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Democracy hacked? How to respond?

Committee Opinion[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Emanuelis ZINGERIS, Lithuania, Group of the European People's Party

A. Conclusions of the Committee

1. The Committee on Legal Affairs and Human Rights welcomes the report prepared by Mr Frithjof Schmidt (Germany, SOC), rapporteur of the Committee on Political Affairs and Democracy, and broadly supports the proposed draft resolution.

2. The Committee on Legal Affairs and Human Rights has already dealt with the issue of "hybrid war" and "hybrid threats" in the 2018 report on "Legal challenges related to hybrid war and human rights" by Mr Boriss Cilevičs (Latvia, SOC).[2] In that report, the rapporteur examined in detail the notion of "hybrid war", which covers not only military actions but also other hostile acts, such as disinformation campaigns via social media, and stressed that this concept raised several legal issues. In its Resolution 2217 (2018), the Parliamentary Assembly therefore expressed concern about the phenomenon of "hybrid war", which could "destabilise and undermine entire societies and cause numerous casualties", and about the adequacy of existing legal norms.[3] It was also worried about "numerous cases of mass disinformation campaigns intended to undermine security, public order and peaceful democratic processes" and stressed the need to develop tools to protect democracy from "information weapons".[4]

3. The report by the Committee on Political Affairs and Democracy rightly examines the impact of disinformation on democracy, especially through the internet and social media, and the measures taken to tackle this problem. It also proposes a number of strategies and specific actions to be taken by the Council of Europe and its member States.

4. The committee considers that large-scale information manipulation in particular in connection with electoral processes might raise issues under Article 10 of the European Convention on Human Rights ("Convention"), enshrining the right to freedom of expression, and under Article 3 of Protocol No. 1 to the Convention, enshrining the right to free elections. It also recalls that numerous sources indicate that some disinformation campaigns preceding elections in many European countries might have been orchestrated by foreign actors, as noted also in the report by the Committee on Political Affairs and Democracy. It recalls that the principle of non-intervention is well-established in international law and that other than in exceptional and strictly limited legal circumstances, States should not interfere in matters within the jurisdiction of any other State, including its political affairs. Therefore, interferences in electoral processes shall be avoided and condemned.

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1. Reference to committee: Bureau decision, reference 4353 of 22 January 2018. Reporting committee: Committee on Political Affairs and Democracy. See Doc. 15028. Opinion approved by the committee on 27 January 2020.
2. Doc. 14523 of 6 April 2018.
3. Paragraph 3 of the resolution.
4. Paragraph 4 of the resolution.

5. For these reasons, the committee wishes to propose certain amendments to further strengthen the draft resolution and emphasise the above-mentioned issues. Moreover, it makes proposals to encourage member States of the Council of Europe to take additional actions to counter large-scale information manipulation on the internet and social media.

B. Proposed amendments

Amendment A (to the draft resolution)

At the end of paragraph 1, add the following words: ", affecting the right to freedom of expression, including the right to receive information, and the right to free elections".

Amendment B (to the draft resolution)

Replace paragraph 2 by the following: "The Assembly recalls that in its Resolution 2217 (2018) on legal challenges related to hybrid war and human rights obligations, it raised concerns over non-military techniques of "hybrid war", such as cyberattacks, mass disinformation campaigns and interference in the election processes, as well as over the adequacy of existing legal norms. It was particularly concerned about numerous cases of mass disinformation campaigns intended to undermine security, public order and peaceful democratic processes, and stressed the vital need to develop tools to protect democracy from "information weapons".

Amendment C (to the draft resolution)

Add a new paragraph 3 with the following wording: "The Assembly is concerned that the phenomenon of systematic influencing of public opinion, in particular before elections, has reached an unprecedented scale and that it is often associated with foreign interference, whether by State or non-State actors. It recalls that such interference by a State in another State's internal affairs contravenes the well-established international legal principle of non-intervention and that States have a duty to investigate and hold to account any non-State actors that interfere in the democratic processes in other States."

Amendment D (to the draft resolution)

At the end of paragraph 3, add the following sentence: "It calls on Council of Europe member States to refrain from taking any measures aimed at imposing State's control over Internet and is worried about the growing trend, in non-democratic States, where governments ascertain authority over society by controlling Internet."

Amendment E (to the draft resolution)

In paragraph 4, after sub-paragraph 4.3, add a new sub-paragraph 4.4 as follows: "invites Council of Europe member States to sign and/or ratify, where this is not already the case, and fully implement the Council of Europe Convention on Cybercrime (ETS No. 185) and its Additional Protocol concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS. No. 189)".

Amendment F (to the draft resolution)

In paragraph 5, add a new sub-paragraph 5.4. with the following wording: "consider updating national legislation in order to counter disinformation campaigns more effectively;".

Amendment G (to the draft resolution)

At the end of paragraph 5, add a new sub-paragraph with the following wording: "provide, in their respective civil, administrative and/or criminal legislation, for sanctions against natural and legal persons involved in "troll factories" disseminating disinformation;"

Amendment H (to the draft resolution)

At the end of paragraph 7 add: "It also invites the European Commission and the Strategic Communication Task Forces of the European External Action Service to ensure greater participation of relevant NGOs, acting within the European Union, in the leadership and consultation of their relevant bodies countering disinformation, in order to better detect, analyse and expose disinformation. These bodies should work closely, in a more transparent way, and regularly exchange information, for the sake of the common good".

Amendment I (to the draft resolution)

After paragraph 7, add a new paragraph: "The Assembly also calls on the member States of the European Union to considerably increase the European Union's budget allocated to the Strategic Communication Task Forces of the European External Action Service in order to strengthen the European Union's capability to combat disinformation".

Amendment J (to the draft resolution)

After paragraph 7, add a new paragraph: "The Assembly also welcomes the work of the intergovernmental European Centre of Excellence for Countering Hybrid Threats, which co-operates closely with the European Union and the North Atlantic Treaty Organization (NATO) and assists the participating States, the European Union and NATO in better understanding and countering hybrid threats, including the influence of disinformation".

C. Explanatory memorandum by Mr Zingeris, rapporteur for opinion

1. Following a request for a current affairs debate on "Democracy hacked. How to respond?" that I had tabled on behalf of my political group, the Standing Committee held a debate on this matter during its meeting in Copenhagen on 24 November 2017. This issue was then referred to the Committee on Political Affairs and Democracy for report. I would like to thank Mr Schmidt for his report, which usefully analyses the impact of disinformation on democracy, especially through the internet and social media, and proposes a number of measures to be taken by the Council of Europe and its member States.

2. I would, however, like to propose a few amendments to the draft resolution with a view to strengthening it and, in particular, putting more emphasis on the issue of foreign interference in elections and other political processes. Mr Schmidt's report refers to this phenomenon and gives some examples, especially as regards disinformation campaigns originating from Russian sources. However, this very dangerous problem has not been sufficiently articulated in the draft resolution, especially in the light of the findings of the European Union institutions and bodies whose work is extensively presented in Mr Schmidt's report. The disinformation originating from Russia in particular puts European democracies at risk, by threatening the organisation of States' electoral systems and public debates, and may be in violation of the international legal principles of sovereign equality of States and of non-intervention, including non-interference in matters within the domestic jurisdiction of other States'.[5] It should also be stressed that such disinformation may affect the enjoyment of the right to freedom of expression and the right to free elections, as guaranteed respectively by Article 10 of the European Convention on Human Rights and Article 3 of its Protocol No. 1.

3. Moreover, I would like to stress that the issue of disinformation campaigns and interference in electoral processes has already been examined by our committee colleague Mr Boriss Cilevičs (Latvia, SOC) in his report of April 2018 on "Legal challenges related to hybrid war and human rights". In this report, Mr Cilevičs examined at length the notions of "hybrid war" and "hybrid threats", as well the existing international legal framework applicable to such phenomena. The concept of "hybrid war", which covers not only military actions but also other non-military hostile acts, such as disinformation campaigns, was already referred to in Assembly Resolution 2217 (2018) and it would be useful to refer to it again in the present draft resolution.

4. Furthermore, I would like to make some proposals concerning actions that member States of the Council of Europe could take to counter disinformation campaigns. I would encourage them to implement the Council of Europe Convention on Cybercrime and its Additional Protocol and reflect on adopting special laws,

5. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, contained in the Annex to Resolution 2625 (XXV) of the United Nations General Assembly of 24 October 1970.

taking inspiration from the examples of France and Germany. Finally, although Mr Schmidt's report provides an exhaustive description of the actions taken by the European Union, I would like to stress the role of the European Centre of Excellence for Countering Hybrid Threats, in which also NATO participates.

1. Explanatory notes

1.1. Amendment A (to the draft resolution)

This amendment is intended to stress that digital disinformation campaigns aimed at shaping public opinion, and other phenomena and behaviours mentioned in paragraph 1 of the draft resolution, represent a challenge not only for democracy, but also for the right to freedom of expression, enshrined in Article 10 of the European Convention on Human Rights, and the right to free elections, guaranteed by Article 3 of Protocol No. 1 to the Convention.

1.2. Amendment B (to the draft resolution)

This amendment is intended to reformulate paragraph 2 of the draft resolution in line with paragraphs 3 and 4 of Resolution 2217 (2018); the current version of this paragraph refers only to paragraph 4 of the said resolution. In paragraph 3 of Resolution 2217(2018), the Assembly referred to the notion of "hybrid war", as a combination of military and non-military techniques; the latter may consist, in particular, of cyberattacks, mass disinformation campaigns and interference in electoral processes. The Assembly also expressed concern as to the adequacy of the existing legal norms that apply to the phenomenon of "hybrid war". Moreover, I would propose deleting the words "as regards cyberattacks" at the beginning of the paragraph (since the latter does not necessarily cover the issue of disinformation), as well as the reference to Recommendation 2130 (2018) (which contains other proposals).

1.3. Amendment C (to the draft resolution)

While paragraph 1 of the draft resolution mentions "trends in foreign electoral interference", this problem is not mentioned elsewhere in the text. Foreign interference in elections is a very worrying issue, which should have been given much more emphasis in this report. According to experts, misinformation campaigns, "sometimes backed by governments", have influenced major events in Europe, such as the Brexit vote and the debates around Catalan independence in Spain and immigration in Italy.[6] The fact that the 2016 elections in the United States of America and the presidential elections in France in 2017 were or may have been influenced by actors tracked back to Russian locations is mentioned in Mr Schmidt's report (paragraph 26).[7] These incidents, as well as other cases of Russian actors' involvement in misinformation campaigns, were also addressed in the above-mentioned report by our committee colleague Mr Cilevičs.[8] Moreover, Mr Schmidt's report[9] refers to the 2019 EU report on the implementation of the Action Plan Against Disinformation[10], according to which Russian sources carried out a widespread disinformation campaign intended to suppress voter turnout and influence voters' preferences during the latest European elections. According to this report, such a campaign, deployed by State and non-State actors, poses "a hybrid threat to the EU".[11] The European Parliament's resolution of 10 October 2019[12] (mentioned in Mr Schmidt's report,[13] but in a general context) refers many times to disinformation campaigns originating from Russia and to incidents of foreign electoral interferences.[14] In this resolution, the European Parliament "expresses" 77deep concern over the highly dangerous nature of Russian propaganda in particular (…) and notes with concern that the number of disinformation cases attributed to Russian sources and documented by the EU East Strategic Communication Task Force more than doubled since January 2019.[15] The said resolution also strongly condemned "the

6. See paragraph 15 of Mr Schmidt's report.
7. See also paragraph 13 of the report referring to disinformation operations in Central and Eastern Europe.
8. Supra note 2, paragraph 7.
9. In paragraph 34.
10. Of 14 June 2019.
11. Ibidem, p. 3.
12. European Parliament resolution of 10 October 2019 on foreign electoral interference and disinformation in national and European democratic processes (2019/2810(RSP)), P9_TA(2019)0031.
13. In paragraph 6.
14. Ibid, preamble, items E, F, L and M.
15. Ibid, paragraphs 8 and 9.

increasingly aggressive actions of state and non-state actors from third countries seeking to undermine or suspend the normative foundations and principles of European democracies and the sovereignty of all EU accession countries in the Western Balkans and Eastern Partnership countries".[16]

Moreover, the European Parliament stressed that "(…) foreign interference in elections undermines the right of people to have their say in the governance of their country, directly or through freely chosen representatives, as enshrined in the Universal Declaration of Human Rights, and that such interference by other states constitutes a violation of international law, even when there is no use of military force, threat to territorial integrity or threat to political independence".[17] The principle of non-interference in other States' domestic affairs is well-established in international law and derives from the principle of the sovereign equality of states; both principles were reaffirmed by the United Nations General Assembly in its declaration of 24 October 1970.[18] Moreover, in the Helsinki Final Act of the Conference on Security and Cooperation in Europe of 1 August 1975, the participating States stated that they would "(…) refrain from any intervention, direct or indirect, individual or collective, in the internal or external affairs falling within the domestic jurisdiction of another participating State, regardless of their mutual relations."[19] Therefore, I am of the opinion that the draft resolution should put more emphasis on the issue of foreign interference in political processes and on its implications for States' sovereignty.

1.4. Amendment D (to the draft resolution)

This amendment is intended to reaffirm the Assembly's attachment to the right to freedom of expression, including the freedom of expression on Internet, and to protect this freedom from State's undue interference. The right to "receive impart information and ideas without interference by public authorities and regardless of frontiers" is enshrined in Article 10 of the European Convention on Human Rights.

1.5. Amendment E (to the draft resolution)

This amendment aims at adding a sub-paragraph to promote implementation at national level of the Council of Europe Convention on Cybercrime (ETS No. 185), which is the only binding international instrument in this field, and its Additional Protocol to concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS. No. 189), which states that "distributing, or otherwise making available to the public", through a computer system of "racist and xenophobic material" and "material which denies, grossly minimises, approves or justifies acts constituting genocide or crimes against humanity" shall be criminalised in national laws (Articles 3 paragraph 1 and 6 paragraph 1). Member States of the Council of Europe which have not yet adhered to these instruments should sign and/or ratify them.[20]

1.6. Amendment F (to the draft resolution)

This amendment is aimed at stressing the need to amend national legislation, if necessary, in order to make it better adapted to the objective of countering disinformation campaigns. As explained in Mr Schmidt's report, Germany and France have adopted special laws to tackle this phenomenon[21]. The German Network Enforcement Act (NetzDG, also known as the "Facebook law")[22] of June 2017, although criticised as a possible threat to freedom of expression, entered into force on 1 January 2018. It obliges social media companies such as Facebook and Twitter to introduce complaint procedures for users to report "illegal content" (meaning hate speech, defamation, incitement to violence and other offences defined in the Criminal Code) posted on their platforms. A bill inspired by the German law was announced by the Croatian government in January 2018.[23]

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16. Ibid, paragraph 10.
17. Ibid, paragraph 3.
18. Supra note 5.
19. Item VI.
20. Still a few countries have not adhered to this legal instrument and its additional protocol, see at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185/signatures?p_auth=Fgx1R46d and https://www.coe.int/en/web/conventions/search-on-treaties/-/conventions/treaty/189/signatures?p_auth=Fgx1R46d (as of 16 January 2020).
21. See paragraphs 70-74 of the report.
22. See its English translation at: https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/NetzDG_engl.pdf%3F__blob=publicationFile%26v=2
23. https://www.poynter.org/ifcn/anti-misinformation-actions/

In France, the "Law on combating information manipulation", was passed in December 2018[24] and is now in force.[25] The law defines "information manipulation" as "inexact or misleading allegations or imputations of a fact that could alter the sincerity of an upcoming vote and that is spread deliberately, artificially or automatically and massively to the online public through a communication service".[26] It imposes several obligations (including reporting and transparency) on digital platform operators during electoral campaigns, especially during the three months preceding any electoral vote. During this period, a candidate, a political party or a political group, the public prosecutor or any person having an interest may bring the case before a judge (*juge des référés*) in order to counter disinformation during the electoral period.[27] The law gives the authorities (the *Conseil Supérieur de l'Audiovisuel*) the power to suspend the diffusion of a service provided by a digital platform operator until the end of the vote, if it finds that the service is under the influence of a foreign State and is deliberately diffusing false information in order to influence the vote.[28] Despite the controversies raised even before its adoption[29], it is important to note that this law specifically addresses the issue of disinformation campaigns aimed at influencing the result of elections.[30]

1.7. Amendment G (to the draft resolution)

As mentioned in Mr Schmidt's report (paragraph 81), "trolling" is one of the symptoms of "democracy hacking". For example, the existence of a "troll factory", based in Saint Petersburg, was often reported by the media.[31] Therefore, States should do more to combat the actions of "troll factories", in particular by providing, in their relevant legislation, for adequate sanctions against natural and legal persons involved in such activities.

1.8. Amendment H (to the draft resolution)

In carrying out its various activities against disinformation, the European Commission and the European External Action Service should co-operate with relevant NGOs, who could assist it detecting fake news. Their relevant internal bodies should also co-operate closely.

1.9. Amendment I (to the draft resolution)

The European Union bodies charged with combatting discrimination have been allocated too scarce resources. As indicated in the European Commission's Joint Communication of 5 December 2018,[32] in 2019, the budget for strategic communication was expected to more than double from 1,9 million euros to 5 million euros. However, this is still very little compared with the sums allegedly spent by some countries to spread their propaganda (for example, it seems that Russia spends more than 1 billion euros for this purpose).[33]

1.10. Amendment J (to the draft resolution)

While the report rightly examines (in section 5) the measures taken by the European Union to combat disinformation, this amendment is aimed at putting emphasis on the work of the European Centre of Excellence for Countering Hybrid Threats ("Hybrid CoE")[34], which is based in Helsinki and was established in 2013. The role of this intergovernmental think-tank consists of assisting the participating States[35], the European Union and NATO in better understanding and countering hybrid threats, including influencing information".

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24. Law No. 2018-1202 of 22 December 2018, Official Journal 0297 of 23 December 2018.
25. http://www.senat.fr/application-des-lois/ppl17-623.html
26. Article 1 of the Law on combating information manipulation.
27. Ibidem.
28. Article 6 of the Law on combating information manipulation.
29. For more information on its procedure in the Senate and the decision of the Constitutional Council of 21 November 2018 see at http://www.senat.fr/dossier-legislatif/ppl17-623.html
30. For more information on the challenges surrounding this law, see M. Guillaume, Combating the manipulation of information – a French case, Strategic Analysis 2/2019, Hybrid Coe.
31. https://www.theguardian.com/world/2018/dec/05/eu-disinformation-war-russia-fake-news
32. JOIN(2018)36 final, p. 6.
33. https://www.theguardian.com/world/2018/dec/05/eu-disinformation-war-russia-fake-news
34. For more information, see: https://www.hybridcoe.fi/what-is-hybridcoe/
35. They are currently 27, including members States of the European Union and NATO allies (as of 16 January 2020).