example, numerous excellent academic studies for the European Parliament alone having been published since 2017,<sup>40</sup> and others have reviewed studies published in academic journals on concepts such as disinformation and fake news.<sup>41</sup> Van Hoboken et al. have recently reviewed the considerable literature relating to definitions of disinformation, noting the variety of definitions and descriptions, but identify how certain approaches have been “particularly influential”.<sup>42</sup> In this regard, Wardle and Derakhshan’s study for the Council of Europe entitled *Information Disorder: Toward an interdisciplinary framework for research and policymaking*, remains an excellent framework for understanding disinformation and related concepts. The study sets out three key definitions:

1. disinformation is information that is false and deliberately created to harm a person, social group, organisation, or country;
2. misinformation is information that is false, but not created with the intention of causing harm; and
3. malinformation is information that is based on reality, used to inflict harm on a person, organisation, or country.<sup>43</sup>

<sup>38</sup> European Parliament resolution of 20 October 2020 on the Digital Services Act and fundamental rights issues posed, para. 15, [https://www.europarl.europa.eu/doceo/document/TA-9-2020-0274\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-9-2020-0274_EN.html).

<sup>39</sup> Ibid.

<sup>40</sup> See, e.g., E. Bressanelli et al., Institutions and foreign interferences (2020); A. de Streel et al., Online Platforms’ Moderation of Illegal Content Online: Law, Practices and Options for Reform (2020); C. Marsden and T. Meyer, Regulating disinformation with artificial intelligence (2019); J. Bayer et al., Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States (2019); A. Alaphilippe et al., Automated tackling of disinformation (2019); L. M. Neudert and N. Marchal, Polarisation and the use of technology in political campaigns and communication (2019); A. Renda, The legal framework to address “fake news”: possible policy actions at the EU level (2018); D. Frau-Meigs, Societal costs of “fake news” in the Digital Single Market (2018); and Ž. Turk, Technology as Enabler of Fake News and a Potential Tool to Combat It (2018).

<sup>41</sup> See E.C. Tandoc, Z.W. Lim, and R. Ling, “Defining ‘Fake News’: A typology of scholarly definitions” (2018) 8(2) Digital Journalism 137 (a review of how 34 academic articles defined and operationalised the term fake news). See also, P.J. Tamás, “A hamis hírek alkotmányos helyzete és szerepe a demokratikus nyilvánosság befolyásolásában” [The issue of the conceptual definition of fake news] (2020) In Medias Res 2020/1, 141–164.

<sup>42</sup> J. van Hoboken, et al., The legal framework on the dissemination of disinformation through Internet services and the regulation of political advertising, A report for the Dutch Ministry of the Interior and Kingdom Relations (2019), p. 15, [https://www.ivir.nl/publicaties/download/Report\\_Disinformation\\_Dec2019-1.pdf](https://www.ivir.nl/publicaties/download/Report_Disinformation_Dec2019-1.pdf). See also, J. Möller, M. Hameleers, and F. Ferreau, Typen von Desinformation und Misinformation [Types of disinformation and misinformation] (2020), <https://www.die-medienanstalten.de/service/pressemitteilungen/meldung/vorgehen-gegen-desinformation-ist-fundamental-fuer-die-kommunikative-basis-unserer-gesellschaft>.

<sup>43</sup> C. Wardle and H. Derakhshan, Information Disorder: Toward an interdisciplinary framework for research and policymaking, Council of Europe report DGI(2017)09, <https://rm.coe.int/information-disorder-toward-an-interdisciplinary-framework-for-research/168076277c>.

Thus, the distinguishing features of these definitions are the falsity of the information, the actor's intention, and the type of harm. Wardle and Derakhshan's conceptual framework for disinformation, misinformation, and malinformation is particularly helpful, and the various definitions contained in EU Member States' legislation will be discussed and sorted under this framework below. This approach can achieve two aims: first, it can help bring more conceptual clarity and show how the definitional categories are evolving; and second, it can help demonstrate in which category there is currently most regulatory activity taking place. Notably, Wardle and Derakhshan's conceptual framework has been adopted by various scholars and institutions. Scholars such as Bayer et al., in a study on disinformation and propaganda, relied upon Wardle and Derakhshan's framework for its "helpful distinction" between disinformation, misinformation, and mal-information<sup>44</sup>, and others, such as Alaphilippe et al., also adopted the framework for their study on disinformation. Indeed, UNESCO prefers the terms disinformation<sup>45</sup> and misinformation, as suggested by Wardle and Derakhshan,<sup>46</sup> while the UN Special Rapporteur on freedom of expression, among others, has also adopted the framework of disinformation, misinformation, and malinformation.<sup>47</sup>

The European Broadcasting Union (EBU) has also referred to Wardle and Derakhshan's study and adopted a similar definition of disinformation, namely inaccurate information that is presented, promoted, or disseminated by one or more actors in the chain with the intention to cause harm or make a profit.<sup>48</sup> As can be seen, the EBU added an element of a profit-motive. Similarly, the EU's independent High-level Group on fake news and online disinformation (HLEG) referred to Wardle and Derakhshan's study and defined disinformation as false, inaccurate, or misleading information designed, presented, and promoted to intentionally cause public harm or for profit.<sup>49</sup> This was built upon by the European Commission for its definition of disinformation contained in the 2018 Communication *Tackling online disinformation: a European Approach*, namely "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,"<sup>50</sup> which has been included in the EU Code of Practice on Disinformation. Notably, in its assessment of the Code of the Practice in September 2020, the Commission noted the Code would benefit from "more precise definitions," and with regard to the "existing regulatory framework and

<sup>44</sup> J. Bayer et al., Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States (European Union, 2019), p. 18.

<sup>45</sup> A. Alaphilippe, et al., Automated tackling of disinformation (European Union, 2019), p. 5.

<sup>46</sup> C. Ireton and J. Posetti, Journalism, fake news & disinformation (UNESCO, 2020), p. 14, <https://unesdoc.unesco.org/ark:/48223/pf0000265552>.

<sup>47</sup> UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, and OAS Special Rapporteur on Freedom of Expression, Joint declaration on freedom of expression and elections in the digital age, 30 April 2020, sec. 1(c)(iv), [https://www.ohchr.org/Documents/Issues/Opinion/JointDeclarationDigitalAge\\_30April2020\\_EN.pdf](https://www.ohchr.org/Documents/Issues/Opinion/JointDeclarationDigitalAge_30April2020_EN.pdf).

<sup>48</sup> EBU, Position Paper: 'Fake News' and the Information Disorder (June 2018), p. 6, [https://www.ebu.ch/files/live/sites/ebu/files/Publications/Position\\_Papers/EBU-Position-EN-Fake\\_News\\_Disinformation-18.04.2018.pdf](https://www.ebu.ch/files/live/sites/ebu/files/Publications/Position_Papers/EBU-Position-EN-Fake_News_Disinformation-18.04.2018.pdf).

<sup>49</sup> A multi-dimensional approach to disinformation, Report of the independent High level Group on fake news and online disinformation (2018), p. 5, [http://ec.europa.eu/newsroom/dae/document.cfm?doc\\_id=50271](http://ec.europa.eu/newsroom/dae/document.cfm?doc_id=50271).

<sup>50</sup> European Commission, Communication on Tackling online disinformation: a European Approach, COM(2018) 236 final, sec. 2.1, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0236>.

legal requirements applicable in the Member States”<sup>51</sup>.

Importantly, Van Hoboken et al. have identified a number of common elements to the definitions of disinformation: (a) the information must be incorrect or misleading; (b) there is an element of harm; (c) the intention of the actor, or whether something was deliberate, plays a role in each definition; and (iv) the economic gain of the actor may play a role.<sup>52</sup> Bayer et al. have also identified some further common elements to disinformation definitions, including that content are on matters of public interest; and strategically disseminated.<sup>53</sup> A final element that must also be recognised is that while disinformation may not be illegal, it constitutes potentially harmful content.<sup>54</sup> As the HLEG emphasised, disinformation is “not necessarily illegal,” but it can “nonetheless be harmful to citizens and society at large,” and falls “outside already illegal forms of speech”.<sup>55</sup> However, disinformation can be accompanied by illegal content, such as incitement to hatred or violence, as noted by scholars such as Tambini.<sup>56</sup>

From a review of the NRA responses to the ERGA questionnaire, a number of legislative provisions at the EU Member State level are applicable to the concept of disinformation. These are set out in the Table below, alongside Wardle and Derakhshan’s definition. In Chapter 4 of the Report, these legislative definitions are further detailed and mapped.

Wardle & Derakhshan	Disinformation is information that is false and deliberately created to harm a person, social group, organisation, or country.
Lithuania	Disinformation shall mean intentionally disseminated false information (Law on the Provision of Information to the Public, art. 19)
Malta	Whosoever shall maliciously spread false news which is likely to alarm public opinion or disturb public good order or the public peace or to create a commotion among the public or among certain classes of the public. (Criminal Code, art. 82)
Greece	Anyone who publicly or via the internet spreads or disseminates false news in any way, causing fear to an indefinite number of people or to a certain circle or category of persons, who are thus forced to carry out unplanned acts or to cancel them, at the risk of cause damage to the country’s economy, tourism or defence capacity or disrupt its international relations. (Criminal Code, art. 191)

<sup>51</sup> Assessment of the Code of Practice on Disinformation - Achievements and areas for further improvement, Commission Staff Working Document, SWD(2020) 180 final, 10 September 2020, p. 12.

<sup>52</sup> Van Hoboken et al., p. 17

<sup>53</sup> Bayer et al., p. 18.

<sup>54</sup> European Commission, Joint Communication on Tackling COVID-19 disinformation, JOIN(2020) 8 final, footnote 14 (“Although disinformation per se is not criminal in nature”).

<sup>55</sup> A multi-dimensional approach to disinformation, Report of the independent High level Group on fake news and online disinformation (2018), p. 10.

<sup>56</sup> D. Tambini, Media Freedom, Regulation and Trust: A Systemic Approach to Information Disorder (COE, 2020), p. 21, <https://rm.coe.int/cyprus-2020-new-media/16809a524f>.



Slovakia	Whoever intentionally causes serious danger to at least a part of the population in some area by spreading an alarming message which is untrue, or by committing any other similar act capable of causing such danger, shall be punished by imprisonment for up to two years. (Penal Code, para. 361)
France	The publication, dissemination, or reproduction, by any means whatsoever, of false news ... attributed to third parties when made in bad faith, has disturbed the public peace or has been likely to disturb it, shall be punishable by a fine of EUR 45,000. (Electoral Code, Art. L97)  Those who, by means of false news, slanderous noises, or other fraudulent manoeuvres, have surprised or hijacked voters, convinced one or more voters to abstain from voting, will be punished by one year's imprisonment and a fine of EUR 15,000. (Law on Freedom of the Press, art. 27)  False information likely to disturb public order or to alter the sincerity of an election; and any allegation or charge of an inaccurate or misleading fact likely to alter the sincerity of the forthcoming vote, which are deliberately, artificially or in an automated and massive manner, disseminated through an online public communication service. (Law on the fight against the manipulation of information, art. 1)
Hungary	Any conduct of uttering or publishing a statement one knows to be false or with a reckless disregard for its truth or falsity at times of special legal order with intent to obstruct or prevent the effectiveness of protective measures shall be construed as a felony offense and shall be punishable by imprisonment between one to five years. (Criminal Code, sec. 337)
Cyprus	Anyone who, in any way, publicises any form of false news or news that can potentially harm civil order or the public's trust towards the State or its authorities or cause fear or worry among the public or harm in any way the civil peace and order, is guilty of a misdemeanour and is punished with imprisonment that cannot exceed two years or with a fine that cannot exceed 1500 pounds or both of those sentences. (Penal Code, art. 50)
Croatia	Whoever invents or spreads false news that will disturb the peace and tranquillity of citizens will be fined for the offense in the domestic equivalent of 50-200 DEM or imprisoned for up to 30 days. (Law on Misdemeanours against Public Order and Peace, art. 16)
Czech Republic	Whoever intentionally causes a threat of serious concernment of at least a portion of the population of a certain area by spreading alarming news that is untrue, shall be sentenced to imprisonment for up to two years or to prohibition, of activity. (Criminal Code, art. 357)

The first point is that only one EU Member State has a statutory definition of the *specific* term disinformation, namely Lithuania. Article 19 of the Law on the Provision of Information to the Public prohibits the dissemination of “disinformation” and information that is slanderous and offensive to a person or which degrades his honour and dignity. Crucially, the term disinformation is defined as “intentionally disseminated false information”<sup>57</sup>. Thus, the definition would seem to partly align with Wardle and Derakhshan’s definition, requiring the elements of the falsity of information and intention to cause certain harms. However, it is limited to causing harm to a specific person, does not include harm to a social group, organisation, or country; and there is no requirement of economic gain or profit-motive.

The second important point is that, while other EU Member State legislation may not use the term disinformation, a number of Member States have legislation that aligns with Wardle and Derakhshan’s definition of disinformation, but is not specifically termed disinformation. Instead, the most common legislative terms for “information that is false and deliberately created to harm a person, social group, organisation or country” are laws on “false news” and “false information”. This observation echoes an earlier ERGA report, which noted that false information and disinformation are “different ways to indicate the same concept,”<sup>58</sup> and the European Commission’s finding in June 2020 that “Several Member States already had provisions, including of criminal nature, related to disinformation”<sup>59</sup>.

For example, in Malta, Article 82 of the Criminal Code prohibits the spreading of false news, providing that “Whosoever shall maliciously spread false news which is likely to alarm public opinion or disturb public good order or the public peace or to create a commotion among the public or among certain classes of the public”<sup>60</sup>. This seems to align with Wardle and Derakhshan’s definition of disinformation, as there is a requirement of (a) false information, (b) intention (i.e. maliciously), and (c) harm (i.e. to public opinion or good order). It also partly aligns with the European Commission’s definition of disinformation (“false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm”), but lacks the element of economic gain.

Similarly, in France, Article 27 of the Freedom of the Press law provides that “publication, dissemination or reproduction, by any means whatsoever, of false news ... attributed to third parties when made in bad faith, has disturbed the public peace, or has been likely to disturb it, shall be punishable by a fine”. Again, this aligns with the definition of disinformation, as it involves (a) false information, (b) intention (i.e. made in bad faith); and (c) harm (i.e. disturbing public peace). While in Greece, Article 191 of the Criminal Code prohibits the dissemination of false news, and provides that “Anyone who publicly or via the internet spreads or

<sup>57</sup> Law on the Provision of Information to the Public, No I-1418, art. 2.

<sup>58</sup> ERGA, Report of the activities carried out to assist the European Commission in the intermediate monitoring of the Code of practice on disinformation (June 2019), p. 4.

<sup>59</sup> European Commission, Joint Communication on Tackling COVID-19 disinformation - Getting the facts right, JOIN(2020) 8 final, s. 6.

<sup>60</sup> Criminal Code, Part II, art. 82.

disseminates false news in any way, causing fear to an indefinite number of people or to a certain circle or category of persons, who are thus forced to carry out unplanned acts or to cancel them, at the risk of cause damage to the country's economy, tourism or defence capacity or disrupt its international relations"<sup>61</sup>. Also, other articles in the Greek Criminal Code deal with different crimes related to the deliberate spreading of false information and there are similar provisions in the legislation of Cyprus, Slovakia, and the Czech Republic.

The third point is that there are also provisions specifically targeting false information during elections, which also align with the definition of disinformation. The most notable is that contained in France, under the 2018 Law on the fight against the manipulation of information, which provides that during the three months prior to an election, a judge may order, as a matter of urgency (within 48 hours), any proportionate and necessary measures to stop the dissemination of "any allegation or charge of an inaccurate or misleading fact likely to alter the sincerity of the forthcoming vote, which are deliberately, artificially or in an automated and massive manner, disseminated through an online public communication service"<sup>62</sup>. As such, the provision requires intention (i.e. "deliberately"), false information (i.e. "inaccurate or misleading fact"), and potential harm (i.e. "fact likely to alter the sincerity of the forthcoming vote"); in addition to being disseminated artificially or in an automated and massive manner. Thus, the provision is limited to potential harm to an election, and not harms such as public order or public harm. Besides, the definition is further limited in that an element is the method of dissemination, i.e., artificially or automatedly, and on a massive scale.

Finally, it should be noted that there have been developments in the context of Covid-19, with some EU Member States introducing provisions applicable to disinformation. In this regard, in Hungary, the crime of "fearmongering" was amended by the Coronavirus Protection Act.<sup>63</sup> Section 337(2) of the Criminal Code now provides that "Any conduct of uttering or publishing a statement one knows to be false or with a reckless disregard for its truth or falsity at times of special legal order with intent to obstruct or prevent the effectiveness of protective measures shall be construed a felony offense and shall be punishable by imprisonment between one to five years." Thus, the provision requires (a) false information, (b) intention, and (c) specific harm related to Covid-19 (i.e. obstruct or prevent the effectiveness of Covid-19 protective measures).

### 2.1.1.1 FAKE NEWS

A further notion that needs to be discussed in relation to disinformation is fake news. It must be emphasised that scholars are quite critical of the term, with Wardle and Derakhshan stating the term is "woefully inadequate" to take account of the complexity of disinformation, and has been "appropriated by politicians around the world to describe news organisations whose

<sup>61</sup> Ποινικός Κώδικας (Νόμος 4619/2019), Άρθρο 191 [Penal Code (Law 4619/2019), art. 191]

<sup>62</sup> LOI n° 2018-1202 du 22 décembre 2018 relative à la lutte contre la manipulation de l'information, art. 1.

<sup>63</sup> Act XII of 2020, Section 10(2) (amending Act C of 2012 on the Criminal Code, s. 337(2)). See also, Government Decree 40/2020 (III. 11.) on the declaration of an emergency.

coverage they find disagreeable”.<sup>64</sup> The EU’s HLEG has been equally critical of the term fake news, stating that the term is “misleading”, and has become a “a weapon with which powerful actors can interfere in circulation of information and attack and undermine independent news media.”<sup>65</sup> McGonagle also notes that “accusations of peddling ‘fake news’ can stigmatize and undermine critical media and erode public trust and confidence in the Fourth Estate”<sup>66</sup>. Both Wardle and Derakhshan’s study, and the HLEG’s report, deliberately refrained from using the term fake news due to its inadequacies, dangers, and vagueness. In this regard, Tandoc et al. have reviewed how over 34 previous academic studies defined and operationalised the term fake new, and noted the incredible breadth of different concepts it can encompass, including news satire, news parody, fabrication, manipulation, advertising, and propaganda.<sup>67</sup> Helpfully, the EBU has examined the definition of fake news, and while it prefers the term “disinformation”, for the purposes of scoping, defines fake news as “intentional creation and/or spreading of false or misleading news on social media and similar platforms, whether for political or other reasons”<sup>68</sup>. As is evident from the NRA responses to the ERGA questionnaire, EU Member State legislation tends to use the term false news rather than fake news.

### 2.1.1.2 PROPAGANDA AND FOREIGN INFLUENCE

An additional closely-related term to disinformation is that of propaganda. Similar to disinformation, scholars have noted the difficulty in defining propaganda, and the OSCE Representative on Freedom of the Media has warned about the dangers of blanket legal prohibitions on propaganda, given the “broadness and vagueness” of the term.<sup>69</sup> A comprehensive study on the different notions of propaganda and their relationship with disinformation was conducted by Bayer et al.<sup>70</sup> They point to scholarship which has defined propaganda as the “art of influencing, manipulating, controlling, promoting, changing, inducing, or securing the acceptance of opinions, attitudes, action, or behaviour.” However, Bayer et al. caution against the use of broad definitions by scholars, as they can “equalise persuasion with manipulation”, and can therefore apply to legitimate political campaigning.

Instead, Bayer et al. prefer the notion of propaganda put forward by the international special mandates on freedom of expression (Kaye et al.), namely propaganda “designed and implemented so as to mislead a population, as well as to interfere with the public’s right to know and the right of individuals to seek and receive, as well as to impart, information and ideas of all kind.”<sup>71</sup> The focus of Kaye et al. is on the *intent* of the propaganda (designed and

<sup>64</sup> Wardle and Derakhshan, p. 5.

<sup>65</sup> A multi-dimensional approach to disinformation, Report of the independent High level Group on fake news and online disinformation (2018), p. 10.

<sup>66</sup> T. McGonagle, “Fake news’: False fears or real concerns?” (2017) 35 Netherlands Quarterly of Human Rights 203, p. 209.

<sup>67</sup> Tandoc et al., p. 138.

<sup>68</sup> EBU, Position Paper: ‘Fake News’ and the Information Disorder (June 2018), p. 6.

<sup>69</sup> OSCE Representative on Freedom of the Media, Communiqué on propaganda in times of conflict, 15 April 2014, <https://www.osce.org/fom/117701>.

<sup>70</sup> Bayer et al., p. 26.

<sup>71</sup> UN Special Rapporteur on Freedom of Opinion and Expression, OSCE Representative on Freedom of the Media, OAS Special Rapporteur on Freedom of Expression and ACHPR Special Rapporteur on Freedom of Expression and Access to Information, Joint declaration on freedom of expression and “fake news”, disinformation and propaganda, 3 March 2017, <https://www.osce.org/files/f/documents/6/8/302796.pdf>.

implemented to mislead), rather than its content, and “thus excluding from the scope of their intervention legitimate forms of persuasion”. A further helpful notion is that of computational propaganda, which has been defined by Woolley and Howard as the “use of algorithms, automation, and human curation to purposefully distribute misleading information over social media networks”<sup>72</sup>. Notably, some EU Member States have legislation on propaganda, but only covering very specific forms of propaganda related to prohibited organisations. For example, in Germany, the dissemination of propaganda material for an anti-constitutional organisation is illegal.<sup>73</sup>

Further, the concept of foreign influence is also a feature of the disinformation and propaganda landscape, and as the European Commission has noted, occurs where foreign actors and third countries are engaged in targeted influence operations seeking to undermine democratic debate and exacerbate social polarisation; or to improve their own image in relation to COVID-19.<sup>74</sup> Notably, one EU Member State, France, has specific provisions in its 2018 Law on the fight against the manipulation of information relating to foreign influence. In this regard, during the three months before national elections, the CSA may suspend (under strict conditions and only until the end of voting operations) the broadcasting of a linear audio-visual media service: (a) controlled by or under the influence of a foreign State and (b) which aims to alter the sincerity of the vote by spreading false news.

## 2.1.2 MISINFORMATION

The second notion is that of misinformation, which, according to Wardle and Derakhshan, is information that is false but not created with the intention of causing harm. An example given of misinformation is where social media users unwittingly share false content or rumours, without any intention to cause harm. Similarly, the European Commission considers that misinformation occurs where there is no intention to deceive or cause public harm, for example, when individuals “share false information unknowingly with friends and family in good faith”.<sup>75</sup> Thus, the major distinction between misinformation and disinformation is the lack of intention to cause harm.

From a review of the NRA responses to the ERGA questionnaire, some EU Member States have legislation that aligns with the definition of misinformation, where it is prohibited to disseminate false information, but there is no express requirement of intention. For example, in Croatia, Article 16 of Law on Misdemeanours against Public Order and Peace, provides that “whoever invents or spreads false news that will disturb the peace and tranquillity of citizens will be fined for the offense in the domestic equivalent of 50-200 DEM or imprisoned for up to 30 days”. On its face, a specific intention is not required under the provision, but

<sup>72</sup> S. Woolley and P. Howard, Computational Propaganda Worldwide, Working Paper No. 2017:11, p. 3, <http://comprop.oii.ox.ac.uk/wp-content/uploads/sites/89/2017/06/Casestudies-ExecutiveSummary.pdf>.

<sup>73</sup> Strafgesetzbuch (StGB), art. 83.

<sup>74</sup> *Joint Communication on Tackling COVID-19 disinformation - Getting the facts right*, JOIN(2020) 8 final, 10 June 2020, sec. 1.

<sup>75</sup> Ibid.



the information must be false information “that will cause” harm, namely a disturbance of the peace and tranquillity of citizens. Similarly, and in the context of Covid-19, in Romania, the Decree on the enforcement of the state of emergency in Romania, providers of hosting services and content providers may be required to immediately stop the transmission via the electronic communications network or the storage of the content, by removing it from the source, if by the respective content fake news is promoted concerning the Covid-19 evolution and the protection and prevention measure.<sup>76</sup> Notably, the Decree applies to false information about Covid-19, but on its face, does not require a specific intent to cause harm, and as such, aligns with the definition of misinformation. Further, the Decree is distinct from legislation in other countries, in that the sanction is the removal of content, rather than criminal sanctions.

## 2.1.3 MALINFORMATION

The third notion is that of malinformation, which is defined as when “genuine information is shared to cause harm, often by moving information designed to stay private into the sphere”.<sup>77</sup> Wardle and Derakhshan give the example of the Macron Leaks on the eve of the 2017 French presidential elections, when Emmanuel Macron’s private emails were leaked to the public, and designed to cause harm to Macron’s presidential campaign.<sup>78</sup> Notably, no EU Member State has legislation with a specific definition of malinformation. However, in France, the *Conseil supérieur de l’audiovisuel* (CSA) has adopted a Recommendation under the 2018 Law on the fight against the manipulation of information, which can be helpful to refer to.<sup>79</sup> In this regard, section 4 sets out some measures online platforms are encouraged to take in order to combat accounts disseminating false information and includes that platforms provide users with information on practices that are likely to result in action being taken by the platform, which includes the use of “stolen” information.<sup>80</sup> As such, the Recommendation ties the spreading of stolen information as potentially indicative of problematic accounts and relates to the notion of malinformation.

## 2.1.4 HATE SPEECH AND OTHER FORMS OF ILLEGAL CONTENT

Finally, it is important to consider the notion of hate speech, and other forms of illegal content, in relation to disinformation and malinformation. Various scholars have written about disinformation and hate speech, such as the 2019 study by Reppell and Shein, describing new disinformation campaigns, where the “calculated amplification of hate speech” is a “common and highly toxic” tactic deployed in these disinformation campaigns.<sup>81</sup> Notably, the European Commission, in its Joint Communication on *Tackling COVID-19 disinformation – Getting the*

<sup>76</sup> Decret privind instituirea stării de urgență pe teritoriul României (16 March 2020), art. 54.

<sup>77</sup> Wardle and Derakhshan, p. 5.

<sup>78</sup> Wardle and Derakhshan, p. 22.

<sup>79</sup> Recommendation no. 2019-03 of 15 May 2019 of the Conseil supérieur de l’audiovisuel to online platform operators in the context of the duty to cooperate to fight the dissemination of false information.

<sup>80</sup> Recommendation no. 2019-03 of 15 May 2019 of the Conseil supérieur de l’audiovisuel to online platform operators in the context of the duty to cooperate to fight the dissemination of false information.

<sup>81</sup> L. Reppell and R. Shein, *Disinformation Campaigns and Hate Speech: Exploring the Relationship and Programming Interventions* (International Foundation for Electoral Systems, 2019), p. 1. [https://www.ifes.org/sites/default/files/2019\\_ifes\\_disinformation\\_campaigns\\_and\\_hate\\_speech\\_briefing\\_paper.pdf](https://www.ifes.org/sites/default/files/2019_ifes_disinformation_campaigns_and_hate_speech_briefing_paper.pdf)

*facts rights*, gave an example of illegal hate speech, “as a result of disinformation about a particular ethnic or religious group being blamed for the spread of COVID-19,” is subject to rules on illegal content.<sup>82</sup> However, hate speech can also be classed as malinformation, with Wardle and Derakhshan including hate speech under the definition of malinformation, as the information can sometimes be based on reality (for example targeting someone based on their religion), but the information is being used strategically to cause harm.<sup>83</sup>

In terms of definitions of hate speech, Kaye has noted how the term is plagued with “vagueness,” and there is a “lack of consensus around its meaning.”<sup>84</sup> However, as the EU Code of Conduct on countering illegal hate speech online states, illegal hate speech, as defined by the Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, means “publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;” and the EU Member States have definitions aligning with the Framework Decision. Crucially, the conduct must be “intentional,” and can include the public dissemination or distribution of tracts, pictures, or other material. Notably, there is no mention of the falsity of the information.

Finally, in terms of other illegal content, the EBU has noted that the “traditional legal framework to fight ‘fake news’, in particular libel and defamation law, which remains quite effective as far as the media are concerned,” but these laws lose much of their “effectiveness in the online world”.<sup>85</sup> Notably, many EU Member States have criminal legislation on defamation, libel, and slander, with the definitions generally applying to an imputation of fact which injures a person’s reputation.<sup>86</sup> For example, in Hungary, slander is defined as making a “false publication orally or in any other way” and “tending to harm a person’s reputation”. Thus, the distinguishing feature of definitions of defamation in relation to disinformation is that while defamation can involve false information, the harm which is crucial is harm to reputation, rather than public harm.

## 2.1.5 FAKE ACCOUNTS, SOCIAL BOTS, AND COORDINATED INAUTHENTIC BEHAVIOUR

In the preceding sections, the various notions and definitions of disinformation have been discussed. But an additional element that is necessary to tease out is the method of disseminating disinformation, namely the use of fake accounts, social bots, and coordinated inauthentic behaviour. In this regard, scholars have described how disinformation campaigns use a range of amplification and dissemination techniques, such as creating fake accounts on social media to influence public opinion<sup>87</sup> and using social-media bot software to amplify fabricated stories. As Wardle and Derakhshan note, machines are poor at creating

<sup>82</sup> Joint Communication on Tackling COVID-19 disinformation - Getting the facts right, JOIN(2020) 8 final, 10 June 2020, s. 1.

<sup>83</sup> Wardle and Derakhshan, p. 21.

<sup>84</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/74/486, 9 October 2019, p. 4, <https://undocs.org/A/74/486>.

<sup>85</sup> EBU, Position Paper: ‘Fake News’ and the Information Disorder (June 2018), p. 6.

<sup>86</sup> EBU, Position Paper: ‘Fake News’ and the Information Disorder (June 2018), p. 6.

<sup>87</sup> Wardle and Derakhshan, p. 31.

disinformation but can be used efficiently to publish and distribute disinformation.<sup>88</sup> In terms of definitions, the European Commission has helpfully defined fake accounts as “simulated profiles” which have no authentic user behind them, and “sometimes orchestrated on a massive scale,” while bots are “automated services” that “artificially amplify the spread of disinformation”.<sup>89</sup> Relatedly, some platforms use the term coordinated inauthentic behaviour for certain behaviour using fake accounts, but these descriptions can differ by company, such as “coordinated efforts to manipulate public debate for a strategic goal where fake accounts are central to the operation”<sup>90</sup>. Crucially, the European Commission states that “coordinated use” of fake or inauthentic accounts, automated bots, and other ways to artificially boost the popularity of the content, can reveal an “intention” to use false or misleading information to cause harm.<sup>91</sup>

From a review of the NRA responses to the ERGA questionnaire, and in terms of definitions, two regulatory approaches in the EU Member States are important to highlight. First, helpful definitions of the use of fake accounts for manipulative behaviour can be found in regulatory codes on social media advertising. For example, in the Netherlands, the Social Media Advertising & Influencer Marketing Code contains a ban on social media “manipulation”, which includes the “systematic creation and/or use of false/non-existent identities in bulk to report on a product and/or service via social media”.<sup>92</sup> Thus, systematic and bulk use and creation of accounts can indicate prohibited manipulated behaviour. Second, in France, another helpful description of fake account use is contained the Recommendation adopted by the CSA under the 2018 Law on the fight against the manipulation of information.<sup>93</sup> The CSA encourages online platforms to establish “appropriate procedures allowing for the detection of accounts disseminating false information on a massive scale”, “proportionate procedures intended to hinder the actions of these accounts”, and an “easily accessible information area providing users with clear and detailed information on practices that are likely to result in action being taken by the operator (creation of abnormal numbers of accounts, sharing of content at abnormal rates, use of false, stolen or misleading information, etc)”.<sup>94</sup> Thus, the type of behaviour being targeted is an abnormal number of accounts, abnormal rates of sharing, and using false or misleading information.

## 2.1.6 POLARISATION, FILTER BUBBLES, AND ECHO CHAMBERS

In addition to the use of automated and amplification techniques for the dissemination of disinformation, two particular features of the social media environment can further exacerbate disinformation, namely filter bubbles and echo chambers. Möller, Helberger & Makhortykh

<sup>88</sup> Ibid.

<sup>89</sup> Communication on Tackling online disinformation: a European Approach, COM(2018) 236 final, sec. 2.2.

<sup>90</sup> Facebook, July 2020 Coordinated Inauthentic Behaviour Report (6 August 2020), <https://about.fb.com/news/2020/08/july-2020-cib-report/>.

<sup>91</sup> Joint Communication on Tackling COVID-19 disinformation - Getting the facts right, JOIN(2020) 8 final, 10 June 2020, sec. 1.

<sup>92</sup> Reclamecode Social Media & Influencer Marketing (RSM) 2019, sec. 4.

<sup>93</sup> Recommendation no. 2019-03 of 15 May 2019 of the Conseil supérieur de l’audiovisuel to online platform operators in the context of the duty to cooperate to fight the dissemination of false information, sec. 4.

<sup>94</sup> Recommendation no. 2019-03 of 15 May 2019 of the Conseil supérieur de l’audiovisuel to online platform operators in the context of the duty to cooperate to fight the dissemination of false information, sec. 4.

have defined a filter bubble as a “recommending-algorithm-induced bubble of like-minded information only.”<sup>95</sup> Zuiderveen Borgesius et al. point to the report of the High-Level Expert Group on Media Diversity and Pluralism, which states that platforms’ filtering mechanisms “make it more likely for people to only get news on subjects they are interested in, and with the perspective, they identify with.”<sup>96</sup> Thus, because of algorithmic filtering on social media, users are presented with a news menu that “avoids counter-attitudinal information,” and is “conceptualized as an echo-chamber,” in which all new information “echoes what we already think.” Similarly, Wardle and Derakhshan argue that online platforms use “algorithms to deliver content that we are most likely to enjoy,” and these platforms “reinforce our worldviews and allow us to stay encased in our safe, comfortable echo chambers.”<sup>97</sup> They argue that filter bubbles worsen polarisation, and an important cause of rapid dissemination of disinformation on online platforms is that many users are within echo chambers. In sum, filter bubbles can be seen as a consequence of polarisation, selective exposure, and algorithmic sorting; and as such quite distinct from disinformation.

From a review of the NRA responses to the ERGA questionnaire, no EU Member State has legislation that defines these terms. However, there are some regulatory measures seeking to limit the influence of filter bubbles and echo chambers. For example, in France, the CSA’s Recommendation adopted under 2018 on the fight against the manipulation of information, encourages online platforms to “deploy technological means aiming to highlight information from press companies and news agencies and from audiovisual communication services and particularly fact-checking content in search engine results, newsfeeds and other dissemination channels using automated classification techniques.” Thus, this measure can be seen as promoting media content in order to reduce the impact of filter bubbles and echo chambers.

## 2.1.7 MEASURES TO TACKLE DISINFORMATION: JOURNALISTIC DUE DILIGENCE

While legislative provisions that apply to the notions of disinformation were described above, it must also be emphasised that there exists a large range of regulatory measures that apply to journalism and the media which assist in the effective tackling of disinformation. As an earlier ERGA report noted, NRAs tackle disinformation mainly through other concepts, such as existing rules on objectivity, accuracy, and fairness which apply to the media.<sup>98</sup> Importantly, scholars have emphasised the “unintentional amplification of disinformation” by the media, and “getting the mainstream media to amplify rumour and disinformation is the ultimate goal of those who seek to manipulate.”<sup>99</sup> As such, regulatory rules applicable to the media can be a powerful bulwark against disinformation. Cappello et al. have conducted a broad study on the substantial and well-developed regulatory and self-regulatory frameworks applicable to broadcast, print, and online news media, to ensure accuracy, objectivity, and fairness in news.<sup>100</sup>

<sup>95</sup> J. Möller, H. Helberger, and M. Makhortykh, *Filter Bubbles in the Netherlands* (CvdM, 2018), p. 4.

<sup>96</sup> F. Zuiderveen Borgesius, et al., “Should we worry about filter bubbles?” (2016) 5(1) *Internet Policy Review*, 2.

<sup>97</sup> Wardle and Derakhshan, p. 49.

<sup>98</sup> ERGA, *Internal Media Plurality in Audiovisual Media Services in the EU: Rules & Practices* (2018), p. 87.

<sup>99</sup> Wardle and Derakhshan, p. 13.

<sup>100</sup> M. Cappello, et al., *Media reporting: facts, nothing but facts?* (European Audiovisual Observatory, 2018).

And as an earlier ERGA Report stated, when facing a case of disinformation, an NRA will more likely use the existing rules related to objectivity, honesty, veracity, accuracy, fairness, or rigour of information, which can be effective tools in tackling disinformation.<sup>101</sup>

A review of the NRA responses to the ERGA questionnaire reveals that some regulatory measures related to objectivity, honesty, veracity, accuracy, and fairness of information can be of assistance in alleviating the consequences and potential impact of disinformation. Worth mentioning in that respect is the new Article 19 MStV in Germany. Article 19 MStV states: “Services with journalistically and editorially designed offers, in which in particular the complete or partial content of periodic print products is published in text form or image must comply with recognised journalistic principles.” The same applies to other business-like, journalistically, and editorially designed telemedia, in which news or political information is contained and which is not covered by sentence 1. Providers who are not subject to self-regulation by the Press Code and the Complaint Mechanisms Regulation of the German Press Council may apply to an organisation of voluntary self-regulation. If not, the Media Authorities are the competent authorities. In addition, the competent Media Authority may object to a decision of a recognised organisation of voluntary self-regulation, which exceeds the margin of judgement and demands their repeal. In Latvia, Section 24 of the Electronic Mass Media Law provides that electronic mass media “shall ensure that facts and events are fairly, objectively, with due accuracy and impartiality reflected in broadcasts, promoting an exchange of opinions, and comply with the generally accepted principles of journalism and ethics.” Importantly, facts must be “reflected in informative documentary and news broadcasts in a way not to intentionally mislead the audience.”<sup>102</sup> Thus, the intention to mislead is a crucial aspect, similar to the definition of disinformation. Another notable example is Denmark, where the Media Liability Act provides that the content and conduct of the mass media shall be in conformity with sound press ethics.<sup>103</sup> Crucially, the Danish Press Council determines whether the conduct of the media is contrary to sound press ethics, and the Press Ethical Rules contain provisions related to false and misleading information. The Rules provide that it is the duty of the media to publish “information correctly and promptly,” and “as far as possible it should be verified whether the information given or reproduced correctly.”<sup>104</sup> Notably, “incorrect information shall be corrected on the editors’ own initiative, if and as soon as knowledge of errors of importance in the published information is received,” and the correction “shall be given in such a form that the readers, listeners or viewers may easily become aware of the correction.”<sup>105</sup> Thus, not only must the media verify the accuracy of the information, but where errors occur, also publish a correction to inform the public of inaccurate information published. Finally, in Sweden, the government issued a Directive establishing the Commission for Media and Information Literacy and Democratic Dialogue, as a national effort to increase the level of media and information literacy, in order to strengthen citizens’ resilience to disinformation,

<sup>101</sup> ERGA, Internal Media Plurality in Audiovisual Media Services in the EU: Rules & Practices (2018), p. 87.

<sup>102</sup> Electronic Mass Media Law, sec. 24.

<sup>103</sup> The Media Liability Act, Consolidating Act 2018-12-27 no. 1719, sec. 34(1).

<sup>104</sup> The Press Ethical Rules, sec. A(1).

<sup>105</sup> Ibid., sec. A(7).



propaganda, and hate speech. Thus, media and information literacy are seen as key bulwarks against disinformation.

## 2.2 POLITICAL ADVERTISING AND ISSUE-BASED ADVERTISING

In this section, the notions of political advertising and issue-based advertising are addressed. Similar to disinformation, there is a great deal of ambiguity around these terms. Indeed, as mentioned above, the 2020 ERGA *Report on disinformation: Assessment of the implementation of the Code of Practice* emphasised that a “key difficulty” was that the EU Member States have different definitions of political advertising<sup>106</sup> and most do not define issue-based advertising. In the EU Code of Practice on disinformation, political advertising is defined as “advertisements advocating for or against the election of a candidate or passage of referenda in national and European elections,” while issue-based advertising is not defined.

Notably, scholars have been examining the definitions of political and issue-based advertising in Europe. In this regard, Van Hoboken et al. point to how the approach of the European Court of Human Rights is quite helpful for a definitional framework for political advertising and has also helped defined commercial advertising.<sup>107</sup> The authors discuss how the European Court takes a “broad view” of what constitutes political advertising, which includes not only paid advertisements concerning political parties and candidates during elections but also so-called issue-based ads, such as paid advertisements on “matters of broader public interest” from campaign groups and NGOs. Indeed, the European Court considers paid political advertising to be a form of political expression and protected under the right to freedom of expression. For example, a political party’s advertisement which urged viewers to vote for the party was speech “indisputably of a political nature,” and this was “[i]rrespective of the fact that it was presented as a paid advertisement”.<sup>108</sup>

Further, Van Hoboken et al. point to how the European Court contrasts the definitions of commercial and political advertising, in order to determine the contours of political advertising. Thus, the European Court has considered that an NGO’s advertisement which urged viewers to eat less meat was a political advertisement, because it contained “controversial opinions pertaining to modern society in general,” and “fell outside the regular commercial context inciting the public to purchase a particular product”.<sup>109</sup> Thus, the European Court does not distinguish between political advertising and issue-based advertising but considers that political advertising includes all paid advertising on matters of broad general interest. However, it would not be political advertising where it includes an incitement to “purchase a particular product,” “product marketing,” or the “means of discovering the characteristics of services and goods offered”.<sup>110</sup> Notably, the European Court’s notion of political advertising is broader than the EU Code of

<sup>106</sup> ERGA, *Report on disinformation: Assessment of the implementation of the Code of Practice* (2020), p. 18..

<sup>107</sup> Van Hoboken et al, p. 45

<sup>108</sup> *TV Vest As & Rogaland Pensjonistparti v. Norway* (Application no. 21132/05) 11 December 2008, para. 64.

<sup>109</sup> *VgT Verein gegen Tierfabriken v. Switzerland* (Application no. 24699/94) 28 June 2001, para. 57

<sup>110</sup> *VgT Verein gegen Tierfabriken v. Switzerland* (Application no. 24699/94) 28 June 2001, para. 57; *TV Vest As & Rogaland Pensjonistparti v. Norway* (Application no. 21132/05) 11 December 2008, par. 64; and *Casado Coca v. Spain* (Application no. 15450/89) 24 February 1994, par. 51.

Practice's definition, which only includes advocating for/against election candidates or passage of referenda.

Importantly, Van Hoboken et al. have also discussed how the paid-for element of political advertising is crucial, as its inclusion in the definition of political advertising can prevent political advertising rules from being potentially misused, and applied to journalistic commentary during election period.<sup>111</sup> In particular, the authors point out how the European Court of Human Rights found a violation of Article 10 ECHR where political advertising rules are used to restrict political expression where there is no paid-for element. This occurred in a 2017 judgment involving the fining of a Russian newspaper, where the Russian government argued that a partisan newspaper article during an election was in effect a political advertisement, and subject to campaigning rules.<sup>112</sup> The ECtHR emphasised the lack of a "paid-for" element as crucial when it wholly rejected that the article was a political advertisement, and instead classified the article as "ordinary journalistic work" during an election.<sup>113</sup> Thus, focusing on the paid-for element of political advertising can also protect the media and other actors against the overzealous application of political advertising rules to political expression and journalistic commentary under Article 10 ECHR.

In addition to political advertising, it is also important to consider the notion of political microtargeting. Zuiderveen Borgesius et al. define online political microtargeting as a type of personalised communication that involves monitoring people's online behaviour, collecting personal information, and using the collected data, sometimes enriched with other data, to display individually targeted political advertisements.<sup>114</sup> Scholars note how microtargeting poses serious risks, with Dobber, Ó Fathaigh & Zuiderveen Borgesius examining how political microtargeting can and could be an important tool for foreign actors to interfere in elections, and for malicious actors using microtargeting to reach the right voter with the right disinformation message, and maximising the impact of each specific message.<sup>115</sup> In Germany, the Media Authority of North Rhine-Westphalia, Landesanstalt für Medien NRW, has conducted a recent study in this field which shows that at least in Germany microtargeting – at the moment – is not a big issue.<sup>116</sup>

From a review of the NRA responses to the ERGA questionnaire, a number of points are evident. First, it is important to reiterate that the many EU Member States prohibit various forms of political advertising in audio-visual media, and the legislation applicable to political advertising is usually in relation to its *prohibition*. Second, there are definitions of political advertising which focus on whether a political candidate bought the advertisement (i.e. financial dimension). For example, in Cyprus, a political advertisement is an "announcement or message of any kind of broadcast in return for payment or for a similar consideration by a candidate ... in presidential or parliamentary

<sup>111</sup> J. van Hoboken et al., The legal framework on the dissemination of disinformation through Internet services and the regulation of political advertising, A report for the Dutch Ministry of the Interior and Kingdom Relations (2019), p. 45.

<sup>112</sup> Orlovskaya Iskra v. Russia (Application no. 42911/08) 21 February 2017.

<sup>113</sup> Orlovskaya Iskra v. Russia (Application no. 42911/08) 21 February 2017, para. 120.

<sup>114</sup> F.J. Zuiderveen Borgesius et al., "Online Political Microtargeting: Promises and Threats for Democracy" (2018) 14(1) Utrecht Law Review 82.

<sup>115</sup> T. Dobber, R. Ó Fathaigh, and F.J. Zuiderveen Borgesius, "The regulation of online political micro-targeting in Europe" (2019) 8(4) Internet Policy Review.

<sup>116</sup> <https://www.medienanstalt-nrw.de/themen/desinformation/microtargeting-in-deutschland-und-europa.html>.

elections or elections of the European Parliament or any other elections<sup>117</sup>”.

Second, some countries prohibit political advertising in a broad sense (i.e. purpose or objective dimension), such as Norway, which prohibits advertisements to “promote belief systems or political messages<sup>118</sup>”, and Ireland, which prohibits advertisements directed towards a “political end<sup>119</sup>”. Similarly, in Denmark, the term “political” is used in a wider sense than “party political,” and includes, campaigning for the purposes of influencing legislation or executive action by local or national (including foreign) governments. In Germany, political, ideological, and religious advertisements are prohibited under the Interstate Media Treaty (MStV)<sup>120</sup>, which entered into force on 7th November 2020. The prohibition only applies to broadcasting, on-demand media services, and audio services and does not apply to social media as such. This type of broad approach aligns with the European Court’s approach of treating political advertising in a very broad sense i.e. concerning matters of public interest, and not merely election-related advertisements.

Third, there are those Member States that define political advertising in a narrow sense related to elections and candidates (i.e. actor dimension), such as Romania, which prohibits “political advertising, whether positive or negative, in connection to political parties, politicians, political messages” (except during elections). Similarly, in Croatia, advertising of political parties, coalitions, and independent members of representative bodies is prohibited (except during elections).

Fourth, and similar to the finding in an earlier ERGA report, EU Member State legislation does not include definitions of issue-based advertising. As mentioned above, the Member States that treat political advertising in the broad sense of applying to matters of public interest, capture issue-based advertising, as does the European Court of Human Rights.

Fifth, while no national legislation defines political microtargeting, some national data protection authorities have issued guidelines and definitions. For example, Luxembourg’s National Commission for Data Protection has issued guidelines on election campaigns respecting the protection of personal data and defines political microtargeting as a form of targeted online advertising that analyses personal data to identify the interests of specific audiences or individuals to influence their actions (which seems to technically also cover commercial advertising).

In sum, the definitions are rather distinct and differ on different dimensions, including (a) actor-based approaches, (b) approaches focusing on paid/not paid, and (c) approaches that focus on the purpose or objective. However, common elements seem to be that advertising is (i) not for the goal of selling products or services, and (ii) not pertaining to commercial actors.

<sup>117</sup> The Radio & Television Organizations Law of 1998 (7(l)/98)

<sup>118</sup> Ot.prp.nr.58 (1998–1999) Om lov om endringer i lov 4 desember 1992 nr 127 om kringkasting m.m (unofficial translation)

<sup>119</sup> Section 22 of the Electoral Act, 1997, amended by the Electoral (Amendment) Act, 2001

<sup>120</sup> Art. 8 para. 9 MStV.

## SUMMARY CONCLUSIONS

From the foregoing discussion, a number of conclusions can be drawn in relation to the various definitions of disinformation and related notions.

- First, only one EU Member State has a legislative definition that *specifically* uses the term disinformation.
- Second, a number of EU Member States have legislation that applies to the concept of disinformation, but is not specifically termed disinformation, and instead concerns prohibitions on false news and false information. Thus, most regulatory activity at the national level concerns disinformation, rather than misinformation or malinformation.
- Third, three key elements emerge in relation to the definitions relating to the disinformation: disinformation concerns (a) false information, (b) disseminated with a specific intention (malicious or bad faith) (c) and causes certain harms.
- Fourth, where there is a lack of malicious intent (i.e. in good faith), it is not considered disinformation and would be misinformation, with only a few Member States covering this concept.
- Fifth, there are varying specific harms mentioned, including economic harm, public harm, personal harm, harm to elections, and affecting measures against COVID-19.
- Sixth, there is an absence of elements relating to misleading information, and dissemination for *economic gain or profit*, in national legislation.
- Seventh, and crucially, national legislation applicable to disinformation is in many instances of a *criminal* nature.

This raises an important question over whether disinformation can be accurately described as merely “harmful” content and not illegal content. In that respect, it needs to be addressed differently than illegal content, where removal of the content itself may be justified. As the European Commission pointed out in its Communication of April 2018<sup>121</sup>: “Legal content, albeit allegedly harmful content, is generally protected by freedom of expression and needs to be addressed differently than illegal content, where removal of the content itself may be justified”. This means that harmful but legal content should be protected under the freedom of expression while illegal content (such as false information intentionally disseminated to cause certain types of harm) should not.

The treatment of disinformation should be done without prejudice to the applicable legal rules at the Union or national level relating to the disinformation containing illegal content. This also aligns with the European Commission’s finding in June 2020 that “The several Member States already had provisions, including of criminal nature, related to disinformation and one Member State introduced a specific new criminal offence for spreading of disinformation during the state

<sup>121</sup> Communication from the European Commission “Tackling online disinformation: a European Approach”, 26.4.2018, COM(2018) 236 final.

of emergency”.<sup>122</sup> Importantly, the Commission emphasises that laws which define these crimes in “too broad terms” and with “disproportionate penalties attached” can lead to “self-censorship, raising particular concerns as regards freedom of expression.”<sup>123</sup>

Finally, in terms of definitions of political advertising and issue-based advertising, three main conclusions emerge.

- First, it still remains the case that the EU Member States adopt different definitions of political advertising, which may be limited to merely election-related advertisements, and prohibitions can be limited to election-time.
- Second, EU Member States still do not specifically define issue-based advertising.
- Third, and notably, a number of EU Member States adopt an approach to political advertising which aligns with the European Court of Human Rights’ approach. Rather than specifically define political advertising, political advertising applies in a broad sense to paid advertising on matters of broad public interest, and is not limited to election-related ads.

<sup>122</sup> Tackling COVID-19 disinformation - Getting the facts right - JOIN/2020/8 final, sec. 6.

<sup>123</sup> Ibid.



### 3. WHAT DISINFORMATION AND RELATED CONCEPTS MEAN FOR DIFFERENT ACTORS

Chapter 3 is dedicated to the definitions and understandings of disinformation and related concepts according to different actors and stakeholders dealing, in different ways, with the disinformation and information disorders issues. The first paragraph of the Chapter analyses the definitions and understanding of disinformation of the so-called “media practitioners”, including media outlets, self-regulatory bodies, professional associations, or similar actors. Other approaches that can be found in media literacy-awareness campaigns or notions used by fact-checker organisations are addressed in the second paragraph. Finally, the third paragraph investigates the different approaches to the disinformation issues typical of different civil society organisations.

#### 3.1 MEDIA PRACTITIONERS

This paragraph is dedicated to the definitions of disinformation and related concepts according to media practitioners such as professional associations of journalists, self-regulatory bodies for press and journalists and media outlets (especially public service broadcasters - PSBs and newspapers), mentioned by the representatives of the ERGA members through their own questionnaires. Every stakeholder mentioned here provides ethical codes, guidelines, or codes of conduct in the respect of journalistic obligations and duties. These codes or guidelines usually do not provide specific definitions of disinformation, political advertising, propaganda, information operations, and related concepts, but rather contain specific indications on which values and news making standards journalists should respect. Only some professional associations of journalists have provided definitions of disinformation to be used in different contexts and activities. A specific study has been made with reference to journalistic trustability through the analysis of the Journalism Trust Initiative approach to these issues.

##### 3.1.1 MEDIA OUTLET'S ETHICAL CODES AND EDITORIAL GUIDELINES

In the ethical codes and editorial guidelines applied by media outlets, disinformation, fake news, and misinformation/malinformation phenomena are not specifically mentioned, since these documents have a strong focus on defining values and standards that journalists should respect. Typically, these codes/guidelines are more concerned about the truthful presentation of events and facts (according to news-making criteria and newsroom routines) than on veracity *per se*.

The deontological code of the **Flemish VRT (PSB)** contains stipulations on the truthfulness of the information and correct information, these requirements presupposing sufficient file knowledge and great care in the collection and processing of the news and sources from journalists.

In the **Croatian Radio-Television (PSB)** journalists and other employees are called to take

part actively in the creation of programmes. They are required to respect high professional standards and ethical principles (true, objective, complete, verified, and timely information) and not change, distort or interpret facts based on their own or others' views or opinions, and must clearly separate objective facts from subjective views, opinions or comments.

As regards the **Italian RAI (PSB)**, the Italian Government Contract provides for RAI guaranteeing complete and impartial information and the quality of the information in any programme (not only news ones) as well, and calls for the application of information pluralism, objectivity, completeness, and impartiality. RAI itself is specifically obliged to guarantee the truthful presentation of facts and events, in such a way as to favour the free formation of opinions. According to art. 6 of the RAI-Italian Government Contract Service Agreement (CSA) 2018-2021, RAI should ensure: a) the truthful presentation of facts and events framing them in their context, as well as the objectivity and impartiality of the data provided, in order to offer information suitable for promoting the free formation of opinions not conditioned by stereotypes; b) the development of a critical, civil and ethical sense in the national community; c) the compliance with the absolute prohibition of using methodologies and techniques capable of manipulating in an unrecognisable way the news content. According to art. 25 of the RAI-Italian Government Contract Service Agreement, RAI should activate tools aimed at countering the spread of fake news and provide in this regard: i) the establishment of a permanent internal observatory; ii) the development of specific educational and didactic products; iii) the implementation of promotional initiatives regarding the risks deriving from the dissemination of fake news. During the COVID-19 emergency, RAI has launched a specific Disinformation Task Force, coordinated by the Director of all-news TV channel RaiNews.

The Charter of Journalists of **RTL**, the private broadcaster with a public service media remit in **Luxembourg**, also has specific provisions in relation to - among others - objectivity, impartiality, respect of reputation, the obligation of accuracy, and prohibition of incitement to hatred on grounds of race, sex, opinion, religion, and nationality. RTL journalists should be compliant with Luxembourg law and international treaties in force, which includes the obligation to refrain from insults, defamation, and slander as provided by law. Also, the presentation of information and the organisation of television and radio debates must take place in a spirit of impartiality and objectivity and with respect for the pluralism of ideas. Other requirements prescribe rigor in the research and verification of information, and the use of reliable sources. In the event of the presentation of information based on dubious sources, there is the obligation to report it to the public. In general, the distinction between the presentation of the raw objective fact and the commentary on the facts should be safeguarded.

The **Norwegian NRK (PSB)** ethical standards are aimed at ensuring objectivity and impartiality of information. Objectivity, analytical approach, and neutrality should be always guaranteed.

Professional standards of **RTV Slovenija (PSB)** look deeper into the accuracy value: "The message conveyed has to reflect the facts and may not be misleading or untrue. The journalist is obliged to gather information with due care, check them ..." <sup>124</sup>. A specific section of the

<sup>124</sup> <https://www.rtvsl.si/strani/professional-standards/17#3>

internal guidelines has been expressly dedicated to checking the facts:

“The journalists and editors of RTV Slovenija have to respect the basic professional rule demanding that all facts be checked before going on air. If checking is not possible, the source has to be stated. If it is a source known to the editorial board as reliable, which does not wish to be revealed, certain descriptive phrases such as from reliable sources, from verified sources, from well-informed sources, from diplomatic sources, from sources close to, etc. may be used.”<sup>125</sup>

According to these guidelines, special attention is necessary when using unauthorised sources from the Internet, since the worldwide web allows unlimited access and uncritical use of data from these sources may lead to the passing on of misinformation to the audience. Hence, before airing unauthorised content from the Internet, all facts have to be checked. If an unauthorised source from the Internet is used anyway, it has to be marked clearly as such.

In Portugal, **RTP Rádio Televisão Portuguesa (PSM)**, determines in its Ethics and Editorial Guide that the professionals working in the Information Department should produce rigorous information, based on verifiable facts, using clear language, and avoiding ambiguous words or expressions (2.1.1.2.). Afterwards, it is pointed out that rigorous information comprises not only the rigor of facts and the consideration of all relevant positions but also the accuracy of the contextualisation, without which the information might not be easy to understand or apprehend by the citizen (2.1.1.6). RTP journalists are supposed to validate the authenticity of documental evidence, both in analogic and digital format, regardless if they are written, or contain sound or audiovisual content; confirm the claims or complaints made by sources, carefully examine and if necessary, verify the reports of eyewitnesses delivered by mail or e-mail before using them, adopting special care when researching online or using material from websites. (points 2.1.2.3, 2.1.2.4, 2.1.2.5.) RTP considers that impartiality, i.e. the ability to work on and present with neutrality the values and interests crossing in the piece of news and in the different informative contents, is at the very core of the public service remit and is the key of the commitment RTP has towards the audience.

Also, the internal guidelines of some **Portuguese newspapers** explicitly address the importance of objectivity. **Expresso**’s code of conduct states that the journalist shall always seek the truth and report it, ensuring a plurality of sources, teamwork, and careful, impartial investigation contribute to impartial reporting: journalists should ensure that they don’t publish unclear, vague, or non-rigorous material, both texts, and images, susceptible of misleading the reader or distorting the facts<sup>126</sup>. In the stylebook from another newspaper, **Público**, we can find a description of objectivity, even related to disinformation phenomena:

“Journalistic objectivity is seen as target value and a goal that Público seeks to reach every day, starting with the accuracy of the facts and the fidelity of the opinions gathered. The cases that relate to campaigns, manipulation, and disinformation require more prudence from the

<sup>125</sup> <https://www.rtvsllo.si/strani/professional-standards/17#3>

<sup>126</sup> <https://expresso.pt/informacao/codigoconduta/2008-01-05-Codigo-de-Conduto-dos-jornalistas-do-Expresso-1>

journalist to ensure impartiality, making use of source plurality and the investigation he or she performs, without being dragged or influenced by preconceived ideas. The mechanisms of objectivity – source plurality, investigation, absence of preconceived ideas – are particularly important in the context of subjects that refer to the military, political, ideological, or economic-financial matters, which are often subject to manipulation and disinformation campaigns.<sup>127</sup>

### 3.1.2 SELF-REGULATORY BODIES FOR JOURNALISTS AND PRESS

The role of self-regulatory bodies for journalists and the press (such as press councils) has been highly affected by the proliferation of news (and newsmakers) in the digital ecosystem. Some national councils, especially in those countries usually considered as characterised by a democratic-corporatist media system (according to the classical definition of Hallin and Mancini in “Comparing media systems”)<sup>128</sup>, have anyway tried to draft some guidelines aimed at preserving the journalist role and work activity in the infodemic era. Even in this case, no definition of disinformation or related concepts has been retrieved, despite fake news and information disorders are often the motivations of the recent updates.

The **Belgian Flemish self-regulatory body for journalists** (working on all media) has reviewed its ethical code on 1 September 2019. Attention for ‘fake news’ was one of the reasons to update the code, although the code does not contain a definition of fake news. The stipulations on ‘truthfulness’ however are strengthened. In addition, there is a new guideline on rectifications in online reporting. This stipulates that in the event of serious errors in online reporting, it is not sufficient to delete or update an article, but that in such cases the journalist must acknowledge the error and publish the correction. In order to combat the spread of fake news through opinion posts, a new guideline stipulates that when a journalist knows that an article which is by nature an opinion contains relevant and manifest factual errors, he has to make this clear to the public.

Even the Code of the **Netherlands Press Council** has been updated in September 2019 as a result of digitisation and the social attention paid to ‘fake news’. As regards the specific decision of the Dutch Press Council, that is able to help victims if the medium itself does not comply with the injured party’s requests and publishes non-binding conclusions, on 18 March 2019, the Council published a conclusion on the complaints against *De Gelderlander* and the *AD newspapers*, concluding that by publishing the sentence “FIOD conducts research”, the article did not provide any insight into the research conducted and the available source material. On 19 March 2019, *De Gelderlander* complied with the advice of the Netherlands Press Council and published the conclusion.

On 24 October 2019, the Dutch Press Council published a conclusion on misleading headlines<sup>129</sup>. JOOP, the online opinion page of public service broadcaster *BNNVARA*, had published an article entitled “Dutch psychologist again pulls Nazi science out of the closet”.

<sup>127</sup> [http://static.publico.pt/nos/livro\\_estilo](http://static.publico.pt/nos/livro_estilo)

<sup>128</sup> D.C. Hallin, P. Mancini (2004), *Comparing Media Systems. Three Models of Media and Politics*, Cambridge (UK), Cambridge University Press.

<sup>129</sup> Dutch Press Council, NVJ (Raad voor de Journalistiek), decision of 22 June 2020, <https://www.rvdj.nl/uitspraken/202022>.

Since in the introduction of the article, it is mentioned that the psychologist praises the intelligence of Nazi leaders, so the headline and the introduction giving rise to the erroneous suggestion that the psychologist was engaged in Nazi science, according to the Dutch Press Council, the Press Council has concluded that the journalist and *JOOP* have acted negligently, the boundaries of journalistic care being exceeded whereas the headline is not justified in the article.

### 3.1.3 PROFESSIONAL ASSOCIATIONS OF JOURNALISTS

The professional associations of journalists, which are dealing with the online platforms and social media have initiated different activities aimed at news creation routines, such as training activities for their members, participation in global networks and projects on journalism, provision of online tools, and, sometimes, they are carrying out media literacy campaigns aimed at reaching the entire population.

The **AJP, a Belgian Wallon professional association of journalists**, has recently published a guide for the journalists working on media literacy in schools.<sup>130</sup> It gives some definitions like the following ones:

“Disinformation is false information produced voluntarily, for political or commercial manipulation; not to be confused with “fake news”. Fake news was originally used to refer to misinformation but it has been used by some to describe journalistic work that is critical of them. Deepfake or hyperfake: an artificial intelligence technique that allows audio and video files to be superimposed on top of each other, also refers to the result of this manipulation (false videos on which faces or words have been replaced by others). Misinformation: false information (text, photo, video, sound, etc.) produced by chance, without any intention to deceive; it is an error due to a lack of rigour or knowledge. Reinforcement: a word used by fascist or reactionary websites that believe that traditional news media hide or distort reality; this term, according to them, refers to “real” information.”

**API – Associação Portuguesa de Imprensa** (Portuguese Press Association) started a Media and Information Literacy project called Media Veritas. The handbook “Journalism, ‘Fake News’ & Disinformation - Handbook for Journalism Education and Training”, by UNESCO<sup>131</sup> is used by API as the basis to the e-learning API promotes under the project Media Veritas. The term disinformation adopted from the book is defined as follows:

“In this publication, disinformation is generally used to refer to deliberate (often orchestrated) attempts to confuse or manipulate people through delivering dishonest information to them. This is often combined with parallel and intersecting communication strategies and a suite of other tactics like hacking or compromising of persons. Misinformation is generally used to refer to misleading information created or disseminated without manipulative or malicious intent. Both are problems for society, but disinformation is particularly dangerous because it is frequently organised, well resourced, and reinforced by automated technology». In this book

<sup>130</sup> The guide is available at <http://www.ajp.be/telechargements/jec/FakeNews.pdf>.

<sup>131</sup> The handbook is downloadable at the link <https://unesdoc.unesco.org/ark:/48223/pf0000265552>



there is also an attempt to refuse the term “fake news” by «avoiding to assume that the term ‘fake news’ has a straightforward or commonly understood meaning. This is because ‘news’ means verifiable information in the public interest, and information that does not meet these standards does not deserve the label of news. In this sense then, ‘fake news’ is an oxymoron which lends itself to undermining the credibility of information which does indeed meet the threshold of verifiability and public interest – i.e. real news.”

In other cases, these professional associations are trying to update their ethical codes, taking into account the issues the spreading of online disinformation is raising.

Some national associations, such as the **Croatian** one, insist on the *right to accurate, complete, and timely information for every citizen*, and, consequently, on the obligations of journalists deriving from the right of the public to be informed (informed of facts and opinions): in their work, journalists are obliged to defend human rights, dignity, freedoms, and values, respect the pluralism of ideas and views, resist all forms of censorship, contribute to strengthening the rule of law and participate as part of the public in democratic control of power.

Finally, looking even to the **press associations**, the **Norwegian** one’s ethical rules call the journalists for emphasising objectivity in content presentation and making clear what the actual information is and what the comments are. Even the images are mentioned: Norwegian journalist should be careful when using images in a different context than the original and protect the credibility of journalistic photography: “images used as documentation must not be altered to create a false impression, while manipulated images can only be accepted as an illustration when it is clear that it is a montage”.

### 3.1.4 JOURNALIST TRUST INITIATIVE: THE ROLE OF JOURNALISM TRUSTABILITY

The Journalism Trust Initiative (JTI) aims at a healthier information space by developing indicators for the trustworthiness of journalism and thus promoting and rewarding compliance with professional norms and ethics. JTI is led by Reporters Without Borders (RSF) in partnership with the European Broadcasting Union (EBU), the Global Editors Network (GEN), and Agence France Presse (AFP). With the support of a grant awarded by the European Commission, JTI working staff is now designing and launching an online self-assessment tool allowing media outlets to voluntarily check their compliance and to run a normative diagnosis of their editorial management systems. JTI aims at the auditability and machine-readability of this tool in order to feed into algorithmic indexation of content online and programmatic advertising.

In light of the relevance of the JTI approach for ERGA SG2 WS1 activities, the drafters of Workstream 1 of ERGA Subgroup 2 have interviewed, on 15 September 2020, Mr. Claudio Cappon, former General Director of Italian PSB RAI and current Secretary General of the Mediterranean Radio and TV Broadcaster’s association COPEAM. Mr. Cappon has been the JTI Chairman of this initiative during the first phase, which concluded with the JTI CEN Workshop Agreement in December 2019.<sup>132</sup> Mr. Cappon has highlighted the added value of JTI in giving

<sup>132</sup> <https://www.cen.eu/News/Workshops/Pages/WS-2019-018.aspx>

stakeholders (investors, regulators, etc.) a white list of publishers, and the huge number of meetings and concrete work aimed at implementing common indicators of journalistic transparency and disclosure (any set of these being drafted by specific subgroups). He has underlined how this work has been challenging in a context of such difficult harmonization due to the clash of journalistic cultures represented by the different JTI stakeholders, coming from different Continents.

Based on the experience made during the JTI working activities, aimed at implementing journalistic values and routines safeguards in editorial systems and organisations through the introduction of certification procedures, Mr. Cappon has stressed the importance of encouraging professional journalism based on important principles such as impartiality, transparency, dividing facts from opinions, and so on. Only in this way, professional journalism could contribute to spread accurate and trustful information and by doing so debunk disinformation. As regards the scope of this Workstream, Mr. Cappon has remarked that an empirical, but concrete definition of disinformation would need to be established. To his opinion such definition could only be achieved by looking by contrast to the best journalistic practices, i.e. looking at the concrete job of the journalists. In other words: when we manage to define the core elements of what constitutes good journalistic practices we can also come closer to the more common understanding of disinformation and closely related concepts.

## 3.2 MEDIA LITERACY-AWARENESS CAMPAIGNS AND FACT-CHECKER NOTIONS

In many countries, important definitions have been developed in media literacy campaigns or fact-checker organisations. Questionnaires from two respondents (PT, NO) helped to identify *fake news* from other kinds of non-legislative approaches.

The **Norwegian Media Authority** has developed a teaching programme that can be used in lower secondary schools. In this programme, fake news is described as “often used for news-like matters that appear to be genuine, but which are fully or partly based on lies, or which have omitted information to create a particular distortion”.

In **Portugal**, the **Safe Internet Centre institution** also gave a definition of fake and/or falsified news or generally referred to fake news<sup>133</sup>, which may indicate the deliberate willingness to distribute false information or rumours, regardless of the media and motivations associated with its creation. Although false news is not in itself a limitation of press freedom, it can distort information conveyed by the media, undermining its credibility.

Conceptual elements related to *disinformation* were also delivered from other sources like the Belgian experts’ group at Walloons. They use the definition of the disinformation concept as adopted by the HLEG: “All forms of false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit. It does not deal with issues arising from the creation and dissemination online of illegal content which is subject to regulatory remedies under EU or national laws, nor with other forms of deliberate but not

<sup>133</sup> <https://www.internetsegura.pt/node/726>

misleading distortions of facts such as satire or parody.”

The Slovak fact-checking organisations (involved in the *Digital Infospace Security Initiative*) use a definition of disinformation as “false information created and intentionally distributed with a clear aim to cause harm”.

The Luxemburgish Bee Secure awareness campaign<sup>134</sup> (initiated by the National Youth Service in collaboration with the centre for political education) uses a notion of disinformation that “includes all forms of false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit.”

Three responding authorities reported definition elements of *misinformation* from non-legislative sources. The Slovak fact-checking organisations refer to the definition of misinformation “as incorrect/untrue information, but is not intended to cause harm”. The Icelandic working group on disinformation (works under the Security Council) describes misinformation that is “false, but also not created with the intention of causing harm”. The Portuguese Press Association started a Media and Information Literacy project called Media Veritas. One of the areas of the project is a learning programme especially addressed to teachers, using as a resource the handbook “*Journalism, ‘Fake News’ & Disinformation - Handbook for Journalism Education and Training*”, by UNESCO. In this handbook misinformation is “generally used to refer to misleading information created or disseminated without manipulative or malicious intent”.

Conceptual elements of *malinformation* (in addition to the Italian NRA report mentioned under part B. “Notions by non-legislative state actors”) were used also by Slovakian fact-checking organizations. By definition, malinformation is the actual information that is shared publicly with the intent to cause harm and may include private information that is disseminated in a manner that damages the other party or its reputation.

The Slovenian fact-checking organisation Oštro closely follows the methodology of the Media Literacy for Active Citizenship (EAVI)<sup>135</sup>, however, categories and definitions are not identical. The definition of clickbait (very similar to EAVI’s) provided by Oštro is:

“Content’s title has no real basis in the text to which it refers. Its purpose is to grab the attention of readers with a sensational headline that promises content that is not actually in the article. Clickbaits are designed to generate clicks that are a source of advertising revenue for the publisher.”

Oštro uses also a category of “satire” with the following description:

“An article that uses elements of fiction for the purposes of a satirical and humorous depiction of reality. Such publications are not disputable in cases when it is clear that they are satire. Satire is often spread in such a way that it looks real, or it is transmitted via social networks by users who are not aware that it is fiction.”<sup>136</sup>

<sup>134</sup> <https://www.bee-secure.lu/fr/news/checkyourfacts-ne-crois-pas-tout-sur-internet/>

<sup>135</sup> [https://eavi.eu/wp-content/uploads/2017/07/beyond-fake-news\\_COLOUR\\_WEB.pdf](https://eavi.eu/wp-content/uploads/2017/07/beyond-fake-news_COLOUR_WEB.pdf)

<sup>136</sup> <https://www.ostro.si/si/razkrinkavanje>

A fact-checking organisation from Slovakia was reported as the source that defined the concept of a *hoax*.

### 3.3 SUMMARY OF MOST USED DEFINITIONS

The most widely used definitions by the different stakeholders according to the sources mentioned above can be placed in the following categories:

- ***fake news*** is false information that does not objectively correspond to the truth or refers to non-existent facts. Such deliberately misleading and harmful information can cause concern and disturb the peace of citizens. Their purpose is to make money or fraud. Sometimes it is hard to detect, they often appear on non-serious websites and spread from there on social media, or sometimes even taken over by serious news channels. Political opinions may be influenced by false news, in this case, it polarizes debates and/or confusing citizens.
- ***disinformation*** can be defined as actually false or misleading information. This includes any form of false, inaccurate, or misleading information for political, economic, or personal gain. The clear aim is to cause harm or make a profit through mass distribution and by misleading and manipulating the public. It often works with well-funded and automated technology.
- ***misinformation*** can be defined as actually false or misleading information but which has not been created with malicious intent but in good faith.
- ***malinformation*** as opposed to misinformation, is based on real facts (which may be private) with the specific intent to harm a person, organisation, or country, or to confirm or disprove a thesis. The specific aim is to discredit the argument. Malicious bad information can promote hate speech or online harassment. It is disseminated in a way that damages the other party or its reputation.
- ***clickbait*** means sensational images, headlines, and titles, which are often misleading and/or manipulating, in order to encourage users to click and gain more information about the content. Users are usually directed to pages full of advertising, generating revenue for the creators of clickbait and every associated intermediary. This phenomenon is also associated with malicious software distribution schemes and other online fraud.
- ***hoax*** is a false report or deliberate lie that relies on people's willingness to believe something. Hoaxes are often a means of attacking authority, customs, or the current state. However, the purpose of the hoax may also be to fulfill one's interest (for example, the generation of profit or the publicity of a particular fraudster).

### 3.4 CIVIL SOCIETY ORGANISATIONS

Given the societal relevance of the issues at stake, we have decided to investigate whether definitions and understandings of disinformation and related concepts by civil society organisations can provide helpful guidance and contribute to more common approaches.

Even if we have looked at their official documents, or the working definitions used in their daily activities as well, we have decided to conduct some interviews<sup>137</sup> with the representatives of some civil society organisations, which are more concerned about these issues. This with the aim of getting a better understanding of the background and the specific choices regarding the concrete processing of disinformation (in terms of research, analysis, awareness campaign, and so on).

We have hence organised the following interviews via conference call:

- **FIDU** (Italian Federation of Human rights), represented by President Antonio Stango and Vice-President Eleonora Mongelli, on 8 September 2020;<sup>138</sup>
- **AlgorithmWatch**, represented by Mackenzie Nelson, Researcher and Project Manager for the Governing Platforms Project, on 15 September 2020;<sup>139</sup>
- **Avaaz**, represented by Nadia Cabral, Advocacy and Media Consultant, Sarah Andrew, Legal Director, and Nick Flynn, Legal Director, on 2 October 2020.<sup>140</sup>

Even if any civil society organisation has expressed a different approach to the disinformation issue (protecting human rights, fighting for open access to online platforms data, strengthening public debate, ...), in every single case some interesting key-points have been identified, which will be briefly addressed beneath.

While the other organisations have not mentioned a clear definition of disinformation used in their activities, Avaaz has instead provided a working definition of this notion: “verifiably false or misleading information; OR content being spread using inauthentic behaviour; AND WHICH may cause public harm for example by undermining democracy or public health, or encouraging discrimination or hate speech”.

<sup>137</sup> During the interviews, after a presentation of the different organisations activities, the ERGA SG2 WS1 active members have focused the discussions with the stakeholders along five key-points (and relative questions):

1. The definitions

Which term/expression do you prefer to use when you discuss about online information distortions? (Misinformation/malinformation/disinformation/information disorder/fake news)

Why do you use it instead of another one?

Do you use more than one of these terms/expressions giving them different definitions?

2. The practice

How do you feel your definitions stand in the practice? Have you decided to adopt or to change them after research activities, discussion with other stakeholders/practitioners or campaigns to general public/citizenship?

3. Other notions

Which other notion(s) do you think is/are useful to consider in information disorders analysis and in the journalism/media literacy practice? )Political adv / political microtargeting / issue-based advertising / coordinated and inauthentic behaviours / information operations / etc.)

4. The current debate

Which definitions, interpretations and understandings of disinformation and related concepts are currently available in the practice?

Please give us some insights about the current debate on the above mentioned notions in the journalism/media literacy practice

5. The evolution of notions during the COVID-19 pandemic

Has the recent COVID-19 pandemic eventually modified the notions used in this field or launched new discussions among practitioners?

<sup>138</sup> <https://fidu.it/>

<sup>139</sup> <https://algorithmwatch.org/>

<sup>140</sup> <https://avaaz.org/page/it/>



### 3.4.1 FIDU: DISINFORMATION AS A HUMAN RIGHTS ISSUE

The Italian Federation for Human Rights – Italian Helsinki Committee (under the acronym, FIDU) is an organisation of the Third Sector, i.e. a non-profit civil society organisation. Active since 6 October 1987 as Italian Helsinki Committee, FIDU promotes the protection of human rights as enshrined in the most relevant international Declarations or Charters. FIDU, therefore, intends to work to spread the knowledge of human rights, monitor and report their violations, create greater awareness in public opinion, and exert influence on the States so that they comply with their commitments on human rights.

In the last June Joint Report with the Open Dialogue Foundation “*The Toll of COVID-19 on Human Rights*” FIDU addresses (even in the final recommendations) the issues related to the access to information and infodemic, propaganda, disinformation during the pandemic. FIDU is in favour of inviting national authorities to proactively work together with media outlets and private social media platforms to combat the so-called ‘infodemic’ by targeting mis- and disinformation, as well as manipulation of public opinion, in a concerted manner.<sup>141</sup>

During our interview, FIDU representatives have pointed out the tight connection between three key points: the right to access to free and accurate information to be ensured to any citizen, the propaganda and information operations role, and the promotion of quality of journalism in a digital age. Discussing how to ensure a free public debate online, FIDU representatives have remarked on the role of civil society in promoting educational projects (the so-called media literacy), but at the same time, they have underlined how poor quality of journalism could be linked to propaganda, and therefore how a not verified practice of journalism, jointly with the ideological propaganda, could bring disinformation even in the most democratic countries.<sup>142</sup>

As far as the current use of the term “infodemic” is concerned, FIDU representatives have noticed that, since the COVID-19 pandemic has created new opportunities to spread disinformation, more correct information is much more needed.

As regards the different notions, FIDU recognises the differences between “disinformation”, “propaganda” and “malinformation” and the dangers an eventual confusion between these issues could bring.

### 3.4.2 ALGORITHMWATCH: CALLING FOR ACCESS TO (ONLINE PLATFORMS) DATA

AlgorithmWatch is a non-profit research and advocacy organisation based in Berlin committed to evaluating and shedding light on algorithmic decision-making processes that have social relevance, meaning they are used either to predict or prescribe human action or to make

<sup>141</sup> <https://fidu.it/wp-content/uploads/2020/06/The-Toll-of-COVID-19-on-Human-Rights-in-selected-countries-1.pdf>

<sup>142</sup> As regards the non-democratic countries and the potential effects of disinformation in these contexts, FIDU representatives have mentioned the Markiv’s case (here you can find a resume in Italian). FIDU has sponsored a documentary of investigative journalism on this story, *Wrong place* by Cristiano Tinazzi, Olga Tokariuk, Danilo Elia and Ruben Lagattolla.

decisions automatically. They are running some research projects, Governing Platforms included<sup>143</sup>, and dissemination activities on the role of algorithmic decision-making processes regarding directly or indirectly disinformation and hate speech.

Even in official documents, AlgorithmWatch has deliberately decided to not give specific definitions of disinformation, hate speech, and related concepts, rather working on the role of algorithms in democracy. According to AlgorithmWatch, giving definitions of these notions and concepts could be useful for academics, but not appropriate in media regulation.

AlgorithmWatch wishes, in general, that public authorities (or institutions linked to, or financed by, public bodies) play no role in content-related decisions. Instead, AlgorithmWatch is calling for binding disclosure and data access obligations that are based on the technical functionalities of the platform service, rather than more ambiguous and politically-charged conceptions of harm such as ‘disinformation’, ‘political advertising’, and ‘hate speech’. Technical features might include: high-level aggregate audience metrics; advertising and micro-targeting; search features; feeds, ranking, and recommendation; and content moderation (including removal but also other measures such as demonetisation or fact-checking).

With specific regard to the COVID-19 pandemic, AlgorithmWatch underlines the limitations of automated content governance and the shortcomings of platforms’ opaque community standards. Acknowledging the potential threats to freedom of expression caused by increased reliance on automated content moderation during the pandemic, AlgorithmWatch has called on tech platforms to provide researchers with data about which takedowns did not receive a human review, whether users tried to appeal the takedown, and reports that were not acted upon. AlgorithmWatch believes that COVID-19 should not be used as a pretext to tighten rules on content removal or other rights-infringing legislative approaches.

### 3.4.3 AVAAZ: A DEFINITION OF DISINFORMATION WITH THE AIM OF STRENGTHENING THE PUBLIC DEBATE

Avaaz launched in 2007 with the mission of organising citizens of all nations to close the gap between the world we have and the world most people everywhere want. Avaaz empowers millions of people from all walks of life to take action on pressing global, regional, and national issues, from corruption and poverty to conflict and climate change. Their model of internet organising allows thousands of individual efforts, however small, to be rapidly combined into a powerful collective force. Avaaz takes action by signing petitions, funding media campaigns and direct actions, emailing, calling and lobbying governments, and organising “offline” protests and events, with the aim of ensuring that the views and values of the world’s people inform the decisions that affect us all. Avaaz has a dedicated team of staff investigating the harm of disinformation since 2018. It set up a ground-breaking investigation ahead of the EU elections which uncovered a flood of disinformation being spread by pages using coordinated inauthentic behaviour and encouraged Facebook to take action against those

<sup>143</sup> <https://algorithmwatch.org/en/project/governing-platforms/>

pages, which had over 500 million views before the vote. Its research continues to track the sources and spread of disinformation across social media, on issues such as climate change, health, and democratic elections, providing hard data on its reach and on the effectiveness of the platform's current ineffective attempts to deal with it. It published its reports, as well as the legislative solutions it has developed on its Disinformation Hub<sup>145</sup>

The most recent report is “Facebook’s Algorithm: A Major Threat to Public Health” which covers the spread of COVID-19 disinformation on Facebook and contains an appeal to online platforms to implement two of its major initiatives: “Correct The Record”, i.e. provide all users who have seen misinformation with independently fact-checked corrections, and “Detox the Algorithm”, a series of practical steps to reduce the reach and speed of the spread of misinformation, requiring the platforms to provide transparency over the actions they have taken to address it.<sup>146</sup>

According to the Avaaz representatives we have interviewed, disinformation threatens irreversible harm to the unity of the EU and the wellbeing of its citizens. In their opinions, the definition of disinformation should have at its heart the concepts of scale and public harm. With their proposal (see at the beginning of this paragraph), Avaaz wishes to contribute to the debate with a working definition, which would provide continuity of approach across illegal and legal but harmful content. Avaaz defines disinformation as “verifiably false or misleading information, as assessed by reputable independent fact-checking organisations, with the potential to cause public harm for example by undermining democracy or public health, or encouraging discrimination or hate speech”. It should also be noted that Avaaz strongly supports the preservation of freedom of speech in the legislative approach and does not support prior monitoring of any single piece of content, but advocates solutions to address the systemic reach of disinformation.

Avaaz representatives mention some important recent events (such as the EU Parliamentary Elections of 2019 and the COVID-19 pandemic) where disinformation has played a significant role, and, by looking at these events, they stress the importance of connecting disinformation strategies with public harm (e.g. effects on public health).

## SUMMARY CONCLUSIONS

From the foregoing discussion regarding the different notions and understanding of disinformation and related concepts coming from different actors and stakeholders, we can surely deduce that no specific and punctual definitions have been provided by media outlets in their ethical codes of journalistic guidelines, since these ones are focusing on which values and news standards journalists should respect. Neither self-regulatory bodies (for journalists or press) have provided such definitions, because they are mainly addressing good practices and editorial routines regarding journalism in general and news creation in particular. The journalistic trustability has

<sup>145</sup> [https://avaaz.org/campaign/en/disinfo\\_hub/?fp](https://avaaz.org/campaign/en/disinfo_hub/?fp)

<sup>146</sup> [https://secure.avaaz.org/campaign/en/facebook\\_threat\\_health/](https://secure.avaaz.org/campaign/en/facebook_threat_health/)

been addressed as a specific response to the disinformation issue, with specific regard to the approach deployed by the Journalism Trust Initiative.

Professional associations of journalists, as well as other public and private actors involved in the organisation of media literacy-awareness campaigns, have instead provided some definitions of disinformation, fake news, misinformation, or malinformation. In addition, the fact-checking organisations active in some EU Member States have provided similar definitions, sometimes looking at the specific differences between the different concepts, too.

As far as civil society organisations are concerned, it has been observed through the interviews and the analysis of these civil society organisations activities that only one of them has expressly mentioned a working definition of disinformation. Nevertheless, it became obvious how important it could be in the near future to look at the different perspectives of disinformation issues, even considering how these topics affect the activities and the sensibility of different actors in civil society. By both looking at the issue as a specific topic in the digital eco-system, or as a broader matter concerning human rights and the correct formation of the public opinion, the importance of the disinformation as a key-issue for the organisations working actively with the civil society has become evident. Even if most of these organisations do not mention some specific definitions for different notions, and some of them insist on the need for an empirical (and not academic) definition of these concepts, other civil society organisations underline the need for a clear distinction between disinformation, malinformation, propaganda, and information operations. In that vein, they would welcome if public authorities could make clear(er) to the general public the differences between the different notions, even within local media literacy campaigns.

<sup>145</sup> [https://avaaz.org/campaign/en/disinfo\\_hub/?fp](https://avaaz.org/campaign/en/disinfo_hub/?fp)

<sup>146</sup> [https://secure.avaaz.org/campaign/en/facebook\\_threat\\_health/](https://secure.avaaz.org/campaign/en/facebook_threat_health/)

## 4. LEGISLATION AND REGULATION RELATING TO DISINFORMATION AND RELATED CONCEPTS

Where Chapter 2 (*Current research on disinformation and related concepts*) of the Report zooms into the different notions of disinformation and related concepts used by scholars and relates them to how the different concepts are used and interpreted in EU member states, Chapter 4 contains a more extensive mapping of national measures. The main purpose of this Chapter is to provide a detailed overview of the national legislative and other tools to regulate and combat the spread of disinformation and related concepts, as well as legislation dealing with political and issue-based advertising. This mapping exercise is mainly based on the replies of ERGA's members to the questionnaire.

### 4.1 MEDIA AND PRESS LEGISLATION AND REGULATIONS

#### 4.1.1 NOTIONS OF DISINFORMATION

In general, the spread of disinformation is typically regulated by non-legislative tools in the responding countries. However, provisions can be found in the criminal law (see in 4.2) of many countries that cover the deliberate dissemination of disinformation insofar as it affects public order or peace (RO, HR, GR, CZ, HU, CY, SK), but – with a few exceptions – it is not typical that disinformation has led to separate legislation in the responding countries.

According to the countries' answers, two main clusters can be framed. The elements of the definition of disinformation and related notions can be separated based on their sources. In the first group the **legislative acts** (see 4.1.1.1) can be found, where statutory regulations containing a specific definition of fake news, information manipulation, and disinformation.

To the second group belongs **non-legislative, but state coordinated** approaches (see 4.1.1.2), where the documents have no legal binding force, but the state played an integral part in the creation of the conceptual elements.

The third section of the document also separates **political advertising and related concepts** (see 4.1.1.3), as both the questionnaire and the countries' answers handle these notions separately.

##### 4.1.1.1 LEGISLATIVE ACTS

Although most countries typically regulate disinformation by non-legislative tools, three respondents have statutory regulations containing a specific definition of fake news, information manipulation, and disinformation. The definition of fake news in Croatia is regulated by the Law on Misdemeanours against Public Order and Peace. According to this "Anyone who invents or disseminates false news that disturbs the peace and quiet of citizens" shall be fined for the crime or imprisoned for 30 days. The French Law on the



Fight against the Manipulation of Information defines the manipulation of information as “any allegation or charge of an inaccurate or misleading fact that are artificial or automated, massive and deliberate”. This law also talks about “false information of such nature to alter the sincerity of an election” and “false information likely to disturb public order or to alter the sincerity of an election”. In Lithuania, according to the Law on Information to the Public, disinformation means “intentionally disseminating false information”, and prohibits the dissemination of disinformation and information that is defamatory and offensive to a person or that impairs his or her honour and dignity.

#### 4.1.1.2 NOTIONS BY NON-LEGISLATIVE STATE ACTORS

Questionnaires from eight responding countries helped to identify *fake news* (PT, IT, NO, HR, GR, FR, BE – Flemish, ES). Six of them: the Italian AGCOM report,<sup>147</sup> the Greek Opinion of the Prosecutor of Court of Appeal of Athens, the French CSA recommendation and Constitutional Council definition, the Flemish Strategic Advisory Board for Media (SARC) recommendations, the teaching programme developed by the Norwegian Media Authority are classified as non-legislative definition and the 2019 report of the Spanish National Intelligence Centre.

In the Italian AGCOM report on *Technical Roundtable for safeguarding News-Media Pluralism and Fairness in the online Platforms*<sup>148</sup>, fake news covers a term that is often used widely and in a general way to distinguish a wide range of information. It can be used to signal completely invented, artificially created news, even with sensationalism and pure click-baiting characters.

According to the Greek definition, “Fake news is objectively untrue and refers to non-existent facts.” To be considered “fake”, the news must be able to provoke people’s concern or fear, where appropriate.

The French Constitutional Council has supplemented the legal concept of information manipulation with the concept of false information, which “must be an allegation or imputation of which it is possible to demonstrate falsity objectively.” Such allegations or imputations do not include opinions, parodies, partial inaccuracies, or mere exaggerations. The CSA recommendation talks about “the fight against the dissemination of false information that is likely to disturb public order or to affect the sincerity of the election.”

The Norwegian NRA has developed a teaching programme that can be used in lower secondary schools. In this programme fake news is described as: “often used for news-like matters that appear to be genuine, but which are fully or partly based on lies, or which have omitted information to create a particular distortion. Often there is a conscious intention behind this form of false information. The purpose may be to make money,

<sup>147</sup> <https://www.agcom.it/documents/10179/13325831/Pubblicazione+20-12-2018/7db41746-11e8-43d4-824b-003d80a6284d?version=1.0>.

<sup>148</sup> <https://www.agcom.it/documents/10179/13325831/Pubblicazione+20-12-2018/7db41746-11e8-43d4-824b-003d80a6284d?version=1.0>.

defraud you, influence your political opinions, polarize debates, or create confusion in a population. Fake news often looks like real news and can be difficult to detect. Fake news often appears on not serious websites and is spread from there to social media and in some cases to serious news channels”.

A total of eleven responding regulatory authorities (EE, PL, LU, D, IT, PT, SK, BE-Walloon, LT, FIN, ES) identified sources that defined the conceptual elements of *disinformation*. Six of them (EE, PL, D, IT, FIN, ES) belongs to a non-legislative source.

In Poland, the Ministry of Digitization defined disinformation for practical usage as “a conscious operational action aimed at making a real impact on public opinion”.

In Estonia, the Strategic Communication Team does have a working definition that it uses in its annual action plans. It coincides to a large extent with the definition offered by the EU: “Disinformation is factually wrong or misleading information that is created and distributed knowingly with the intent of political, economic or personal gain.”.

The Italian AGCOM report defines a clear structure for the scope of online information disorders as follows: “Disinformation occurs when online information contents are manipulated with both falseness and malicious intent”. This category includes all those types of false information –that may be perceived as real –deliberately created to emotionally damage individuals, social groups, organizations, or countries, or to support or discredit an argumentation, and purposely spread for political, ideological, or commercial reasons (click-baiting included). Since it has also a viral nature –the attitude, according to the addressed topic, to convey emotional state and perceptions on a large scale—it is mainly delivered on online platforms, that intensifies its massive propagation. For instance, there is false contextualization (truthful contents shared within false information about the context), contents delivered by false sources (contents delivered by false sources personifying genuine sources), contents created artificially (completely false or unfounded contents created to deceive or damage) and manipulated news (truthful information or images purposely manipulated to deceive).

In Germany, the Media Authority of NRW started a call for paper *Disinformation as an area of work for media regulators*<sup>149</sup> The survey focused on different types of disinformation and provides policy implications, and practical and policy management recommendations. This survey shows that “Disinformation [is] typically intentionally designed or fabricated to affect citizens, and clings on to existing identities and ideologies in order to make an impact on public opinion and society. As such types of communicative untruthfulness are hard to correct, they may have a larger impact on society.”

In Finland, the Prime Minister’s office has produced a guide in relation to disinformation for communication officers within the government. In the guide, a concept of information influence (“Informaatiovaikuttaminen”) is used. The guide is based on the originally published Swedish *Countering information influence activities – A handbook for*

<sup>149</sup> [https://www.medienanstalt-nrw.de/fileadmin/user\\_upload/NeueWebsite\\_0120/Themen/Desinformation/WasIstDesinformation\\_Paper\\_LFMNRW.pdf](https://www.medienanstalt-nrw.de/fileadmin/user_upload/NeueWebsite_0120/Themen/Desinformation/WasIstDesinformation_Paper_LFMNRW.pdf)

*communicators*<sup>150</sup>. In the guidebook “Disinformation” refers to erroneous or manipulated information that is deliberately disseminated in order to mislead. This is the cornerstone of classic propaganda, but it is also the basis of the more recent phenomenon of fake news. The deliberate use of false information to mislead is nothing new. However, digital platforms have fundamentally changed the nature of disinformation. Spurious content can occur in the form of manipulated text, image, video, or audio. These elements can be used to support false narratives, sow confusion, and discredit legitimate information, individuals, and organizations.”

Three respondent authorities reported definition elements to *misinformation*.

In Iceland, the working group under the Security Council described misinformation that is “false, but not created with the intention of causing harm.”

The already mentioned German survey of the Media Authority of NRW points out that “Misinformation can be defined as the dissemination of untruthful or inaccurate information without the goal to mislead or manipulate the audience”. Another definition of misinformation describes it as any type of information that is not supported by empirical evidence and/or expert knowledge. Although both definitions of misinformation are slightly different, they both assume that the communicator does not aim to mislead receivers.

Also, the already mentioned Italian AGCOM report outlines that “Misinformation occurs when information is created starting from inaccurate or untruthful contents without a malicious intent, but users have believed that it is based on real facts”. In this case, the information spread is proved to be incorrect due to a wrong understanding of facts, superficiality, not verifying sources, or purposely not doing it to ridicule or to mock. Satire and parody (information contents that are deliberately false and intensified, and may be perceived as real and spread to deride aspects or people of contemporary life) misleading information (the deceiving use of information to frame topics or people) and false connections (when titles, images, and wordings do not match the information content) fall into this category.”

The Italian AGCOM report also mentions under definitions that “*Malinformation* occurs when information contents are based on real facts (usually private), but the way facts are contextualised make them viral with the specific aim to damage individuals, organizations or countries, or to support or discredit an argumentation. Some examples of this type of information disorders are information leaks that may promote hate speech or online harassment, or the news amplification based on real facts to prove or challenge a certain thesis.” *Online malinformation* is “based on real facts (also private), disclosed on the Internet and contextualized, viral and convey a message with the specific intent to damage a person, an organization or a country, or affirm / discredit a thesis.”

<sup>150</sup> <https://www.msb.se/RibData/Filer/pdf/28698.pdf>

### 4.1.1.3 NOTIONS OF POLITICAL ADVERTISING AND RELATED CONCEPTS

Fake news is usually intended to be harmful or to mislead the media consumer. The danger posed by such content is of paramount importance during elections. Due to the detrimental influence of the voting citizen, the questionnaire also focused on the definitions of political advertising, political microtargeting, or issue-based advertising.

Contrary to disinformation, regarding political advertising, most respondents have some form of electoral or media law. In these, even if the concept of political advertising is not defined at a conceptual level, all countries uniformly regulate and allow such activity during election periods.

Six responding countries reported a definition for political advertising (AT, FR, HU, CY, LT, SK). Norway and Italy use the term “political message”, and French legislation uses different words for “political advertising” or “issue-based advertising”. Only Norway reported a definition for “political messages” from the non-legislative document<sup>151</sup> and it should be noted that the definition of issue-based advertising did not appear elsewhere in the responses (with the exception of the French report).

Based on the reports (AT, FR, HU, CY, LT, SK) *Political advertising* is an announcement or message of any kind of broadcast in return for payment or for a similar consideration by a candidate presidential or parliamentary elections or elections of the European Parliament or any other elections. Political advertising can be any programmes published with the purpose of enhancing or advocating support for a political party or political movement, or the government, or promoting such entities similar to an advertisement. These are paid advertisements with the purpose to introduce politicians or to invite voters to certain voting behaviour, or with the purpose to promote other campaigning groups.

The concept of the political message in Norway encompasses a broader concept than the definition of political advertisements in most countries. Here *political messages* include all messages, regardless of form, that aim to promote support for/influence public opinion on various political and social issues, at the local, national, and international level. Political messages also include campaigns or statements of opinion aimed at influencing the decisions of local or central authorities. This, therefore, applies not only to strictly party-based political issues in connection with elections, but also to statements aimed at influencing public opinion in general about political messages. In Italy, the definition of political messages is defined in *Par Condicio Law* as a political programme or a motivating presentation of opinions.

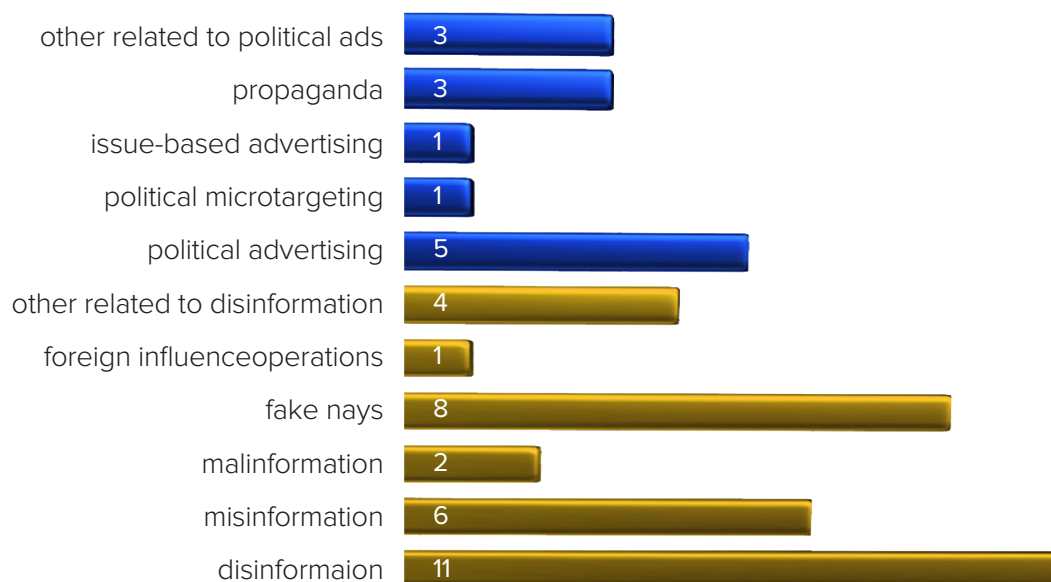
It is important to mention the use of the word *propaganda* in addition to political advertisements and messages. Two responding countries (PT, RO) reported conceptual legislative elements of political or electoral propaganda. In Portugal, the Electoral Law considers any activity aimed directly or indirectly, at promoting a candidate, a political party,

<sup>151</sup> White paper: Ot.prp.nr.58 (1998–1999) Om lov om endringer i lov 4 desember 1992 nr 127 om kringkasting m.m

or the holder of such a body as political propaganda. But agents and any other person associated with them, namely publication texts and images that express or represent the content of that activity are included as well. In Romania, election propaganda is very similar to political advertising, but an important element in the Romanian definition is that it goes beyond journalistic work in informing the audience. In Slovakia, the Security Council has defined non-legislative term for *information warfare*. Based on this, information warfare is the coordinated use of information and disinformation by state authorities, the armed forces, or other subjects for the purpose of influencing people's thinking and actions to gain an advantage over the adversary.

The *Finnish Security Strategy* (2017) is a government resolution that harmonises the set of national principles regarding preparedness and guides the preparedness actions taken by the administrative branches. It determines *information operations* and hybrid influencing in Appendix 1 Concepts and definition. It defines information operations as “systematic action, carried out by editing information, in which the aim is to achieve changes in the information and public opinion environment of the targeted community that are in accordance with the instigator's aims.” *Hybrid influencing* is an “action in which the aim of the instigator is to achieve its aims by using a multitude of complementary methods and exploiting the weaknesses of the targeted community. Hybrid influencing can be by economic, political, or military means. Hybrid influencing can also be based on technology and social media. The methods may be used simultaneously or in succession. Hybrid influencing may be difficult to recognize.”

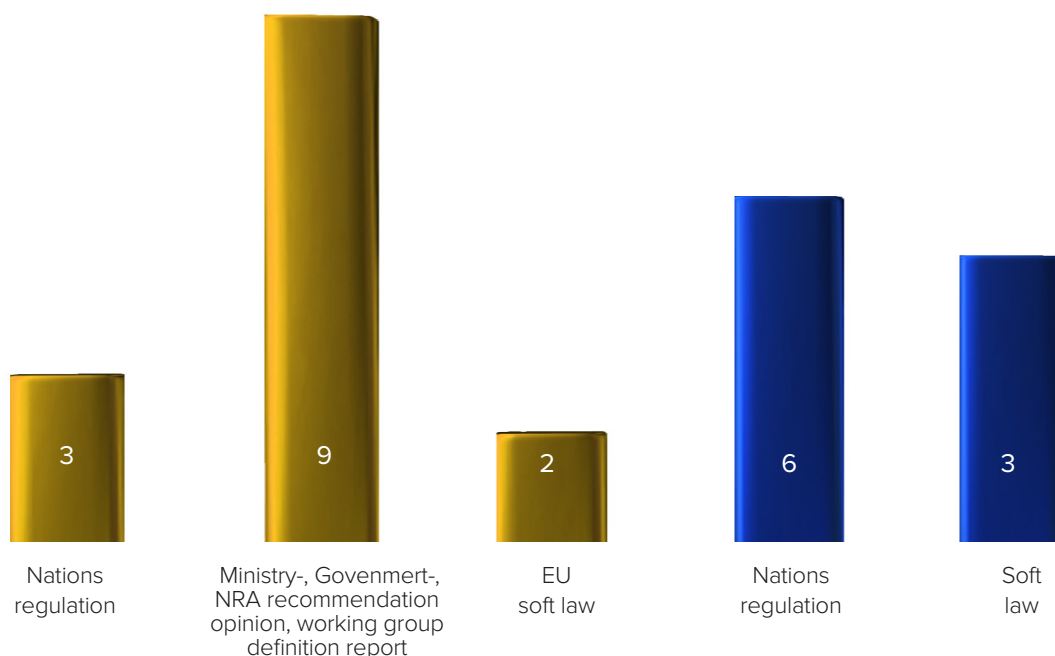
Report on notions



The graph above shows how many respondents reported conceptual elements for the notions at stake. The brown lines show the number of reports for disinformation and related concepts and the blue lines show the number of reports for political advertising, foreign influence, and related concepts. We can see that the most conceptual elements were reported for disinformation (11) and fake news (8).



Sources of notions



The graph above shows the category of the sources of notions. The brown columns show the category of the sources for disinformation and related concepts<sup>152</sup>, the blue columns show the category of the sources for political advertisements and related concepts. We can notice that the most conceptual element relates to disinformation and related concepts<sup>153</sup> come from national non-legislative sources: Ministry, Government or NRA document (9), nearly the same from Media literacy, awareness campaign or civil society actors (6), and only a few respondents mentioned EU soft law (2)

## 4.2 CRIMINAL LAW AND PENAL CODES

Questions 1.1, 1.2, 2.4, and 2.5 of the survey were intended to map existing criminal law of Member States that affects the concept and characteristics of disinformation, the definition of hate speech, defamation, or any similar legislation. These regulations and the legal definitions – as untrue contents that may disturb public order – can bring us closer to mapping out how some nations approach the criminal law regulation of such and similar conducts.

The majority of respondents did not point out a significant connection between hate speech and disinformation, i.e., how the crime of hate speech or defamation could bring us closer to defining the concept of disinformation. From the answers to the questionnaire, it can be deduced, that most of the countries have some kind of criminal law regulation on the subject in question, but only some of them contain specific rules on the phenomenon of disinformation, although they do not label them as disinformation.

It should be noted that it is difficult to compare the criminal law rules of different nations, as this area of law is significantly influenced by the legal tradition of the given country, which

<sup>152</sup> Disinformation, Misinformation, Malinformation, Fake news, Hoax, Clickbait.

<sup>153</sup> Political advertising, Political message, Propaganda, Information warfare.

can develop different regulatory models. There is also a big difference in the formulation of these norms in penal codes or other legal acts. Criminal law is a special form of liability, and in some nations, defamation and discriminatory offenses are not criminal offenses, they are only misdemeanours or the violation of civil or media law. In connection with this issue, it is therefore justified to examine the “peripheral areas” as well, since we cannot limit ourselves only to the rules that have been laid down in criminal codes. Any existing or planned regulation in criminal law or other areas of law can also be relevant, which aims to tackle untrue statements made in public that is able to disturb public order.

Based on the responses to the questionnaire, the responding countries can be divided into the following groups:

1. **Disinformation is regulated by criminal law:** There are norms in criminal codes specifically related to disinformation, but this terminology is not used (e.g. CZ, CY, SK, HU).
2. **Disinformation is partially regulated by criminal law:** Other crimes partially cover disinformation practices, but some of the main elements of disinformation are lacking (e.g. NO, DE).
3. **Disinformation is regulated by other areas of law:** Hate speech and discriminative acts are illegal but not regulated by criminal law norms (e.g. BE, EE).

## 4.2.1 NORMS IN PENAL CODES SPECIFICALLY RELATED TO DISINFORMATION

Some of the respondents reported rules in criminal law that could cover disinformation, however, none of them uses this terminology. The *Hungarian Criminal Code* names these violations Scaremongering<sup>154</sup>, the *Planar Code of the Republic of Cyprus* is titled “Publication of fake news, etc.”<sup>155</sup>, in the *Czech Republic* it is called “Spreading of Alarming News”<sup>156</sup>. In *Romania* the relevant crime is called “Giving false information”,<sup>157</sup> *Slovak Penal Code* also

<sup>154</sup> Section 337 in Hungarian Criminal Code: “(1) Any conduct of uttering or publishing before the public at large a statement in connection with collective danger one knows to be false or with a reckless disregard for its truth or falsity at the scene of some emergency by which to violate public order or disturb the public peace at a place of public danger is guilty of a felony punishable by imprisonment not exceeding three years. (2) Any conduct of uttering or publishing a statement one knows to be false or with a reckless disregard for its truth or falsity at times of special legal order with intent to obstruct or prevent the effectiveness of protective measures shall be construed a felony offense and shall be punishable by imprisonment between one to five years.”

<sup>155</sup> Article 50 of the Planar Code of the Republic of Cyprus states (unofficial translation) “Anyone who, in any way, publicizes any form fake news or news that can potentially harm civil order or the public’s trust towards the State or its authorities or cause fear or worry among the public or harm in anyway the civil peace and order, is guilty of a misdemeanour and is punished with imprisonment that cannot exceed two years or with a fine that cannot exceed 1500 pounds or both of those sentences.”

<sup>156</sup> Section 357 of Czech Penal says: “(1) Whoever intentionally causes a threat of serious concernment of at least a portion of population of a certain area by spreading alarming news that is untrue, shall be sentenced to imprisonment for up to two years or to prohibition of activity. (2) Whoever communicates the news referred to in Sub-section (1) or other untrue news capable of causing precautions leading to a risk of serious concernment of at least a portion of population of a certain place or an unfounded rescue operation of the integrated emergency system to court or to a police authority of the Czech Republic, to a state administration authority, local self-administration authority or another public authority, to a legal person, natural person who is an entrepreneur or a mass communication media, shall be sentenced to imprisonment for six months to three years or to prohibition of activity.”

<sup>157</sup> “The act of communicating or disseminating, in full knowledge, by any means, of false news, data or information or false documents, if such act is likely to jeopardize national security or the international relations of Romania, shall be punishable by no less than 1 and no more than 5 years of imprisonment.”

contains a section on spreading “alarming messages or information”, as well as Greece where<sup>158</sup> the Greek Penal Code among the “Threats to public order” chapter provides a criminal definition of acts related to disinformation.<sup>159</sup> Bulgaria answered, that a report for the European Union Agency for Fundamental Rights (FRA) says that public prosecutors, using other provisions of the Bulgarian Criminal Code have launched several pre-trial investigations for disinformation, including two cases for spreading false news on Facebook.<sup>160</sup>

Instead of a detailed analysis of these criminal offenses, it is more necessary to consider the common elements of them in order to clarify the conceptual elements of disinformation. Therefore, in view of the above legal provisions, the following common features can be highlighted:

- **False statement:** the communicated information must be false at the time of communication;
- **Active conduct:** assumes publishing and/or disseminating information (passive behaviour, such as reading or not deleting, does not constitute a crime);
- **Publicity:** untrue facts are communicated to the general public or through the media;
- **Intentional conduct:** the perpetrator knows that the statement is not true (except in Greece, where if someone negligently becomes guilty of the act shall also be punished slightly);
- **Public interests:** aims to protect public order and peace as main interest, not private rights (e.g. carries a risk of violation of public order or trust in state authorities, or causing fear to an indefinite number of people);
- **The real harm is not always required:** instead of the actual disturbance in public peace or order, the danger of which also can justify criminal liability;

**Opinions excluded:** freedom of expression protects the opinions as to the main condition of the democratic public debate. There are no provisions in the national regulations identified that would criminalise opinions, except in very special cases (e.g. in FR where contesting the existence of crimes against humanity constitutes a crime and in DE, HU, SK, and SI where Holocaust denial opinions are prohibited).

<sup>158</sup> Paragraph 361 in Greek Penal Code states: “Whoever intentionally causes serious danger to at least a part of the population in some area by spreading an alarming message which is untrue, or by committing any other similar act capable of causing such danger, shall be punished by imprisonment for up to two years.”

<sup>159</sup> Article 191 says “1. Anyone who publicly or via the internet spreads or disseminates false news in any way, causing fear to an indefinite number of people or to a certain circle or category of persons, who are thus forced to carry out unplanned acts or to cancel them, at the risk of cause of damage to the country’s economy, tourism or defense capacity or of disruption of its international relations, is punishable by up to three years in prison or a fine. 2. Whoever negligently becomes guilty of the act of the previous paragraph shall be punished by a fine or by the provision of community service”.

<sup>160</sup> Article 326 from the Bulgarian Criminal Code says: (1) A person who transmits over the radio, by telephone or in some other way false calls or misleading signals for help, accident or alarm, shall be punished by imprisonment for up to two. (2) If the act under paragraph 1 resulted in considerable harmful consequences, the punishment shall be imprisonment for up to five years and a fine from BGN five hundred to two thousand

## 4.2.2 OTHER CRIMINAL FACTS PARTIALLY COVERING DISINFORMATION PRACTICES

Traditionally in the national systems, criminal law is based on the assumption that every crime violates or threatens a certain value or fundamental right. This protected right can be of a private nature (such as human dignity) or of a community nature (such as public peace). Defamation, hate speech and discriminative acts usually violate the human dignity of an individual or group, but at the same time it can disturb public peace, if these crimes were committed in public or have a significant impact on the public debate (e.g. defamation of members of the government, or incitement to hatred against minority).

Countries belonging to this group have such criminal law rules, however, one of the currently known features of disinformation is missing. In these countries according to these crimes public peace is not always the primary interest to be protected, but the human dignity and freedom of the given individual (e.g. LT, HR, DE, AT, LU, PL, ES). Separately from the crimes against human dignity and the individual, the Criminal Code of these countries sets out a different chapter on crimes against public order and peace, in which, however, it is not always a factual element that statements made are untrue. Nor is the publicity, as a way of committing a crime, a requirement in all cases. However, when the crime is made through mass media or in circumstances that make its diffusion easier, the applicable penalties can be higher (e.g. PT, PL).

The criminal laws of these countries partially cover disinformation behaviours. Defamation and hate speech exists as a criminal norm, but in these cases the private nature dominates, or the crime can be committed by true statements also. As a consequence, these regulatory models do not bring much closer to deciphering the criminal law concept of disinformation.

## 4.2.3 HATE SPEECH, DEFAMATION, AND DISCRIMINATIVE ACTS, CONSIDERED ILLEGAL BUT NOT REGULATED BY CRIMINAL LAW

As mentioned earlier, responding countries did not always report criminal legislation in the areas in question. Countries like *Croatia*, *Bulgaria*, and *Belgium* have certain legislation covering defamation and hate speech, however, in their answers, they mentioned different legal tools, such as misdemeanour, media, or civil law. Despite this difference, some of them have developed useful legal concepts according to disinformation.

In *Croatia*, Article 16 of the Law on Misdemeanours against Public Order and Peace says “whoever invents or spreads false news that will disturb the peace and tranquility of citizens will be fined (...) or imprisoned for up to 30 days”. The consequence of this act is a disturbance of the peace and tranquility of the citizens so that false news placed in public will not be considered a misdemeanour unless the consequence required by the legal description of the misdemeanour is caused. In *Norway*, a new bill about editorial media mentions disinformation and the dissemination of such (along with propaganda and hate speech) as a potential threat against the public conversation. It is not a regulation of disinformation, but the bill and

other preparatory works have elements of relevance. It is mentioned that “false news” is an inaccurate collective term which is unfortunate because it holds several categories of both legal and illegal utterance that demands different forms of response.

## 4.2.4 FINAL THOUGHTS ON CRIMINAL REGULATION

Based on the responses to the questionnaire, it was possible to classify the respondents into four categories, however, it can be assumed that in some form hate speech and defamation are punishable in all countries. Criminal liability is a special form of liability that is designed to sanction the worst, most dangerous behaviours in any legal system. That is why it is important to note, that the way criminal law is regulated and the reason for criminalising individual conduct can be very different.

This part of the questionnaire aimed to draw conclusions from national regulatory models of disinformation and similar crimes, that can bring us closer to define the conceptual elements of disinformation. However, due to the aforementioned specialty of criminal law, these statutory definitions also contain specific conceptual elements that elevate “ordinary” disinformation acts to the level of criminal law. The national legislature has added additional elements by which the communication of disinformation reaches a level of danger that necessarily requires intervention from the state. This state intervention is a criminal procedure, that investigates the liability of a person who provides false information. In contrast, media law and other areas of law examine the liability of the platform, media content provider, and so on. It is also a discrepancy that criminal law, as a general rule, examines the perpetrator from a subjective point of view, that is, whether his/her conduct was intentional, negligent, or innocent.

In order to gather the conceptual elements of disinformation among the responding countries those regulation models can be most helpful, which have an explicit crime for such conducts (see Group 1). However, there are some features that are not uniform, so they may need further consideration. The following issues arise not only in the criminal law regulation of disinformation but also in defining its general definition:

- Does the communicating person have to act intentionally in all cases, or is negligence sufficient under certain conditions?
- Does the forwarding or reposting of false content also constitute disinformation, or can only the original communicator realize it?
- Is it a condition, that the conduct also has a concrete result, or real danger is sufficient? In other words, is it required that the false statement also have a proven negative effect on public order, or is it enough if it is capable of doing so?
- The false information provided must be false at the time of publication, or it will suffice if it later becomes false? On the other side, if the information is knowingly untrue at the time of communication, but later becomes true, can we speak of disinformation?



## 4.3 MEASURES RELATED TO COVID-19 AND DISINFORMATION

The responding countries' answers highlight that the issue of disinformation is a growing concern in general and not only a problem of the COVID-19 pandemic. To summarize the answers given to the questionnaire it can be concluded that most responding countries and also civil society actors started discussions about the "fake news" and "disinformation" phenomena. Some countries created task forces, working groups, or commissions in order to create a legislative framework for disinformation, while other countries implemented new articles in the existing regulation, especially regarding criminal law and media regulation. On the other hand, most countries started media literacy and informative campaigns, formulated recommendations for journalists, news agencies, and broadcasters, conducted survey by the media authorities or in collaboration with universities, before and during the COVID-19 pandemic.

In connection with the COVID-19 pandemic, the following observations can be made. 18 out of the 32 respondents who completed the survey gave an answer that contained information regarding the COVID-19 pandemic. None of the countries indicated a new definition creating processes regarding the coronavirus pandemic. However, in some respect, new processes have been initiated or previous efforts have been accelerated with regard to the pandemic disinformation issues. In the case of Hungary, new criminal code legislation occurred (see in 2. c. section), while the Italian House of Representatives has approved a bill aimed at establishing a "two-chamber" Parliamentary Inquiry Commission on fake news with tasks that include COVID-19 disinformation, and in Spain the Ministry of Justice announced a legislative change to provide with legal instruments against those who "disseminate pollute public opinion, impeding the right to receive truthful information". Countries such as Iceland and Portugal also started legislative processes or working group activities with the aim of legislation (see in 4. section). These processes are indeed influenced by the pandemic situation but do not derive from it. A good example is Iceland, where not only information campaigns were initiated, but a state survey was made to analyse COVID-19 disinformation among society. Three countries, Germany, Iceland, and Norway initiated state-coordinated surveys in connection with disinformation after March 2020. The Hungarian media authority conducted research in 2019 in connection with a fake news perception, however, definition elements were not included in the survey. The survey centred around the prevalence and public opinions of the phenomenon. These country surveys did not contain any definition.

Regarding information campaigns, Cyprus, Iceland, Luxemburg, Norway, Italy, Portugal, and Bulgaria mentioned that state coordinated campaigns or official statements were created in connection with the crisis. These campaigns and statements also included guidelines for the public and broadcasters in connection with responsible, accurate, and correct information spreading regarding COVID-19. In Iceland, the term "information disorder" and "fake news" were used, which is defined as "false and misleading information, disguised as real news, which can affect the opinions, ideas, and even public health". It is not known whether the definition was created during the pandemic or it is a previously used interpretation. Norway also launched an information campaign called "STOP. THINK. CHECK". The campaign was created on the basis of

a previous definition, used in a 2019 fake news programme (see in 1. b. section). In Portugal, the National Centre of Cybersecurity created literacy material that used the previously constructed definition of disinformation in connection with cybersecurity issues. The definition was not included in the country's answers.

Regarding „fact-checking” Belgium and Portugal mentioned the direct connection with fact-checkers whose task is to ensure the reliability of COVID-19 information, while Belgium, Poland, and Slovenia stated that they have official information portals about the COVID-19 pandemic. On the other hand, it is known that other countries also have such portals, but the answers did not include information regarding such websites.

## 4.4 JURISPRUDENCE AND CASE LAW

In addition to academics, researchers, legislators, and regulators, courts in many of the European countries have been dealing with cases that to a certain extent focused on disinformation or related concepts as well. While the sections above were dedicated to the legislation or regulation that would provide useful definitions of disinformation or related concepts, this one focuses specifically on case law including court decisions, and jurisprudence referring in any way to the definitions of studied concepts.

In the ERGA survey for this Report, three questions were dedicated to cases including court decisions in their respective countries that refer to definitions or understanding of disinformation or related concepts, political advertising, political microtargeting or issue-based advertising or cases, and court decisions dealing with ensuring accuracy, objectivity, and impartiality of information or combatting defamation, incitement to hatred and other illegal content.

### 4.4.1 DISINFORMATION

Fifteen NRAs reported no relevant court cases. In the majority of the countries that reported any relevant cases the cases fall within the criminal code. Fewer countries reported cases related to media regulation.

Media regulation-related cases were reported by France, Greece, Poland, Lithuania, and the Netherlands. Criminal proceedings with some references to disinformation were referenced in answers from Germany, Croatia, Spain, Latvia, Hungary, Czech Republic, and Romania. Below are listed the main aspects of the definition of disinformation or related concepts, each with a brief elaboration on the court cases reported by the NRAs.

#### Intention

The relevant example in France is related to fairly unique French legislation against manipulation of information from 2018. The Council of State in providing its opinion<sup>161</sup> on the draft of the legislation referred to the electoral code from 1881 that defined the notion of false news. False news is interpreted as referring to news relating to a precise and detailed

<sup>161</sup> Council of State, Opinion N° 394641-394642.

fact, not yet disclosed, and whose false nature is objectively established. According to the opinion of the Council of State, the scope of the notion of “false information” is broader in that it removes the condition that the disputed information must not have been previously disclosed. What distinguishes this specific definition is that the Council emphasised that, this definition does not include any reference to the intention, therefore, the opinion further states, to avoid a disproportionate infringement of freedom of expression, the Council of State recommends that the fight against false information be systematically confined to cases where it is established that the dissemination of such information is based on a deliberate intention to cause harm. The element of intention is, therefore, an integral and crucial part of the definition of the concept of the term “fake news” in this case. The intention is also mentioned as an important factor in the guide of the State Attorney General’s office in Spain that should help prosecutors to identify the different types of criminal offenses that may include false news according to its content and the intention of the author.

### **Capacity to disrupt public order**

Another element of the definition of fake news was mentioned in the Opinion of the Prosecutor of the Court of Appeals in Athens, Greece where “the news that objectively does not correspond to the truth and which is referring to not existing facts. The news must be capable to provoke a concern or fear of the people in order to be considered fake, according to this opinion.

Latvia reported criminal proceedings related to websites spreading false information. Police claimed that the information in question disrupted the public peace and the operations of companies and institutions. Similarly, the case in Croatia related to false information about COVID-19 was reported to be conducted in accordance with the Law on Misdemeanours against Public Order and Peace. The police in Hungary launched 87 proceedings with connection to emergency for fearmongering and 27 proceedings with connection to threatening the public.

### **Lack of added value for society**

The Polish Supreme court, in its judgements, added an interesting perspective when focusing on the added value of the distribution of a certain type of information. Below is a closer elaboration of the two cases.

In its judgement<sup>162</sup> from 2014, the Supreme Court claimed that “a journalist’s duty is to remain reliable, that is, to be reliable, responsible for the word, not to be misled”, and further specifies that “the obligation of special diligence and reliability is not limited only to the compliance of the informant’s statements with the content of the publication and to providing the source. In fact, untrustworthy information is disinformation”. Here the judgment refers to the claim of the Supreme Court from 2003 that used the same claim about disinformation.<sup>163</sup>

In a Supreme Court case in 2016 in Poland, the Civil chamber weighted the conflict of values in the form of the press and the personal rights of people affected by the press material.

<sup>162</sup> Judgment of the Supreme Court of October 8, 2014, file ref. act: II CSK 19/14.

<sup>163</sup> Judgment of the Supreme Court of June 5, 2003, file ref. act: II CKN 14/01.

The judgement does mention both disinformation and misinformation and provides some elements of them being devoid of any value for the society as a whole. The judgment concludes that “it cannot be assumed that the society would benefit from the freedom of speech understood as approval of the dissemination of untrue information or interpretations distorting reality, in a way devoid of any factual justification or presenting the press material in a way that does not allow the reader to distinguish between the statement concerning the facts and the assessment formulated by author or cite their views as irrefutable facts”.<sup>164</sup> According to the judgement, society does not benefit from misinformation, disinformation, and instrumental treatment.

### **The recipient's perception**

A different approach to defining whether the information is misleading was taken by the Court of Appeal in Warsaw, Poland, in 2019.<sup>165</sup> When dealing with the consumer protection case the Court of Appeal stated that “whether the information is misleading or not is determined by the way it is received by the clientele, and not only by its objective content.” This view was also shared by the Supreme Court in its judgment,<sup>166</sup> in which it was stated that “we deal with “misleading” information when the recipient’s ideas based on it are not consistent with reality (real state); the use of objectively true information does not exclude that, due to the way it is presented (e.g. incomplete or ambiguous information), it may cause a false impression on the recipient and lead him to misleading conclusions (e.g. as to the actual characteristics of one’s product or a competitor’s product), which justifies qualifying the entire message as “misleading”.

## **4.4.2 POLITICAL ADVERTISING, POLITICAL MICROTARGETING, AND ISSUE-BASED ADVERTISING**

The data collected through the survey focused also on court cases providing definitions of political advertising, political microtargeting, or issue-based advertising. The majority (22/27) of NRAs reported no cases or any court decisions that would give relevant definitions. Additionally, some NRAs referred to existing relevant legislation focusing specifically on political advertising, but with no definition of the term. For example, the French law on freedom of communication from 1986 does say that “advertising programmes of political nature are prohibited” but there is no case law that would be helpful in seeking a relevant definition of the term. Media regulators in several countries do have specific rules for the election period and in their decisions, they also provide some insight into their understanding of the studied terms.

### **Advertisement directed towards a political end**

One of the most extensive definitions of “the advertisement directed towards a political end” is described by the Broadcasting Authority of Ireland (BAI). The Broadcasting Act of 2009, in

<sup>164</sup> Judgment of the Supreme Court - Civil Chamber of November 29, 2016, file ref. act: I CSK 715/15.

<sup>165</sup> Judgment of the Court of Appeal in Warsaw - VII Commercial Division of October 29, 2019, file ref. act: VII AGa 1432/18.

<sup>166</sup> Supreme Court judgment of 9 October 2014, IV CSK 56/14.

its section 43(1) prohibits advertisements directed towards a “political end”. While the legislator did not provide any definition of “an advertisement directed towards a political end”, the BAI, and its predecessors have defined it with reference to a key High Court judgment - *Colgan vs. the IRTC* (1998). This defined such an advert as one that is directed towards:

- furthering the interests of a particular political party, or;
- procuring changes in the laws of this country, or countering suggested changes in those laws, or;
- procuring changes in the laws of a foreign country or countering suggested changes in those laws, or;
- procuring a reversal of Government policy or of particular decisions of governmental authorities in this country or countering suggested reversals thereof, or;
- procuring a reversal of Governmental policy or of particular decisions of Governmental authorities in foreign countries or countering suggested reversals thereof.

As such, the legislation is not restricted solely to adverts which further the interests of a political party nor it is restricted to political matters relating to the jurisdiction of the Republic of Ireland. In determining whether a communication may contravene the statutory prohibition, the BAI is of the view that it is reasonable for broadcasters to take into account the following three factors:

- The content of the advert.
- The context in which the advert is broadcast.
- The aims and objectives of the advertiser and of the advertising campaign.

It is the BAI’s experience to date that one or more of the three factors may play a determining role in deciding whether an advert complies with the statutory prohibition. In certain circumstances, the current political context may have a strong bearing in determining whether an advert complies. In other circumstances, the text may be fundamentally problematic even if the advertiser is not political or exclusively political in nature. Advertisements that advance the interests of organisations whose sole or predominant purpose is of a political nature have a higher potential to fall foul of the prohibition e.g. political parties, special interest lobby groups, etc.

### **Electoral advertising**

The Spanish Supreme Court in its decision interpreted the concept of “electoral advertising or propaganda” in 1992. According to this decision “certainly, any action which is intended to persuade the citizen to cast his vote in favour of a candidate, or, on the contrary, aimed at dissuading him of any such possibility, always with a public outreach, can be identified, all circumstances of each case acknowledged, as an unlawful propagandistic activity”. The case dealt with an electoral campaign that took place out of the legal boundaries set forth in the Representation of the People Institutional Act 5/1985, of June 19.



## Social media as platforms for election propaganda

The Portuguese National Electoral Commission in 2015<sup>167</sup> added a fairly new element to their view on “political propaganda” when they recognised that “Facebook, among other social media, has been widely used for political and electoral propaganda, particularly during election processes, which means that they have to face the legal norms which regulate those special periods”. According to this decision, the specific online environment, where the “illicit propaganda on reflection and election day” happens is also part of its definition. The decision lists websites, open groups on social media and personal chronologies whose privacy settings allow people other than “friends” and “friends of friends” to access it. The decision goes on to specify that this applies namely in the cases when a) any person, including non-Facebook users, can access and see the information provided by the user (public universal access) and b) any Facebook user can access or see the information provided by the user (public access on the social platform).

## Reference to social justice

A Constitutional court decision<sup>168</sup> in Malta, related to the Broadcasting Authority’s decision to stop broadcasting of an advertisement of the General Workers Union, gives a hint at how the court understands the term political advertisement. The court confirmed that the advert in question was without doubt political as it referred to social justice. The decision then goes on to claim that political advertising could be stopped only to protect public opinion from the pressures of powerful financial groups and undue commercial influence. According to the court decision the reference to social justice makes the advertisement undoubtedly political.

## 4.4.3 ACCURACY, OBJECTIVITY AND IMPARTIALITY OF INFORMATION, DEFAMATION, AND INCITEMENT TO HATRED

Similar to court decisions dealing with disinformation, the cases dealing with ensuring accuracy, objectivity, and impartiality of information or combatting defamation, incitement to hatred, and other illegal content, the court cases reported by the NRAs fall either under criminal law and penal code or media regulation. Very few of these cases provide any relevant definitions of studied concepts.

A criminal proceeding in connection to incitement to hatred was reported in Luxemburg, France, and Slovakia while in Belgium, Austria, Greece, Bulgaria, Poland, Latvia, Portugal, and the Netherlands NRAs referred to decisions of broadcasting authorities focusing on the duty of broadcaster to ensure accuracy, objectivity, and impartiality of information. Below are elaborations on the cases that do provide some useful elements for defining disinformation or related concepts.

<sup>167</sup> Comissão Nacional de Eleições, Comunicação oficial da CNE, Proibição de propaganda na véspera e no dia da eleição, 6 October 2019, [http://www.cne.pt/sites/default/files/dl/2019-ar\\_comunicado-propaganda-vespera-e-dia-eleicao.pdf](http://www.cne.pt/sites/default/files/dl/2019-ar_comunicado-propaganda-vespera-e-dia-eleicao.pdf).

<sup>168</sup> Case 754 / 2000 / 1 - ZARB TONY ET vs AWTORITA TAX-XANDIR, 28 August 2000, <https://ecourts.gov.mt/online-services/CivilCases/Detail/86465>

### Distinction between facts and commentary or opinions

The Council of State ruling from 2019<sup>169</sup> in France provides some insight on the honesty of the information. The French media regulatory authority gave notice to RT France to comply with the obligation provided in its license to broadcast of rigor in the presentation and processing of information following the broadcast. The Council of State ruled that the obligations stemming from the license to broadcast require the broadcaster to ensure that the distinction is made between the presentation of facts and their commentary and that different points of view are expressed. While this decision does not provide a clearly stated definition, the technique of blurring the line between facts and commentary is a useful element when defining the term.

The Portuguese regulatory authority, ERC alluded to a similar element of the definition, when stated that “rigorous informing is a guiding principle of journalistic practice, comprising demands of impartiality and objectivity, rejecting sensationalism, separating facts from opinions, ensuring all versions of the story are told and that sources of information are identified or identifiable”<sup>170</sup>

### Related offences

The Spanish Criminal Code copes with various related offences, such as calumny, slander, and false accusation that contain useful elements for definitions of studied concepts.

According to Article 205, calumny is defined as an imputation of a criminal offense made with the knowledge of its falsehood or with reckless disrespect towards the truth. Article 208 defines slander as an action or expression that injures the dignity of another person, damaging his or her reputation or harming his or her self-esteem. Only serious slanders are to be considered criminal offences, given their nature, effects, and circumstances.

While the criminal offence of incitement to hatred is not defined, Article 510 declares punishable the actions of anyone that publicly foster, promote or incite, directly or indirectly to hatred, hostility, discrimination, or violence against a group of individuals, a portion of that group or against an individual, on grounds of his or her affiliation to said group, on grounds of racism, antisemitism or other reasons touching upon the ideology, religion or beliefs, family situation, belonging of their members to an ethnic, race or nation, origin, nationality, sex, sexual preferences or sexual identity, gender, illness or disability.

## 4.5 FUTURE INITIATIVES

Based on the questionnaire, 14 countries had relevant information on this topic. In substance, it seems that there are political initiatives in most countries to regulate disinformation specifically, but concrete suggestions on the definition of disinformation are almost nowhere to be found yet. In Bulgaria, a bill amending the Personal Data Act has been submitted to the National Assembly (but not yet accepted), in which there is a proposed definition of “disinformation in the internet environment”, as follows “...the dissemination through social networks, Internet sites or otherwise in the Internet environment, through websites accessible from the territory of the Republic of

<sup>169</sup> Conseil d’Etat, 22 November 2019, Société RT France, No 422790.

<sup>170</sup> Deliberação ERC/2020/142 (CONTJOR-TV), 22 July

Bulgaria, of a publication that contains false information concerning individuals or legal entities”.

In Austria, there is a draft for a new law against hate speech and in general on the protection of users based on the German NetzDG. Also, in Latvia, there are drafted amendments to Electronic Mass Media Law and Law on the Press and Other Mass Media with reference to disinformation, but they do not include a definition of disinformation or related concepts.

In many countries, for example in Slovenia, the need for regulation has been an issue for a long time, but no concrete steps have yet been taken. The same could be said about Poland where a draft bill in this regard was initiated but ultimately not passed. However, the Slovenian Broadcasting Council proposed an introduction of an “accurate reporting” obligation to the media law, which would make it mandatory to properly distinguish between opinion articles and factual coverage, and in the latter case incomplete, inaccurate reporting could be sanctioned. A similar approach could be found in Latvia and Belgium in relation to veracity, where they plan to strengthen the requirements for accurate reporting and credible information.

Another way of a possible legislative solution could be found in Luxembourg, where a draft of the new press law has been adopted, allowing the state to provide support to professional journalists in the future, thus helping to curb disinformation.

It is a common practice that the countries ask a committee of experts to assess the particular regulatory environment and future regulatory options of disinformation, and it is expected that further regulatory decisions will be made based on these results. This is the case for instance in Italy, Iceland, Portugal, and Slovakia. These committees generally assess the current status of disinformation and other manipulative trends, the roles of online platforms in the media market, and regulatory options (self-regulation, co-regulation, or legislative measures) regarding disinformation. As a starting point to this consultation process, the Portugal ERC defined disinformation as „any information that is demonstrably false or misleading, that is created, presented and disseminated to obtain economic benefits or to deliberately mislead the public, and which is likely to cause public harm”.

In addition, many countries<sup>171</sup> responded that the transposition of the new rules of the AVMS Directive and the consultation of the DSA and the European Democracy Action Plan brought forward the question of disinformation, and also the strengthening of national media authorities’ powers regarding online platforms, but again, no definite steps had been made yet.

### Summary conclusions

The overall conclusion of Chapter 4 is that in general, there are very few examples of enacted legislation containing definitional elements for disinformation. Conceptual elements related to disinformation can be delivered mainly by governmental activities, including official documents, recommendations, reports, or guidelines. Nevertheless, some provisions in the criminal laws which can help to define disinformation have been identified. These common features are that the statements must always be false, their dissemination must be intentional, active conduct, and

<sup>171</sup> E.g. Belgium, Estonia, France, Iceland, Slovakia

that this act could be dangerous to the public interest. It should also be noted that opinions are always excluded from the realm of disinformation, except in very special cases (i.e. Holocaust denial).

Contrary to disinformation, with regard to political advertising, most countries have reported some form of electoral or media law. But amongst those countries, only a few countries have been identified where conceptual elements for the notion of political advertising are being used.

Furthermore, it could be stated, that the overall picture is that unique legislation in connection with disinformation in relation to the COVID-19 pandemic has not been enacted.<sup>172</sup> There are political initiatives in most countries to regulate disinformation specifically, but these are not tightly related to COVID-19, and concrete suggestions on the definition of disinformation are almost nowhere to be found yet.

Searching for definitions of disinformation and related concepts in the case law and jurisprudence led to a fairly brief list of core elements of the definition that can contribute to the overall aim of this report. Any relevant and useful data could be found in decisions of courts across the EU Member States dealing with cases related to criminal legislation such as penal codes and media regulation. The core elements of the definition of disinformation or related concepts that can be usually observed in case law are 1.) intention to cause harm, 2.) capacity to disrupt the public order, 3.) lack of any added value for the society and 4.) the perception of the recipient that is key in determining whether the information is misleading or not.

Decisions of courts also provide a few elements of the definition of political advertising or issue-based advertising, some even specifically mentioning the role of social media. The timing of publication of such content, particularly on the day of the election, is apparently a crucial part of defining the political propaganda. Reference to social justice is, according to some court decisions, a clear indication that the content is of a political nature.

Ensuring accuracy, impartiality, and objectivity of the information in the media is generally covered by the media regulations across the EU. The key element of the definition of disinformation and related concepts provided by the related court decisions is the insufficiently clear distinction between commentary and facts. Presenting commentary and opinions as facts is in itself misleading and has the potential to manipulate public opinion.

The responses to the survey clearly demonstrate that it is common practice in countries to ask a committee of experts to assess the particular regulatory environment and future regulatory options of disinformation. Other possibilities are legislative support for professional journalism or the possibility of a media/press regulation regarding accurate and credible reporting. In countries where some legislative procedures have started, it is not yet possible to predict the end of the process and whether or not it will contain some form of the definition of disinformation.

<sup>172</sup> Except for Hungary where section 337 of the Hungarian criminal code has been amended under the Coronavirus Protection Act.

## CONCLUSIONS AND RECOMMENDATIONS

### Conclusions

In conclusion, we can say that in general, there are very few examples of enacted legislation containing definitional elements for disinformation. Conceptual elements related to disinformation can be delivered mainly from governmental, official documents, recommendations, reports, or guidelines, however, there are some provisions in the criminal laws that can help to define disinformation. These common features are that the statements must always be false, their dissemination must be intentional, active conduct, and that this act could be dangerous to the public interest. It should also be noted that opinions are always excluded from the realm of disinformation, except in very special cases (i.e. Holocaust denial).

Searching for definitions of disinformation and related concepts in the case law and jurisprudence led to a fairly brief list of core elements of the definition that can contribute to the overall aim of this report. Any relevant and useful data could be found in decisions of courts across the EU member states dealing with cases related to penal codes and media regulation. The core elements of the definition of disinformation or related concepts that can be usually observed in case law are: 1) intention to cause harm, 2) capacity to disrupt the public order, 3) lack of any added value for the society and 4) the perception of the recipient that is key in determining whether the information is misleading or not.

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Furthermore, looking at the current situation in the European countries, the conclusion is that unique and specific legislation to combat disinformation in connection with the COVID-19 pandemic has not been initiated with the exception of Hungary.<sup>173</sup> There are political initiatives in most countries to regulate disinformation specifically, but these are not tightly related to COVID-19, and concrete suggestions on the definition of disinformation are almost nowhere to be found yet. It is common practice in most countries to involve a committee of experts to assess the particular regulatory environment and future regulatory options of disinformation. Other available instruments are legislative support for professional journalism or media/press regulation aiming at accurate and credible reporting, but in countries where some legislative

<sup>173</sup> Section 337 of the Hungarian criminal code has been amended under the Coronavirus Protection Act.



procedure has started, it is not yet possible to predict the end of the process and whether or not it will contain or refer to some form of the definition of disinformation.

From the foregoing discussion regarding the different notions and understanding of disinformation and related concepts coming from different actors and stakeholders, it can be concluded that no specific and punctual definitions have been provided by media outlets in their ethical codes or journalistic guidelines. The reason is that these codes and guidelines have a strong focus on the values and news standards journalists should respect. Neither self-regulatory bodies (for journalists or press) have provided such definitions, since they are rather focusing instead on good practices and editorial routines for journalism in general and news production in particular. The journalistic trustability has been addressed as a specific response to the disinformation issue, with specific regard to the approach deployed by the Journalism Trust Initiative. Encouraging professional journalistic standards aiming at accuracy and trustfulness of information and other values could contribute to more common understandings of what disinformation and closely related concepts mean.

Professional associations of journalists, as well as other public and private actors involved in the organisation of media literacy awareness campaigns, have instead provided some definitions of disinformation, fake news, misinformation, or malinformation. In addition, the fact-checking organisations active in some European Member States have provided similar definitions, sometimes looking at the specific differences between the different concepts.

As far as civil society organizations are concerned, the analysis of their activities and the interviews conducted with representatives, demonstrate the importance to look at the different perspectives. Looking at the issue as a specific topic in the digital eco-system, or as a broader matter concerning human rights and the correct formation of the public opinion, the importance of disinformation as a key-issue for the organisations working actively with the civil society can be witnessed. Even if most of these organisations do not mention some specific definitions for different notions, and some of them insist on the need for the empirical (and not academic) definition of these concepts, they underline the need for a clear distinction between disinformation, malinformation, propaganda, and information operations. In that regard, they are increasingly encouraging public authorities to make clear to the general public the differences between the different concepts, even within media literacy campaigns.

A number of conclusions can be drawn in relation to the various definitions of disinformation and related notions. First, many Member States have adhered to, in one way or another, the conceptual framework of disinformation and misinformation, as developed by both the High-Level Expert Group on disinformation, and the work of Wardle and Derakhshan. Second, only one EU Member State has a legislative definition that specifically uses the term disinformation. Third, a number of EU Member States have legislation that applies to the concept of disinformation, but is not specifically termed disinformation, and instead concerns prohibitions on false news and false information. Thus, most regulatory activity at the national level concerns disinformation, rather than misinformation or malinformation. Further, other concepts, such as fake news, propaganda, foreign influence, were also seen to fit within the notions of disinformation. Fourth,

three key elements emerge in relation to the definitions relating to disinformation: disinformation concerns (a) false information, (b) disseminated with a specific intention (malicious or bad faith) (c) and causes certain harms. In this regard, many definitions focus on the act of communication to the public, rather than solely limited the creator of the content. Fifth, where there is a lack of malicious intent (i.e. in good faith), it is not considered disinformation, but must be seen as misinformation, with only a few Member States covering this concept.

In addition, while most of the definitions contain some core common elements they differ widely in detail. There are varying specific harms mentioned, including economic harm, public harm, personal harm, personal dignity, harm to elections, and affecting measures against COVID-19. Some national laws or guidelines address exclusively the communication of disinformation to the public, while others also include the creation. One Member State, France, explicitly addresses forms of algorithmic amplification, though it should be noted that the law does not use the notion of “algorithmic amplification”. It uses the two following expressions: “transparency of algorithms” and “any allegation or charge of an inaccurate or misleading fact that are artificial or automated, massive and deliberate”. Those laws or regulations that refer to intent, differ on whether they (also) require commercial intent or for-profit elements. If there are legal rules, they can be adopted in varying legal areas, from criminal law to defamation or media law. Some countries have adopted formal laws, others have issued external or even only internal guidelines. This diversity of divergent approaches displays a highly unharmonized approach, creating challenges for transborder services from an internal market perspective.

Crucially, national legislation applicable to disinformation is in many instances of a criminal nature. Coupled with this, having provisions in criminal law, without clear definitions, creates risks of even more serious interferences with freedom of expression. This finding aligns with the European Commission’s finding in June 2020<sup>174</sup> that “Several Member States already had provisions, including of criminal nature, related to disinformation and one Member State introduced a specific new criminal offence for spreading of disinformation during the state of emergency.” Importantly, the Commission emphasises that laws which define these crimes in “too broad terms” and with “disproportionate penalties attached” can lead to “self-censorship, raising particular concerns as regards freedom of expression.” Indeed, such laws may also raise obstacles to the free flow of information, and freedom to provide services.<sup>175</sup>

In terms of definitions of political advertising and issue-based advertising, three main conclusions emerge. First, it remains the case that the EU Member States adopt, if, at all, different definitions of political advertising, which may be limited to merely election-related advertisements, and prohibitions can be limited to election-time. Second, EU Member States still do not specifically define issue-based advertising. Third, and notably, a number of EU Member States adopt an approach to political advertising which aligns with the European Court of Human Rights’ approach.

<sup>174</sup> Tackling COVID-19 disinformation - Getting the facts right , JOIN/2020/8 final

<sup>175</sup> See, e.g., European Parliament resolution of 20 October 2020 on the Digital Services Act and fundamental rights issues posed, para. 15 (“in order to protect freedom of speech, to avoid conflicts of laws, to avert unjustified and ineffective geo-blocking and to aim for a harmonised digital single market, hosting service providers should not be required to remove or disable access to information that is legal in the Member State that they are established in, or where their designated legal representative resides or is established”).

Rather than specifically define political advertising, political advertising applies in a broad sense to paid advertising on matters of broad public interest and is not limited to election-related ads.

## Recommendations

1) Any definition of disinformation in legislation or other regulation, such as regulatory guidance, must take into account the **serious implications for freedom of expression and media freedom**. Particularly to the extent that provisions on disinformation have been adopted in criminal law, a precise definition is paramount. This is even more important following the basic principle of criminal law, which prescribes that penalties only may be imposed when the criminal behaviour and the applicable penal sanctions within the upper and lower limits are precisely formulated in the law. Scholars and fundamental rights experts have warned that disinformation is an “extraordinarily elusive concept to define in law”, and is “susceptible to providing executive authorities with excessive discretion to determine what is disinformation, what is a mistake, what is truth”.<sup>176</sup> Further, measures to combat disinformation “must never prevent journalists and media actors from carrying out their work or lead to content being unduly blocked on the Internet.”<sup>177</sup> Indeed, the European Commission has warned that laws on disinformation which are “too broad” raise particular concerns as regards freedom of expression, and can lead to self-censorship.<sup>178</sup> Given the dangers associated with defining disinformation in legislation, great caution should be exercised in enacting a definition.

2) Current national approaches are very divergent, which from a Digital Single Market and market freedom perspective can create problems for the freedom of the media to disseminate information across borders. This clearly demonstrates a further need for considering all options of **handling more unified concepts**.

3) Where disinformation is sought to be defined, common elements of a more unified approach to defining disinformation should be: (a) **false or misleading information**, (b) disseminated with a specific intention (**malicious or bad faith**) (c) and has the ability to cause certain **public harms**. Importantly and additionally, a number of **other considerations** should apply:

- a) Clarify if only the act of public dissemination is covered, or also the creation.
- b) Describe clearly the object of the definition: a definition that refers to an objective standard like objectively wrong or factually wrong will offer more legal certainty and predictability than definitions that refer to vague notions such as false information. The latter category offers considerable room for interpretation and little predictability, which seems particularly problematic where provisions are implemented in a criminal law context.

<sup>176</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Disease pandemics and the freedom of opinion and expression, A/HRC/44/49, 23 April 2020, at para. 42, <https://undocs.org/A/HRC/44/49>.

<sup>177</sup> Council of Europe Commissioner for Human Rights, Press freedom must not be undermined by measures to counter disinformation about COVID-19, 3 April 2020, <https://www.coe.int/en/web/commissioner/-/press-freedom-must-not-be-undermined-by-measures-to-counter-disinformation-about-covid-19>.

<sup>178</sup> Ibid.

- c) When there is a lack of malicious intent (i.e. in good faith), it should not be considered as disinformation but misinformation. Accordingly, different measures should be considered, which are proportionate and strike the right balance with securing the freedom of expression, taking into account that misinformation can be harmful but is not illegal. Relatedly, given the risks of disproportionate sanctions for freedom of expression, and given that there is a lack of intention, misinformation should not attract sanctions for those creating or disseminating it. However, measures aimed at the disseminators such as platforms (i.e. fact-checking initiatives) would keep their relevance to alleviate the potential negative societal effects of disinformation or misinformation.
  - d) To the extent that a reference to public values (public order, peace, public opinion) is included and made part of the definition, this again risks overly broad application and a lack of legal certainty. Instead, it should be clarified as specific as possible what kind of harm the provision seeks to protect from, and above all: the powers granted by the law to interfere as a public authority should be clearly formulated and carefully framed.
  - e) The aim of impacting public opinion itself does not refer to concrete enough harm. All media content, and more generally, all public communication is intended to impact public opinion in one way or another. Broad definitions like these risks ruling out all publication communication.
  - f) Given the wide range of parties that can play a role in the dissemination of disinformation references to specific actors in a definition should be avoided.
  - g) When defining disinformation and related concepts the act of automatic amplification techniques, should be addressed to acknowledge the role of online platforms in the dissemination of disinformation and mitigate the risks
  - h) When references are made in provisions to related concepts such as propaganda, hate speech, etc. these should be fitted into existing categories in order to increase the overall conceptual clarity and comparability.
- 4) As is already confirmed in the 2018 Communication of the European Commission a definition of disinformation should include the elements of either false or misleading information and malicious intent. It is important to **avoid any subjective notions** when determining whether the information is misleading, in order to reduce the (potential) risks to the freedom of expression.
- 5) Given the criticism that has been levelled at the use of the term **fake news**, there is a strong argument for discontinuing its use as a concept (in policy debates) in relation to disinformation. As two reports for the Council of Europe and EU have emphasised, the term is “woefully inadequate” to take account of the complexity of disinformation, and has been “appropriated by politicians around the world to describe news organisations whose coverage they find disagreeable”.<sup>179</sup> The term is also “misleading”, and has become “a weapon with which powerful actors can interfere in the circulation of information and attack and undermine independent media”.<sup>180</sup>

<sup>179</sup> See Wardle and Derakhshan, p. 5

<sup>180</sup> A multi-dimensional approach to disinformation, Report of the independent High level Group on fake news and online disinformation (2018), p. 10

6) There are two types of political advertising that need to be addressed separately. In relation to defining the first type of political advertising and also issue-based advertising, it is recommended that the **framework adopted by the European Court of Human Rights** should be followed. Political advertising would apply in a broad sense to *targeted and paid* advertising on , and would not be limited to election-related advertising. This broad definitional approach would also capture issue-based advertising, and also obviates the need for defining issue-based advertising in legislation. This would remove additional ambiguity over the differences between election-related advertising and issue-based advertising. Thus, the essential elements defining political advertising would be (a) that it is targeted at specific audiences (b) that it is paid-for (i.e. in return for payment or similar consideration; or offered freely by platforms for a specific purpose), and (c) that it is not commercial advertising (i.e. marketing, product, or service related). The other type of political advertising is the content propagating a political message (i.e. support for a political party or a candidate) but posted by users (whether for payment from a political party or a candidate to supporters or out of genuine support for a political party or a candidate). Users uploading such content should have to acknowledge that it includes political advertising.

7) In the event that content of political advertising is being shared organically this could avoid such content being labelled by online platforms as political advertising; a point that could need further consideration. However, when this would happen on a mass-scale or in another artificial way by circumventing labelling mechanisms this could indicate **inauthentic behaviour**. Hence this could be addressed by platforms under their general commitments to ensure transparency and/or implement other proportional remedies against such inauthentic behaviour.



## LIST OF ABBREVIATIONS

ERGA – European Regulators Group for Audiovisual Media Services

EU – European Union

CoE - Council of Europe

EC - European Commission

SG 2 – ERGA Subgroup Media Plurality - Disinformation

NRA – National Regulatory Authorities

ECtHR - The European Court of Human Rights

PSM - Public service media

PSB – Public service broadcaster

MPM - The European Media Pluralism Monitor

AVMSD - Audiovisual Media Services Directive

Country codes and NRAs:

Belgium (BE): Conseil supérieur de l’audiovisuel (CSA),

Belgium (BE): Vlaamse Regulator voor de Media (VRM)

Greece (EL): National Council for Radio and Television (NCRT),

Lithuania (LT): Radio and Television Commission of Lithuania (RTCL),

Portugal (PT): Regulatory Authority for the Media (ERC),

Bulgaria (BG): Council for Electronic Media (CEM),

Spain (ES): National Authority for Markets and Competition (CNMC),

Luxembourg (LU): Autorité Luxembourgeoise Indépendante de l’Audiovisuel (ALIA),

Romania (RO): National Audiovisual Council (NAC),

Czech Republic (CZ): Council for Radio and TV Broadcasting (RRTV),

France (FR) : Conseil Supérieur de l’Audiovisuel (CSA),

Hungary (HU): Media Council of the National Media and Infocommunications Authority (NMHH),

Slovenia (SI): Agency for Communication Networks and Services of the Republic of Slovenia (AKOS),

Denmark (DK): Radio and Television Board, c/o Agency for Culture and Palaces,

Croatia (HR): Agency for Electronic Media of the Republic of Croatia (AEM),

Malta (MT): Malta Broadcasting Authority,

Slovakia (SK): Council for Broadcasting and Retransmission of the Slovak Republic (CBR),

Germany (DE): Directors Conference of the State Media Authorities (DLM),


Italy (IT): Italian communications authority (AGCOM),

Netherlands (NL): Commissariaat voor de Media (CvdM),

Finland (FI): The Finnish Communications Regulatory Authority (FICORA),

Estonia (EE): Technical Regulatory Authority (TRA),

Cyprus (CY): Cyprus Radio-Television Authority (CRTA),



Austria (AT): Kommunikationsbehörde Austria (KommAustria),  
Sweden (SE): Swedish Press and Broadcasting Authority (MPRT),  
Ireland (IE): Broadcasting Authority of Ireland (BAI),  
Latvia (LV): National Electronic Mass Media Council (NEPLP),  
Poland (PL): National Broadcasting Council (KRRiT),  
Norway (NO): Norwegian Media Authority (NMA),  
Iceland (IS): Icelandic Media Commission (IMC)

## LIST OF SURVEY QUESTIONS

*Section 1: overview of definitions, interpretations and understandings of the notion of disinformation and (closely) related concepts such as misinformation, mal information, fake news, false news, false information and foreign influence operations.*

**1.1** Does your national legislation or other regulation including (self-regulatory) codes and guidelines in general (so not specifically related to Covid-19 measures covered by question 1.5) contain or refer to a definition, interpretation or understanding of disinformation or related concepts such as misinformation, mal information, fake news, false news, false information or foreign influence operations?

Explanation: the principal purpose of our report is to identify and list definitions, interpretations and understandings of disinformation (or related concepts) used in the ERGA Member States.

Example: a definition of disinformation laid down in your national Media Act or Penal Code.

**1.2** Are there any measures applied in practice by your authority or other relevant actors dealing with disinformation (or related concepts) that contain or refer to definitions, interpretations or understandings of disinformation or related concepts?

Explanation: the answer would provide insight in measures applied in practice by your authority or other relevant actors (e.g.: other regulatory authorities, online platforms, media service providers, journalistic organizations, civil society organizations, fact checkers etc..) that could contain useful information or guidance for the definition of disinformation (or related concepts). Here it would be also important to elaborate in the answer the legal or regulatory basis used by the authority or other relevant actors to apply measures.

Example: local guidelines of a global online platform in your country that would contain elements for the definitions.

**1.3** Are authorities in your country entitled to decide about the qualification of information as disinformation (or related concepts)?

Explanation: the answer would provide insight in measures to safeguard the rule of law and fundamental rights applied in practice by your authority or other relevant actors (e.g.: judicial redress, other regulatory authorities, online platforms, media service providers, journalistic organizations, civil society organizations, fact checkers etc.) and that could contain useful information or guidance for the definition of disinformation (or related concepts). The answer would also need to address the checks and balances in place to safeguard the rule of law and fundamental rights, such as the freedom of expression.

Example: a possibility to contest the qualification as disinformation that would contain elements for the definitions.

**1.4** Are there any measures applied in practice by your authority or other relevant actors dealing with context-related (online) issues such as fake accounts, coordinated inauthentic behaviour,

social bots, echo chambers and filter bubbles and do they contain or refer to definitions, interpretations or understandings of disinformation (or related concepts)?

Explanation: the answer would provide insight in measures applied in practice by your authority or other relevant actors (e.g.: other regulatory authorities, online platforms, media service providers, journalistic organizations, civil society organizations, fact checkers etc..) dealing with online phenomena that can increase the impact of disinformation and that could contain useful information or guidance for the definition of disinformation (or related concepts).

Example: a guideline for online behaviour of a platform in your country that addresses the phenomenon of fake accounts and that would contain elements for the definitions.

**1.5 More specifically are there any recent or planned legal measures, practical applications or other measures in your country dealing with disinformation or (closely) related concepts with regard to the current COVID-19 crisis country that contain or refer to definitions, interpretations or understandings of disinformation (or related concepts)?**

Explanation: since our report aims to be up-to-date it would need to provide insight in recent national measures dealing with disinformation in relation to the current COVID-19 crisis that could contain useful information or guidance for the definition of disinformation (or related concepts). The answer would also need to provide information about the temporary character of these specific measures and the safeguard provisions for the protection of fundamental rights linked to such measures.

Example: a governmental guideline dealing with public information on the COVID-19 crisis in your country that would contain elements for the definitions.

**1.6 Are there any cases including court decisions in your country dealing with disinformation that contain or refer to definitions, interpretations or understandings of disinformation (or related concepts)?**

Explanation: the answer would provide insight in national jurisprudence that could contain useful information or guidance for the definition of disinformation (or related concepts).

Example: a short summary of a judgement of a national court or journalistic arbitration court that would contain elements for the definitions.

**1.7 Are you aware of national research on disinformation or (closely) related concepts or more context-related (online) issues such as fake accounts, coordinated inauthentic behaviour, social bots, echo chambers and filter bubbles that contain or refer to definitions, interpretations or understandings of disinformation (or related concepts)?**

Explanation: the answer would provide insight in national available research that could contain useful information or guidance for the definition of disinformation (or related concepts).

Example: a recent report of a national research institute on echo chambers and filter bubbles that would contain elements for the definitions.

### 1.8 Are you aware of any ongoing or pending discussions on the regulation of disinformation (or related concepts) or more context-related (online) issues?

Explanation: the answer would provide insight in whether any initiatives to that extent are being planned and that could contain useful information or guidance for the definition of disinformation (or related concepts) or more context-related (online) issues.

Example: a letter or report of a ministry that addresses the issues at stake and recommends further actions and that would contain elements for the definitions.

Section 2: overview of definitions, interpretations and understandings of notions linked to (regulatory) measures to regulate political and issue-based advertising, to ensure accuracy, objectivity and impartiality of information and to combat defamation, incitement to hatred and other illegal content.

### 2.1 Does your national legislation or other regulation contain or refer to a definition, interpretation or understanding of political advertising, political microtargeting or issue-based advertising (advertising to persuade people to change their opinions or behaviour rather than to sell them something)?

Explanation: one of the main purposes of our report is to identify definitions, interpretations and understandings of political advertising, political microtargeting and issue-based advertising since a lack of (clear) definitions, interpretations and understandings of these issues in the ERGA Member States can affect the effectiveness of measures dealing with disinformation. Where possible and relevant the answer should elaborate whether distinctions are made between offline and online political advertising.

Example: a definition of political advertising laid down in your national Media Act or electoral regulations.

### 2.2 Are there any cases including court decisions in your country that contain useful information or guidance for the definition, interpretation or understanding of political advertising, political microtargeting or issue-based advertising?

Explanation: the answer would provide insight in national jurisprudence that could contain useful information or guidance for the definition of political advertising, political microtargeting or issue-based advertising. Where possible and relevant the answer should elaborate whether distinctions are made between offline and online political advertising.

Example: a summary of a judgement of a national court or journalistic arbitration court on impartiality of information that would contain useful elements for the definitions.

### 2.3 Are you aware of any ongoing or pending discussions on the regulation of political advertising, political microtargeting or issue-based advertising?

Explanation: the answer would provide insight in whether any initiatives to that extent are being planned and that could contain useful information or guidance for the definition of political advertising, political microtargeting or issue-based advertising. Where possible and relevant the



answer should elaborate whether distinctions are made between offline and online political advertising.

Example: a letter or report of a ministry that addresses the issues at stake and recommends further actions and that would contain useful elements for the definitions.

**2.4 Is there legislation or other regulation in your country dealing with ensuring accuracy, objectivity and impartiality of information or combatting defamation, incitement to hatred and other illegal content that contain useful information or guidance for the definition, interpretation or understanding of disinformation (or related concepts)?**

Explanation: the answer would provide insight in legislation dealing with more general issues which can affect the effectiveness of measures tackling disinformation research and that could contain useful information or guidance for the definition of disinformation (or related concepts).

Example: a definition of hate speech in the national Penal Code that would contain elements for the definitions.

**2.5 Are there any measures applied in practice by your authority or other relevant actors in your country dealing with ensuring accuracy, objectivity and impartiality of information or combatting defamation, incitement to hatred and other illegal content that contain useful information or guidance for the definition, interpretation or understanding of disinformation (or related concepts)?**

Explanation: the answer would provide insight in the national measures applied in practice by your authority or other relevant actors (e.g.: other regulatory authorities, online platforms, media service providers, journalistic organizations, civil society organizations, fact checkers etc.) that could contain useful information or guidance for the definition of disinformation (or related concepts).

Example: a code of conduct of a media service provider dealing with impartiality of information and related issues that would contain elements for the definitions.

**2.6 Are there any cases including court decisions in your country dealing with ensuring accuracy, objectivity and impartiality of information or combatting defamation, incitement to hatred and other illegal content that contain useful information or guidance for the definition of disinformation (or related concepts)?**

Explanation: the answer would provide insight in national jurisprudence dealing with ensuring accuracy, objectivity and impartiality of information or combatting incitement to hatred and other illegal content that could contain useful information or guidance for the definition of disinformation or (related concepts).

Example: a summary of a judgement of a national court or journalistic arbitration court on impartiality of information that would contain useful elements for the definitions.