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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
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**THE IMPACT OF THE INFORMATION DISORDER (DISINFORMATION)  
ON ELECTIONS**

**by**

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*\*This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents*

1. This brief (hereinafter: the Brief) is to support the 'Study on the role of social media and the Internet in democratic development' prepared by José Luis Vargas Valdez\* for the Venice Commission of the Council of Europe (hereinafter: the Valdez-Study). The aim of the Brief is to (a.) provide input on relevant Council of Europe (hereinafter: CoE) standards and other instruments and materials relating to elections and the internet; and (b.) suggest additions to the Valdez-Study for a better presentation of the critical aspects regarding the enjoyment of the right to free elections within the transformed communicative spheres.

2. The Brief presents (i.) an overview on latest academic research and policy reflections and recommendations on information disorder in the digital environment and its implications for political/electoral campaigning; (ii.) the CoE standards on the right to free elections; and (iii.) suggestions for improving the structure and coherence of the Valdez-Study.

### **A. Information disorder and its (potential) impact on elections**

3. 1. The internet has to a large extent changed political campaigning. Major political events in 2016 in the United Kingdom and the United States of America, namely the Brexit referendum and the presidential election, respectively, have showcased the impact of the digital environment on electoral processes and pointed to several potentially critical defects in this regard. The enforcement of rules and regulations on paid advertising was limited; voters' personal data were collected and processed for election purposes without their consent and in lack of legal entitlement; political communication was channeled to unregulated social media platforms without safeguards in place on fair media coverage. These implications challenged the "established institutions and principles of regulation of election communications such as freedom of association, spending limits, and regulation of political advertising (Council of Europe's Study on the use of internet in electoral campaigns 2017, hereinafter the "CoE Election Study 2017"):13), and undermined the ability of the current regulatory regimes to maintain a level playing field in electoral communication. They posed threats to elections and unleashed a potential for corrupt practices to emerge.

4. 2. Policy-makers, governments and civil society alike had to face the reality of there being *limits to law enforcement of the current regulation on the internet*, including as regards the applicability of existing regulation on electoral campaigns. Such regulation aims to protect the integrity of elections and ensure that they are free and fair. To that end, both the influence of money and political advertising need to be regulated and ensure that all political actors have a fair and equal chance of addressing the electorate and that their viewpoints are not overly influenced by big donors. In its Guidelines on Political Party Regulation<sup>†</sup>, the Venice Commission set out that electoral campaigns' regulations should

(i) prevent improper influence (and ensure the independence of parties) on political decisions through financial donations;  
(ii) provide for transparency in expenditure of political parties and  
(iii) ensure that all political parties have an opportunity to compete in line with the principle of equal opportunity.

5. In order to achieve these objectives, the "main ways campaign communication has been regulated has been through electoral law including spending limits and campaign finance controls; subsidies for campaigning communications; pre-poll black outs; media regulation in particular broadcast licensing; rules on political advertising including impartiality, subsidies and free air time; and self-regulation and journalism ethics." (CoE Election Study 2017:9).

6. It is now clear that these legislative limits on campaign finance have been challenged by new forms of digital advertising which are inherently less transparent than their analogue

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\* This brief is based on the June 2018 version of the Study.

† European Commission for Democracy through Law (Venice Commission), 2010: Guidelines on Political Party Regulation (CDL-AD(2010)024), p. 35, para. 159.

predecessors, thus undermining the existing definitions and restrictions based on specific media types. The safeguards against corruption based on methods for calculating spend and categories for reporting spend on traditional media channels have lost their meaning as political campaigning shifted to the internet. As a result, also the absolute spending limits imposed on broadcasting are becoming less meaningful, while transparency regulations ensuring that citizens are aware of campaign finance and spend are difficult, if not impossible to implement across borders in the digital environment (CoE Election Study 2017:20-21).

7. However, perhaps even more profound consequences for the electoral processes can be drawn from the transformed communicative spheres on the internet and the changed way of transmitting political messages to voters. The changes in the distribution of information, have, as documented by the Council of Europe's Information Disorder Report 2017, led to the stage of *information disorder*, making it possible for false and/or harmful information to "spread among potential voters on an unprecedented scale without any oversight or rebuttal" (CoE Election Study 2017):15). This stage was reached as a consequent sequence of changing media consumption practices. Social media are becoming one of the primary sources of news across the world. Today approximately two billion internet users are using social networks\* on a daily basis, a habit that has become almost ubiquitous among young adults†. Moreover, social media have become an indispensable part of modern political campaigning, their effects on the public being dependent on multiple factors such as channel-variables (e.g., Twitter vs. Instagram), specific audience characteristics and predispositions, user motivations and the political campaign context overall (Dimitrova & Matthes, 2018). The operators of such platforms, a type of *internet intermediaries*‡, give access to and host content, facilitating its creation and sharing among their virtual networks and communities, acquired control over the flow, availability, findability and accessibility of information and other content online.

8. In the past, journalists with their editorial practices and ethical obligations held the gatekeeper role in electoral communication including adherence to the statutory requirements, such as a fair and balanced coverage by the public service media, transparency of the media with regard to paid political advertising, silence periods, and/or the right of reply and equivalent remedies for candidates and political parties. Now this function is increasingly taken over by the new intermediaries. This has drastically changed the nature and the structure of the *public sphere*, the platform of democratic public discourse. This sphere used to be hierarchically organised with set and established functions of various players such as the State, the media, the church, or educational institutions, all of which have today lost control over the horizontal interchange of news and views among the users. This relative freedom from the influence of the political and social elites both empowered and disempowered individuals in their information routines, and the same likely applies to their electoral behaviour. Research is already conducted into the psychological processes and related conditions for how the use of social media, in its various forms, might translate into a variety of impacts on individuals' political participation (Knoll et al., 2018).

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\* Statista – Most popular social networks worldwide as of October 2018. Available at <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/>

† Pew Research Center - Social Media Use in 2018. Available at <http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/>

‡ The term 'internet intermediaries' refers to the operators of online media platforms, of search engines, social networks and app stores (van der Noll, Helberger, & Kleinen-von Königslöw, 2015). According to the Council of Europe's Recommendation CM/Rec(2018)2 on the roles and responsibilities of internet intermediaries, these players facilitate interactions on the internet between natural and legal persons by offering and performing a variety of functions and services. Some connect users to the internet, enable the processing of information and data, or host web-based services, including for user-generated content. Others aggregate information and enable searches; they give access to, host and index content and services designed and/or operated by third parties. Some facilitate the sale of goods and services, including audio-visual services, and enable other commercial transactions, including payments.

9. Firstly, the growing range of information, including electoral information, available online, faster digital consumption, and the increasing use of social media streams and newsfeeds implies that individuals today “discover” content rather than search for specific information. They thus depend, to a large extent, on the social platforms’ content moderation and ranking which is primarily supported by non-transparent algorithms, but does not benefit from editorial filters of accuracy, fact-checking and separation of fact and opinion. Personalised selection and organisation of content and corresponding recommendations of information are based on users’ expressed or inferred preferences and adapted to their profiles. Designed for maximum engagement of the target audience, such recommendations may well lead a user to misleading or false content, proving social media to be a fertile ground for information disorder.

10. In this connection, the Information Disorder Report 2017 introduced a detailed conceptual framework for examining the multifaceted phenomenon, until then widely but inadequately described as “fake news”, a notion that was appropriated by politicians around the world to describe news they found disagreeable and therefore turned into a mechanism for attacking media freedom. The Report conceptualised three main types of information disorder:

11. Mis-information stands for sharing false information, but without the intent of causing harm;

Dis-information stands for knowingly sharing false information with the intent to harm;

Mal-information describes genuine information shared with the intent to cause harm, often by disclosing information from the private sphere into the public sphere.

12. The empowered communication practices also brought to light some new perspectives on the very *nature of human communication*; evidence is now available that people are *more likely to share untrue news*, usually with exaggerated and emotional headlines (called clickbait) specifically designed to attract a large number of users, although most of these false stories inspire fear, disgust, or surprise in the replies. Latest academic research also analysed whether the issue of disinformation is caused by algorithms or human behaviour (Lazer et al., 2018) and the findings were contrary to conventional wisdom, the spread of false news was *not accelerated because of robots* but because *humans were more likely to spread it* (Vosoughi, Roy, & Aral, 2018). Moreover, there are significant gender aspects to political communication on the internet, leaving the door open to excessive comments, including sexism and sexist hate speech\*.

13. In a more sinister vein, in certain cases untrue information was *strategically* disseminated with the intent to *influence election results*. It has been documented that *cyber troops* on the internet are often *government, military or political party teams committed to manipulating public opinion* over social media. Organised *social media manipulation first emerged* in 2010, and by 2017 there are details on such organisations in 28 countries (Bradshaw & Howard, 2017). However, it is not only the social media, but also search engine providers that can manipulate information with or without the intent to skew the election results in favour of a particular political option. Recent research shows that manipulations of search results by those providers can produce a so-called *search engine manipulation effect* which can shift the voting preferences of undecided voters by 20% or even more in some demographic groups (Epstein & Robertson, 2015).

14. As regards the issue of resilience against mis-, dis- and malinformation, research found a clear geographic pattern in such potential for resilience. The countries with a better performance are those from the North and Northwest of Europe, as opposed to the countries in South-Eastern Europe (Open Society Foundation, 2018).

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\* Feasibility study (DGI(2017)10) on media coverage of elections with specific focus to gender equality and the use of the internet in elections

15. However, even in cases where political messages are not outright false or produced as part of a concerted campaign to undermine the integrity of elections, election results can be influenced through the social media by employing a vast amount of data that can be collected from different sources (political surveys, public records, social media themselves, etc.) in order to engage in targeted messaging of voters. Because these targeted messages do not reach the public, but only selected groups or individuals, they are not subject to any oversight or journalistic scrutiny. Consequently, political candidates and parties can make different promises to different people, dispersing their political objectives into separate, not necessarily reconcilable messages. Indeed, some research shows increased digital campaigning on the so-called wedge issues, those that are highly divisive but have the ability to mobilise voters (immigration policies, welfare, same-sex marriages, etc.). Lastly, message targeting seeks to optimise the electoral campaigns' resources and thus focuses largely on swing or undecided voters. Those who are not singled out by political party messages are deprived of an entire spectrum of political stances, which in turn creates inequalities in terms of the available information on which the voters base their political choices.

16. The impact of *mis-, dis- or mal-information on democratic electoral processes* raised the need for public scrutiny and concrete measures countering their wide dissemination and potential impact. The Information Disorder Report 2017 identified a number of recommendations directed at governments, education ministries, media organisations, technology companies and civil society. The recommendations range from, among other, regulating advertising on the social platforms as a way of preventing websites with disinformation and false content from creating ad revenues; joining efforts in supporting quality journalism based on ethical principles, public service media and local news outlets; building fact-checking and verification tools online and debunking false and misleading information; taking action against automated accounts boosting content and providing transparent criteria for ranking online content; and educating the public about the threat of information disorder.

17. More efforts will also be needed to remedy the adverse effects of digitisation of electoral communication. In this regard, the CoE Election Study 2017 recommended scrutinising the use of personal data in the context of electoral campaigns; reviewing the relevant legislation and including focuses on online campaigning and monitoring of online spending; specifying the responsibilities of internet intermediaries as regards political campaigning on their platforms; and reclaiming the important role of journalism and its watchdog function in relation to politics and electoral campaigns.

18. In addition to the work of the Council of Europe in this area, the European Commission (EC) has created the High-Level Expert Group which issued a report in March 2018, analysing the phenomenon (HLG, 2018). In September 2018, the EC made specific recommendations with the aim to protect Europe's democratic processes from manipulation by the third countries or private interests, and proposed new rules on election cooperation networks, online transparency, protection against cybersecurity incidents and steps to counter disinformation campaigns in the context of the European elections\*. The NATO has set up a Stratcom Centre of Excellence,† a think tank focusing on the impact of information domination on the internet‡ and cyber defence. As a result of EU-NATO cooperation on hybrid threats, the European Centre of Excellence for Countering Hybrid Threats was established in 2017.§

19. On the national level, it is worth mentioning a Czech initiative\*\* setting up an official unit for monitoring disinformation in order to ensure the fairness of the elections. In 2018

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\* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Securing free and fair European elections COM(2018) 637 final

† NATO Strategic Communications Centre of Excellence

‡ See e.g. the Report on Robottrolling (Aug 2018)

§ The European Centre of Excellence for Countering Hybrid Threats (Hybrid CoE)

\*\* Centre Against Terrorism and Hybrid Threats

several other states have passed legislative rules to counter politically loaded disinformation in their elections. Germany acted first\* by obliging internet intermediaries to remove within 24 hours any illegal content designated as such in the Criminal Code; offences range from hate speech and certain defamatory offences to content amounting to a threat to the constitutional order or national security, etc., which can have a direct impact on public debate and opinion especially during times of elections. Recently, France has presented a bill to combat manipulation of information during electoral periods, which imposes sanctions for posting or sharing "false, exaggerated or tendentious news".† While these legislative steps may yield some positive results, they have also attracted criticism‡ as to their potential on limiting freedom of speech and expression.§

20. In sum, the fundamentals of ensuring *the right to free elections* need to be revisited in light of the digital revolution and its impacts. Therefore, it is necessary to take stock of the applicable European legal stipulations and the relevant standards set by the Council of Europe in this regard

## **Conclusions**

21. Today we are witnessing the parallel proliferation of information and its pollution at a global scale. The internet-based services have enriched and diversified news sources, facilitating individuals' access to information and their decisions on the most crucial matters in democracy, notably on the choice of their legislature. However, at the same time, a new era of information disorder (CoE Information Disorder Report, 2017) distorted the communication ecosystem to the point where voters may be seriously encumbered in their decisions by misleading, manipulative and false information designed to influence their votes. This environment potentially undermines the exercise of the right to free elections and creates considerable risks to the functioning of a democratic system.

22. The *guarantees of a level playing field aimed at ensuring fair, clean and clear campaigns are under threat*. The objectives as identified by the Venice Commission are challenged in multiple ways stemming from (a.) distorted channels of communication and information; (b.) structural and institutional limitations to ensuring equal opportunities to competing political parties; and (c.) inapplicability of existing rules and regulations pertaining to democratic electoral processes. As a result, fair and equal access to media channels is not ensured; nor are there sufficient safeguards for transparent party and campaign finance (CoE Election Study 2017).

23. It can be concluded that a serious shift in the influence of internet-based channels of electoral communication has reached a tipping point in terms of immediacy and power (Plaizier, 2018) and dominance (Tambini, 2018). This tremendous change calls for action in the following areas.

A. Revision of rules and regulations on political advertising: in terms of access to the media (updating broadcasting quotas, limits and reporting categories, introduction of new measures covering internet-based media, platforms and other services, addressing the implications of microtargeting) and in terms of spending (broadening of scope of communication channels covered by the relevant legislation, addressing the monitoring capacities of national authorities);

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\* Gesetz zur Verbesserung der Rechtsdurchsetzung in sozialen Netzwerken (Netzwerkdurchsetzungsgesetz – NetzDG)

† France presented on 7 June 2018 the Bill to combat the manipulation of information

‡ See e.g. Deutsche Welle, Economist

§ Lately, on the EU-level, the EC proposed regulation to combat terrorist content with obliging intermediary service providers to remove illegal content within one hour (Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on preventing the dissemination of terrorist content online. Brussels, 12.9.2018 COM(2018) 640 final). The definition of 'terrorist content' covers extreme speech online, whereby the boundaries defining such content are vague, therefore implications to freedom of expression might be detrimental.

B. Accountability of internet intermediaries in terms of transparency and access to data: enhancing transparency of spending, specifically for political advertising, and shifting revenue streams away from websites and other sources of electoral propaganda and disinformation aimed at harming the integrity of elections. Furthermore, internet intermediaries should provide access to data on paid political advertising, so as to avoid facilitating illegal (foreign) involvement in elections, and identify the categories of target audiences.

C. Quality journalism: strengthening of news accuracy and reliability, enhanced engagement with the audience, strengthening of public service media and local media, and empowering self-regulation with an added focus on transparency of online news and their circulation;

D. Empowerment of voters towards a critical evaluation of electoral communication targeted action for preventing exposure to false, misleading and harmful information (with due reflection on the limits of fact-checking initiatives (Lazer et al., 2018); efforts on media literacy (including social media literacy) through education and advocacy.

## **B. The right to free elections in the instruments of the Council of Europe**

24. Under the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5, hereinafter: the Convention), as interpreted by the European Court of Human Rights (hereinafter: the Court), the CoE member states have an obligation to secure the rights and freedoms for everyone within their jurisdiction, both offline and online. The *right to free elections* enshrined in Article 3 of Protocol No. 1 to the Convention is not only an objective and essential principle in any democratic society, but also a fundamental individual right on which every citizen can rely, one that most effectively promotes “true democracy” (Lécuyer, 2014).

25. The right to free elections incorporates the right to vote and the right to stand for election. Moreover, it also entails a positive obligation on the member states to ensure conditions under which people can freely form and express their opinions and choose their representatives. This obligation is of utmost importance with regards to the (un)disrupted communicative context of elections. The right to free elections provides that member states “undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature”, which indicates that the rights to freedom of expression and to free elections are prerequisites of each other (Plaizier, 2018). This interpretation was reaffirmed by the Court in stating, that “free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system”.\*

26. The ECtHR also clearly pointed to the responsibility of the State for preventing inequality in media coverage during elections<sup>†</sup> online and offline, however with significant differences as regards the *influence* between traditional media and new media<sup>‡</sup>. The issue at stake now is how to define those differences precisely – *whether they have already reached a “sufficiently serious shift in the respective influence”*<sup>§</sup>. The crucial caption of the momentum of this ‘shift’ is to determine whether the positive obligations of the State in assuring equal exposure of political parties and candidates are to be applied to new information intermediaries and in what manner.

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\* *Bowman v the United Kingdom* App. no. 24839/94 (ECtHR, 19 February 1998), para 42.

† *Communist Party of Russia and Others v Russia* App. no. 29400/05 (ECtHR, 19 June 2012)

‡ *Animal Defenders International v the United Kingdom* App. no. 48876/08 (ECtHR, 22 April 2013)

§ *Ibid.*, para 119.

### C. Relevant CoE instruments and standards relating to elections & media

CoE standards were set in two major areas, namely (i.) on funding of political campaigns; and on (ii.) media coverage of elections.

#### iii. Standards on electoral funding

27. There is a range of commonly agreed standards against corruption in the funding of political parties and electoral campaigns (set by the PACE Recommendation 1516 (2001)<sup>\*</sup> and followed upon by the Committee of Ministers Recommendation Rec(2003)4<sup>†</sup> which are recommended to also apply to entities related to political parties, such as political foundations. The standards to be applied include (a.) requirements on a *reasonable balance* between public and private funding of political parties; (b.) the use of *fair criteria* for the distribution of state contributions to parties; (c.) imposition of strict rules concerning private donations including *bans on or limitations of contributions* from foreign donors, religious organisations and restrictions on corporations and anonymous donations; (d.) *limitations on parties' expenditures* linked to election campaigns; (e.) provisions on *transparency* of donations and expenses of political parties; and (f.) the establishment of an *independent authority* and meaningful *sanctions* for those who violate the rules.

28. The applicable standards were set high in order to “protect the integrity of elections, ensure they are free and fair, and not captured by a narrow range of interests.” (CoE Election Study 2017:9). However, the legislative steps taken by the member states and regulations implemented focused on the offline context. Therefore, their *applicability and efficacy in times of digital political advertising* turned out to be *severely limited*.

#### iv. Standards on political speech and media coverage on electoral campaigns

29. The standards and other instruments in this area seek to provide an *enabling communication context for the enjoyment of the right to free elections*. They reflect the positive obligations of the State to ensure that citizens receive necessary and truthful information on political parties to support their democratic choice to elect their representatives. The Recommendation CM/Rec(2007)15<sup>‡</sup> applies to a broad range of media, irrespective of the means and technology used for the dissemination of their content, providing guidelines for free and independent media coverage of political campaigns, with higher standards applicable to the public service media outlets (‘media owned by public authorities’). The Recommendation makes a number of guidelines aimed at ensuring responsible, accurate and fair coverage of electoral campaigns; however public service media have a particular responsibility to cover elections in a “fair, balanced and impartial manner, without discriminating a specific political party or a candidate”. As regards the overall opportunities for the political parties and candidates to address the electorate, the Recommendation leaves it to the discretion of individual member states whether they will allow for paid political advertising. However, where parties have the possibility of buying advertising space for the purpose of electoral campaigning, they must be able to do so under equal conditions and rates of payment. Furthermore, the Recommendation sets out a few general requirements for ensuring fair and transparent campaigns; for example, the *right of reply* or equivalent remedies should be made available to the candidates and/or political parties, so as to enable them to effectively respond to any statements that might cause them prejudice during the relatively short duration of electoral campaigns. Also, the *modalities of disseminating opinion polls* should provide the public sufficient information to make a judgment on the value of the polls, while the potential impact of electoral messages just before the elections is mitigated by the provision allowing the member states to consider prohibiting their dissemination on the day preceding voting (“day of reflection”). Moreover, the Recommendation spells out *transparency requirements* on *paid advertising content* along with *ownership* of the outlets (these requirements are detailed by the Recommendation CM/Rec(2018)1<sup>§</sup>). The above-mentioned guidelines target, first and

<sup>\*</sup> PACE Recommendation 1516 (2001) on the financing of political parties

<sup>†</sup> Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns

<sup>‡</sup> Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of electoral campaigns

<sup>§</sup> Recommendation CM/Rec(2018)1 on media pluralism and transparency of media ownership



foremost, linear broadcast (private and public) media with extensions to non-linear audiovisual services of public service media. However, with the shift of political campaigning to the online social media context in the past decade, their effectiveness is proving to be reduced.

30. This shift is reflected also in the Recommendation CM/Rec(2018)1<sup>\*</sup>, which clearly points to the potentially disturbing impact that the online platform's control over the flow, availability, findability and accessibility of information can have on *media pluralism*. Selective exposure to media content leading to potential societal fragmentation is identified as one of the major concerns especially during the time of elections. Therefore, the Recommendation calls on the States to fulfill their positive obligation and to act as the ultimate guarantor of media pluralism by *ensuring pluralism in the entirety of the multimedia ecosystem*. This interpretation is reinforced by the Recommendation CM/Rec(2018)2<sup>†</sup> which addresses the roles and responsibilities of internet intermediaries in relation to their users and to the member states, having due regard to their growing power over communication and the dissemination of information. The potential co-responsibility of intermediaries for content that they store - if they do not act expeditiously to restrict access to content or services as soon as they become aware of their illegal nature (in line with the principles of legality, necessity and proportionality) - should be read in this context. Meanwhile, intermediaries should bear no general obligation to monitor content, which they merely give access to, or which they transmit or store.

31. The presented CoE standards demonstrate the *dual nature of concerns* with regard to the communication on the internet. On the one hand, they acknowledge the crucial role of intermediaries, including the social media, in providing services of public value and facilitating public discourse and democratic debate, as protected by Article 10 of the Convention. On the other hand, the standards set out the intermediaries' responsibilities with respect to ensuring human rights and fundamental freedoms on their platforms, which includes the right to free elections. In this regard, internet intermediaries should be subject to effective oversight of the State and regular due diligence assessments of their compliance with their responsibilities.

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<sup>\*</sup> See above fn. 23

<sup>†</sup> Recommendation CM/Rec(2018)2 on the roles and responsibilities of internet intermediaries

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