

**UNIVERSITÄT  
LUZERN**



# **FAKE NEWS AND THE REGULATION OF PLATFORMS IN THE EU AND THE US**

**ICJ-CH LECTURE SERIES**

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## TALK POINTS >> GOAL: ENABLING DISCUSSION

- **understanding the conditions of free speech online**
- **understanding the phenomenon of fake news in legal and societal context**
- **the regulation of platforms in the European Union and in the United States, by reference to the different regulation of free speech**







The Great Moon Hoax by the tabloid *The Sun* from 1835. Depiction of moon surface. Source: [Wikipedia](#)



Source: [Google Image Search](#)



# 2021 This Is What Happens In An Internet Minute



As of July 2021, the internet reaches 65% of the world's population and now represents 5.17 billion people—a 10% increase from January 2021. Of this total, 92.6 percent accessed the internet via mobile devices. According to Statista, the total amount of data consumed globally in 2021 was 79 zettabytes, an annual number projected to grow to over 180 zettabytes by 2025.

As the world changes, businesses need to change too—and that requires data. Domo gives you the power to make data-driven decisions at any moment, on any device, so that you can make smart choices in a rapidly changing world. Every click, swipe, share, or like tells you something about your customers and what they want, and Domo is here to help you and your business make sense of all of it.

### Global Internet Population Growth (IN BILLIONS)



Learn more at [domo.com](https://domo.com)

SOURCES: LOCAL IQ, BUSINESS OF APPS, DUSTIN STOUT, HOOTSUITE, EXPANDED RAMBLINGS, INTERNET WORLD STATS, STATISTA, CNBC, BRANDWATCH, KILL THE CABLE BILL, YOUTUBE, KINSTA, THE VERGE, MANAGEMENT COMMUNICATION: A CASE ANALYSIS APPROACH, INTERNET LIVE STATS, SODA, STATISTA



## THE 'WHO?'



**Donald J. Trump** ✓

@realDonaldTrump

Following



With all of the Fake News coming out of NBC and the Networks, at what point is it appropriate to challenge their License? Bad for country!

8:55 AM - 11 Oct 2017

**5,146** Retweets **19,803** Likes



16K 5.1K 20K

## THE 'WHAT?'



Source: [BBC News](#)





## THE 'HOW?' UNDERSTANDING OLD vs. NEW EDITORS

- **conventionally:** editorial roles under a single institution; editorial choices based on a limited pool of materials; mandate for trustworthiness, quality and diversity  
editorial decisions as to content and format reach the entire audience the same way
- **the rise of the new editors:** new editors are multiple, widely distributed and disintegrated; they are based on algorithm-driven aggregators that distribute content based on certain criteria, such as previous media consumption, friends, likes, etc.
- 
- **the power of the (few) platforms:** the 'new governors' of the digital media space





## PLATFORM ENFORCEMENT OF FREE SPEECH/PRIVACY STANDARDS

### Twitter User Agreement

If you live in the United States, the Twitter User Agreement comprises these [Terms of Service](#), our [Privacy Policy](#), the [Twitter Rules](#) and all incorporated policies.

If you live in the European Union or otherwise outside the United States, the Twitter User Agreement comprises these [Terms of Service](#), our [Privacy Policy](#), the [Twitter Rules](#) and all incorporated policies.



We reserve the right to remove Content that violates the User Agreement, including for example, copyright or trademark violations, impersonation, unlawful conduct, or harassment. Information regarding specific policies and the process for reporting or appealing violations can be found in our Help Center (<https://support.twitter.com/articles/15789#specific-violations> and <https://support.twitter.com/articles/15790>).

## PLATFORM ENFORCEMENT OF FREE SPEECH/PRIVACY STANDARDS

### Hateful conduct policy



**Hateful conduct:** (<https://help.twitter.com/rules-and-policies/twitter-rules#hateful-conduct>) You may not promote violence against or directly attack or threaten other people on the basis of race, ethnicity, national origin, caste, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease. We also do not allow accounts whose primary purpose is inciting harm towards others on the basis of these categories.

**Hateful imagery and display names:** You may not use hateful images or symbols in your profile image or profile header. You also may not use your username, display name, or profile bio to engage in abusive behavior, such as targeted harassment or expressing hate towards a person, group, or protected category.

## CHALLENGES TO PROFESSIONAL JOURNALISM



Chappatte, <http://www.globecartoon.com/>



## THE NEW GOVERNORS



# THE NEW GOVERNORS



# FREEDOM OF EXPRESSION: THE LEGAL FRAMEWORK



## FREEDOM OF EXPRESSION: PROTECTION IN INT. HUMAN RIGHTS ACTS

- **Article 19 of the Universal Declaration of Human Rights**
- **Article 19 of the International Covenant on Civil and Political Rights**
- **Article 10 of the European Convention on Human Rights**
- **Article 13 of the American Convention on Human Rights**
- **Article 9 of the African Charter on Human and Peoples' Rights**
  
- list of international and regional standards:
- <https://www.ohchr.org/en/issues/freedomopinion/pages/standards.aspx>

## **FREEDOM OF EXPRESSION: ART. 19 UDHR**

**Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.**

## ART. 10(1) ECHR

**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. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.**

## ART. 10 ECHR: SCOPE OF PROTECTION

- **freedom to hold opinions**
- **freedom of expression**
  - **active**: freedom to express an opinion and to impart information and ideas (incl. freedom of art)
  - all forms of expression, any media, any content (facts, opinions, entertainment) (*Groppera Radio AG* (1990, 12 EHRR 321))
  - also commercial statements covered, incl. criticism of business practices and commercial publicity
  - **passive**: freedom to receive information
- **freedom of the press and of the media**
- **freedom of the arts**



## ART. 10 ECHR: CONDITIONS FOR INTERFERENCE AND CLASHES OF RIGHTS

- interferences with the freedom of expression permitted only when **(1) prescribed by law;** **(2) adopted in pursuance of one of the objectives listed in art. 10(2);** and **(3) necessary in a democratic society; all conditions must be met**
- art. 10(2) objectives:
  - **national security**
  - **territorial integrity or public safety**
  - for the **prevention of disorder or crime**
  - for the **protection of health or morals**
  - for the **protection of the reputation or rights of others**
  - for **preventing the disclosure of information received in confidence**
  - for **maintaining the authority and impartiality of the judiciary**
- **jurisprudence on clashes of rights**

## **'ANALOGUE' LAW MATTERS**

## JOINT DECLARATION ON FREEDOM OF EXPRESSION AND 'FAKE NEWS', DISINFORMATION AND PROPAGANDA (2017)

**General 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.

Criminal defamation laws are unduly restrictive and should be abolished. Civil law rules on liability for false and defamatory statements are legitimate only if defendants are given a full opportunity and fail to prove the truth of those statements and also benefit from other defences, such as fair comment.

State actors should, in accordance with their domestic and international legal obligations and their public duties, take care to ensure that they disseminate reliable and trustworthy information, including about matters of public interest, such as the economy, public health, security and the environment (...)

**States have a positive obligation to promote a free, independent and diverse communication environment, including media diversity, which is a key means of addressing disinformation and propaganda.**

## US vs. EU APPROACHES TO FREE SPEECH (1)

- **US:**
  - robust protection of free speech under the First Amendment
  - promotion of the 'marketplace of ideas'; bad speech can be cured by more speech
  - restrictions on speech only in a limited number of situations, such as obscenity, child pornography, fraud, treason, incitement to crime, fighting words, true threats
  - since the 2012 Supreme Court decision in *United States v. Alvarez*, it has also become clear that false statements fall within the scope of the First Amendment
  - platforms have limited liability; they are neither speakers nor media organizations; content moderation permitted (safe harbour under section 230 *Communications Decency Act* of 1996, (CDA), codified at 47 U.S.C. §§223, 230)



## US vs. EU APPROACHES TO FREE SPEECH (2)

- **EU:**
  - positive duty of the state to protect freedom of speech and act as the ‘ultimate guarantee’ of media pluralism
  - robust protection of free speech but balanced against other rights and key societal values, such as equality, anti-discrimination and democracy
  - platforms have limited liability but this too is judged against other rights
- **new discrete initiatives to regulate platforms**



# Audiovisual Media Services Directive (AVMSD)

a REVISED media framework for the 21<sup>st</sup> century  #AVMSD #DigitalSingleMarket



## NEW RULES

Video-sharing platforms and social media used for sharing video content will now need to **protect minors from harmful content**, protect citizens from incitement to violence and hatred and from illegal content.

They will also need to respect certain advertising rules and to indicate when user generated videos have an advertising purpose. Video-sharing platforms will also be encouraged to **reduce the exposure of children to ads** for unhealthy foods.



Strengthened **rules against hate speech and terrorist content** across the EU: on TV, VOD and now also on video-sharing platforms.

**Independence of audiovisual regulators** will be reinforced so that their work is not influenced by their governments or industry.



**European works** will be **better promoted** on VOD services - at least 30% share of their catalogues will need to be devoted to European content.

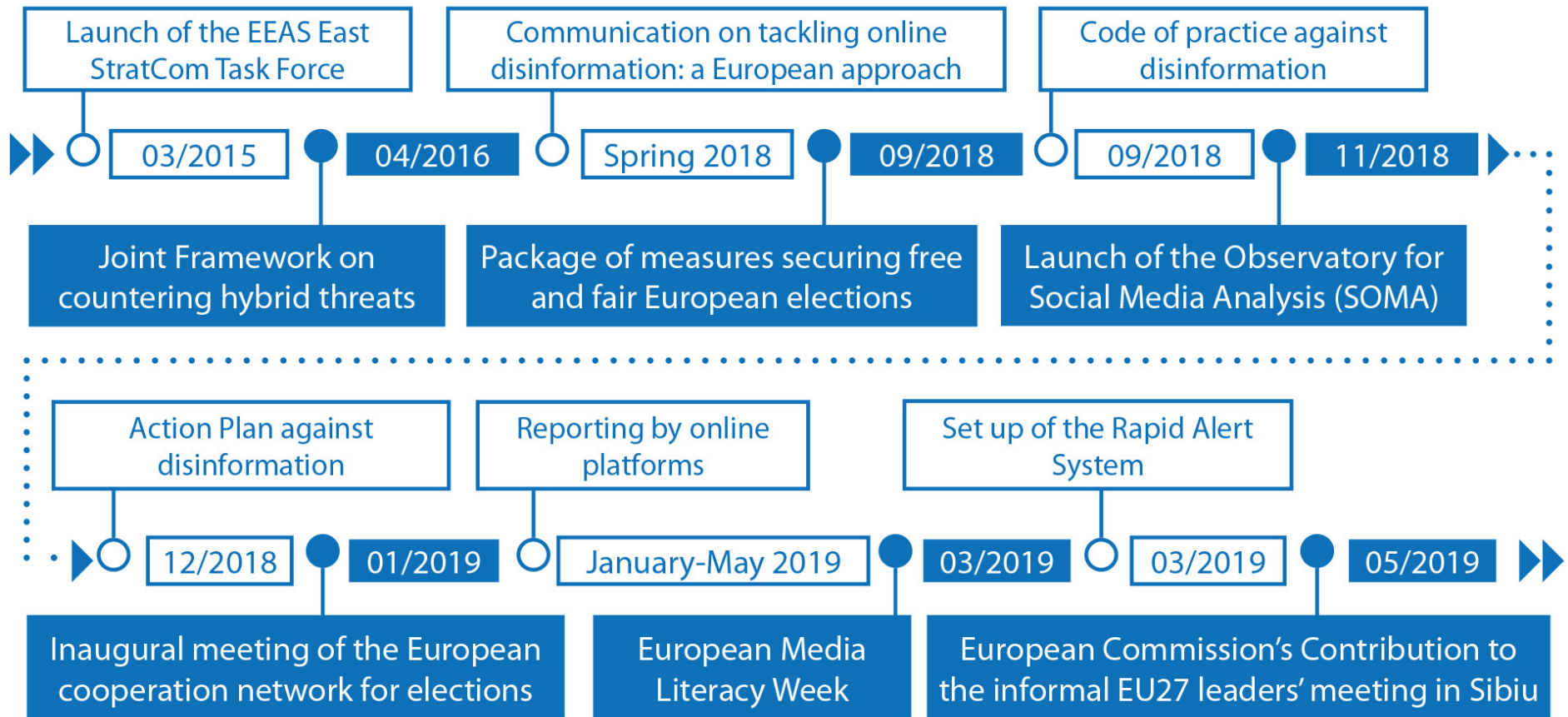


Broadcasters will be given **more flexibility** as to when ads can be shown, but these still cannot make more than 20% of broadcast time during the day (6:00 – 18:00) and during prime time (18:00 – 24:00).

At the same time the rules seeking to **protect the most vulnerable** are reinforced, in particular to protect children from advertising for alcohol or unhealthy foods.



OVERVIEW OF EU JOINT AND COORDINATED ACTION AGAINST DISINFORMATION



- **2016 Code of Conduct on Countering Illegal Hate Speech Online**
- **2018 Code of Practice on Disinformation:** ensures the credibility of information and improves content moderation practices: **by closing false accounts; investing in technologies that help users make informed decisions when receiving false information** (e.g. through trust markers); **prioritizing relevant and authentic information; improving transparency of political and issue-based advertising**
- **2021 new Code of Practice on Disinformation towards a co-regulatory instrument foreseen under the Digital Services Act (DSA)**
- **2022 DSA:** greater burden, especially for Very Large Platforms (VLPs)
  - indicating restrictions in ToS
  - detailed transparency reports
  - complaint management systems
  - out of court dispute settlement
  - priority for trusted flaggers
  - transparency of online advertising
  - transparency of recommender systems
  - data sharing with authorities and researchers
  - compliance officer / external auditing
  - new European Board for Digital Services / for VLPs the Commission can start its own proceedings

## STRONGER REGULATION OF PLATFORMS: THE GERMAN NETWORK ENFORCEMENT ACT

- **Act to Improve Enforcement of the Law in Social Networks (2017)**
- obliges social network providers to delete unlawful content within a short timeframe:
  - obviously unlawful content must be deleted within 24 hours of being reported (without any involvement of the author of the statement)
  - content that is not obviously unlawful, must be deleted within seven days
- failure to do so is a regulatory offence, which can lead to considerable fines
- the law also contains a reporting obligation and a requirement for social network providers outside Germany to have an authorized person within Germany
- updated in June 2021
- **DSA will harmonize laws across EU member states; yet, fake news not directly targeted**



## **EU AS A GLOBAL LEGAL ENTREPRENEUR: THE 'BRUSSELS EFFECT'**

- **EU regulation does have extraterritorial effect and implications for globally present platforms**
- **similarly as with the GDPR, the EU is a legal entrepreneur aiming at creating global standards of protection, which fuels the so-called 'Brussels effect', whereby EU rules become essentially the global ones**
- **the 'Brussels effect' observable also through the CJEU jurisprudence**

***EVA GLAWISCHNIG-PIESCZEK v FACEBOOK IRELAND LIMITED***



***vs.***



## **A European Court Decision May Usher In Global Censorship**

On Thursday, the top European court dealt a major blow to free speech, paving the way for a single nation to act as a global censor and require that online platforms act as its minions in doing so.

## **EVA GLAWISCHNIG-PIESCZEK v FACEBOOK IRELAND LIMITED, CASE C-18/18, JUDGMENT OF 3 OCTOBER 2019**

Directive 2000/31/EC, in particular Article 15(1), must be interpreted as meaning that it does not preclude a court of a Member State from:

- ordering a host provider to remove information which it stores, the content of **which is identical to the content of information which was previously declared to be unlawful**, or to block access to that information, irrespective of who requested the storage of that information;
- ordering a host provider to remove information which it stores, the content of which is **equivalent** to the content of information which was previously declared to be unlawful
- ordering a host provider to remove information covered by the injunction or to block access to that **information worldwide within the framework of the relevant international law**
- a new practice, different from limited to the EU only application of the ‘right to be forgotten’ (C-507/17, *Google v. CNIL*, judgment of 24 September 2019)

## WRAPPING-UP

- **LAW adapts due to the implications of FAKE NEWS, the critical role of platforms as speech intermediaries and their power**
- **yet, this is a highly fluid and complex environment and the identification of the right tools is by no means easy**
- **evident that the different constitutional traditions and understandings of the role of the state in the protection of fundamental rights have led to the emergence of very different regulatory environments**
- **both come with pros and cons and raise questions as to proper balance**
- **at this point in time, we also have ‘geographically-segmented speech’, and regulators would need to make sure that this situation is not exacerbated, either by means of geographic filtering or by agreeing upon new baselines of transparency and accountability, and enhanced cooperation between governments and tech companies**

thank you!

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**related literature: M. Burri, 'Fake News in Times of Pandemic and Beyond: Enquiry into the Rationales for Regulating Information Platforms', in K. Mathis and A. Tor (eds), *Law and Economics of the Coronavirus Crisis* (Berlin: Springer, 2022), 31–58.**