

**Event on Democratic Participation and Electoral Matters****25-26 April 2018**Questions to Member States' authorities

1. *Has your country introduced any measures governing the use of media and social media in the context of election campaigns? These measures may include, but not be limited to:*
  - i. *the observance of election silence period,*

The freedom of expression (Article 5 Subsec. 1 of the Basic Law) and the freedom of political parties (Article 21 Subsec. 1 of the Basic Law) are essential elements of the free democratic basic order. Article 21 Subsec. 1 of the Basic Law guarantees political parties the right of free establishment and participation in the formation of the political will, including the freedom of campaigning (cf. Federal Constitutional Court's Judgment of 27 February 2018, 2 BvE 1/16). There is no general silence period before elections in Germany. During polling hours however no influence may be exerted on voters by word, sound, writing or image and no signatures may be collected in or around the building in which the polling station is located as well as directly in front of the entrance to the building (Section 32 Subsec. 1 of the Federal Election Act).

*ii. prohibition of disinformation (fake news)*

The Act to Improve Enforcement of the Law in Social Networks (Network Enforcement Act, NetzDG) entered into force on 1 October 2017. The new law defines binding standards for effective and transparent complaints management, which ensure that social networks process complaints about specific unlawful content more effectively. Amongst other things, the law requires the take down or blocking of hate crime, criminally punishable fake news and other unlawful content within specific time frames. With regard to manifestly unlawful content, the content needs to be checked and removed within 24 hours of receiving a user complaint. With regard to unlawful content, a social network in general needs to respond within 7 days; however there are some exceptions where the networks have more time. Systemic failure can result in a fine of up to EUR 50 million. It is important to note that the act only covers illegal fake news, i.e. content that constitutes an offense according to the German Criminal Code, e.g. insults, defamations, intentional defamation and holocaust denial. No new offenses were created so far to deal with the phenomenon of fake news.

*iii. equal representation of candidates*

Section 5 of the Act on Political Parties states that where a public authority makes facilities available to political parties or provides them with other public contributions and services, equal treatment shall be accorded to all political parties. Pursuant to Section 42 Subsec. 2 of the Interstate Broadcasting Agreement any political party taking part in elections for the German Bundestag or in the election of candidates from the Federal Republic of Germany for the European Parliament shall, subject to cost reimbursement, be granted a reasonable amount of transmission time if at least one state list or one electoral list has been approved for that party. However neither the Political Parties Act nor the Interstate Broadcasting Agreement is applicable to social media platforms.

*iv. financial rules on campaigning and especially advertising limitations, awareness campaigns or bypassing the established financial limits.*

There are no statutory limitations and no government regulations of the way parties decide to conduct their election campaigns and citizens make use of their basic rights of freedom of expression and political participation. Owing to the freedom of political parties enshrined in the Constitution (Article 21 of the Basic Law) and the right contained therein of citizens to be active in and for political parties, there are no statutory limitations by the state to the amount of legal donations and campaign expenditure. The Constitution and the Political Parties Act however provide for total transparency of party finances and sources of party income without limitation to election campaigns by annual public statements of accounts for all parties publicised by the President of the Bundestag that must contain the expenditure spent on election campaigns (Section 24 Subsec. 5 No. 2 c).

*If so, please briefly list such measures and explain possible exemptions for example for social media. If not, is your country currently considering introducing such measures in the future and for which media?*

See above.

*2. Is there any existing case law in your country or relevant opinions of the electoral commission regarding the use of media, and of social media platforms, during election period? If so, please provide an overview.*

Public and private broadcasting in TV and radio provides for a certain amount of time to present themselves to the electorate for all parties taking part in an election. There is case law concerning the scope of access to free advertisement in public and private broadcasting. These cases are decided by the courts, not by the electoral commission. The Political Parties Act provides in accordance with decisions of the Federal Constitutional Court that where a public authority makes facilities available to political parties or provides them with other public contributions and services, equal treatment shall be accorded to all political parties. The extent to which such facilities or services will be provided may be scaled in accordance with the respective importance of the various parties measured by their electoral performance in recent elections.

The broadcasting operator is essentially limited to control whether the content is even election advertising and whether the advertising is an evident violation of general laws, especially criminal law.

There is no limitation to additional purchased advertisements. Political advertisements purchased by private persons are considered as party donations and must be declared as such in the annual statements of account of the party if they are launched in collaboration with the party.

*3. Has your country introduced any transparency or disclosure requirements for political entities advertising online in general and social media in particular? Do political digital ads have to be explicitly labelled with an imprint? Does the funding and provenance of these ads have to be clearly displayed?*

Specific laws are applicable in the area of marketing and advertising (not just for political entities advertising online), in particular provisions from the Telemedia Act (Telemediengesetz - TMG), the

Interstate Broadcasting Treaty (Rundfunkstaatsvertrag - RStV) and from the Unfair Competition Act (Gesetz gegen den unlauteren Wettbewerb - UWG) are relevant.

Section 58 Subsec. 1 Interstate Broadcasting Treaty requires that “advertising shall be clearly recognizable as such and shall be distinctly separate from the other parts of the offers provided. Advertising shall not use subliminal techniques. “

According to Section 6 Subsec. 1 No. 1 and 2 Telemedia Act (1) commercial electronic communication has to be clearly recognizable as such and (2) the natural or legal person, on whose account the commercial communication is happening, has to be clearly identifiable.

Section 6 Telemedia Act serves the purpose of transparency in electronic communication. It is based on the principle of separation of information and advertisement and implements Article 6 of the e-Commerce Directive (2000/31/EC).

The benchmark for the recognisability as advertisement is the average user. Whether the advertisement is recognisable as such depends on the concrete design and implementation of the advertisement. If the average user is not able to immediately recognize that a given content constitutes commercial communication, the content needs to be labelled as advertisement.

To fulfil the requirement that the natural or legal person, on whose account the commercial communication is happening, has to be clearly identifiable, it is sufficient that the name of the natural or legal person or the (company) logo is visible on the advertisement, or that the information can be reached permanently and without much technical effort, e.g. via a link on the same webpage.

The Constitution and the Political Parties Act provide for transparency of party finances and sources of party income without limitation to election campaigns by annual public statements of accounts for all parties publicised by the President of the Bundestag and that must contain the expenditure spent on election campaigns (Section 24 Subsec. 5 No. 2 c).

There are considerations on federal states level to introduce a fine-enforced labeling requirement in the Interstate Broadcasting Treaty regarding the use of social bots in social networks. On federal level there are considerations to assess whether the providers of social networks located in Germany and third countries should be obliged to label content which is created or distributed by social bots.

4. *In which way do you monitor the application of relevant provisions of national election laws or other above mentioned measures? Which authority covers political ads (i.e. advertising authority or other authorities)? Have you started to develop online archives of political adverts?*

Under the free and democratic order of the Basic Law it is not for the government to establish an authority to control parties, the political activities of its citizens or the conduct of political campaigns. Where infringements of the laws (i.e. penal laws against libel, infringements on personal honour, damages, misconduct under the state statutes regulating misconduct of the free press) occur it is for the law enforcement agencies and the penal and civil courts to sanction legal misconduct. Where the rules of party financing set up in the Political Parties Act are ignored or broken it is in the authority of the President of the Bundestag to apply sanctions under the Political Parties Act. There is no state agency that collects and controls advertisements in election campaigns. The scrutiny of elections and

of infringements on electoral law is within the responsibility of the Bundestag and its electoral scrutiny committee under the supervision by the Federal Constitutional Court.

5. *Would you consider a possible role for National Statisticians to play in formal fact checking during elections, at least of certain materials where statistical data is at the core?*

All state bodies have to refrain from any intervention into the electoral process and electoral campaigns. That also applies for national statisticians. The national statistics office and all government officials can make public statements concerning statistical facts. In a free democracy it is however neither for government officials nor for objective and independent statisticians offices, but for the electorate to judge the validity and soundness of political arguments and electoral campaigns. Where infringements of the ordinary law of the land occur remedy is to be sought before the courts.

6. *Given the importance of freedom of expression in election campaigning and the democratic process, what is in your view the balance between formal regulation and self-regulation?*

Any state measures must respect the process of a free and open formation of the will and opinion of the people (Federal Constitutional Court's Judgment of 10 June 2014, 2 BvE 4/13). When exercising their power to inform and to maintain public relations, state bodies are obliged to observe the principle of neutrality towards political parties. In regard to election campaigns of political parties they have to observe utmost restraint (Federal Constitutional Court's Judgment of 2 March 1977, 2 BvE 1/76). Under the Constitution, the Federal Government may not identify with individual parties and may not make use of the available means and possibilities in their favour or at their expense. When the Federal Government explains its policies and refutes objections thereto, it may not use this as an opportunity to advertise for governing parties or to fight opposition parties. Instead, it must restrict itself to explaining its political decisions and to deal with objections thereto in an objective, facts-based manner. Like all state action, the Federal Government's information and public relations activities are subject to the requirement of objectivity. This does not exclude rejections of incorrect representations of facts or of discriminating value judgments. (Federal Constitutional Court's Judgment of 27 February 2018, 2 BvE 1/16).

Fundamental rules for a fair conduct of electoral campaigns have been agreed upon in informal agreements among the major parties. The general law of the land sets limits to the freedom of expression. In a free and democratic society it is for the electorate to judge the validity and soundness of political arguments and electoral campaigns.

7. *The use of third party data sources by political parties is increasing significantly - from companies such as Experian, Axiom etc. These data sources are then linked to electoral registers. There are significant issues around transparency and whether the public are aware of this. What in your view can be done to make the public more aware of how data is used in campaigning?*

Companies or political parties do not receive personal data from the electoral registers. Political parties may however receive limited information about personal data from the population registers.

Acknowledging the interest of political parties, associations of voters and other nominated candidates in obtaining information in the run-up to elections and voting, Section 50 (1) of the Federal Act on Registration permits the communication of information about names, academic titles

and postal addresses of groups of eligible voters without any particular preconditions. Age is the only criterion defining the composition of any group of people for whom this information may be communicated. Hence, communicable information from the population register relates to groups of eligible voters of a particular age (e.g. junior voters, older persons or other groups of voters of a particular age group). It is not permissible to retrieve information based on gender or marital status. Apart from the aforementioned information, it is not permissible to communicate any other information in the context of elections or voting. Information about a person's eligibility to vote and their belonging to a certain age group to which the communicated information relates is implicitly communicated. The person or body to whom the data are released is permitted to use these data only for advertising for an election or vote referred to in the information request and must delete or destroy them no later than one month after the election or vote.

Section 50 (1) of the Federal Act on Registration does not apply to requests for information from the population register by any third party. In accordance with Section 46 of the Federal Act on Registration, third parties may request information about a number of unidentified persons (groups of people); for the composition of such groups, only certain criteria may be used. The third party must also demonstrate that there is a public interest in such information. Economic interests of individuals or businesses are not considered a public interest in the meaning of Section 46 of the Federal Act on Registration.

*8. Has your national data protection authority issued guidance on personal data processing, including with regards to social media, in the context of election campaigns?*

As provisions in national legislation, which implement the Member States' obligation under Article 14(3) TEU and Article 39 of the Charter of Fundamental Rights of the EU (CFREU), must be considered to be implementing EU law within the meaning of Article 51(1) CFREU (cf. Judgment of the Court of Justice of 6 October 2015, Thierry Delvigne v Commune de Lesparre-Médoc, Préfet de la Gironde, C-650/13, EU:C:2015:648, paragraph 33), the Regulation of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) applies to the processing of personal data in regard to the Election of Members of the European Parliament from the Federal Republic of Germany.

*9. Does the electoral commission in your country have any specific collaboration with data protection authorities with regard to the issues discussed above? Is this collaboration formalised in any way (e.g. through a Memorandum of Understanding or similar)?*

In case the election is threatened by fake news spread nationwide and the technical connection of the Federal Returning Officer breaks down, there is an agreement that the Federal Office of Civil Protection and Disaster Assistance transmits announcements of the Federal Returning Officer to the population via secure channels of communication. In collaboration with the federal authority responsible for IT security, the Federal Returning Officer has furthermore taken measures and issued guidelines for the federal states to prevent manipulation of the election through interference with the electoral process.