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## Fake News, Free Elections, and Free Expression: Balancing Fundamental Rights in Irish Policy Responses to Disinformation Online

*Ethan Shattock*

National University of Ireland Maynooth, Postgraduate Program in Law, Maynooth/Co. Kildare, Ireland. E-mail: ethan.shattock@mu.ie

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### Abstract

This paper considers the widely discussed problem of fake news in democracy and posits how Irish regulatory solutions should proceed in light of requisite human rights considerations. Firstly, the conceptual problems associated with fake news are examined, including the qualitative variation and harmful use of the term. The existing Irish and European legal framework is analysed, followed by analysis of European Court of Human Rights (ECtHR) case law. In many instances, the Court has attempted to balance the right of free elections under Article 3 of Protocol 1 with the right to free expression under Article 10 of the European Convention on Human Rights (ECHR). In light of factors that shape the Court in balancing these interrelated fundamental rights, it is argued that policy initiatives to tackle disinformation online should limit interferences with Article 10. Ultimately, initial measures are suggested for stakeholders to adopt, including the proposed Electoral Commission.

### Keywords

Democracy; Fake News; Human Rights; Free Expression; Free Elections.

## *Fake News, Eleições Livres e Liberdade de Expressão: Equilibrando Direitos Fundamentais em Políticas Públicas Irlandesas para Desinformação Online*

### Resumo

Este artigo considera o problema amplamente discutido das *fake news* em democracias e propõe como as soluções regulatórias irlandesas devem proceder à luz das considerações necessárias sobre direitos humanos. Em primeiro lugar, examinam-se os problemas

conceituais associados às *fake news*, incluindo a variação qualitativa e usos prejudiciais do termo. Em seguida, foi abordado o atual quadro jurídico irlandês e europeu, seguido de uma análise da jurisprudência do Tribunal Europeu de Direitos Humanos (TEDH). Em muitos casos, a Corte tentou equilibrar o direito de eleições livres nos termos do artigo 3º do Protocolo 1 com o direito à liberdade de expressão nos termos do artigo 10º da Convenção Europeia dos Direitos do Homem (CEDH). À luz dos fatores que guiam a Corte no equilíbrio destes direitos fundamentais interrelacionados, defende-se que as iniciativas políticas para combater a desinformação online devem limitar interferências no artigo 10. Em última análise, são sugeridas medidas iniciais para adoção institucional, incluindo a proposta de Comissão Eleitoral.

### Palavras-chave

Democracia; Fake news; Direitos Humanos; Liberdade de Expressão; Eleições Livres.

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## 1. Public Concern about Fake News and Elections

The existence of fake news online is a source of concern among citizens in Ireland and Europe. Ireland is now characterised by wide usage of digital platforms for news consumption. In 2016, the Broadcasting Authority of Ireland (BAI) reported that 52% of Irish news consumers engage news through social media. However, a 2018 survey showed that only 28% of Irish respondents “understood the role of algorithms” and had a “limited understanding of how news appears in their social media feeds”.<sup>1</sup> A 2018 report found that 41% of Irish news consumers between 18-24 consume news exclusively online, but only 17% feel they can trust news on social media.<sup>2</sup> This low level of public trust is linked to concerns about “fake news”. A Eurobarometer report found that a majority of European respondents “encounter fake news at least once a week”, while 37% “come across fake news every day or almost every day”. Furthermore, 85% of respondents thought “the existence of fake news is a problem in their country, at least to some extent,” and 83% said that its existence is “is a problem for democracy in general.”<sup>3</sup> If fake news is disseminated to citizens, citizens may be making choices on the basis of factually incorrect

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<sup>1</sup> Use of social media for news amongst Irish consumers declines while understanding of how news appears in their social media feeds remains low Broadcasting Authority of Ireland (14 Jun 2018) <Last accessed 24 July 2019> <<https://www.bai.ie/en/use-of-social-media-for-news-amongst-irish-consumers-declines-while-understanding-of-how-news-appears-in-their-social-media-feeds-remains-low/>>

<sup>2</sup> Digital News Report Ireland 2019 <<https://www.bai.ie/en/increase-in-number-of-irish-media-consumers-concerned-about-fake-news-on-the-internet-reuters-digital-news-report-2019-ireland/>> <Last accessed 30 July 2019>

<sup>3</sup> Ibid.

information. As the mechanism that facilitates citizen decisions, elections are an institutional prerequisite for democracy. Neubauer delineates “some minimal level of citizen participation in decision making” and “communication among members of the political system” as necessary preconditions for democracy.<sup>4</sup> Dahl posits free and fair elections as a necessary constitutive element of “large scale” democracies.<sup>5</sup>

In light of this importance, concerns about how fake news may compromise electoral outcomes must be addressed. Literature has not yielded conclusive evidence that indicate a strong effect of fake news on elections. As Katsirea notes, questions about regulatory solutions to fake news are “debated largely in a vacuum of evidence as to the necessity of their adoption”.<sup>6</sup> As Fletcher et al. outline, “governments, policymakers, and other stakeholders have started to take formal steps towards assessing and tackling” fake news in spite of the fact that stakeholders “lack even the most basic information about the scale of the problem” in Europe.<sup>7</sup> However, numerous studies demonstrate citizen exposure to false news stories in close proximity to elections. Murphy et al. examine effects of fabricated stories on voters before the 2018 abortion referendum in Ireland, showing participants six campaign related news stories, two of them “fabricated”. They found that “almost half of the sample reported a false memory for at least one fabricated event, with more than one third of participants reporting a specific memory of the event”.<sup>8</sup> In the run up to the 2016 election in the United States, the phrase “fake news” was entered into Google in November and December 2016 in greater numbers than the “combined previous 15 months”.<sup>9</sup> As Silverman finds, false news stories generated more interactions and “outperformed” legitimate news in the run up to the 2016 U.S election with “20 top-performing false election stories from hoax sites and hyper partisan blogs” generating “8,711,000 shares, reactions, and comments on Facebook”. This can be contrasted with “the 20 best-performing election stories from 19 major news websites generating “367,000 shares, reactions, and

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<sup>4</sup> NEUBAUER, Deane E. Some Conditions of Democracy, *The American Political Science Review* Vol. 61, No. 4 (Dec., 1967), pp. 1002-1009

<sup>5</sup> DAHL, Robert. 'What Political Institutions Does Large Scale Democracy Require?' (2005) *Political Science Quarterly* Volume 120, Issue 2, Pages 187-197 <<https://dwebber21.files.wordpress.com/2014/09/dahl-what-institutions-does-democracy-require-psq.pdf>> Last accessed 8 October 2019

<sup>6</sup> KATSIRA, Irini. “Fake news”: reconsidering the value of untruthful expression in the face of regulatory uncertainty, (2018) *Journal of Media Law*, 10:2, 159-188, DOI: 10.1080/17577632.2019.1573569

<sup>7</sup> FLETCHER, Richard and others. 'Measuring the reach of “fake news” and online disinformation in Europe' (2018) Reuters Factsheet <<https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2018-02/Measuring%20the%20reach%20of%20fake%20news%20and%20online%20distribution%20in%20Europe%20CORRECT%20FLAG.pdf>> Last accessed 24 July 2019 last accessed 17 Oct 2019.

<sup>8</sup> MURPHY, Gillian and others. False Memories for Fake News During Ireland’s Abortion Referendum. (2019) *Psychological Science*, 30(10), 1449–1459. <https://doi.org/10.1177/0956797619864887>

<sup>9</sup> VARGO, Chris J. 'The agenda-setting power of fake news: A big data analysis of the online media landscape from 2014 to 2016' (2018) *New Media & Society*, 20(5), 2028–2049 <<https://journals.sagepub.com/doi/abs/10.1177/1461444817712086>> last accessed 25 July 2019

comments" on the platform.<sup>10</sup> Fletcher et al. find that in France, "a handful of false news outlets" accumulate "more or as many interactions as established news brands".<sup>11</sup>

The above concerns have provoked debates about whether regulation may be a necessary step in protecting elections. After the 2017 French Presidential election, Emmanuel Macron vowed to take active steps to curtail the spread of fake news after winning the Presidency. He claimed that "if we want to protect liberal democracies, we must be strong and have clear rules."<sup>12</sup> This is a pervasive sentiment in Europe. Damien Collins MP, Chair of the Digital Culture Media and Sport Committee said that the "relentless targeting of citizens with disinformation" constitutes a threat to democracy and that "the age of inadequate self regulation must come to an end" in favour of more robust framework to be "established in statute".<sup>13</sup>

## 2. Fake News - Conceptual Problems

Gelfert notes that the term fake news is used "both as a distinct class of misleading reports and as a rhetorical device for shutting down critical reporting". He observes that the use of the term in "sometimes conflicting" and disparate ways renders "conceptual analysis" more challenging.<sup>14</sup> An assessment of definitions reflects the lack of uniformity and qualitative variation associated with the term. As Allcott and Gentzkow attempt to define, fake news involves "news articles that are intentionally and verifiably false, and could mislead readers".<sup>15</sup> Similarly, Gelfert posits that the term fake news "should be reserved for cases of deliberate presentation of (typically) false or misleading claims as news, where these are misleading by design".<sup>16</sup> Mc Gonagle uses the same definition, however also expresses that "definitional dilemmas" hamper the establishment of a normative singular concept. He argues that "the economy and simplicity of the two-word combination make it a real buzz-word and a great sound-bite. It instantly conjures up a variety of meanings and can thus be used very flexibly." As he also notes, behind the ostensible simplicity

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<sup>10</sup> SILVERMAN, Craig. 'This Analysis Shows How Viral Fake Election News Stories Outperformed Real News On Facebook' (Buzzfeed Nov 16 2016) <<https://www.buzzfeednews.com/article/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook>> Last accessed 24 July 2019

<sup>11</sup> (n 23).

<sup>12</sup> SILVERMAN, Craig. 'This Analysis Shows How Viral Fake Election News Stories Outperformed Real News On Facebook' (Buzzfeed Nov 16 2016) <<https://www.buzzfeednews.com/article/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook>> Last accessed 24 July 2019

<sup>13</sup> Disinformation and 'Fake News' Final Report Published, Commons Select Committee (18 Feb 2019) <<https://www.parliament.uk/business/committees/committees-a-z/commons-select/digital-culture-media-and-sport-committee/news/fake-news-report-published-17-19/>> Last accessed 14 October 2019

<sup>14</sup> GELFERT, Alex. 'Fake News: A Definition', *Informal Logic*, Volume 38, Issue 1, 2018, p. 84–117 <<https://www.erudit.org/en/journals/informallogic/2018-v38-n1-informallogic04379/1057034ar.pdf>> Last accessed 14 October 2019

<sup>15</sup> ALLCOTT, Hunt and Matthew Gentzkow, Social Media and Fake News in the 2016 Election, *Journal of Economic Perspectives—Volume 31, Number 2—Spring 2017—Pages 211–236* <<https://web.stanford.edu/~gentzkow/research/fakenews.pdf>> Last accessed 15 October 2019

<sup>16</sup> (n 33).

of the term lies a "potentially vast range of qualitatively different types of expression", ranging from "anything from playful hoaxes to belligerent propaganda or incitement to violence".<sup>17</sup>

The term fake news is also used to systematically undermine the credibility of the free press. Katsirea notes a "troubling use of the term 'fake news' by nationalist, far-right parties such as the German parties Alternative for Germany (AfD) and Patriotic Europeans against the Islamisation of the West (Pegida) for political advantage".<sup>18</sup> Globally, the phrase fake news is increasingly weaponised as part of state driven invectives directed at the media to silence criticism. President of the Philippines Rodrigo Duterte has used the term in this vituperative manner. Journalists at the news outlet Rappler reported on abuses of power by Duterte in the form of punitive and extrajudicial campaigns against individuals suspected of dealing drugs. The President's disparaging response labelled the publication a "fake news outlet".<sup>19</sup> Concerns such as these are linked to potential political misuse of laws that aim to curtail false information. McGonagle notes a link between an "absence of clear definitions" and legislation that becomes vulnerable to "misuse and abuse through arbitrary interpretation and enforcement".<sup>20</sup> In 2018, Kenyan cybercrime legislation was initiated to combat the "publication of false information". Under the new regime, Kenyan citizens are prohibited from sharing "false, misleading or fictitious data" with potential sentences of up to 2 years in prison and pecuniary sanctions of up to \$50,000 for violations. Despite stated attempts to encourage responsibility from social media platforms,<sup>21</sup> provisions of this legislation were challenged in the Constitutional and Human Rights Division of the Kenyan High Court.<sup>22</sup> In Malaysia, the Anti-Fake News Act was passed in 2018 and has since been repealed after objection by human rights organisations and parliamentary members. The Act defined fake news widely, as "any news, information data and reports which is or are wholly or partly false, whether in the form of features, visuals or audio recordings or in any other form capable of suggesting words or ideas".<sup>23</sup> The first arrest under the law involved a

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<sup>17</sup> Ibid.

<sup>18</sup> Editorial Board, 'A Philippine News Outlet is Exposing Duterte's Abuses. He Calls it Fake News' Washington Post (12 Dec 2018) <[https://www.washingtonpost.com/opinions/a-philippine-news-outlet-is-exposing-dutertes-abuses-he-calls-it-fake-news/2018/12/12/c97a0d5a-f722-11e8-8d64-4e79db33382f\\_story.html?noredirect=on&utm\\_term=.1dff6e026fd8](https://www.washingtonpost.com/opinions/a-philippine-news-outlet-is-exposing-dutertes-abuses-he-calls-it-fake-news/2018/12/12/c97a0d5a-f722-11e8-8d64-4e79db33382f_story.html?noredirect=on&utm_term=.1dff6e026fd8)> Last accessed 30 July 2019

<sup>19</sup> Editorial Board, 'A Philippine News Outlet is Exposing Duterte's Abuses. He Calls it Fake News' Washington Post (12 Dec 2018) <[https://www.washingtonpost.com/opinions/a-philippine-news-outlet-is-exposing-dutertes-abuses-he-calls-it-fake-news/2018/12/12/c97a0d5a-f722-11e8-8d64-4e79db33382f\\_story.html?noredirect=on&utm\\_term=.1dff6e026fd8](https://www.washingtonpost.com/opinions/a-philippine-news-outlet-is-exposing-dutertes-abuses-he-calls-it-fake-news/2018/12/12/c97a0d5a-f722-11e8-8d64-4e79db33382f_story.html?noredirect=on&utm_term=.1dff6e026fd8)> Last accessed 30 July 2019

<sup>20</sup> (n 44)

<sup>21</sup> National Assembly of the Republic of Kenya <<http://www.parliament.go.ke/index.php/the-national-assembly/house-business/hansard>> Last accessed 8 Oct 2019

<sup>22</sup> Ibid.

<sup>23</sup> National Assembly of the Republic of Kenya <<http://www.parliament.go.ke/index.php/the-national-assembly/house-business/hansard>> Last accessed 8 Oct 2019

Danish citizen who complained about the delayed arrival time of police officers after a shooting of a foreign national, underscoring the oppressive enforcement on foot of the legislation.<sup>24</sup>

In light of this qualitative variation and authoritarian usage, Irish and European legislators have been reluctant to adopt the term fake news when positioning future responses. Often, the term "disinformation" is applied. Commentators generally view disinformation as intentionally false information that aims to deceive. A final report issued in February 2019 by the U.K Parliament was renamed "Disinformation and Fake News". The initial title of the report contained only "fake news", but the committee justified the name change on the grounds of fake news becoming a "loaded term", citing concerns similar to those expressed above.<sup>25</sup> Disinformation is also the term used by the Irish government, and was adopted in the *First Report of The Interdepartmental Group on Security of Ireland's Electoral Process and Disinformation*.<sup>26</sup> The European Union Codes of Practice also avoid the term fake news in favour of disinformation, defined as "verifiably false or misleading information which, cumulatively, is created, presented and disseminated for economic gain or to intentionally deceive the public".<sup>27</sup> The Codes assert that "satire and parody" as well as "partisan news" are to be excluded from regulatory scrutiny in this area, detailing that "the notion of "Disinformation" does not include misleading advertising, reporting errors, satire and parody, or clearly identified partisan news and commentary."<sup>28</sup> It is critical that Irish developments acknowledge this fundamental distinction.

### 3. Policy Framework

#### 3.1 Ireland

The Irish legislative framework for elections is derived from various instruments and attempt to enshrine transparency into political advertising. The *Electoral Act 1992* established criteria that must be satisfied for every "notice, bill, poster or similar document" distributed in relation to parliamentary elections, stipulating that documents display "the name and address of the printer

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<sup>24</sup> First person convicted under Malaysia's fake news law (The Guardian, 30 April 2018) <<https://www.theguardian.com/world/2018/apr/30/first-person-convicted-under-malaysias-fake-news-law>> Last accessed 8 Oct 2019

<sup>25</sup> House of Commons Digital, Culture, Media and Sport Committee, Disinformation and 'fake news': Final Report Eighth Report of Session 2017–19 <<https://publications.parliament.uk/pa/cm201719/cmselect/cmcmds/1791/1791.pdf>> Last accessed 11 Oct 2019

<sup>26</sup> Department of An Taoiseach (June 2018) <<https://assets.gov.ie/2224/241018105815-07f6d4d3f6af4c7eb710010f2ae09486.pdf>> Last accessed 15 Oct 2019

<sup>27</sup> Ibid.

<sup>28</sup> Department of An Taoiseach (June 2018) <<https://assets.gov.ie/2224/241018105815-07f6d4d3f6af4c7eb710010f2ae09486.pdf>> Last accessed 15 Oct 2019

and of the publisher thereof.”<sup>29</sup> Under Part 4 of the *Electoral Act 1997*, political parties must not “directly or through any intermediary, accept a donation exceeding £100 in value” if such donations are made anonymously.<sup>30</sup> Parties in receipt of anonymous donations of this nature are directed to “not later than 14 days after the receipt of such donation, notify the Public Offices Commission in writing of such receipt and remit the donation or the value thereof to the said Commission”.<sup>31</sup> Members of the Oireachtas or representatives in the European Parliament are required to furnish yearly “donation statements” for the preceding year, disclosing donations exceeding statutory limits.<sup>32</sup> The 1997 Act defines donations as a “contribution given for political purposes”<sup>33</sup> describing “political purposes” as encompassing activities aimed at the promotion or opposition “directly or indirectly”, the interests and policies of political parties and groups, as well as activities to otherwise “influence the outcome of the election or a referendum or campaign.” Similar statutory requirements are replicated in other legislative provisions, such as the *Referendum Act 1994*<sup>34</sup> and the *Presidential Elections Act 1993*.<sup>35</sup> Furthermore, the *European Parliament Elections Act 1997* also proscribes the “omission” of “printer and publisher” details,<sup>36</sup> while the *Local Elections Regulations* impose similar positive obligations.<sup>37</sup> In addition to these statutory instruments, the Advertising Standards Authority of Ireland (ASAI) issues a “Code of Standards for Advertising and Marketing Communications in Ireland,” which addresses “marketing communications” including on “any digital and electronic storage materials.”<sup>38</sup>

### 3.1.2 "Online" Statutory Gaps

An overarching feature of the Irish statutory framework for elections is that it restricts anonymous and excessive donations, fostering transparency in political advertising. However, a notable gap is that the Irish framework does not sufficiently address the wide usage of digital platforms for political advertising. While the ASAI addresses advertising online, it is not directed towards political content. In spite of attempts by the Electoral Acts to ensure transparency in political advertising, the substance and veracity of advertisements is insufficiently addressed. In this way, Ireland lacks a consolidated and sufficiently modernised statutory framework that addresses disinformation online during elections. Legislative gaps have led to calls for change in

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<sup>29</sup> Section 140, Electoral Act 1992.

<sup>30</sup> Electoral Act, Section 23(1).

<sup>31</sup> Ibid Section 23(2).

<sup>32</sup> Ibid Section 24.

<sup>33</sup> Electoral Act, Consolidated Version, Section 22(2)(a).

<sup>34</sup> Section 2(3)(b), Referendum Act 1994.

<sup>35</sup> Section 3(3)(b), Presidential Elections Act 1993.

<sup>36</sup> Section 109.

<sup>37</sup> S.I No. 297/1995 - , Part XV, 101, Local Elections Regulations, 1995

<sup>38</sup> Section 2(e), Code of Standards for Advertising and Marketing Communications in Ireland (7th Edn 2016).

this area. Extra legal and civil Society organisations such as the Transparent Referendum Initiative (TRI) have advocated for "increased transparency of digital advertising" during Irish elections and compiled a database of online political ads targeting Irish users" in the 2018 abortion referendum to invite "scrutiny" from third parties.<sup>39</sup> The Standards In Public Office Commission (SIPO) has called for a "modernisation and clarification" of electoral legislation to reflect "common usage of the internet as a common communication device."<sup>40</sup> This mirrors similar calls in the United Kingdom, with senior figures in the U.K Electoral Commission stating a need for "a very clear change in the law" in order to inculcate transparency requirements for digital political advertisements.<sup>41</sup> Proposals have been synthesised to legislate for more secure elections and close gaps in this area, including the *Social Media Online Advertising Transparency Bill 2017*.<sup>42</sup> Aimed at updating the current framework to bring it in line with digital developments, the Bill defines "online advertising" as "any communication which is placed or promoted for a fee on an online platform".<sup>43</sup> Part 2 replicates statutory requirements for online political advertisements to display "transparency notices", which are required to "display in a clear and conspicuous manner" funding details and target audiences.<sup>44</sup> The Bill would also impose fines for failure to display transparency notices,<sup>45</sup> and the use of "bot" accounts "to cause multiple online presences directed towards a political end" would be proscribed.<sup>46</sup>

In line with the Electoral Act's targeting of "political purposes", The 2017 Bill lends from the Broadcasting Authority of Ireland's definition of "political end", described as information that "promotes a candidate or candidates for public office in an election within the State or a political party registered on the Register of Political Parties, or if it promotes a message on a matter of political interest or importance or a matter".<sup>47</sup> Irish Broadcasting legislation prohibits any "broadcaster" from disseminating advertisements "directed towards a political end", under Section 41(3) of the Broadcasting Act 2009.<sup>48</sup> The BAI has issued a three part test to determine whether a message would be in contravention of Section 41(3). They include "content of the advertisement", the "context in which the advertisement is broadcast and "the aims and

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<sup>39</sup> Transparent Referendum Initiative, The Database.

<sup>40</sup> Proposal to Create an Electoral Commission, Submission by the Standards in Public Office Commission (2019) <<https://www.sipo.ie/documents/english/Standards-Commission-submission-to-public-consultation-on-electoral-commission.pdf>>

<sup>41</sup> CELLAN JONES, Rory. 'Online political ads 'need law change' (BBC, 6 May 2019) <<https://www.bbc.com/news/business-48174817>> Last accessed 15 Oct 2019.

<sup>42</sup> Online Advertising and Social Media (Transparency) Bill 2017 Part 1, 2.

<sup>43</sup> Ibid Part 1, (2)(1).

<sup>44</sup> Ibid Part 2, Section 4.

<sup>45</sup> Ibid Part 2 Section 5 (3).

<sup>46</sup> Ibid Section 6(1).

<sup>47</sup> Ibid, Part 1, 2(2)

<sup>48</sup> Broadcasting Act 2009, Section 42 <<http://www.irishstatutebook.ie/eli/2009/act/18/section/41/enacted/en/html>> Last accessed 11 Oct 2019



objectives of the advertiser”.<sup>49</sup> In addition to calls for a modernisation of electoral legislation, attention has been paid to disinformation as a threat to Ireland’s electoral process. In 2018, the Interdepartmental Group on the Security of Ireland’s Electoral Process and Disinformation was published in order to present an assessment of the security of elections in Ireland. The first report was synthesized in light of the aforementioned 2017 Bill and also based on what the government called “substantive issues arising from recent experiences in other democratic countries with regard to the use of social media by external, anonymous or hidden third parties”.<sup>50</sup> The government also stated the report was “prompted by a rising concern over the spread of disinformation online and recent international experience of interference in political processes.”<sup>51</sup> The report ascertained the overall risk posed to Ireland’s elections is “relatively low”. However, online developments stood out as pressing concerns. Both “cyber attacks” and “the spread of disinformation online” were identified as “substantial risks”.<sup>52</sup>

False information and a lack of transparency in political advertising were cited as electoral risks that “operate indirectly by seeking to influence voter opinions”.<sup>53</sup> As part of the “electoral process risk assessment” in the Report, seven areas were assessed. These included the “register of electors”, “linear broadcasting”, “online platforms”, and “cyber security”. Out of these, only “online platforms” was deemed a “high risk” area. Particular online risks included “microtargeting”, as well as a lack of “transparency of advertising” and “the speed at which disinformation can be spread and accessed online.”<sup>54</sup> In highlighting how “widespread use of social media can have in accentuating any concerted programme of disinformation”, this marks an important recognition of disinformation as a technologically spawned electoral threat.<sup>55</sup>

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<sup>49</sup> Broadcasting Authority of Ireland, Rule 27 Guidelines

<[https://www.bai.ie/en/media/sites/2/dlm\\_uploads/2018/09/Rule27\\_ElectionGuide\\_vFinal\\_English.pdf](https://www.bai.ie/en/media/sites/2/dlm_uploads/2018/09/Rule27_ElectionGuide_vFinal_English.pdf)> Last accessed 11 Oct 2019

<sup>50</sup> Government publishes first Report of the Interdepartmental Group on security of Ireland’s Electoral Process and Disinformation, (Merrion Street, 17 Jul 2018) < [https://merrionstreet.ie/en/News-Room/Releases/Government\\_publishes\\_first\\_Report\\_of\\_the\\_Interdepartmental\\_Group\\_on\\_security\\_of\\_Ireland's\\_Electoral\\_Process\\_and\\_Disinformation.html](https://merrionstreet.ie/en/News-Room/Releases/Government_publishes_first_Report_of_the_Interdepartmental_Group_on_security_of_Ireland's_Electoral_Process_and_Disinformation.html) > Last accessed 11 Oct 2019

<sup>51</sup> first Report of the Interdepartmental Group on security of Ireland’s Electoral Process and Disinformation, Pg 3.

<[https://merrionstreet.ie/MerrionStreet/en/ImageLibrary/FIRST\\_REPORT\\_OF\\_THE\\_INTERDEPARTMENTAL\\_GROUP\\_ON\\_SECURITY\\_OF\\_IRELAND'S\\_ELECTORAL\\_PROCESS\\_AND\\_DISINFORMATION.pdf](https://merrionstreet.ie/MerrionStreet/en/ImageLibrary/FIRST_REPORT_OF_THE_INTERDEPARTMENTAL_GROUP_ON_SECURITY_OF_IRELAND'S_ELECTORAL_PROCESS_AND_DISINFORMATION.pdf)> Last accessed 11 Oct 2019

<sup>52</sup> Overview- Regulation of Transparency of Online Political Advertising in Ireland, Department of the Taoiseach (14 Feb 2019) <[https://www.gov.ie/en/policy-information/7a3a7b-overview-regulation-of-transparency-of-online-political-advertising-/->](https://www.gov.ie/en/policy-information/7a3a7b-overview-regulation-of-transparency-of-online-political-advertising-/) Last accessed 11 Oct 2019

<sup>53</sup> First Report of the Interdepartmental Group on Security of Ireland’s Electoral Process and Disinformation (Department of An Taoiseach 2018), Pg 3.

<sup>54</sup> Ibid Pg 15.

<sup>55</sup> Risk Assessment Summary

<[https://merrionstreet.ie/MerrionStreet/en/ImageLibrary/FIRST\\_REPORT\\_OF\\_THE\\_INTERDEPARTMENTAL\\_GROUP\\_ON\\_SECURITY\\_OF\\_IRELAND'S\\_ELECTORAL\\_PROCESS\\_AND\\_DISINFORMATION.pdf](https://merrionstreet.ie/MerrionStreet/en/ImageLibrary/FIRST_REPORT_OF_THE_INTERDEPARTMENTAL_GROUP_ON_SECURITY_OF_IRELAND'S_ELECTORAL_PROCESS_AND_DISINFORMATION.pdf)> Last accessed 11 Oct 2019

Any Irish legal responses to disinformation must be cognisant of Irish constitutional protections a primary legal source. Article 40.6.1 protects "The right of the citizens to express freely their convictions and opinions."<sup>56</sup> However, this is not an absolute right. Article 40 also stipulates that:

"the State shall endeavour to ensure that organs of public opinion, such as the radio, the press, the cinema, while preserving their rightful liberty of expression, including criticism of Government policy, shall not be used to undermine public order or morality or the authority of the State."

In this way, regulation in pursuit of stemming disinformation must be cognisant of rights of citizens to freely express opinions in so far as is constitutionally permissible. This caveat also informs the European and international legal framework.

### 3.2 European and International Policy Framework

The Irish legal framework exists in conjunction with the competence of supranational law from the European Union, along with international legal instruments that address fundamental rights in this area. The European Convention on Human Rights (ECHR) guarantees the right to free expression under Article 10, and the right to free elections under Article 3 of Protocol 1. Article 10 is not an absolute right, with Article 10(2) stipulating the accompanying "duties and responsibilities", allowing for restrictions "prescribed by law" and "necessary in a democratic society."<sup>57</sup> In addition, the Charter of Fundamental Rights of the European Union (CFREU) establishes a "right to vote and to stand as a candidate at elections to the European Parliament" under Article 39,<sup>58</sup> and Article 11 guarantees free expression.<sup>59</sup> Article 52 of the Charter addresses the "scope" of rights and outlines that interferences must be "provided for by law and respect the essence of those rights and freedoms". They must also be "subject to the principle of proportionality", and must be "necessary and genuinely meet objectives of general interest recognised by the Union".<sup>60</sup>

The right to free expression and free elections are linked. The *Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* describes free expression as a "central pillar of democratic societies, and a guarantor of free and fair electoral

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<sup>56</sup> Bunreacht na hÉireann, Article 40.6.1

<sup>57</sup> Article 10(2), European Convention on Human Rights

<sup>58</sup> Charter of Fundamental Rights of the European Union (CFREU), Chapter V Citizens Rights

<sup>59</sup> Charter of Fundamental Rights of the European Union (CFREU), 11(2) stipulates that the "freedom and pluralism of the media" should be observed.

<sup>60</sup> Ibid, Article 52.

processes."<sup>61</sup> Freedom of expression is protected under Article 19 of the International Covenant on Civil and Political Rights ("ICCPR"). Article 19(1) guarantees rights to "hold opinions without interference". As Article 19(2) indicates, this includes a right to "receive and impart information and ideas of all kinds". Article 19(3) outlines strict criteria that may be used to justify interferences, mirroring requirements under the ECHR. Interferences be "provided by law and necessary" and pursued in order to protect "rights or reputations of others" or "for the protection of national security or of public order, or of public health or morals."<sup>62</sup> The United Nations Human Rights Commissioner has advised that restrictions should be made publicly "accessible" and "formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly."<sup>63</sup> However, Article 20 prohibits "any propaganda for war",<sup>64</sup> as well as "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."<sup>65</sup> The right to free elections is enshrined in Article 25 of the ICCPR, protecting the right of citizens to participate in "public affairs, directly or through freely chosen representatives"<sup>66</sup> and to "vote and to be elected at genuine periodic elections" through mechanisms that protect "the free expression of the will of the electors".<sup>67</sup> Article 19 of the Universal Declaration of Human Rights (UDHR) recognises "freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."<sup>68</sup> Article 21 (1) enshrines "the right to take part in the government of his country, directly or through freely chosen representatives". Article 21(3) stipulates "the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures".<sup>69</sup> Under the UDHR, the electoral process requires "all contesting points of view being fairly and equitably communicated so that the people may make informed choices." In

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<sup>61</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, Human Rights Council, U.N. Doc. A/HRC/26/30 (Jul 2, 2014), available at <<http://undocs.org/A/HRC/26/30>>. Last accessed 11 Oct 2019

<sup>62</sup> International Covenant on Civil and Political Rights, Article 19(3)(a)(b)

<sup>63</sup> U.N. Human Rights Comm., General Comment No. 34, Article 19, Freedoms of Opinion and Expression, U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011), at ¶ 25, available at <<http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>>. Last accessed 14 Oct 2019

<sup>64</sup> (n 110), Article 20 (1) <<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>> Last accessed 14 Oct 2019

<sup>65</sup> Ibid art 20 (2)

<sup>66</sup> Ibid 25(a)

<sup>67</sup> Ibid 25 (b)

<sup>68</sup> Article 19, Universal Declaration of Human Rights.

<sup>69</sup> Article 21, Universal Declaration of Human Rights.

addition, "the ability to express views freely in opposition to the status quo is essential" to effective elections.<sup>70</sup>

#### 4. Free Elections v Free Expression and the ECtHR

The protection of electoral integrity is at the core of public policy efforts to combat disinformation. However, if such efforts involve the imposition of restrictions on content online, this will elicit concerns about the potential for regulation to result in disproportionate incursions on free expression. In light of this, a critical balance that must manifest in future efforts should mediate the right to free elections and the right to free expression. This balance can be analysed under the legal framework by the European Convention of Human Rights (ECHR), and through case law of the European Court of Human Rights (ECtHR). In *Soering v UK*,<sup>71</sup> it was stated that "inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individuals fundamental rights." When positing how policy responses to disinformation online should develop in light of potentially conflicting rights, it is useful to analyse the Court's balancing of the right to free elections under Article 3 of Protocol 1 and the right to free expression under Article 10.

##### 4.1 Resolving Tensions between Article 10 and Article 3 of Protocol 1

The ECtHR has noted that electoral rights under the Convention are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the "rule of law," and that "free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system."<sup>72</sup> The Court has reasoned that Article 10 and Article 3 Protocol 1 "operate to reinforce each other", as citizens must be able to express their choice in the legislature freely. This has been extended to incarcerated citizens.<sup>73</sup> The Court has recognised that Article 3 of Protocol 1 may be subject to implied limitations as the Convention does not establish it in "express terms". Interferences can be imposed within a "wide margin of appreciation", however it is

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<sup>70</sup> Guidelines For Election Broadcasting in Transitional Democracies Article 19 (1994 Reprinted April 1997) <<https://www.article19.org/data/files/pdfs/tools/electionbroadcastingtrans.pdf>> Last accessed 14 Oct 2019

<sup>71</sup> Application no. 14038/88

<sup>72</sup> *Orlovskaya Iskra v. Russia* at para 110.

<sup>73</sup> *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01

integral that "such conditions must not thwart "the free expression of the opinion of the people in the choice of the legislature." <sup>74</sup> In addition, the Court has recognised a particular need for the right of free expression to be protected when debating political and electoral issues.

In *Bowman v United Kingdom*, <sup>75</sup> the Court reiterated that freedom of political debate is a particularly robust type of expression, and that "it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely." <sup>76</sup> The Court has attempted to balance rights to free elections and free expression interferences in the following terms. Firstly, states have a wide margin of appreciation when introducing electoral regulatory measures that infringe on Article 10. But these measures must be prescribed by law, pursue a legitimate aim, and be necessary in a democratic society. In discerning whether interferences are permissible under the Convention, it must be established that they are proportionate to the aim sought. In *Orlovskaya Iskra v. Russia*, the Court postulated a potentially more "circumscribed national margin of appreciation" when regulatory interferences concern advertisements "of a political nature." <sup>77</sup> This was applied in *TV Vest AS and Rogaland Pensjonistparti*, <sup>78</sup> which concerned a statutory ban on televised political advertising. <sup>79</sup> It was reiterated that "the Court speaks in favour of allowing a somewhat wider margin of appreciation than that normally accorded with respect to restrictions on political speech in relation to Article 10 of the Convention." <sup>80</sup> The Court reasoned that if such a margin of appreciation were not applied in such cases, the resulting discretionary interpretation by contracting states may lead to an incompatibility between the domestic electoral framework in contracting states and the uniquely "privileged" posture of "free political speech" within the confines of Article 10.

The Court has addressed the scope of free expression for press outlets that publish unproven allegations online in respect of candidates running for election, and pointed out that steps to verify allegations by journalists can indicate good faith. In *Ólafsson v. Iceland*, <sup>81</sup> the applicant circulated allegations of sexual abuse made by two sisters directed towards a candidate for constitutional assembly elections. Allegations were published online

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<sup>74</sup> *Matthieu-Mohin and Clerfayt v. Belgium* (Application no. 9267/81) Para 51,52,53.

<sup>75</sup> 141/1996/760/961

<sup>76</sup> Para 43.

<sup>77</sup> Para 110.

<sup>78</sup> Application no. 21132/05

<sup>79</sup> Para 9.

<sup>80</sup> Para 67.

<sup>81</sup> Application no. 58493/13

through the applicant's website, along with pictures of the sisters. Defamation proceedings were successfully lodged in the Reykjavík District Court. A number of statements were declared null and void, including the quote "we cannot sit quietly by while a child abuser stands for election to the Constitutional Assembly". The ECtHR acknowledged that the candidate for election would have to had understood the nature of potentially wide criticism and scrutiny associated with public office. Steps had been taken to verify the allegations by interviewing several people. Additionally, the candidate had been given normal time to respond to allegations, as customary in normative journalistic practice. The Court noted that "the disputed statements did not originate from the applicant himself nor from the journalist who wrote the articles, but from the sisters."<sup>82</sup> Determining that the applicant had acted in good faith, the Court noted that potentially excessive sanctions on such allegations could take contracting states beyond their margin of appreciation on the basis that harsh sanctions may run a risk of "obstructing or paralysing future media coverage of similar questions."<sup>83</sup>

## 4.2 False Information in Elections

The ECtHR has addressed the dissemination of false information in the run up to elections, often protecting free expression robustly. The Court has ruled that penalties imposed for disseminating false information in the run up to elections may violate citizen rights under Article 10. In *Salov v. Ukraine*,<sup>84</sup> the applicant was a legal representative of a Ukrainian Presidential candidate in 1999. It was alleged that Salov circulated forged publications containing purported statements from the Speaker of the Rada that the presidential incumbent was dead. Salov was charged with disseminating false information and interfering with citizens' voting rights. His legal licence was subsequently revoked. The Court found that this interference was prescribed by law, and pursued a legitimate aim of issuing true information to voters in the run up to the presidential elections. When addressing the democratic necessity of the interference, there was no doubt that the article was factually inaccurate. However, the applicant himself had not originated or produced the false statement. The Court drew an important distinction between false information produced and factually dubious information received and subsequently discussed. The Ukrainian courts did not prove that there was intentional deceit to harm the rights of voters. The Court also considered the potential impact the publication may

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<sup>82</sup> Para 59.

<sup>83</sup> Para 61.

<sup>84</sup> Application no. 65518/01

have. Here, the applicant only possessed 8 copies of the paper and spoke to a limited number of people about it. The punishment of a 5 year sentence along with a fine and licence revocation was deemed disproportionate.

In *Brzeziński v. Poland*,<sup>85</sup> a violation of Article 10 was also found. Polish electoral legislation contained provisions that allowed courts to determine whether "untrue" information had been published, with further powers to prohibit further dissemination. The applicant was a candidate for a municipal councillor and in the run up to local elections published a handbook criticising a mayor and local councillor. He went to a church on a Sunday before the elections and distributed handbooks to a "large number" of churchgoers. An action was subsequently brought under the Polish domestic law ordering him to correct the information and cease to issue the booklet. The Court addressed the material's veracity, noting it contained "untrue" and "malicious" allegations which "exceeded the permissible forms of electoral propaganda."<sup>86</sup> The Polish Court of Appeal upheld the conviction to issue an apology, stop producing the information, and pay fees and a sum to charity. The ECtHR again held that the electoral legislation was "prescribed by law" and pursued a legitimate aim of protecting the rights and reputation of others. However, the question of whether the interference was necessary in a democratic society was more vexed. The Court noted that the information produced was made in the run up to elections and was thus an important issue of public interest, leaving "little room" for interference. In addition, the Court emphasised a wider scope of legitimate criticism directed at elected officials, further limiting the margin of appreciation. Consequently, the ECtHR was highly critical of the Polish courts, in particular at the tendency for the comments to be "immediately classified as lies." Furthermore, the Court noted that the Polish authorities had not "examined whether the impugned remarks had a sufficient factual basis." The tone of the remarks involved an implication and not assertion of fraudulent behaviour and were not 'vulgar or insulting', falling within the scope of 'admissible exaggeration and provocation' within 'political debate at local level'. Therefore, there was not a sufficient "pressing social need" to justify the interference.<sup>87</sup> As in *Salov*<sup>88</sup>, the Court noted that the sanctions were excessive in stipulating an apology, rectification, payment of PLN 360 in costs to the complainant, and charitable donation of 5,000 zlots, and could lead to "a chilling effect on individuals engaged in local political debate". The electoral legislation in question was Section 72 of the Local Elections Act, and the Court

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<sup>85</sup> Application no. 47542/07.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> (n 216).

had ruled previously on this provision. In the 2008 case of *Kita v Poland*,<sup>89</sup> the applicant disseminated a publication involving "alleged financial irregularities in the municipality." A distinction can be drawn from *Salov* in that the applicant had himself published the information, rather than a third party. After his employer (a newspaper) closed down, he published and distributed allegations through leaflets. The article was entitled "Information Bulletin: What the president of the City Council and the City Council Board have to hide." In it, he alleged that 6 municipality officials diverted attention from administering "municipal educational funds" in favour of "interfering with the employment policies of the local schools", leading to improper allocation of entitlements that teachers were statutorily entitled to receive. Citing *Bladet Tromsø and Stensaas v. Norway*<sup>90</sup>, the court reiterated "the right to impart, in good faith, information on matters of public interest, even where this involved damaging statements about private individuals."<sup>91</sup> In addition the Court cited *Feldek v. Slovakia*,<sup>92</sup> and "emphasised that the limits of acceptable criticism are still wider where the target is a politician." The Court again found that the interference was prescribed by law and pursued a legitimate aim of "protecting the reputation or rights of others, namely the named individual members of a political group, within the scope of Article 10 § 2 of the Convention."<sup>93</sup> When assessing whether the interference was necessary in a democratic society, the Court advised that this should be assessed "in the light of the case as a whole, including the content of the statements concerned", and "the context in which they were made."<sup>94</sup> When addressing the substance, the court said that the Polish courts "unreservedly qualified all of them as statements which lacked any factual basis without examining the question whether they could be considered to be value judgments".<sup>95</sup>

Because of the political context, a distinction between "facts and value judgements" would nonetheless not have been consequential, in light of the pre existing wider scope of acceptable criticism directed at public officials. While particular statements could arguably lack "a sufficient factual basis", it was determined that the applicant's statements were motivated primarily by a desire to "cast doubt on the suitability of the local politicians for public office."<sup>96</sup> In this way, the applicant did not act in bad faith in the

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<sup>89</sup> Application no. 57659/00

<sup>90</sup> GC], no. 21980/93, ECHR 1999 III)

<sup>91</sup> Para 37.

<sup>92</sup> Application no. 29032/95, § 74, ECHR 2001-VIII

<sup>93</sup> Para 35.

<sup>94</sup> Para 41.

<sup>95</sup> Para 44.

<sup>96</sup> Para 45



course of making the statements. The ECtHR unanimously held that the fine issued under the provision constituted an interference that violated Article 10. The Court's reasoning indicates that while Article 10 is not intended to perpetuate the spread of false information, restrictive and punitive interferences on free expression should be limited even if based on the prevention of disseminating false information in the run up to elections. As such, Irish measures should initially limit interferences with free expression and instead favour measures that pursue other ways of minimising the effects of disinformation.

## 5. Future Efforts: The Electoral Commission

### 5.1 Oversight

In Ireland, the proposed Electoral Commission must assume a robust oversight role. A 2006 report urged a need for the "observation of elections" to be a statutory function of the Commission, while a 2016 Joint Oireachtas Committee Report suggested "oversight" of the electoral register as a function.<sup>97</sup> Going forward, this oversight function should monitor for disinformation online during elections. The Commission should actively work to prevent disinformation from deceiving voters and compromising the outcome of elections. This has been emphasised by Irish legislators. Senator Lynne Ruane noted the ability of anti-democratic actors to "surreptitiously target undecided voters with false information via social media to swing entire elections" as a pressing concern in the contemporary electoral landscape, encouraging the Commission to "safeguard citizens and their democratic choices against these threats."<sup>98</sup> The evolving Irish policy framework on political advertising may establish separate legislation governing political advertising transparency.<sup>99</sup> However, this is only a partial solution. Disinformation is often not synthesised from political parties and donors, but from user generated content. As Senator Paudie Coffey suggested, "the Commission should also be involved in ensuring the information made available to citizens in a referendum is distributed in a robust, fair and objective way".<sup>100</sup> This is an important observation, but the Commission should also possess expertise and resources to notify citizens about disinformation circulating during

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<sup>97</sup> Houses of the Oireachtas Joint Committee on Environment, Culture and the Gaeltacht Report of the Joint Committee on the Consultation on the Proposed Electoral Commission 2016 January 2016 <<https://webarchive.oireachtas.ie/parliament/media/committees/archivedcommittees/environmentcultureandthegaeltacht/report-on-electoral-commission-final-20160113.pdf>> last accessed 17 Oct 2019.

<sup>98</sup> Seanad Éireann debate - Thursday, 27 Sep 2018 , Electoral Commission: Statements

<sup>99</sup> (n 42).

<sup>100</sup> Ibid.

elections. This may arise from "outside interference in elections," an area in which Minister of State at the Department of Housing, Planning and Local Government Deputy John Paul Phelan has acknowledged the Commission will likely have a key role.<sup>101</sup>

As the ECtHR has outlined<sup>102</sup>, the potential impact of harmful information during elections should assist in prioritising how to address restrictions on false information. The Commission should prioritise information that falls within the scope of harmful disinformation, as opposed to innocuous satirical content or factually based partisan claims. False and misleading claims should be analysed under a number of factors. Firstly, it should be determined whether the false information may have an impact on electoral events. Secondly the scope of impact should be assessed. Finally, the Commission should determine whether the falsity of the information has any mitigating factors. This can be achieved through use of fact checking software, in consultation with relevant and independent experts. In light of the wide scope of information and claims online, this would be a highly labour intensive process if carried out exhaustively. As such, analysis of the potential impact of false claims can help the Commission to prioritise efforts. Specific methods of this impact analysis should be considered, which may necessitate collaboration with digital platforms. Measuring the potential impact of false claims will likely require access to data that indicates diffusion trends on digital platforms. It may also involve technological expertise and systematic network-based diffusion analysis (NBDA) in order to quantify and measure the spread of false claims. If such expertise is not available within the Electoral Commission, collaboration with digital platforms may be necessary in achieving an informed monitoring process. As discussed below, this also raises data protection concerns.

## 5.2 Transparency and Fact Checking

To ensure transparency, the Commission should publish relevant "disinformation" claims online, accompanied by cautionary campaigns. This function would be similar to efforts by the Transparent Referendum Initiative (TRI), which compiled a database of adverts on Facebook in relation to the 8th Amendment referendum in 2018. This was a "crowdsourced" initiative, limited by access barriers to Facebook's comprehensive datasets related to listed advertisements. While the TRI invites third party fact checkers to scrutinise advertisements, it does not execute this function itself. This is an area where the

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<sup>101</sup> Ibid.

<sup>102</sup> (n 83).

Commission could direct expertise and resources to detect disinformation claims and make them publicly available. As reiterated below, this is a process that should be cognisant of data protection requirements. In addition, research should be conducted in order to prevent a counter intuitive "Streisand Effect".<sup>103</sup> For example, if research yielded data indicating that reproduction of false claims by the Commission could lead to voters believing such claims or sharing them for novelty purposes<sup>104</sup>, this functional component may need to be reconsidered. At a minimum, voters should be able to inquire about the veracity or falsity of alleged claims and to be informed of accurate information. This can be achieved through collaboration with external fact checkers. For example, the Journal.ie online newspaper has launched a fact checking initiative.<sup>105</sup> Any collaboration must not compromise the independence of the Commission's statutory functions. In order to increase efficiency and ensure transparency in this process, the Commission should publish annual reports, and specific reports for each electoral event monitored. Reports should include publicly accessible and easily readable data related to disinformation in the Irish electoral process.

### 5.3 Establishing A Research Agenda and Fostering Media Literacy

The Commission should research pertinent questions about disinformation, including techniques used by anti-democratic actors and preventative measures that voters themselves can take. Research should also engage voters directly and yield quantitative results that demonstrate public attitudes towards the Commission's role in preventing and educating about disinformation. Results should be publicly accessible and may involve collaboration with third parties from academic and scientific communities. This is also an area that may invite collaboration with technological companies. Technological companies have unique access into trends associated with information diffusion on digital platforms. These companies possess technological expertise that statutory bodies may not have ongoing access to. Therefore, collaboration with technological platforms may assist in yielding research outputs that inform the electorate and better prepare citizens in their engagement with the electoral process. Collaboration between public and private actors

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<sup>103</sup> JANSEN, Sue Curry. The Streisand effect and censorship backfire, (2015), University of Wollongong Research Online Faculty of Law, Humanities and the Arts - Papers Faculty of Law, Humanities and the Arts

<sup>104</sup> BOVET, Alexandre Bovet and Hernán A. Makse, Influence of fake news in Twitter during the 2016 US presidential election (2019), Nature Communications volume 10, Article number: 7; (n 45).

<sup>105</sup> 'Fact Check' TheJournal.ie <<https://www.thejournal.ie/fact-check/news/>> last accessed 17 Oct 2019.

already exists in efforts to counter disinformation, with technological signatories to the EU Codes of Practice issuing "baseline" reports detailing implementation strategies.<sup>106</sup>

This should be accompanied by a function that aims to improve media literacy and engagement with digital information during elections. In the 2018 abortion referendum, the Referendum Commission (RefCom) released a 16 page booklet outlining impartial information for voters. While such efforts are encouraging, more rigorous attempts should aim to provide comprehensive and digitally conscious information. In Australia, the Electoral Commission (AEC) is responsible for maintaining an "impartial and independent electoral system" through administrative functions including "active electoral roll management" and periodic engagement with "parliamentary committees". However, the Commission also launches targeted public awareness programmes aimed at educating voters and fostering informed voting.<sup>107</sup> This includes a comprehensive "AEC for schools programme" and is indicative of the type of education function that the proposed Irish Electoral Commission should pursue. The AEC educational programme offers free digital education resources for students and teachers, and interactive online modules to encourage informed democratic participation amongst students.<sup>108</sup> The Commission should pursue similar initiatives. Research and media literacy goals should be interrelated. Research should identify vulnerable voters and literacy initiatives should inform such voters how to prevent engagement with disinformation and measure the veracity of news online. This would complement existing media literacy initiatives in Ireland, for example the Webwise initiative to combat "fake news".<sup>109</sup>

## 5.4 Ensuring Data Protection Compliance

To ensure compliance with requisite privacy requirements, monitoring and research should be guided by the seminal principle of data protection "by design and by default", as stipulated in Article 25 of the General Data Protection Regulation (GDPR).<sup>110</sup> Efforts by the Commission should inculcate privacy protection into activities. Monitoring and research functions involving data collection or data processing should be conducted in recognition of the rights of data subjects as delineated in Chapter 3 of the GDPR and if deemed

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<sup>106</sup> See for Facebook <[http://ec.europa.eu/information\\_society/newsroom/image/document/2019-5/facebook\\_baseline\\_report\\_on\\_implementation\\_of\\_the\\_code\\_of\\_practice\\_on\\_disinformation\\_CF161D11-9A54-3E27-65D58168CAC40050\\_56991.pdf](http://ec.europa.eu/information_society/newsroom/image/document/2019-5/facebook_baseline_report_on_implementation_of_the_code_of_practice_on_disinformation_CF161D11-9A54-3E27-65D58168CAC40050_56991.pdf)>

<sup>107</sup> The AEC's Role <[https://www.aec.gov.au/About\\_AEC/index.htm](https://www.aec.gov.au/About_AEC/index.htm)> last accessed 17 Oct 2019.

<sup>108</sup> *Ibid.*

<sup>109</sup> Explained: What is Fake News? (Webwise) <<https://www.webwise.ie/teachers/what-is-fake-news/>>

<sup>110</sup> Article 25, General Data Protection Regulation.

necessary should involve a "data protection impact assessment" as outlined in Article 35.<sup>111</sup> Article 35(7) enshrines the need for interferences with the right of data subjects to satisfy a test of "necessity and proportionality of the processing operations in relation to the purposes."<sup>112</sup> It is vital in this function and others that activities are compliant with GDPR requirements and conducted in light of privacy principles. This could be effectively achieved through periodic consultation with the Office of the Data Protection Commissioner (DPC). In addition to being mindful of rights to free elections and free expression, the Commission should be cognisant of human rights principles that enshrine protections for privacy as a fundamental right. This includes Article 8 of the Charter of Fundamental Rights of the European Union, which guarantees the right to "personal data".<sup>113</sup>

## 5.5 Other potential measures

The proposed Electoral Commission's scope may extend beyond the above mentioned functions. The Commission may also require statutory powers of investigation and enforcement in order to have the "teeth" to carry out its role effectively. This could involve investigative powers into campaign advertising and donations, with fines imposed for administrative offences under relevant electoral legislation. This exists in the United Kingdom and Australia, both of which have a statutorily established Electoral Commission. In the United Kingdom, the Commission can issue monetary fines for offences, and makes investigations into offences publicly available, along with a summary of reasons detailing decisions.<sup>114</sup> For example, it imposed a sanction of £600 on the Wandsworth Planning Reform Party for a "late delivery of quarterly donations and transactions reports", and imposed "variable monetary penalties" on the political party Britain First for numerous offences, including a "failure to deliver accurate quarterly donations reports."<sup>115</sup> The Electoral Commission in the United Kingdom upholds to publish "case summaries" concerned with investigations deemed to be of "significant public interest", and also allows for "allegations" to be made via their publicly accessible website, detailing the regulatory scope of the Commission in order to streamline complaints and minimise

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<sup>111</sup> Article 35, General Data Protection Regulation.

<sup>112</sup> *Ibid* 35 (7).

<sup>113</sup> Article 8, Charter of Fundamental Rights of the European Union.

<sup>114</sup> The Electoral Commission: Who We Are and What We Do  
<<https://www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-enforcement-work/investigations>> last accessed 17 Oct 2019.

<sup>115</sup> *Ibid*.

superfluous claims. Statutory functions and accompanying supervisory powers are detailed in the *Political Parties and Elections Act 2009*.<sup>116</sup> The AEC also has statutory powers to "undertake investigations relating to potential breaches of financial disclosure requirements"<sup>117</sup> under the Commonwealth Electoral Act 1918, including under Section 316 which designates that an "authorised officer" may investigate complaints.<sup>118</sup>

In order to ensure conformity with free expression, it is essential that if further powers are established for the proposed Commission, there should be a suitable appeals process. Sanctions imposed on the basis of statutory violations should be open to challenge from political parties and private citizens. If investigative and sanctioning powers are established, an effective and independent appeals system is imperative. The Council of Europe has issued guidance when creating an "effective system of appeal" when enforcing compliance with electoral legislation.<sup>119</sup> The Council posits two options when creating an appeals system. One choice is to follow normative judicial procedure by outsourcing appeals mechanisms "ordinary courts, a special court or the constitutional court." Another option is to have the appeals procedure carried out by the Electoral Commission or independent "highly specialised" body. The Council suggests that irrespective of the chosen method, there must be "some level of judicial supervision" to sufficiently balance competencies.<sup>120</sup>

Irrespective of whether the Electoral Commission is ultimately tasked with investigative and sanctioning powers, achievable and proportionate functions are recognisable. Initial functions should involve fostering transparency in political advertising and actively tackling disinformation through monitoring and research functions. Going forward, it is critical that regulatory responses to disinformation online are proportionate, and interferences with Article 10 should be limited in order to avoid violations of the fundamental right to free expression that the ECtHR has protected during elections. Systematic countermeasures must be continuously informed and measurably effective. This may necessitate collaboration with technological companies in order to fully realise the potential for a new statutory body to combat disinformation and protect the rights of citizens to vote freely and without interference while respecting free expression. Through establishing coordinated media literacy programmes to inform the electorate about

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<sup>116</sup> Political Parties and Elections Act 2009.

<sup>117</sup> Compliance Program: Financial Disclosure  
<[https://www.aec.gov.au/Parties\\_and\\_Representatives/compliance/index.htm](https://www.aec.gov.au/Parties_and_Representatives/compliance/index.htm)> Last accessed 17 Oct 2019.

<sup>118</sup> Commonwealth Electoral Act 1918, Section 316(1).

<sup>119</sup> Freedom of Expression and Elections (Council of Europe 2018) <<https://rm.coe.int/factsheet-on-media-and-elections-july2018-pdf/16808c5ee0>>

<sup>120</sup> Ibid.

disinformation, the Commission can mitigate the distinct online threats to electoral security that the Irish government has recognised.

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*Ethan Shattock*

Ethan Shattock is an early PhD candidate at Maynooth University. His thesis is entitled “A Legal Response to the Fake News Phenomenon: Adopting a Human Rights Approach in Order to Facilitate Democracy and Veracity”. His research focuses on human rights based solutions to fake news online.

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**Enviado em: 06 de agosto de 2019**

**Aprovado em: 20 de novembro de 2019**