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Definition and Regulation as an Effective Measure to Fight Fake News in the European Union*

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Summary: Fake news is relevant in most countries of the world; nowadays the disinformation and fake news are of great importance as they greatly affect different political and social aspects of public life including healthcare, elections, migration, economy, etc. People are free to express themselves in different forms on the Internet, including publishing any content due to the freedom of expression. In order to understand how to legally frame fake news, it should first be clearly defined. The problem of disinformation and fake news is closely connected to the fact that providing a new law on fake news is likely to not just overlap but even often to conflict with the legislations that guarantee freedom of expression as fundamental freedom in the European Union. After considering existing laws, comparing, and analyzing measures taken to combat fake news, it appears that legislation may lead to over-censoring, violating freedom of expression. For effective fighting with fake news and its negative impact on the EU public, regulation on fake news is not necessary, it brings more legal issues than benefits to combating the dissemination of disinformation. Clearly defining the borderline between fake news and lies in the context of freedom of expression can therefore be more useful, taking a balancing approach. The general public is in many cases lacking media literacy and it can be improved by strengthening the role of media, which should be more consistent and be aimed at educating modern society.

Keywords: disinformation, fake news, freedom of expression, legal definition, regulation

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1. Introduction

Technological evolution has led humanity to great achievements, having an impact on both economy and society.[1] Along with the development, the era of digital technologies brings a certain lack of control over the information freely flowing on the Internet.[2] In 2020 in Estonia, 89% of population has used Internet, in the world the number is smaller, however still sufficient – 56,7%.[3] The tendency of Internet usage grows tremendously, it is also demonstrated by rates of social media use all over the world, as well as in the EU. Social media has become a platform for generating content rather than platform meant purely for communication.[4] Such a new role of social media leads to the fact that enormous amount of content is left out of control, including illegal content and fake news. Fake news may lead to different issues, such as influence and interference with elections,[5] casting doubts on the trustworthiness of authorities and public health system during the COVID-19 pandemic.[6] The dissemination of fake news poses a risk to both

1 SHEPHERD, J. What is the Digital Era? In: DOUKIDIS, G., MYLONOPOULOS, N., POULOUDI, N. (ed.). *Social and Economic Transformation in the Digital Era,* UK: Idea Group Inc. 2004, pp. 1–18.; HOFFMANN, T. The Impact of Digital Autonomous Tools on Private Autonomy. *Baltic Yearbook of International Law Online*. 2020, vol. 18, pp. 18−31; KERIKMÄE, T., HOFFMANN, T., CHOCHIA, A. Legal Technology for Law Firms: Determining Roadmaps for Innovation. *Croatian International Relations Review*. 2018, vol. 24, no. 81, pp. 91−112. DOI: 10.2478%20/cirr-2018-0005

2 KERIKMÄE, T., NYMAN-METCALF, K. The Rule of Law and the Protection of Fundamental Human Rights in an Era of Automation. In: GORDON, J.-S. (ed.). *Smart Technologies and Fundamental Rights.* Brill: Philosophy and Human Rights; 2020, vol. 350, pp. 221−239. DOI: 10.1163/9789004437876_011; NYMAN-METCALF, K., KERIKMÄE, T. Machines are taking over – are we ready? Law and Artificial Intelligence. *Singapore Academy of Law Journal*. 2021, vol. 33, pp. 24−49.

3 The World bank, Individuals using the internet (% of population), 2020.

4 Please see *e.g.* KOBERNJUK, A., KASPER, A. Normativity in the EU's Approach towards Disinformation. *TalTech Journal of European Studies*. 2021, vol. 11, no. 1, pp. 170−202. DOI: 10.2478/bjes-2021-0011; LAMBERT, P., NYMAN-METCALF, K. Country Reports: Estonia. In: LAMBERT, P. (ed.). *International Handbook of Social Media Laws*. Croydon: Bloomsbury. 2015, pp. 299−304.

5 ALCOTT, H., GENTZKOW, M. Social Media and Fake News in the 2016 Election. *Journal of Economic Perspectives*. 2017, vol. 31, no. 2, pp. 211–236.

6 GUTIÉRREZ, C., COBA-GUTIÉRREZ, L. M., GÓMEZ-DÍAZ, J. A. Fake news about COVID-19: a comparative analysis of six Ibero-American countries. *Revista Latina De Comunicacion Social.* 2020, no. 78, pp. 237–264.

freedom of expression and the right to access information. Legislation is few steps behind the technology, confirmed by the fact that fake news, that is being disseminated in different forms (text, images, videos, deepfakes or combination of these forms)[7] all over the internet, often cannot be forbidden on legal grounds, because fake news has not been defined or regulated. Such a situation has occurred due to the overlapping with freedom of expression, fundamental freedom which is an integral part of human dignity.[8] This research discusses whether definition and regulation of fake news is a necessary measure to combat fake news. The aim of this research is to assess how much it is necessary to restrict freedom of expression in the context of fake news and if fake news should be eventually regulated. The first section explains how freedom of expression is being balanced with other rights and freedoms. Through interpretation of case-law different approaches are explained. These approaches are necessary in context of possible categorization of fake news as a form of expression. The second section provides information on existing measures to combat fake news in the EU. The comparison between legal acts on the matter in different countries shows lack of harmonization. Additionally, it considers the research in context of definition of fake news taking place in the EU and slightly discusses the approach of United States. The US approach is necessary for understanding legal issues that would possibly arise if a common definition is not adopted.

2. Interference with Freedom of Expression

Freedom of expression is a fundamental freedom and therefore an integral part of a modern democratic society.[9] The freedom of expression is protected by Article 11 of Charter of Fundamental Rights of the European Union (hereinafter Charter), which is a primary law. European Convention on Human Rights (hereinafter Convention) also guarantees specific rights and freedoms, including freedom of expression in accordance with Article 10. The meaning of freedom of expression does not only consist of interpretation of Article 10 paragraph 1 of the Convention but also derives from the case-law. Along with the expression of opinion,

[7] BOTHA, J., PIETERSE, H. Fake News and Deepfakes: A Dangerous Threat for 21st Century Information Security. *International Conference on Cyber Warfare and Security*. 2020, vol. 15, pp. 57–66.

[8] KOCHARYAN, H., VARDANYAN, L., HAMUĽÁK, O., KERIKMÄE, T. Critical Views on the Right to be Forgotten after the Entry into Force of the GDPR: Is it Able to Effectively Ensure our Privacy? *International and Comparative Law Review.* 2021, vol. 21, no. 2, pp. 96−115. DOI: 10.2478/ iclr-2021-0015

[9] ELFORD, G. Freedom of expression and social coercion. *Legal theory*. 2021, vol. 27, no. 2, pp. 149–175.

information or ideas through speech,[10] freedom of expression includes expressing oneself in clothing,[11] the access to public information,[12] the artistic expression,[13] radio and television broadcasting,[14] protection of witnesses from incriminating themselves,[15] the expression in written form (such as leaflets),[16] the displaying of vestimentary symbols of religious or political groups,[17] and the expression of criticism or satire.[18] Freedom of expression is indeed a right that all EU citizens are entitled to, however this right is neither an absolute right nor a non-derogable right, such as right to life, prohibition of torture, prohibition of slavery, right for no punishment without law; these rights are not subjected to derogation even in time of emergency pursuant to Article 15 of the Convention, meaning that no interference is allowed and there is no right to balance these rights with public safety interests.[19] However, the derogation from freedom of expression is possible in some conditions.[20] Moreover, it should be balanced with other rights and freedoms in a way that it neither infringes other rights[21] and freedoms nor violates media pluralism.[22] According to Article 10 paragraph 2 of the Convention, this freedom may be restricted on several occasions. When considering how to balance different rights it is essential to pay attention to the case-law.

2.1. Forms of expression

Freedom of expression may be restricted pursuant to Article 10 paragraph 2 of the Convention, if there is a threat to public safety, national security, public health,

[10] DJAJIĆ, S. Freedom of expression, strong language and public servants. *Zbornik radova Pravnog fakulteta Novi Sad*. 2021, vol. 55, no. 3, pp. 803–827.

[11] Stevens v. United Kingdom, no. 11674/85, ECtHR, 1986.

[12] Leander v. Sweden, no. 9248/81, ECtHR, 1987.

[13] Müller and Others v. Switzerland, no. 10737/84, ECtHR, 1988.

[14] Groppera Radio AG and Others v Switzerland, no. 10890/84, ECtHR, 1990.

[15] K. v. Austria, no. 47/1992/392/470, ECtHR, 1993.

[16] Chorherr v. Austria, no. 13308/87, ECtHR, 1993.

[17] Vajnai v. Hungary, no. 33629/06, ECtHR, 2008.

[18] Eon v. France, no. 26118/10, ECtHR, 2013.

[19] TOULA, C. M. Freedom of Expression. *The Southern communication journal*. 2020, vol. 85, no. 3, pp. 203–204.

[20] GUNATILLEKE, G. Justifying Limitations on the Freedom of Expression. *Human Rights Review*. 2021, vol. 22, no. 1, pp. 1–18.

[21] RIDDIHOUGH, G., PURNELL, B., TRAVIS, J. Freedom of Expression. *Science (American Association for the Advancement of Science)*. 2008, vol. 319, no. 5871, p. 1781. DOI: 10.1126/science.319.5871.1781

[22] DYER, A. Freedom of Expression and the Advocacy of Violence: Which Test Should the European Court of Human Rights Adopt? *Netherlands quarterly of human rights*. 2015, vol 33, no. 1, pp. 78–107.

or morals. Furthermore, this freedom may be restricted when overlapping with other rights and freedoms, such as right to privacy, which is also mentioned most frequently. In some circumstances even restrictions of Article 10 paragraph 2 of the Convention shall be reconsidered, like derogation from freedom of expression in case of overlapping with someone's right for protection of reputation which is a part of right to privacy protected by Article 8 of the Convention. In *Frankowicz v. Poland,*[23] the Court found that expressing critical opinion about the medical treatment of the patient by another doctor shall not be considered as violation of one's reputation, since restriction of freedom of expression in this particular case could prevent doctors from providing patients with an objective opinion about their health and the treatment received, and thereby undermine the very purpose of the medical profession, namely the goal of protecting life and health of patients.[24] Such restrictions shall be considered and decided by the court based either on proportionality or on balancing approach.[25] The categories that the court uses are mainly: forms of expression that fall outside the scope of Article 10 (hate speech, Holocaust denial and incitement to violence)[26] and other forms that should be considered separately (value judgements, statements of fact, insulting speech and expressing opinion). Given that artistic expressions are forms of expression protected by the Convention, it is important to clarify that if hate speech, Holocaust denial or incitement to violence is represented in artistic works, such expression falls outside the scope of protection.[27] Distinction between statement of facts and value judgement is crucial in understanding which forms of expression benefit the protection. Whereas description of fact is easily proved right or wrong, the value judgements can only express the attitude towards the subject matter,[28] which can be either negative or positive. While balancing rights courts come across value judgements that cannot be factually justified, because they are based on one's opinion. In *Morice v. France*[29] the Court found that demanding the proof for value judgements itself violates freedom of expression. However, there should be some degree of "factual basis". "The necessity of a link between a value judgment and its supporting facts may vary from case to case according to the specific circumstances".[30] In *Feldec v. Slovakia* the Court

[23] Frankowicz v. Poland, no. 53025/99, ECtHR, 2008.
[24] Frankowicz v. Poland, no. 53025/99, § 51, ECtHR, 2008.
[25] COUNCIL OF EUROPE: EUROPEAN COURT OF HUMAN RIGHTS. Guide on Article 10 of the European Convention on Human Rights. Freedom of Expression*,* 2021, pp. 24–26.
[26] PÉGORIER, C. Speech and Harm: Genocide Denial, Hate Speech and Freedom of Expression. International Criminal Law Review. 2018, vol. **18, no. 1, pp.** 97–126.
[27] Leroy v. France, no. 36109/03, ECtHR, 2018.
[28] Lingens v. Austria, no. 9815/82, ECtHR, 1986.
[29] Morice v. France, no. 29369/10, ECtHR, 2015.
[30] Feldek v. Slovakia, no. 29032/95, ECtHR, 2001.

decided that applicant's statement about other person's fascist past in a political context had a factual basis, since it was based on existing facts, which had been publicly accessible. Though, if value judgement lacks the factual basis, the court while balancing freedom of expression and right to protection of reputation will decide in favor of the latter.[31] Despite that fact in *Flux v. Moldova,*[32] statement of fact expressed by the press without sufficient factual basis was found to fall within the scope of Article 10 of the Convention even though the reputation of political party suffered significantly as a consequence of applicant's actions. This happened due to the fact that information had been obtained through responsible journalistic research. In such cases, the court pays attention to the proportionality of interference as well, defining whether it is necessary in a democratic society, and whether contribution of such measure is important to the general public.[33] The Court has commented that "journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation",[34] which raises a question of how in context of fake news, which may consist of an inverted fact, the spread of disinformation by press on legal grounds can be avoided. In *Shtekel v. Ukraine*[35] the Court found that growing importance of Internet may pose even a higher risk on protection of freedom of expression or balancing it with other rights than press.

The general principles for balancing freedom of expression derive from cases *Perinçek v. Switzerland,*[36] *Von Hannover v. Germany,*[37] and *Axel Springer AG v. Germany.*[38] When balancing freedom of expression and right to privacy it is necessary to bear in mind that they both deserve equal respect, the compliance of striking balance and taking appropriate measures is within the discretion of the Contracting States. "The margin of appreciation, however, goes hand in hand with European supervision, embracing both the legislation and the

[31] SMET, S. Freedom of Expression and the Right to Reputation: Human Rights in Conflict. *American University International Law Review*. 2011, vol. 26, no. 1, pp. 183–236.

[32] Flux v. Moldova, no. 31001/03, ECtHR, 2007.

[33] FLAUSS, J. The European Court of Human Rights and Freedom of Expression. *Indiana Law Journal*. 2009, vol. 84, no. 3, pp. 809–849.

[34] Flux v. Moldova, no. 31001/03, § 45, ECtHR, 2007.

[35] Shtekel v. Ukraine, no. 33014/05, ECtHR, 2011. More on freedom of media in Ukraine, please see: SHUMILO, O., KERIKMÄE, T., CHOCHIA, A. Restrictions of Russian Internet Resources in Ukraine: National Security, Censorship or Both? *Baltic Journal of European Studies*. 2019, vol. 9, no. 3, pp. 82−95. DOI: 10.1515/bjes-2019-0023; NYMAN-METCALF, K. Post-Conflict Reconstruction of Trust in Media. In: SAYAPIN, S., TSYBULENKO, E. (ed.). *The Use of Force against Ukraine and International Law.* The Hague: Springer. 2018, pp. 425−445. DOI: 10.1007/978-94-6265-222-4_20

[36] Perinçek v. Switzerland, no. 27510/08, ECtHR, 2015.

[37] Von Hannover v. Germany, no. 59320/00, ECtHR, 2004.

[38] Axel Springer v. Germany, no. 39954/08, ECtHR, 2012.

decisions applying it, even those given by independent courts. In exercising its supervisory function, the Court does not have to take the place of the national courts but to review, in the light of the case as a whole, whether their decisions are compatible with the provisions of the Convention relied on".[39] Furthermore, decisions of the national courts have to be in line with case-law and any deviation shall be due to the significant reasons. The protection of different forms of expression, even the offensive and insulting ones (excluding hate speech, holocaust denial and incitement to violence), is a necessity not only within the framework of freedom of expression, but also freedom of information and media pluralism.[40] According to *Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria,*[41] the access to information is an integral part of the freedom of expression.

2.2. Proportionality and balancing approach

Deriving from wording of Article 10 paragraph 2 of the Convention, the restrictions are possible, yet not mandatory. The interference with freedom of expression shall be justified and therefore courts make assessment on case-by-case basis guided by the three-part test.[42] Three conditions shall be fulfilled in order to consider justified interference with the freedom of expression[43] or the rights and freedoms prescribed in Articles 8,9, and 11 of the Convention, as reasonable. Such interference must be prescribed by the law, aimed at protecting interests or values prescribed in Article 10 paragraph 2 of the Convention and the interference must be necessary for preserving democratic society.[44] It is a role of court to interpret which interference is prescribed by the law. According to case-law such law must be foreseeable to some degree (paragraph 99 of *Magyar v. Hungary*[45] *and* paragraph 135 of *Perinçek v. Switzerland)* and accessible (paragraph 36 of *Karademirci and Others v. Turkey)*.[46] The foreseeability of consequences

[39] Perinçek v. Switzerland, no. 27510/08, § 198, ECtHR, 2015.

[40] Lingens v. Austria, no. 9815/82, § 41, ECtHR, 1986.

[41] Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria, no. 39534/07, ECtHR, 2013.

[42] BYCHAWSKA-SINIARSKA, D. *Protecting the Right to Freedom of Expression Under the European Convention of Human Rights: A Handbook for Legal Practitioners*. Strasbourg: Council of Europe. 2017.

[43] LANZA, E. National case law on freedom of expression. *Inter-American Commission on Human Rights, OAS*. 2017, pp. 1–95.

[44] MCGOLDRICK, D. The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective. *Human Rights Law Review*. 2013, vol. 13, no. 1, pp. 125–151.

[45] Magyar v. Hungary, no. 73593/10, ECtHR, 2014.

[46] Karademirci and Others v. Turkey, nos. 37096/97 and 37101/97, ECtHR, 2005.

may consist of uncertainty, mostly it depends on the context. The accessibility criteria can be met if the legislation is published in a medium such as an official gazette. However, the law must not only be foreseeable and accessible, but also quality of law should be considered,[47] which means that measures should be taken only if they are "necessary in a democratic society".[48] The legal basis for any interference must be established in written form in international or domestic law. Legitimate aim is specified in Article 10 paragraph 2 of the Convention, interference with the freedom of expression should only be carried out for the purpose of "national security, territorial integrity or public safety". The "necessity" has been determined through *Observer and The Guardian v. United Kingdom*:[49] "the adjective 'necessary' within the meaning of Article 10(2) of the Convention is not synonymous with 'indispensable' or as flexible as 'reasonable' or 'desirable,' but it implies the existence of a pressing social need." Moreover, according to *Stoll v. Switzerland*[50] "the interference shall be proportionate to the legitimate aim pursued" and "the reasons adduced by the national authorities to justify it are 'relevant and sufficient'". The measures applied shall be considered both necessary in democratic society as well as proportionate if such measures are least restrictive and "there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned" as derives from paragraph 99 of the *Glor v. Switzerland*.[51] As a further consideration of pressing social need, it is clear that this factor is not always relevant according to case-law.

Interference shall not be carried out when concerning any form of criticism, written, verbal or in form of images, describing one's opinion even a critical one shall fall within the scope of Convention. In *Vereinigung Bildender Künstler v. Austria,*[52] during the exhibition "The century of artistic freedom" in 1998, a painting "Apocalypse" created by artist Otto Mühl was shown to public. The painting depicted important political and public figures at that time in the nudity with some sexual context. A former general secretary of the Austrian Freedom Party, Mr. Walter Meischberger considered this picture degrading to his dignity, and he filed a claim against Vereinigung Bildender Künstler Wiener Secession association in accordance with Section 78 of the Copyright Act, since part of

[47] SLOOT, B. The Quality of Law: How the European Court of Human Rights gradually became a European Constitutional Court for privacy cases. *JIPITEC*. 2020, vol. 11, no. 2, pp. 160–185.

[48] Big Brother Watch and Others v. the United Kingdom, nos. 58170/13, 62322/14 and 24969/15, ECtHR, 2013, 2014, 2015.

[49] Observer and The Guardian v. United Kingdom, no. 13585/88, ECtHR, 1991.

[50] Stoll v. Switzerland, no. 69698/01, ECtHR, 2007.

[51] Glor v. Switzerland, no. 13444/04, ECtHR, 2009.

[52] Vereinigung Bildender Künstler v. Austria, no. 68354/01, ECtHR, 2007.

the painting used elements of photos cut from newspapers. Court prohibited further use of the painting in association's exhibition, this decision was met with an appeal by the association, claiming that their freedom of expression was violated. The court has examined whether interference and measures taken were justified in accordance with Article 10 paragraph 2 and the three-part test. The legal basis has been established in domestic copyright law; therefore, interference was prescribed by law. The protection of morals, right to reputation and individual rights shall be considered as legitimate aim in certain circumstances. The matter of proportionality and necessity is controversial though; the painting has been partly damaged during the exhibition, the part where Mr Meischberger was illustrated was covered with red paint and at a time when he claimed about violation of his rights, the exhibition had already been closed. "The injunction prohibiting any further exhibition of the painting, concerned not only the applicant association but also the painter himself and any other third person wishing to exhibit the painting and were equivalent to the deletion of the painting from the collective memory".[53] Such removal without limits in time or space indeed constitutes a disproportional measure to the aim pursued. Therefore, satirical statements, images or artistic expressions must be protected by Article 10 of the Convention and censorship should not discourage others from expressing their critical opinion.

2.2.1. Justified interference with the freedom of expression of the media

Some restriction and interference with the freedom of expression shall be applied to press as well, in such circumstances, when it is "severely" violating someone's right to privacy[54] or if journalists do not act in good faith and do not check the reliability of the content. Such limitation of liability derives from the fact that, the press plays role of a "public watchdog", which includes function of coverage of socially important events.[55] The protection of right to reputation is a part of the right to respect for private life and therefore is protected by Article 8 of the Convention. According to *Axel Springer v. Germany* the freedom of expression may be restricted if there is a severe interference with privacy. In present case the German newspaper has published articles where it claimed that Mr X had been convicted of illegal drug possession. In its reasoning the Court referred to the case *Sidabras and Džiautas v. Lithuania*[56] that protection to the right of

[53] Vereinigung Bildender Künstler v. Austria, no. 68354/01, § 25, ECtHR, 2007.
[54] Axel Springer v. Germany, no. 39954/08, ECtHR, 2012.
[55] Bladet Tromsø and Stensaas v. Norway, no. 21980/93, § 59, ECtHR, 1999.
[56] Sidabras and Džiautas v. Lithuania, nos. 55480/00 and 59330/00, ECtHR, 2004.

reputation shall not be considered violated if the consequences of one's actions were foreseeable to lead to loss of reputation, especially when a person committed a crime. Pursuant to abovementioned facts and the fact that publication of the articles had not resulted in serious consequences for Mr X, the attack to his privacy shall not be considered severe. However, even if the journalist is acting in good faith, the interference with one's right to private life may be considered disproportionate and not necessary in a democratic society.[57]

The increased influence of bloggers in social media platforms make it crucial considering their role in informing or deceiving public. Bloggers should be treated the same as regular press, since with the development of technologies, social media have taken root and the role of blogger can be assimilated to the role of modern "public watchdog".[58] When blogger is acting in good faith and expressing opinion in the political context as in *Rebechenko v. Russia,*[59] his/her opinion should be protected by freedom of expression. It is important to note that offensive content that incites violence is subject to the restriction to freedom of expression. However, in *Savva Terentyev v. Russia*[60] the Court decided that measures taken (imprisonment for one year) for publishing insulting content are not necessary in democratic society as well as relevant and sufficient. The applicant's freedom of expression has been violated as measures taken were disproportionate to the aim pursued. Furthermore, through interpretation of the case it was decided that applicant is not a well-known blogger[61] or an influential figure.[62]

Freedom of expression is a key right but not absolute, it is possible to limit it in certain circumstance like derogation from freedom of expression in case of overlapping with other rights and freedoms and under certain conditions prescribed by law. It is possible to regulate fake news but the question is how and if it is a good idea, which is further discussed in Section 3.

[57] Bladet Tromsø and Stensaas v. Norway, no. 21980/93, ECtHR, 1999.

[58] *VORHOOF, D. European court of human rights: Rebechenko v. Russia.* Human Rights Centre of Ghent University and Legal Human Academy, 2019, vol. 6, no. 1, pp. 1–3.

[59] Rebechenko v. Russia, no. 10257/17, ECtHR, 2019.

[60] Savva Terentyev v. Russia, no. 10692/09, ECtHR, 2018.

[61] Magyar v. Hungary, no. 73593/10, § 168, ECtHR, 2014.

[62] Osmani and Others v. the former Yugoslav Republic of Macedonia, no. 50841/99, § 75, ECtHR, 2001.

3. Regulation And Definition Of Fake News

3.1. Definition Of Fake News

What does fake news mean? There is no definition provided by any form of legislation. There is a difficulty in defining fake news by dictionaries[63] as well because it consists of two distinct words that must have a meaning of "false" "material reported in a newspaper or news".[64] The problem is the confusion that "fake" brings in context of news, which shall be considered as facts. Fake facts are just lies, but fake news is not "only" lies. The most problematic is that fake news may not be lies at all, but inverted facts, or "facts with nuances",[65] like using exaggerated and deceptive headlines that are meant to attract the audience[66] with the purpose to generate income from online advertising (hereinafter click-bait headlines). Such manipulation with words may mislead or bring to wrong conclusions. European Democracy Action Plan defines such important terms as disinformation and misinformation, which fake news consists of. While misinformation is defined as "false or misleading content shared without harmful intent", disinformation requires an intention to mislead, and as a consequence cause harm or lead to economic or political gain. EU seeks to combat disinformation and the misinformation that consequently harms the public. Fake news should not be confused with journalistic errors or completely made-up stories.[67] The errors made by press shall be protected by the Convention if the journalist had been acting in good faith and on occasion of responsible journalism. Made-up stories shall be considered as fake news if they are presented in way that pretend to be truth.[68] Intention is the key characteristic in understanding the disinformation and fake news, however motives are difficult to prove.

In the US, there have been attempts made to define fake news by several researchers and journalists.[69] The definition should have been narrow and not

[63] MOLINA, M., SUNDAR, S. S., LE, T., LEE, D. "Fake News" Is Not Simply False Information: A Concept Explication and Taxonomy of Online Content. *American Behavioral Scientis*. 2019, vol. 65, no 2, pp. 180–212.

[64] DÍAZ, J. B., NICOLAS-SANS, R. COVID-19 and Fake News. *Encyclopedia 2021.* 2021, vol. 1, no. 4, pp. 1175–1181.

[65] GELFERT, A. Fake News: A Definition. *Informal Logic*. 2020, vol. 38, no. 1, pp. 84–117.

[66] JEGANATHAN, K., SZYMKOWIAK, A. Social Media Content Headlines and Their Impact on Attracting Attention. *Journal of Marketing and Consumer Behaviour in Emerging Markets*. 2020, vol. 1, no. 10, pp. 49–59. DOI:10.7172/2449-6634.jmcbem.2020.1.3

[67] SARDO, A. Categories, Balancing, and Fake News: The Jurisprudence of the European Court of Human Rights. *Canadian Journal of Law & Jurisprudence.* 2020, vol. 33, no. 2, pp. 435–460.

[68] DENTITH, M. R. The Problem of Fake News. *Public Reason.* 2017, vol. 8, no. 1, pp. 65–79.

[69] PARK, A., YOUM, K. H. Fake news from a legal perspective: The United States and South Korea compared. *Southern Journal of International law*. 2018, vol. 25, no. 1, pp. 100–119 [online].

ambiguous at the same time, however it appeared that making up such definition may violate the First Amendment that protects freedom of speech. The problem of defining fake news is closely connected to the fact that regulation may lead to interference with the exercise of freedom of speech.[70] Such overlapping leads to the fact that the US government lacks intention to restrict freedom of speech in the context of fake news as there is a lack of understanding as to its meaning.[71] The lack of common definition in US and EU could lead to occurrence of more legal issues considering the social media platforms such as Facebook, Twitter and Instagram, which are based in US. In case of being regulated, fake news should be treated equally in key jurisdictions to minimize the capability of VPN users to take advantage of less harsh regulation.

As it was stipulated in Sub-section 1.1 there are 2 categories of forms of expression, those that fall outside the scope of protection of Article 10 of the Convention and those that should be considered by courts on case-by-case basis. Since fake news appear to be both misinformation and disinformation, any content which is not meant to mislead or harm people should not be considered as disinformation and in case of controversies should be decided through court interpretation. In case of dissemination of illegal content through hyperlink it was decided in *Magyar* case that person sharing it does not have a control over the website, therefore measures should be in conformity with three-part test as well. Nevertheless, despite the fact that there is no existing definition of fake news as well as it is not regulated, because such definition could interfere with the freedom of expression or lead to over-censorship of the content,[72] the absence of definition harms other fundamental rights and freedoms of humankind as well as affects the public health in connection with disseminated disinformation in the context of COVID-19. The absence of definition may lead to problems using balancing approach, because understanding of context is not sufficient to interpret the EU principles.

Available at: https://rss.swlaw.edu/sites/default/files/2019-04/7.%20Ahran%20Park%3B%20Kyu%20Ho%20Youm%2C%20Fake%20News%20from%20a%20Legal%20Perspective%20-%20The%20United%20States%20and%20South%20Korea%20Compared.pdf

70 MANZI, D. C. Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News. *Fordham Law Review.* 2019, vol. 87, no. 6, pp. 2623–2651.

71 NAPOLI, P. M. What if More Speech is No Longer the Answer. *Federal Communications Law Journal.* 2018, vol. 70, no. 1, pp. 55–104 [online]. Available at: http://www.fclj.org/volumes/volume-70-2017-2018/issue-1/

72 JANSEN, S.; MARTIN, B. The Streisand Effect and Censorship Backfire. *International Journal of Communication.* 2016, vol. 9, pp. 656–671 [online]. Available at: https://ijoc.org/index.php/ijoc/article/view/2498/1321

3.2. Existing regulation on fake news

So far there have been measures initiated on both, the EU and national levels. In 2018 the Communication on Tackling online disinformation[73] (hereinafter Communication) and Action Plan against Disinformation[74] were adopted and Elections Package, which consists of recommendations, guidelines as well as amendments and regulation with measures for securing free and fair elections, proposed by the former president of the European Commission, Jean-Claude Juncker. It is clearly seen from the EU approach that it is not fake news itself that imposes threat to the democratic society, but the disinformation and resulting from it distrust of information and institutions. In accordance with the definition provided in the Communication, disinformation is an information that has been created with an intention to mislead general public and/or get financial benefit from deceiving. Though, intention is not easily identifiable, it is clear that not all fake news shall be considered as disinformation. "Reporting errors, satire, parody, and partisan news and commentary" are excluded from the scope of the Disinformation. The Communication proposes measures to combat disinformation, which include using modern technologies such as Artificial Intelligence (hereinafter AI), fact-checking, strengthening media literacy, cyber-security measures against interference with elections, and press role.[75] It is important to notice that countering disinformation after it is being released is useful, but it cannot be the only measure taken as consequences of dissemination of fake news are quite complex.[76] Fake news affects humans in a way that it creates distrust feeling towards the government.[77] European Digital Media Observatory has worked out systems to check facts, by which it combats disinformation as well as having positive impact on media literacy. The fact-checking researchers show an incredible result of fighting disinformation, it is justified by the fact that the number of fake news that reach the traditional media is not

[73] Communication on Tackling online disinformation: a European Approach COM (2018) 236 final.

[74] Action Plan against Disinformation JOIN (2018) 36 final.

[75] ANDRAŠKO, J., MESARČÍK, M., HAMUĽÁK, O. The regulatory intersections between artificial intelligence, data protection and cyber security: challenges and opportunities for the EU legal framework. *AI & Society*. 2021, vol. 36, no. 2, pp 623−636. DOI: 10.1007/s00146-020-01125-5; NYMAN-METCALF, K. Digitalisation and beyond: Media freedom in a new reality. In: KOLTAY, A. (ed.*). Media Freedom and Regulation in the New Media World.* Hungary: Wolters Kluwer. 2014, pp. 65−83.

[76] RICHTER, A. Fake News and Freedom of the Media. *Journal of International Media & Entertainment Law,* 2019, vol. 8, no. 2, pp. 1–34 [online]. Available at: https://www.academia.edu/38682259/Fake_News_and_Freedom_of_the_Media

[77] PENNYCOOK, G., RAND, D. G. The Psychology of Fake News. *Trends in Cognitive Sciences*. 2021, vol. 25, no. 5, pp. 388–402.

significant.[78] The EU Code of conduct on countering illegal hate speech online has been joined by Facebook, Microsoft, Twitter, YouTube, Instagram, LinkedIn, Jeuxvideo.com, Snapchat, TikTok and Dailymotion. The Commission has supported Code of Practice on Disinformation (hereinafter Code of Practice), the initiative of High-level Expert Group, to strengthen the trustworthiness and transparency of the content on the internet and counter disinformation all over the EU on a self-regulatory basis. The Code of Practice has been signed by different platforms such as Facebook, Google, Twitter, and taking part in tackling disinformation is voluntary. According to Assessment of The Code of Practice[79] released in 2020, online platforms that are signatories to the Code of Practice increase their own accountability by taking measures against disinformation and monitoring the content. The Communication and the Code of Practice propose to use AI systems to tackle and combat disinformation effectively. However, it should be born in mind that leaving filtering and moderation role for AI systems, that may misunderstand the context is not a sufficient measure. Over-censorship is indeed an issue, moderating content considers work of AI systems or algorithms but leaving such an important role on non-humans raises the warning of whether they are aware of what content is fake and which is true. According to report released by Cambridge Consultants[80] some changes may lead to strengthening AI system's filtering role; AI system may proceed with pre-moderation process taken place before the publication is made and after that if system accepts the content which does not consist of any obvious potentially harmful material, the human should do additional content moderation. In turn, a person can make changes to the AI system and "educate" (machine learning process) to identify possible inconsistencies with further content processed. Consequently, the system can prioritize the processed content that a person needs to work with. Therefore, there is a likelihood of an effective cooperation between human and machine in moderation process. Pursuant to research held by Harvard Kennedy School, moderation and removal of content is not the only option available. In India WhatsApp disinformation has led to real harm to integrity of some people. The research has shown that limiting the number of times the content can be shared can stop the spread of disinformation without violation of freedom of expression.[81]

[78] GUTIÉRREZ, C., COBA-GUTIÉRREZ, L. M., GÓMEZ-DÍAZ, J. A. Fake news about COVID-19: a comparative analysis of six Ibero-American countries. *Revista Latina De Comunicacion Social.* 2020, no. 78, pp. 237–264.

[79] SWD (2020) 180 Final – Assessment of the Code of Practice on Disinformation

[80] OFCOM. Use of AI in online content moderation. *Cambridge Consultants*, 2019, vol. 5 [online]. Available at: https://www.readkong.com/page/use-of-ai-in-online-content-moderation-2282845

[81] KAZEMI, A., GARIMELLA, K., SHAHI, G. K., GAFFNEY, D., HALE, S. A. Research note: Tiplines to uncover misinformation on encrypted platforms: A case study of the 2019 Indian

European Commission Guidance on Strengthening the Code of Practice on Disinformation has covered an importance of providing access to reliable information during the time of crisis as well as initiated the COVID-19 monitoring and reporting programme, which ensures accountability in tackling disinformation. European Democracy Action Plan has defined disinformation as "false or misleading content that is spread with an intention to deceive or secure economic or political gain and which may cause public harm"; the audience plays significant role in disseminating fake news,[82] but its awareness of the fact that content is false is doubtful. The more Internet users give social feedback (likes, shares, comments, and accesses to the content), the more it becomes likely that the content will be accessed by others,[83] by doing so it draws attention to such content and causes the spread of fake news. Other users that disseminate disinformation are called "trolls",[84] in other words users are getting paid for actively promoting some content. Moreover, people tend to react more actively on fake news rather that real news.[85] It shows more necessity in bringing digital media literacy in life of Internet users, which could help them to understand whether the content is fake or true and how to distinguish between them, where to check the facts, and on what sources to look for reliable information. Some social media platforms like Twitter made warning of the fact that the information a user accessed is a "heated" or "intense"[86] conversation which may raise one's need to check facts. Proposal on the transparency and targeting of political advertising seeks to complement existing EU legislation on fighting disinformation.

Most of the EU Member States have initiated laws that oblige removal of illegal content, such as child abuse material, terrorism, hate crimes, copyright and intellectual property infringements and national security.[87] The idea of blocking and removal of illegal content has itself a good purpose, however if not formulated accurately such legal acts may lead to unlawful interference with

general election on WhatsApp. *Harvard Kennedy School Misinformation Review*. 2022, vol. 3, no. 1, pp. 1–17.

82 LEWIS, S. C., WESTLUND, O. Actors, Actants, Audiences, and Activities in Cross-Media News Work. *Digital Journalism*. 2015, vol. 3, no. 1, pp. 19–37 [online]. Available at: https://www.tandfonline.com/doi/full/10.1080/21670811.2014.927986

83 TANDOC, E. C., LIM, Z. W., LING, R. Defining 'Fake News': A Typology of Scholarly Definitions. *Digital Journalism*. 2018, vol. 6, no. 2, pp. 137–153. DOI:10.1080/21670811.2017.1360143

84 WATTS, C. *Messing with the Enemy. Surviving in a Social Media World of Hackers, Terrorists, Russians, and Fake News*, US: Harper. 2018.

85 VOSOUGHI, S., ROY, D., ARAL, S. The Spread of True and False News Online. *Science*. 2018, vol. 359, no. 6380, pp. 1146–1151.

86 The Guardian, Twitter trials warnings about 'intense' conversations, 2021.

87 SWISS INSTITUTE OF COMPARATIVE LAW. *Comparative Study on blocking, filtering and take-down of illegal internet content.* Strasbourg: Council of Europe, 2017, vol. 16.

freedom of expression. In 2017, Germany passed a legislation German Act to Improve Enforcement of the Law in Social Networks (hereinafter the Network Enforcement Act). The purpose of the Network Enforcement Act is to combat hate speech, dissemination of fake news online and to look for such a content that may lead to incitement to violence or other crimes both online and offline. The scope of application is described in Article 1 of the Network Enforcement Act, pursuant to which the following act shall apply to social network providers that have 2 million registered users on the territory of Germany. It is also stipulated which content shall be considered unlawful; it derives from Criminal Code of Germany.[88] However, some restrictions, coming from Criminal Code of Germany are controversial as they may violate the freedom of expression, one of such restriction is prohibition of giving critical opinion about religion in general, not taking into consideration any specific religious group in particular. The content shall only be considered as hate speech when there is a direct threat to physical integrity of an individual or group of individuals according to the decision taken in *Delfi AS v. Estonia*[89] *(*hereinafter *Delfi* case) in the context of defining hate speech, when users of Estonian news forum were posting humiliating comments. Network Enforcement Act places an obligation on providers of social network to remove or block access to the manifestly unlawful content within 24 hours or 7-day-period after receiving complaint if the content is unlawful. If not removed or blocked, the social network provider may be sanctioned for up to 50 million euros. Imposing such high fines may lead to over censoring of content without sufficiently delving into whether the content is actually illegal.

In Estonia service providers are not bound to monitor the illegal content transmitted by users in accordance with Article 15 of the Directive on electronic commerce[90] (hereinafter E-Commerce Directive). An information society service provider can benefit from limited liability over the content if has no knowledge of illegal activity or in case of awareness have "expeditiously" removed the information or access to it. There is an uncertainty to what shall be considered as expeditiously removed content after the host receives the notice to take it down, there is no information on how much time it requires. In accordance with recital 48 of the E-Commerce Directive, Member States may require hosts of information to take "duties of care" in order to "detect and prevent certain types of illegal activities" imposed by public and criminal law. The host cannot

[88] Articles 86, 86a, 89a, 91, 100a, 111, 126, 129 to 129b, 130, 131, 140, 166, 184b, 184d, 185, 186, 187, 241 and 269.

[89] Delfi AS v. Estonia, no. 64569/09, ECtHR, 2015.

[90] 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.

exempt from liability pursuant to Article 14 of the E-Commerce Directive if he played an active role instead of a mere technical, automatic, and passive nature.[91] According to Audio-visual Media Services Directive[92] video-sharing platform service generated by users for non-economic purpose are exempted from liability as well.[93] If a private user posts insulting audio-visual content on YouTube "for the purposes of sharing and exchange within communities of interest", not for economic purposes, the removal of access to YouTube itself or this information in particular violates freedom of expression; such measure is not proportionate to the legitimate aim pursued, according to *Cengiz and others v Turkey.*[94] Pursuant to *Delfi* case, hosts may be held liable for illegal content published by third parties on their online platforms, if they fail to take measures to remove or block an illegal content consisting of hate speech expeditiously after the notice to take it down, as it does not violate Article 10 of the Convention. Additionally, case has identified criteria to assess whether social network provider shall remove third party's comments. Following criteria has been identified with a purpose to strike a balance between freedom of expression and right to reputation of a person: "the context and content of comments, the liability of authors of the comment, the measures taken by the applicant and the conduct of the aggrieved person, the consequences for aggrieved person". As a consequence of *Delfi* case, most of websites have established codes of conduct to elaborate their own rules and recommendations which allow them to take down content that does not fit their policies.

France has proposed a law regulating the dissemination of disinformation about political parties during and/or 3 months before the elections in the country. However, the "Law to combat false information" and later changed into "Law against manipulation of information" has received a lot of controversy. After the appeal of more than 60 members of Senate and Prime Minister of France in 2018 the Constitutional Council released the decision, where it examined the legality of the proposal. Constitutional Council found that the law is compatible with French Constitution, however the measures to combat manipulation of information should be in conformity with freedom of expression.[95] This legal act proposes several approaches of combating manipulation of information, which

[91] Court decision, 12.07.2011, L'Oréal SA, C-324/09, ECLI:EU:C:2011:474. Delfi AS v. Estonia, no. 64569/09, ECtHR, 2015.

[92] Directive 2010/13/EU of the European Parliament.

[93] P. 21 of Directive 2010/13/EU of the European Parliament.

[94] Cengiz and others v Turkey, no. 48226/10, ECtHR, 2015.

[95] COUZIGOU, I. The French Legislation Against Digital Information Manipulation in Electoral Campaigns: A Scope Limited by Freedom of Expression. *Election Law Journal.* 2021, vol. 20, no. 1, pp. 98–115.

includes strengthening media literacy and increasing the level of trust in online platforms using third parties such as Conseil Supérieur de l'Audiovisuel, which combat disinformation controlled or influenced by a foreign state.[96] Taking into consideration different legislations, they display a lack of harmonization within EU. National legislations take different approaches to combat fake news and illegal content itself, when taking into account the principle of mutual recognition what is illegal in one EU Member State shall be illegal in another one. However, as it has been mentioned in the current Section, what is considered as illegal content in Germany will not necessarily be illegal in Estonia. Existing regulation shows some necessity in cooperation and co-regulation.[97]

During the Russian invasion to Ukraine in 2022, the enormous amount of fake news and propaganda have been used.[98] Social media is overflooded with fake news, which is being spread on social media platforms such as Twitter,[99] Instagram,[100] TikTok.[101] Algorithms of social media platforms promote content, based on interactions and its popularity[102]. Bots play significant role in disseminating fake news as they spread information until it becomes viral; algorithms that control the activity of bots are manipulated by humans.[103] Internet users may unintentionally spread disinformation as well, for the reason that they simply do not have knowledge on how to check metadata of pictures and videos. COVID-19 has shown that during times of crisis tackling disinformation becomes essential as in addition to an economic and public health crisis, starts an information crisis,[104]

[96] GUILLAUME, M. Combating the manipulation of information – a French case. *Hybrid CoE Strategic Analysis 16,* 2019 [online]. Available at: https://www.hybridcoe.fi/wp-content/uploads/2020/07/HybridCoE_SA_16_manipulation-of-information_.pdf

[97] MARSDEN, C., MEYER, T., BROWN, I. Platform Values and Democratic Elections: How Can the Law Regulate Digital Disinformation? *Computers Law & Security Review.* 2020, vol. 36, pp. 1–18.

[98] TSYBULENKO, E., PLATONOVA, A. Violations of Freedom of Expression and Freedom of Religion by the Russian Federation as the Occupying Power in Crimea. Baltic Journal of European Studies. 2019, vol. 9, no. 3, pp. 134−147. DOI: 10.1515/bjes-2019-0026; MÖLDER, H., SAZONOV, V., CHOCHIA, A., KERIKMÄE, T. The Russian Federation in the Global Knowledge Warfare: Influence Operations in Europe and Its Neighborhood. Springer, 2021. DOI: 10.1007/978-3-030-73955-3

[99] Euronews, The Disinformation War: The falsehoods about the Ukraine invasion and how to stop them spreading, 2022.

[100] BBC news, Ukraine invasion: Misleading claims continue to go viral, 2022.

[101] Media matters, TikTok is facilitating the spread of misinformation surrounding the Russian invasion of Ukraine, 2022.

[102] NORSTRÖM, L., ISLIND, A. S., LUNDH SNIS, U. M. Algorithmic Work: The Impact of Algorithms on Work with Social Media. *ECIS 2020 Research Papers*. 2020, vol. 185, pp. 1–17.

[103] CHAKRABORTY, T. Dynamics of Fake News Diffusion. In: CHAKRABORTY, T., LONG, C., SANTHOSH, K. G. (ed.). *Data Science for Fake News*. Switzerland: Springer. 2021, pp. 101–127.

[104] DÍAZ, J. B., NICOLAS-SANS, R. COVID-19 and Fake News. Encyclopedia 2021, 2021, vol. 1, no. 4, pp. 1175–1181.

but highly difficult.[105] Different measures can be taken on national or international level to keep information from manipulation like enabling fact-checkers or bringing awareness to public by providing trustworthy information on national official websites. In Russia the government proposes a legislation which envisages imprisonment for up to 15 years for dissemination of fake news about the actions of Russian troops.[106] Russian Federal Law on Information, Information Technology and Protection of Information establishes general principles of liability for dissemination of fake news and defines fake news as "false reports about acts of terrorism and other unreliable socially significant information disseminated under the guise of reliable messages that poses a threat of harm to the life and (or) health of citizens, property, a threat of mass disruption of public order and (or) public safety". However, fake news is defined in broad sense which enables the state to decide in favor of illegitimacy of content, making it unforeseeable and unpredictable for people to acknowledge whether the content they post online is an unreliable information or not. Such a strict measure in context of existing legislation defining fake news may cause violation of right to access information.

4. Conclusion

Fake news is nothing new, it has been there even in 1938,[107] the broadcasting of The War of the Worlds written by Herbert George Wells on radio had been highly discussed in press, claiming that the story about alien invasion to Earth had led to panic of listeners. However, the facts were exaggerated and eventually it appeared that press had been manipulating readers to maintain press's dominance of the **news** market, to cause distrust towards radio. The story has also raised the concern about media literacy of the general population, which is still a non-solved problem of the society; there is no definition or regulation proposed on the matter. Nowadays, fake news is being combated through different tools, by self-regulated social network platforms, nevertheless the impact of fake news on society in general can be reduced by ensuring media literacy and strengthening journalism's role. Initially the journalists had a role of the watchdogs, whose

[105] HARRISON, R. Tackling Disinformation in Times of Crisis: The European Commission's Response to the Covid-19 Infodemic and the Feasibility of a Consumer-centric Solution. *Utrecht Law Review*. 2021, vol. 17, no. 3, pp. 18–33 [online]. Available at: https://www.utrechtlawreview.org/articles/10.36633/ulr.675/

[106] Esquire, The Russia Duma proposed to punish for up to 15 years for fakes about the actions of the Russian army, 2022.

[107] NTAHONSIGAYE, M. K. Fake News Hysteria: How an analysis of Orson Welles' War of the Worlds broadcast can inform the issue of "fake news". *Major Papers*. 2018, vol. 61.

main purpose was to educate and defend the public; the process of putting information on public domain has been disintermediated, which has indeed led to lack of veracity. Social media platforms and bloggers have to rethink their role and position as modern watchdogs and take more responsibility of fact-checking process of content before publishing.

However, detecting fake news is problematic. Algorithmic approach to filtering is not accurate enough and needs improvements. There is a risk of over-censorship, because systems cannot understand the context of the content, therefore there is a significant need in cooperation with human on several stages of the content moderation. Over-censorship may lead to violation of both freedom of expression and the right to access information. Moreover, there is no common definition of fake news, which makes it difficult to remove the content on self-regulatory basis. Filtering is not the only option to reduce harm posed by fake news, though. There are other ways found to stop dissemination of disinformation without violating freedom of expression; social media platforms can adopt the experience gained by WhatsApp.

Current national legislation in different countries discussed in the paper shows the lack of harmonization within the EU, it happens for several reasons; one of these reasons is the fact, that no definition to fake news have been made. In order to fight disinformation more effectively it should be clearly defined to which extend the freedom of expression should be limited when fake news is concerned. There is indeed a risk of over-censorship in case of defining and further regulation of fake news on one side and threat to other fundamental rights and freedoms if not defined on the other side. However, considering the balancing approach explained in Sub-section 1.2, fake news might be considered as a distinguished form of expression as long as not all content consisting of fake news should be considered as disinformation; cases of violation of freedom of expression in context of fake news could be decided on case-by-case basis which requires a common definition to fake news. Strict fines and sanctions prescribed by law will inevitably lead to over-blocking of content, therefore the actors liable for the content moderation should work in cooperation with both national authorities and on EU level, to invent new ways to combat disinformation and improve the transparency.

The problem is not fake news itself but the disinformation and what it leads to and potential violent impact it might have on society. Therefore, such complicated problem requires different ways of action: proposing a common definition and its further use in balancing approach in the ECtHR, strengthening the role of press, as well as rethinking the role of social media platforms and its users, and increasing media literacy. Some kind of regulation on liability is inevitable, as long as there are legislations on national level and they lack harmonization, EU

have to propose a regulation with minimal definition of fake news that will not lead to severe intervention with the freedom of expression. Technology needs to be adapted to the circumstances that fit the needs of global society.

List of References

ALCOTT, H., GENTZKOW, M. Social Media and Fake News in the 2016 Election. *Journal of Economic Perspectives*. 2017, vol. 31, no. 2, pp. 211–236.

ANDRAŠKO, J., MESARČÍK, M., HAMUĽÁK, O. The regulatory intersections between artificial intelligence, data protection and cyber security: challenges and opportunities for the EU legal framework. *AI & Society*. 2021, vol. 36, no. 2, pp 623−636. DOI: 10.1007/s00146-020-01125-5

BYCHAWSKA-SINIARSKA, D. *Protecting the Right to Freedom of Expression Under the European Convention of Human Rights: A Handbook for Legal Practitioners.* Strasbourg: Council of Europe. 2017.

BOTHA, J., PIETERSE, H. Fake News and Deepfakes: A Dangerous Threat for 21st Century Information Security. *International Conference on Cyber Warfare and Security.* 2020, vol. 15, pp. 57–66.

CHAKRABORTY, T. Dynamics of Fake News Diffusion. In: CHAKRABORTY, T., LONG, C.; SANTHOSH, K. G. (ed.). *Data Science for Fake News*. Switzerland: Springer. 2021, pp. 101–127.

SWISS INSTITUTE OF COMPARATIVE LAW. *Comparative Study on blocking, filtering and take-down of illegal internet content.* Strasbourg: Council of Europe, 2017, vol. 16.

COUZIGOU, I. The French Legislation Against Digital Information Manipulation in Electoral Campaigns: A Scope Limited by Freedom of Expression. *Election Law Journal.* 2021, vol. 20, no. 1, pp. 98–115.

DENTITH, M. R. The Problem of Fake News. *Public Reason.* 2017, vol. 8, no. 1, pp. 65–79.

DJAJIĆ, S. Freedom of expression, strong language and public servants. *Zbornik radova Pravnog fakulteta Novi Sad*. 2021, vol. 55, no. 3, pp. 803–827.

DÍAZ, J. B., NICOLAS-SANS, R. COVID-19 and Fake News. *Encyclopedia 2021.* 2021, vol. 1, no. 4, pp. 1175–1181.

DYER, A. Freedom of Expression and the Advocacy of Violence: Which Test Should the European Court of Human Rights Adopt? *Netherlands quarterly of human rights*. 2015, vol 33, no. 1, pp. 78–107.

ELFORD, G. Freedom of expression and social coercion. *Legal theory*. 2021, vol. 27, no. 2, pp. 149–175.

FLAUSS, J. The European Court of Human Rights and Freedom of Expression. *Indiana Law Journal*. 2009, vol. 84, no. 3, pp. 809–849.

GELFERT, A. Fake News: A Definition. *Informal Logic*. 2020, vol. 38, no. 1, pp. 84–117.

COUNCIL OF EUROPE: EUROPEAN COURT OF HUMAN RIGHTS. Guide on Article 10 of the European Convention on Human Rights. Freedom of Expression*,* 2021, pp. 24–26.

GUILLAUME, M. Combating the manipulation of information – a French case. *Hybrid CoE Strategic Analysis 16,* 2019 [online]. Available at: https://www.hybridcoe.fi/wp-content/uploads/2020/07/HybridCoE_SA_16_manipulation-of-information.pdf

GUNATILLEKE, G. Justifying Limitations on the Freedom of Expression. *Human Rights Review*. 2021, vol. 22, no. 1, pp. 1–18.

GUTIÉRREZ, C., COBA-GUTIÉRREZ, L. M., GÓMEZ-DÍAZ, J. A. Fake news about COVID-19: a comparative analysis of six Ibero-American countries. *Revista Latina De Comunicacion Social.* 2020, no. 78, pp. 237–264.

HARRISON, R. Tackling Disinformation in Times of Crisis: The European Commission's Response to the Covid-19 Infodemic and the Feasibility of a Consumer-centric Solution. *Utrecht Law Review*. 2021, vol. 17, no. 3, pp. 18–33 [online]. Available at: https://www.utrechtlawreview.org/articles/10.36633/ulr.675/

HOFFMANN, T. The Impact of Digital Autonomous Tools on Private Autonomy. *Baltic Yearbook of International Law Online*. 2020, vol. 18, pp. 18−31.

JANSEN, S., MARTIN, B. The Streisand Effect and Censorship Backfire. *International Journal of Communication.* 2016, vol. 9, pp. 656–671 [online]. Available at: https://ijoc.org/index.php/ijoc/article/view/2498/1321

JEGANATHAN, K., SZYMKOWIAK, A. Social Media Content Headlines and Their Impact on Attracting Attention. *Journal of Marketing and Consumer Behaviour in Emerging Markets*. 2020, vol. 1, no. 10, pp. 49–59. DOI:10.7172/2449-6634.jmcbem.2020.1.3

KAZEMI, A., GARIMELLA, K., SHAHI, G. K., GAFFNEY, D., HALE, S. A. Research note: Tiplines to uncover misinformation on encrypted platforms: A case study of the 2019 Indian general election on WhatsApp. *Harvard Kennedy School Misinformation Review*. 2022, vol. 3, no. 1, pp. 1–17.

KERIKMÄE, T., HOFFMANN, T., CHOCHIA, A. Legal Technology for Law Firms: Determining Roadmaps for Innovation. *Croatian International Relations Review*. 2018, vol. 24, no. 81, pp. 91−112. DOI: 10.2478%20/cirr-2018-0005

KERIKMÄE, T., NYMAN-METCALF, K. The Rule of Law and the Protection of Fundamental Human Rights in an Era of Automation. In: GORDON, J.-S. (ed.). *Smart Technologies and Fundamental Rights.* Brill: Philosophy and Human Rights; 2020, vol. 350, pp. 221−239. DOI: 10.1163/9789004437876_011

KOCHARYN, H., VARDANYAN, L., HAMUĽÁK, O., KERIKMÄE, T. Critical Views on the Right to be Forgotten after the Entry into Force of the GDPR: Is it Able to Effectively Ensure our Privacy? *International and Comparative Law Review.* 2021, vol. 21, no. 2, pp. 96−115. DOI: 10.2478/ iclr-2021-0015

KOBERNJUK, A., KASPER, A. Normativity in the EU's Approach towards Disinformation. *TalTech Journal of European Studies*. 2021, vol. 11, no. 1, pp. 170−202. DOI: 10.2478/bjes-2021-0011

LAMBERT, P., NYMAN-METCALF, K. Country Reports: Estonia. In: LAMBERT, P. (ed.). *International Handbook of Social Media Laws*. Croydon: Bloomsbury. 2015, pp. 299−304.

LANZA, E. National case law on freedom of expression. *Inter-American Commission on Human Rights, OAS*. 2017, pp. 1–95.

LEWIS, S. C., WESTLUND, O. Actors, Actants, Audiences, and Activities in Cross-Media News Work. *Digital Journalism*. 2015, vol. 3, no. 1, pp. 19–37. [online]. Available at: https://www.tandfonline.com/doi/full/10.1080/21670811.2014.927986

MANZI, D. C. Managing the Misinformation Marketplace: The First Amendment and the Fight Against Fake News. *Fordham Law Review,* 2019, vol. 87, no. 6, pp. 2623–2651.

MARSDEN, C., MEYER, T., BROWN, I. Platform Values and Democratic Elections: How Can the Law Regulate Digital Disinformation? *Computers Law & Security Review.* 2020, vol. 36, pp. 1–18.

MCGOLDRICK, D. The Limits of Freedom of Expression on Facebook and Social Networking Sites: A UK Perspective. *Human Rights Law Review*. 2013, vol. 13, no. 1, pp. 125–151.

MOLINA, M., SUNDAR, S. S., LE, T., LEE, D. "Fake News" Is Not Simply False Information: A Concept Explication and Taxonomy of Online Content. *American Behavioral Scientis*. 2019, vol. 65, no 2, pp. 180–212.

MÖLDER, H., SAZONOV, V., CHOCHIA, A., KERIKMÄE, T. *The Russian Federation in the Global Knowledge Warfare: Influence Operations in Europe and Its Neighborhood*. Springer, 2021. DOI: 10.1007/978-3-030-73955-3

NAPOLI, P. M. What if More Speech is No Longer the Answer. *Federal Communications Law Journal.* 2018, vol. 70, no. 1, pp. 55–104 [online]. Available at: http://www.fclj.org/volumes/volume-70-2017-2018/issue-1/

NORSTRÖM, L., ISLIND, A. S., LUNDH SNIS, U. M. Algorithmic Work: The Impact of Algorithms on Work with Social Media. *ECIS 2020 Research Papers*. 2020, vol. 185, pp. 1–17.

NTAHONSIGAYE, M. K. Fake News Hysteria: How an analysis of Orson Welles' War of the Worlds broadcast can inform the issue of "fake news". *Major Papers*. 2018, vol. 61.

NYMAN-METCALF, K. Digitalisation and beyond: Media freedom in a new reality. In: KOLTAY, A. (ed.). *Media Freedom and Regulation in the New Media World.* Hungary: Wolters Kluwer. 2014, pp. 65−83.

NYMAN-METCALF, K. Post-Conflict Reconstruction of Trust in Media. In: SAYAPIN, S., TSYBULENKO, E. (ed.). *The Use of Force against Ukraine and International Law.* The Hague: Springer. 2018, pp. 425−445. DOI: 10.1007/978-94-6265-222-4_20

NYMAN-METCALF, K., KERIKMÄE, T. Machines are taking over – are we ready? Law and Artificial Intelligence. *Singapore Academy of Law Journal*. 2021, vol. 33, pp. 24−49.

OFCOM. Use of AI in online content moderation. *Cambridge Consultants*, 2019, vol. 5 [online]. Available at: https://www.readkong.com/page/use-of-ai-in-online-content-moderation-2282845

PARK, A., YOUM, K. H. Fake news from a legal perspective: The United States and South Korea compared. *Southern Journal of International law*. 2018, vol. 25, no. 1, pp. 100–119 [online]. Available at: https://rss.swlaw.edu/sites/default/files/2019-04/7.%20Ahran%20Park%3B%20Kyu%20Ho%20Youm%2C%20Fake%20News%20from%20a%20Legal%20Perspective%20-%20The%20United%20States%20and%20South%20Korea%20Compared.pdf

PÉGORIER, C. Speech and Harm: Genocide Denial, Hate Speech and Freedom of Expression. *International Criminal Law Review.* 2018, vol. 18, no. 1, pp. 97–126.

PENNYCOOK, G., RAND, D. G. The Psychology of Fake News. *Trends in Cognitive Sciences*. 2021, vol. 25, no. 5, pp. 388–402.
RIDDIHOUGH, G., PURNELL, B., TRAVIS, J. Freedom of Expression. *Science (American Association for the Advancement of Science)*. 2008, vol. 319, no. 5871, p. 1781. DOI: 10.1126/science.319.5871.1781
SARDO, A. Categories, Balancing, and Fake News: The Jurisprudence of the European Court of Human Rights. *Canadian Journal of Law & Jurisprudence.* 2020, vol. 33, no. 2, pp. 435–460.
SHEPHERD, J. What is the Digital Era? In: DOUKIDIS, G., MYLONOPOULOS, N., POULOUDI, N. (ed.). *Social and Economic Transformation in the Digital Era.* UK: Idea Group Inc. 2004, pp. 1–18.
SHUMILO, O., KERIKMÄE, T., CHOCHIA, A. Restrictions of Russian Internet Resources in Ukraine: National Security, Censorship or Both? *Baltic Journal of European Studies*. 2019, vol. 9, no. 3, pp. 82−95. DOI: 10.1515/bjes-2019-0023
SLOOT, B. The Quality of Law: How the European Court of Human Rights gradually became a European Constitutional Court for privacy cases. *JIPITEC*. 2020, vol. 11, no. 2, pp. 160–185.
SMET, S. Freedom of Expression and the Right to Reputation: Human Rights in Conflict. *American University International Law Review*. 2011, vol. 26, no. 1, pp. 183–236.
TANDOC, E. C., LIM, Z. W., LING, R. Defining 'Fake News': A Typology of Scholarly Definitions. *Digital Journalism*. 2018, vol. 6, no. 2, pp. 137–153. DOI:10.1080/21670811.2017.1360143
TOULA, C. M. Freedom of Expression. *The Southern communication journal*. 2020, vol. 85, no. 3, pp. 203–204.
TSYBULENKO, E., PLATONOVA, A. Violations of Freedom of Expression and Freedom of Religion by the Russian Federation as the Occupying Power in Crimea. *Baltic Journal of European Studies*. 2019, vol. 9, no. 3, pp. 134−147. DOI: 10.1515/bjes-2019-0026
VORHOOF, D. *European court of human rights: Rebechenko v. Russia.* Human Rights Centre of Ghent University and Legal Human Academy, 2019, vol. 6, no. 1, pp. 1–3.
VOSOUGHI, S., ROY, D., ARAL, S. The Spread of True and False News Online. *Science*. 2018, vol. 359, no. 6380, pp. 1146–1151.
WATTS, C. *Messing with the Enemy. Surviving in a Social Media World of Hackers, Terrorists, Russians, and Fake News*, US: Harper. 2018.

European court decisions

Axel Springer v. Germany, no. 39954/08, ECtHR, 2012.
Big Brother Watch and Others v. the United Kingdom, nos. 58170/13, 62322/14 and 24969/15, ECtHR, 2013, 2014, 2015.
Bladet Tromsø and Stensaas v. Norway, no. 21980/93, ECtHR, 1999.
Cengiz and others v Turkey, no. 48226/10, ECtHR, 2015.
Chorherr v. Austria, no. 13308/87, ECtHR, 1993.
Court decision, 12.07.2011, L'Oréal SA, C-324/09, ECLI:EU:C:2011:474.
Delfi AS v. Estonia, no. 64569/09, ECtHR, 2015.

Eon v. France, no. 26118/10, ECtHR, 2013.
Feldek v. Slovakia, no. 29032/95, ECtHR, 2001.
Flux v. Moldova, no. 31001/03, ECtHR, 2007.
Frankowicz v. Poland, no. 53025/99, ECtHR, 2008.
Glor v. Switzerland, no. 13444/04, ECtHR, 2009.
Groppera Radio AG and Others v Switzerland, no. 10890/84, ECtHR, 1990.
K. v. Austria, no. 47/1992/392/470, ECtHR, 1993.
Karademirci and Others v. Turkey, nos. 37096/97 and 37101/97, ECtHR, 2005.
Leander v. Sweden, no. 9248/81, ECtHR, 1987.
Leroy v. France, no. 36109/03, ECtHR, 2018.
Lingens v. Austria, no. 9815/82, ECtHR, 1986.
Magyar v. Hungary, no. 73593/10, ECtHR, 2014.
Morice v. France, no. 29369/10, ECtHR, 2015.
Müller and Others v. Switzerland, no. 10737/84, ECtHR, 1988.
Observer and The Guardian v. United Kingdom, no. 13585/88, ECtHR, 1991.
Osmani and Others v. the former Yugoslav Republic of Macedonia, no. 50841/99, ECtHR, 2001.
Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung v. Austria, no. 39534/07, ECtHR, 2013.
Perinçek v. Switzerland, no. 27510/08, ECtHR, 2015.
Rebechenko v. Russia, no. 10257/17, ECtHR, 2019.
Savva Terentyev v. Russia, no. 10692/09, ECtHR, 2018.
Shtekel v. Ukraine, no. 33014/05, ECtHR, 2011.
Sidabras and Džiautas v. Lithuania, nos. 55480/00 and 59330/00, ECtHR, 2004.
Stevens v. United Kingdom, no. 11674/85, ECtHR, 1986.
Stoll v. Switzerland, no. 69698/01, ECtHR, 2007.
Vajnai v. Hungary, no. 33629/06, ECtHR, 2008.
Vereinigung Bildender Künstler v. Austria, no. 68354/01, ECtHR, 2007.
Von Hannover v. Germany, no. 59320/00, ECtHR, 2004.

Other sources

Esquire, The Russia Duma proposed to punish for up to 15 years for fakes about the actions of the Russian army, 2022. Retrieved from https://esquire.ru/news/politics-news/01-03-2022/324993-v-gosdume-predlozhili-nakazyvat-na-srok-do-15-let-za-feyki-o-deystviyah-rossiyskoy-armii/, 02 March 2022.
The World bank, Individuals using the internet (% of population), 2020. Retrieved from https://data.worldbank.org/indicator/IT.NET.USER.ZS, 05 January 2022.
Euronews, The Disinformation War: The falsehoods about the Ukraine invasion and how to stop them spreading, 2022. Retrieved from https://www.euronews.com/next/2022/02/25/the-disinformation-war-the-falsehoods-about-the-ukraine-invasion-and-how-to-stop-them-spre, 27 February 2022.
BBC news, Ukraine invasion: Misleading claims continue to go viral, 2022. Retrieved from https://www.bbc.com/news/60554910, 02 March 2022.

Media matters, TikTok is facilitating the spread of misinformation surrounding the Russian invasion of Ukraine, 2022. Retrieved from https://www.mediamatters.org/russias-invasion-ukraine/tiktok-facilitating-spread-misinformation-surrounding-russian-invasion, 02 March 2022.

The Guardian, Twitter trials warnings about 'intense' conversations, 2021. https://www.theguardian.com/technology/2021/oct/07/twitter-trials-warnings-intense-conversations-abuse, 02 March 2022.