



**Organization for Security and Co-operation in Europe
The Representative on Freedom of the Media**

**International Standards and Comparative National Approaches to Countering
Disinformation in the Context of Freedom of the Media
(on the request of the Russian Federation)**

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Vienna, March 2019

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I. INTRODUCTION

1. On 6 February 2019 the Russian Federation requested the Office of the Representative on Freedom of the Media (RFOM) to provide a comparative analysis of “legislative norms and practices in the sphere of countering the spread of false information” with the aim that it serves as food-for-thought “to inspire further discussions on the matter within and among all OSCE participating States.
2. In his reply on 15 February 2019 the Representative on Freedom of the Media noted that his Office was also particularly concerned by this matter, and had “engaged in many discussions and initiatives on the topic with various stakeholders in the OSCE region, as such narratives may affect trust and co-operation between and within nations, or even endanger international security. These narratives may also undermine confidence in the most professional media.” The Representative on Freedom of the Media expressed his readiness, with the expertise of his Office, to provide a report of some of the related policies and legislation, which have been established in countering the spread of false information in the OSCE region.” RFOM also wished to add to the report any available data on media self-regulation and co-regulation including on fact-checking initiatives, as well as information on media literacy programmes, as well as on initiatives from the intermediaries (such as internet service providers) to eliminate the automated dissemination of propaganda, and the use of fake accounts and bots. RFOM felt assured that this would assist Russian authorities in determining national policies. In offering this advice, the RFOM emphasises his continued readiness to engage in further dialogue with the Russian Federation and other interested OSCE participating States on these issues.
3. This review will focus on the legal aspects of the issue.
4. The current media environment and the widespread proliferation of disinformation confront professional traditional media entities with numerous new challenges, and place a heavier burden on journalists and standards of journalism. By blurring the lines between false and true, disinformation undermines public trust in quality journalism and its role in a democratic society.
5. The prevalence of online and offline disinformation can threaten security in the OSCE region, participating States’ sovereignty, political independence, territorial integrity and the security of their citizens. The paper therefore notes the larger context of the comprehensive approach of the OSCE to security, in which the protection of human rights, including freedom of expression and freedom of the media, is seen as an integral part of the OSCE's participating States’ contribution to peace and security. On several occasions, the OSCE Representative on Freedom of the Media highlighted - as his predecessors did before him - that this approach, acknowledging the intertwined character of peace and security efforts in the three dimensions

- of the OSCE (political and military, economic and environmental policies, and the human dimension), defines the unique character of the OSCE and has been confirmed many times.
6. The problem of disinformation calls upon politicians, intergovernmental organizations, civil society and businesses among the major stakeholders to address the urgent need of assessing the feasibility and effectiveness of existing measures to counteract the its intentional spread, as well as their conformity to the OSCE commitments. There are many additional political challenges to designing regulation of disinformation, one of them being that some governments might exploit constraints on disinformation to curtail freedom of expression. The problem also relates to issues with the definitions related to the phenomenon, such as their vagueness.
 7. This paper takes a retrospective look at existing international standards, current national and international practices of policy-making and regulation, as well as related efforts by media associations and companies. It has a particular focus on the relevant statements and activities of the OSCE Representative on Freedom of the Media.
 8. The OSCE is based on the 1975 Helsinki Final Act, wherein the States voluntarily pledged “to promote, by all means which each of them considers appropriate, a climate of confidence and respect among peoples.”
 9. Historically, international debate has proven that the remedy for disinformation is not to be provided by governments, while there is a need to enable the media to strive for fair reporting and the public – to appreciate media efforts to meet higher standards. The international right to seek, receive and impart information and ideas “of all kinds” by definition includes the right to any information, right or wrong. While no “ministries of truth” should be established to verify accuracy, current and past debates point to the duty of everyone, including public authorities, to aid in the dissemination of the truthful information.
 10. Recent developments in some OSCE countries provide a worrying response to the problem of “disinformation in the media, through amendments to legislation on national security and on national history, targeted sanctions and rulings of the national media regulating authority.
 11. This is said not to discourage attempts to counteract disinformation at all possible levels, but rather to call for greater multi-stakeholder efforts. There is no one-size-fits-all solution to the problem of false news in the region. This report presents different examples of policies aimed at countering disinformation which: 1) avoid chilling effects on freedom of the media; 2) ensure that interferences with free speech are prescribed by a law, which is accessible, precise, clear and foreseeable; 3) pursue the legitimate aims as set in international human rights agreements; and 4) not have an unnecessary or disproportionate impact on the free flow of information. They allow for guarantees of the editorial independence of the media, which are not subjected in law and practice to self-censorship. By contrast, bad practices though

they may sometimes be well-meaning, tend to present risks to free expression and other fundamental rights. They can backfire and be not just ineffective, but counter-productive.

12. This paper is structured as follows: first, international law and standards on disinformation; and second, examples of comparative approaches on the issue amongst OSCE participating States. It is intended to offer guidance on the scope of circumstances, if any, in which authorities may counteract disinformation according to international law and standards.
13. This paper takes many sources into consideration, including treaty law, resolutions, declarations and legal reviews issued by the Office of the OSCE Representative on Freedom of the Media alongside other intergovernmental mandate-holders on freedom of expression, submissions of leading NGOs in the field of freedom of expression.

II. APPLICABLE INTERNATIONAL LAW AND STANDARDS

A. General Principles

1. *Broad scope of freedom of expression*

14. Under international law, the right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights (“ICCPR”). Article 19 of the ICCPR, the key international treaty provision on freedom of expression, states:
- a. “2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
15. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
- a. For respect of the rights or reputations of others;
 - b. For the protection of national security or of public order (ordre public), or of public health or morals.”
16. This provision is similar to provisions of regional human rights law, including notably Article 10 of the European Convention on Human Rights (ECHR), see below.
17. Article 20(2) of the ICCPR subsequently provides that propaganda for war and “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”¹
18. At the outset, it is important to note that the right to freedom of expression is broad in its scope encompassing “even expression that may be regarded as deeply offensive”,² as stated by the Human Rights Committee, or ideas, information and opinions “that offend, shock or disturb the State or any part of the population”,³ as stated by the European Court of Human Rights (ECtHR).

¹ <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>

² Human Rights Committee, General Comment No 34, CCPR/C/GC/34, 12 September 2011, para 11.

³ *Handyside v UK*, Application No 5493/72, judgment of 7 December 1976 at para 49.

19. International human rights bodies, as well as the ECtHR, have acknowledged that human rights, particularly the right to freedom of expression, extends and applies to the online sphere.⁴
20. Under international legal standards, limitations of the right to freedom of expression are permissible but “must not put in jeopardy the right itself” and meet certain conditions, namely they must be: (1) “provided by law” which is sufficiently clear and precise; (2) pursue a legitimate aim set out in Article 19 para 3 of the ICCPR (the “rights or reputations of others” or “the protection of national security or of public order (*ordre public*), or of public health or morals”); and (3) conform to the “strict tests of necessity and proportionality”.⁵

2. *National security and freedom of information*

21. For the purposes of this paper, special attention should be given to the arguments on the need to reinforce national security through restrictions of freedom of information that are spearheaded towards disinformation. Adopted by a group of distinguished experts in international law in 1984, the *Siracusa Principles* provide useful guidance on the interpretation of the limitation of human rights as established by the ICCPR. Although an outcome of a non-governmental conference, the Siracusa Principles contain a valuable reference for the public authorities as to when a restriction on freedom of expression can be said to serve the needs of national security:
 - a. “National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force.
 - b. National security cannot be invoked as a reason for imposing limitations to prevent merely local or relatively isolated threats to law and order.
 - c. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse.
 - d. The systematic violation of human rights undermines true national security and may jeopardize international peace and security. A state responsible for such violation shall not invoke national security as a justification for measures aimed at suppressing

⁴ Human Rights Council resolutions 26/13 of 26 June 2014 and 32/13 of 18 July 2016; General Assembly resolution 68/167 of 18 December 2013; Report of the Special Rapporteur on freedom of opinion and expression, 11 May 2016, A/HRC/32/38, para 6.

⁵ Human Rights Committee, General Comment No 34, CCPR/C/GC/34, 12 September 2011, para 22.

opposition to such violation or at perpetrating repressive practices against its population.”⁶

22. In 1999, the UN Special Rapporteur on Freedom of Opinion and Expression endorsed the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information* as they “give useful guidance for protecting adequately the right to freedom of opinion, expression and information”.⁷ The Johannesburg Principles state that expression may be punished as a threat to national security only if a government can demonstrate three components: the expression is intended to incite imminent violence; it is likely to incite such violence; and there is “a direct and immediate connection between the expression and the likelihood or occurrence of such violence”.⁸

B. Standards on disinformation and remedies thereof

1. Balance between freedom of expression and disinformation

23. Relevant UN human rights bodies have made it clear that criminalising disinformation is inconsistent with the right to freedom of expression. For example, commenting on the domestic legal system of Cameroon, the UN Human Rights Committee (UNHRC) stated that:
- a. “the prosecution and punishment of journalists for the crime of publication of false news merely on the grounds, without more, that the news was false, [is a] clear violation of Article 19 of the Covenant [ICCPR].”⁹
24. In 1998, UNHRC expressed concerns about the compatibility of the Law on the Press and Other Mass Media of the Republic of Armenia with freedom of expression under Article 19 of the Covenant, finding the notion of “untrue and unverified information” (Article 6 of the law) an unreasonable restriction on freedom of expression.¹⁰ The law was repealed in 2004 and replaced with the Law on the Dissemination of Mass Information, which did not contain the objected provision.¹¹

⁶ Siracusa Principles on the Limitation and Derogation of Provision in the ICCPR, Annex. UN Doc E/CN.4/1984/4. Principle B (vi). <https://tinyurl.com/y8l2769e>

⁷ Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, 29 January 1999, paragraph 23. <https://bit.ly/2Kae6uc>

⁸ Johannesburg Principles on National Security, Freedom of Expression and Access to Information. Adopted on 1 October 1995. Principle 6. <http://hrlibrary.umn.edu/instree/johannesburg.html#6>

⁹ Consideration of reports submitted by States Parties under Article 40 of the Covenant: Concluding observations of the Human Rights Committee. CCPR/C/79/Add.116. November 1999. Para 24. <http://www.refworld.org/pdfid/3ae6b01014.pdf>

¹⁰ Concluding Observations of the Human Rights Committee Armenia. UN Doc CCPR/C/79/Add.100, 19 November 1998, para. 20. <http://www.refworld.org/docid/3df375c24.html>.

¹¹ See <https://tinyurl.com/y8zycq4u>

25. On another occasion, UNHRC noted that the sections of the media law dealing with false information unduly limited the exercise of freedom of opinion and expression as provided for under Article 19 of the ICCPR. In this context, UNHRC was concerned that those offences carried particularly severe penalties when criticism was directed against official bodies, as well as the army or the administration, a situation which inevitably resulted in self-censorship by the media when reporting on public affairs.¹²
26. In yet another case, UNHRC reiterated that false news provisions “unduly limit the exercise of freedom of opinion and expression”. It has taken this position even with respect to laws which only prohibit the dissemination of false news that poses a threat to public order.¹³
27. In 2000, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression strongly urged all governments to ensure that press offences are no longer punishable by terms of imprisonment, except in cases involving racist or discriminatory comments or calls to violence. He singled out such offences as publishing or broadcasting “false” or “alarmist” information, where “prison terms are both reprehensible and out of proportion to the harm suffered by the victim <...> as punishment for the peaceful expression of an opinion constitutes a serious violation of human rights”.¹⁴
28. Lastly, in 2017, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the OSCE Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights Special Rapporteur on Freedom of Expression and Access to Information issued a Joint declaration *on freedom of expression and “fake news”, disinformation and propaganda* (see reviewed below).¹⁵

2. *International right of correction*

29. In the early stages of the intergovernmental debate on the threats of disinformation, the right of correction or reply in the mass media has been raised as a very important shield and remedy from information attacks from one state against another. It has also been highlighted

¹² Concluding Observations of the Human Rights Committee, Tunisia, U.N. Doc. CCPR/C/79/Add.43 (1994). <http://hrlibrary.umn.edu/hrcommittee/tunisia1994.html>

¹³ [19th Annual] Report of the UN Human Rights Committee. A/50/40. 3 October 1995 §89. <https://bit.ly/2ftJV46>

¹⁴ UN Commission on Human Rights. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted in accordance with Commission resolution 1999/36. E/CN.4/2000/63. 18 January 2000. §205. <http://www.refworld.org/docid/3b00f3e10.html>.

¹⁵ Joint declaration on freedom of expression and “fake news”, disinformation and propaganda, 3 March 2017. See Appendix 1.

as a human right related to freedom of information, a spin-off of the international regulation of disinformation.

30. In the early 1950s, a French initiative led the UN General Assembly to adopt the *Convention on the International Right of Correction*¹⁶, aimed at maintaining peace and friendly relations among nations. It considered that, “as a matter of professional ethics, all correspondents and information agencies should, in the case of news dispatches transmitted or published by them and which have been demonstrated to be false or distorted, follow the customary practice of transmitting through the same channels, or of publishing, corrections of such dispatches” (both the “correspondents” and “information agencies” were broadly defined therein).
31. The Convention acknowledged the impracticality of establishing an international procedure for verifying the accuracy of media reports that might lead to the imposition of penalties for the dissemination of false or distorted reports. It prescribed, though, that if a contracting State’s international relations or “national prestige or dignity” might suffer from false information, or be distorted by a news dispatch, it has the right to submit its version of the facts to those States from which the dispatch originated, with a copy provided to the journalist and media outlet concerned to enable a correction. Then, within five days, the recipient State is obliged to release the correction to the media operating in its territory. In case of failure to do so, the correction will be given appropriate publicity by the UN Secretary-General.
32. Nevertheless, the Convention on the International Right of Correction has rarely been enforced. Thus, experts believe that it is not clear how effectively it has served its original purpose.¹⁷ Consideration can be given to its reinvigorating.

3. Joint Declaration “On freedom of expression and “fake news”, disinformation and propaganda”

33. The most important document to have come out so far from my Office on the issue of disinformation is the joint declaration “On freedom of expression and “fake news”, disinformation and propaganda”. In 2017, in the context of growing unrest about the potential impact of false information campaigns in electoral processes, the theme was chosen by the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the OSCE Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African

¹⁶ UN Convention on the International Right of Correction. Opened for signature on 31 March 1953. Entered into force 24 August 1962. See <https://tinyurl.com/y8ztcfa7>. The Convention has 12 signatories and 17 parties, including 6 OSCE participating States.

¹⁷ Youm, Kyu Ho. Op.cit., pp.1023-1024.

Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information as the topic for their 19th annual statement.

34. The free speech rapporteurs took note of the growing prevalence of disinformation (sometimes referred to as “false” or “fake news”) and propaganda in legacy and social media, fuelled by both States and non-State actors alike, and the various harms to which they may be a contributing factor or primary cause. The rapporteurs expressed their concern that disinformation and propaganda are often 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 kinds, regardless of frontiers, protected under international legal guarantees of the rights to freedom of expression and to hold opinions. They emphasised that some forms of disinformation and propaganda may harm individual reputations and privacy, or incite to violence, discrimination or hostility against identifiable groups in society.
35. They highlighted the importance of unencumbered access to a wide variety of both sources of information and ideas, along with opportunities to disseminate them. They also noted the significance of having a diverse media in a democratic society, including in terms of facilitating public debates and open confrontation of ideas in society, and acting as a watchdog of government and the powerful. Moreover, they acknowledged that prohibitions on disinformation may violate international human rights standards. The 2017 Joint Declaration specifically referred to the role played by digital technologies in enabling responses to disinformation and propaganda, while also facilitating their circulation.
36. The four rapporteurs agreed therein on a number of basic principles in regards to responses to disinformation and propaganda:
 1. States may impose restrictions on the right to freedom of expression only in accordance with the test for such restrictions under international law, namely that they be provided for by law, serve one of the legitimate interests recognised under international law, and be necessary and proportionate to protect that interest.
 2. Such restrictions may also be imposed, as long as they are consistent with the requirements noted in paragraph (a), to prohibit advocacy of hatred that constitutes incitement to violence, discrimination or hostility (in accordance with Article 20(2) of the ICCPR).
 3. The standards outlined in paragraphs (a) and (b) apply regardless of frontiers.
 4. Intermediaries should never be liable for any third party content unless they specifically intervene in that content, or refuse to obey an order adopted with due process by an independent, impartial, and authoritative oversight body (such as a court) to remove it and they have the technical capacity to do that.

5. Consideration should be given to protecting individuals against liability for merely redistributing or promoting content of which they are not the author and which they have not modified.
 6. State mandated blocking of entire websites, IP addresses, ports or network protocols is an extreme measure which can only be justified if provided in line with the requirements noted in paragraph (a) and if there are no less intrusive alternative measures which would protect the interest and respect minimum due process guarantees.
 7. Content filtering systems if imposed by a government and not end-user controlled are not justifiable.
 8. The right to freedom of expression applies “regardless of frontiers” and the jamming of signals from a broadcaster based in another jurisdiction, or the withdrawal of rebroadcasting rights in relation to that broadcaster’s programmes, is legitimate only where the content disseminated by that broadcaster has been held by an oversight body described in (d) to be in serious and persistent breach of a legitimate restriction on content (i.e. one that meets the conditions of paragraph (a)) and other means of addressing the problem have proven to be ineffective.
37. Specific standards on acting on disinformation, suggested in the Joint Declaration, included a call to abolish general prohibitions on the dissemination of information based on vague and ambiguous ideas, including “false news” or “non-objective information”, *as incompatible with international standards for restrictions on freedom of expression*. They also called on State actors not to make, sponsor, encourage or further disseminate statements which they know or reasonably should know to be false (disinformation) or which demonstrate a reckless disregard for verifiable information (propaganda). Moreover, State actors should, in accordance with their domestic and international legal obligations and their public duties, take care to ensure that they disseminate reliable and trustworthy information, including about matters of public interest, such as the economy, public health, security and the environment.
38. A positive obligation to promote media diversity was put forward in the Joint Declaration as a key means of addressing disinformation and propaganda. That would include providing support for the production of diverse, quality media content; prohibiting undue concentration of media ownership; and rules requiring media outlets to be transparent about their ownership structures.
39. With regards to the regulation of broadcasting, governments were called in the Joint Declaration to adhere to a clear regulatory framework overseen by a body immune to political and commercial interference or pressure and serving a free, independent and diverse media

audiovisual sector. Another element in this context is the presence of strong, independent and sustainable public service media with a clear mandate and high standards of journalism.

40. The Joint Declaration further urged governments taking measures to promote media and digital literacy, such as engagement with civil society to raise awareness about problematic issues. They should also consider other measures to promote equality, non-discrimination, intercultural understanding and other democratic values, including with a view to addressing the negative effects of disinformation and propaganda.
41. Specific recommendations for journalists and media outlets in the Joint Declaration included support of effective systems of media self-regulation based on standards on striving for accuracy in the news, including by offering a right of correction and/or reply to address inaccurate media reports. They were called to consider including critical coverage of disinformation and propaganda as part of their news services, particularly during elections and regarding debates on matters of public interest.

C. Regional Instruments

1. European Union

42. The European Parliament (EP), in its landmark 2016 resolution on EU strategic communication to counteract propaganda, laid certain policy foundations for both anti-EU propaganda and disinformation in legacy and social media. The link between *propaganda* and *disinformation* was seen therein in the following way:
 - a. “propaganda against the EU comes in many different forms and uses various tools... with the goal of distorting truths, provoking doubt, dividing Member States, engineering a strategic split between the European Union and its North American partners and paralysing the decision-making process, discrediting the EU institutions and transatlantic partnerships... in the eyes and minds of EU citizens and of citizens of neighbouring countries, and undermining and eroding the European narrative based on democratic values, human rights and the rule of law.”¹⁸
43. The link between propaganda and disinformation is seen also in the thesis that the former can only be fought by rebutting the latter, and by making use of positive messaging and information.¹⁹
44. The Resolution made a further distinction between *criticism*, on the one hand, and *propaganda or disinformation*, on the other, by pointing to “the context of political

¹⁸ European Parliament resolution of 23 November 2016 on EU strategic communication to counteract propaganda against it by third parties (2016/2030(INI)). Para 1. <https://tinyurl.com/ydyfy89k>

¹⁹ Ibid., Para 46.

expression, instances of manipulation or support linked to third countries and intended to fuel or exacerbate this criticism”. Under the circumstances, such narratives should provide grounds to question the reliability of disseminated messages.²⁰

45. The Resolution described the current situation as growing, systematic pressure on Europeans to tackle information, disinformation and misinformation campaigns and propaganda from countries and non-state actors (such as transnational terrorist and criminal organisations) in their neighbourhood. These campaigns are intended to undermine the very notion of objective information or ethical journalism, casting all information as biased or as an instrument of political power, and to also target democratic values and interests. The EP found that targeted information warfare, once extensively used during the Cold War, has returned as an integral part of modern hybrid warfare, defined as “a combination of military and non-military measures of a covert and overt nature, deployed to destabilise the political, economic and social situation of a country under attack, without a formal declaration of war.”²¹
46. Therefore, the EP encouraged legal initiatives and a “truly effective strategy” be established at the international and national levels to provide more accountability when dealing with disinformation. These legal efforts should also provide and ensure a framework for quality journalism and a variety of information, by combating media concentrations which have a negative impact on media pluralism.²²
47. Among other initiatives, the Resolution also called on European States to develop media literacy and quality journalism education, and to strengthen the role model of public service media, among other initiatives.
48. It specifically advocated for reinforcing the European External Action Service (EEAS)’s East StratCom task force²³, the EU’s office set up in September 2015 to combat propaganda and disinformation, including through “proper staffing and adequate budgetary resources”.²⁴ This office was established after the European Council asked EU High Representative for Foreign Affairs and Security Policy, Federica Mogherini, to submit an action plan on strategic communication to address “Russia’s ongoing disinformation campaigns.” It relies heavily on volunteers to collect the disinformation stories (over 3,000 disinformation examples since 2015) it presents and explains in its weekly newsletters, as part of its efforts.²⁵
49. Countering disinformation may not be enough. The EEAS of the EU noted that:

²⁰ Ibid., Para 40.

²¹ Ibid., Para D.

²² Ibid., Paras 35, 46, 48.

²³ See more at: <https://tinyurl.com/l8xmygb>

²⁴ European Parliament resolution of 23 November 2016 on EU strategic communication to counteract propaganda against it by third parties (2016/2030(INI)). Paras 27, 42.

²⁵ 'Fake news' and the EU's response (April 2017): <https://tinyurl.com/yap5qhd3>. See also Speech by the High Representative / Vice-President Federica Mogherini at the conference "Hybrid threats and the EU: State of play and future progress", 2 October 2017. <https://tinyurl.com/yals5eab>

- a. “Unfortunately, experience tells us that when a fake news [story] is out, it is already too late [to counter it]. Reacting is very important, but it is even more crucial to make sure that the real news reaches the broadest possible audience, both inside and outside our Union. So our first duty is to talk about what we are doing, to explain with the maximum of transparency our policies, spread the real stories about the positive impact that our European action has on the lives of so many people.”²⁶
50. Following the work of the *High Level Expert Group on Fake News and Online Disinformation* in early 2018, the European Commission came up with a Communication to the EP and the Council titled “Tackling online disinformation: a European Approach”. In its own words, the Communication “presents a comprehensive approach” aimed at responding to this phenomenon in the digital world by promoting transparency and prioritising “high-quality information, empowering citizens against disinformation, and protecting” democracies and policy-making processes in the EU.²⁷
51. In December 2018 the European Commission and High Representative of the Union for Foreign Affairs and Security Policy forwarded to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions a Joint Communication “Action Plan against Disinformation.”²⁸
52. The Action Plan provides a definition of disinformation, not dissimilar from the one above, saying:
- Disinformation is understood as verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm. Public harm includes threats to democratic processes as well as to public goods such as Union citizens’ health, environment or security.
53. Disinformation does not include inadvertent errors, satire and parody, or clearly identified partisan news and commentary.
54. The 2018 Action Plan is based on the following four pillars:

²⁶ Speech by the High Representative / Vice-President Federica Mogherini at the conference “Hybrid threats and the EU: State of play and future progress”, 2 October 2017. [The “broadest possible audience” of fake news websites was proven to have, at least in France and Italy, on average, a monthly reach of some 3.5% in 2017, with most reaching less than 1% of the online population in both countries. Conversely, the most popular news websites in France and Italy had an average monthly reach of 22.3% and 50.9%, respectively. See also Fletcher, Richard, Alessio Cornia, Lucas Graves, and Rasmus Kleis Nielsen “Measuring the reach of “fake news” and online disinformation in Europe”. Factsheet, February 2018, p.1. Reuters Institute for the Study of Journalism at the University of Oxford. <https://bit.ly/2J3UnvH>](#)

²⁷ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Tackling online disinformation: a European Approach”. COM/2018/236 final. 26 April 2018. <https://bit.ly/2rz2WrW>

²⁸ Action Plan against Disinformation. Brussels, 5.12.2018 JOIN(2018) 36 final. https://eeas.europa.eu/headquarters/headquarters-homepage/54866/action-plan-against-disinformation_en

- improving the capabilities of Union institutions to detect, analyse and expose disinformation;
- strengthening coordinated and joint responses to disinformation (incl. establishing a rapid alert system);
- mobilising private sector to tackle disinformation (incl. through the Code of Practice);
- raising awareness and improving societal resilience.

55. The debate within the EU on false news is very much focussed on the issue of liability of internet intermediaries for dissemination of provocative information. A starting point was the 2000 EU Directive on electronic commerce.²⁹ This firmly stated, in its Section 4, that the “information society service providers” were not liable for mere conduit, caching, or hosting, nor were they obliged to monitor the information they transmitted or stored, in particular with the aim of actively seeking facts or circumstances indicating illegal activity. These rules apply only under certain conditions of non-interference and passive provision of information society services (Art. 12). Such information society services provide a wide range of economic activities which take place online, such as those offering online information or commercial communications, or those providing tools allowing for search, access and retrieval of data. They also include services consisting of the transmission of information via a communication network, in providing access to a communication network or in hosting information provided by a recipient of the service.³⁰
56. The above provisions of the Directive do not affect the possibility for a court or administrative authority, in accordance with the EU member States’ national legal systems, of requiring the service provider to terminate or prevent an infringement, or establishing a system for removal or disabling of access to illegal information (Art. 14). National law may indeed establish obligations for the providers to promptly inform the competent public authorities of alleged illegal activities undertaken, or information provided by recipients of their service or to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service (Art. 15).
57. Of importance here is the 2008 Council of the EU *Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law*. It prescribes each

²⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce). Section 4: Liability of intermediary service providers: <https://tinyurl.com/jwwnwx8>. In the U.S., the law that protects “interactive computer service providers” from liability for the content they carry if it is not produced directly by them is Section 230 of the 1996 Communications Decency Act (47 U.S.C. § 230).

³⁰ Television and radio broadcasting are not information society services as they are not provided at individual request. By contrast, services which are transmitted point to point, such as video-on-demand or the provision of commercial communications by email are information society services. The use of email or similar individual communications for instance by natural persons acting outside their trade, business or profession is neither an information society service.

EU member State take the necessary measures to ensure that certain *intentional* conduct is punishable. Such conduct includes 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. The Decision also calls to punish publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity, crimes against peace and war crimes (as defined in the Statute of the International Criminal Court and the Charter of the International Military Tribunal), if directed against same types of a group of persons or a member of such a group when the conduct is carried out in a manner likely to incite to violence or hatred against them.

58. The Decision expects that the EU member states will take measures that are consistent with fundamental principles relating to “freedom of expression, in particular freedom of the press and the freedom of expression in other media as they result from constitutional traditions or rules governing the rights and responsibilities of, and the procedural guarantees for, the press or other media where these rules relate to the determination or limitation of liability”.³¹

2. *Council of Europe*

59. Article 10 (“Freedom of expression”) of the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, or ECHR) reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

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

³¹ Council of European Union Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. <https://tinyurl.com/j4vq667>

disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”³²

60. The European Court of Human Rights, which is mandated to interpret the ECHR, was very precise when it stated that: “Article 10 of the Convention as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention.”³³ In the Court’s view, Article 10 applies not only to the content of information, but also to the means of transmission or reception, since any restriction imposed on the means necessarily interferes with the right to receive and impart information.³⁴
61. At the same time, the rules of broadcasting in Europe are more strict and specific in addressing the issue of media content. The *European Convention on Transfrontier Television* prescribes that broadcasters “shall ensure that news fairly presents facts and events and encourages the free formation of opinions.”³⁵
62. The issue of disinformation was a subject of Resolution 2143 (2017) of the Parliamentary Assembly of the Council of Europe (PACE) “Online media and journalism: challenges and accountability”.³⁶ The Resolution referred to an undefined line “between what could be considered a legitimate expression of personal views in an attempt to persuade readers and disinformation or manipulation.” It noted with concern the growing number of online media campaigns designed to misguide sectors of the public, through intentionally biased or false information, hate campaigns against individuals and personal attacks, often in a political context, aimed at harming democratic political processes.³⁷
63. The Resolution suggested a number of steps be taken by national authorities, such as inclusion of media literacy in the school curricula, support to awareness-raising projects and targeted training programmes to promote the critical use of online media, and support for professional journalistic training.³⁸
64. In another of its previous resolutions, PACE, while acknowledging that the internet “belongs to everyone; therefore, it belongs to no one and has no borders” and that there is a need to

³² Convention for the Protection of Human Rights and Fundamental Freedoms. Rome, 4.XI.1950
<https://bit.ly/1foTq0D>

³³ *Salov v. Ukraine*, 65518/01, Judgment, 06/09/2005 para 113. <http://hudoc.echr.coe.int/eng?i=001-70096>

³⁴ *Autronic AG v. Switzerland*. Application No 12726/87. Judgment of 22 May 1990.
<https://bit.ly/2KRQT1a>

³⁵ European Convention on Transfrontier Television. Strasbourg, 5.V.1989. Art. 7 para 3.
<https://bit.ly/2rzG6Qf>

³⁶ Parliamentary Assembly of the Council of Europe. Resolution 2143 (2017) Online media and journalism: challenges and accountability. Text adopted on 25 January 2017. <https://tinyurl.com/ydxzsc8k>

³⁷ Ibid. Para 6.

³⁸ Ibid. Para 12.1.

preserve its openness and neutrality, noted that the internet also “intensifies the risk of biased information and manipulation of opinion.” As such, it “must not be allowed to become a gigantic prying mechanism, operating beyond all democratic control” or “a *de facto* no-go area, a sphere dominated by hidden powers in which no responsibility can be clearly assigned to anyone.”³⁹ The Parliamentary Assembly recommended to the member States of the Council of Europe (CoE) to consider actions that would prevent the risk of information distortion and manipulation of public opinion, mostly through coherent regulations and/or incentives for self-regulation concerning the accountability of the internet operators.⁴⁰

65. In October 2017, the CoE published a report titled “Information Disorder: Toward an interdisciplinary framework for research and policy making”.⁴¹ The document examines the way in which disinformation campaigns have become widespread and, heavily relying on social media, contribute to a global media environment of information disorder. The authors advocate for definitional rigour, rejecting the term “fake news” as inadequate to describe the complex phenomena at stake.
66. The report provides a new framework for policy-makers, legislators, researchers, technologists and practitioners working on the theoretical and practical challenges related to:
 - a. misinformation, when false information is shared, but no harm is meant;
 - b. disinformation, when false information is knowingly shared to cause harm; and
 - c. malinformation, when genuine information is shared to cause harm, often by moving information designed to stay private into the public sphere — the three elements of information disorder.
67. “The complexity and scale of information pollution in our digitally-connected and increasingly polarised world”, says the report, “presents an unprecedented challenge.” It examines solutions that have been rolled out by the social media networks and considers ideas for strengthening existing media, news literacy projects and regulation. The authors claim that, while they deem fact-checking and debunking initiatives admirable — an appendix to the report lists such actions in Europe, there is an immediate need to understand the most effective formats for sparking curiosity and scepticism in audiences, about the information they consume and the sources from which that information stems.
68. There is a need to work collaboratively on workable solutions, and the report provides a framework for the different stakeholders. In particular, the national governments are advised to commission research to map information disorder; draft regulations to prevent any

³⁹ PACE. Resolution 1970 (2014) Internet and politics: the impact of new information and communication technology on democracy. Text adopted 29 January 2014. Paras 12, 14 <https://bit.ly/2qEvqze>

⁴⁰ Ibid. Para 19.9.

⁴¹ Information Disorder: Toward an interdisciplinary framework for research and policymaking. By Claire Wardle and Hossein Derakhshan. Published by the Council of Europe, October, 2017. <https://bit.ly/2jNx3Yg>

advertising from appearing on disinformation sites; require transparency around Facebook ads; support public service media organisations and local news outlets; roll out advanced cybersecurity training; and enforce minimum levels of public service news on to the platforms.⁴²

3. *European Court of Human Rights*

69. The overall bulk of the case law of the European Court of Human Rights (ECtHR) related to dissemination of false information is about the restrictions or penalties imposed by the national authorities for the protection of the reputation or – to a lesser degree – the right to respect for private and family life.
70. The domestic laws of member States of the CoE, meanwhile, generally say that defamatory accusations should be factually false, or ungrounded, in order to be found liable by a court. A defamatory statement may be declared null and void if the defendant fails to prove its truthfulness. In order for defamation to constitute a violation of law, it is generally imperative that the information be false, i.e. untrue. Moreover, a remedy may only be used when the allegedly defamatory statement consists of facts, since the truthfulness of value judgments is not susceptible of proof. If a statement is found to be defamatory, the person who made it may be ordered to pay compensation to the aggrieved party.
71. The relevant case law of the ECtHR reveals numerous complaints on a possible violation by the restrictions or penalties of the applicant’s right to freedom of expression (under the above-cited Article 10 of the ECHR). In particular, it evaluates if the interference with the right to freedom of expression was indeed prescribed by law and was necessary in a democratic society, pursued a legitimate aim and was proportionate to it. The case law usually takes into account the role of the press in a democratic society, public interest factors, and possible status of the defamed person as a public figure whose limits of acceptable criticism are wider than those of private individuals. In addition, the ECtHR is mindful of the fact that journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation.⁴³ Subject to paragraph 2 of Article 10, freedom of expression is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness which constitute a “democratic society”.⁴⁴

⁴² Ibid., p. 8.

⁴³ See *Prager and Oberschlick v. Austria*, judgment of 26 April 1995, Series A no. 313, p. 19, § 38.

⁴⁴ See *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, pp. 23-24, § 31 and *Steel and Morris v. the United Kingdom*, no. 68416/01, § 87, ECHR 2005-II.

72. The ECtHR has repeatedly noted that the safeguards afforded by Article 10 to journalists, in relation to their factual reporting on issues of general interest, is subject to the proviso that they are acting in *good faith*, in order to provide *accurate and reliable information* in accordance with the *ethics of journalism*, that includes an ordinary obligation to verify factual statements.⁴⁵ For example, in the *Goodwin* case, the ECtHR noted that the central rationale for the shielding of journalists' confidential sources was to strengthen "the vital public-watchdog role" of the media and not to adversely affect its ability "to provide accurate and reliable information."⁴⁶
73. Despite the dominance of defamation and privacy case law, there are several judgments of the ECtHR that relate to the topic of this paper, by evaluating false statements in a political speech unrelated to reputation or private life.
74. For example, a decision on admissibility of an application to the ECtHR (*Bader v. Austria*⁴⁷) addresses a claim by the applicant, an Austrian professor, that the public broadcaster ORF disseminated biased information on the need for the country's EU accession which was incompatible with its obligation of objectivity under the national Broadcasting Act. The applicant therefore requested to annul the results of the EU accession referendum held earlier in the same year.
75. However, the European Commission of Human Rights (which until 1998 served as a buffer between applicants and the ECtHR) found that the applicant was not actually affected by the claimed violation of his right to information, and had formed his opinion on the referendum's purpose irrespective of the possible bias in ORF. It noted that the right to freedom to receive information "basically prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him." The European Commission of Human Rights concluded that Article 10 of the ECHR did not, in general, embody an obligation on Governments to impart information to the individual. The Commission could not find grounds for the allegation that any alleged insufficiency of information provided by the Austrian authorities, in relation to the above referendum, prevented the applicant from the effective exercise of his own right to freedom of thought. Thus the application was found inadmissible.
76. In a judgment on the 2008 case of *Balsytė-Lideikienė v. Lithuania*⁴⁸, the ECtHR reviewed an application of the editor and publisher of "Lithuanian Calendar – 2000". Here the applicant complained that her right to free expression was violated by the national authorities seizing and destroying a calendar she had published and subsequently banning its further distribution.

⁴⁵ See the *Goodwin* judgment, p. 500, § 39, *Fressoz and Roire*, § 54, and *Bladet Tromsø and Stensaas*, § 65.

⁴⁶ *Goodwin v. the United Kingdom*, § 39. Judgment no. 17488/90, 27 March 1996. <https://bit.ly/2KRQYCO>

⁴⁷ *Bader v. Austria*, Application No. 26633/95. Decision on admissibility, 15 May 1996.

<https://bit.ly/2G3H0tl>

⁴⁸ *Balsytė-Lideikienė v. Lithuania*, Application No. 72596/01, 4 November 2008. <https://bit.ly/2wtV0x5>

The seizure of the calendar copies occurred after the national authorities (a parliamentary committee and the office of the Prime Minister) requested an investigation into possible violation of the national law through the calendar's distribution in bookstores. A particular reason was that the back cover of "Lithuanian calendar 2000" contained a map of the Republic of Lithuania, falsely depicting the neighbouring territories of the Republic of Poland, the Russian Federation and the Republic of Belarus as "ethnic Lithuanian lands under temporary occupation". Moreover, the Foreign Ministry of Lithuania received diplomatic notes from the Russian Embassy and the Embassy of Belarus. Interestingly enough, the national courts found neither calls for violence, nor expressions of hatred against the ethnic groups or the superiority of the Lithuanians over other nationals in the calendar, while the negative statements about the Jewish population were not found to be anti-Semitic. However, the courts highlighted that the publication had caused negative reactions from parts of society as well as some foreign embassies. Furthermore, the appellate instance attested that the comments in the calendar were based on the ideology of extreme nationalism, which rejected the idea of civil society's integration and endorsed xenophobia, national hatred and territorial claims. It emphasised, however, that the breach of the administrative law committed by the applicant was not serious, and that it had not caused significant harm to society's interests. Therefore, it affirmed an imposition on the applicant of an administrative warning and the confiscation of the publication.

77. In the ECtHR, the Lithuanian Government argued that, by withdrawing the publication from distribution and imposing an administrative warning on the applicant, the authorities had sought to prevent the spreading of ideas which might violate the rights of ethnic minorities living in the country, as well as endanger Lithuania's relations with its neighbours.
78. In its judgment the ECtHR had particular regard to the general situation of the Republic of Lithuania. It took into account the Government's explanation as to the context of the case that, after the re-establishment of the independence of Lithuania in 1990, the questions of territorial integrity and national minorities were sensitive. The ECtHR also noted that the publication received negative reactions from the diplomatic representations of the Republic of Poland, the Russian Federation and the Republic of Belarus. As to the language of the publication, it held that the applicant "expressed aggressive nationalism and ethnocentrism" thereby "giving the Lithuanian authorities cause for serious concern." The ECtHR thus found no breach of Article 10 of the ECHR.
79. In another case (*M.S. and P.S. v. Switzerland*), the applicants, employees of the Soviet Novosti Press Agency (NPA)⁴⁹ bureau in Switzerland, complained of being victims of the decision by the nation's collective executive head of government and state, the Federal

⁴⁹ Predecessor to the current information agency called Rossiya Segodnya, or Russia Today: <https://bit.ly/2HIIdUSW>

Council, to shut down their employer. The decision was made in 1983 on the constitutional provision that entitled the expulsion of foreigners who constitute a danger to the security of the state. This decision was based on the conclusions of a police report and conclusions of the Federal Attorney-General, all classified confidential. The police report's conclusions allegedly demonstrated that, from the beginning, the NPA bureau in Bern was not about providing information but "operated as a centre of disinformation, subversion and agitation." The conclusions also stated:

"The activities engaged in to influence the political decision-making process in our country clearly constitute an interference in Swiss internal affairs. They violate Swiss sovereignty and compromise our relations with other countries."

80. The ECtHR noted that the closing of the NPA was not intended to punish the applicants but to prevent certain activities. In dismissing the application, it said the shut-down "might possibly be an infringement of the fundamental rights of the agency but not those of the applicants."⁵⁰

81. Five years later, in yet another case against Switzerland a violation of Article 10 was indeed found. It started with the national regulator's ban of particular satellite dishes enabling customers to watch Soviet TV. Before the ECtHR, the Swiss Government argued that a total ban on unauthorised reception of transmissions from telecommunications satellites was the only way of ensuring "the secrecy of international correspondence", because there was no means of distinguishing signals conveying such correspondence from signals intended for the general use of the public. The authorities' submission was found by the ECtHR to be "unpersuasive", since there was no risk of obtaining secret information by means of dish aerials receiving broadcasts from satellites. The State's interference with the right to receive information from abroad was not found necessary in a democratic society. Moreover, the ECtHR judgment said the interference could only happen on the basis of paragraph 2 of the ECHR's Article 10. The concurring opinion of Judge De Meyer stated in particular: "The freedom to see and watch and to hear and listen is not, as such, subject to States' authority."⁵¹

82. It should also be noted that the ECtHR generally found inadmissible all applications for violation of Article 10 related to genocide denials, on the grounds that such speech not only goes against facts established by international tribunals, but also violates Article 17 ("Prohibition of abuse of rights") of the ECHR, worded as follows:

- a. "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction

⁵⁰ *M.S. and P.S. v. Switzerland*. Application No 10628/83, Decision of 14 October 1985 on the admissibility of the application. <https://bit.ly/2rzAK7p>. See also *Sigma Radio Television LTD. v. Cyprus* below.

⁵¹ *Autronic AG v. Switzerland*. Application No 12726/87. Judgment of 22 May 1990. <https://bit.ly/2KRQT1a>

of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.”

83. Article 17 (above) empowers the ECtHR to affirm any activity against the human rights specified in it (such as right to life and non-discrimination) as activity that may not rely on the protection of the ECHR in general, including Article 10 on freedom of expression.
84. Thus, the ECtHR places the criteria for limitation of speech not so much on the falsity or truthfulness of information, but rather on other criteria, such as the harm that it has or has not caused.

D. Principles developed by international NGOs

85. A number of international media freedom non-governmental organizations (NGOs) and professional media associations spoke recently in a consistent way on the issue of legal regulation of false information.⁵² A most systematic approach seems to be the one submitted by the UK-based Media Legal Defence Initiative,⁵³ an NGO providing legal defence to independent media, journalists and bloggers who are under threat for their reporting, and echoed by ARTICLE 19,⁵⁴ which defends freedom of expression and freedom of information worldwide. Both organisations similarly stated that making false information illegal presents several unacceptable dangers in today’s media world.⁵⁵
86. The concise arguments of the international media freedom NGOs may be summarised and commented as follows:
87. Legal bans on false news can have a serious chilling effect on the work of reporters. In situations of rapidly developing news, or where different sources contradict each other, facts may be difficult to check. Given that reporters’ reputations depend on the quality of the information they provide, they naturally have a strong incentive only to share news which they are fairly confident is correct, and to warn their audience if a certain fact cannot be verified. If, however, journalists have the sword of a general legal ban of disinformation hanging over their head, they might simply decide, for fear of breaking the law, to report only the news that they are completely certain of. This will happen on the background of the

⁵² See, e.g. Reporters Without Borders “Predators of press freedom use fake news as a censorship tool”. 16 March 2017. <https://tinyurl.com/yd8qn9kw>; Freedom House. Freedom on the Net 2017: Manipulating Social Media to Undermine Democracy. <https://freedomhouse.org/report/freedom-net/freedom-net-2017>

⁵³ <https://www.mediadefence.org/>

⁵⁴ <https://www.article19.org/>

⁵⁵ Stephens, Mark, et. al. “In the Case of *Dareskizb Ltd v Armenia*”. Application No. 61737/08. A Submission to the European Court of Human Rights on behalf of the Media Legal Defence Initiative. 15 March 2012, paras 13-27. <https://tinyurl.com/y99tysnw>. Article 19 (no date). False news. Quoted in: <https://tinyurl.com/yaf5zfr9>

growing number of attempts to discard from the law a most important privilege of journalists – to keep secret their confidential sources. As a result journalists seeking to prove the truth of their statements beyond doubt may frequently be unable to do so.⁵⁶ Consequently, citizens will be deprived of potentially vital information on current developments.

88. While the law might sometimes demand separation of potentially accurate facts and free opinions⁵⁷ this is not always easily done. In many cases, opinions are expressed through sarcastic, satirical, hyperbolic or comical statements that are false on face value. In defamation lawsuits, the court usually takes the genre and context into account but if there is a general prohibition of false news it can easily become a ban on opinions. That will endanger the free confrontation between different points of view which lies at the heart of democracy.⁵⁸
89. False news legal provisions will fail to recognise that it is often far from being self-evident what the ‘truth’ on a particular matter is. Any such provisions will be almost by definition impermissibly vague, they are bound to fail the criteria of legal certainty and predictability that characterize the rule of law. Moreover, with very few exceptions, even if a particular truth is well established, it may not always remain that way.
90. Fact and truth are not easily separated either. There is truthful reporting of the facts, say someone’s account of the events, and there is reporting true account of the facts, by providing a holistic set of accounts on the story and discounting reporter’s possible personal biases. The latter approach serves as a goal for the media, but is too often hard to achieve.
91. The public authorities generally have sufficient possibilities and power, including easy access to the private and public media, to enable them to refute false statements. This leading position which the governments occupy in the information market makes it necessary for them to display restraint in resorting to administrative or criminal legal instruments, where other means are available for replying to falsities.
92. Even if it could be said that under certain circumstances, the publication of false news of a specific kind may give rise to a risk of public disorder, such cases are likely to be extremely rare and cannot alone constitute sufficient justification for a general prohibition of disinformation. Undoubtedly, truthful news of a specific kind under certain circumstances

⁵⁶ In this case, it is interesting to look at the norm of the Russian Mass Media Law which requires that journalist checks the “reliability” of information that he/she disseminates, and not “truth beyond doubt.” This provision was likely caused by the fact that the press does not have either status or instruments to prove facts beyond doubt. See more in: Рихтер А.Г. Правовые основы интернет-журналистики: Учебник. М.: ИКАР, 2014, с. 205-206.

⁵⁷ Such as the Slovak Broadcasting Law, see below.

⁵⁸ See *R v Zundel* below.

may also give rise to a risk of public disorder but that characteristic alone does not and may not foresee a hypothetical ban on “true news.”

93. Furthermore, according to the international media freedom NGOs, whilst the publication of false news may be viewed as potentially detrimental to the public good, its restriction involves far greater risks because it undermines democracy itself. This is particularly true where the nation’s institutions, in particular the judicial system, civil society, and a robust and independent media, remain fragile. Media Legal Defence Initiative notes that there are obvious dangers in placing prior restraints on free speech and that this alone requires them to be subject to concerned scrutiny.
94. The Camden Principles on Freedom of Expression and Equality, prepared by ARTICLE 19 on the basis of discussions held with high-level international officials, civil society and academics represent an interpretation of international law and standards. Out of the 12 principles, one (principle 7) endorses the right of correction and reply (see above), best protected through self-regulatory systems:
 - a. “The right of reply gives any person the right to have a mass media outlet disseminate his or her response where the publication or broadcast by that media outlet of incorrect or misleading facts has infringed a recognised right of that person, and where a correction cannot reasonably be expected to redress the wrong.”⁵⁹
95. To sum up, there are a number of ideas floating in intergovernmental fora as to how to limit the effects of disinformation detrimental to global peace, security and cooperation. The debate traditionally points to governments’ responsibility to refrain from sponsoring, encouraging, producing, endorsing or disseminating false information, especially if it sows distrust among nations.
96. While “ministries of truth” are never recommended to be established, debates point to the duty of everyone, including public authorities, to aid in the dissemination of truthful information, including through the media.
97. In the legal field, the three-part test of legality, legitimacy and proportionality sets the standard regulation.

⁵⁹ The Camden Principles on Freedom of Expression and Equality, 2009, – p. 7. <https://bit.ly/1XfMDrL>

II. EXAMPLES OF NATIONAL LAW AND PRACTICE

98. Throughout the OSCE region, there are provisions in national regulations that recognise untrue information, in one context or another, as a violation of law. Falsehood of statements is usually part and parcel of defamation tort or crime; it may also present a separate tort in most countries if related to disparagement of a product or to fraud.
99. Existing national criminal law in some OSCE participating States likewise bans the spreading of false statements if they cause harm to legitimate interests of the individuals, public, and the state. Most often, such interests are defined in a narrowly enough way. For instance, they might include approval of, denial or rendering harmless an act committed under the rule of National Socialism or by the Nazis (or, Holocaust denial), or a public denial of other acts of genocide. It might also be an important feature of “hate speech”. Criminal norms – aimed at providing the voters with true information in the course of the campaigns – often happen to outlaw false statements in relation to candidates at elections. In all such instances, there should be *harm* (injury) inflicted upon private or public interests. In this sense, harm to protected interests, narrowly defined in the law, distinguishes itself from *other consequences*, no matter how negative that false information might have been.

1. Canada

100. Canadian Criminal Code (section 181) once prescribed the following offence:

“Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.”⁶⁰

101. The best known trial under the provision was caused by Mr Zundel’s denial of the Holocaust and which resulted in him being convicted of “spreading false news”. He appealed the verdict and, in *R v Zundel*,⁶¹ the Canadian Supreme Court struck down the conviction. The Supreme Court majority held that, while Mr Zundel breached section 181 in that he “misrepresented the work of historians, misquoted witnesses, fabricated evidence, and cited non-existent authorities”, his conviction should be set aside because section 181 in its turn violated section 2(b) (“freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication”) of the Canadian Charter of Rights and

⁶⁰ Criminal Code (R.S.C., 1985, c. C-46). <http://laws-lois.justice.gc.ca/eng/acts/C-46/section-181.html>

⁶¹ *R v Zundel* [1992] 2 S.C.R. 731. More on the case, see <https://tinyurl.com/yb44fdtn>

Freedoms, entrenched in the national Constitution. In addition to violating the constitutional guarantee of freedom of expression, by saying “likely to cause injury or mischief to a public interest” section 181 was found to be overbroad.⁶² The Supreme Court stated therein: “The reality is that when the matter is one on which the majority of the public has settled views, opinions may, for all practical purposes, be treated as an expression of a ‘false fact.’”⁶³ It continued:

“The danger is magnified because the prohibition affects not only those caught and prosecuted, but those who may refrain from saying what they would like to because of the fear that they will be caught. Thus worthy minority groups of individuals may be inhibited from saying what they desire to say for fear that they might be prosecuted. ... Should a medical professional be precluded from describing an outbreak of meningitis as an epidemic for fear that a government or private organization will conclude and a jury accept that his statement is a deliberate assertion of a false fact?”⁶⁴

102. Canada also has a separate tort of product disparagement through malicious falsehood. It requires the plaintiff to prove that the defendant published a false statement about the product with malice, or the intention to cause injury, and that actual financial injury occurred as a consequence, while damage to reputation is not required.⁶⁵

2. Croatia

103. The Criminal Code of Croatia (Article 322) was used to criminalise the dissemination of “false and disturbing rumours with the aim of causing a disturbance of the greater number of people” (defined as three persons or more), under the condition that disturbance actually occurs. This particular provision was annulled with the adoption of the current Criminal Code⁶⁶, which entered into force on 1 January 2013, just six months before Croatia joined the EU.

104. At the same time, paragraph 3 of Article 260 of the present Criminal Code acknowledges as an abuse of the capital market regulations a dissemination of “information in the media, the

⁶² Gibson, Judith. The Fourth Estate and the Fake Estate: Brexit, Trump and the rise of Populism. Paper presented at the Media Law Conference, London, 25 September 2017. <http://bit.ly/2mj6097>

⁶³ *R. v. Zundel*, [1992] 2 S.C.R. 731. <https://tinyurl.com/zlpwuur>

⁶⁴ *Ibid.*, 772.

⁶⁵ MacLeod Rogers, Brian. Canada. International libel and privacy handbook: a global reference for journalists, publishers, webmasters, and lawyers / edited by: Charles J. Glasser Jr. -3rd edition. Hoboken: John Wiley & Sons, Inc., 2013, p. 41.

⁶⁶ See its text (in Croatian): <https://tinyurl.com/yb6va48t>

Internet or in any other way or means of giving false or misleading messages about financial instruments, including the spread of rumours and false or misleading news, whereas the person who provided the information knew or was to know that the information was false or misleading.” It is punishable with up to three years imprisonment.⁶⁷

3. Cyprus

105. The Criminal Code (Article 50) states that any person who publishes, in any form, false news, or information that may otherwise undermine public order or the public’s confidence in the state or organs, or cause fear or concern to the public, or interfere in any way with the common peace and orderliness is guilty of a misdemeanour. The punishment is imprisonment for up to two years or a fine. However, the article states that if the court is satisfied that the publication was made in good faith or in circumstances justifying its publication, there will be no punishment.⁶⁸

106. The Broadcasting law of Cyprus prescribes that broadcasting, both private and public, should be governed by a set of principles, including “objectivity, completeness and timeliness of information”. Specific demand regulates “news bulletins and the current affairs programmes” that must be in conformity of “objectivity and plurality, especially regarding political issues as well as other social issues that are of concern to public opinion.”⁶⁹

107. The latter norm on news is further detailed in “The Radio and Television Stations Regulations”, which directs broadcasters to prepare news bulletins in advance and to transmit them “with accuracy, objectivity, impartiality, multifariousness and the greatest possible fullness”.⁷⁰

108. In an exemplary court case, private Sigma TV complained that various decisions of the Cyprus Radio and Television Authority (CRTA), the national regulator, concerning a number of its broadcasts, violated Sigma’s right to freedom of expression. In particular, CRTA fined

⁶⁷ Ibid.

⁶⁸ Defamation and Insult Laws in the OSCE Region: A Comparative Study (Commissioned by the OSCE Representative on Freedom of the Media). March 2017. Author/Lead Researcher: Scott Griffen, Managing Editor: Barbara Trionfi, International Press Institute, p.79.
<http://www.osce.org/fom/303181?download=true>

⁶⁹ The Radio and Television Broadcasters Law of 1998 to 2016. Number 7 (I) of 1998. Art. 26.
<https://tinyurl.com/yd7cyseo>

⁷⁰ Regulation 24 of the Radio and Television Stations Regulations of 2000 (Regulatory Act 10/2000). As quoted in: Case of Sigma Radio Television LTD. v. Cyprus. (Applications nos. 32181/04 and 35122/05). 21 July 2011. Para 90. <http://hudoc.echr.coe.int/eng?i=001-105766>

Sigma TV for a report in its news bulletin about three young drug use suspects. The regulator considered that the news had lacked objectivity, impartiality, accuracy and pluralism, in violation of the above regulation. It noted in this regard that, although the allegations made over the phone by the mother of one of the three accused regarding the effectiveness of the state institutions and the attitude of the medical authorities towards drug addicts had been transmitted, those institutions and medical authorities had not been given the opportunity to express their dissenting views. The case went through the national court system and ended in the ECtHR which judged that, in the sanctions by CRTA, there was no breach of the applicant's right to freedom of expression.⁷¹

4. France

109. The classical media act of the country, the 1881 law on freedom of the press, in its contemporary form states as follows (Article 27):

“The publication, dissemination or reproduction, by any means whatsoever, of false news, of fabricated, forged material or material falsely attributed to third parties - when made in bad faith, disturbed public peace or has had the potential to disturb it, will be punished by a fine of 45,000 euros.

The same deeds will be punished by a fine of 135,000 euros, when publication, dissemination or reproduction, made in bad faith, is of the nature that undermines the discipline or morale of the armed forces or hinders the war effort of the Nation.”⁷²

110. In order to protect media freedom the same law allows for action within three months of the violation of the law (Article 65).

111. As noted, the ban applies only to information produced and disseminated in bad faith with the objective of disturbing “public peace.” “Bad faith” can be difficult to define and to prove. A debate in the French Senate at the time of the law's adoption points to some explanation of the notion. The head of the law committee reportedly said then that intentional disturbing “public peace” should be a “far more dangerous” act than “breaking a window of a café.”⁷³

⁷¹ Case of *Sigma Radio Television LTD. v. Cyprus*. (Applications nos. 32181/04 and 35122/05). 21 July 2011. Para 90. <http://hudoc.echr.coe.int/eng?i=001-105766>

⁷² “Loi du 29 juillet 1881 sur la liberté de la presse” (Law of 29 July 1881 on freedom of the press), Article 27.

<https://tinyurl.com/yb3tbsc5>. The original text of the law additionally envisioned imprisonment of one month to one year.

⁷³ Al-Boray, Nagad Mohamed. *Egypt: National Security, Freedom of Expression and State Secrets / Secrecy and liberty: national security, freedom of expression and access to information* / edited by Sandra Coliver [et al.] The Hague; London: Martinus Nijhoff, 1999, pp.262-263.

112. The modern case law on a violation of this norm is apparently limited to false information, “or a false mixture (amalgam) of facts or perfidious allusions” which denies Holocaust.⁷⁴
108. Two laws, draft ordinary and organic laws on the fight against the manipulation of information, were adopted on 20 November 2018 by the French parliament. The laws are specifically designed for electoral cycles, during which the spread of disinformation may harm the functioning of democratic institutions. The laws allow the judiciary to act against disinformation if the disinformation is manifest, widely and artificially distributed and if it could lead to disturbing the public peace or the sincerity of the vote.
109. Under the new laws, an emergency procedure can be used to stop the dissemination, during election campaigns, of “inaccurate or misleading allegations or statements likely to affect the sincerity of the vote” when they are “disseminated on a massive scale in a deliberate, artificial or automated manner via an online public communication service”.
110. Digital platforms are also subject to new obligations concerning cooperation (to combat “fake news”) and transparency. For example, those “whose activity exceeds a certain number of connections on French soil” will be required to “provide users with accurate, clear and transparent information about the identity of any natural person, or the name, headquarters and purpose of any legal entity, or of that on whose behalf it is acting, that pays the platform to promote information linked to a debate of general public interest”. Failure to respect these obligations may be punished by a year’s imprisonment and a EUR 75 000 fine.
111. The law also amends the law of 30 September 1986 on freedom of communication. The national audiovisual regulatory authority (the Conseil supérieur de l’audiovisuel - CSA) will be able to prevent, suspend or prohibit the distribution of television services controlled by a foreign state that “harm the fundamental interests of the nation, including the smooth functioning of its institutions - particularly by disseminating false information”. The law in particular establishes an exceptional procedure for administrative suspension of the distribution of a licensed broadcasting service during election campaigns.
112. The Constitutional Council validated the two laws in two decisions of 20 December 2018 (Decisions no. 2018-773 DC and 2018-774 DC), after some reservations concerning interpretation in order to guarantee the balance between the limits to freedom of expression, the need for a sincere vote and the principle of clarity of the electoral vote.⁷⁵
113. It is noteworthy that in France, the draft law on false information relies primarily on the role of the judiciary and the regulatory body. They decide on possible action against alleged false information, i.e. on the limits of the fundamental right to freedom of expression and freedom

⁷⁴ Bakert, Wallace R. and Patrick de Fontbressin. The French référé procedure and conflicts of human rights. / Syracuse Journal of International Law and Commerce, Vol. 25, No. 1 [1998], Art. 6. 69-92, p.77, fn 11.

⁷⁵ http://merlin.obs.coe.int/newsletter.php?year=2019&issue=1&iris_ref=2019+1+15

of the media. In comparison, in neighbouring Germany the recently adopted legislation (NetzDG) has instead chosen to rely primarily on self-regulation by the internet companies, with potentially heavy fines on social media who would fail to comply repeatedly in taking down on their own initiative content that is flagged as offensive and illegal.

114. OSCE Media Freedom Representative published a press release and a legal review of French laws against manipulation of information on 11 January 2019.⁷⁶ The review was shared with the French authorities in November 2018.
115. The legal review examines the new laws in the context of international principles on freedom of expression. It includes an analysis of the risks related to the scope of the law, the definition of “false news”, which could fail to recognize the nature of the journalistic work, especially within the very short 48-hour deadline for judicial response. It also places greater responsibility on the Internet platforms, whose interpretation of the scope of the content to be taken down could be much broader than the previous judgments of the Conseil Constitutionnel and of the European Court of Justice.
116. On the extension of the powers of the Conseil Supérieur de l’Audiovisuel, the review notes that the new laws do not contradict the relevant international obligations of France.
117. In its recommendations, the review explores the possibility of introducing a new legal statute for Internet platforms. The review also proposes enhancing media literacy and supporting the self-regulation efforts of the media community to enhance quality journalism, in particular through certification and fact-checking.

5. Germany

118. In 2017, motivated by the spread of “hate speech” and “fake news” on social media, the German Parliament adopted the Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act, or NetzDG). The law deals, in particular, with the handling of complaints about unlawful content, and demands that the provider of a social network maintains an effective and transparent procedure for handling such complaints of users in an easily recognisable, directly accessible and permanently available procedure. Unlawful content is defined in NetzDG as content that breaches already existing provisions of the Criminal Code, such as the rules on slander in its Article 185 and certain criminal law provisions on protection from threats to the democratic rule of law.
119. Section 3 of NetzDG enforces that the providers remove or block access to “manifestly” unlawful content within 24 hours from receiving the complaint, or within 7 days of receiving

⁷⁶ The legal review (in French) can be found at: <https://www.osce.org/fr/representative-on-freedom-of-media/408872>

the complaint regarding all other illegal content. The 7-day time limit may be exceeded if the decision regarding the unlawfulness of the content depends on the proof of falsity of a statement of facts, or is clearly dependent on other factual circumstances. In such cases, the social network shall give the user an opportunity to respond to the complaint before the decision is rendered. The social network provider may also avoid a penalty under NetzDG if – within 7 days of receiving the complaint – it applies for a decision on the lawfulness of the disputed content from the “recognised self-regulation institution” (established by the same act) and agrees to accept its decision.⁷⁷

120. This act, while still a draft, was subject to a legal review by an independent expert commissioned by the Office of the OSCE RFOM. The expert then noted that the new concept of “unlawful content” could lead to the deletion of content without the user having foreseen it. This ambiguity could lead to a considerable widening of the scope of the law.⁷⁸
121. As this law entered into force, the RFOM called on the authorities to ensure that freedom of expression is safeguarded in its implementation. The RFOM commented that, according to the law’s provisions, decisions to remove content considered unlawful or illegitimate from social networks rests with the operators of those networks, who may remove more than is necessary or proportionate, and that the list of offences, such as “treacherous false information disseminated or made public”, for which content may be deleted is overbroad. It must be an untrue assertion capable of endangering Germany’s external security or relations with a foreign power. “In its current form, the law may have a chilling effect on freedom of expression,” the RFOM stated.⁷⁹ On 20 January 2018, speaking at a conference of the German journalists’ union Ver.di in Berlin, the Representative called for an evaluation of the impact of the law on freedom of expression and freedom of the media. The German authorities have announced that such an evaluation might indeed take place.⁸⁰
122. Reportedly, in the first week of the law’s inception on 1 January 2018, over 1,000 German moderators of Facebook had to process hundreds of thousands of complaints. Overwhelmed by the volume and wary of incurring such huge fines, social-media firms apparently erred on the side of censorship.⁸¹
123. According to Human Rights Watch, at least three countries – Russia, Singapore, and the Philippines – have directly cited the German law as a best practice while they contemplate or

⁷⁷ Act to Improve Enforcement of the Law in Social Networks (official translation into English): <https://bit.ly/2J29ANS>

⁷⁸ Legal Review of the Draft Law on Better Law Enforcement in Social Networks. Prof. Dr. Bernd Holznagel, LL.M. Commissioned by the Office of the OSCE Representative on Freedom of the Media. May 2017. <https://bit.ly/2qDb0Ye>

⁷⁹ OSCE Representative on Freedom of the Media warns Germany social networks law could have disproportionate effect. 4 October 2017. <https://www.osce.org/fom/347651>

⁸⁰ Bundesregierung will NetzDG überprüfen. / ZEIT ONLINE, 8 January 2018 <https://bit.ly/2jL7FIW>

⁸¹ Germany is silencing “hate speech”, but cannot define it, editorial. / The Economist 13 January 2018 <https://bit.ly/2JTAh8P>

propose legislation to remove “illegal” content online.⁸² In the meantime, the German Chancellor stated that the current “basic approach that we need rules is absolutely right and necessary”, while making amendments to the law is still possible.⁸³

6. Kazakhstan

124. The 2014 Criminal Code of Kazakhstan introduced, in Article 274, a criminal offence of “disseminating knowingly false information that creates a risk of public disorder or substantial harm to the rights and legitimate interests of citizens or organisations or the legally protected interests of society or the state”.⁸⁴
125. The use of the media and telecommunication networks for dissemination of knowingly false information is an aggravating factor to the crime, leading to higher sentencing of imprisonment of between two and five years. Article 274 does not explain what is meant by “knowingly false information” and does not differentiate facts and value judgments.
126. According to the ARTICLE 19, this provision allows for “subjective interpretation that is open to abuse and can be used to suppress legitimate expression that the authorities simply disagree with”.⁸⁵
127. Amnesty International several times commented on this norm by pointing out that it had “particular implications for journalists, several of whom have faced prosecution under this article”. It noted that the threat of prosecution under Article 274 makes journalists afraid to report on sensitive issues. “In addition, the line between fact and opinion can be blurred: a ban on false news can easily become a ban on opinions not favoured by the authorities.”⁸⁶
128. The OSCE RFOM, Amnesty International and Freedom House provided examples of using Article 274, in particular the case of Guzyal Baidalinova, the owner and editor of the independent news portal Nakanune.kz. She was arrested for dissemination of knowingly false information, after the news outlet published her articles on the activities of the bank

⁸² Germany: Flawed Social Media Law: NetzDG is Wrong Response to Online Abuse. Human Rights Watch statement, 14 February 2018. <https://www.hrw.org/news/2018/02/14/germany-flawed-social-media-law>

⁸³ Merkel suggests changes could be made to new online hate speech law / Reuters, 3 February 2018 <https://bit.ly/2H8DsHK>

⁸⁴ Уголовный Кодекс Республики Казахстан (in Russian): <https://tinyurl.com/y7accncn>. See also OSCE/ODIHR database Legislationline at: <http://www.legislationline.org/documents/section/criminal-codes>

⁸⁵ Kazakhstan: Land Reform Protesters Must Be Released. Article 19, 30 November 2016. <https://bit.ly/2H6XdU4>

⁸⁶ Written Statement by Amnesty International at the 2017 OSCE Human Dimension Implementation Meeting, Warsaw 11-22 September 2017. Working Session I: Fundamental freedoms I, including: freedom of expression, free media and information. 11 September 2017. <https://tinyurl.com/y8a9vv9y>. “Think before you post: closing down social media space in Kazakhstan.” Amnesty International, 2017, – p. 8. <https://tinyurl.com/hvbucuk>

- Kazkommertsbank, linking it to corruption in the construction industry.⁸⁷ In May 2016, Guzyal Baidalinova was convicted under Article 274 and sentenced to 1.5 years imprisonment (converted to a suspended sentence on appeal in July 2016).⁸⁸
129. Reportedly, authorities have also made use of Article 274 in other cases to stifle criticism and dissent on social media, thus violating the rights to freedom of expression and to seek, receive, and impart information.⁸⁹ There is a record of relevant case law that punishes violation of this article as recently as in 2016.⁹⁰
130. In late 2017, the Parliament adopted certain amendments to the national mass media law, that relate to the issue of false news. In particular, a new article in the law sets out “basic principles” of mass media activity. Two out of the four principles prescribed are “objectivity” and “veracity.”⁹¹ In addition, the law now defines propaganda in the following words:
- “propaganda in the mass media is understood as the dissemination of views, facts, arguments and other information, including deliberately distorted, for the formation of a positive public opinion about information prohibited by the legislation of the Republic of Kazakhstan and/or for inducement of an unlimited circle of persons to commit an unlawful act or to stay inactive.”⁹²
131. Certain types of propaganda serve as a reason to suspend or annul the governmental permission for the media outlets to function.
132. The OSCE Office of the RFOM commissioned an independent legal analysis of the draft amendments. The reviewer noted that the definition of propaganda lacks narrowly defined subject-matter and legal clarity. Consequently, it allows for unproportioned sanctions against the media, including those acting in a lawful way or at least in good faith.⁹³

⁸⁷ OSCE media freedom representative calls on authorities in Kazakhstan to stop persecuting independent journalists. 26 December 2015. <http://www.osce.org/fom/212731>; Written Statement by Amnesty International, op.cit.; Freedom House, Freedom in the World 2016: *Kazakhstan*. <https://bit.ly/2qCY4BG>

⁸⁸ Radio Azzatyq, “Kazakh Court Suspends Journalist’s Jail Sentence”, 12 July 2016, <https://bit.ly/2I4IEC9>

⁸⁹ Written Statement by Amnesty, op.cit.

⁹⁰ Defamation and Insult Laws in the OSCE Region: A Comparative Study (Commissioned by the OSCE Representative on Freedom of the Media). March 2017. Author/Lead Researcher: Scott Griffen, Managing Editor: Barbara Trionfi, Executive Director, International Press Institute, pp. 133-134. <https://bit.ly/2sd9EpG>

⁹¹ Закон Республики Казахстан от 23 июля 1999 года № 451-І «О средствах массовой информации» (с изменениями и дополнениями по состоянию на 28.12.2017 г.). The Statute of the Republic of Kazakhstan of 23 July 1999, N 451-І “On the mass Media” (with amendments and additions as of 28.12.2017). Article 2-1. <https://tinyurl.com/y89b78ss>

⁹² Ibid. Articles 2 and 13.

⁹³ Комментарии к проекту закона Республики Казахстан «О внесении изменений и дополнений в некоторые законодательные акты Республики Казахстан по вопросам информации и коммуникаций» (The final legal review of draft law of the Republic of Kazakhstan On Amendments and Addenda to Some Legal Acts of the Republic of Kazakhstan on Issues of Information and

7. Lithuania

133. The Constitution (Article 25), while affirming everyone’s right to freedom of expression and freedom of information, notes that the “freedom to express convictions and to impart information shall be incompatible with ... disinformation.”⁹⁴
134. To follow the basic law of the country, Lithuania’s “Law on the Provision of Information to the Public,” the main legal instrument to regulate the media, contains a blanket ban “to disseminate disinformation.”⁹⁵ A person being of the opinion that a producer and/or disseminator of public information, including re-broadcasters, has published and/or disseminated disinformation has the right to appeal to the competent authority, presenting a reasoned request to conduct investigation, take a decision and impose if necessary sanctions. The authority shall, within ten working days, examine the circumstances specified in the request and notify the applicant about the results. If the circumstances referred to in the request prove to be true, the authority shall, within a further 20 working days, take a decision which specifies sanctions, which can be appealed in court.
135. Prosecutors and/or media associations may also appeal to the authority to end the infringement of the ban and, if they fail, further appeal to court with a request ordering the competent authorities to properly perform the function of the control of information and to impose the lawful sanctions.
136. The “Law on the Provision of Information to the Public” provides protection to freedom of opinion by saying that the opinion “is usually subjective, therefore, it is not subject to the criteria of truth and accuracy; however, it must be expressed in good faith and ethically, without deliberately concealing and distorting the facts and data.”⁹⁶
137. There are recent cases when the national regulatory authority, the Radio and Television Commission of Lithuania (RTCL), has addressed the issue of disinformation in broadcasts. In its decision “On the distribution of the television channel NTV Mir Lithuania exclusively in TV packages available for extra fee” the RTCL determined that the programme “Special Case: the Investigation” aired on NTV Mir Lithuania⁹⁷ on 15 April 2016 was promoting war

Communications). Written by Dmitry Golovanov and commissioned by the OSCE Office of the Representative on Freedom of the Media. August 2017. <http://www.osce.org/fom/358671>

⁹⁴ The Constitution of the Republic of Lithuania (Adopted on 25 October 1992). <https://tinyurl.com/ycm35ete>

⁹⁵ Republic of Lithuania. Law on the Provision of Information to the Public. 2 July 1996, No I-1418. (As of 12 January 2018). Article 19 (part 2). The law also offers a definition of “disinformation”, see above. In English: <https://bit.ly/2vlbabL>

⁹⁶ Ibid., Article 2 (part 36).

⁹⁷ *NTV Mir Lithuania* is broadcast by the Baltic Media Alliance Ltd. and falls within the UK jurisdiction being supervised by its regulator Ofcom.

and hatred. It ordered the channel to be economically sanctioned for 12 months.⁹⁸ In its arguments the RTCL linked “hate speech” and disinformation by arguing the following:

“When determining whether information being published constitutes incitement to hatred, the criterion of whether this information corresponds to the reality is not the main one: it is much more important to ascertain what effect this information has on the audience. Information that is propaganda in nature is characterised by certain features and disinformation is just one of them.”⁹⁹

138. In 2017, the RTCL suspended for one month the possibility of free reception of the Russian TV channel TVCI, which was re-broadcast in the territory of Lithuania by several audiovisual service providers. The decision came into force after it was sanctioned by the Vilnius Regional Administrative Court on 12 April 2017. According to the decision of the regulator, the TVCI violated, in a public affairs programme, the norm of the “Law on the Provision of Information to the Public”, which prohibits dissemination of disinformation and incitement to hatred. According to the RTCL press release, the senior heads of the offending company visited the RTCL “to make explanations in regards to the broadcast information. They regretted the situation, but could not guarantee such kind of information would not be repeated in the future”.¹⁰⁰

139. Activities of printed press that violate the ban on disinformation may also be suspended by a court for up to 3 months.¹⁰¹

140. It should also be noted that any entity intending to broadcast or re-broadcast, with or without a license, TV and radio programmes in Lithuania via any platform, including the internet and on-demand services, should officially submit a specific notification. Therein it should declare whether it maintains or previously has maintained national security threatening relationships with institutions of foreign states other than EU and NATO members, or with the persons who are directly or indirectly controlled by such states. In case such a prohibited relationship is established, the RTCL must refuse to give its consent for dissemination of programming.¹⁰²

⁹⁸ Para 5.1. of the decision (in Lithuanian): <https://tinyurl.com/y9l2gpwq>

⁹⁹ Radio and Television Commission of Lithuania: 2016 Annual Report, p. 35. <https://tinyurl.com/ydhcks36>. The same station was also found in breach of the due impartiality rules in the UK, see Donde, Maria, Asja Rokša-Zubčević, and Emmanuelle Machet. “Role of Regulators Implementing Accuracy, Objectivity and Impartiality in Practice”. Comparative Background Document. 46th EPRA Meeting. Vienna: 12-13 October 2017, p. 6. <https://tinyurl.com/y8rkxg3p>

¹⁰⁰ “Free reception of the Russian TV Channel “TVCI” suspended in Lithuania”. Statement by the RTCL, 13 April 2017. <https://tinyurl.com/ybaew4z>. Later, on 20 September 2017 the RTCL adopted a new decision to restrict for 6 months the free reception of TVCI. See <https://tinyurl.com/y83ttyw>

¹⁰¹ Republic of Lithuania. Law on the Provision of Information to the Public. 2 July 1996, No I-1418. (As of 12 January 2018). Article 31, para 16. (in English): <https://tinyurl.com/y7x7v24g>

¹⁰² Ibid., Articles 31, 33.

8. Slovak Republic

141. The Slovak Broadcasting Law prescribes: “Broadcaster shall ensure objectivity and impartiality of news programmes and political affairs programmes; opinions and evaluating commentaries must be separated from information of a news character.”¹⁰³
142. According to the national regulatory authority, the Council for Broadcasting and Retransmission of the Slovak Republic (CBR), this body handles cases of violation of this norm quite frequently, mostly in relation to the main newscasts and political affairs programmes. The most common problem is presentation of one-sided opinions. A recent case was an administrative proceeding against a regional radio broadcaster who hosted an extreme right-wing politician in a 90-minutes programme: it provided just one, extreme right-wing viewpoint on the important topics of race and faith. CBR found the broadcaster was in breach of the law and imposed a warning and a fine of 15,000 euros.¹⁰⁴
143. Such practice was strongly challenged by a decision of the Slovak Constitutional Court noting that the right to objective information cannot be deduced from right to information: “<...> the Constitutional Court <...> states that the legal limitation of the freedom of the media to require objectively and impartially information in news programmes and public affairs programmes and the related authority of the CBR to impose sanctions for violation of this requirement is not possible to draw from the constitutional right of individuals to receive information (Article 26 (2) of the Constitution¹⁰⁵ and Article 10 (1) of the Convention¹⁰⁶), since the right to receive information includes the right to receive information both truthful, verifiable and neutral, as well as fictitious, unreliable, untrue or distorting truth or presenting a particular viewpoint. In addition, information that is fictitious, inaccurate and untrue encourages the recipient when confronted with the information on the same subject received from other sources to engage in critical thinking and increases the will to seek and learn other views on the subject. This leads to the self-realization of the person and encourages an on-going social discourse on the subject. The Constitutional Court assesses this as a democratic element of a free society.”¹⁰⁷

¹⁰³ Act of 14 September 2000 on Broadcasting and Retransmission and on the amendment of Act No. 195/2000 on Telecommunications, Section 16, part 3 b. <https://tinyurl.com/ycnzzggs>

¹⁰⁴ Donde, Maria, Asja Rokša-Zubčević, and Emmanuelle Machet. “Role of Regulators Implementing Accuracy, Objectivity and Impartiality in Practice”. Comparative Background Document. 46th EPRA Meeting. Vienna: 12-13 October 2017, p.7. <https://tinyurl.com/y8rkxg3p>

¹⁰⁵ The text of the national Constitution can be accessed here: <https://tinyurl.com/y6vpm3ue>.

¹⁰⁶ Meaning ECHR.

¹⁰⁷ Judgement of the Constitutional Court of the Slovak Republic (*Nález Ústavného súdu Slovenskej republiky*) on the complaint of MAC TV. Case II. ÚS 307/2014-45. 18 December 2014. Para 61.

9. United Kingdom

144. The UK traditionally provides detailed and argumentative practice, as a result of its system of external regulation in electronic media through the fair presentation of facts and news as prescribed by Sections 2 and 5 of the Broadcasting Code.¹⁰⁸ In particular, the Broadcasting Code states that “[f]actual programmes or items or portrayals of factual matters must not materially mislead the audience”. As to the news, it makes two important rules that it, “in whatever form, must be reported with due accuracy and presented with due impartiality”, while “[s]ignificant mistakes in news should normally be acknowledged and corrected on air quickly.”¹⁰⁹ The rule of due accuracy under the Broadcasting Code applies only to news reports, and not to other programming, such as investigative current affairs programmes.¹¹⁰
145. The Office of Communications, commonly known as Ofcom, is the government-approved regulatory and competition authority for broadcasting in the UK. Under the Broadcasting Act, Ofcom has a statutory duty to set standards for broadcast content which it considers best calculated to secure a number of standards objectives. These objectives include ensuring that generally accepted standards are applied to the contents of television and radio services, so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material. This should be done in the manner which best guarantees an appropriate level of freedom of expression.
146. In one of its recent rulings, Ofcom reviewed the content of Truthseeker, an investigative current affairs series broadcast on RT, following a complaint of unjust and unfair treatment of the BBC news and current affairs programmes therein. The BBC complained to Ofcom and pointed to “a number of unsubstantiated and untrue allegations..., including that the BBC had fabricated an atrocity in reports on Syria and had digitally altered the words spoken by an interviewee in footage in the BBC Programmes.”¹¹¹ Ofcom acknowledged that it is “not a fact finding tribunal and is not able or empowered, therefore, to establish the truth or otherwise of such allegations and to make findings of fact.” As such, it was not possible or appropriate for Ofcom to attempt to prove (or disprove) the allegations made in the Truthseeker.¹¹²

<https://tinyurl.com/y8yot6zd> This judgement does not cite but still follows the logic of the important case of the US Supreme Court *United States v. Alvarez*, 567 U.S. 709 (2012), in which the Court struck down the *Stolen Valor Act*, a federal law that criminalised false statements about having a military medal.

¹⁰⁸ *The Ofcom Broadcasting Code*. 3 April 2017. <https://tinyurl.com/hl5vz83>

¹⁰⁹ *Ibid.*, paras 2.2, 5.1 and 5.2.

¹¹⁰ Standards cases: The Truthseeker: Media ‘Staged’ Syria Chem Attack / *Ofcom Broadcast Bulletin*, 288. 21 September 2015, – p. 31. <https://tinyurl.com/ycdfllu9v>

¹¹¹ *Ibid.*, pp.89-90.

¹¹² *Ibid.*, p.115.

147. At the same time, in its decision on the complaint, the national regulatory authority referred to its own published Guidance provided to assist broadcasters in interpreting and applying the Broadcasting Code. Referring to the rules of Section 2, it stated that Ofcom is “required to guard against harmful or offensive material, and it is possible that actual or potential harm and/or offence may be the result of misleading material in relation to the representation of factual issues”. The Guidance asserts that Rule 2.2 is therefore “designed to deal with content that **materially misleads the audience so as to cause harm or offence**” [emphasis in original] and not with “issues of inaccuracy in non-news programmes”. Further, the Guidance states that “[w]hether a programme or item is ‘*materially*’ misleading depends on a number of factors such as the context, the editorial approach taken in the programme, the nature of the misleading material and, above all, either what the potential effect could be or what actual harm or offence has occurred [emphasis in original]”.¹¹³
148. Ofcom further explained the rule by saying that broadcasters should “take care to ensure that facts are not presented in programmes in a way that is materially misleading. This is particularly important in factual programmes such as current affairs programmes or programmes of an investigative nature as the level of audience trust and the audience’s expectation that such programmes will not be materially misleading is likely to be higher.”¹¹⁴ If such programmes contain materially misleading facts, while editorial context was not sufficient so as to correct them, then it causes harm or potential harm to audiences’ trust.
149. Ofcom noted that the ban to materially mislead the audience should neither prevent a broadcaster from making serious allegations of wrongdoing about organisations and individuals; nor should it prevent broadcasters from making programmes about controversial issues. Indeed, it is crucial that broadcasters have the editorial freedom to do so. However, in doing so, license-holders are required to ensure they do not mislead the public by misrepresenting facts.¹¹⁵ It found a breach of Rule 2 and directed RT to broadcast a summary of its decision.
150. In another decision, Ofcom emphasised that there is also no requirement for broadcasters to provide an alternative viewpoint on *all* news stories or issues in the news, or to do so in *all individual* news items or programs. However, all news must be presented with due impartiality: that is, with impartiality adequate or appropriate to the subject and nature of the programme. In particular, when reporting on matters of *major political controversy* and major matters relating to current public policy in news programmes, broadcasters must ensure that they reflect a sufficiently wide range of significant views and give those views

¹¹³ Current version of the Guidance Notes, Issue Eleven, 1 July 2015, can be found here: <https://bit.ly/2wqHPgg>

¹¹⁴ Standards cases: The Truthseeker: Media ‘Staged’ Syria Chem Attack / *Ofcom Broadcast Bulletin*, 288. 21 September 2015, – p.44. <https://tinyurl.com/yedflu9v>

¹¹⁵ *Ibid*, p.45 and 48.

due weight.¹¹⁶

10. United States of America

151. As part of the 2017 National Defense Authorization Act (NDAA), the Countering Foreign Propaganda and Disinformation Act (CFPDA), a bipartisan initiative, was adopted by the Congress and signed by the US President. According to the official transcript of its content,¹¹⁷ the bill reflected the concern of Congress that some foreign governments use disinformation and other propaganda tools to undermine the national security objectives of the United States and key allies and partners. It mandates the US government, in particular the State Department and the Department of Defense, to develop a comprehensive strategy to counter foreign disinformation and propaganda and assert leadership in developing a fact-based strategic narrative; an important element of this strategy being to promote an independent press in countries that are vulnerable to foreign disinformation.
152. The Department of State also established a Global Engagement Center (GEC) to lead, synchronise, and coordinate efforts of the federal government to recognise, understand, expose, and counter foreign state and non-state propaganda and disinformation efforts aimed at undermining U.S. national security interests.¹¹⁸
153. The CFPDA authorises the GEC to provide grants to support civil society groups, media content providers, NGOs, federally-funded research and development centres, private companies, or academic institutions in analysing, reporting on, and refuting foreign disinformation efforts.
154. According to its website, the work of the GEC is currently focussed around four core areas: science and technology, interagency engagement, partner engagement, and content production.¹¹⁹ They are explained below:

Science & Technology: the focus is to enable the government and its partners to increase the reach and effectiveness of their communications. Research is on target audiences and utilises data science techniques to measure the effectiveness of debunking efforts.

¹¹⁶ Standards case of RT. / *Ofcom Broadcast Bulletin*, 266, 10 November 2014, – p.43. <https://bit.ly/2rwTkx6>. See more on this case in Richter, Andrei. Legal Response to Propaganda Broadcasts Related to Crisis in and around Ukraine, 2014-2015. *International Journal of Communication*. 9, 2015, pp. 3133-3134. <https://tinyurl.com/y8upoo7d>. See more summaries of the Ofcom cases in: Donde, Maria, Asja Rokša-Zubčević, and Emmanuelle Machet. “Role of Regulators Implementing Accuracy, Objectivity and Impartiality in Practice”. Comparative Background Document. 46th EPRA Meeting. Vienna: 12-13 October 2017, p.7. <https://tinyurl.com/y8rkxg3p>, and in: Asja Rokša-Zubčević. The role of regulatory authorities: Background Questionnaire Report. (Final post-meeting version of 15 November 2016). EPRA/2016/10, pp.13-14. <https://tinyurl.com/y8df9qy>

¹¹⁷ <https://tinyurl.com/y7yandkp>

¹¹⁸ <https://www.state.gov/r/gec/>

¹¹⁹ Ibid

Interagency Engagement: The GEC works closely with the national security agencies to identify opportunities in the messaging process.

Partner Engagement: GEC is tasked to identify, cultivate, and expand a global network of partners who could counteract harmful propaganda. It conducts trainings to enable them to develop and disseminate their own content, using data science and innovative techniques.

Content Production: GEC supports programming in various languages across multiple platforms, including social media, satellite TV, radio, film, and print. These media platforms allow the government and its partners to inject factual content and prevent radicalisation.

155. The CFPDA made some structural changes in the Broadcasting Board of Governors, which oversees the activities of several individual news outlets, such as VOA and RFE/RL.¹²⁰ The agency was placed under the direction of a Chief Executive Officer appointed by the US President, and the 9-member board was reduced to an advisory role and will eventually be renamed. This enabled the streamlining of funding and the consolidation of efforts necessary to meet the purposes of the CFPDA. However, the consolidation of administration created some concerns regarding journalistic independence and credibility for media outlets such as the Voice of America.¹²¹

11. False information and electoral processes

156. Free and fair elections are the bedrocks of a democracy. The role the media, both traditional and increasingly so online, play during elections by carrying out their activities in a fair and balanced way contributes significantly to maintaining an enabling environment for voters guided by their free and well-informed choices.

157. Today a number of countries are concerned with the purity, authenticity and truthfulness of information disseminated in the media during election campaigns. The reason behind it is that the proliferation of disinformation may have a lasting and disruptive effect for citizens electing their representatives and thus could present dangers to democracy and fairness of its instruments. In the words of an OSCE expert on election media campaigns, “the spread of “false information” has increased dramatically because of the rise of populism and the growing use of the Internet and social media for political purposes”.¹²² Indeed, populist

¹²⁰ <https://www.bbg.gov/>

¹²¹ Holly Kathleen Hall (2017) The new voice of America: Countering Foreign Propaganda and Disinformation Act, *First Amendment Studies*, 51:2, 49-61. [10.1080/21689725.2017.1349618](https://doi.org/10.1080/21689725.2017.1349618)

¹²² Glavaš, Davor. Political advertising and media campaign during the pre-election period: A Comparative Study Commissioned by the OSCE Mission to Montenegro. May/July 2017. <https://tinyurl.com/y99j5egr>

rhetoric seems to present a very important contextual element for the current rise of false news.¹²³

158. While in some OSCE participating States there is no specific legislation governing such cases and the general provisions on defamation apply,¹²⁴ other jurisdictions ensure certain common features in the national law related to dissemination of untrue information during electoral campaigns.
159. For example, the **UK** Representation of the People Act 1983 brands an illegal practice making or publishing “any false statement of fact in relation to the candidate’s personal character or conduct”, in particular knowingly publishing “a false statement of a candidate’s withdrawal at the election for the purpose of promoting or procuring the election of another candidate.”¹²⁵ A person making or publishing any false statement of fact may be restrained by injunction by the court from any repetition of that or a similar false statement in relation to the candidate and, for the purpose of granting an interim injunction, *prima facie* proof of the falsity of the statement shall be sufficient.¹²⁶
160. In **Uzbekistan** a “Regulation” on media use during parliamentary campaigns (Clause 15) provides that “information which is disseminated in the mass media shall be true and shall not violate the rights and legitimate interests of candidates for deputy, political parties and initiative groups of electors”. Clause 20 of the Regulation further stipulates that: “editorial offices of the mass media must refrain from dissemination of false information as well as of information denigrating candidates for deputy’s honour and dignity. Candidates for deputy have the right to demand from the editorial office a retraction of false and denigrating information published in the mass media”.¹²⁷
161. The same is true of the Code of Administrative Offences of **Turkmenistan** which (Art. 69) contains a provision that established the offence of “disseminating information about a candidate known to be false” in election and pre-election processes. According to this article, dissemination of information about a candidate known to be false or other acts harming the honour and dignity of the candidate, his/her close relatives and trusted persons incur a fine of

¹²³ See Haiden, Leonie. “Tell me Lies, Tell me Sweet Little Lies: Post-truth and populist politics – a match made in 2016?” in: Fake News: A Roadmap. Ed.: Althuis, Jente and Leonie Haidenis. – King’s Centre for Strategic Communications (KCSC) and the NATO Strategic Communications Centre of Excellence: Riga, 2018, pp. 7-13. <https://tinyurl.com/ybr29km8>

¹²⁴ Glavaš, Davor. Political advertising and media campaign during the pre-election period: A Comparative Study Commissioned by the OSCE Mission to Montenegro. May/July 2017 <https://tinyurl.com/y99j5egr>

¹²⁵ Representation of the People Act 1983, s. 106. <http://www.legislation.gov.uk/ukpga/1983/2>

¹²⁶ Ibid

¹²⁷ Regulation on the Use of Mass Media by Candidates for Deputy, Political Parties, Initiative Groups of Electors during Canvassing within the Framework of Election Campaign for Elections to the Legislative Chamber of the Oliy Majlis of the Republic of Uzbekistan. As quoted in: Defamation and Insult Laws in the OSCE Region: A Comparative Study (Commissioned by the OSCE Representative on Freedom of the Media). March 2017. Author/Lead Researcher: Scott Griffen, Managing Editor: Barbara Trionfi, International Press Institute, p.235 <https://tinyurl.com/yem2p2t7>

up to five times the base amount for physical persons and up to 10 times the base amount for officials.¹²⁸

162. Of particular importance are the relevant changes in the law of **France** (see above).

163. In a case related to defamation *in a specific context of the election campaign*, the **European Court of Human Rights** found a violation of Article 10 of the Convention in a criminal conviction for a false report. The report was published in 8 copies of the forged edition of the official gazette and claimed that the country's president was dead and had been substituted by a look-alike. In this case, we see a conspiracy-theory type allegation of, not so much the death of the President, an easily verifiable fact, but rather of an opinion, based on hearsay, that he was replaced by a double. The complainant therein called not to vote for the wrong person at the forthcoming presidential elections. The ECtHR came to the conclusion that the domestic courts had failed to prove that the complainant was intentionally trying to deceive voters and to impede their ability to vote. It acknowledged that the national Government pursued a legitimate aim of providing the voters with truthful information in the course of the presidential campaign, but dismissed the national court decision as manifestly disproportionate to the aim pursued.¹²⁹

164. In conclusion, we observe that despite certain decriminalisation steps, some OSCE participating States maintain overbroad bans on the dissemination of falsities for the sake of preserving often undefined public interest. Such general bans kept in the statutes are rarely supported by case law, although they still may present the threat of a chilling effect on free speech and freedom of the media.

165. As the UN Special Rapporteur on the right to promotion and protection of the right to freedom of opinion and expression stated in 2000, editors and journalists are arrested, charged, tried and/or sentenced for, *inter alia*, publishing "false and insulting information". He then strongly urged all Governments to ensure that press offences were no longer punishable by terms of imprisonment, except in cases involving racist or discriminatory comments or calls to violence: "In the case of offences such as ... publishing or broadcasting "false" or "alarmist" information, prison terms are both reprehensible and out of proportion to the harm suffered by the victim. In all such cases, imprisonment as punishment for the peaceful expression of an opinion constitutes a serious violation of human rights."¹³⁰

166. In addition, a number of OSCE participating States have in their national law demands to broadcasters, especially public ones, to observe the principles of truthfulness and

¹²⁸ Ibid., p.240.

¹²⁹ *Salov v. Ukraine*, 65518/01, Judgement, 06/09/2005, para 113. <http://hudoc.echr.coe.int/eng?i=001-70096>

¹³⁰ UN Commission on Human Rights. Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussain, submitted in accordance with Commission resolution 1999/36. E/CN.4/2000/63, 18 January 2000, paras 27 and 205. <https://bit.ly/2K8XSBu>.

fairness/objectivity of news and current affairs programming. Violations are punishable by citations, fines or even suspension of broadcast licenses.

167. Independent media regulators, or national regulatory authorities (NRAs), are increasingly becoming the main instrument to counteract dissemination of false news and information in broadcasting. In fact, a number of such NRAs in Europe believe that their remit should be amended to include the regulation of all online media in the matters of accuracy, objectivity and impartiality, including activities related to research, close monitoring of developments and the need (of NRAs) to maintain high level of expertise on these issues.¹³¹
168. According to a report prepared in 2017 for the European Platform of Regulatory Authorities (EPRA), their main challenge lies in the difficulty to achieve a balance between the right to freedom of expression and information, and offences caused by (independent) editorial decisions. As there is no clear-cut solution to such a contradiction, these issues are reviewed only on a case-by-case basis, “examining different factors, such as the nature of the subject matter, the type of programme and channel, the likely expectation of the audience as to content, and the extent to which the content and approach is signalled to the audience.” When dealing with the false news problem, “it appears that the main challenge for the regulator is to determine if such instances can be attributed to an individual, accidental oversight (which can be easily corrected by publishing an apology, reply or correction) or is it a case of editorial policy intention, in which case, once the intent has been established, an appropriate measure by the NRA should be imposed.”¹³²
169. A proof of a person’s intent (or rather malice in the case of false information) is in itself difficult to comprehend and prove (even for a court): people act for a variety of reasons, while actions driven by different reasons can sometimes produce the same results. Thus, judging motivation based on one’s actions alone, or their results, can be counter-productive.¹³³

¹³¹ Donde, Maria, Asja Rokša-Zubčević, and Emmanuelle Machet. “Role of Regulators Implementing Accuracy, Objectivity and Impartiality in Practice”. Comparative Background Document. 46th EPRA Meeting. Vienna: 12-13 October 2017, p. 16. <https://tinyurl.com/ybcszz2a>

¹³² Ibid., p. 8. See also Asja Rokša-Zubčević. The role of regulatory authorities: Background Questionnaire Report. (Final post-meeting version of 15 November 2016). EPRA/2016/10, pp. 11-13. <https://bit.ly/2luHxKk>

¹³³ Verstraete, Mark and Bambauer, Derek E. and Bambauer, Jane R., Identifying and Countering Fake News (August 1, 2017). Arizona Legal Studies Discussion Paper No. 17-15, - pp. 11-12. <https://bit.ly/2I5x5cD>

III. MEDIA SELF-REGULATION AND CO-REGULATION, INCLUDING FACT-CHECKING INITIATIVES

1. European approach to media accountability

170. The issue of self-regulation in the context of challenges and accountability to online media and journalism was a subject of Resolution 2143 (2017) of the Parliamentary Assembly of the Council of Europe (PACE) “Online media and journalism: challenges and accountability”.¹³⁴ It recommended that the European Federation of Journalists (EFJ)¹³⁵ and the Association of European Journalists¹³⁶ call on their members to ensure that legacy news media uphold their editorial standards in their internet presence. This should include their own media content, advertising, third-party content, as well as user-generated content such as feedback or comments by users. Users of online media are to be informed about the same possibilities to address complaints as those of offline media, including to relevant journalists, their media outlet or their professional association.¹³⁷
171. According to the CoE parliamentarians, “all third-party content posted on the websites of professional media falls under the editorial responsibility of these media.”¹³⁸ This provision was apparently influenced by the controversial judgment of the ECtHR in the case of *Delfi AS v. Estonia*,¹³⁹ in which a commercially-run internet news portal was found liable for the offensive online comments of its readers. At the same time, the ECtHR rightfully claims that it does not set in the *Delfi* case any new rules/requirements for other countries concerning the liability of internet news portals for user-generated comments.¹⁴⁰
172. The European Internet Services Providers Association¹⁴¹ was recommended in Resolution 2143 to call on its members who provide social media, search engines and news aggregators to develop ethical quality standards regarding their own transparency and the due diligence of their media services. All providers were expected to set up self-regulatory mechanisms for monitoring these standards and informing the public about their adherence to them. In particular, they were asked to empower their users to report false information to service providers and thus make it known publicly; and voluntarily correct false content or publish a

¹³⁴ Parliamentary Assembly of the Council of Europe. Resolution 2143 (2017) Online media and journalism: challenges and accountability. Text adopted on 25 January 2017. <https://tinyurl.com/ydxzsc8k>

¹³⁵ <https://europeanjournalists.org/>

¹³⁶ <http://www.aej.org/>

¹³⁷ Parliamentary Assembly of the Council of Europe. Resolution 2143 (2017) Online media and journalism: challenges and accountability. Text adopted on 25 January 2017, para 12.2. <https://bit.ly/2HOavFr>

¹³⁸ Ibid, para 12.2.1.

¹³⁹ Case of *Delfi AS v. Estonia* (Application No. 64569/09) Judgment, 16 June 2015. <https://tinyurl.com/ybqz23zl>

¹⁴⁰ Press Unit of the European Court of Human Rights. Q & A *Delfi AS v. Estonia*, Grand Chamber judgment. 16 June 2015, p. 3. <https://tinyurl.com/ydbf9otu>

¹⁴¹ <http://www.euroispa.org/>

reply in accordance with the right of reply or remove such false content. It requested that the ISPs set up alert mechanisms against individuals who regularly post insulting or inflammatory text (“trolls”), and which empower users to complain about these trolls, with a view to excluding them from their forums.¹⁴²

173. The European Interactive Digital Advertising Alliance¹⁴³ was advised in the document to develop self-regulatory standards to ensure that advertisers and public relations companies identify their own internet presence and their contributions to the internet presence of others. They should in particular disclose to the public the person, organisation or company by whom they are commissioned, while disguised advertising and lobbying were recommended to be barred by professional media on the internet, as well as by social media providers, under their terms of service.¹⁴⁴

174. The latest initiative for a multi-stakeholder “Code of Practice” came from the *High level Group on fake news and online disinformation*. A major, if not the core, proposal of the Group’s final report is an idea of a common code for the relevant actors, such as online platforms, news media outlets, journalists, publishers, independent content creators, the advertising industry, and fact-checkers to elaborate, on the basis of the ten guiding principles provided by the Group and mostly related to the work of the social media platforms, search engines, news aggregators. The board of a coalition of the stake-holders is intended to ensure the code’s implementation, continuous monitoring and review.¹⁴⁵ This initiative was fully supported by the European Commission.¹⁴⁶

175. In 2018 representatives of online platforms, leading social networks, advertisers and advertising industry agreed on a self-regulatory Code of Practice to address the spread of online disinformation and fake news.¹⁴⁷

¹⁴² Parliamentary Assembly of the Council of Europe. Resolution 2143 (2017) Online media and journalism: challenges and accountability. Text adopted on 25 January 2017, para 12.3.

<https://tinyurl.com/ydxzsc8k>

¹⁴³ <http://www.edaa.eu/>

¹⁴⁴ Parliamentary Assembly of the Council of Europe. Resolution 2143 (2017) Online media and journalism: challenges and accountability. Text adopted on 25 January 2017, para 12.4.

¹⁴⁵ A multi-dimensional approach to disinformation: Report of the independent High level Group on fake news and online disinformation. Brussels, 2018, pp. 32-33. <https://tinyurl.com/yc6fvmuf>

¹⁴⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions “Tackling online disinformation: a European Approach”. COM/2018/236 final. 26 April 2018. <https://bit.ly/2rz2WrW>

¹⁴⁷ See <https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation>

2. Professional codes

176. The **International Federation of Journalists** (IFJ) has proclaimed a set of principles setting out the professional conduct of journalists who are “engaged in gathering, transmitting, disseminating and commenting on news and information in describing events”. The very first standard reads as follows:

“Respect for truth and for the right of the public to truth is the first duty of the journalist.”¹⁴⁸

177. In the pursuit of the truth, according to the IFJ code, the journalist shall, at all times, deem it his or her duty to faithfully “defend the principles of freedom in the honest collection and publication of news, and of the right of fair comment and criticism.” The journalist is called to “report only in accordance with facts of which he/she knows the origin”. The IFJ further pledges that journalists shall not suppress essential information or falsify documents. If any published information is still found to be *harmfully* inaccurate, the journalist shall do the utmost to rectify it.¹⁴⁹

178. These principles are unsurprisingly shared by national associations of journalists that are members of the IFJ, as well as followed by the grounding documents of the national self-regulation bodies. For example, the Code of Ethics of Journalists in the **Northern Macedonia**, in its preamble states that the “main duty of the journalist is to respect the truth and right of the public to be informed.”¹⁵⁰

179. In turn, Section 1 (“Truthfulness and preserving human dignity”) of the **German** Press Code proclaims:

“Respect for the truth, preservation of human dignity and accurate informing of the public are the overriding principles of the Press. In this way, every person active in the Press preserves the standing and credibility of the media.”¹⁵¹

180. Members of the National Union of Journalists (**UK and Ireland**) are expected to abide by the professional principle to ensure that information disseminated is honestly conveyed, accurate and fair and to do her/his utmost to correct harmful inaccuracies.¹⁵² Additionally, in Ireland, the self-regulatory body for on-demand audiovisual services has recently developed

¹⁴⁸ IFJ Declaration of Principles on the Conduct of Journalists. (Adopted by 1954 World Congress of the International Federation of Journalists - IFJ. Amended by the 1986 World Congress.)

<https://tinyurl.com/zplxstsu>

¹⁴⁹ Ibid.

¹⁵⁰ http://znm.org.mk/?page_id=1412&lang=en

¹⁵¹ German Press Code. Drawn up by the Deutscher Presserat (German Press Council) in collaboration with the Press associations and presented to Federal President Gustav W. Heinemann on 12 December 1973 in Bonn. Version of 22 March 2017. <https://tinyurl.com/yaxjfqwt>

¹⁵² National Union of Journalists (NUJ) Code of Conduct. The latest version of 5 February 2013. The NUJ's Code of Conduct has set out the main principles of British and Irish journalism since 1936. Paras 2 and 3. The code is part of the rules and all journalists joining the union must sign that they will strive to adhere to it. <https://tinyurl.com/y9kjdb6>

and introduced a code that includes requirements for news and current affairs. Specifically, this includes an obligation that, where content is purported to be news or current affairs, the concepts of fairness, objectivity and impartiality should apply.¹⁵³

181. In **Finland**, the Guidelines for Journalists, a document used for self-regulation purposes, provides the following canons regarding dissemination of information in the media:

“(8) The journalist must aim to provide truthful information. <...>

(10) Information obtained must be checked as thoroughly as possible, including when it has been published previously.

(11) The public must be able to distinguish facts from opinions and fictitious material.

Similarly, photographic and sound material must not be used in a misleading manner.

(12) Information sources must be approached critically. This is particularly important in controversial issues, since the source of the information may be intended for personal gain or to damage others.

(13) A news item may be published on the basis of limited information. Reports on subjects and events should be supplemented once new information becomes available. News events should be pursued to the end.”¹⁵⁴

3. Media councils

182. Regarding the best practice on self-regulation of “false news” in the OSCE area, it is of particular interest to look at the recently established practice of the **Advisory Commission on Counteracting the Propaganda**. The Commission was set up in 2016 by the media self-regulation bodies in Armenia, Azerbaijan, Belarus, Georgia, Moldova, Russia and Ukraine, each of them delegating a representative. These media councils currently comprise the informal Network of Media Self-Regulation Bodies.¹⁵⁵

183. The Recommendations of this Network, one of its major documents made on behalf of the seven media self-regulation councils, provide for a set of the main features of propaganda. This set is based on an earlier decision¹⁵⁶ of the Public Collegium on Media Complaints

¹⁵³ Donde, Maria, Asja Rokša-Zubčević, and Emmanuelle Machel. “Role of Regulators Implementing Accuracy, Objectivity and Impartiality in Practice”. Comparative Background Document. 46th EPRA Meeting. Vienna: 12-13 October 2017, p. 10. <https://tinyurl.com/y8rkxg3p>

¹⁵⁴ Guidelines for Journalists in Finland (version from 1 January 2014). <https://bit.ly/2K8Eepc>

¹⁵⁵ See more on it here: <https://www.mediacouncils.org/about-us/>

¹⁵⁶ On the complaint of the Commission on Journalists’ Ethics, Ukraine, regarding the programme Vesti nedeli of the TV channel Rossiya-1 and its anchor-man, Dmitry Kiselyov, triggered by the airing of a story on the “Ukrainian Assembly”: Decision of the Public Collegium on Media Complaints N 98. 13 February 2014. <https://tinyurl.com/y9cupeoh>. See more in: Propaganda and Freedom of the Media: Non-paper of the OSCE Office of the Representative on Freedom of the Media. – Vienna: Organization for Security and Co-operation in Europe, 2015, pp. 55-57. <http://www.osce.org/fom/203926>

(PCMC), a national media council in Russia, and includes the following three characteristics relevant to this report:

- a. a targeted selection of facts that works for the tight “script,” an active use of misinformation, where useful and possible, a manipulation with facts, statistics, opinions, including expert ones, or a shift in emphases where direct misinformation seems a “no-go”;
- b. an action in the logic of “the end justifies the means”; the use of means and methods that are mostly incompatible with values such as honesty and truthfulness;
- c. the falsification of the appearances of reliability of information, including its sources.¹⁵⁷

184. So far the practice of the Advisory Commission on Counteracting the Propaganda, a somewhat unusual supranational press council in the region, consists of just four decisions called “opinions” dating from September 2017. In all cases, this body prominently referred to the above characteristics of propaganda-related disinformation.¹⁵⁸ In one of them, it found a story by famous Azerbaijani journalist Eynulla Fatullayev – published on the news website of his own NGO – unethical and unprofessional from an international standards viewpoint. The story had reported on the Azerbaijani opposition’s subversive activity in Tbilisi. In particular, the Advisory Commission considered as “by nature unfair, provocative and manipulative the pseudo-facts, presented as uncontested reality in the story, but actually having all features of the post-truth, prohibitive for journalism”.¹⁵⁹

185. The opinion on another case came to the same conclusion – this time on the nature of the “journalist investigation” report by the Russian CrimeaInform news agency that had provided disinformation to the readers with the aim of creating false scoops. The Advisory Commission criticised the media outlet for publication in a “long story” of a large number of unsubstantiated statements, as well as those not supported by facts, while purely alarmist, defamatory in nature and calculated, in particular, to cause feelings of suspicion, anxiety or even fear of “enemy press” (in this case – Radio Liberty). The Advisory Commission found

¹⁵⁷ Recommendations of the Network of Media Self-Regulation Bodies as to the dissemination of propaganda in the media (*Рекомендации Сети организаций медийного саморегулирования (СОМС) относительно распространения пропаганды в СМИ*), 17 June 2016. <https://tinyurl.com/y8m8qr8x>

¹⁵⁸ All four are published (in Russian) at: <https://bit.ly/2JRa0GM>.

¹⁵⁹ “Opinion of the Advisory Commission on Counteracting the Propaganda of the Network of Media Self-Regulation Bodies (NMSB) on the complaint of the Council of Charter of Journalists’ Ethics of Georgia as to the story published on website <https://haqqin.az>” (*Мнение Консультативной комиссии по противодействию пропаганде Сети организаций медийного саморегулирования (СОМС) относительно жалобы Совета Хартии Журналистской Этики Грузии на публикацию сайта <https://haqqin.az>*). 14 September 2017. <https://tinyurl.com/y75axra8>

incompatible with the “civilized idea of journalism and freedom of speech” an uncontested opinion of the report’s expert as to the nature of activity of journalists working undercover for the Radio Liberty outlet falling into the scope of the crime of state treason.¹⁶⁰

186. Some press councils already regulate online publications,¹⁶¹ such as the UK’s Independent Press Standards Organisation, which oversees over 1,100 online publications,¹⁶² and are subject to the Editors’ Code of Practice.¹⁶³ Standards of truth and accuracy are often quoted today by complainants to the press councils as a reason of their dissatisfaction with the journalists’ work.¹⁶⁴
187. To improve the climate of self-regulation, the press councils and media organisations are assisted by a number of national media regulators to better adhere to voluntarily accepted professional standards. According to the above-mentioned report provided in 2016 to EPRA, some NRAs, such as in Croatia, “have prepared guidelines to clarify legal provisions with examples offering best practice on how to deal with propaganda issues and maintain professional standards in reporting.” In order to help broadcasters of Bosnia and Herzegovina solve a possible dilemma on what to do with propaganda, the Communications Regulatory Agency developed Guidelines on Implementation of the Code on Audiovisual and Radio Media Services. In the UK, Ofcom, and in France, the CSA, introduced guidance on the application of the impartiality and accuracy provisions of the law.¹⁶⁵
188. The development of codes of ethics and the sustaining of high professional standards, though not a direct impact of the NRA’s decisions is very much connected to their activity. “Good-practice examples in this respect are numerous and are again related to the interconnection of industry and NRA’s work, coupled with wider societal perception and needs.”¹⁶⁶

¹⁶⁰ “Opinion of the Advisory Commission on Counteracting the Propaganda of the Network of Media Self-Regulation Bodies (NMSB) on the complaint of the Commission on Journalist Ethics of Ukraine as to the publication of the CrimeaInform news agency” (*Мнение Консультативной комиссии по противодействию пропаганде Сети организаций медийного саморегулирования (СОМС) относительно обращения Комиссии по журналистской этике Украины на публикацию информационного агентства «Крым информ»*). 14 September 2017. <https://bit.ly/2sOGKLk>

¹⁶¹ Mamontova, Olga. Area of activity of modern press councils in Europe. In: *The Online Media Self-Regulation Guidebook*, Ed. by A. Hulin and M. Stone. – Vienna: OSCE Representative on Freedom of the Media, 2013, pp.104-105 <https://tinyurl.com/y79k45e8>

¹⁶² “IPSO welcomes new members”, statement of 6 February 2017. <https://tinyurl.com/ycvqsxao>

¹⁶³ <https://www.ipso.co.uk/editors-code-of-practice/>

¹⁶⁴ Such as in Ireland where they were cited in 51.2 percent of all complaints to the Press Council, see 2016 Annual Report of the Press Council of Ireland and the Office of the Press Ombudsman, p. 9. <https://tinyurl.com/y8p6vajw>

¹⁶⁵ Asja Rokša-Zubčević. The role of regulatory authorities: Background Questionnaire Report. (Final post-meeting version of 15 November 2016). EPRA/2016/10, p. 10. <https://tinyurl.com/y8df9qy>

¹⁶⁶ *Ibid.*, p. 12.

4. Self-regulation efforts by media companies

189. Traditionally, public service media set the example and provide a model for accuracy in reporting. For example, due accuracy is a fundamental commitment for the *British Broadcasting Corporation* (BBC) in the UK. It is also a requirement under the Agreement accompanying the BBC Royal Charter from 2017 (and earlier ones).
190. The word “due” here means that the accuracy must be adequate and appropriate to the BBC product, appropriate to the subject and nature of the content, the likely audience expectation and any flagging that may influence that expectation. Therefore, its requirements may vary for fiction, such as drama, entertainment and comedy, and for “factual content,” as they are different genres. The requirements may even vary within a genre, depending on whether, for example, fiction is based on facts.
191. Wherever possible, accuracy is achieved by using first hand sources, checking and crosschecking of facts, validating the authenticity of documents and other (increasingly digital) materials, and corroborating claims and allegations made by contributors.
192. The BBC Editorial Guidelines state that “Accuracy is not simply a matter of getting facts right. If an issue is controversial, relevant opinions as well as facts may need to be considered. When necessary, all the relevant facts and information should also be weighed to get at the truth. In news and current affairs content, achieving due accuracy is more important than speed.”¹⁶⁷
193. The Board of Directors of the international news service *Agence France Press* (AFP) in its latest report noted that verification of information is at the heart of the agency’s mission and practices, through strengthening its vigilance towards rumours and unverified information, particularly on the social networks. As part of this effort, AFP played a major role in the CrossCheck project,¹⁶⁸ with 37 partners, ahead of the 2017 French presidential election. It is one of the 66 international media signatories from such OSCE participating States as Bosnia and Herzegovina, Croatia, the Czech Republic, Georgia, Germany, Italy, Ireland, the Netherlands, Norway, Portugal, Serbia, Sweden, Spain, Turkey, the UK, and the USA to the Code of Principles of the International Fact Checking Network (IFCN).¹⁶⁹ Launched by Poynter Institute¹⁷⁰ in 2015, the IFCN supports fact-checking initiatives by promoting best practices and exchanges in this field. In Norway an NGO by the name Faktisk.no provides a

¹⁶⁷ Accuracy part of the BBC Editorial Guidelines:

<http://www.bbc.co.uk/editorialguidelines/guidelines/accuracy>

¹⁶⁸ CrossCheck was launched by the First Draft network and Google News Lab, as a collaborative tool bringing media, technological and academic partners together to stop dissemination of disinformation online and to improve access of the public to verified information.

<https://crosscheck.firstdraftnews.org/france-en/>

¹⁶⁹ <https://tinyurl.com/ycbv3ojb>

¹⁷⁰ A non-profit school for journalism and media studies located in St. Petersburg, Florida (USA).
<https://www.poynter.org/>

badge that confirms that the news resource is compliant with the IFCN principles and subjected itself to the established vetting process and evaluated by external assessors. Through this process, an organization must exhibit a commitment to non-partisanship and fairness, transparency of sources, transparency of funding and organization, transparency of methodology, and a commitment to open and honest corrections.¹⁷¹

AFP has created “Factuel”,¹⁷² a blog dedicated to cross checking information, and is developing data journalism and verification tools, particularly for news videos on social networks. The agency also participated in media education at schools.¹⁷³ Also in France, the audiovisual public service media have launched “Vrai ou Fake” in June 2018.¹⁷⁴ It is a common platform of fact-checking that gathers content produced by Arte, Institut national de l’audiovisuel, France Médias Monde, France Télévisions, Radio France and TV5 MONDE, and includes programmes such as L’Oeil du 20 heures, le Vrai du faux, Les Idées claires, Les Observateurs and Désintox.

194. A US congressional report points to a number of steps by other media outlets to exercise “collective discipline” that led to an increase of scrutiny of information before publication to avoid spreading fake news.¹⁷⁵ It gives an example of *Le Monde*’s Decodex project¹⁷⁶ which enabled a suite of fact-checking products based on a database of more than 600 websites, both French and international, identified by its fact checkers as unreliable because the sites could not be verified as legitimate or were deemed to manipulate information.¹⁷⁷ The report makes a specific case of Facebook, which “perhaps drawing from lessons learned in the 2016 U.S. election” announced in April 2017 that it had suspended 30,000 accounts for promoting propaganda or election-related spam before the poll in France, although the report quotes as many as 70,000 the number of accounts that could have been suspended.¹⁷⁸

¹⁷¹ <https://www.faktisk.no/om-oss>

¹⁷² <https://factuel.afp.com/>

¹⁷³ “AFP approves the 2018 budget and boosts its means for fighting fake news.” 31 January 2018 <https://bit.ly/2H7pZ7d>

¹⁷⁴ See <https://www.francetvinfo.fr/vrai-ou-fake/>

¹⁷⁵ “Putin’s asymmetric assault on democracy in Russia and Europe: implications for U.S. national security”: A minority staff report prepared for the use of the Committee on Foreign Relations, United States Senate, One Hundred Fifteenth Congress, second session, January 10, 2018. Washington: U.S. Government Publishing Office, 2018. <https://tinyurl.com/ybgxturm>

¹⁷⁶ See <http://www.lemonde.fr/verification/>

¹⁷⁷ Davies, Jessica. “Le Monde Identifies 600 Unreliable Websites in Fake-News Crackdown,” Digiday, 25 January 2017. As quoted in “Putin’s asymmetric assault on democracy in Russia and Europe” op. cit., p.125.

¹⁷⁸ Auchard, Eric & Joseph Menn, “Facebook cracks down on 30,000 fake accounts in France,” Reuters, 13 April 2017; Joseph Menn, “Russia Used Facebook to Try to Spy on Macron Campaign—Sources,” Reuters, 27 July 2017. As quoted in “Putin’s asymmetric assault on democracy in Russia and Europe” op. cit., p.126. More on the efforts taken by online platforms Facebook, Twitter, Reddit, and Google counteracting the dissemination of false news, see the report from the Stanford University Law School’s Law and Policy Lab “Fake News & Misinformation Policy Practicum” led by Sen. Russ Feingold and published in October 2017: <https://stanford.io/2jN82Na>

195. Alas, a recent study showed that fact-checking websites have a targeting problem, with “no instances of people reading a fake news article and a fact-check of that specific article,” at least in the US.¹⁷⁹ The study also found that Facebook was by far the platform through which Americans most often navigated to a “fake news” site. In 2017, in response to criticism, the company began flagging stories on its site that third-party fact-checkers found to make false claims with a red label saying “disputed.” Still, in December of the same year, Facebook announced a change to its monitoring approach: instead of labelling false stories, it now surfaces the fact-checks along with the fake story in the user’s news feed.¹⁸⁰
196. In 2017, Wikipedia founder Jimmy Wales launched WikiTribune,¹⁸¹ a large-scale attempt to combat fake news. It is a news website in which professional journalists research and report news stories alongside volunteers who curate articles by proofreading, fact-checking, suggesting changes, and adding sources.¹⁸²
197. In the same year, Mozilla Firefox, an open-source web browser developed by Mozilla Foundation and Corporation, started a Mozilla Information Trust Initiative in yet another attempt to keep the internet credible and healthy. It pledged to develop products, research, and communities to battle information pollution and online “fake news”. In particular, it promised to address the issue of educating and empowering online users, as well as those leading innovative literacy initiatives, through developing a web literacy curriculum that addresses misinformation.¹⁸³
198. In 2016, the European Commission and four major social media platforms announced a *Code of Conduct on countering illegal online hate speech*.¹⁸⁴ It included a series of commitments by Facebook, Twitter, YouTube and Microsoft to have in place clear and effective processes to review notifications regarding illegal hate speech on their services so they can remove or disable access to such content in Europe. The *Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law* (see above) serves as a benchmark for an evaluation of notifications. An evaluation carried out by NGOs and public bodies in EU 24 Member States, released a year later, showed that the companies

¹⁷⁹ Carey, Benedict. “‘Fake news’: wide reach but little impact, study suggests.” 2 January 2018 <https://tinyurl.com/y9c3mvl5>

¹⁸⁰ Ibid.; Chirgwin, Richard. Facebook folds fake news flag: We’re not disputing that. / The Register. 21 December 2017. <https://tinyurl.com/yaewgq3u>; Juhász, Attila and Patrik Szicherle. The political effects of migration-related fake news, disinformation and conspiracy theories in Europe. Budapest, 2017, – pp. 25-26. <https://tinyurl.com/ycw38fvu>

¹⁸¹ <https://www.wikitribune.com/>

¹⁸² Owen, Laura Hazard. “Wikipedia founder Jimmy Wales launches WikiTribune, a large-scale attempt to combat fake news”. 24 April 2017. <https://tinyurl.com/mtz5y8c>

¹⁸³ Borchert, Katharina. The Mozilla Information Trust Initiative: Building a movement to fight misinformation online. 8 August 2017. <https://tinyurl.com/ydf6qjgx>

¹⁸⁴ Code of Conduct on countering illegal hate speech online. Factsheet, December 2016. <https://bit.ly/2I7qElo>

had made significant progress in following up on their commitments.¹⁸⁵ However, the practice of media platforms policing false news may become a difficult step for a market-driven entity: when “fake” is popular, opposing it may make platforms unpopular.¹⁸⁶

5. Media literacy

199. Education is generally understood as an activity designed to encourage those who study to seek and learn the truth. Media literacy makes our societies more enlightened and better prepared to defend their own interests, for which peace and security are the essential requirements, from manipulations in the media. The more intelligent the readers and viewers are internationally, the more social media can play an important role in the OSCE region. Media literacy should aim at rational censorship, the only kind of censorship that can be endorsed by international organisations. It enables one to judge news reports correctly and to understand what and why the media actually say or do not say.
200. “Media literacy” is a broad notion that includes the technical, cognitive, social, civic and creative capacities that allow a citizen to access, have a critical understanding of and interact with the media. A key element in this, and in other definitions of media literacy, is the development of critical thinking by the media user.¹⁸⁷
201. The EP sees the potential of entertainment-education as a means of articulating shared human values, a practice that may be studied as part of media literacy in the larger OSCE region.¹⁸⁸
202. As a report for EPRA noted, media literacy “also helps people to manage content and communications, and protect themselves and their families from the potential risks associated with using these services. In this context, the development of cognitive skills, or critical understanding, is a useful means by which children and adults can learn to identify the relative trustworthiness of different forms of content and information.”¹⁸⁹ In this regard, it was concluded that such regulatory authorities might have relevant powers to promote media

¹⁸⁵ “Countering online hate speech – Commission initiative with social media platforms and civil society shows progress.” European Commission - Press release. Brussels, 1 June 2017. <https://tinyurl.com/y7lavjbw>. See also Facebook Community Standards: <https://tinyurl.com/yanebsa3>; Facebook files / The Guardian. <https://tinyurl.com/m7kxgm8>

¹⁸⁶ Verstraete, Mark and Bambauer, Derek E. and Bambauer, Jane R., Identifying and Countering Fake News (August 1, 2017). Arizona Legal Studies Discussion Paper No. 17-15, – p. 31. <https://bit.ly/2I7UzKh>

¹⁸⁷ Mandate of the Expert Group on Media Literacy. European Commission, Directorate-General for Communications Networks, Content and Technology. Brussels, 6 July 2016. <https://tinyurl.com/ybxfygae>

¹⁸⁸ European Parliament resolution of 23 November 2016 on EU strategic communication to counteract propaganda against it by third parties (2016/2030(INI)). Para 54. <https://tinyurl.com/ydyfy89k>

¹⁸⁹ Rokša-Zubčević, A. The role of regulatory authorities: Background Questionnaire Report. (Final post-meeting version of 15 November 2016). EPRA/2016/10, – p.10. <https://tinyurl.com/y8df9qy>

- literacy.¹⁹⁰ In Switzerland, for example, the Federal Office of Communications¹⁹¹ promotes internet services that take over the role of “lighthouses of trust” and offer content, “which has a certain “public service value” and respects the rules on accuracy, objectivity and impartiality”.¹⁹²
203. Online media literacy programmes are already in place in a number of OSCE participating States. For example, an “extraordinary experiment” was launched in late 2017 by the Italian government, in cooperation with leading digital companies including Google and Facebook. It aims to train a “generation of students” how to recognise fake news and conspiracy theories online. The programme teaches students how their “likes” are monetised and politicised, and, in particular, makes them keep an eye out for parody URLs. The students are also tasked to “re-report articles” by reaching out to experts to verify facts.¹⁹³
204. The first online course on disinformation and media literacy in English was jointly developed in 2018 by universities in Slovakia and Hungary.¹⁹⁴ Throughout the course, students learn and discover basic terminology and concepts, but also, using concrete examples, understand the way disinformation impacts the lives of individuals and entire societies. It provides practical tips on how to spot and stop the spread of online disinformation.
205. Reports suggest that media literacy programmes can be quite effective. For example, a 2017 audience survey in Ukraine pointed out that consumers are becoming more aware of the motives behind the information they access. More than half of Ukrainian readers and viewers are mindful of “pre-paid materials” (known as *dzhinsa*) placed in media outlets, and out of the 55 percent of people who know *dzhinsa* exists, 63 percent say they understand how to spot a “paid news” report, an increase of 16 percent from 2016.¹⁹⁵
206. A recent report prepared by the European Audiovisual Observatory for the European Commission, and based on the data provided by a pan-European team of national experts, refers to 547 media literacy projects implemented in EU member States since 2010. Media literacy skills linked to critical thinking was addressed by 403 of those projects, while those related to media use featured in 385 of the 547 projects.¹⁹⁶
207. Critical thinking, in this context, means an understanding of how the media industry works and how media messages are constructed; questioning the motivations of content producers

¹⁹⁰ Ibid., p. 15.

¹⁹¹ <https://www.bakom.admin.ch/bakom/en/homepage.html>

¹⁹² Donde, Maria, Asja Rokša-Zubčević, and Emmanuelle Machet. “Role of Regulators Implementing Accuracy, Objectivity and Impartiality in Practice”. Comparative Background Document. 46th EPRA Meeting. Vienna: 12-13 October 2017, p. 10. <https://tinyurl.com/y8rkxg3p>

¹⁹³ Horowitz, Jason. In Italian Schools, Reading, Writing and Recognizing Fake News. The New York Times. 18 October 2017. <https://nyti.ms/2kXxumx>

¹⁹⁴ <http://www.knowhoax.org/course?courseid=cto>

¹⁹⁵ Ukrainians Grow as Critical News Consumers. 6 September 2017. <https://tinyurl.com/y7y1t8yx>

¹⁹⁶ Chapman, Martina. Mapping of media literacy practices and actions in EU-28. (Ed. by Maja Capello). Strasbourg: European Audiovisual Observatory, 2016, – pp. 28, 39. <https://www.obs.coe.int/en/web/observatoire/reports>

in order to make informed choices about content selection and use; recognising different types of media content and evaluating content for truthfulness, reliability and value for money; and recognising and managing online security and safety risks. Media use skills relate to the ability to search, find and navigate and use media content and services.¹⁹⁷

208. Lying is immoral and unprofessional, while the mechanisms to keep the standards of the journalist profession are well-known: voluntary self-regulation, such as media councils and codes of practice. These provide useful communication with the audience and the public at large. Efforts are made to apply these mechanisms in the field of social media and other online speech. Media literacy initiatives, which recently gained wider support, also aim at improving understanding and communication between the public and the media. Perhaps, developing and widening this two-way street will bring a solution to the problems established by disinformation.

¹⁹⁷ Ibid. p. 41.