


Disinformation regarding COVID-19 in light of the priorities of the European Commission and the legal regulations binding and currently drafted in Poland¹

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Abstract: Disinformation regarding the COVID-19 pandemic is a global phenomenon. It constitutes a threat to the values protected under the law, health in particular. The primary issue tackled in “Disinformation regarding COVID-19 in the light of priorities of the European Commission and the legal regulations binding and currently drafted in Poland” paper is an attempt at answering the following question: Is eliminating COVID-19 disinformation from public space possible in light of the priorities of the European Commission and the legal regulations already effective and currently being drafted in Poland? The analyses conducted under the paper lead to the conclusions that the provisions currently regulating freedom of expression theoretically constitute a basis for eliminating disinformation from public space but are, in practice, not very effective. This leads to the need for searching for other, more effective legal instruments in this field, both on the level of European Union law making and domestic legislation. Although we may speak of a consensus concerning assessment of the very phenomenon of disinformation the legislative and practical actions taken, both on the domestic level and the European Union level, enable us to indicate substantial and frequently disturbing differences

¹ Legal status as of: 25th of January 2022.

regarding shifting the aspects emphasized by legislation. As compared to the proposed solutions drafted by the European Commission and the drafts of domestic acts, the vastly different approach to the idea of controlling disinformation is clearly visible. Therefore, it must be stated that such circumstances will lead to development of varied legal effects of the drafted regulations that will decide, among other issues, the practical effectiveness or lack thereof in the case of the drafted solutions. In the course of the analysis of the issue constituting the subject of this paper we should concurrently bear in mind that freedom of expression is one of the principles in a democratic state governed by the rule of law.

1. Introduction

For close to two years the world has been attempting to overcome the COVID-19 pandemic which in a global scale has claimed the lives of over 5 million people². Proliferation of the SARS-CoV-2 virus has been from the very beginning accompanied by the virus of disinformation. As a result of development of electronic means of social communication this phenomenon, although long known in various forms³, constitutes an imminent risk to not only the quality of social communication but also to specific values protected under the law. It is global in nature and as of yet a solution to it has not been discovered⁴. The phenomenon of disinformation refers

² The COVID-19 death toll as of 17.09.2021 was 4,675,036 and 5,604,957 as of 25.01.2022.

³ Cf. Russell L. Weaver, "Fake News (& Deep Fakes) and Democratic Discourse," *Journal of Technology Law & Policy* 24, no. 1 (2019): 39–40; Udo Fink, and Ines Gillich, "Fake News As A Challenge For Journalistic Standards In Modern Democracy," *University of Louisville Law Review* 58, no. 2 (2020): 265–266.

⁴ Cf. David García-Marín, "Infodemia global. Desórdenes informativos, narrativas fake y fact-checking en la crisis de la Covid-19," *El Profesional de la Información* 29, no. 4 (2020): 2; Jesús-Ángel Pérez-Dasilva, Koldobika Meso-Ayerdi, and Terese Mendiguren-Galdospín, "Fake news y coronavirus: detección de los principales actores y tendencias a través del análisis de las conversaciones en Twitter," *El Profesional de la Información* 29, no. 3 (2020): 1–22. Authors draw attention to the fact that by preying on emotions of fear and uncertainty false information spread faster than the coronavirus itself and lead to social unrest. It is prudent to remember that lack of social trust constitutes a significant problem - it is a factor which leads to deterioration of all social groups, development of social tensions

to the COVID-19 epidemic in a particular manner. On the legal grounds disinformation regarding the COVID-19 epidemic should be placed within the space of freedom of expression to which everyone is entitled. Counteracting and controlling distribution of false information, a phenomenon detrimental to society, presents specific challenges in the context of the role and significance of freedom of expression in a democratic state. Disinformation itself is being concurrently perceived as a serious threat to democracy⁵. In all of its context this phenomenon is recognized as one of the most prominent challenges that the European Union faces, as evidenced by, for example, the priorities of the European Commission.

The primary issue to be tackled in this paper has been formulated in the form a question: Is eliminating disinformation regarding COVID-19 from public space possible in the light of the priorities of the European Commission and the legal regulations already effective and currently drafted in Poland? When tackling this issue we should consider several specific problems. Firstly, it is prudent to determine the nature of disinformation related to the COVID-19 epidemic; what is the priority of this issue according to the European Commission?; Can COVID-19 disinformation be effectively counteracted by the currently binding and drafted Polish legal provisions? The issues presented in such a manner correspond with the structure of this paper. The first part of this paper (2) discusses the nature of disinformation regarding COVID-19, that constitutes a particular

and is conducive to developing resistance to rational argumentation regarding all subjects. Authors of the invoked works emphasize that dissemination of the falsehoods regarding COVID-19 results in development of a factual threat and related after effects - it is dangerous because it influences health and may lead to further infections and deaths.

⁵ Chris Tenove, "Protecting Democracy from Disinformation: Normative Threats and Policy Responses," *The International Journal of Press/Politics* 25, no. 3 (2020): 517–537; Edda Humprecht, Frank Esser and Peter Van Aelst, "Resilience to Online Disinformation: A Framework for Cross-National Comparative Research," *The International Journal of Press/Politics* 25, no. 3 (2020): 493–516; W. Lance Bennett and Steven Livingston, "The Coordinated Attack on Authoritative Institutions. Defending Democracy in the Disinformation Age," in *The Disinformation Age. Politics, Technology, and Disruptive Communication in the United States*, ed. W. Lance Bennett, Steven Livingston (Cambridge University Press, 2021), 261–283; Yochai Benkler, Robert Faris and Hal Roberts, *Network Propaganda. Manipulation, Disinformation and Radicalization in American Politics* (New York: Oxford University Press, 2018), 341–349.

form of disinformation; the second part of the article (3) presents the European approach to this phenomenon expressed in terms of the priorities of the European Commission; the third part of the paper (4) confronts COVID-19 disinformation phenomenon with the binding and currently drafted Polish legislation in the context of the potential effectiveness of the legislation in the field of eliminating this phenomenon from the public space and the fourth part (5) embodies conclusions *de lege lata* and *de lege ferenda*. In the circumstances of a still ongoing pandemic unprecedented in terms of scale, this paper does not claim the right to formulate definitive conclusions on the subject but instead constitutes an attempt to present the opinion of the author and an open invitation to discussion.

2. The nature of the COVID-19 disinformation phenomenon

From the formal point of view disinformation regarding COVID-19 is a particular form of disinformation in its general meaning. According to the „EU Code of Practice on Disinformation”, disinformation is „verifiably false or misleading information which, cumulatively, is created, presented and disseminated for economic gain or to intentionally deceive the public and may cause public harm, intended as threats to democratic political and policymaking processes as well as public goods such as the protection of EU citizens’ health, the environment or security”⁶. Furthermore, the document adds that „the notion of disinformation does not include misleading advertising, reporting errors, satire and parody, or clearly identified partisan news and commentary, and is without prejudice to binding legal obligations, self-regulatory advertising codes, and standards regarding misleading advertising”. On these grounds we may assume that COVID-19 disinformation is distinguished by deliberate dissemination of false information concerning all aspects of the SARS-CoV-2 and COVID-19 disease the virus causes, including challenging and negating the existence of the disease. Such information misleads a recipient and may constitute an imminent and factual threat to the values protected under the law. The phenomenon of disinformation is directly related to the phenomenon of infodemic. “Infodemic is a blend of *information* and *epidemic* that typically refers to a rapid

⁶ EU Code of Practice on Disinformation, accessed December 30, 2021, <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation>.

and far-reaching spread of both accurate and inaccurate information about something, such as a disease. As facts, rumours, and fears mix and disperse, it becomes difficult to learn essential information about an issue. Term “infodemic” was coined in 2003, and has seen renewed usage in the time of COVID-19⁷. The category of *fake news*, the false (as in falsified, intentionally fabricated in order to appear credible) information served as press information distributed over media⁸, is intrinsically related to the issue of disinformation. The term *fake news* was initially related solely to press messages. As a result of common and widely spread use of this term, a semantic shift has occurred in the meaning and currently the term *fake news* is used in reference to all false news appearing in the public space, not necessarily prepared and posted by professional journalists and press.

The issue of disinformation in reference to COVID-19 has been for the first time recorded by the World Health Organization⁹ which along with nine other organizations operating within the framework of the United Nations Organization¹⁰ (hereinafter: the UNO)) drew attention to the most

⁷ It should be noted that this term is considered to have been coined by David Rothkopf who used it for the first time in 2003 in an article devoted to spread of SARS virus published in *Washington Post* on 11.05.2003. – “Words We’re Watching: ‘Infodemic,’” accessed November 19, 2021, <https://www.merriam-webster.com/words-at-play/words-were-watching-infodemic-meaning>.

⁸ It is prudent to bear in mind that there is no singular, commonly accepted definition of this term. Cf.: Fink, and Gillich, “Fake News,” 267: “Despite various proposals by scholars to define “fake news” and to distinguish it from other forms of distorted or misleading information, there is still no consensus on the definition of this concept. According to some scholars, “fake news” describes deliberately false factual statements, i.e. lies, distributed through news channels. Others conceive a broader meaning to cover speech that is presented in such a way as to make its recipients likely to draw certain false conclusions (distorted news or “fake news” in a broader sense)”

⁹ During the Munich Security Conference held in the beginning of 2020 the Managing Director of World Health Organization stated during meeting of the foreign policy and security experts that “(...) we’re not just fighting an epidemic; we’re fighting an infodemic. Fake news spreads faster and more easily than this virus, and is just as dangerous (...) We call on all governments, companies and news organizations to work with us to sound the appropriate level of alarm, without fanning the flames of hysteria” “Munich Security Conference,” accessed November 19, 2021, <https://www.who.int/director-general/speeches/detail/munich-security-conference>

¹⁰ “Managing the COVID-19 infodemic: Promoting healthy behaviours and mitigating the harm from misinformation and disinformation. Joint statement by WHO, UN,

important aspects of disinformation: disinformation constitutes a factual threat - it may be harmful to physical and psychological well-being of humans; it intensifies social stigmatization, it polarizes the public discourse related to COVID-19; it provokes and intensifies hate speech; it increases the risk of conflicts, violence and violation of human rights; ultimately, it endangers development of democracy, human rights and social cohesion in the long-term perspective¹¹. In relation to the above, the UNO called for developing and implementing plans for counteracting infodemic through promoting timely distribution of accurate and credible information based on scientific knowledge among all social groups, particularly among high-risk groups. The call also concerned preventing proliferation of disinformation and controlling disinformation with concurrent observation of the freedom of speech. The Member States have also been called for cooperating with all social groups during development of domestic plans of action and for supporting the said groups in developing solutions and resistance to disinformation¹². The statement and the call to action included therein are not binding in a legal sense. However, the fact that it has been proclaimed and adopted is evidence for the magnitude of the issue - the authors of the document directly speak that the price for dissemination of false information is being paid in human life; furthermore the authors advocate for the absolute need for the greatest possible degree of cooperation between public and non-public institutions in the field of counteracting disinformation.

3. COVID-19 disinformation in the context of the priorities of the European Commission

The issue of disinformation related to COVID-19 is treated very seriously by the European Union (the EU). The need for providing credible and accurate information regarding the pandemic has been indicated among the ten most important actions the EU is taking in its fight against COVID-19 and

UNICEF, UNDP, UNESCO, UNAIDS, ITU, UN Global Pulse, and IFRC,” accessed November 19, 2021, <https://www.who.int/news/item/23-09-2020-managing-the-covid-19-infodemic-promoting-healthy-behaviours-and-mitigating-the-harm-from-misinformation-and-disinformation>.

¹¹ “Managing the COVID-19 infodemic.”

¹² “Managing the COVID-19 infodemic.”

the European Parliament called for “establishing a European source of information with the goal of providing all citizens with access to accurate and credible information in their native language and asked social media platforms for joining in the fight with disinformation and hate speech”¹³. The body responsible for coordination of joint response to the pandemic is the European Commission. Counteracting and controlling disinformation on the subject of COVID-19 is one of the areas in which the Commission operates in relation to the pandemic. According to the conception developed by the European Commission the departure point for the anti-disinformation strategy as well as one of its priorities is the necessity of protecting freedom of expression as well as other guaranteed rights and freedoms which should be treated as an axiom. Due to this fact the primary goal of the actions taken is not criminalizing disinformation as such or prohibiting it *expressis verbis* but the work for the benefit of increasing transparency of the Internet environment and responsibilities of the entities operating therein through substantially improving transparency of content moderation practices, bolstering position of citizens in this area and supporting an open democratic debate. This goal is to be realized through mobilizing all agents operating in this area: public bodies, businesses, media, academic circles and civil society, to cooperate.

The European Commission has been tackling the issue of disinformation for several years and its stance on the COVID-19-related disinformation is the derivative of the stance of the Commission on disinformation in general. The fight against disinformation was indicated in priority no. 6 adopted by the European Commission for the years 2019–2024 and titled “A new push for European democracy”¹⁴. In this priority the following declaration was made among other declarations: „in order to protect our democracy from external interference, a joint approach is necessary to tackle issues such as disinformation and online hate messages”¹⁵. “European Democracy Action Plan” has been adopted within the framework

¹³ “10 things the EU is doing to fight the coronavirus,” accessed November 19, 2021, <https://www.europarl.europa.eu/news/pl/headlines/society/20200327STO76004/10-dzialan-ue-w-walce-z-koronawirusem>.

¹⁴ “A new push for European democracy,” accessed November 19, 2021, https://ec.europa.eu/info/strategy/priorities-2019–2024/new-push-european-democracy_en.

¹⁵ “A new push for European democracy.”

of the priority in which counteracting and controlling disinformation has been indicated as one of the four actions for the benefit of bolstering standing of citizens and establishing more resistant democracies across the entire EU¹⁶. It has been emphasized that “democracies around the world are facing a proliferation of false information, which may have the potential to destabilize their democratic institutions, and undermine the trust of citizens. To address misinformation, disinformation and foreign interference different policy responses are required”¹⁷. The Commission was obliged to improve methods for counteracting foreign interference in the information space of the EU and to effect adoption of such changes in “Code of Practice on Disinformation” which will ensure that the Code will project responsibility of the Internet platforms on the basis of the principle of co-regulation consistently with the drafted Digital Services Act and that the Code will enable defining solid foundations for monitoring of implementation of the adopted premises¹⁸. Improving and strengthening of media education, understood as developing the capacity for utilizing media, improving awareness and providing support to the civil society in this regard, which is not greatly valued in Poland, plays a pivotal role in the information space. Implementation of the adopted premises and criteria is to be assessed in 2023.

There is no doubt that counteracting disinformation effectively requires as wide approach to the problem as possible, which in practice means that the Commission has to act in two different ways. On the one hand the Commission postulates the necessity of reinforcing self-regulating actions, on the other the Commission demands legislative solutions and thus it has prepared a set of acts related to digital services (Digital Services Act and Digital Markets Act) in which particular attention is being drawn to self-regulating actions. Both types of actions directly indicate the necessity of counteracting and controlling disinformation.

The most important component of the initiatives taken in the field of self-regulation is “Code of Practice on Disinformation” adopted in 2018.

¹⁶ “European Democracy Action Plan,” accessed November 19, 2021, https://ec.europa.eu/info/strategy/priorities-2019–2024/new-push-european-democracy/european-democracy-action-plan_en

¹⁷ “European Democracy Action Plan.”

¹⁸ Cf. “European Democracy Action Plan.”

Its signatories consist of the largest Internet platforms operating within the EU as well as the primary industry associations representing the European advertising sector. The Code has become an instrument which ensures greater transparency and responsibility of Internet platforms; it proposed a framework for monitoring and improving policy of platforms in relation to counteracting disinformation. However, in the face of new challenges, in particular the challenges related to disinformation on the subject of COVID-19, provisions of the act proved to be insufficient. Due to this fact the Commission has prepared new guidelines on the issue of reinforcing and improving “Code of Practice on Disinformation”. As it has been decided in the Digital Services Act the improved Code will evolve towards the form of a co-regulating instrument. The key elements which according to the Commission are essential for transforming the code into a stronger counter-disinformation instrument as well as a tool for establishing safer and more transparent Internet environment were indicated within the framework of the guidelines. Among other components the guidelines include: the need for expanding the scope of application of the Code (object expansion) to address disinformation in not only its narrow understanding as false or misleading content that is distributed with the goal of misleading or acquiring economical or political gain and that may result in public harm but also in the understanding of disinformation as false or misleading content made available without harmful intentions when there is a risk of serious public harm provided that the freedom of speech is guaranteed; the need for extending participation in the role of signatories to the Code to smaller websites (subjective expansion), the need for signatories of the Code to establish a permanent mechanism for adapting the Code to the current requirements; the need for exercising control over posted advertisements; the need for unifying the understanding of prohibited behaviour; the need for reinforcing standing of the users, primarily through effective media education but also through increasing visibility of the credible information the public is interested in by way of issuing warnings addressed to the users who come into contact with false or misleading content achieved through propagation and improving effectiveness of the functions used to flag harmful and false information and by making credibility indicators available thus enabling users to make an informed and conscious choice regarding navigating the Internet; ultimately,

the need for cooperation between the signatories of the Code and the scientific circles researching the phenomenon of disinformation. It is worth emphasizing that the importance and practical power of the Code stems from its self-regulating nature - signatories voluntarily oblige to adhere to its provisions, jointly cooperate to develop solutions and provisions which they then follow. The importance of such solutions does not deteriorate when the area they regulate becomes encompassed by legislative solutions. Quite the contrary, these two types of regulations reinforce each other mutually, particularly when an instrument of self-regulation evolves towards co-regulation¹⁹.

The Proposal for a Regulation of the European Parliament and Of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/E²⁰ (hereinafter: DSA) submitted by the Commission include compatible regulations developed as a consequence of the manner in which the Commission currently perceives the issue of disinformation. The issue itself appears *expressis verbis* in the recitals preceding the normative text. Disinformation is to be countered and controlled through further development of supervision and regulations concerning advertisement systems utilized by major Internet platforms (recital 63). Disinformation has also been indicated as the area requiring being taken into consideration during development of codes of conduct (recital 68). It has been emphasized in particular that the provisions regarding proceedings within the framework of the ordinance (DSA) may serve as a basis for the already taken self-regulating actions on the level of the European Union and reinforcing the already adopted “Code of Practice on Disinformation” (recital 69). Finally, developing the so called “crisis protocols” is supposed to aid in counteracting disinformation. This instrument

¹⁹ European Commission, “Communication From The Commission to the European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions. European Commission Guidance on Strengthening the Code of Practice on Disinformation”, COM(2021) 262 final, accessed December, 03, 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0262&from=pl>.

²⁰ European Commission, “Proposal for a Regulation of The European Parliament and of The Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC”, accessed December, 11, 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0825>.

may be utilized in the event of extraordinary circumstances influencing public security or health. In the case of absence of the crisis protocols their development may be initiated by the Commission in order to coordinate rapid, joint and cross-border response in the Internet environment. The extraordinary circumstances may consist of all unforeseen events, including serious cross-border threats to public health such as pandemics, in the case of which the Internet platforms may be used for the purpose of rapid proliferation of disinformation (recital 71). It has been emphasized that the Internet platforms are to be encouraged to develop and apply specific crisis protocols. The protocols themselves should be activated only for a limited period of time and the measures adopted within their framework should be limited to the measures absolutely indispensable for countering extraordinary circumstances. The regulation stipulates specific provisions referring to two specific institutions pivotal for combating disinformation. According to these provisions the European Commission and the European Board for Digital Services²¹ will not only facilitate developing codes of conduct on the European Union level but may also invite appropriate entities to develop such codes in the event of emergence of a systemic risk, also through defining obligations in the field of implementing particular measures limiting such risks as well as defining the framework for regular reporting regarding all implemented measures and their results (Art. 35 of DSA). These postulates also concern Internet advertising (Art. 36 of DSA). In accordance with Art. 37 of DSA the European Board for Digital Services may order the Commission to initiate development of crisis protocols for the purpose of counteracting a crisis strictly limited to extraordinary circumstances influencing public security or health. Among a number of requirements, a crisis protocol should meet the requirement that has been indicated regarding the protocol specifically defining the types of protection measures

²¹ European Board for Digital Services is established as an independent advisory group of Digital Services Coordinators on the supervision of providers of intermediary services. The Board shall be composed of the Digital Services Coordinators, who shall be represented by high-level officials. Where provided for by national law, other competent authorities entrusted with specific operational responsibilities for the application and enforcement of this Regulation alongside the Digital Services Coordinator shall participate in the Board. Other national authorities may be invited to the meetings, where the issues discussed are of relevance for them under (article 47).

enabling preventing all adverse impact on exercising basic rights indicated in the Charter of Fundamental Rights of the European Union, in particular the freedom of expression and information. Thus, all actions taken with the goal of counteracting disinformation should also secure and protect exercising the basic rights, including the right to freedom of expression.

4. Disinformation on the subject of COVID-19 and the legal regulations effective and currently drafted in Poland

Being aware of the nature, content and the magnitude of proliferation of disinformation concerning COVID-19 we should pose a question: Does the law effective in Poland govern the instruments which may be used for restricting this phenomenon? Are the binding legal provisions capable of effectively governing the cases of dissemination of falsehoods regarding COVID-19 and therefore preventing their adverse impact while concurrently maintaining freedom of speech, which is one of the principles of a democratic state governed by the rule of law?

The analysis of the currently binding provisions applicable to the current health situation in Poland²² resulting from proliferation of SARS-CoV-2 virus and COVID-19 disease the virus causes and referring directly to the proclaimed state of the epidemic leads to the conclusion that these provisions do not refer to disinformation regarding COVID-19 and freedom of speech - such provisions are not included in the Act on the prevention and control of infections and infectious diseases in humans of 5 December 2008²³ and the Act of 2 of March 2020 on special measures for preventing, counteracting and controlling COVID-19, other infectious diseases and crisis caused by said diseases²⁴.

²² State as of 25th of January 2022 - the state of the epidemic has been instituted and remains in effect in the area of the Republic of Poland.

²³ Act on the prevention and control of infections and infectious diseases in humans of 05 December 2008, Journal of Laws 2021, item 2069, uniform text.

²⁴ Journal of Laws 2021, item 2095; The solutions introduced in the act were criticized repeatedly by prof. E. Łętowska, incl. criticism in the interview for *Gazeta Wyborcza*: „Prof. Ewa Łętowska: The act regarding coronavirus violates the Constitution. It should be rescinded,” *Gazeta Wyborcza*, March 4, 2020, accessed November 18, 2021, <https://wyborcza.pl/7,75398,25755535,prof-ewa-letowska-ustawa-o-koronawirusie-narusza-konstytucje.html>.

Due to these circumstances the phenomenon of proliferation of false information regarding COVID-19 should be analyzed on the basis of the binding law as an issue referring to content and scope of freedom of expression to which everyone is entitled on the basis of general provisions governing these issues. The framework for the regulations regarding the scope and legal boundaries of freedom of expression effective in Poland is defined by international acts and the Constitution of the Republic of Poland and the specifics of these regulations are defined in ordinary legal acts and ordinances. The issue of freedom of expression in the international legal sources of the United Nations' legal order is governed by the International Covenant on Civil and Political Rights (ICCPR)²⁵ drawn up on 19th of December 1966 in New York and ratified by Poland in 1977 whereas in the legal order of the Council of Europe the issue of freedom of speech is governed by the Convention for the Protection of Human Rights and Fundamental Freedoms²⁶ drawn up on 4th of November 1950 in Rome and effective in Poland since 19th of January 1993. Analyzing the provisions regarding freedom of expression in the context of the European Union we cannot omit the Charter of Fundamental Rights of the European Union²⁷. Each of the listed acts not only defines the content of freedom of expression but also allows for restricting freedom of expression in extraordinary circumstances and defines under what circumstances limiting freedom of expression is acceptable²⁸. Obviously, the provisions of the Constitution of the Republic of Poland serve as a starting point for the derivative statutory legal sources concerning freedom of expression²⁹. The constitutional model adopted in the provisions of the fundamental law constitutes a foundation

²⁵ International Covenant on Civil and Political Rights of 19 December 1966, *Journal of Laws* 1977, No. 38, item 167, art. 19.

²⁶ Convention for the Protection of Human Rights and Fundamental Freedoms 04 November 1950, *Journal of Laws* 1993, No. 61, item 284, art. 10.

²⁷ EU(2000) Charter of Fundamental Rights of the European Union, 2000/C 364/01, 7 December 2000, art. 11.

²⁸ Author of the paper does not quote and discuss these regulations due to the fact that these regulations are well known to the reader and the volume of the paper is limited.

²⁹ The Constitution of the Republic of Poland, *Journal of Laws* 1997, No. 78, item 483, as amended.

for the specific solutions and provisions adopted in ordinary legal acts³⁰ and lower-order legal regulations.

The analysis of the provisions regarding freedom of expression in all the acts invoked hereinabove leads to the conclusion that the model of freedom of expression adopted therein establishes strikingly similar standards. Acknowledging this particular freedom as one of the pillars of a democratic state governed by the rule of law does not automatically impart the qualities of an absolute freedom to the freedom of expression. Each of the invoked legal acts allows for restricting freedom of expression under specific circumstances defined by law and the conditions for restricting freedom of expression correspond with the adopted standards. The requirements for restricting freedom of expression are as follows: firstly, restricting freedom of expression has to be provided for in the provisions of law; secondly, restricting freedom of expression has to be indispensable for protecting specific values; thirdly, the said values have to be directly indicated in the invoked legal acts. These values refer to public interest and therefore public interest is a general determinant of the boundaries of freedoms and rights of an individual; it is a typical general clause which requires constant redefinition consistent with the shifting social context³¹.

Therefore, can proliferation of false information regarding COVID-19 be legally restricted? Can it be treated as violation of boundaries of freedom of speech? It appears so - disinformation regarding COVID-19, particularly during the pandemic, may be considered as the action meeting criteria justifying elimination of such misleading expressions from the public space. It appears that the value that requires elimination of disinformation related to a dangerous pandemic from the public space is health indicated *expressis verbis* as the value justifying restriction of rights and freedoms in all legal acts governing freedom of expression, including Art. 31, Section 3

³⁰ The most important are: the Act of January 26, 1984 – Press Law, i.e. Journal of Laws 2018, item 1914; the Act of December 29, 1992 - Broadcasting Act, i.e. Journal of Laws 2020, item 805; the Act of September 6, 2001 - Act on Access to Public Information, i.e. Journal of Laws 2020, item 2176.

³¹ Cf. Leszek Garlicki and Krzysztof Wojtyczek, "Art. 31," in *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Vol. II*, 2nd edition, ed. Marek Zubik, (Warszawa: Wydawnictwo Sejmowe, 2016), accessed December 29, 2021 <https://sip.lex.pl/#/commentary/587744241/541681?tochHit=1&cm=RELATIONS>.

of the Constitution of the Republic of Poland³². Furthermore, Art. 68 of the Constitution is devoted to the issue of health as a value. In accordance with the content of this article each person has a right to protect one's health and public authorities are responsible for combating and controlling epidemic diseases³³. Although there is an ongoing debate regarding the nature of this norm we may most certainly claim that public authorities are obliged to take actions aimed at controlling and combating epidemics. The first actions coming to our minds when thinking of such activities are the actions taken within the sanitary and medical fields; however, the postulate addressed to public authorities and formulated in such manner does not exclude taking other actions including actions in the field of freedom of expression including the care for ensuring that the information regarding epidemics accessible in the public space is credible and true and that the information not meeting these criteria is removed. It must be recalled that according to the Constitutional Tribunal "the possibility envisaged in Art. 31, Section 3 of the Constitution restricting the right to freedom of expression due to reasons of health protection may refer to both protecting health of the entire society as well as protecting health of individual groups or individual persons"³⁴. Obviously, in any particular case the issue of judging importance of these values – freedom of speech on the one hand and the values violated by misleading information on the other – would be resolved by an independent court and an independent judge. Each attempt at eliminating a case of disinformation on the basis of the invoked regulations

³² It is worth to remember that the understanding of the premises and criteria indicated in art. 31, section 3 can overlap in a various ways - e.g. protecting health is a component of public order protection; particularly drastic cases of threat to public order may become a threat to national security, including health etc. However, indicating only a single premise/criterion is required for restricting rights and freedoms of an individual person - cf. Garlicki and Wojtyczek, "Art. 31".

³³ Cf. art. 68 sections 1 & 4 of the Constitution of the Republic of Poland/ Polish Constitutional Tribunal, Judgement of 09 July 2009, Ref. No. SK 48/05. Health is also subject of legal protection under numerous legal acts of state rank - in civil law as a personal good of a human, listed in the exemplary catalogue of goods as the primary personal good (the right to protect health), in criminal law as subject of protection threatening or violating which bears criminal liability (offences against life and health and offences against common security) and in a number of acts of administrative law.

³⁴ Polish Constitutional Tribunal, Judgement of 09 July 2009, Ref. No. SK 48/05.

would require filing a suit or a complaint with an appropriate court and receiving an appropriate ruling. Such proceedings would each time require an enormous commitment of resources and time and the ruling would apply solely to a particular case. In the case of disinformation in general and the COVID-19-related disinformation in particular, when the scale of the issue is enormous and global in nature, this model of operation should be considered as entirely ineffective or with a severely limited effectiveness³⁵. Thus, a question comes to mind: is it possible to effectively control and counteract disinformation regarding COVID-19 by using a differently drafted legal measure?

It appears that such beliefs are held by the entities which suggested introducing particular changes into legal provisions. We must not naively believe that legal provisions will eradicate the virus of COVID-19-related disinformation but without such provisions combating disinformation is entirely impossible. Defining the legal status of disinformation regarding COVID-19 unambiguously would make actions aimed at eliminating such information much easier. However, several remarks regarding the legislative actions postulate must be made. First and foremost, such actions must be constantly accompanied by the awareness of the fact that freedom of expression is one of the principles in a democratic state governed by the rule of law. Thus, all legislative actions which interfere with the freedom of expression principle should be applied only to the extent allowed by law and necessary for protecting the values indicated by the legislator - in this case, health. This remark is even more justified due to the fact that the analogous regulations enforced in certain countries are being perceived as using the pandemic as a justification for unauthorized and unlawful restriction of freedom of expression and media³⁶. It has been observed that among these regulations there are regulations which could make supervising public administration and transparency of its actions more difficult for unjustified

³⁵ Cf. Michał Krawczyk and Kamil Mikulski, *COVID-19: Disinformation in the Polish Cyberspace* (Kraków: The Kosciuszko Institute, 2020), 4–34.

³⁶ Scott Griffen, “Seizing the moment,” *British Journalism Review* 31, no. 2 (2020): 37; Evelyn Mary Aswad, “In A World Of Fake News. What’s A Social Media Platform To Do?,” *Utah Law Review*, no. 4 (2020): 1009–1028.

reasons³⁷. Introducing the custodial sentence (imprisonment) sanction for dissemination of false information regarding pandemic is being perceived as an excessive, disproportional and dangerous restriction³⁸. Thus, developing effective legal regulations preventing proliferation of false information regarding a pandemic is not an easy task³⁹ and certain representatives of the doctrine directly serve the ground for a thesis that “there are no effective legal solutions in the field of distribution of false information”⁴⁰. However, it appears that any possible difficulties should not be a decisive factor for not taking legislative action regarding this issue.

In this context it is prudent to take note of two legislative proposals submitted in Poland.

The first is a draft of the act submitted by Members of Parliament on 21st of October 2020, that advocates for changing the Act of 5 December 2008 on preventing and control of infections and infectious diseases in humans, which according to the submitting MPs is aimed at combating disinformation related to COVID-19⁴¹. It concerns “introduction of sanctions (a fine or restriction of freedom) for publicly challenging the threat to public health presented by SARS-CoV-2 virus or challenging existence of the virus by introduction of penalizing provisions”⁴². It constitutes

³⁷ Cf. A protest of Spanish journalists - “Cientos de periodistas rechazan el control de las preguntas en las ruedas de prensa en La Moncloa,” *ABC ESPAÑA*, April 06, 2020, accessed January 02, 2021. https://www.abc.es/espana/abci-medio-centenar-periodistas-rechazan-control-preguntas-ruedas-prensa-moncloa-202003312101_noticia.html In Poland similar effect is the result of the “one press agency, one question” rule used during press conferences held by the government. It is an example of unauthorized and unlawful restriction of the right to information.

³⁸ Cf. Roxana Radu, “Fighting the ‘Infodemic’: Legal Responses to COVID-19 Disinformation,” *Social Media + Society* 6, no. 3 (2020): 1–4.

³⁹ Jason Pielemeier, “Disentangling Disinformation: What Makes Regulating Disinformation So Difficult?,” *Utah Law Review*, no. 4 (2020): 917–940.

⁴⁰ Weaver, “Fake News,” 51.

⁴¹ Justification for draft of the Act on altering the act on prevention and control of infections and infectious diseases in humans, accessed December 30, 2021, 9–020–297–2020.pdf (sejm.gov.pl).

⁴² Sejm paper EW-020–297/20. Paper no. 746. In the self-submitted correction to the draft the applicants resigned from the restriction of liberty penalty, accessed December 30, 2021, <https://www.sejm.gov.pl/Sejm9.nsf/druk.xsp?nr=746>

a criminal law provision⁴³ within the framework of administrative and legal regulations.

The analysis of the content of this draft leads to several conclusions. This regulation should remain in effect solely for the duration of the state of the epidemic, therefore only for the period when the state of the epidemic is formally instituted and maintained. The regulation would not be applied without limitations regarding duration and area – an aspect of the regulation which should be assessed positively. It would not be utilized to fight disinformation in the general understanding or in the case when a state of the epidemic would not be instituted in a given area even if the epidemic would, in fact, break out in the said area. It appears that the requirement for the distributed information remaining in conflict with the current state of medical knowledge (“contradicting the current state of medical knowledge”) included in the drafted change would, in actuality, make applicability of the provision more difficult because qualifying each case would require determining “the state of current medical knowledge” and indicating the existing conflict. If in a defined factual state an appropriate body formally institutes a state of the epidemic, negating the threat or challenging existence of the threat should constitute an adequate premise for implementation of this provision. Finally, the hallmarks defining the causative act proposed in the draft do not cover all possible instances of dissemination of false information regarding COVID-19, which could result in tragic consequences⁴⁴. The proposed regulation neither includes provisions enabling direct elimination of COVID-19-related disinformation from the public space. Thus, in the proposed wording the regulation would realize the goal presented by the authors of the draft only partially.

⁴³ “Art. 1 of the Act on altering the act on prevention and control of infections and infectious diseases in humans,” accessed December 30, 2021, 9–020–297–2020.pdf (sejm.gov.pl).

⁴⁴ Examples include false information regarding composition, structure and the manner in which COVID-19 vaccines act and their after effects - such information do not meet the criteria of the causative act stipulated in the draft of the act - although such false information remain in conflict with the contemporary medical knowledge they do not need to automatically negate the threat (an epidemic) to public health, challenge existence of the epidemic, discourage from or incite to not implement or not follow the procedures ensuring protection, and yet still such information remain dangerous *fake news*.

The draft of the Act on Freedom of Speech in the Internet Social Networking Services drawn up by the Ministry of Justice⁴⁵ should be the second legislative proposal that should draw attention. In Art. 1 of the Act the authors of the draft proposal indicate the goals of the act is to establish conditions for supporting freedom of expression, ensuring the right to access to credible information, improving degree of protection of human rights and freedoms in the social networking services with at least one million registered users available in the area of the Republic of Poland as well as ensuring that the Internet networking services adhere to regulations regarding freedom of expressing opinions and views, gathering information, distributing information, expressing religious beliefs, beliefs concerning general outlook and philosophy as well as the freedom of communication. For the purpose of the drafted act, disinformation has been defined as “false or misleading information created, presented and distributed for the purpose of gain or interfering with public interest”⁴⁶; while disinformation has been recognized as unlawful content⁴⁷. The Freedom of Speech Council is to be appointed on the basis of the drafted act, a new body of public administration “ensuring that the Internet social networking services adhere to provisions regarding freedom of expressing beliefs and opinions, collecting and distributing information, expressing religious beliefs and beliefs regarding general outlook and philosophy as well as freedom of communication” (Art. 4). The analysis of this draft leads to the conclusion that the act is highly repressive in its nature. The draft rises numerous and well justified concerns among experts. Primarily, the draft of the act proposes imposing a number of responsibilities and obligations on service providers, that appear to be impossible to meet in practice and a failure to meet them is

⁴⁵ Draft of the Act on Freedom of Speech in the Internet Social Networking Services, D293, 28.09.2021 version, currently under review, accessed December 17, 2021, <https://legislacja.rcl.gov.pl/projekt/12351757/katalog/12819479#12819479>.

⁴⁶ Art. 3, point 6 of the draft of the Act on Freedom of Speech in the Internet Social Networking Services.

⁴⁷ Art. 3, point 8 of the draft of the Act on Freedom of Speech in the Internet Social Networking Services: “Whenever the act speaks of unlawful contents the said contents are to be understood as the contents violating personal goods, disinformation, contents of criminal character, as well as the contents which violate good morals, in particular the contents which propagate and laud violence, suffering or humiliation”.

penalized with substantial penalties⁴⁸. The obliged entities are concurrently deprived of a number of procedural guarantees that are considered as standard for a state governed by the rule of law, both at the administrative and court proceedings stages⁴⁹. The analysis of the draft leads to a further conclusion that the willingness to protect freedom of speech, which should be perceived and assessed positively, indicated in the content of the act and the draft authors' declarations, will in practice be used primarily to protect actions of the users who come into conflict with regulations on the Internet platforms. Being aware that the regulations prohibit publishing the content that violates the law raises a question: Whose freedom of speech understood in what manner is this act supposed to protect? It is hard not to notice that the act attempts to govern only a fraction of the Internet reality in a selective manner subordinate to indirectly stated goals of the act and completely disregards the fact that the previously discussed regulations concerning, among other issues, disinformation spread by means of the Internet are currently being developed at the level of the European Union. It is prudent to take note that the majority of the entities reviewing the draft, including the Chairman of the Office of Competition and Consumer Protection, President of the Personal Data Protection Office, President of the National Broadcasting Council and Polish Ombudsman, submitted a number of substantive and critical remarks. Furthermore, it is hard not to notice that the solutions adopted within the framework of the draft in numerous sections constitute a legislative practice inconsistent with standards of a state governed by the rule of law. In this context it is difficult to assess this draft positively.

⁴⁸ Within 48 hours a service provider is obliged to process the complaint submitted by a user regarding propagation of unlawful contents, restricting access to contents or restricting access user's profile and after lapse of this period a user may refer the matter to the Freedom of Speech Council; not fulfilling the obligation to review and process the complaint within the deadline may result in imposing a pecuniary fine in the amount ranging from PLN5,000 to PLN50,000,000.

⁴⁹ The exemptions projected in the draft in regards to the scope of proper application of the provisions of the act of 14th of June 1960. Code of Administrative Procedure of 14 June 1960, Journal of Laws 2021, item 735, as amended, deprives the parties to the proceedings of various rights incl. the right to active participation in the case or the objective truth principle.

When speaking about the proposals regarding legislative actions aimed at restricting proliferation of false information on the pandemic it is prudent to recall that introduction of the John Doe lawsuit (“the unknown defendant lawsuit”, which is literally called “blind lawsuit” in Poland) into the Polish legal order with the goal of combating *fake news* has been postulated within the doctrine for several years. Introduction of this legal instrument has been proposed within the framework of the Civil Code amendment draft submitted by the Ministry of Justice. This instrument could be also used for counteracting disinformation related to COVID-19⁵⁰, though it has not been directly proposed as a tool for combating proliferation of false information regarding COVID-19.

5. Conclusions

The analysis performed within this paper leads to the conclusions which enable us to make an attempt at providing the answer to the questions presented above, that may be regarded as the conclusion *de lege lata* and *de lege ferenda*.

Development of electronic means of social communication has led to the state in which disinformation constitutes an imminent threat not only to the quality of social communication but also to specific values protected by law. The above remark particularly concerns disinformation regarding COVID-19 in the case of which the endangered value protected by law is health. However, we must bear in mind that disinformation also constitutes a threat to other basic democratic values and the very democracy itself and therefore there is a general consensus at both the European level and within the Polish discourse regarding understanding of disinformation. The essence of the COVID-19-related disinformation is the intentional distribution of false information regarding all aspects of SARS-CoV-2 virus and COVID-19 disease the virus causes, including challenging existence of the virus itself and the disease it causes. This issue stops being a purely

⁵⁰ Cf. Anna Krzyżanowska, “Fake news – jak z nim walczyć i czy da się wygrać,” *Rzeczpospolita*, April 29, 2020, accessed December 30, 2021, <https://www.rp.pl/Dobra-osobiste/304299824-Fake-news--jak-z-nim-walczy-c-i-czy-da-sie-wygrac.html> ; the subject of this proposition has been discussed by: prof. E. Łętowska, prof. A. Rzepliński and prof. A. Bodnar and others; Cf. Tomasz Pietryga, “Ślepym pozwem w fake newsa,” *Rzeczpospolita*, April 29, 2020, accessed December 30, 2021. <https://www.rp.pl/article/20200429/PCD/304299826>.

theoretical problem when we recall the number of infections and the death toll caused by SARS-CoV-2 virus and when we realize that the pandemic continues.

Although we may speak of the consensus regarding assessment of the very phenomenon of disinformation, the legislative and practical actions taken at the level of the European Union and at the domestic level enable us to indicate major differences and frequently disturbing shift of emphasis.

Within the framework of the conclusions *de lege lata* and *de lege ferenda*, it must be noted that combating disinformation in general and the COVID-19-related disinformation in particular constitutes a significant component of the actions taken by the European Commission on behalf of the European Union as evidenced by the adopted priorities. At the level of the European Union the need for developing such legal instruments, that will enable the combat disinformation effectively if properly developed and improved within a set time-frame, is clearly observable. The existing solutions have proven to be ineffective. All actions taken in this field are subordinate to the imperative priority of protecting freedom of expression as well as other guaranteed rights and freedoms and the solutions proposed at the level of the European Union appear to actually implement this postulate. Therefore the basic mechanism of the adopted solutions is, instead of criminalizing disinformation, to develop solutions within the framework of self- and co-regulation in cooperation with service providers: increasing transparency of the Internet, increasing responsibility of the entities operating in the Internet as these entities have been for many years getting prepared for accepting this responsibility as well as bolstering status of citizens through various means, including media (digital) education, and supporting an open democratic debate. Attention must be drawn to the fact that at the level of the European Union's regulations, disinformation is not automatically treated as illegal content. The financial penalties for not observing the provisions of the regulations enforced under the DSA are also provided for but are treated as a measure of last resort and the procedure for imposing them is precisely governed.

The analysis of the legal provisions currently effective and binding in Poland leads to the conclusion that although elimination of disinformation related to COVID-19 would be theoretically possible on the basis of

the existing regulations governing restriction of freedom of expression, in practice the operational model would be highly ineffective or effective to a severely limited degree. Thus, public opinion has been presented with a proposal of legislative solutions that are supposed to be more effective. Similarly, to the proposals of the European Union, the domestic drafts of acts tackling the issue of the COVID-19-related disinformation emphasize the role of freedom of expression and declare the willingness to protect it. However, the detailed analysis of the proposed domestic solutions *de lege ferenda* may rise justified concerns. First and foremost, unlike the European Union legislators, the domestic law proposal authors automatically consider disinformation as illegal and unlawful content and the primary and, essentially, basic instruments to fight disinformation include penalties with the major difference between the drafts prepared by Members of Parliament and the Ministry, being the fact that in the case of the former the entities putting disinformation into circulation are to be penalized whereas in the case of the latter penalties are to be imposed on service providers. The solutions proposed under the domestic Polish legislation do not tackle or address the problem of disinformation holistically. Therefore, it appears that even if the proposed solutions were adopted, they would not result in effective elimination of disinformation, including disinformation regarding COVID-19.

As compared to the solutions drafted by the European Commission and the domestic drafts of acts, the different approach to the idea of controlling and counteracting disinformation is clearly visible. The European Commission encourages agents operating in the information space to develop self-regulation solutions and in the legislative space - co-regulation solutions resulting from joint effort to develop and further improve effective solutions. The domestic acts' proponents, particularly the authors of the proposal prepared by the Ministry of Justice, impose a number of enormous and impossible to realize responsibilities and obligations on service providers and then transfer the full responsibility for realizing and meeting these obligations to service providers and further secure and enforce meeting these obligations by means of enormous financial penalties arbitrarily imposed by the administrative body appointed for this purpose and concurrently deprive service providers of a number of process guarantees in this respect.

These two kinds of policies are more enlightening than the pure, literal wording of the proposed solutions. The solutions proposed by the European Union are based on joint and conscious development of the solutions protecting against disinformation and concurrently upholding the right to freedom of expression, that are to be later adopted. The domestic solutions are based on unilaterally imposing highly repressive regulations that neither address the actual possibility of implementing the said regulations nor ruthlessly deprive the entities, these regulations apply to, of the basic guarantee that their rights will be protected. Unfortunately, it is to be expected that these two completely different paradigms of counteracting disinformation regarding COVID-19 are irreconcilable and that the latter one fails to reconcile with democratic standards.

Therefore, the attempt to answer the question whether eliminating COVID-19 disinformation from the public space is possible in the light of the priorities of the European Commission and the legal regulations already effective and currently drafted in Poland must be concluded that the European Union paradigm offers a chance of achieving this goal due to being prepared jointly in cooperation with the entities to which these regulations apply to. Furthermore, we have to emphasize that there is no doubt that correctly constructed legal provisions constitute a necessary instrument that allows for eradicating the COVID-19 disinformation from the public space but such provisions can be developed only as a result of respecting democratic standards of legislation, cooperation and mutual respect among all participants of the process - factors that have been, as it would seem, forgotten by the authors of the domestic proposals.

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