

Policy Paper

Tackling the spread of disinformation

Why a co-regulatory approach is the right way forward for the EU.

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#Disinformation
#CodeofConduct
#CoRegulation



In recent years social media platforms have led to an unprecedented increase in the spread of disinformation. Concerns about these new and dynamic ways to spread falsehoods have brought politicians and regulators onto the stage. In this paper Paul-Jasper Dittrich proposes a European co-regulatory approach to tackle disinformation on social media instead of the current self-regulatory approach or direct regulation.

Executive Summary

Disinformation and political propaganda are as old as politics itself. In recent years however social media platforms have led to an unprecedented increase in its spread. False information with the intent to deceive and manipulate can be distributed faster, cheaper and to a larger audience than ever before.

Concerns about these new and dynamic ways to spread falsehoods have brought politicians and regulators onto the stage. Together with stakeholders, the European Commission has negotiated the European Code of Practice on Disinformation with social media platforms and is considering further far-reaching legislation. The difficult question however is what kind of approach is best suited at EU-level to curb the spread of disinformation on social media.

This paper provides arguments in favour of a co-regulatory approach to achieve these ends instead of the current self-regulatory approach or direct regulation. In a co-regulatory setting, the EU would set out principles and objectives in a legislative act with regards to tackling disinformation. Social media companies would then in a Code of Conduct commit to introducing measures against disinformation based on these principles. The Code of Conduct would be developed by the platforms together with civil society representatives under the guidance and monitoring by the Commission.

The Code of Conduct should be developed towards the following objectives:

- Increase transparency of content distribution. This entails both transparency about the algorithmic curation of content as well as transparency about the manipulation and abuse of social media platforms by fake accounts and coordinated inauthentic behaviour.
- Improve content management. This entails principles and guidelines for human as well as automatic content moderation and for professional fact-checking organizations.
- Improve independent public knowledge about the social dynamics on social media platforms. This entails independent access for academic research to granular data in compliance with the GDPR.

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1 The Political Debate around Disinformation

What is disinformation? The term may well be routinely used in public discourse, but two people rarely mean the same thing when referring to it. Using the definition as employed by the European Commission, this paper refers to disinformation as “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. ‘Public harm’ includes threats to democratic processes as well as to public goods such as Union citizens’ health, environment or security.”¹

The emphasis on the intention to deceive is important. It delineates disinformation from mere misinformation. Misinformation can be incorrect or misleading information, which is distributed or shared inadvertently. Disinformation, whether politically or economically motivated, has always played a role in political and media discourse. In recent years however, the eruption of global social media platforms has led to an unprecedented increase in its spread. False information with the intent to deceive and manipulate can be distributed faster, cheaper and to a larger audience than ever before. Thanks to vast data collection by digital platforms and profiling of its users, it has become possible to deliver curated misleading political ads, conspiracy theories or foreign political propaganda to customised audiences.

Concerns about these new and dynamic ways to spread falsehoods have brought politicians and regulators onto the stage. The efforts of social media companies to tackle disinformation by themselves are increasingly seen as insufficient.² Together with stakeholders, the European Commission has negotiated the European Code of Practice on Disinformation with social media platforms and is considering further far-reaching legislation. The planned update of the 2000 E-Commerce Directive into a Digital Services Act demonstrates political commitment on the part of both the Commission and most member states to reform intermediary liability for online platforms in general.³ For social media platforms as a subset of online platforms, it will aim at slowing down the distribution of illegal content (such as hate speech) online and pushing platforms to take more proactive steps against abuse of their Terms and Services. The political momentum behind this legislative package should also be employed to build a regulatory framework to tackle disinformation on social media platforms.

“The efforts of social media companies to tackle disinformation by themselves are increasingly seen as insufficient.”

1.1 A Regulatory Answer to Disinformation: Complicated

In its June 2018 conclusions the European Council explicitly invited the Commission and the High Representative to develop an action plan with specific proposals for a coordinated EU response to the challenges of disinformation. The EU is better suited to deal with disinformation than member states’ governments: By setting rules for the entire Single Market for social media platforms it can effectively avoid regulatory fragmentation in this crucial area. Representing a market of hundreds

¹ European Commission, *Code of Practice on Disinformation*, 26.09.2018

² Florian Eder, Věra Jourová: *Platforms ‘need to open up’ algorithms to deal with disinformation*, Politico, 12.06.2019.

³ European Commission, *Leaked Document on Digital Services Act*, published by Netzpolitik.org, 16.07.2019

of millions of potential users of their services, the European Commission is also in a much better position to negotiate with the social media platforms.

The difficult question however is what kind of approach is best suited at EU-level to curb the spread of disinformation on social media. Regulating this policy area is much more sensitive than setting rules for most other industries. Social media platforms enable private and public exchanges to take place on an unprecedented scale and with a previously unheard-of reach. Any regulation geared at curbing these exchanges risks infringing the freedom of expression enjoyed by European citizens.

These objections should not mean that European policymakers should shy away from acting. Social media platforms are part of the problem that needs to be addressed by the EU. Their online communication architectures are highly conducive to spreading disinformation. Algorithmic content curation by social media platforms favours maximizing user engagement, which in turn leads to favouring more emotional, sensationalist or partisan content that is more likely to include disinformation.⁴

The openness of social media platforms has also led to an explosion of fake accounts and of so-called ‘coordinated inauthentic behaviour’. Such techniques are heavily used to spread commercial and political disinformation, to create false impressions of the virality or popularity of certain profiles, or to support for misleading narratives. For one recent report prepared by the NATO Strategic Communications Centre of Excellence, researchers managed to buy 25,000 fake ‘likes’ and more than 3500 fake comments on various social networks – for €300.⁵ By its own admission, which has not been independently verified, Facebook had around 392 million “duplicate, undesirable, misclassified or false” accounts on its platform by the end of 2019 and claims that “duplicate accounts represent approximately 11 per cent of monthly active users while fake versions make up another 5 per cent”⁶. Current attempts by social media platforms at content moderation and fake account detection have failed to effectively counter inauthentic coordinated behaviour as former European Commissioner for security, Julian King, made clear at the end of October 2019.⁷

“The openness of social media platforms has led to an explosion of fake accounts and of so-called ‘coordinated inauthentic behaviour’”

In short: Without stricter rules, a credible threat of enforcement and the possibility to monitor algorithms and anti-disinformation measures of social media companies, the EU risks not only letting private companies set the *de facto* standards and parameters for exchanges and political discourse online across the Single Market. It also risks seeing the social fabric and democratic institutions in member states and at the EU level weakened by torrents of disinformation and propaganda.

⁴ Joshua Tucker et al. *Social Media, Political Polarization and Political Disinformation: A Review of the Scientific Literature*, 03.2018

⁵ Sebastian Bey, Rolf Fredheim, *Falling Behind. How Social Media Companies are Failing to Combat Inauthentic Behaviour Online*, Report prepared by the NATO Strategic Communications Centre of Excellence, 06.12.2019.

⁶ Elaine Moore, Hannah Murphy, *Facebook’s Fake Numbers Problem – Lex in Depth*, Financial Times, 18.11.2019

⁷ Daniel Boffey, *EU disputes Facebook’s claims of progress against fake accounts*, TheGuardian, 29.10.2019.

The task at hand is hence to find a solution that protects freedom of expression while steering social media platforms towards two sets of actions:

1. Measures that better curb the spread of disinformation and inauthentic behaviour.
2. Measures that lead to greater transparency of algorithmic content curation and content moderation and create effective monitoring of said measures against disinformation.

This paper provides arguments in favour of a co-regulatory approach to achieve these ends instead of the current self-regulatory approach or direct regulation. In a co-regulatory setting, the EU would set out principles and objectives in a legislative act with regards to tackling disinformation. Social media companies would then in a Code of Conduct commit to introducing measures against disinformation based on these principles. The Code of Conduct would be developed by the platforms together with civil society representatives under the guidance and monitoring by the Commission. This paper formulates principles for a co-regulatory framework on disinformation and argues in favour of an approach that targets content distribution instead of content itself. A co-regulatory approach should be complemented by an independent body to monitor the measures deployed by social media companies against disinformation.

2 Finding the right regulatory approach to combat disinformation on the European level

With the aim of increasing efficiency and flexibility, the EU increasingly uses self-regulatory or co-regulatory mechanisms to implement rules enshrined in European legislation.⁸ This is especially true with regards to internet governance and the governance of the platform economy, which is comprised of digital architectures like social media companies that can regulate user behaviour flexibly and dynamically by changing code. In its 2016 Communication on Online Platforms, the Commission proposed self- and co-regulation on the assumption that such measures could to a degree replace top-down legislation in this area of the digital economy.⁹ Self-regulation and co-regulation are private-public mechanisms for setting rules and standards.

Under a self-regulatory or co-regulatory mechanism, for example a Code of Conduct, individual companies or companies within an industry develop their own standards and guidelines together with relevant stakeholders such as business associations, social partners or NGOs. The difference between self-regulation and

⁸ The 2003 *Interinstitutional Agreement* on better law-making defines co-regulation as the ‘mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, trade unions, non-governmental organisations, or associations).’ Self-regulation is defined as the ‘possibility for economic operators, the social partners, non-governmental organisations or associations to adopt among themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements).’ *Inter-institutional Agreement on Better Law Making*, 2003 C321/01

⁹ Michèle Finck, *Digital Regulation: Designing a Supranational Legal Framework for the Platform Economy*, LSE Law, Society and Economy Working Papers 15/2017

co-regulation lies in the degree of involvement of the Commission. In a co-regulatory approach, the Commission sets out legally binding principles and objectives, has to approve industry-developed standards, while measures by the platforms are monitored by an independent body.

Various forms of self- and co-regulatory mechanisms are being used today by member states as well as at EU level in dozens of industries. Internet governance has a particularly long history of using self-regulatory and co-regulatory approaches in member states and at the EU level.¹⁰ Private Domain Name Registry Operators, for example, are often governed by a co-regulatory framework through which governments exercise control over the process of domain name registration.¹¹

Self-regulatory mechanisms are already used to change social media companies' practices towards content regulation and to combat disinformation at European level, with the European Code of Practice on Disinformation. However, this approach has so far failed to combat disinformation effectively.

2.1 Why self-regulation is not enough

Self-regulatory measures in the EU can take various forms ranging from voluntary measures by the industry to more supervised forms of industry-led rulemaking with the involvement of other stakeholders. They have, to a certain degree, helped push platforms into stepping up their measures against disinformation in the last years in the Single Market. In a European Code of Practice on Disinformation and Political Advertising, social media platforms have, for example, committed themselves to adopting stronger measures to fight disinformation.¹² Signatories of the Code of Practice, among them all large social media companies and online ad associations groups operating in the EU, have committed themselves to better detection and identification of bots and agreed not to “prohibit or discourage good faith research into disinformation and political advertising on their platforms”.¹³ They also signed up to publishing annual public reports on their efforts against disinformation.

However, these measures have not created enough transparency about how the companies are dealing with disinformation and have not led to publicly verifiable results about their success. The Sounding Board of civil society stakeholders which was involved in the process of creating the Code of Practice immediately voiced concerns about the inadequacy of the measures.¹⁴ Due to its largely voluntary nature, the Code of Practice does not include transparency obligations with regards to the digital architecture of social media platforms. The voluntary nature of commitments within the self-regulatory mechanism also prevents any real enforcement of the commitments to improve content moderation or to facilitate comprehensive data exchange between researchers and social media platforms.

“The Code of Practice does not include transparency obligations with regards to the digital architecture of social media platforms.”

¹⁰ Chris Marsden, *Options for and Effectiveness of Internet Self- and Co-Regulation*, Prepared for the Steering Committee, Rand Europe, 27.06.2007.

¹¹ Chris Marsden, Trisha Meyer and Ian Brown, *Platform Values and democratic elections: How can the law regulate digital disinformation?* Computer Law & Security Review: The International Journal of Technology Law and Practice, 15.11.2019.

¹² European Commission, *Code of Practice on Disinformation*, 26.09.2018

¹³ Ibid.

¹⁴ European Commission, *The Sounding Board's Unanimous Final Report on the so-called Code of Practice*, 24.09.2018.

2.2 Effectiveness of measures cannot be independently verified

Human content moderators cannot review the billions of posts uploaded daily on social media platforms. Employing automatic decision-making systems for content moderation and fake account detection is hence inevitable. Social media companies use a mix of technical means (such as image recognition) as well as human moderators and so-called ‘trusted flaggers’ to moderate content online. However, authorities have no means to independently verify the accuracy or effectiveness of these measures within the framework of the Code of Practice.

The reason for this is that the commitments in the Code of Practice are not legally binding and cannot be enforced. If transparency reports do not contain all the necessary information policymakers cannot assess the platforms’ claims. At the same time, they cannot force the platforms to provide the necessary additional information.

2.3 Information asymmetry

The Code of Practice also contains no mechanism to monitor the effects that algorithmic content curation decisions made by the platforms have on public discourse or the media. These decisions, such as the pivot to video in the newsfeed of Facebook, can however have drastic consequences for private and commercial users of social media platforms. After Facebook changed its newsfeed algorithms to favour video over text and downgraded political content, hundreds of newspapers saw their online revenues drop drastically almost overnight.¹⁵ A small technical change thereby had a profound impact on the media diet of millions of Europeans; but its effects on political discourse and on the distribution of disinformation remain completely opaque. A future European regulatory framework needs to address this absence of transparency in algorithmic content curation. Since social media platforms are unlikely to voluntarily agree to make enough relevant information available to the public or at least to the Commission, any new regulatory framework will have to include obligations on the transparency of algorithmic content curation.

The current lack of transparency over the effects of algorithmic changes is an example for a larger problem between social media and regulators as well other relevant stakeholders. There is a general information asymmetry and subsequent knowledge gap between social media platforms and everyone else. Social media platforms obtain live data on social and communication dynamics from which they can draw inferences on disinformation, propaganda, or the effectiveness of political ads. They are the only ones in possession of reliable data on the exact numbers of fake accounts on their platforms as well as on the prevalence and effects of coordinated inauthentic behaviour. This data and knowledge are of immense relevance for policymakers, for example when the integrity of elections is concerned. Yet, most social media platforms do not provide authorities and researchers enough access and granular data to study these phenomena independently and in full detail despite the commitments made in the Code of Practice.

“There is a general information asymmetry and subsequent knowledge gap between social media platforms and everyone else.”

¹⁵ Alexis Madrigal, Robinson Meyer, *How Facebook’s Chaotic Push Into Video Cost Hundreds of Journalists Their Jobs*, 18.10.2018.

2.4 Why legally binding rules for social media platforms could backfire

The shortcomings of the Code of Practice in addressing disinformation should however not lead to the conclusion that direct regulation of content on social media platforms would be the preferable option. In theory, the EU could enact a law that is similar in structure and intent to the German *Netzwerkdurchsetzungsgesetz (NetzDG)* but serves to curb disinformation. Germany enacted the law in 2017 to stop the spread of illegal content by changing the intermediary liability rules for platforms. It requires them to take down flagged content that is ‘manifestly unlawful’ under the German Criminal Code within 24 hours of receiving any complaint from a user, public authority or trusted flagger.¹⁶ In cases requiring a prolonged examination of the legality of the flagged post the complaint must be handled within a week.

Three reasons speak against a similar approach at European level, i.e. the EU making binding rules on the content management of social media platforms in order to tackle disinformation.

First, most of the content in question is not strictly illegal. Some will be illegal, some in a legal grey zone; other forms of disinformation might just be socially undesirable. Legally mandating the deletion of such content would thereby simply amount to censorship. It could still be argued that a law should be designed to take down disinformation that is also illegal or disinformation which poses a clear danger to public safety or health, but this would not go very far either.

Secondly, under such an approach, social media companies would become the arbiters of truth. They would have to decide for hundreds of thousands of posts flagged as disinformation every day whether they individually contain disinformation as defined by law or not. At such a scale it is simply impossible for humans to make judgements accurately for every single post. In practice, such a legal mandate would lead social media platforms to install strong content filters. These filters would delete massive amounts of content that its algorithms have identified as disinformation before it can even be published.

Such an approach would be especially counterproductive since, third, the actual societal impact of disinformation is empirically poorly researched. A recent book by Yochai Benkler and co-authors analysing dozens of studies from an American context suggests there is no conclusive evidence both on the efficacy of hyper-partisan and micro-targeted political online advertising on voting behaviour and on the direct effects of online interference by foreign actors on voting behaviour.¹⁷ Disinformation most likely poses a danger to the fabric of European societies beyond elections, for example by contributing to an increasing polarization of societies or digital tribalism.¹⁸ Existing evidence on the causal mechanism of internet use and polarization is, however, too weak to justify regulation that

“The actual societal impact of disinformation is empirically poorly researched.”

¹⁶ For example, an NGO, journalistic network or foundation which entered into an agreement with the large social media companies.

¹⁷ Yochai Benkler, Robert Faris, Hal Robert, *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics*, 10.2018

¹⁸ Samantha North, Lukasz Piwek, Adam Jonson, *Battle for Britain: Analysing drivers of political tribalism in online discussions about Brexit* in: A. Aker, D. Albakour, A. Barr´on-Cede˜no, S. Dori-Hacohen, M. Martinez, J. Stray, S. Tippmann (eds.): *Proceedings of the NewsIR’19 Workshop at SIGIR, Paris, France, 25.07.2019*

would lead to a massive infringement of a fundamental right.¹⁹ A key problem in this regard is also that most research on the societal impact of social media companies hails from the US and American data, while such effects in the EU are not very well researched.

For all these reasons, the EU should refrain from mandating social media platforms to police content directly. Instead, the EU should focus on how the platforms tackle two main drivers of the spread of disinformation, namely fake accounts and inauthentic behaviour. This in turn requires a lot more transparency about the distribution and managing of content by social media platforms. To attain more transparency and to make social media platforms accountable for their tackling of fake accounts and inauthentic behaviour, a co-regulatory approach is much better suited than a pure top-down approach.

“The EU should focus on two main drivers of the spread of disinformation, fake accounts and inauthentic behaviour.”

3 Why co-regulation strikes the right balance

A co-regulatory framework has an efficiency and flexibility advantage over direct regulation and is more inclusive. Social media companies operate technologically complex systems and manage complex and dynamic social interactions at a vast scale. The techniques and channels used to distribute disinformation for example regularly change. Direct regulation would most likely fail to incorporate this complexity of interactions and create rules that are not adaptable to the technical realities of individual platforms. A well-intended law to increase transparency and accountability with regards to inauthentic coordinated behaviour could force social media platforms to delete large amount of non-illegal content. In a co-regulatory setting, legally binding principles and objectives for transparency can be set out by the EU. They are then developed into a Code of Conduct in close cooperation with the platforms, which have the expertise and the leeway needed to technically implement the Code. Participation of various stakeholders in the development of the Code of Conduct ensures that the interests of civil society, the media or academia are factored in.

Co-regulatory frameworks in the EU context usually have three layers: The statutory layer of general principles and objectives which the EU develops in a legislative act; the co-regulatory layer where the industry and other relevant stakeholders form a body that develop a Code of Conduct based on the principles and objectives fixed in EU legislation; and a third layer where companies develop concrete measures to implement the Code of Conduct. These measures have in turn to be approved by the EU-Commission. An independent monitoring board, for example consisting of stakeholders from civil society or academia monitors the process and effectiveness of its implementation. One example for such a framework is the EU approach to countering illegal hate speech online.²⁰

In the fight against disinformation such an approach has several advantages. It is more legally binding and has more teeth than self-regulation. At the same time,

¹⁹ Sebastian Deri, *Internet Use and Political Polarization: A Review*, Cornell University, 06.11.2019.

²⁰ Chris Marsden, Trisha Meyer and Ian Brown, *Platform Values and democratic elections: How can the law regulate digital disinformation?* Computer Law & Security Review: The International Journal of Technology Law and Practice, 15.11.2019.

it can make use of the efficiency of self-regulation and leave implementation to the platforms who are best equipped to develop the required technical standards and tools. They are also able to adapt them flexibly and dynamically. Stakeholders from civil society as well as the social media platforms are involved in the process of drawing up a Code of Conduct; this makes the process more inclusive and ensures that the interests of civil society and researchers are considered.

Figure 1: Set-up of a co-regulatory approach to tackle disinformation in the EU



Concretely, the EU should lay down principles and objectives for content distribution, content management processes of social media platforms as well as data access for researchers in a Regulation. These principles would then have to be translated into a Code of Conduct that contains detailed rules for the conduct of social media platforms. The Code of Conduct would be developed and adopted by a by a co-regulatory body whose composition would be laid down in the Regulation. It would be comprised, industry representatives, civil society organisations and academics and would decide by consensus. The Code of Conduct would then need to be approved by the Commission. The co-regulatory body would also develop indicators, benchmarks and processes with regards to content distribution, inauthentic behaviour and algorithmic transparency. Social media companies would then have to develop their own measures to abide by the Code of Conduct.

Their effectiveness would be assessed by an additional monitoring board made up of independent experts. On the proposal of the monitoring board, the co-regulatory body could reject individual measures and demand that companies implement new measures. If companies consistently fail to comply, the co-regulatory body could refer the matter to the Commission which in turn could mandate certain actions by the company in question to make it compliant with the objectives and principles of the Regulation.

3.1 A Code of Conduct against Disinformation

The Regulation should fix the following objectives by establishing principles for the Code of Conduct:

- Increase transparency of content distribution. This entails both transparency about the algorithmic curation of content as well as transparency about the manipulation and abuse of social media platforms by fake accounts and coordinated inauthentic behaviour. Finally, transparency about automatic and human content moderation should also be increased. A principle of transparency should ensure that public scrutiny can be applied to the actual dynamics on social media.
- Improve content management. This entails principles and guidelines for human as well as automatic content moderation and for professional fact-checking organizations. A principle of responsibility for content moderation practices should lead to a more ethical and professional human content moderation as well as a new balance between fact checkers and social media platforms.
- Improve independent public knowledge about the social dynamics on social media platforms. This entails independent access for academic research to granular data in compliance with the GDPR. A principle of supervised openness should ensure that the social dynamics on social media platforms can be researched without breaches of privacy.

The co-regulatory body should then develop a regulatory design and Code of Conduct based on these principles. The Code of Conduct should include at least the following concrete rules and measures:

- Concrete indicators, benchmarks and standards for transparency reports on fake accounts and inauthentic behaviour and processes for independent verification of these reports.
- Indicators, benchmarks and standards for transparency reports on content moderation measures and processes for independent verification of these reports.
- Rules for the ethical treatment and better journalistic and legal training of human content moderators. Human content moderators are currently low-wage employees of contractors to which social media companies have outsourced moderation of content. In many cases they do not receive the care and remuneration that would be warranted given the psychologically and physically difficult work they do. They also do often not receive sufficient journalistic and legal training before having to make content decisions.
- Rules and a process for data access of independent researchers to the platforms. Researchers should be free to choose their own research topics and should get access to all data needed to conduct it, in compliance with the GDPR.
- Rules to formalize the relationship between fact-checking organizations and social media platforms. Fact-checking organizations already play an important role in uncovering coordinated disinformation campaigns of domestic and foreign actors. In a Code of Conduct their role should be improved. They should be able to

force social media platforms to shut down or demonetize accounts with a strong follower base, for example more than 5000, if they can produce comprehensive evidence that these accounts are engaged in spreading disinformation as defined by the EU or engage in coordinated inauthentic behaviour. Currently, social media platforms are not bound by the findings of fact-checking organizations.

Independent monitoring of the effectiveness of the technical measures social media companies put in place will be key to the success of the co-regulatory approach. Especially in the case of transparency obligations on algorithmic content curation and coordinated inauthentic behaviour, the monitoring board must not only be independent but also be endowed with considerable resources and technical expertise. It should consist of experts appointed by the European Commission. It should be able to scrutinize transparency reports and therefore have access to relevant data as well as to the digital architecture of social media platforms that drives their content curation.

“Independent monitoring of the effectiveness of the measures will be key to the success of the co-regulatory approach.”

Conclusion

A co-regulatory approach is the best imperfect way forward to tackle disinformation in its current state given knowledge constraints about the societal effects of disinformation and the danger regulation poses to freedom of expression. But this does not mean that full-blown top-down regulation of social media companies should be discarded for all time.

If a co-regulatory approach as described in this paper is successful it should lead to a considerable improvement in understanding the dynamics of disinformation online and the contributing factors behind it. This could in future lead to more direct regulation of ad-driven business models or warrant regulation that addresses the current openness to abuse of platforms.

On the same topic

- Paul-Jasper Dittrich
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