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Lei de emerxencia e desinformación: unha análise do artigo 36 da Lei de servizos dixitais da EU

Ley de emergencia y desinformación: un análisis del artículo 36 de la Ley de Servicios Digitales de la UE

Emergency law and disinformation: an analysis of Article 36 of the EU Digital Services Act

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Resumo: Este artigo examina como o Dixital Services Act da Unión Europea regula o perfil específico da resposta a crise por parte das redes sociais, tal como defínese no artigo 36 do DSA e o Considerando 91. Céntrase nos mecanismos a través dos cales as redes sociais, en situacións de emerxencia, deben frear a proliferación de desinformación que poida contaminar os fluxos de información. Neste contexto, o artigo traza o camiño histórico que conduciu á redacción do DSA, marcando un cambio no enfoque regulatorio en comparación co pasado e propoñendo unha regulación máis unilateral e robusta. Ao mesmo tempo, mostra como, para manter un equilibrio de dereitos que evite formas de censura, o DSA non opta por obrigacións directas cara ás redes sociais ao ditar as modalidades de xestión da desinformación, senón que deixa unha ampla marxe de discreción, obrigándoas a levar a cabo actividades de moderación con transparencia e responsabilidade.

Abstract: This paper examines how the Digital Services Act (DSA) of the European Union regulates the specific profile of crisis response by social networks, as defined by Article 36 of the DSA and Whereas 91. It focuses on the mechanisms through which social networks, in emergency situations, must curb the

proliferation of disinformation that risks polluting information flows. In this context, the paper traces the historical path that led to the drafting of the DSA, marking a shift in regulatory approach compared to the past and proposing a more unilateral and robust regulation. At the same time, it shows how, to maintain a balance of rights that avoids forms of censorship, the DSA does not opt for direct obligations towards social networks by dictating the modalities of disinformation management, but leaves ample room for discretion, while obliging them to carry out moderation activities with transparency and responsibility.

Key words: Disinformation, fake news, emergency, crisis, European Union, Digital Services Act.

Resumen: Este artículo examina cómo el Digital Services Act de la Unión Europea regula el perfil específico de la respuesta a crisis por parte de las redes sociales, tal como se define en el artículo 36 del DSA y el Considerando 91. Se centra en los mecanismos a través de los cuales las redes sociales, en situaciones de emergencia, deben frenar la proliferación de desinformación que pueda contaminar los flujos de información. En este contexto, el artículo traza el camino histórico que condujo a la redacción del DSA, marcando un cambio en el enfoque regulatorio en comparación con el pasado y proponiendo una regulación más unilateral y robusta. Al mismo tiempo, muestra cómo, para mantener un equilibrio de derechos que evite formas de censura, el DSA no opta por obligaciones directas hacia las redes sociales al dictar las modalidades de gestión de la desinformación, sino que deja un amplio margen de discreción, obligándolas a llevar a cabo actividades de moderación con transparencia y responsabilidad.

Palabras clave: Desinformación, noticias falsas, emergencia, crisis, Unión Europea, Ley de Servicios Digitales.

SUMMARY: 1. “Emergency law” as part of Administrative Law. 2. Administrative law and the control of disinformation in emergencies. 3. A new rule on a specific aspect: managing disinformation on social media during emergencies. 4. The doubts and criticisms addressed to the provision. 5. Bibliography.

1 “Emergency law” as part of Administrative Law

Administrative law is a dynamic discipline that, like other legal fields, evolves over time. Even within a relatively stable framework, it can give rise to the progressive emergence of new sub-disciplines in response to societal evolution and transformations, marked by the rising of new sensibilities, needs, worldviews, and social contrasts¹.

We can find many significant examples of these changes and evolutions of administrative law. One such example is the rise of environmental law in the second half of the twentieth century. A hundred years earlier (or even just fifty years earlier), this was not a field of law because there was not a widespread social sensitivity that justified its status as a legal discipline². Similarly, we can observe this kind of change in

¹ CARRO FERNÁNDEZ-VALMAYOR J.L., *Una introducción a la idea de modernización administrativa*, in *Dereito. Revista jurídica de Universidade de Santiago de Compostela*, monográfico *Estudios sobre la modernización administrativa*, 2011, 5; LADEUR K.-H., *The Evolution of General Administrative Law and the Emergence of Postmodern Administrative Law*, in *Osgoode CLPE Research Paper*, 2011, 16, 3; STEWART R.B., *Administrative law in the twenty-first century*, in *New York University Law Review*, 2003, 2, 437; CASSESE S., *Il diritto amministrativo. Storia e prospettive*, Milano, Giuffrè, 2010, 8. CERULLI IRELLI V., *Lineamenti di diritto amministrativo*, Torino, Giappichelli, 2022, 1.

² SAND P.H., *The Evolution of Transnational Environmental Law: Four Cases in Historical Perspective*, Cambridge University Press, 2012.; SABATO G., *Tempo e ambiente: un ponte tra passato e presente*, in *Federalismi.it*, 2023, 6, 173; ONIDA M., *Il diritto ambientale dell'UE nel tempo, tra agenda europea e politiche nazionali*, in *Federalismi.it*, 2020, 7, 93.; SALVEMINI L., *Un sistema multilivello alle origini del diritto ambientale*, in *Federalismi.it*, 2022, 4, 902; FEDERICO A., *Un'introduzione al diritto internazionale dell'ambiente*, in *DirittoConsenso*, 2022; VOSA G., *La tutela dell'ambiente “bene materiale complesso unitario” fra Stato e autonomie territoriali: appunti per una riflessione*, in *Federalismi.it*, 2017, 19, 2.

the evolution of telecommunications law, which was born again in the second half of the twentieth century, in relation to the general development of mass media and ICT³.

The current century is also characterized by the development of new branches of administrative law, as well as the increasing importance of sub-disciplines that, while already existing, are now gaining significant prominence⁴. One of these, now playing an important role in the international scenario, could be called “emergency administrative law”⁵.

Emergency law constitutes a subset of administrative law, encompassing a comprehensive body of rules and legal institutions designed to govern and manage unforeseen circumstances characterized by unpredictability and urgency, which deviate from the ordinary course of events⁶.

That field constitutes a primary, rather than a secondary, component of administrative law, given its fundamental connection to the core functions of governance. Any governing entity, be it at the state, regional, or local level, has a primary obligation to manage emergencies and restore normalcy in the face of unforeseen and disruptive events⁷.

We can think, for example, of environmental administration; it almost has to deal with emergency situations more than ordinary situations⁸.

We could therefore observe the paradox whereby the “emergency law”, despite its nature being made up of exceptions to ordinary rules, is often applied more frequently than the same ordinary rules. One could almost go so far as to argue that in administrative management “emergency is normality”⁹.

In any case, emergency law is characterized by the fact that it regulates many aspects of the administration, often providing for derogations and exceptions to the

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³ MÍGUEZ MACHO L., *Últimos psos en la impantación de la administración electrónica: el desarrollo de las leyes 39 y 40/2015 en materia de actuación y funcionamiento del sector público por medios electrónicos*, in GARCÍA NOVOA C., SANTIAGO IGLESIAS D. (ed.), *4ª revolución industrial: impacto de la automatización y la inteligencia artificial en la sociedad y la economía digital*, Navarra, Aranzadi, 2018, 345; REITZ J.C., *E-Government*, in *The American Journal of Comparative Law*, 2006, suppl. 1, 733; CIVITARESE MATTEUCCI S., TORCHIA L., *La tecnificazione dell'amministrazione*, in ID., *La tecnificazone*, Firenze University Press, 2016, 11; FAINI F., *Il diritto nella tecnica: tecnologie emergenti e nuove forme di regolazione*, in *Federalismi.it*, 2020, 16, 79; IANNOTTI DELLA VALLE A., *L'età digitale come "età dei diritti": un'utopia ancora possibile?* in *Federalismi.it*, 2019, 16, 2; BOTTARI M., *Procedimento amministrativo: evoluzione digitale e suoi sviluppi nell'era dell'Intelligenza artificiale*, in *Il Diritto Amministrativo*, 2024, 11.

⁴ RODOTÀ S., *La vita e le regole*, Milano, Feltrinelli, 2018. ID., *I nuovi diritti che hanno cambiato il mondo*, in *Privacy.it*, 2004; CASSESE S., *“Le droit tout puissant et unique de la société”: ParadoSSI del diritto amministrativo*, in *Rivista trimestrale di diritto pubblico*, 2009, 4.

⁵ LÓPEZ OLVERA M.A., *Garantías en los estados de emergencia*, in *Foro*, 2010, 13, 77; TIAN G., *Administrative Law Regulation of Social Risk-Focus on Improving the Emergency Response Law*, in *Science of Law Journal* 2022, 2, 67; FIORITTO A., *L'amministrazione dell'emergenza tra autorità e garanzie*, Bologna, Il Mulino, 2008; CAVALLI PERIN R., *Il diritto amministrativo dell'emergenza per fttori esterni all'amministrazione pubblica*, in *Diritto Amministrativo*, 2005, 1, 777.

⁶ SIMONCINI M., *Introduzione alla nozione di emergenza nel diritto amministrativo. Il caso inglese*, in *Federalismi.it*, 2007, 19, 4.

⁷ SAGOS N., *Law and the Concept of Emergency*, in AA.VV., *Democracy, Emergency, and Arbitrary Coercion*, Leida, Brill, 2015, 60; BRIGNOLI N., *Il problema dei problemi: emergenza e ordinamento giuridico. Spunti sui risvolti ordinamentali dell'emergenza pandemica da Covid-19*, in *Nuove Autonomie*, 2022, 2, 552.

⁸ See the concept of “Smrt environnement” in SANTIAGO IGLESIAS D., «Smart cities», *aproximación un fenómeno en auge*, in NOVOA C., SANTIAGO IGLESIAS D. (ed.), *4ª revolución industrial: impacto de la automatización y la inteligencia artificial en la sociedad y la economía digital*, Navarra, Aranzadi, 2018, 421.

⁹ CHIVIELLO D., *L'amministrazione dell'ordinaria emergenza*, in *Federalismi.it*, 2010, 12, 24.

ordinary rules. Among them, financial profiles, use of resources, and environmental management¹⁰.

This analysis will explore emergency law from a very specific perspective: the information governance. We will investigate how the regulation of information on social media and the Internet is impacted during crisis situations, with specific attention to recent EU frameworks governing the state's role in managing information flows.

2 Disinformation in the emergency: an old and new problem

In examining the topic of “regulating information in emergencies”, we will start from a first consideration. The concept of ‘emergency’ is intrinsically broad. The events that can be defined as emergencies are different, heterogeneous, with very different characteristics from each other¹¹.

Firstly, events classified as emergencies may differ from each other in relation to voluntariness. Emergencies can be categorized as either natural disasters, which are independent of human intervention, or human-made disasters, which are directly attributable to human actions. Additionally, there are hybrid emergencies, such as floods, which are influenced by both natural and anthropogenic factors.

Emergencies can be very different also in their relationship with time: some time they can be immediate events that transform a situation in a few minutes, such as the eruption of a volcano, or in other cases they can be very slow events that develop over decades, such as climate changes. Furthermore, the emergency situations can be very different in their relationship with space. There are emergencies that can concern the entire planet, like in the case of a pandemic¹², which reaches even the most remote islands, but in other situations they can concern a well-defined area and not affect those just outside that perimeter, such as in a civil war¹³.

¹⁰ DUGATO M., *I golden powers tra espansione ed atipicità*, in *Munus*, 2023, 1, V; PASSAGLIA P., *Poteri emergenziali e deroghe al principio di legalità*, in *cortecostituzionale.it*, 2011; AFFANNATO E., *Lo stato di emergenza e i suoi rimedi: il riparto delle competenze fra Stato e Regioni come limite alla decretazione d'urgenza e il fondamento costituzionale delle ordinanze contingibili e urgenti nazionali, regionali e locali*, in *Federalismi.it*, 2022.3, 64; VALENTINI F., *Necessità e urgenza: i poteri dell'amministrazione per fronteggiare le emergenze*, in *Altalex*, 2017; LINARDI S., *Ricorso all'urgenza come deroga all'ordinamento giuridico con particolare riguardo alle ordinanze contingibili e urgenti in materia di prot.civ.*, in *Amministrativamente*, 2010, 6.

¹¹ BOTTINO G., *L'amministrazione dell'emergenza*, in *CERIDAP*, 2024, 1; CERQUAZZI F., *“Stato d'emergenza” e Costituzione*, in *Ius in itinere*, 2020.

¹² COMZZETTO G., *Lo stato di eccezione nell'ordinamento italiano*, in *BioLaw Journal*, 2020, 1, 35.; CARLESIMO V., *Stato di diritto e pandemia*, in *Altalex*, 2020; LANCILLOTTI A., *Emergenza sanitaria e diritto internazionale umanitario*, in BONAVITA A., FATTORINI S., MARCHEGIANI M., *Le situazioni emergenziali tra diritti e restrizioni*, Torino, Giappichelli, 2022, 2.

¹³ Or concerning neighboring countries, in the management of refugee reception: CASU S., *Crisi ucraina: l'accoglienza dei profughi tra obblighi di fonte UE e discrezionalità statale*, in *Ius in itinere*, 2022.

However, despite all this heterogeneity, there is a common element that unites all emergency situations and is always present. This element is misinformation, which spreads rapidly on the web and in social networks¹⁴.

In fact, in every emergency scenario (any of the types mentioned above), information follows uncontrollable flows, where the truth and the false can be mixed, making it difficult (or impossible) to distinguish one from the other. In this frame dominated by uncertainty, discussions become polarized, and a loop of false information and hate speech is generated, easily spiraling out of control¹⁵.

In other words, we can argue that every emergency not only presents a primary phenomenon of material crisis but also gives rise to a parallel eruption of a 'conceptual magma chamber' composed of distorted information, opinions disguised as facts, falsehoods, exaggerations, fake news, and polarizations.

It's important to note that this is not a new phenomenon, and it does not necessarily pertain to the era of social media. In fact, it has also occurred in conjunction with major crises and emergencies in the past, during the pre-Internet age.

We can consider, for example, the disinformation and conspiracy theories that arose in relation to historical moments of primary importance, which at the time constituted emergencies of great impact. A classic example is the assassination of John F. Kennedy in 1963, around which a veritable galaxy of conspiracy theories has arisen, becoming the subject of numerous studies. Or we can consider the fake news related to the terrorist attacks of September 11, 2001, iconic example of the proliferation of disinformation by leveraging the dimension of uncertainty and fragility of information sources in the face of an unexpected tragedy¹⁶.

From this point of view, the human tendency to create and spread conspiracy theories in relation to unforeseen, unexpected, disruptive events has been extensively studied by experts¹⁷.

There could be many other examples of emergency phenomena giving rise to disinformation or at least information uncertainty. Indeed, one could argue that, historically, almost every emergency event has been a source of fake news.

At least three recent events have confirmed this trend, and indeed have shown that the danger of "emergency disinformation" is growing. They are the 2020 pandemic¹⁸, the war in Ukraine¹⁹ and the crisis between Israel and Gaza²⁰. These are very

¹⁴ AA.VV. Dalla pandemia alla guerra in Ucraina; un anno e mezzo di contrasto alla disinformazione, EDMO fact-checking network, 2023.

¹⁵ BENVENGA L., ZATERINI M.J., *Il ruolo della disinformazione in un contesto di emergenza socio-sanitaria*, in *Iconocrazia*, 2022, 1, 112; MAGNANI C., *Emergenza sanitaria e libertà d'informazione: cenni sul contrasto alla disinformazione nei giorni del coronavirus* in *Forum di Quaderni costituzionali*, 2020, 2, 237.

¹⁶ POLIDORO M., *11/9 La cospirazione impossibile*, Milano, Piemme, 2007.

¹⁷ BROTHERTON R., *Suspicious Minds: Why We Believe Conspiracy Theories*, London, Bloomsbury Sigma, 2015.

¹⁸ PONTI B., *La libertà di informazione al tempo della pandemia. Rilievi critici in margine all'istituzione dell'«unità di monitoraggio per il contrasto della diffusione di fake news relative al COVID-19 sul web e sui social network*, in *Biolaw Journal*, 2020, 1, 635.

¹⁹ O.L. *Fake news e guerra Ucraina: impennata di siti di disinformazione*, in *Corriere Comunicazioni*, 2022.

²⁰ AA. VV., *Israele-Hamas: tra guerra, fake news e polarizzazione*, in *Ispionline.it*, 2023; AA. VV., *La crisi in Israele riaccende l'industria delle fake news*, in *Wired*, 2023.

different cases, especially the first compared to the second two, but in them there is the common denominator in the difficulty in correctly managing information.

The 2020 pandemic is also significant because it generated a specific type of “scientific misinformation” linked to medical issues, distinct from the more “political” misinformation that arises in times of war and conflict. This significant event, as we know, gave rise to the well-known neologism “infodemic”. The term was first introduced by the World Health Organization, which defined it as follows: “An infodemic is too much information including false or misleading information in digital and physical environments during a disease outbreak. It causes confusion and risk-taking behaviors that can harm health. It also leads to mistrust in health authorities and undermines the public health response”²¹.

The examples we’ve recalled, from the Kennedy assassination to the COVID-19 pandemic and the war in Gaza, demonstrate that the link between emergencies and disinformation is a recurring theme throughout history. These events, spanning different types and time periods, highlight the enduring nature of this connection²².

These examples range from the pre-Internet and pre-social media era to the current era of the web and social networks.

From this perspective, two distinct aspects can be observed. On the one hand, disinformation in times of crisis is not a new phenomenon, predating the internet. On the other hand, it is clear that the internet, especially social media, has significantly amplified this issue²³.

Numerous studies have explored this aspect, focusing on phenomena that fuel disinformation in social networks, such as the echo chamber, the filter bubble²⁴, and the Dunning-Kruger effect, where individuals overestimate their expertise and misinformation from inexperienced sources mixes with that of experts, particularly in scientific fields²⁵.

It is therefore clear that social networks, while also constituting a beneficial tool (for example, allowing for better diversification of information compared to television), bring with them the serious “collateral effect” whereby, with the same ease with which they allow for unfiltered universal communication, they become a real “detonator” of false information during crises. The pre-existing phenomenon of fake news is therefore significantly amplified in the current era and in current crises.

²¹ See the page <https://www.who.int/health-topics/infodemic>

²² PASSAGLIA P., *Fake news e fake democracy: una convergenza da scongiurare*, in *Federalismi.it*, 2020, 11, 126.

²³ RUBIN V.L., *Disinformation and misinformation triangle: A conceptual model for “fake news” epidemic, causal factors and interventions*, in *Journal of Documentation*, 2019: AA. VV., *Come si diffonde la disinformazione sui social media*, in *Le Scienze*, 2017.

²⁴ SUNSTEIN C., *#Republic*, Princeton University Press, 2018; CHITRA U, MUSCO C., *Understanding Filter Bubbles and Polarization in Social Networks*, in *researchgate.net*, 2019; BIANCA M., *La filter bubble e il problema dell'identità digitale*, in *Media Laws*, 2019, 2, 5.

²⁵ DUIGANN B., *Dunning-Kruger effect*, in *Britannica.com*, 2024.

3 Administrative law and the control of disinformation in emergencies

The fact that disruptive events are accompanied by an “earthquake of disinformation” is not merely a social phenomenon but also has significant legal implications.

In fact, it can be argued that from an administrative standpoint, the management of information and disinformation is an integral part of emergency management by public bodies.

The public administration must not only be prepared to manage emergencies from a material perspective but also to stem the uncontrolled flow of disinformation, ensuring the most orderly transition possible out of the crisis²⁶.

Especially today, in the era of online administration and in the fully developed society of communication and information, it can be asserted that this function is also part of the duties connected to the principle of “good administration” as guaranteed by state constitutions and by European rules²⁷.

However, it is necessary to shift the focus of the discussion to the practical operational level, and therefore ask how public power can materially and legally fulfill this function. It is necessary, in other words, to understand what operational tools and what legal institutions have the public power at their disposal to intervene on the information flows connected to emergency situations²⁸.

As we will see below, while in the past the issue had a regulatory vacuum, today there is a structured discipline of these aspects, representing a fundamental innovation in the paradigm of national and supranational administrative regulation.

In particular, the European Union Digital Services Act, EU Regulation 2022/2065, now includes a provision establishing special obligations for social networks during crises.

To fully understand the specific provision, it is helpful to first understand the broader context of the Digital Services Act and the new paradigm it introduces²⁹.

²⁶ TORPAN S., HANSSON S., RHINARD M., KZEMEKITYTE A., JUKARAINEN P., MEYER S.F., SCHIEFFELERS A., LOVASZ G., ORRU K., *Handling false information in emergency management: A cross-national comparative study of European practices*, in *International Journal of Disaster Risk Reduction* 2021; DI COSTANZO F., *Che può fare la pubblica amministrazione per salvarci dalle fake news*, in *Agenda Digitale*, 2018.

²⁷ VESE D., *Governing Fake News: The Regulation of Social Media and the Right to Freedom of Expression in the Era of Emergency*, Cambridge University Press, 2021; GIACOMAZZI M., *Disinformazione: perché la vera chiave di contrasto è la democrazia digitale*, in *Agenda Digitale*, 2022.

²⁸ OMAR S., VAN BELLE J.P., *Disaster Misinformation Management: Strategies for Mitigating the Effects of Fake News on Emergency Response*, in: ROCHA Á., FERRÁS C., HOCHSTETTER DIEZ J., DIÉGUEZ REBOLLEDO M. (eds), *Information Technology and Systems*, New York, Springer, 2024; IORIO E., *Comunicazione in emergenza: il ruolo della PA per un'informazione certificata*, in *ForumPA*, 2020.

²⁹ TURILLZZI A., TADDEO M., FLORIDI L., CASOLARI F., *The digital services act: an analysis of its ethical, legal, and social implications*, in *Law Innovation and Technology*, 2023, 1, ; CATALETA A., LASAVIO A., *Digital Services Act e riforma del panorama digitale: la stretta sulle big tech*, in *Cybersecurity* 360, 2023.

The idea that social networks represent a phenomenon that needs to be regulated, and that alongside their benefits, they also present excesses that must be contained and controlled, has become increasingly clear in the past decade³⁰.

Social communication has been extensively studied from both social and legal perspectives, revealing the distorting effects of phenomena such as hate speech and misinformation³¹.

As is widely known, these “polluting factors” of information are fueled by degenerative dynamics of online communication, which, while not eliminating the “healthy” aspects of social life on the web³², coexist with and undermine its serenity. Examples of these phenomena include some of the degenerative effects already mentioned above: echo chambers, filter bubbles³³, the “cascade effect”³⁴, and the widespread Dunning-Kruger effect³⁵.

When addressing this issue from a legal standpoint, it is evident that the United States and the European Union have adopted vastly different approaches, representing two distinct paradigms in regulating media, the web, and social networks.

As is widely known, the U.S. legal system applies a philosophy of “free marketplace of ideas” to the problem of disinformation, a principle rooted in the First Amendment of US Constitution³⁶. This philosophy posits that the information system should self-regulate, eliminating the need for government intervention. This is a longstanding belief in the United States, particularly entrenched in the era of the internet and social media, which has led to a policy of non-intervention³⁷.

Only recently has the U.S. begun to debate challenging this vision. The social media TikTok, in particular, has tested this legal paradigm, as it is seen by some U.S. politicians as both a source of disinformation and a non-transparent platform with unclear management criteria³⁸. However, even this debate has not yet led to significant U.S. government intervention in social media regulation, suggesting that the “free market of ideas” principle remains dominant, emphasizing the role of diverse information sources over government control³⁹.

³⁰ DUNN P. *Piattaforme digitali e moderazione dei contenuti d'odio: nodi giuridici e pratici*, in *Media Laws*, 2021; MANETTI M., *Regolare Internet*, in *Media Laws*, 2020, 2, 35.

³¹ FLAMINIO S. *Lotta alle fake news: dallo stato dell'arte a una prospettiva di regolamentazione per il “vivere digitale” a margine del Digital Services Act*, in *Rivista Italiana di Informatica e Diritto*, 2022, 2, 75; GRIMALDI D., *La responsabilità dei social tra fake news e hate speech: perché è tema cruciale per la democrazia*, in *Agenda Digitale*, 2020.

³² PELEN N.N. GÖLGEI M., *Vector-borne disinformation during disasters and emergencies*, in *Physica A*, 2022, 15; AA. VV., *I social media migliorano la democrazia?*, in *Irpa.eu*, 2024.

³³ PARISER E., *The Filter Bubble: What the Internet is Hiding from*, New York, Penguin Press, 2011.

³⁴ CALDERINI B., *La disinformazione corre sui social e le contromisure non bastano: che fare?*, in *Agenda Digitale*, 2020.

³⁵ PROTTI G. *Effetto Dunning-Kruger: attenzione alla trappola cognitiva*, in *Medical Facts*, 2020.

³⁶ GRANDE E., *I mobili confini della libertà di espressione negli Stati Uniti e il metro della paura*, in *Questione Giustizia*, 2015, 4, 47.

³⁷ DE GREGORIO G., *The market place of ideas nell'era della post-verità: quali responsabilità per gli attori pubblici e privati online?*, in *Media Laws*, 2017, 1, 93.

³⁸ MALLAMACI A. *Che ne sarà di TikTok negli Usa? Ecco i possibili scenari*, in *Agenda Digitale*, 2024; IUVINLE G. IUVINALE N., *L'influenza della Cina su TikTok: Usa e Ue provano a difendere democrazia e sicurezza nazionale*, in *Agenda Digitale*, 2023; BORGIO-BELLO M., *Ue e Usa uniti contro TikTok: in ballo non solo la privacy ma la manipolazione sociale*, in *Agenda Digitale*, 2022.

³⁹ BASSINI M., *Libertà di espressione e social network, tra nuovi “spazi pubblici” e “poteri privati”. Spunti di comparazione*, in *Rivista Italiana di Informatica e Diritto*, 2021, 2, 46.

As is well known, the American approach stands in stark contrast to the European Union's, which is characterized by a more interventionist stance towards regulating social media⁴⁰.

The European model is characterized by active government intervention, where European countries, magistrates, administrative authorities, and the European Commission can intervene to curb the distorting effects of social networks⁴¹.

However, this interventionism is balanced with safeguards and precautions, given the sensitive nature of information management. Specifically, European governments and the EU Commission must avoid undermining freedom of expression or engaging in censorship, as striking this balance is central to the European approach to internet law.

In pursuit of this complex balance, European intervention in the dynamics of internet communication has historically occurred in two distinct phases, representing two paradigms of public authority approaches to social media regulation within the European Union.

The first phase took place in the latter part of the 2010s and was characterized by a "horizontal" approach, primarily based on soft law. The second phase, on the other hand, is occurring in the current decade of the 2020s and is characterized by a more 'vertical' orientation, based on the issuance of rules with legal obligations for social networks⁴².

The first phase, with a "horizontal" orientation, consisted of not imposing legal obligations on social network companies but rather of encouraging a condition in which web platforms self-regulated⁴³.

A commonly used tool was to convene equal working tables where representatives of web platforms could discuss, evaluate best practices, and establish self-regulation codes.

In this phase, the communications authorities in each European country (and therefore, in Italy, AGCOM) played a fundamental role in assuming the role of 'impartial referees' in this horizontal management of the problem⁴⁴.

In Italy, the most significant experience of this management model occurred in 2017, when on November 6th, the Italian Telecommunications Authority established a 'Working Table for the guarantee of pluralism and correctness of information on digital platforms'. This forum facilitated discussions among representatives of major

⁴⁰ CALDERINI B., *I nuovi obblighi UE cambieranno le piattaforme online: ecco come*, in *Agenda Digitale*, 2023.

⁴¹ SASSI S., *L'Unione Europea e la lotta alla disinformazione online*, in *Federalismi.it*, 2023, 15, 183.

⁴² CORASANITI G., *Regolazione, autoregolazione, sovraregolazione della Rete: dal "far" web al "fair" web*, in *Diritto di Internet*, 2021, 12.

⁴³ CANTERO MARTÍNEZ J., *La incidencia del la técnica y de las transformaciones sociales en el derecho administrativo; el recurso la denominada "autorregulación regula"*, in PUNZÓN MORALED A J. (ed.), *Administraciones públicas y nuevas tecnologías*, Valladolid, Lex Nova, 2005, 309; AA.VV., *L'Europa si interroga: quali responsabilità per quali piattaforme digitali?*, in *Irpa.eu*, 2021.

⁴⁴ ALLEGRI M.R., *Social e politica, l'approccio soft di Agcom: tutte le zone grigie*, in *Agenda Digitale*, 2020.

online platforms, aimed at comparing best practices and developing self-regulation measures⁴⁵.

This body, operating on a ‘horizontal’ management model, first conducted a reconnaissance mission, publishing documentation on the current state of social disinformation. Subsequently, it produced self-contained codes, notably during the Italian political elections of 2018 and the European elections of 2019⁴⁶.

At that stage, therefore, control over fake news was primarily linked to managing political and electoral events, rather than emergency situations. However, this was a significant step as it marked the first attempt to hold social networks and web platforms accountable for managing disinformation on their platforms⁴⁷.

Contemporaneously, at the European level, the European Commission prompted web platform managers to identify self-regulation mechanisms, fostering a “horizontal” rather than unilateral governance approach. This led to the creation of the “EU Code of Practice on Disinformation”, in which social networks voluntarily committed to implementing moderation and content control measures to combat fake news⁴⁸.

In particular, in this document is written that “Relevant Signatories commit to invest in products, technologies and programs [...] to help people make informed decisions when they encounter online news that may be false, including by supporting efforts to develop and implement effective indicators of trustworthiness in collaboration with the news ecosystem”⁴⁹.

These documents are just a small part of a vast documentation that reflects an approach, at that time, lacking rigorous regulatory instruments for the regulation of social networks, instead preferring self-responsibility.

While undeniably soft, this approach has initiated a phase of awareness, placing social networks in a position to recognize their power and thus making them somewhat accountable. However, it also has its limitations⁵⁰.

However, in concrete terms the horizontal approach has proven to be weak and has not always given good results⁵¹.

This has been seen in two circumstances in recent years in which social networks have been put to the test in their ability to moderate content.

These circumstances are represented by events that are less predictable than the “political” ones for which self-regulation codes of web platforms were designed. In

⁴⁵ See the official page in the AGCOM website: <https://www.agcom.it/comunicazione/comunicati-stampa/comunicato-stampa-16-novembre-2017>

⁴⁶ See the documents at the AGCOM website: <https://www.agcom.it/tavolo-pluralismo-e-piattaforme-online>

⁴⁷ MORCELLINI M., *Per una migliore informazione online, quali policy e il ruolo dell'Autorità*, in *Agenda Digitale*, 2018.

⁴⁸ See the official page: https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/protecting-democracy/strengthened-eu-code-practice-disinformation_en

⁴⁹ See the document at the page: https://eaca.eu/wp-content/uploads/2022/02/final_eu_code_of_practice_on_disinformation_D338C8F1-A97F-2907-656993A02EFA92BA_54454-1.pdf

⁵⁰ NICITA A., *Le piattaforme online tra moderazione e autoregolazione: verso il Digital Services Act*, in *Media Laws*, 2020.

⁵¹ BONINI P., *L'autoregolamentazione dei principali Social Network. Una prima ricognizione delle regole sui contenuti politici*, in *Federalismi.it*, 2020, 11, 280.

particular, we have encountered unexpected emergency events that have generated crises greater than those anticipated in previous years.

This occurred during the health crisis caused by the 2020 pandemic⁵² and in the context of the war in Ukraine that began with the Russian invasion of 2022⁵³.

In both circumstances, numerous studies and observers have identified a significant increase in misinformation, which has been “detonated”. In the first case, as previously mentioned, the World Health Organization coined the term “infodemic”⁵⁴ to describe the uncontrolled circulation of inaccurate or misleading information.

Faced with these significant stress tests, it became clear that social networks were unable to independently stem the tide of disinformation. The mechanisms of horizontal governance and soft law proved ineffective, or at best, very weak, in a context of rapidly spreading misinformation⁵⁵.

Moreover, due to these unsatisfactory experiences, the early 2020s saw a shift towards a new European regulatory phase focused on controlling social networks. This transition is marked by a more top-down approach, as exemplified by the Digital Services Act, European Union Regulation No. 2065 of 2022⁵⁶.

It is well-known that this regulation imposes real obligations on social networks, systematically addressing issues of responsibility and transparency⁵⁷.

Most of the obligations outlined in the Digital Services Act are specifically targeted at “very large online platforms”, which are defined as social networks and web services with at least 45 million monthly active users. Currently, there are 17 such platforms in Europe, all subject to these regulations⁵⁸.

4 A new rule on a specific aspect: managing disinformation on social media during emergencies

The aspect we wish to focus is that the Digital Services Act, within its broad framework aiming to enhance the transparency and accountability of social networks, introduces a particularly innovative provision: Article 36. This provision, compared to others, appears to be completely new in the general regulatory framework. In fact,

⁵² GOTTLIEB M., DYER S. *Information and Disinformation: Social Media in the COVID 19 Crisis*, in *Academic emergency medicine*, 2020, 7, 640.

⁵³ DODA I., *I siti che hanno pubblicato bufale sulla pandemia ora diffondono disinformazione sull'Ucraina*, in *Wired.it*, 2022.

⁵⁴ The *Cambridge Dictionary* define “infodemic” as “a situation in which a lot of false information is being spread in a way that is harmful”: <https://dictionary.cambridge.org/dictionary/english/infodemic>

⁵⁵ DAL CO M., *Fuga dalle news: come pandemia e guerra hanno cambiato il nostro rapporto coi media*, in *Agenda Digitale*, 2022. LAMANUZZI M., *Il problema della disinformazione in rete: i limiti del diritto penale e le potenzialità del nuovo Codice rafforzato di buone pratiche dell'UE*, in *Media Laws*, 2022.

⁵⁶ DE VIVO I., *Il potere d'opinione delle piattaforme-online: quale ruolo del “regulatory turn” europeo nell'oligopolio informativo digitale?*, in *Federalismi.it*, 2024, 2, 45; MURONE F.G., *Il Digital Service Act e il contrasto ai contenuti illeciti online*, in *Ius In Itinere*, 2021.

⁵⁷ BORGOBELLO M., *Digital Service Act, obblighi di trasparenza e legal design: come adeguarsi*, in *Agenda Digitale*, 2024; CARBONE M.R., *Le “relazioni di trasparenza” nel Digital Services Act: cosa sono e come farle*, in *Agenda Digitale*, 2024; CATALETA A.; LOSAVIO A., *Digital Services Act, perché cambia tutto per diritti e sicurezza: ecco i punti chiave*, in *Agenda Digitale*, 2022.

⁵⁸ See the official page: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2413

it specifically addresses the management of social networks during crisis situations, such as emergencies⁵⁹. The rule is worded as follows:

“Where a crisis occurs, the Commission, acting upon a recommendation of the Board may adopt a decision, requiring one or more providers of very large on-line platforms or of very large online search engines to take one or more of the following actions:

(a) assess whether, and if so to what extent and how, the functioning and use of their services significantly contribute to a serious threat as referred to in paragraph 2, or are likely to do so;

(b) identify and apply specific, effective and proportionate measures, such as any of those provided for in Article 35(1) or Article 48(2), to prevent, eliminate or limit any such contribution to the serious threat identified pursuant to point (a) of this paragraph;

(c) report to the Commission by a certain date or at regular intervals specified in the decision, on the assessments referred to in point (a), on the precise content, implementation and qualitative and quantitative impact of the specific measures taken pursuant to point (b) and on any other issue related to those assessments or those measures, as specified in the decision”⁶⁰.

It is a rule that underwent a lengthy development process, spanning approximately two years before its implementation. Drafted in several phases between 2020 and 2022, it reflects and incorporates the most significant crisis events that unfolded on the international stage during that period⁶¹.

In its initial draft, this provision was primarily conceived in the context of the 2020 pandemic, aiming to address the “infodemic”, the widespread dissemination of misinformation, particularly regarding pseudoscientific topics, that accompanied the health crisis⁶².

However, the final text that entered into force was significantly influenced by the fact that, during the development of the legislative act, new global events occurred that generated disinformation crises. The most relevant of these is the conflict between Russia and Ukraine, which began in March 2022⁶³.

The rule has therefore become more robust in its aim to counter misinformation, drawing a parallel to the physical world where we construct barriers to protect against natural hazards like floods and volcanic eruptions.

⁵⁹ PANETTA R., *Digital Services Act, le norme da tenere d'occhio: ecco l'impatto sulla nostra vita online*, in *Agenda Digitale*, 2022.

⁶⁰ See the official text here: https://www.eu-digital-services-act.com/Digital_Services_Act_Article_36.html

⁶¹ SAETTA B., *Entra in vigore il Digital Services Act, la principale normativa europea che regola il mondo digitale*, in *Valigia Blu*, 2023.

⁶² FERREAU J.F., *Crisis? What crisis? The risk of fighting disinformation with the DSA's crisis response mechanism* in *Journal of Media Law*, 2024, 16.

⁶³ MEAKER M., *Ukraine war prompts Europe's new emergency rules for the Internet*, in *Wired*, 2022.

A thorough examination of Article 36 of the Digital Services Act highlights two unanswered questions: what is meant by ‘crisis’, and what measures can social networks adopt to manage the situation⁶⁴.

In reality, there are legal reasons why these aspects remain undefined in the law, particularly the second one regarding ‘which measures’ to implement. This is linked to the legislator’s need to balance imposing obligations on social networks with the need to avoid excessive interference with freedom of information⁶⁵.

However, a closer look reveals that the regulatory vacuum is only apparent, as the answers to these questions are already embedded in the legislation itself.

Rather than being found in Article 36 itself, the relevant information is located in a different part of the document, particularly in “whereas” clause 91, which provides the key to understanding Article 36 of the Digital Services Act⁶⁶.

In that part of the directive, objective reference points are provided to help us understand when a “crisis” occurs that necessitates the implementation of Article 36. It is stated as follows: “In times of crisis, there might be a need for certain specific measures to be taken urgently by providers of very large online platforms” And then it explains:

“In that regard, a crisis should be considered to occur when extraordinary circumstances occur that can lead to a serious threat to public security or public health in the Union or significant parts thereof. Such crises could result from armed conflicts or acts of terrorism, including emerging conflicts or acts of terrorism, natural disasters such as earthquakes and hurricanes, as well as from pandemics and other serious cross-border threats to public health”.

Therefore, the crisis conditions that determine the possibility of requesting special measures from social networks are varied and include emergencies such as conflicts, terrorism, as well as natural disasters like earthquakes and pandemics⁶⁷.

Therefore, from the combined provisions of the rules, it appears that Article 36 of the Digital Services Act primarily requires social network managers to verify how they actively contribute to, for example, exacerbating conflicts through uncontrolled hate speech or fueling the spread of fake news during a crisis or pandemic.⁶⁸

⁶⁴ BUIJS D., BUR I., *The DSA's crisis approach: crisis response mechanism and crisis protocols*, in *DSA Observatory*, 2023.

⁶⁵ VASINO G., *Censura “privata” e contrasto all’hate speech nell’era delle Internet Platforms*, in *Federalismi.it*, 2023, 4, 130; FULCO D., *Il Digital Services Act tutela davvero la democrazia? I problemi dell’approccio Ue*, in *Agenda Digitale*, 2023; BORGOELLO, M., *L’ombra della censura sul Digital Services Act*, in *Agenda Digitale*, 2024.

⁶⁶ BIRRI TIERI E., *Contrasto alla disinformazione, Digital Services Act e attività di private enforcement: fondamento, contenuti e limiti degli obblighi di compliance e dei poteri di autonormazione degli operatori*, in AA. VV., *Come individuare e contrastare operazioni coordinate di disinformazione in Italia*, Roma, Luiss, 2023, 64.

⁶⁷ MÉNDEZ-MUROS S., ALONSO-GONZÁLEZ M., PÉREZ-CURIEL C., *Disinformation and Fact-Checking in the Face of Natural Disasters: A Case Study on Turkey–Syria Earthquakes*, in *SOCIETIES*, 2024, 4; DALAYLI F., *Disinformation in Times of Disaster and Crisis*, in *Journal of Disaster and Risk*, 2024, 2, 505.

⁶⁸ GIUSTI N., LONGO A., *Digital services act: molti vantaggi per utenti ed Europa, ma sarà una sfida attuare le nuove norme*, in *Cyber-security360*, 2022.

Even the second point, apparently left unresolved by Article 36 – namely, “what measures can be adopted by social networks”, finds clarification in the same ‘whereas’ clause, number 91, of the directive. The text is worded as follows:

“Measures that those providers may identify and consider applying may include, for example, adapting content moderation processes and increasing the resources dedicated to content moderation, adapting terms and conditions, relevant algorithmic systems and advertising systems, further intensifying cooperation with trusted flaggers, taking awareness-raising measures and promoting trusted information and adapting the design of their online interfaces”

It is therefore possible to observe how, at the heart of the entire regulatory system, there are several elements: the focus on content moderation, the allocation of greater resources for this purpose, and the orientation towards reliable sources.

One way to achieve this is for social networks to modify their algorithms to prioritize news from institutional sources over news from uncontrolled sources⁶⁹.

In relation to these aspects, it is, however, possible to focus on an important profile

It is a matter of the fact that the European Commission (therefore the public authority) does not indicate to the web platforms “what to do” in peremptory mode, that is, it does not provide direct elements on how to operate to achieve the required objectives, but, on the contrary, leaves full freedom of action on which strategies to adopt to contain the crisis conditions in terms of controlling disinformation⁷⁰.

The freedom given to social networks in deciding what actions to take is balanced by an obligation of transparency, as they are required to report ex post on the activities carried out and the measures implemented⁷¹.

In fact, “Whereas” number 91 of the Digital Services Act merely provides examples of possible actions, as reported above. The directive essentially instructs the managers of large web platforms to assess their role in the intensification of the crisis and, if applicable, to take independent measures and subsequently report on their actions: “verify whether you have a role in the intensification of the crisis, and if you believe you have, adopt measures independently, and report at the end on how you operated”⁷².

It is important to note that this is likely the maximum extent to which a legal provision can go. Any more direct or peremptory intervention could be seen as excessive legislative interference and an undue infringement on freedom of information.

⁶⁹ BUCCA R. SABATINI M., *Digital services act, la Ue a una svolta: cosa cambia per utenti, aziende e big tech*, in *Agenda Digitale*, 2022; GIRARDI M.C., *Libertà e limiti della comunicazione nello spazio pubblico digitale*, in *Federalismi.it*, 2024, 17, 150.

⁷⁰ KOZINOWSKY A.E., *EU's fight against disinformation – Who owns the truth?*, in *Media Laws*, 2024.

⁷¹ FRANCHI J., *Moderazione contenuti social: ecco cosa rivelano i primi numeri post Digital Services Act*, in *Agenda Digitale*, 2023.

⁷² RAZZANTE R., *Nuove frontiere della libertà d'espressione alla luce del Digital services act (Dsa) e dell'evoluzione normativa europea, tra criticità applicative e possibili risvolti costituzionali*, in *Dirittifondamentali.it*, 2023, 3, 136.

The European directive therefore necessarily sought a balance, holding social networks accountable while granting them freedom of action and avoiding undue interference in their management choices⁷³.

Although this provision appears balanced, it has actually generated significant opposition and controversy.

5 The doubts and criticisms addressed to the provision

The Digital Services Act provision we are examining, structured as it is, has generated numerous controversies and attracted criticism, especially from external observers. One criticism of the provision is that it could lead to censorship of social networks.

In particular, the rule has been criticized by EDRI (“European Digital Rights”), a group of Not Governative Organizations that deal with the protection of human rights on the Internet. The member organizations signed a document on 12 April 2022 that, while appreciating some aspects of the art. 36 of Digital Services Act, also expresses strong criticism.

In the criticism these words are used:

“The proposed mechanism is an overly broad empowerment of the European Commission to unilaterally declare an EU-wide state of emergency. It would enable far-reaching restrictions of freedom of expression and of the free access to and dissemination of information in the Union”⁷⁴

It also states that:

“Decisions that affect freedom of expression and access to information, in particular in times of crisis, cannot be legitimately taken through executive power alone”, and that “The definition of a crisis (now broadly including pandemics, terrorism, or “emerging conflicts”) must fulfil the principles of clarity and specificity and should not empower the Commission to uphold crisis measures for years on end”.

Furthermore, the document states verbatim that: “The mechanism proposed must include a time limit to crisis measures”, and it contains a question: “we question whether the Commission is the right body to make such an assessment unilaterally, especially during politically charged times and under strong political pressure from Member States”

Conversely, it is possible that the opposite problem could occur, where public power becomes excessively dependent on social networks for content moderation, thereby shifting power from the public sphere to private entities⁷⁵.

In other words, the Digital Services Act provision formally recognizes the significant role social media platforms play in managing information flows. Doing this,

⁷³ TOURKOKHORITI I., *The Digital Services Act and the EU as the Global Regulator of the Internet*, in *Chicago Journal of International Law*, 2023, 1, 136.

⁷⁴ The full document is available at the page <https://www.article19.org/resources/eu-digital-services-act-crisis-response-must-respect-human-rights/>

⁷⁵ SCOPELLITI D., *Poteri privati e responsabilità pubbliche dei social network al tempo della democrazia digitale*, in *Federalismi.it*, 2024, 7, 239.

the act not only legitimizes this power but also places obligations on platforms to exercise it responsibly and transparently.

However, this could be considered a “forced situation” within the framework of European legal principles and rules. Public power could not do otherwise than invest in social networks with the responsibilities of managing information, with final reporting obligations. In fact, any more direct action by public power would be more invasive and potentially harmful to freedom of expression, as would happen if those who govern dictated direct criteria to social networks for moderation and content filtering.

So ultimately, it is possible to summarize the general picture like this: the problem of disinformation during emergencies is exacerbated by an increase in fake news and hate speech. While public authorities cannot directly intervene to control these phenomena without violating the law, legislative action at the European Union level has shifted the responsibility to large online platforms. These platforms are now required to manage the crisis in a transparent and accountable manner.

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