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14<sup>th</sup> of March 2023

The Registrar  
**European Court of Human Rights**  
Council of Europe  
F-67075 Strasbourg Cedex  
France

**Third-Party Intervention by  
European Information Society Institute (EISI)**

**In re Ben Bradshaw and Others against the United Kingdom  
(Application no. 15653/22)**

**Introduction**

- (1) Before the Internet, political campaigns were conducted mostly via television, radio, placards or by talking to people. The digital world opened new ways of how to reach people. It allowed everyone to instantaneously connect and exchange ideas across the globe. Digital services became the new spaces where people spend their days. Thus, the advertising carried by some of these services, such as social media, turned out to be especially crucial for modern politics. To politicians, digital ads offer a new *cheaper, faster, targeted, and largely unregulated* method of speaking to their voters. This submission highlights why transparency of how politicians talk to their voters is the defining problem of our times. It focuses on the relationship between transparency and Article 3 Protocol 1 ('A3P1'). To illustrate our points, we differentiate between two stages of electoral processes: the pre-election and the post-election phase of the election cycle.
- (2) In the *pre-election context*, it is important that voters are informed about who speaks to them through political ads and why they are targeted. The increasing threat of manipulation by others underlines minimum disclosures are necessary to preserve the fairness of elections. In the *post-election context*, for the same reasons, substantiated allegations of election manipulation must be investigated by impartial bodies. Effective investigations inform voters and enable collective learning through trial and error. *Transparency in both cases helps to solidify the public's trust in the democratic system because voters are assured that they were not misled and that their vote continues to make a difference.*

- (3) Accordingly, this submission, first, focuses on the pre-election context and highlights the growth of the ‘digital campaigning’ phenomenon and the risks of foreign interference exacerbated by a lack of transparency. Minimum pre-election transparency requirements for digital political ads are thus a must to achieve fair and free elections. Second, focusing on the post-election context, in the interests of transparency, effective and independent bodies must investigate claims of election interference to reassure the public of the strength and the fairness of the democratic system and to encourage people to remain politically active. These approaches reflect the evolutive interpretation that the Court has adopted in interpreting the ECHR as a *living instrument*, one that is up-to-date with today’s challenges and safeguards democracies proportionately, without interfering excessively in national frameworks (*Tyrer v United Kingdom* App. No. 5856/72).

### **Pre-Election Campaigns: Digital Campaigning and Transparency Concerns**

- (4) Social media has been a game changer for political advertising. Political ads can be bought and appear on users’ social media feeds to influence their people’s voting decisions. Ads allowed politicians to customize their messaging to people with laserlike precision. They gave them the power to whisper to individual voters’ ears different messages based on their backgrounds. Politicians have clearly recognised that voters are now getting their news and information from social media over television. The Reuters Institute shows that this is indeed a phenomenon common among the members of the Council of Europe. In 2022, 56% of Spaniards, 71% of Greeks, 47% of Italians and 55% of Poles get their news from social media.<sup>1</sup> The figures are even greater when considering those getting their news from online sources overall (79%, 90%, 75% and 80% respectively).
- (5) Consequently, digital spending in political advertising is increasing at an exponential rate, seen by candidates to be fertile ground to garner electoral support as opposed to the more regulated and rigid traditional broadcast media. For example, in the UK, digital advertising expenditure by parties on social media ads increased from 1.7% in 2014 to 42.8% in 2017<sup>2</sup>, meaning nearly half of all political ads are placed on social media. In Belgium, during the 2019 official election campaign period, nearly 32% of all political spending for Flemish parties was for digital campaign spending (the figures are nearly 24% for Walloon parties and 27% for unitary parties).<sup>3</sup> However, for many Council of Europe members it is difficult to obtain figures denoting the percentage of political expenditure on political ads in relation to overall campaign spending, feeding into the overarching theme of a lack of transparency which political social media ads create. Indeed, Italian rules on political advertising do not extend to digital campaigning, meaning that political parties do not have to disclose their online advertising spending,<sup>4</sup> notwithstanding the fact that the Oxford University’s Reuters Institute shows almost half of Italians get their news from social media.

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<sup>1</sup> ‘Digital News Report 2022’, Reuters Institute (2022)

<sup>2</sup> ‘Transparency in digital campaigning’, Consultation produced by the Cabinet Office (from 12/08/20 to 4/11/20)

<sup>3</sup> Gunther Vanden Eynde, ‘Political Finance in the Digital Age: A Case Study of Belgium (2023) International Institute for Democracy and Electoral Assistance at pg 5

<sup>4</sup> Regulation of Political Advertising in the EU: A study of Political Advertising Laws in Bulgaria, Hungary, Italy, the Netherlands and Slovenia’ Civil Liberties Union for Europe at pg 7

- (6) The prevalence of political campaigning through ‘digital ads’, particularly on social media, can severely undermine the transparency of the election process. Often, digital ads are very difficult to track, making it impossible for users to understand who has paid for them. Furthermore, as alluded to, digital campaigning allows for the targeting of groups of individuals based on demographic data stored by social media companies. Not only is this problematic given that individuals consequently may be targeted with vastly different information, even by the same candidate, but also because individuals themselves often do not know they are being targeted and, specifically, how their personal data has been used in this formulation. For instance, some of the best-performing advertisements of the Conservative Party ahead of the Brexit referendum in the UK were highly gender-targeted. On the one hand, advertisements claiming post-Brexit Britain will be the best place to ‘start a business’ or to ‘unleash the potential of all our towns, cities and villages’ had an exclusively male audience of more than 125,000 views. On the other hand, an advertisement stating that ‘[w]e’re recruiting 20,000 more police and giving them the powers they need to keep you safe’ was seen over 250,000 times, but exclusively by women.<sup>5</sup> *A lack of information about such practices translates into a lack of public debate.*
- (7) Domestic authorities have, to an extent, recognised the state of *opacity* in which digital campaigning enjoys, but progress has been at a slow rate, one dwarfed by the comparative explosion of the digital campaigning phenomenon in European elections. While the UK, for instance, legislates that printed campaign materials must include an imprint identifying who paid for it<sup>6</sup>, no such an imprint is required by online platforms for digital political ads. In fact, while a third of British people could not discern who has paid for a digital political ad, 72% of them agreed that it is fundamental for them to know.<sup>7</sup> Given that the data from the Reuters Institute shows that an overwhelming majority of Council of Europe citizens gain their information and news online. *The continued inactivity of domestic authorities to regulate this area is not only unjustifiable, but it threatens the transparency of the campaigning process as a whole.* While states have regulations to ensure the transparency of the pre-election campaigning process, many Council of Europe states are only slowly extending those rules to the online world.<sup>8</sup> This is despite the fact that the concerns already recognised in the context of traditional broadcast media, including by this Court, are only compounded in the context of digital ads.
- (8) Social media companies have made some movements towards increasing transparency with regard to political advertisements found on their feeds. For example, following the Cambridge Analytica scandal in 2018, Facebook created an ‘Ad Library’ in 2019 in the UK and all EU states with the purpose of ensuring the integrity of elections through providing transparency so that users can understand why they are being shown the ad, who it is paid for and where they are located.<sup>9</sup> While this is a welcome step towards more

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<sup>5</sup>J Smith et al, ‘How parties used Facebook, Instagram and Google ads’ The Guardian (12/12/2019), available at: <https://www.theguardian.com/politics/2019/dec/12/how-parties-used-facebook-instagram-and-google-ads> (last accessed: 4/3/2023)

<sup>6</sup>Representation of the People Act 1983; the Political Parties, Elections and Referendums Act 2000

<sup>7</sup>The Electoral Commission, ‘Report overview: 2019 UK parliamentary general election’

<sup>8</sup>(n4) Council of Europe states in question were Bulgaria, Hungary, Italy and Slovenia

<sup>9</sup>‘Political Advertising on Social Media: Study of the Facebook Ad Library for Social, Electoral and Political Content’ (2020) Conseil Supérieur de L’Audiovisuel at pgs 6-8

transparency, its positive impact is mitigated by its discretionary, wholly voluntary, nature; there is no binding legal duty to create them, resulting in the ability of social media companies to disband transparency programs at their own will. Democracies, however, cannot be dependent on private companies' good faith. After all, other social networks have not followed suit, creating discrepancies in transparency self-regulation depending on the social media network. This leads to a patchwork of different approaches, knitted by individual social media companies. Lastly, these transparency databases can also be criticised given their conduct is frequently unreliable. Researchers from the Oxford Technology and Election Commission, in this regard, have described data from these transparency databases as being 'inadequate for meaningful analysis'<sup>10</sup>, especially since ad expenditure is underreported.<sup>11</sup> Evidently, therefore, mechanisms designed by social media companies to self-regulate political ads have fallen short of their goals of transparency.

- (9) *The opacity over who is behind ads, combined with the micro-targeting potential, renders the digital sphere a fertile ground for foreign interference in election campaigns.* Evidence to support this assertion is plentiful within the Russian foreign interference context. In the 2017 French Presidential Election, President Macron's team maintained that 'hundreds if not thousands of attacks against their system 'originated from inside Russia'<sup>12</sup> In the 2018 Swedish Elections, Swedish authorities noticed increased hacking operations and dissemination campaigns aimed at polarising Swedish society originating in Russia.<sup>13</sup> The aim of this interference is to '(a) polarise and disrupt societal cohesion by exacerbating important and divisive issues, such as race, social class, and gender; (b) undermine public confidence in democratic institutions and processes; (c) spread confusion, generate exhaustion, and create apathy; (d) gain strategic influence over political decision-making and public opinion.'<sup>14</sup>
- (10) In electoral terms, these objectives translate into direct and indirect impacts. Directly, disinformation might make voters change their electoral preference to opt for a candidate favoured by the disinformers. Indirectly, voters may become radicalised, resulting in a spill-over effect on undecided voters, or simply voters may get overwhelmed by the information, losing trust in the democratic process and abstaining. Given the prevalence of digital campaigning in modern European elections and their lack of transparency regulations, it is all too easy for malignant foreign powers to dump ads on social media, most often containing rife disinformation, to interfere with the election result. Only with transparency mechanisms in the pre-election period can domestic authorities enable this threat to not strike at the public's confidence, ensuring the aims of the disinformers are decisively foiled.

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<sup>10</sup> LM Neudert and P Howard, 'Online politics needs to be cleaned up – but not just by Facebook and Twitter' The Guardian (11/11/2019), available at: <https://www.theguardian.com/commentisfree/2019/nov/11/online-politics-facebook-twitter-social-media-political-parties> (last accessed: 4/3/2023)

<sup>11</sup> *ibid*

<sup>12</sup> Erik Brattberg and Tim Maurer, 'Five European Experiences with Russian Election Interference' (2018) Carnegie Endowment for International Peace at pg 9-11

<sup>13</sup> *ibid* at page 24-25

<sup>14</sup> Marek Posard et al, 'From Consensus to Conflict: Understanding Foreign Measures Targeting US Elections' (Rand Corporation 2020) at pg 5

### **Pre-election Positive Obligations: Minimum Threshold of Transparency**

- (11) The changes that the digital world has brought to election campaigning outlined above demonstrate the need for domestic authorities to adopt *positive measures* to ensure the plurality of views is not obscured by disinformation and shady financing. A democratic society cannot exist without a political debate that reflects a plurality of ideas and opinions. The media, by dispersing ‘currents of opinion’ throughout all levels of life in society make an irreplaceable contribution to this political debate (*Yumak and Sadak v. Turkey*, App. No. 10226/03, para. 107). The electorate should be exposed to a wide number of perspectives and information on candidates to facilitate political opinion formation.
- (12) In this vein, the Court has held that the state is under an obligation to adopt some positive measures to secure pluralism of views in the pre-election period (*Communist Party of Russia & Others v. Russia*, App. No. 29400/05, para. 123). In particular, authorities should take measures to prevent financially powerful groups from distorting the political debate. In *Animal Defenders International v the United Kingdom* (App. No. 48876/08, para 112), the Court recognized that domestic authorities are legitimate in their ‘desire to protect the democratic debate and process for distortion by powerful financial groups with advantageous access to influential media’. Without regulation, the Court recognized that powerful financial groups could use their resources to gain competitive advantages in paid advertising and thereby ‘curtail a free and pluralist debate, of which the State remains the ultimate guarantor’ (para 112).
- (13) The Court’s jurisprudence concerning the protection of pluralist debate in the pre-election period has, however, primarily concerned the medium of traditional broadcasting media. Indeed, ten years ago in *Animal Defenders International v the United Kingdom*, the Court reassured itself that social media had not yet reached such a level of impact that it could be considered on par with traditional broadcast media (para 119). As the previous section has demonstrated, however, this point no longer holds weight today. With a majority of individuals within European countries consuming their news and information online, a new approach is needed from the Court.
- (14) Outside the context of pre-election media plurality, the Court has in fact recognised the importance of the internet and social media for the right to freedom of expression. In *Times Newspapers Ltd* (App. Nos. 3002/03 and 23676/03), the Court established that “the internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information in general” (para 27). Consequently, the Court is very much aware of the challenges that the digital age presents to the right of freedom of expression. These concerns apply equally, and are in fact amplified, when considering the freedom of expression of individuals during the pre-election campaigning period. Concerns for the right to free and fair elections which applied to traditional broadcast media, which resulted in significant transparency mechanisms, apply with equal weight to concerns which are now being brought to light regarding digital campaigning. *It is simply unjustifiable that the two systems (traditional media versus digital media) are to be subject to two separate regimes when the same underlying principles penetrate concerns underlying both.* This will undoubtedly become even more justified as time advances, and trends of social media use for accessing news ever-increases and ever-outpaces that of traditional media. The way forward is minimum transparency requirements for both.

- (15) The Council of Europe’s Committee of Ministers has echoed this requirement in formulating its ‘principles for media and communication governance’.<sup>15</sup> Its report outlines several procedural transparency principles with respect to online media that are all based in establishing the basic threshold of transparency in such spaces. For example, good media and communication governance should ensure ‘transparency of content production’, embodying an obligation to provide information on the circumstances of the content production, its funding, and a duty to disclose the instance of potential bias resulting from algorithmic systems (i.e., targeted content).<sup>16</sup> These principles not only allow a plurality of debate to persist in election campaigns but ensure that large financial actors who may be able to circumvent restrictions present in traditional political advertising media, are not able to dominate the election via digital campaigning. These *minimum procedural transparency obligations* also respect the wide margin of appreciation given to states in regulating political advertising standards (*Animal Defenders International v the United Kingdom*, para 123).
- (16) For these reasons, for instance, 27 countries that are members of the European Union recently adopted the Digital Services Act which contains elaborate rules concerning the transparency of advertising on digital services, and an explicit obligation of very large online platforms to mitigate risks, including to the integrity of electoral processes.<sup>17</sup> Any advertisement they publish must disclose who paid for it, and who requested it and preserve the copy. Perhaps most importantly, the information must include advertisers targeting parameters and exposure records. Advertisers thus cannot anymore rely on full secrecy of their targeting campaigning techniques. Moreover, the reach records will be seen by competitors and potentially scrutinized by journalists to study and react to the ongoing practices. Digital advertising will start leaving more traces than before. Moreover, the EU is about to adopt additional rules for political advertising.<sup>18</sup>
- (17) Undeniably, this case presents a novel issue for the Court. It centres on the use of political campaigning on online media rather than traditional broadcast media. However, *despite the medium into which information is being disseminated having been changed, the principles applicable to broadcast media are transferable to the new digital context*. The existing framework for the regulation of broadcasters leaves little scope for opaque advertising ensuring transparency in communication. With a large proportion of political campaigning and advertising currently taking place in the online space, however, there is an imminent need to ensure the same level of transparency is upheld in such activities on online media. This imminence is compounded by the fact that digital advertising as opposed to traditional political advertising is in fact far more effective in its reach, being able to be read by millions at any time in any place, and sophisticated in its capability, being able to target specific sectors of the population whose support political parties may crave.

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<sup>15</sup> Recommendation CM/Rec(2022)11 of the Committee of Ministers to member States on principles for media and communication governance available at :

[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680a61712](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680a61712)

<sup>16</sup> (n15) pgs 4-5

<sup>17</sup> See Articles 26, 34(1)(c) and 39, Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

<sup>18</sup> Council of EU, ‘Transparency and targeting of political advertising’, available at :

<https://www.consilium.europa.eu/en/press/press-releases/2022/12/13/transparency-and-targeting-of-political-advertising-council-agrees-its-negotiating-mandate/>

## Post-Elections: Dealing with Irregularities

- (18) Post-election procedures, such as investigations and effective judicial remedies, are important tools for ensuring that elections remain *free and fair*. This is, in part, because such procedures enhance transparency. Transparency serves several key functions in democratic processes. The OECD's Secretary-General, Angel Gurría, has noted the importance of transparency for 'accountability and trust', which are 'necessary for the functioning of democracies...'<sup>19</sup>. The Guidelines for Civil Participation in Political Decision-Making (2017)<sup>20</sup> also endorses transparency and openness as a key principle for civil participation. The Council of Europe's anti-corruption body (GRECO) in 2022 released its annual report recommending that states increase transparency and accountability around political lobbying.<sup>21</sup> Transparency enhances trust, facilitates access to information and elevates the quality of public debate. Part of transparency, especially in the post-electoral context, requires performing investigations and hearing appeals that explore potential irregularities and publishing these so that the public can have a more accurate idea of the forces at play during elections. This ensures that elections *are* as well as *are seen* to be fair in the public's eyes. As Lord Hewart, the then Lord Chief Justice of England, once said 'Justice must not only be done, but must also be seen to be done'<sup>22</sup>.
- (19) In this vein, the Venice Commission Report on Election Dispute Resolution (Council of Europe, 2020) highlights that 'electoral disputes are a natural part of a lively domestic political life, which in turn is a natural part of a lively pluralistic system.' (para 9). This, in turn, means that 'election dispute resolution' systems are key to 'an effective and functional electoral governance...to ensure confidence in electoral processes.' (para 9). The Venice Commission Code of Good Practice in Electoral Matters also highlights under *Procedural Guarantees* Guidelines that there must be an effective system of appeal (3.3). This appeal body must be 'either an electoral commission or a court' (3.3.a) and there must always be a possibility for a 'final appeal to a court' (3.3.a). This procedure must also be devoid of formalism (3.3.b). At 3.3.f, the Guidelines also note that 'all candidates and all voters registered in the constituency must be entitled to appeal'. (3.3.f). In the Explanatory Section of the Venice Commission Code of Good Practice in Electoral Matters, it is stated that 'it is necessary to eliminate formalism, and so avoid decisions of inadmissibility, especially in politically sensitive cases.' Further to this, the Office for Democratic Institutions and Human Rights issued the Handbook for the Observation of Election Dispute Resolution in 2019 which notes that 'ensuring access to legal redress during the electoral process is important to increase public trust in elections, contribute to the legitimacy of the government, and protect voters' rights' (page 5).
- (20) Since 2015, there were several two notable examples of states undergoing electoral reform after post-election investigations relating to foreign interference. The overall lesson to be learned is that transparency is key to understanding how foreign interference works and

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<sup>19</sup><https://www.oecd.org/about/secretary-general/opennessandtransparency-pillarsfordemocracytrustandprogress.htm>

<sup>20</sup>[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=09000016807509dd](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016807509dd)

<sup>21</sup> <https://www.coe.int/en/web/greco/about-greco/priority-for-the-coe>

<sup>22</sup> *Rex v. Sussex Justices*, [1924] 1 KB 256.

how to prevent it in the future. After the 2016 US election, which was plagued with accusations of foreign interference<sup>23</sup>, the US President passed an Executive Order in 2018 ordering an ‘assessment’ to identify ‘the nature of any foreign interference’<sup>24</sup>. The Secure Elections Act 2018 (s2593)<sup>25</sup> was introduced. This was spurred by ‘a campaign’ organised by the National Election Defense Coalition, comprising experts and federal officials who educated ‘policy makers’ to implement institutional and legislative reform.<sup>26</sup> In 2017, the Presidential Election in France was also mired by alleged foreign interference. In response to these attempts, President Macron created an office (VigiNum) dedicated to the detection and characterisation of ‘foreign media manipulation’<sup>27</sup>. VigiNum became a project for the French government after the publication of *Les Manipulations De L’Information - Un Défi Pour Nos Démocraties* by the Institut de Recherche Stratégique De L’École Militaire (attached to the French Defence Ministry). The Center for Strategic and International Studies (CSIS) also released a report, *Successfully Countering Russian Electoral Interference*<sup>28</sup>, listing some of the lessons that could be drawn from France’s response to foreign interference in their 2017 election. The ability of France to successfully respond via the creation of a specialised body and become a global example of successfully countering interference is in part a product of the context of openness and transparency within which the interference took place.

### **Post-Election Positive Obligation: Independent Investigations**

(21) The Court has similarly recognised the importance of post-election investigative regimes at enhancing the transparency of elections and generating confidence in the democratic process. In *Namat Aliyev v Azerbaijan* (App. No. 18705/06), the Court reiterated that the ‘existence of a domestic system for effective examination of individual complaints and appeals in matters concerning electoral rights is one of the essential guarantees of free and fair elections’ (para 81). The Court has stated that free elections would be at risk if complaints concerning the thwarting of free expression of people received no effective examination at the domestic level (*Darydov and Others v Russia* App. No 75947/11, paras 283-88). Indeed, the Court went as far as to suggest the individual right to free and fair elections would be ‘illusory’ if challenges by individuals could not be brought before an effective and competent domestic body (*Namat Aliyev v Azerbaijan* para 81). These domestic bodies must be impartial, have their discretion circumscribed with sufficient precision by domestic law and must guarantee a fair, objective and sufficiently reasoned decision (*Mugemangango v Belgium* App. No. 310/15 para 70).

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<sup>23</sup> US Department of Justice, Report On The Investigation Into Russian Interference In The 2016 Presidential Election (see <https://www.justice.gov/archives/sco/file/1373816/download>), <https://www.reuters.com/article/us-usa-trump-russia-senate-findings-fact-idUSKCN25E2OY>, and

<sup>24</sup> Executive Order 13848—Imposing Certain Sanctions in the Event of Foreign Interference in a United States Election (see <https://www.govinfo.gov/content/pkg/DCPD-201800593/pdf/DCPD-201800593.pdf>)

<sup>25</sup> <https://www.congress.gov/bill/115th-congress/senate-bill/2261>

<sup>26</sup> National Election Defense Coalition, Senate Bill 2953 : The Secure Elections Act, (see <https://www.electiondefense.org/senate-bill-2261-the-election-security-act/>)

<sup>27</sup> Lawfare Blog, Nov 2021, Laudrain (see <https://www.lawfareblog.com/france-doubles-down-countering-foreign-interference-ahead-key-elections-0>)

<sup>28</sup> Centre for Strategic and International Studies, *Successfully Countering Russian Electoral Interference* (see <https://www.csis.org/analysis/successfully-countering-russian-electoral-interference>)

- (22) In examining the domestic investigative system in *Mugemangango*, the Court was unequivocal in stating that the domestic system, which only allowed individual complaints to the Walloon Parliament could not be considered impartial given MPs cannot be politically neutral by definition (para 107). Judge Turković and Lemmens in their Joint Concurring Opinion to the *Mugemangango* case concluded that it seems that the domestic investigative system must involve recourse to either judicial or quasi-judicial bodies (para 5). Judge Wojtyczek in his Concurring Opinion held that the overarching standard of investigative decision-making bodies is one of adequacy: ‘the reaction of the body competent to examine electoral appeals should be adequate to the nature of the irregularities established and should especially take into account their impact upon the outcome of elections (para 7). In examining the effectiveness and absence of arbitrariness of post-election investigative systems, the Court focuses on whether a ‘genuine effort was made’ to determine the validity of the applicant’s claims as evidenced by a ‘sufficiently well-reasoned’ explanation (*Namat Aliyev v Azerbaijan* para 81-90). Furthermore, when it came to the examination of the claims of irregularities by Azerbaijani Courts, the Court criticised the ‘extremely formalistic reasons’ provided so as to avoid an examination of the complaints (para 90).
- (23) Beyond specific instances of electoral irregularities affecting the election of certain applicants, the Court is also aware of the larger picture of the fairness and transparency of elections on the whole. In this regard, the Court in *Namat Aliyev* criticised the Precinct Election Commission (PEC) for failing to request electoral commissions to submit alleged serious irregularities concerning the ‘large scale tampering with ballots’ for independent examination. Indeed, if such examination substantiated those inconsistencies, an assessment of how the election results were thus impacted would be necessary (para 89). Where alleged breaches ‘seriously undermined the legitimacy of the election as a whole’, the Court will then assess whether the breach has taken place, considering whether or not an assessment has been made by domestic courts, and if answered in the affirmative, whether such assessment was arbitrary (*Davydov and Others v Russia* para 277).
- (24) Domestic authorities have a narrow margin of appreciation concerning A3P1 when it comes to departures from the principle of universal suffrage, a wider margin concerning measures to prevent candidates from standing for election and an even wider margin concerning vote counting and tabulation (*Davydov and Others v Russia* paras 286-87). It can be gleaned that the wider the Court’s lens zooms out from the individual in an election context, the less stringent its examination is. Therefore, when it comes to allegations of widespread election irregularities, the margin of appreciation is at its broadest given the complexity of viewing the election procedures as a whole. Consequently, *only serious and widespread irregularities that domestic authorities subsequently failed to be investigated would constitute a violation of A3P1*. The Court in this examination is limited to ensuring that domestic law afforded minimum procedural guarantees and that decisions were not arbitrary.
- (25) Disinformation infiltrates every crevice of the election procedure. Its reach is beyond those many cases in the Court’s jurisprudence whereby an individual alleges specific instances of unfairness, to the point where the very foundations of the elections are shaken. In these circumstances, while domestic authorities have a wide margin of appreciation given the scale and complexity of the issue, they must nevertheless adopt post-election investigative systems to ensure the right to free and fair elections is not merely illusory.

- (26) Given the seriousness embodied in disinformation claims relative to their effect on the democratic process, at a minimum, domestic authorities must submit severe substantiated claims to an *independent examination by judicial or quasi-judicial bodies adequately armed to look into the effects of disinformation on elections and then recommend reform.*
- (27) The states should naturally remain free to design their elections systems as they see fit, however, *transparency* of what is going on should not be negotiable. Where domestic authorities ignore substantiated claims of widespread interference, the true effect on elections remains in unknown, which in turn severely degrades peoples' trust in the democratic process, thus rendering the right to free and fair elections illusory. Such flawed system moreover only invites further abuse because politicians who successfully benefited from such manipulation are also those who are the least likely to correct the flaws of the system. Post-election investigative procedures cut through this mist, allowing the public to shelve their doubt in democratic processes and gain reassurance that their vote remains to be a powerful influence in the outcome of the election notwithstanding the challenges brought by the digital age. It sheds light on what is being obscured by technology.

## CONCLUSIONS

The European Information Society Institute (EISI) suggests that the Court:

- *holds* that minimum pre-election transparency requirements for digital political ads on social media are a must to achieve fair and free elections in the digital world;
- *recognizes* that the principles applicable to broadcast media are transferable to the new digital context because the concerns are of the same nature;
- *recognizes* that only serious and widespread irregularities that domestic authorities subsequently fail to investigate should constitute a violation of A3P1;
- *holds* that independent examination by judicial or quasi-judicial bodies that are able to look into the effects of disinformation on elections and then recommend reform facilitate the public debate and, in the long-run, foster trust of the voters in the political process;