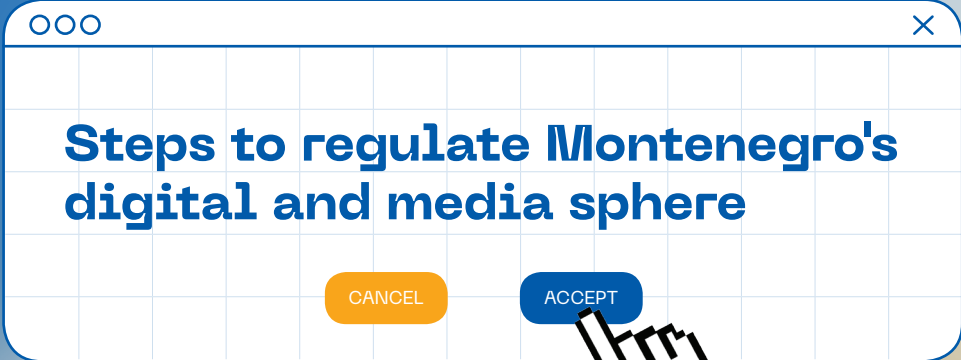
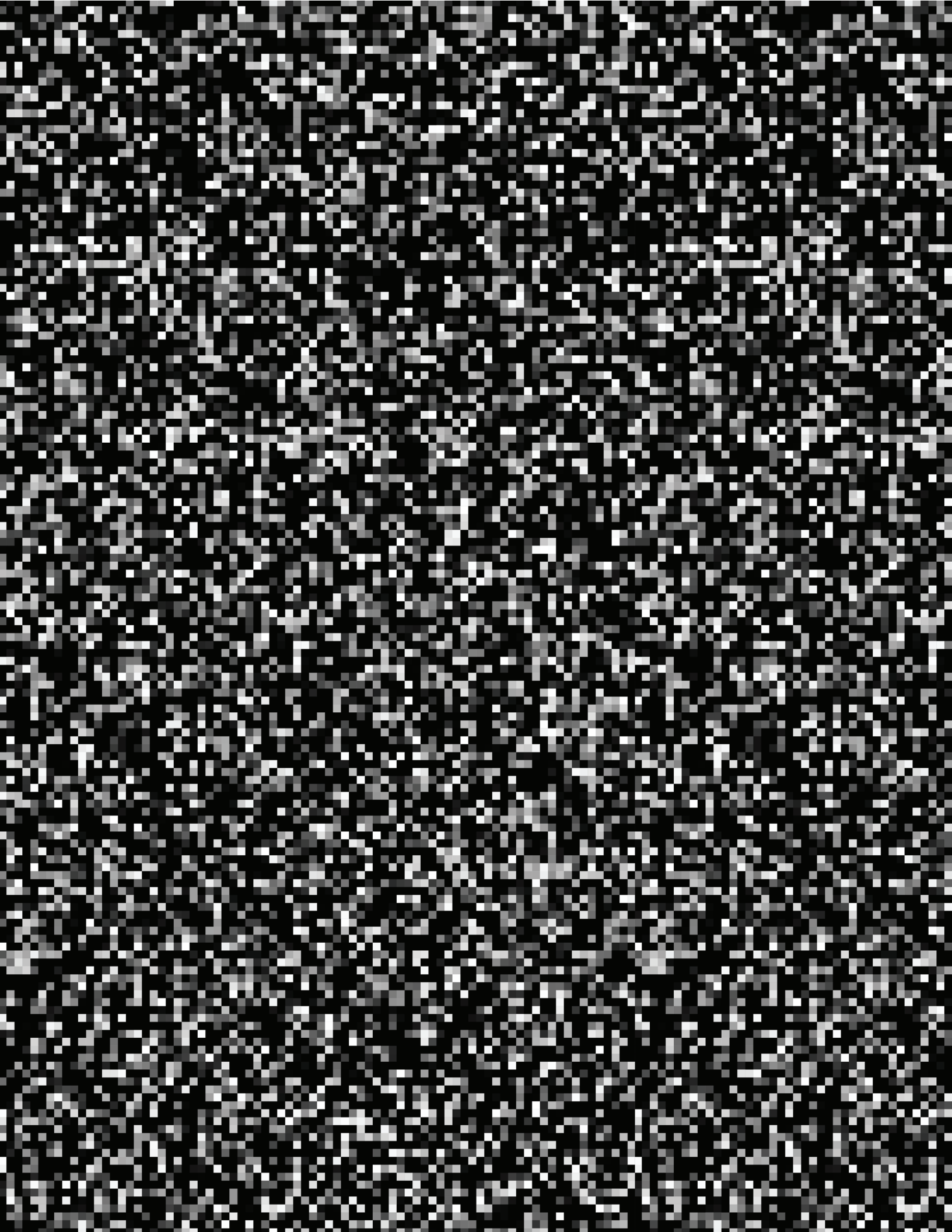


COUNTERING DISINFORMATION WHILE PROTECTING FREEDOM OF EXPRESSION





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**Steps to regulate Montenegro's
digital and media sphere**

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List of abbreviations

AI	Artificial intelligence
Big Tech	Big technology companies
CDT	Center for Democratic Transition
DMMA	Digital Markets Act
DSA	A Digital Services Act
ECRI	European Commission against Racism and Intolerance
EDAP	European Democracy Action Plan
EEA	European Economic Area
EMFA	European Media Freedom Act
EU	European Union
HLEG	High Level Expert Group on Fake News and Online Disinformation
INGE	Special Committee for foreign interference in all democratic processes in the EU, including disinformation
NetzDG	The Network Enforcement Act (Ger. Netzwerkdurchsetzungsgesetz)
SAD	United States of America
UN	United Nations

A Foreword by the Publisher

Citing commitments made as part of the Declaration of the EU-Western Balkans Summit held in Tirana in 2022, the European Commission's most recent report on Montenegro highlights the need for Montenegro to step up efforts to close space for foreign interference and information manipulation, including disinformation. Last year's resolution of the European Parliament also expressed concern over malignant foreign influences, attempts at destabilization and disinformation campaigns meant to undermine Montenegro's European path and fuel divisions and tensions. Montenegro is therefore called upon to undertake major and systematic efforts to identify and expose disinformation factories, and reinforce the importance of media freedom and independence, high-quality reporting and promoting media literacy as key elements in the fight against disinformation.

However, Montenegro took no visible efforts in this field that could be described as significant or systematic. The current legal framework governing the issue of media, known as "media laws", does not cover the topic of disinformation at all, nor does it mention the very term. Digital media content and platforms, which

are distributed and consumed via digital technologies and the Internet, are virtually unregulated. The strategic documents that are currently in force are mutually incompatible, and although the first-ever Media Strategy does touch upon the issue of disinformation, it offers very few concrete solutions and measurable performance indicators.

While major processes are underway in Europe to regulate the digital media landscape, with many democracies seeking effective mechanisms to shield their societies from the harmful impact of disinformation, Montenegro appears to be stuck in the era of analogue media. A host of accumulated issues such as political and economic influences on the media, a lack of editorial independence and self-regulation are keeping the discussion about the need for better regulation of the media space trapped within the framework of competing political and/or ownership interests, while completely overlooking the contemporary challenges and ways of addressing them. These challenges are not insignificant, and they are not to be addressed through solutions that could easily be replicated from elsewhere without



jeopardizing freedom of expression and democracy.

The Center for Democratic Transition (CDT) hopes that this analysis will encourage the necessary discussion on ways to curb the unchecked spread of disinformation through a new legal and strategic approach.

The key conclusions of the analysis underscore the importance of changing the current approach to combating disinformation. Adopting a holistic approach is advised in place of inconsistent and often contradictory plans as implemented by different actors. It is also recommended that a dedicated strategy for combating disinformation be developed, along with the establishing of a parliamentary committee specifically tasked with addressing this issue.

It is crucial to keep up to date with EU policies in the area of fight against disinformation at all times, and carefully harmonize with and implement new European regulations.

It is also critical to improve media legislation so as to ensure the transparency of media ownership and fun-

ding and promote media freedom and pluralism. It is vital to plan and consistently implement measures to improve media literacy.

Lastly, a comprehensive analysis of the strategies currently employed to sanction disinformation is necessary. Potential restrictions on the right to freedom of expression should be planned and carried out in line with EU and Council of Europe standards, with due consideration given to proportionality and training for representatives of all the relevant authorities.

We hope that this analysis will serve as a source of inspiration for decision-makers and policy makers, and encourage them to consider measures to improve and amend the legislative and institutional framework. We remain open to any and all constructive criticism, proposals, and suggestions, so that we can contribute to the efforts to create better and more effective solutions in combating disinformation.

CDT team

I. Disinformation in the Digital Age: definition and (self)regulation challenges

The global technological advancement has been so rapid in recent decades that only now, as the risks of new digital technologies are becoming more widely acknowledged in practice, is a legal framework beginning to emerge. Moreover, since the inception of social networks on the Internet, their owners have maintained that they have nothing to do with the media content itself, but that they simply serve as the final in a line of printers and transmitters that facilitate communication. The legislation of the United States of America, where most of the tech companies were launched, allows precisely that in Section 230¹ of the 1996 Telecommunications Act, which gives them, as providers of an interactive computer service, immunity from being treated "as the publisher or speaker of any information provided by another information content provider". The new EU regulatory framework is on a similar track: online platforms "have a key role in the content organization, including by automated means or algorithms, but do not exercise editorial responsibility over the content to which they provide access."² Technology is available to all under equal conditions and every member of a society can publish what they want and follow what others are publishing, and no media editors or ministries of truth will be standing in their way – this was the mantra.

However, the technology that made information more accessible to all by enabling anyone with a smartphone and an Internet connection to share their content with a worldwide audience had thus contributed to, for example, the Arab Spring (2010–2012),³ fueled hatred in the bloody conflict in Myanmar,⁴ interfered with election procedures in democratic countries and made it possible for users' personal information to be misused for pre-election purposes,⁵ fueled the spread of dangerous conspiracy theories like Pizzagate⁶, supported attempts to stay in power by force,⁷ and even backed publicly choosing of sides during election campaigns.⁸ Some social media self-regulation attempts such as Oversight Board⁹ proved to be useful, despite the fact that their (im)potence also prompted the establishment of the Real Oversight Board,¹⁰ while other such attempts failed miserably, as testified by former workers and whistleblowers coming from Facebook,¹¹ Google,¹² Twitter¹³ and other mostly California-based Big Tech companies, as well as TikTok¹⁴ which is associated with China.¹⁵

1 More at: https://en.wikipedia.org/wiki/Section_230

2 More at: https://eur-lex.europa.eu/legal-content/HR/TXT/HTML/?uri=OJ:L_202401083

3 Jason Kelley, „A Decade After the Arab Spring, Platforms Have Turned Their Backs on Critical Voices in the Middle East“, *Electronic Frontier Foundation*, 17.12.2020, www.eff.org/deeplinks/2020/12/decade-after-arab-spring-platforms-have-turned-their-backs-critical-voices-middle

4 “Myanmar: Facebook’s Systems Promoted Violence Against Rohingya - Meta Owes Reparations: New Report“, *Amnesty International*, 29.09.2022, www.amnesty.org/en/latest/news/2022/09/myanmar-facebooks-systems-promoted-violence-against-rohingya-meta-owes-reparations-new-report/

5 Carole Cadwalladr and Emma Graham-Harrison, “Cambridge Analytica: The Story So Far“, *The Guardian*, 17.03.2018, <https://www.theguardian.com/news/2018/mar/17/cambridge-analytica-facebook-influence-us-election>

6 More at: https://en.wikipedia.org/wiki/Pizzagate_conspiracy_theory

7 “Jan. 6 Committee Report: Social Media Fueled Right-Wing Extremism“, *The Washington Post*, 17.01.2023, <https://www.washingtonpost.com/technology/2023/01/17/jan6-committee-report-social-media/>

8 Barbara Ortutay, „Elon Musk buys 9% stake in Twitter after hinting at shake-up“, *AP News*, 08.11.2022, <https://apnews.com/article/elon-musk-twitter-inc-technology-cbd873f1bd81fa4356b81f89c4c5ebed>

9 More at: <https://informationisbeautiful.net/visualizations/facebook-meta-oversight-board-decisions-major-rulings/>

10 More at: <https://the-citizens.com/campaign/real-facebook-oversight-board/>

11 “Frances Haugen to MEPs: EU digital rules can be a game changer for the world“, *European Parliament News*, 07.11. 2021, <https://www.europarl.europa.eu/news/en/press-room/20211107IPR16801/frances-haugen-to-meps-eu-digital-rules-can-be-a-game-changer-for-the-world>

12 Matthew Taylor, „There was all sorts of toxic behaviour: Timnit Gebru on her sacking by Google, AI’s dangers and Big Tech’s biases“, *The Guardian*, 22.05.2023, <https://www.theguardian.com/lifeandstyle/2023/may/22/there-was-all-sorts-of-toxic-behaviour-timnit-gebru-on-her-sacking-by-google-ais-dangers-and-big-techs-biases>

13 Julia Carpenter, „Twitter’s head of site integrity Yoel Roth is leaving for cryptocurrency company“, *CNN*, 29.11.2022, <https://edition.cnn.com/2022/11/29/tech/yoel-roth-twitter-elon-musk>

14 Craig Timberg, „TikTok whistleblower will meet with congressional investigators“, *The Washington Post*, 10.03.2023, <https://www.washingtonpost.com/technology/2023/03/10/tiktok-data-whistleblower-congress-investigators/>

15 Casey Newton, „TikTok’s China Problem Is Back“, *Platformer*, 01.08.2022, <https://www.platformer.news/tiktoks-china-problem-is-back/>

However, the widespread use of new technologies sparks enough interest to have their unrestricted freedom to distribute content start becoming legally balanced against other freedoms, regardless of whether those technologies — that is, their algorithms — are in their essence neutral or simply highly adapted to increase the engagement of social network users. Voices that call for change have become louder, with more reactions coming from many countries outside the US, from both democratic and autocratic governments, after decades of prevalence of Silicon Valley tech companies' philosophy "Unless you are breaking stuff, you are not moving fast enough" ("Move fast and break things").

International conventions of the United Nations, which have been shaping common principles of all its members since the end of World War II, are still relevant, such as the Universal Declaration of Human Rights,¹⁶ International Covenant on Civil and Political Rights,¹⁷ and International Covenant on Economic, Social and Cultural Rights.¹⁸ Since the adoption of these conventions in 1966, the obligation to uphold fundamental human rights lies with the state, but, as of 2011, also with companies, as they are ever since being held accountable for their (in)action, including the selection of their business partners, as explained in the *Guiding Principles on Business and Human Rights*¹⁹.

In addition, the *Windhoek +30 Declaration: information as a public good* was adopted in 2021 to regulate freedom of information and expression in the digital sphere²⁰, which calls on states to ensure a conducive environment for freedom of expression and access to information online and offline, while requiring tech companies to, among other things, be more transparent about their automated systems and to proactively prevent threats to freedom of expression and access to information. For legal and legitimate restrictions on those freedoms, such as e.g. in cases of incitement to hatred, the UN also developed practical guidelines, such as the Rabat threshold test for incitement to hatred,²¹ whereas Council of Europe applies ECRI criteria²² for combating hate speech.

However, many countries were "stuck" on content regulation during the first state-level regulation attempts that took place between 2011 and 2022, when over 70 states tried to regulate social networks. In fact, as pointed out in the analysis *Chilling Legislation: Press Freedom and the Battle against Fake News*, when criminalization of production and dissemination of what is understood by the contentious term "fake news" is predicated on ambiguous definitions, it may be construed differently and used specifically as a weapon "turning legislation into a tool to stifle independent media".²³

It is important to keep in mind that Big Tech firms have far more economic clout than governments that seek to impose obligations on them under the threat of sanctions. Even unions of states such as the European Union, which have imposed severe penalties against online platforms, have not shown to be very successful in enforcing regulations such as the General Data Protection Regulation.²⁴ The power of Big Tech is also evidenced by the millions spent on lobbying: 113 million euros in the European Union last year alone,²⁵ with lobbyists coming straight from senior-ranking posts in EU agencies.

As for the European continent's approach to the matter, the Council of Europe and the European Union applied the scientific and research-based method — they decided to first of all define the problem. PhD Claire Wardle and Hossein Derakhshan's 2017 paper "Information Disorder: Toward an interdisciplinary framework for research and policy making" proved to be paramount.²⁶

16 More at: <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

17 More at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

18 More at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>

19 *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, Office of the United Nations High Commissioner for Human Rights, https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf

20 More at: <https://unesdoc.unesco.org/ark:/48223/pf0000378158>

21 More at: https://www.ohchr.org/sites/default/files/Rabat_threshold_test.pdf

22 ECRI General Policy Recommendation No. 15 on Combating Hate Speech, Council of Europe, 2016, <https://rm.coe.int/ecri-general-policy-recommendation-no-15-on-combating-hate-speech/16808b5b01>

23 Gabrielle Lim and Samantha Bradshaw, *Chilling Legislation: Navigating the State of Media Laws Worldwide*, Center for International Media Assistance, 2023. https://www.cima.ned.org/wp-content/uploads/2023/06/CIMA-Chilling-Legislation_web_150ppi.pdf

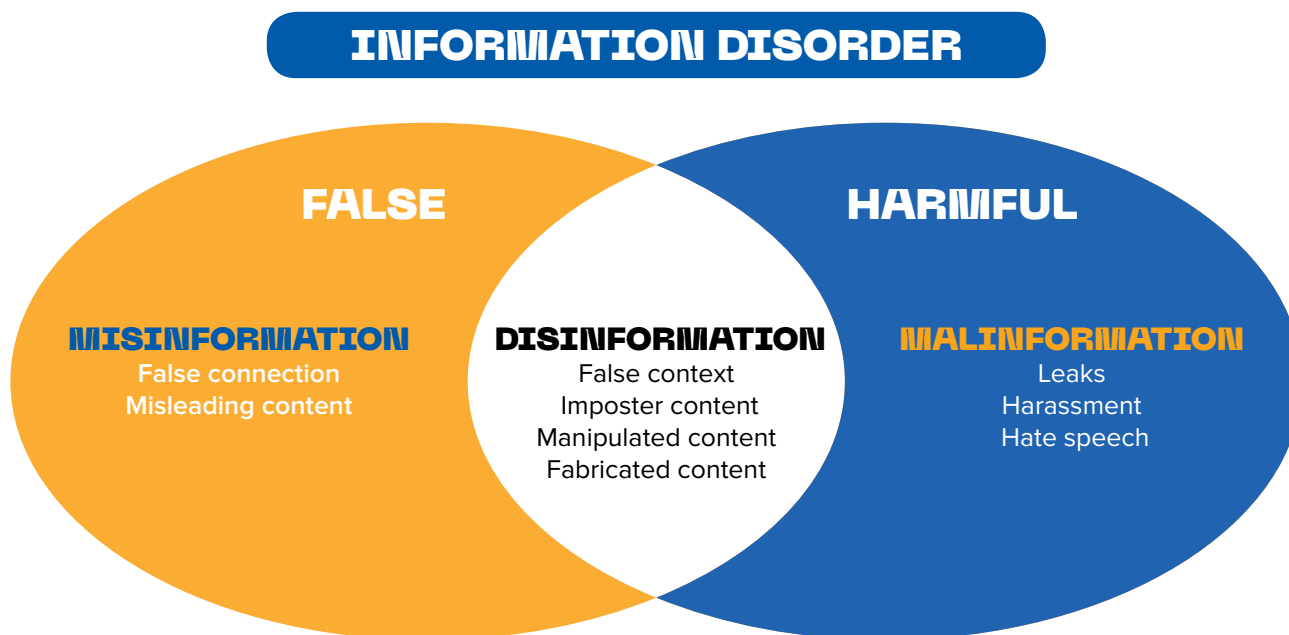
24 Florian Zandt, „Highest fines for GDPR breaches“, *Statista*, 23.05.2023, <https://www.statista.com/chart/25691/highest-fines-for-gdpr-breaches/>

25 "Big Tech Lobby Power in Brussels Continues to Grow", *Corporate Europe Observatory*, 07.09.2023, <https://corporateeurope.org/en/2023/09/big-tech-lobby-power-brussels-continues-grow>

26 Claire Wardle, PhD & Hossein Derakhshan, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making*, Council of Europe, 2017, <https://edoc.coe.int/en/media/7495-information-disorder-toward-an-interdisciplinary-framework-for-research-and-policy-making.html>

They also reject the term "fake news", as it falls short of encompassing a phenomenon as intricate as information pollution, and argue that it was coined by politicians to characterize the media that are not to their liking. After all, disinformation has always existed, it is just that the internet and social media have drastically altered how it is produced, communicated, and distributed. The new conceptual framework envisages three stages in which information disorders occur: creation, media production, and distribution, while the three main elements are agent, who produces and disseminates the information, message, and receiver (interpreter). In this novel classification of information disorders, it is critical to differentiate between messages that are true from those that are false, and those that are harmful from those that are not, as intention plays a crucial role in the whole matter:

*“Mis-information is when false information is shared, but no harm is meant.
Dis-information is when false information is knowingly shared to cause harm.
Mal-information is when genuine information is shared to cause harm, often by moving information designed to stay private into the public sphere.”*



This concept was adopted by the EU in 2018, first through the multidisciplinary²⁷ High Level Expert Group on Fake News and Online information – HLEG, which published the report “A multi-dimensional approach to disinformation”:²⁸

“Disinformation as defined here includes forms of speech that fall outside already illegal forms of speech, notably defamation, hate speech, incitement to violence, etc. but can nonetheless be harmful. It is a problem of actors — state or non-state political actors, for-profit actors, citizens individually or in groups — as well as infrastructures of circulation and amplification through news media, platforms, and underlying networks, protocols and algorithms. In the near future, it will increasingly involve communication via private messaging applications, chat bots, and voice-operated systems, as well as augmented reality and virtual reality and content generated or manipulated by AI.” *renu stvarnost i virtualnu stvarnost te sadržaj koji generiše ili manipuliše AI.”*

²⁷ Raegan MacDonald, „The High-Level Group on Fake News and Online Disinformation“, Mozilla NetPolicy Blog, 26.03.2018, <https://blog.mozilla.org/netpolicy/2018/03/26/hlegonfakenews/>

²⁸ A Multi-Dimensional Approach to Disinformation: Report of the Independent High-Level Group on Fake News and Online Disinformation, European Commission, 2018, <https://www.ecsite.eu/sites/default/files/amulti-dimensionalapproachtodisinformation-reportoftheindependenthighlevelgrouponfakenewsandonlinedisinformation.pdf>

II. European policies and fight against disinformation: Navigating the uncharted territory

Democratic governments and societies, like those in the European Union, rely on citizens' ability to access a variety of accurate, complete and timely information in order for them to be able to form their own opinions and engage in an informed public debate, which in turn allows them to participate in free and fair political decision-making processes that affect their lives. As a result, both legal regulation and practice are evolving in a way that safeguards the democratic system, although in various ways across member states.

In Slovakia, a country whose digital market caters for 5.4 million Slovak-speaking citizens, there are no repercussions, for example, for any instances of election meddling. Disinformation was used so extensively in the 2019 presidential election that, according to Globsec research, Russian-affiliated Facebook pages and disinformation profiles launched a vigorous smear campaign against one of the candidates.²⁹ Also, just before election silence at the end of 2023, advancements in technology i.e. artificial intelligence (AI) was utilized to create audio recordings on digital platforms that falsely claimed that some candidates had plans for hiking beer prices, and that a reputable journalist was complicit in vote manipulation³⁰.

In France, major legislative developments took place as back as in 2018, and were centered around elections,³¹ and an expedited process to "take down" (*interrompre la diffusion*) the blatantly fake news that get widely and artificially disseminated and could affect election outcome was introduced into election campaigns through the Law against Manipulation of Information (*La loi contre la manipulation de l'information*).

Germany reinforced its legislation by adopting the Network Enforcement Act back in 2017 (*Netzwerkdurchsetzungsgesetz, NetzDG*).³² In 2019, the Federal Constitutional Court of Germany issued an injunction³³ ordering Facebook to temporarily restore access to a suspended user account of a small right-wing political party The Third Path (Der Dritte Weg), while the election campaign was still ongoing, after it had been blocked ahead of European election over a status that was labelled as hate speech. Additionally, in 2021, the German Federal Court of Justice³⁴ repealed some of Facebook's rules that govern the removal of racist content and the blocking of its author, as Facebook does not provide an explanation for the removal of posts and blocking of accounts, nor does it offer the right of appeal. However, the law has drawn criticism since it compels platforms to disclose users' identities³⁵ to law enforcement without a court order, and the court in Cologne upheld the action brought by Meta and Google, with the conclusion that this German law violates EU law, specifically the E-commerce Directive, because it imposes obligations on companies that are not registered in Germany, and the Audiovisual

29 Miroslava Sawiris and Katarína Klingová, Presidential Election Monitoring Report, GLOBSEC, 2019, <https://www.globsec.org/sites/default/files/2019-04/Presidential-Election-Monitoring-report.pdf>

30 Karin Kóváry Sólymos „Slovakia: Deepfake Audio of Denník N Journalist Offers Worrying Example of AI Abuse“, *IPI Media, International Press Institute*, 31.10.2023, <https://ipi.media/slovakia-deepfake-audio-of-dennik-n-journalist-offers-worrying-example-of-ai-abuse/>

31 More at: https://fr.wikipedia.org/wiki/Loi_contre_la_manipulation_de_l%27information

32 Mark Scott and Janosch Delcker, „Germany's Hate Speech Law Forces Big Tech to Clean Up Its Act“, *Politico*, 06.07. 2021, <https://www.politico.eu/article/germany-hate-speech-netzdg-facebook-youtube-google-twitter-free-speech/>

33 “Der Dritte Weg v. Facebook Ireland Ltd“, *Global Freedom of Expression*, Columbia University, <https://globalfreedomofexpression.columbia.edu/cases/der-dritte-weg-v-facebook-ireland-ltd/>

34 “Top German court strikes down Facebook rules on hate speech“, *Euractiv*, 02.06.2020, <https://www.euractiv.com/section/digital/news/top-german-court-strikes-down-facebook-rules-on-hate-speech/>

35 Janosch Delcker, „Germany's controversial online hate speech law turns 3“, *Politico*, 01.06.2020. <https://www.politico.eu/article/germany-hate-speech-internet-netzdg-controversial-legislation/>

Media Services Directive, because the implementing body is not functionally independent from state ministry³⁶. In any case, the German law needs to be harmonized with the new European Digital Services Act.

In Poland, in the spring of 2024, the first ruling that imposes an obligation on a social media was rendered as based on national law; it specifically said that a social network could not block users solely on the grounds that "community standards have been violated" without providing a reason or a possibility of filing an appeal. The Civil Society Drug Policy Initiative (*Spółeczna Inicjatywa Narkopolityki, SIN*) initiated a five-year legal battle, with backing from the Panoptikon Foundation,³⁷ all without even referring to the European regulation that was adopted in the meantime.

Ireland is also an example worth mentioning, as that is where most Big Tech companies have their headquarters registered for EU operations. Its national law Online Safety and Media Regulation Act³⁸ has revamped the regulatory body for electronic media and transformed it into a Media Commission composed of several persons, including the Online Safety Commissioner,³⁹ and established rules for managing harmful content on all audiovisual media, including traditional TV programs and on-demand services.

II.1. Legislative advancements in common EU policies

A set of regulations was adopted at the end of 2020 that is expected to increase the resilience of democracy. Alongside the new European Rule of Law Mechanism, the new Strategy for Strengthening the Application of the Charter of Fundamental Rights, and the Media Action Plan, there is also the European Democracy Action Plan⁴⁰ (EDAP), which envisages activities in three directions:

- promoting free and fair elections by introducing legislation on the transparency of political advertising and revising the rules on funding of European political parties;
- strengthening media freedoms and pluralism by creating recommendations for safety of journalists, launch initiatives to stop the misuse of litigation against public participation (SLAPP), introducing financial support for media pluralism, as well as legal and practical support for journalists, and by increasing the transparency of media ownership and state advertising through the new Media Ownership Monitor;⁴¹
- Countering disinformation by imposing costs on perpetrators and overhauling the Code of Practice on Disinformation into a co-regulatory framework of obligations and accountability of online platforms.

36 <https://www.lexology.com/library/detail.aspx?g=442d7097-d4ca-4ad7-93da-043ble33b619>

37 More at: <https://edri.org/our-work/win-against-facebook-giant-not-allowed-to-censor-content-at-will/>

38 More at: <https://www.gov.ie/en/publication/88404-publication-of-the-online-safety-and-media-regulation-bill/>

39 More at: <https://www.citizensinformation.ie/en/consumer/buying-digital-content-and-services/online-safety/#2c479e>

40 "Questions and Answers: Digital Services Act package", *European Commission*, 15.20.2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2250

41 More at: <https://media-ownership.eu/>

● INSTRUMENTS AND CHALLENGES OF SELF-REGULATION

The first Code of Practice on Disinformation⁴² from 2018, which many online platforms pledged to comply with, at least in principle, did not contain clear benchmarks such as quantifiable targets, which made it difficult to track potential progress. The European Commission and civil society expressed dissatisfaction with the outcomes, and the European Court of Auditors determined⁴³ that while the Code was pertinent and on the right track, it was still lacking in certain areas, ranging from insufficient human resources in institutions to platforms that were not held accountable..

In its revamped 2022 edition, the Code defines⁴⁴ obligations in much greater detail, along with related measures, qualitative reporting elements and service level indicators for each service, classified by EU and EEA member states and/or languages. Its chapters cover demonetization through scrutiny of ads, political and issue advertising, and the integrity of services enabled by AI.

Users, the reliable research community, and the fact-checking community are the three groups of actors that are most empowered through the regulated standards of collaboration. Consequently, it is the very organizations that represent those actors that signed the Code⁴⁵ along with the vast majority of major online platforms — with the exception of X (formerly Twitter), which withdrew from the Code after Elon Musk took over the reins⁴⁶.

Public transparency is maintained through the regular release of reports and data from all Code signatories, with reports from very large online platforms being made available to the public every six months at www.Disinfocode.eu.

The effectiveness of this Code will be evaluated as based on these reports; if it satisfies the requirements set forth in the Digital Services Act, it will be recognized as a Code of Conduct that is compliant with the Digital Services Act both by the European Commission and the European Board for Digital Services.

The goals of the following *Defense of Democracy Package*⁴⁷ were further defined in light of the first plan's outcomes. However, given the impending June 2024 European parliamentary election, it is expected that the new makeup of European bodies will be facing greater challenges with enforcing the existing regulations — such as the Media Freedom Act and the Digital Services Act and its accompanying Code of Practice on Disinformation, rather than with shaping new regulations. And the approaching elections will be their first major test.

The EU approached the regulation of the digital sphere through a lens of a single European market and consumer rights. First, as the "gatekeepers" in the online platform market, the Digital Market Act (DMA)⁴⁸ regulated the online platform competitive landscape and required online platforms to be transparent and interoperable. The Digital Services Act (DSA) further regulates them, acknowledging the unique role of "gatekeepers" of major online platforms whose services are extensively used in the EU.⁴⁹

42 More at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/protecting-democracy/strengthened-eu-code-practice-disinformation_en

43 Special Report: Combating disinformation – EU efforts are fragmented and fail to counteract disinformation effectively, European Court of Auditors, 2021, https://www.eca.europa.eu/Lists/ECADocuments/SR21_09/SR_Disinformation_EN.pdf

44 More at: <https://disinfocode.eu/signatories-archive/>

45 "Twitter's retreat from the Code of Practice on Disinformation raises a crucial question: Are DSA codes of conduct really voluntary?," *DSA Observatory*, 12.06.2023, <https://dsa-observatory.eu/2023/06/12/twitters-retreat-from-the-code-of-practice-on-disinformation-raises-a-crucial-question-are-dsa-codes-of-conduct-really-voluntary/>

46 More at: <https://disinfocode.eu/reports-archive/?years=2024>

47 More at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/protecting-democracy_en

48 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R1925>

49 More at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-services-act_en

DSA establishes the rules that govern online ecosystems. It acknowledges that platforms, which act as intermediaries in the dissemination of disinformation, cannot bear full responsibility for every outcome resulting from their digital services. However, it requires them to take measures to mitigate systemic risks and ensure adequate conditions for combating disinformation and redesign their service when needed.

DSA views platforms as a type of online service provider (hosting provider) that offers information storage and public distribution, even though it does not impose any additional responsibility for content. As they only have a duty to remove the prohibited content, these tech companies' legal liability for the dissemination of content therefore depends on whether or not they are aware that some activity or content is expressly forbidden. If the content is harmful, but not prohibited, as is the case with disinformation and manipulative activities, then this is defined as a systemic risk that they must reduce.

A total of 156 recitals and 93 articles in the DSA specify the rights of users and researchers,⁵⁰ It defines the obligations of online platforms and shapes new national and supranational public bodies; the penalty clause is brief but applicable and clear: fines of up to 6% of the business' global annual turnover.

Users are provided with mechanisms to safeguard their rights, including the right to be given an explanation of the operation of algorithmic recommender systems. Also, they must be given the possibility to alert the platform when they come across illegal content — the role of trusted flaggers has been additionally defined to that end. Platforms are required to provide a precise and unambiguous explanation for any interruptions in the provision of service, including the temporary or permanent restriction of content, advertisements, and access to service and user account. Platforms are required to have an effective system for filing complaints, take part in the out-of-court reconciliation process, and report on all of this to the public, which for the first time brought to light the unexpectedly high volume of different complaints made by users on online platforms.⁵¹

For very large online platforms and online browsers with at least 45 million users in the EU each month, new requirements have been introduced, such as to identify, analyze, and assess all systemic risks at least once a year, set up measures to mitigate these risks, and have a crisis response mechanism set up. The main risks that they must consider are related to the dissemination of unlawful content, content with adverse effects on fundamental rights enshrined in the EU Charter, democratic processes and civil discourse, public safety, gender-based violence, the protection of public health and minors, and grave consequences for people's physical and mental health.

According to the DSA, independent audit companies hired by the platforms will oversee the first step of implementation of these obligations and then publish their reports. At the same time, verified researchers need to have access to the data required for analyzing the systemic platform risks.

Furthermore, a system of public bodies is being established — the European Board for Digital Services, which is made up of national Digital Services Coordinators appointed by each member state — either as a new body or as a function of an already existing, but politically independent body. The European Commission also takes part in the oversight, as it is required to facilitate the creation of "bylaw" codes and has the right the access to platform's data in real time and launch investigations and inspections.

The transparency of all these processes should enable the public to oversee the work of oversight bodies and evaluate the effects for themselves. But the very first messages coming from the European level caused some concern, possibly because they were conveyed during protests in France. In an interview with France Info,⁵² European Commissioner for Internal Market Thierry Breton announced the DSA's entry into force. In essence, he said that big online platforms will have to "delete hateful content, content that calls, for example, to riot, to killing... or setting cars on fire" instantly, or else face immediate penalties. Civil society quickly responded negatively⁵³ over the risk of overly harsh measures against harmful speech jeopardizing freedom of expression.

50 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), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uris-er-v:OJ.L_.2022.277.01.0001.01.ENG#d1e40-1-1

51 More at: <https://transparency.dsa.ec.europa.eu/>

52 More at: <https://youtu.be/1fNh2fGDal?feature=shared&t=947>

53 Karen Gullo, "International Rights Groups to Thierry Breton: You Need to Make Clear Under the DSA States", *Electronic Frontier Foundation*, 17.07.2023, <https://www.eff.org/deeplinks/2023/07/international-rights-groups-thierry-breton-you-need-make-clear-under-dsa-states>

● GUIDELINES FOR EUROPEAN ELECTIONS

The European Commission released Guidelines for large platforms and search engines on lowering systemic risks for electoral processes less than three months ahead of the European Parliament election.⁵⁴ Though not legally binding, the Commission views the guidelines as a check list of how serious the platforms are in investing their efforts. Platforms are expected to have a sufficient number of local experts well versed in the specifics of each platform and how it affects the local context. This will enable them to strike a good balance when determining how to moderate political content, such as when distinguishing malicious political disinformation from legitimate political satire.

These guidelines highlight good practices: political advertisements should be easily identifiable, AI-generated content, such as deepfakes, should be clearly labelled; and there should be a plan in place to promptly handle unforeseen events and minimize their impact on the outcome of the election. The platforms will need to assess how well these Guidelines were observed after the election is over, and then publish their findings so that the general public can provide feedback.

The European Parliament passed two additional acts that are pertinent to the regulation of this complex area in March 2024, as it was nearing the end of its current mandate: the Artificial Intelligence Act, which will progressively go into effect, but offer users of new AI technologies only minimal protection and the European Media Freedom Act (EMFA).⁵⁵ In order to effectively address threats to free, independent, and active journalism in Europe, the EMFA sets minimum standards and common principles for all member states. These standards and guidelines cover topics such as media capture, intrusive oversight, political interference, declining media pluralism, and the unchecked power of social media platforms.

For instance, the EMFA lays out measures to safeguard editors' independence and prevent political meddling in editorial decisions and forbids governments from placing spyware on journalists' phones. At the same time, it ushers in a greater degree of transparency regarding media ownership and state advertising in the media. Additionally, it makes audience measurement more transparent and offers media some protection from the arbitrary removal of media content by large online platforms. The implementation will be overseen by a new, politically independent body called the European Board for Media Services, which will be composed of national media regulatory bodies. Although EMFA does not answer all the questions raised about the future of journalism and media in the EU, such as that of their business models not being sustainable in the digital sphere, numerous civil society organizations,⁵⁶ including journalist associations,⁵⁷ welcomed the adoption of the act, as much is expected from its implementation.

54 More at: <https://digital-strategy.ec.europa.eu/en/library/guidelines-providers-vlops-and-vloses-mitigation-system-ic-risks-electoral-processes>

55 More at: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/protect-ing-democracy/european-media-freedom-act_en

56 "Coalition calls for effective implementation as the Parliament adopts the European Media Freedom Act", International Press Institute, 13.03.2024, <https://ipi.media/coalition-calls-for-effective-implementation-as-the-parliament-adopts-the-european-media-free-dom-act/>

57 "EFJ calls for immediate and ambitious implementation of the European Media Freedom Act", European Federation of Journalists, 26.03.2024, <https://europeanjournalists.org/blog/2024/03/26/efj-calls-for-immediate-and-ambitious-implementation-of-the-european-media-freedom-act>

III. Legal framework in Montenegro: A blank page

The current legal framework that governs the issue of the media, i.e. the so-called "media laws", namely the Law on Media,⁵⁸ the Law on Electronic Media⁵⁹ and the Law on the National Public Broadcaster Radio and Television of Montenegro,⁶⁰ do not address the topic of disinformation at all, nor do they mention the actual term.

According to the Law on Media, a competent court may, upon the state attorney's proposal, restrict further distribution of media content that directly and intentionally encourages the commission of offences listed in the Criminal Code of Montenegro. These offences include: forcibly jeopardizing or unlawfully changing the constitutional order; terrorism; jeopardizing Montenegro's territorial integrity, and violence or hatred directed towards a group or a member of a group that is defined by virtue of race, skin color, religion, origin, nationality or ethnic affiliation, or any other characteristic.

This type of procedure is considered urgent by law, and the norm makes it clear that only the state prosecutor has the authority to initiate it.

As a matter of course, in a hypothetical situation — and only in the most extreme circumstances — disinformation might potentially be addressed through this law. However, these provisions were not primarily designed to combat disinformation, as was made clear in the government's explanation⁶¹ provided during the process of incorporating these provisions into the law. This argument *inter alia* states that the aim of these provisions is to safeguard the "legitimate interests of the state" and to prevent hate speech, without clearly specifying that they are aimed at suppressing disinformation.

It should be noted that in the event of a clearly unlawful content, the current Media Law permits the removal of reader comments from online portals. Disinformation can be dealt with, under certain circumstances and to a limited extent, using this legal framework. Again, in a way that is not disinformation-specific, as the provisions were not expressly created to combat disinformation.

Disinformation is also not covered in the publicly accessible drafts of new "media laws": the Draft Law on Media, the Draft Law on Audiovisual Media Services, and the Draft Law on the Public Media Service of Montenegro. It should be noted, though, that the Draft Law on Audiovisual Media Services does, in compliance with Directive (EU) 2018/1808, introduce certain rules on video-sharing platforms and the authority of the Agency for Audiovisual Media Services with regard to registration, registry management, and specific oversight roles.

A strategic document adopted by the Montenegrin government, the 2023–2027 Media Strategy, lists "improved quality of information for citizens and enhanced media literacy" as one of its strategic goals. One of the operational objectives in this regard is to create an improved system for effectively combating hate speech, online harassment, and disinformation. On the other hand, it does not contain disinformation-related performance indicators.

58 Law on Media (Official gazette of Montenegro No 82/2020)

59 Law on Electronic Media (Official gazette of Montenegro No 46/2010, 40/2011 – as amended, 53/2011, 6/2013, 55/2016, 92/2017 and I 82/2020)

60 Law on the National Public Broadcaster Radio and Television of Montenegro (Official gazette of Montenegro No 080/20)

61 More at: <https://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/895/2195-13750-10-3-19-2-12.pdf>

The following activities are scheduled in the 2023–2024 Action plan for the implementation of the 2023–2027 Media Strategy:

- drafting the Analysis of needs for amending the existing mechanisms in order to sanction the spread of disinformation (by the end of the second quarter of 2024);
- drafting the Proposal of the Law on Media in order to more effectively counter hate speech, online harassment and disinformation (by the end of the first quarter of 2024);
- establishing a close coordination mechanism for fighting hate speech, online harassment and disinformation, along with the obligation of periodic reporting on these cases and the preparation of recommendations for improving the conditions in the media (by the end of the fourth quarter of 2024);
- developing an analysis on directions of cooperation with global Internet companies and social media networks with the aim of countering disinformation and hate speech (by the end of the fourth quarter of 2024).

The Government of Montenegro adopted the 2022-2026 Cyber Security Strategy, and its operational goal of improving the response to cybercrime states the following:

“Amendments to the Criminal Code and Criminal Procedure Code, a 100% capacity expansion in the Police Administration's Group for Combating Cyber Crime, and specialized cybercrime training for the Ministry of Interior and Police Administration personnel and judicial officers will be taking priority in the upcoming period. Amendments to the Criminal Code are meant to sanction crimes related to the dissemination and spread of fake news and disinformation, while changes to the Criminal Procedure Code are to enhance and streamline the investigative process”.

According to the 2022–2023 Action Plan of the 2022–2026 Cyber Security Strategy of Montenegro, amending the country's Criminal Code to make it illegal to create and disseminate fake news and disinformation online was a task that was supposed to be finished by the end of the third quarter of 2023.

In reality, the situation actually developed in the exact opposite way from what was envisaged in the aforementioned strategic plan.

Namely, between 2003 and late 2023, the criminal offence of "causing panic and disorder" under Article 398 of Montenegro's Criminal Code was formulated as follows:

“(1) Whoever causes panic by disclosing or disseminating false news or allegations or seriously disrupts public law and order or thwarts or hampers to a significant extent the enforcement of decisions and measures of state authorities or organizations exercising public powers, shall be punished by a fine or a prison sentence for a term not exceeding one year.

(2) Where the offence set forth in paragraph 1 of this Article is committed using the media or other means of public information or similar means or at a public meeting, the perpetrator shall be punished by a prison sentence for a term not exceeding three years.”

However, the definition of this criminal offence was completely changed in the Law on Amendments to the Criminal Procedure Code, which took effect in December 2023, and it now reads:

“(1) Whoever threatens a large number of citizens with commission of a criminal offense punishable by an imprisonment sentence of five years or more, and thereby causes panic or serious disturbance among citizens, shall be punished by a fine or imprisonment of up to one year.

“(2) Where the offence set forth in paragraph 1 of this Article is committed using the media or other means of public information or similar means or at a public meeting, the perpetrator shall be punished by a prison sentence for a term not exceeding three years.”⁶²

Therefore, contrary to strategic plans, the Criminal Code was amended so that the criminal offence of causing panic and disorder no longer involves disclosing or disseminating false news or allegations. As a result, such behaviour no longer qualifies as criminal.

All of the above indicates that the current legal framework does not address or specifically target disinformation, and the legislative interventions that are in the pipeline do not offer noteworthy progress. Additionally, there indeed are certain strategic directions aimed at suppressing disinformation, but experience has shown that sometimes the strategically planned course of action differs greatly from the actual course taken.

62 Criminal Code of Montenegro (“Official gazette of the Republic of Montenegro”, No 70/2003, 13/2004, 47/2006 and “Official gazette of Montenegro”, No 40/2008, 25/2010, 32/2011, 64/2011 – as amended, 40/2013, 56/2013, 14/2015, 42/2015, 58/2015 – as amended, 44/2017, 49/2018, 3/2020, 26/2021 - revision,144/2021 and 145/2021 and 110/2023)

IV. A clash of values: legal framework for countering disinformation in light of freedom of expression

The European Convention for the Protection of Fundamental Human Rights and Freedoms safeguards the right to *freedom of expression*. The European Convention has precedence over domestic legislation and is directly applied where it regulates the matter differently from national legislation because it is, by definition, an international treaty that has been duly ratified and published. This is stated in the Montenegrin Constitution. Furthermore, as mandated by the Constitution, all laws must be enacted in conformity with the Constitution itself and with the ratified international treaties, such as the European Convention.

This means that any action that encroaches on freedom of expression must be subject to convention law's standards. These standards are defined and developed by the European Court of Human Rights in Strasbourg through its case law, in line with the *autonomous interpretation doctrine*, which holds that this Court alone is qualified to interpret terms used in the European Convention. The Court in Strasbourg's extensive body of case law — generated on a case by case basis — has produced a number of standards and tests that make up convention law together with the European Convention.

The mechanisms to counteract the harmful effects of disinformation are still in their infancy, although there are many different ones in place. As a result, the Strasbourg Court has not yet had the chance to develop standards in this particular area. This will only happen when steps to counter disinformation are taken further and cases pertaining to specific issues get brought before the Strasbourg Court.

Until then, we cannot but hypothesize, despite the risks such a limited perspective could entail, over how far we should be taking the anti-disinformation measures before they start to violate people's right to freedom of expression, by examining the general standards and evolution of case law in the area of freedom of expression.

Freedom of expression is safeguarded under Article 10 of the European Convention, which stipulates:

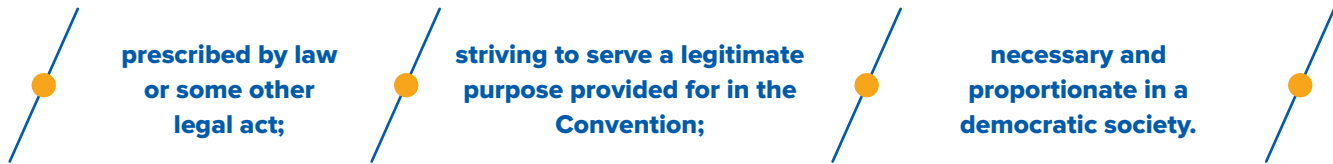
“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting,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

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

As is evident from the provision itself, the European Convention defines the content of the right to freedom of expression (freedom to hold opinions and to receive and impart information and ideas), as well as the conditions for restricting this right.

The Strasbourg Court created the so-called three-part test based on Article 10 paragraph 2 of the European Convention. This test is used to determine whether or not a restriction on freedom of expression is in compliance with the European Convention; if not, such a restriction is deemed to constitute a violation of the right to freedom of expression.

According to the three-part test, any restriction on the right to free speech must be:



A measure is deemed to be in violation of the right to freedom of expression if it does not meet all three requirements of the three-part test.

Regarding the first requirement that the measure be prescribed, the Court of Human Rights' standards suggest that a norm must possess a specific quality, namely, a particular provision restricting the right to freedom of expression must be unambiguous and clear so that everyone can adjust their conduct and comply accordingly.

The second requirement, "striving to serve a legitimate purpose," suggests that restrictions on the right to freedom of expression may only be implemented inasmuch as they serve the values listed in Article 10 paragraph 2 of the European Convention. More precisely, the legitimate restrictions are those that safeguard:

- national security;
- territorial integrity or public safety;
- prevention of disorder or crime;
- protection of health or morals;
- protection of the reputation or the rights of others;
- preventing the disclosure of information received in confidence;
- or maintaining the authority and impartiality of the judiciary.

We can see right here already that no measure that would restrict the right to freedom of expression can be applied to a piece of information just because it is not true. This is to say that, in order to justify taking action against disinformation, this particular disinformation must have an impact on one of the listed interests.

The most abstract of the three parts of the test is the requirement for a restrictive measure to be necessary in a democratic society, and the Strasbourg Court made different observations regarding this matter depending on the circumstances in individual cases. It implies not only that the measure (the legal provision) needs to pass this test, but also that its application in each and every case must be necessary in a democratic society. This requirement suggests that there must be a compelling social need to restrict certain forms of expression, as based on ECtHR case law. In a democratic society, the requirement of necessity also calls for the application of the principle of proportionality, which states that any measure taken must be commensurate with the potential risk to the interest being pursued. Measures that would have a deterrent effect on future exercise of freedom of expression, such as prison sentences, disproportionate fines, and other measures, will certainly not be in conformity with the principle of proportionality.

All of the above means that measures taken against disinformation that entail curbing the freedom of expression must be taken with the intention of protecting the legitimate interests listed above, to the extent necessary to serve the legitimate purpose, while staying within the bounds of proportionality.

Additionally, it should be recalled that ECtHR grants special protection to "*public watchdogs*," when deciding on measures that are to be applied. Journalists, civil activists, bloggers, policy researchers, authors of scientific and scholarly papers are provided with additional safeguards on freedom of expression, especially when they initiate public debates on issues of public concern.⁶³

The Strasbourg Court underscores the importance of distinguishing between statements of fact and value judgments when it comes to the way in which freedom of expression is exhibited. The existence of facts can, by their very nature, be demonstrated, whereas the truth of value judgments is not susceptible of proof. This is precisely why responsibility for value judgments/opinions is limited to exceptional situations only. However, where a statement amounts to a value judgment, it still needs to have a sufficient factual basis in order for it to be permitted.

The Strasbourg Court has addressed a number of issues pertaining to the exercise of freedom of expression online in its case law thus far.

The Court observes that the Internet has become a fundamental medium for individuals to exercise their constitutional right to receive and exchange ideas and information, providing resources for participating in public discourse on political issues and other subjects of public interest.⁶⁴ Because of its accessibility and ability to store vast amounts of data and communications, the Court believes that the Internet contributes significantly to the public's access to news and generally facilitates the dissemination of information.⁶⁵

The Court points out that a clear legal framework that governs the extent of the access ban and ensures judicial review of the measure in order to prevent abuses and arbitrary treatment is necessary in order to make it possible to restrict access to a specific Internet page, even temporarily.⁶⁶

The Court also considered situations in which web portals could be held liable for reader comments posted publicly in the comments section. In one such case⁶⁷ the Court found that domestic legal measures that clearly declare from the outset that the publisher of a media portal established for commercial purposes bears responsibility for content that is clearly unlawful and appears on the portal are in compliance with the standards. Because the ruling in this case attracted particular attention and raised questions in a related case,⁶⁸ the Court provided the circumstances that it deemed particularly important when evaluating the online portal publisher's possible liability for the published content. These circumstances included the following: the setting in which the comments were posted; the comment's actual content; the author's potential liability; the actions taken by the portal (in this case, comment removal); the actions taken by those whose rights were potentially violated (in this case, reporting, request for comment removal); and the consequences incurred by both the portal's publisher and the individual whose rights were violated by the comment.

The Court also found that sanctioning a politician for failing to remove a hate speech comment from the public Facebook account he was using for his election campaign was not in violation of the principles of freedom of expression.⁶⁹

The prohibition of abuse of rights is prescribed in Article 17 of the European Convention. This means that nothing in the Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth in the Convention or at their limitation to a greater extent than is provided for in the Convention. This means that neither the state, nor anyone else, can act in a way that goes against any convention right or freedom by invoking the European Convention.

63 Key theme - Article 10 Contributions to public debate: Journalists and other actors, European Court of Human Rights (ECtHR), 2023, <https://ks.echr.coe.int/documents/d/echr-ks/contributions-to-public-debate-journalists-and-other-actors>

64 Factsheet - Access to Internet and freedom to receive and impart information and ideas, European Court of Human Rights (ECtHR), 2022, https://www.echr.coe.int/documents/d/echr/FS_Access_Internet_ENG

65 Ibid.

66 Yidrim v. Turkey, application No 3111/10.

67 Delfi AS v. Estonia, application No 64569/09.

68 Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary, application No 22947/13.

69 Sanchez v. France, application No 45581/15

In practical terms, this prohibition is most pertinent in the context of freedom of expression. Simply put, in extreme situations when someone abuses freedom of expression against the Convention rights themselves, then the Convention does not offer them protection against being sanctioned and having their freedom of expression restricted.

The very Convention, and particularly the case law of the European Court of Human Rights, identify the values that the Convention safeguards, and the exercise of Convention rights may not interfere with those values. These values are justice and peace, effective political democracy, peaceful settlement of international conflicts and sanctity of human life, tolerance, social peace and non-discrimination, gender equality, coexistence of members of society free from racial segregation, etc.⁷⁰

The Strasbourg Court case law thus far demonstrates that the prohibition of abuse of rights is not applicable to those who use their right to freedom of expression to promote or incite: hatred, violence, xenophobia and racial discrimination, anti-Semitism, Islamophobia, terrorism and war crimes, the denial or revision of historical facts that are well-established (such as the Holocaust), totalitarian ideology, or other political ideologies that are incompatible with democracy.⁷¹

Given the serious threat that disinformation poses to democracy, it is possible that in the future, as convention law develops, the Strasbourg Court will view disinformation as an infringement on the right to freedom of expression in certain contexts.

However, when rendering decisions, the Court always takes into account the context, including the social one. It is therefore possible that developed democracies will allow a wider scope of measures for restricting freedom of expression, including sanctioning, as these countries have developed mechanisms to prevent the abuse of repressive measures. Conversely, delicate democracies will likely be expected to put in place measures that are carefully tailored, well-balanced, very precise, and applied with even greater care and precision.

70 Guide on Article 17 of the European Convention on Human Rights, Prohibition of abuse of rights, European Court of Human Rights (ECtHR) 2022, https://www.echr.coe.int/documents/d/echr/Guide_Art_17_ENG

71 Ibid.

V. Mapping the unknown: steps for (self)regulation in the digital and media sphere in Montenegro

As previously mentioned, there are no provisions on combating disinformation in the current legal framework.

On the other hand, there are indeed strategic deliberations on how to tackle this issue, but they are not well elaborated. Media Strategy and Cyber Security Strategy, the two relevant strategic documents, have different approaches to combating disinformation. Additionally, experience has shown that the actual activities undertaken tend to diverge greatly from the strategically planned action.

Therefore, it makes sense to view and address the problem of combating disinformation from a holistic perspective, so as to ensure that the different policies in place do not conflict with one another. It would be reasonable to think about adopting a dedicated strategic document for combating disinformation, of course, presuming that its implementation would be overseen and carried out.

There is clearly a vast array of potential actions. First, engaging in stimulating activities. Next, the measures that the media legislation would put into effect. Then, there are measures related to the exercise of voting rights and combating disinformation during the electoral process. Lastly, actions that trigger criminal liability.

Incentive measures pose no risks and can only have positive outcomes and contribute to a wholesome information environment when put into practice. By this, we mean actions that not only increase media literacy but also the awareness of all public actors. These actions are also a prerequisite for introducing policies that are restrictive to freedom of expression, as governments enacting only restrictive policies without any encouraging ones would be in violation of standards for combating disinformation.

Measures that could restrict the right to freedom of expression need to be carefully thought out. They need to be thoroughly examined for compliance with human rights protection standards prior to being introduced. The legal norms that would define such measures would need to be clear and unambiguous to those tasked with putting them into practice. They need to strive to serve legitimate purposes and be proportionate. It is especially important to watch out that the actions have no deterrent effect on the media and its role in a democratic society.

The civil sector, media regulatory bodies, and media associations, through their self-regulation and other facilitating tools, should play a special role in assessing the needs and measures to combat disinformation. The European Commission's recommendation on internal safeguards for editorial independence and ownership transparency in the media sector remains highly relevant⁷².

In the next section, we present a five-fold plan of action in the effective fight against disinformation, a few of the most important steps to start (self)regulation in this area:

72 European Commission's recommendation (EU) 2022/1634 as of September 16 2022 on internal safeguards for editorial independence and ownership transparency in the media sector, https://eur-lex.europa.eu/legal-content/HR/TXT/?uri=uriserv%3AOJ.L_.2022.245.01.0056.01.HRV&toc=O-J%3AL%3A2022%3A245%3AFULL

V.1. Keeping up and harmonizing with EU policies

Even the most economically developed nations are faced with contemporary challenges in regulating relationships with big tech platforms, a problem that Montenegro is unable to successfully handle on its own. Because of this, it is vitally important for Montenegro to stay abreast of EU policies and harmonize its laws and practices accordingly.

This calls for the meticulous preparation of transposition tables for incorporating EU regulations into national provisions so that they are truly applicable, rather than just automatically transposed. Montenegro should look for the best institutional design for the Digital Services Act's implementation and begin harmonizing its laws straightaway.

Mitigating detrimental effects of disinformation on democratic processes, particularly elections, has now become part of the fundamentals cluster that covers the functioning of democratic institutions under the revised negotiations model, which already extends to Albania and North Macedonia's accession process. As a result, even though not legally required, it is crucial to take into account developing a roadmap for strengthening of democratic institutions in light of this and other challenges in this area

V.2. Defining a strategic framework for combating disinformation

From the perspective of illegal interference with freedom of expression, the standards and comparative practices presented in this document make it abundantly evident that regulating disinformation involves much more than simply inserting a few articles into media laws or haphazardly prescribing criminal sanctions whose application will be problematic.

Effectively mitigating the adverse impact of disinformation extends well beyond the regulation of legacy media and covers digital services, digital security, and safeguarding democratic institutions and economic systems, all the while maintaining the rights and freedoms that have been achieved.

Although the Media Strategy in effect does touch upon the issue of disinformation, its main contribution was to define it in an official document for the first time ever, without providing adequate measures. This strategy makes sense because the issues at hand and their potential solutions go far beyond than what can be accomplished within the conservative framework that views the disinformation ecosystem as a problem limited to the media landscape only.

Because of the complexity of the issue, a multi-sector inclusive dialogue is needed to develop a comprehensive disinformation-fighting strategy that takes a multifaceted approach to the problem. A strategic approach consists of much more than just a set of objectives and measures; it also involves the creation of an institutional framework that may facilitate the adoption of novel solutions, which is composed of both new and existing institutions.

In this regard, we would like to bring to your attention the CDT's previous proposal to create a parliamentary committee, modelled after the European Parliament's INGE Committee, to address foreign meddling in democratic processes, including disinformation. This committee could provide both substantive and political support for these efforts.

The INGE Committee's mandate calls for evaluating the extent of foreign threats in the following domains: major national and European elections across the EU, disinformation campaigns on traditional and social media aimed at swaying public opinion, cyberattacks targeting vital infrastructure, direct and indirect financial support and economic coercion of political actors, and subversion of civil society. The Committee's task is to analyze the issue, find solutions, and suggest countermeasures to these attempts to undermine democratic processes.

V.3. Increasing the transparency of the media sector through legislative intervention

Although there are still many unanswered questions when it comes to regulating accountability for publishing disinformation, particularly in the digital realm, the need to make media ecosystems more transparent is already well-established, with many good practices in place that regulators could call on.

The creation of a comprehensive and functional platform for publishing detailed information on media ownership and funding is mandated by law. Data on direct, indirect, controlling, or beneficial owners, as well as information on the size of their ownership stake, must be gathered and published in addition to data on legal ownership. Broadcasting licenses should not be granted to media outlets where the source of the founding capital cannot be ascertained. Media laws should mandate the publication of information about the ownership and editorial structure of the media and prescribe mandatory registration for online portals.

Identifying an efficient monitoring mechanism, with effective sanctions and accountability for compliance, is essential for the execution of these provisions.

V.4. Strengthening media professionalism and media literacy through active state participation

Good international practices all point to the need for a balanced approach to regulating the protection of society from disinformation, and are largely in favor of incentive measures rather than introduction of restrictions.

Incentive measures encompass investment in journalism as an activity that serves the public interest, but also, in a broader sense, investment in education, culture, and science, all of which contribute to increasing media literacy in society.

It is vital to improve the current system of funding projects meant to promote media pluralism and media professionalism through changes to media laws. Redefining the list of priority areas for which funds are allocated from the Fund for Encouraging Pluralism and Media Diversity is necessary in order to direct financial support to issues of social importance that do not generate profit, as opposed to, e.g., promoting tourism and agriculture or affirming entrepreneurship, which can get endorsement from the profit sector for their media production. The previous approach, which did not distinguish between high-quality and low-quality projects and did not take the applicants' integrity into account because it was driven more by the desire to appease all applicants by awarding them government grants or even win the favor of the media, must be drastically changed in order to introduce clear criteria in the project awarding process.

New provisions ought to prohibit the awarding of even the tiniest amounts of money to those that produce and disseminate hate speech, disinformation, or intolerance. Media service providers who have in-house

policies and processes in place for checking accuracy and ensuring content verification and legal and ethical compliance should be the recipients of grants.

V.5. Analyzing the need for introducing restrictive measures

Current strategic documents indicate the possibility of introducing measures that restrict freedom of expression. Thus, as previously stated herein, the 2023-2024 Action Plan for the implementation of the 2023-2027 Media Strategy includes the activity of drafting an analysis of the needs for changes to existing mechanisms to sanction the spread of disinformation. On the other hand, the 2022-2026 Cyber Security Strategy envisions amending Montenegro's Criminal Code to sanction disinformation.

Analyzing whether other measures could achieve the intended goals in lieu of restrictive measures should be the first step in such actions. Should the analysis indicate that they are necessary, restrictive measures must be carefully crafted to ensure that they do not conflict with the standards of freedom of expression laid down in the legal frameworks of the European Union and the Council of Europe.

Even well-thought-out laws could jeopardize the principles of freedom of expression if they are not properly put into practice. Furthermore, the Strasbourg Court's standards state that every case should be evaluated on its own merits, with all of its particularities taken into account. Therefore, all the authorities that might get tasked with implementing these norms need to be well versed in standards governing freedom of expression.

VI. Instead of conclusion – a summary of recommendations

- Avoid the current approach where different actors implement ill-coordinated and at times conflicting plans and actions for combating disinformation;
- adopt a holistic approach, and consider developing a dedicated strategy to combat disinformation;
- establish a special parliamentary committee modelled after the European Parliament's INGE committee to address foreign meddling in democratic processes, including disinformation;
- keep up to date with EU policies in the fight against disinformation and carry out careful and thorough implementation;
- start harmonizing legislation with DSA;
- improve media legislation, with special emphasis placed on transparency in media ownership and funding;
- improve the existing mechanism for awarding projects intended for promoting media professionalism and encouraging media pluralism;
- examine the practicality and rationale behind present strategic initiatives to sanction disinformation;
- take into account the standards of the EU and the Council of Europe when considering the introduction of measures that restrict freedom of expression, whilst making sure that such measures are only introduced to serve the legitimate purposes specified in the European Convention and that the proportionality of their implementation is secured;
- in the event that measures restricting freedom of expression are introduced, plan for specialized trainings on the application of these measures and pertinent standards to be delivered to all public authority representatives that implement or take part in such procedures on behalf of the state.



