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STUDY ON THE USE OF INTERNET IN ELECTORAL CAMPAIGNS

The rules of the game: the Internet, Social Media and Election Communications

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Introduction

In the terms of reference for the Steering Committee on Media and Information Society (CDMSI) for the biennium 2016 – 2017, the Committee of Ministers asked the CDMSI to "carry out a feasibility study on a possible standard-setting instrument on media coverage of elections, with particular regard to gender equality and the use of the internet in elections" and approved the committee of experts on media pluralism and transparency of media ownership (MSI-MED) as a subordinate structure to facilitate the work of the CDMSI. The composition of the MSI-MED appears in the Appendix.

In its first meeting on 22 – 23 March 2016, the expert committee decided to deal separately with the two components of the study, namely the use of the internet in electoral campaigns and gender equality in the context of media coverage of elections. Mr Damian Tambini was appointed as Rapporteur for the preparation of the study on the use of internet in electoral campaigns.

Subsequently it was decided in the CDMSI Bureau and confirmed by the MSI-MED to omit from the titles of the studies the mention "feasibility" and the references to standard-setting instruments, given the open-ended conclusions of the studies and the need to obtain more comparative information before deciding on what specific follow-up to give to them.

1. What could possibly go wrong? Social Media, Elections and Democratic Legitimacy

In human rights and constitutional law, freedom of expression is fundamental, and political speech is the most protected form of speech. But political communication during election periods has long been subject to various forms of regulation. Most member states of the Council of Europe have rules on paid political advertising such as limits on electoral campaign spending, on the amount of airtime that can be purchased for campaigning, on contributions of individuals, corporations or foreign entities, etc. A number of member states maintain bans on paid political advertising on television and radio, which are mostly balanced by free airtime in which political parties can present their programmes. The aim of these rules is to maintain the integrity, fairness and legitimacy of the election process and its outcome, and guard against the possibility that private interests and powerful minorities can control outcomes through collusion between media and politicians, or the buying of influence over public opinion. These rules are contained in election law, broadcasting law and self-regulatory codes and are also reflected in international human rights standards that require that rules are necessary and proportionate.

The internet has given people unprecedented access to information about elections and enabled them to express their opinions, interact with candidates and get actively involved in electoral campaigns. According to a polling report of

Ipsos Mori and King's College London in 2015[1], 71% of Britons (88% of 18-34 year olds) felt that social media platforms are giving a voice to people who would not normally take part in political debate.

The internet is also a useful platform for political parties to present their agenda to the electorate and to mobilise a larger support base for their causes. The cost of communicating with voters can be substantially lower via this medium than via broadcast media, given the availability of free blog and video sharing platforms and social media. Small political parties with limited resources and independent candidates in particular can benefit from this type of communication.

However, the changes in the production and consumption of election-related content also raise a number of concerns. In recent years, a growing number of researchers have raised questions about the potential impact of the internet, especially social media, on electoral choices. In the abovementioned poll social media platforms have been found, especially among the young population, to have a considerable impact. 34% of 18-34s thought that information they read on social media would influence their vote. The general population expressed less trust in social media; only one in five Britons (19%) was found to have more trust in political information available on social media platforms than that they read in newspapers.

This feasibility study sets out the principles and institutions of campaign regulation and discusses the implications of different ways in which the internet has changed political campaigning, be it with regard to paid advertising, the use of social media by the politicians to present and discuss their programmes, the weakened gatekeeping capacities of media and authorities with regard to electoral messages, the collection and processing of the voters' personal data for election purposes, etc.

The aim of the study is to flag the potential problems which have emerged or have been aggravated with the shift of political propaganda and especially election campaigns onto the internet. Because existing regimes for campaign finance control and transparency within the member states of the Council of Europe are quite varied, for example with regards to political advertising and campaign finance, conclusions made will not apply to all member states equally. Some standards set will be at the level of principles, and others concrete rules and institutions.

The study will outline how the following aspects of electoral campaigns influence the electoral process as a result of the move of an important part of electoral communication to the internet:

- **Broadcasting regulation:** Previously, broadcasting regulation such as advertising restrictions and impartiality obligations could help ensure a level

[1] Gideon Skinner, Ipsos Mori, A third of young people think social media will influence their vote.

https://www.ipsos.com/ipsos-mori/en-uk/third-young-people-think-social-media-will-influence-their-vote.

playing field for political debate. As political campaigns move online effectiveness of these regimes declines.

- **Spending:** Campaign finance controls seek to limit the role of money in electoral outcomes. But existing regulations limiting this advertising spend are no longer effective due to a shift in balance between local and national spending, and because detailed quotas do not effectively record online spend. Rules vary by country and according to local market conditions, but it is clear that campaign spending limits will need recalibration.

- **Targeting:** Targeting of key messages to key demographics raises new challenges for individual autonomy and deliberation. On one hand individual citizens' autonomy may be undermined by a lack of impartial information and on the other, entire demographic groups or regional interests may be excluded from political deliberation.[2]

- **New actors in the electoral process:** intermediaries adopt powerful new gatekeeper positions that enable them to influence the outcome of electoral processes. Search engines, seen as trustworthy by a majority, have the potential to influence the electorate's attention and voting preferences. Epstein and Robertson (2015) have highlighted the "search engine manipulation effect", showing that a biased search engine result ranking can shift undecided voters towards one candidate. It is argued that such an effect is particularly relevant for elections with a limited number of closely ranked candidates. Diakopoulos (2016) has demonstrated the potentially powerful implications of display of search results.[3] This could lead to new forms of corruption and manipulation that are not captured by existing rules that focus mainly on broadcasting and that cross jurisdiction boundaries.

- **Truth and misleading statements:** Disintermediation of political campaigning undermines traditional filters based on journalism values of truth, fact-checking and separation of opinion from fact. This has weakened the effectiveness of the traditional rules governing false and misleading claims.

- **Representation of public opinion**[4] (silence periods)[5]. Most democracies have rules governing publication of opinion polls, and campaigning on election day

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[2] Barocas, S. (2012). The price of precision: Voter microtargeting and its potential harms to the democratic process. Paper presented at the Proceedings of the first edition workshop on Politics, elections and data pp.33-35.

[3] Diakopoulos. N and M. Koliska. 2016. Algorithmic Transparency in the News Media. *Digital Journalism*; Epstein, R. and Robertson, R.E., 2015. The search engine manipulation effect (SEME) and its possible impact on the outcomes of elections. *Proceedings of the National Academy of Sciences*, *112*(33), pp.E4512-E4521.

[4] See http://www.lse.ac.uk/media@lse/documents/MPP/Policy-Brief-5-Semantic-Polling_The-Ethics-of-Online-Public-Opinion.pdf

[5] See Ofcom code rule 6.5. Compare Par Condicio in Italy.

and in a specified period before. These have come under scrutiny because of the difficulty of enforcing them online.

- **Transparency:**[6] Public scrutiny of campaigns has been enabled by a number of rules obliging campaigners to be transparent about funding and origin of campaign communications: These include the obligation to note the printer and funder of leaflets. These are difficult to impose online.[7]

Whilst many of the phenomena described remain possibilities rather than empirically demonstrable outcomes it is essential that policy and civil society respond to the potential undermining of democratic legitimacy that they present. Existing regulation is based on traditional media and should be reviewed and complemented by measures aimed at new media and other digital technologies to prevent democratic failures and protect the legitimacy of democratic processes.

2. Background: Regulation of electoral campaigns: fair, clean and clear

The use of internet in elections engages standards and regulatory institutions across a range of distinct areas including freedom of expression, freedom of association and electoral law and international election monitoring.

According to the Venice Commission, Guidelines on Political Party Regulation (2010)[8] money in elections is regulated in order to ensure campaigns are:

- **Fair:** to prevent improper influence (and ensure the independence of parties) on political decisions through financial donations.

- **Clean:** to ensure all political parties have an opportunity to compete in line with the principle of equal opportunity, and

- **Clear:** to provide for transparency in expenditure of political parties.

The main ways campaign communication has been regulated has been through electoral law including

a. Spending limits & campaign finance controls.

b. Subsidies for campaigning communications.[9]

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[6] (PPERA Ch III s126) http://www.legislation.gov.uk/ukpga/2000/41/section/126.

[7] UK electoral commission has repeatedly called all such rules to be applied to campaign communications including Non print communications.

[8] European Commission for Democracy through Law (Venice Commission) 2010 : Guidelines on Political Party Regultion CDL-AD(2010)024 pp.35, para.159.

[9] IDEA: 142-3.

c. Pre-poll black outs.

d. Media regulation in particular broadcast licensing.[10]

e. Rules on political advertising including impartiality, subsidies and free air time.[11]

f. Self-regulation and journalism ethics.

(a) Objectives

The overarching objective of campaign regulation is to protect the integrity of elections, ensure they are free and fair, and not captured by a narrow range of interests.

Rules seek to do this in two ways: on one hand they attempt to facilitate the opinion formation process in society by helping ensure that each citizen has access to a balanced range of views and opinions. On the other hand, they limit the role of money in the electoral process, through for example limits on political advertising and campaign spending. Campaign finance is considered a form of beneficial speech but can be problematic particularly if parties and campaigns depend on a small number of large donations. These policy objectives are achieved through a combination of media law, election law and international human rights standards. According to The Committee for Standards in Public Life in the United Kingdom (hereinafter the UK), one of the primary reasons for campaign spending limits was to prevent an "undue focus on fundraising."[12] The commission pointed out that funding of political parties through private contributions is also a form of civic participation and freedom of expression thus any legislation should attempt to achieve a balance between encouraging moderate contributions and limiting unduly large contributions.

(b) International standards and principles

Regulation of elections is internationally recognised in a set of international treaties including the International Covenant on Civil and Political Rights[13] (ICCPR), the European Convention on Human Rights (the Convention) and the United Nations Convention against Corruption (UNCAC),[14], which also provides specific rules aimed at ensuring transparency in electoral campaigns.

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[10] For the relevant UK rules see the Ofcom broadcasting code section on elections. http://stakeholders.ofcom.org.uk/broadcasting/broadcast-codes/broadcast-code/elections-and-referendums/

[11] To see for example communications act 2003 section 333.

[12] The Committee on Standards in Public Life, 1998. The Funding of Political Parties in the United Kingdom, Cm 4057–I, pp.120. para 10.29.

[13] United Nations National Assembly. 1966. International Covenant on Civil and Political Rights. Article 25.b. pp.179.

[14] UN Convention against Corruption (UNCAC). 2003. Article 7.3.pp.11.

A number of instruments pertaining directly or indirectly to the electoral process and, more specifically, electoral campaigns, has been adopted by the Council of Europe.

(i) Financing of political parties

Recommendation Rec(2003)4 of the Committee of Ministers to member states on common rules against corruption in the funding of political parties and electoral campaigns[15] and the Parliamentary Assembly's Recommendation 1516 (2001) on the financing of political parties[16] recommend some general principles the financing of political parties should abide by:

- **A reasonable balance** between public and private funding.
- **Fair criteria** for the distribution of state contributions to parties.
- **Strict rules** concerning private donations including bans on contributions from foreign donors, religious organisations and restrictions on corporations and anonymous donations.
- **A limit** on parties' expenditures linked to election campaigns.
- **Transparency** of donations and expenses of political parties.
- **The establishment** of an independent authority and meaningful sanctions for those who violate the rules.

The above legislations should also be extended to third party- non-political party group.

(ii) Media coverage of electoral campaigns

Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of electoral campaigns applies to a broad range of media, namely to "those responsible for the periodic creation of information and content and its dissemination over which there is editorial responsibility, irrespective of the means and technology used for delivery, which are intended for reception by, and which could have a clear impact on, a significant proportion of the general public". This definition covers print, broadcast and online media; however, its applicability may not extend to social media where a large part of electoral communication takes place today.

The general principles of media reporting on elections include:

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[15] http://www.coe.int/t/dg1/legalcooperation/economiccrime/cybercrime/cy%20activity%20interface2006/rec%202003%20(4)%20pol%20parties%20EN.pdf

[16] Parliamentary Assembly of the Council of Europe: Recommendation 1516 (2001), Financing of political parties. Para.8.

- ☐ **Non-interference** by public authorities.
- ☐ **Protection by public authorities** against attacks, intimidation or other types of unlawful pressure on the media.
- ☐ **Editorial independence** of the media.
- ☐ **Requirement of fair, balanced and impartial coverage by media** owned by public authorities.
- ☐ **Transparency of the media** with regard to content that is paid political advertising, as well as with regard to ownership of media by political parties or politicans.
- ☐ **The right of reply** or equivalent remedies for candidates or political parties.
- ☐ **Distribution of opinion polls** accompanied by sufficient information to make a judgment on their value.
- ☐ **Introduction of the "day of reflection".**

(iii) Rules on broadcasting and political advertising

Political advertising controls have formed an important part of the regime that seeks to guard democracy against capture by money. However this must be balanced with rights to freedom of expression.

Broadcasting in contrast to press and online media has been subject to detailed regulation of political campaigns. Firstly, licence requirements require impartiality in political matters, for many television and radio channels specific codes are applied and these pay particular attention to election and referendum periods. Secondly broadcasters are required to exercise restraint in publication of opinion poll findings and also enforce quiet periods prior to election day. Third, political advertising is regulated as regards to: (i) transparency (ii) advertising time and cost (iii) paid political advertising (in some cases broadcast political advertising is banned), and (iv) subsidies for advertising budgets and/or reserved time on public broadcasters constitutes a form of rationing that serves to level the political playing field.

The fact that advertising bans apply to broadcasters but not online media means that they will be less effective in this objective as political communication shift online. Therefore new developments of the standards of the European Court of human rights (the Court) will be important. Hitherto, the Court has not had an opportunity to address the question of political advertising online. It has however pronounced itself on several bans on political advertising in the broadcast media, with contrasting results.

In a case where a fine was imposed on a television channel for broadcasting paid advertisement for a small pensioners' political party, in breach of the blanket prohibition provided for in the national legislation, the Court found a violation of Article 10 of the Convention (*TV Vest AS and Rogaland Pensjonistparti v.*

Norway). The Court reached a similar conclusion with regard to Swiss blanket ban on political advertising in *VgT Verein Gegen Tierfabriken v. Switzerland* where an animal rights organisation attempted to have its commercial against animal farming broadcast on the national television. Not excluding that such a ban could be compatible with the right to freedom of expression in certain situations, the Court did not accept general justifications that (a) the ban prevented financially powerful groups from distorting public debate and that (b) broadcast media must be subject to greater restrictions due to their influence.

However, in *Animal Defenders International v. the United Kingdom*, a case with nearly identical facts (animal rights NGO's commercial against cruelty to primates), the Court ruled in favour of the blanket ban. Adopting a new doctrine of "general measures", the Court widened substantially the states' margin of appreciation, relying much more on the domestic authorities' assessment of the necessity of the measure. The Court's reasoning was based, among other, on the lack of a European consensus on how to regulate paid political advertising in broadcasting, on possible abuse of less restrictive rules, and on the applicant's access to other powerful communication tools such as print media, the internet and demonstrations. Despite the rising importance of the internet and social media, however, the Court found that the prohibition specifically limited to broadcast media made sense, given the immediate and powerful effect of such media.

As regards access to broadcast media, according to the Court's case-law Article 3 of Protocol No. 1, which enshrines the principle of equal treatment of citizens in the exercise of their electoral rights, does not as such guarantee any right for a political party to be granted airtime on radio or television during the pre-election campaign. Only in exceptional circumstances, if access was denied to one party in anthis arbitrary manner and granted to other parties, an issue might arise under that provision (*Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v. Latvia* (dec.)).

In 2017, the Court found a violation of Article 10 in the case *Orlovskoya Iskra v. Russia* which concerned the publication of articles critical of a political candidate in the applicant newspaper. The Russian electoral laws prohibit pre-election campaigning, which includes dissemination of information about a candidate together with positive or negative comments. The Russian Government claimed that the print media should be subjected to requirements of impartiality, neutrality and equality of treatment during an election period, but the Court held otherwise, rejecting the argument that the case concerned political advertising and finding that Article 10 encompassed a right to free editorial choice to publish information in public interest which took a critical stance toward a candidate. According to the Court, although certain restrictions on Article 10 could be justified to secure free expression of the opinion of the people in the choice of legislature, independent exercise of freedom of expression by the press had to be upheld also at election time.

Political Campaign Regulation and Mass Media. Some Comparisons[17]

	TV Political Advertising Permitted	Spending Limits on Expenditure	Direct Public Funding	Spending Disclosure Rules	Provision of free political advertising time on TV
United Kingdom	No	Yes	Yes	Yes	Yes
France	No	Yes	Yes	Yes	Yes
Germany	Yes	No	Yes	Yes	Yes
Italy	Yes	Yes	Yes	Yes	Yes
Spain	No	Yes, The ceiling on party election expenditure is established for each electoral cycle by the General Accounting Court	Yes	Yes	Yes
Denmark	No	No	Yes	Yes	Yes
Poland	Yes	Yes	Yes	Yes	Yes
Ireland	No	No, A party can only spend part of a party candidate's election expenditure limit, which the candidate has to agree to	Yes	Yes. Disclosure is required for campaign expenditure	Yes
Portugal	No	Yes, EUR 3M	Yes	Yes	Yes
Switzerland	No	No	No	No	No
Belgium	No	Yes, EUR 1M	Yes	Yes	Yes

3. The Changing Reality of Political Campaigning

New internet technologies pose challenges for established institutions and principles of regulation of election communications such as freedom of association, spending limits, and regulation of political advertising.

They undermine the ability of existing regulation to maintain a level playing field in electoral communication between new and established, rich and poor, corporate and civil society campaigns.

New intermediaries and platforms now occupy important gatekeeper positions once occupied by journalists but have not adopted the ethical obligations of the

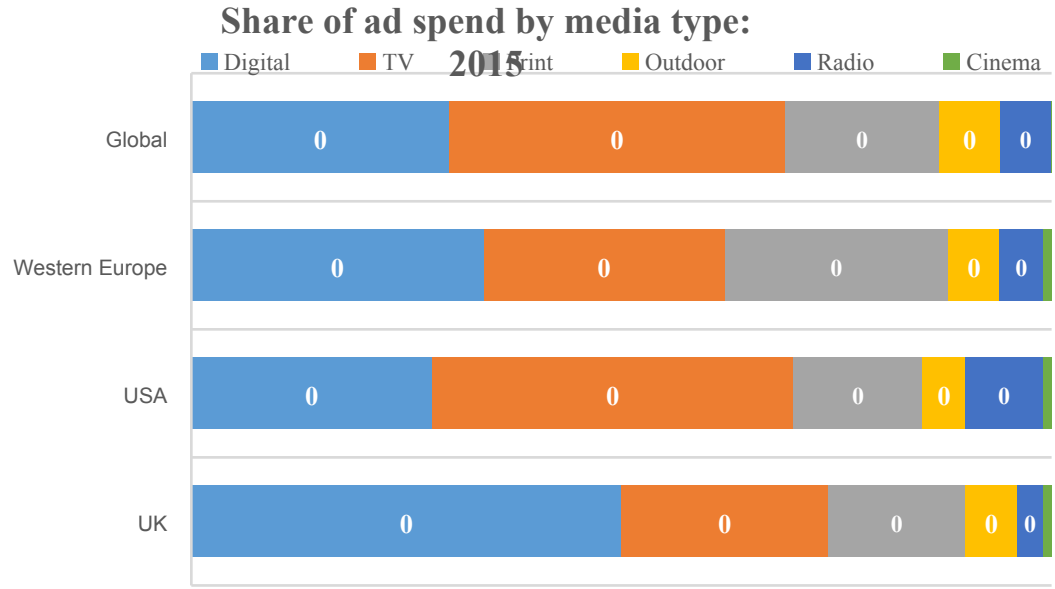
[17] This table is reproduced from Tambini et al 2017. It is indicative and subject to change. Compiled from: *Holtz-Bacha, C., & Kaid, L. L. (2006). Advertising in international comparison. The Sage handbook of political advertising, 3-14 and IDEA. 2014. Funding of Political Parties and Election Campaigns: A Handbook on Political Finance.* see also: http://www.idea.int/sites/default/files/publications/the-state-of-political-finance-regulations-in-western-europe.pdf

media. This presents a threat to elections and potential for corrupt practices to emerge.

(a) Spending

In Europe, as elsewhere, advertising spend has shifted significantly to digital over the past decade. This has raised questions about the efficacy of existing campaign finance regulation.

A shift of consumers to digital forms has seen advertisers follow suit with their marketing budgets. The result has been the percentage of ad spend devoted to online forms has grown significantly and taken share from more traditional media such as TV, radio and print. In Europe more than a third (36%) of advertising spend is spent on digital channels (up from 6% in 2006) surpassing TV advertising (33%) for the first time in 2015, although this masks significant difference between regions.[18] In the UK, one of the more advanced digital markets, more than 50% of every advertising pound spent goes to online channels.



Source: Strategy Analytics Advertising Forecast, 2015

Reflecting these larger structural trends in the advertising market, political parties have also begun to shift their advertising spend towards digital channels. In the UK, 2015 was the first year where figures have been reported on digital spending on political campaigns. In total £1.6M was spent by the main parties on digital, about 23% of the total advertising budget with the vast majority of the digital budget being spent with Facebook.[19] In the United States of America (hereinafter the US), even with the presence of TV advertising spend (largely

[18] IAB Europe. 2016. "Adex Benchmark" 2015.

[19] Electoral Commission. 2016. UK Parliamentary General Election 2015: Campaign spending report pp.28.

absent in Europe), almost a billion dollars or 10% of political ad spend is forecast to be spent in the 2016 elections[20].

	Total Political Ad Spend (Share %)				
	2008	**2010**	**2012**	**2014**	**2016E**
Broadcast	69%	65%	64%	61%	59%
Cable TV	8%	8%	11%	10%	11%
Radio	9%	7%	9%	7%	8%
Print	10%	11%	10%	11%	8%
Out of Home	4%	9%	4%	9%	4%
Digital	0%	0%	2%	4%	10%

Source: Borrell and Associated, Kantar/CMAG, Nomura estimates

These new forms of digital advertising are less widely understood than their analogue predecessors and are inherently less transparent. They may undermine existing definitions and limits based on specific media, and the ability of the regime as a whole to create a level playing field.

(b) New Digital Marketing Techniques and their application in politics.[21]

(i) Push vs Pull Advertising

The basic models for political online advertising do not differ from what is available to commercial firms looking to target potential customers online. There are two categories, push and pull although more recently the lines between the two have blurred as data from one is used to for the other.

The pull method is largely associated with search engine advertising. It is keyword triggered. In other words ads are targeted to users after they search

[20] Borrell and Associated, Kantar/CMAG, Nomura estimates.

[21] The author acknowledges the excellent research assistance of Sharif Labo on this paper and particularly on this section.

on a keyword which an advertiser has chosen to trigger their advertising copy. For example a political party might choose to bid on a keyword ' EU Referendum' which would trigger their ad to appear on the search results page if a user searched for this term or a related one. This is akin to the yellow pages or telephone book, where a user looking for a product or service consulted a directory which listed providers of that service and potentially advertisers who might have paid for a more prominent listing. The business model is based on cost per click i.e. if the user clicks on the ad in question, the advertiser (in this case the political party) is charged. The amount they are charged is largely dependent on how popular the service they are advertising is and how closely related it is to what they are offering. Another less popular business model is the cost per impression. Ads are charged every time they are displayed rather than when they are clicked. Cost per click is largely the business model for search advertising.

In addition to keyword trigger, advertisers are also able to target and tailor their ads based on what devices users are on, language and regional settings.

Push advertising on the other hand involves little agency from the user. In this case advertisements are displayed to users unprompted as they carry out their regular activities online. This would include adverts on regular publisher's websites; news, magazines, blogs as well as on platforms such as social media and video sites. Here the targeting options are myriad. Advertisers are able to target by demographic group, or interests, according to what websites the users have visited previously, what pages they like, their behavior and personal details and so on.

Increasingly the sharing of data across platforms means the lines between push and pull are blurred. For example Facebook ads can be targeted not just according to data volunteered and in circulation in the Facebook ecosystem but also what users do outside of Facebook, for example their browsing history on other websites. Similarly an advertiser, a political party for example or a supermarket can upload lists of their users into Facebook and use the platform to advertise to them and similar users. Search advertising can also take advantage of data from users who have performed an action away from the search engine results page, for example a user who has visited a website and did not purchase or sign up can be 'remarketed' to.

(ii) Message targeting

The common thread that emerges from these new advertising techniques is one of a movement from scale to precision. Political parties (and commercial advertisers) have moved from blunt methods that favoured reaching millions of people with a similar message to more precise tools which are able to target smaller audiences with bespoke such messages. By applying sophisticated data-mining techniques capable of linking people's personal characteristics with political beliefs and discovering the voters' political behaviour, political parties aim to attract new voters by delivering individualised messages on specific issues that may concern them personally and may well be decisive in how they cast their vote, irrespective of whether they are of concern to the broader electorate.

This has allowed party officials to reach the thousands that win elections. Admittedly, even before the internet thoroughly transformed electoral communication, politicians were delivering targeted messages through door-to-door campaigning, via direct mail or telephone calls to mobilise the voters and influence their choices. However, they had nowhere near as much personal details available to personalise their campaigning. Today, once the voter data is analysed and patterns of behaviour discovered, message targeting itself can be applied using both traditional methods of electoral communication (direct mail, door-to-door, etc.) and/or new media (emails, targeted messages via social networks, etc.), the latter being more cost-effective.

Social media campaigning has grown into a very attractive means of reaching out to potential voters. However, this kind of message targeting is not done in public and is therefore not subject to any monitoring or journalistic scrutiny. Consequently, inaccurate information can spread among potential voters on an unprecedented scale without any oversight or rebuttal of politicians' claims. Furthermore, it allows politicians to make different promises to different people, thus dispersing their political objectives into separate, not necessarily reconcilable messages. In the UK, a project called Who Targets Me is addressing this opaque advertising by seeking to obtain information from the social media users on what adverts they are seeing.[22]

Furthermore, message targeting seeks to optimise the electoral campaigns' resources and thus focuses largely on swing or undecided voters. Those who are not singled out by party messages are deprived of an entire spectrum of political stances which the parties do not communicate to the entire public, which in turn creates inequalities in terms of the available information on which the voters base their political choices.

These forms of targeted advertising are considered to be more efficient not only because messages can be tailored to suit citizens based on sophisticated data driven profiling, but because messages can be targeted on those constituencies and demographics likely to 'swing' an election. The result is that others are excluded from the discussion. As one person who was involved with the UK Conservatives election campaign in 2015 put it "People said to me….I don't see anything from you guys….This was like stealth. Basically if you don't live in one of the 100 key constituencies you are going to see very little from us."

4. Potential Problems associated with New Digital Techniques

These new methods however raise concerns about their impact on the legitimacy and fairness of elections, and the ability of the current regulatory and ethical framework to protect it including:

[22] https://whotargets.me/en/

(a) Regulation of electoral campaigning

Online media may undermine applicable rules on electoral campaigning, especially broadcast advertising rules. For example in the recently concluded EU referendum in the UK, Britain Stronger in Europe targeted videos towards certain demographics. One entitled "What would Brexit mean for my children" targeted at mothers registered almost 600k views. With younger demographics increasingly consuming the majority of their TV content via online video channels such as YouTube, it raises questions as to the effectiveness of the current regulatory framework because audiences for audiovisual content are shifting rapidly to platforms not subject to those rules.

Furthermore, in countries which impose periods of election silence on the last day/days before elections, preventing campaigning and reporting of the results, pre-election opinion polls or exit polls, the shift of electoral reporting and campaigning to online platforms has made it more difficult to monitor the observance of these rules. This is all the more difficult since many violations of election silence originate from websites operating outside a particular state jurisdiction. For example, while French media are bound to respect the 32-hour election silence, such a restriction does not apply to francophone Swiss and Belgian media with websites available in France. During the 2017 French presidential election, many of them began reporting on the election exit polls well before the polls closed.[23]

(b) Transparency

2015 was the first year where figures have been reported on digital spending on political campaigns in the UK. In total £1.6M was spent by the main parties on digital, about 23% of the total advertising budget with the vast majority of the digital budget being spent with Facebook. There are however big gaps in how digital spending is reported due to current reporting requirements. These gaps mean it is unclear whether or not we are looking at the entire picture. The main issue is there are no separate reporting lines for social or digital media. According to the UK Electoral Commission digital advertising could be hidden within larger categories such as market research, advertising and unsolicited campaign material. Identification of what constitutes digital is made based on the name of the provider. For example, Google or Facebook are recognised providers of advertising services on digital platforms, however a lot of digital spending takes places via intermediaries such as advertising agencies or consultancies. A case in point is the Labour Party's reported spend on digital advertising in the 2015 UK Parliamentary General Election. Initial reports about Labours' online spend indicated they had spent only £16k, however this proved to be erroneous as they had spent about £130,000 using an advertising agency which is common practice. The Electoral Commission has identified this as an important issue to monitor and put forward a recommendation that parties be

[23] http://www.rtl.fr/actu/politique/resultats-legislatives-2017-rtbf-le-soir-la-libre-7788906040

required to report on more detailed breakdowns including social media spend before the next parliamentary general election.[24]

(c) Campaigning on Wedge Issues

The ability to micro-target political messages increases the likelihood that parties and candidates campaign on wedge issues. These are issues which are highly divisive in a public forum but also have the ability to mobilize voters. such as matters on immigration and welfare.[25] Research from the US[26] has shown that candidates are more likely to campaign on these wedge issues when the forum is not public. This however again raises questions about the impact this type of precise hidden campaigning and asymmetric informational flows has on the polarization of citizens. Message targeting speaks to the individual concerns of citizens as part of a group. The legitimate concerns of opposing groups are discredited or dismissed. Because these messages are being played out largely in secret they cannot be challenged or fact checked.

(d) Political Redlining[27]

Message targeting encourages contact and engagement only with those who are deemed worthy of political campaigning, for example those in marginal seats or judged to be undecided voters might receive attention, however it begs the question what happens to those who are not regarded as strategically important. Groups less likely to vote risk being further disenfranchised with this move to precise targeting during election campaigning'. There is also a risk of a compounding effect. Data on past elections are often used as a guide to inform future campaigning, so groups which are seen as not worth the resources are likely to be bypassed in the future. On the flip side those already seen as 'decided' are likely to receive information only from their affiliated party, if at all (as it might be considered a waste of resources). If democratic societies flourish through the free flow of information which in turn allow citizens to consider issues on balance then any move to restrict information flow might exacerbate polarization. As Karpf (2012) noted, advances in technology which allow message targeting remove a "beneficial inefficiency" that aided the public sphere.[28]

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[24] Electoral Commission. 2016. UK Parliamentary General Election 2015: Campaign spending report pp.55-56.

[25] Barocas, S., 2012, November. The price of precision: Voter microtargeting and its potential harms to the democratic process. In *Proceedings of the first edition workshop on Politics, elections and data* (pp. 31-36). ACM.

[26] Sunne Hillygus .D & Shields.G. T. 2009. "The Persuadable Voter:Wedge Issues in Presidential Campaigns.

[27] Howard, P.2006. New Media Campaigns and the Managed Citizen. Cambridge University Press

[28] Karpf, D. 2012. The MoveOn Effect: The Unexpected Transformation of American Political Advocacy, Oxford University Press.

(e) Intermediaries

Gatekeeping, message targeting and opinion shaping is taking place on opaque internet intermediaries. By virtue of their new position in not only hosting the audience that political parties wish to reach but also the targeting tools and the all-important user data, they sit on top of a new power hierarchy.

As regards hosting services, some online platforms have introduced policies aimed at identifying political campaigning and bringing it into line with the national laws. Advertisements on Google, for example, must comply with applicable laws of the state in which they are being run. Also Twitter's policy includes restrictions on political advertising pertaining to disclosure and content requirements, eligibility restrictions, etc. However, the question arises whether the platforms have the means and strategies to effectively enforce their own policies. In Spain, for example, certain rules on electoral campaigning such as the prohibition of campaigning on the day before the election apply also to online media. However, it is argued that such restriction cannot be enforced properly on the internet and no longer makes any sense. In France, the rules on opinion polls do not cover most online surveys, since they do not constitute representative samples of the electorate. Consequently, the ban on publishing polls on the day before the election and on the election day can easily be bypassed, and the offenders are rarely sanctioned. Secondly, in some member states such as the UK national legislation does not provide for monitoring of online electoral communication by the national authorities.[29]

Furthermore, these platforms have the ability to facilitate or impede information dissemination. They could in theory make it easier for a political party with which their business/ideological interests align to reach their supporters or vice versa. There are already real concerns about this, with one former Facebook employee recently claiming to have been involved in keeping conservative issues from trending on the site. The methods used to curate and display information on these sites are opaque which means it is impossible to independently authenticate these claims. On a structural level this raises questions about the future of the public sphere if discourse fundamental to a democracy is taking place in a privatised sphere. A sphere, where the terms of discourse are controlled by a few private internet companies and which favours those with the resources to understand and make sense of this highly technical world.

(f) Ethics and journalism self-regulation

Elections have long featured a healthy scepticism about whether politicians "tell the truth", but the Brexit referendum and the U.S. Presidential campaign in 2016

[29] European Audiovisual Observatory: Media coverage of elections: the legal framework in Europe, p.p. 44, 45, 53, and 60. http://www.obs.coe.int/documents/205595/8714633/IRIS+Special+2017-1+Media+coverage+of+elections+-+the+legal+framework+in+Europe.pdf/b9df6209-651b-456a-bdf5-1c911d6768cc

have led to a renewed debate about "post-truth, or post-fact politics"[30] and the role of social media in propagating rumour and untruth.[31] The factual basis of politics has been in part supported by a filter of journalism ethics and fact-checking. As a greater proportion of electoral information is now shown independently of such editorial gatekeeping for example on social media, this raises questions about the efficiency of these filters. Electoral laws do in some cases regulate the telling of deliberate untruths in campaigns[32] in strictly limited circumstances, but such rules may be difficult to enforce in future.

During the recent wave of legislative/presidential elections voters in a number of European countries and the US were targeted by disinformation campaigns which produced a huge number of false stories online. Although no empirical data are available about the real impact of such campaigns, there is evidence that false stories were more widely shared on Facebook than those produced by quality media: "In the final three months of the US presidential campaign, 20 top-performing false election stories from hoax sites and hyper-partisan blogs generated 8,711,000 shares, reactions, and comments on Facebook. Within the same time period, the 20 best-performing election stories from 19 major news websites generated a total of 7,367,000 shares, reactions, and comments on Facebook.[33] During the French Presidential election, Twitter raids were organised in which coordinated false news with the same hashtags targeted individual accounts they were hoping to influence.

A number of initiatives were introduced to tackle the flood of false messages. The social networks' and independent organisations preferred countermeasure is fact-checking, and all major intermediaries have developed or supported mechanisms allowing verification of factual statements to determine their accuracy.[34] In France, election based initiative CrossCheck was debunking claims around French Presidential election.[35] However, debunking has limited effects since it does not necessarily reach the same audience as the original false claim. An analysis into the effectiveness of fact-checks related to the French election

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[30] http://www.nytimes.com/2016/08/24/opinion/campaign-stops/the-age-of-post-truth-politics.html?_r=0

[31] http://www.nytimes.com/2016/08/28/magazine/inside-facebooks-totally-insane-unintentionally-gigantic-hyperpartisan-political-media-machine.html?smid=fb-share&_r=0 See also Myth vs. fact: are we living in a post factual democracy? Susan Banducci and Dan Stevens. In The EU referendum analysis 2016: media, in voters and the campaign. Daniel Jackson Et Al eds.

[32] Robertson and Nicol (1992) pp. 615.

[33] Silverman, C. (2016b) This Analysis Shows How Viral Fake Election News Stories Outperformed Real News On Facebook, Buzzfeed News, November 16, 2016. https://www.buzzfeed.com/craigsilverman/viral-fake-election-news-outperformed-real-news-on-facebook

[34] Mosseri, A. (2016) News Feed FYI: Addressing Hoaxes and Fake News, Facebook Newsroom, December 15, 2016. https://medium.com/google-news-lab/growing-the-first-draft-coalition-4fc59a11c441

[35] https://crosscheck.firstdraftnews.com/france-en/

showed that there was almost no overlap between the group that discussed a particular rumour on Twitter and the group that discussed the debunk.

(g) Privacy

Privacy helps protect freedom of speech and facilitates political debate by providing citizens a space to form opinions and develop identities free from surveillance. An online sphere where every conversation, comment or post is recorded and can be analysed for its commercial and political use could have negative repercussions for the free expression and exchange of views especially as privacy concerns among citizens grow.[36] Social networks, specialised services and also political parties themselves are today able to collect personal data from political surveys, public records, social media and other commercial sources for the purposes of modelling the electorate and assessing people's political preferences. The potentially huge databases can be used for political canvassing and targeted paid advertising. The legality of such databases is unclear and their potential for data breaches considerable.

In Europe all entities collecting and processing personal data are subject to national data protection laws based on several international instruments. The Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108) includes personal data about political opinions among sensitive data which cannot be processed automatically unless domestic law provides appropriate safeguards, first and foremost the express consent of the person concerned. This applies also with to the use of third-party data; prior consent must be obtained also in those cases. In the member states of the European Union the processing of personal data is also covered under both the 1995 European Data Protection Directive (95/46/EC) and the General Data Protection Regulation (GDPR). In line with the GDPR, political opinions are defined as sensitive form of personal data; nevertheless, political parties are allowed to compile data on peoples' political opinions in the course of their electoral activities under essentially equal conditions than those resulting from the Convention 108. One of the problems in the practical application of these standards is the vagueness of the notion "political opinions" which may exceed political affiliation. With the internet having enabled mass engagement in public debate, individuals convey their political preferences and affiliations in many different contexts when communicating online.

In the UK, the Information Commissioner's Office has launched an investigation over possible breaches of data laws during the 2016 EU referendum by the Vote Leave and Leave.EU campaigns which allegedly used vast amounts of personal

[36] Kreiss, D. (2012). Yes we can (profile you): A brief primer on campaigns and political data. *Stanford Law Review Online, 64*, 70.

data from people's social media profiles to decide who to target with highly individualised advertisements.[37]

(h) Tracking the sources of campaign financing

Expenditure on campaigns run from outside the country can pose serious challenges for regulating expenditure as well as for message dissemination. In many countries, electoral legislation prohibits foreign contributions to political campaigns. For example, under the Irish Electoral Act, political parties or non-governmental organisations are prohibited from accepting foreign political donations. However, whereas a foreign donor might be prevented from providing funding directly to an Irish-based political party or campaign, the rules do not address expenditure on political activities which are conducted outside the state. Such cases may include digital campaigning disseminated into the state. The Standards in Public Office Commission, which has a supervisory role in regard to disclosure of interests and compliance with, *inter alia*, election expenditure, has recently noted instances where foreign NGOs have run campaigns from outside the state during elections/referendums. They directed the campaigns using new internet technologies and targeted very specific demographic groups within the state. Given that the organisations are not based in Ireland, their actions their actions are difficult to police as the funding never technically entered Ireland.

Also crowd funding is becoming an important new source of funding in this day and age of social media, as is making donations electronically. In Ireland political parties and third parties are obliged to refuse or return donations above the allowable thresholds, and must likewise refuse foreign donations. Nevertheless, more and more parties and organisations provide for online donations or seek to avail themselves of crowd funding, which makes the tracking of the sources of donations increasingly difficult.

(i) Overview: the objectives revisited - the new threats to fair, clean and clear election campaigning.

In summary, the economics of campaigning is changing. Television is still important but online is growing most quickly and shaping political campaigns in ways that researchers are only beginning to understand.

Internet campaigning challenges all three of the high level policy objectives identified by the Venice Commission.

Of particular concern is the first objective: maintaining a level playing field and the principle of equality of opportunity for political parties. The key problem is that most safeguards were written into the broadcast licensing regime which contained rationing means to ensure fair access to broadcasters and the audience as they could guarantee. In addition, less money goes further in the era of targeting. Therefore absolute spending limits may do less to protect democracy.

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[37] https://www.theguardian.com/politics/2017/feb/26/us-billionaire-mercer-helped-back-brexit

The second objective was guarding against corruption and we can see that the key instruments in particular party finance and campaign finance rules do face challenges. Existing methods for calculating spend and categories for reporting political spend needs to be revisited.

Transparency, the third objective is undermined in a variety of ways. Not only is it more difficult to implement a labelling regime that makes citizens aware of campaign finance, it becomes more difficult to implement reporting requirements to electoral regulators. Message targeting involves not just the delivery of messages themselves but a huge amount of resources behind the scenes to analyse the data to determine the target segments and messages[38]. In addition to these established policy principles, academic research has highlighted new challenges to election legitimacy, namely problems of autonomy, privacy deliberation and message targeting that may in the long term need to be addressed to protect the legitimacy of democratic processes.

This is not only about the democratic system as a whole but about each individual citizen – the autonomy of their decisions, the privacy of their data and of the ballot itself. Data privacy and freedoms of association and expression are fundamentally impossible to separate. Increasing the 'knowability' of processes of will formation leads to self-censorship and itself chills political mobilisation.

In its report on the Scottish independence referendum 2014, the UK Electoral Commission (2013, 2016) made several recommendations; for example that there should be proportionate imprint requirements[39] on non-printed material at referendums and elections across the UK. Such a requirement, according to the commission, should strike the right balance between ensuring there is transparency about who is behind the material and proportionate and modern regulatory requirements.

They also recommended that government should refrain from distributing paid leaflets, which was ignored by the government during the EU referendum, and warned that regulation of the content of campaigns was inappropriate.

5. Conclusions

The most fundamental, pernicious, and simultaneously difficult to detect implication of the shift to social media is not the rising power of intermediaries but the inability of regulation to level the playing field for political contest and limit the role of money in elections. It is now well accepted, indeed legal and regulatory norms reflect this point, that media institutions play a key role in shaping democratic debate and voter preference formation. This is why a series

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[38] Tufekci, Z. (2014). *Engineering the public: Big data, surveillance and computational politics*.

[39] Legal requirement to include on printed election material names and addresses of the printers and campaigners, therefore persons responsible for the production of the material.

of safeguards have been developed to prevent abuse of the political process by mass media. These rules must be updated to take account of media change.

In the UK, the review of campaign finance legislation by the Electoral Commission (2014) and the Committee for Standards in Public Life (1998) recognised that the job of a regulator would be to keep legislation under review to account for changes in technology.

"In addition to its overall duty of keeping election and funding arrangements under review, the Election Commission should be specifically charged with monitoring the working of the current arrangements… and the effect on political advertising generally of developing communications technologies."[40]

Many of the emergent problems with internet campaigning concern the content of campaigns messaging which has not been subject to regulation or standard setting. Election monitors and regulators should however maintain a watching brief with regard to issues such as message targeting, redlining and the undermining of deliberation. There are a number of areas where more active standard setting could be fruitful.

Personal data

In line with the Convention 108 and according to Recommendation CM/Rec(2012)4 on the protection of human rights with regard to social networking services and Recommendation CM/Rec(2016)5 on Internet freedom, social network services should not process personal data beyond the specified purposes for which they have collected it. Electoral campaigning constitutes in most cases a distinct purpose for which distinct consent is required. The use of personal data for message targeting services in the context of electoral campaigns should be scrutinised by national data protection agencies in collaboration with electoral monitors to ensure that it complies with national laws. Member states should also raise awareness among voters with regard to their online activities being used for political purposes.

Intermediaries' responsibilities in the area of freedom of association and the right to freedom of peaceful assembly

Recommendation CM/Rec(2016)5 on Internet freedom specifies that individuals and associations are free to use the internet and internet platforms to organise themselves for purposes of peaceful assembly. Political campaigning undertaken by political parties, candidates and other individuals online entails responsibilities not only for governments but also for platforms and intermediaries, which should develop codes of conduct that make explicit their respect for such fundamental rights and put in place strategies for their effective enforcement in line with the respective national rules on political campaigning.

Electoral campaigns regulation

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[40] The Committee on Standards in Public Life, 1998. The Funding of Political Parties in the United Kingdom, Cm 4057–I, pp.183.

The shift to online political advertising constitutes a major disruption of political campaigning, and as such should lead national authorities to review the effectiveness of these rules in their current form. The relevant standards and principles should be updated to reflect the importance of online campaigning. This should include an update of methods of monitoring: selection of media for monitoring (content monitoring); revision of spending monitoring, and transparency and data requirements for platforms and intermediaries.

Monitoring of electoral spending

Relevant national authorities (electoral commissions, independent national regulatory agencies in the communications sector) should monitor the importance of online political advertising and campaigning in the overall process of electoral campaigning and review the effectiveness of current quotas, limits and reporting categories in the area of electoral spending and subsidised public service announcements. A wide review of the ability of the legal framework to ensure a fair, clean and clear electoral campaign should be conducted. Definitions of the cost of campaigning should be expanded to include consultancy and database costs that relate to campaign spend, or a shift to donation limits rather than spending limits should be considered.

Media Law

The role of broadcasting regulation in particular, and its ability to maintain a level playing field in political campaigns should be reviewed. New and innovative measures to ensure that new, less well resourced, and minority political campaigns can be heard should be sought.

Self-regulation and news accuracy.

Whereas the idea of fake news is often exaggerated and used instrumentally by interested parties, there is nonetheless an important role to play for journalism self-regulation in creating professional incentives that support accuracy of reporting. Self-regulatory bodies in journalism should be encouraged to collaborate with internet intermediaries to create environments conducive to fact checking independently from the state, and also to prevent deliberate misinformation likely to impact electoral processes.

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Appendix

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