

VON DER LEYEN'S PLANS WHAT TO EXPECT FROM EU REGULATION ON ONLINE THREATS TO DEMOCRATIC DISCOURSE¹

AMID MUCH CONCERN ABOUT ONLINE MANIPULATION OF ELECTIONS AND WIDER DEMOCRATIC DEBATE, THE EU HAS TAKEN STEPS TO ENSURE THAT ONLINE DISCOURSE DOES NOT HARM DEMOCRACY. THE VON DER LEYEN COMMISSION HAS PROMISED TO STEP UP THESE EFFORTS. WE TAKE A LOOK AT THE CURRENT STATE OF PLAY.

KEY ISSUES

- EU regulatory efforts to ensure a democratic debate online will take place under two different headings: the Digital Services Act, an update of the e-commerce directive, with a focus on ensuring the common market for digital services, which could include common rules on illegal content; and the upcoming Democracy Action Plan (which could focus more on problems like disinformation and political advertising).
- Draft regulatory language will be unveiled in the fourth quarter of 2020. Before that, public consultations will be held, but no timing has yet been announced.
- New communications from 19 February 2020 provide more details on some regulatory aspects. They do not cover the important questions of access to data for research on online discourse. Likewise, they do not mention the possibility of an EU regulator in this field.

1. VON DER LEYEN'S COMMITMENTS

Ms. van der Leyen, the EU's new Commission President, made her main commitments on online discourse in two chapters of

¹ This paper was written by **Michael Meyer-Resende** based on a review of documents and conversations with policy-makers. Rafael Goldzweig provided comments.

her overall programme “Agenda for Europe”². As a follow-up the European Commission published on 19 February a Communication on ‘Shaping Europe’s Digital Future’³, which indicates that draft proposals for regulations are to be expected in the 4th quarter of 2020 with public consultations being held before that.

The relevant two chapters in the ‘Agenda for Europe’ are:

EUROPE FIT FOR THE DIGITAL AGE

This chapter outlines an optimistic vision of unleashing the EU’s economic potential in the digital economy better. It promises regulatory standards for new issues like AI or quantum computing. It also promises a new Digital Services Act (DSA) which “will upgrade our liability and safety rules for digital platforms, services and products, and complete our Digital Single Market.” As will be shown below, the DSA will probably address some aspects that are relevant to democratic online discourse. Its scope will be identifying common standards across the EU, for example on illegal content, to avoid confronting social media and other relevant companies with a fragmented legal environment. The DSA will overhaul the 2000 e-Commerce Directive.

The chapter also stresses the need for digital education, but more from the perspective of increasing digital skills as a part of professional qualifications, less to increase resilience against disinformation and other manipulations.

A NEW PUSH FOR EUROPEAN DEMOCRACY

This chapter includes a number of specific items, such as the role of the European parliament in decision-making or the establishment of citizen assemblies to discuss the future of the EU. It includes a sub-chapter on “Protecting our Democracy” that focuses on the need to protect the EU against foreign interference, disinformation and hate speech. The chapter includes a commitment to adopting a ‘European Democracy Action plan’.

The Commission’s 19 February Communication, ‘Shaping Europe’s Digital Future’ confirms that regulatory efforts by the EU on online discourse will proceed on the two parallel tracks of the Digital Service Act –focused on uniform standards to allow a smooth digital operations across the single market– and the Democracy Action Plan, which will look more at democratic resilience.

2. WHO IS IN CHARGE?

The dual-track approach extends into the highest level of the European Commission’s hierarchy. Margarethe Vestager, one of two executive Vice-Presidents, will be in charge of a “Europe fit for the Digital Age”. The Digital Services Act will fall under her remit and that of internal market commissioner

Thierry Breton, who reports to her. The Directorate General (DG) CONNECT will have the leading role.

The Democracy Action Plan will be managed by the Vice-President for Values and Transparency, Vera Jourová and Commissioner Didier Reynders who heads DG Justice and Consumers, which will lead on the Democracy Action Plan.

The Foreign Policy High Representative Josep Borrell will also be consulted, given the work on disinformation done by the External Action Service. Its Strategic Communications Division addresses disinformation from abroad and its Democracy and Election Observation Division addresses the issue as well, in particular as part of EU Election Observation Missions that now also analyse social media debates before elections and thus add to the growing body of evidence on disinformation and online discourse.

It is noteworthy that the leadership on the Digital Services Act is provided by politicians of liberal leaning (Vestager, Breton) who may be cautious about regulation, although they have been assertive in recent statements. It will be important to stress that social media and other aspects of political information online should not be treated as just another business. They represent an expansion of the public debate sphere, at least as far as they are public information. The EU should apply *mutatis mutandis* the same logic that it applies to audiovisual media services, which are “are as much cultural services as they are economic services. Their growing importance for societies, democracy — in particular by ensuring freedom of information, diversity of opinion and media pluralism — education and culture justifies the application of specific rules to these services”⁴.

3. WHAT COULD BE REGULATED TO STRENGTHEN DEMOCRATIC ONLINE DISCOURSE

The following aspects of social media, online debate and information provision could be addressed either by the Digital Services Act or the Democracy Action Plan:

DISINFORMATION

The EU defines disinformation as “verifiably false or misleading information created, presented and disseminated for economic gain or to intentionally deceive the public.”⁵ It is not clear yet what the Commission may propose in terms of regulation. It has approached the problem from a view of self/co-regulation whereby the big tech companies committed to a code of conduct.⁶ The Commission has not completed

²Ursula von der Leyen, „A Union that Strives for More: My Agenda for Europe”, European Commission, Brussels, 2019, https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf

³“Shaping Europe’s Digital Future”, Communication by the European Commission, Brussels, February 2020, https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020_en_3.pdf

⁴ See para.5 “Audiovisual Media Services Directive”, The European Parliament and the Council of the European Union, Brussels, April 2010, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32010L0013&from=EN>

⁵“Policy: Tackling Online Disinformation”, European Commission, Brussels, <https://ec.europa.eu/digital-single-market/en/tackling-online-disinformation>

⁶ For more, see: Democracy Reporting International, “The EU Framework Against Disinformation: What Worked, What Changed and the Way Forward”, Berlin, August 2019, <https://democracy-reporting.org/wp->

the review of the companies' reports on the implementation of the code. In its action plan, it had noted: "Should the implementation and the impact of the Code of Practice prove unsatisfactory, the Commission may propose further actions, including actions of a regulatory nature."

The Commission's approach to disinformation has focused on the "message", more than on the "messenger" (notably their authenticity, etc.) or the "messaging (modes of distribution)"⁷. Given that the response to most disinformation is unlikely to be an obligation to take-down the content, the focus should be more on distribution, for example by demanding basic transparency on algorithm design for users to understand ranking of posts or search results).⁸ Disinformation will be addressed in the Democracy Action Plan.⁹

HATE SPEECH

The legal regime on hate speech across the EU is fragmented. Germany enacted the NetzDG which obliges companies to take down illegal content, including speech that violates German laws. France enacted similar measures. Other EU member states have no regulations on this. From a common market perspective, there is an interest in a uniform regime so that social media and other relevant companies operate under an EU-wide framework, reducing their risks of violation. This makes it likely that it would be addressed under the Digital Service Act, which aims at improving the common market of digital services. It should be kept in mind however that hate speech is not only a legal risk for companies but a serious problem for the individuals who are targeted and for a free debate on the internet. Users, especially from vulnerable groups, are already withdrawing from online debates to avoid becoming targeted.

PAID POLITICAL ADVERTISING

This area is considered to be a low hanging fruit for regulation generally, but the EU's competence is not so clear (some consider Article 114 TFEU a possible option, which covers the approximation of member state legislation. While there are some challenges, such as delimiting what is political advertising and what is not, there appears to be broad consensus on obligations for tech companies. These include a high standard of transparency, involving easily searchable databases with up-to-date, detailed information on who

content/uploads/2019/08/EU-Actions-Against-Disinformation-EP2019-Final-1.pdf

⁷ For more see: Democracy Reporting International, "Briefing Paper 100: Online Threats to Democratic Debate: A Framework for a Discussion on Challenges and Responses", Berlin, June 2019, https://democracy-reporting.org/wp-content/uploads/2019/06/BP_Threats-to-digital-democracy.pdf

⁸ It is noteworthy that the EU has set a precedent for such basic transparency in the [regulation](#) 2019/1150 'On promoting fairness and transparency for business users of online intermediation services'. §24 of the regulation notes *inter alia*: "Providers should therefore outline the main parameters determining ranking beforehand, in order to improve predictability for business users, to allow them to better understand the functioning of the ranking mechanism and to enable them to compare the ranking practices of various providers."

⁹ See page 12 of "Shaping Europe's Digital Future", Communication by the European Commission, Brussels, February 2020, https://ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020_en_3.pdf

bought what kind of political advertising and which groups were targeted.

Here the EU should demand, at a minimum, to be treated equally to the US market, where Facebook offers more information on political ads, if not higher standards and that are applied equally to all member states, notably when it comes to respecting national legislations. For example, in Portugal Facebook ignored the prohibition on paid political advertising during the 2019 elections.

The recent Communication seems to suggest that paid advertising will be dealt with in the Democracy Action Plan, which could make sense in view of its relevance for elections. It could also be included in the DSA which will deal with advertising more generally.

A REGULATOR

Given the complexity and fast-changing nature of political discourse online, the EU should establish a specialised regulator that interacts with tech companies at an equal level, as opposed to a fragmented field with various authorities in the 27 member states. Some first ideas for such a regulator have been laid out by Kuklis and Wagner¹⁰. However, after Brexit, there is no great appetite in the EU to launch and finance new bodies.

In the absence of a regulator, the European Commission would oversee the enforcement of EU law in this field within its capacity and abilities. A softer model than a full-fledged new regulator may be an observatory along the lines of the EU Observatory on the Online Platform Economy¹¹, which is composed of some Commission officials and an expert group. The recent Communication 'Shaping the Digital Future' did not mention the idea of a regulator.

TRANSPARENCY AND ACCESS TO DATA FOR RESEARCH

The tech companies have used varying practices to give researchers access to data. Facebook's agreement for significant data access with a number of research institutions faltered amid allegations by researchers that the data provided were insufficient, missing in particular privately shared data¹². Facebook, in response to these concerns, cited privacy concerns to terminate the agreements. Facebook now provides data access to selected groups and researchers through its CrowdTangle application. Twitter, on the other hand, allows easier data access to researchers.

Without good access to data for social science research, much of the social media discourse – even public discourse – remains in a black box. Without solid evidence, policymaking

¹⁰ Lusbos Kuklis and Ben Wagner, "Disinformation, data verification and social media", LSE Blog, London, January 2020

<https://blogs.lse.ac.uk/mediase/2020/01/07/disinformation-data-verification-and-social-media/>

¹¹ "Policy: EU Observatory on the Online Platform Economy", European Commission, Brussels <https://ec.europa.eu/digital-single-market/en/eu-observatory-online-platform-economy>

¹² Elizabeth Gibney, "Privacy Hurdles Thwart Facebook Democracy Research", Nature, 3 October 2019, <https://www.nature.com/articles/d41586-019-02966-x>

remains difficult. Therefore, research access is crucial for any kind of evidence-based policymaking.

The issue is on the EU's agenda. The European Commission noted in October 2019:

"While progress has been reported on the commitments monitored by the Commission from January to May ahead of the 2019 European Parliament elections, less is reported on the implementation of the commitments to empower consumers and the research community. The provision of data and search tools is still episodic and arbitrary and does not respond to the needs of researchers for independent scrutiny."

The recent Commission Communication on "A European Strategy for Data" (19 February 2020) covers questions of data access for research, but it focuses on non-personal, industrial data. It does not focus on social media data for research on disinformation or similar phenomena. Likewise, it has a lot to say about government – business relations but does not discuss data access for academia or civil society organisations.