

## REGULATING DISINFORMATION:

### LOOK-UP ON THE LEGAL FRAMEWORK IN LUXEMBOURG

Disinformation has become one of the central challenges of modern democracies. With the multiplication of discussion spaces as well as the explosion of user generated content, the amount of –and speed at which– disinformation is created and spread is unprecedented. Facing this evolving challenge (disinformation is not something new), multiple legal and non-legal frameworks have been implemented both at European and national level in EU Member States.

This document aims at putting together the key issues regarding the legal framework applicable in Luxembourg, in June 2023.

*We would like to thank Norton Rose Fullbright law practice for their support, as well as Thomson Reuters TrustLaw programme.*

#### NATIONAL LEGISLATION

The term “disinformation” encompasses a series of topics that may be tackled, under Luxembourgish law, such as: disinformation/misinformation, defamation/slander, impersonation of organisations, online content moderation, unfair advertising, political advertising, and information manipulation and foreign interference.

**Dis- and misinformation**, as an individual behaviour consisting in sharing fake news, is not yet regulated in Luxembourg. The right of freedom of speech is guaranteed by Article 24 of the Luxembourg Constitution, both for individuals and for the media.

The Luxembourgish Criminal Code (Article 443) punishes the offences of **defamation and slander**. The offence can be established even if the offender merely reproduced a publication made in Luxembourg or in another country, for example on a social media such as Facebook.

The **impersonation** of organisations, for example the impersonation of a company’s domain name, may be considered as a form of fraud towards individuals and other companies under the Luxembourgish Criminal Code.

Despite the fact that **online content moderation** is partly regulated, under Luxembourgish law, there is no legal definition on the meaning of “online content moderation”.

By reference to Luxembourgish Consumer Code, **unfair advertising** – containing false information that is likely to mislead the average consumer – is defined as a form of misleading commercial practice. Misleading omission may also be considered as a misleading commercial practice. Therefore, a piece of advertising that does not mention an element that may be important for the consumers to make an informed decision may be considered as a misleading omission.

**Online political advertising is mainly self-regulated through agreements between Political parties. the only exception to this self-regulation** being if the advertisement contains illegal content. The latest voluntary code of conduct on this topic signed between nine Luxembourgish political parties

includes a financial limit of advertising, including on social networks. However, the lack of a legal basis also means that there are no fines or other sanctions for breaking these rules.

The Luxembourgish law has no legal definition of **information manipulation and foreign interference**, as these topics are not regulated. There are no rules or regulations that prohibit or regulate the foreign interference through denial, disinformation and manipulation of information. However, there are rules regulating the dissemination of illegal content, and these rules exist at national level. The rules on impersonation, online content moderation, and unfair advertising exist also at national level.

## **EUROPEAN LEGISLATION**

There are three main European instruments that play a role, in Luxembourg, in relation to online content moderation. The “**e-commerce Directive**” (2000/31), provides rules for information society services. The **Directive SMA** (2010/13) created a legal regime for video content sharing platforms and was transposed in the law of 27 July 1991 on electronic media. The **Commission Recommendation (EU) 2018/334** guides Member States in effectively tackling illegal content online while respecting certain fundamental principles.

In 2022, the **Digital Services Act (DSA)** was adopted. Aiming at regulating online platforms and their content moderation processes, this regulation will have an impact on how harmful content is managed by online services. The Luxembourgish Ministry of Economy is the authority responsible for the DSA implementation in the country.

# Questionnaire

- 1 Are there any laws or regulations which focus on regulating disinformation? (including in relation to intentionally deceiving the public, defamation/libel, impersonation of organisations, online content moderation, unfair advertisement, and political advertisement). If so, please summarise the key provisions for each.**

First of all, a distinction must be made between different topics within the broad term “disinformation”, as used in this main question. Indeed, it encompasses a series of topics that may be tackled, under Luxembourgish law, by different laws and regulations. Therefore, we will analyse in turn: disinformation/misinformation, defamation/slander, impersonation of organisations, online content moderation, unfair advertising, political advertising, and information manipulation and foreign interference.

## **A. Disinformation/Misinformation**

Under Luxembourgish law, disinformation/misinformation, as an individual behaviour consisting in sharing fake news (and not as a broad term which encompasses several behaviours), is not yet regulated. In Luxembourg, each citizen has the right of freedom of speech, which is guaranteed by the Constitution, both for individuals and for the media (Article 24 of the Luxembourg Constitution). Freedom of speech is defined by Article 10 of the European Convention on Human Rights:

*“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises*

*2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”*

Nevertheless, and in accordance with paragraph 2 of the above-mentioned article, the freedom of speech has limits, and notably an opinion cannot be freely expressed if it results in malicious behaviour (e.g., racism, discrimination, etc.). Therefore, even if disinformation is not yet regulated under Luxembourgish law, there are laws which regulate the dissemination of illegal content, e.g., terrorist, racist, denialist, etc. statements, both by the individuals and by the media.

### **a. Racism, revisionism and other forms of discrimination**

The Luxembourgish Criminal Code defines discrimination as: “any distinction made between natural persons on the basis of their origin, colour, sex, sexual orientation, gender reassignment, gender identity, family status, age, state of health, disability, sexual orientation, political or philosophical opinions, trade union activities, membership or non-membership, whether actual or assumed, of a particular ethnic group, nation, race or religion” (Article 454, al.1). The same defines applies to discrimination against legal persons (Article 454, al. 2).

According to Article 457-1 of the Luxembourgish Criminal Code, is punishable by imprisonment up to two years and/or a fine of up to 25,000 euros:

- 1) anyone who, either by speeches, shouts or threats uttered in public places or meetings, or by writings, printed matter, drawings, engravings, paintings, emblems, images or any other written, spoken or pictorial material sold or distributed, offered for sale or displayed in public places or meetings or by

placards or posters exposed to public view, or by any means of audio-visual communication, incites to the acts provided for in Article 455, to hatred or violence against a person, natural or legal person, group or community on the basis of one of the elements referred to in Article 454;

- 2) anyone who belongs to an organisation whose aims, or activities consist in committing any of the acts provided for in paragraph 1) of this Article;
- 3) anyone who prints or causes to be printed, manufactures, holds, transports, imports, exports, causes to be manufactured, imported, exported or transported, puts into circulation on Luxembourg territory, sends from Luxembourg territory, gives to the post office or to another professional responsible for the distribution of mail on Luxembourg territory, causes to transit through Luxembourg territory, writings, printed matter, drawings, engravings, paintings, posters, photographs, cinematographic films, emblems, images or any other written, spoken or pictorial material of a nature to incite to the acts provided for in Article 455, to hatred or violence towards a person, natural or legal, a group or a community, based on one of the elements referred to in Article 454.

In relation to revisionism/negationism, Article 457-3 punishes by imprisonment of up to two years and/or a fine of up to 25,000 euros:

- anyone who, either by speeches, shouts or threats made in public places or meetings, or by writings, printed matter, drawings, engravings, paintings, emblems, pictures or any other written, spoken or pictorial material sold or distributed, put on sale or exhibited in public places or meetings, or by placards or posters displayed in public view, or by any means of audiovisual communication, has contested, minimised justified or denied the existence of one or more crimes against humanity or war crimes as defined by Article 6 of the Statute of the International Military Tribunal annexed to the London Agreement of 8 August 1945 and which were committed either by members of an organisation declared criminal pursuant to Article 9 of the said Statute, or by a person found guilty of such crimes by a Luxembourg, foreign or international court.
- Anyone who, by one of the means set out in the preceding paragraph, contests, minimises, justifies or denies the existence of one or more genocides as defined by Article 136bis of the Criminal Code, as well as crimes against humanity and war crimes as defined in Articles 136ter to 136quinquies of the Criminal Code and recognised by a Luxembourg or international court, shall be punished by the same penalties or one of these penalties only.

## **B. Defamation/slander**

Similarly to Article 443 of the Belgian Criminal Code, Article 443 of the Luxembourgish Criminal Code punishes the offences of defamation and slander which are defined as followed: "Whoever, in the cases hereinafter indicated, has maliciously imputed to a person a specific fact which is of such a nature as to be prejudicial to the honour of that person or to expose him to public contempt, is guilty of slander, if, in cases where the law admits legal proof of the fact, such proof is not produced. It is guilty of defamation, if the law does not admit such proof."

The Article 444 of the Luxembourgish Criminal Code specifies the sanctions that accompany the offences of defamation and slander. More precisely, Article 444 provides that: "The offender shall be punished by imprisonment of up to one year and a fine of up to 2,000 euros, where the imputations have been made:

- Either in public meetings or places;
- Or in the presence of several individuals, in a non-public place, but open to a certain number of persons having the right to assemble there or to frequent it;
- Or in any place, in the presence of the offended person and before witnesses;
- Or by printed or unprinted matter, images or emblems displayed, distributed or communicated to the public by any means, including the media, sold, offered for sale or exposed to public view;

- Or finally by writings, images or emblems not made public, but addressed or communicated by any means whatsoever, including through the media, to several persons.”

It must be mentioned that the offence of defamation/slander can be established even if the offender merely reproduced a publication made in Luxembourg or in another country<sup>1</sup>. Therefore, an individual may be charged with defamation, even if it has only shared what has already been published by somebody else, e.g., on a social media such as Facebook.

## **C. Impersonation of organisations**

### *a. Criminal offense*

The impersonation of a person is punishable under the Luxembourgish Criminal Code by an imprisonment of up to three months, and/or a fine of up to 3,000 euros (Article 231 of the Luxembourgish Criminal Code). The same article seems to be applicable also to the impersonation of organisations' names. Furthermore, if the impersonation was committed for the purpose of disturbing the peace and quiet of a third party, or for the purpose of damaging the honour or reputation of a third party, the sanctions that could be imposed are an imprisonment of up to two years, and/or a fine of up to 3,000 euros (Article 231bis).

### *b. Fraud*

In addition to that, the impersonation of organisations may be considered as a form of fraud towards individuals and other companies. The fraud is defined by the Luxembourgish Criminal Code as the offence committed by a person who, with the aim of appropriating something belonging to another person, has had money, furniture, bonds, receipts, discharges, electronic keys, etc. handed over or delivered or attempted to be handed over or delivered (Article 496 Luxembourgish Criminal Code).

The fraudulent means may include using a false name or capacity, therefore if a person is impersonating an organisation as a way to appropriate something belonging to another, it may constitute fraud under the meaning of the Luxembourgish Criminal Code. The fraud is punishable by imprisonment up to five years and a fine up to 30,000 euros (Art. 496). Furthermore, attempting to commit the fraud offence shall be punishable by the same sanctions (Art. 496).

### *c. Domain names*

The same applies to the impersonation of a company's domain name. Cybercriminals often use a technique called “spoofing”, through which the cybercriminal impersonates the identity of a company in order to get the individuals to reveal their personal details and/or secret bank codes in order to get money out of them straight away. They often use very similar domain names in order to mislead the consumers, and this kind of impersonation is punishable, as a form of fraud, by imprisonment up to five years and a fine up to 30,000 euros (Art. 496).

In the absence of any fraudulent situation, Article 2.20 of the Benelux Convention on intellectual property allows the trademark owner to prohibit the use of a domain name that is (i) either identical or similar to its trademark, where the use of that domain name (ii) takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trademark.<sup>2</sup> Furthermore, registering a domain name that is very similar to a registered trademark, to take undue advantage of the trademark's reputation, is an act of parasitism that may be prohibited by the Luxembourgish law as a form of unfair competition.<sup>3</sup>

## **D. Online content moderation**

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<sup>1</sup> Article 451 of the Luxembourgish Criminal Code.

<sup>2</sup> Convention Benelux en matière de propriété intellectuelle, art. 2.20, d).

<sup>3</sup> Loi du 23 décembre 2016 sur les ventes en soldes et sur trottoir et la publicité trompeuse et comparative, art. 6, (2), 7°

There are three main European instruments that play a role, in Luxembourg, in relation to online content moderation. First, the Directive 2000/31, also called “e-commerce Directive”, provides rules for information society services<sup>4</sup>. It includes two main provisions:

- Article 14 establishes the principle of the exemption of accommodation providers conditional on compliance with certain requirements. Luxembourg transposed Article 14 of the e-Commerce Directive which provides that the hosting service provider is not liable for the information stored at the request of the recipient of the service, if certain conditions are met. It was transposed in the law of 14 August 2000, whose Article 62 provides that:

*“(1) Without prejudice to Article 63(2), a provider who provides an information society service consisting in the storage of information provided by a recipient of the service shall not be liable for information stored at the request of a recipient of the service provided that*

*(a) the provider does not have actual knowledge that the activity or information is unlawful and, as regards an action for damages, is not aware of facts or circumstances from which the unlawful nature of the activity or information is apparent; or*

*(b) the provider, on becoming aware of the activity or information, acts promptly to remove or disable access to the information.*

*(2) Paragraph 1 shall not apply where the recipient of the service is acting under the authority or control of the provider.”*

- Article 15 prohibits to create a general obligation to actively search for facts or circumstances revealing unlawful activities. Luxembourg transposed Article 15 of the e-Commerce Directive in the law of 14 August 2000, whose Article 63 provides that:

*(1) In providing the services referred to in Articles 60 to 62, providers shall not be under a general obligation to monitor the information they transmit or store, nor shall they be under a general obligation to seek facts or circumstances indicating unlawful activities.*

*(3) Paragraphs 1 and 2 of this Article are without prejudice to any targeted or temporary surveillance activity requested by the Luxembourg judicial authorities where this is necessary to safeguard safety, defence, public security and for the prevention, investigation, detection and prosecution of criminal offences.”*

Second, the Directive 2010/13, also called “Directive SMA”, created a legal regime for video content sharing platform, essentially through Article 28b of the Directive which was included through the adoption of Directive 2018/1808. Article 28b imposes on Member States to ensure that video-sharing platform providers take appropriate measures to protect:

- minors from programmes, user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development in accordance with Article 6a (1);
- the general public from programmes, user-generated videos and audiovisual commercial communications containing incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter;
- the general public from programmes, user-generated videos and audiovisual commercial communications containing content the dissemination of which constitutes an activity which is a criminal offence under Union law, namely public provocation to commit a terrorist offence as set out in Article 5 of Directive (EU) 2017/541, offences concerning child pornography as set out in Article 5(4)

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<sup>4</sup> Directive 2000/31

of Directive 2011/93/EU of the European Parliament and of the Council ( 1 ) and offences concerning racism and xenophobia as set out in Article 1 of Framework Decision 2008/913/JHA

The Directive was transposed in the law of 27 July 1991 on electronic media, whose article 28septies provides that:

*“(1) Without prejudice to Articles 60 to 63 of the amended law of 14 August 2000 on electronic commerce, providers of video-sharing platforms under the jurisdiction of the Grand Duchy of Luxembourg shall take appropriate measures to protect:*

*(a) minors from programmes, user-created videos and audiovisual commercial communications likely to harm their physical, mental or moral development, in accordance with Article 27ter(1) and (2);*

*(b) the general public from programmes, user-created videos and audiovisual commercial communications containing incitement to violence or hatred directed against a group of persons or a member of a group on any of the grounds referred to in Article 21 of the Charter of Fundamental Rights of the European Union;*

*(c) the general public of programmes, user-generated videos and audiovisual commercial communications containing content the dissemination of which constitutes a criminal offence, namely public provocation to commit a terrorist offence as set out in Article 135-11(1) and (2) of the Criminal Code, offences relating to child pornography as set out in Article 379(2) of the Criminal Code and offences relating to racism and xenophobia as set out in Articles 457-1 and 457-3 of the Criminal Code.”*

Finally, the Commission Recommendation (EU) 2018/334 on measures to effectively tackle illegal content online was adopted as a way to guide Member States in tackling effectively illegal online content while respecting certain fundamental principles<sup>5</sup>.

*“Internet and service providers active on the Internet contribute significantly to innovation, economic growth and job creation in the Union. Many of those service providers play an essential role in the digital economy by connecting businesses and citizens and by facilitating public debate and the distribution and reception of factual information, opinions and ideas. However, their services are in certain cases abused by third parties to carry out illegal activities online, for instance disseminating certain information relating to terrorism, child sexual abuse, illegal hate speech or infringements of consumer protection laws, which can undermine the trust of their users and damage their business models. In certain cases, the service providers concerned might even gain some advantages from such activities, for instance as a consequence of the availability of copyright-protected content without authorisation of the right holders.”<sup>6</sup>*

The “*Autorité Luxembourgeoise Indépendante de l’Audiovisuel*” (**ALIA**) monitors the correct application of regulations in relation to audiovisual media services. It covers conventional television, on-demand services (VOD), video-sharing platforms (VSPs) and national, regional and local radio stations. Its scope extends also to the publication of online content through websites of Luxembourgish media platforms. The ALIA has the power to impose sanctions where the content infringes the protection of minors, harms human dignity, violates the prohibition against discrimination, or contains pornography.<sup>7</sup>

## **E. Unfair advertising**

Unfair advertising is a form of misleading commercial practice towards consumers that is tackled by Articles L.122-2 to L.122-4 of the Luxembourgish Consumer Code. First, Article L.122-2(1) provides that: “A commercial practice shall be regarded as misleading:

*(1) if it contains false information; or*

*(2) in any way, including general presentation, misleads or is likely to mislead the average consumer, even if the information presented is factually correct, in relation to one or more of the following matters, and in either case causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.” (Annex I).*

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<sup>5</sup> Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, C/2018/1177, L 63/50.

<sup>6</sup> Ibid, recital 1.

<sup>7</sup> <https://www.alia.lu/fr/alia/les-missions>.

Second, Article L. 122-2 provides that: *“A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he or she would not otherwise have taken, and it involves:*

*(a) any marketing activity concerning a product, including comparative advertising, which creates confusion with another product, brand, trade name or other distinguishing feature of a competitor*

*(b) failure by the trader to comply with commitments contained in a code of conduct by which he has undertaken to be bound, provided that those commitments are firm and verifiable, and that he indicates that he is bound by the code*

*(c) any marketing activity which presents a good in one Member State as identical to a good marketed in other Member States, when that good has a significantly different composition or characteristics, unless this is justified by legitimate and objective factors”.*

Third, Article L.122-3 provides that a misleading omission may also be considered as a misleading commercial practice (**Annex I**). Therefore, if a piece of advertising does not mention an element that may be important for the consumers to make an informed decision, it may be considered as a misleading omission. Finally, Article L.122-4 lists a series of practices that are always considered as misleading commercial practices (**Annex I**).

## **F. Political advertising**

In Luxembourg, during the electoral campaigns, the parties voluntarily reach an electoral agreement on e.g., the following points<sup>8</sup>:

- Refusal to engage in negative campaigning
- Refusal to destroy election posters
- Protection of the data on the electoral lists
- Official start of the election campaign (in national elections usually 5 weeks before voting day)
- Limit on election costs (e.g., €75,000 per party for election spots on radio, in the print media and on the internet in the 2017 municipal or 2018 national elections)
- Refusal to broadcast TV spots

On 23 January 2023, Nine political parties in Luxembourg signed a code of conduct to regulate campaigning modalities and budgets for the next communal and national elections. Under the agreement, the parties undertake not to use personal insults during the campaign, not to spread false information and not to slander their opponents. Furthermore, the political parties will start campaigning for the local elections four weeks before the 11 June poll. For the national elections on 8 October, five weeks of campaigning are planned. For both campaigns, they will be able to spend a maximum of 100,000 euros on advertising in the media and on social networks. This does not include production costs, such as TV spots<sup>9</sup>

In addition, the agreement regulates the number of goodies produced by parties, restricts letterbox campaigns and stipulates that ministers and candidates in municipal elections will not use official channels for their campaigns.

There are no rules that regulates the content of the online political advertising unless the advertisement contains illegal content. Therefore, and because of the lack of a legal framework, political parties have been meeting for years to sign a voluntary agreement. But the lack of a legal basis also means that there are no fines or other sanctions for breaking these rules.

Currently, there is an EU proposal which aims to harmonise transparency obligations for providers of political advertising and related services to retain, disclose and publish information connected to the provision of such services<sup>10</sup>. Furthermore, it aims to harmonise rules on the use of targeting and amplifications techniques in the context of the publication, dissemination or promotion of political advertising that involve the use of personal data.

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<sup>8</sup> <https://zpb.lu/wp-content/uploads/2020/09/Campagne-%C3%A9lectorale-FR-31.08.2018.pdf>.

<sup>9</sup> <https://paperjam.lu/article/partis-s-engagent-a-mener-camp>.

<sup>10</sup> [https://www.europarl.europa.eu/meetdocs/2014\\_2019/plmrep/AUTRES\\_INSTITUTIONS/COMM/COM/2023/01-23/COM\\_COM20210731\\_EN.pdf](https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/AUTRES_INSTITUTIONS/COMM/COM/2023/01-23/COM_COM20210731_EN.pdf).



## G. Information manipulation and foreign interference

There are no rules or regulations that prohibit or regulate the foreign interference through denial, disinformation and manipulation of information. This is due to the fact that no rules or regulations in general exist, under Luxembourgish law, to regulate disinformation, misinformation, denial or manipulation of information. As long as the information shared is not illegal, it cannot be tackled by the authorities and/or the online service providers.

In April 2023, Members of the European Parliament (**MEPs**) called for coordinated EU strategy against foreign interference<sup>11</sup>. This call was initiated by the MEPs because increased interference and information manipulation is expected ahead of the 2024 European elections. According to the report adopted on 26 April 2023 (in Committee), the EU needs a coordinated strategy against foreign interference and information manipulation, including measures to enforce better existing provisions to fight it. The report will be submitted to the vote of the Parliament at the end of May.

## H. Extracontractual civil liability

Article 1382 of the Luxembourgish Civil Code is the legal basis of the extracontractual liability in Luxembourg. It has been interpreted extensively by the judges, and therefore it may be used as a way to restrict the freedom of speech. Notably, the existence of a fault within the meaning of Article 1382 of the Civil Code can be assessed in the light of the violation of journalistic ethical standards, such as the prohibition on disseminating information whose origin is unknown, or the obligation to verify the veracity of information and to report it honestly<sup>12</sup>. However, caution should be exercised, as the violation of a code of deontology does not ipso facto constitute a fault within the meaning of Luxembourgish civil liability.

In addition, the extracontractual civil liability principles may also be applied in a situation where a media is accused of a criminal offense, such as defamation. The European Court of Human Rights (**ECHR**) in *Thoma v. Luxembourg* does not rule out, as a matter of principle, the application of article 1382 of the Civil Code, in parallel or concurrently with the criminal provisions specific to the media.<sup>13</sup> The ECHR validates the application of the provisions of article 1382 of the Luxembourg Civil Code to the media, even though there are criminal provisions defining specific offences.<sup>14</sup>

## I. Influencers

In June 2023, France has adopted a law aiming at regulating commercial influence and combating abuses by influencers on social networks<sup>15</sup>. Currently, there is no such law in Luxembourg and the authorities have no plans to introduce a similar law within its regulatory framework. However, the influencers must comply with the Luxembourgish rules on advertising at the risk of being targeted by the ALIA. Similar to the situation in Belgium, the Luxembourg Consumer Code provides that advertising must always be recognisable as such and that it must be made clear to the consumer that it is a commercial message.

An advertising that does not clearly indicate its commercial nature constitutes a misleading commercial practice and is therefore prohibited. The influencers must indicate that the advertising is part of a commercial partnership, and indicate the name of the promoted undertaking. The prohibition applies only if the influencers are in a commercial relationship with the undertaking concerned. A commercial relationship will be deemed to exist if the influencer receives a counterpart or the opportunity to receive such counterpart in exchange of the advertising.

According to Article L.122-4, 11° of the Code, undertakings must ensure that influencers who are paid to promote their products on social media clearly state that it is an advertisement. Failing to do so, the undertakings could be sued for misleading commercial practice. In Luxembourg, no recommendations on influencers have been published yet, contrary to the recommendations issued by the Belgian Centre of

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<sup>11</sup> <https://www.europarl.europa.eu/news/en/press-room/20230424IPR82034/meps-call-for-coordinated-eu-strategy-against-foreign-interference>.

<sup>12</sup> Conseil de presse Luxembourg, Code de déontologie, 2021, art. 4.

<sup>13</sup> ECHR, case *Thoma v. Luxembourg*, 29 March 2001.

<sup>14</sup> In the present case, the criminal provision was Article 443 of the Criminal Code on the prohibition of defamation.

<sup>15</sup> Loi n° 2023-451 du 9 juin 2023 visant à encadrer l'influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux, *Journal Officiel de la République Française*, 10 juin 2023.

Communication in 2022<sup>16</sup>. However, the influencers may still refer to the Good practice guide on online advertising published by the OECD in 2019<sup>17</sup>.

1.1 *How are concepts of disinformation, misinformation, foreign interference and other related topics defined at law?*

**Disinformation/Misinformation**

Despite the absence of legal definition of disinformation, under Luxembourgish law, the Communication from the Commission on tackling online disinformation defines disinformation as<sup>18</sup>: “verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm.” The main difference between disinformation and misinformation is the intent, as disinformation requires an economic gain or an intention to deceive the public on behalf of the person who shares false or misleading information.

**Defamation/Slander**

On the one hand, defamation is defined by the Luxembourgish Criminal Code as: “a behaviour where a person has maliciously imputed to another person a specific fact which is of such a nature as to be prejudicial to that person's honour or to expose him or her to public contempt, and the law does not admit legal proof of the fact (e.g., because it is obtained illegally or because of prescription)”.<sup>19</sup>

On the other hand, slander is defined by the Luxembourgish Criminal Code as: “a behaviour where a person has maliciously imputed to another person a specific fact which is of such a nature as to be prejudicial to that person's honour or to expose him or her to public contempt, and, in cases where the law admits legal proof of the fact, such proof is not produced (e.g., because it is obtained illegally or because of prescription)”.<sup>20</sup>

**Impersonation of organisations**

The Luxembourgish Criminal Code does not define specifically the impersonation of organisations, however it contains a general information of what is considered as impersonation. Indeed, the Luxembourgish Criminal Code punishes anyone “who publicly takes on a name that does not belong to them”.<sup>21</sup>

**Online content moderation**

Despite the fact that online content moderation is partly regulated, under Luxembourgish law, through the implementation of the above-mentioned directives, there is no legal definition on the meaning of “online content moderation”.

**Unfair advertising**

By reference to Luxembourgish Consumer Code, unfair advertising is defined as a form of misleading commercial practice, i.e., a commercial practice which contains false information and is therefore deceptive or in any way, including its general presentation, misleads or is likely to mislead the average consumer with respect to certain elements, even if the information presented is factually correct, and in either case causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise not otherwise have made.<sup>22</sup>

**Political advertising**

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<sup>16</sup> JEP, *Recommandations du Centre de la Communication en matière d'influenceurs*, [https://www.jep.be/wp-content/uploads/2022/04/influencers\\_FR.pdf](https://www.jep.be/wp-content/uploads/2022/04/influencers_FR.pdf).

<sup>17</sup> OECD, “Good practice guide on online advertising: Protecting consumers in e-commerce”, *OECD Digital Economy Papers*, No. 279, OECD Publishing, Paris, <https://doi.org/10.1787/9678e5b1-en>.

<sup>18</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Tackling online disinformation: a European Approach, COM(2018) 236 final, 26 April 2018.

<sup>19</sup> Art. 443 of the Luxembourgish Criminal Code.

<sup>20</sup> Art. 443 of the Luxembourgish Criminal Code.

<sup>21</sup> Art. 231 of the Luxembourgish Criminal Code.

<sup>22</sup> Article L. 122-2.

By reference to the voluntary code of conduct signed by nine political parties in Luxembourg to regulate campaigning modalities and budgets for the next communal and national elections, political advertising covers notably the advertising in the media and on social networks. Even if the production costs of TV spots are not covered by the financial limit included in the code of conduct, the TV spots are also a form of political advertising.

### ***Information manipulation and foreign interference***

As these topics are not regulated under Luxembourgish law, there is no legal definition of information manipulation and foreign interference.

#### ***1.2 Do laws/regulations exist at the regional, national or local level?***

As abovementioned, there are no rules regulating disinformation or misinformation. However, there are rules regulating the dissemination of illegal content, and these rules exist at national level. The rules on impersonation, online content moderation, and unfair advertising exist also at national level.

#### ***1.3 Do prohibitions on information sharing in law/regulation change/heighten in the months preceding an election?***

Depending on the content of the voluntary agreement concluded between the political parties, prohibitions on information sharing may change in the months preceding an election. However, nothing changes in the Luxembourgish law as the political advertising is not yet regulated, including in the months preceding an election.

#### ***1.4 Do specific laws/ regulations exist in relation to online political advertising? If so, please summarise key provisions. If not, are there any plans to introduce a law covering this in 2023/2024?***

As above-mentioned, there are no rules that exist in relation to political advertising, and the same applies to online political advertising. However, the latest voluntary code of conduct signed between nine Luxembourgish political parties includes a financial limit of advertising, including on social networks. But the lack of a legal basis also means that there are no fines or other sanctions for breaking these voluntary rules.

#### ***1.5 Were specific laws in disinformation introduced in response to the COVID-19 pandemic?***

No specific rules on disinformation were adopted in response to the Covid-19 pandemic. Therefore, anybody can publish any wrongful statement in relation to the pandemic as long as the content is not illegal.

#### ***1.6 Were any specific laws/regulations introduced in response to the war in Ukraine and associated sanctions?***

The same as previously said in relation to the Covid-19 pandemic is true for the war in Ukraine. No specific rules on disinformation were adopted in response to the war in Ukraine. Therefore, anybody can publish any wrongful statement in relation to the war, as long as the publication does not contain any illegal content.

#### ***1.7 How have laws/regulations been interpreted by the courts? Please provide case study examples.***

### ***Negationism/denial***

The *Tribunal d'Arrondissement du Luxembourg* issued a decision on 4 May 2017<sup>23</sup> in relation to an individual who was accused of negationism in violation of Article 457-3 of the Luxembourgish Criminal Code, and more precisely, the individual was accused of negationism in relation to the Holocaust through the publication of a book. In the present case, the Court noted that the comments that were the subject of the quotation cannot be described as hateful, notably because no anti-Semitic or racist insults were uttered.

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<sup>23</sup> Jugement n°1330/2017, not. 30903/15/CD, [https://anon.public.lu/D%C3%A9cisions%20anonymis%C3%A9es/Tribunal%20d%27arrondissement%20Luxembourg%20p%C3%A9nal/09\\_Chambre%20correctionnelle/2017/20170504-TALux9-1330a-accessible.pdf](https://anon.public.lu/D%C3%A9cisions%20anonymis%C3%A9es/Tribunal%20d%27arrondissement%20Luxembourg%20p%C3%A9nal/09_Chambre%20correctionnelle/2017/20170504-TALux9-1330a-accessible.pdf).

While this characteristic should be taken into consideration in favour of the defendant, it also has the perverse effect of making his comments more insidious. In fact, when a normally diligent reader stumbles across a derogatory comment full of statements oozing hatred and racism while wandering around on the internet, he or she will not, in principle, give it any credence. However, the same does not apply to comments expressed correctly and with an appearance of neutrality in a book published by a university-educated author.

It should also be noted that while publications on social networks only take a few seconds to appear online and it is therefore understandable - though not excusable - that comments may go beyond the substance of the author's thoughts or be expressed in a clumsy manner, such an explanation is no longer valid in the case of a book, where the author has had time to reflect on both the content and the form and which, in principle, undergoes numerous proofreadings and modifications before reaching its final form. It is therefore all the more incomprehensible that an author who claims to be acting in good faith and who states that he has spent three years writing his book should not have given more thought to his argument, the way it is presented and, above all, the impact it is likely to have. No one can ignore the fact that, despite the passage of time, the Holocaust remains one of the most traumatic and significant events in modern human history. the modern history of mankind.

The Court notes that at the hearing the defendant gave more the image of a naïve rather than a malicious individual who, while condemning Holocaust denial for being the breeding ground of war conspiracy theories, is providing fertile ground for anti-Semitism and the repetition of repetition of history.

Moreover, it is likely that this same naivety led the defendant to express himself in the same way as the alternative sites he visited to compile part of his alleged documentation, without there having been any deliberate and thoughtful intention on his part to manipulate the reader by using these expressions and questions. Although the accused appeared sincere at the hearing in expressing certain regrets, he also expressed his astonishment at being prosecuted, which raises doubts as to whether he was truly aware of the seriousness of the offending developments. At one point in his note, the defendant even suggested that the problem lay with the company or with certain of its members, who were too emotional to deal with the subject properly.

The Tribunal decided to sentence the author to 18 months' imprisonment (suspended due to the lack of previous criminal record) and 2,000 euros fine.

### ***Defamation/slander***

As an example, the Luxembourgish Court of Cassation issued a ruling in 2021 against two individuals who were convicted by the Luxembourgish Court of Appeal for defamation against a third individual.<sup>24</sup> The convicted persons claimed that the Court of Appeal did not show the malicious intent that is required to establish the existence of a defamation offence, in accordance with Article 443 of the Luxembourgish Criminal Code. Furthermore, they said that it was not sufficient to establish that the individuals know the falsity of the facts invoked against the victim. Unfortunately, the Court of Cassation rejected the argument because the assessment of the element of intent is a matter for the discretion of the appeal judge. The same reasoning was followed by the Court of Cassation on the argument claiming that the element of publicity was not met in the present case.

## **2 Which national authorities have countering disinformation as part of their mandate, and what powers do they have to do this?**

The Ministry of Justice seems to be the authority responsible for fighting against disinformation. In November 2022, Ministers and high-level representatives from the 38 OECD member and candidate countries met in Luxembourg to reaffirm their shared commitment to defending and strengthening the democratic values that unite them at the Ministerial Meeting on Public Governance, which focused on "Building Trust and Reinforcing

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<sup>24</sup> Cass., 11 February 2021, N°27/21, <https://juricaf.org/arret/LUXEMBOURG-COURDECASSATION-20210211-2721>.

Democracy"<sup>25</sup>. Notably, Luxembourg has publicly supported the OECD Resource Centre Platform on Misinformation by making a financial contribution of €100,000 to the Centre.

## **ALIA**

ALIA is the independent body responsible for regulating the audiovisual media sector in Luxembourg. ALIA monitors the correct application of regulatory texts in relation to audiovisual media services. Its remit covers conventional television, on-demand services (VOD), video-sharing platforms (VSPs) and national, regional and local radio stations. ALIA did not deal yet with disinformation.

### **3 What is the impact of the European Commission's Code of Practice on Disinformation in each country? How is data collected through this mechanism fed back into national law and regulation?**

In some EU countries, regulatory bodies have analysed the code of practice and submitted recommendations for further improvements. In Ireland, notably the national broadcasting authority published in 2021 a report on the assessment of the implementation of the EU Code of Practice on Disinformation in relation to the Covid-19 crisis. However, in Luxembourg, the relevant regulatory bodies have not yet analysed the Commission's Code of Practice.

### **4 Has draft law/regulation been made public outlining how each country will implement the forthcoming European Digital Services Act? If so, please summarise key provisions.**

On the 15 February 2023, the Luxembourgish Ministry of Economy published a press release on the scope of the DSA, the obligation to publish the number of average active recipients, and on the responsible authority for the DSA implementation<sup>26</sup>. The Ministry of Economy will be the authority responsible for the DSA implementation, and it mentioned in the press release that more information on its implementation in Luxembourg will be shared. For the time being, the Luxembourgish Ministry of Economy has only published a Q&A document on identification and counting of active recipients of the service under the DSA<sup>27</sup>.

### **5 Do other non-legal mechanisms exist for regulating disinformation in each country?**

#### ***Media deontology body***

In Luxembourg, the "Conseil de Presse" (**Press Council**) was created in 1979 by the law on the recognition and protection of the professional title of journalist<sup>28</sup>. In addition to the issuance of press cards, the Press Council has a committee dealing with appeals from the public against media professionals, and it is also the guardian of the code of ethics for professional journalists.

#### ***EDMO Belux***

EDMO Belux, a cross-community, multilingual collaboration between Vrije Universiteit Brussel, Université Saint-Louis – Bruxelles, Mediawijs, Média Animation, EU DisinfoLab, Agence France-Presse, RTBF, RTL Luxembourg and Athens Technology Center, allows to monitor disinformation in Belgium and Luxembourg<sup>29</sup>.

#### ***Factcheckers***

In Luxembourg, the public media agency "RTL" has a specific section on its website called "Fact Check"<sup>30</sup> which helps to fight against disinformation/misinformation. Fact checking is a form of journalistic treatment that

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<sup>25</sup> [https://gouvernement.lu/en/actualites/toutes\\_actualites/communiqués/2023/03-mars/07-ocde-desinformation.html](https://gouvernement.lu/en/actualites/toutes_actualites/communiqués/2023/03-mars/07-ocde-desinformation.html).

<sup>26</sup> [https://gouvernement.lu/en/actualites/toutes\\_actualites/communiqués/2023/02-fevrier/15-economie-digital-services-act.html](https://gouvernement.lu/en/actualites/toutes_actualites/communiqués/2023/02-fevrier/15-economie-digital-services-act.html).

<sup>27</sup> <https://gouvernement.lu/dam-assets/documents/actualites/2023/02-fevrier/15-economie-digital-services-act/ga-counting-users-en.pdf>

<sup>28</sup> <https://www.press.lu/qui-nous-sommes/historique/>.

<sup>29</sup> <https://belux.edmo.eu/>.

<sup>30</sup> <https://today.rtl.lu/news/fact-check>.

aims to examine and verify statements made by officials or institutions, or to check the veracity of information circulating on social networks.

The aim of this practice is to gather factual and objective elements in order to verify the veracity of facts or the accuracy of figures presented. RTL allows the reader to check the latest news and to verify those who were considered as being fake or altered.

## **Annex I – Legal provisions**

### **Article L. 122-2**

(1) A commercial practice shall be regarded as misleading

1) if it contains false information; or

2) it misleads or is likely to mislead the average consumer in any way, including by its general presentation, even if the information presented is factually correct, in relation to one or more of the following matters, and in either case causes or is likely to cause the average consumer to take a transactional decision that he would not have taken otherwise. These elements relate to:

(a) the existence or nature of the product

(b) the main characteristics of the product, such as its availability, benefits, risks, performance, composition, accessories, after-sales service and complaint handling, method and date of manufacture or supply, delivery, fitness for purpose, use, quantity, specifications, geographical or commercial origin or the results to be expected from its use, or the results and essential characteristics of tests or checks carried out on the product

(c) the extent of the trader's commitments, the motivation for the commercial practice and the nature of the sales process, as well as any statement or symbol suggesting direct or indirect sponsorship or support for the trader or the product

(d) the price or the method of calculating the price, or the existence of a specific price advantage

(e) the need for a service, spare part, replacement or repair

(f) the nature, qualities and rights of the trader or his representative, such as his identity and assets, his qualifications, status, approval, affiliation or links or his industrial, commercial or intellectual property rights or the awards and distinctions he has received

g) the consumer's rights, in particular the right to replacement or reimbursement under Article L. 212-5 of the Consumer Code in respect of legal guarantees, or the risks he may incur.

(2) A commercial practice shall also be regarded as misleading if, in its factual context, taking account of all its features and circumstances, it causes or is likely to cause the average consumer to take a transactional decision that he would not otherwise have taken, and it involves

(a) any marketing activity concerning a product, including comparative advertising, which creates confusion with another product, brand, trade name or other distinguishing feature of a competitor

(b) failure by the trader to comply with commitments contained in a code of conduct by which he has undertaken to be bound, provided that these commitments are firm and verifiable and that he indicates that he is bound by the code.

(c) any marketing activity which presents a good in one Member State as identical to a good marketed in other Member States, when that good has a significantly different composition or characteristics, unless justified by legitimate and objective factors.

### **Article L. 122-3**

1) A commercial practice shall be regarded as a misleading omission if, in its factual context, taking account of all its features and circumstances and the limitations of the medium used, it omits material information which the average consumer needs, taking account of the context, in order to make an informed transactional decision and thereby causes or is likely to cause the average consumer to make a transactional decision which he would not have made otherwise.

2) A commercial practice shall also be regarded as a misleading omission where a trader, having regard to the matters referred to in subsection (1), conceals material information as referred to in that subsection or provides it in an unclear, unintelligible, ambiguous or untimely manner or where he fails to indicate his true commercial intent if it is not already apparent from the context and where, in either case, the average consumer is thereby led or is likely to be led to take a transactional decision which he would not otherwise have taken.

3) In determining whether information has been omitted where the means of communication used for the commercial practice imposes space or time limits, account should be taken of those limits and of any steps taken by the trader to make the information available to the consumer by other means.

4) When inviting the consumer to purchase, the following information should be regarded as material, if not already apparent from the context

(a) the main characteristics of the product, to the extent appropriate to the means of communication used and the product concerned

(b) the geographical address and the identity of the trader, such as his business name and, where appropriate, the geographical address and the identity of the trader on whose behalf he is acting

(c) the price inclusive of taxes or, where the nature of the product means that the price cannot reasonably be calculated in advance, the manner in which the price is calculated, as well as, where appropriate, any additional transport, delivery and postal costs or, where such costs cannot reasonably be calculated in advance, a statement that such costs may be payable by the consumer

(d) the terms of payment, delivery and performance if they differ from the terms of professional diligence

(e) where appropriate, the existence of a right of withdrawal.

(f) for products offered on online marketplaces, whether the third party offering the products is a professional or not, based on the declaration of that third party to the provider of the online marketplace. 29

5) Information to be determined by Grand-Ducal regulation relating to commercial communications, including advertising or marketing, shall also be deemed to be substantial.

(6) Where consumers are given the possibility to search for products offered by different traders or consumers on the basis of a query consisting of a keyword, a phrase or the input of other data, irrespective of where such transactions are ultimately concluded, general information made available in a specific section of the online interface, which is directly and easily accessible from the page on which the results of the query are presented, concerning the main parameters which determine the ranking of the products presented to the consumer in response to his search query, and the order of importance of those parameters, as opposed to other parameters, shall be deemed to be substantial.

Paragraph 1 shall not apply to providers of online search engines as defined in Article 2(6) of Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 promoting fairness and transparency for business users of online intermediation services.

(7) Where a trader provides access to consumer reviews of products, information as to whether and how the trader ensures that the published reviews are from consumers who have actually used or purchased the product shall be deemed to be substantial.

#### **Article L. 122-4**

The following misleading commercial practices are considered unfair in all circumstances:

1) For a trader to claim to be a signatory to a code of conduct when he is not.



- 2) Displaying a certificate, quality mark or equivalent without having obtained the necessary authorisation.
- 3) Claiming that a code of conduct has been approved by a public or other body when it has not.
- 4) Claiming that a professional (including his or her business practices) or a product has been approved, endorsed or authorised by a public or private body when it has not, or without complying with the terms of the approval, endorsement or authorisation received.
- 5) Offering to purchase products at a stated price without disclosing any plausible reason why the trader may believe that he will not be able to do so himself, or to have another trader supply the products in question or equivalent products at the stated price, for a period of time and in quantities which are reasonable in view of the product, the extent of the advertising of the product and the price offered (bait advertising).
- 6) Offering to purchase products at a stated price and then, for the purpose of promoting a different product
  - (a) refuse to show consumers the advertised item,
  - (b) refuse to take orders for that article or to deliver it within a reasonable time; or
  - (c) present a defective sample of the article.
- 7) Falsely stating that a product will only be available for a very limited period of time, or that it will only be available under particular conditions for a very limited period of time, in order to obtain an immediate decision and deprive consumers of an opportunity or sufficient time to make an informed choice.
- 8) Undertaking to provide after-sales service to consumers with whom the trader has communicated prior to the transaction in a language which is not an official language of the Member State in which he is established and then providing that service only in another language without clearly informing the consumer before he enters into the transaction.
- 9) Stating or giving the impression that the sale of a product is lawful when it is not.
- 10) Presenting rights conferred on the consumer by legal or regulatory provisions as a feature of the trader's offer.
- 11) Using editorial content in the media to promote a product, when the trader has financed the promotion himself, without clearly indicating this in the content or using images or sound clearly identifiable by the consumer (advertorial).
- 12) Making factually inaccurate claims about the nature and extent of the risks to the consumer's personal safety or that of his or her family if the product is not purchased.
- 13) Promoting a product similar to that of a particular manufacturer in such a way as to deliberately mislead the consumer into thinking that the product is from that same manufacturer when it is not.
- 14) Creating, operating or promoting a pyramid scheme in which a consumer pays a fee in exchange for the opportunity to receive consideration primarily from the entry of other consumers into the scheme rather than from the sale or consumption of products.
- 15) Stating that the trader is about to cease trading or move elsewhere when this is not the case.
- 16) Claiming that a product increases the chances of winning at games of chance.
- 17) Falsely claiming that a product is capable of curing diseases, malfunctions or deformities.
- 18) Communicating factually inaccurate information about market conditions or the availability of the product in order to induce the consumer to purchase the product on less favourable terms than normal market conditions.

- 19) Claiming, in the context of a commercial practice<sup>5</sup>, that a competition is being held or that a prize can be won without awarding the prizes described or a reasonable equivalent.
- 20) Describing a product as "free", "complimentary", "no charge" or similar terms if the consumer has to pay anything other than the unavoidable costs of responding to the marketing practice and taking possession or delivery of the item.
- 21) Including in promotional material an invoice or similar document requesting payment which gives the consumer the impression that he has already ordered the marketed product when this is not the case.
- 22) Falsely stating or giving the impression that the trader is acting for purposes which are outside his trade, business, craft or profession, or falsely representing himself as a consumer.
- 23) Creating the false impression that after-sales service in relation to a product is available in a Member State other than that in which the product is sold.
- 24) Reselling tickets for events to consumers if the trader has acquired them by using an automated means to circumvent any limit on the number of tickets a person may purchase or any other rule applicable to the purchase of tickets. <sup>32</sup>
- 25) Claiming that product reviews are submitted by consumers who have actually used or purchased the product, without taking reasonable and proportionate steps to verify that they are from such consumers. <sup>33</sup>
- 26) Sending or instructing another legal or natural person to send false consumer reviews or recommendations, or distorting consumer reviews or social recommendations in order to promote products. <sup>34</sup>
- 27) Providing search results in response to a consumer's online search query without clearly informing the consumer of any paid advertisement or payment made specifically to obtain a higher ranking of products in the search results.