Online disinformation and freedom of expression in the electoral context: the European and Italian responses

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1. Introduction

This contribution addresses the relevance of the sub-category "disinformation" under a constitutional law lens, i.e. where possible tensions with fundamental rights and alteration of dynamics of the democratic process are created, with specific regards to the electoral context. Through the comparison of the constitutional paradigms of freedom of expression across the Atlantic, the regulatory responses attempted by the European Union are explored to set the background of the Italian experience. Section 1 presents the issues relating to disinformation practices, translating them into the specific electoral context. Section 2 provides a comparative view of the constitutional framework, including the US and European perspectives. Section 3 provides an overview of the different responses of legislators at the EU level and Italy. Section 4 focuses on the case of the 2016 Italian constitutional referendum and the adopted approach with a forward-looking view to subsequent elections. Section 5 concludes.

1.1 Defining the object: why "disinformation"?

Online disinformation has rapidly become a topical interest, with terms such as "fake news" and "online propaganda" becoming worldwide buzzwords. As reported by many studies (Bayer *et al*., 2019; De Gregorio, Perotti, 2019),[1] to adequately frame the problem, an ambiguous use of the

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terms must be rejected. This contribution relies on the definition of "disinformation" given by the Commission's High-Level Expert Group ("HLEG") encompassing *"false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit"*.[2] The distinguishing factor from the broader concept of "misinformation" is the intentional character with which dissemination occurs, defining the latter as *"misleading or inaccurate information shared by people who do not recognize it as such"*[3] (Pollicino, Bietti, 2019, 47-49). Given the preponderant role of the concept of "disinformation" in the European agenda and the Italian framework, as will be discussed *infra*, this contribution will focus on the particular subcategory of "disinformation".

Its characteristics display a risk of threatening democratic political processes and values in different sectors and is driven by *"the production and promotion of disinformation for economic gains or for political or ideological goals"*,[4] which may vary depending on how it is received by audiences and communities. This definition includes harmful speech which does not fall under other categories already identified as illegal, i.e. hate speech, defamation or incitement to violence (*ibid*.).

1.2 Defining the problem

From a constitutional perspective, disinformation practices become relevant where they cause tensions to the exercise of citizens' rights, or where other dynamics of the democratic process are altered. In recent years they have affected the functioning of foundational democratic processes. As a matter of fact, the debate exploded in the wake of the 2016 US Presidential elections and the UK's Brexit referendum, as well as major privacy scandals such as that involving the company Cambridge Analytica (Pollicino, Bietti, 2019, 63; Bayer *et al*., 2019, 15) which, in turn, raise another line of concerns on citizens' personal data collection and use. These events triggered fear across the Atlantic that democracy itself was at risk at the hand of technology and its harmful uses (Benkler *et al*., 2018, 4). Whereas it is consensual that disinformation, "fake news", propaganda and political persuasion do not constitute new phenomena (Martens *et al*., 2018, 8), today's novelty resides in the 'empowering' character of the Internet in terms of potential scale and reach, velocity and pervasiveness (Sunstein, 2017).

As is well known, social media have evolved into a major source of information for Internet users. Evidence shows that social networks' algorithms have been used to purposefully distribute manipulated contents with the view of polarizing and influencing public perception (Flore *et al*.,

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[1] See also European Commission, *A multi-dimensional approach to disinformation, Report of the independent High-level Group on fake news and online disinformation*, 2018.

[2] European Commission, *cit*., *A multi-dimensional approach to disinformation,* 10.

[3] *Ibid.*

[4] *Ibid.*

2019, 29). Whilst trust in mainstream media decreased, alternative news ecosystems have risen to spread *"extremist, sensationalist and conspirational"* content (Del Vicario *et al*., 2016). Indeed, the exploitative distribution of polarizing political content has been facilitated by highly personalized algorithms able to, based on preferences and behavior, select visible information, create "filter bubble" effects characterized by the imperceptibility of their inherent biases (Pariser, 2011). This, in turn, allows for greater and faster dissemination of content (Flore *et al*., 2019, 29) and group polarization leading to higher degrees of societal fragmentation (Sunstein, 2017, 76-77).

1.3 Disinformation in electoral processes and specificities of referenda

Undeniably, technology has improved the opportunities to search, receive and impart information and ideas in the political debate and the Internet has allowed politicians, political organizations and parties to communicate with citizens and exchange information in an unprecedented way. Nevertheless, serious concerns are cast as to the effects that such information flow generates on public debates and society at large (Tucker *et al*. 2017). Institutions like the European Commission have recognized in an official capacity that disinformation is capable of undermining trust in institutions and in the media, both traditional and digital outlets, and may harm democracy by affecting citizens' ability to take informed decisions.[5] In fact, according to the HLEG report, *"special attention should be paid to the threat represented by disinformation aimed at undermining the integrity of elections"*,[6] as accurate information is necessary to ensure full enjoyment of the right to vote. The element of information in connection with the public sphere illustrates a number of relations that are typically recognized and protected in liberal constitutional orders. The interplay between freedom of expression, the right to receive information and informed participation in a democracy is an example of the interdependency and 'triangular' nature of the relationship involving democracy, the rule of law and fundamental rights (Carrera *et al*., 2013). As notably held, the freedom of speech paradigm is wider than the notion of democracy solely understood in the frame of electoral and public deliberation processes, as it broadly embraces the notion of "democratic culture" (Balkin, 2004, 21-22). Nevertheless, the role of information and the ability to freely express and receive it remains undeniably essential in that timeframe when citizens are called to express their political views through the election of representatives. Factual information and knowledge are necessary to ensure the genuine ability of a citizen to take informed decisions, as well as to participate

[5] Communication from the Commission, Tackling online disinformation: a European Approach, COM/2018/236 final, 1, ("Disinformation Communication").

[6] European Commission, *cit.*, *A multi-dimensional approach to disinformation,* 12.

in public debates (Bayer *et al*., 2019, 61). Accordingly, freedom of speech is not an end in itself but is instrumental to the self-government and determination of a people (Meiklejohn, 1961).

As free participation in the public sphere during electoral periods presupposes awareness on public policies, their effects and alternatives,[7] the lack of freedom of information, or being subject to information that is systematically deceitful, may cause a distortion of the opinion-forming process, which may ultimately reflect in the election ballot. Along these lines, if disinformation practices were to attain a degree of intensity as to alter or misrepresent public discourse, the exercise of citizens' voting rights would be at risk in that it could, ultimately, lead to electoral results distorted by a perverted public discourse (Bayer *et al*., 2019, 77-78). Analogically, this reflection may be translated into a particular kind of voting exercise: the referendum. Broadly speaking, the referendum endows the electorate with the right to express its opinion directly on the constitutional or legislative questions of a State, typically with the view of confirming, amending or abrogating laws adopted through parliamentary processes.[8] As is well known, referendum consultations are often used as a tool to call for the electorate's opinion on contentious, divisive issues, or as a mandate to back political choices which affect the polity. Along these lines, this instrument can only closely and reliably reflect the will and preferences of a citizenry at a given time where there is, on the one hand, wide participation in terms of turnover, and on the other hand, where this position is genuinely expressed on the basis of an informed choice. It follows that factual information on referendum questions and related public debates are necessary to ensure that the vote authentically expresses the electorate's stand. For the purposes of this contribution, the heart of the problem lies in investigating the latter element, which translated into the digital sphere amounts to understanding whether and how disinformation practices may affect the informative process prior to electoral consultations.

2. Tackling disinformation practices *v*. upholding freedom of expression

2.1 Theoretical justifications

This section will briefly present the theoretical frame of free speech and its development across the Atlantic, through the constitutional paradigms of the US and European traditions.

The possibility of regulatory intervention to tackle disinformation practices and other forms of illegal speech display the risk of affecting fundamental rights in a way that may not be compatible with the liberal constitutional framework. Disinformation is not a new, "digital age" phenomenon. Its occurrence in today's online environment, however, highlights particular features linked to the

[7] Confirmed in a number of decisions of the ECtHR, see *LCB v United Kingdom* (1998), paras 38-9 and *Roche v. United Kingdom* (2006), paras. 165-6.

[8] A more detailed discussion will follow on the Italian legal framework.

borderless, pervasiveness and velocity of its dissemination. Indeed, attempts to regulate such phenomenon raise concerns relating to the freedoms of the parties involved and break the traditional vertical State-individual relationship. A clear example would be intervention to regulate platforms' online content, opposing free speech and privacy of individuals and platform owners, and the latter's freedom to conduct business. Regulatory measures would likely intervene to defend certain freedoms at the cost of sacrificing other equally protected ones. Silencing certain forms of speech causes evident tension, among others, with freedom of expression, at the heart of this inquiry.

Freedom of expression and opinion, along with the right to information, are recognized as a component of citizens' political rights,[9] the lack of which is typically associated with authoritarian and illiberal states. Those rights are considered worthy of protection in that they are necessary to safeguard citizens' ability to participate in democratic decision-making processes (Bayer *et al*., 2019, 76). As is well known, different theoretical arguments have emphasized the justifications on which the freedom may rely. Already in the XVII century, Milton argued that freedom of expression should suffer no limitations, as a free and open confrontation of ideas would eventually lead to the emergence of the truth (Milton, 1644). Moreover, Mill (1863, 50-58) understood the flourishing of speech as a community's necessary pursuit of the truth, an exercise admitting falsehood as a means to achieve this goal. Barendt's (2005, 19-20) instrumental theory places the focus on citizens' ability to engage in public debates and participate in a polity; on the other hand, Dworkin's constitutive argument frames the freedom as enabling *"responsible moral agents of a just political society"* (Dworkin, 1999, 200). In light of these brief remarks, the following sections will, firstly, present the constitutional traditions on freedom of expression and their application to the Internet from the US and European perspectives and secondly, frame the European dimension of the freedom in the electoral context.

2.2 The US perspective

Freedom of speech is a fundamental tenet of the United States' constitutional tradition. Its protection, grounded in the First Amendment to the US Constitution, provides a peremptory prohibition for Congress to interfere with free speech, enjoying an unparalleled scope of protection (Bollinger, 1988; Sedler, 2007; Pollicino, 2017a, 24) and a pivotal role in connection with democratic processes (Sunstein, 2017, 204). In time, this broad scope has been construed by the US Supreme Court relying on the paradigm formulated by Justice Holmes in his Dissenting Opinion in *Abrams v United States* of 1919,[10] known as the origin of the celebrated metaphor of the "marketplace of ideas". According to this rationale:

[9] Articles 19(1) and (2) of the International Covenant on Civil and Political Rights of 1966.

[10] US Supreme Court, *Abrams v United States*, 250 U.S. 616 (1919).

> *"*[T]*he ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out* […] *I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threatened immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country."*[11]

This evocative model has acted time and again as a shield against State intrusion on a range of forms of speech. US constitutionalism, nevertheless, does not deny *per se* that certain exercises of free speech may be subject to legislative limitations, i.e., in those cases where speech determines a "clear and present danger"[12] assessed on the basis of a strict scrutiny (Pollicino, 2017a, 23-27).
Justice Holmes' rationale was first analogically applied to the Internet context in *Reno v ACLU*,[13] where the Supreme Court found that the contested provisions, aiming to restrict obscene online speech, were unconstitutional as they exercised a censoring force spilling over to other forms of non-obscene speech (Pollicino, Bietti, 2019, 53). The view expressed by the Supreme Court is that:

> *"The record demonstrates that the growth of the Internet has been and continues to be phenomenal.* […] *we presume that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it. The interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."*[14]

This landmark judgment effectively elected the Internet as the "new" marketplace of ideas and awarded online speech the strongest level of protection, setting accordingly the highest parameter for judicial scrutiny on possible content-based Internet restrictions that may be established in the future; which may be upheld to the extent that a compelling state interest is promoted by the contested regulation and only where this special interest successfully fulfills the proportionality test (Fraleigh, Tuman, 2011, 309).[15] More recently, the Supreme Court has recognized the importance of cyberspace, and particularly of social media, as a key forum for exchanging views,[16] limitations to

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[11] *Ibid*., para 630.

[12] US Supreme Court, *Schenck v United States*, 249 U.S. 47 (1919). Nuanced to an "imminent lawless action" test in the case of political speech in *Brandenburg v Ohio*, 395 U.S. 444 (1969).

[13] US Supreme Court, *Reno v ACLU*, 521 U.S. 844 (1997).

[14] *Ibid*., 885.

[15] This strict test was subsequently endorsed by lower US Courts in *ACLU v Johnson*, 194 F.3d 1149 (10th Cir. 1999), para 1156; *Mainstream Loudoun v Board of Trustees of the Loudoun County Library*, 24 F. Supp. 552 (E.D. Va, 1998), para 563; *Cyberspace Comm. Inc. v Engler*, 142 F. Supp. 2d 827 (E.D. Mich., 2001), para 830.

[16] US Supreme Court, *Packingham v North Carolina*, 582 U.S. (2017).

which may only be imposed – even for the most serious crimes – where the provision is *"narrowly tailored to serve a significant governmental interest"*.[17]

In less suspicious times, Balkin (2004, 4-6) highlighted how the Internet was bringing a 'democratizing' effect on speech; nowadays, at a more advanced stage of development of the social web, a new pluralist model of speech emerges, where the threat of speech limitation and censorship do not derive solely, nor prevalently, from the traditional State powers but rather, from a range of private actors (Balkin, 2017). Fundamental changes in online speech regulation created a new governance model characterized by collateral censorship, public/private cooperation or cooptation and private governance (Balkin, 2014; *Id*., 2017, 25, 29).

Despite negative consequences following from State intervention to contrast online speech, government regulation in a free society should not be opposed as such, nor should the approaches to regulation be confronted as an *aut-aut* (Sunstein, 2017, 189-190). Whereas US constitutional tradition recognizing that *"there is no such thing as a false idea"*[18] and that First Amendment law *"requires that we protect some falsehood in order to protect speech that matters"*,[19] a more cautious handling of the "new" marketplace of ideas metaphor was already suggested (Pollicino, 2017b). Not only has the factual context in which the metaphor was devised fundamentally changed, but also doubts on the self-correcting ability of the marketplace may be raised (*ibid*.). Accordingly, the US free speech paradigm may be in need of a reformed construction, mindful of other democratic values such as equality and pluralism, whilst providing protection vis-à-vis private parties exerting uncontrolled power. As traditionally applying in the bilateral, vertical State-individual relationship, the doctrine could be tailored to intercept speech expressed within a *"highly privatized digital public sphere"* (Pollicino, Bietti, 2019, 55) as to allow tackling disinformation perpetrated by a mix of public and private agents. Indeed, Balkin (2017, 66-67) suggested online platforms change their self-conception, calling for a "new set of social responsibilities" to defend democratic values in the digital sphere.

Specifically concerning disinformation, the question is whether or not patently false forms of speech are worthy of protection in a democratic society. As illustrated by Pollicino and Bietti (2019, 51), false forms of speech are often awarded protection with the view of safeguarding other equally worthy values, including diversity of opinion, with a broad scope for public debates and freedom of the press. Along these lines, false speech displays *"instrumental rather than intrinsic value"* and, to the extent that it serves to promote values such as plurality, its worthiness of constitutional protection may be

[17] *Ibid*., 1736.

[18] US Supreme Court, *Gertz v Welch*, 418 U.S. 323 (1974).

[19] *Ibid*., para 341.

justified (*ibid*.). However, in light of *"overgenerous constitutional protection"*, an overprotective approach could be questioned, in favor of a more careful consideration of counter claims (*ibid*., 52).

2.3 The European perspective

The suitability of the US free speech paradigm to the European context is not evident, as it finds a narrower scope of protection and different focus (Pollicino, 2017b; De Gregorio, 2018, 4-5). Unlike notably put by Meikeljohn (1967) for the United States, in Europe, freedom of expression is not "an absolute". US First Amendment law refers to the active dimension of the freedom, i.e. a right to express oneself, whereas the European Convention of Human Rights ("ECHR"), in its article 10 highlights the freedom's passive dimension,[20] incorporating a right to be "pluralistically informed" (Pollicino, 2017b). At the EU level, the provision is reflected in the EU Charter of Fundamental Rights ("EU Charter"),[21] where the fundamental tenets of media freedom and pluralism are explicitly enshrined in the freedom's design.[22] The EU Court of Justice has developed its caselaw on freedom of expression consistently with the construction of its constitutional framework of fundamental rights (Pollicino, Bassini, 2014, 14), broadly fashioned along the ECHR paradigm through the interpretative parameter of article 52(3) of the Charter.

The European approach does not automatically assume that all forms of speech enjoy the same degree of immunity from State intervention by relying openly on the self-correcting force of the information market. European courts have placed at the forefront of their analysis values such as human dignity and pluralism (Pollicino, Bietti, 2019, 55). In the nature of *obiter dictum*, the European Court ("ECtHR") had maintained that:

> "*Freedom of expression* […] *is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'*."[23]

Broadly speaking, article 10 ECHR caselaw has enabled the construction of a common standard of protection within the European national legal orders and has acted as a binding interpretative parameter vis-à-vis EU law.[24] Whereas article 10(1) of the ECHR frames the fundamental character

[20] ECtHR, *Bladet Tromsø and Stensaas v. Norway* (1999), para 62.

[21] Article 11 EU Charter.

[22] Article 11(2) EU Charter.

[23] ECtHR, *Handyside v. United Kingdom* (1976), in *obiter dictum*.

[24] Resulting from article 6(3) of the Treaty on the European Union and article 52(3) EU Charter.

of the right, the second paragraph clearly asserts its relative nature, susceptible of meeting certain limitations as may be "necessary in a democratic society" – provided the requirements set by the Convention are met. As noted, the highlight on the right's passive dimension, encompassing a right to receive sources in a pluralistic context, would suggest that, translated into the online setting, false, misleading or deceitful information do not enjoy unfettered protection under the chapeau of article 10 ECHR (Pollicino, Bietti, 57). A further containment is enabled by the so-called "abuse clause" provided by article 17 ECHR, which protects Convention rights from depletion through abusive exercise of other equally protected rights.[25] On this basis, legislation to contrast hate speech has been adopted (*ibid*., 58), and may serve as an enabler if article 10 were to be abused through other forms of unprotected speech.

The balancing act between harm and freedom of the press is no less complex when relating to online speech to define the contours of protection of false news. The ECtHR's approach seems to be that of protecting fundamental rights from the perils of the Internet, rather than treating it as an empowering tool. Despite a strict interpretation of article 10(2), cases brought before the European Court have emphasized the possibility of limiting freedom of expression. The Court appears to rely on the presumption that the Internet is fundamentally different from the traditional media environment, with the consequence that the rules governing the latter are not automatically fit for the former, and in need of a new balance (Pollicino, Bietti, 59-60). In fact, concerning freedom of the press and the Internet, the Strasbourg Court expressed the view that:

> *"The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms* […] *is certainly higher than that posed by the press. Therefore, the policies governing reproduction of material from the printed media and the Internet may differ. The latter undeniably have to be adjusted according to technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned"*.[26]

In this case, the balancing test was tipped in favor of allowing greater limitation under article 10 ECHR. The Court has further maintained the relativity of guarantees underpinning Convention rights, in the sense that they may give way to ensure that other legitimate imperatives are preserved, further highlighting that it would be a task for the legislator to *"provide the framework for reconciling the various claims which compete for protection in this context"*.[27]

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[25] For instance, disputing the existence of "clearly established historical facts" constitutes an abuse of freedom of expression, breaching article 10 ECHR, see *Lehideux and Isorni v. France* (1998). The practice may therefore be legitimately restricted in accordance with the Convention, provided the applicable conditions are met.

[26] ECtHR, *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* (2011), para 63.

[27] ECtHR, *K.U. v. Finland* (2008), para 49. In this case, namely, the prevention of disorder or crime and competing third-party rights were at stake.

The means through which content is distributed rise to a crucial consideration within the proportionality test performed by the Court (*ibid*., 62-63). Presumably, this balancing act continues to prove consequential with the view of assessing competing interests in the management of online content and assessment of prevailing rights in each particular case. Accordingly, issues relating to the role of Internet intermediaries and their liability (or lack thereof) remain inextricably linked to possible interventions covering content regulation.

2.4 Freedom of expression in the electoral context

Freedom of expression and opinion is particularly salient in the electoral phase and involves another Convention-protected right, i.e. the right to free elections.[28] In fact, the Strasbourg Court notably held:

> *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:* […] *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 that opinions and information of all kinds are permitted to circulate freely*.[29]

Although freedom of expression is not absolute – one clear limitation is that imposed to defamatory allegations and speech violating personality rights – the reference to "all kinds of information" suggests a broad scope of protection from what would otherwise constitute undue censorship.[30] Nevertheless, the ECtHR also recognized that in case of conflict between the two rights, Contracting States have a margin of appreciation in balancing the opportunity of a restriction on speech during the electoral period if necessary to protect the *"free expression of the opinion of the people in the choice of the legislature"*.[31]

The work of the Council of Europe's platform on media freedom[32] commits to promoting and facilitating pluralistic expression of opinions through regulatory frameworks, providing an obligation to cover electoral campaigns in a *"fair, balanced and impartial manner in the overall programme services of broadcasters"*,[33] for both public service media and private broadcasters. As illustrated by

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[28] Article 3 of Protocol no. 1 to the ECHR.

[29] ECtHR, *Bowman v. The United Kingdom* (1998), para 42.

[30] ECtHR, *Bladet Tromsø and Stensaas v. Norway* (1999), paras 66, 73.

[31] *Ibid*., para 43.

[32] See https://www.coe.int/en/web/media-freedom.

[33] Council of Europe, Freedom of expression and elections, July 2018, 1, https://rm.coe.int/factsheet-on-media-and-elections-july2018-pdf/16808c5ee0.

the Strasbourg Court's caselaw involving freedom of expression, the media and the right to free elections, the interplay between these rights may touch upon different angles. *Inter alia*, cases have related to electoral law restrictions on print media during electoral campaigns,[34] injunctions against print media for criticism in the electoral period,[35] reporting on candidates' private life,[36] convictions for disseminating false information in the period preceding elections,[37] as well as different issues concerning broadcasting. With specific reference to online media outlets, the European Court found a violation of article 10 ECHR, in the case of an editor of an Internet media website which had been fined for publishing allegations of child abuse against an Icelandic candidate, amounting, according to the Icelandic Supreme Court, to defamatory conduct.[38] Interestingly, the candidate had acted in proceedings for defamation only against the editor of the media website and not against his accusers, who had already previously made available the same statements on which the contested article was based. Safe the candidate's possibility to act against his accusers, the Court took the view that the decision against the editor, albeit only civil in nature and regardless of the fine's amount, that: *"*[a]*ny undue restriction on freedom of expression effectively entails a risk of obstructing or paralysing future media coverage of similar questions"*.[39] This approach shows the importance of the media's role in public discourse and opinion formation for the electorate voting their representatives, i.e. their freedom to inform citizens can only be restricted in exceptional circumstances.

3. Legislators' responses

In the wake of increasing concerns of the effects of online disinformation on democratic discourse, legislators have attempted to tackle the phenomenon. This section will address the efforts currently underway within the EU and subsequently, Italy's unsuccessful attempt to legislate.

3.1 EU level

The European Union was first confronted with the growing concern of disinformation in March 2015, when the European Council invited the development of an action plan by the High Representative to address Russian ongoing disinformation campaigns,[40] leading to the establishment

[34] ECtHR, *Orlovskaya Iskra v. Russia* (2017).

[35] ECtHR, *Cumhuriyet Vakfi and Others v. Turkey* (2013).

[36] ECtHR, *Saaristo and Others v. Finland* (2010).

[37] ECtHR, *Salov v. Ukraine* (2005).

[38] ECtHR, *Ólafsson v. Iceland* (2017).

[39] *Ibid*., para 61.

[40]European Council conclusions, 19-20 March 2015.

of the East Strategic Communication Task Force of the European External Action Service. Responding to the European Parliament's mandate, [41] inviting the Commission *"to verify the possibility of legislative intervention to limit the dissemination and spreading of fake content"*;[42] a range of exploratory actions were undertaken and finally resulted in the Communication on disinformation of April 2018. Based on the specifically European constitutional commitment to the protection of the freedom, to receive and impart information, enshrined in both the ECHR and the EU Charter, the HLEG set out the groundwork for possible action. This includes general and specific objectives to tackle forms of speech which are not illegal in themselves, yet, still harmful for society and citizens. The HLEG presumed that all responses should avoid any interference with the freedoms involved.[43] Indeed, according to the "multidimensional approach" required by the multi-faceted nature of disinformation practices,[44] a number of lines of action, combining both short-term and long-term solutions was set forth in the following form:

> *(1) a legal and regulatory effort to enhance the transparency of online news, including on data practices; (2) an educational effort to promote digital media literacy; (3) a technical effort to develop tools that empower readers and journalists and allow them to engage in positive public discourse; (4) a cultural effort to preserve and enhance the diversity and sustainability of the European news media ecosystem, and finally (5) an effort keep promoting research on and monitoring of disinformation in Europe* (Pollicino, Bietti, 2019, 82-83).

Along those lines, the "European approach" illustrated by the Commission relied on four main principles: (i) improvement of transparency as to how information is produced or sponsored; promotion of (ii) diversity of information and (iii) credibility of information; (iv) fostering inclusive solutions with broad stakeholder involvement.

Among parallel measures, in October 2018, major online platforms signed a Code of Practice on Disinformation,[45] voluntarily committing to a set of standards to fight disinformation practices ranging from efforts to enhance transparency in political advertising, to those concerning the take down of fake accounts. Whereas the Commission had initially expressed a positive view in its follow-

[41] European Parliament resolution of 15 June 2017 on online platforms and the digital single market (2016/2276(INI)).

[42] *Ibid*., pt. 36.

[43] European Commission, *A multi-dimensional approach to disinformation, cit.*, 19.

[44] *Ibid*., 12.

[45] See https://ec.europa.eu/digital-single-market/en/news/code-practice-disinformation. The Code is accompanied by an annex setting best practices.

up report,[46] the results following the baseline report on the implementation of the Code submitted by signatories to the Code were unsatisfactory.[47]

The years 2018 and 2019 saw the fight against disinformation practices and hybrid threats at the top of the EU agenda,[48] as the then upcoming European elections raised concerns to ensure the integrity of the EU Parliament's IX legislature's formation.[49] In that period, improvements in actions to contrast inauthentic behavior and limit the scope of spam and disinformation were reported.[50]

Before the end of 2019, an assessment on the first year of implementation of the Code is expected by the Commission, with the caveat that: *"*[s]*hould the results of this assessment not be satisfactory, the Commission may propose further initiatives, including of a regulatory nature"*.[51] As illustrated above, the adequacy of regulatory intervention at the EU level is still being evaluated.

Against this backdrop, some remarks can be made. Firstly, while the EU legislator's cautious and incremental approach is generally to be welcomed, yet, the appropriateness of intervention may be questioned altogether. On the one hand, while a number of soft law instruments are being adopted in the field, hard regulation would require the identification of a legal basis in the EU Treaties, which is not evident in itself. Although the internal market basis[52] has served to construct the digital single market and was used as the foundation of data protection legislation – at the time devised as an instrument for the internal market's completion –[53] it is hard to imagine how it could justify, alone, a measure whose connection to the internal market appears loose. Even if the internal market basis was proposed and not contested by the Member States on a matter of competence, it could still face

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[46] Report from the Commission on the implementation of the Communication "Tackling online disinformation: a European Approach", COM(2018) 794 final, 2.

[47] See https://ec.europa.eu/digital-single-market/en/news/first-results-eu-code-practice-against-disinformation.

[48] See Press Release of 5 December 2018, http://europa.eu/rapid/press-release_IP-18-6647_en.htm.

[49] An "Election Package" was adopted and includes: Commission Communication on securing free and fair European elections, COM (2018), 637; Commission Recommendation on election cooperation networks, online transparency, protection against cybersecurity incidents and fighting disinformation campaigns in the context of elections to the European Parliament, COM (2018) 5949; Commission Guidance on the application of Union data protection law in the electoral context, COM (2018) 638; Regulation (EU, Euratom) No 2019/493 of the European Parliament and of the Council of 25 March 2019 amending Regulation (EU, Euratom) No 1141/2014 as regards a verification procedure related to infringements of rules on the protection of personal data in the context of elections to the European Parliament, OJ L 85I , 27.3.2019.

[50] Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions Report on the implementation of the Action Plan Against Disinformation, JOIN(2019) 12 final, 4.

[51] *Ibid*., 5.

[52] Article 114 TFEU.

[53] Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, was founded on the equivalent of today's article 114 TFEU and despite the Lisbon reform establishing a novel basis to protect the fundamental right – article 16 TFEU – it remains broadly fashioned along the mixed internal market / human rights rationale underlying EU data protection law.

judicial scrutiny as regards to its compliance with fundamental rights.[54] Secondly, the appropriateness of some of these soft law instruments could be questioned. Whereas co- and self-regulatory instruments certainly display benefits in terms of efficiency and practical expertise,[55] and may well serve as trial-and-error groundwork in a context that is still yet to be entirely understood, serious doubts may be cast on their use where fundamental rights and major political choices are at stake.[56] Well-known problems also concern the effectiveness of their implementation. In the particular case of the Code on disinformation, the EU institutions' efforts to monitor, evaluate and complement is clear. Nevertheless, effective control and implementation remains with the signatories, leaving no redress mechanisms nor possibility of judicial scrutiny. The report on the Code's first year of implementation expected by the end of 2019 may perhaps show whether the threat of regulatory intervention has pushed for strong implementation.

Finally, the fact that different national legislations are emerging in Member States, such France[57] and Germany,[58] cannot be overlooked from a coherence perspective of possible EU-wide action.

3.2 Italy's (failed) attempt to legislate "fake news"

In February 2017, a draft law was filed at the Italian Senate titled "Provisions to prevent the manipulation of online information, to ensure transparency on the web and to encourage media literacy" ("DDL Gambaro").[59] The report to the draft law opens with an address referring to the cornerstones of any democratic system, including: *"the freedom and credibility of information, which in turn represent the essence of journalism, whose first duty is to the truth"*.[60] Admittedly, the initiative stems from the concerns expressed by the Council of Europe's assembly resolution on online media and journalism[61] regarding online campaigns devised to *"misguide sectors of the public*

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[54] A parallel may be drawn with the Data Retention Directive 2006/24/EC saga. In Case C-301/06 *Ireland v European Parliament and Council of the European Union* [2009] I-00593, paras 28-33, 58, Ireland questioned the suitability of article 114 TFEU as a legal basis for the Directive vis-à-vis the mixed nature of surveillance-related requirements and economic activity. Despite the Court of Justice ruling the legitimacy of the legal basis, subsequent litigation, as is well known, struck down the Directive due to its serious interference with fundamental rights in Case C-293/12 *Digital Rights Ireland Ltd*, [2014] ECLI:EU:C:2014:238.

[55] See https://ec.europa.eu/digital-single-market/en/cop-principles-better-self-and-co-regulation.

[56] White Paper on European Governance, COM/2001/0428 final, 12.10.2001; implemented by European Parliament, Council, Commission "Interinstitutional Agreement on better law-making", 16.12.2003 (*cfr*. para. 18), no longer in force and substituted by a new "Interinstitutional Agreement on Better Law-Making", 13.04.2016, dropping the reference to co- and self-regulation.

[57] Loi n° 2018-1202, 22 décembre 2018 relative à la lutte contre la manipulation de l'information.

[58] Netzdurchsetzunggesetz, Law of 30 June 2017, Federal Law Gazette I, p. 3352 ff ("NetzDG").

[59] DDL no. 2688 – XVII Legislature. All translations from Italian are by the author.

[60] See http://www.senato.it/japp/bgt/showdoc/17/DDLPRES/0/1006504/index.html?part=ddlpres_ddlpres1.

[61] Parliamentary Assembly, "Online media and journalism: challenges and accountability", Resolution 2143 (2017).

through intentionally biased or false information, hate campaigns against individuals and also personal attacks, often in a political context, with the objective of harming democratic political processes".[62] DDL Gambaro introduced amendments to the Italian criminal code concerning on the one hand, the "publication or dissemination of false, exaggerated or biased news likely to disrupt public order, through computer platforms",[63] and on the other, the "dissemination of false news that can raise public alarm, mislead sectors of public opinion or concerning hate campaigns and campaigns aimed at undermining the democratic process".[64] Subsequently, a short set of provisions deal with communication and rectification requirements,[65] as well as intermediary liability in case of publication or dissemination of "fake news".[66] The debate around DDL Gambaro was united in opposing it, identifying violations of the principles of determination, the exhaustiveness and offensiveness of the types of offence, likewise a patent violation of freedom of expression (Lehner, 2019, 100-101). Furthermore, as the monitoring requirements were entrusted to the platform provider, the possible consequences of private censoring activities were heavily criticized (Magnani, 2019, 4). As remarked by the opening of the report to the draft law, a "duty of truth" appears to underlie the *ratio legis*, preoccupying in that it appears to assume falsehood as an illegal element in itself (Bassini, Vigevani, 2017, 15) and not in relation to its aptness to violate constitutionally protected values (Allegri, 2018, 201). The draft law did not proceed in the parliamentary procedure. Later that year, in December 2017, another draft law,[67] promoted by different first signatories, was announced but never lodged, titled "General rules on social networks and to combat the dissemination of illegal content and fake news on the Internet" ("DDL Zanda and Filippin"). The new draft, largely inspired by the German NetzDG,[68] targeted specifically social networks – rather than "computer platforms" – and relies on existing provisions of the Italian criminal code. The draft provides a seven day-period for removal of "non manifestly illegal" content imposed upon social networks, avoidable in two limited circumstances: firstly, where the decision on the illegal nature of the content depends on false allegation or examination of other circumstances; secondly, where, before the seven-day term, the social network delegates the decision to a self-regulatory authority established in accordance with the law (Lehner, 2019, 99).[69] As Monti (2017) observed, the rationale of the second initiative frames the

[62] *Ibid*., pt. 6.

[63] Article 1 DDL no. 2688.

[64] *Ibid*., Article 2.

[65] *Ibid.,* Articles 3-4.

[66] *Ibid*., Article 7.

[67] DDL no. 3001 – XVII Legislature.

[68] *Supra* fn. 58.

[69] This provision reproduces *verbatim* article 1(3)(2) of NetzDG.

problem of interference with public opinion solely from the political dimension, not considering the distortion of free information and the press, essential for democratic accountability of political power. Accordingly, Monti (*ibid*.) concludes the ineffectiveness of a solution disregarding its context, nor considering social networks' role in the information chain.

The assessment of whether and how similar interventions are admissible in Italy must be searched in relation to constitutional principles and the interpretation that freedom of expression in the Italian constitutional order. Distinguished commentators (Esposito, 1958; Pace, Manetti, 2006) originally excluded that consciously spread falsehood deserved protection. This allowed legislative intervention to protect public faith from the spread of the patently false, insofar as the objective and subjective elements of expression and inner thought could be separated (Esposito, 1958, 36-37). According to Esposito (1958, 48) freedom of expression cannot jeopardize constitutional principles, nor social peace. Yet, forms of speech including "propaganda, apology, public exaltation and manifestation instigating the realization of the thought expressed" are legitimately protected (*ibid*., 49).

Pace (2006, 88-96) considered that false information may be worthy of protection to the extent that it originated from *bona fide* conduct. As illustrated by Barile (1975), freedom of expression encounters the sole limitation of illegal "purposeful deception". Therefore, spreading falsehood cannot be deemed illegal in and of itself (*ibid*., 229). As Allegri points out (2018, 191) the question whether to regulate "fake news" with the view of suppressing their dissemination, assuming its constitutional compatibility, depends on preferring a "functional approach" relying on the passive dimension of the freedom. Conversely, an "individualistic approach" would protect false news, as contributor of public opinion (Allegri, 2018, 192). Assuming the harmfulness of the "fake news" phenomenon, rather than regulatory intervention, a constitutionally sounder solution would focus on increasing information production and dissemination, as well as promoting tools for critical information consumption (Bassini, Vigevani, 2017, 18-19). This second approach reflects more closely the known marketplace of ideas rationale, as able to autonomously select worthy information. Given the way disinformation practices spread, fragment and polarize audiences, emphasis should therefore be placed on enhancing transparency and pluralistic values in the online media system, rather than attempting to suppress it altogether (Allegri, 2018, 202).

In any case, any legislation imposing duties on Internet intermediaries in terms of monitoring, filtering and content removal would have to comply with the legal standards excluding, as a rule, general monitoring and liability of neutral intermediaries with regards to user-generated content.[70]

[70] Articles 12-15 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000.

4. The Italian Referendum case

This section will present the disinformation debate surrounding the Italian constitutional referendum of 2016. Against brief remarks on the referendum, this section focuses on the approaches and responsive actions taken by the Italian authorities.

4.1 The Italian framework on referenda

As an instrument of direct democracy, the referendum consists of a consultation of the electorate producing legal effects. The Italian Constitution provides for different types of referenda.[71] According to article 138, laws promoting revision of the constitutional text and other constitutional laws must be adopted by each Chamber of Parliament with two successive resolutions, occurring at least three months from one another. In the second voting session, the reforming laws may be approved by absolute majority of the members of each Chamber.[72] Where the law is approved by a qualified majority below two-thirds of the members of each Chamber, a referendum procedure may be initiated within three months of the law's publication, upon request of either: (i) one-fifth of the members of a Chamber; (ii) five hundred thousand voters; (iii) five regional councils. Once subject to consultation, the law may only be promulgated if approved by a majority of valid votes.[73] Whereas if the law is passed with a two-thirds majority, resort to a referendum is excluded.[74]

One distinguishing procedural element is the lack of a participation *quorum* for the validity of the referendum. [75] On the one hand, the rationale was devised to allow, upon minority action, the electorate to express its view on a revision likely promoted by a governmental majority. On the other, the lack of a minimum *quorum* may lead to the slimmest part of the electorate blocking reform, for instance, in case of general disinterest by the majority (Bin, Pitruzzella, 2017, 362-365).

A participatory *quorum* for the referendum's validity would emphasize the protection of constitutional rigidity, inasmuch as a proportional or majority representation could in principle adopt constitutional laws that do not correspond to the majorities expressed by the electorate (Canepa, 2001, 303). Nevertheless, Canepa (2001, 306) illustrates how prevailing scholarship, relying on the constituent debate, highlighted the opposition character of this institution, safeguarding political

[71] See articles 138, 75, 132 and 133 Constitution.

[72] Article 138(1).

[73] Article 138(2).

[74] Article 138(3).

[75] For instance, provided for the abrogative referendum of article 75 Constitution.

minorities and the constitutional text, in consideration of the optional nature of the procedure and the entitlement of a parliamentary minority to launch the referendum initiative.[76]

It must be noted that the instrument has seen rare application, as the 2016 consultation was the third in Republican history.[77] The text of the reform, approved in second vote by absolute majority below two thirds, provided to overcome perfect bicameralism, reduce the number of MPs, contain the operating costs of the institutions, abolish the National Council of Economy and Labour and revise Title V, Part II of the Constitution.[78] During the consultation, the electorate rejected the reform, with 59.11% of valid votes against and 40.89% in favor, upon an overall turnover of 65.47%.[79]

4.2 Disinformation and interference with the 2016 referendum

Allegations that undue interferences had influenced the political debate and results of the referendum emerged. Notably, Biden and Carpenter[80] held that following the US presidential elections, other *"steps to sway political campaigns"*[81] were taken to influence consultations in Europe, including the Italian referendum. According to the US State Department, efforts to influence elections and referenda in Europe include *"overt and covert support for far left and right political parties, funding front groups and NGOs, and making small, low-profile investments in key economic sectors to build political influence over time,"*[82] and that its tactics *"focus on exploiting internal discord in an effort to break centrist consensus on the importance of core institutions."*[83]

Concerning Italy specifically, Russian electoral interference is reported to have occurred through disinformation and "fake news" campaigns promoting anti-establishment and extremist political parties,[84] widely shared on social media, with alarm for the then upcoming national elections of March 2018.[85] Manipulation of social media, in the Italian case, has been described as an *"ecosystem*

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[76] In contrast, the abrogative referendum of article 75 Constitution does not provide entitlement to launch the initiative upon MPs: this power lies with the electorate – upon request of 500.000 rightholders – or five regional Councils.

[77] See http://elezionistorico.interno.it/index.php?tpel=F.

[78] GU Serie Generale n.88, 15.04.2016.

[79] See https://elezionistorico.interno.gov.it/index.php?tpel=F&dtel=04/12/2016&tpa=Y&tpe=A&lev0=0&levsut0=0&es0=N&ms=S.

[80] J. R. Biden, M. Carpenter, "How to Stand Up to the Kremlin; Defending Democracy Against Its Enemies" Foreign Affairs, January 2, 2018.

[81] *Ibid*.

[82] Committee on Foreign Relations of the USA, Putin's Asymmetric Assault on Democracy in Russia and Europe: Implications for US National Security, 10 January 2018, 38.

[83] *Ibid*.

[84] *Ibid*., 137-139.

[85] A vast number of reported disinformation cases in that period is available at "EUvsDisinfo", see https://euvsdisinfo.eu/disinformation-cases/?text=italy&disinfo_issue=&date=.

coordinating different types of initiatives mostly affiliated with populist forces" (Bradshaw, Howard, 2018, 35). Moreover, false news is shared by leading politicians, shifting to platforms the burden to moderate content (Bayer *et al*., 2019, 45). Analysis has shown how foreign media have played a polarizing role in debates on salient issues by *"reinforcing local media narratives and supporting communities with abnormal levels of engagement, creating an imbalance in narratives being published and therefore consumed by the public"*[86] and confirming that historical data preceding 2017 points to specific narratives' construction and systematic dissemination long before the electoral process.[87] In fact, it was found that half of the most shared stories on social media covering the constitutional referendum were fabricated.[88]

In 2016, the Italian independent administrative authority responsible for the communications sector ("AGCOM") adopted safeguards including: (i) dispositions implementing the framework on "political communication and equal access to the media relating to the campaign recommendation"[89] to give effect to the principles of pluralism, impartiality, independence, objectivity and completeness of the radio and television system, and rights granted to political subjects;[90] and (ii) recommendations issued for the respect of pluralism in view of the constitutional referendum.[91] These instruments, directed at public and private broadcasters and print media outlets, promote traditional measures in the political campaigning context. Following the referendum, in the wake of allegations and evidence of disinformation practices' interference, the AGCOM rapidly responded to evolve its policies. Accordingly, a technical working group on the safeguard of "pluralism and fairness of information on digital platforms"[92] was established with the objective of promoting self-regulation of online platforms and the exchange of good practices for the identification and combating of online disinformation resulting from targeted strategies, an example of institutionalized cooperation between independent media, information market regulators and platforms. In its first technical report, the working group analyzed online disinformation strategies and the fake content chain.[93] What can be noted is that rather than relying on "truthfulness" of the information, the report focuses on information distortion and public opinion formation, based on analysis of the underlying socio-economic

[86] Alto Data Analytics, The construction of anti-immigration electoral messages in Italy, 2018.

[87] *Ibid*.

[88] I. Kottasova, "Did Fake News Influence Italy's Referendum?" CNNMoney, December 5, 2016. https://money.cnn.com/2016/12/05/media/fake-news-italy-referendum/index.html.

[89] AGCOM, Delibera N. 448/16/CONS, 4 October 2016.

[90] *Ibid*., see article 1.

[91] AGCOM, Delibera N. 327/16/CONS, 7 July 2016.

[92] AGCOM, Delibera N. 423/17/CONS, 6 November 2017.

[93] Rapporto tecnico - Le strategie di disinformazione online e la filiera dei contenuti fake, 9 November 2018.

characteristics of supply and demand for online information (Magnani, 2019, 23). The report identifies a particular disinformation strategy created by stable organizations, or temporary organizations with specific interests, driven by precise economic and/or political-ideological objectives, supported by financial, technological and organizational endowments and with identified targets.[94] These strategies include actions constituting fully-fledged campaigns, as a series of publications and/or republications of fake contents, not single sporadic episodes.[95] Alongside, a number of studies have been investigating disinformation,[96] online news consumption,[97] their application to the electoral context,[98] as well as monthly reviews on online disinformation patterns.[99] As noted by Magnani (2019, 22), the AGCOM's active role is conceived in close relation with market operators, pushing its specific competences to "a role of impulse and coordination between the different actors operating in the field of online information to promote self-regulation on a voluntary basis".[100] A clear distinction from the failed legislative attempts emerges from these brief remarks, departing reliance on any conception of "truth" as the object of protection, pursuing instead the protection of the fundamental tenet of pluralism.

4.3 The shift towards an integrated approach in electoral monitoring

Furthermore, prior to the national elections held on March 4th 2018, a more tailored approach to disinformation can be noticed on part of the supervisory authority, as specific "Guidelines on for equal access to online platforms during the 2018 general election campaign"[101] were issued to adapt the general principles to all media,[102] including digital platforms. The Guidelines provide "prevention strategies, detection methods, tools for blocking or removing online content that can be qualified as damaging to the correctness, impartiality and pluralism of information".[103] This exemplifies a choice to unify under the AGCOM's umbrella different facets of mass communications and technology, striving for a comprehensive understanding and increasingly integrated approach (Magnani, 2019,

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[94] *Ibid*., 51.

[95] *Ibid*.

[96] AGCOM, News vs. Fake nel Sistema dell'Informazione, Interim Report, Indagine Conoscitiva, Delibera N. 309/16/Cons, November 2018.

[97] AGCOM, Rapporto sul consumo di informazione, February 2018.

[98] AGCOM, Il consumo di informazione e la comunicazione politica in campagna elettorale.

[99] See https://www.agcom.it/documenti-tppo.

[100] AGCOM, Delibera n. 423/17/CONS, 3.

[101] Delibera n. 423/17/CONS.

[102] Legge 22 febbraio 2000, n. 28 - Disposizioni per la parita' di accesso ai mezzi di informazione durante le campagne elettorali e referendarie e per la comunicazione politica, GU n.43, 22-2-2000.

[103] Allegato A alla delibera n. 423/17/CONS.

21). As illustrated above, a shift in the authority's approach is noticeable since the experience of the 2016 referendum. Despite concerns on disinformation being already salient, the Italian approach was still fairly cautious. After 2016, action sought to frame the phenomenon, with an eye specifically on preparing for the then upcoming national and European elections. This has been, so far, mostly of an aware, cautious self-regulatory nature, relying on concerted actions involving stakeholders. In parallel to the EU approach, it promotes, similarly, multi-faceted responses. With a forward-looking view, the tools include, as envisaged at EU level and generally supported in scholarship, the promotion of media literacy, fact-checking, measures supporting quality journalism. In the longer term, these solutions constitute the least invasive, relying on citizens' resilience to informative overload and malicious practices.

5. Conclusions

This contribution explored from a constitutional and comparative perspective the question of disinformation practices' capability to affect democratic processes, specifically, with regards to the electoral context, focusing on the possible tensions to the exercise of citizens' rights. Secondly, through an analysis of the US and European constitutional traditions, doubt is cast on the appropriateness of applying to the Internet an uncontrolled paradigm of "new marketplace of ideas". Accordingly, the need for a construction mindful of other democratic values and the media's role in public opinion, whilst providing protection vis-à-vis private parties is suggested. Thirdly, this contribution explored the legislative responses underway at the EU level and in Italy, based on a cautious approach reliant on stakeholder cooperation. The effectiveness of the Code of Practice on disinformation signed by major online platforms and the very choice to rely on soft law are questioned. Moreover, the Italian attempts to regulate "fake news" have been presented and criticized in their framework. It is maintained that interventions should emphasize the principles of transparency and pluralism in the online media system, rather than attempt to suppress disinformation altogether. Fourthly, focusing on the case of online disinformation practices during the 2016 Italian constitutional referendum, a shift in approaches was presented, as a number of initiatives to counter online disinformation have been launched and the AGCOM promoted increasingly integrated action. Indeed, going forward, an approach not invasive of citizens' fundamental rights constitutes the sounder solution, as emphasis should be placed on tools promoting informative resilience.

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