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**To cite this article:** Elena Abrusci (02 Dec 2024): The UK Online Safety Act, the EU Digital Services Act and online disinformation: is the right to political participation adequately protected?\*, Journal of Media Law, DOI: [10.1080/17577632.2024.2425551](https://doi.org/10.1080/17577632.2024.2425551)

**To link to this article:** <https://doi.org/10.1080/17577632.2024.2425551>



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Published online: 02 Dec 2024.



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# The UK Online Safety Act, the EU Digital Services Act and online disinformation: is the right to political participation adequately protected?\*

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## ABSTRACT

Online disinformation is a constant on social media platforms, particularly flourishing in times of elections. While sometimes harmless, it can lead to very serious human rights violations, including the right to political participation. The recent Online Safety Act in the United Kingdom and the EU Digital Services Act promise to make the online space safe by addressing harmful online content. This article explores the extent to which the OSA and DSA protect the right to political participation when addressing online disinformation. By comparing the two instruments, the article argues that they fall short in effectively protecting the two main components of Article 25 ICCPR, the right to vote and the right to stand for election, when threatened by online disinformation. In particular, it shows that the existing provisions are often vague and general with excessive deference to online platforms, urging strong enforcement and a more prominent role for regulators.

**ARTICLE HISTORY** Received 8 August 2024; Accepted 22 October 2024

**KEYWORDS** Disinformation; political participation; DSA; OSA

## Introduction

Online disinformation is one of the features of the past decade.<sup>1</sup> Since the 2016 US presidential elections and the 2016 Brexit referendum, there has

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\*This article was presented as a draft paper at the workshop 'The Human Right to Democracy in the Digital Age' hosted at the Bonavero Institute of Human Rights, University of Oxford on 14 May 2024. I am indebted to Tanya Krupiy, Katie Pentney, Martin Sheinin, Richard Mackenzie-Gray Scott, Six Silberman, Nina Keese, Neli Frost and Linda Eggert and to the Journal of Media Law's editors and anonymous peer reviewer for invaluable feedback and comments.

<sup>1</sup>Samantha Bradshaw and Philip N Howard, *The Global Disinformation Order 2019 Global Inventory of Organised Social Media Manipulation* (Oxford Internet Institute and University of Oxford 2019); W Lance Bennett and Steven Livingston (eds), *The Disinformation Age: Politics, Technology and Disruptive Communication in the United States* (CUP 2020); Philip N Howard, *Lie Machines* (Yale University Press 2020).

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not been one election that was not characterised by a more or less big controversy on the role that fake news, bots and trolls could have played in shaping the results.<sup>2</sup> With the news being mainly provided and received through social media, and political communication changed into a new and more tailored individual marketing strategy, disinformation has quickly become a prime tool for directing the course of elections. In doing so, disinformation not only threatens the right to receive information but also that of political participation. Recent surveys by IPSOS and UNESCO conducted in 16 countries around the world confirmed that for 56% of respondents social media is the primary source of news (figure confirmed in the UK by the Ofcom News Consumption survey with 59% of respondents accessing news primarily through social media)<sup>3</sup>, 87% of them expressed concerns about the impact of disinformation on the upcoming elections in the country and 89% called their governments and regulators to do more to ensure trust and safety on social media platforms during election campaigns.<sup>4</sup>

The quick development of AI-powered tools that make it extremely easy and accessible to create altered digital content (deepfakes) could further impact the normal course of elections and threaten democracy.<sup>5</sup>

As a consequence, states have been urged to intervene by enacting legislation that could protect online users from disinformation. In some countries, this has taken the form of anti-disinformation laws, where the spreading of this false information is criminalised.<sup>6</sup> In others, addressing disinformation fits within a broader plan to ensure ‘safety’ online and regulate the online space.<sup>7</sup> Among the most recent examples, are the EU Digital Services Act and the UK Online Safety Act.

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<sup>2</sup>Serena Giusti and Elisa Piras (eds), *Democracy and Fake News: Information Manipulation and Post-Truth Politics* (Routledge 2020) 1–18; Spencer McKay and Chris Tenove, ‘Disinformation as a Threat to Deliberative Democracy’ (2021) 74 *Political Research Quarterly* 703, 703–17.

<sup>3</sup>Ofcom, *News Consumption in the UK: 2024*, Research findings report, 10 September 2024.

<sup>4</sup>IPSOS- UNESCO, ‘Survey on the Impact of Online Disinformation and Hate Speech’, September 2023, <<https://www.ipsos.com/sites/default/files/ct/news/documents/2023-11/unesco-ipsos-online-disinformation-hate-speech.pdf>> accessed 27 September 2024.

<sup>5</sup>House of Commons Digital, Culture Media and Sport Committee, Disinformation and ‘Fake News’: Final Report (HC 1791, 18 February 2019) 68–77; Stephanie Kirchgaessner and others, ‘Revealed: The Hacking and Disinformation Team Meddling in Elections’ *The Guardian* (London, 15th February 2023); Dan Milmo and Alex Hern, ‘Elections in UK and US at Risk from AI-driven Disinformation, say experts’ *The Guardian* (London, 20th May 2023); Marina Adami, How AI-generated disinformation might impact this year’s elections and how journalists should report on it, Reuters Institute- University of Oxford, 15 March 2024, <<https://reutersinstitute.politics.ox.ac.uk/news/how-ai-generated-disinformation-might-impact-years-elections-and-how-journalists-should-report>> accessed 27 September 2024.

<sup>6</sup>Jason Pielemeier, ‘Detangling Disinformation: What Makes Regulating Disinformation so Difficult?’ (2020) 4 *Utah Law Review* 917.

<sup>7</sup>Christopher Marsden, Trisha Mayer and Ian Brown, ‘Platform values and democratic elections: How can the law regulate digital disinformation?’ (2020) 36 *Computer Law & Security Review* 105373.

Both instruments have been already largely analysed and criticised under a human rights lens, especially for the threats they pose to freedom of expression.<sup>8</sup> However, little attention has been dedicated to how they impact the right to political participation, provided by Article 25 of the International Covenant on Civil and Political Rights (ICCPR). With the online space becoming the new public square and social media being the main vehicle for news sharing, electoral campaigns and, frequently, even political debate, it is necessary to conduct a dedicated analysis of how this right is affected. The right to political participation, which includes the right to vote, to stand for elections and to take part in political debate, is often overlooked and considered not as a standalone right but as an emanation of the concept of ‘democratic society’.<sup>9</sup> While this certainly acknowledges the importance of the right for the maintenance of a democracy, it does not recognise its legal value, as a provision determining positive and negative obligations upon states.

Online information manipulation, including online disinformation, significantly impacts the right to political participation, altering the relationship between voters and candidates and eroding the trust in the information received.<sup>10</sup> It could also lead to vote suppression or to the decision of candidates to step down following threats and harassment campaigns.<sup>11</sup> As such, adequate legislation is needed to ensure the right is protected. However, excessively restrictive legislation could also negatively impact the enjoyment of this right, especially when it overly restricts freedom of expression.<sup>12</sup>

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<sup>8</sup>See, among others, John Barata, ‘The Digital Services Act and Its Impact on the Rights to Freedom of Expression: Special Focus on Risk Mitigation Obligations’ (2023) *Plataforma por la Libertad de Información*; Peter Coe, ‘Tackling Online False Information in the United Kingdom: The Online Safety Act 2023 and its Disconnection from Free Speech Law and Theory’ (2023) 15 *Journal of Media Law* 2, 213–42; Ricki-Lee Gerbrandt, ‘Media freedom and Journalist Safety in the UK Online Safety Act’ (2023) 12(2) *Journal of Media Law* 179–212; Ellen Judson, Beatriz Kira and Jeffrey W Howard, ‘The Bypass Strategy: Platforms, the Online Safety Act and Future of Online Speech’ (2024) *Journal of Media Law*; Eliza Bechtold, ‘Regulating Online Harms: An Examination of Recent Developments in the UK and the US through a Free Speech Lens’ (2024) *Journal of Media Law*.

<sup>9</sup>McKay and Tenove (n 2), 707–10.

<sup>10</sup>Kate Jones, ‘Online Disinformation and Political Discourse: Applying a Human Rights Framework’ (2019) Chatham House; Christopher Marsden, Ian Brown and Michael Veale, ‘Disinformation and Digital Dominance: Regulation through the Lens of the Election Lifecycle’ in Martin Moore and Damian Tambini (eds) *Dealing with Digital Dominance* (OUP 2021).

<sup>11</sup>Susan Morgan, ‘Fake News, Disinformation, Manipulation and Online Tactics to Undermine Democracy’ (2018) 3 *Journal of Cyber Policy* 39–43; Elizabeth F Judge and Amir M Korhani, ‘Disinformation, Digital Information Equality and Electoral Integrity’ (2020) 19 *Election Law Journal* 240; Ian Vandewalker, *Digital Disinformation and Vote Suppression* (2020) Brennan Center for Justice Research Report.

<sup>12</sup>Fernando Nunez, ‘Disinformation Legislation and Freedom of Expression’ (2020) 10 *UC Irvine Law Review* 783; Donato Vese, ‘Governing Fake News: The Regulation of Social Media and the Right to Freedom of Expression in the Era of Emergency’ (2021) 13 *European Journal of Risk Regulation* 477–513; Irene Khan, *Disinformation and freedom of opinion and expression: report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression* (2021) A/HRC/47/25; Katie Pentney, ‘Tinker, Tailor, Twitter, Lie: Government Disinformation and Freedom of Expression in a Post-Truth Era’ (2022) 22 *Human Rights Law Review* 1–29.

This article explores how the EU Digital Services Act and the UK Online Safety Act protect the right to political participation while addressing online disinformation. It shows how little attention both instruments dedicate to protecting the right to political participation from disinformation. In particular, the article reflects on the fact that although both instruments were adopted to address information manipulation also in times of election, the right to political participation is never actually considered in the relevant provisions. While all human rights find limited meaningful protection, the specific right to political participation is particularly disregarded. However, the recent EU Commission guidelines on the duties of service providers in times of elections address several of these gaps, providing an interesting example and guidance that Ofcom could follow in the implementation and enforcement of the UK Online Safety Act.

Disinformation is usually defined as the spreading of false information with the intent of creating harm.<sup>13</sup> This is different from misinformation where such harmful intent is not present and mal-information where information is correct but twisted or presented in a deliberately harmful way.<sup>14</sup> In this paper, the term disinformation is used to include both disinformation and misinformation, i.e. the spreading of false information regardless of the intent behind it.

The article only looks at the relevant provisions for the enjoyment of the right to political participation when threatened by disinformation. Consequently, it will not provide an overall analysis or discussion of the implication of the two legislative instruments on human rights or the practice of social media platforms as this will be way outside the scope of this article.

## **The impact of disinformation on the right to political participation**

It is now well-established that disinformation can have a significant impact on people's minds and thoughts.<sup>15</sup> The news and the content we read on social media influence what we think, how we look at the world and, ultimately, who we are. As Aristotle said, humans are 'political animals' (ζῷον πολιτικόν)<sup>16</sup> and, since we decided to live in collective and organised

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<sup>13</sup>Alice Marwick and Rebecca Lewis, *Media Manipulation and Disinformation Online* (2017) Data & Society Research Institute; Cherilyn Ireton and Julie Posetti, *Journalism, fake news & disinformation: handbook for journalism education and training* (UNESCO 2018).

<sup>14</sup>*Ibid.* This is also the classification used by the European Democracy Action Plan (2020).

<sup>15</sup>Zach Bastick, 'Would you Notice if Fake News Changed your Behavior? An Experiment on the Unconscious Effects of Disinformation' (2021) 116 *Computers in Human Behavior* 106633; Ullrich K H Ecker and others, 'The Psychological Drivers of Misinformation Belief and its Resistance to Correction' (2022) 1 *Nature Reviews Psychology*, 13–29; Alexa Raad, 'Protecting Freedom of Thought: Mitigating Technological Enablers of Disinformation' (2024) Centre for International Governance Innovation, Policy Brief No. 4.

<sup>16</sup>Aristotle, *Politics*, Book 1, section 1253a.

communities, one of the key aspects of our life is the participation in the political affairs of the society we live in.

The right to political participation is thoroughly protected by international human rights law. The International Covenant on Civil and Political Rights provides in Article 25 that ‘every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.’

This provision is wide-encompassing and, in line with the principle of interdependence of rights, requires the enjoyment of other fundamental rights and freedoms to be fully protected, including the freedom of expression, freedom of association, and freedom of assembly. Political participation is a flexible concept and can be understood in a more narrow or wide way.<sup>17</sup> As explained in Human Rights Committee’s General Comment No. 25, the right to political participation ‘requires the full enjoyment and respect of the rights guaranteed in Articles 19, 21 and 22 of the Covenant, including freedom to engage in political activity individually or through political parties and other organisations, freedom to debate public affairs, to hold peaceful demonstration and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.’<sup>18</sup> This is part of the reason why such a right is usually considered a consequence of the enjoyment of other rights and has rarely been the focus of scholars’ attention.<sup>19</sup>

Similar provisions to Article 25 ICCPR can be found in the American Convention on Human Rights (Article 23) and in the African Charter on Human and Peoples’ Rights (Article 13) but there is no explicit right to political participation in the European Convention on Human Rights (ECHR). The ECHR contains a ‘right to free elections’ (Protocol 1, Article 3) and the European Union Charter of Fundamental Rights provides in Articles 39 and 40 a right to vote and stand as a candidate but, strangely, only for elections to the European Parliament and at municipal elections. This may be due to the overlapping concept of the rule of law, which is sometimes confused with the right to political participation, as the two have several common elements.<sup>20</sup>

<sup>17</sup>Patrick J Conge, ‘The Concept of Political Participation: Towards a Definition’ (1998) 20(2) *Comparative Politics* 241.

<sup>18</sup>UN Human Rights Committee, *General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote)*, UN Doc. CCPR/C/21/Rev.1/Add.7 (1996) para 25. See also HRC, *Gauthier v Canada*, No 633/1995, para 13.4 (hereinafter HRC GC No.25)

<sup>19</sup>Fabienne Peter, ‘The Human Rights to Political Participation’ (2013) 7 *Journal of Ethics & Social Philosophy* 2 iii, 7–9.

<sup>20</sup>Gregory H Fox, ‘The Right to Political Participation in International Law’ (1992) 86 *Proceedings of the ASIL Annual Meeting 1992*, 249–53.

While Article 25 ICCPR protects the right to political participation at any time, its importance is heightened in times of election. This somehow matches the time when disinformation campaigns are at their highest level, due to the political advantages that could derive from conditioning the electoral results in one or the other way. This has been consistently observed during political elections in almost all countries globally in the last eight years and, certainly, in the European space and the UK.<sup>21</sup> While disinformation can certainly impact the right to political participation, a different question is whether disinformation has an actual impact on election results. Studies in several countries show that disinformation may be considered a contributing factor to the election results but is never the main or sole cause of the outcome.<sup>22</sup> This is extremely important as it puts into perspective the effective urgency of curbing down disinformation at all costs for the sake of protecting democracy.

Worth noticing is also that the rights conferred by Article 25 ICCPR are valid only for the state's citizens and not for all people, like other ICCPR rights.<sup>23</sup> This is particularly relevant in the context of online media, where users transcend traditional country boundaries and where it is hard (if not impossible) to ascertain the nationality of online users. Klein reflects that to overcome this problem, we could understand the 'information society' as a society where 'public affairs are conducted in political institutions separate from existing national governments. These new institutions constitute 'governments', and the people participating in those governments are 'citizens'.<sup>24</sup> This would move the burden to respect and protect the right to political participation from the states to the social media companies or other international institutions (e.g. ICANN) that govern the online space.

To understand how disinformation may impact the right to political participation, it is useful to break down the different specific components of this right and individually analyse both the individual rights citizens have and the positive obligations for states that derive from Article 25 ICCPR.

### ***The right to engage in public debate***

First, Article 25 ICCPR protects the right to engage in public debate, which includes any type of discussion and confrontation on relevant public issues. Such a right, which is linked to freedom of expression and the right to receive

<sup>21</sup>Max Bader, 'Disinformation in Elections' (2018) 29 Security and Human Rights 24–35.

<sup>22</sup>Nir Grinberg and others, 'Fake News on Twitter during the 2016 Presidential Election' (2019) 363 Science 6425, 374–78; Michele Cantarella, Nicolás Fraccaroli, Roberto Volpe, 'Does Fake News Affect Voting Behaviour?' (2023) 52 Research Policy 1; Howard (n 1); Howard and Bradshaw (n 1).

<sup>23</sup>Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press 2013) 728.

<sup>24</sup>Hans Klein, 'The Right to Political Participation and the Information Society' in Rikke Frank Jorgensen (ed), *Human Rights in the Global Information Society* (MIT Press 2006) 186.

information (Article 19 ICCPR), is based on the assumption that voters should have adequate information on which to base their choices.<sup>25</sup> More specifically, as the Human Rights Committee (HRC) clarifies, ‘voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind’.<sup>26</sup> As such, one could consider Article 25 ICCPR as adding a specification and a purpose to Article 19 ICCPR, further stressing the fundamental role of freedom of expression in a democratic society. In doing so it does not change the main features of the freedom of expression provision, nor its application in practice. It still imposes positive obligations on the state to ensure that everyone can receive a plurality of information to be able to freely form their opinions and that, consequently, everyone should have the right to freely express their opinions in any form. Moreover, it adds a further responsibility on the state to ensure that voters are not victims of ‘compulsion, inducement or manipulative interference’ when accessing information. This is a slightly higher bar compared to the usual understanding of the positive obligations arising from Article 19 ICCPR. However, this may align with a thorough interpretation of freedom of thought and opinion, requiring states to ensure that everyone is able to freely develop their thoughts and opinions without interference.<sup>27</sup> Yet, the usual limitations and lawful restrictions set out in Article 19 (3) ICCPR, as well as those provided by Article 20 ICCPR, apply.

The impact of disinformation on the right to engage in public debate and the linked freedom of expression is extensive and has been widely discussed.<sup>28</sup> On the one hand, the spreading of disinformation, especially online, could impact the right to engage in a public debate and restrict the right to receive information.<sup>29</sup> Both state propaganda based on disinformation or foreign campaigns aimed at impacting upcoming elections could significantly influence domestic public discussions.<sup>30</sup> Culloty and Suiter have shown how online disinformation shapes the public debate on sensitive issues such as immigration, affecting people’s perceptions and opinions.<sup>31</sup> Similarly, Gorell and others have demonstrated that disinformation is

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<sup>25</sup>HRC, GC No. 25, para 12.

<sup>26</sup>*Ibid.*, para 19.

<sup>27</sup>Ahmed Shaheed, Freedom of thought: report of the UN Special Rapporteur on freedom of religion or belief, (2021), A/76/380.

<sup>28</sup>Organization for Security and Co-operation in Europe (OSCE). Joint declaration on freedom of expression and ‘fake news’, disinformation and propaganda, March 2017; Khan, (n 11).

<sup>29</sup>*Ibid.*

<sup>30</sup>Dean Jackson, How disinformation impacts politics and publics, International Forum for Democratic Studies – National Endowment for Democracy (NED), 2018 Issue Brief, <<https://www.ned.org/wp-content/uploads/2018/06/How-Disinformation-Impacts-Politics-and-Publics.pdf>> accessed 27 September 2024.

<sup>31</sup>Eileen Culloty and Jane Suiter, ‘How Online Disinformation and Far-right Activism is Shaping Public Debates on Immigration’ in Marie McAuliffe (ed) *Research Handbook on International Migration and Digital Technology* (Edward Elgar 2021) 316–29.



influencing online public debate, polarising society and misleading potential voters.<sup>32</sup>

Such an impact of disinformation on public discourse requires states to take proactive measures to address the harmful impact of disinformation and address the chilling effect that disinformation can cause through silencing minorities' voices.<sup>33</sup> The most common approach is enacting anti-disinformation legislation, making certain types of disinformation illegal. Moreover, as Pentney argues, states have a positive obligation to create an environment that encourages active participation in public discussion, through regulation or media literacy initiatives.<sup>34</sup>

On the other hand, an overly restrictive intervention against disinformation could significantly impact the right to engage in a public debate. It follows that, when regulating disinformation, states should be extremely mindful not to overly restrict freedom of expression, as any attempt to police what can or cannot be published online inevitably restricts expression and the ability to take part in the public debate.<sup>35</sup> As the European Court of Human Rights held in *Salov v Ukraine*, 'Article 10 of the Convention as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention'.<sup>36</sup> However, as freedom of expression is a qualified right, it can be lawfully limited when proportionate, prescribed by law and in pursuance of a legitimate aim. The issue is whether a fair balance is struck and if the legislation does not allow over or arbitrary restriction to freedom of expression.

### **The right to vote**

Second, the right to political participation provides the right to vote. The right to vote includes both the right to cast the vote and the right to receive correct information about the modalities of the voting procedures, such as information on where and when the voting takes place and what are the needed documents to exercise the right. This right equally imposes a respective positive obligation on the State to ensure that everyone eligible

<sup>32</sup>Genevieve Gorrell and others, 'Partisanship, Propaganda and Post-Truth Politics: Quantifying Impact in Online Debate' (2019) 7 Journal of Web Science, arXiv:1902.01752; Howard and Bradshaw (n 1).

<sup>33</sup>Suneal Bedi, 'The Myth of the Chilling Effect' (2021) 35 Harvard Journal of Law & Technology 267.

<sup>34</sup>Katie Pentney, 'State's Positive Obligation to Create a Favourable Environment for Participation in Public Debate: A Principle in Search of a Practical Effect?' (2024) Journal of Media Law 1–32.

<sup>35</sup>Barrie Sander, 'Freedom of Expression in the age of Online Platforms: The Promise and Pitfalls of a Human Rights Based Approach to Content Moderation' (2020) 43 Fordham International Law Journal 939; Pielemeier (n 5), 925.

<sup>36</sup>*Salov v Ukraine*, Application No. 65518/01 (ECtHR, 6 September 2005), para 13.

to vote has the actual possibility to enjoy their right. While it is completely up to the state to decide on eligibility criteria and on the most appropriate modalities to facilitate the carrying out of the voting procedures, states have specific duties. As established by the HRC in its General Comment No. 25, 'States must take effective measures to ensure that all persons entitled to vote are able to exercise that right [...] Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty or impediments to freedom of movement which prevent persons entitled to vote from exercising their right effectively'.<sup>37</sup>

Disinformation could impact the right to vote in a wide range of ways, as acknowledged by the UN Guidelines for States on the effective implementation of the right to participate in public affairs.<sup>38</sup> With the help of bots and trolls or more sophisticated deepfakes, disinformation could distort the public debate, altering the opinions and positions of the different candidates, providing wrong and misleading information about when to go to the voting station and, ultimately, manipulating voting or participation through micro-targeting.<sup>39</sup> Moreover, there have been instances of campaigns aimed at discouraging voters from exercising their right to vote, particularly targeting specific ethnic, religious or other minorities.<sup>40</sup> It follows that states have positive obligations to ensure that disinformation campaigns do not jeopardise the actual exercise of the right to vote.

### ***The right to run for and hold office***

Third, Article 25 ICCPR also protects the right to run and hold office 'without political interference or pressure'. This includes the right to stand for election, without the threat of being targeted with online disinformation campaigns and hate speech.<sup>41</sup> From a state perspective, this imposes a positive obligation to ensure that candidates are concretely able to run for office 'on general terms of equality'. States are free to decide on eligibility rules, but these should be 'justifiable on objective and reasonable criteria'.<sup>42</sup> Moreover, states should ensure that any person entitled to stand for election does not

<sup>37</sup>HRC, GC No. 25, para 11 and 12.

<sup>38</sup>UN Office of the High Commissioner for Human Rights, Guidelines for States on the effective implementation of the right to participate in public affairs (2018), para 9.

<sup>39</sup>Samantha Bradshaw and Philip N Howard, *Troops, Trolls and Troublemakers: A Global Inventory of Organized Social Media Manipulation* (2017) Oxford Internet Institute Report; Combating Information Manipulation: A Playbook for Elections and Beyond (2021) NDI, IRI and Stanford Internet Observatory Report, <<https://www.ndi.org/sites/default/files/InfoManip%20Playbook%20updated%20FINAL.pdf>> accessed 27 September 2024; Khan (n 11).

<sup>40</sup>See, for instance, studies reported by 'Election disinformation campaigns targeted voters of color in 2020. Experts expect 2024 to be worse, *Politico* (27 July 2023) < <https://www.politico.com/news/2023/07/29/election-disinformation-campaigns-targeted-voters-of-color-in-2020-experts-expect-2024-to-be-worse-00108866>> accessed 27 September 2024.

<sup>41</sup>Jones (n 9), 49.

<sup>42</sup>HRC, GC No. 25, para 15.

suffer any discrimination or disadvantage. On the contrary, states have a positive obligation to encourage and facilitate the number of candidates belonging to minorities.<sup>43</sup>

Disinformation has been widely used to discredit electoral candidates, dissuade potential candidates from standing or encourage them to withdraw. Studies show that this is particularly true for women or candidates belonging to minority groups.<sup>44</sup> Likewise, inadequate anti-disinformation initiatives could equally jeopardise the right to run for and hold office by putting excessive restrictions on freedom of expression and practically limiting the possibility of a candidate to conduct their electoral campaign and to have actual chances of being elected. As mentioned above, this requires extremely careful design of anti-disinformation policies to strike a fair balance between competing interests and rights.

## **Regulation attempts of online content in the European Union and the United Kingdom**

Since disinformation and ‘fake news’ became a buzzword around 2016 with the Brexit referendum and the US presidential elections, several countries around the world have resorted to dedicated legislation to prohibit and sometimes criminalise the production and spreading of certain types of false information.<sup>45</sup> These ‘anti-disinformation laws’ have been widely criticised by scholars and practitioners for their potential to overly restrict freedom of expression and the subjective assessment of what constitute the truth, especially in the context of political and electoral debate.<sup>46</sup>

Partially taking these concerns into account, the most recent approaches to regulating online content focus on more comprehensive legislation aimed at imposing responsibilities on online platforms and intermediaries with the final goal of keeping the online space safe. Among the most recent and notable attempts, one can list the UK Online Safety Act (2023) and the EU Digital Services Act (2023). These two instruments, considered by their

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<sup>43</sup>HRC, Concluding Observations, France, CCPR/C/FRA/CO/4, para 12.

<sup>44</sup>Dhanaraj Thakur, DeVan Hankerson Madrigal, ‘An Unrepresentative Democracy: How Disinformation and Online Abuse Hinder Women of Color Political Candidates in the United States’, Center for Democracy & Technology, 27 October 2022, <<https://cdt.org/insights/an-unrepresentative-democracy-how-disinformation-and-online-abuse-hinder-women-of-color-political-candidates-in-the-united-states/>> accessed 27 September 2024; Neil Johnston Nerys Davies, Intimidation of candidates and voters, House of Commons Library Research Briefing, 8 April 2024.

<sup>45</sup>Poynters, A guide to anti-disinformation actions around the world, <<https://www.poynter.org/ifcn/anti-misinformation-actions/>> accessed 27 September 2024.

<sup>46</sup>Paolo Cavaliere, ‘The Truth in Fake News: How Disinformation Laws are Reframing the Concepts of Truth and Accuracy on Digital Platforms’ (2022) 3 European Convention on Human Rights Law Review 481–523; Gabrielle Lim and Samantha Bradshaw, Chilling Legislation: Tracking the Impact of “Fake News” Laws on Press Freedom Internationally (2023) Centre for International Media Assistance – NED Report.

respective promoters as ‘world-leading’,<sup>47</sup> have different scopes and functioning, but they share the same intent and rationale of regulating the online content space with the, at least declared, goal of protecting citizens, users and democracy. This section will introduce these two regimes and highlight their main features before moving, in the following section, to the analysis of how they consider, respect and protect the right to political participation.

### ***The UK Online Safety Act***

On 26 October 2023, the Online Safety Act (OSA) was finally enacted.<sup>48</sup> After more than five years of iteration and discussion, this very debated piece of legislation aims to make the United Kingdom the ‘safest place to be online’.<sup>49</sup> Arguably, it does not do that, and it addresses even less the harmful impact of disinformation in the political context. Scholars and practitioners have extensively engaged with the Act in all its draft forms, criticising its scope, formulation and threats to fundamental rights, especially to freedom of expression.<sup>50</sup>

In a nutshell, the OSA is a risk-based regime that establishes a duty of care upon service providers to identify, mitigate and remove harmful online content, with particular attention to content that could harm children. The Act also distinguishes different categories of service providers, depending on their size (in terms of users) and role, and imposes on them different obligations. The biggest platforms, which include the usual YouTube, WhatsApp, Instagram, X and TikTok, are labelled as Category 1 services and bear the highest level of obligations.

Under the new OSA regime, Ofcom (the UK media regulator) becomes the Online Safety regulator, with the power to provide further guidance on the implementation of the regime and to issue fines to companies that do not comply with their duty of care.

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<sup>47</sup>Benjamin Farrand, ‘How do we understand online harms? The impact of conceptual divides on regulatory divergence between the Online Safety Act and Digital Services Act’ (2024) *Journal of Media Law* 1–23.

<sup>48</sup>Online Safety Act 2023, 26 October 2023 (c. 50).

<sup>49</sup>UK Government, ‘UK Children and Adults to be safer online as world-leading bill becomes law’, Press release, 26 October 2023, <<https://www.gov.uk/government/news/uk-children-and-adults-to-be-safer-online-as-world-leading-bill-becomes-law>> accessed 27 September 2024.

<sup>50</sup>Lorna Woods, ‘The Duty of Care in the Online Harms White Paper’ (2019) 11 *Journal of Media Law* 6–17; Peter Coe, ‘The Draft Online Safety Bill and the Regulation of Hate Speech: have we Opened a Pandora’s Box?’ (2022) 14(1) *Journal of Media Law* 50–75; Alexander Dittell, ‘The UK’s Online Safety Bill: The Day We Took a Stand against Serious Online Harms or the Day we Lost Our Freedoms to Platforms and the State?’ (2022) 5(2) *Journal of Data Protection & Privacy* 183–94; Coe (n 7), 213–42; Article 19, UK: Online Safety Bill is a serious threat to human rights online’, 5 April 2022, <<https://www.article19.org/resources/uk-online-safety-bill-serious-threat-to-human-rights-online/>> accessed 27 September 2024; Electronic Frontier Foundation: The UK Online Safety Bill: A Massive Threat to Online Privacy, Security and Speech, 19 September 2023, <<https://www.eff.org/pages/uk-online-safety-bill-massive-threat-online-privacy-security-and-speech>> accessed 27 September 2024.

The OSA is an extremely lengthy piece of legislation, yet the attention to disinformation is surprisingly limited. The only time in the OSA where disinformation is explicitly mentioned is in section 152 where the Act requires Ofcom to establish an advisory committee on disinformation and misinformation. Such a body should advise Ofcom on how regulated services are dealing with mis and disinformation and support Ofcom's role in promoting media literacy.<sup>51</sup> Nevertheless, there are two main ways in which the Act addresses disinformation. First, it prohibits the publication of 'false communication' and, second, it offers a 'triple-shield', as Coe argues, that could allow the regulation and removal of both illegal and 'legal but harmful content', both categories where disinformation may fit.<sup>52</sup>

The false communication offence is provided by section 179 OSA. This prohibits the publication of content when the following criteria are met: (1) the person sends a message (understood as including also the publication and transmission on social media or enabling this to happen); (2) the message conveys information that the person knows to be false; (3) at the time of sending it, the person intended the message, or the information in it, to cause non-trivial psychological or physical harm to a likely audience; (4) the person has no reasonable excuse for sending the message.

This definition is very hard to meet and especially to prove. First, it requires demonstrating that the sender knew, rather than believed, the information to be false, significantly increasing the threshold. Moreover, this connotation makes mal-information fall outside the scope of the provision completely. Furthermore, especially in the context of political information, defining truth and falsity is often extremely difficult and any ultimate decision could be continuously challenged.<sup>53</sup> Second, the definition requires the sender to have the deliberate intent of causing 'non-trivial psychological or physical harm'. Besides the obscurity of what this expression means and the threshold of severity of the intended harm,<sup>54</sup> there are objective problems in assessing the *mens rea* of the sender of the message. The assessment becomes even harder when the message is further shared by people without such intent but with the ultimate result of inflicting serious harm. Moreover, the OSA provides an exemption for 'recognised news publishers', whose content does not fall within the scope of the regime.<sup>55</sup> This automatically excludes any disinformation contained in mainstream media and posted on social media, which is quite alarming since some UK outlets are notorious for having spread harmful disinformation in the past.<sup>56</sup>

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<sup>51</sup>OSA, s 152.

<sup>52</sup>Coe (n 7), 230.

<sup>53</sup>Cavaliere (n 43).

<sup>54</sup>Coe (n 7), 232.

<sup>55</sup>OSA, s 18. See also s 56.

<sup>56</sup>See, for instance, the findings in Andrew Chadwick, Cristian Vaccari and Ben O'Loughlin, 'Do Tabloids Poison the Well of Social Media? Explaining Democratically Dysfunctional News Sharing' (2018) 20(1) *New Media & Society* 4255–74.

As Coe argues, disinformation could be also regulated through a ‘triple-shield’ contained in the OSA.<sup>57</sup> The first shield is section 10 (2) and (3) OSA on ‘priority illegal content’. Under section 10 (3) of the OSA, all regulated services have a duty to ‘(a) minimise the length of time for which any priority illegal content is present; (b) where the provider is alerted by a person to the presence of any illegal content or becomes aware of it in any other way, swiftly take down such content’.<sup>58</sup> However, the effectiveness and potential implications of this duty hinge on a crucial point: the definition of ‘illegal content’. The OSA, as defined in section 59(2), identifies illegal content as content amounting to a ‘relevant offence’, including the newly created offence of ‘false communication’ within the Act itself.<sup>59</sup> Notably, the responsibility for identifying this illegal content falls on the service providers, who are required to act when they have ‘reasonable ground to infer’ that the elements of the offence are met.<sup>60</sup> This creates a significant concern. By delegating the assessment of offences and content removal decisions entirely to private companies, the OSA raises questions about due process and the potential for stifling legitimate expression. As Harbinja and Ni Loideain aptly point out, this ‘illegality duty’ could incentivize platforms to adopt an overly cautious approach.<sup>61</sup> This might translate into programming algorithms and moderation protocols to remove any content even remotely suspected of illegality. Such a scenario could lead to significant filtering of online content, potentially impacting freedom of expression and hindering a free and pluralistic debate.

Second, the OSA further expands the responsibilities of large platforms (Category 1) by mandating the removal of content prohibited by their terms of service and requiring the establishment of mechanisms for users and affected persons to report such content or individuals in violations of the terms of service.<sup>62</sup> As Coe argues, disinformation could be certainly included in this content takedown process if listed in the terms of reference.<sup>63</sup> Yet, by doing so, the OSA leaves even a wider margin to the private actors to decide what content should or should not appear online and it may ultimately lead just to self-regulation on statutory footing.

Third, it allowed adults to tailor the type of content they see via toggles, giving them the possibility to (potentially) avoid harmful content should they not wish to see it. This may appear as a solution based on giving more agency to the user and more control over the information they

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<sup>57</sup>Coe (n 7) 230.

<sup>58</sup>OSA, s 10(3)(a) and (b).

<sup>59</sup>OSA, s 59(2).

<sup>60</sup>OSA, s 192(5), (6)(a).

<sup>61</sup>Edina Harbinja and Nora Ni Loideain, *Making Digital Streets Safe? Progress on the Online Safety Bill* (2023) Aston University/IALS Policy Report.

<sup>62</sup>OSA, s 10 (5), (6), (7), (8), (9) and s 17 (4) and (5).

<sup>63</sup>Coe (n 7) 234.

access online. While this is certainly needed, it does not substitute the responsibility of the service providers and the state to comply with their legal obligations.

Finally, section 17 requires Category 1 services to ‘protect content of democratic importance’. The provision mandates platforms to use ‘proportionate systems and processes designed to ensure that the importance of the free expression of content of democratic importance is taken into account’<sup>64</sup> when deciding on content moderation and curation measures. While this appears to safeguard public debate content from undue restriction, the scope of the duty remains concerningly vague. Section 17(7)(b) defines content of democratic importance as any content ‘that is or appears to be specifically intended to contribute to the democratic political debate in the United Kingdom or a part or area of the United Kingdom’.<sup>65</sup> Such a broad definition could be applied to virtually any content, given the potential for someone in the UK to be interested in the topic at hand. This, coupled with the prevalence of disinformation often masquerading as legitimate political discourse, raises concerns about the effectiveness of this safeguard as this could be used to justify both a full take-down of the content as disinformation or a complete lack of moderation due to free speech and democracy concerns.

### ***The EU Digital Services Act***

The Digital Services Act (DSA) is part of the package of legislation adopted in the EU in the last few years to address the emerging challenges posed by technology. Together with the Digital Market Act, it forms the Digital Services Act package to ‘create a safer digital space in which the fundamental rights of all users of digital services are protected’.<sup>66</sup> As Husovec and Roche Laguna explain, the DSA preserves and upgrades the liability exemptions for online intermediaries while simultaneously imposing due diligence obligations.<sup>67</sup> Leiser comments that the DSA’s model of regulation focuses on ‘user transparency, reporting obligations and accountability for content moderation and removal decisions’.<sup>68</sup> The DSA imposes duties on all online platforms and service providers but the range of these obligations changes depending on their size, scope and operation. The basic obligations should be respected by all platforms regardless of their size or role and came

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<sup>64</sup>OSA, s 17 (2).

<sup>65</sup>OSA, s 17 (7) (b).

<sup>66</sup>European Commission, ‘The Digital Service Act package’ <<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>> accessed 27 September 2024.

<sup>67</sup>Martin Husovec, Irene Roche Laguna, *Principles of the Digital Services Act* (OUP 2024) 9.

<sup>68</sup>Mark Leiser, *Reimagining Digital Governance: The EU’s Digital Services Act and the Fight Against Disinformation* (2023) SSRN papers, <<https://research.vu.nl/ws/portalfiles/portal/306628066/SSRN-id4427493.pdf>> accessed 27 September 2024.



into force on 17th February 2024. On the contrary, very large online platforms (VLOP) or very large online search engines (VLOSE), identified based on the number of active users, should comply with the highest level of obligations and, for them, the DSA came into force already on 25th August 2023. The most popular social media platforms fall within this last category.

The DSA recitals explicitly list disinformation as one of the online challenges the new legislation aims to address.<sup>69</sup> In particular coordinated disinformation campaigns are considered one of the systemic risks platforms should consider while providing their services.<sup>70</sup> Moreover, in Recital 95, the DSA motivates some of the additional requirements on VLOPs to address online advertisement issues (including disinformation) with the need to avoid, among others, negative impacts on political participation.<sup>71</sup> However, in the operational text of the DSA, there is no explicit mention of disinformation. This is probably because fighting online disinformation is left to more specific instruments, such as the very debated 2022 Strengthened Code of Practice on Disinformation.<sup>72</sup> Yet, as Pentney comments, this resulted in a disjointed and ambiguous approach to disinformation, leaving it to the platforms to interpret what specific obligations the DSA imposes in relation to disinformation, other than those agreed upon under the Code of Practice.<sup>73</sup> Moreover, whether disinformation was to be addressed at all by the DSA was at the core of the negotiations on the text. The Committee on Civil Liberties, Justice and Home Affairs of the European Parliament (LIBE Committee) strongly opposed the inclusion of any ‘harmful but legal content’ for fears of excessive restriction to freedom of expression.<sup>74</sup> Therefore, the final text of the DSA was a clear compromise between diverging views.<sup>75</sup>

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<sup>69</sup>DSA, Recitals 2 and 9.

<sup>70</sup>DSA, Recitals 83–84.

<sup>71</sup>DSA, Recital 95.

<sup>72</sup>For discussion on the Code of Practice see European Commission, Assessment of the Code of Practice on Disinformation – Achievements and Areas for Further Improvement (Commission Staff Working Document) (2020) 180 final 7–19; Cavaliere (n 43), 3; Ethan Shattock, Self-regulation 2.0? A critical reflection of the European fight against disinformation (Harvard Kennedy School Misinformation Review, May 31, 2021) <<https://misinformationreview.hks.harvard.edu/article/self-regulation-20-a-critical-reflection-of-the-european-fight-against-disinformation/>> accessed 27 September 2024; Ethan Shattock, ‘Fake News in Strasbourg: Electoral Disinformation and Freedom of Expression in the European Court of Human Rights’ (2022) 13(1) European Journal of Law and Technology.

<sup>73</sup>Katie Pentney, ‘The DSA, Due Diligence & Disinformation: A Disjointed Approach or a Risky Compromise?’ (2022) TechREG Chronicle, December 2022, 8.

<sup>74</sup>Committee on Civil Liberties, Justice and Home Affairs for the Committee on the Internal Market and Consumer Protection on the proposal for a regulation of the European Parliament and of the Council Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM (2020)0825) (May 19, 2021) Amendments 21–24, 28, 29, 91–93, <[https://www.europarl.europa.eu/doceo/document/LIBE-PA-692898\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/LIBE-PA-692898_EN.pdf)> accessed 27 September 2024.

<sup>75</sup>See also Martin Husovec, ‘The Digital Services Act’s Red Line: What the Commission Can and Cannot do about DISINFORMATION’ (2024) Journal of Media Law.



The DSA tackles disinformation in two main ways: as illegal content with obligations on all platforms and as content identifiable through systemic risk assessments with obligations only upon VLOPs. This creates significant issues in terms of definitions as we will later discuss, since the definition of illegal content is not always clear (and harmonised across EU member states) and the procedures for identifying risks and the most appropriate measures could vary from platform to platform.<sup>76</sup> Moreover, the DSA imposes additional obligations on platforms, including enhanced transparency about content moderation,<sup>77</sup> assessments of systemic risks and auditing processes<sup>78</sup> and collaboration with third-party fact-checkers and trusted flaggers.<sup>79</sup> Furthermore, the DSA explicitly requires service providers to carry out risk assessments taking into consideration ‘any actual or foreseeable negative effects on civic discourse and electoral processes’.<sup>80</sup>

When it comes to disinformation, the DSA works closely with the EU Code of Practice on Disinformation, adopted in 2018 and revamped in 2022. The DSA strongly encourages service providers to become signatories of voluntary codes of conduct, where additional and topic-specific requirements and guidance are laid out.<sup>81</sup> The Code of Practice is a voluntary framework of industry self-regulation (signed by all the major social media platforms) that sets out five broad commitments for signatories: improving the scrutiny of advertisements, ensuring public disclosure of political and issue-based ads, ensuring the integrity of their services, empowering users, and empowering the research community. Signatories also commit to prepare annual self-assessment reports and submit them to the EU Commission. The Code has been widely criticised, even during its drafting process,<sup>82</sup> for being vague and general, without meaningful commitments or measurable objectives.

Lastly, the EU has recently adopted two additional instruments, with the specific aim of preparing for the 2024 EU Parliament elections and protecting EU citizens and institutions from disinformation. On 20th March 2024, a new regulation on the transparency and targeting of political advertising<sup>83</sup> was adopted, filling significant gaps in the DSA. This new important piece

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<sup>76</sup>Sharon Galantino, ‘How Will the EU Digital Services Act Affect the Regulation of Disinformation?’ (2023) 20(1) ScriptEd 89.

<sup>77</sup>DSA, Articles 15, 27, 39 and 42.

<sup>78</sup>DSA, Articles 34 and 37.

<sup>79</sup>DSA, Article 19.

<sup>80</sup>DSA, Article 34.

<sup>81</sup>DSA, Recitals 103–106.

<sup>82</sup>European Commission, ‘Minutes, Fourth Meeting of the Multi-Stakeholder Forum on Disinformation’ (17 September 2018), <[https://ec.europa.eu/information\\_society/newsroom/image/document/2019-4/final\\_minutes\\_of\\_4th\\_meeting\\_multistakeholder\\_forum\\_on\\_disinformation\\_002\\_67AFE6B\\_9-B872-0AAE-0D090C9AB5EEBC77\\_56666.pdf](https://ec.europa.eu/information_society/newsroom/image/document/2019-4/final_minutes_of_4th_meeting_multistakeholder_forum_on_disinformation_002_67AFE6B_9-B872-0AAE-0D090C9AB5EEBC77_56666.pdf)> accessed 27 September 2024.

<sup>83</sup>European Union, Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising.

of legislation requires online platforms (defined in the same ways as in the DSA) to enhance their transparency efforts about political advertising. In particular, it encourages platforms to participate in disinformation demontisation initiatives aimed at preventing the placement of political advertising containing disinformation.<sup>84</sup>

In addition, on 26 April 2024, the EU Commission issued a Communication with ‘Guidelines for providers of Very Large Online Platforms and Very Large Online Search Engines on the mitigation of systemic risks for electoral processes’.<sup>85</sup> This document, which constitutes an authoritative interpretation of the DSA, addresses the specific challenges of disinformation in times of elections and provides guidance on what are the expectations from VLOPs and VLOSE to address them. This came in the same week of some ‘stress tests’ to assess platforms’ election readiness under the DSA, where the Commission prepared a series of fictitious scenarios involving attempts of election manipulation and interference to understand whether the platforms existing protocols and safeguards were sufficiently robust.<sup>86</sup>

## The right to political participation in the DSA and OSA

Academics and practitioners are dedicating little attention to the extent to which the DSA and the OSA interact with the right to political participation. In particular, there is a lack of analysis on whether the DSA and OSA take into account the obligations states have under Article 25 ICCPR and promote the enjoyment of the rights contained therein.

This section investigates in detail the relationship between the DSA and OSA and the two main aspects of the right to political participation: the right to vote and the right to stand for election with specific reference to online disinformation.

As mentioned earlier in this article, Article 25 ICCPR also includes and presupposes a right to engage in a free and public debate. Freedom of expression is often considered the cornerstone of a democratic society because, without a free and pluralistic debate, it is not possible to share and challenge opinions and consciously contribute to the governing of the state. However, as previously discussed, the right to political participation adds little to freedom of expression, besides emphasising its importance

<sup>84</sup>Ibid, Recital 20.

<sup>85</sup>European Union, Commission Guidelines for providers of Very Large Online Platforms and Very Large Online Search Engines on the mitigation of systemic risks for electoral processes pursuant to Article 35 (3) of Regulation (EU) 2022/2065, <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52024XC03014#ntr2-C\\_202403014EN.000101-E0002](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52024XC03014#ntr2-C_202403014EN.000101-E0002)> accessed 27 September 2024 (hereinafter EU Commission Guidelines).

<sup>86</sup>European Commission, Commission stress tests platforms’ election readiness under the Digital Services Act, 24 April 2024, <<https://digital-strategy.ec.europa.eu/en/news/commission-stress-tests-platforms-election-readiness-under-digital-services-act>> 27 September 2024.

and instrumental value. As the aim of this paper is to understand how the right to political participation is respected and protected under the OSA and DSA, the discussion on whether these regimes comply with freedom of expression, on the extent to which this is needed for the maintenance and flourishing of a 'free public debate' and a broader discussion on the relationship between freedom of expression and disinformation<sup>87</sup> remains out of scope.<sup>88</sup> As a consequence, the analysis below will only focus on the two characterising aspects of the right to political participation, the right to vote and the right to stand for elections. Mentions to freedom of expression will be made when relevant to discuss the impact of the DSA and OSA on these two rights.

### **The right to vote**

The right to vote is, in the words of Nowak, the most important political right.<sup>89</sup> It protects the right of every citizen to participate in political affairs by freely contributing to the decision on who will be elected in the organs of the State. Article 25 ICCPR requires elections to be free and genuine to guarantee the right to vote.

From a disinformation standpoint, the right to vote requires providing citizens with accurate information on voting procedures, including the time and day of the election, eligibility criteria, voting registration procedures if needed, etc. As the HRC clarified in its general comment, 'States must take effective measures to ensure that all persons entitled to vote can exercise that right.'<sup>90</sup> For establishing a breach of the state's positive obligation there is no need to demonstrate that, as a consequence of disinformation, voters did not exercise their rights, which could be a difficult assessment to make. It is enough to demonstrate that voters were not able to exercise their vote due to adverse situations, leaving the discretion to each voter to decide whether to cast the ballot. Disseminating wrong information on when or where an election takes place or about the necessary documents to cast a vote has been historically one of the easiest and most common ways to dissuade people from voting in the hope of altering the elections' results. This should also be relatively straightforward information to ensure, as there is little doubt as to where the truth lies.

The other aspect of the right to vote includes having access to accurate information on the candidates. This includes both objective information as

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<sup>87</sup>Nunez (n 11); Pielemeier (n 5).

<sup>88</sup>For such discussion see Coe (n 7); Barata (n 7); Article 19, 'At a glance: Does the EU Digital Services Act protect freedom of expression?' (2021), <<https://www.article19.org/resources/does-the-digital-services-act-protect-freedom-of-expression/>> 27 September 2024.

<sup>89</sup>William Shabas, *UN International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (Engel 2019) 708.

<sup>90</sup>HRC, GC No. 25, para 11.

to who the candidates are and what is their political affiliation and less objective information such as their concrete ideas and manifestos. In *Brzeziński v Poland*, the first case in which the term ‘fake news’ was used by the ECtHR, the Court acknowledged that it was necessary to address the spreading of fake news on electoral candidates to preserve the quality of the debate during the pre-election period.<sup>91</sup> This second aspect of the right to vote overlaps with the right to engage in pluralistic debate and mostly falls within the discussion articulated in previous sections of this paper.

Surprisingly, the DSA and the OSA do not dedicate much attention to either of them, even though one may interpret the ‘democratic content’ of section 17 OSA as including information needed to exercise the right to vote.

Despite the lack of specific provisions in the OSA and the DSA prohibiting disinformation on the voting procedures or the candidates, both regimes require platforms to remove ‘illegal content’ and this is defined as the content prohibited by existing legislation in the UK and EU respectively. This raises the question of whether the dissemination of false or misleading information on the voting process or the candidates is illegal under existing domestic or EU law.

In the UK, section 114A of the Elections Act 2022 criminalises ‘undue influence’ on elections. Undue influence is defined as ‘any activity within subsection (4) for the purpose of (a) inducing or compelling a person to vote in a particular way or to refrain from voting, or (b) otherwise impeding or preventing the free exercise of the franchise of an elector or of a proxy for an elector’.<sup>92</sup> Subsection 4 clarifies that these activities include any use or threat to use violence, damage or threat to damage property or reputation or ‘doing any act designed to deceive a person in relation to the administration of an election’.<sup>93</sup> Disinformation about the voting procedures and the candidates running for office could fall within the latter definition, as long as it is ascertained that the aim of providing wrong information on the date, time or location of the polling station is to deceive a person and impede and prevent them from voting. While the assessment seems straightforward, it is unclear whether online platforms are capable and equipped to make this call consistently and what role, if any, Ofcom or the Electoral Commission should play in addition to that of the police, who currently deals with the matter. From section 10 OSA, it appears evident that if specific content is flagged as illegal, this should be swiftly removed but waiting for a user to flag it may be too late to avoid irreparable harm. To

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<sup>91</sup>Translation by the author of the original French judgment (*‘admet qu’il est nécessaire de lutter contre la dissémination d’informations fallacieuses à propos des candidats aux élections afin de préserver la qualité du débat public en période préélectorale’*). *Brzezinski v Poland*, Application No. 47542/07 (ECtHR, 25 July 2019), Judgment (Merit and Just Satisfaction), para 55.

<sup>92</sup>Elections Act 2022, s 114A (2).

<sup>93</sup>*Ibid.*, (4) (g).

this end, the Electoral Commission could play a pivotal role in monitoring and alerting service providers to ensure citizens can enjoy their right to vote but the OSA does not entrust the Commission with this power and the only oversight role is carried out by Ofcom.

When it comes to false information on the candidates, the Electoral Commission specifies that ‘making false statements about the personal character of a candidate’ constitutes electoral fraud and should be reported to the police, as prohibited by section 106 of the Representation of the People Act 1983.<sup>94</sup> Once again, this requires a careful consideration of whether the statements made against the candidate are false, especially if they do not pertain to objective aspects such as whether the candidate is running or what political party is representing. This very vague sentence is apt in a context where public authorities wish to encourage wide reporting from people but with the ultimate decision on appropriate measures resting in their hands. On the contrary, this is not adequate in the online environment context, where the ultimate decision is taken by a private platform. The lack of accountability and democratic scrutiny over their operations and the fact that social media platforms’ business model is oriented to profit maximisation make the wide margin of interpretation left to them particularly unsuitable and potentially dangerous.

Both types of disinformation could also fall within the OSA false communication offence explained at length above, yet the problem of proving both the intent and the consequent harm remains problematic. Ofcom, as the designated regulator for the regime, is required to prepare a code of practice and guidance for providers ‘describing measures recommended for compliance with duties set out in section 10 or 27 (illegal content)’.<sup>95</sup> This would be the opportunity to provide clarity on how service providers should engage with this complex definition, and it will be necessary for Ofcom to specifically engage with election-related content. In this context, the example of collaboration and joint efforts among regulators set out by the Digital Regulation Cooperation Forum (DRC) should encourage Ofcom to closely work with the Electoral Commission to define specific measures to support the right to vote.

Similarly to the OSA, also the DSA requires any provider of services to remove illegal content if requested by a relevant national judicial or administrative authority (Article 9) or notified by any individual or entity (Article 16). The intentional spread of false information on the electoral process to mislead voters is considered illegal under EU law and the majority of the EU member states’ national legislation.<sup>96</sup> This would require platforms to

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<sup>94</sup>Representation of the People Act 1983, s 106.

<sup>95</sup>OSA, s 41.

<sup>96</sup>EU Commission Guidelines, para 1.1. (7).

remove such content either upon request of national judicial and administrative authorities or when they autonomously assess the illegality of the content following the notice by users or entities. In this latter scenario, the platform's discretion in deciding the misleading intent remains problematic and further shows the enforcement complexity of the DSA.<sup>97</sup>

However, in contrast with the general DSA, the Commission's guidelines on elections provide detailed support for VLOPs and VLOSEs to protect the right to vote. In particular, the guidelines recommend VLOPs and VLOSEs to 'facilitate access to official information concerning the electoral process, including information on how and where to vote, based on official information from the electoral authorities' to 'prevent the spread of misinformation, disinformation and foreign information manipulation and interference (FIMI) on the electoral process'.<sup>98</sup> The guidelines also offer very specific recommendations on how this should be implemented, suggesting information panels, banners, pop-ups, search interventions, links to the electoral authorities' websites, etc. In addition, the guidelines recommend platforms to ensure that official accounts or accounts controlled by member states are clearly identifiable and visible, to guide users to the most trustworthy and official sources. This should also be accompanied by a reshaping of the recommender system that should be adjusted in a way to give users meaningful choices over their feeds and reduce the prominence of disinformation, being fully transparent on the modalities used to assess the veracity of the information.<sup>99</sup> Lastly, the guidelines suggest that this should be addressed by increasing media literacy and adjusting the recommender systems to prioritise official information on the electoral process.<sup>100</sup> The guidelines provide concrete practical recommendations, supporting the enforcement of the DSA in times of elections, in a way that seems more in alignment with the provision of Article 25 ICCPR. However, there is still no guidance on the actual monitoring of electoral disinformation, in particular as to who should monitor the content and what content moderation or curation measures should be adopted.

The EU regulation on political advertising also dedicates specific attention to the targeting of political advertising during electoral campaigns.<sup>101</sup>

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<sup>97</sup>On DSA enforcement challenges see Marco Bassini, 'Fundamental Rights and Private Enforcement in the Digital Age' (2019) 25(2) *European Law Journal* 182–97; Amelie P. Heldt, 'EU Digital Services Act: The White Hope of Intermediary Regulation' in Terry Flew and Fiona R. Martin (eds), *Digital Platform Regulation* (Palgrave 2022); Joris van Hoboken and others, 'Putting the Digital Services Act into Practice: Enforcement, Access to Justice, and Global Implications' (2023) *Amsterdam Law School Research Paper No. 13*; Augustin Reyna, 'DMA and DSA Effective Enforcement- Key to Success' (2024) 12(2) *Journal of Antitrust Enforcement* 320–24.

<sup>98</sup>EU Commission Guidelines, para 27 (a).

<sup>99</sup>EU Commission Guidelines, para 27 (d).

<sup>100</sup>*Ibid.*

<sup>101</sup>European Union, Regulation (EU) 2024/900 of the European Parliament and of the Council of 13 March 2024 on the transparency and targeting of political advertising.

Acknowledging the prevalence of disinformation in political advertising and the impact this may have on influencing citizens who wish to exercise their vote, the Regulation and the EU Commission's guidelines call on service providers to label political advertising in a clear, salient and unambiguous manner. Moreover, they request platforms to ensure they have systems in place to prevent the misuse of advertising systems to spread misleading information, disinformation and FIMI with regards to electoral processes.<sup>102</sup>

From the analysis above, it emerges that both instruments do not adequately protect the right to vote. Even when disinformation concerns information on voting procedures, the general and vague definitions contained in the DSA and OSA fail to address a relatively easy manifestation of the problem. By doing so, they both fall short of protecting a key component of Article 25 ICCPR, as they could do more to comply with the positive obligations states have to ensure citizens have a right to vote. While it is undoubted that people in the EU and the UK can exercise the right to vote, one could argue that states should do more to ensure this is enforced when challenged by online disinformation. Recalling the theory on positive obligations, a breach can be found when states have knowledge of the harm, there is a causation between the state's omission and the harm caused and the measures expected by states are reasonable.<sup>103</sup> In this context, the first element is undoubted, as states are well aware of the impact of disinformation on the right to vote. As for causation, this is hard to prove with certainty, but studies show that where disinformation on the voting procedures was left unchecked, potential voters were dissuaded from voting and ended up not exercising their rights. The last element could potentially be the most controversial as the assessment of what measures are reasonable is highly subjective. As Stoyanova explains, positive obligations should not impose an 'impossible and disproportionate burden upon the state' but the knowledge of the risk and the public interest should be prominently considered when deciding what obligations are reasonable.<sup>104</sup> As such, one could certainly argue that states can't be reasonably expected to eliminate online disinformation to protect the right to political participation. However, when corrective measures are available and feasible, such as checking the factual correctness of information on voting procedures and enabling the relevant regulators to work closely with tech and social media companies, these could meet the reasonableness test.

In this direction is heading the EU Commission with its latest Guidelines, as they provide the right attention to systemic disinformation used to suppress voters and further expand its recommendations with concrete measures platforms should put in place. However, the issue of appropriate

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<sup>102</sup>EU Commission Guidelines, para 27 (e) (iv).

<sup>103</sup>Vladislava Stoyanova, *Positive Obligations Under the European Convention on Human Rights* (OUP 2023).

<sup>104</sup>*Ibid*, 73.



oversight to ensure enforcement remains unsolved. The UK should follow suit, with Ofcom's opportunity to engage with the Electoral Commission and follow the best practices of the EU Commission.

### ***The right to stand for election***

The third component of the right to political participation is the right to stand for election. This right does not only require states to enable citizens to run for office, within the rules and requirements they wish the set, but also to protect candidates from interference with their electoral campaigns. Several reports have highlighted how online disinformation has been used to target political figures or electoral candidates to dissuade them from running or to induce them to step down from the race.<sup>105</sup> This phenomenon is global and affects everyone but is particularly prevalent against women and candidates representing minority groups.<sup>106</sup>

The issue of intimidation of candidates has also been largely discussed by the UK Parliament. Since 2017, parliamentary inquiries highlighted how both MPs and candidates running for office have been victims of online harassment and threats campaigns.<sup>107</sup> Yet, the legislative response in terms of added protection has been limited. Similarly to what was previously observed, the OSA does not contain any specific provision aimed at protecting electoral candidates from online disinformation. However, as observed above, there are two main ways in which candidates could be protected from online disinformation. The first is the already extensively discussed false communication offence. The concerns expressed above about the intricacy of proving the intent to cause non-trivial harm and the knowledge of the falsity of the content remain valid here. To make it even more complex, disinformation campaigns against political candidates are usually done in an incremental way,<sup>108</sup> where one single message taken in isolation may not

<sup>105</sup>Thakur and Hankerson Madrigal (n 44); Neil Johnston Nerys Davies, *Intimidation of candidates and voters*, House of Commons Library Research Briefing, 8 April 2024.

<sup>106</sup>For a detailed studies on gendered disinformation see Lucina de Meco, 'Why Disinformation Targeting Women Undermines Democratic Institutions', Power 3.0, 1 May 2020, <<https://www.power3point0.org/2020/05/01/why-disinformation-targeting-women-undermines-democratic-institutions/>> accessed 27 September 2024; Lucina De Meco, 'Gendered Disinformation, Democracy and the Need for a New Digital Social Contract', Council on Foreign Relations, 6 May 2021, <<https://www.cfr.org/blog/gendered-disinformation-democracy-and-need-new-digital-social-contract>> accessed 27 September 2024.

<sup>107</sup>Committee on Standards in Public Life, 'Intimidation in Public Life: A Review by the Committee on Standards in Public Life', 13 December 2017, <<https://www.gov.uk/government/publications/intimidation-in-public-life-a-review-by-the-committee-on-standards-in-public-life>> accessed 27 September 2024; House of Commons Joint Committee on Human Rights, *Democracy, freedom of expression and freedom of association: Threats to MPs*, First Report of Session 2019–20, 16 October 2019, <<https://publications.parliament.uk/pa/jt201919/jtselect/jtrights/37/37.pdf>> accessed 27 September 2024.

<sup>108</sup>Amnesty International, *Toxic Twitter: A toxic place for women* (2018) Amnesty International Report <<https://www.amnesty.org/en/latest/research/2018/03/online-violence-against-women-chapter-1-1/>> accessed 27 September 2024.



meet the severity threshold required by the false communication offence, but it would create significant harm once repeated over time and in association with other similar messages. Such dynamic is not contemplated by the provision.

The second option is to resort to the already invoked section 10 OSA, depending on whether attacks and harassment against electoral candidates are currently illegal in the UK. As explained by the Cabinet Office's response to the Committee on Standards in Public Life's report on Intimidation in Public Life, existing legislation already prohibits several of these conducts.<sup>109</sup> In particular, harassment, stalking and threats to kill are all prohibited and punished by, respectively, the Protection from Harassment Act 1997 and the Offences against the Person Act 1981. When urged to introduce new offences to respond to the specific challenges posed, among others, by online disinformation, the Government responded that the existing legislation was sufficient. Moreover, invoking relevant case law from the European Court of Human Rights, it committed not to criminalise offensive communications to preserve freedom of expression.<sup>110</sup> However, the specific offences listed above only capture the most serious and harmful type of disinformation and as mentioned earlier, do not consider the cumulative impact. Moreover, section 106 of the Representation of the People Act 1983 prohibits the publishing of 'any false statement of fact in relation to the candidate's personal character or conduct [...] unless he can show that he had reasonable ground for believing, and did believe, that statement to be true.'<sup>111</sup> The requirements of this offence, similar to the false communication offence in section 179 of the OSA discussed earlier on, make it very hard to prove and leave an extremely wide margin of discretion to the platforms to act in one way or another, considerably impacting the candidates' campaigns and chances of election. In the absence of more guidance, and hopefully oversight, from Ofcom, the OSA falls short of protecting the right to run for office under Article 25 ICCPR.

Also in the DSA there is no explicit mention of the need to protect the right to run for office, nor the aim of regulating the online environment to ensure the right can be effectively enjoyed by electoral candidates. However, as for the OSA, the provisions related to the removal of illegal content could be used to require platforms to remove disinformation that amounts to illegal content under EU or national laws.<sup>112</sup> And, like in the

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<sup>109</sup>Cabinet Office, Responding to electoral recommendations and issues raised in the Committee on Standards in Public Life's report on Intimidation in Public Life, July 2018, <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/730209/CSPL.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/730209/CSPL.pdf)> accessed 27 September 2024.

<sup>110</sup>Ibid, 5.8–5.10.

<sup>111</sup>Representation of the People Act 1983, s 106 (1).

<sup>112</sup>DSA, Article 9.

case of the OSA, this comes with significant challenges and freedom of expression risks.

However, the Commission guidelines once again fill some gaps in the DSA and offer additional protection. The guidelines specifically mention online hate speech and harassment against political candidates as one of the systemic risks for electoral processes that VLOPs and VLOSEs need to take into consideration.<sup>113</sup> Unfortunately, they do not expand on what measures are expected from the companies once these risks are considered, leaving wide discretion to the platforms to identify the most appropriate solutions. While this has the advantage of flexibility and adaptability, it may lead to ineffective and superficial measures, especially without adequate oversight. The guidelines also recommend providers of VLOPs and VLOSEs to prevent ‘deception through impersonation of candidates’, which could significantly impact the electoral campaigns.<sup>114</sup> This is particularly important in light of the increasing use of generative AI and deepfakes to manipulate voters and citizens.<sup>115</sup> Lastly, they require platforms to show that their ‘content moderation decisions do not affect the equality of candidates or disproportionately favour or promote voices representing certain (polarised) views’.<sup>116</sup> Importantly, the Commission also reflects that one of the aims of these measures is to ensure that information manipulation during the election does not silence voices in the democratic debate, in particular those representing vulnerable groups or minorities.<sup>117</sup> It makes the specific example of gendered disinformation to highlight how this could undermine open, democratic dialogue and debate. All these recommendations are fully in line with Article 25 ICCPR and seem to be able to achieve the protection required by the provision. However, differently from the recommendations to address vote suppression, here the Commission does not recommend any specific measures, nor makes any example of appropriate initiatives. It follows that independent oversight is essential to ensure adequate enforcement.

Finally, the state’s duty to protect candidates against interference with their electoral campaign concerns the candidates’ freedom of expression. As discussed above, both the OSA and the DSA contain problematic provisions about content removal that could significantly hinder this right. In

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<sup>113</sup>EU Commission Guidelines, 7.

<sup>114</sup>EU Commission guidelines, 27 (h) (i).

<sup>115</sup>Rumman Chowdhury, ‘AI-fuelled campaigns are here – where are the rules?’, *Nature*, 9 April 2024, <<https://www.nature.com/articles/d41586-024-00995-9>> accessed 27 September 2024; Jonathan Yerushalmy, ‘AI deepfakes come of age as billions prepare to vote in a bumper year of elections’ *The Guardian* (London, 23 February 2024) <<https://www.theguardian.com/world/2024/feb/23/ai-deepfakes-come-of-age-as-billions-prepare-to-vote-in-a-bumper-year-of-elections>> accessed 27 September 2024.

<sup>116</sup>EU Commission guidelines, 32.

<sup>117</sup>EU Commission guidelines, 34.

particular, the relevant provisions could be used and exploited by political opponents to silence voices and instances, claiming that the content of the electoral campaign is illegal or simply false. It goes without saying that an overly cautious approach by the service providers with the removal of the content as soon as this gets notified can become extremely dangerous for freedom of expression and the right to run for election, as the candidates won't be ultimately able to campaign for themselves.

In conclusion, this section showed how both instruments do not adequately protect the right to run for election and do not fully comply with the positive obligations stemming from Article 25 ICCPR. In particular, even though there is political will to address the issue of targeted online disinformation campaigns against candidates, there is no translation into specific measures to address the phenomenon. Existing regulation criminalising harassment and threats offline may not be sufficient to address the challenges of online disinformation campaigns. Recalling the tests to assess positive obligations mentioned in the previous section, here states have certainly knowledge of the harm likely to be caused by disinformation to electoral campaigns and several studies have shown the causation link between online disinformation and candidates stepping down from the electoral race. As for the reasonableness test, one could arguably hold that more protective measures for electoral candidates should be reasonably expected by the states to safeguard the rights of everyone, especially of minorities and disadvantaged groups, to run for office. The EU Commission's Guidelines are again an important addition to the DSA, especially as they highlight all the relevant aspects and urge platforms to consider these aspects when designing moderation tools and protocols. However, they do not offer any guidance as to the specific measures and initiatives that should be put in place. Further guidance may be therefore needed, both from the EU Commission and Ofcom (in collaboration with other relevant regulators) for effective enforcement of the OSA and DSA to protect the right to stand for elections.

## Conclusion

Both the OSA and the DSA were drafted over several years, also motivated by the need to address the waves of disinformation that affected elections worldwide. Yet, none of the instruments properly addresses online disinformation in times of election. Even less attention is devoted to the protection of the right of political participation. While they both recognise the importance of addressing online information manipulation for a flourishing democracy, they do not recognise the need to regulate the online space to respect and guarantee the right to political participation. Such right, enshrined in Article 25 ICCPR finds a less predominant echo in the ECHR or the EU Charter of Fundamental Rights, and this could partly explain why it is

rarely mentioned among the fundamental rights the OSA and DSA aim to protect.

Even though, in Europe, the right to vote and the right to stand for election at its core are generally protected and ensured, online disinformation poses additional challenges to these rights that determine further positive obligations upon states. Defining these additional positive obligations is not straightforward as the assessment of what is reasonably expected by a state could be highly debated. Moreover, some elements of this right may never be fully enjoyed, such as the right to vote without manipulation. In our information society where we're continuously exposed to nudges and dark patterns, targeting and profiling, it is probably unrealistic to think we will ever be free from manipulation.<sup>118</sup> Nonetheless, states could do more to ensure a better enjoyment of Article 25 ICCPR and fulfil their positive obligations even within the limits posed by the complexity of online disinformation. Unfortunately, the OSA and DSA seem not to support them (yet) on this.

Both the UK OSA and the EU DSA are very good at providing a legal basis for service providers to remove content that is considered illegal. However, even in doing so they both do not protect enough citizens against factual false content or harassing content that could impact the right to vote or the right to run for office. Moreover, the excessively vague and general definitions significantly threaten freedom of expression and the right to engage in pluralistic debate. The EU Commission, with its guidelines for election contexts, partially fill the gaps by providing additional recommendations on specific measures to put in place to support, among others, the right to vote and the right to run for office and meet the requirements set by Article 25 ICCPR. This brings the DSA closer to a satisfactory level of protection of the right to political participation. Yet some recommendations remain too vague to be properly implemented. In general, while flexible definitions, general risk assessments and transparency measures may be useful to adapt to different contexts and situations, they need adequate independent oversight to be enforced and to effectively protect rights. In the EU, the Commission is closely watching the online information space, with the first investigation against Meta already started.<sup>119</sup> In the UK, Ofcom can take on a leading role in providing guidance and oversight but, to do so, it needs to work closely with other regulators (namely the Electoral Commission and the Equality and Human Rights Commission) and interpret in an expansive way the remit given to it by the OSA. Following the riots and unrest in the

<sup>118</sup>Richard Mackenzie-Gray Scott, 'Managing Misinformation on Social Media: Targeted Newsfeed Interventions and Freedom of Thought' (2023) 21 *Northwestern Journal of Human Rights* 109.

<sup>119</sup>European Commission, Commission opens formal proceedings against Facebook and Instagram under the Digital Services Act, 30 April 2024, <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_24\\_2373](https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2373)> accessed 27 September 2024.

UK in summer 2024 fuelled by mis and disinformation on social media, Keir Starmer opened to the possibility to review or amend the OSA.<sup>120</sup> While it is unclear whether this will actually happen and when, such a review could be an opportunity to properly address the issues of enforcement of the vague and general definitions highlighted in this article and adequately protect the right to political participation.

Since the effective impact of disinformation on the outcome of an election is overall limited,<sup>121</sup> one should carefully consider how to operate the balance between rights at stake. It is certainly true that disinformation threatens several rights, beyond political participation and freedom of expression. However, if the attempts to regulate it fail to adequately protect the right to political participation and pose excessive limitations to freedom of expression, then a serious consideration about the balancing of rights is needed. This is something human rights institutions are very used to, and the practice of regional human rights courts and the UN Human Rights Committee could be invoked in assistance, urging closer collaboration between media regulators and human rights institutions.

### Disclosure statement

No potential conflict of interest was reported by the author(s).

### Data Access Statement

No new data were created with this study.

### Notes on contributor

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<sup>120</sup> Amy Gibbons, Sir Keir Starmer to review social media laws in wake of riots, *The Telegraph* (London, 9 August 2024) <<https://www.telegraph.co.uk/politics/2024/08/09/sir-keir-starmer-to-review-social-media-laws-wake-of-riots/>> accessed 27 September 2024.

<sup>121</sup> Magda Osman, 'Disinformation is often blamed for swaying elections- the research says something else', LSE Blog, 5th February 2024, <<https://blogs.lse.ac.uk/medialse/2024/02/05/disinformation-is-often-blamed-for-swaying-elections-the-research-says-something-else/>> accessed 27 September 2024.