

THE EUROPEAN APPROACH TO DISINFORMATION: POLICY PERSPECTIVES

GIOVANNI DE GREGORIO, ORESTE POLLICINO

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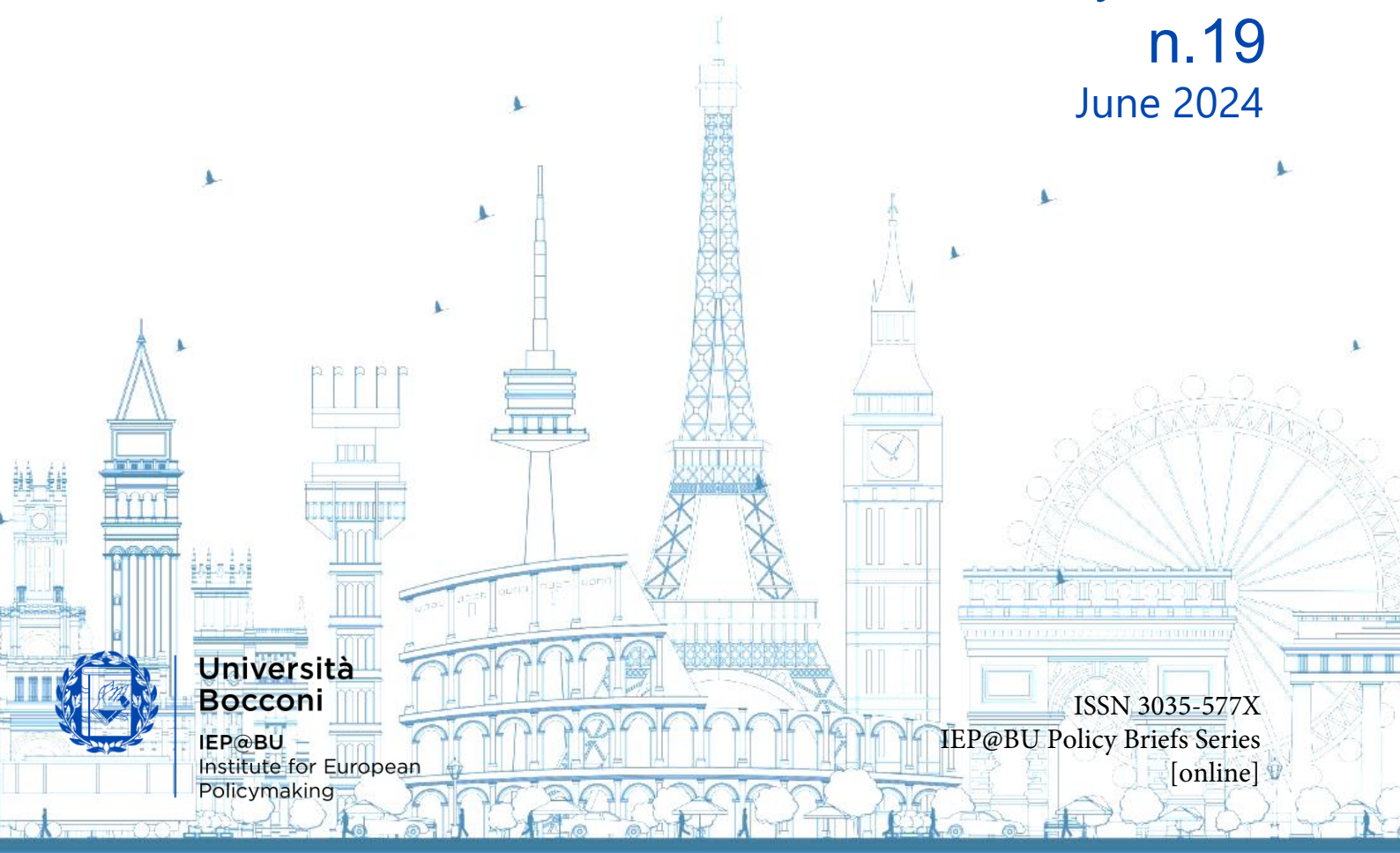


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Abstract

This paper examines the EU approach to combating disinformation. The EU's strategy, developed in response to growing concerns about the impact of false and misleading content on democratic discourse, includes significant regulatory measures such as the Digital Services Act (DSA) and the Strengthened Code of Practice on Disinformation.

These measures represent a blend of hard regulation and self-regulation aimed at increasing transparency, accountability, and procedural safeguards among online platforms. By focusing on platform regulation rather than content restriction, the EU seeks to balance conflicting constitutional rights and freedoms.

This approach highlights the EU's commitment to protecting democratic values through a collaborative policy-making and enforcement process, involving both public and private actors.

The paper explores the evolution of the EU's policy on disinformation, evaluates its current strategies, and discusses future perspectives, emphasizing the importance of transparency and accountability in the digital age.

Introduction

Growing concerns about disinformation have been spreading in the last years. The 2024 elections around the world have been surrounded by the concerns raised by false, fabricated and misleading content that has increasingly been used within the influencer market in the case of 'disinformation for hire' about vaccinations, the challenges raised by information warfare strategies as underlined by the Ukrainian conflict, the constitutional challenges raised by populist narratives, and the spread of generative artificial intelligence applications.

The resulting fears about the ties between disinformation and democratic discourse, has pushed leading constitutional democracies to wondering how to deal with the spread of online disinformation, particularly after the Brexit referendum and the US Presidential elections in 2016 which look nowadays as distant memories. While different regulatory measures and strategies have been



adopted in different areas of the world,¹ as in the case of France or Brazil,² other constitutional systems have merely stepped aside, particularly the USA.

The European Union has demonstrated to be mindful of this scenario as respectively underlined by the adoption of the Digital Services Act,³ and the Strengthened Code of Practice on Disinformation.⁴ Despite the limited relevance of the AI Act in the field of content moderation, the two aforementioned regulatory instruments define a new approach of the Union to disinformation based on a mix between hard regulation and self-regulation. This approach aims to tackle disinformation not by regulating speech but by targeting the dynamics affecting its circulation, primarily looking at online platforms, and strengthening the ties between public and private actors.

Within this framework, this work aims to look at the path and evolution of the European policy to address the spread of disinformation in the digital age. The first part of this work analyses the path of the European policy on disinformation. The second part focuses on the strategy to fight online disinformation as emphasized by the Digital Services Act and the Strengthened Code of Practice on Disinformation. The third part focuses on the perspectives of the European approach to tackle online disinformation.

The Path of the European Policy on Disinformation

The concern of disinformation as a potential threat for the European Union and its democratic institutions primarily emerged in 2015, when European leaders invited the High Representative of the Union for Foreign Affairs and Security Policy, alongside the EU institutions and the Member States, to present an action plan to “challenge Russia’s ongoing disinformation campaigns”.⁵ Nonetheless, it was only at a later stage that the European Parliament adopted a Resolution in order

¹ D Funke, and D Flamini ‘A Guide to Anti-Misinformation Actions around the World’ (Poynter, 2023), <https://www.poynter.org/ifcn/anti-misinformation-actions/>.

² French Proposed Organic Law Against Manipulation of Information, no. 772; and Proposed Bill on the Fight Against the Manipulation of Information, no. 799; Brazil Fake News Bill no. 2.630, 2020.

³ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ L 277/1.

⁴ European Commission, ‘Strengthened Code of Practice on Disinformation’, 6 June 2022.

⁵ European Council, Conclusions, 19-20 March 2015, <https://www.consilium.europa.eu/en/press/press-releases/2015/03/20/conclusions-european-council/>.



to encourage the Commission to deal with the dissemination of fake news online.⁶ This step then led the Commission to consider the fight against online disinformation as a priority including it in its 2018 Work Programme.⁷

After the public consultation launched by the Commission in November 2017,⁸ the High-Level Expert Group made a step forward by providing a report on disinformation.⁹ Firstly, the HLEG provides a definition of “disinformation”, as anticipated above, encompassing “false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit.”¹⁰ The intention of dissemination is the crucial distinguishing factor from the broader category of “misinformation”. However, this definition does not clarify what forms of speech may be caught, as there may be a fine line between intentionally deceitful speech and say, partisan or satirical news, not always easily identifiable as such if taken out of context. Nevertheless, it is noteworthy that the line of action recommended by the HLEG is based on the paradigm principle of protection of fundamental rights, on a “multidimensional approach” to disinformation is built.

Based on this work, the European Commission outlined the “European approach” to disinformation.¹¹ As the Commission observed, the phenomenon of disinformation challenges democratic values. These concerns became more urgent in December 2018, as the European Council voiced its worries for the upcoming European elections.¹² In response to this call, the EU Action Plan on Disinformation set four key pillars to fight disinformation, while preserving democratic processes and maintaining

⁶ European Parliament, Resolution of 15 June 2017 on online platforms and the digital single market, 2016/2276(INI).

⁷ Communication from the Commission to the European Parliament, the Council, the European and Economic and Social Committee and the Committee of Regions, Commission Work Programme 2018. An agenda for a more united, stronger and more democratic EU, COM(2017) 650 final, Strasbourg, 24 October 2017.

⁸ The summary of the consultation is available at <https://ec.europa.eu/digital-single-market/en/news/summary-report-public-consultation-fake-news-and-online-disinformation>

⁹ HLEG, ‘A multi-dimensional approach to disinformation’ 2018 <https://ec.europa.eu/digital-singlemarket/en/news/experts-appointed-high-level-group-fake-news-and-online-disinformation>.

¹⁰ Ibid.

¹¹ 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.

¹² European Council Conclusions, 18 October 2018, <https://www.consilium.europa.eu/media/36775/18-euco-final-conclusions-en.pdf>.



trust in the institutions.¹³ Also, the so-called “Election package” has been adopted with the aim of protecting the integrity of the EU elections.¹⁴

Within this framework, one of the most promising steps in the fight against disinformation is the adoption of self-regulatory tools, in the form of the Code of Practice on Disinformation.¹⁵ Major platforms voluntarily committed to implementing a set of standards to tackle disinformation practices on their platforms.¹⁶ The Code of Practice tries to introduce a system to scrutinize advertising placements (aimed at demonetizing online purveyors of disinformation) and focuses on how to ensure that political advertising and issue-based advertising can be clearly identified by the users and even for research purposes. Furthermore, the Code of Practice also deals with integrity of services aimed at identifying and closing fake accounts and using appropriate mechanisms to signal bot-driven interactions.

Already in 2018, Europe had tried to adopt a self-regulatory approach, thus leaving *de facto* the regulation of disinformation to online platforms and, therefore, to private determinations. The European decision to follow the path of self-regulation was primarily rooted in the metaphor of the free marketplace of ideas that led the European Commission to delegate the writing of the first Code of Practice on Disinformation to online platforms. When in 2018 the European Commission decided to adopt a strategy to deal with disinformation, the prevailing discourse was precisely oriented towards the importation of the metaphor of the Internet as the new marketplace of ideas from the humus of US constitutionalism as also demonstrated by the internal market focus of the e-Commerce Directive.¹⁷ Therefore, the European approach was guided by the promises of the self-corrective

¹³ European Commission and High Representative of the Union for Foreign Affairs and Security Policy, Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Action Plan against Disinformation, Brussels, 5.12.2018 JOIN(2018) 36 final.

¹⁴ The “Election Package” included the Commission Communication on securing free and fair European elections, COM (2018), 637; Commission Recommendation on election cooperation networks, online transparency, protection against cybersecurity incidents and fighting disinformation campaigns in the context of elections to the European Parliament, COM (2018) 5949; Commission Guidance on the application of Union data protection law in the electoral context, COM (2018) 638; Regulation (EU, Euratom) No 2019/493 of the European Parliament and of the Council of 25 March 2019 amending Regulation (EU, Euratom) No 1141/2014 as regards a verification procedure related to infringements of rules on the protection of personal data in the context of elections to the European Parliament, OJ L 85I, 27.3.2019.

¹⁵ Code of Practice on Disinformation, 2018 <https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation>.

¹⁶ The original signatories of the Code were Facebook, Google, Twitter and Mozilla as well as trade associations representing online platforms, the advertising industry, and advertisers, subsequently joined by Microsoft in 2019.

¹⁷ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects



capacity of the market, through a free competition of ideas and opinions (even false ones), or in any case to isolate disinformation without the need for any intervention from public institutions. This ideology was translated into a self-regulation mechanism as the only viable policy option available, thus making the internal market as the primary point of reference.

This first attempt, which also represented a unicum worldwide as a model of voluntary commitment by online platforms to adopt a whole series of measures that contained the phenomenon, was disappointing in terms of the vagueness of the obligations assumed by the platforms themselves and the almost complete absence of criteria for verifiability and measurability of the commitments, as underlined by the Sounding Board on the Multistakeholder Forum on Disinformation.¹⁸ In particular, the 2018 version did not provide the basic conditions for making the Code an effective tool to combat disinformation, particularly considering the absence of objectives and guidelines defined by the Commission and tools for assessing the measures agreed by the signatories.

This approach was anything but in harmony with European constitutional traditions and with the level of competitiveness of the pluralism of public debate that has characterized the continental model. The metaphor of the free digital marketplace of ideas fits uneasily with the European value system both as regards the role played by freedom of expression, and with reference to the concept of abuse of right and with regard to attention to the passive profile of the right to be informed if not in a truthful way. When, in 2018, the metaphor was forcibly imported by the European Commission in the old continent in order to elaborate the first European strategy against disinformation, the economic structure that characterized the digital environment was and is still far from free, due to the emergence and consolidation of online platforms.

However, addressing online disinformation is insidious for constitutional democracies. The risk of compromising freedom of expression and market freedoms is only one of the concerns when designing policies to address disinformation. Constitutional democracies also need to consider the shortages of policy options due to the limit of public enforcement. As underlined in the next section, this situation has led European policy-makers towards collaborative regulatory solutions at the intersection between hard regulation and self-regulation.

of information society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"), OJ L 178/1.

¹⁸ Sounding Board of Forum on Disinformation Online Issues Unanimous Opinion on So-Called Code of Practice, 26 September 2018, <https://www.ebu.ch/news/2018/09/sounding-board-of-forum-on-disinformation-online-issues-unanimous-opinion-on-so-called-code-of-practice>.



The European Approach to Disinformation

The European strategy against disinformation has not based on repressive narratives or the protection of absolute rights but on striking a balance among conflicting constitutional rights and freedoms clashing in the disinformation arena. This way has not led to restricting content or leaving online platforms free to set their own standards but to regulating the processes characterising the spread of disinformation, even if mainly looking at platform regulation.

The adoption of the Digital Services Act has been a critical step for providing a new legal framework for digital services and in mitigating the fundamental rights challenges raised by online platforms to protect European democratic values. Moreover, the introduction of additional regulatory solutions to cooperate with platforms in the fight against certain online content,¹⁹ such as the Strengthened Code of Practice on Disinformation, have been contributing to characterise the European strategy to fight disinformation. First, by adopting the Digital Services Act, the European approach has focused on tackling disinformation through procedural safeguards to increase transparency and accountability in the process of content moderation by (very large) online platforms (VLOPs) based on risk regulation. Second, the EU has introduced collaborative instruments, particularly the Strengthened Code of Practice on Disinformation, which have enriched the European regulatory strategy.

The Digital Services Act

The Digital Services Act came with the goal of defining a new regulatory path for online platforms and content moderation in the digital age. Among the main objectives, the Digital Services Act aims to ensure ‘a secure, predictable and trustworthy online environment’,²⁰ which inevitably involve tackling the spread of disinformation to achieve that goal. While this European regulation maintains the rules of liability for online intermediaries, now established as the foundation of the digital economy and instrumental to the protection of fundamental rights, it aims to increase the level of transparency and accountability of online platforms to mitigate societal risks, including

¹⁹ European Commission, ‘The EU Code of Conduct on Countering Illegal Hate Speech Online’ (30 June 2016); European Commission, ‘2018 Code of Practice on Disinformation’ (October 2022).

²⁰ Digital Services Act, Art 1(1).



disinformation.²¹ In other words, the Digital Services Act does not directly address illegal content but the actors dealing with that content, primarily online platforms. Indeed, the Digital Services Act does not define disinformation, not even illegal content whose notion is left to the law of Member States.²²

This approach extends to areas that are critical for disinformation, including advertising. The Digital Services Act, indeed, recognizes that advertising systems used by VLOPs pose particular risks, for instance, relating to the spread of disinformation which could impact on public health, public security, civil discourse, political participation and equality.²³ As a result, the Digital Services Act requires VLOPs to compile and make publicly available in a specific section of their online interface a repository containing various information, including the nature of the advertiser, and keep this information online for at least one year after the advertisement was presented for the last time on their online interfaces.²⁴

Likewise, the Digital Services Act proceduralises the process of crisis in cases of extraordinary circumstances affecting public security or public health.²⁵ In these cases, the Commission has the power to rely on crisis protocols to coordinate a rapid, collective and cross-border response, especially when online platforms are misused for the rapid spread of illegal content or disinformation or where the need arises for rapid dissemination of reliable information.²⁶ In these cases, very large online platforms are required to adopt these protocols, although these are to be applied only temporarily and should not lead platforms to a general monitoring obligation of online content.

Procedural safeguards do not exhaust the obligations introduced by the Digital Services Act. With respect to VLOPs, these actors are required to conduct a risk assessment at least once a year about any significant systemic risks, including disinformation, stemming from the functioning and use made of their services in the EU,²⁷ while putting in place reasonable, proportionate, and effective mitigation measures.²⁸ Likewise, VLOPs will be required to include in their terms and conditions the parameters used by recommender systems, in a clear, accessible, and easily comprehensible manner.²⁹

²¹ Ibid., Recital 9.

²² Ibid., Art 3(h).

²³ Digital Services Act, Recital 81.

²⁴ Ibid., Art 39.

²⁵ Ibid., Art 36.

²⁶ Ibid., Art 37. See also Recital 71.

²⁷ Digital Services Act, Art 34.

²⁸ Ibid., Art 35.

²⁹ Ibid., Art 38.



The move to risk regulation leads the Digital Services Act, and the European strategy on disinformation, towards a more flexible system of enforcement. In Europe, risk regulation is broadly expanding from environmental law to food safety, and it is also now spreading to digital policies as also underlined not only by the Digital Services Act but also by the AI Act. As a result, considering disinformation as a risk which requires online platforms to act properly in order to mitigate the spread of false content. Nonetheless, this assessment is not only left to online platforms which are called to run a risk assessment in order to balance their economic interests with public interest goals, but also to a system of enforcement requiring coordination across Member States.

The Code of Practice on Disinformation

The challenges raised by disinformation encouraged the Commission to overhaul the self-regulatory approach reflected by the Code of Practice adopted in 2018 and propose a co-regulatory framework. Even before the adoption of the Digital Services Act, the European strategy against disinformation reached a new point with the adoption of the Strengthened Code of Practice on Disinformation. Compared to 2018, the Strengthened Code Preamble refers to the European constitutional traditions and to the fundamental role of the Charter of Fundamental Rights of the Union, thus giving centre stage to fundamental rights, and their balancing, in contrast to disinformation.³⁰ This approach is aligned with the expansion of constitutional values in European digital policies and underlines how the Union is putting the accent on the protection of rights and freedoms as an overarching goal in the digital age.

The Digital Services Act contributes to this move by shedding lights on the still voluntary nature of codes of conduct but on co-regulation as a mitigation measure to address harmful content. In this case, codes of conduct aim to play an important role in tackling the amplification of false news through bots and fake accounts, and may be considered as an appropriate risk mitigating measure by very large online platforms.³¹ Rather than the promotion of a self-regulatory framework, the Digital Services Act clarifies that the refusal without proper explanations by a provider of an online platform or of an online search engine of the Commission's invitation to participate in the application of such

³⁰ Strengthened Code of Practice on Disinformation, 1.

³¹ Digital Services Act, Recital 104.



a code of conduct could be taken into account, where relevant, when determining whether the online platform or the online search engine has infringed their obligations.³²

The Strengthened Code aims to enhance transparency to combat online disinformation, particularly focusing on content monetization mechanisms within social media business models, which can incentivize the spread of disinformation. It emphasizes the fight against disinformation professionals to reduce the financial incentives for polluting public discourse. Regarding political advertising, the Code calls for clear identification and labelling of such content on the web, especially during sensitive times, like elections. The new Code also places a greater emphasis on improving security and countering hidden disinformation tactics and procedures. The Code empowers users by providing tools and risk mitigation measures to combat disinformation, complementing the Digital Services Act. Additionally, it emphasizes granting researchers access to data for in-depth studies on online disinformation while complying with GDPR regulations, addressing the previous limitations in data access from online platforms.

The enlarged content of the new Code already shows a different commitment of all the stakeholders to this policy objective. This result has been possible also considering the diversity of the signatories. The Code of Practice has not been only shaped by online platforms, but also by other stakeholders, including representatives of civil society, the community of fact-checkers and advertising companies, the European Regulators Group for Audiovisual Media Services and the European Digital Media Observatory.

The guidelines of the Commission set the red line defining a limit to safeguard the protection of rights and indicating proposals for measuring and monitoring the objectives of the Code. One added value of the new Code consists of a much more massive and detailed presence of performance indicators relating to the effectiveness (and therefore measurability) of the commitments agreed by the signatories, almost completely absent in 2018, thus defining critical steps to verify whether and how the commitments undertaken by the signatories are then translated into concrete actions.

This new architecture to fight disinformation has also been fostered by the establishment of a Transparency Centre and a Task Force which are essential bodies reflecting the dynamic identity of the new Code as a work in progress. They aim to support the effectiveness of the commitments

³² Ibid.



taken by online platforms and their general implementation. The Task Force also contributes to the definition of Structural Indicators as diagonal measures that allow the general measurement of the objectives, as also supported by the European Digital Media Observatory (EDMO) and the European Regulators Group for Audiovisual Media Services (ERGA). This part plays a fundamental role in ensuring that the Code is a living instrument, and can be adapted to the challenges of disinformation and efficiently contributes to countering it.

Perspectives on the European Strategy

The European approach to disinformation has been building a unique model to fight disinformation on a global scale. Particularly considering the interdependency between public and private actors, what has become particularly relevant is the relationship of trust between regulators and stakeholders, which is not only based on a formal compliance mechanism but on accountability, collaboration and faith.

Even beyond the framework of disinformation, being aware of the perils of disproportionate regulatory measures, the Union have made increasing resort to regulatory strategies meant to increase flexibility in European digital policies. The risk-based approach introduced by the Digital Services Act for VLOPs can be considered a different way of regulating disinformation which is not addressed from the perspective of content but of procedural safeguards. Likewise, the risk protocol system fosters the dialogue between the Commission and online platforms to address the spread of online disinformation in times of emergencies such as war or a global pandemic.

A regulatory framework to address disinformation does not only require considering the protection of conflicting constitutional interests, primarily rights and freedoms, but also the relationship of interdependency between public and private actors. Particularly, when freedoms are abused and not just authority, constitutional law should be a trigger for reaction to address the exercise of hybrid powers. The limited public enforcement and the power of online platforms to set content moderation standards makes private actors a critical fragment of a broader constitutional mosaic, which does not only see public actors as source of powers. As a result, rather than adopting a rigid compliance approach, the Union aims to increase the accountability of VLOPs, and this approach is relevant in implementing risk mitigations measures to tackle disinformation. This approach contributes to strike a balance between market freedoms and the protection of individual rights and democratic values. Therefore, the reliance on the risk-based approach shows how the Union aims to promote a regulatory strategy focused on the balancing of interests and values.



However, the risk-based approach is only one part of the European way to address online disinformation. The Strengthened Code of Practice on Disinformation complements the approach of the Union followed with the Digital Services Act by supporting a cooperative regulatory regime. The Digital Services Act recognizes to the Commission (and the European Board for Digital Services) the role of encouraging and facilitating the drawing up of voluntary codes of conduct, taking into account in particular the specific challenges of tackling different types of illegal content and systemic risks.³³ These codes can play a critical role not only to better detailing the obligations coming from the Digital Services Act but they should be also considered as risk mitigation measures implemented by VLOPs to tackle systemic risks, including disinformation.

However, the Strengthened Code of Practice on Disinformation does not seem to achieve this purpose. Despite these steps taken after the failure of the first code in 2018, the Strengthened Code of Practice still represents a voluntary mechanism which only aspires to become a code of conduct and, therefore, a co-regulatory measure. At the moment, it is not clear whether the Code of Practice on Disinformation would meet the expectations of becoming a code of conduct. Furthermore, the scope of the Code could be challenged by the expansion of the European policies addressing online platforms and content moderation. Some parts of the Code tend to overlap with legal obligations which have been introduced by European legislation after its adoption. For instance, access to data owned by online platforms for research purposes in the Code overlaps with the legal framework introduced by the Digital Services Act.³⁴ Likewise, the rules on political advertising of the Code are likely to meet the obligation which will be introduced by the European proposal on transparency of political advertising.³⁵

Despite these challenges, codes of conduct provide another example of how the Union is designing a third way to tackle disinformation. Rather than relying on top-down rigid strategies, such a mechanism promotes policy-making and enforcement processes where private actors actively participate in conversation with public actors. While public actors define public policy objectives and keep the enforcement power, including sanctions and fines, private actors are responsible and accountable to implement these rules. These processes would reduce that gap which limits the power of public actors to enforce their policy in digital spaces, and, particularly, mitigate the spread

³³ Ibid, Art 45(1).

³⁴ Ibid, Art 40.

³⁵ Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising.



of disinformation. Furthermore, the participation and agreement of rules between public and private actors would also increase the reactivity of private actors and the acceptance of potential sanctions.

The European approach on disinformation underlines the intention of the Union to tackle disinformation without disproportionately regulating disinformation as content or stretching EU legal bases to address this purpose. The adoption of the Digital Services Act and the Strengthened Code of Practice defines a critical moment for the European approach on disinformation. Rather than opposing online platforms but recognizing their critical role, the European approach to online disinformation can be considered a third way to balance fundamental rights and market freedoms.

Conclusions

The spread of disinformation has raised questions for European digital policy. The evolution of the European approach to address falsehood in the digital age have revealed how disinformation is not just a matter of free speech but a broader set of conflicting constitutional values.

The introduction of the Digital Services Act has moved the focus on limiting the discretion of online platforms in making decisions on freedom of expression by introducing more safeguards. It represents a first step to remedy the lack of transparency and accountability, also by relying on a risk-based approach which is based on the balancing between fundamental rights and economic freedoms. Likewise, the Strengthened Code of Practice on Disinformation has encouraged more dialogue between public and private actors to strike a balance among conflicting constitutional interests. This approach aims to ensure that the enforcement of public policies does not only come from private determinations or public orders but relies on a transparent and accountable collaboration between public and private actors.

The primary challenge to address online disinformation is to find a balanced approach among conflicting constitutional interests, particularly economic freedoms and fundamental rights. The European approach underlines how, in order to ensure the effective achievement of digital policies, tackling disinformation cannot be based exclusively on a top-down strategy but requires building a relationship of trust and collaboration between public and private actors based on transparency and accountability. Between leaving the market free to shape disinformation and relying on oppressive measures to tackle the spread of disinformation, the European strategy on disinformation defines an evolving relationship between public and private actors to mitigate the risks of disinformation.

