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RESPUESTAS REGULADORAS EUROPEAS A LA DESINFORMACIÓN. ATENCIÓN ESPECIAL A LAS CAMPAÑAS ELECTORALES

EUROPEAN REGULATORY RESPONSES TO DISINFORMATION. SPECIAL ATTENTION TO ELECTION CAMPAIGNS¹

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Resumen

Existe una preocupación creciente en Europa en cuanto a interferencias en las campañas políticas: a veces, a causa de la desinformación promovida por “partes interesadas” o “entes extranjeros”, a veces porque las leyes no tienen en cuenta ni los nuevos medios ni los entornos de las redes sociales. En este artículo, abordaremos tres aspectos en concreto: la aclaración de la naturaleza de la desinformación (¿se trata de un fenómeno nuevo que deriva de las ICT?), las garantías de las campañas electorales en Europa (¿están las leyes y las instituciones electorales preparadas para manejar las interferencias técnicas? ¿Son válidas las actuales normas?) Se hace una revisión crítica de las respuestas europeas desde la ley, las iniciativas legales (Unión Europea, Alemania, Francia...) en relación con Twitter o con Facebook.

Entendemos que un asunto clave –y parte de la solución para luchar contra la desinformación- es la atribución de fuentes (Bel y Corredoira,³ Cotino, Moretón⁴) desde el punto de vista de las garantías, principalmente del derecho a informar del artículo 19 de la DUDH y la Constitución Española que consagra la libertad de “información veraz” (noticias) y también de “ideas” y “opiniones”.

Summary

There is increasing concern in Europe about interference in political campaigns: sometimes because of the disinformation or misinformation that some “interested parties” or “foreign entities” promote, sometimes because laws do not take into account the new media and Social Network environments.

In this paper, we will address three aspects in particular:

Clarification regarding the nature of disinformation (Is it a new phenomenon deriving from ICT?)

Guarantees of the electoral campaign processes in Europe (Are laws and electoral bodies ready to handle technical interferences? Are the current regulations valid?)

Critical review of the European responses from the Law, legislative initiatives (EU, Germany, France..) related to Twitter or Facebook.

We consider that a key issue –and part of the solution to combat disinformation- is the attribution of sources (Bel & Corredoira, Cotino, Moretón) from the viewpoint of guarantees, primarily of the right to communicate contained in Art. 19 of UDHR and Spanish Constitution which enshrines the freedom of “truthful information” (news) and also of “ideas” and “opinions”.

Palabras clave: Desinformación. Derecho a la información. Internet. Redes sociales

Keywords: Disinformation. Right to communication. The Internet. Social networking

1. Introduction. The question of names and the problem of the “legal qualification” of disinformation

The matter under discussion here is of enormous importance because in 2019 a considerable number of elections have taken place or will take place on both sides of the Atlantic. This past year has seen EU elections to the European Parliament and local and regional elections in Spain. The data available from these elections will undoubtedly enrich our debate. The issues which will be discussed are the following:

- The question of names or denominations given to the issue of “*disinformation*” and the legal qualification of the “problem” in international terms.
- The focus given to disinformation in Europe, which distinguishes between two types of message:
 - In the context of (usually brief) news - “*fake news*”.
 - In political propaganda or communication, especially during electoral campaigns - “*disinformation*” or “*misinformation*”, since it is in this context that the greatest intended distortion of messages occurs.
- Thirdly, I would like to review with you the political, juridical and ethical solutions which are offered by the European Union as a whole, but with special reference to Germany, France and Spain.

Before I begin with the linguistic questions, I would like to mention one of my mentors, Gloria Toranzo (1972), who used to say that “science is giving names to things”.

In 1995, the United Nations for the first time raised the issue of a declaration regarding disinformation as an international problem; the matter was again debated on various occasions, the last being in 2018. Following the line of Prof. Margarita Robles, of the University of Granada, the first question to be tackled is the notorious “lack of agreement regarding the legal qualification” of disinformation.

Specifically, the discussion in international organisms is whether we are talking about a question of “cybersecurity” or a question of “disinformation”. The following is a brief summary of “various juridical qualifications” of the problem:

- UN Resolution of November, 2018, not signed by the U.S. or the E.U.
- NATO, considers it to be a “hybrid threat” or “hybrid war” which would allow invocation of Article 5 of the Treaty of Washington, to take action in cases of “disinformation campaigns and malicious cybernetic activities”. The Declaration of Brussels states: “we face hybrid challenges, including disinformation campaigns and malicious cyber activities”.
- OSCE and UNESCO prefer to speak of it in terms of “a threat to freedom of expression”.
- The Council of Europe however suggests the prosecution of “criminal activities”.
- The European Union has suggested a number of initiatives, the last of which was in November 2018, and there are as many as 5 categories or countries (ranging from the U.K. to Cyprus). We’ll look at these now in more detail.

2.The “legal qualification” of the European Union

It should first be mentioned that the EU has few competencies in respect of security since Europe is NATO territory; secondly, as in other matters of Foreign Policy, there is no overall agreement. There are up to five categories of countries in terms of compromises or solutions, from the U.K, to Cyprus.

For Robles, there is no shortage of initiatives, but none of them are effective. The European Commission has been very active in the last two years and has been supported by the initiatives of the *European Union Agency for Network and Information Security* (ENISA). Specific measures include the following:

- ***Fake news and online disinformation***: the following report is their **work plan** regarding Fake News after various years of work by the experts of the High Level Expert Group on Fake News:
<https://ec.europa.eu/digital-single-market/en/fake-news-disinformation>
- In September 2018, the Commission published a Guidance Document. *Free and Fair elections. Commission guidance on the application of Union data protection law in the electoral context (COM 2018, 638 final) for the interpretation of the use of data in electoral campaigns.*
- And finally, the overall vision of the Commission regarding communication is "Tackling online disinformation: a European approach", which proposes **self-regulation of the sector**.

- A ***Code of practice against disinformation*** has recently been published, which appeals for self-regulation by the social network platforms to take action **against false accounts**. In April 2019, the code received a favorable reception by *Twitter*, *Facebook* and *Google*.

As we mentioned above, in face of this lack of unity, a possible solution would be to promote a norm under the system of Enhanced Cooperation (which requires the agreement of a minimum of 9 countries). However this system would promote further fragmentation of the Union – one of the aims of disinformation.

3. Disinformation and the communication rights

First of all, in order to standardize the terminology, we should refer to disinformation in relation with the communication rights (to research, receive and impart truthful information, the operative word being truthful. It is not surprising that this right has been referred to as “the right to facts”). That is the concept whose name was coined for the first time in 1946 by the Director of the agency France Presse (Paul-Louis Bret), who, in the post-war period in Europe, insisted on access to Information sources as “rights to facts”, and which Duvernier and Remedio Sánchez (1974) later identified with the constitutional right to be informed or to informative truth.

So it is necessary in the first place to pinpoint disinformation in the news, especially political disinformation in electoral campaigns. There is obviously more freedom in the area of opinion or ideas, but news should be a faithful record of reality as it happens. An aphorism by C.P. Scott, a British journalist, states that “opinions are free, facts are sacred”.

In Spanish, the concept we prefer in reference to information (which the Spanish Constitution refers to as “truthful”, referring to facts) is the following given by the Spanish Royal Academy of Language. We provide below an English translation.

DESINFORMAR (Spanish meaning)

tr. Dar información intencionadamente manipulada al servicio de ciertos fines.
Give intentionally manipulated Information to serve a given end

tr. Dar información insuficiente u omitirla.
Give insufficient Information or omit it.

It's clear that the second definition (insufficient information) refers to news or incomplete facts or half-truths, and is more applicable to the area of news; whereas the first definition (tendentiously and deliberately manipulating information) is clearly more frequent in the area of opinion or ideas (political, xenophobic propaganda, etc.). Therefore the journalists working in the newsrooms are more ethically obliged to be objective and accurate because they follow the rigorous constraints of press journalism.

However, in the communication of political ideas or in opinions even regarding facts, freedom and therefore interpretation is greater. In this sense, *fake news* is the manifestation of disinformation which is so preoccupying at this time, as it was centuries ago.

Again in reference to terminology, UNESCO (ut supra) mentions as many as three “spreading untruths” (...) namely:

- Disinformation: Information that is false and deliberately created to harm a person, social group, organization or country,
- Misinformation: Information that is false but not created with the intention of causing harm,
- Mal-information: Information that is based on reality, used to inflict harm on a person, social group, organisation or country.

In the second definition, error is also possible (that is, not deliberate, genuine omission or insufficiency).

So, in my opinion, we can see that there are various types of

- Wrong information
- Deliberately wrong information
- Misleading/manipulated incomplete information
- Misleading/manipulated Information through omission
- False Information aiming to deceive.

In Spanish, ***Disinformation is synonymous with Misinformation***, and includes both wrong information and deliberately manipulated information intended to deceive, whereas ***Disinformation refers to fake material - fake news, fake videos, fake ads., etc.***

In English, the Cambridge Dictionary defines Disinformation as “false information spread in order to deceive people”; we think that this is the most accurate definition and it coincides with the Spanish use.

4. European Regulatory Responses to Disinformation. What is Europe doing and what has it achieved in this respect?

It is no secret to say that there is concern in Europe about “fake news” in the press and the social networks; a concern which I would compare with that which occurred in the 1990s in respect of the concentration of ownership of the media.

If disinformation has always existed, why is it so important now? On the one hand, because of the notoriety of certain events and the “noise” they make, which is greater than before and on the other, because of the leaking of personal data, such as that revealed in the case of Cambridge Analytica.

The use in past years of “fake news” in the press is documented in historical archives, but the difference with the present day is that there is now a new actor (the Social Networks!)

and greater relation between their use and electoral processes. The Cambridge Analytica case or the Brexit campaign – as J. Graham shows us in the documentary *The Uncivil War* – points to the use of big data and artificial intelligence to produce familiarity with and segmentation of target audiences in order to deliver effective messages. There is nothing particularly worrying about this, except, as has been demonstrated in the Cambridge Analytica case, that people's private data are compromised.

According to a number of authors, the way to fight against disinformation in the press is to have "more journalism", that is, a more professional journalism endowed with the best human and technical resources. In this sense, the High Level Expert Group on Fake News has come to the conclusion that the press requires a handbook of good practices, which should include special norms of transparency in the sense of "rendering account" and "compliance", that is, following the principles of self-regulation in order to recover credibility and confidence as a source of Information.

There must be a public debate on whether or not Twitter, YouTube or Facebook are being transparent when they close accounts which cannot be verified or which post comments of hate.

5. Disinformation in electoral campaigns

As we have said before, in an English-speaking environment, we need to refine our definitions (Rubio) following Robles, Cotino, Bel and other constitutional scholars in Europe.

There is "disinformation" and "misinformation" in electoral campaigns when trolls are disseminated or when the media broadcast untrustworthy news in order to "manipulate, distort or change" the vision of the receiver. The new technologies have enormous impact here, not only because of bias in the profile of network users, but also because of the abusive utilization of robots (Bots) or trolls, which affect the way in which the right to information is understood in the Web and which can affect – if not people's freedom to vote, at least a shift in their feelings – the equity of the political contest, new forms of participation and political discourse itself.

At the time of an election, not only during the campaign itself (the 15-20 days prior to the elections), this type of concern is even greater and the phenomenon borders on issues of cybersecurity.

6. European solutions to electoral interference

My third and final point deals with disinformation and interference in electoral processes. We will quickly enumerate some of the measures which have been put in place in the EU in the last few months.

In respect of individual countries, we will refer to laws passed in Germany and France and to Spanish legislation regarding data protection during electoral campaigns. Both Germany and France have passed laws which hold social platforms and other media responsible for the diffusion of fake news.

The German Law, called the Network Enforcement Act 2017 (“Facebook Law”), was passed by the Bundestag (German Parliament) in June, 2017 and has been in force since October 2017. This Law requires that **platforms with more than 2M users withdraw content within 24 hours of a user complaint.**

The French Law, “Loi organique relative à la manipulation de l'information”, was passed in November 2018, and, although there was wide public opinion discussion and international doubts, it was validated by the Conseil Constitutionnel of France. This Law states that **during election periods, judges can order the immediate erasing of online articles considered “disinformation”.**

The French law therefore establishes a jurisdictional norm, whereas the German law urges the sector to act and apply the rules.

Spain has not passed any laws requiring responsibility for “fake news” or falsehood in the media, except that of a criminal nature, like insider trading or identity forgery, which is not the case here.

The way that political parties have used the social networks during the campaigns has been particularly relevant this last year. Activities such as the sale of whatsapp lists and breaches of security in services such as those of Facebook have brought the matter into the domain of the right to privacy of data.

Shortly before its dissolution in November, the Spanish Parliament approved without prior warning Article 58B of the LOREG (Organic Law governing Electoral Processes) to coincide with the coming into effect of the European Regulation on Data Protection; this article legalizes political spam and does so while considering political parties as an exception in comparison with other uses. The law authorizes parties to use the data profiles of citizens: this has been interpreted in the press and in civil rights associations as a “legalization of Cambridge Analytica”.

This change opens the door for political parties to be able to make massive use of our data, which can be obtained on the social networks and “other sources of public access”. Which in fact means any source.

An immediate appeal against this decision was made to the Spanish Constitutional Court on the grounds that it violated a number of rights, including: Article 18,4 CE of the Law itself, the right to ideological freedom (Article 16 CE), the right to communicate and freedom of expression (Art. 20 CE) and the right to political participation (Art.23 CE) and as we expected, it was considered unconstitutional.

7.What the European Union has done

Even in a scenario of lack of government-level agreement in the EU, which I have already referred to, a number of provisions have been approved; not all are obligatory, but only guidelines, proposals of good practice, or recommendations to deal with what they call “online disinformation”.

On the one hand, the Commission has made an effort to establish some dissuasive measures against the sectors concerned and political parties.

As it was mentioned, in September 2018, the Commission published a *Guidance Document. Free and Fair elections. Commission guidance on the application of Union data protection law in the electoral context (COM 2018, 638 final)* for the interpretation of the use of data in electoral campaigns.

And finally, the overall vision of the Commission regarding communication is "Tackling online disinformation: a European approach", which proposes self-regulation of the sector and presents these four principles to guide the action: improvement of transparency regarding the way information is produced or sponsored; diversity of information; credibility of information; inclusive solutions with broad stakeholder involvement.

A *Code of practice against disinformation* has recently been published, which appeals for self-regulation by the social network platforms against false accounts. As I have already mentioned, the important thing is how to select them. In April 2019, the code received a favorable reception by Twitter, Facebook and Google.

At a more strictly political level: since the Commission is the executive branch of the EU and the European Parliament, which is elected directly by the citizens of the Union, is the co-decision making legislative organism, the European Parliament has also taken steps to prevent electoral interference.

- (1) The Constitutional Commission, presided over by the Euro MP Anna Fotyga, has produced a report which is more guiding than binding and which gives special attention to the social networks: "The Diffusion of Disinformation". The report refers to the Information "war" and it highlights what appear to be cold-war actions (massive Russian action in Ukraine and Crimea) which demonstrates what we said at the outset – how necessary it is to qualify these actions in legal terms.

- (2) And finally, although they were just released when we were finalizing this paper, the Parliament released a document, not a Law itself, on *New rules to prevent breaches of data used to influence elections*.

In conclusion

We need to unify terminology at European and international level.

In the context of journalism and analysis, we also need to agree on the use of the three "untruths" and give each one its separate responsibility.

We assume that disinformation is a phenomenon which affects the neutrality of Information and the independence of elections, but which, in order to safeguard the principle of right to Information, can only be sanctioned *a posteriori*.

The measures taken to fight against disinformation cannot violate other important rights (ideological freedom, privacy, etc.) and should limit the power of the state.

As far as the EU is concerned, the Regulation regarding Data Protection, which includes important monetary sanctions, has made the platforms change their positions.

In the Spanish General Election in April this year, there were complaints about lack of guarantees and accounts were closed without any kind of explanation. There happened the closing of *Podemos, PP and PSOE* Whatsapp accounts and the plan for more transparency and compliance

Finally, we hope to finish this investigation in a question of months and we will then have a wider perspective to analyse whether – apart from the use of personal data in campaigns – the “soft law” self-regulation measures of the EU have been effective or not in the current electoral year.

¹ Working paper. Two preliminary version of this paper were presented in two conferences in 2019. One in the “Congreso Elecciones, gobierno abierto, información y “fake news””, organized by the DerechoTics.com Network, March 2019, Valencia (Spain) and “Communication Beyond Borders” the International Communication Association annual Conference, hold in Washington D.C., 24-28 May 2019. <https://www.icahdq.org/page/PastFuture>

² This research area is part of the ongoing R&D Project co-directed by Loreto Corredoira & Rafael Rubio: “Guarantees against disinformation in electoral processes. Cybersecurity and other information disorders in Social Networks”, SN-DISORDERS, Ref. PID2019-105334RB-I00.

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⁴ MORETÓN TOQUERO, M.A.(2014). “La protección de las fuentes de información: la integración del modelo español con la jurisprudencia del TEDH”, *Estudios de Deusto: revista de la Universidad de Deusto*, [Vol. 62, Nº. 2](#), , 121-144.

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