FAKE NEWS, FREE SPEECH AND DEMOCRACY: A (BAD) LESSON FROM ITALY?

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"[S]i qua possit ratione, competitoribus tuis exsistat aut sceleris aut libidinis aut largitionis accommodata ad eorum mores infamia."

"[A]s far as possible, arise against your opponents a suspicion, appropriate to their behavior, of guilt, of luxury or waste."

– QUINTUS TULLIUS CICERO, HOW TO WIN AN ELECTION 78-79 (Philip Freeman trans., 2012).

ABSTRACT

Using Silvio Berlusconi's successful campaign for Italy's President of the Council of Ministers as a case study, this article deals with control and use of media powers to gain and maintain political consensus. First, this article analyzes a precise period of Italy's recent history when the dissemination of news via major media outlets that were in Berlusconi's control, primarily television channels, but also newspapers and magazines, became weapons in the hands of a political leader. Recalling Berlusconi's additional recourse to litigation in order to fend off criticisms from the free press, this article demonstrates the importance of rules against conflicts of interest between media and politics and clarifies the bluntness of general antitrust in tackling such situations. The article further underscores the lack of intervention from both European and international institutions. Considering similar problems arising again in the European States, this paper suggests a solution through common European legislative intervention: adoption of a uniform set of rules for all EU Member States

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promoting media diversity and outlawing any direct or indirect control of media outlets by persons engaged in political activities. Finally, since the case study of this article reveals a strong connection between effective contrast to "fake news" and the existence of a media legal landscape based on the principles of impartiality, transparency and pluralism, it is submitted that the adoption of uniform European rules could significantly limit the impact of false or misleading information pending electoral periods.

I. INTRODUCTION: FAKE NEWS, FREEDOM OF EXPRESSION AND THE RIGHT TO FREE ELECTIONS IN LIGHT OF EUROPEAN AND INTERNATIONAL HUMAN RIGHTS PRINCIPLES

"Fake news" is not an invention of the Internet. Although the web offers new and easier avenues to disseminate false information,[1] democracies historically must defuse the constant danger of false facts, especially in the context of a political debate. Weaponized defamation, used as a deterrent against the free press, is similarly not a new occurrence. Both phenomena, spreading false information and threats of defamation suits, call into question two of the main pillars of the European human rights system, particularly during electoral campaigns: The right to freedom of information, including the right to be correctly informed, and the right to free elections.

In this connection, Article 10 of the European Convention on Human Rights and Fundamental Freedoms ("ECHR") provides that the freedom of expression "shall include freedom to hold opinions *and to receive* and impart information and ideas without interference by public authority and regardless of frontiers."[2] The same wording appears almost verbatim in Article 19 of the International Covenant on Civil and Political Rights ("ICCPR").[3] The European Court of Human Rights ("ECtHR") illustrates this emphasis on freedom of information in recent judgments where the court highlighted State

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1. In *Delfi v. Estonia*, the Grand Chamber of the European Court of Human Rights ("ECtHR") underscored that:

> [U]ser-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression. That is undisputed and has been recognized by the Court on previous occasions. However, alongside these benefits, certain dangers may also arise. Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds, and sometimes remain persistently available online.

Delfi v. Estonia, 2015-II Eur. Ct. H.R. 319 (first citing Ahmet Yildirim v. Turkey, 2012-VI Eur. Ct. H.R. 465; and then citing Times Newspapers Ltd. v. United Kingdom (nos. 1 and 2), 2009-I Eur. Ct. H.R. 377), https://www.echr.coe.int/Documents/Reports_Recueil_2015-II.pdf.

2. European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, ¶ 1, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention on Human Rights] (emphasis added); *see Chart of Signatures and Ratifications of Treaty 005: Convention for the Protection of Human Rights and Fundamental Freedoms*, COUNCIL EUR., https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/005/signatures?p_auth=mtIQiCmd (last visited Aug. 20, 2018). For a comment on this provision, see JEAN FRANÇOIS RENUCCI, DROIT EUROPÉEN DES DROITS DE L'HOMME 183 (2d ed. 2012).

3. International Covenant on Civil and Political Rights, art. 19, ¶¶ 1, 2, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] ("Everyone shall have the right to hold opinions without interference. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers[.]"). The ICCPR entered into force on March 23rd, 1976 and, as of September 2018, has 172 signatories. See SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (3d ed. 2013) for a commentary on the ICCPR.

Parties' obligation to not only respect freedom of speech but to also foster an environment suitable for inclusive and pluralistic public debate. To meet these obligations, the ECtHR dictates that States must refrain from interference and censorship, as well as adopt "positive measures" to protect freedom of information in its "passive" element; that is, the right to be correctly informed.[4]

Considering the special duties and responsibilities freedom of information carries,[5] the ECHR and the ICCPR permit interference with this right, but only if such interference is prescribed by law, pursues a legitimate aim and is necessary to a democratic society.[6] Significantly, on several occasions, the Strasbourg Court has held that "there is little scope under Article 10, paragraph 2 of the [ECHR] for restrictions on political speech or on the debate of questions of public interest."[7]

In turn, Article 3 of Protocol 1 to the ECHR and Article 25 of the ICCPR codify the right to free elections.[8] The ECHR provides that "High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."[9] Thus, the two fundamental rights share a strong connection: An election process is "free" if the electorate's choice is based on its access to the widest possible range of proposals and ideas, and if false information does not distort or alter election result.

Access to correct information is a precondition for an informed and genuine exercise of the right to vote and this proposition is well established in international case law. This conclusion emerges in several ECtHR

4. *See, e.g.*, Centro Europa 7 Srl v. Italy, 2012-III Eur. Ct. H.R. 339, 363-66.

5. Access to information is essential to democracy for at least two basic reasons. First, citizens must have access to government information in order to participate in the political process. Second, access to government information is necessary in order to hold governments accountable and to prevent governmental abuse and corruption. CHERYL ANN BISHOP, LAW AND SOCIETY 52-53 (Melvin I. Urofsky ed., 2012).

6. European Convention on Human Rights, *supra* note 2, art. 10, ¶ 2; ICCPR, *supra* note 3, art. 19, ¶ 3.

7. *See* Salov v. Ukraine, 2005-VIII Eur. Ct. H.R. 143, 177 (first citing Lingens v. Austria, 103 Eur. Ct. H.R. (ser. A) at 26 (1986); and then citing Castells v. Spain, 236 Eur. Ct. H.R. (ser. A) at 23 (1992)).

8. Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 262; ICCPR, *supra* note 3, art. 25. Article 25 of the ICCPR recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. *Id.*

9. Protocol to the European Convention on Human Rights and Fundamental Freedoms, *supra* note 8, art. 3.

judgments, including, for instance, *Bowman v. United Kingdom*. In *Bowman*, the ECtHR found that:

> Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system. The two rights are inter-related and operate to reinforce each other: for example, freedom of expression is one of the conditions necessary to ensure the free expression of the opinion of the people in the choice of the legislature. For this reason, it is particularly important in the period preceding an election for opinions and information of all kinds to be permitted to circulate freely.[10]

The Human Rights Committee of the United Nations, which monitors the application of the ICCPR, shares this view. In its General Comment on Article 25, the Committee dealt with freedom of expression in the context of participation in public affairs and with the right to vote.[11] In paragraph 25, the Committee states that:

> Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association . . . . In order to ensure the full enjoyment of rights protected by article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to

10. Bowman v. United Kingdom, App. No. 24839/94, 26 Eur. H.R. Rep. 1 (1998). In addition, in *Communist Party of Russia and Others v. Russia*, the ECtHR addressed whether the State had a *positive obligation* under Article 3 of Protocol 1 to ensure that coverage by regulated media was objective and compatible with the spirit of "free elections" even in the absence of direct evidence of deliberate manipulation. Communist Party of Russ. v. Russia, App. No. 29400/05, 61 Eur. H.R. Rep. 28 (2012) (finding that the existing system of electoral remedies in Russia was sufficient to satisfy the State's positive obligation of a procedural nature).

11. Hum. Rts. Comm., General Comment No. 25 on the Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service Under Article 25 of the Covenant, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996), *reprinted in* Rep. of the Hum. Rts. Comm., U.N. GOAR Supp. (No. 40), U.N. Doc. A/57/40, at 98 (1997). Article 25 of the Covenant recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. ICCPR, *supra* note 3, art. 25.

> criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.[12]

All Member States of the European Union are parties both to the ECHR and the ICCPR. Therefore, in addition to the principles enshrined in their national constitutions, Member States share a common, solid legal background of protecting freedom of expression. Furthermore, when Member States implement EU law, they are also bound to the Charter of Fundamental Rights of the European Union ("the Charter"), which codifies the basic right to free expression in Article 11 with similar wording.[13] Notwithstanding this strong commitment, "free speech crises" still emerged in certain European States, and some proved unable to sufficiently respond to the dissemination of false information that aimed to distort, or at least condition, public discourse. Thus, the purpose of this article is to shed light on a specific – and admittedly, unique – situation that occurred, and still occurs to some extent, in Italy, where dissemination of fake news and recourse to weaponized defamation facilitated a media tycoon's rise to power and enabled him to retain such position for several years.

II. A TALE OF RECENT HISTORY: POLITICAL CONSENSUS AND MEDIA POWER IN SILVIO BERLUSCONI'S RAISE TO POWER IN ITALY

"*One Italian out of three has already decided to vote for Forza Italia.*" In early 1994, this political claim was broadcast most frequently and any Italian viewer watching Mediaset television channels was constantly exposed to the message. Mediaset made up part of the Berlusconi media empire, Fininvest, which itself consistently comprises roughly one third of Italy's TV audience shares.[14] The slogan, invented by advertising agency Publitalia,

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12. General Comment No. 25, *supra* note 11, ¶¶ 8, 25.

13. Article 11, titled "Freedom of expression and information" reads:

> (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.
>
> (2) The freedom and pluralism of the media shall be respected.

Charter of Fundamental Rights of the European Union, art. 11, Oct. 26, 2012, 2012 O.J. (C 326) 391; *see* Roberto Mastroianni & Girolamo Strozzi, *Articolo 11*, *in* CARTA DEI DIRITTI FONDAMENTALI DELL'UNIONE EUROPEA 217, 217-35 (Roberto Mastroianni et al. eds., 2017); Lorna Woods, *Article 11: Freedom of Expression and Information*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS 354, 354-83 (Steve Peers et al. eds., 2014).

14. *See* AUTORITÀ PER LE GARANZIE NELLE COMUNICAZIONI, 2017 ANNUAL REPORT 8-12 (2017) ("In the free-to-air television, RAI and Mediaset confirmed the two main operators in terms of audience, respectively with 36% and 31% of audience shares."). *See generally* Brendan Quigley, *Immunity, Italian Style: Silvio Berlusconi Versus the Italian Legal System*, 34 HASTINGS INT'L & COMP. L. REV. 435, 440-41 (2011) (first citing Alberto Vannucci, *The Controversial Legacy of*

also under Berlusconi's control, is a good starting point for the present analysis, since it represents an early model of public opinion manipulation via mass media.

In 1994, when this statement permeated every Italian household, the new political movement *Forza Italia* was just taking its first steps in the political arena and preparing for the general election. The 1994 general elections were unique because they took place after a period of serious turmoil in Italian politics in which the country's most important political parties imploded due to anti-corruption investigations called "Mani Pulite" ("clean hands").[15]

Let us travel back to 1994 for a closer look at the social and political atmosphere in Italy. Since 1992, Italy had been in deep crisis – financial, political and cultural crisis – which dissolved the controlling political parties and put an end to the so-called First Republic. Silvio Berlusconi's media assets were also under threat. Fininvest was heavily in debt, and the government was considering revising existing law to limit Fininvest's near monopoly in commercial television.[16] Former prime Minister Benedetto "Bettino" Craxi, Berlusconi's political mentor, friend and one of many politicians under investigation for corruption, resigned from his leadership position in the Socialist Party.[17] By the end of 1993, the "progressive" alliance won municipal elections in Italy's major cities, including Rome, Venice, Naples and Palermo. The left wing had never been so close to power.

To defend his heritage and to fill the void left by the collapse of the old parties, Silvio Berlusconi contemplated his entry into politics.[18] After a long period of indecision[19] (which was probably staged indecision—another

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'Mani Pulite': A Critical Analysis of Italian Corruption and Anti-Corruption Policies, 1 BULL. ITAL. POL. 233, 233-34 (2009), http://www.gla.ac.uk/media/media_140182-en.pdf; and then citing MICHAEL E. SHIN & JOHN A. AGNEW, BERLUSCONI'S ITALY 1-2, 10-11 (2008)).

15. See ALEXANDER STILLE, THE SACK OF ROME 121-26 (2006) for an explanation of the "clean hands" investigation.

16. PAUL GINSBORG, ITALY AND ITS DISCONTENTS 289 (2003).

17. Alan Cowell, *Italian Chief Replaces Three Ministers Who Resigned in Bribery Scandal*, N.Y. TIMES, Feb. 22, 1993, at A2.

18. For a complete analysis of the establishment of the *Forza Italia* political movement, see EMANUELA POLI, FORZA ITALIA: STRUTTURE, LEADERSHIP E RADICAMENTO TERRITORIALE (2001); *see also* GIOVANNI ORSINA, IL BERLUSCONISMO NELLA STORIA D'ITALIA (2013).

19. Between September and December 1993, the Research Institute Diakron, directed by a former manager of Publitalia (not surprisingly elected to the Italian Parliament with *Forza Italia* in the 1994 elections), circulated a long series of its polls in which Silvio Berlusconi was considered the most popular and trustworthy character for the Italian future. On December 19, 1993 Italian newspapers issued a survey, again signed by Diakron, where it turned out that 48.4% of Italians would vote for a center-right coalition led by Silvio Berlusconi. Particular attention should be paid to the date—at the beginning of December 1993, the birth of *Forza Italia* and Berlusconi direct involvement had not yet been officially announced. *See* Dan Mihalache, *The Italian Political*

strategy inspired by advertising techniques), the national *Forza Italia* association was officially established in November 1993.[20] During the campaign, Berlusconi mobilized the extraordinary resources of his media organization to advertising and market research. Absent laws limiting such direct political involvement of persons in control of large media companies, the first Italian party-business ("partito-impresa") was born.[21]

According to well-respected and neutral polling agencies, *Forza Italia*'s support ranged from three to six percent of voters at the beginning of the pre-electoral period (January 1994), while other survey agencies, those closer to Berlusconi's interests, supplied far more generous estimates.[22] At the ballot boxes two months later, *Forza Italia* secured twenty-one of the votes[23] – a huge success for a brand new political party, the highest percentage of votes for the lower house of Parliament, the Chamber of Deputies (Camera dei Deputati), but still twelve points lower than the projection Berlusconi-friendly polling agencies issued at the beginning of the electoral period.

It is rather clear to political analysts[24] that the extremely powerful political campaign, facilitated by the conjunction of Berlusconi's status as a media tycoon and as a political candidate, was a weapon which allowed Berlusconi to achieve such an unusual result. For example, the widely-disseminated catchphrase "One Italian out of three," inspired by commercial advertising techniques,[25] was clear and simple. It meant, in brief, that *Forza Italia* was already a winning party, and suggested to voters that it was in their best interest to join the club. In other words, it was a call to jump on the bandwagon, or, in Italian: "salire sul carro del vincitore."

Thus, the messages Berlusconi used in his campaign was what we would today call "fake news." It is no surprise that, when combined with other strategies,[26] the masterful use of advertising techniques helped *Forza Italia*

System Case Study: Berlusconi – The Invention of the Political Man, 5 COGITO: MULTIDISCIPLINARY RES. J. 67, 72 (2013); STILLE, *supra* note 15, at 252-53.

20. *See* FEDERICO ORLANDO, IL SABATO ANDAVAMO AD ARCORE (1995).

21. *See generally* PINO CORRIAS ET AL., 1994 COLPO GROSSO (1994).

22. *See* Interview by Franco Melandri with Giorgio Calò, former CEO, Research Institute Directa, *in* 38 UNA CITTÀ (1995), http://www.unacitta.it/newsite/intervista.asp?id=725.

23. *See* Duncan McDonnell's survey, *Silvio Berlusconi's Personal Parties: From Forza Italia to the Popolo della Libertà*, 61 POL. STUD. 217, 219 (2013).

24. CORRIAS ET AL., *supra* note 21, at 64.

25. For a statement that, in the case of commercial advertising, such false claims might well be considered (and sanctioned) as "misleading advertising," see the interview with Giorgio Calò, *supra* note 22.

26. For a more comprehensive and detailed analysis of the political and historical elements that favored Silvio Berlusconi's victory in 1994, see Guido D'Agostino & Riccardo Vigilante, *Le elezioni politiche del marzo 1994*, 195 ITALIA CONTEMPORANEA 221, 221-22 (1994) (It.).

increase its voter appeal and achieve unexpected electoral result. This early success transformed Berlusconi's political movement into a coalition[27] that then gained a majority in Parliament and facilitated Berlusconi's first appointment as Prime Minister of the Italian Government.[28]

III. USING MEDIA POWER FOR POLITICAL CONSENSUS: THE MAIN "WEAPONS"

The foregoing Berlusconi example was selected from a range of mass media "weapons" that were used to influence political choices in Italy. Obviously, not all instances concern Berlusconi and his party. However, Berlusconi's dual role as political leader and media tycoon, which enabled his near total control over the private broadcasting market, newspapers, magazines and the publishing house Mondadori, makes this experience unique, at least among European Union Member States. Several independent observers and supranational institutions recognize this sort of uniqueness as an unprecedented threat to basic democratic rules.[29]

This article takes a closer look at the main categories of the "weapons" Berlusconi's broadcasting channels used to deploy his mass media power. Before considering those categories, however, it is important to recall that this analysis relates mostly to the "analog" media period. During this period, scarcity of television frequencies limited the Italian public's exposure to the information and messages broadcast by a small number of available channels.[30] More precisely, until the advent of satellite transmissions and, for terrestrial transmission, the transition from analog channels towards the new system of digital broadcasting,[31] the television market was controlled by

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27. *Forza Italia* allied in South Italy with the conservative right-wing party *Alleanza Nazionale*, and in the North with the secessionist party *Northern League* – a rather bizarre coalition. *See* STILLE, *supra* note 15, at 157-58.

28. The first Berlusconi government had a very short life. Due to almost immediate implosion of the coalition and pressure of the public opinion following criminal investigations, Silvio Berlusconi resigned on December 22nd, 1994. *Berlusconi Resigns*, AP ARCHIVE, http://www.aparchive.com/metadata/youtube/e275f384ef39c6e2bdd17c641948960e (last visited Aug. 20, 2018); Quigley, *supra* note 14, at 441-42 (citing Alan Cowell, *Italian Premier, Facing Defeat, Resigns Urging Elections*, N.Y. TIMES, Dec. 23, 1994, at A10).

29. *See infra* notes 55-60.

30. Legge 6 agosto 1990, n.223, G.U. Aug. 9, 1990 n.185 (It.). Article 15 allowed a single media company to control three out of eleven of the national networks to the national frequency-allocation plan irrespective of the audience reached and the market share of that company. *Id.*

31. The switch took place with a very slow and controversial process, with the final transition to digital broadcasting completed in July 2012. According to the ECtHR and the Court of Justice of the European Union, the rules adopted in Italy, while intended to open the market to new operators, in fact confirmed the same position of dominance in favor of the incumbents. Centro Europa 7 Srl v. Italy, 2012-III Eur. Ct. H.R. 339, 352; Case C-380/05; Centro Europa 7 S.r.l. v. Ministero delle

only two operators: One public operator (RAI), and one private operator (Mediaset), both with three channels each.[32]

In addition, because specific rules imposing neutrality and free access of all political formations conditioned RAI's programs, the messages diffused via Mediaset channels had an extremely powerful impact on television audiences. Berlusconi, as Head of the Executive branch, also had the opportunity to deeply influence RAI's governance since RAI's Board of Governors and its main executives were chosen either directly by or under proposal of the Executive (i.e., Berlusconi).[33] In brief, Berlusconi's media outlets and immense economic resources distorted the political competition upon which a healthy democracy depends during the 1994 campaign and, in part, subsequent elections as well.

A. *Political Advertisements*

Berlusconi's use of political advertisements was only one of the most successful uses of such advertisements. More generally (and temporarily bracketing the question of the "fakeness" of the messages diffused),

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Comunicazioni e Autorità per le garanzie nelle comunicazioni and Direzione generale per le concessioni e le autorizzazioni del Ministero delle Comunicazioni, 2008 E.C.R. I-00349. For an analysis of these judgments, see Roberto Mastroianni, *Media Pluralism in Centro Europa 7 srl, or When Your Competitor Sets the Rules*, *in* EU LAW STORIES 245, 253-55 (Fernanda Nicola & Bill Davies eds., 2017).

32. *Italy*, 28 U.S. DEP'T ST. ANN. HUM. RTS. REP. 1332, 1336 (2003); *see* ALESSANDRO PACE & MICHELA MANETTI, RAPPORTI CIVILI: LA LIBERTÀ DI MANIFESTAZIONE DEL PROPRIO PENSIERO 575 (2006) (presenting a detailed legal analysis of the development of private television broadcasting in Italy).

33. Before the 2015 reform, according to Article 49 of the Consolidated Law on Audiovisual and Radio Media Services ("CLARMS"), the Board of Directors consisted of nine members, seven of which were appointed by the Parliamentary Supervision Committee, whose membership reflects, in proportion, the political composition of the Parliament. The other two members of the Board of Directors – one of which is the Chair of the Board – were appointed directly by the majority shareholder, that is, the Ministry of Economy and Finance. The appointment of the Chair, however, became effective following approval by the Parliamentary Supervision Committee by a two-thirds majority vote. Concerns have been voiced both by scholarly and institutional commentators as to the ability of RAI's governance system to ensure its independence from political and governmental influence. The Parliamentary Assembly of the Council of Europe, in Resolution 1387 dedicated to "*[m]onopolisation of the electronic media and possible abuse of power in Italy*," noted that RAI "has always been a mirror of the political system of the country" and that it "has moved from the proportionate representation of the dominant political ideologies in the past to the-winner-takes-all attitude reflecting the present political system." Eur. Parl. Ass., *Resolution of the Parliamentary Assembly*, 23d Sess., RES. NO. 1387 (2004) [hereinafter RESOLUTION 1387]; *see* ROBERTO MASTROIANNI & AMEDEO ARENA, MEDIA LAW IN ITALY (2d ed. 2012). After the reform, adopted in December 2015, the new rules now provide that seven members comprise the Board: the two chambers of Parliament elect four members, and the Executive choses two members and RAI employees select one member. Legge 28 dicembre 2015, n.220, G.U. Jan. 15, 2016 n.11 (It.).

Berlusconi's direct control of media channels also meant that the political agenda was substantially determined by Berlusconi's party and its spin-doctors. That is, Mediaset's communication experts "pushed" public opinion towards arguments and questions to follow specific political objectives and, consequently, to gain political consensus.

B. *Election Polls*

Before a new set of legislative rules entered into force in late 1993 (and thereafter due to totally ineffective rules on sanctions), publication of election polls was not conditional upon use of scientific methods. Therefore, Italian viewers were routinely confronted with substantially different polling projections.[34]

C. *Presence of Political Leaders in Informative and Non-Informative Programs*

Furthermore, Berlusconi's dual role as politician and media tycoon made it extremely easy for him to invite himself or other members of his party onto television programs, which reinforced his impact on public opinion. It is worth recalling the nine-minute televised message wherein Berlusconi announced his initial decision to engage directly in the political arena far and wide. The pre-recorded message was widely anticipated and, on January 24th, 1994, broadcast not only on Berlusconi's three channels but on RAI's public channels as well free of charge and absent any debate with journalists or competitors.[35]

D. *Political "Endorsements" by Anchorpersons and Television Show Hosts*

Endorsements by media personalities were one of the most powerful weapons in Berlusconi's arsenal. The public opinion was confronted with apparently spontaneous declarations made during the most popular TV programs. In the 1994 campaign, many of the most popular anchorpersons and show hosts on Mediaset channels passionately declared that they were supporting Berlusconi's decision to enter into the political arena. Again, thanks to his direct control of a large part of the TV market, this strategy differentiated (and obviously advantaged) Berlusconi and his party from any other political competitor. In the absence of legislation prohibiting these acts, anchorpersons' direct endorsements were not illegal. Still, these

34. STILLE, *supra* note 15, at 252.

35. *Id.* at 151-54.

endorsements had a strong impact on public opinion due to the popularity of the persons involved.

E. *Attacks of political competitors, including fake news: The strange case of Telekom Serbia*

Here we return to the realm of more "traditional" fake news, where mass media is used to launch personal attacks against political competitors. This use is rather common in the political arena, as attacks come from any side and are part of the very essence of political confrontation. But things become more complicated when only one of competitor has major television networks at his disposal to freely disseminate personal assaults. In fact, Italian viewers, and therefore voters, witnessed several attacks against political opponents, and, in some cases, attacks directed at judges involved in Berlusconi's several trails who Berlusconi accused of acting in poor taste![36] When conveyed by mass media in a more neutral, "institutionalized" context, these attacks were even more subtle, as demonstrated by the famous story of Telekom Serbia.

This case deserves a more detailed analysis. In 1997, the Italian public telecom company, Telecom Italia, acquired twenty-nine percent of Telekom Serbia shares for 878 billion lire (equivalent to about €450 million).[37] In 2003, Igor Marini, a self-styled financial broker – in fact only a porter for a fruit market in Brescia – accused the most prominent center-left political alliance personalities, including former Prime Minister Romano Prodi (at that time President of the European), and the Secretary of the Democratic Party, Piero Fassino, of taking bribes to facilitate the Telecom Italia deal. These accusations were promptly and widely disseminated in the main mass media, not surprisingly on the TV stations and newspapers owned by Berlusconi and led to two judicial investigations and one parliamentary inquiry. The events also had some comedic results. Memorably, in May 2003, during a trip to Switzerland intended to collect evidence to support the accusations, Mr.

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36. On October 16th, 2009, both a magazine and a Mediaset information program presented a "scoop" showing a few minutes on the private life of the judge who, just a few weeks before, had ordered the Fininvest group to pay €750 million in compensation to CIR of Carlo De Benedetti. The big "scoop" was based, among other things, on the Judge's questionable taste in selecting the colors of his socks! Emilio Randacio, *E Canale 5 "pedina" il giudice Mesiano "Stravaganti i suoi comportamenti,"* LA REPUBBLICA (Oct. 16, 2009), http://www.repubblica.it/2009/10/sezioni/politica/cir-fininvest/canale-5-mesiano/canale-5-mesiano.html.

37. Richard Owen, *Berlusconi and Prodi in Bribes Dispute*, TIMES (Sept. 2, 2003, 1:00 AM), https://www.thetimes.co.uk/article/berlusconi-and-prodi-in-bribes-dispute-ccc5vdlg7xd.

Marini and two members of the Parliament Committee of inquiry were arrested by local authorities, accused of "economic espionage."[38]

The bribery accusations directed at Mr. Prodi and other politicians were blatantly false. In fact, they did not lead to any formal indictments. Still, the allegations occupied mass media headlines for weeks, imprinting a sense of repulsion toward the whole political establishment and, in particular, the most influential leaders of the center-left alliance upon a large segment of the public. Importantly, these accusations were a tactic meant to offset the much more serious criminal allegations against Mr. Berlusconi himself, which years later, on November 27th, 2013, would lead to his conviction and consequent expulsion from the Senate.[39]

None of the investigations led to any formal charges against Prodi, Fassino or other left-wing politicians, and Mr. Marini was criminally convicted for defaming the accused politicians and sentenced to years of prison time in 2015.[40] In her judgments against Mr. Marini, Judge Rosanna Ianniello, President of the Tribunal of First Instance in Rome, expressed shock that Mr. Marini had received so much publicity.[41] Judge Ianniello explained that a parliamentary commission of inquiry had not "shed light on the reasons why a person who, with his scams and the small appropriations of money, who had difficulty in guaranteeing to himself and his wife a dignified existence, and who was foreign to institutional environments" was taken so seriously.[42] "It seems obvious," she argued, "that Marini did not act alone and that he [was] not the sole architect of this great lie but only the interpreter of a plot ordained by others."[43] Ultimately, the Court described Igor Marini as "a pathological and compulsive liar."[44]

F. *Threatening press watchdogs with resource-sapping litigation: Berlusconi v.* The Economist

38. Davide Gorni, *Deputati italiani accusati di spionaggio*, CORRIERE DELLA SERA (May 9, 2003), http://www.corriere.it/Primo_Piano/Politica/2003/05_Maggio/09/arresto_marini.shtml.

39. *Berlusconi non è più senatore, il Senato approva la decadenza*, LA REPUBBLICA (Nov. 27, 2013), http://www.repubblica.it/politica/2013/11/27/news/voto_senato_decadenza-72093870/.

40. *Telekom Serbia, definitiva la condanna a 7 anni per Igor Marini*, IL FATTO QUOTIDIANO (Jan. 10, 2015), https://www.ilfattoquotidiano.it/2015/01/10/telekom-serbia-definitiva-condanna-7-anni-per-igor-marini/1330527/.

41. *Telekom Serbia, la grana infinita*, IL FATTO QUOTIDIANO (Feb. 19, 2012), https://www.ilfattoquotidiano.it/2012/02/19/telekom-serbia-la-grana-infinita/192331/.

42. *Id.*

43. *Id.*

44. *Id.*

Recourse to litigation to threaten the free press is a tactic typical of politicians in any corner of the world, and it is no surprise that this occurred frequently in the Berlusconi era. The most telling and famous case is the 2001 civil suit Mr. Berlusconi launched against *The Economist*, one of the most influential international magazines. On April 26th, 2001, *The Economist* published a long editorial, titled "An Italian Story," about Mr. Berlusconi. The editorial argued that, for reasons mainly linked to his conflicts of interest in many economic fields, including media markets, Berlusconi was "unfit to lead Italy."[45] Berlusconi sued *The Economist* before a civil court in Rome, alleging the article defamed him. Berlusconi asked for damages of at least €1 million. In its judgment, issued on September 5th, 2008,[46] the Court in Milan found that the magazine had exercised its right to journalistic criticism and rejected all of Mr. Berlusconi's claims, ordering him to bear costs. The judgment was confirmed by both the Court of Appeals in Milan and, in February 2017, by a definitive ruling of the Supreme Court of Cassation.[47]

Though *The Economist* ultimately prevailed in this case, recourse to litigation nonetheless risks a "chilling effect" on media freedom.[48] Specifically, the director of *The Economist* once declared that he preferred not to publish articles on Berlusconi in Italian to avoid immediate recourse

45. *The Economist* found that, while Prime Minister of Italy, Berlusconi retained control of ninety percent of all national television broadcasting, taking into consideration TV stations he owned directly as well as public service broadcaster RAI, which he had indirect control over as Prime Minister of Italy. In addition, *The Economist* pointed out that, in the pending cases against him for falsifying accounting records and bribing judges, Berlusconi had not defended himself in court, but instead relied upon political and legal manipulations, most notably by changing the statute of limitations, which "extinguishes the crime." Editorial, *An Italian Story*, ECONOMIST (Apr. 26, 2001), https://www.economist.com/special/2001/04/26/an-italian-story.

46. Tribunale di Milano, 2 settembre 2008, n.10661, Giur. it. 2008, I, 1, 8412 (It.); *see id.*

47. Cass. sez. tre. 28 febbraio 2017, n.5005, Foro. It. 2017, I, 820 (It.).

48. The risk of "chilling effect" is often present in the Council of Europe's approach to journalists' freedom under Article 10 of the European Convention of Human Rights. See, for example, the Committee of Ministers' recommendation to member States on the protection of journalism and safety of journalists and other media actors, adopted on 13 April 2016, where the Committee states that "actual misuse, abuse or threatened use of different types of legislation to prevent contributions to public debate, including defamation, anti-terrorism, national security, public order, hate speech, blasphemy and memory laws can prove effective as means of intimidating and silencing journalists and other media actors reporting on matters of public interest. *The frivolous, vexatious or malicious use of the law and legal process, with the high legal costs required to fight such law suits, can become a means of pressure and harassment, especially in the context of multiple law suits.*" COUNCIL EUR., *Recommendation of the Comm. of Ministers*, 1253d Mtg., CM/Rec(2016)4[1] (2016) (emphasis added). *See generally* DIRK VOORHOOF, EUROPEAN UNIV. INST., THE RIGHT TO FREEDOM OF EXPRESSION AND INFORMATION UNDER THE EUROPEAN HUMAN RIGHTS SYSTEM (2014), http://cadmus.eui.eu/bitstream/handle/1814/29871/RSCAS_2014_12.pdf.

to a civil suit that carried a risk of heavy pecuniary sanctions. The concern was legitimate as Berlusconi, both as an individual and through his companies, often turned to litigation in response to what he considered libel.[49]

Quick recourse to litigation even more profoundly affects small newspapers with more limited financial means than larger organizations like *The Economist*. Initiating a civil action is intimidating and defending against such actions may be costly. Even if the complaint is proved totally unfounded after years of litigation,[50] the cost of its defense may well bankrupt the media-defendant, and it is nearly impossible for media companies and journalists to obtain redress for the harm suffered.[51] This not only endangers the survival of a small newspaper but also compromises the work of the entire editorial staff as the "chilling effect" has already set in.[52] That is, journalists are incentivized to write less critically and to strive for "political correctness" to avoid prompting legal retaliation. Dissemination of information suffers as a result.

Undoubtedly, access to litigation is a basic right that cannot be denied or limited. But civil actions that request payments in the millions of euros boarder on abuse of litigation, especially when brought against publishing companies that, directly or indirectly, compete in the media market. In short,

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49. For examples of law suits against the newspaper *La Repubblica*, see Max Maine, *Legittime le dieci domande a Berlusconi "Erano diritto di cronaca e di critica,"* LA REPUBBLICA (Sept. 13, 2011), http://inchieste.repubblica.it/it/repubblica/rep-it/2011/09/13/news/assolte_le_dieci_domande-21582192/; and *Prosciolto 'L' Espresso Querelato Da Berlusconi*, LA REPUBBLICA (Nov. 3, 1989), http://ricerca.repubblica.it/repubblica/archivio/repubblica/1989/11/03/prosciolto-espresso-querelato-da-berlusconi.html. In both cases, the newspaper prevailed.

50. To give just one example, in 2003 a journalist working for the Italian national newspaper *la Repubblica* was accused of libel for a series of articles criticizing Mediaset and the laws that the author considered to have favored the company's when Berlusconi was head of the Government and leader of the political majority in Parliament. According to Mediaset, the articles represented an unjust defamatory campaign and a violation of the rules on unfair competition. The Tribunal of Rome decided in favor of the media company and the case climbed to the Court of Appeal and then to the Court of Cassation. With its judgment in 2015, *twelve years* after the first legal action, the latter confirmed that *La Repubblica* and the journalist had not defamed the company. It argued that at the center of the political debate "there is the conviction of a close interaction between the business group Mediaset and a political party, Forza Italia," which "in turn led to the political and entrepreneurial figure of Mr. Berlusconi." Therefore, "the articles of criticism of the company must be read in the light of political opposition, and fall under the right to political criticism." David Rampello, *La Verita di Berlusconi*, LA REPUBBLICA (Mar. 10, 1994), http://ricerca.repubblica.it/repubblica/archivio/repubblica/1994/03/10/la-verita-di-berlusconi.html.

51. GIOVANNA CORRIAS LUCENTE, IL DIRITTO PENALE DEI MEZZI DI COMUNICAZIONE DI MASSA (2000); Giovanna Lucente Corrias, *Il business della diffamazione*, 4 MICROMEGA 108 (2007) (It.).

52. *See* CATERINA MALAVENDA ET AL., LE REGOLE DEI GIORNALISTI: ISTRUZIONI PER UN MESTIERE PERICOLOSO (2012).

if lawsuits serve to protect the reputation of an individual on the one hand, they can also act as a powerful method of limiting freedom of information on the other.

IV. REACTIONS AND LEGISLATIVE RESPONSES

The second part of this article is devoted to a brief account of the legal reactions that the "anomaly" of Berlusconi's conflicts of interest encountered at both a domestic and an international level. This article will then consider the timid and ineffective response in Italy, and the vehement reactions that were nonetheless ineffective due to a lack of formal legislative power at the European and international level. Considering similar situations arising in other European countries where new democracies face threats to independent mass media, particularly public service broadcasters, a solution is to adopt common European rules that impose a clear distinction between political power and media control.

A. *National and International Reactions*

Returning to the Berlusconi example, we previously noted that the conflict of interest in favor of *Forza Italia* and its leader distorted the political arena. One might have expected a dramatic reaction, at least from Berlusconi's political opponents. One might have equally expected that, when a different coalition ascended to power, it would have re-balanced the political arena with new laws that required fairer conduct in electoral campaigns.

Yet, this is not what Italy experienced. This is not the appropriate venue to analyze why Berlusconi's political opponents, with some exceptions, avoided concrete initiatives against such an unprecedented conflict of interest. It is enough to note here that, when the center-left coalition was in power from 1996 to 2001, from 2006 to 2008 and, at least in part, in the legislature that ended in March 2018, it did not make any such attempts, even at the expense of its own interests.[53] As to the second query, the Parliament did enact laws to limit Berlusconi's enormous media power, at least during the first period of Berlusconi's entry into the political arena. Still, those laws had a limited effect, leaving the underlying problem unchanged.

53. For details on this point, see MICHELE DE LUCIA, IL BARATTO 181 (2008); PETER GOMEZ & MARCO TRAVAGLIO, INCIUCIO 120 (2005).

B. *Rules on Political Independence of Broadcasters*

Before turning to a deeper analysis of the rules devised by the Italian legislature to ensure a level playing field in the access to political broadcasting,[54] we must bear in mind the de facto situation in Italy. It was characterized, as the European Parliament put it, by "a unique combination of economic, political and media power in the hands of one man – the current President of the Italian Council of Ministers, Mr. Silvio Berlusconi."[55] Mr. Berlusconi had been the largest shareholder of the Mediaset network group since its establishment in 1978, and Prime Minister of Italy from 1994 to 1995, from 2001 to 2006 and from 2008 to 2012. According to scholarly commentators, this type of conflict of interest may contravene the balance of electoral competition contrary to the Italian constitutional principles of internal and external pluralism (Article 21), equality (Article 3), impartiality of public administration (Article 97), and equal access to public offices (Article 51).[56]

Moreover, as noted by the European Parliament[57] and the Parliamentary Assembly of the Council of Europe,[58] this situation is at odds with the principle of freedom of expression enshrined in Article 10 of the ECHR and Article 11 of the Charter of Fundamental Rights of the European Union.[59] As summarized by the Council of Europe Parliamentary Assembly in Resolution 1387:

> Through Mediaset, Italy's main commercial communications and broadcasting group, and one of the largest in the world, Mr[.] Berlusconi owns approximately half of the nationwide broadcasting in the country. His role as head of government also puts him in a position to influence indirectly the public broadcasting organisation, RAI, which is Mediaset's main

54. See ROBERTO MASTROIANNI & AMEDEO ARENA, MEDIA LAW IN ITALY ¶ 197 (Peggy Valcke & Eva Lievens eds., 2014) for a more in-depth explanation on this point.

55. European Parliament Resolution on the Risks of Violation, in the EU and Especially in Italy, of Freedom of Expression and Information (Art. 11(2) of the Charter of Fundamental Rights of the European Union), 2004 O.J. (C 104E) 1026, ¶ 60 (Apr. 30, 2004).

56. See, among others, ROBERTO ZACCARIA ET AL., DIRITTO DELL'INFORMAZIONE E DELLA COMUNICAZIONE (6th ed. 2016).

57. In addition to the European Parliament resolution cited in note 55, see European Parliament Resolution on the Situation as Regards Fundamental Rights in the European Union, 2002 O.J. (C 76E) 412, ¶ 37 (Mar. 25, 2004) (deploring "the fact that in Italy in particular a situation is continuing in which media power is concentrated in the hands of the Prime Minister, without any rules on conflict of interest having been adopted").

58. *See* RESOLUTION 1387, *supra* note 33, ¶ 1 (expressing concern about "the concentration of political, commercial and media power in the hands of one person, Prime Minister Silvio Berlusconi").

59. Charter of Fundamental Rights of the European Union, *supra* note 13, art. 11, ¶ 2; European Convention on Human Rights, *supra* note 2, art. 10.

> competitor. As Mediaset and RAI command together about ninety percent of the television audience and over three quarters of the resources in this sector, Mr[.] Berlusconi exercises unprecedented control over the most powerful media in Italy . . . . This duopoly in the television market is in itself an anomaly from an antitrust perspective. The status quo has been preserved even though legal provisions affecting media pluralism have twice been declared anti-constitutional and the competent authorities have established the dominant positions of RAI and the three television channels of Mediaset. An illustration of this situation was a recent decree of the Prime Minister, approved by parliament, which allowed the third channel of RAI and Mediaset's Retequattro to continue their operations in violation of the existing antitrust limits until the adoption of new legislation. Competition in the media sector is further distorted by the fact that the advertising company of Mediaset, Publitalia '80, has a dominant position in television advertising.[60]

The debate surrounding the conflict of interest was sparked in 1994, following Mr. Berlusconi's first election and appointment as Prime Minister. Some Members of the Italian Parliament claimed that Berlusconi's election to the Chamber of Deputies was inconsistent with Article 10 of the 1957 Decree of the President of the Republic, which prohibited holders of public concessions of a significant value from election to the Chamber of Deputies.[61] The Chamber's Committee of Elections, made up of members of the Parliament and having sole jurisdiction over electoral issues, however, took the objectionable view that the Decree only concerned persons holding broadcasting concessions "in their own name," not those holding indirectly through shareholdings like Mr. Berlusconi.[62] A different interpretation would have required Mr. Berlusconi to choose between maintaining his equity holdings in the media sector and taking up public office. Instead, the Committee's decision confirmed a lack of legal instruments to prevent overlap between media power and public service.

In 1996, the Committee confirmed its position when Berlusconi's opponents held majority in the Parliament. Indeed, it was not until 2004 that the legislature passed a bill aimed at regulating conflicts of interest between public officials and professional and entrepreneurial activities: the so-called

60. RESOLUTION 1387, *supra* note 33, ¶¶ 4, 5.

61. Decreto Presidente della Repubblica 30 marzo 1957, n.361, G.U. June 3, 1957, n.139 (It.).

62. See the Committee for Elections of the Chamber of Deputies decisions of July 20th, 1994 and October 17th, 1996. *Esame di ricorsi per ineleggibilità*, GIUNTA DELLE ELEZIONI (July 20, 1994), http://legislature.camera.it/_dati/leg12/lavori/Bollet/39690_01.pdf; *Seguito della verifica dei poteri nella V circoscrizione Lombardia 3*, GIUNTA DELLE ELEZIONI (Oct. 17, 1996), http://leg13.camera.it/_dati/leg13/lavori/bollet/199610/1017/pdf/16.pdf.

Frattini Law.[63] Academic commentators and institutional actors have expressed skepticism that the Frattini Law can effectively address the conflict of interest currently tainting the Italian media sector.[64]

In particular, the Council of Europe Commission for Democracy Through Law ("Venice Commission") highlighted several weaknesses in the Frattini Law.[65] First, that law "only declares a general incompatibility between the management of a company and public office, not between ownership as such and public office," despite the fact that the latter appears to be at the heart of the conflict of interest in Italy.[66] Second, by defining conflict of interest to include measures having "a specific, preferential effect on the assets of the office-holder," the Frattini Law may be unable to prevent an office-holder "from intervening in matters which generally and indirectly, though surely, affect his or her proprietary interests."[67] Moreover, the requirement that this effect be "specific" and "to the detriment of the public interest" implies a very high burden of proof, thus making application of the Law extremely difficult in practice.[68]

Considering these main features of the Frattini Law, it is no surprise that in more than ten years of application of this law, which was adopted when Berlusconi was President of the Council of Ministers, the combination of media and political power that lies at the heart of Berlusconi's conflict of interest remains totally untouched.

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63. The Frattini Law was named after its sponsor Minister Franco Frattini, in charge of the Public Functions Department of the Berlusconi Cabinet. The Frattini Law requires persons holding a government office to devote themselves exclusively to the public good and to abstain from taking measures and participating in joint decisions in situations where there is a conflict of interest. Conflicts of interest are defined as an act of commission or omission by persons holding a government office: (i) when they are also holding an incompatible post as defined above; or (ii) when that act has a specific, preferential effect on the assets of the office-holder or of his or her spouse or relatives up to the second degree, or of companies or other undertakings controlled by them, to the detriment of the public interest. The Frattini Law provides that holding a government office (e.g., the Prime Minister, ministers, etc.) is incompatible with the occupation of specific kind of posts, such as those involving the management of business undertakings. Individual entrepreneurs must entrust their undertakings to one or more trustees (including family members). Legge 20 luglio 2004, n.215, G.U. Aug. 18, 2004, n.193 (It.).

64. *See, e.g.*, Bruno Valensise, *Il conflitto di interessi nella legge n. 215 del 2004 tra luci (poche) ed ombre (molte)*, *in* STUDIUM IURIS 1034, 1034-41 (2005); ZACCARIA ET AL., *supra* note 56, at 72-77.

65. EUR. COMM'N DEMOCRACY, *Opinion of the Venice Commission on the compatibility of the Laws 'Gasparri' and 'Frattini' of Italy with the Council of Europe standards in the field of freedom of expression and pluralism of the media*, 63d Sess. Opinion No. 309/2004, ¶ 215 (June 13, 2005).

66. *Id.* ¶¶ 236-37.

67. *Id.* ¶¶ 215, 236.

68. *Id.* ¶ 240.

C. *Fair Representation in Election Periods*

The Italian Constitutional Court expressly recognizes the right to fair representation in election periods. This right stems from the constitutional principles of freedom of expression (Article 21), freedom of association (Article 49), equal access to public offices (Article 51), and popular sovereignty of the people (Article 1).[69]

The Italian Parliament adopted the first equal-time regime for electoral campaigns in 1993. The equal-time regime originates in the U.S., where it first became apparent that broadcasters could manipulate the outcome of elections by portraying exclusively or predominantly only one angle of the political debate.[70] The 1993 Italian equal-time regime laid down a new, comprehensive set of rules on access to televised political information, seeking to ensure a level playing field for all political actors, particularly during electoral periods.[71]

The law applies to three categories of programs: political communication programs, information programs and self-managed slots ("messaggi autogestiti"). Political communication programs include all broadcasts that contain a political opinion or assessment, but not the diffusion of news in information programs. Information programs include news presented in a narrative or argumentative context. Self-managed slots are airtime segments allotted to political actors where the latter can divulge their political platform.

If broadcasters infringe the equal-time rules, Italy's communications authority, AGCom, can grant the harmed party additional time during political communication programs or additional self-managed slots to restore the balance. In cases of serious violations, AGCom may enjoin the broadcaster to give notice of the infringement decision and to air a reply by the harmed party, which must be given the same visibility in terms of time-slot and presentation as the offending broadcast.

In addition, during electoral periods, political communication can only take place through political debates, adversarial presentations, interviews and

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69. *See* Art. 1, 21, 49, 51 Costituzione [Cost.] (It.).

70. G. Lane Earnest, *The Equal-Time Provisions: Has Broadcasting Come of Age?*, 36 U. COLO. L. REV. 257, 258-59 (1963) (first citing S. REP. NO. 87-994, at 1 (1962); and then citing Jack H. Friedenthal & Richard J. Medalie, *The Impact of Federal Regulation on Political Broadcasting: Section 315 of the Communications Act*, 72 HARV. L. REV. 445, 450 (1959)); *see* Alan Cowell, *Electoral Reform is the Focus of Italian Referendums*, N.Y. TIMES, Apr. 18, 1992, at L3, https://www.nytimes.com/1993/04/18/world/electoral-reform-is-the-focus-of-italian-referendums.html.

71. Legge 22 febbraio 2000, n.28, G.U. Feb. 22, 2000, n.43 (It.).

other formats that enable a pluralistic portrayal of the different political positions. Self-managed slots during electoral periods are subject to stringent rules as to their remuneration and allotment to political actors. On election days, television broadcasts must not directly or indirectly provide voting recommendations. Anchorpersons are required to behave impartially so as not to exert a disguised influence on the audience. Moreover, the law forbids publishing the results of polling projections and voters' political preferences in the fifteen days preceding the elections, even if such surveys were prepared at an earlier date.

D. *News and Current Affairs Programs*

Article 7 of Consolidated Law on Audiovisual and Radio Media Services ("CLARMS") provides that information programs must be, among other things, truthful and open to all political actors.[72] This provision was implemented by an AGCom Decision, which sets out the rules for equal access to information programs during non-electoral periods.[73]

All information programs, including news broadcasts and in-depth features, must comply with the principles of comprehensiveness and accuracy of information, objectivity, fairness, honesty, impartiality, pluralism, and equal treatment.[74] Political actors' participation in broadcasts must be balanced, and this must be ensured throughout the schedule of a given information program, if possible, by publishing the schedule in advance.[75] That balance must be restored in the next available broadcast if altered in pre-electoral periods.[76]

Additionally, program presenters must behave in a fair and impartial manner, including with respect to the selection and involvement of studio audiences, so as not to affect the public opinion. The provision of information must be kept quite distinct from its comment and critique.[77] Entertainment programs, as a rule, should not host political actors, unless those programs deal with topics wherein political actors have a particular

72. Decreto Legislativo 31 luglio 2005, n.177, G.U. Sept. 7, 2005, n.208 (It.), *as amended by* Decreto Legislativo 15 marzo 2010, n.44, G.U. Mar. 29, 2010 n.73 (It.).

73. AGCom, Decision no. 22/06/CSP, 'Disposizioni applicative delle norme e dei principi vigenti in materia di comunicazione politica e parità di accesso ai mezzi di informazione nei periodi non elettorali,' O.J. Feb. 4, 2006, no.29.

74. *Id.* art. 2, ¶ 1; *see also* O. Grandinetti, *Par condicio e programmi di informazione*, *in* 12 GIORNALE DI DIRITTO AMMINISTRATIVO 1157 (2008).

75. Decision 22/06/CSP, *supra* note 73, art. 2, ¶ 2.

76. *Id.* art. 2, ¶ 3.

77. *Id.* art. 2, ¶ 6.

competence or expertise.[78] In such situation, the relevant segments are considered an "informative window" within an entertainment program. Such informative windows are subject to the same rules applicable to information programs.

E. *Political Advertising*

While news and current affairs programs must represent a plurality of political views, political advertising enables political actors to unilaterally inform the audience about their political platform and must take the form of self-managed slots (messaggi autogestiti).[79] Broadcasting self-managed slots are compulsory for the public service media operator, like RAI, and optional for commercial broadcasters.[80] Self-managed slots must be broadcast in the context of specific container-programs (no more than two) and cannot exceed twenty-five percent of the total airtime devoted to political communication programs each week.[81] Self-managed slots are also allotted to political actors under non-discriminatory terms according to a random process. No political actor can be assigned more than two slots within the same container-program and each slot must clearly identify its political assignee.

The Italian equal-time regime is so detailed in order to counterbalance Berlusconi's significant media power. Still, it does not *outlaw* the overlap between political and media power in the hands of a single person. That issue remains relevant today: In a world characterized by a hypertrophy source of information, television stations, at least in Italy, remain the most authoritative medium. A 2017 survey revealed that 60.6% of the population (53% of young people between the age of nineteen and twenty-nine) relied on television as its main source of information.[82] Therefore, television networks may still influence election results, especially in countries like Italy, where elections are traditionally won or lost by a handful of votes.

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78. *Id.* art. 3, ¶ 2.

79. AGCom, Decision no. 200/00/CSP, 'Disposizioni di attuazione della disciplina in materia di comunicazione politica e di parità di accesso ai mezzi di informazione nei periodi non elettorali,' O.J. July 1, 2000, n.152.

80. Legge 22 febbraio 2000, n.28, art. 3, § 2, G.U. Feb. 22, 2000, n.43 (It.).

81. *Id.* art. 3, ¶ 4.

82. *See* I Media E Il Nuovo Immaginario Collettivo, *14° Rapporto Censis-Ucsi sulla comunicazione*, CENSIS 11 (Oct. 4, 2017), http://comunicazione.formez.it/sites/all/files/censis_sintesi_2.pdf.

V. THE NEED FOR A COMMON EUROPEAN REGULATION ON CONFLICTS OF INTEREST AND MEDIA PLURALISM

The intrinsically transnational nature of broadcasting services can hardly be addressed by an exclusively national solution to problems of conflicts of interest and information pluralism. In other words, the protection of pluralism in the media and the prevention of conflict of interest is too sensitive an issue to be left to the competence of only one State. In addition, national rules are easily circumvented – at least in the light of the European principles on free movement of broadcasting and online services[83] – by simply establishing a media outlet in another Member State and directing the message concerned to the audience of the home State. Italy's rules were clearly insufficient to prevent media power from influencing election results, and once a media tycoon acquires political power, it is quite natural that he or she will employ that power to consolidate his or her dominance in the media markets by all possible means, including the adoption of "friendly" legislation.

In Italy, the media concentration debate has faded somewhat in recent years, namely because the conflict of interest that characterized the Italian media landscape apparently vanished in 2013 with Berlusconi expulsion from Parliament following his four-year tax fraud conviction.[84] Although a new bill on conflicts of interest was introduced in 2013 and approved by the Chamber of Deputies only in 2016, it was not discussed in the Senate. It is fair to say that the new conflict of interest bill does not appear to be a legislative priority.

It is submitted that the recent Italian experience and new troubling situations emerging in other parts of the Continent call for a common European solution. In this connection, regard must be had to the European Citizen Initiative ("ECI") for Media Pluralism,[85] which seeks to promote the

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83. Consolidated Version of the Treaty on the Functioning of the European Union, art. 56, ¶ 1, May 9, 2008, 2008 O.J. (C 115) 47 ("Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member States who are established in a Member State other than that of the person for whom the services are intended.").

84. The Court of Cassation, on August 1st, 2013, convicted Berlusconi and others for tax fraud under section 2 of Legislative Decree number 74. *See* Cass. sez. fer. 1 agosto 2013, n.35729, Foro. it. 2013, II, 11, 601 (It.). In the March 2018 general elections, Berlusconi campaigned as the leader of the center-right alliance and has recently announced his intention to run in the European Parliament elections of 2019.

85. The ECI is a new tool of participatory democracy introduced by the Lisbon Treaty that allows civil society coalitions able to collect one million signatures in at least seven EU member states to submit to the European Commission a draft proposal for an EU Directive. *See Our History*, EUR. MEDIA INITIATIVE, https://mediainitiative.eu/our-history/ (last visited Aug. 18, 2018). For a

adoption of EU legislation to ensure the independence of the media from political and economic interests. The aim of this initiative is to bring about a partial harmonization of the national rules on media ownership and transparency, conflicts of interest with political offices and the independence of media supervisory bodies.[86]

Its proponents—including the present author—demand an effective legislation to prevent the concentration of media ownership and control of advertising; a guarantee of independence of supervisory bodies from political power; the definition of conflict of interest in order to avoid media moguls occupying high political office; a clear European monitoring systems to regularly check the health and independence of the media in the member States; and guidelines and best practice of new models of publishers sustainability to guarantee the quality of journalism and in support of those who work within the sector.

Unfortunately, the ECI on Media Pluralism so far has not reached the minimum number of signatories the European Commission is to take into account (one million, in at least seven different Member States). Also, the European Parliament has repeatedly called for EU action in the area of media pluralism. In its Resolution of March 10th, 2011 concerning Hungary, for instance, the European Parliament called upon the Commission to propose a legislative initiative, making use of its competences in the fields of the internal market, competition and audio-visual policy, with a view to defining at least the minimum standards of media pluralism that all Member States must meet.[87] The European Parliament took a similar view in its November 15th, 2017 Resolution concerning the rule of law crisis in Poland.[88]

Despite these calls by the European Parliament and by civil society, so far, the European Commission has contemplated the possibility of an

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deeper analysis of the legal aspects of the ECI in light of recent practice see ROBERTO MASTROIANNI, L'INIZIATIVA DEI CITTADINI EUROPEI (A. Maffeo ed., 2015).

86. *See* EUROPEAN MEDIA INITIATIVE, *supra* note 85.

87. See European Parliament Resolution on Media Law in Hungary, EUR. PARL. DOC. PVII_TA(2011)0094 (2011), where the Parliament "[c]alls on the Commission to act, on the basis of Article 265 TFEU, by proposing a legislative initiative pursuant to Article 225 TFEU on media freedom, pluralism and independent governance before the end of the year, thereby overcoming the inadequacies of the EU's legislative framework on the media, making use of its competences in the fields of the internal market, audiovisual policy, competition, telecommunications, State subsidies, the public-service obligation and the fundamental rights of every person resident on EU territory, with a view to defining at least the minimum essential standards that all Member States must meet and respect in national legislation in order to ensure, guarantee and promote freedom of information and an adequate level of media pluralism and independent media governance."

88. *See* European Parliament Resolution on the Situation of the Rule of Law and Democracy in Poland, EUR. PARL. DOC. PVIII_TA(2017)0442; (2017/2931(RSP)) (2017).

initiative to harmonize national media ownership regulations and conflicts of interest but has never formally tabled a legislative proposal to that effect. As the European Commission holds a quasi-monopoly in proposing EU legislation,[89] its failure to submit a proposal has nipped in the bud any prospect of enacting EU legislation to promote media pluralism.[90]

The main reason the European Commission failed to act upon these calls to action is that the EU lacks a clear legislative competence to regulate media pluralism issues. This argument is rather unpersuasive, however.[91] Suffice it to say that an existing piece of EU legislation – the so-called Audiovisual Media Services ("AVMS") Directive[92] – has already carried out a (partial) harmonization of national laws in the area of media freedom: Article 28 requires Member States to guarantee the right of reply in case "incorrect facts" are broadcast in a television program.[93]

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89. Consolidated Version of the Treaty on the Functioning of the European Union, *supra* note 83, art. 17, ¶ 2 (establishing the European Union).

90. On the failed attempt to intervene with an EU Directive harmonizing European laws governing media ownership, see Rachael Craufurd-Smith, *European Community Media Regulation in a Converging Environment*, *in* REGULATING THE INTERNAL MARKET 105 (Niamh Nic Shuibhne ed., 2006); Rachael Craufurd-Smith, *Rethinking European Union Competence in the Field of Media Ownership: The Internal Market, Fundamental Rights and European Citizenship*, 29 EUR. L. REV. 652 (2004); and Alison J. Harcourt, *EU Media Ownership Regulation: Conflict over the Definition of Alternatives*, 36 J. COMMON MKT. STUD. 369 (2002).

91. *See* Roberto Mastroianni, *Promoting Information Pluralism Through EU Law: Regulation of Competition Law in the Audiovisual Sector?*, *in* EU COMPETITION LAW 333, 334 (Bernardo Cortese ed., 2013).

92. Directive 2010/13/EU, of the European Parliament and of the Council of 10 March 2001 on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services (Audiovisual Media Services Directive), 2010 O.J. (L 95) 1, 20.

93. The relevant text of the Directive is the following:

> (1) Without prejudice to other provisions adopted by the Member States under civil, administrative or criminal law, any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a television programme must have a right of reply or equivalent remedies. Member States shall ensure that the actual exercise of the right of reply or equivalent remedies is not hindered by the imposition of unreasonable terms or conditions. The reply shall be transmitted within a reasonable time subsequent to the request being substantiated and at a time and in a manner appropriate to the broadcast to which the request refers.
>
> (2) A right of reply or equivalent remedies shall exist in relation to all broadcasters under the jurisdiction of a Member State.
>
> (3) Member States shall adopt the measures needed to establish the right of reply or the equivalent remedies and shall determine the procedure to be followed for the exercise thereof. In particular, they shall ensure that a sufficient time span is allowed and that the procedures are such that the right or equivalent remedies can be exercised appropriately by natural or legal persons resident or established in other Member States.
>
> (4) An application for exercise of the right of reply or the equivalent remedies may be rejected if such a reply is not justified according to the conditions laid down in paragraph 1, would involve a punishable act, would render the broadcaster liable to civil-law proceedings or would transgress standards of public decency.

The issue of media pluralism resurfaced two years after the adoption of the AVMS Directive, when the European Commission set up a High-Level Group on Media Pluralism to provide a set of recommendations for the respect, support and promotion of media freedom and pluralism.[94] These encompass limitations to media freedoms caused by political interference (state intervention or national legislation); limitations to media independence caused by political and economic interference; the issue of media ownership concentration and its impact on the freedom of media outlets; pluralism in the media; and the role and independence of regulatory authorities.

The High-Level Group drafted a Report, presented in January 2013, confirmed both that the EU has competence to act in media pluralism and that there was a need for EU legislation in this area.[95] The general expectation was thus that the findings of the High-Level Group would have provided sufficient momentum for new European legislation, overcoming the predominantly political obstacles that had hitherto prevented its enactment. Yet, more than five years later, no such action has been taken at the EU level, while the risk of conflicts of interest and limited public media independence have spilled over from Italy into other EU Member States. One would thus be excused for lacking optimism.

CONCLUSION: FAKE NEWS IN POLITICAL CAMPAIGNS AS A EUROPEAN ISSUE

It is widely recognized that "fake news" in political communications, particularly in the context of electoral campaigns, is not new, and this Symposium moves exactly from this assumption. The Italian case that we summarized above is a clear example of how disinformation characterizes the electoral debate, risking distortion of correct political confrontation and the basic, constitutional right of the electors to be correctly informed when exercising their right to vote. At the same time, the Berlusconi case is rather specific, since it is based on an "anomaly" – the overlap of media control and political power that was not solved in time and that was difficult to envisage, at least in those years, in other angles of the old continent. This anomaly is

(5) Provision shall be made for procedures whereby disputes as to the exercise of the right of reply or the equivalent remedies can be subject to judicial review.

Id.; *see* András Koltay, *The Right of Reply in a European Comparative Perspective*, 54 ACTA JURIDICA HUNGARICA 73, 74-75 (2013) (Hung.).

94. *See* VAIRA VĪĶE-FREIBERGA ET AL., EUR. COMM'N: HIGH LEVEL GRP. ON MEDIA FREEDOM AND PLURALISM, A FREE AND PLURALISTIC MEDIA TO SUSTAIN EUROPEAN DEMOCRACY 3 (2013), https://ec.europa.eu/digital-single-market/sites/digital-agenda/files/HLG%20Final%20Report.pdf.

95. *See id.* at 3, 7, 19-20.

the direct consequence of a weakness in Italian legislation which failed to impose a formal separation between media and political interests. No substantial legislative initiative has since been taken to address this issue. Thus, as submitted previously, a common European regulation must be adopted to prevent similar situations in the future.

The case study in this article reveals a strong connection between effective contrast to "fake news" and the existence of a media legal landscape based on the principles of impartiality, transparency and pluralism. Unsurprisingly, in a Joint Statement of March 3rd, 2017 dedicated to "Freedom of expression and 'fake news,' disinformation and propaganda,"[96] the U.N. Special Rapporteur on Freedom of Expression and the Organization for Security and Co-operation in Europe ("OCSE") Representative on Freedom of the Media, dealing with measures that States should adopt to contrast the dissemination of false information in accordance with their international obligations, called for "Enabling Environment for Freedom of Expression." Specifically, according to the Joint Statement, States "are under a positive obligation to promote a free, independent and diverse communications environment, including media diversity, which is a key means of addressing disinformation and propaganda."[97]

In the wake of the latest Presidential election in the U.S., debate is rising in many European countries as to whether adopting legal measures aimed at preventing or limiting the dissemination of fake news, especially in electoral periods, is necessary, or whether traditional legal instruments, including right of reply, defamation laws and so on, are sufficient shields against the spread of false information online.

Moreover, a vivid debate is taking place among Italian scholars. For example, Oreste Pollicino calls for a "public law" approach to the question of fake news. [98] He strongly disagrees with the theory that the Internet is the

96. U.N. Special Rapporteur on Freedom of Opinion and Expressions, Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, Organization of American States (OAS) Special Rapporteur on Freedom of Expression & African Commission on Human and People's Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, *Joint Declaration on Freedom of Expression and "Fake News", Disinformation and Propaganda*, ¶ 3, OSCE FOM.GAL/3/17 (Mar. 3, 2017) [hereinafter Joint Declaration], https://www.osce.org/fom/302796?download=true.

97. *Id.* (emphasis added).

98. Oreste Pollicino, *Fake News, Internet and Metaphors (to be Handled Carefully)*, 9 ITALIAN J. PUB. L. 23, 23-25 (2017). The same view is taken by the President of the Italian Competition Authority, Giovanni Pitruzzella, who asks for the establishment of new independent agencies entitled to intervene rapidly on request by interested parties and impose on line operators to remove "manifestly false" information. *See* Giovanni Pitruzzella, *La libertà di informazione nell'era di Internet*, *in* GIOVANNI PITRUZZELLA, ORESTE POLLICINO & STEFANO QUINTARELLI, PAROLE E POTERE: LIBERTÀ D'ESPRESSIONE, HATE SPEECH E FAKE NEWS 57, 57 (2017) (It.). Such proposal

"new free marketplace of ideas," where intervention by public authorities (and public law) against fake news is unwarranted. First, he argues that, while it may be the case that the problem of scarcity of technical resources does not affect the Internet, our attention and time continue to be scarce "products." Secondly, Pollicino believes it is reasonable to ask whether the marketplace of ideas metaphor is well suited to the scope and limits of free speech protection under the European constitutionalism paradigm, which he considers in contrast the American model.

Other commentators reject the claim that the peculiar traits of the online dissemination of fake news online call for a new approach and argue instead that any legislative intervention can be justified only if the protection of other constitutional values is at stake. For instance, Marco Bassini and Giulio Enea Vigevani assume that there is no qualified connection between the rise of the Internet and the spread of fake news and call for a more precise definition of fake news in order to determine which categories of false statements may affect constitutionally-protected interests and those which are merely irrelevant.[99]

It is difficult to reconcile additional measures, for instance, imposing specific ex ante monitoring mechanism on traditional media and online operators or establishing new agencies or authorities aimed at analyzing the content of some information, with the right of information as enshrined in Article 21 of the Italian Constitution, Article 10 of the ECHR and other international instruments protecting free speech.[100] If it is true that the second paragraph of Article 10 of the ECHR and Article 19 of the ICCPR make it possible for States Parties to adopt legislation aimed at limiting or restricting free speech, this can only be done if such measures are prescribed by law,

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met firm dissent by Pablo Pagliaro. *See* PAOLO PAGLIARO, PUNTO: FERMIAMO IL DECLINO DELL'INFORMAZIONE 112 (2017).

99. Marco Bassini & Giulio Enea Vigevani, *Primi appunti su fake news e dintorni*, 1 RIVISTA DI DIRITTO DI MEDIA 11, 11 (2017) (It.), http://www.medialaws.eu/wp-content/uploads/2017/10/Bassini-Vigevani.pdf.

100. *See* Art. 21 Costituzione [Cost.] (It.). As Dirk Voorhoof recalled, "the main characteristic of Article 10(2) is precisely that, by imposing the so-called 'triple test,' it substantially reduces the possibility of interference with the right to express, receive and impart information and ideas. Interferences by public authorities are only allowed under the strict conditions that any restriction or sanction must be 'prescribed by law, 'must have a 'legitimate aim' and finally and most decisively, must be 'necessary in a democratic society." VOORHOOF, *supra* note 48, at 2. At the international level, the Joint Declaration on freedom of expression and "fake news," disinformation and propaganda states at point 2a that "[g]eneral prohibitions on the dissemination of information based on vague and ambiguous ideas, including 'false news' or 'non-objective information,' are incompatible with international standards for restrictions on freedom of expression, as set out in paragraph 1(a), and should be abolished." Joint Declaration, *supra* note 96, § 2(a).

have a legitimate aim and are necessary in a democratic society.[101] In addition, legislation should pass a proportionality test, which seems rather difficult in the case of laws that allow private operators to restrict other individuals' or companies' freedom to be informed.[102] Not surprisingly, the Strasbourg Court adopts a strict interpretation of Article 10(2) of the ECHR. In its recent judgment in *Rolf Anders Daniel Pihl v. Sweden* on March 9th, 2017, for example, the Court clarified that liability of website or online platform operators containing defamatory user-generated content is limited.[103]

Nevertheless, some European countries are adopting – or plan to adopt – new legislation, aimed at contrasting or mitigating the effects of fake news on public opinion. A proposed solution, creating a governmental Task Force, as recently established in the Czech Republic, empowered to intervene in politically-sensitive periods, has not been particularly successful and seems at odds with Article 10 of the ECHR.[104] Another possible solution is to impose obligations and high fines in case of non-compliance on online operators and require them to act as "guardians" of the truthfulness of the information they carry. An important example in this direction is the recent German Act to Improve the Enforcement of the Law in Social Networks, adopted on September 1st, 2017 and in force since October 1st.[105]

The Law targets only online hate crimes and false news reports, requiring social networks to ensure, through an effective and transparent procedure, that complaints are immediately examined. Social networks must

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101. ICCPR, *supra* note 3, art. 19.

102. *See* DAMIAN TAMBINI, FAKE NEWS 1, 11 (2017), http://eprints.lse.ac.uk/73015/1/LSE%20MPP%20Policy%20Brief%2020%20-%20Fake%20news_final.pdf.

103. According to Voorhoof "the Court's decision is also to be situated in the current discussion on how to prevent or react on 'fake news,' and the policy to involve online platforms in terms of liability for posting such messages, since ruling expresses concerns about imposing liability on internet intermediaries that would amount to requiring excessive and impractical forethought capable of undermining the right to impart information via internet." Dirk Voorhoof, *ECHR in Pihl v. Sweeden: Blog Operator Not Liable for Promptly Removed Defamatory User Comment*, MEDIA REP. (Mar. 23, 2017), http://www.mediareport.nl/en/press-law/23032017/echr-in-pihl-v-sweden-blog-operator-not-liable-for-promptly-removed-defamatory-user-comment.

104. *See* Rick Noack, *Czech Elections Show How Difficult It Is to Fix the Fake News Problem*, WASH. POST (Oct. 20, 2017), https://www.washingtonpost.com/news/worldviews/wp/2017/10/20/czech-elections-show-how-difficult-it-is-to-fix-the-fake-news-problem/?noredirect=on&utm_term=.19396270da54.

105. Netzwerkdurchsetzungsgesetz [NetzDG] [Network Enforcement Act], June 30, 2017, Deutscher Bundesrat: Drucksachen [BT] 536/17, http://www.bundesrat.de/SharedDocs/drucksachen/2017/0501-0600/536-17.pdf?__blob=publicationFile&v=1 (Ger.). For a short analysis of the new law, see Bianca Borzucki, *Germany Network Enforcement Act Enters into Force*, IRIS (Jan. 15, 2018), http://merlin.obs.coe.int/iris/2018/1/article15.en.html.

remove content that is "manifestly unlawful" within twenty-four hours of the reception of the complaint; all other unlawful content must be removed within seven days.[106] The law also provides for a fine up to €5 million in case of infringements.[107] The obvious question here is whether private operators are fit to judge and balance the constitutional values at stake in such decisions?

A different solution is currently in development in France. In view of the future European elections, as announced by the President Macron in January 2018, a bill on contrast to false information was submitted to the National Assembly on March 21st,[108] along with a draft implementing act to ensure that the bill will apply during the presidential election campaign. According to its explanatory memorandum, the bill aims to counteract any attempts at destabilization that could emerge during the forthcoming elections.

Three areas of reform are planned, the first of which involves the introduction of new tools aimed at combating the spread of such information. This legislation will probably be adopted within the end of this year and will confer to French courts the power to adopt emergency measures to remove or block certain content deemed "fake" during sensitive election periods. It would also require greater transparency for sponsored content and would enable the Conseil Supérieur de l'Audiovisuel to combat "any attempt at destabilization" by foreign-financed media organizations.[109]

Compared to German Law, the French solution appears more in line with the European constitutional model. Following the example of European Union e-commerce and copyright legislation, it will give a court or an Independent Authority whose decisions can be challenged before a court, the responsibility to ensure adequate balance between the fundamental rights and principles at stake, and to decide whether a given piece of information is "fake" and deserves to be taken down.

It is evident that, given the nature and the international dimension of the problem of fake news, a solution can only come, at least, at the European Union level. For example, it would be useful to extend the scope of the provisions on the right of reply, currently confined to the audiovisual media

106. NetzDG, *supra* note 105.

107. *Id.*

108. Proposition de loi 799 du 21 mars 2018 relative à la lutte contre les fausses informations, enregistré à la présidence de l'assemblée nationale, [Law Proposition 799 of March 21, 2018 on the fight against the false information] (Fr.), http://www.assemblee-nationale.fr/15/pdf/propositions/pion0799.pdf.

109. *Id.*

services sector, to include the dissemination of fake news online.[110] In addition, in the light of the imperatives of the relevant international treaties, a good starting point would be to adopt measures intended to strongly protect the genuine exercise of the right to vote.[111]

Unfortunately, the European Commission's response to this problem is, for the moment, rather unsatisfactory. After a stakeholders' consultation process,[112] the Commission established a High-Level Expert Group on fake news and online disinformation ("HLEG") in November 2017 required to advise on policy initiatives to counter disinformation online. In March 2018, the HLEG released a detailed Report designed to identify the best answers to the fake news problem in the light of fundamental principles.[113] The Group specifically promoted a series of medium and long-term proposals. For the purpose of this work, it is sufficient to note the HLEG points out that disinformation problem can be handled most effectively, and in manner that is fully compliant with freedom of expression, free press and pluralism, only if all major stakeholders collaborate ("multi-dimensional approach").

Any form of censorship either public (by a public authority) or private (by platforms) should be avoided, as well as fragmentation of the Internet or other harmful consequences to its technical functioning. The Report briefly takes into consideration – but clearly does not suggest – a possible "harder" approach with adoption of binding obligations on Member States and online platforms to contrast fake news. The Report limits itself, stating that after the actual implementation of the "soft" measures envisaged by the Report, it will rest on the Commission to decide whether legally binding rules are necessary.[114]

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110. This solution does not appear to be taken into consideration in a recent proposal. *See* Commission Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the Coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, at 6, COM (2016), 0287 final (May 25, 2016).

111. *See* Joint Declaration, *supra* note 96.

112. *See* EUR. COMM'N, HIGH-LEVEL GRP. ON FAKE NEWS & ONLINE DISINFORMATION, A MULTI-DIMENSIONAL APPROACH TO DISINFORMATION 5-6 (2018), https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation. The European Commission initiative is based on the European Parliament Resolution PVIII_TA(2017)0272 on online platforms and the Digital Single Market, adopted June 15, 2017. In that document, the European Parliament considers the role of online platforms and fake news and calls on the Commission to analyze in depth the current situation and legal framework with regard to fake news, and to verify the possibility of legislative intervention to limit the dissemination and spreading of fake content. *Id.*

113. *Id.*

114. *See id.* at 35 ("In a second step, an intermediate evaluation of the effectiveness and efficiency of these short and medium-term measures should then lead the Commission to re-examine the matter in Spring 2019, with a view to deciding whether further measures, including

Based on the indications provided by the Report, on April 26th, 2018, the European Commission adopted a communication called Tackling Online Disinformation: a European Approach.[115] This Report puts forward an action plan that basically consists in some self-regulatory tools. More to the point, the Commission approach appears to take into consideration the link between democracy and the existence of free and independent media. It underlines that disinformation may harm our democracies "by hampering the ability of citizens to take informed decisions," so impairing freedom of expression, a fundamental right enshrined in the Charter.[116] It also recognizes that the "primary obligation of State actors in relation to freedom of expression and media freedom is to refrain from interference and censorship," but also "to ensure a favorable environment for inclusive and pluralistic public debate," particularly in election times.[117]

Nevertheless, as to the concrete measures to be taken, the Commission follows the "soft" approach and the suggestions of the HLEG. It is also conscious that several Member States are currently exploring possible measures to protect the integrity of political processes from online disinformation and to ensure the transparency of online political advertising. It even underlines that "inaction is not an option."[118] Although temporarily, it adopts a rather cautious position, confining itself basically to suggest platforms to adopt self-regulatory measures.

In brief, the Commission main request to online platforms is to adopt a "Code of Practice on disinformation" with the aim of ensuring transparency about sponsored content, in particular political advertising, as well as restricting targeting options for political advertising and reducing revenues for purveyors of disinformation; providing greater clarity about the functioning of algorithms with which they select and diffuse the news and enabling third-party verification; making it easier for users to discover and access different news sources representing alternative viewpoints; introducing measures to identify and close fake accounts and to tackle the

(co)regulatory interventions, competition instruments or mechanisms to ensure a continuous monitoring and evaluation of self-regulatory measures, should be considered for the next European Commission term.").

115. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling Online Disinformation: A European Approach*, at COM (2018) 236 final (Apr. 26, 2018), https://ec.europa.eu/digital-single-market/en/news/communication-tackling-online-disinformation-european-approach.

116. *Id.*

117. *Id.*

118. *Id.* at 6.

issue of automatic bots; and enabling fact-checkers, researchers and public authorities to continuously monitor online disinformation.

In this respect, the Commission also points out that by December 2018, it will deliver a report focused on the progress achieved and on the possible need to adopt subsequent measures to guarantee the ongoing monitoring and evaluation of the actions agreed upon. Only under this circumstance and should the results of the implemented measures be unsatisfactory, binding legal measures will be taken into further consideration.

At least in the short term, then, the Commission intends to suggest exclusively self-regulatory instruments. This is reminiscent of the slow and rather inconclusive approach that the Commission had in relation to the problem of media ownership and independence in the late 1990s.[119] It is plain to see that much more can (and should) be done: Fake news is a legal and political challenge the EU can no longer afford to ignore. In addition, the increasing unilateral initiatives of Member States might create a patchwork of legislative solutions such that it will be difficult to harmonize at a later stage. A good starting point could be to forestall the negative effects of disinformation and propaganda with measures aimed at precluding media concentration and conflicts of interest, while simultaneously promoting transparency, diversity and other democratic values.

119. *See supra*, section IV.