Online Disinformation, Informed Democracy, and Human Rights: Identifying and Applying a European Human Rights Perspective to the Regulation of Online Disinformation with a Focus on the Political and Electoral Context

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Plagiarism Declaration

I hereby certify that this material, which I now submit for assessment on the programme of study leading to the award of PhD in Law, is entirely my own work and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged within the text of my work.

Signed: **Date: __31st October 2023____**

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Abstract

The spread of online disinformation in elections has become a widely debated problem in Europe. In response to this problem, European Union (EU) institutions and several EU Member States have developed legislation with a view to establishing responsibilities for technological intermediaries to limit the spread of false and misleading communications. Adopting a human rights perspective, this thesis develops a novel human rights framework and applies this framework to examine the extent to which specific EU and EU Member State legislation to combat online disinformation is compatible with the right to freedom of expression and the right to free elections as provided for under the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (CFR). Limited academic scrutiny has been applied to how the regulation of online disinformation—including online disinformation which may not be illegal under EU or domestic European laws—could undermine the right to freedom of expression in Europe. However, there has been a dearth of in-depth academic inquiry on how the spread of online disinformation could undermine the right to free and fair elections under the European human rights legal framework.

To address this gap, this thesis adopts a doctrinal methodology—and is guided by a human rights perspective—to identify the applicable standards on how the right to freedom of expression must be balanced alongside the right to free elections in the regulation of online disinformation in Europe. As part of its analysis, this thesis focuses on the applicable human rights standards that should inform the regulation of online disinformation which is disseminated in political and electoral contexts. Providing a distillation of these standards, this thesis draws extensively from the jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). As will be demonstrated, the analysis conducted in this thesis has immediate policy relevance by providing and applying a timely analytical framework to examine how current EU and EU Member State legislation is compatible with the right to freedom of expression and the right to free elections as interpreted under the ECHR and CFR systems.

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List of key abbreviations

AVMSD	Audiovisual Media Services Directive
CFR	Charter of Fundamental Rights of the European Union
COE	Council of Europe
CJEU	Court of Justice of the European Union
DSA	Digital Services Act
DSC	Digital Services Co-ordinator
ECHR	European Convention on Human Rights
ECOMMHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
ERA	Electoral Reform Act
EU	European Union
MOA	Margin of Appreciation
MS	Member State
NGO	Non-governmental Organisation
P1-3	Article 3 Protocol 1 ECHR
OSMRA	Online Safety and Media Regulation Act
UDHR	Universal Declaration of Human Rights
VLOP	Very Large Online Platform

Introduction

(1) Context of thesis

As has become evident in high-profile European elections and referendums, new technologies can be used to spread false information and manipulate how voters form opinions on political topics.[1] Academic commentators generally acknowledge that the intentional spread of false information for political purposes is not a new phenomenon.[2] However, this issue is heightened by the novel capabilities for anti-democratic actors to distort voter choices through efficient online communication technologies.[3] Due to the potential for false information to be disseminated with speed and precision online, there has been particular scrutiny in Europe regarding the appropriate legal responsibilities for technological intermediaries to limit the spread of online disinformation to protect democratic elections. Relatedly, focus has been placed on the role of States and EU institutions in designing such legal responsibilities.[4]

There has been extensive academic inquiry regarding the potential harm that online disinformation poses to democratic elections.[5] However, there is limited scholarship on how online disinformation disseminated in political and electoral contexts implicates human rights. In existing literature, focus has been devoted to how measures to curb online disinformation—by States and technological intermediaries—could undermine the right to freedom of

[1] Ciara Greene and others, 'Misremembering Brexit: Partisan bias and individual predictors of false memories for fake news stories among Brexit voters,' (2021) 29(5) Memory 587-604; Max Bader, 'Disinformation in election,' (2018) 29(1-4) Security and Human Rights 24-35.

[2] Marta Pérez-Escolar and others, 'A systematic literature review of the phenomenon of disinformation and misinformation,' (2023) 11(2) Media and Communication 76-87; Rachel Kuo and Alice Marwick, 'Critical disinformation studies: History, power, and politics,' (2021) 2(4) Harvard Kennedy School Misinformation Review 1-11; Deen Freelon and Chris Wells, 'Disinformation as political communication,' (2020) 37(2) Political Communication 145-156.

[3] Tatiana Dourado, 'Who Posts Fake News? Authentic and Inauthentic Spreaders of Fabricated News on Facebook and Twitter (now X),' (2023) 1(20) Journalism Practice; Soroush Vosoughi and others, 'The spread of true and false news online,' (2018) 359 Science 1146–1151.

[4] Tambiama Madiega, 'Reform of the EU liability regime for online intermediaries Background on the forthcoming digital services act,' European Parliament (May 2020); Iva Nenadic, 'Unpacking the European approach to tackling challenges of disinformation and political manipulation' (2019) 8(4) Internet Policy Review.

[5] Greg Elmer and Sabrina Ward-Kimola, 'Crowdfunding (as) disinformation: 'Pitching' 5G and election fraud campaigns on GoFundMe,' (2023) 45(3) Media, Culture & Society 578-594.; Chris Marsden and others, 'Platform values and democratic elections: How can the law regulate digital disinformation?' (2020) 36 Computer law & security review.

expression.[6] Of direct relevance to this thesis, however, there is a dearth of in-depth inquiry regarding how the spread of online disinformation can undermine the right to free and fair elections as protected under European human rights law. Contemporary debates generally examine the role of technological intermediaries in protecting or undermining freedom of expression without thorough consideration of the right to free elections under the European human rights framework.

To address this gap, this thesis provides an understanding of how the problem of online disinformation in political and electoral contexts implicates human rights as provided for under the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.[7] In providing this knowledge, this thesis identifies a set of human rights standards that can inform how to balance the right to freedom of expression with the right to free elections in the regulation of online disinformation. Applying a novel interpretive framework based on these standards, this thesis then provides an in-depth analysis of the EU's Digital Services Act (DSA) and the EU's 2022 Code of Practice on Disinformation. This thesis further provides an analysis of Ireland's Online Safety and Media Regulation Act (OSMRA) and Electoral Reform Act (ERA).

(2) Key aims and research questions

The overarching aim of this thesis is to develop an in-depth understanding of the requirements under European human rights law that are applicable to the problem of online disinformation in political and electoral contexts. To achieve this overarching aim, this thesis provides novel insights regarding how the spread—and regulation of—online disinformation can implicate the right to freedom of expression and the right to free elections as provided for under European human rights law. As part of this aim, this thesis also provides insights regarding how these two rights under the European human rights framework can be reconciled in the online disinformation context.

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[6] Rebecca Helm and Hitoshi Nasu, 'Regulatory responses to 'fake news' and freedom of expression: Normative and empirical evaluation,' (2021) 21 Human Rights Law Review 302–328; Rachel Craufurd Smith, 'Fake news, French law and democratic legitimacy: Lessons for the United Kingdom?' (2019) 11 Journal of Media Law 52–81.

[7] This thesis acknowledges the problems that online disinformation can pose to democratic elections while also acknowledging the broad range of information and ideas that can affect how form opinions that affect voting behaviour. To account for this, this thesis uses the term 'political and electoral contexts.'

This thesis is guided by two overarching research questions (RQs):

> RQ 1: What are the applicable requirements under European human rights law which have bearing for the regulation of online disinformation in political and electoral contexts?
>
> RQ 2: To what extent do current EU and EU Member State legislative initiatives comply with applicable requirements under European human rights law which have bearing for the regulation of online disinformation in political and electoral contexts?

To address these two overarching research questions, this thesis poses a series of inter-related sub-questions. To assist in answering the first overarching question, this thesis first inquires how the European Court of Human Rights (ECtHR) reconciles the right to freedom of expression (Article 10 ECHR) and the right to free elections (Article 3 Protocol 1 ECHR) and the relevance of this in the online disinformation context. This thesis then considers whether Articles 11 and 39 CFR, as interpreted by the Court of Justice of the European Union (CJEU), provide additional insight into the complex question of how these two rights can be reconciled in the online disinformation context. To inform the second overarching question, this thesis poses a sub-question of whether the EU's Digital Services Act (DSA) is sufficiently protective of the right to freedom of expression and the right to free elections under the ECHR and the CFR systems. Examining Ireland as a national case study, this thesis further asks whether Ireland's recently adopted Online Safety and Media Regulation Act (OSMRA) and Electoral Reform Act (ERA) are sufficiently protective of the right to freedom of expression and the right to free elections under the ECHR and the CFR systems. As part of this in-depth and tailored legislative analysis, these sub-questions further consider how current EU and Irish legislative responses to online disinformation can be adapted to provide an improved protection of these rights.

Jurisdictional scope of thesis

A wide range of European and global legislation has been developed in response to online disinformation.[8] Many States in Europe are bound to protect the right to freedom of expression

[8] On this see Ronan Ó Fathaigh and others, 'The perils of legally defining disinformation,' (2021) 10(4) Internet policy review 2022-40.

and the right to free elections under various international human rights instruments.[9] The scope of the inquiry in this thesis is on identifying the standards applicable to EU institutions and EU Member States to protect the right to freedom of expression and the right to free elections in the regulation of online disinformation. Due to this tailored jurisdictional focus, it is necessary for this thesis to provide an understanding of the right to freedom of expression and the right to free elections—and the application of these rights in the online disinformation context—as provided for under the Charter of Fundamental Rights of the European Union (CFR) and the European Convention on Human Rights (ECHR). Thus, while the focus of this thesis is on how EU institutions and EU Member States must balance the right to freedom of expression and the right to free elections in the regulation of online disinformation, the analysis of this thesis also has relevance for Council of Europe (CoE) States which are not currently EU Member States.[10] Furthermore, due to the globally persuasive nature of the ECHR and CFR human rights systems, the analysis also provides lessons that have broader international significance.

(3) Methodology and structure of thesis

Having introduced the key aims and research questions which guide this thesis, this section briefly introduces the core methodology and structure which this thesis follows.

Methodology of thesis

The approach adopted in this thesis is informed by doctrinal research. Hutchinson describes the key feature of doctrinal legal research as 'a critical conceptual analysis of all relevant legislation and case law to reveal a statement of the law relevant to the matter under investigation.'[11] Gerstel and Melitz describe the doctrinal methodology as involving an analysis 'derived from authoritative sources, such as existing rules, principles, precedents, and scholarly publications.'[12] This thesis acknowledges that legal scholarship has become increasingly receptive to a combination of methodological approaches.[13] However, it also

[9] These will be briefly mentioned in Chapter One section 1.4.
[10] Abbreviated as 'CoE States' in this thesis.
[11] Terry Hutchinson, 'Vale Bunny Watson? Law Librarians, Law Libraries and Legal Research in the Post-Internet Era', (2014) 106(4) Law Library Journal.
[12] Robert van Gestel and Hans Wolfgang Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?' (2011) European University Institute Working Papers Law (2011)/05, accessed 3 September 2023.
[13] Terry Hutchinson, 'The doctrinal method: Incorporating interdisciplinary methods in reforming the law,' (2015) 8 Erasmus Law Review 130.

acknowledges the continued position of doctrinal research as the 'core legal research method.'[14]

This thesis adopts a doctrinal methodology to investigate the interrelated rights under the ECHR and CFR systems which are at stake in the online disinformation context. This not only involves an analysis of relevant ECHR and CFR provisions but also necessitates an in-depth exploration of how the ECtHR and the CJEU interpret such provisions. Identifying the relevant jurisprudence of the ECtHR and the CJEU, this thesis provides a distillation of the applicable standards to identify how the right to freedom of expression and the right to free elections can be balanced in the regulation of online disinformation in political and electoral contexts. Using these human rights standards as an interpretive framework, this thesis then provides an in-depth analysis of EU and Irish legislation and considers the extent to which this legislation is compatible with the ECHR and the CFR. Particularly where EU and Irish legislative provisions establish responsibilities for technological intermediaries to control the spread of false and misleading information in elections, it is necessary for this thesis to conduct a thorough analysis of relevant provisions under the EU's Digital Services Act (DSA) as well as Ireland's Online Safety and Media Regulation Act (OSMRA) and Electoral Reform Act (ERA). This analysis will consist of a detailed illustration of these regional and domestic laws and also a critical analysis regarding the conformity of these laws with international human rights standards.[15] To provide analytical foundations for this critical analysis, the adoption of a doctrinal approach is necessary in order to distil the relevant principles from ECtHR and CJEU case law and provide a normative framework which will inform analysis of EU and domestic legislation.

Structure of thesis

This thesis consists of six substantive chapters. Chapters One first provides a detailed overview of current academic literature surrounding the problems which online disinformation can pose for democracy. As part of this analysis, Chapter One identifies a dearth of in-depth academic literature regarding the problems which the spread of online disinformation may pose for human rights. Building from this, Chapters Two to Four identify the key standards under

[14] Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2011) 17(1) Deakin Law Review 85.
[15] Specifically, standards that can be gleaned from the existing and relevant body of case law that the ECtHR and the CJEU have developed.

European human rights law which are applicable for the regulation of online disinformation in political and electoral contexts. After providing a distillation of these key standards in Chapter Four, Chapters Five and Six use these standards as a framework to assess whether EU and Irish legislation is compatible with the ECHR and CFR.

More specifically, Chapter One first provides an overview of how online disinformation threatens democratic elections. Providing a comprehensive analysis of academic literature regarding the problems that online disinformation poses for democracy, this chapter then explains the contested role of technological intermediaries in controlling the spread of online disinformation in political and electoral contexts. Chapter One also introduces the key concepts which are relevant to this thesis.[16] This chapter further discusses the focus of the thesis on the right to freedom of expression and the right to free elections under the ECHR and the CFR systems. Chapter Two proceeds to examine the ECtHR's application of the right to freedom of expression under Article 10 ECHR. The focus of this chapter is on the ECtHR's interpretive approaches in Article 10 ECHR jurisprudence which have relevance for the regulation of online disinformation in political and electoral contexts. Building from this analysis, Chapter Three then investigates the ECtHR's application of the right to free elections under Article 3 of Protocol 1 ECHR. This chapter focuses on the ECtHR's key interpretive approaches when applying the right to free elections and identifies novel insights that can be applied in the online disinformation context. Identifying the important relationship between freedom of expression and free elections under the ECHR system, this chapter further illustrates the key standards which can be extracted from the ECtHR's approaches to Article 10 ECHR and Article 3 of Protocol 1 ECHR and which have bearing for the regulation of online disinformation in political and electoral contexts.

Chapter Four then considers the provisions of the CFR which have relevance for online disinformation. Examining the right to freedom of expression (Article 11 CFR) and the right to free elections (Article 38 CFR), this chapter analyses the CJEU's interpretive reasoning in jurisprudence which has specific relevance in the online disinformation context. Chapter Four then provides a distillation of the applicable standards from the jurisprudence of the ECtHR and the CJEU where both courts balance the right to freedom of expression alongside the right

[16] As part of this analysis, Chapter One also highlights various ambiguities that persist regarding some of the key concepts which this thesis examines.

to free and informed democratic elections.[17] Providing a visual distillation of these standards, a key purpose of Chapter Four is to develop a novel interpretive framework that this thesis then uses when applying a human rights perspective to its analysis of EU and Irish legislative responses to online disinformation. Chapter Five first investigates EU initiatives—namely the Digital Services Act (DSA) and the 2022 Code of Practice on Disinformation—which Union institutions have developed in response to the problem of online disinformation. Chapter Six then examines Ireland as a case study of an EU Member State that has recently adopted domestic legislation—namely the Online Safety and Media Regulation Act (OSMRA) and the Electoral Reform Act (ERA)—which establishes responsibilities for intermediaries to control the spread of online disinformation and harmful content in political and electoral contexts. Applying the interpretive framework which Chapter Four distils, the focus of Chapter Five and Chapter Six is to assess the extent to which EU and Irish legislative responses to online disinformation are compatible with the right to freedom of expression and the right to free elections under the ECHR and the CFR systemsI. As part of this analysis in Chapter Five and Chapter Six, this thesis considers the hypothetical application of EU and Irish legislation and considers whether this legislation requires adaptations to ensure compliance with applicable ECHR and CFR standards for online disinformation. Following on from the six substantive chapters of this thesis, a conclusory section then provides a brief summary of the key findings and overall contribution of this thesis to academic literature.

(4) Contribution of thesis

This thesis advances the current state of the art in several fields related to the above-mentioned overarching research questions.[18] The core contribution of this thesis is to develop a novel interpretive framework that can be used to assess whether legislation designed to regulate online disinformation in electoral and political contexts is compatible with human rights under the ECHR and CFR systems. To develop this novel framework, this thesis draws from the jurisprudence of the ECtHR and the CJEU and generates vital insights regarding how the right to freedom of expression and the right to free elections can be balanced in the specific context of the regulation of online disinformation in electoral and political settings. By proceeding to

[17] Although it must be acknowledged here that—owing to several factors which will be discussed in Chapter Two-Chapter Four—it is not always a straight-forward balancing exercise that these courts engage in when mediating tension between these two rights.

[18] For example, this thesis builds upon existing scholarship related to the problem of online disinformation which has been developed in the fields of human rights law and Information Technology (IT) law.

apply this interpretive framework, this thesis contributes knowledge by assessing the extent to which current EU and Irish legislation in the online disinformation field is compatible with the ECHR and CFR systems. As part of this core contribution, this thesis provides a focused legislative analysis of the EU's Digital Services Act (DSA) in addition to Ireland's Online Safety and Media Regulation Act (OSMRA) and Electoral Reform Act (ERA). As will also be demonstrated, the framework which this thesis develops has a broader application as a template to assess whether future EU and national laws to tackle online disinformation can remain rights compliant.

As part of its overarching contribution, this thesis addresses several critical gaps in current academic literature. First, this thesis provides novel insights regarding the applicable standards for the regulation of online disinformation that can be identified from the right to free elections under Article 3 Protocol 1 ECHR.[19] Second, this thesis provides knowledge regarding the relationship between the right to freedom of expression and the right to free elections as protected under the interrelated ECHR and the CFR systems. Third, this thesis provides specific insights regarding the thorny question of how the regulation of online content containing misleading—but not necessarily illegal—information in election contexts can be reconciled with the protection of the right to freedom of expression and the right to free elections under the ECHR and CFR systems.

[19] A critical focus will also be applied in Chapter Three regarding the ECtHR's existing clarity on whether CoE States have—and if so, to what extent—positive obligations to combat online disinformation to protect free and fair elections under Article 3 Protocol 1 ECHR.

Chapter 1: Understanding the Problem of Online Disinformation in Democracy

1.1 Introduction

This chapter outlines the key problem which this thesis examines by highlighting how the spread of online disinformation can harm democracy by misleading voters in elections. This chapter further considers how the problem of online disinformation can implicate human rights. As part of this, this chapter provides an overview of how the regulation of online disinformation by EU institutions and EU Member States—in addition to Council of Europe (CoE) States—involves a delicate balance between the right to freedom of expression and the right to free elections under the European Convention of Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (CFR) systems.[1]

This chapter proceeds as follows. Section 1.2 introduces the problem of 'online disinformation' and considers how this concept is defined for the purposes of this thesis.[2] This section also highlights how the spread of online disinformation can undermine democracy by misleading voters in elections. Section 1.3 then provides an overview of the role of technological intermediaries in mediating the free flow of information in democracy. This includes a brief discussion on the important—but uncertain—role of intermediaries in controlling the spread of online disinformation in political and electoral contexts. Section 1.4 then introduces how the problem of online disinformation can implicate human rights. This section sets foundations for further analysis in this thesis by outlining how the dissemination of online disinformation—and attempts to control the spread of online disinformation in political and electoral contexts—can generate tensions between the right to freedom of expression and the right to free elections under the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (CFR) systems.[3] As will be outlined in this section, the core focus of this thesis is to develop an understanding of human rights principles which can be identified from the ECHR and CFR systems and can be used to inform how these interrelated rights can be protected when tackling online disinformation in political and electoral settings.

[1] Referred to throughout this thesis as ECHR and CFR.
[2] While defining how this thesis uses the term 'online disinformation.'
[3] Hereinafter 'ECHR' and 'CFR.

1.2 Understanding the Problem of Online Disinformation for Democracy

This section introduces the problem of 'online disinformation' and the focus of the thesis on this problem. Section 1.2.1 first introduces how the concept of 'online disinformation' is generally defined and sets out how this term is used in this thesis. Section 1.2.2 then provides an overview of how the dissemination of online disinformation can undermine democratic values. The focus here is on the value of an informed populace in democracies and how the deliberate dissemination of online disinformation can potentially threaten this value. Building from this, section 1.2.3 then focuses on how online disinformation can be used to mislead voters in elections. This section notes specific examples which demonstrate the potential for online disinformation to disrupt democratic processes.

1.2.1 The Concept of Online Disinformation

'Disinformation' refers to the intentional dissemination of false or misleading information. The use of the term can be traced back to the mid-20th century where 'disinformation' was used to describe purposeful tactics by Soviet State actors to influence public opinion by disseminating misleading information.[4] Freelon and Wells highlight how academic references to 'disinformation' throughout the 20th century did not constitute a 'literature in the usual sense' because commentators who referenced the term did not 'reference each other or seek to build a broad program' of 'disinformation research.'[5] However, 20th century scholarly references to Soviet 'disinformation' generally discussed purposeful tactics to mislead during the Cold War.[6] This is captured by Romerstein's description of 'disinformation as a KGB weapon.'[7]

Commentators generally agree that 'disinformation' relates to the intentional dissemination of false or misleading information. Fallis describes 'disinformation' as 'inaccurate' information with a 'function of misleading.'[8] McKay and Tenove refer to false information which is spread

[4] Ladislav Bittman, 'Soviet Bloc 'Disinformation' and other 'Active Measures,'' in Pfaltzgraff and others (eds.), *Intelligence Policy and National Security* (Palgrave, 1981) 212-228.
[5] Dan Freelon and Chris Wells, 'Disinformation as political communication,' (2020) 37(2) Political Communication 145-156.
[6] Dennis Kux, 'Soviet measures and disinformation: Overview an assessment,' (1985) 15(4) Parameters 19-28; John Martin, 'Disinformation: An instrumentality in the propaganda arsenal,' (1985) 2(1) Political Communication 47–64; Richard Clogg, 'Disinformation in Chechnya: An anatomy of a deception,' (1997) 16(3) Central Asian Survey 425–430.
[7] Herbert Romerstein, 'Disinformation as a KGB Weapon in the Cold War,' (2001) 1(1) Journal of Intelligence History 54-67.
[8] Don Fallis, 'What is disinformation?' (2015) 63(3) Library trends 401-426.

to 'promote false understandings.'[9] Bradshaw and Howard describe the dissemination of 'disinformation' as the 'purposeful distribution' of falsehoods to 'influence or deceive.'[10] Similarly, Wardle and Derakshan note that:

> Disinformation is information that is false, and the person who is disseminating it knows it is false. It is a deliberate, intentional lie, and points to people being actively disinformed by malicious actors.[11]

As such descriptions suggest, 'disinformation' involves an intention to mislead. This intentionality distinguishes 'disinformation' from the related concept of 'misinformation.' Ireton and Posetti distinguish that 'misinformation is generally used to refer to misleading information created or disseminated without manipulative or malicious intent.'[12] Feltzer observes how the differences between 'disinformation' and 'misinformation' lie in 'having an agenda' to mislead.[13] Katsirea discerns 'disinformation' from 'misinformation' by noting that the difference between these two concepts sits 'on a scale according to the degree of the intent to deceive.'[14] The notable distinction here is that 'misinformation' involves misleading information but is generally not understood to carry intentions to mislead. Highlighting this, Fallis describes the sharing of 'misinformation' as a potentially 'honest mistake.'[15] Freelon and Wells decipher 'misinformation' as a 'conceptual relative' of 'disinformation' which lacks 'malicious intent.'[16]

While 'disinformation' generally refers to false information which is intentionally spread, it must be acknowledged here that concepts around 'disinformation' can be used fluidly.[17] For

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[9] Spencer McKay and Chris Tenove, 'Disinformation as a threat to deliberative democracy,' (2021) 74(3) Political Research Quarterly 703-717.
[10] Samantha Bradshaw and Philip Howard, 'The global organization of social media disinformation campaigns' (2018) 71(1.5) Journal of International Affairs 23-32.
[11] Claire Wardle and Hossein Derakshan, 'Thinking about 'information disorder': formats of misinformation, disinformation, and malinformation' in Cherilyn Ireton and Julie Posetti (eds), *Journalism, fake news & disinformation: handbook for journalism education and training* (Unesco Publishing, 2018) 43.
[12] Cherilyn Ireton and Julie Posetti, *Journalism, fake news & disinformation: handbook for journalism education and training* (Unesco Publishing, 2018) 7.
[13] James Fetzer, 'Disinformation: The use of false information' (2004) 14(2) Minds and machines 231-240.
[14] Irena Katsirea, 'Fake news: reconsidering the value of untruthful expression in the face of regulatory uncertainty,' (2018) 10(2) Journal of Media Law 159-188.
[15] Don Fallis, 'A Conceptual Analysis of Disinformation,' (University of Arizona, 2009) 1.
[16] Freelon and Wells, 'Disinformation as political communication.' (n 5).
[17] It must also be noted that 'disinformation' may be defined differently in European legislation and case law.

example, studies can refer to 'deliberate' attempts to spread 'misinformation.'[18] Relatedly, commentators may use the term 'fake news' when referring to the intentional spread of false information.[19] While the term 'fake news' can be interpreted as including purposefully fabricated information, this term is generally interpreted as also including satirical and factually exaggerated information which may be disseminated for a variety of purposes.[20] Accordingly, commentators caution against the use of the term 'fake news' when referring specifically to the concept of 'disinformation'. For example, McGonagle notes how the 'catchy' nature and 'apparent simplicity' of the term 'fake news' can mask the 'variety of meanings' that this term carries.[21] Venturini similarly cites an 'awful vagueness' of the term 'fake news' and urges against the use of this term.[22]

There is no singular definition for the term 'online disinformation.' Generally, however, the 'contemporary manifestation' of 'disinformation' is defined by links to online communication technologies.[23] As Kapatani et al. acknowledge, 'spreading false or inaccurate information is a phenomenon almost as old as human societies' but the internet enhances the 'scale, volume, and distribution speed of disinformation.'[24] Kalsnes describes how 'disinformation' has 'existed as long as humans have communicated' but posits that internet technologies enable 'new ways to produce' and distribute 'disinformation'.[25] As Wooley et al. similarly note, individuals who disseminate 'disinformation' can exploit online communications to assist with 'subtle attempts to manipulate public opinion.'[26] These acknowledgments of the internet's potential to exacerbate the dissemination of false information are often linked to studies

[18] Caio Machado and others, 'A Study of Misinformation in WhatsApp groups with a focus on the Brazilian Presidential Elections,' (World Wide Web Conference, May 2019); Alex Gelfert, 'Fake news: A definition,' (2018) 38(1) Informal logic 84-117.
[19] Kerim Peren Arin and others, 'Ability of detecting and willingness to share fake news,' (2023) 13(1) Scientific Reports 7298.
[20] Edson C. Tandoc Jr and others, 'Defining "Fake News"' (2018) 6(2) Digital Journalism 137-153; Hunt Allcott and Matthew Gentzkow, (2017) 'Social Media and Fake News in the 2016 Election,' (2017) 31(2) Journal of Economic Perspectives 211–236.
[21] Tarlach McGonagle, 'Fake news: False fears or Real concerns?' (2017) 35(4) Netherlands Quarterly of Human Rights 203–209.
[22] Tommaso Venturini, 'Confession of a Fake News Scholar', (International Communication Association Conference, Prague, 2018).
[23] Julie Posetti and Alice Matthews, 'A short guide to the history of 'fake news' and disinformation' (2018) 7 International Center for Journalists 2018-07.
[24] Eleni Kapantai and others, 'A systematic literature review on disinformation: Toward a unified taxonomical framework,' (2021) 23(5) New media & society 1301-1326.
[25] Bente Kalsnes, 'Fake news' (Oxford Research Encyclopedia of Communication, 2018).
[26] Philip Howard and Samuel Woolley, 'Political communication, computational propaganda, and autonomous agents (2016) 10 International Journal of Communication 1.

documenting how misleading information travels online with considerable speed and efficiency.[27]

Acknowledging the above-discussed literature, this thesis adopts the term 'online disinformation' to describe any false or misleading information which is intentionally disseminated through any form of online communication. Where this thesis refers to 'misinformation', this refers to false or misleading information which is disseminated online but not with the purpose of misleading. Importantly, this thesis also acknowledges that the term disinformation may not always be defined consistently across various legislative instruments and in academic debates. This justifies why, as subsequent chapters will demonstrate, it is necessary for this thesis to adopt a broad analysis of case law and legislation that relates to the restriction of false and misleading information online.

1.2.2 The Disruptive Potential of Online Disinformation for Democracy

Before focusing on how online disinformation can be spread in a manner that affects elections, it is necessary to first understand the importance for individuals to possess knowledge in democracies. It is widely regarded that functioning democracies must enable individuals to freely exchange information. This not only allows individuals to form opinions but also to identify the broader interests of society. Outlining the concept of the 'public sphere,' Habermas describes this as a realm where 'private people gathered together as a public and articulating the needs of society with the state.'[28] Hauser describes the 'public sphere' as a 'discursive space' which enables 'individuals and groups associate to discuss matters of mutual interest and, where possible, to reach a common judgment about them.'[29] Fraser similarly envisages the 'public sphere' as 'a theater in modern societies in which political participation is enacted through the medium of talk.'[30] Central to the idea of the public sphere is that functioning democracies must ensure that individuals can freely exchange information without interference. Referencing this, Dahlberg identifies 'autonomy from state and corporate'

[27] Craig Silverman, 'This Analysis Shows how Fake Election News Stories Outperformed Real News on Facebook." (BuzzFeed News, 16 November 2016); Soroush Vosoghi and others, 'The spread of true and false news online' (2018) 359 Science 1146-1151.
[28] Jürgen Habermas, 'The Public Sphere: An Encyclopedia Article,' (1964) 3 New German Critique 49-55.
[29] Gerard Hauser, *Vernacular voices: The rhetoric of publics and public spheres* (University of South Carolina Press, 2022) 61.
[30] Nancy Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy', (MIT Press, 1992)123.

interference as a pre-condition for a functioning 'public sphere.'[31] Garnham highlights how 'undistorted communication' enables opinion formation in a functioning 'public sphere.'[32] Habermas himself explicitly calls the public sphere a 'realm of our social and political life in which something approaching public opinion can be formed.'[33]

The free exchange of information in democracies enables the identification of the opinions and needs of the political populace.[34] As Laidlaw submits, democracy 'at its core' requires 'the rational and open exchange of opinions as the ideal way to reach understanding and agreement concerning common issues of concern.'[35] Neubauer considers that 'communication' between different groups of individuals is 'necessary for the identification and articulation of common preferences.'[36] Accordingly, it is generally regarded to be vital in democracies that individuals have access to reliable knowledge that can inform the development of such preferences.[37] Dahl posits that 'effective' democracies require 'informed participation' by individuals who must understand their 'interests' and the 'consequences' of political policies.[38] Kellner considers that a 'genuinely participatory democracy' requires individuals to be 'informed' and 'capable of argumentation and participation.'[39] As Aalberg et al. submit, knowledge not only enables individuals to make 'informed decisions' about political representation but also to ensure that political 'representatives uphold their oaths of office.'[40]

This thesis explores how the spread of online disinformation can undermine democracy by misleading the political populace. It must briefly be acknowledged that democracies may not always be capable of ensuring that every individual is fully informed about issues which affect

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[31] Lincoln Dahlberg, 'The Habermasian Public Sphere: A Specification of the Idealized Conditions of Democratic Communication,' Studies in Social and Political Theory,' (2004) 10(2) 2–18.
[32] Nicholas Garnham, 'Habermas and the public sphere' (2007) 3(2) Global Media and Communication 201-214.
[33] Habermas, 'The Public Sphere' (n 28) 49-55.
[34] Where this thesis refers to the term 'political populace,' this refers broadly to all individuals in democratic societies who form viewpoints and participate in the democratic process (particular focus is on elections).
[35] Emily Laidlaw, 'Internet gatekeepers, human rights and corporate social responsibilities' (Doctoral thesis, London School of Economics and Political Science 2012).
[36] Deane Neubauer, 'Some conditions of democracy' (1967) 61(4) American Political Science Review 1002-1009.
[37] For an overview on the online context see Michael Delli Carpini and Scott Keeter, 'The internet and an informed citizenry,' in David Anderson and Michael Cornfield (eds.), *The Civic Web: Online Politics and Democratic Values* (Rowmand and Littlefield, 2002) 129-153.
[38] Robert Dahl, 'A democratic dilemma: system effectiveness versus citizen participation,' (1994) 109(1) Political Science quarterly 23-34.
[39] Douglas Kellner, 'Habermas, the public sphere, and democracy,' in Diana Boros and James Glass (eds.) *Re-imagining Public Space* (Palgrave Macmillan, 2014) 19-43.
[40] Toril Aalberg and James Curran (eds.), *How media inform democracy: A comparative approach* (Routledge, 2012).

their interests.[41] It must also be acknowledged that—as critical feminist scholars have highlighted when critiquing the above-mentioned 'public sphere' concept—access to discursive spaces in democracies has long been dominated by a narrow range of interests.[42] Notwithstanding these acknowledgements, it must be recalled here that the problem of online disinformation is not defined merely by the absence of a consistent flow of accurate or reliable information. This problem involves the intentional —and technologically efficient—attempts to misinform how individuals form viewpoints on issues which affect them.[43] Actors who disseminate online disinformation often attempt to mislead individuals on topics which conjure emotion and societal fears.[44] This is significant in the context of online communications because individuals are more receptive to—and likely to re-share—information that elicits strong emotive responses.[45] While this thesis acknowledges that actors who disseminate online disinformation may seek to mislead individuals in various contexts, it specifically examines the disruptive potential of online disinformation on the political information environment and the manifestation of this in elections.

1.2.3 The Spread of Online Disinformation in Elections

The value of an informed political populace has critical significance during elections.[46] Hochschild argues that an 'informed electorate' is 'essential to good democratic practice.'[47] Individuals must 'know who and what they are choosing' when electing political representation and 'why.'[48] Delli and Carpini similarly argue that democracies are 'better off' if individuals

[41] See Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (Harper and Row, 3rd edn 1950); Larry Bartels, 'Uninformed votes: Information effects in presidential elections,' (1996) 40(1) American journal of political science 194-230.
[42] Joan B. Landres, *Women and the Public Sphere in the Age of the French Revolution* (Cornell University Press, 1988); Fraser, 'Rethinking the Public Sphere' (n 30).
[43] See distinctions between voters being 'uninformed' and actively 'wrong-headed' by James Kuklinski and others, 'Misinformation and the currency of democratic citizenship,' (2000) 62(3) The Journal of Politics 793.
[44] Shahin Nazar and Toine Pieters, 'Plandemic revisited: a product of planned disinformation amplifying the COVID-19 "infodemic",' (2021) Frontiers in Public Health 954; Stephen Lewandowski, 'Climate change disinformation and how to combat it,' (2021) 42 Annual Review of Public Health 1-21.
[45] Ellen Cotter, 'Influence of emotional content and perceived relevance on spread of urban legends: A pilot study,' (2008) 102(2) Psychological reports 623-629; Kim Peters and others, 'Talking about others: Emotionality and the dissemination of social information,' (2009) 39(2) European Journal of Social Psychology 207–222.
[46] Where this thesis refers to 'elections' or 'election contexts,' this refers to the period preceding an election and the period during an election (acknowledging that this may differ in various European States).
[47] Jennifer Hochschild, 'If Democracies Need Informed Voters, How Can They Thrive While Expanding Enfranchisement?' (2010) 92(2) Election Law Journal: Rules, Politics, and Policy 111-123.
[48] ibid.

are 'informed about the issues of the day.'[49] This enables individuals to understand 'the behavior of political leaders' and 'the rules under which they operate.'[50] As Aalberg and Curran further highlight, individuals require access to knowledge if they are to vote 'in their own self-interest' when choosing elected representatives.[51]

This is significant because online disinformation can be used to influence how individuals vote. A widely discussed example here is the 'Vote Leave' campaign's misleading claim that public funds would be diverted to the National Health Service (NHS) if the campaign were successful in the UK Brexit Referendum.[52] A related example is the United Kingdom Independence Party's (UKIP) dissemination of posters which misleadingly conflated the EU's migration policy to migration occurring outside of the EU territory.[53] Other pertinent examples of election-related controversies involve factually dubious claims which—in the absence of supporting evidence—allege that democratic elections have been held unfairly or otherwise compromised.[54] Such examples are seen in the context of prominent elected officials such as Donald Trump publicly claiming to have been unjustifiably prevented from democratic institutions from being declared the winner of a free and fair election.[55] In particular, the Vote Leave 'breaking point' poster exemplified how online disinformation can be disseminated in European elections to target vulnerable minorities. For example, Pierri et al. find that 'deceptive information circulating on Twitter' in the run up to 2019 Italian parliamentary elections largely focused on 'controversial and polarising' narratives on 'immigration' and 'nationalism.'[56] Larsson finds that far-right political actors were more successful in fostering

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[49] Michael Delli Carpini, 'In search of the informed citizen: What Americans know about politics and why it matters,' (2000) 4(1) The Communication Review 129-164.
[50] ibid.
[51] Aalberg and Curran (n 40).
[52] Rob Merrick, 'Brexit: Vote Leave chief who created £350m NHS claim on bus admits leaving EU could be 'an error' *The Independent* (London, 4 July 2017); John Cromby, 'The myths of Brexit,' (2019) 29(1) Journal of Community & Applied Social Psychology 56-66; Manuel Hensmans, and Koen van Bommel, 'Brexit, the NHS and the double-edged sword of populism: Contributor to agonistic democracy or vehicle of ressentiment?' (2020) 27(3) Organization 370-384.
[53] Heather Stewart and Rowena Mason, 'Nigel Farage's anti-migrant poster reported to police' *The Guardian* (London, 16 June 2016); Andrew Reid, 'Buses and breaking point: Freedom of expression and the 'Brexit' campaign,' (2019) 22 Ethical theory and moral practice 623-637.
[54] See generally, Nicolas Berlinski and others, (2023) 'The effects of unsubstantiated claims of voter fraud on confidence in elections,' Journal of Experimental Political Science, 10(1), 34-49; Also Gordon Pennycook and David Rand (2021) 'Examining false beliefs about voter fraud in the wake of the 2020 Presidential Election,' The Harvard Kennedy School Misinformation Review.
[55] See <US election 2020: Fact-checking Trump team's main fraud claims - BBC News>
[56] Francesco Pierri and others, 'Investigating Italian disinformation spreading on Twitter (now X) in the context of 2019 European elections,' (2020) 15(1) PloS one.

audience engagement than mainstream news outlets in the month preceding 2018 Swedish elections.[57] A related problem is that online disinformation can also be used to discourage minority groups from electoral participation.[58] This reflects what Asmolov calls the 'disconnective power of disinformation campaigns.'[59]

While examples of false and misleading claims surrounding the Brexit referendum and the 2020 U.S election have understandably attraced extensive debate, it remains important that such claims have initially originated from public speeches and offline election posters.[60] As referenced in the introduction to this thesis, the focus of this thesis is on the spread of false information online in the political and electoral context. This thesis does not make the claim that electoral falsehoods are new and also does not attempt to dismiss the potentially significant implications on the democratic process of false electoral communications offline.[61] It must be acknowledged, however, that new communication technologies can be used to spread online disinformation with greater speed and efficiency. For example, Silverman finds that false news stories were spread more widely than genuine news stories in the months preceding the 2016 US Presidential election.[62] Vosoughi et al. observe how false political news stories 'diffused faster than' accurate news stories on Twitter (now X) from 2006-2017.[63] Baptista et al. similarly find that misleading news stories were more likely to be shared online than genuine news stories in the months preceding the 2019 Portuguese parliamentary elections.[64]

As some commentators argue, exposure to online disinformation in election periods does not necessarily mean that individuals will be misled in a manner that affects their political and

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[57] Anders Larsson, 'Right-wingers on the rise online: Insights from the 2018 Swedish elections,' (2020) 22(12) New Media & Society 2108-2127.
[58] Rachel Kuo and Alice Marwick, 'Critical disinformation studies: History, power, and politics,' (2021) 2(4) Harvard Kennedy School Misinformation Review 1-11; Mutale Nkonde and others, 'Disinformation creep: ADOS and the strategic weaponization of breaking news,' (2021) Harvard Kennedy School Misinformation Review.
[59] Gregory Asmolov, 'The disconnective power of disinformation campaigns,' (2018) 71(1.5) Journal of International Affairs 69-76.
[60] Many of Trump's claims regarding the veracity of vote tallying in the 2020 Election have been made in public speeches, see David Canon and Owen Sherman, (2021) 'Debunking the "big lie": Election administration in the 2020 presidential election,' Presidential Studies Quarterly 51(3): 546-581; Also Stephen C Craig and Jason Gainous, (2024) 'To vote or not to vote? Fake news, voter fraud, and support for postponing the 2020 US presidential election,' Politics & Policy 52 (1) 33-50.
[61] See above discussion in section 1.2.1 on the historical invocation of the term 'disinformation.'
[62] Silverman, 'This analysis shows how fake election news stories outperformed real news on Facebook' (n 27).
[63] Soroush Vosoughi and others, 'The spread of true and false news online,' (2018) 359(6380) Science 1146-1151.
[64] João Pedro Baptista and Anabela Gradim, 'Online disinformation on Facebook: the spread of fake news during the Portuguese 2019 election,' (2020) 30(2) Journal of contemporary European studies 297-312.

electoral choice. For example, Vosoughi et al. submit that misleading information may travel faster in elections due to 'the degree of novelty' that confected falsehoods can elicit and that this does not always demonstrate effects on voters' choices.[65] Relatedly, Guess et al. find that misleading election information online may increase during election periods but that this only constitutes 'a small share of peoples' information diets.'[66] While these factors should be acknowledged, exposure to falsehoods can still be disruptive to elections even if such falsehoods do not necessarily sway voter choice. For example, polling data shows that European voters are increasingly concerned by the presence of online disinformation in election periods.[67] As Rowbottom identifies, perceptions of widespread disinformation during elections can undermine 'the tone' of pre-election debate and disengage voter turnout.[68] Relatedly, Ognyanova et al. find that widespread exposure to online falsehoods can foster a 'lower trust in media' and could undermine 'public trust in democratic institutions.'[69] This disruptive potential of online disinformation in elections must be acknowledged.

1.3 Controlling the Spread of Online Disinformation

As introduced, the spread of online disinformation can potentially undermine the basis of an informed political populace by misleading voters in elections. It is now necessary to consider current uncertainties regarding how the spread of online disinformation can be controlled while ensuring the free flow of information in democracies. Section 1.3.1 first highlights how the internet can be used to enhance—but also undermine—the ability of individuals to access information and political knowledge. Section 1.3.2 then builds from this overview by highlighting the role of intermediaries in controlling the spread of online disinformation.

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[65] Vosoughi and others, 'The spread of true and false news online,' (n 59).
[66] Andrew Guess and others, 'Exposure to untrustworthy websites in the 2016 US election,' (2020) 4(5) Nature human behaviour 472-480; Matteo Cinelli and others, 'The limited reach of fake news on Twitter (now X) during 2019 European elections,' (2020) 15(6) PloS one.
[67] European Commission, 'Fake news and disinformation online,' Publications Office of the European Union, 2018 <https://data.europa.eu/doi/10.2759/559993> accessed 23 July 2023.
[68] Jacob Rowbottom, 'Lies, manipulation and elections—controlling false campaign statements,' (2012) 32(3) Oxford Journal of Legal Studies 519.
[69] Katherine Ognyanova and others, 'Misinformation in action: Fake news exposure is linked to lower trust in media, higher trust in government when your side is in power,' (2020) 1(4) The Harvard Kennedy School (HKS) Misinformation Review 1.

1.3.1 The Uncertain Role of the Internet in Providing Access to Knowledge in Democracy

Commentators generally agree that the internet plays a vital role in contemporary democracies by enabling access to information.[70] Dahlgreen observes how the internet 'extends and pluralises' access to information.[71] Papacharissi highlights how internet technologies 'enable discussion between people on far sides of the globe.'[72] Hacker and Van Dijk identify how the internet facilitates access to information 'without the limits of time, space and other physical conditions.'[73] Significantly, the internet not only enables rapid access to information but also empowers individuals to express viewpoints. Östman describes how the internet can 'promote political participation' through its 'expressive, performative and collaborative features.'[74] As Edgerly et al. argue, the internet not only 'provides users with an unprecedented amount of political information at their fingertips' but also allows 'almost anyone to create and widely disseminate their own ideas.'[75] This reflects Balkin's description of the internet's potential to facilitate 'democratic culture.'[76]

The internet's 'democratic potential' has utmost significance for elections.[77] As Lilleker and Jackson observe, 'the internet first played a minor role in' political campaigning in the 1990s but 'has gradually increased in importance so that it is central to election campaign strategy.'[78] Bimber highlights how the 'sophisticated and intensive' penetration of social media drove the success of Barack Obama's Presidential campaigns in 2008 and 2012.[79] As Brandle et al. observe, the successful targeted election campaigning of the Vote Leave campaign in the 2016

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[70] The share of European Union (EU) households with internet access rose from 72% in 2011 to 92 % in 2021 <https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Digital_economy_and_society_statistics_-_households_and_individuals> accessed 23 July 2023.

[71] Peter Dahlgreen, 'The Internet, Public Spheres, and Political Communication: Dispersion and Deliberation,' (2005) 22(2) Political Communication 147-162.

[72] Zizi Papacharissi, 'The virtual sphere: The internet as a public sphere,' (2002) 4(1) New Media & Society 27.

[73] Kenneth L Hacker and Jan van Dijk, *Digital Democracy: Issues of Theory and Practice* (Sage Books, 2000).

[74] Johan Östman, 'Information, expression, participation: How involvement in user- generated content relates to democratic engagement among young people,' (2012) 14(6) New Media & Society 1004–1021.

[75] Stephanie Edgerly and others, 'YouTube as a public sphere: The Proposition 8 debate,' (Internet Research conference, Milwaukee, October 2009).

[76] Jack Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information society', (2004) 79(1) New York University Law Review 3.

[77] Emily Laidlaw, 'A framework for identifying Internet information gatekeepers,' (2010) 24(3) International Review of Law, Computers & Technology 263-276.

[78] Daniel Lilleker and Nigel Jackson, *Political campaigning, elections and the Internet: Comparing the US, UK, France and Germany* (Routledge, 2013).

[79] Bruce Bimber, 'Digital media in the Obama campaigns of 2008 and 2012: Adaptation to the personalized political communication environment,' (2014) 11(2) Journal of information technology & politics 130-150.

Brexit referendum 'demonstrated the importance of social media campaigning.'[80] Significant here is that the internet enables voters to access information which—in turn—can inform which candidates they vote for and why.[81]

While this thesis acknowledges that the internet has the potential to enhance the range and quality of information being exchanged in democracies, it also acknowledges that online communication technologies enable individuals to efficiently spread misleading information which is hostile to democratic values. For example, Lewis finds that 'alternative' online communities appear 'rebellious and fun' but subtly advance discourses that are hostile towards 'vulnerable and underrepresented populations.'[82] As Eveland Jr and Shah similarly find, politically extremist online communities often present misleading narratives information and couch these as information that 'the news won't show you.'[83] Such observations reflect the potential of the internet to incubate and reinforce misleading narratives that are hostile to democratic values. Commentators often examine this by focusing on how individuals can access online information in a manner that repels contradictory narratives. As Sunstein cautions, the internet enables like-minded individuals to selectively access political information which reinforces their existing beliefs but resists alternative viewpoints.[84] In turn, Sunstein argues that this can lead to 'group polarisation and cultural balkanization.'[85] Describing the concept of a 'filter bubble,' Pariser cautions that the internet empowers individuals to access political information that conforms to their beliefs while they simultaneously can refuse to engage with opposing viewpoints.[86] The extent to which these features of the internet affect how individuals vote is currently empirically uncertain.[87] However, the potential for the internet to enhance but also manipulate how individuals access political information is crucial. To further understand the tension between the internet's

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[80] Verena Brändle and others, 'Brexit as 'politics of division': Social media campaigning after the referendum,' (2022) 21(1-2) Social Movement Studies 234-253.
[81] Thomas Johnson and Barbara Kaye, 'Credibility of social network sites for political information among politically interested internet users,' (2014) 19(4) Journal of Computer-mediated communication 957-974.
[82] Becca Lewis, Alternative Influence (Data and Society, 2018) <https://datasociety.net/wp-content/uploads/2018/09/DS_Alternative_Influence.pdf> accessed 19 July 2023.
[83] William Eveland Jr. and Dhavan Shah, 'The Impact of Individual and Interpersonal Factors on Perceived News Media Bias,' (2003) 24(1) Political Psychology 101-117.
[84] Cass Sunstein, *Echo Chambers: Bush v Gore, Impeachment & Beyond* (Princeton University Press, 2001).
[85] Cass Sunstein, 'Republic.com,' (2001) Harvard Journal of Law and Technology 756.
[86] ibid.
[87] Mario Hai and others, 'Burst of the filter bubble? Effects of personalization on the diversity of Google News,' (2018) 6(3) Digital journalism 330-343; Eytan Bakshy and others, 'Exposure to ideologically diverse news and opinion on Facebook,' (2015) 348(6239) Science.

potential to strengthen and pollute the political information environment, it is necessary to focus on the important—but uncertain—role of intermediaries in enabling the free flow of information in democracies and controlling the spread of online disinformation.

1.3.2 Understanding the Role of Intermediaries in Controlling the Spread of Online Disinformation

As noted above, it is widely acknowledged that functioning democracies must ensure that individuals can freely exchange information and that the internet can play a vital role in assisting with this. However, the free flow of information in democracy can become polluted by the dissemination of online disinformation and this can potentially undermine the value of an informed political populace in elections. To understand the tension between these values, it is now necessary to consider the uncertain role of intermediaries in controlling the spread of online disinformation in democracies.

Where this thesis refers to 'intermediaries', it adopts the definition which the Council of Europe (CoE) provides for 'internet intermediaries.'[88] The CoE describes 'internet intermediaries' as:

> A wide, diverse and rapidly evolving range of service providers that facilitate interactions on the internet between natural and legal persons. Some connect users to the internet, enable processing of data and host web-based services, including for user-generated comments. Others gather information, assist searches, facilitate the sale of goods and services, or enable other commercial transactions.[89]

As this definition captures, the concept of 'internet intermediaries' refers to a potentially broad range of technological entities that facilitate online communications.[90] This is further reflected in how the OECD defines 'internet intermediaries' as entities that 'bring together or facilitate transactions between third parties on the internet.'[91] It must be acknowledged here that intermediaries can generally be distinguished by the specific types of services that they provide. For example, Reed distinguishes between 'internet access providers' (IAP) and 'internet

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[88] Council of Europe, 'Internet Intermediaries' <https://www.coe.int/en/web/freedom-expression/internet-intermediaries> accessed 20 July 2023; hereinafter 'CoE.'
[89] ibid.
[90] Michael O'Doherty, *Internet Law* (1st edn, Bloomsbury Professional 2020) [1.66].
[91] OECD, 'The Economic and Social Role of Internet Intermediaries' <https://www.oecd.org/digital/ieconomy/44949023.pdf> accessed 20 July 2023.

service providers (ISPs).[92] As Reed argues, IAPs provide 'fundamental communication services' while ISPs enable 'some additional service' enabling commercial transactions.[93] Li distinguishes that 'information intermediaries' facilitate the 'hosting' and 'access of information' while 'platforms' describe 'a subset of information intermediaries' that specifically focus on 'content' and 'relationships to users.'[94] Perset further differentiates between 'e-commerce intermediaries' such as Amazon and eBay and 'participative networked platforms' such as Facebook and Twitter (now X).[95]

It is widely acknowledged that intermediaries—particularly ISPs and social media platforms—play an indispensable role in democracy by enabling the free flow of information. Highlighting the role of intermediaries generally, Laidlaw submits that intermediaries can influence 'participation in democratic culture' by enabling or obstructing the 'flow' of information.[96] Focusing on the role of ISPs such as Google, Van Hoboken highlights how these intermediaries determine whether information online is 'visible and likely to be encountered.'[97] Focusing on the role of social media platforms such, Leerssen identifies how these intermediaries 'possess the technical means to remove information and suspend' individuals from expressing information.[98] This makes social media platforms 'uniquely positioned to delimit the topics and set the tone of public debate.[99]

Of crucial relevance to the inquiry of this thesis is the extent to which intermediaries use this 'discursive power' to control the spread of online disinformation in political and electoral settings.[100] It must be highlighted here that several powerful intermediaries have adopted policies—and make decisions to moderate content—which are expressly designed to limit the

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[92] Chris Reed, *Internet Law: Text and Materials* (Butterworths, 2000) 78.
[93] ibid.
[94] Tiffany Li, 'Beyond Intermediary Liability: The Future of Information Platforms,' (2018) Yale Law School Workshop Report 13 February 2018.
[95] Karine Perset, 'The Economic and Social Role of Internet Intermediaries' (2010) OECD Digital Economy Papers 171, accessed 18 July 2023.
[96] Laidlaw, 'Internet gatekeepers' (n 35).
[97] Joris Van Hoboken, 'Search engine freedom: on the implications of the right to freedom of expression for the legal governance of Web search engines,' (PhD thesis, University of Amsterdam 2012).
[98] Paddy Leerssen, 'Cut Out by The Middle-Man: The Free Speech Implications of Social Network Blocking and Banning in the EU,' (2015) 6 Journal of Intellectual Property, Information Technology and E-Commerce Law 99-119.
[99] ibid.
[100] Andreas Jungherr and others, 'Discursive power in contemporary media systems: A comparative framework,' (2019) 24(4) The International Journal of Press/Politics 404-425.

spread of online disinformation. For example, ISPs such as Google have existing policies to prevent individuals from encountering false information and to ensure that individuals access authoritative and relevant information.[101] Social media platforms such as Facebook have policies which enable internet users to report—and request removal of—accounts that spread false narratives.[102] Importantly, many powerful intermediaries have existing policies which are designed to specifically address—by adopting a range of measures to limit or correct—false information during election periods.[103] This demonstrates how intermediaries already play a crucial role in influencing the extent to which individuals access authoritative or false information online.

Importantly, however, the power of intermediaries is not necessarily used in a manner that corresponds to the goals of a functioning democracy. For example, there is evidence which indicates that the technological infrastructure of powerful intermediaries—specifically ISPs and social media platforms—enable individuals to rapidly disseminate misleading online narratives.[104] For example, this includes evidence that Facebook can be used in a manner that provides tools for individuals to purposefully disseminate misleading content during election periods.[105] Relatedly, Lauer argues that Facebook's commercial incentives can often encourage the platform to encourage users to access extremist political narratives.[106] As evidenced by events such as the Cambridge Analytica scandal, intermediaries such as Facebook can make economic gains through the subtle collection and sale of information which provides insights for how individuals are likely to vote in elections.[107] These observations are consistently

[101] Google, 'Misinformation Policies' <https://support.google.com/youtube/answer/10834785?hl=en> accessed 16 July 2023.
[102] Facebook, 'Report Fake Facebook Account Profiles,' <https://www.facebook.com/help/306643639690823> accessed 18 July 2023.
[103] Meta, 'Election integrity at Meta,' <https://www.facebook.com/business/m/election-integrity> accessed 18 July 2023; Youtube, 'An update on our approach to US election misinformation,' (YouTube Blog, 2 June 2023) accessed 18 July 2023; TikTok, 'Election Integrity' <https://www.tiktok.com/safety/en/election-integrity/> accessed 18 July 2023.
[104] Morgan Lundy, 'TikTok and COVID-19 Vaccine Misinformation: New Avenues for Misinformation Spread, Popular Infodemic Topics, and Dangerous Logical Fallacies,' (2023) 17 International Journal of Communication 24; Samantha Bradshaw, 'Disinformation optimised: Gaming search engine algorithms to amplify junk news,' (2019) 8(4) Internet policy review 1-24.
[105] Lorena Orón and others, 'Disinformation in Facebook Ads in the 2019 Spanish general election campaigns,' (2021) 9(1) Media and Communication 217-228; João Pedro Baptista and Anabela Gradim, 'Online disinformation on Facebook: the spread of fake news during the Portuguese 2019 election,' (2022) 30(2) Journal of contemporary European studies 297-312.
[106] David Lauer, 'Facebook's ethical failures are not accidental; they are part of the business model,' (2021) 1(4) AI Ethics 395-403.
[107] Jim Isaak and Hanna Mina, 'User data privacy: Facebook, Cambridge Analytica, and privacy protection,' (2018) 51(8) Computer 56-59.

associated with how powerful intermediaries—while possessing the potential to enhance democratic engagement—are often chiefly informed by commercial and not public values. As Helberger et al. posit, the 'commercial interests and corresponding strategic motives' of large intermediaries 'do not always align well with those of public institutions' in democracy.'[108]

Authors such as Marsden et al. posit that States must 'regulate the values' which underpin how intermediaries control the spread of online disinformation to ensure that 'platform values' align with the values of 'democratic elections.'[109] Highlighting alleged failures of social media companies to curtail the spread of disinformation during the Covid-19 pandemic, Donovan argues that intermediaries must be compelled to 'flatten the curve' of false and misleading information online.[110] Such calls are often linked to the general understanding that online disinformation may often not consist of content which is illegal.[111] Bennett notes that online disinformation is generally considered to consist of 'harmful-but-legal content.'[112] Katsirea similarly describes how online disinformation may often consist of 'untruthful but not illegal information.'[113]

The practical consequence here is that intermediaries may often have discretion to control the spread of online disinformation, but may be inclined to do so in a manner that aligns with their commercial and strategic objectives. An important concern here is that prioritising such objectives—if this leads to a laissez-faire approach regarding how intermediaries control the spread of false information—could foster the spread of information that misleads voters in elections. A related problem is that intermediaries—without being overseen by public authorities—can limit the free flow of information and ideas which democracies should enable access to. Noting this, Quintais et al. highlight how intermediary 'content moderation decisions' based on 'terms and conditions' have the potential to suppress 'important public

[108] Natalie Helberger and others, 'Governing online platforms: From contested to cooperative responsibility,' (2018) 34(1) The information society 1-14.
[109] Chris Marsden and others, 'Platform values and democratic elections: How can the law regulate digital disinformation?' (2020) 36 Computer law & security review.
[110] Joan Donovan, 'Social-media companies must flatten the curve of misinformation,' (2020) Nature.
[111] Acknowledging that debates generally refer to whether disinformation is illegal under national European laws, EU law, or US law.
[112] Owen Bennett, 'The promise of financial services regulatory theory to address disinformation in content recommender systems,' (2021) 10(2) Internet Policy Review 1-26.
[113] Katsirea, 'Fake news' (n 14).

interest speech.'[114] This contention is supported by documented instances wherein powerful social media companies have enforced their terms and conditions to remove access to online speech from dissident political activist groups and vulnerable communities.[115] Thus, a pivotal question relates to whether intermediaries can—and ought to—control the spread of online disinformation in political and electoral settings in a manner that does not lead to unjustified or excessive removal of democratic communications. This question becomes crucial when considering how the actions of technological intermediaries may often be defined and overseen by a combination of both public and private institutions. As authors such as Frosio and Geiger highlight, the lack of accountability of 'private ordering' of content removal from powerful technological platforms can become problematic where, for example, platforms suppress the communication of elected officials.[116] To assist in understanding the appropriate role of technological intermediaries in the context of political and electoral disinformation, the following section now proceeds to outline the importance of ensuring compatibility with international human rights standards when adopting measures to protect the value of an informed political populace.

1.4 Adopting a European Human Rights Perspective for Online Disinformation

Having introduced how the problem of online disinformation can lead to tensions between the free flow of information and the value of an informed political populace, this section now provides an overview of the spread of online disinformation in elections can implicate human rights.[117] Section 1.4.1 first considers how the spread of online disinformation could potentially undermine the right to free elections. Section 1.4.2 then considers how attempts to control the

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[114] Joao Pedro Quintais and others, 'Using terms and conditions to apply fundamental rights to content moderation,' (2022) German Law Journal, 1-31.

[115] Thomas Poell, 'Social Media Activism and State Censorship,' in Daniel Trottier and Christian Fuchs (eds.), *social media, politics and the state: protests, revolutions, riots, crime and policing in the age of Facebook, Twitter (now X) and YouTube* (Routledge, 2015) 189-206; Arne Hintz, 'Restricting digital sites of dissent: commercial social media and free expression,' (2016) 13(2) Critical Discourse Studies 325-340.

[116] See Giancarlo Frosio and Christophe Geiger (2023), 'Taking Fundamental Rights seriously in the Digital Services Act's Platform Liability Regime' European Law Journal 29(1-2), where the authors cite the example of Twitter's permanent suspension of former U.S President Donald Trump's account. See also the subsequent critical commentary from Ursula Von Der Leyen where Von Der Leyen states that 'no matter how right it may have been for Twitter to switch off Donald Trump's account five minutes after midnight, such serious interference with freedom of expression should be based on laws and not on company rules. It should be based on decisions of parliaments and politicians and not of Silicon Valley managers') <Speech by the President on inauguration of new US President (europa.eu)>

[117] This thesis does not attempt to consider all human rights that could potentially be affected by the problem of online disinformation. As noted below, the focus is on freedom of expression and free elections.

spread of online disinformation can potentially undermine the right to freedom of expression.[118] Acknowledging how a tension can arise between these rights in the online disinformation context, section 1.4.3 then identifies how the ECHR and the CFR can provide an analytical framework which can be used to inform how EU institutions and EU Member States—as well as CoE States—must balance these rights when attempting to control the spread of online disinformation in political and electoral contexts.[119]

1.4.1 Online Disinformation and the Right to Free Elections

The right to free elections is enshrined in numerous international human rights instruments. For example, Article 21 of the Universal Declaration of Human Rights (UDHR) states that 'everyone has the right to take part in the government of his country, directly or through freely chosen representatives.'[120] Article 25 of International Covenant for the International Covenant on Civil and Political Rights (ICCPR) states that 'every citizen' to 'take part in the conduct of public affairs, directly or through freely chosen representatives.'[121] Article 3 of Protocol 1 ECHR states that ECHR 'Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'[122] Chapter Three of this thesis provides a detailed analysis regarding the development of this right and its application in the online disinformation context. Providing a background to this analysis as part of this thesis, this section's purpose is to consider generally how online disinformation could affect this right.

Several authors argue that the spread of online disinformation could potentially undermine the right to free elections by disrupting the integrity of the election process as a whole. For example, Rodriquez submits that 'disinformation has the potential to sway the outcome of an election and therefore discredits the idea of free and fair elections.'[123] Dahlgreen describes online 'disinformation campaigns' as a method of 'cyber-enabled interference' with 'free and

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[118] This analysis acknowledges the existence of these rights under a range of international human rights instruments, before considering the protection of these rights under the ECHR and CFR in section 1.4.3.
[119] Focusing on the right to freedom of expression and the right to free elections.
[120] Art 21, UDHR.
[121] Art 25, ICCPR.
[122] Art 3 Protocol 1, ECHR.
[123] Manuel Rodriguez, 'Disinformation operations aimed at (democratic) elections in the context of public international law: The conduct of the internet research agency during the 2016 US presidential election,' (2019) 47(3) International Journal of Legal Information 149-197.

fair democratic processes.'[124] Adopting a similar view, Colomina states that online disinformation undermines the right to 'participate in public affairs and vote in elections.'[125] There is also an expanding inquiry regarding how the spread of online disinformation undermines the right to free elections by interfering with how voters formulate political viewpoints. For example, Mastrioianni submits that 'access to correct information is a pre-condition for an informed and genuine exercise of the right to vote.'[126] Craufurd Smith argues that 'the unchecked transmission of disinformation undermines the ability of the people to form opinions and to act on them at the ballot box.'[127] Adopting a similar focus, Nunez posits that the spread of online disinformation can undermine 'free and fair electoral processes' by interfering with 'an individual's right to 'receive and impart ideas.'[128] Rowbottom similarly submits that the purposeful spread of falsehoods undermines free elections by manipulating 'voters to make choices based on false information' and that this becomes particularly undemocratic if 'the false statement leads to a different candidate being elected.'[129] Simultaneously, however, Rowbottom cautions that it can become difficult to 'separate the cut and thrust of political debate' from 'tactics' that actively mislead how citizens engage with the electoral process.[130]

While these arguments highlight general problems that online disinformation could cause for free elections, there remains a dearth of evidenced-based inquiry regarding the substantive steps that European States must take to prevent the spread of disinformation from undermining the right to free elections.. For example, Brkan considers that the dissemination of disinformation through 'data-driven political campaigns' could potentially undermine free elections.[131] However, Brkan notes that disinformation could undermine free elections as a 'political value' while acknowledging that 'it is not entirely clear whether' the targeted spread

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[124] Hans Dahlgren and others, 'Tackling disinformation and strengthening election integrity to support democracy,' (The State of the Union Conference, Florence, 2019).
[125] Carme Colomina and others, 'The impact of disinformation on democratic processes and human rights in the world,' (European Parliament, 2021).
[126] Roberto Mastroianni, 'Fake news, free speech and democracy: A (bad) lesson from Italy,' (2019) 25 Southwestern Journal of International Law 42.
[127] Rachel Craufurd Smith, 'Fake news, French Law and democratic legitimacy: lessons for the United Kingdom?' (2019) 11(1) Journal of Media Law 11.1 52-81.
[128] Fernando Nuñez, 'Disinformation legislation and freedom of expression,' (2019) 10 University of California Irvine Law Review Rev 783.
[129] Rowbottom, 'Lies, manipulation and elections,' (n 64).
[130] ibid.
[131] Maya Brkan, 'EU fundamental rights and democracy implications of data-driven political campaigns,' (2020) Maastricht Journal of European and Comparative Law 27(6), 774-790.

of disinformation 'would necessarily endanger' free elections a 'fundamental right.'[132] Nenadic highlights current ambiguities regarding the appropriate role of States to 'provide correct information' to voters to protect the 'conditions' of free elections.[133] As Rozgonyi further argues, online disinformation 'potentially undermines the exercise of the right to free elections' but 'more scrutiny' is required to clarify how the 'accountability of internet intermediaries' can be 'enhanced' to prevent this.[134]This thesis aims to address the current analytical gap regarding the extent to which the spread of online disinformation may implicate the right to free elections under European human rights law. In addressing this gap, this thesis develops an understanding of the relevant standards which can be used to ensure that EU institutions and EU Member States—as well as CoE States—address this problem in a manner that is protective of the right to free elections.

1.4.2 Online Disinformation and the Right to Freedom of Expression

As this thesis examines, a tension can arise between the right to free elections and the right of individuals to freely access information and express their political opinions. The right to freedom of expression is protected under various international human rights instruments. Article 19 ICCPR states 'everyone' has the right to freedom of expression and that this right includes the 'freedom to seek, receive and impart information and ideas of all kinds' through 'any media.'[135] Article 19 UDHR states that 'everyone' has the 'freedom to hold opinions without interference' and 'seek, receive, and impart information and ideas through any media and regardless of frontiers.'[136] Article 10 ECHR similarly states that the right to freedom of expression includes a right for 'everyone' to have the 'freedom to hold opinions and to receive and impart information and ideas.'[137]

It could be argued that online disinformation undermines the right to freedom of expression by distorting how individuals formulate ideas in the political information environment. Tenove considers that online disinformation interferes with how individuals deliberate ideas by

[132] ibid.
[133] Iva Nenadić, 'Unpacking the "European approach" to tackling challenges of disinformation and political manipulation,' (2019) 8(4) Internet Policy Review 1-22.
[134] Krisztina Rozgonyi, 'Disinformation online: potential legal and regulatory ramifications to the right to free elections–policy position paper,' (Interact Conference, Cardiff 2020).
[135] Art 19, ICCPR.
[136] Art 19, UDHR.
[137] Art 10, ECHR.

'increasing the quantity of false claims in circulation' and 'decreasing people's interest and opportunity to engage in public discussions.'[138] Helm and Nasu highlight how the spread of false information has the 'potential to distort public opinions.'[139] Expressing a similar view, Pentney argues that individuals who 'lie about matters of public importance' can 'impair the quality of public debate' in democracies.[140]

Importantly, however, it is generally understood that States could undermine the right to freedom of expression by attempting to limit the spread of online disinformation. This is often associated with concerns regarding how the concept of disinformation can be difficult to legally—and consistently—define. To briefly introduce this, it is necessary to acknowledge that several EU Member States already have laws which these States could enforce to limit the dissemination of online disinformation in the political and electoral context. For example, Slovakia's criminal code prohibits the dissemination of false information that 'deliberately creates the danger of serious concerns among the population of a certain location.'[141] France introduced a law in 2017 which specifically prohibits the 'manipulation of information' in elections.[142] Poland's Local Elections Act prohibits the dissemination of 'untrue information' in election periods.[143] While such laws appear to be designed to limit false information that could disrupt society, none reference the term me disinformation. This reflects O'Fathaigh et al.'s finding that there is no 'clear' or 'uniform' definition of disinformation in national European laws that could be used to limit the dissemination of misleading information in election periods.[144] The UN Special Rapporteur on freedom of expression has also described disinformation as an 'extraordinarily elusive concept to define in law.'[145]

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[138] Chris Tenove, 'Protecting democracy from disinformation: Normative threats and policy responses,' (2020) 25(3) The International Journal of Press/Politics 517-537.
[139] Rebecca Helm and Hitoshi Nasu, 'Regulatory responses to 'fake news' and freedom of expression: normative and empirical evaluation,' (2021) 21(2) Human Rights Law Review 302-328.
[140] Katie Pentney, 'Tinker, tailor, Twitter (now X), lie: Government disinformation and freedom of expression in a post-truth era,' (2022) 22(2) Human Rights Law Review 2.
[141] Slovak Criminal Code s 361.
[142] See Proposition de loi relative à la lutte contre la manipulation de l'information <https://www.assemblee-nationale.fr/dyn/15/textes/l15t0190_texte-adopte-provisoire.pdf> accessed 21 July 2023.
[143] Local Elections Act, s 72.
[144] Ronan Ó Fathaigh and others, 'The perils of legally defining disinformation,' (2021) 10(4) Internet policy review 2022-40.
[145] UN Human Rights Commissioner, 'Mandate of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression,' (2018) 1/2018.

An overarching concern here is that States may often have 'excessive discretion to determine what is disinformation.'[146] This—in turn—could enable States to undermine the right to freedom of expression by arbitrarily restricting the free flow of information in democratic societies. Highlighting this, McGonagle cautions that States can develop laws to curb the spread of misleading information but use such laws to 'to stifle independent and critical media, thereby creating a chilling effect on freedom of expression and public debate.'[147] Katsirea similarly argues that 'regulatory interventions seeking to curb the flow' of false information require 'careful consideration' and must not provide State actors with ill-defined powers to become 'the arbiters of truth.'[148] Such observations are linked to cautionary arguments—consistently advanced by civil society stakeholders—that authoritarian political leaders often develop laws which appear designed to limit the spread of disinformation but are used to stifle independent media and political dissidents.[149]

A related problem is that intermediaries can potentially also undermine the right to freedom of expression by attempting to limit the spread of online disinformation in political and electoral environments. Pielemeier highlights how intermediaries generally 'face serious challenges disaggregating harmful disinformation' from other forms of communication including 'satire and irony' when moderating content.[150] As Bontridder and Poullet observe, intermediaries often employ automated technologies to detect 'all false, inaccurate or misleading information with no distinction related to the intent of the sharer.'[151] This raises uncertainty regarding how intermediaries—even if effective in limiting the spread of online disinformation—could seriously affect freedom of expression and information.[152] This uncertainty can be exacerbated by how online disinformation may often consist of 'untruthful but not illegal content.'[153] As Kuczerawy posits, it is 'not a trivial task' for intermediaries to identify the legality of content but it can be even more complicated for intermediaries to assess the 'accuracy or relevance' of

[146] ibid.
[147] McGonagle, 'Fake news: False fears or Real concerns?' (n 21).
[148] Irini Katsirea, 'Fake news: reconsidering the value of untruthful expression in the face of regulatory uncertainty,' (2018) 10(2) Journal of Media Law 159-188.
[149] See for an overview on this Csaba Gyory, 'Fighting Fake News or Fighting Inconvenient Truths? On the Amended Hungarian Crime of Scaremongering,' (Vergassungsblog, 11 April 2021) accessed 20 July 2023.
[150] Jason Pielemeier, 'Disentangling disinformation: what makes regulating disinformation so difficult?' (2020) Utah Law Review 917.
[151] Noémi Bontridder and Yves Poullet, 'The role of artificial intelligence in disinformation,' (2021) 3 Data & Policy 32.
[152] ibid.
[153] Katsirea, 'Fake news,' (n 144).

information.'[154] Thus, attempts by intermediaries to reduce the spread of online disinformation in elections risk 'becoming arbitrary in the absence of specific criteria' regarding how the right to freedom of expression must be protected.[155] There is potential for both States and online intermediaries to affect the right to freedom of expression as part of attempts to control the spread of online disinformation. However, the failure of these stakeholders to limit the spread of online disinformation can potentially implicate the right to free elections. As this thesis will explore, this is an important tension which arises when considering how the delicate balance between protecting human rights and limiting the dissemination of online disinformation in elections.

1.4.3 The Focus on the ECHR and the CFR in the Online Disinformation Context

As noted, there are growing observations regarding how the spread of online disinformation can potentially undermine the right to free elections. However, it is also generally understood that attempts to control the spread of online disinformation—including through the regulation of technological intermediaries—can potentially undermine the right to freedom of expression. This reflects a general understanding of how attempts to regulate the spread of online disinformation in elections can bring about tension between these rights. Examining the tension between these rights, this thesis is primarily concerned with identifying the applicable standards that can inform how EU institutions and EU Member States can address the spread of online disinformation—including through the regulation of intermediaries—while protecting the right to freedom of expression and the right to free elections. This necessitates a focus on both the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (CFR) systems. Due to its particular focus on the ECHR system, the analysis in this thesis also has a vital application for CoE States that are not EU Member States. The justification for focusing on the ECHR and the CFR systems must now briefly be considered.

1.4.3.1 The ECHR

[154] Aleksandra Kuczerawy, 'Fighting online disinformation: did the EU Code of Practice forget about freedom of expression?' (2019) 6 Disinformation and Digital Media as a Challenge for Democracy" European Integration and Democracy Series.
[155] ibid.

The ECHR is widely regarded as one of the most effective systems for the protection of human rights in Europe. All forty-six CoE States are Contracting Parties to the ECHR and new CoE States are expected to ratify the Convention at the earliest opportunity upon joining.[156] Article 1 ECHR states that Contracting Parties 'shall secure to everyone within their jurisdiction the rights and freedoms' under ECHR provisions.[157] While this undertaking to 'secure' rights does not legally require Contracting Parties to incorporate ECHR provisions into their national legal system, all Contracting Parties have done so.[158] This reflects Keller and Sweet's observation that 'national systems are increasingly porous to the influence of the ECHR' and 'no State can fully insulate itself from the regime's reach.'[159] Kilkelly similarly describes the Convention as 'the most successful system for the enforcement of human rights in the world.'[160]

Significantly for this thesis, the ECHR protects the right to freedom of expression and the right to free elections. Article 10 ECHR states that 'everyone has the right to freedom of expression.'[161] This provision further states that 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.'[162] Article 3 of Protocol 1 ECHR states that Contracting Parties 'undertake to hold free elections at reasonable intervals by secret ballot.'[163] Article 3 of Protocol 1 ECHR also provides that elections must occur 'under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'[164] When examining the ECHR provisions that have relevance to the problem of online disinformation in elections, this thesis will focus on the relevant standards regarding Article 10 ECHR and Article 3 of Protocol 1 ECHR. To identify these standards in the online disinformation context, this thesis will focus on the case law of the European Court of Human Rights (ECtHR).[165] As Costa describes, the ECHR provides a 'skeleton that supports and protects the democratic state' but the European Court of Human Rights (ECtHR) is the interpretive authority which 'has put

[156] See, 'Honouring of commitments entered into by member states when joining the Council of Europe,' 1031 (1994).
[157] Art 1, ECHR.
[158] Hellen Keller and Stone Sweet, 'A Europe of Rights,' in (eds.) Robert Blackburn and Jorg Polakiewicz (eds.), *Fundamental Rights in Europe* (Oxford, 2001) 683.
[159] Helen Keller and Stone Sweet, *Assessing the impact of the ECHR on national legal systems* (Oxford University Press, 2018) 677-712.
[160] Ursula Kilkelly, (ed.), *The Child and the European Convention on Human Rights* (1st edn, Routledge 1999).
[161] Art 10 ECHR.
[162] ibid.
[163] Art 3 Protocol 1, ECHR.
[164] ibid.
[165] Hereinafter 'ECtHR.'

flesh on these bones.'[166] Thus, to understand the tension between these ECHR rights in the online disinformation context, this thesis must examine case law where the ECtHR applies and balances these rights.[167]

As is also important for the purposes of this thesis, the ECHR is designed to identify and protect European democratic values. As Zand observes, the 'heinous atrocities' inspired by Nazism and Communism led the ECHR drafters to devote 'a prominent role to promotion of pluralism and democracy' by 'incorporating the idea of democracy as a cornerstone to protect the right of the individual.'[168] As Harris et al. highlight, the influence of the Convention 'increased greatly following the fall of the Berlin wall in 1989 and the disintegration of the Socialist Federal Republic in the early 1990s.'[169] For example, the number of Contracting Parties expanded from twenty-two in 1989 to forty-seven in 2008.[170] As Buyse and Hamilton argue, this eastward expansion demonstrates how the Convention has been a 'standard-setting text for transitions to peace and democracy' in Europe.[171]

A further justification for the focus of this thesis on the ECHR system is that the ECHR provides a framework for understanding the institutional duties and responsibilities for States to protect the right to freedom of expression and the right to free elections in the political and electoral context. As noted above, existing academic literature often focuses on the applicable duties for States to refrain from interference with political and civil rights such as the right to freedom of expression. Importantly, however, the ECHR is not merely limited to preventing interference with individual rights but also seeks to encourage proactivity from States in ensuring respect for human rights. This is evident in the above-referenced language of Article 1 ECHR which expressly states that ECHR Contracting Parties 'shall secure to everyone in their jurisdiction the right and freedoms defined in' the Convention.[172] As this thesis will examine in Chapter Two and Chapter Three, the ECtHR may consider the of 'positive

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[166] Jean-Paul Costa, 'The links between democracy and human rights under the case-law of the European Court of Human Rights,' (Helsinki, 5 June 2008).
[167] Hereinafter ECtHR.
[168] Joseph Zand, 'The Concept of Democracy and the European Convention of Human Rights,' (2017) 5(2) University of Baltimore Journal of international Law 15.
[169] David Harris and others, *Law of the European convention on human rights*, (Oxford University Press, 2014).
[170] ibid 4.
[171] Antoine Buyse and Michael Hamilton, (eds.) *Transitional jurisprudence and the ECHR: justice, politics and rights* (Cambridge University Press, 2011).
[172] Article 1, ECHR.

obligations' for States to protect ECHR rights.[173] Dickson decribes the concept of 'positive obligations' as the duties under the ECHR whereby States must 'take direct action to protect' rights rather than obligations whereby States must merely 'refrain from interfering with' the rights of individuals.[174]

While positive obligations become important in the context of Article 10 and Article 3 Protocol 1 ECHR, it must be acknowledged here that a singular definition of this concept remains elusive in ECtHR jurisprudence. As Stoyanova highlights, 'the ECtHR 'has not proposed a general analytical framework for reviewing' positive obligations which arise under ECHR provisions and has 'explicitly refused' to develop a general definition of positive obligations that flow from Convention provisions.175 Further referencing the ECtHR's lack of clarification on the concept and scope of 'positive obligations', authors such as O'Connell point to a need for clarification of this in the specific context of ECHR provisions which are designed to promote 'political equality.'176 Acknoweding this ambiguity, this thesis will place specific focus in Chapter Two and Three on the existing language and reasoning of the ECtHR which is then used to distil minimum obligations for States to protect democratic elections from being undermined by the dissemination of false and misleading communications. This analysis will further inform assessments in this thesis regarding the appropriate role of technological intermediaries in this area.

1.4.3.2 The CFR

In addition to examining the ECHR, this thesis is concerned with the applicable human rights standards for online disinformation that can be identified under the CFR framework. The CFR was proclaimed in 2000 and was designed to give 'visibility' to fundamental rights that EU Member States and institutions must protect.[177] The CFR creates additional obligations for

[173] This will be examined in Chapter Two and Chapter Three.
[174] See Brice Dickson, 'Positive Obligations and the European Court of Human Rights,' (2010) Northern Ireland Legal Quarterly 61(3).
[175] See Vladislava Stoyana, 'Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights,' (2018) Human Rights Law Review 18, 309-346; See where the ECtHR explicitly stated this in *Platform Arzte fur das Leben v Austria* Application No 10126/82, Merits and Just Satisfation, 21 June 1988 at para 32 where the Court refused to infer a 'general theory of the positive obligations which may flow from the Convention.'
[176] Rory O'Connell, 'Realising Political Equality: The European Court of Human Rights and Positve Obligations in a Democracy,' (2010) Northern Ireland Legal Quarterly, 61(3).
[177] Agreement of Cologne European Council of June 1999, COM (2000) 559 7.

certain CoE States—who are also EU Member States—to protect fundamental rights.[178] Crucially, the CFR also provides the basis for the obligations for EU institutions to protect fundamental rights. The CFR can be used not only to guide how EU institutions must interpret and protect fundamental rights but also to set aside EU legislation which fails to ensure compatibility with fundamental rights. Highlighting this, Peers et al. note that the CFR can serve as 'an anchor' to ensure that 'all action undertaken' by EU institutions 'remains grounded in the values on which the Union is founded.[179]

The CFR protects the right to freedom of expression and the right to free elections. Article 11 CFR states that 'everyone has the right to freedom of expression' and that '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.'[180] Article 39 CFR—which protects the right to free elections—states that 'every citizen of the Union has the right to vote and to stand as a candidate at elections' in European or Member State elections.'[181]

Commentators often highlight that actions taken by EU Member States and institutions must ensure compatibility with the right to freedom of expression as provided for under Article 10 ECHR and Article 11 CFR. For example, Leiser highlights that attempts to regulate the spread of online disinformation at the national European level must comply with 'Convention and Charter rights to respect free expression.'[182] De Cock Buning notes that EU attempts to regulate disinformation must respect the right to freedom of expression under the CFR and the Convention which 'affirm Europe's particular constitutional commitment to freedom of expression and the right to receive and impart information.'[183] Notably, however, there is limited in-depth academic inquiry regarding how the right to free elections under Article 39 CFR may apply in the online disinformation context.

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[178] As Chapter Four will explain, this is the case only where EU Member States are implementing EU law.
[179] Steve Peers and others, (eds.) *The EU Charter of fundamental rights: a commentary* (Bloomsbury Publishing, 2021).
[180] Art 11, CFR.
[181] Art 39, CFR.
[182] Mark Leiser, 'Regulating Fake News,' (Bileta Conference, Leicester, 2020).
[183] European Parliament, 'A multi-dimensional approach to disinformation: Report of the independent High-level Group on fake news and online disinformation,' (2021).

This thesis acknowledges the ECHR and the CFR—particularly Article 10 ECHR, Article 3 Protocol 1 ECHR, Article 11 CFR, Article 39 CFR—as providing the necessary European human rights framework which can provide insights on how EU institutions and EU Member States can balance the right to freedom of expression with the right to free elections when regulating the spread of online disinformation in election contexts. By focusing on the ECHR and CFR systems, the analysis of this thesis also has relevance for CoE States which are not currently EU Member States.

Crucially from the specific analysis that this thesis will undertake, the ECHR and the CFR provide urgently needed guidance regarding how the actions taken by technological intermediaries to control the spread of online disinformation in elections can ensure compatability with international human rights standards.[184] This is particularly vital when considering how—as this thesis will examine—the true extent of the obligations for private platforms to ensure compliance with international human rights standards is often uncertain.[185] In examining the standards from the ECHR and the CFR that EU Member States must follow to ensure compatibility with human rights, this thesis primarily focuses on the 'vertical' relationship between States and individuals.[186] As this thesis will also examine, however, many new legislative provisions—developed by EU institutions and Member States such as Ireland—will involve an indirect 'horizontal' application of international human rights law imposed on online platforms.[187]

1.5 Conclusions

This chapter provided an overview of the problem of online disinformation and introduced key concepts that are used in this thesis. To contextualise how this thesis examines the problem of online disinformation, this chapter discussed the value of an informed political populace while

[184] With specific reference to standards that can be observed from ECtHR and CJEU case law.
[185] Chapter Five and Chapter Six will analyse this in-depth.
[186] Chapter Two and Chapter Three will set out the obligations for CoE States to protect the rights of individuals under the ECHR. Chapter Four will set out the obligations for EU Member States and EU institutions to protect the rights of individuals under the CFR. This vertical relationship will also be examined when assessing the design and enforcement of EU secondary legislation in Chapter Five. Also examined will be Ireland's obligations to protect the rights (as interpreted under the ECHR and the CFR) of individuals through the design and enforcement of domestic legislation in Chapter Six.
[187] This will be examined in Chapter Five when examining, in particular, provisions of the Digital Services Act (namely, Article 14, Article 34, and Article 35).

illustrating how online disinformation can undermine this value. As part of this discussion, this chapter set the foundations for the further analysis in this thesis by outlining how the spread of online disinformation during elections is considered to be particularly harmful to democracy.

This chapter acknowledged that the spread of online disinformation is not a new phenomenon. The purposeful spread of falsehoods—including in elections—has long been understood as a problem for democracies. However, contemporary technologies enable actors to disseminate false information with increased speed and efficiency. When discussing this, this chapter introduced key stakeholders which are implicated by the spread of online disinformation in elections. Specifically, the role of intermediaries was outlined. Moreover, this chapter laid foundations for the remainder of this thesis by highlighting uncertainties regarding how EU institutions and Member States can regulate how intermediaries protect the free flow of information in democracies while controlling the spread of online disinformation in elections.

As part of this overview, this chapter acknowledged that there are existing concerns regarding how States—and intermediaries—could undermine the right to freedom of expression as part of attempts to control the spread of online disinformation. Importantly, however, it also introduced how online disinformation can potentially undermine the right to free elections. While acknowledging this generally, this chapter also introduced why the European human rights framework—specifically as provided for by the ECHR and CFR—should provide insights regarding how these rights can be balanced as part of responses to control the spread online disinformation by EU institutions and EU Member States. As noted, a comprehensive analysis of the applicable human rights standards for EU institutions and EU Member States requires an examination of the ECHR system in addition to the CFR system. Accordingly, the following chapter proceeds to consider how the right to freedom of expression is protected under Article 10 ECHR and the relevance of Article 10 ECHR as regards the regulation of online disinformation in political and electoral contexts.

Chapter 2: Mapping the ECtHR's Application of Article 10 ECHR: Identifying Key Interpretive Approaches for Online Disinformation

2.1 Introduction

As Chapter One introduced, the European Court of Human Rights (ECtHR) has developed extensive jurisprudence wherein the court has applied the right to freedom of expression under Article 10 of the European Convention on Human Rights (ECHR).[1] Analysing this jurisprudence, this chapter distils the ECtHR's key interpretive approaches to Article 10 ECHR that have relevance for the regulation of online disinformation in political and electoral contexts. Section 2.2 begins by detailing the criteria which inform the ECtHR's application of the right to freedom of expression. This section not only unpacks the text of Article 10 ECHR but also sets out key principles—including the margin of appreciation—which assist the Court's interpretation of the right to freedom of expression. Section 2.3 then identifies ECtHR interpretive approaches to Article 10 ECHR which have bearing in the online disinformation context. This section's focus is on standards that inform the ECtHR's reasoning where the Court has applied Article 10 ECHR in cases involving false or misleading communications which have been disseminated in political environments.[2] Section 2.4 then considers the ECtHR's application of Article 10 ECHR to online expression. The focus here is on how the ECtHR interprets the internet's potential to enable—but also undermine—the informed communication of the political populace. This section further identifies analytical considerations which inform the Court's assessment of online intermediary responsibilities to limit the dissemination of harmful communications. Section 2.5 condenses this chapter's findings and considers how the ECtHR mediates tensions between the need for open political debate and the need for an informed political populace when applying Article 10 ECHR.

2.2 The ECtHR's Application of Article 10 ECHR

Before mapping ECtHR jurisprudence which has relevance in the online disinformation context, it is necessary to provide an overview of how the Court applies Article 10 ECHR. Accordingly, this section sets out key criteria underpinning the ECtHR's application of the

[1] Hereinafter 'ECtHR' or 'the Court'.
[2] Due to the lack of existing academic literature which interrogates these specific approaches of the ECtHR in the online disinformation context, this analysis further critiques the consistency and the coherence of the Court's approaches in this case law.

right to freedom of expression under Article 10 ECHR. Section 2.2.1 first examines the text of Article 10 ECHR and considers the broad application of the right to freedom of expression. Section 2.2.2 then highlights criteria under Article 10(2) ECHR which inform how the ECtHR assesses interferences by Council of Europe (CoE) States with freedom of expression. Section 2.2.3 then lays foundations for further analysis by outlining how the margin of appreciation principle informs the ECtHR's application of Article 10 ECHR.

2.2.1 Text of Article 10 ECHR

Inspired by Article 19 of the Universal Declaration of Human Rights (UDHR), Article 10 ECHR states that:[3]

> 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.
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> 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.[4]

As this language suggests, the right to freedom of expression under Article 10 ECHR is 'intended to be interpreted broadly.'[5] The first paragraph states that 'everyone' has the right to freedom of expression.[6] This paragraph not only references 'information' but also 'ideas' and 'opinions.'[7] It further specifies that freedom of expression may be enjoyed 'without

[3] On the 'notably close' text between Art 10 ECHR and Art 19 UDHR see Michael O'Flaherty, 'Freedom of expression: article 19 of the international covenant on civil and political rights and the human rights committee's general comment no 34' (2012) 12(4) Human Rights Law Review 627-654.
[4] Art 10 ECHR.
[5] Phil Hugenholtz, 'Copyright and freedom of expression in Europe: Expanding the boundaries of intellectual property' (2001) Innovation policy for the knowledge society 343.
[6] Art 10(1) ECHR.
[7] ibid.

interference by public authorities and regardless of frontiers.'[8] Such language elucidates what Wragg describes as the 'extensive broadness' of the scope of application of Article 10 ECHR.[9]

As the text of Article 10 ECHR also states, however, Contracting Parties may limit 'the exercise' of the right to freedom of expression.[10] The first paragraph clarifies that Article 10 ECHR 'shall not prevent States from requiring' the licensing of broadcasting, television, or cinema enterprises.'[11] As Macovei highlights, this statement stems from the 'limited number of available frequencies' at the time of the Convention's drafting when 'most European states had a monopoly of broadcasting and television.'[12] Relevant to this chapter's analysis, the second paragraph then specifies that the 'exercise' of 'freedoms' under Article 10 ECHR 'may be subject' to limitations.[13] Article 10(2) ECHR states that these limitations may consist of 'formalities, conditions, restrictions or penalties.'[14] The second paragraph states that these limitations must be 'prescribed by law' and be pursued in alignment with at least one of the following aims:[15]

- The interests of national security.
- The protection of public safety.
- The prevention of disorder or crime.
- The protection of health or morals.
- The protection of the reputation or rights of others.
- The prevention of the disclosure of information received in confidence.
- The maintenance of the authority and impartiality of the judiciary.[16]

The second paragraph also sets out that limitations on freedom of expression must be 'necessary in a democratic society.'[17] This phrase reflects the ECHR's foundational connection

[8] ibid.
[9] Paul Wragg, 'Critiquing the UK Judiciary's Response to Article 10 Post-HRA: Undervaluing the Right to Freedom of Expression?' (PhD thesis, Durham University, 2009) 36.
[10] Term describing States which ratify the ECHR.
[11] Art 10(1) ECHR.
[12] Monica Macovei, 'A Guide to the Implementation of Article 10 ECHR of the ECHR' (Council of Europe, 2004).
[13] Art 10(2) ECHR.
[14] ibid.
[15] ibid.
[16] ibid.
[17] ibid.

to democracy that Chapter One referenced.[18] Buyse and Hamilton recall how the Convention's drafting was foreshadowed by a fragile 'transition from authoritarianism to democracy' in CoE States.[19] As Hannie and Voorhoof posit, these political fragilities spurred concerns amongst ECHR drafters that Convention provisions could only be realised 'within a democracy capable of defending itself.'[20] Inclusion of the phrase 'necessary in a democratic society' may therefore appear unsurprising when considering the Convention's pretext.[21] Before analysing substantive ECtHR jurisprudence, the following section first outlines how criteria under Article 10 ECHR inform the ECtHR's application of the right to freedom of expression.

2.2.2 Assessment Criteria Under Article 10 ECHR

As Costa posits, ECHR provisions provide a 'skeleton' of instructions on how Contracting Parties must protect Convention freedoms.[22] However, it is the ECtHR's role to 'put flesh on these bones.'[23] Spano describes the Strasbourg Court as an authoritative 'setter of minimum standards' for protecting the right to freedom of expression.[24] As O' Faithigh and Voorhoof postulate, the Court's role as a 'standard setter' not only informs CoE States but also carries persuasive relevance in 'developing a global understanding' of this right.[25]

The criteria under Article 10(2) ECHR provide the basis for how the ECtHR interprets interferences by States with the right to freedom of expression. As noted, freedom of expression under Article 10 ECHR applies broadly. This is not only evident in the text of Article 10 ECHR but also by the ECtHR's application of this provision. The Court has confirmed that freedom

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[18] See Chapter One, section 1.4.

[19] Antoine Buyse and Michael Hamilton (eds) *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights* (Cambridge University Press, 2011) 131.

[20] Hannie Cannie and Dirk Voorhoof, 'The Abuse Clause and Freedom of Expression in The European Convention on Human Rights: An Added Value for Democracy And Human Rights Protection?' (2011) 29(1) Netherlands Quarterly of Human Rights 54-83.

[21] Art 10(2) ECHR.

[22] Jean Paul Costa, 'Links between democracy and human rights under the case-law of the ECtHR' (Helsinki, 5 June 2008) <https://www.echr.coe.int/documents/d/echr/Speech_20080605_Costa_Helsinki_ENG> last accessed 9 July 2023.

[23] ibid.

[24] Robert Spano, 'The future of the European court of human rights—Subsidiarity, process-based review and the rule of law' (2018) 18(3) Human Rights Law Review 473-494.

[25] Rónán Ó Fathaigh and Dirk Voorhoof, 'The European Court of Human Rights, media freedom and democracy' in Price Monroe and others (eds) *Routledge Handbook of Media Law* (Routledge, 1st edn 2015) 107-124.

of expression applies to both natural and legal persons.[26] The Court has also clarified that Article 10 ECHR not only covers the 'substance' of information but also the 'form' in which information is communicated.[27] For example, the ECtHR has applied Article 10 ECHR to verbal statements, news articles, plays, paintings, and advertisements.[28] The ECtHR's application of the right to freedom of expression is guided by the text of Article 10 ECHR. However, the Court has interpreted this text in a manner that the Court considers necessary to give effect to freedom of expression. For example, the first paragraph states that 'public authorities' must refrain from 'interference' with freedom of expression and this first paragraph does not directly reference obligations for these authorities to proactively adopt measures to protect this right.[29] As Mowbray highlights, however, the ECtHR has been instrumental in 'developing' and 'expanding' a range of 'positive obligations' for Contracting Parties that the Court deems necessary to give effect to freedoms provided for under Article 10 ECHR.[30] While the text of Article 10 ECHR does not explicitly exclude any form of expression from protection under the Convention's framework, the ECtHR has applied Article 17 ECHR to ensure that individuals do not misuse freedom of expression to undermine ECHR democratic values. This will be analysed in section 2.3.

As noted, Article 10(2) ECHR lists criteria that must be satisfied where Contracting Parties impose any 'formalities, conditions, restrictions, or penalties' that constitute an interference with freedom of expression. The ECtHR has identified a broad range of measures—imposed by Contracting Parties—that may constitute an interference with Article 10 ECHR. Such measures may include confiscations of published materials, restrictions on the dissemination of advertisements, arrests of protestors, or refusals to grant broadcasting rights.[31] If the Court identifies that a Contracting Party has interfered with the right to freedom of expression, it

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[26] *Sunday Times v the United Kingdom* Application No 6538/74 (ECtHR, 26 April 1979); *Autronic AG v Switzerland* Application No 12726/87 (ECtHR, 22 May 1990); *The Observer and the Guardian v The United Kingdom* Application No 13585/88 (ECtHR, 26 November 1991).
[27] *Jersild v Denmark* Application No 15890/89 (ECtHR, 23 September 1994).
[28] *Perinçek v Switzerland* Application No 27510/08 (ECtHR, 15 October 2015); *Sunday Times v The United Kingdom* (Application No 6538/74 (ECtHR, 26 Apr 1979); *Dichand and others v Austria* Application No 29271/95 (ECtHR 26 February 2002); *Unifaun Theatre Productions Ltd and others v Malta* Application No 37326/13 (ECtHR 15 May 2018); *Vereinigung Bildender Künstler v Austria* Application No 68354/01 (ECtHR 5 April 2007); *Sekmadienis v Lithuania* Application No 69317/14 (ECtHR 30 January 2018).
[29] Art 10(1) ECHR.
[30] Alister Mowbray, *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (Bloomsbury Publishing, 2004).
[31] See *Handyside v United Kingdom*, Application No 5493/72 (ECtHR, 7 December 1976); *Murphy v Ireland* Application No 44179/98 (ECtHR, 10 July 2003); *Éva Molnár v Hungary* Application No 10346/05 (ECtHR, 7 October 2008); Fáber v Hungary Application No 40721/08 (ECtHR 24 July 2012).

proceeds to assess whether the interference is justified under Article 10 ECHR. This assessment, which Gerards describes as a 'triple test,' asks:[32]

- Is the interference prescribed by law?
- Does the interference pursue a legitimate aim?
- Is the interference necessary in a democratic society?

When testing whether interferences with Article 10 ECHR are prescribed by law, the ECtHR generally considers whether the domestic legal basis for the interference was 'accessible' and 'foreseeable.'[33] Stated differently, individuals must be able to comprehend how their actions could breach the law and the 'legal consequences' of such breaches.[34] The ECtHR has elucidated that these requirements prevent 'arbitrary interferences by public authorities' with freedoms which Article 10 ECHR provides for.[35] However, the Court has clarified that individuals are not required to understand laws with absolute 'certainty.'[36] As Sales and Hooper posit, such a threshold would hinder States from adjusting laws in accordance with societal changes.[37] The need for accessibility and foreseeability merely requires that citizens reasonably understand how their actions could lead to an interference with their rights. Moreover, the ECtHR may consider that interferences are prescribed by law but still identify uncertainties in domestic legal frameworks that could undermine the right to freedom of expression.[38]

If the ECtHR confirms that a Contracting Party's interference with the right to freedom of expression is prescribed by law, the Court proceeds to assess whether the interference pursues a legitimate aim under Article 10(2) ECHR. If a Contracting Party justifies an interference with freedom of expression by invoking multiple aims under Article 10(2), the Court may accept the validity of one aim while rejecting others.[39] While legitimate aims are listed exhaustively

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[32] Jannicke Gerards, 'How to improve the necessity test of the European Court of Human Rights' (2013) 11(2) International Journal of Constitutional Law 466–490.
[33] Talita de Souza Dias, 'Accessibility and Foreseeability in the Application of the Principle of Legality under General International Law: A Time for Revision?' (2019) 19(4) Human Rights Law Review 649–674.
[34] Joske Graat, 'The Legality Principle: Its Link to the EAW, Jurisdiction and Forum Choices' in Joske Graat (ed) *The European Arrest Warrant and EU Citizenship* (Springer, 2022) 41-82.
[35] *Malone v the United Kingdom* Application No 8691/79 (ECtHR 2 August 1984) para 67.
[36] *Perinçek v Switzerland* Application No 27510/08 (ECtHR, 15 October 2015) para 131.
[37] Phillip Sales and Ben Hooper, 'Proportionality and the form of law' (2003) 26 Law Quarterly Review 438-439.
[38] *The Observer and the Guardian v The United Kingdom* Application No 13585/88 (ECtHR, 26 November 1991) para 66.
[39] *Morice v. France* Application No 29369/10 (ECtHR, 24 April 2015) para 170; *Stoll v Switzerland* Application No 69698/01 (ECtHR, 10 Dec 2007).

under Article 10(2) ECHR, this does not preclude the ECtHR from interpreting these aims flexibly.[40] For example, the Court's interpretation of what constitutes a legitimate aim under Article 10(2) ECHR is often informed by contextual national circumstances in CoE States.[41] As will be examined in section 2.3, the ECtHR may also make explicit reference to aims which are not listed under Article 10(2) but which the Court appears to identify as important on when mediating the right to freedom of expression with countervailing Convention values.[42] While contextual circumstances are crucial in the ECtHR's assessment of whether State actions fulfil legitimate aims under Article 10(2) ECHR, these aims remain vital in the Court's assessment of whether interferences with the right to freedom of expression are proportionate.

If the ECtHR is satisfied that an interference with freedom of expression is prescribed by law and pursues a legitimate aim under Article 10(2) ECHR, the Court then inquires whether the interference is 'necessary in a democratic society.'[43] As Kozlowski highlights, this test 'occupies most of the ECtHR's judicial attention.'[44] Inquiring whether interferences with Article 10 ECHR are 'necessary in a democratic society,' the ECtHR often examines whether a 'pressing social need' or 'sufficient and pertinent reasons' may justify a restriction with an individual or entity's freedom of expression.[45] The Court further considers whether restrictions involve measures that are proportionate to legitimate aims pursued.[46] It is crucial to highlight that—when applying its 'democratic necessity test'—the ECtHR may consider a wide range of national circumstances in Contracting States that could justify restrictions on Convention

[40] For example, see *Merabishvili v Georgia* Application No 72508/13 (ECtHR, 28 November 2017) para 302 where the ECtHR stated that 'that overview shows that although the legitimate aims and grounds set out in the restriction clauses in the Convention are exhaustive, they are also broadly defined and have been interpreted with a degree of flexibility.'; Also *Engel and others v Netherlands* Application No 5100/71 (ECtHR, 8 June 1976 para 98 'the concept of 'order' refers not only to public order or 'ordre public… It also covers the order that must prevail within the confined of a specific special group.'

[41] See where the Court interpreted 'protection of morals' under Article 10 (2) in *Handyside v United Kingdom* Application No 5493/72 (ECtHR 7 Dec 1976); And in *Murphy v Ireland* Application No 44179/98 (ECtHR, 10 July 2003).

[42] This will be examined, in particular, when assessing the Court's approach to anti-democratic propaganda in section 2.3.2 and when assessing the Court's approach to false communications in election contexts in section 2.34.

[43] Art 10(2).

[44] Dan Kozlowski (2006) 'For the Protection of the Reputation or Rights of Others: The European Court of Human Rights' Interpretation of the Defamation Exception in Article 10' (2006) 11(1) Communication Law and Policy 133-178.

[45] Robin Herr, 'The right to receive information under Article 10 of the ECHR: An investigation from a copyright perspective' (2011) 204.

[46] Dirk Voorhoof, 'The right to freedom of expression and information under the European Human Rights system: towards a more transparent democratic society' European University Institute Working Paper 2014/12 <https://cadmus.eui.eu/handle/1814/29871> last accessed 9 July 2023.

rights.[47] Gerards critiques that the ECtHR's tendency to consider national circumstances can lead the Court to 'obscure' established standards for CoE States to identify when 'relevant and sufficient' reasons may justify interferences with freedom of expression.[48] Conversely, Arai-Takahashi submits that there is a need for the ECtHR to adopt a fluid interpretation of measures that may be 'necessary in a democratic society' on account of how CoE States must accommodate 'multiple eventualities in the future.'[49] Section 2.3 will detail key factors which inform the ECtHR's calculus when assessing whether measures to limit the spread of false or misleading communications are necessary in a democratic society. Before assessing this, it is instructive to first outline how the margin of appreciation principle modifies the Court's application of Article 10 ECHR.

2.2.3 The Margin of Appreciation Under Article 10 ECHR

As added by Protocol 15, the text of the ECHR preamble states that Contracting Parties are afforded a 'margin of appreciation' to secure Convention freedoms under the 'supervisory jurisdiction' of the ECtHR.[50] The ECtHR applies the margin of appreciation (MoA) principle to modify the level of discretion for national authorities to fulfil ECHR commitments. As Carozza describes, this principle has roots in the international legal principle of 'subsidiarity.'[51] Ovey similarly describes how the MoA may often come into play where the ECtHR deems national authorities to be 'better placed' to identify appropriate circumstances to restrict Convention rights.[52] Authors such as Yourow describe the MoA as a mechanism to give Contracting Parties 'breathing space' to limit the exercise of ECHR freedoms.[53] Importantly, however, the Convention preamble clarifies that the primary responsibilities 'to secure the

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[47] Gerards, 'How to improve the necessity test of the European Court of Human Rights' (n 31).
[48] ibid.
[49] Yutaka Arai-Takahashi, 'The margin of appreciation doctrine: A theoretical analysis of Strasbourg's variable geometry' in A Follesdal and others (eds) *Constituting Europe: The European Court of Human Rights in a National, European and Global Context* (Studies on Human Rights Conventions, 2013) 62-105.

[50] See Protocol No. 15 amending
the Convention on the Protection of Human Rights and Fundamental Freedoms Strasbourg, 24.VI.2013 <https://www.echr.coe.int/documents/d/echr/Protocol_15_ENG>
; Hereinafter 'MoA.'
[51] Paolo G Carozza, 'Subsidiarity as a Structural Principle of International Human Rights law'(2003) 97(1) American Journal of International Law 38–79; The ECHR preamble expressly states that the Contracting Parties are afforded responsibilities 'in accordance with the principle of subsidiarity.'
[52] Clare Ovey, 'The Margin of Appreciation and Article 8 of the Convention in The Doctrine of the Margin under the European Convention on Human Rights: Its Legitimacy in Theory and Application in Practices' (1998) 19 Human Rights Law Journal 10.
[53] Howard Yourow, 'The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence' (PhD thesis, University of Michigan 1996) 13.

rights and freedoms defined in this Convention and the Protocols' lie with the Contracting Parties.[54] Accordingly, the ECtHR does not apply the MoA to absolve States from fulfilling ECHR obligations but may invoke this principle when extending a 'certain amount of trust in States' in fulfilling these obligations.[55] The MoA granted to Contracting Parties may widen or narrow depending on factors which the ECtHR deems relevant. As Greer highlights, key factors often include the 'relative importance of the right' at stake and the existence of 'any relevant common European standard' that may inform the Court's assessment.[56] As later analysis will consider, other factors may include the nature of legitimate aims pursued or whether restricting one ECHR right may be necessary to secure protection of another right.

Section 2.3 will map factors which inform the ECtHR's application of the MoA principle in Article 10 ECHR cases and will consider relevant factors in the online disinformation context. Before illustrating this, it is necessary to briefly outline how the Court may integrate the MoA principle when assessing Contracting Party measures to restrict Article 10 ECHR freedoms. An illustrative example is seen in the ECtHR's interpretation of 'morals' in *Handyside v the United Kingdom*.[57] In this foundational case, an applicant had disseminated several hundred copies of a controversial 'schoolbook' containing sections on sexual topics.[58] Addressing the controversial nature of this book, the ECtHR proclaimed that freedom of expression extends:

> Not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society.'[59]

This language notwithstanding, the Court agreed that the United Kingdom's interference with Article 10 ECHR—by ceasing the book's distribution—had been 'necessary in a democratic society.'[60] Pivotal was the Court's extension of a wide MoA for Contracting Parties in the

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[54] ECHR preamble.
[55] Jan Kratochvíl, 'The Inflation of the Margin of Appreciation by the European Court of Human Rights' (2011) 29(3) Netherlands Quarterly of Human Rights 324-357.
[56] Steven Greer, *Human rights files No. 17 The Margin of Appreciation Doctrine* (Council of Europe Publishing, 2000).
[57] *Handyside v United Kingdom* Application No 5493/72 (ECtHR 7 Dec 1976).
[58] ibid para 20; This "reference book", discussed 'intercourse', 'contraceptives,' and 'menstruation.'
[59] ibid para 49.
[60] ibid para 57.

sphere of 'morals.'[61] Specifically, the ECtHR identified no 'uniform European conception of morals' and thus considered that UK authorities were 'in a better position' to identify materials which offended public sensitivities.[62] Here, this was justified 'by reason of their direct and continuous contact with the vital forces of their countries.'[63] The ECtHR's tendency to widen the MoA for Contracting Parties to identify communications which offend public morals has been evident in several cases involving Ireland. In *Open Door and Well Woman v Ireland*, the Court examined Ireland's application of injunctions preventing advocacy groups from providing Irish women with information on abortion services.[64] In spite of agreeing that Ireland had a wide MoA, the ECtHR found that Ireland violated Article 10 ECHR due to the 'absolute nature' of Ireland's measures which lead to a 'perpetual restraint on information.[65]The Court still acknowledged that 'national authorities enjoy a wide margin of appreciation in matters of morals.'[66] In Ireland's domestic context, the Court reasoned that this included 'matters of belief concerning the nature of human life.'[67] The ECtHR's extension of a wide MoA was further evident in *Murphy v Ireland* where the Court considered that Ireland's blanket prohibition on religious advertisements had been 'necessary in a democratic society' and did not violate Article 10 ECHR.[68] Here, the Court acknowledged that the transmission of such advertisements may not 'on its face be offensive.'[69] However, it considered that Ireland's 'extremely divisive' religious sensitivities were best understood at the domestic level.[70] Moreover, the lack of a 'uniform European conception of morals' informed the Court's extension of a wide MoA in regulating such communications.[71]

A contrasting feature of the ECtHR's application of Article 10 ECHR is that the Court appears to narrow the MoA for Contracting Parties to limit access to information of strong public interest. In *Sunday Times v United Kingdom*, the applicant newspaper had been issued an injunction from publishing articles documenting birth defects—and pending litigation—

[61] ibid para 57.
[62] ibid para 48.
[63] ibid para 48.
[64] *Open Door and Well Woman v Ireland* Application Nos 14234/88 and 14235/88, (ECtHR, 29 Oct 1992).
[65] ibid para 73.
[66] ibid para 68.
[67] ibid.
[68] *Murphy v Ireland* Application No 44179/98, (ECtHR July 10, 2003).
[69] ibid para 72.
[70] ibid para 74.
[71] ibid para 67.

associated with thalidomide.[72] The ECtHR considered that the injunction had been prescribed by law and served the legitimate aim of 'maintaining the authority and impartiality of the judiciary'.[73] Crucially, however, the Court highlighted that the newspaper's articles concerned 'responsibility' for the 'tragedy' of thalidomide birth defects.[74] Accordingly, publication of the articles—even if occurring during pending litigation—could not be restrained as their content concerned a 'matter of public interest.'[75] The ECtHR did not explicitly define elements that gave rise to a 'public interest' for individuals to freely receive information.[76] Notably, however, the Court found it vital that the articles brought 'to light certain facts which may have served as a brake on speculative and unenlightened discussion.'[77] In the subsequent case of *Thorgeirson v Iceland,* the ECtHR found that Iceland violated Article 10 ECHR after prosecuting an applicant journalist for publishing allegations of police brutality.[78] Here, the Court stressed that such allegations were of 'utmost' public concern even though only one instance of police brutality had been proven.[79] The Court again focused on the public interest of accessing information when finding a violation of Article 10 ECHR in *Hertel v Switzerland*.[80] This involved Switzerland's prosecution of an individual for publishing articles stating that the consumption of microwaveable food was hazardous to public health.[81] The ECtHR agreed with Switzerland's legitimate aim to protect potentially damaging information from creating 'unfair competition' between commercial food providers.[82] However, the Court narrowed the MoA to restrict the publications due to the applicant's 'participation in a debate affecting the general interest.'[83]

The ECtHR did not explicitly define what constitutes a strong 'public interest' to access information in the above cases.[84] Generally, however, the ECtHR narrows the MoA for Contracting Parties to limit access to information where the Court considers that there is an

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[72] *Sunday Times v United Kingdom*, Application No 6538/74 2 (ECtHR, 6 Apr 1979).
[73] ibid para 63.
[74] ibid para 66.
[75] ibid para 66.
[76] ibid.
[77] ibid.
[78] *Thorgeirson v Iceland* Application No 13778/88, (ECtHR, 25 June 1992).
[79] ibid para 65.
[80] *Hertel v Switzerland* Application No 25181/94 (ECtHR, 25 August 1998).
[81] ibid para 12.
[82] ibid para 47.
[83] ibid.
[84] Jean-François Flauss. 'The European Court of Human Rights and the freedom of expression' (2009) 84 ILJ 809.

interest for individuals to access information that sheds a factual light on high-profile or controversial matters. This was evident in the Court finding a violation of Article 10 ECHR in *Tønsbergs Blad AS and Haukom v Norway.*[85] Norway had ordered applicants to pay compensation for publishing news articles that identified a leading industrialist as being suspected of failing to comply with local planning regulations.[86] The Court agreed with Norway that it was legitimate to protect the industrialist's reputation but distinguished that the applicant's aim had not been to inflict such damage.[87] Conversely, the Court noted that the applicant's articles had sought to 'illustrate a problem which the public had an interest in being informed about.'[88] The ECtHR adopted similar reasoning when finding an Article 10 ECHR violation in *Mor v France.*[89] France had convicted an applicant lawyer for commenting to the press about a confidential expert report on the death of a twelve-year old child.[90] The Court accepted the applicant had professional duties not to divulge details of a confidential investigation but stressed that the applicant had merely replied to questions posed by journalists in possession of the report that the applicant referred to.[91] Thus, the information had already been 'part of a debate of general interest.'[92] Addressing the substance of the comments, the Court considered that the applicant had commented on 'facts' of 'direct relevance to a public-health issue' regarding liability of pharmaceutical laboratories. Such facts were of 'undoubted interest to the general public' who had a 'right to be informed.'[93] As the ECtHR's language in these cases illustrates, the Court will tend to apply a narrow MoA where Contracting Parties limit the dissemination of information that could inform the political populace of CoE States. As Fenwick and Phillipson postulate, the ECtHR's application of the MoA principle in Article 10 ECHR cases reflects how the Court is 'concerned above all with ensuring the free flow of widely disseminated information relevant to legitimate public debate.'[94] As section 2.3 will further examine, the ECtHR's focus on factual veracity—and the need for an informed political populace—is evident in jurisprudence which has application in the online disinformation context.

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[85] *Tønsbergs Blad AS and Haukom v Norway* Application 510/04 (ECtHR, 1 March 2007).
[86] ibid para 18.
[87] ibid para 63.
[88] ibid para 87.
[89] *Mor v France* Application No 28198/09 (ECtHR, 15 Dec 2011).
[90] ibid para 6.
[91] ibid para 63.
[92] ibid para 64.
[93] ibid.
[94] Helen Fenwick and Gavin Phillipson *Media freedom under the Human Rights Act* (Oxford University Press, 2006) 71.

This section has laid foundations for this chapter's analysis of ECtHR approaches to freedom of expression in cases which have application for online disinformation. As introduced, the ECtHR's application of Article 10 ECHR and use of the MoA principle may often be informed by national circumstances in CoE States. This is significant when considering Bradshaw and Howard's observation that 'national contexts are always important to consider' when assessing 'the experience of organised disinformation campaigns' in European States.[95] Chen et al. similarly highlight how 'national identity language' may often be used to 'exacerbate public engagement' with online disinformation.[96] As illustrated, however, the ECtHR generally narrows the MoA when considering limitations on access to information that has informative value to the public. A logical question from the disinformation perspective is whether the ECtHR considers the dissemination of false or misleading information in political and electoral contexts to be an activity that undermines the fundamental democratic values protected by the ECHR. Accordingly, it is instructive to now analyse how the Court interprets the need for open—but also accurately informed—political debate.

2.3 ECtHR Interpretive Approaches to Article 10 ECHR

Having set out the criteria underpinning the ECtHR's application of the right to freedom of expression, this section now identifies the Court's key interpretive approaches to Article 10 ECHR which are instructive in the online disinformation context. This section maps these approaches by extracting the ECtHR's reasoning—and interpretive standards which inform this reasoning—in jurisprudence involving false and misleading communications disseminated in political and electoral contexts. Section 2.3.1 first sets out the ECtHR's justifications for extending robust protection of political communications when applying Article 10 ECHR. Section 2.3.2 then evaluates the justifications underpinning the ECtHR's reluctance to extend Article 10 ECHR protections to anti-democratic propaganda.[97] Building from this analysis, this section then unpacks the ECtHR's approach where the Court applies Article 10 ECHR to

[95] Samantha Bradshaw and Philip Howard, 'The global organization of social media disinformation campaigns' (2018) 71(1) Journal of International Affairs 23-32.
[96] Anfan Chen and others, 'When national identity meets conspiracies: the contagion of national identity language in public engagement and discourse about COVID-19 conspiracy theories' (2023) 28(1) Journal of Computer-Mediated Communication.
[97] This will also involve a critical assessment of the ECtHR's inconsistent application of Article 17 ECHR to anti-democratic propaganda.

misleading communications.[98] Section 2.3.3 first considers factors which inform the ECtHR's calculus when distinguishing misleading statements of fact from misleading statements conveying value judgments. Section 2.3.4 then analyses the Court's application of Article 10 ECHR specifically in the context of the dissemination of misleading electoral communications.

2.3.1 The ECtHR's Approach to Political Communication under Article 10

As Chapter One introduced, it is vital in functioning democracies that individuals have access to—and can freely disseminate—a broad range of information that could affect their participation in political and electoral processes.[99] As Chapter One set out, however, academic commentators generally agree that individuals require access to reliable information when participating in such processes.[100] The problem of online disinformation embodies how tensions can arise between these interrelated principles.[101] To identify how the ECtHR attempts to resolve tensions between the need for open political debate and the need for factual veracity in political communications, it is first necessary to provide an overview of how the Court applies Article 10 ECHR in cases involving political communications.

When applying Article 10 ECHR, the ECtHR provides extensive protection to communications which convey criticisms of political officials. Illustrative of this is the case of *Lingens v Austria* which concerned a journalist who had been convicted for defaming Austrian politician Bruno Kreisky.[102] The applicant's articles condemned Kreisky's 'immoral' and 'undignified' support of former SS members participating in Austrian politics.[103] The ECtHR accepted that Austria's defamation penalty had been prescribed by law and pursued legitimate aims to protect Kreisky's reputation.[104] Vital, however, was the applicant's role as a 'political journalist' discussing 'issues of public interest' in Austria.[105] Finding Austria to be in violation of Article 10 ECHR, the Court reasoned that the 'limits of acceptable criticism' are wider when directed at politicians—including Kreisky—who 'knowingly' submit themselves 'to close scrutiny' by

[98] The focus here will also be on the ECtHR's language surrounding the need for CoE States to ensure an informed electorate (and the Court's invocation of the right to free elections under Article 3 Protocol 1 ECHR).
[99] See Chapter One, section 1.2.
[100] ibid 1.3.
[101] See Peaks Krafft and Joan Donovan, 'Disinformation by design: The use of evidence collages and platform filtering in a media manipulation campaign' (2020) 7(2) Political Communication 194-214.
[102] *Lingens v Austria* Application No 9815/82, (ECtHR, 8 July 1986).
[103] ibid para 9.
[104] ibid para 36.
[105] ibid para 37.

journalists and the public.[106] Addressing this context further, the Court considered that open political debate lies at the 'very core of' democracy and 'prevails throughout the Convention.'[107] The ECtHR again focused on the wider limits of acceptable criticism aimed at political officials in *Castells v Spain* when examining Spain's conviction of a Senator who publicly accused State officials of facilitating abuses of Basque political dissidents.[108] The Court found an Article 10 ECHR violation as the applicant was convicted without opportunities to substantiate his claims.[109] This was significant because of his status as an opposition politician who had criticised leaders in a 'dominant position' of holding elected office.[110] Again highlighting the wider 'limits of permissible criticism' of politicians, the ECtHR considered that 'actions or omissions' of politicians require 'close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion.'[111] The Court again addressed this need for public scrutiny in *Manole and Others v Moldova*.[112] The applicants—editors of a publicly funded media company—alleged the company's programming had been censored through governmental interference with political coverage.[113] Agreeing that Moldova violated Article 10 ECHR, the ECtHR reasoned that democracies require 'diverse' political viewpoints even if certain viewpoints 'call into question the way a State is currently organised, provided that they do not harm democracy itself.'[114]

Several commentators observe that the ECtHR applies a categorically high level of protection to political expression. For example, Sharland describes 'political expression' as a category of expression 'receiving the most protection' under Article 10 ECHR.[115] Scott labels political expression as one of the 'uppermost categories' of protected expression in Article 10 ECHR jurisprudence.[116] It is important to highlight, however, that the ECtHR closely assesses the underlying motives which inform the dissemination of offensive criticism aimed at political officials. *Oberschlick v Austria* involved an applicant's conviction for defaming a politician

[106] ibid para 42.
[107] ibid.
[108] *Castells v Spain* Application No 11798/85 (ECtHR, 23 April 1992).
[109] ibid para 46.
[110] ibid.
[111] ibid para 46.
[112] *Manole and others v Moldova* Application No 13936/02 (ECtHR, 17 September 2009).
[113] Teleradio-Moldova" (TRM).
[114] ibid 95.
[115] Andrew Sharland, 'Focus on Article 10 of the ECHR' (2009) 14(1) Judicial Review 63.
[116] Andrew Scott, 'A Monstrous and Unjustifiable Infringement: Political Expression and the Broadcasting Ban on Advocacy Advertising' (2003) 66(2) The Modern Law Review 224-244.

who had glorified German soldiers in the Second World War.[117] The applicant had written that the implicated politician was 'not a Nazi' but was an 'idiot.'[118] The ECtHR agreed with Austria that the article's remarks could 'certainly be considered polemical' but rejected that they were a 'gratuitous personal attack.'[119] Key here was that the applicant had commented on actual statements 'derived' from the politician's speech.[120] Thus, his offensive insult had been based on an 'objectively understandable' form of political criticism and was permissible under Article 10 ECHR.[121] The Court placed identical focus on an applicant's intentions underlying political criticism in *Lopes Gomes da Silva v Portugal.*[122] Here, the applicant journalist was convicted for libel after describing a political chairman as 'grotesque' and 'buffoonish.'[123] The applicant himself acknowledged that his comments had been expressed in 'virulent and provocative' terms but maintained that they were 'justified in view of the equally virulent nature of the political ideology advocated by the targeted politician.'[124] Agreeing with these justifications, the Court found an Article 10 ECHR violation on the basis that the applicant's criticism did not:

> Convey a gratuitous personal attack because the author supports them with an objective explanation. The Court points out in that connection that, in this field, political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society.[125]

As this language demonstrates, the ECtHR acknowledges that offensive communications—even if involving insults and mockery—may have value in political and democratic processes by airing genuine political grievances. This is consistently evident in the Court's interpretation of satirical political communications. In *Vereinigung Bildender Künstler v Austria,* the ECtHR found that Austria had violated Article 10 ECHR after ordering an applicant to suspend his art exhibition depicting public figures in sexually explicit positions.[126] The Court highlighted that the exhibition did not intend to convey realistic portrayals but conveyed a 'caricature of the

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[117] *Oberschlick v Austria* Application No 20834/92 (ECtHR, 1 July 1997).
[118] ibid para 9.
[119] ibid para 33.
[120] ibid
[121] ibid.
[122] *Lopes Gomes da Silva v Portugal* Application No 37698/97 (ECtHR, 28 September 2000).
[123] ibid para 10.
[124] ibid para 25.
[125] ibid para 34.
[126] *Vereinigung Bildender Künstler v Austria* Application No 68354/01, (ECtHR, 25 January 2007).

persons concerned using satirical elements.'[127] Highlighting the value of satire in democracy, the Court stressed that:

> Satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care.[128]

Striking here is the ECtHR's explicit recognition that factual 'exaggeration and distortion of reality' can facilitate valuable 'social commentary' in democracies.[129] This appears to be informed by the possibility that provocative—and even factually exaggerated—commentary can be used to highlight misuses of political power. In *Alves da Silva v Portugal*, the applicant was convicted for displaying a puppet at a festival depicting a mayor 'unlawfully' receiving sums of money.[130] The ECtHR accepted that Portugal had interests to protect the mayor's reputation but noted how the applicant's depiction was 'quite clearly satirical in nature.'[131] Highlighting satire as 'social commentary' containing 'exaggeration and distortion of reality,' the Court reasoned that such commentary needed to be assessed in light of the 'greater degree of tolerance towards criticism' of political officials.[132] The Court's finding of an Article 10 ECHR violation should be contrasted with *Muller v Switzerland*.[133] Here, the ECtHR found that Switzerland did not violate Article 10 ECHR when convicting an applicant for depicting well-known public figures in sexually explicit paintings on the grounds that such depictions were obscene.[134] Notably, the paintings made no reference to political figures and did not convey political criticism.[135] The Court found an Article 10 ECHR violation in *Eon v France* where France convicted a political activist for waving an incendiary placard at the French President.[136] The Court accepted that the applicant's criticism had been vulgar and would hypothetically not receive protection under Article 10 ECHR if he had aimed to undermine the

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[127] ibid para 33.
[128] ibid para 33.
[129] ibid.
[130] *Alves da Silva v Portugal* Application no. 41665/07 (ECtHR, 17 September 2009).
[131] ibid.
[132] ibid
[133] *Muller v Switzerland* Application No 10737/84 (ECtHR, 24 May 1988).
[134] ibid.
[135] ibid.
[136] *Eon v France* Application No 26118/10 (ECtHR, 14 March 2013); Reading "Get lost, you sad prick."

President's 'private life or honour.'[137] On an assessment of the facts, however, the Court considered the placard not to be a 'gratuitous personal attack' and highlighted how it had been disseminated by a political activist who had 'fought a long-running campaign' supporting immigrants before the President's State visit.[138] Importantly, the placard also included a phrase that the President was widely known for uttering.[139] The placard therefore conveyed an 'exaggeration' of 'reality' which contributed to a matter of genuine 'public concern' and required tolerance in a 'democratic society.'[140]

As the above cases indicate, the ECtHR acknowledges that not all individuals have equal power in democracies. The Court demonstrates a propensity to ensure that freedom of expression can be used to hold powerful political officials accountable. Accordingly, the Court often finds an Article 10 ECHR violation where States curtail political communications without factoring in the varying communicative power that different individuals have over the political populace. This is evident in the ECtHR's approach to statutory restrictions on the dissemination of political advertisements. In *Bowman v United Kingdom*, the Court assessed an applicant's prosecution for distributing political leaflets before elections and spending beyond the UK's statutory spending cap.[141] On the facts, the Court found that the UK violated Article 10 ECHR because the restriction constituted 'a total barrier' to the applicant's ability to disseminate political information 'with a view to influencing the voters.'[142] Notably, however, the ECtHR agreed with the UK that the statutory prohibition served the State's legitimate interest of securing political 'equality between candidates' by preventing disproportionate spending on advertisements by political actors.[143] The Court's focus on political equality was again evident in *TV Vest AS &. Rogalaand v Norway.*[144] The applicants had been fined for broadcasting a television advertisement promoting the political 'pensioners party.'[145] The ECtHR observed that this fine pursued legitimate aims because it sought to prevent the 'powerful and pervasive form' of television advertising from being dominated by 'financially powerful' political

[137] ibid 57.
[138] ibid 58.
[139] ibid para 45.
[140] ibid para 60.
[141] *Bowman v United Kingdom* Application No 141/1996/760/961 (ECtHR, 19 February 1998) para 42.
[142] ibid para 47.
[143] ibid.
[144] *TV Vest AS &. Rogalaand v Norway* Application No 21132/05 (ECtHR, 11 Dec 2008).
[145] ibid para 7.

groups.[146] The Court also accepted that the law underpinning the fine sought to 'obtain a fair framework for political and public debate' in the pre-election period.[147] However, the ECtHR found an Article 10 ECHR violation because Norway's fine was applied to a political party that could only 'put its message across to the public through' televised advertising.[148] Thus, the implicated 'pensioners party' had 'belonged to a category' of political parties 'for whose protection the ban was' intended.[149] Such facts contrast with the Grand Chamber case of *Animal Defenders v United Kingdom.*[150] Here, the ECtHR found no Article 10 ECHR violation where the UK prohibited an applicant NGO from broadcasting advertisements highlighting chimpanzee abuse.[151] The Court accepted that the ad was 'primarily political in nature' and highlighted that States have a narrow MoA to restrain information containing subjects of public interest' which enable discovery of the 'attitudes of political leaders.'[152] Significantly, however, the Court agreed with the UK's aim to prevent 'well-endowed interests' from using 'the power of the purse' to distort a fair 'framework for political debate.'[153] Considering this, the Court balanced:

> The applicant NGO's right to impart information and ideas of general interest which the public is entitled to receive with, on the other, the authorities' desire to protect the democratic debate and process from distortion by powerful financial groups with advantageous access to influential media.[154]

Unlike in *TV Vest,* the applicant NGO could 'advertise on radio and television' and through print media.[155] Highlighting this as a justification for finding no Article 10 ECHR violation, the Court considered that 'access to alternative media is key to the proportionality of a restriction on access to other potentially useful media.'[156] The Court's focus on alternative access to information was also reflected in *Appleby v United Kingdom*.[157] Here, the ECtHR

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[146] ibid para 70.
[147] ibid.
[148] ibid para 73.
[149] ibid.
[150] *Animal Defenders v United Kingdom* Application No 48876/08 (ECtHR, 22 April 2013).
[151] See 'My Mate's a Primate.' <https://www.youtube.com/watch?v=qON_lFQE4HY>
[152] *Animal Defenders v UK* (n 147) para 102.
[153] ibid para 22.
[154] ibid para 99.
[155] ibid para 124.
[156] ibid.
[157] *Appleby v United Kingdom* Application No 44306/98 (ECtHR, 6 May 2003).

considered whether Contracting Parties had positive obligations under Article 10 ECHR to enable activist speakers to access privately-owned shopping malls to disseminate ideas.[158] Addressing this, the Court reasoned that Article 10 ECHR 'does not bestow any freedom of forum for the exercise of that right.'[159] It accepted that this may change in circumstances where 'the bar on access to property has the effect of preventing any effective exercise of freedom of expression.'[160] Here, however, the Court found no Article 10 ECHR violation and noted that the applicants had not been prevented from 'communicating their views' through other nearby businesses and through 'public access paths into the area.'[161] Also instructive is the Grand Chamber case of *Mouvement Raelien Suisse v Switzerland.*[162] The ECtHR found no Article 10 ECHR violation after Switzerland restricted an applicant's poster campaign which promoted human cloning and 'geniocracy.'[163] It was again crucial that the association remained 'able to continue to disseminate its ideas through its website' and 'other means at its disposal such as the distribution of leaflets.'[164] Further significant was that—contrasting with the above-mentioned facts in *TV Vest* and *Animal Defenders*—the Court only identified tangential 'social or political ideas' in the content of the applicant's poster campaign and described this campaign as 'closer to commercial speech than to political speech per se.'[165] This absence of concrete political ideas afforded Switzerland a wider MoA to limit the advertisement campaign.[166]

As this section has examined, the ECtHR generally offers extensive protection to political communications when applying Article 10 ECHR. Informing this extensive protection is the Court's perspective that vigorous political debate contributes to a functioning democracy. The Court extends a narrow MoA for Contracting Parties to limit access to polemic—and even factually exaggerated—communications that convey criticism of political officials. As identified, however, the ECtHR consistently focuses on whether provocative political communications convey sincere political grievances and is likely to find an Article 10 violation if States limit access to information conveying such grievances. Moreover, the Court appears more inclined to agree with domestic prohibitions on political communications if such

[158] ibid para 36.
[159] ibid para 47.
[160] ibid.
[161] ibid para 48.
[162] *Mouvement Raelien Suisse v Switzerland* Application No 16354/06 (ECtHR, 13 July 2012).
[163] ibid para 12.
[164] ibid para 73.
[165] ibid para 63.
[166] ibid.

prohibitions are designed to restrict powerful stakeholders from dominating political communication.

The ECtHR's approach in the above-mentioned case law correctly reflects the importance of the right to freedom of expression for a functioning democracy.[167] In light of the aforementioned language under Article 10(2) which references the need for interferences with Article 10 to be 'necessary in a democratic society', the Court's consistent and explicit reference to 'democracy' is desirable.[168] Moreover, it should be welcomed that the ECtHR provides an identifiable and substantive justification for its tendency to offer wide protection under Article 10 ECHR to the speech of elected political officials.[169] As is evident in various key cases discussed above, for example, the Court is consistently and specifically inclined to justify this approach by referencing the vital role of political officials in reflecting the views of the electorate and for such officials to be held accountable by the electorate.[170] This is an important observation as it implies that the Strasbourg Court is unlikely to provide robust protection to the speech of powerful political officials merely due to their status of having been democratically elected. Notably, this is evident where the ECtHR appears to draw a distinction between political communications that contributes to a functioning democracy and communications that may 'harm the democracy itself.'[171] This is further reflected where the Court—while highlighting the need for vigorous political debate in democracies—acknowledges that political debate may become unfairly distorted. While it is arguable that in the above case law that the Strasbourg Court provides limited guidance on these type of distinctions, greater clarity may be found when assessing the Court's posture in cases involving the dissemination of anti-democratic propaganda.

2.3.2 The ECtHR's Approach to Anti-democratic Propaganda under Article 17 ECHR

As identified, the ECtHR emphasises the need to protect political communications, including where those communications can be considered polemic or factually exaggerated. Importantly,

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[167] For example, the Court's emphasis on the need to protect wide access to information in political environments is consistent with the wide academic consensus on this topic that Chapter One, section 1.2 discussed.
[168] See text of Article 10(2); See the Court's language in Lopes Gomes da Silva v Portugal Application No 37698/97 (ECtHR, 28 September 2000) at para 124 and in Animal Defenders v United Kingdom Application No 48876/08 (ECtHR, 22 April 2013) at para 94.
[169] This was clearly highlighted (and has subsequently been highlighted extensively) by the Court in *Lingens v Austria* Application No 9815/82, (ECtHR, 8 July 1986) at para 42.
[170] ibid; See also *Oberschlick v Austria* Application No 20834/92 (ECtHR, 1 July 1997) para 33.
[171] *Manole and others v Moldova* Application No 13936/02 (ECtHR, 17 September 2009) para 114.

however, the Court appears less likely to find Article 10 ECHR violations if States restrict the dissemination of offensive communications which do not convey genuinely held grievances or criticisms against political officials. Highlighting this, the ECtHR has explicitly distinguished criticism of how democratic power is exercised from criticism which is designed to 'harm democracy itself.'[172] Such distinctions are fundamental in the context of online disinformation. As Chapter One introduced, actors who disseminate disinformation often attempt to undermine democratic elections and target vulnerable minorities.[173] It is therefore necessary to analyse the ECtHR's approaches to anti-democratic propaganda and consider these in the online disinformation context.

It must briefly be acknowledged here that, as Guess et al. surmise, the terms 'disinformation' and 'propaganda' are often 'used interchangeably, with shifting or overlapping definitions.'[174] While there is no singular consensus on how the term 'propaganda' is defined, commentators generally agree that propaganda involves the intention use of information to shift public opinion for political goals. Powell idenfies the term 'propaganda' as the use of information with an intention to 'change, destablise, or subvert other countries' political or social, and economic systems.'[175] Rapaport and Schabio describe propaganda as 'simplified information, usually biased and always goal-oriented, designed to shape public attitudes and behavior.'[176] While such definitions appear to conceptualise propaganda as a form of manipulative or deceptive communication techniques, many authors simultaneously highlight how the concept of propaganda has not always carried negative connotations.[177] Further, the concept of propaganda is not always connected to false or deceptive messaging.[178] As will be examined in the case law below, the ECtHR does not offer a singular definition of the term propaganda. Moreover, many of the cases discussed below do not necessarily involve false or misleading

[172] *Manole and others v Moldova* (n 109).
[173] Chapter One, Section 1.3.
[174] Andrew Guess and Benjamin Lyons, *Misinformation, disinformation, and online propaganda. Social media and democracy: The state of the field, prospects for reform* (Springer, 2020) 10.
[175] Jon T Powell, 'Towards a negotiable definition of propaganda for international agreements related to direct broadcast satellites,' Law & Contemporary Problems (1982) 45(3).
[176] Elisa Rapaport and William Schabio '"Propaganda." The Holocaust: Remembrance, Respect, and Resilience' (2023).
[177] For example, several authors note that while propaganda is generally defined as involving some form of 'persuasion', this does not always involve necessarily negative connatations. On this see Jason Brennan, 'Propaganda about Propaganda,' (2017) Critical Review 29.1, 34-48; Also Douglas Walton, 'What is Propaganda and What Exactly is Wrong With It?' (1997) Public Affairs Quarterly 11.4; Also Sheryl Tuttle Ross, 'Understanding propaganda: The epistemic merit model and its application to art,' (2002) Journal of Aesthetic Education 36(1), 16-30.
[178] ibid.

communications and appear to encompass communications which frustrate the ECHR's democratic values. Thus, the concept of 'anti-democratic propaganda' here is intended to refer to communications which are intentionally disseminated to undermine the ECHR's democratic values as interpreted by the Strasbourg Court.

The ECtHR often applies Article 17 ECHR when confronted with communications that undermine the Convention's democratic values. Inspired by Article 30 of the Universal Declaration of Human Rights (UDHR), Article 17 ECHR states that:

> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.[179]

If the ECtHR considers that an alleged interference with freedom of expression relates to communications which are aimed at the 'destruction' of Convention rights, the Court can apply Article 17 ECHR and not examine this alleged interference with freedom of expression under Article 10 ECHR.[180] Alternatively, the Court may apply Article 10 ECHR but use Article 17 ECHR 'indirectly' as an interpretative aid when assessing the interference under Article 10(2).[181] Keane identifies Article 17 ECHR as a tool for the ECtHR to 'attack hate speech.'[182] Hannie and Voorhoof similarly describe Article 17 ECHR as an 'abuse clause' for the Court to curtail 'certain hate speech.'[183] Importantly, these authors further observe that Article 17 ECHR is connected to the 'maintenance of democracy' under the ECHR framework.[184] Stated differently, the provision reflects a desire of the Convention drafters to prevent abuse of Convention rights by 'enemies of democracy.'[185] Taking a critical view, De Morree posits that the Court's use of Article 17 ECHR embodies a 'militant' response to propaganda which

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[179] Art 17 ECHR.
[180] ibid.
[181] See Paulien de Morree, *Rights and Wrongs under the ECHR: The prohibition of abuse of rights in Article 17 of the European Convention on Human Rights* (Intersentia, 2016).
[182] David Keane, 'Attacking hate speech under Article 17 of the European Convention on Human Rights.' (2007) 25(4) Netherlands Quarterly of Human Rights 641-663.
[183] Cannie and Voorhoof, 'The abuse clause and freedom of expression in the European Convention on Human Rights' (n 19).
[184] ibid.
[185] ibid.

undermines the ECHR's 'democratic values.'[186]

The ECtHR's application of Article 17 ECHR to curb anti-democratic propaganda is evident when assessing circumstances wherein Strasbourg organs have applied Article 17. Article 17 ECHR was first applied in *Communist Party of Germany v the Federal Republic of Germany* where Germany dissolved the German Communist Party.[187] The European Commission on Human Rights (ECommHR) rejected admissibility of the application under Article 10 ECHR due to the party's 'revolutionary' aim to promote 'dictatorship of the proletariat' and abolish Germany's 'liberal democratic order.'[188] The ECommHR assessed a different form of propaganda in *Glimmerveen and Hagenbeek v the Netherlands* where the applicant election candidates had been prosecuted for disseminating xenophobic pamphlets.[189] The ECommHR rejected the admissibility of the application under Article 10 ECHR because the pamphlets encouraged expulsion of non-whites from the Netherlands.[190] Important here was that their pamphlets promoted ideas that were 'inspired by the overall aim to remove all non-white people from the Netherlands.'[191] Such ideas were 'aimed at the destruction of any of the rights and freedoms' in the Convention.[192] A concrete example of anti-democratic propaganda that frustrates the Convention's democratic values is Nazi propaganda. The ECtHR rejected admissibility under Article 10 ECHR in *BH, MW, HP and GK. v Austria* where Austria had prevented neo-Nazi politicians from disseminating conspiratorial pamphlets.[193] Informing the Court's application of Article 17 ECHR was that the ideas expressed in pamphlets were 'inspired by National Socialist ideas' which were 'incompatible with democracy.'[194] Importantly, the ECtHR further stressed how the applicants had disseminated the pamphlets in Austria. Thus, the domestic authorities were ideally placed to interpret this propaganda 'in view of the historical past forming the immediate background of the Convention itself.'[195] The Court again deferred to national authorities in *Kühnen v Germany* where a proponent of a renewed

[186] De Morree, *Rights and Wrongs under the ECHR* (n 168).
[187] *Communist Party of Germany v the Federal Republic of Germany* Application No 250/57 (Commission decision, 20 July 1957).
[188] The ECommHR filtered whether ECTHR applications were well founded (abolished by Protocol 11 ECHR.)
[189] *Glimmerveen and Hagenbeek v the Netherlands* Application Nos 8348/78 & 8406/78, (Commission decision, 11 October 1979).
[190] ibid para 3.
[191] ibid.
[192] ibid.
[193] *B.H, M.W, H.P and G.K. v Austria* Application No 12774/87 (ECtHR, 12 Oct 1989).
[194] ibid para 3.
[195] ibid.

Nazi party disseminated pamphlets excoriating 'Zionism' and 'masses of foreign workers.'[196] Applying Article 17 ECHR directly, the ECtHR not only stated that the pamphlets could undermine the 'basic order of democracy' but also referenced how 'reinstitution' of the Nazi party could 'revive' the 'state of violence and illegality which existed in Germany between 1933 and 1945.[197] This focus was also critical in *X v Austria* where the applicant contested his inclusion on a Nazi organization blacklist merely because he opposed the 'growing Communist infiltration in Austria.'[198] Notably, the Court rejected admissibility under Article 10 ECHR even though it was unclear if the applicant had made overtly racist statements. Irrespective of this, the Court reasoned that Austria was better placed to determine whether affiliation with the 'Vienna League of Young Patriots' constituted activities promoting Nazi ideals.[199]

Contrasting with the ECtHR's generally high protection for political officials to disseminate ideas under Article 10 ECHR, the Court is highly reluctant to enable political leaders to misuse this provision to disseminate ideas that frustrate democratic values. The Court's application of Article 17 ECHR epitomises this. *Le Pen v France* concerned France's conviction of a politician for publicly inciting hatred towards Muslims.[200] Le Pen—a former 'National Front Party' leader—proclaimed that 'the day there are no longer 5 million but 25 million Muslims in France, they will be in charge.'[201] The ECtHR stated that it attaches the 'highest importance' to freedom of political debate and accepted the applicant was an elected representative discussing public interest matters.[202] However, it rejected Article 10 ECHR admissibility because Le Pen had used his influential position in a manner that could 'generate misunderstanding and incomprehension' and promote 'feelings of rejection and hostility' towards Muslims.[203] As his comments were presented 'as an already latent threat to the dignity and security of the French people,' the Court reasoned that national authorities enjoyed 'considerable latitude' to assess whether prosecution for his comments was justified.'[204] The ECtHR expressed similar reasoning when indirectly applying Article 17 ECHR in *Feret v Belgium.*[205] A parliamentarian had been prosecuted for inciting discrimination through

[196] *Kühnen v Germany* Application No 12194/86, (ECtHR, 12 May 1988).
[197] ibid.
[198] *X v Austria* Application No 1747/62 (ECtHR, 13 Dec 1963).
[199] ibid.
[200] *Le Pen v France* Application No 18788/09 (ECtHR, 7 May 2010).
[201] ibid.
[202] ibid.
[203] ibid.
[204] ibid.
[205] *Feret v Belgium* Application No 15617/07 (ECtHR, 16 July 2009).

electoral leaflets which presented immigrants as 'criminally-minded and keen to exploit the benefits they derived from living in Belgium.'[206] The ECtHR accepted that the right to freely express ideas was 'especially' important for 'an elected representative.'[207] However, the Court tempered this by stating that:

> It was crucial for politicians, when expressing themselves in public, to avoid comments that might foster intolerance. The impact of racist and xenophobic discourse was magnified in an electoral context, in which arguments naturally became more forceful.[208]

This reasoning—indicating the ECtHR's concern with how positions of public influence may be used to incite hatred—was further evident in *Belkacem v Belgium*.[209] The Court rejected admissibility under Article 10 ECHR where the applicant disseminated YouTube videos encouraging viewers to 'dominate' and 'fight non-Muslim' groups.[210] The ECtHR classified the videos' instructions as a 'vehement attack' which frustrated 'values of tolerance, social peace and non-discrimination' underpinning the Convention.'[211] Here, the applicant was not a politician but still held influence as a Salafist leader.[212] Thus, the Court is not strictly concerned with whether an individual is an elected official but considers the broader influence of individuals on the political populace. This was illustrated where the Court applied Article 17 ECHR in *Šimunić v Croatia*.[213] Here, the applicant was a footballer convicted for inciting discrimination by participating with fan chants which had infamous connotations to Croatian fascism and 'racist ideology.'[214] The Court highlighted that the player had not only repeated the chant four times but was also:

> A role-model for many football fans, should have been aware of the possible negative impact of provocative chanting on spectators' behaviour, and should have abstained from such conduct.[215]

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[206] ibid.
[207] ibid.
[208] ibid.
[209] *Belkacem v Belgium* Application Number 34367/14 (ECtHR, 27 Jun 2017).
[210] ibid para 33.
[211] ibid.
[212] ibid para 8.
[213] *Šimunić v Croatia* Application No 20373/17 (ECtHR, 22 Jan 2019).
[214] ibid para 3.
[215] ibid para 45.

As this language demonstrates, the ECtHR may apply Article 17 ECHR in circumstances where prominent public figures disseminate ideas that frustrate the Convention's democratic values by targeting minorities. Of significance from the online disinformation perspective is that the Court has also used Article 17 ECHR to exclude certain conspiratorial political narratives from protection under Article 10 ECHR. *Lehideux and Isorni v France* involved France's conviction of applicants who had publicly defended 'crimes of collaboration' between Marshal Petain with Nazi Germany.[216] Using Article 17 ECHR as an interpretive aid, the Grand Chamber highlighted how the applicants 'omitted to mention historical facts' of Nazi atrocities.[217] However, the Court distinguished that the substance of contested public statements—regarding Nazi collaboration—formed 'part of an ongoing debate between historians.'[218] The Grand Chamber reasoned that it was not the Court's 'task' to 'settle' such matters.[219] The Court clarified that it could exclude statements from the protection of Article 10 ECHR if they disputed a 'category of clearly established historical facts—such as the Holocaust—whose negation or revision would be removed from the protection of Article 10 ECHR by Article 17.'[220] This specific factual context arose in *Garaudy v France* where an applicant distributed a book entitled 'The Founding Myths of Modern Israel.'[221] This publication did not merely omit to reference Nazi atrocities but was designed with a 'marked denialist character' by disputing the existence of gas chambers in the holocaust.[222] Thus, the ECtHR reasoned that the book's true purpose was not to conduct historical research but to promote 'negation or revision of historical facts.'[223] This not only threatened 'the rights of others' but also undermined ECHR values of 'democracy and human rights.'[224] The ECtHR's robust stance against holocaust denial was further evident in *Witzsch v Germany* where it rejected Article 10 ECHR admissibility after an applicant had been prosecuted for publishing a letter denying Hitler's intention to murder Jews.[225] Notably, the fact that this statement had been sent through private correspondence did not carry any weight in the Court's admissibility.[226] Further illustrative

[216] *Lehideux and Isorni v France* Application No 24662/94 (ECtHR, 23 Sep 1998).
[217] ibid para 47.
[218] ibid.
[219] ibid.
[220] ibid.
[221] *Garaudy v France* Application No 65831/01 (ECtHR, 7 July 2003).
[222] ibid para 47.
[223] ibid.
[224] ibid.
[225] *Witzsch v Germany* Application No 7485/03 (ECtHR, 13 Dec 2005).
[226] ibid.

here is *M'Bala M'Bala v France* where a comedian applicant had been prosecuted for committing public insult against persons of the Jewish faith after inviting an academic on a tv show and the academic denied the existence of gas chambers.[227] Accompanying this was a presentation of an award to the academic by a hired actor wearing clothing that resembled clothing worn by Jewish deportees.[228] Refusing the applicant's admissibility under Article 10 ECHR, the ECtHR acknowledged that the applicant's show frequently engaged in political satire but considered that the show had 'lost its entertainment value 'by calling one of the best-known French revisionist' to express ideas which undermined 'the fundamental values of the Convention.'[229] The ECtHR again placed little weight on factual context in *Pastors v Germany* where an applicant politician had denied the Holocaust during a parliamentary debate.[230] The fact that the applicant ordinarily had parliamentary immunity did not carry weight in the Court's assessment that he had disseminated 'untruths' to defame Jews and undermine the 'democratic process' in a manner that ran 'contrary to the text and spirit of the Convention.'[231]

While the ECtHR has consistently applied Article 17 ECHR to Nazi propaganda and Holocaust denial, the Court has not coherently defined the full material scope of communications which this provision may apply to. For example, the Court has not only applied this provision to ideas promoting totalitarianism but also to discriminatory communications promoting Islamophobia and Homophobia.[232] Several commentators opine that the ECtHR's expansive use of Article 17 ECHR undermines the value of assessment criteria under Article 10(2) ECHR. Hannie and Voorhoof contend that the Court's use of Article 17 ECHR to categorically exclude certain propaganda damages the Court's process of considering all 'factual and legally relevant elements' when under Article 10(2).[233] Lobba similarly posits that Article 17 ECHR may have useful applications to propaganda but only if applied indirectly to complement the 'ordinary necessity test' under Article 10(2) ECHR.[234] This author has previously expressed a cautionary

[227] *M'Bala M'Bala v France* Application No 25239/13 (ECtHR, 20 October 2015).
[228] ibid.
[229] ibid para 39.
[230] *Pastors v Germany* Application No 55225/14 (ECtHR, 3 Oct 2019).
[231] ibid para 46.
[232] See *Norwood v United Kingdom* Application No 23131/03 (ECtHR, 16 Nov 2004); *Ayoub and Others v France* Application Nos 77400/14, 34532/15 and 34550/15 (ECtHR, 8 Oct 2020).
[233] Cannie and Voorhoof, 'The Abuse Clause and Freedom of Expression in The European Convention on Human Rights' (n 19).
[234] Paolo Lobba, 'Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime,' (2015) 26(1) European Journal of International Law 237–253.

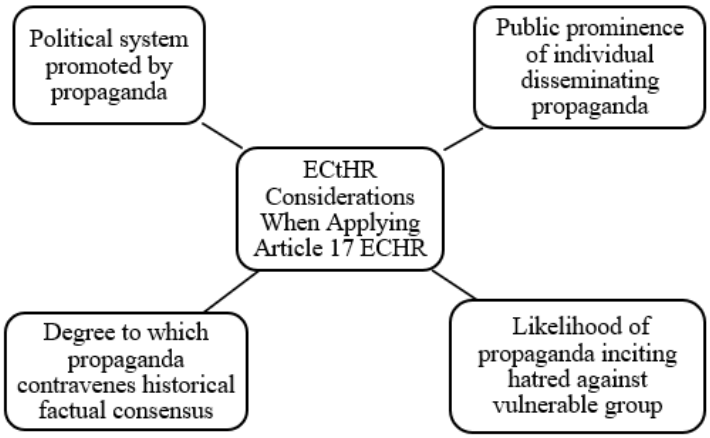
view regarding how the ECtHR could hypothetically apply Article 17 ECHR to propaganda containing online disinformation without assessing this under Article 10(2) ECHR.[235]

These criticisms are instructive when considering how the ECtHR may still assess propaganda under Article 10 ECHR even if confronted with circumstances which—based on the Court's reasoning detailed above—appear to justify applications of Article 17 ECHR. Instructive here is the Grand Chamber case of *Jersild v Denmark* concerning an applicant convicted for inciting the Greenjackets political group to air propaganda as interviewees of his radio show.[236] The Court observed that the applicant had not only edited the interview to air discriminatory statements but had also shared beer with the interviewees.[237] However, the Grand Chamber found a violation of Article 10 ECHR and highlighted the applicant's role as a political journalist who had been exposing 'opinions of public interest.'[238] The Court further stressed that the 'public also had an interest in being informed of notoriously bad social attitudes, even those which were unpleasant.'[239] Considering how the applicant had purposefully disseminated anti-minority propaganda, it is questionable why the ECtHR did not even reference Article 17 ECHR. Further relevant is the subsequent Grand Chamber case of *Perincek v Switzerland*.[240] This concerned an applicant who was a well-known ultranationalist activist convicted for repeatedly describing the Armenian genocide as an 'international lie' on Swiss television.[241] Here, the Grand Chamber highlighted that the applicant had expressed his 'views as a politician, rather than a historian scholar.'[242] In this capacity, his statements had demonstrated an 'intransigent' political view but did not explicitly express 'contempt or hatred for the victims of the events of 1915 nor called Armenians liars or attempted to stereotype them.'[243] Finding Switzerland's violation of Article 10 ECHR, the Court reasoned that the applicant's statements included 'an element of exaggeration as they sought to attract attention.'[244] The Court also distinguished the applicant's denialist statements from Holocaust denial by highlighting the

[235] Ethan Shattock, Should the ECtHR Invoke Article 17 for Disinformation Cases?' (European Journal of International Law Talk 26 March 2021) <https://www.ejiltalk.org/should-the-ecthr-invoke-article-17-for-disinformation-cases/> last accessed 8 July 2023.
[236] *Jersild v Denmark* Application No 15890/89 (ECtHR, 23 September 1994).
[237] ibid para 16.
[238] ibid para 12.
[239] ibid.
[240] *Perincek v Switzerland* Application No 27510/08 (ECtHR, 15 October 2015).
[241] ibid para 153.
[242] ibid para 223.
[243] ibid.
[244] ibid para 239

'lapse of time between Perincek's statements and the events of 1915' and by observing how most Armenian genocide victims had already perished.[245] Further addressing this, the Grand Chamber considered that the need to regulate the impugned communications was 'bound to recede with the passage of time.'[246] Partially due to these factors, the Court found that there were 'no grounds to apply Article 17.'[247] Notably, the Court found an Article 10 ECHR violation even while accepting that the applicant had deliberately travelled to Switzerland to 'test' the limits of Swiss genocide denial laws.[248] As these Grand Chamber cases illustrate, the ECtHR has not identified factors which justify applications of Article 17 ECHR in a consistent manner. As this section has gleaned, however, there are several key circumstances which—particularly if arising cumulatively—are likely to result in the ECtHR's application of Article 17 ECHR where the Court receives complaints based on alleged interferences with the right to freedom of expression under Article 10 ECHR. This is illustrated below.

Figure 1. ECtHR assessment factors when applying Article 17



As the foregoing analysis and above diagram illustrates, Strasbourg judicial organs initially applied Article 17 ECHR to prevent resurgences of authoritarian political regimes which preceded the Convention's drafting.[249] However, the ECtHR has been increasingly predisposed to apply this provision to an increasingly broader range of propaganda—although it must be restated here that the ECtHR does not offer a singular definition for this term—which the Court

[245] ibid para 250.
[246] ibid.
[247] ibid para 282.
[248] ibid.
[249] Namely Communism and Nazism.

identifies as inciting hatred or political violence against vulnerable groups. The Court is more likely to apply Article 17 ECHR—and to refuse admissibility under Article 10 ECHR—where such propaganda is disseminated by prominent individuals who hold influence over the populace. Instructive in the disinformation context is that—where propaganda involves misleading narratives—the Court closely examines the extent to which propaganda contravenes an established factual consensus. Considering how these factors inform the ECtHR's exclusion of Article 10 ECHR protections for communication, it must be noted here that Contracting Parties have extensive latitude to restrict—and make illegal—disinformation which explicitly promotes totalitarian political systems or promotes specific falsehoods—namely Holocaust denial—to incite hatred against vulnerable minorities.

As the ECtHR thus appears highly reluctant to offer protection to certain falsehoods by applying Article 10 ECHR, it is arguable that the Strasbourg Court should more explicitly state this when applying Article 17 ECHR. As identified in several of the above admissibility cases, the Court appears reluctant to allow individuals—including elected political officials—to invoke the right to freedom of expression under Article 10 ECHR as a vehicle for disseminating falsehoods aimed at the destruction of the ECHR's democratic values.[250] While this is welcome and consistent with the Court's approach to political communications under Article 10 ECHR more generally, the Court should more clearly state the criteria which ought to justify its application of Article 17 ECHR and its refusal to apply Article 10 ECHR in cases involving falsehoods.[251] Outside of the understandable but very specific context of communications involving Holocaust denial, the scope of false communications which are likely to invite the Court's application of Article 17 currently remains uncertain. This uncertainty is particularly importantly when recalling how many forms of online disinformation may not meet any criteria which the ECtHR considers in its application of Article 17 ECHR.[252] It is therefore necessary

[250] Holocaust denial is the clearest existing example of a category of falsehoods that will likely lead the ECtHR to invoke Article 17 ECHR directly. See *Garaudy v France* Application No 65831/01 (ECtHR, 7 July 2003); *Lehideux and Isorni v France* Application No 24662/94 (ECtHR, 23 Sep 1998); *M'Bala M'Bala v France* Application No 25239/13 (ECtHR, 20 October 2015).

[251] As noted above, the Grand Chamber's approach in *Perincek v Switzerland* Application No 27510/08 (ECtHR, 15 October 2015) makes it difficult to definitively establish the criteria whereby intentional falsehoods aimed at a minority group will lead the ECtHR to disallow applications under Article 10 ECHR and invoke Article 17 ECHR directly.

[252] For example, it is highly unlikely that the example of the Vote Leave NHS Brexit claim (discussed in Chapter One) would lead the Court to invoke Article 17 ECHR based on the above cases.

to further dissect the Court's approaches to misleading communications disseminated in political environments.

2.3.3 The ECtHR's Distinction Between Facts and Value Judgments

As the foregoing analysis has highlighted, the ECtHR offers extensive protection under Article 10 ECHR to polemic—including factually exaggerated—communications disseminated in political environments. However, the Court is inclined to consider—particularly in light of Article 17 ECHR—that Article 10 ECHR must not be misused to undermine ECHR democratic values. This is significant in the disinformation context because—as section 2.3.2 highlighted—the Court can interpret that certain 'untruths' may frustrate these democratic values.[253] It remains, however, that the dissemination of disinformation may often not involve communications which involve explicit repudiations of established historical facts.[254] Accordingly, it is necessary to further unpack the ECtHR's interpretive reasoning in cases involving statements—disseminated in political contexts—which lack veracity. Instructive here is the Court's distinction between facts and value judgments where the Court applies Article 10 ECHR.

The ECtHR's distinction between facts and value judgements stems from the aforementioned case of *Lingens v Austria*.[255] Recalling this case, the Court found that Austria's libel conviction of a journalist violated Article 10 ECHR because this conviction targeted publications discussing a known political leader.[256] As the domestic conviction also involved allegedly defamatory statements, the ECtHR also considered the truth of the applicant's statements.[257] Addressing this, the ECtHR distinguished that his statements—condemning a politician's 'immoral' actions and 'baseless opportunism'—had not asserted facts and instead conveyed 'value judgements.'[258] The Court highlighted the importance of this by instructing that:

[253] *Pastors v Germany* (n 17) para 46.
[254] Discussed in Chapter One, section 1.3.2.
[255] *Lingens v Austria* (n 99).
[256] ibid para 15.
[257] ibid para 41.
[258] ibid para 45.

> A careful distinction needs to be made between facts and value-judgments. The existence of facts can be demonstrated, whereas the truth of value-judgments is not susceptible of proof. The Court notes in this connection that the facts on which Mr. Lingens founded his value-judgment were undisputed, as was also his good faith.[259]

As the above language suggests, this distinction is partially based on a practical inability of individuals to prove the veracity of their opinions in every instance. The ECtHR expressed concern that Austria's criminal code could effectively require applicants to prove the veracity of opinionated political criticisms. For example, the Court considered that domestic legal requirements for individuals to prove the truth of a value judgment 'is impossible of fulfilment' and 'infringes freedom of opinion' which 'is a fundamental part of the right secured by Article 10 ECHR.'[260] In light of the political relevance of the applicant's publications, the Court further considered that such requirements would 'likely deter journalists from contributing' to 'political debate' and 'public discussion of issues affecting the life of the community.'[261] This element of the ECtHR's focus was again visible in the Grand Chamber case of *Dalban v Romania* where an applicant journalist had been convicted for publishing articles suggesting that a chief executive of a State-owned agricultural company had committed fraud.[262] The ECtHR found this conviction to have violated Article 10 ECHR because the Court identified the applicant's comments as 'critical value judgements' rather than 'totally untrue' factual allegations.[263] This distinction was vital because the substance of the applicant's value judgments concerned the 'management of State assets and the manner in which politicians fulfil their mandate.'[264] This political context was again vital in *Scharsach and News Verlagsgesellschaft mbH v Austria* where the applicant had been convicted for describing a well-known politician as a 'closeted Nazi.'[265] Finding an Article 10 ECHR violation, the ECtHR stressed that Austrian courts had failed to consider how the applicant was a journalist covering a matter of 'public interest' and had written the article 'in a political context.'[266]

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[259] ibid para 46.
[260] ibid.
[261] ibid para 44.
[262] *Dalban v Romania* Application No 28114/95 (ECtHR, 28 Sep 1999).
[263] ibid para 49.
[264] ibid para 48.
[265] *Scharsach and News Verlagsgesellschaft mbH v Austria* Application No 39394/98 (ECtHR, 27 Oct 2005).
[266] ibid para 38.

Moreover, the Court disagreed with Austria that his use of the term 'closeted Nazi' was not a statement of fact but' needed to be 'understood as a permissible value judgment' due to the political context.[267]

As the ECtHR's reasoning in above cases suggests, the Court not only examines whether statements lacking a complete factual basis are value judgments but also whether they have been imparted in the context of political debates. Both considerations were central to the ECtHR's finding of an Article 10 ECHR violation in *Lopes Gomes da Silva v Portugal*.[268] In this case, the Court agreed with Portugal that the applicant's description of a politician as 'buffoonish' had been 'provocative' but found it important that this description had been 'expressed in the context of heated political debate.'[269] The Court considered this while simultaneously classifying the applicant's description as 'an opinion shaped by the political persuasions' of the prominent figure he had targeted.[270] Stated differently, polemic value judgments lacking a complete factual basis are more likely to be protected under Article 10 ECHR if they involve criticism of prominent political figures. This is evident when examining *Dichand and Others v Austria*.[271] Here, applicant journalists had been ordered to retract published statements that a known politician had purchased a rival paper and created conflicts between his business and political interests.[272] The ECtHR found an Article 10 ECHR violation even while the Court explicitly agreed with Austria that some of the applicant's criticisms had been published in 'polemic language' and 'on a slim factual basis.'[273] Important was the Court's interpretation that not all of the applicant's criticisms contained factual assertions and some contained 'a fair comment on an issue of general public interest.'[274] In any event, it was important that such criticisms concerned a 'politician of importance' whose affairs gave 'rise to public discussion.'[275] The Court applied similar reasoning when finding a violation of Article 10 ECHR in *Lepojic v Serbia.*[276] The applicant himself was a prominent politician who published an article accusing a mayor of 'near-insane' spending of public funds on frivolous

[267] ibid para 41.
[268] *Lopes Gomes da Silva v Portugal* (n 119).
[269] ibid.
[270] ibid para 33.
[271] *Dichand and Others v Austria* Application No 29271/95 (ECtHR, 26 February 2002).
[272] ibid para 22.
[273] ibid para 51.
[274] ibid para 50.
[275] ibid.
[276] *Lepojic v Serbia* Application No 13909/05 (ECtHR, 6 Nov 2007).

events.[277] Addressing the substance of this description, the ECtHR accepted that certain language used could ordinarily be construed as factual assertions but highlighted that they had 'obviously' been used to question the mayor's spending 'in his capacity as a politician' and not to factually assert the Mayor's 'mental state.'[278]

Drawing from the ECtHR's distinction between facts and value judgments, some commentators interpret that misleading statements are likely to receive protection under Article 10 ECHR if the Court classifies such statements as opinionated viewpoints rather than factual assertions. Steiger observes that 'value judgments' are protected under Article 10 ECHR irrespective of whether they consist of 'true or false' information.[279] McGonagle uses the Court's distinction here to observe that 'protection afforded by Article 10 ECHR is not limited to truthful information.'[280] Significantly, however, the ECtHR consistently focuses on whether political criticisms—even if containing value judgements—are grounded in accurate observations. Recalling *Lopes Gomes da Silva v Portugal*, this is suggested in the Court's classification of the applicant's use of the term 'buffoonish' as a statement containing a value judgment which had been 'shaped by the political persuasions' of a political figure.[281] Moreover, the Court highlighted that the applicant's comments were not gratuitous because he had 'supported them with an objective explanation.'[282] Absent this underlying 'factual basis,' his dissemination of a polemic opinion may have been 'excessive.'[283] Further recalling *Lepojic v Serbia,* the ECtHR considered it vital that the applicant 'clearly had some reason to believe that the Mayor might have been involved in criminal activity.'[284] The Court's focus on facts underpinning opinionated criticisms was also key in *Brasilier v France* where an applicant parliamentarian had been convicted for defamation after publicly accusing a rival electoral candidate of attempting to 'hold up' sixty thousand ballot papers to hurt the applicant's electoral chances.[285] The ECtHR found that France violated Article 10 ECHR due to failures

[277] ibid para 6.
[278] ibid para 70.
[279] Dominik Steger, 'Protecting Democratic Elections Against Online Influence via "Fake News" and Hate Speech–The French Loi Avia and Loi No. 2018–1202, the German Network Enforcement Act and the EU's Digital Services Act' in *Theory and Practice of the European Convention on Human Rights*. (Verlagsgesellschaft mbH & Co. KG, 2021) 165-214.
[280] Tarlach McGonagle, 'Fake news" False fears or real concerns?' (2017) 35(4) Netherlands Quarterly of Human Rights 203-209.
[281] *Lopes Gomes da Silva v Portugal* (n 119) para 33.
[282] ibid para 31.
[283] ibid para 34.
[284] *Lepojic v Serbia* (n 260) para 77.
[285] *Brasilier v France* Application No 71343/01 (ECtHR, 11 Apr 2006).

of French courts to apply any distinction between facts and value judgements in the context of political debate.[286] This was significant because the electoral candidate—who the applicant directed statements towards—had previously been examined for engaging in electoral fraud.[287] The ECtHR again sought to identify whether value judgments contained a factual basis when finding an Article 10 ECHR violation in *Dyuldin v Russia.*[288] The applicant had been ordered to publish retractions of an open letter condemning the Russian governments 'destructive' socio-economic policies.[289] The Court found it crucial that domestic courts had applied 'no distinction between value judgements and statements of fact.'[290] Importantly, however, the applicant's value judgment had been shaped by a document containing 'first-hand experience' corroborating this claim.[291] Addressing this, the Court reasoned that:

> A value judgment must be based on sufficient facts in order to constitute a fair comment under Article 10 ECHR, the difference between a value judgment and a statement of fact finally lies in the degree of factual proof which has to be established.[292]

Such language is pivotal from the disinformation perspective as it suggests that even opinionated criticisms generally require some factual basis in political and electoral contexts. . Recalling *Scharsach and News Verlagsgesellschaft mbH v Austria,* the ECtHR disagreed with Austria that the applicant's description of a politician as a 'closeted Nazi' had been a value judgment and not a factual assertion.[293] This was permissible because the targeted politician was a prominent individual who had also publicly criticised Austrian legislation 'which bans National Socialist activities.'[294] This provided a 'body of facts' substantiating the applicant's opinion that the politician was a 'closeted Nazi.'[295] The Court's focus on this past context was also critical when finding an Article 10 ECHR violation in *Wirtschafts-Trend Zeitschriften-Verlags GmbH v Austria.*[296] Applicants had been convicted of libel for publishing criticisms of

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[286] ibid.
[287] ibid.
[288] *Dyuldin v Russia* Application No 25968/02, (ECtHR, 31 July 2007).
[289] ibid.
[290] ibid.
[291] ibid.
[292] ibid para 48.
[293] *Scharsach and News Verlagsgesellschaft mbH v Austria* (n 249).
[294] ibid para 41.
[295] ibid.
[296] *Wirtschafts-Trend Zeitschriften-Verlags GmbH v Austria* Application Nos 66298/01 and 15653/02 (ECtHR, 27 Jan 2006).

a politician's 'belittlement of the concentration camps as "punishment camps".'[297] The Court identified this as criticism conveying a value judgement that had been informed by the politician's previous use of the term 'punishment camps.'[298] Such statements could 'reasonably be criticised as a belittlement of the concentration camps all the more so if that term was applied by someone whose ambiguity towards the Nazi era is well-known.'[299] Absent this underlying factual background, the statement would have been 'excessive.'[300]

When seeking to establish whether value judgments are supported by some underlying factual basis, the ECtHR appears concerned not only with veracity but also with the conduct and intentions of applicants. This has specific relevance where professional journalists impart factually dubious statements in political contexts. *Prager & Oberschlick v Austria* concerned an applicant convicted for publicly suggesting that members of Austria's judiciary were corrupt.[301] The ECtHR identified the applicant's statements as value judgments but found no Article 10 ECHR violation because he had failed to even attempt to 'establish that his allegations were true' and could therefore not 'invoke his good faith or compliance with the ethics of journalism' to verify allegations.[302] The Court further highlighted that the serious nature of his accusations 'not only damaged their reputation, but also undermined public confidence in the integrity of the judiciary as a whole.'[303] The ECtHR's focus on the applicants' good faith was also visible in the Grand Chamber case of *Bladet Tromso and Stensaas v Norway*.[304] Here, the Grand Chamber found that Norway had violated Article 10 ECHR after convicting applicant journalists for publishing articles exposing cruelty in harp seal hunting.[305] The ECtHR observed that applicants had made several factually inaccurate assertions based off an unverified report. Importantly, however, the Court agreed with the applicants that the report appeared credible at the time and was obtained from a representative of the Ministry of Fisheries.[306] Thus, the journalists had made inaccurate statements but had been 'entitled to rely' on the veracity of the report.[307] Further citing the applicants' good faith, the Court observed

[297] ibid para 7.
[298] ibid para 40.
[299] ibid.
[300] ibid.
[301] *Prager & Oberschlick v Austria* Application No 15974/90 (ECtHR, 28 February 1994).
[302] ibid para 38.
[303] ibid para 36.
[304] *Bladet Tromso and Stensaas v Norway* Application No 21980/93 (ECtHR, 20 May 1999).
[305] ibid para 31.
[306] ibid para 68.
[307] ibid.

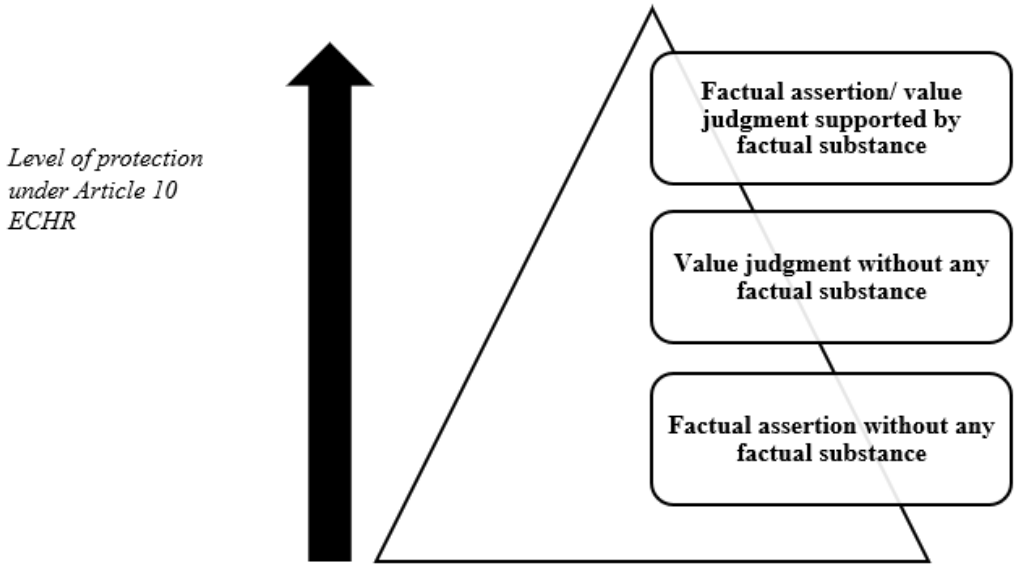
that they had not named individuals accused of the 'reprehensible acts.'[308] Thus, the 'potential adverse effect of the impugned statements on each individual seal hunter's reputation or rights was significantly attenuated.'[309] This may be contrasted with *Pedersen and Baadsgaard v Denmark* where the ECtHR found no violation of Article 10 ECHR after Denmark held journalists liable for damages after accusing a police officer of suppressing key evidence.[310] The applicants had made this accusation through a documentary wherein they had interviewed witnesses nine years after a high-profile murder case. Unlike the circumstances in *Bladet Tromso and Stensaas v Norway*, the applicants had not relied on a third party but had themselves produced the allegation without taking 'good faith' steps to verify the police chief's corruption by checking the accuracy of interviewees' statements.[311] The ECtHR's reasoning in these contrasting cases demonstrates the Court's focus on whether applicants—if having disseminated non-factual statements—have done so with genuine belief in the veracity of information.[312] As section 2.3.4 will illustrate, this has specific relevance in electoral contexts.

The ECtHR's approach in the above-mentioned cases is both timely and highly instructive in the context of assessing the extent to which false statements receive protection under Article 10 ECHR. Importantly, the ECtHR affords more protection to misleading statements conveying value judgments—as opposed to factual assertions—when applying Article 10 ECHR. The Court's distinction is based on the idea that individuals may often be unable to prove the veracity of opinionated statements. Crucially, however, the ECtHR consistently seeks to establish whether factually dubious communications—even if plausibly classified as value judgments—are supported by underlying facts.[313] Due to the increasingly contentious debates which call into question how to balance the right to freedom of expression with the dissemination of false communications, the above cases provide welcome and urgently needed clarity by demonstrating the Court's identifiable reluctance to provide protection to knowingly

[308] ibid.
[309] ibid para 67.
[310] *Pedersen and Baadsgaard v Denmark* Application No 49017/99 (ECtHR, 19 Jun 2003).
[311] ibid.
[312] It should be acknowledged that the Court has often assessed this in the context of whether journalists disseminate good faith statements in line with their professional journalistic ethics. See *Prager & Oberschlick v Austria* Application No 15974/90 (n 285) para 37; *Bladet Tomso and Stensaas v. Norway* (n 288) para 65.
[313] This is most clearly elucidated where the Court stated in *Dyuldin v Russia* Application No 25968/02, (ECtHR, 31 July 2007) para 48 that 'the difference between a value judgment and a statement of fact finally lies in the degree of factual proof which has to be established.'

false statements in political contexts.[314] Arguably, however, the application of the ECtHR's distinction between facts and value judgments is more straight forward in the context of offline communications. Threaded throughout the above-discussed cases is the Court's capacity to engage in detailed factual and contextual assessments which shed light on whether false statements made by individuals should be classified as a knowing falsehood or plausibly good faith—but potentially misguided—opinionated statement.[315] Outside of the ECtHR's consistent application of a fact based contextual assessment, the Court provides little clarity as to the specific elements which must be identified in order to apply this distinction in practice. In spite of this ambiguity—which will be further unpacked in Chapter Four—, the Court's level of protection to misleading communications in the above cases can be surmised below.

Figure 2. ECtHR interpretation of the distinction between facts and value judgments



As illustrated in the foregoing analysis of this section, the ECtHR is likely to find Article 10 ECHR violations where Contracting Parties restrict the dissemination of statements containing factual assertions which are supported by evidence. Relatedly, the Court offers scarce protection to statements which purport to assert facts but lack any veracity. When identifying that misleading statements contain value judgments, the ECtHR still examines whether such

[314] On these debates see Fernando Nuñez, 'Disinformation legislation and freedom of expression,' UC Irvine Law Review 10 (2019) 783.

[315] Online platforms and independent regulators, for example, will not always have the time and financial resources to provide a lengthy and in-depth contextual assessment to ascertain whether a false statement if a fact or value judgment. On empiricial evidence of this, see Daphne Keller and Paddy Leerssen, 'Facts and where to find them: Empirical research on internet platforms and content moderation,' (2020) Social media and democracy: The state of the field and prospects for reform, 220-251.

statements—even if conveying opinions rather than assertions of fact—are supplemented by an underlying factual substrate. Alongside these considerations, the Court consistently seeks to establish whether individuals—if having disseminated statements which could be misleading in the context of political debate—have intended to denigrate other individuals or have conveyed information in good faith. As is evident in the cases discussed in this section, the Court often assesses misleading communications that could harm the reputation of political officials. As the section below now examines, however, the Court's focus on the desirability for factual veracity is also evident in a broader range of cases regarding the dissemination of misleading electoral communications.

2.3.4 The ECtHR's Assessment of Misleading Electoral Communications Under Article 10

As section 2.3.3 has identified, the ECtHR places strong emphasis on the need for factual veracity when applying the right to freedom of expression to communications which may lack a complete factual basis. As also considered, however, the Court is generally inclined to provide robust protection under Article 10 ECHR to communications which bring issues to light that have relevance to the political populace.[316] In the context of online disinformation, it is therefore logical to assess the ECtHR's approach in specific cases where the Court has applied Article 10 ECHR in the context of misleading electoral communications.

As noted, the ECtHR is likely to find Article 10 ECHR violations where Contracting Parties fail to establish that individuals have disseminated misleading communications with the intention to denigrate political officials. Aligning with this, the ECtHR places considerable focus on whether applicants who disseminate misleading electoral communications have intended to mislead voters. Instructive here is *Salov v Ukraine* where the applicant was prosecuted for disseminating a false rumour about the death of a Presidential election candidate.[317] The Court agreed with Ukraine's desire to provide 'voters with true information' during elections as a legitimate aim underpinning the interference.[318] However, the Court observed that Article 10 ECHR:

[316] Chapter 2, 2.3.1.
[317] *Salov v Ukraine* Application No 65518/01 (ECtHR, 6 Sept 2005).
[318] ibid para 110.

> Does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 ECHR of the Convention.[319]

It was vital from the Court's perspective that the rumour—while false—had not been 'produced or published by the applicant himself' and had been 'referred to by him in conversations with others.'[320] Thus, he had engaged in 'a personalised assessment' of information while having himself 'doubted' its veracity.[321] Finding an Article 10 ECHR violation, the Court found it crucial that the domestic courts 'failed' to establish 'that he was intentionally trying to deceive other voters and to impede their ability to vote.'[322] The ECtHR's focus on intention to mislead was also key in *Kwiecień v Poland* where an applicant had been convicted for publishing an open letter containing spurious allegations of misconduct by an election candidate.[323] The applicants had been ordered to correct the 'untrue' information and pay PLN 10,000 to the election candidate and to pay PLN 10,000 to a charity.[324] Finding an Article 10 ECHR violation, the Court identified that the applicant's 'general aim' had been to 'attract the voters' attention to the suitability of' an election candidate whom the applicant genuinely believed to be unfit for office.[325] The 'thrust of his argument' was not to lie about the politician but to 'cast doubt' on his electoral suitability.[326] This good faith intention—even if leading to 'far-fetched' claims—required close scrutiny due to the political context of such claims.'[327] The Court again examined the same electoral legislation in *Kita v Poland.*[328] The applicant had publicly accused high ranking municipality officials of misusing public funds.[329] The ECtHR accepted that his statements had not been 'based on precise or correct facts' but still found Poland's interference with Article 10 ECHR had not been 'necessary in a democratic

[319] ibid para 113.
[320] ibid.
[321] ibid.
[322] ibid.
[323] *Kwiecień v Poland* Application No 51744/99 (ECtHR, 9 January 2007).
[324] ibid para 50.
[325] ibid para 51.
[326] ibid.
[327] ibid.
[328] *Kita v Poland* Application No 57659/00 (ECtHR, 8 July 2008).
[329] ibid para 8.

society'.[330] Again crucial was that the 'thrust of the applicant's article was to cast doubt on the suitability of the local politicians for public office.'[331] It is notable that a violation was found in spite of the penalty imposed being a requirement 'to pay a small amount' in damages.[332] The lack of evidently bad faith intentions of the applicant was vital to the Court's proportionality assessment of the Article 10 ECHR inference. The Court applied similar focus and used notable language in *Brzeziński v Poland* where the applicant election candidate had been convicted for defamation after publishing a booklet accusing politicians of unlawfully receiving subsidies.[333] Significantly, the Court explicitly accepted that Poland—and other Contracting Parties—had legitimate aims to 'ensure that 'fake news' did not undermine the 'reputation of election candidates' or 'distort' election results.[334] However, the Court still found an Article 10 ECHR violation because domestic courts had 'immediately classified' his statements as 'malicious' lies without any detailed assessment of this.[335] The ECtHR considered this alongside the fact that the applicant had 'participated in the political debate at the local level.'[336] As the State had imposed penalties in this political context without establishing the applicant's bad faith intentions, the Court found that the interference had not been 'necessary in a democratic society.'[337]

Notably, the ECtHR applied this focus on the presence—or absence—of deceitful intentions even while expressing that online communications can exacerbate electoral lies in *Jezior v Poland*.[338] The Court found an Article 10 ECHR violation where Poland had convicted an applicant for hosting false statements contained in user generated comments hosted on his website. The ECtHR accepted that the speed of internet communications could exacerbate the harm caused to the election candidate.[339] However, it highlighted how the applicant had integrated notification mechanisms to detect and remove defamatory content.[340] Acknowledging this as a good faith attempt to prevent harmful false statements, the Court

[330] ibid para 28.
[331] ibid para 51.
[332] Contrasting with *Kwiecień v Poland (n 304)* where the Court noted that the 'awards were the maximum amounts which could be imposed under the Local Elections Act, as worded at the relevant time', para 56.
[333] *Brzeziński v Poland* Application No 47542/07 (ECtHR, 25 July 2019).
[334] ibid para 35.
[335] ibid.
[336] ibid para 61.
[337] ibid para 63; He had been prohibited from publishing the election booklet, forced to publicly apologize, and to donate to a charity as fiscal punishment.
[338] *Jezior v Poland* Application No 31955/11 (ECtHR, 4 June 2020).
[339] ibid para 21.
[340] ibid.

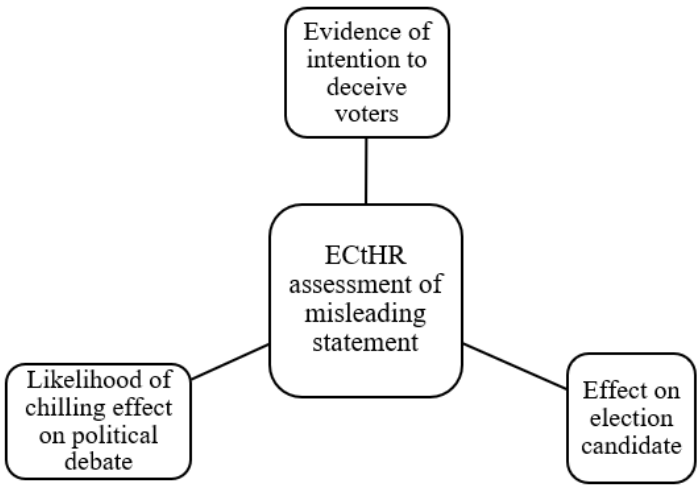
disagreed with Poland that the applicant should be required to pre-monitor comments as this 'would require excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet.'[341] This contrasts with *Staniszewski v Poland* where the ECtHR found that Poland's application of its electoral law did not violate Article 10 ECHR.[342] The applicant journalist alleged that a local mayor had chosen a specific village for a regional harvest festival solely to generate support for his electoral candidacy. The Court noted that 'the applicant did not contest' in domestic proceedings that 'his statements of fact had not been true' and had not submitted 'any evidence' supporting 'the veracity of his statements.[343] Moreover, he had failed to 'demonstrate that the research done by him before the publication of the untrue statements of fact was in good faith and complied with the ordinary journalistic obligation to verify a factual allegation.'[344] Importantly, the Court considered this while also highlighting Poland's 'legitimate goal of ensuring the fairness of the electoral processes and that this 'should not be questioned from a Convention standpoint.'[345] This existed alongside Poland's wide 'margin of appreciation in applying the summary procedure under the Election Code.'[346] Thus, while the statements had been disseminated in a political context, this lack of veracity and good faith led the Court to find that the interference with Article 10 ECHR had been 'necessary in a democratic society.'[347]

As discussed, the ECtHR applies a narrow MoA to cases where Contracting Parties limit exchanges of information contributing to sincere political debates.[348] Accordingly, it is unsurprising that the Court highlights how—without identifying an applicant's intention to mislead voters—laws restricting the circulation of misleading statements will likely chill democratic debate. In *Salov v Ukraine,* the Court reasoned that Ukraine's imposition of a five-year prison sentence for the applicant had been 'very severe' in light of how he had not intended to deceive voters.[349] This was additionally significant due to Ukraine's narrow MoA to limit 'public discussion in the course of elections' which affect 'the ability of the electorate to

[341] ibid.
[342] *Staniszewski v Poland* Application No 20422/15 (ECtHR, 14 October 2021).
[343] ibid para 50.
[344] ibid para 51.
[345] ibid para 54.
[346] ibid para 56.
[347] ibid para 57; The Court also noted that it had been 'unable to assess whether' the requirement for the applicant to pay the equivalent of €2500 to charity' had been 'excessive' because he had not 'submitted details of his personal financial situation', para 56.
[348] Chapter 2, 2.3.1.
[349] ibid para 115.

support a particular candidate.'[350] In *Kwiecień v Poland,* the Court not only condemned Polish courts for incorrectly treating the applicant's statements as malicious but also distinguished that the 'limits of acceptable criticism of someone heading a local administrative authority were wider than in relation to a private individual.'[351] This was crucial because democratic elections—alongside freedom of expression—form the 'bedrock of a democratic society.'[352] The Court also urged wide tolerance of electoral expression in *Kita v Poland* when condemning Polish courts for having 'unreservedly qualified all' of the applicants statements as lies 'without examining the question whether they could be considered to be value judgments.'[353] Even where the Court accepted the need for Contracting Parties to curtail 'fake news' in *Brzeziński v Poland*, the Court disapproved of how domestic courts had 'immediately classified' the applicant's statement as lies' without examining whether the impugned remarks had factual grounding.[354] As can be gleaned from the ECtHR's reasoning in the above cases, the Court consistently assesses three interrelated factors when examining whether Contracting Parties have violated the right to freedom of expression under Article 10 ECHR by deeming that individuals have disseminating misleading electoral communications.

Figure 3. ECtHR assessments of interferences with Article 10 ECHR for misleading statements



[350] *Salov v Ukraine* (n 298).
[351] ibid para 47.
[352] ibid para 48.
[353] *Kita v Poland* (n 309) para 44.
[354] *Brzeziński v Poland* (n 314).

The ECtHR's reasoning in cases involving misleading electoral communications is instructive in the context of online disinformation. As this section has considered, the Court consistently acknowledges that Contracting Parties have legitimate interests to prevent the right to freedom of expression from being misused to disseminate false claims to mislead voters. When assessing whether Contracting Parties have violated Article 10 ECHR in the above jurisprudence, the Court places consistent focus on whether such communications have been disseminated with the intention to mislead voters. Where domestic authorities have failed to establish that individuals have disseminated misleading electoral statements with any deceptive intentions, the ECtHR is likely to find an Article 10 ECHR violation even if misleading statements could potentially damage the reputation of an election candidate. This is linked to the Court's perspective that—without identifying that applicants who disseminate misleading information have deceptive intentions—Contracting Parties are likely to undermine Article 10 ECHR by creating a chilling effect on the ability of individuals to criticise political officials. The Court appears more inclined to tolerate Contracting Party interferences with Article 10 ECHR in the above cases if domestic authorities have established that individuals disseminating false statements have done so with the intention to deceive voters. If States have identified such intentions, the Court appears to extend a wider MoA for States to limit the dissemination of misleading electoral communications when assessing State interferences with Article 10 ECHR in election contexts.

While the above cases generally involve the dissemination of false and misleading materials in the lead up to national elections, the ECtHR rarely makes any reference to the fact that the right to free elections is protected under Article 3 of Protocol 1 ECHR. This is a disappointing omission when considering the Court's explicit recognition of how the right to free elections and the right to freedom of expression under Article 10 as being interlinked.[355] As the ECtHR is evidently reluctant to allow knowingly false communications to disrupt the integrity of national electoral processes in CoE States, it would be welcome if the Court provided more explicit confirmation regarding how the intentional dissemination of falsehoods, in addition to being an impermissible misuse of Article 10, also contravenes the spirit and substance of the right to free elections as contained under Article 3 of Protocol 1. As the ECtHR's reasoning on this specific issue is limited in the above Article 10 cases, it is necessary to evaluate the Court's

[355] Notably in *Bowman vs United Kingdom* Application No 141/1996/760/961, (ECtHR, 19 February 1998) para 42.

approaches in specific cases wherein the Court has examined the issue of election falsehoods when applying Article 3 Protocol 1. The following chapter will examine this in detail.

2.4 The ECtHR's Application of Article 10 ECHR to Online Expression

Recalling discussions in Chapter One, the contemporary manifestation of disinformation is intimately linked to expansions of new communication technologies.[356] The dissemination of misleading electoral communications is often aided—and exacerbated—by the use of communicative platforms which facilitate rapid user distribution and access to information.[357] Moreover, powerful technological intermediaries play an instrumental role in facilitating—but also limiting—the spread of online disinformation. Unpacking the ECtHR's reasoning in cases which touch on these subjects, section 2.4.1 first sets out the Court's perspective regarding the internet's potential to further —but also undermine—ECHR democratic values. Building from this, section 2.4.2 then considers the Court's approach regarding applicable duties under Article 10 ECHR for technological intermediaries to limit the dissemination of harmful communications.

2.4.1 The Internet's Uncertain Power in Democracy

When applying Article 10 ECHR to online communications, the ECtHR has explicitly highlighted the power of the internet to enable the political populace to access an unprecedented volume of information. The Court first delineated this in *Times Newspapers v The United Kingdom* where an applicant newspaper was convicted for retaining two articles on its online archive containing libellous content.[358] The applicant complained that the domestic law unjustly applied an 'internet publication rule' to internet archives whereby a new cause of libel action could arise each time libellous content had been accessed online.[359] The ECtHR accepted that this could potentially create 'ceaseless liability' for libellous internet publications but found no violation of Article 10 ECHR as such liability had not arisen on facts.[360] However, the Court highlighted that the domestic legal framework should avoid creating circumstances

[356] Chapter 1, 1.2.1
[357] ibid.
[358] *Times Newspapers v The United* Application Nos 3002/03 and 23676/03 (ECtHR, 10 March 2009).
[359] ibid para 3.
[360] ibid para 35.

whereby the publication rule could undermine the 'contribution' of online archives in facilitating access to public interest information.[361] The Court further highlighted the internet's informative value by providing 'readily accessible' and 'generally free' access to information for 'education and historical research.'[362] The ECtHR again considered these benefits in *Editorial Board of Pravoye Delo and Shtekel v Ukraine* where it found an Article 10 ECHR violation after an applicant newspaper was convicted for publishing online allegations of misconduct by State officials.[363] The Court agreed with Ukraine that the online publications contained defamatory statements but noted the relevant domestic law did not exempt journalists from liability—as it had for offline sources—for republishing materials 'obtained from the Internet'.[364] This prevented journalists from exercising their 'public watchdog role' by obtaining information through online sources.[365] Highlighting the value of online sources, the Court further described the internet as a 'distinct' tool 'especially as regards the capacity to store and transmit information.[366] The ECtHR again elucidated the internet's potential when finding an Article 10 ECHR violation in *Yildirim v Turkey*.[367] The applicant PhD student argued that Turkey's prohibition of websites hosted by Google had been applied so widely that it not only targeted sites inciting public disorder but also banned access to his personal website.[368] The ECtHR condemned this broad application as the prohibition was 'bound to have an influence on the accessibility of the internet.'[369]

As noted, the ECtHR often considers whether individuals—if being denied access to a specific form of communication—can still impart and access information through alternative means.[370] It is therefore unsurprising that the Court consistently highlights the internet's unique capacities to enable access to information that has democratic importance. Illustrative here is the Court's finding of Turkey's Article 10 ECHR violation in *Cengiz and Others v Turkey*.[371] Applicant professors argued that Turkey's ban on YouTube had been based on preserving the 'memory'

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[361] ibid para 45.
[362] ibid.
[363] *Editorial Board of Pravoye Delo and Shtekel v Ukraine* Application No 33014/05 (ECtHR, 5 August 2011).
[364] ibid para 66.
[365] ibid para 65.
[366] ibid para 63.
[367] *Yildirim v Turkey* Application No 3111/10 (ECtHR, 18 December 2012).
[368] ibid para 51.
[369] ibid para 53.
[370] See 2.3.1
[371] *Cengiz v Turkey* Applications Nos 48226/10 and 14027/11 (ECtHR, 17 June 2010).

of Mustafa Ataturk but had effectively blocked the entire website.[372] The Court agreed with the applicants that YouTube facilitated access to 'information of specific interest, particularly on political and social matters.'[373] Notably, the Court also observed that YouTube 'permitted the emergence of citizen journalism which could impart political information not conveyed by traditional media.'[374] The internet's distinctive potential was also vital where the ECtHR found that Estonia's ban on internet access for prisoners violated Article 10 ECHR in *Kalda v Estonia.*[375] The Court reasoned here that 'an increasing amount of services and information is only available on the Internet.'[376] This was exemplified in how Estonia's 'official publication of legal acts effectively takes place via the online version' of the State journal and 'no longer through its paper version.'[377] This precise observation regarding the internet's uniqueness was further visible where the ECtHR again found a violation in *Jankovskis v Lithuania.*[378] Here, the Court disagreed with Lithuania's refusal to grant the applicant prisoner access to an online educational website when referring how 'certain information is exclusively available on the Internet.'[379] Finding that Lithuania's denial of the applicant's internet access had not been 'necessary in a democratic society', the Court considered it important that the applicant had been denied access to a website with 'comprehensive information about learning possibilities in Lithuania.'[380] Notable here is the Court's tendency to highlight that restraints on access to online information may limit the ability of individuals to access valuable information not available through other means of communication.

While the ECtHR acknowledges the internet's potential to empower individuals by providing access to information and ideas, the Court has also identified that this potential may be used to exacerbate effects of harmful communications. In the above-mentioned case of *Editorial Board of Pravoye Delo and Shtekel v Ukraine,* the Court highlighted the internet's 'distinct' capacity to transmit information to a global audience.[381] However, the Court simultaneously identified possible circumstances wherein:

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[372] ibid para 7.
[373] ibid.
[374] ibid.
[375] *Kalda v Estonia* Application No 17429/10 (ECtHR, 19 Jan 2016).
[376] ibid para 52.
[377] ibid.
[378] *Jankovskis v Lithuania,* Application No 21575/08 (ECtHR, 17 Jan 2017).
[379] ibid para 62.
[380] ibid.
[381] *Editorial Board of Pravoye Delo and Shtekel v Ukraine* (n 346) para 63.

> The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by the press. Therefore, the policies governing reproduction of material from the print media and the Internet may differ. The latter undeniably have to be adjusted according to the technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned.[382]

The ECtHR did not exhaustively define circumstances where 'the risk of harm posed' by online communications could be 'higher than that posed by the press.'[383] However, the Court has consistently focused on whether enhanced access to information online is likely to exacerbate harms caused by certain online communications. This is illustrated in how the ECtHR assesses the likelihood of harmful content being accessed widely by internet users. For example, the Court found no Article 10 ECHR violation in *Perrin v the United Kingdom* where the UK had limited the applicant's ability to post sexually explicit material online.[384] The ECtHR disagreed with the applicant that the explicit material would 'rarely' be 'accessed by accident' by minors and would 'normally have to be sought out' by the internet user.[385] Crucial to this disagreement was the Court's reasoning that the applicant's webpage 'was freely available to anyone surfing the internet' and could be accessed for free with no age checks.[386] *Willem v France* concerned France's conviction of a mayor for publicly encouraging boycotts of Israeli goods.[387] The ECtHR not only agreed with France that he had incited discrimination but further opined that the mayor's use of a publicly accessible municipality website had 'aggravated the discriminatory position' of his political speeches.[388] The Court further rejected the applicant's argument that he had—as an elected official— been imparting political information 'of general interest' due to his misuse of this website to influence voters.[389] The ECtHR again focused on the use of the internet to cause harm through influential positions when finding no Article 10

[382] ibid.
[383] ibid.
[384] *Perrin v the United Kingdom* Application No 5446/03 (22 March 2002).
[385] ibid.
[386] ibid.
[387] *Willem v France* Application No 10883/05 (ECtHR, 16 July 2009).
[388] ibid para 35.
[389] ibid.

ECHR violation in *Szima v Hungary.*[390] The applicant police officer had been demoted and fined for posting critical comments over senior police management through a Trade Union website which 'was effectively under her control.'[391] The Court agreed with Hungary that her blogs could cause an 'instigation of subordination' by national policing authorities.[392] Further, the Court not only reasoned that the applicant had provided no 'factual basis' for accusations which could undermine the State's legitimacy but also that this could be exacerbated by her 'considerable influence on trade union members' which she had exercised through the union's website.[393]

This element of the ECtHR's focus—regarding the likelihood of harmful communications being widely accessed—bears striking similarity to the Court's approach to anti-democratic propaganda. Recalling section 2.3.2, the Court pays close attention to whether such propaganda is disseminated by prominent public figures when applying Article 17 ECHR and excluding such propaganda from protection under Article 10 ECHR.[394] It is instructive to note here that the Court has often applied Article 17 ECHR to online communications. Recalling *Belkacem v Belgium*, the Court found that the applicant could not claim protection under Article 10 ECHR after he had been convicted for publicly inciting hatred against non-Muslims.[395] It was not only important that the applicant was a prominent Salafist leader but also that he had disseminated Salafist propaganda through his 'publicly accessible' YouTube account.[396] He had therefore used YouTube to deflect Article 10 ECHR from its true purpose and undermine the Convention's democratic values.[397] The ECtHR again applied Article 17 ECHR in *Smajić v Bosnia and Herzegovina* where an applicant lawyer had been convicted for disseminating plans to incite violence in Serbian villages of the Brčko district.[398] The Court observed that he had used racial slurs to advocate—through online posts—for ethnic cleansing in the event of another war in that region.[399] That fact that the applicant had referred to hypothetical events did not appear to detract from the potentially severe harms that his ideas could have caused

[390] *Szima v Hungary* Application No 29723/11, (ECtHR, 9 Oct 2012).
[391] ibid para 6.
[392] ibid para 24.
[393] ibid para 33.
[394] See 2.3.2.
[395] *Belkacem v Belgium* (n 196).
[396] ibid para 4.
[397] ibid para 31.
[398] *Smajić v Bosnia and Herzegovina* Application No 48657/16 (ECtHR, 8 Feb 2018).
[399] ibid para 42.

through being disseminated on a 'publicly accessible internet forum.'[400] The Court again referenced the internet's potential to exacerbate harm when applying Article 17 ECHR as an interpretive aid in *Kilin v Russia*.[401] This concerned Russia's conviction of an applicant for sharing online content to incite violence against non-Russian ethnicities. Finding the application under Article 10 ECHR to be inadmissible, the ECtHR noted that the contentious material had been 'uploaded to a social-networking website that was accessible' to a 'large audience.'[402]

As the above analysis demonstrates, the ECtHR has acknowledged the power of online communication technologies to strengthen—but also pollute—the quality of information which the political populace has access to. Considering the well-documented evidence regarding the potential of contemporary internet technologies to enhance the speed and precision at which harmful communications may be used to distort political debate, it is a positive development that the Strasbourg Court has already explicitly identified the internet's potential to exacerbate the effects of harmful communications.[403] One striking omission of relevance to this thesis, however, is that the Court has only expressly considered how the speed and wider availability of information online could undermine the right to 'respect for private life' under the Convention without offering specific guidance on how online communications could be disruptive to electoral processes.[404] To glean further insights which are necessary to identify for the subsequent analysis in this thesis, it is now necessary to examine how the Court interprets the power—and associated duties under Article 10 ECHR—for technological intermediaries to mediate access to harmful online communications.

2.4.2 Intermediary Liability for Illegal Communications

As Chapter One set out, technological intermediaries play a crucial role in mediating access to information and ideas which affect how the political populace votes in elections.[405] The role of intermediaries is vital in the online disinformation context. Intermediaries enable unprecedented access to reliable information but also aid—and potentially exacerbate—

[400] ibid para 36.
[401] *Kilin v Russia* Application No 10271/12 (ECtHR, 11 May 2021).
[402] ibid para 91.
[403] On this well-documented evidence refer back to Chapter One, section 1.3.
[404] See, for example, *Editorial Board of Pravoye Delo and Shtekel v Ukraine* (n 346) para 63.
[405] See Chapter 1, section 1.2.2.

deceptive electoral practices.[406] It is therefore necessary to map the ECtHR's jurisprudence where the Court has considered the appropriate duties for online intermediaries to limit the dissemination of misleading information. Article 10 ECHR

The ECtHR has accepted that States have a justification to impose duties for intermediaries to restrict access to false information when applying Article 10 ECHR. The Court has often assessed these duties in the context of communications which are aimed at political figures and are alleged to lack a factual basis. Importantly, however, the ECtHR has primarily focused on these duties in respect of false statements which are illegally disseminated. This is important when recalling how—as Chapter One introduced—the dissemination of online content containing disinformation may often contain both illegal and legal communications. [407] An instructive case here is the Grand Chamber case of *Delfi AS v Estonia* where Estonia held an applicant online news portal liable for failure to pay damages for defamatory comments posted on the portal's comment section.[408] The comment section contained allegations of corruption against a well-known shipping company and the disputed comments remained online for six weeks before the applicant removed them upon explicit request from the company's representatives.[409] The applicant did not pay requested damages.[410] The ECtHR found that Estonia had not violated Article 10 ECHR by holding Delfi liable for the comments. A critical factor here was the Court's agreement with Estonia that the comments had been 'clearly unlawful' and 'on their face' were 'tantamount to an incitement to hatred or to violence.'[411] Moreover, the Court acknowledged the internet's potential to promote 'the free flow of ideas and information' but highlighted how the 'scope and speed of the dissemination of information on the Internet' may 'considerably aggravate the effects of unlawful speech on the Internet compared to traditional media.'[412] The ECtHR's focus on the legality of misleading online communications was again crucial in *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary*.[413] Here, the Court found that Hungary had violated Article 10 ECHR for holding the applicant news portals liable for defamatory user comments which had criticised

[406] ibid.
[407] See Chapter One, section 1.3.
[408] *Delfi AS v Estonia* Application No 64669/09 (ECtHR, 16 June 2015).
[409] ibid para 19.
[410] ibid para 20.
[411] ibid para 114.
[412] ibid para 147.
[413] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* Application No 22947/13 (ECtHR, 2 February 2016).

well-known real estate companies.[414] Importantly, the Court distinguished the circumstances from *Delfi* by highlighting that 'the incriminated comments did not constitute clearly unlawful speech and they certainly did not amount to hate speech or incitement to violence.'[415] Absent of this crucial element, the Court reasoned that the imposition of objective liability amounted 'to requiring excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet.'[416] The ECtHR again focused on the legality of online content when it found Hungary to have violated Article 10 ECHR in *Magyar Jeti Zrt v Hungary*.[417] Here, the applicant had been held liable for posting a hyperlink on its online portal which directed users to a YouTube interview containing defamatory statements asserting the involvement of right-wing politicians in the harassment of Roma students by football fans.[418] The ECtHR again distinguished the circumstances from *Delfi* by focusing on how 'utterances' in the linked interview 'could not be seen as clearly unlawful' by the journalist who had initially posted it.[419] Without identification of this 'clearly unlawful' element, the Court noted that Hungary's application of:

> Objective liability may have foreseeable negative consequences on the flow of information on the Internet, impelling article authors and publishers to refrain altogether from hyperlinking to material over whose changeable content they have no control. This may have, directly or indirectly, a chilling effect on freedom of expression on the Internet.[420]

As this language suggests, the ECtHR is not merely concerned with the legality of harmful communications but also with the control that intermediaries have over such communications. For example, the Court appears more inclined to agree that States are justified in holding intermediaries responsible for enabling access to illegal online content if there is an economic incentive for intermediaries to allow this access. The Court explicitly referenced this in *Magyar Jeti Zrt v Hungary,* where it distinguished how hyperlinks—unlike authored materials—'merely direct users to content available elsewhere on the Internet' rather than endorsing content for commercial gain.[421] Moreover, the ECtHR further referenced this in *Magyar*

[414] ibid para 42.
[415] ibid para 64.
[416] ibid para 82.
[417] *Magyar Jeti Zrt v Hungary* Application No. 11257/16 (ECtHR, 4 December 2018).
[418] ibid para 8.
[419] ibid para 82.
[420] ibid para 83.
[421] ibid para 73.

Tartalomszolgáltatók when identifying how one of the applicant news portals was a 'non-profit self-regulatory association' with no economic interests in attracting user comments.[422] As the Court further distinguished, this was different from the facts in *Delfi* which concerned a large internet news portal that provided 'a platform for user-generated comments' for 'economic purposes' and enabled 'users of such platforms to engage in clearly unlawful expressions.'[423]

Where the ECtHR has assessed intermediary liability for harmful—and misleading—communications under Article 10 ECHR, the Court has exclusively assessed materials which are illegal under the domestic law of the concerned State. Significantly, however, the Court also places focus on the practical consequences that such material may have on individuals. Recalling *Delfi AS v Estonia,* the Court specifically described the defamatory user comments as containing unlawful comments affected the reputation of others and 'amounted to hate speech and incitements to violence.'[424] Notably, the Court further recalled the applicant portal's 'wide readership' and 'known public concern regarding the controversial nature of the comments it attracted.'[425] The Court directly contrasted this with *Magyar ZRT* wherein offensive comments were not only 'free of the pivotal element of hate speech' but also imparted 'expressions' which limited 'the impact that can be attributed to those expressions.'[426] The ECtHR also focused on practical consequences of offensive comments in *Tamiz v United Kingdom* where it found Google not to be liable for comments against the applicant which had been posted below a blog post.[427] Here, the ECtHR agreed with UK courts that the applicant had not met the 'real and substantial' tort requirement to claim defamation and highlighted that the publications had been 'too trivial in character' to cause 'any significant damage' to his reputation.[428] This was also crucial in the above-mentioned *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary.*[429] Recalling that case, the ECtHR distinguished the facts from *Delfi* by highlighting how the targeted companies had already been subjected to extensive public scrutiny. Crucially, the Court was therefore 'not convinced that the comments in question were capable of making any additional and significant impact on the attitude of the

[422] ibid para 64.
[423] ibid para 63.
[424] *Delfi AS v Estonia* (n 389) para 153.
[425] ibid para 117.
[426] ibid para 77.
[427] *Tamiz v United Kingdom* Application No 3877/14 (ECtHR 12 October 2017).
[428] ibid para 87.
[429] *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* (n 394).

consumers concerned.'[430] Also instructive here is the ECtHR's finding of an Article 10 ECHR violation in *Kilin v Russia* where an applicant had been convicted for publicly inciting violence by making third-party content available through a social networking website.[431] Here, the Court explicitly considered that the restrictions on unlawful third party content had to be considered against the possibility that 'sharing certain content still could contribute to an informed citizenry.'[432] Importantly, the ECtHR further considered how intermediary liability for harmful communications may often require an assessment of the 'potential influence of an online publication to determine the scope of its reach to the public.'[433] Thus, the ECtHR not only considers whether liability pertains to illegal content but also assesses the potential likelihood for such content to cause identifiable societal harms.

Arguably, the ECtHR's focus on the practical effects of harmful communications is linked to the Court's broader inclination to preserve access to communications that may be informative in political contexts. In *Magyar Tartalomszolgáltatók,* the Court explicitly reiterated how applicable principles governing online expression needed to be applied in line with 'narrower' limits to 'permissible criticism' for 'politicians or governments.'[434] Noting this, the Court observed how 'there was a public interest in ensuring an informed public debate over a matter concerning many consumers and Internet users.'[435] Owing to this 'public interest,' the Court noted that the context of the comments 'cannot be considered to be devoid of a factual basis.'[436] This political context was also relevant in the above-mentioned *Magyar Jeti Zrt v Hungary.*[437] In that case, the Court explicitly referenced the political nature of the communications and relied on this to suggest that there was a lesser likelihood for journalists to 'reasonably have assumed that the content to which he provided accesses through a hyperlink had contained unlawful comments.'[438] The ECtHR's caution regarding restraints on political expression was further epitomised in the aforementioned case of *Jezior v Poland*.[439] Recalling that case, the applicant was convicted for hosting 'untrue information' about an election candidate through

[430] ibid para 85.
[431] *Kilin v Russia* (n 384).
[432] ibid para 73.
[433] ibid para 78.
[434] ibid para 55.
[435] ibid para 72.
[436] ibid para 73.
[437] *Magyar Jeti Zrt v Hungary* (n 398).
[438] ibid para 82.
[439] *Jezior v Poland* (n 319).

user generated comments.[440] Notable here was that the Court found a violation of Article 10 ECHR pertaining to Poland's conviction of the applicant even though it agreed with Poland that the impugned comments were unlawful and defamatory.'[441] The ECtHR's finding of this violation was linked to the Court's identification that Poland had effectively required the applicant to take pre-emptive measures to filter out potentially defamatory comments in a manner that would 'require excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet.'[442] This was critical where such forethought could cause a chilling effect on political topics 'which the public had an interest to receive.'[443] The ECtHR has often discussed the importance of preventing this chilling effect when adopting a critical view where States impose a 'prior restraint' on access to information.[444]

As this section has set out, the ECtHR has consistently reasoned that States have a justification to impose obligations on intermediaries to restrict access to misleading communications. At this point in time, the ECtHR has generally assessed State interferences with Article 10 ECHR which are based on false or misleading statements that are defamatory and satisfy the 'prescribed by law test' under Article 10(2).[445] Within the Article 10 context, the ECtHR places focus on the effects that false communications are likely to have on the reputation of individuals when assessing whether State measures to limit false communications are necessary in a democratic society. From this analysis, the ECtHR's reasoning suggests that the Court is likely to find an Article 10 ECHR violation if States hold intermediaries liable for enabling access to false or misleading content which is not illegal under domestic law. Based on the foregoing analysis, the ECtHR is likely to apply an even higher standard of scrutiny if States hold intermediaries liable for enabling access to such content where such content is disseminated in electoral contexts. Having examined the Court's approaches to political communications and misleading statements in earlier sections of this chapter, however, it must simultaneously be

[440] ibid.
[441] ibid.
[442] ibid.
[443] ibid.
[444] See the Court's language in *Kablis v. Russia*, (Applications nos. 48310/16 and 59663/17), 30 April 2019 'The Court reiterates in this connection that Article 10 ECHR does not prohibit prior restraints on publication as such. However, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court and are justified only in exceptional circumstances' (Para 91); Also *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC], (Application no. 32772/02) where the Court stated that 'prior restraints on publication entail such dangers that they call for the most careful scrutiny.' (Para 92).
[445] See Article 10 ECHR (2).

recalled that the ECtHR appears highly reluctant to enable individuals to misuse Article 10 ECHR for the purpose of disseminating intentional falsehoods. This is significant when recalling that the dissemination of online disinformation may often not be unlawful at the domestic level and can often occur during election periods. It is therefore necessary to further inspect whether—and if so under what conditions—requirements for an informed electorate under the Convention may potentially justify intermediary responsibilities to restrict access to deceptive—but potentially lawful—communications in electoral contexts. This will be unpacked in chapter three.

2.5 Conclusions

This Chapter has analysed ECtHR jurisprudence where the Court has applied the right to freedom of expression under Article 10 ECHR and has identified the Court's interpretive approaches in cases which have key significance in the context of online disinformation which is exchanged in political and electoral contexts. Having identified the key standards which inform the Court's calculus in this jurisprudence, several key findings must now be considered when reflecting on the lessons from ECtHR Article 10 case law that have relevance for online disinformation.[446]

An important finding from this Chapter relates to the ECtHR's promotion of vigorous—but sincere—political debate. The ECtHR's tendency to extend robust protection to political expression under Article 10 ECHR is linked to the Court's interpretation of the right to freedom of expression as an enabler of informed communication in democracies. Section 2.3.1 first highlighted this when examining the Court's approaches in cases involving polemic communications aimed at political officials. In such cases, the ECtHR focuses on whether polemic—and even factually exaggerated—criticisms of politicians may contain legitimate political grievances.[447] Notably, the Court is inclined to not even apply Article 10 ECHR when confronted with circumstances where individuals attempt to use this provision as a means of undermining the Convention's democratic values by disseminating information containing propaganda or conspiracy theories. As is evident in the ECtHR's application of Article 17 ECHR, the Court is not likely to afford protection to communications containing propaganda

[446] Focusing on how findings from this chapter relate to online disinformation communicated in political and electoral contexts.
[447] See section 2.3.1.

under Article 10 ECHR even if such communications are disseminated in political or electoral contexts.[448] When examining if States have violated the right to freedom of expression, the Court consistently seeks to ascertain whether communications disseminated in political and electoral contexts may further—or hinder—the democratic process.

A related finding—which has key significance for online disinformation in this context—is that the ECtHR places considerable emphasis on the need for factual veracity in political communications. Section 2.2 first introduced this by highlighting the Court's language in formative Article 10 ECHR cases wherein the Court interpreted the concept of 'public interest.'[449] Section 2.3 then highlighted how the need for factual veracity is pivotal to the Court's distinction between facts and value judgments. The Court's tendency to offer stronger protection to factually inaccurate political opinions—as opposed to factually inaccurate assertions of fact—never precludes the Court from assessing whether value judgments contain a factual basis. The ECtHR's focus on factual veracity is further evident in cases involving false statements made during election campaigns. Notable in such cases is that the Court has explicitly identified that Contracting Parties have justifications to curtail the dissemination of false electoral communications when applying the democratic necessity test under Article 10 ECHR.

While the ECtHR repeatedly acknowledges that States have interests to restrict the ability of individuals to spread misleading information in electoral contexts, the Court is likely to find an Article 10 ECHR violation under the democratic necessity test if domestic authorities have interfered with the right to freedom of expression without identifying that individuals disseminating misleading communications have done so with an intention to deceive the political populace. Section 2.3.3 first highlighted this when tracing the Court's distinction between false statements containing factual assertions and false statements conveying value judgments. Section 2.3.4 also identified deception as a key factor informing the Court's assessment of restrictions on misleading electoral communications. Crucial here is that—when interfering with the right to freedom of expression as a means of limiting the dissemination of misleading communications—the Court will likely find an Article 10 ECHR violation unless

[448] And the Court does widens the MoA for States to limit the dissemination of such information and ideas in political and electoral contexts.
[449] See section 2.2.3.

States identify an applicant's intention to mislead the electorate. The ECtHR appears concerned with the practical effects that misleading propaganda—such as disinformation—will have in distorting the democratic process.

A consistent finding from this Chapter is that the Court is conscious of how powerful and influential stakeholders have the potential to distort sincere and informed political debate in the democratic process. Section 2.3.1 first highlighted this when examining the ECtHR's language on how political debate must not become unfairly dominated by powerful entities. As section 2.3 then evaluated, the Court—when examining anti-democratic propaganda—perceives that the effects of such propaganda are likely to be exacerbated if spread by individuals in positions of public prominence. As Chapter Three will explore, these elements—concerning deception and political influence—are central to the Court's approaches in cases involving the right to free elections under Article 3 of Protocol 1 ECHR.

One important ambiguity within the ECtHR's Article 10 ECHR jurisprudence in the context of intermediary liability relates to how Contracting Parties may hold technological intermediaries liable for deceptive communications in electoral contexts. As section 2.4 discussed, the Court has applied Article 10 ECHR to online communications and has explicitly highlighted the internet's potentially informative effects in democracy. Importantly, however, the Court has simultaneously acknowledged how the effects of harmful online communications may be amplified in electoral contexts. When examining domestic laws that Contracting Party States use to hold intermediaries liable for harmful communications, the Court appears highly likely to find violations of this provision if Contracting Parties hold intermediaries liable for content which does not contain identifiably unlawful elements. The Court also gives weight to the reach and material effects that online communications may pose to individuals when assessing the proportionality of measures in this area. Remaining unclear is whether the ECtHR deems that States have justifications to ensure that voters are informed during elections when applying the right to free elections under Article 3 of Protocol 1 ECHR and whether this may justify States to impose intermediary responsibilities to curtail the spread of online disinformation. This will be discussed in the following chapter.

Chapter 3: Mapping the ECtHR's Application of Article 3 of Protocol 1: Identifying Key Interpretive Approaches for Online Disinformation

3.1 Introduction

The European Court of Human Rights (ECtHR) has developed extensive jurisprudence wherein the Court has applied the right to free elections under Article 3 of Protocol 1 of the European Convention on Human Rights (ECHR).[1] Analysing this jurisprudence, this chapter identifies the ECtHR's interpretative approaches to Article 3 Protocol 1 ECHR which are instructive in the online disinformation context. Section 3.2 first provides an overview of the ECtHR's development and application of the right to free elections under Article 3 Protocol 1 ECHR. The focus here is on the ECtHR's analytical role in expanding the application of Article 3 Protocol 1 ECHR and the Court's identification of positive obligations for Contracting Parties to hold democratic elections. Section 3.3 then identifies the ECtHR's interpretive approaches to Article 3 Protocol 1 ECHR which have a key application in the online disinformation context. Within this analysis, this particular section places particular focus on the ECtHR's focus on the value of an informed political populace when applying the right to free elections under Article 3 Protocol 1 ECHR and the Court's identification of the legitimate interests of States to prevent voters from being misinformed. This includes an assessment of the Court's consideration of positive obligations for States to hold free and fair elections and the relevance of this for online disinformation. Section 3.4 then considers the interplay between the right to freedom of expression and the right to free elections under the ECHR. This section provides a summary of the key insights that can be found in the ECtHR's approaches to Article 10 and Article 3 Protocol 1 ECHR and the practical relevance of these insights in the online disinformation context.

3.2 Background to Article 3 of Protocol 1

This section provides an overview of the ECtHR's application of the right to free elections under Article 3 Protocol 1 ECHR (P1-3).[2] Section 3.2.1 first considers the textual construction of P1-3 and identifies the sensitive political context preceding this provision's drafting. Section

[1] Hereinafter hereinafter ECtHR or 'the Court'.
[2] Article 3 Protocol 1 hereinafter 'P1-3.'

3.2.2 examines how the ECtHR has expanded the application of P1-3.[3] As this section illustrates, the Strasbourg judicial organs have progressed from only interpreting P1-3 as an obligation for States to hold elections towards a view that P1-3 also contains rights for individuals to vote and stand for election. This section also briefly illustrates how the ECtHR generally extends a wide margin of appreciation (MoA) to CoE States to manage national elections. Section 3.2.3 then introduces how the ECtHR can identify positive obligations under P1-3 for States to ensure that elections are held democratically. In providing this overview of the ECtHR's application of P1-3, this section sets foundations for later analysis of the Court's interpretative approaches regarding the need for free and informed elections under P1-3.oStates

3.2.1 The Textual Construction of Article 3 of Protocol 1

P1-3 ECHR States that:

> The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the people in the choice of the legislature.[4]

The 'construction' of P1-3 ECHR was 'far from straight forward.'[5] As Marks describes, the inclusion of the right to free elections was an 'immediately controversial' proposal as part of the introduction of the First Protocol of the ECHR in 1950.[6] The Consultative Assembly sought to introduce a free elections provision into the First Protocol in 1949 but faced resistance when recommending this to the Committee of Ministers.[7] As Golubok highlights, the Committee of Ministers considered electoral rights to fall outside of the scope of the Convention's framework.[8] Viviani notes opposition to the inclusion of the term 'universal suffrage' in the

[3] With focus also given to the role of the European Commission on Human Rights (ECommHR).
[4] Final adopted text.
[5] Sergey Golubok, 'Right to Free Elections: Emerging Guarantees or Two Layers of Protection?' (2009) 27(3) Netherlands Quarterly of Human Rights 364.
[6] Susan Marks, 'The European Convention on Human Rights and its Democratic Society,' The British Yearbook of International Law (1996) 66(1) 209-238.
[7] The originally proposed Article stated: 'The Convention shall include the undertaking by Member States to respect the fundamental principles of democracy in all good faith, and in particular, as regards their metropolitan territory: 1. To hold free elections at reasonable intervals, with universal suffrage and secret ballot, so as to ensure that Government action and legislation is, in fact, an expression of the will of the people. 2. To take no action which shall interfere with the right of criticism and the right to organize a political opposition.'
[8] Martinus Nijhoff, *Collected Edition of the 'Travaux préparatoires' of the European Convention on Human Rights*, (Council of Europe, 1979) 184-186.

first draft of the 'political clause' in 1949.[9] Instrumental to this opposition was the United Kingdom delegation who raised concerns regarding the practical challenges for all Contracting Parties—which had politically diverse systems—to guarantee 'universal suffrage' and interpret this concept harmoniously.[10] Conversely, proponents of a free elections provision in the Consultative Assembly reasoned that a 'clause on democratic institutions' was necessary to ensure the 'protection of important political rights and freedoms.'[11] For example, the French delegation submitted that the absence of guarantees for democratic elections could undermine Europe's resistance to insurgent 'Fascist or Nazi' regimes.[12] This reflects Roca's description of P1-3 as 'a product of the early post-war period and encapsulates a democratic reaction to the brutal experience of totalitarianism.'[13]

Due to these divergent perspectives, the wording of P1-3 underwent several changes throughout the various stages of the travaux preparatoires of the First Protocol.[14] The initial wording required States to 'hold free elections at reasonable intervals, with universal suffrage and secret ballot' to 'ensure that Government action and legislation is, in fact, an expression of the will of the people.'[15] However, the phrase 'universal suffrage' was eliminated from the final adopted text due to the 'practical difficulties in defining' this concept harmoniously in States.[16] A proposed second paragraph further restricted States from interfering 'with the right of criticism and the right to organize a political opposition.'[17] This second paragraph was also deleted as analogous criteria already existed in other Convention provisions.[18] Upon adopting the final agreed text, a 'compromise' was met whereby P1-3 required States to 'hold free

[9] Francesca Viviani, 'Right to free elections in the case-law of the European Court of Human Rights' (LUISS thesis, 2013) 6.
[10] ibid.
[11] Consultative Assembly Reports, First session (August 10- September 8, 1949) 1158.
[12] See Agustín Robledo, 'The Construction of the Right to Free Elections by the European Court of Human Rights' (2018) 7(2) Cambridge International Law Journal 225-240.
[13] Javier Roca, 'From States' International Commitment to Organise Free Elections to the Citizens' Right to Vote and Stand for Election (Art. 3 P1 ECHR)' In Brill Nijhoff (ed) *Europe of Rights: A Compendium on the European Convention of Human Rights* (2012).
[14] Term commonly used to describe negotiations of the First Protocol.
[15] See P1-3 travaux preparatoires <https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-P1-3-Cour(86)36-BIL1221606.pdf>
[16] Robledo, 'The construction of the right to free elections by the European Court of Human Rights,' (n 12) 226.
[17] ibid.
[18] Namely Art 10 ECHR and Art 11 ECHR.

elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the people in the choice of the legislature.'[19]

Marks argues that this final adopted language of P1-3 was 'modest' due to 'inter-state colouring' of its 'phraseology.'[20] Roussellier posits that P1-3 purposefully imposes a 'very specific obligation' on Contracting Parties to hold elections without imposing prescriptive constraints that could undermine political diversity across domestic systems.[21] The cautious construction of terminology under P1-3 can be contrasted with the right to free elections under Article 21 UDHR.[22] For example, Article 21 UDHR states that 'everyone has the right to take part' in elections and to have 'equal access to public service, '[23] Unlike Article 21 UDHR, P1-3 ECHR does not explicitly reference the right of individuals to vote or stand for election. As must now be discussed, however, the Strasbourg judicial organs have inferred the existence of such rights under P1-3.

3.2.2 An overview of the ECtHR's Application of Article 3 Protocol 1 ECHR

The final adopted text of P1-3 was 'relatively modest' and did not explicitly establish the right of individuals to vote or stand for election.[24] Since the drafting of P1-3, however, Strasbourg judicial organs—specifically the European Commission of Human Rights (ECommHR) and the ECtHR—have gradually identified that P1-3 contains individual electoral rights.[25] Building from this identification of individual electoral rights, the ECtHR has generally adopted a practical approach when applying P1-3 and has extended a wide MoA for States to arrange national electoral affairs. Before investigating substantive P1-3 jurisprudence that has relevance for online disinformation, it is necessary to first provide a brief overview of how the ECtHR has developed the application of P1-3.

3.2.2.1 The Shifting Interpretation of P1-3 by the ECommHR and the ECtHR

[19] Kriszta Kovács, 'Parliamentary Democracy by Default: Applying the European Convention on Human Rights to Presidential Elections and Referendums,' (2020) 2 Jus Cogens 237–258; Final adopted text.
[20] Marks, 'The European Convention on Human Rights and its Democratic Society' (n 6) 209-238.
[21] Jacques Roussellier, 'The Right to Free Elections: Norms and Enforcement Procedures,' (1993) 4(2) Helsinki Monitor 25-30.
[22] Art 21, UDHR States that 'everyone has the right to take part in the government of his country, directly or through freely chosen representatives.'
[23] Art 21(2), UDHR.
[24] Marks, 'The European Convention on Human Rights and its Democratic Society' (n 6).
[25] European Commission on Human Rights hereinafter 'ECommHR.'

The early admissibility decisions involving P1-3 demonstrated a reluctance from the EcommHR to interpret P1-3 as containing the right to vote or stand for election. As Sahin observes, the EcommHR initially 'adopted the approach that the right to free elections' under P1-3 imposed 'positive obligations on the parties rather than bestowing rights on individuals.'[26] Bodnar similarly notes how the EcommHR originally interpreted 'the right to vote and stand for election' to fall outside of the scope of P1-3 'as an internal affair for the States.'[27] This was evident in admissibility decisions where the EcommHR rejected the idea that P1-3 included the right to vote or stand for 103lectionn.[28] However, the EcommHR's initially cautious interpretation of P1-3 'gradually changed.'[29] Specifically, the EcommHR began to adopt a more teleological interpretation of the right to free elections by inferring that P1-3 could confer 'subjective' rights for individuals to participate in elections.[30] Such acknowledgments by the EcommHR began to spell an end to what Lecuyer describes as the early 'black hole' period of ECHR free elections jurisprudence by establishing clarity that P1-3 contained rights to vote and stand for election.[31]

The ECtHR first acknowledged that P1-3 contained individual electoral rights in *Mathieu Mohin and Clerfayt v Belgium.*[32] The applicants in this case argued that Belgian electoral laws prevented French speaking citizens in certain territories from electing French speaking representatives to the Flemish Council in a discriminatory manner.[33] Highlighting that the interpretation of free elections had 'evolved' in preceding EcommHR decisions, the ECtHR reasoned that the exclusion of individual rights was a 'restrictive interpretation' of P1-3 that could no longer 'stand up to scrutiny.'[34] Demonstrating a more flexible interpretation of the concept of free elections, the Court considered:

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[26] Erdal Şahin, 'Applicability of the right to free elections clause of the ECHR to presidential elections: the case of Turkey's new presidential system,' (2023) 27(4) The International Journal of Human Rights 754-771.
[27] Eszter Bodnar, 'The level of protection of the right to free elections in the practice of the European Court of Human Rights,' in Helen Hardman and Brice Dickson (eds.) *Electoral Rights in Europe* (Routledge, 1st edn 2017) 49.
[28] *X v Federal Republic of Germany* Application No 530/59 (Commission decision 4 January 1960); *X and Others v Belgium* Application No. 1065/61 (Commission decision 30 May 1961); *X v Belgium* Application No 1028/61 (Commission decision 18 September 1961).
[29] Şahin, 'Applicability of the right to free elections clause of the ECHR to presidential elections,' (n 29).
[30] X v Germany Application No 2728/66 (Commission decision 6 October 1967); *W, X, Y and Z v Belgium* Application No 6745/74 (Commission decision 30 May 1975).
[31] Yannick Lécuyer, *Political rights in the case law of the European Court of Human Rights* (Dallos, 2009) 99.
[32] *Mathieu Mohin and Clerfayt v Belgium* Application No. 9267/81 (ECtHR, 2 March 1987).
[33] ibid para 20.
[34] para 49.

> From the idea of an "institutional" right to the holding of free elections (decision of 18 September 1961 on the admissibility of application no. 1028/61, X v Belgium, Yearbook of the Convention, vol. 4, p. 338) the Commission has moved to the concept of "universal suffrage" (see particularly the decision of 6 October 1967 on the admissibility of application no. 2728/66, X v the Federal Republic of Germany, op. cit., vol. 10, p. 338) and then, as a consequence, to the concept of subjective rights of participation – the "right to vote" and the "right to stand for election to the legislature" (see in particular the decision of 30 May 1975 on the admissibility of applications nos. 6745-6746/76, W, X, Y and Z v Belgium, op. cit., vol. 18, p. 244). The Court approves this latter concept.[35]

The ECtHR found no violation of P1-3 on an assessment of the facts of *Mathieu Mohin*. However, the Court appeared to acknowledge an expansion of the range of electoral rights under the ECHR.[36] Underpinning this was the Court's acknowledgement that the institutional commitments under P1-3 could not be practically achieved without the 'collective enforcement of certain rights and freedoms' in electoral processes.[37] Identifying individual rights from the institutional mandate to hold elections, the ECtHR inverted its general 'technique of deriving positive obligations from the expressly articulated guarantees of individual rights contained in other Articles of the Convention.'[38] Harris et al. describe this as an 'interpretive leap' by the Court.[39] It must be acknowledged here that—since inferring the existence of individual electoral rights under P1-3—the Court distinguishes between 'active' and 'passive' electoral rights.[40] As the Court has clarified, the 'active' aspect of P1-3 refers to the right of individuals to vote.[41] The 'passive' aspect of P1-3 relates to the right candidates and political parties to

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[35] ibid para 51.
[36] See the description of the ECtHR as taking a 'colossal leap' in the Matheiu-Mohin case Lorenzo Martín-Retortillo Baquer, 'Los derechos electorales a la luz de la jurisprudencia del Tribunal Europeo de Derechos Humanos' in Fabio Pascua Mateo (ed), Estado democrático y elecciones libres: cuestiones fundamentales de derecho electoral (Civitas-Thomson Reuters, Madrid 2010) 26.
[37] *Mathieu Mohin and Clerfayt v Belgium* (n 35) para 51.
[38] ibid.
[39] David Harris and others (eds.) *Law of the European Convention on Human Rights* (Oxford, 2014) 921.
[40] On this see William Anthony Schabas, The European Convention on Human Rights (Oxford: Oxford University Press 2015), 1015; Some authors refer to 'active suffrage' and 'passive suffrage' Kirill Ryabtsev, 'Political Micro-Targeting in Europe: A Panacea for the Citizens' Political Misinformation or the New Evil for Voting Rights,' (2020) 8(1) Groningen Journal of International Law 69-80; Robledo, 'The construction of the right to free elections by the European Court of Human Rights,' (n 12).
[41] Ždanoka v Latvia Application No 58278/00 (ECtHR,16 March 2006) para 105.

stand for election.[42] As this chapter's later analysis will demonstrate, the ECtHR has acknowledged the value of voters to be informed in elections when interpreting both the right to vote and stand for election.

3.2.2.2 The ECtHR's Practical Application of Article 3 of Protocol 1

Before analysing ECtHR jurisprudence which has relevance in the online disinformation context, it is first necessary to set out the potentially wide range of circumstances wherein the Court may apply P1-3. Since identifying individual electoral rights under P1-3, the ECtHR has adopted a practical interpretation regarding the circumstances where P1-3 can apply.

An example here is the ECtHR's broad interpretation regarding the type of elections that P1-3 can extend to. As noted, the text of P1-3 only references elections to 'the legislature.'[43] Adopting a critical view of this language, Harris et al. argue that confining P1-3 to parliamentary legislatures significantly limits 'the effectiveness of Article 3 as a mechanism for developing a robust and comprehensive Convention law on voting rights.'[44] Van der Schyff cautions how a literal interpretation of P1-3 places 'a large number of rulemaking authorities outside the reach' of P1-3.[45] Crucially, however, the ECtHR's interpretation of 'legislature' accounts for various constitutional structures and the Court does not limit its application of P1-3 to national parliamentary elections. In *Mathieu-Mohin*, the ECtHR reasoned that 'elections' do 'not necessarily mean only the national parliament' and that electoral laws should be 'interpreted in the light of the constitutional structure of the State in question.'[46] Accordingly, the ECtHR has considered that legislative power may not always be exercised solely through national parliaments. The ECtHR has accepted that a body is not a legislature if it can only propose but not adopt bills.[47] It has further considered that P1-3 does not apply to bodies that merely possess deliberative powers.[48] As van Dijk et al. posit the practical consideration for whether the Court applies P1-3 to elected bodies is whether the body has 'real power' to affect

[42] ibid para 106.
[43] Text of Art 3 Protocol 1.
[44] Harris and others (n 42).
[45] Gerhard Van der Schyff, 'The concept of democracy as an element of the European Convention,' (2005) 38(3) The Comparative and International Law Journal of Southern Africa 355–372.
[46] *Mathieu Mohin and Clerfayt v Belgium* (n 35) para 53.
[47] *W, X, Y and Z v Belgium* Application No 6745/74 (Commission decision 30 May 1975).
[48] *Lindsay and others, v United Kingdom* Application No *31699/96* (ECtHR, 17 January 1997).

laws.[49] The ECtHR's practical approach is also evident in the Court's assessment of whether national electoral procedures fall within the material scope of P1-3. For example, the text of P1-3 does not expressly state whether the right to free elections applies to national referendums. However, in *Moohan and Gillon v the United Kingdom*, the Court reasoned that a 'democratic process described as a referendum' could 'potentially fall within the ambit' of P1-3 if the process occurred 'at reasonable intervals by secret ballot.'[50] This was because:

> There are numerous ways of organising and running electoral systems and a wealth of differences in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision.[51]

This language—demonstrating the ECtHR's flexible interpretation of where P1-3 can apply to national electoral systems—was evident in *Boškoski v the Former Yugoslav Republic of Macedonia*.[52] Here, the Court accepted that P1-3 could apply to Presidential elections if the Head of State possessed power to initiate and adopt legislation.[53] Implicit in this reasoning is the need to assess electoral systems in alignment with the national context. This is further evident in recent decisions such as *Repetto Visentitni v Italy* and *Miniscalco v Italy*.[54] In these joint cases, the ECtHR considered legislative powers of regional councils in light of Italian constitutional reforms that empowered regional councils to govern areas of public life that were not explicitly governed by the State.[55] The Court appeared reticent in *Ahmed and Others v United Kingdom* to agree with an applicant's assertion that P1-3 applied to supranational legislatures.[56] However, it provided clarity on this question in the Grand Chamber decision of *Matthews v United Kingdom*.[57] Here, the ECtHR accepted that the applicant was directly affected by legislative actions of the European Parliament and that P1-3 was applicable to that

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[49] Pieter Van Dijk and others, *Theory and practice of the European convention on human rights* (Fourth edn, Intersentia 2006) 931.
[50] Moohan and Gillon v United Kingdom Application Nos 22962/15 and 23345/15, (ECtHR, 13 June 2017).
[51] Ibid para 49. This departed from admissibility decisions that categorically excluded referendums from P1-3. See *Bader v Austria* (dec.) Application No 26633/95 (ECtHR 23 June 1994); Also *Nurminen v Finland* (dec.) Application No 27881/95, (ECtHR, 26 February 1997).
[52] *Boškoski v the former Yugoslav Republic of Macedonia* (dec.) Application No. 11676/04 (ECtHR, 2 September 2004).
[53] ibid.
[54] *Repetto Visentitni v Italy* and *Miniscalco v Italy* (dec.) Application No 42081/10 (ECtHR, 9 March 2021).
[55] Application No 55093/13 (ECtHR, 17 June 2021).
[56] *Ahmed and Others v United Kingdom* Application No 22954/93 (ECtHR, 2 September 1998).
[57] *Matthews v United Kingdom* Application No 24833/94, (ECtHR, 18 February 1999).

body.[58] Reiterating the need to assess electoral systems in light of specific 'constitutional structures', the Court clarified that its assessment of whether P1-3 applies 'must have regard not solely to the strictly legislative powers which a body has, but also to that body's role in the overall legislative process.'[59]

Importantly from the online disinformation perspective, the ECtHR also adopts a practical approach when interpreting States' justifications to restrict electoral rights. While there is no direct textual guidance regarding legitimate aims to limit rights under P1-3, the Court has considered that Contracting Parties can rely on 'implied limitations' to electoral rights which are not explicitly mentioned in ECHR provisions.[60] Referencing these 'implied limitations' under P1-3, the Court has noted that P1-3 'is not limited by a specific list of "legitimate aims" such as those enumerated in Articles 8-11' ECHR.'[61] Thus, States are often 'free to rely on an aim not contained in that list to justify a restriction, provided that the compatibility of that aim with the principle of the rule of law and the general objectives of the Convention is provided in the particular circumstances of a case.'[62]

The ECtHR's flexible approach here is evident in the Court's acknowledgement of implied limitations for States to prevent individuals from misusing electoral rights to undermine national democratic values. For example, in the Grand Chamber case of *Labita v Italy*, the ECtHR accepted that Italy could justify temporary suspensions on the right of Mafia members to vote in line with the 'implied limitations' under P1-3.[63] Moreover, in *Etxeberria and Others v Spain*, the Court accepted that Spain could bar election candidates who promoted separatist viewpoints that exploited social divisions.[64] The Grand Chamber also recognised implied limitations on the exercise of electoral candidacy rights in *Ždanoka v Latvia*.[65] In that case, the Court accepted Latvia's legitimate interest to curtail pro-Soviet candidates and stressed the need to assess restrictions against the 'historical development, cultural diversity and political

[58] ibid.
[59] ibid para 50.
[60] Contrasting with Art 8-11.
[61] *Ždanoka v Latvia* Application No 58278/00 (ECtHR, 16 March 2006) para 115.
[62] Ibid.
[63] *Labita v Italy* Application No 26772/95 (ECtHR, 6 April 2000).
[64] *Etxeberria and Others v Spain* Application Nos 35579/03, 35613/03, 35626/03 et 35634/03 (ECtHR, 6 November 2009).
[65] *Ždanoka v Latvia* Application No 58278/00 (ECtHR, 16 March 2006).

thought within Europe.'[66] The ECtHR's flexibility in identifying permissible justifications for States to limit electoral rights under P1-3 is of critical importance from the online disinformation perspective. For example, the Court has agreed with the stated aims of States to ensure that voters make informed choices under P1-3.[67] As later analysis in this chapter will outline, this has key significance where the Court considers whether States have legitimate interests to prevent election candidates from disseminating false information to voters.

3.2.2.3 The ECtHR's Extension of a Wide Margin of Appreciation under P1-3

Aligning with the ECtHR's practical approach when applying P1-3, the Court generally extends a wide margin of appreciation (MoA) for States to organise national electoral arrangements.[68] For example, the ECtHR does not generally require Contracting Parties to secure free elections by conforming to any specific method of electoral administration. Provided that elections accurately reflect the will of the electorate, the Court gives considerable latitude to States when interpreting acceptable electoral systems under P1-3. In *Matthews v United Kingdom*, the ECtHR described an 'electoral system' as a mechanism whereby 'the free expression of the opinion of the people in the choice of the legislature is ensured.'[69] Accordingly, the Court accepted that any voting system could be compatible with P1-3 provided that such a system did not 'thwart the free expression of the people in their choice of the legislature.'[70] The Court agreed with the UK that P1-3 did not require 'proportional representation' or a 'first-past-the-post' mechanism.[71] In *Bompard v France*, the Court accepted that France had discretion under P1-3 to redraw electoral boundaries provided that this redrawing did not 'thwart' the 'free expression of the opinion of the people in the choice of the legislature.'[72] The ECtHR again stressed the need for State discretion when conducting elections in *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v Latvia* by stressing that P1-3 did not require 'all votes' to 'necessarily have equal weight as regards the outcome, nor

[66] ibid.
[67] *Alajo v Hungary* Application No. 38832/06, (ECtHR, 20 Aug 2010); *Krasnov and Skuratov v Russia* Application Nos 17864/04 and 21396/04, (ECtHR, 19 July 2007.)
[68] Hereinafter 'MoA.'
[69] *Matthews v United Kingdom* (n 60).
[70] ibid para 63.
[71] ibid para 64.
[72] *Bompard v France* (dec.) Application No 44081/02 (ECHR, 4 April 2006).

all candidates have equal chances of winning.'[73] In that case, the Court accepted that statutory 'thresholds for parliamentary representation' may be necessary to identify the political will of the electorate and that in any event States enjoyed a 'particularly wide' MoA.[74]

The ECtHR's focus on ensuring that States do not 'thwart' the 'free expression' of the electorate underscores how the need to accurately reflect the electorate's choice is a key consideration informing the Court's perspective on P1-3. This was explicitly highlighted in the Grand Chamber decision of *Yumak and Sadak v Turkey* concerning Turkey's minimum legal thresholds to attain parliamentary seats.[75] In that decision, the ECtHR reiterated Turkey's discretion to administer elections under P1-3 and stressed that relevant national factors could justify seat thresholds that could ordinarily be considered 'excessive.'[76] However, the Court highlighted how even extenuating factors could not negate the 'ultimate' commitment under P1-3 for States to 'hold elections' under 'conditions which will ensure the free expression of the opinion of the people in their choice of the legislature.'[77] The Grand Chamber highlighted why the protection of the 'free expression' of voters was the key standard for States to promote under P1-3:[78]

> Expression of the opinion of the people is inconceivable without the assistance of a plurality of political parties representing the currents of opinion flowing through a country's population. By reflecting those currents, not only within political institutions but also, thanks to the media, at all levels of life in society, they make an irreplaceable contribution to the political debate which is at the very core of the concept of a democratic society.[79]

Provided that States secure the free expression of the electorate, the Court generally adopts a flexible approach when interpreting how States regulate national electoral affairs. Acknowledging this, the ECtHR has stated that the 'standards to be applied' when restricting

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[73] *Partija "Jaunie Demokrāti" and Partija "Mūsu Zeme" v Latvia Application Nos*. 10547/07 and 34049/07 (ECtHR, 29 November 2007).
[74] ibid.
[75] *Yumak and Sadak v Turkey* Application No 10226/03 (ECHR, 8 July 2008).
[76] ibid para 115.
[77] ibid.
[78] ibid para 118; The Court uses the term 'free expression' when referencing P1-3 conditions rather than 'freedom of expression' as under Art 10.
[79] ibid para 107.

electoral rights are 'less stringent' than criteria under Articles 8-11 of the Convention.'[80] Some authors argue that the Court's application of the MoA to States under P1-3 is overly deferential to national interests. For example, O'Connell argues that the discretion to States under P1-3 may often 'not set a very high standard' for the protection of electoral rights of members of the political populace who have been 'systematically excluded from political participation.'[81] Adopting a similar critical perspective, Zysett argues that the Court's flexible interpretation of permissible State restrictions on the rights under P1-3 can lead to State actions not being subjected to 'strict scrutiny including the tests of legitimacy and necessity' as is otherwise be applied under provisions such as Article 10 ECHR.[82] However, it must be recalled that the ECtHR's extension of a wide MoA under P1-3 does not absolve States from their commitments 'to ensure the observance of the engagements undertaken by the High Contracting Parties'.[83] As must also now be introduced, the wide MoA which the ECtHR extends to States under P1-3 must be understood alongside positive obligations for States to ensure that elections are held democratically.

3.2.3 The ECtHR's Identification of Positive Obligations for States to Hold Fair Elections Under P1-3

While the ECtHR has inferred the existence of individual electoral rights under P1-3, this provision remains 'expressly about positive obligations.'[84] Contracting Parties must not only avoid arbitrary interferences with electoral rights but must also to take steps to secure conditions for free and fair democratic elections. Before considering how the ECtHR identifies positive obligations for States to prevent voters from being misinformed, it is necessary to briefly consider how the Court can identify States positive obligations under P1-3 for States to fairly hold elections.

Unlike the right to freedom of expression under Article 10 ECHR, P1-3 does not explicitly require States to ensure that interferences with electoral rights under P1-3 are 'prescribed by

[80] ibid para 106.
[81] Rory O'Connell, 'Realising political equality: the European Court of Human Rights and positive obligations in a democracy,' (2010) 61 Northern Ireland Legal Quarterly 270.
[82] Alain Zysset, 'Calibrating the response to populism at the European Court of Human Rights,' (2022) 20(3) International Journal of Constitutional Law 976–1005.
[83] Art 19 ECHR.
[84] O'Connell, 'Realising political equality' (n 84).

law.'[85] Arguably, however, the ECtHR has identified a positive obligation under P1-3 for States to ensure that national laws which govern elections are easily understood by individuals.[86] For example, the ECtHR found that Bulgaria had violated P1-3 in *Petkov and Others v Bulgaria* because electoral legislation had been amended two months preceding an election.[87] The Court cited how rapid changes to electoral laws—particularly in the months prior to an election—could 'engender serious practical difficulties' when developing rules for electoral deregistration.[88] Importantly, the Court not only referenced how this could confuse election candidates but also 'voters whose understanding of candidates running in the elections was undoubtedly affected.'[89] The ECtHR again condemned this in *Tanase and Chirtoaca v Moldova* where Moldova had changed electoral laws less than one year prior to elections.[90] Here, the Court explicitly considered that Moldova's positive obligations needed to be assessed alongside the country's 'historical and political context' and that swift changes to electoral law could be justified to avoid 'actual' threats to national 'independence and security.'[91] However, it was vital that the change in electoral law arose 'shortly before the elections' when 'the governing party's percentage of the vote was in decline.'[92] Thus, the Court agreed with the applicant's contention that the change had been aimed at weakening 'the very prospect of opposition parties gaining power at some point in the future.'[93] Finding a violation of P1-3, the Court distinguished:

> Between loyalty to the State and loyalty to the government. While the need to ensure loyalty to the State may well constitute a legitimate aim which justifies restrictions on electoral rights, the latter cannot. In a democratic State committed to the rule of law and respect for fundamental rights and freedoms, it is clear that the very role of MPs, and in particular those members from opposition parties, is to represent the electorate by ensuring the accountability of the government in power and assessing their policies. Further, the pursuit of different, and at times diametrically opposite, goals is not only

[85] Art 10(2) ECHR.
[86] See Chapter 2, section 2.2.2 on this criteria under Art 10 ECHR.
[87] *Petkov and Others v Bulgaria* Application Nos 77568/01, 178/02 and 505/02, (ECtHR, 11 June 2009).
[88] ibid para 66.
[89] ibid.
[90] *Tanase and Chirtoaca v Moldova* Application No 7/08 (ECtHR, 27 Apr 2010).
[91] ibid para 103.
[92] ibid para 179.
[93] ibid.

> acceptable but necessary in order to promote pluralism and to give voters choices which reflect their political opinions.[94]

As this language reflects, the ECtHR acknowledges that States could rapidly change national electoral laws with a view to stifling political opposition. Related to this concern, the Court has also appeared to identify positive obligations under P1-3 for States to ensure that all aspects of electoral administration—particularly State measures to investigate election irregularities or annul election results—must be overseen by an independent body. For example, in *Kovach v Ukraine*, the Court found a violation of P1-3 due to an electoral commission's annulment of polling results in a manner that negated the applicant's election victory.[95] Examining Ukraine's legislative criteria for annulling election results, the ECtHR reasoned that States had wide discretion to set 'eligibility conditions' for election candidates.[96] Crucially, however, the Court stressed that Ukraine was required to ensure that decisions on candidate eligibility:

> Must be reached by a body which can provide a minimum of guarantees of its impartiality. Similarly, the discretion enjoyed by the body concerned must not be exorbitantly wide; it must be circumscribed, with sufficient precision, by the provisions of domestic law. Lastly, the procedure for declaring a candidate ineligible must be such as to ensure a fair and objective decision and prevent any abuse of power on the part of the relevant authority.[97]

This language reflects the contention by Diamond and Myers that democratic elections are only fair if administered by 'a neutral authority not controlled by the ruling party.'[98] Notable here is that—where the ECtHR finds a P1-3 violation—this may arise due to the State's general failure to ensure fairness when organising national electoral processes. In *Podkolzina v Latvia*, the ECtHR found that Latvia had violated P1-3 through methods of investigating the applicant election candidate's competence in the national language.[99] The Court observed how she had been approached by an invigilator who questioned the 'reasons for her political orientation'

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[94] ibid para 166.
[95] *Kovach v Ukraine*, Application No 39424/02 (ECHR, 7 May 2008).
[96] ibid para 54.
[97] ibid.
[98] Larry Diamond and Ramon Myres, *Elections and Democracy in Greater China* (Oxford University Press, 2001) 3.
[99] *Podkolzina v Latvia* Application No 46726/99 (ECtHR, 9 Apr 2002).

rather than her linguistic competence.[100] The Court stressed that electoral rights 'must be effective' in a 'truly democratic regime' and that this requires Contracting Parties—particularly where administering disqualifications of election candidates—to 'guarantee a fair and objective decision and prevent any abuse of power on the part of the relevant authority.'[101] In *Georgian Labour Party v Georgia*, the applicant alleged that an electoral commission was composed of members whose independence was tainted by allegiances to the incumbent government.[102] On the facts, the ECtHR did not find sufficient evidence of Presidential interference but nonetheless stressed that States must ensure that electoral bodies 'function in a transparent manner and to maintain impartiality and independence from political manipulation.'[103]

Of relevance in the online disinformation context is that—when assessing positive obligations under P1-3—the ECtHR is inclined to highlight how any investigations by States regarding alleged election irregularities are conducted independently and not by political officials in positions of dominance. Instructive here is the Court's finding of a P1-3 violation in *Grosaru v Romania*.[104] This arose where a State body hearing an election dispute was composed of politicians who were in direct opposition to the applicant candidate.[105] Highlighting this body's lack of independence, the Court condemned Romania's failure to ensure 'sufficient guarantees as to the impartiality' of bodies responsible for such hearings under P1-3.'[106] The Grand Chamber further probed this in *Mugemangango v Belgium* where an applicant election candidate had been refused a recount of voters in a constituency where he had lost by a slim margin.[107] Crucial to the Grand Chamber's finding of a P1-3 violation was that the decision not to recount was taken by several individuals who had been victorious electoral opponents of the applicant. Addressing this, the ECtHR considered that:

> The applicant's complaint was examined by a body which did not provide the requisite guarantees of its impartiality and whose discretion was not circumscribed with sufficient precision by provisions of domestic law. The safeguards afforded to the

[100] ibid para 36.
[101] ibid para 35.
[102] *Georgian Labour Party v Georgia* Application No 9103/04, (ECtHR, 8 Aug 2008).
[103] ibid para 100.
[104] *Grosaru v Romania* Application No 78039/01 (ECtHR, 2 June 2010).
[105] ibid para 54.
[106] ibid para 57.
[107] *Mugemangango v Belgium* Application No 310/15, (ECtHR, 10 July 2020).

applicant during the procedure were likewise insufficient, having been introduced on a discretionary basis.[108]

As this language suggests, the ECtHR generally considers that States are under a positive obligation to ensure that investigations into alleged election irregularities are conducted fairly and impartially. It must also be highlighted, however, that the ECtHR can also find that States have failed under positive obligations to secure free elections by failing to adequately investigate alleged election interference. For example, in *Davydov v Russia*, the applicant election candidate pointed to an alleged 'falsification' of precinct voting results and complained that the State had failed to effectively investigate alleged irregularities.[109] Identifying that Russia had failed in its 'obligation to hold elections under free and fair conditions,' the ECtHR found a violation of P1-3 as authorities had not responded to the applicant's complaints in a timely and effective manner.[110] The Court similarly found that Azerbaijan had violated P1-3 in *Gahramanli and Others v Azerbaijan.*[111] The applicant alleged fraudulent interferences with voting ballots by State actors in his constituency and that there had been no attempt from national authorities to investigate alleged irregularities.[112] Crucial was that the domestic authorities had failed to demonstrate any 'genuine concern' for preventing the alleged fraud which may have affected the applicant's right to stand for election.[113]

As this section has set out, the ECtHR's assessment of whether Contracting Parties comply with P1-3 may often be linked to whether States have failed to take proactive steps to secure conditions for fair and democratic elections. The Court not only examines circumstances where States interfere with individual electoral rights but may also assess whether—to give practical effect to P1-3—States must take steps to ensure fairness and political equality in all aspects of the electoral process. It remains, however, that the text of P1-3 does not explicitly define where such obligations may arise. It is therefore vital to assess key considerations which inform the

[108] ibid para 122.
[109] *Davydov v Russia* Application No 75947/11, (ECtHR, 13 Nov 2017).
[110] ibid para 276.
[111] *Gahramanli and Others v Azerbaijan* Application No 36503/11, (ECtHR, 8 Jan 2016).
[112] ibid para 9.
[113] ibid para 87.

Court's calculus when identifying positive obligations under P1-3 that may come into play in the context of online disinformation.

3.3 The ECtHR's Interpretive Approaches to Article 3 of Protocol 1

Having introduced the ECtHR's application of P1-3, this chapter now identifies the Court's key interpretive approaches to the right to free elections which have an application in the online disinformation context. Section 3.3.1 first considers the ECtHR's reasoning where the Court has assessed justifications by Contracting Parties to limit the electoral franchise. The focus here is on the Court's emphasis on the value of an informed political populace in this jurisprudence. Section 3.3.2 then considers the ECtHR's interpretative approach regarding the discretion for States to restrict the ability of election candidates to undermine free and fair elections by promoting anti-democratic ideas when running for election. Building from this, section 3.3.3 then focuses on the ECtHR's reasoning where the Court has assessed how individuals could undermine P1-3 by misleading voters. This includes a discussion of factors which could lead the Court to identify a positive obligation for States to investigate alleged irregularities in the electoral process. Section 3.3.4 then considers the Court's use of P1-3 as an interpretive aid when assessing the need for fair and accurate media coverage as part of democratic debate.

3.3.1 The ECtHR's Emphasis on the Connection to National Electoral Affairs and Voter Knowledge

The ECtHR extends wide discretion for Contracting Parties to restrict voting by individuals who have lost a meaningful connection to their country of origin.[114] While the ECtHR has not directly addressed the problem of online disinformation in this jurisprudence, the Court has consistently stressed how individuals who vote in national elections must generally possess knowledge of relevant national electoral affairs.

The Strasbourg approach to political franchise has long reflected the idea that individuals who vote in national elections must have genuine connections to national political affairs. This can be traced back to early ECommHR admissibility decisions. *X v the United Kingdom* concerned a UK citizen who had been resident in France for five years and was prevented from voting in

[114] State discretion to confine 'citizenship' is well established in international law. See Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws L.N. Doc. C 24 M. 13.1931.VV, Art. 1 states 'it is for each state to determine under its own law who are its nationals.'

UK parliamentary elections.[115] Rejecting the applicant's contention that the UK's residency restriction violated her right to vote under P1-3, the ECommHR agreed that the UK had a legitimate interest to prevent expatriates from voting and highlighted a justifiable 'assumption' that:

> A non-resident citizen is less directly or continuously interested in, and has less day-to-day knowledge of its problems; secondly, the impracticability for Parliamentary candidates of presenting the different electoral issues to citizens abroad to secure a free expression of opinion; thirdly, the need to prevent electoral fraud, the danger of which is increased in uncontrolled postal votes.[116]

Here, the ECommHR disagreed that the applicant had not 'lost touch with her country of origin' and thus accepted that her ability to vote could be restricted.[117] In the subsequent decision of *X v United Kingdom*, the applicant was denied the right to vote in UK parliamentary elections even though she was still technically resident in the UK.[118] The ECommHR focused on the substance of the applicant's living 'situation' and noted that her attachment to the UK was purely for tax purposes and a 'matter of minor detail.'[119] This demonstrated how her connection to UK political affairs differed 'considerably from that of citizens permanently resident in the United Kingdom.'[120] Accordingly, the ECommHR rejected the applicant's 'claim to be affected by the acts of these political bodies to a similar extent as resident citizens.'[121] The ECommHR applied similar reasoning when assessing the UK's restriction on the right of British citizens—living in the Jersey Islands—to vote in UK parliamentary elections.att[122] Here, the ECommHR accepted that certain aspects of Jersey's sovereignty were connected to the UK Parliament but considered that Jersey residents were 'rarely' directly affected by Acts of Parliament.[123] In any event, Jersey had its own elected legislature that exercised local competence on matters relevant to local residents.[124]

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[115] *X v United Kingdom* Application No 7566/76, (Commission decision 11 December 1976).
[116] ibid.
[117] ibid.
[118] *X v United Kingdom* Application No 7730/76 (Commission decision 28 February 1979).
[119] ibid.
[120] ibid.
[121] ibid.
[122] *X v United Kingdom* Application No 8873/80 (Commission decision 13 May 1982).
[123] ibid.
[124] ibid.

As the above reasoning suggests, Contracting Parties can restrict the right of individuals to vote under P1-3 if individuals do not have a meaningful stake in national electoral affairs. The ECtHR affords a wide MoA to States on this issue and does not generally give weight to specific factual circumstances concerning applicants. In *Luksch vs. Germany,* the ECtHR accepted that the applicant may not have 'severed any ties' with Germany but nonetheless maintained that the restriction had to lay down a 'general rule' without considering all relevant factual circumstances.[125] The wide MoA on this issue was confirmed in the Grand Chamber decision of *Sitaropoulos and Giakoumopoulos v Greece.*[126] Unanimously reversing the Chamber finding, the ECtHR found that Greece's residency requirement to vote did not violate P1-3. A crucial factual element—explaining the ECtHR's deference to national authorities—was that the applicants in the case retained 'close and continuing links' with their home country.[127] They had taxable property in Greece and were registered as lawyers there.[128] The Court further acknowledged that the Greek constitution expressly provided for the legislature to secure conditions for expatriate citizens to vote.[129] However, no P1-3 violation was found. Importantly, the Grand Chamber acknowledged a growing global preference to facilitate 'external voting' for expatriates but identified a lack of international consensus on this issue.[130] Moreover, the Court noted that relevant Greek constitutional provisions permitted expatriate voting but did not oblige the legislature to facilitate this.[131] Ioannidis describes the Grand Chamber's findings as demonstrating a 'far reaching' deference to Greece.[132] It remains notable, however, that the Court appears to be informed by the need for national authorities to limit electoral participation to individuals who have a genuine stake in the electoral process.

While the ECtHR affords latitude for States to identify where individuals have lost meaningful connections to the State, the Court has assessed this by focusing on with whether individuals—who States have prevented from voting—possess knowledge of relevant national affairs in their host State. *Polacco and Garofalo v Italy* concerned applicants who Italy prevented from voting in regional elections as they had not been continually resident in the region for a statutory

[125] *Luksch v Germany* Application No 35385/97 (Commission decision 21 May 1997).
[126] *Sitaropoulos and Giakoumopoulos v Greece* Application No 42202/07 (ECtHR, 15 March 2012).
[127] ibid para 79.
[128] ibid para 52.
[129] ibid para 16.
[130] ibid para 73.
[131] ibid para 76.
[132] Michael Ioannidis, 'The ECtHR, National Constitutional Law, and the Limits of Democracy: *Sitaropoulos and Others v Greece*,' (2011) 17(4) European Public Law 661-671.

minimum of four years.[133] Here, the ECommHR accepted that a four-year minimum residency requirement constituted a 'lengthy period' but reasoned that such a period was necessary due to the 'social, political and economic situation of the Region of Trentino-Alto Adige.'[134] Further, the ECommHR agreed with Italy that the 'lengthy' period of minimum residency was necessary:

> For the elector to have a thorough understanding of the regional context, so that his vote in the local elections can reflect the concern for the protection of the linguistic minorities.[135]

Significant here was the ECommHR's identification that Italy needed to ensure voters remained informed on regional contexts and that this—in turn—necessitated a wide MoA for States to impose limits on the right to vote under P1-3. This was also a salient factor in *Hilbe v Liechtenstein*, where the ECtHR agreed with Liechtenstein's restriction on the applicant's right to vote in national elections from abroad even though he may not have fully 'severed ties' with Liechtenstein.[136] The Court again referenced how States may require voters to have a 'close connection' with national affairs and be 'directly affected' by electoral outcomes.[137] Moreover, it specifically highlighted how citizens based abroad could lack the requisite 'knowledge' of their home 'country's day-to-day problems' and agreed that States may limit electoral participation from such citizens.[138] Here, the Court highlighted:

> The legitimate concern the legislature may have to limit the influence of citizens living abroad in elections on issues which, while admittedly fundamental, primarily affect persons living in the country.[139]

Such language suggests that States not only have a legitimate interest in limiting political participation to voters who possess knowledge on national electoral affairs but also to limit influence from external actors who lack connection to national affairs. The Court stated this

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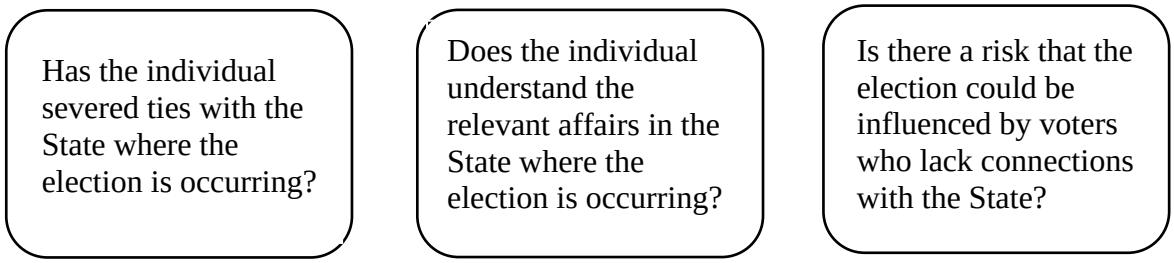
[133] *Polacco and Garofalo v Italy* Application No. 23450/94 (ECtHR, 15 September 1997).
[134] ibid.
[135] ibid.
[136] *Hilbe v Liechtenstein* (dec.), Application No 31981/96, (7 September 1999).
[137] ibid.
[138] ibid.
[139] ibid.

explicitly in *Py v France* where France imposed a ten-year minimum residency period before citizens could vote in the French territory of New Caledonia.[140] While the Court opined that ten years was an unusually high threshold, it was justified considering New Caledonia's 'turbulent political and institutional history.'[141] The region's 'transitional phase' and 'bloody conflict' meant it was legitimate for France to impose high residency thresholds as a means to ensure that voters possessed an 'understanding' of this political context.[142] Further highlighting this, the Court stated that 'ballots should reflect the will of the people concerned and that their results should not be affected by mass voting by recent arrivals in the territory who did not have strong ties with it.'[143]

Figure 4: ECtHR considerations when assessing CoE State restrictions on the electoral franchise under P1-3



The above diagram provides a summary of factors that the ECtHR considers when assessing whether States are justified in restricting the electoral franchise under P1-3. As illustrated, the Court is generally concerned with whether individuals——who States have prevented from voting in a national election——have lost a meaningful connection to the national electoral affairs of the State where the election is occurring. Alongside this, the Court places emphasis on whether such individuals possess an understanding of the electoral affairs in the State where the election is occurring. While this should not be interpreted to suggest that individuals may lose the right to vote under P1-3 merely for being uninformed, it is notable that the Court appears to recognise that individuals may lose a connection to their host State through a lack of knowledge on relevant national electoral issues. As also noted, the Court has explicitly accepted that States may have legitimate interests under P1-3 to ensure that electoral outcomes

[140] *Py v France* Application No 66289/01, (ECtHR, 11 January 2005).
[141] ibid para 62.
[142] ibid para 56.
[143] ibid.

do not become compromised by the involvement of individuals who are not connected to national affairs in the host State where elections are occurring. This is instructive when considering how the dissemination of online disinformation is often considered to be a manifestation of form of 'external' and 'foreign' interference.[144]

The approach of the Strasbourg Court in the above cases—which generally relate to the 'active' aspect of the right to vote under Article 3 Protocol 1—is instructive in the online disinformation context.[145] This is chiefly because of the above-detailed factors which appear to justify the Court's extension of a wide margin of appreciation for CoE States to restrict the right to vote in the specific context of individuals who States have identified as severing their ties with their host country.[146] In particular, two factors provide welcome clarity regarding the substantive limits of the right to vote under Article 3 Protocol 1. Firstly, the ECtHR consistently reasons that voters should have knowledge about relevant national affairs. Secondly, the Court appears to identify legitimate interests for CoE States to restrict external stakeholders from participating in national elections if this could lead to a thwarting of States' identification of the genuine will of the electorate. While this is important in the disinformation context, it is notable that in the above cases the Court does not speak to the scope of the substantive positive obligations that States have may to ensure—or even seek to promote—that voters have access to reliable and accurate information.[147] This will be further unpacked below.

3.3.2 The ECtHR's Assessment of State Restrictions on Anti-Democratic Election Candidacy

The ECtHR does not consider that the dissemination of anti-democratic propaganda constitutes an acceptable exercise of electoral rights under P1-3. It is instructive here to consider the admissibility decision of *Glimmerveen and Hagenbeek v Netherlands*.[148] The applicants argued that the Netherlands had imposed a disproportionate restriction on their ability to disseminate

[144] Ronan Ó Fathaigh and others, 'Microtargeted propaganda by foreign actors: An interdisciplinary exploration,' (2021) 28(6) Maastricht Journal of European and Comparative Law.
[145] ibid (n 40).
[146] See figure 4.
[147] For example, in *Polacco and Garofalo v Italy* Application No. 23450/94 (ECtHR, 15 September 1997), the Court did not say whether a 'thorough understanding of the regional context' necessitated access to accurate information.
[148] *Glimmerveen and Hagenbeek v Netherlands* Application Nos 8348/78 & 8406/78, (Commission decision 11 October 1979).

election leaflets as a means of participating in elections under P1-3. As the ECommHR noted, the 'policy advocated by the applicants' had been 'inspired by the overall aim to remove non-white people' from the Netherlands.'[149] Because of this, the ECommHR did not substantively consider any alleged infringement of P1-3.[150] Outlining its refusal to consider substantively whether the applicants had been disproportionately restricted from running in municipal elections under P1-3, the ECommHR reasoned that the applicants had 'intended to participate in these elections and to avail themselves of 'the right to free elections' for reasons which were 'unacceptable.'[151] This was also seen in *X v Belgium* where the ECommHR rejected admissibility under P1-3 for an applicant who had been prevented from standing for election due to his Nazi collaborations.[152] Accepting Belgium's justification to restrict his candidacy, the Commission considered that:

> The purpose of legislation depriving persons convicted of treason of certain political rights and, more specifically, the right to vote [was] to ensure that persons who [had] seriously abused, in wartime, their right to participate in the public life of their country are prevented in future from abusing their rights in a manner prejudicial to the security of the State or the foundations of a democratic society.[153]

Notable here is the idea that election candidates can undermine P1-3 by advocating for anti-democratic regimes. This was evident in the Grand Chamber case of *Ždanoka vs Latvia*, where the ECtHR accepted that Latvia could restrict election candidates who promoted Communist viewpoints that threatened the country's newly established 'democratic regime.'[154] Vital here was that the applicant was linked to the Communist Party at a time when the Party had sought to disrupt Latvia's breakaway from the USSR. Acknowledging this specific context, the Grand Chamber reasoned that Latvian authorities were 'better placed to assess the difficulties faced in establishing and safeguarding the democratic order.'[155] The Court further agreed that Latvia had interests under P1-3 to restrict election candidates who expressed 'opinions incompatible

[149] ibid.
[150] ibid.
[151] ibid.
[152] *X v Belgium Application No 1028/61 (Commission decision 18 September 1961).*
[153] ibid.
[154] *Ždanoka v Latvia* (n 68).
[155] ibid para 134.

with the need to ensure the integrity of the democratic process.'[156] In *Adamsons v Latvia*, the ECtHR again considered that Latvia's 'particular socio-historical background' established a pressing need to prevent Communist influence in the national elections.[157] Agreeing with Latvia that this justified a restriction on the applicant's candidacy, the Court considered that 'the electoral legislation in question had the legitimate aim of protecting the independence of the State, its democratic order, its institutional system and its national security.'[158] On an assessment of the facts, however, a violation of P1-3 was found. This was because the applicant—unlike in *Zdanoka*—had not engaged in any 'actual conduct' which threatened Latvia's democracy and had merely been accused of conspiring with 'misdeeds of the communist totalitarian regime.'[159] This suggests that the ECtHR affords more latitude for States to restrict the right of individuals to stand for election if States can provide evidence that individuals are seeking to promote ideas which are hostile to democracy. For example, the ECtHR found no violation of P1-3 in *Etxeberria and Others v Spain* where Spain restricted election candidates who had ties to separatist political groups.[160] It was pivotal here that Spanish authorities took steps to demonstrate an 'unequivocal link' between the applicants and 'political parties that had been declared illegal' in Spain.[161]

The ECtHR acknowledges the role of States to prevent individuals from running for election if individuals hold an unfair position of advantage in the electoral process. This is evident where the Court has assessed State restrictions on election candidacy from individuals who have previously held public office. For example, in *Gitonas and Others v Greece*, the applicant was prohibited from running in national elections because he had recently held a powerful position in a public media company.[162] Highlighting the 'considerable' latitude that States have in this area, the ECtHR considered that:

> Such disqualification, for which equivalent provisions exist in several member States of the Council of Europe, serves a dual purpose that is essential for the proper functioning and upholding of democratic regimes, namely ensuring that candidates of

[156] ibid.
[157] *Adamsons v Latvia* Application No 3669/03 (ECtHR, 24 June 2008).
[158] ibid.
[159] ibid para 98.
[160] *Etxeberria and Others v Spain* (n 67).
[161] ibid para 55.
[162] *Gitonas and Others v Greece* Application Nos 18747/91, 19376/92, 19379/92 (ECtHR, 1 July 1997).

> different political persuasions enjoy equal means of influence (since holders of public office may on occasion have an unfair advantage over other candidates) and protecting the electorate from pressure from such officials who, because of their position, are called upon to take many - and sometimes important - decisions and enjoy substantial prestige in the eyes of the ordinary citizen, whose choice of candidate might be influenced.[163]

Applying this reasoning, the Court examined Greek legislation that banned election candidates who had held 'salaried' public positions for more than three months in the period preceding an election.[164] The ECtHR agreed that Greece's rule sought to ensure a 'genuine manifestation' of voters' choices.[165] The 'substantial prestige' of the candidate's recent position meant that restrictions were needed to maintain an 'equal means of influence' between candidates.[166] The Grand Chamber applied a similar focus on the prestige of the individual being restricted from running for election in *Paskas vs Lithuania.*[167] Here, Lithuania restricted a former president from running an election campaign on the grounds that he had previously been impeached for unlawfully granting Lithuanian citizenship to a major campaign donor.[168] On an assessment of the facts, the Court found a violation of P1-3 due to the 'permanent and irreversible' nature of the individuals' 'disqualification.'[169] The Grand Chamber further considered that the impugned restriction undermined the 'free expression' of voters' choice in the legislature because they ought to retain 'the opportunity to choose at the polls whether to renew their trust in the person concerned.'[170] Notably, however, the Court observed that the relevant domestic law had been based on holding 'the highest-ranking State officials' accountable for abusing public positions 'while in office.'[171] Describing this domestic law as a 'self-protection mechanism for democracy,' the Court accepted—in principle—that Lithuania's de-registration of an election candidate for having previously abused a public position had been 'intended to preserve the democratic order' and constituted a legitimate aim under P1-3.[172]

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[163] ibid para 40.
[164] ibid.
[165] ibid para 37.
[166] ibid para 40.
[167] *Paskas vs Lithuania* Application No 34932/04 (ECtHR, 6 Jan 2011).
[168] ibid para 23.
[169] ibid para 104.
[170] ibid.
[171] ibid para 100.
[172] ibid.

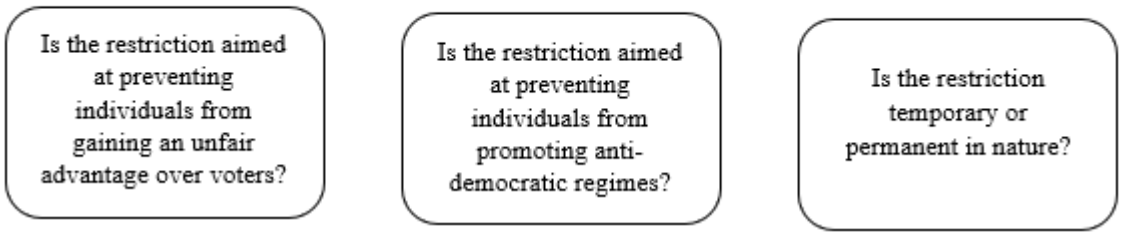
The ECtHR's reasoning here suggests that—to ensure that elections remain democratic—States have latitude to prevent individuals from obtaining an unfair position of influence in elections. This is evident where the Court has assessed State measures to prohibit foreign election campaign funding. In *Parti Nationalist Basque v France*, the applicant was a Basque political party operating in France.[173] France's electoral commission refused to approve certain funding to the Party because it originated from a larger Basque party based in Spain. The ECtHR found no violation of P1-3 as it agreed that France was justified in preventing foreign election funding from disrupting 'institutional order' necessary for free elections.[174] In *Political Party 'Patria and Others v the Republic of Moldova*, the Court investigated similar restrictions on 'foreign origin funding' but reached a different conclusion based on an absence of procedural safeguards.[175] Here, an entire group of political party candidates was disqualified due to allegedly illegitimate funding secured by the party leader. The ECtHR accepted such restrictions could be justified by Moldova's legitimate aims to protect 'democracy's proper functioning which implied the assurance of equal and fair conditions for all candidates in the electoral campaign.'[176] Notably, the ECtHR further clarified that such conditions may be necessary to facilitate the 'free expression of the people in their choice in the legislature.'[177] However, the Court found a violation of P1-3 because—unlike in *Parti Nationaliste Basque*—the Moldovan electoral commission had presented no evidence of unsanctioned foreign funding and had only 'informed the applicant party about its hearing only fifteen minutes in advance.'[178]

As the ECtHR's reasoning in the above cases suggests, the Court affords a wide MoA for States to identify circumstances whereby individuals must be prevented from standing for election to preserve the national democratic order. However, the Court also recognises that States can disproportionately interfere with the free expression of the electorate by imposing permanent restrictions on the right of individuals to stand for election. Recalling cases such as *Gitonas* and *Ždakona,* the Court found it crucial that any restrictions on electoral candidacy carried

[173] *Parti Nationalist Basque v France* Application No 71251/01, (ECtHR, 7 September 2007).
[174] ibid para 43.
[175] *Political Party 'Patria and Others v the Republic of Moldova* Application No. 5113/15 (ECtHR, 4 August 2020.)
[176] ibid para 34.
[177] ibid.
[178] ibid.

specific time limits.[179] Conversely, in the aforementioned *Podkolzina v Latvia,* the Court took particular issue with how the applicant had already passed a formal language test by a five-member panel but was again approached for an informal test by national authorities.[180] Cautioning against the use of arbitrary and 'exorbitant power' in this area, the Court highlighted that the restriction had been a politically motivated attempt by state actors to prevent electoral candidacy in a manner that lacked 'fundamental guarantees of fairness.'[181] In the aforementioned decision of *Paskas v Lithuania*, the ECtHR accepted that a candidate's undemocratic conduct may warrant restrictions on their rights under P1-3 but found a violation of this provision due to the permanency and 'immutability' of Lithuania's restriction.[182] This suggests that the ECtHR—while not having a limitation clause to interpret as the Court has when applying the right to freedom of expression under Article 10(2) ECHR—is unlikely to agree with permanent restrictions on electoral candidacy. The illustration below provides a summary of the key factors that the ECtHR generally considers when assessing State restrictions on electoral candidacy under P1-3:

Figure 5: ECtHR considerations when assessing CoE State restrictions on electoral candidacy under P1-3



The ECtHR's approach when interpreting State restrictions on election candidacy is instructive in the online disinformation context. As the Court's reasoning in the above cases suggests, the Court generally affords a wide MoA for States to identify whether individuals can be prevented from standing for election to preserve the national democratic order. However, the ECtHR is likely to find that States are justified in restricting election candidacy if the Court deems that candidates are seeking to use P1-3 to advocate for anti-democratic regimes. As the above cases

[179] *Gitonas and Others v Greece* (n 234); *Ždanoka v Latvia* (n 68).
[180] *Podkolzina v Latvia* (n 146).
[181] ibid para 37.
[182] *Paskas v Lithuania* (n 239) para 110.

also suggest, the Court acknowledges the role of States to identify circumstances where certain election candidates may have an unfair advantage in elections by holding positions of influence over the political populace. Crucially, the ECtHR appears inclined to agree with State restrictions on election candidacy if such restrictions are based on preventing election candidates—particularly candidates who hold prominent public positions—from using P1-3 to promote anti-democratic regimes. Provided that State restrictions are temporary and not permanent, the Court appears to afford a wide MoA to States in this area. The ECtHR provides welcome and urgently needed clarity in the above case law by fleshing out the substantive limits of the right to stand for election in the specific context where election candidates could unfairly distort the fairness of electoral process or could use their electoral position to advocate for political regimes which contravene the ECHR's democratic values. This also demonstrates a welcome consistency with the Court's approach to anti-democratic propaganda and the unfair distribution of airtime in the context of political communications in case law where the Court applies Article 10 ECHR.[183] Having examined this generally, it is now necessary to consider the ECtHR's approach where States impose restrictions under P1-3 on the grounds that election candidates are seeking to mislead voters by disseminating false information.

3.3.3 The ECtHR's Approach to Misleading Statements and Fraudulent Electoral Activity

As outlined, the ECtHR has explicitly highlighted the value of voters possessing a knowledge and understanding of relevant national electoral issues.[184] As also noted above, the Court generally extends a wide MoA for States to prevent election candidates from promoting anti-democratic ideas as part of election campaigns.[185] To further unpack the Court's approach to P1-3 in the online disinformation context, it is now necessary to examine the ECtHR's interpretation of whether individuals who disseminate misleading information could undermine democratic elections under P1-3. Threaded throughout this case law is the Court's reasoning that election candidates must impart accurate information during election campaigns and must not deceive voters. As must also be considered here, the Court appears to identify a positive obligation under P1-3 for States to investigate credible allegations that election results have been falsified or tampered with.

[183] See Chapter Two, 2.3.2.
[184] Section 3.2.1.
[185] Section 3.2.2.

3.3.3.1 The ECtHR's Focus on Whether Misleading Statements are Deceptive

The ECtHR has often assessed circumstances whereby States have restricted the right of individuals to stand for election on the grounds that individuals have submitted false statements to national electoral commissions. Notably, the ECtHR has identified a legitimate aim under P1-3 for States to ensure that voters are not misinformed by individuals who disseminate false information. However, the Court appears likely to find a violation of P1-3 if States sanction individuals for submitting false information without establishing that individuals have acted in an intentionally deceptive manner. This was evident in the case of *Russian Conservative Party of Entrepreneurs and others v Russia.*[186] Here, Russia had removed an entire list of political party candidates from the electoral register because several members had submitted 'incorrect' information on their property and income status to an electoral commission.[187] The ECtHR agreed with Russia that statutory requirements for electoral candidates to accurately disclose such information to electoral commissions served legitimate aims to 'enable the voters to make an informed choice and to promote the overall fairness of elections.'[188] However, the Court found Russia's disqualification of an entire list of candidates to violate P1-3. Crucial was that certain candidates had been 'sanctioned for circumstances which were unrelated to their own law-abiding conduct and were also outside their control.'[189] The Court further commented that candidates who had not submitted false information 'were not required to verify the truthfulness of financial representations that were not their own.'[190] Thus, Russia's disqualification of an entire list of candidates—including candidates who had not intentionally submitted false declarations—had been 'disproportionate' to the legitimate aim of 'ensuring the truthful disclosure of the candidates' financial position and promoting the integrity of electoral blocs or unions.'[191] The ECtHR's focus on whether individuals have sought to intentionally mislead voters was further pivotal in *Melnychenko v Ukraine* where an election candidate submitted untrue information to an electoral commission related to his 'habitual' residence.[192] The applicant did not dispute that he had submitted misleading information to authorities. Importantly, however, he explained that he had only misrepresented his residency

[186] *Russian Conservative Party of Entrepreneurs and others v Russia* Application Nos 55066/00 and 55638/00 (ECtHR, 11 January 2007).
[187] ibid para 51.
[188] ibid para 62.
[189] ibid para 65.
[190] ibid para 65.
[191] ibid.
[192] *Melnychenko v Ukraine* Application No 17707/02, (ECtHR, 19 October 2004) para 20.

status due to his 'fear of persecution in Ukraine.'[193] He had not lied to deceive the electorate but merely to avoid compromising his 'personal safety or physical integrity.'[194] Thus, the ECtHR found that Ukraine had violated P1-3 as there was a justifiable reason—not grounded in intentional deception—for the applicant's misrepresentation. The Court again focused on the applicant's reason for falsifying information in *Sarukhanyan v Armenia* where the applicant provided false information about his assets and was deregistered as a candidate in parliamentary elections.[195] The ECtHR agreed that—in principle—deregistration served an 'undoubtedly legitimate' aim under P1-3 to prevent voters from being 'misled by false representations.'[196] The Court further acknowledged that national electoral commissions had 'undoubtedly legitimate' reasons to require electoral candidates to submit information that was 'accurate to the best of their knowledge.'[197] However, the Court found a violation of this provision because there was an understandable explanation for the applicant having misrepresented his 'property status.'[198] Specifically, numerous governmental documents listed his mother as the sole owner. Citing this, the ECtHR expressly considered that:

> The applicant cannot be regarded as having acted in bad faith since, as already mentioned above, he had good reason to believe that the information was accurate, all the more so considering that his omission was the result of misleading privatisation rules and practices and could not reasonably be blamed on him.[199]

Implicit from such language is the ECtHR's focus on a distinction between erroneous and intentionally deceptive false declarations. The Court explicitly drew this distinction in *Krasnov and Skuratov v Russia* where two election candidates had been disqualified from standing in general elections after submitting untrue information to election authorities.[200] The ECtHR accepted Russia's 'incontestably' legitimate aim to require election candidates to submit accurate information 'to the best of their knowledge.'[201] This not only served to 'enable voters to make an informed choice' but also to prevent them from being 'misled by false

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[193] ibid para 46.
[194] ibid para 65.
[195] *Sarukhanyan v Armenia* Application No 38978/03, (ECtHR, 27 May 2008).
[196] ibid para 42.
[197] ibid.
[198] ibid.
[199] ibid para 49.
[200] *Krasnov and Skuratov v Russia* Application Nos 17864/04 and 21396/04, (ECtHR, 19 July 2007).
[201] ibid para 44.

representations.'[202] However, the Court illustrated a critical distinction between the first and the second applicant. The first applicant had claimed to be head of a district council even though he no longer held the position.[203] The Court reasoned that he had knowingly provided 'substantially untrue information' and 'cloaked himself in the authority associated in the voters' eyes with a position he no longer held.'[204] Accordingly, the Court reasoned that his 'submission of untrue information' could have 'adversely affected' voters' 'ability to make an informed choice.'[205] Conversely, however, the Court did not identify deceptive conduct by the second applicant who had listed his position as acting head of a law department while merely employed as a professor in the department. The Court disagreed with the 'inconsistent findings' of the domestic authorities as to the misleading nature of his submission and observed how 'the place of work he listed in his nomination form matched the most recent entry in his employment record.'[206] He therefore could have plausibly believed that he was required to list his most recent and senior position. Differentiating this submission from the first applicant's, the ECtHR found it crucial that 'nothing' in this declaration suggested that he had 'acted in bad faith.'[207] The second applicant had also been disqualified for misleading voters on his ties to the Communist Party. However, he had at no point denied these links and merely admitted this information as opposed to deceptively obscuring his Communist connections.[208] Thus, the Court found Russia's interference with P1-3 to be justified for the first applicant but not for the second applicant. As this suggests, the ECtHR is more likely to find legitimate aims under P1-3 for States to sanction election candidates for submitting false information if candidates have acted in an intentionally deceptive manner. Importantly, the Court's approach here not only clarifies its reluctance to tolerate deceptive electoral campaigning when applying Article 3 Protocol 1 ECHR but also remains consistent with the Court's distinction between false statements of fact and value judgments when applying Article 10 ECHR.[209] This will be further discussed in section 3.4.

[202] ibid para 38.
[203] ibid para 48.
[204] ibid.
[205] ibid.
[206] ibid para 60.
[207] ibid para 61.
[208] ibid para 63.
[209] As discussed in Chapter Two, section 2.3.2.

A related test which informs that ECtHR's calculus here is whether false information has relevance to voters and the broader political populace. Recalling *Sarukhanyan v Armenia*, the Court not only highlighted that the applicant had mistakenly misrepresented information but also that the information itself—regarding technical details on his property status—was of 'minor importance' to voters.[210] The ECtHR agreed with Armenia that his declaration to the electoral commission was untrue but disagreed that the factual discrepancy was 'seriously capable of 'misleading the electorate.'[211] The Court further stated that it found 'it hard to imagine why a parliamentary candidate would intentionally conceal' such information if this could place 'his standing in the election' at risk.[212] Further recalling *Krasnov and Skuratov v Russia*, the Court noted that the question of whether the applicant was the current head of a district council 'was not a matter of indifference for the voters' and thus his falsification 'could have adversely affected their ability to make an informed choice.'[213] Conversely, the Court expressed doubt that the second applicant's discrepancy 'was capable of misleading the voters' in a manner that affected their vote.[214] This reflects the observation from Cavaliere that the ECtHR in this case 'paid attention to the effect on voters' choices when assessing the misleading nature of the applicant's statements.'[215] From the online disinformation perspective, the relevant observation here relates to how the Court appears more inclined to agree that States are justified in restricting the right of individuals to stand for elections if individuals have intentionally false information which is likely to influence individual voter choices and political engagement.

3.3.3.2 The ECtHR's focus on Whether Misleading Information and Election Tampering Could Influence Election Results

The ECtHR not only assesses whether falsified information may affect individual voter choices but also whether this could—in turn—shift electoral results. *Babenko v Ukraine* concerned an applicant who alleged that 'ballots of different candidates had been mixed up' and that voting irregularities had skewed the outcome of an election to his detriment.[216] The Court rejected the

[210] *Sarukhanyan v Armenia* (n 274) para 94.
[211] ibid.
[212] ibid para 47.
[213] *Krasnov and Skuratov v Russia* (n 279) para 62.
[214] ibid.
[215] Pablo Cavaliere, 'The Truth in Fake News: How Disinformation Laws Are Reframing the Concepts of Truth and Accuracy on Digital Platforms,' (2022) 3(4) European Convention on Human Rights Law Review 481-523.
[216] *Babenko v Ukraine* Application No 43476/98 (ECtHR, 4 May 1999).

application on the grounds that he failed to demonstrate how the alleged irregularities had 'specifically affected' the election outcome.[217] As the applicant had received ten thousand votes fewer than the eventual election winner, the Court doubted that any alleged distortions had shifted the election in a manner that decisively affected results.[218] Similar reasoning was visible in *Kerimova v Azerbaijan.*[219] Here, the ECtHR accepted that there may have been 'impermissible alterations' with polling data when two election officials 'confessed to having tampered with the election protocols' to disadvantage the applicant.[220] However, the Court found that Azerbaijan had violated P1-3 by invalidating the election results.[221] This was because there had been insufficient evidence that the irregularities in five polling stations had seriously affected election results.[222] Notably, the Court reiterated that the goal of free elections is to identify 'the opinion of the electorate' but cautioned against 'a situation where a winning candidate is wrongfully punished by being deprived of his or her victory in the election for malfeasance attributable to his or her losing opponents.'[223] Here, the electoral commission's annulment had distorted the outcome in a manner far more disruptive to the election than the alleged specific irregularities could have been. This may be contrasted with *Davydov and Others v Russia* where applicant election candidates complained that electoral commissions had 'falsified the results of the elections by ordering recounts' that 'systematically' increased the ruling party's share.[224] Crucially, these allegations were corroborated by a third-party election observer. Finding a violation of P1-3, the ECtHR reasoned that any attempts to investigate alleged tampering had been limited to 'trivial questions of formalities' while 'ignoring evidence pointing to serious and widespread irregularities' that could plausibly have affected the outcome of the election.[225]

The ECtHR's reasoning here suggests that States have positive obligations to make good faith efforts to investigate credible accusations of election results having being falsified or tampered with. The Court's approach suggests that this positive obligation is most likely to arise if there is a likely causal link between alleged misconduct and the outcome of an election. In the Grand

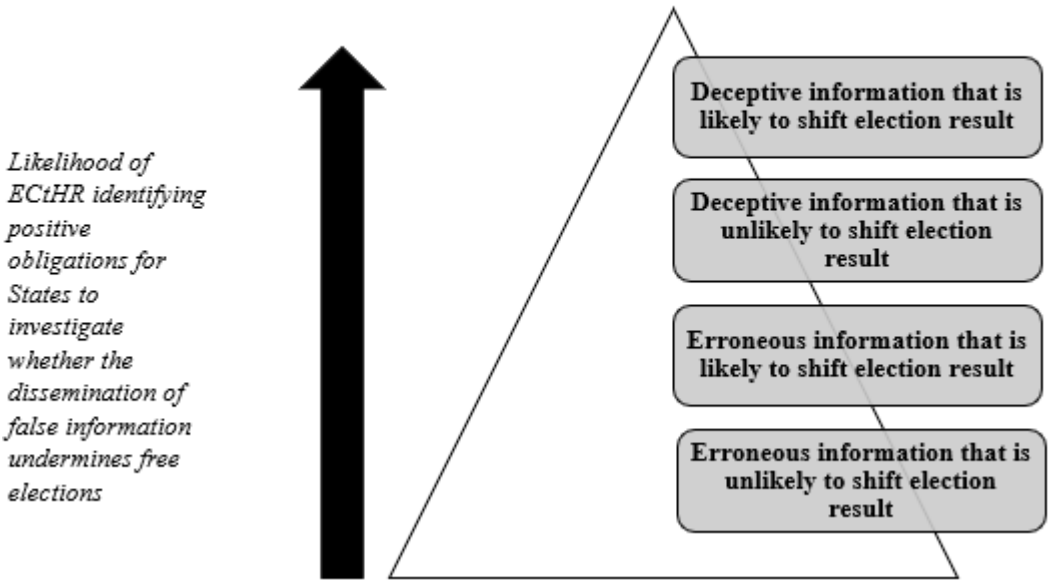
[217] ibid.
[218] ibid.
[219] *Kerimova v Azerbaijan* Application No 20799/06 (30 December 2010).
[220] ibid para 48.
[221] ibid para 51.
[222] ibid.
[223] ibid para 41.
[224] *Davydov and Others v Russia* (n 156).
[225] ibid.

Chamber decision of *Mugemangango v Belgium*, the applicant had failed to win a seat in parliamentary elections by just fourteen votes.[226] He called for a re-examination of votes in his constituency on the grounds that thousands of votes were declared spoilt and that some votes may have been erroneously disqualified. The Grand Chamber found that the new parliament's refusal to allow this had constituted a violation of P1-3. It was not only important that the applicant's allegations were 'sufficiently serious' but also that there was a significant likelihood of him winning the election if recounts had occurred.[227] Thus, by failing to address the applicant's concerns, Belgium had not only disrupted the applicant's right to stand for election but failed to proactively investigate irregularities as required under P1-3. Extensive focus has been given to positive obligations in cases of ballot tampering concerning Azerbaijan. In *Namat Aliyev v Azerbaijan* the ECtHR found a violation of P1-3 because the State had failed to seriously investigate the applicant's substantiated allegations that fake votes had been cast and stuffed in ballot boxes.[228] The Court stressed that some effective investigatory steps were required even if alleged ballot stuffing had not decisively altered election outcomes. While the applicant had no entitlement to win the election, this did not negate his right to 'freely and effectively stand' for election.[229] Therefore, his evidence of alleged election tampering required the State to make a 'genuine effort' to investigate this alleged wrongdoing.[230] In *Abil v Azerbaijan*, the applicant complained that his election campaign had been sabotaged through false allegations that he had illegitimately solicited votes.[231] The electoral commission had deregistered the applicant after receiving 'a number of written statements from voters claiming that the applicant had promised them money in exchange for their promise to vote for him.'[232] Importantly, however, the electoral commission had de-registered the candidate without examining credible accusations that the individuals who alleged the applicant's misconduct 'were actually relatives of various officials of the local executive authorities.'[233] The State had not only failed to= establish 'sound, relevant and sufficient proof' that the applicant had engaged in misconduct but also to investigate whether his own allegations of sabotage had been credible and had adversely affected his electoral rights under P1-3.[234] This constituted a failure

[226] *Mugemangango v Belgium* (n 154).
[227] ibid para 79.
[228] *Namat Aliyev vs Azerbaijan* Application No 18705/06, (ECtHR, 8 July 2010) para 78.
[229] ibid.
[230] para 83.
[231] *Abil v Azerbaijan* Application No 16511/06, (ECtHR, 21 May 2012).
[232] ibid para 80.
[233] ibid.
[234] ibid para 81.

of the State's positive obligation to investigate credible accusations of election tampering under P1-3.

Figure 6. The ECtHR's approach to misleading statements and alleged election tampering under P1-3.



The above illustration provides a summary of the factors which generally increase the likelihood of the ECtHR identifying a positive obligation for States to actively investigate whether the dissemination of false information could undermine free elections under P1-3. Importantly, the ECtHR is most likely to identify the existence of this State obligation where candidates disseminate misleading information in a deceptive manner and where this is likely to alter an election result. Conversely, the Court is least likely to find such obligations where States are confronted with merely erroneous information which is unlikely to affect electoral results.

One critical omission in the above cases is that the ECtHR appears to tentatively identify a positive obligation under P1-3 for States to take some rudimentary steps to investigate credible accusations of election tampering but arguably stops short of providing any prescriptive measures for States to ensure this. For example, in several of the above-detailed cases, the Court appears reluctant to find that States have fallen foul of P1-3 obligations to secure free elections provided that some steps from the relevant electoral or parliamentary bodies are taken in response to accusations which—if substantiated with evidence—point to irregularities which are likely to shift election results. This does not set a very high bar regarding the requirements

under P1-3 for States to proactively secure legislative frameworks that insulate States from such irregularities.[235]

While the Court has not directly referred to the problem of online disinformation when applying this reasoning under P1-3, the above cases demonstrate the clear potential for the Court to do so. In January 2023, the Court communicated the case of *Bradshaw and Others v the United Kingdom* to the United Kingdom.[236] This concerns the United Kingdom's alleged failure 'to investigate credible allegations of' Russian disinformation campaigns and provide a 'legal and institutional framework to combat foreign interference in democratic elections and referenda.'[237] If the ECtHR proceeds with its established approach when assessing the UK's positive obligations under P1-3 in this communicated case, this author submits that the above detailed analytical considerations will come into play. Crucially, this case also provides the Court with ample opportunity to clarify the scope of the positive obligations for States to investigate and rectify alleged instances of disinformation having potentially distorted the outcome of a national electoral process.

3.3.4 The ECtHR's Use of P1-3 as an Interpretive Aid When Identifying Positive Obligations for States to Ensure Fair Pre-Election Debate

As the foregoing analysis has found, the ECtHR has often highlighted the value of an informed political populace when applying the right to free elections under P1-3. The Court also appears inclined to extend a wide MoA for States to ensure that elections do not become unfairly distorted by political officials who hold a position of influence over voters. Examining these aspects of the ECtHR's approach further, this section considers how the Court interprets P1-3 as requiring States to ensure fair pre-election debate. While the ECtHR generally considers this when applying the right to freedom of expression under Article 10 ECHR, the Court has used P1-3 as an interpretive aid when stressing the importance for States to ensure that pre-election debate does not become unfairly contested. Importantly from the online disinformation

[235] See an analogous criticism of the 'not very high standard' established in the ECtHR's identification of positive obligations under p1-3 to secure protection for voters with disabilities, Rory O'Connell, 'Realising political equality: the European Court of Human Rights and positive obligations in a democracy,' (2010) 61 Northern Ireland Legal Quarterly 270.
[236] *Bradshaw and Others v the United Kingdom* Application no. 15652/22; This is the current state of the communicated case at the time of writing in October 2023.
[237] ibid.

perspective, the Court has also used P1-3 as an interpretive aid when highlighting the legitimate aims for States to take steps to ensure that coverage of election affairs is accurately imparted to voters through media.

The ECtHR has used P1-3 as an interpretive aid when assessing statutory restrictions on pre-election campaigning under Article 10 ECHR. A crucial case here—demonstrating the interdependence between Article 10 and P1-3—is *Bowman vs United Kingdom* where the applicant distributed 25,000 anti-abortion leaflets in the run up to general elections.[238] She had been prosecuted for having exceeded the statutory spending limit of £5 to promote candidates six weeks before an election.[239] Addressing the applicant's right to impart leaflets to voters at a 'critical period when their minds were focused on their choice of representative', the ECtHR considered that:

> Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system. The two rights are inter-related and operate to reinforce each other: for example, as the Court has observed in the past, freedom of expression is one of the 'conditions' necessary to "ensure the free expression of the opinion of the people in the choice of the legislature." For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely.[240]

Notwithstanding this statement, the ECtHR's contrasting observation was that democratic requirements for open political debate and fair elections could 'come into conflict' in a manner that may require 'certain' restrictions on electoral communications.[241] Here, the ECtHR found the UK's restriction to have violated Article 10 ECHR because the Court considered a five pound spending cap to be a 'total barrier' on imparting information to voters.[242] It remains instructive, however, that the Court used P1-3 as an interpretive aid when identifying legitimate aims for Contracting Parties to impose statutory limitations on electoral spending to secure

[238] *Bowman vs United Kingdom* Application No 141/1996/760/961, (ECtHR, 19 February 1998).
[239] ibid para 13.
[240] ibid para 42.
[241] ibid para 43.
[242] ibid para 47.

'political equality between' election candidates.[243] The Court expressly stated that such restrictions—even if constituting 'a type which would not usually be acceptable'—served specific functions of preserving the 'free expression of the opinion of the people in the choice of the legislature.[244]

The ECtHR's use of P1-3 as an interpretive aid in *Bowman v United Kingdom* is notable because the Court used this provision to stress the need for Contracting Parties to prevent pre-election debate from becoming unfairly dominated by powerful political stakeholders. This is notable in the online disinformation context because it suggests that the ECtHR may be more inclined to agree with specific statutory restrictions on pre-election debate if this is necessary to protect the free expression of voters in their choice of the legislature. The Court explicitly referenced this in *TV Vest & Rogaland Pensjonistparti v Norway.*[245] Here, the ECtHR accepted that Norway's statutory prohibition on election advertisements through broadcast media pursued the legitimate aim of ensuring a 'level playing field in elections.'[246] The Court expressly referenced P1-3 when it considered that restrictions on such communications could be justified to 'secure the free expression of the opinion of the people in the choice of the legislature.'[247] However, the Court took issue with how—in practice—the restriction prevented a financially weak group from imparting their manifesto to voters. Stated differently, the applicant party had not 'obtained an unfair advantage over those with less resources' and 'belonged to a category for whose protection the ban was, in principle, intended.'[248] In the subsequent case of *Animal Defenders International v United Kingdom,* the Court reached a different conclusion and found no violation of Article 10 ECHR where the UK prevented an NGO—which had access to alternative forms of media—from imparting information in broadcast media..[249] While the Grand Chamber in that case did not expressly reference P1-3, it acknowledged that that 'a statutory control of the public debate' could be 'necessary given the risk posed to the right to free elections.'[250] Relatedly, the Grand Chamber referenced an obligation for States to ensure that pre-election debate was 'nurtured at all times by free and

[243] ibid.
[244] ibid para 44.
[245] *TV Vest & Rogaland Pensjonistparti v Norway* Application No 21132/05 (ECtHR, 11 December 2008).
[246] ibid para 44.
[247] ibid para 65.
[248] ibid para 73.
[249] *Animal Defenders International v United Kingdom* Application No 48876/08 (ECtHR, 22 April 2013) para 81.
[250] ibid para 111.

pluralistic debate.'[251] The ECtHR again appeared to reference a positive obligation for States to ensure fair pre-election media coverage in *Communist Party of Russia and Others v Russia.*[252] Here, the Court agreed with applicants that States have a positive obligation 'to intervene in order to open up the media to different viewpoints' in election periods.[253] On an assessment of the facts, however, the Court rejected the applicant's core argument that Russia had failed in this obligation by preventing the applicants from having the ability to impart information to voters.[254]

Of further relevance from the online disinformation perspective is that the ECtHR may use P1-3 as an interpretive aid to highlight the value of informed voters when applying Article 10 ECHR. In *Orlovskaya Irskra v Russia,* the applicant newspaper editors were prosecuted for publishing articles during an election time in which they accused a governor of being corrupt.[255] Referencing P1-3 in this case, the ECtHR accepted that the relevant electoral law pursued the legitimate aim of 'enforcing the voters' right to impartial, truthful and balanced information via mass media outlets and the formation of their informed choices in an election.'[256] On the facts, however, the Court found an Article 10 ECHR violation because Russia had classified the applicant's statements as 'pre-election campaigning.'[257] The Court considered that the State had 'excessively' applied the domestic legal restriction regarding 'pre-election campaigning' by applying the restriction not only to political parties but also to 'press expression.'[258] The ECtHR expressed similar criticism of Russia in *OOO Informatsionnoye Agentstvo Tambov-Inform v Russia,* where the applicants were prosecuted for publishing articles and online polls related to an election campaign.[259] The Court again accepted that States had a legitimate aim to restrict 'pre-election campaigning' as a means of 'protecting free elections' and enforcing 'the voters' right to impartial, truthful and balanced information via mass media outlets and the formation of their informed choices in an election.'[260] It was again crucial, however, that Russia had applied an overly broad interpretation of 'pre-election campaigning' to include press

[251] ibid.
[252] *Communist Party of Russia and Others v Russia* Application No 29400/05 (ECtHR, 19 June 2012).
[253] ibid para 126.
[254] ibid para 122.
[255] *Orlovskaya Irskra v Russia* Application No 42911/08, (ECtHR, 3 July 2017).
[256] ibid para 104.
[257] ibid para 127.
[258] ibid para 133.
[259] *OOO Informatsionnoye Agentstvo Tambov-Inform v Russia* Application No 43351/12, (ECtHR, 18 May 2021).
[260] ibid para 81.

'articles' as opposed to election 'campaign material.'[261] Thus, the ECtHR acknowledges that statutory limitations on pre-election debate can ensure informed voter choices in line with P1-3 but is inclined to highlight that States must place less intrusive measures on journalists as opposed to political parties.

The ECtHR's reasoning in the above jurisprudence demonstrates how the Court can use P1-3 to inform its assessment regarding the permissible limitation on the right to impart information in pre-election periods. While the ECtHR considers that pre-election debate must be vigorous in democracies and generally examines this under Article 10 ECHR, it is notable that the Court interprets statutory restrictions on pre-election debate as being necessary to protect free and fair elections. It is arguable, however, that the Court—referencing P1-3 in cases where Article 10 ECHR is applied—should provide more clarity regarding the conditions which are likely to justify States in restricting the dissemination of false and misleading communications. In the seminal case of *Bowman v United Kingdom,* for example, the Court was explicit in stating why access to a wide variety of information and ideas is particularly crucial in the pre-election period.[262] Less clear, however, have been the specific thresholds whereby 'it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the "free expression of the opinion of the people in the choice of the legislature.'[263] Due to the critical importance of this ambiguity in the online disinformation context, the proceeding section examines in detail the interplay between the right to freely receive and impart information under Article 10 and the obligation for States to protect free and fair elections under P1-3.

3.4 Interplay Between Article 10 and P1-3: Lessons in the Online Disinformation Context

As this chapter has already shown, there is significant relationship between the right to free elections and the right to freedom of expression in ECtHR jurisprudence. Recalling *Bowman v United Kingdom,* this is reflected in the Court's statement that Article 10 and P1-3 are 'interrelated and operate to reinforce each other.'[264] On the one hand, the Court appears to

[261] ibid para 92.
[262] See the Court's commentary in *Bowman vs United Kingdom* Application No 141/1996/760/961, (ECtHR, 19 February 1998) para 42.
[263] Ibid para 42.
[264] ibid para 42.

stress the value of open and unconstrained political debate in elections to ensure that voters can access a pluralistic range of viewpoints. On the other hand, the Court acknowledges that statutory controls on pre-election debate may be necessary to ensure the free expression of the voters' 'choice in the legislature'.[265] Recalling Chapter One, the problem of disinformation epitomises key tensions between these interrelated democratic interests. Having now analysed the ECtHR's interpretive approaches to P1-3 and Article 10 ECHR, this section considers key lessons from the Court's reasoning which have significance in the online disinformation context. The figure below provides a summary of key findings that can be found from ECtHR jurisprudence.

Figure 7. Summary of key takeaway lessons from the ECtHR's approaches to Article 10 and Article 3 Protocol 1 ECHR.

Finding from ECtHR jurisprudence	***Example in Article 10 ECHR Jurisprudence***	***Example in Article 3 Protocol 1 ECHR Jurisprudence***
CoE States have legitimate interests to ensure that elections (including pre-election debate) do not become unfairly influenced.	ECtHR extends wide MoA for States to regulate political advertising.	ECtHR identifies positive obligations for States to investigate credible accusations of political interference/ irregularities in elections
CoE States have legitimate interests to prevent individuals from spreading anti-democratic propaganda during elections.	ECtHR application of Article 17 ECHR instead of Article 10 ECHR in cases involving anti-democratic propaganda.	ECtHR provides wide MoA for States to sanction election candidates for running anti-democratic election manifestos
CoE States have legitimate interests to prevent individuals from deceiving voters in elections.	ECtHR approach to false and misleading statements in elections.	ECtHR assessment of false declarations made by election candidates.

3.4.1 The Interests for States to Ensure that Elections Do Not Become Unfairly Influenced

An important finding from ECtHR jurisprudence on P1-3 and Article 10 ECHR relates to the Court's identification of the legitimate interests for States to prevent political and electoral debate from being unfairly influenced. The ECtHR explicitly encourages States to ensure that voters have access to a wide and diverse range of information in pre-election periods. For example, the Court has explicitly stated that 'free elections are inconceivable without the free circulation of political opinions and information.'[266] The Court has also elucidated how it is 'particularly important' for information and ideas 'of all kinds' to freely flow in election periods.[267] Drawing from this reasoning, Fink and Gillich highlight the ECtHR's tendency to

[265] See section 3.3.4.
[266] See *United Communist Party of Turkey and Others* v Turkey, (ECtHR 30 January 1998).
[267] *Bowman vs United Kingdom* (n 316) para 42.

stress that States must generally 'guarantee a free flow of information' in electoral periods.[268] Crucially, however, the ECtHR also acknowledges that pre-election debate can become unfairly distorted by powerful political and commercial interests. This has been discussed where the Court assesses statutory prohibitions on political debate when applying Article 10 ECHR.[269] Recalling *Bowman v United Kingdom*, the Court accepted that the UK's statutory restriction to prevent uncontrolled election spending was aimed at ensuring 'equality between candidates.'[270] In *TV Vest AS &. Rogalaand v Norway*, the ECtHR accepted that Norway's restriction on political advertisements through broadcast media was aimed at avoiding circumstances whereby 'complex issues might easily be distorted' by 'financially powerful groups' in a manner that could put financially weaker groups at a significant disadvantage.'[271] The Court used similar reasoning in *Animal Defenders v United Kingdom* where it considered that a 'statutory control of the public debate' could be 'necessary given the risk posed to the right to free elections.'[272] As found, however, the ECtHR often considers contextual factors when assessing whether statutory restrictions on pre-election debate are necessary in a democratic society. Specifically, the Court is more likely to find that States have acted in compatibility with Article 10 ECHR if States apply such restrictions to limit the ability of politically and commercially powerful individuals and entities to impart information in pre-election periods. This stems from the Court's recognition that such individuals and groups are more capable of unfairly influencing political debate in pre-election periods.[273] The ECtHR's consideration of this contextual factor is crucial where the Court assesses the compatibility of States' restrictions on pre-election debate with Article 10 ECHR. .

The ECtHR also highlights the need for States to ensure that powerful individuals and entities to not unfairly influence elections when assessing where States impose restrictions on election candidacy under P1-3. Recalling *Gitonas and Others v Greece* and *Paskas v Lithuania*, the Court has accepted that eligibility restrictions for election candidates serve a legitimate aim of

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[268] Udo Fink and Ines Gillich, 'Fake News as a Challenge for Journalistic Standards in Modern Democracy,' (2020) 58 University of Louisville Law Review 263.
[269] See Chapter 2, section 2.2.1.
[270] *Bowman vs United Kingdom* (n 316) para 47.
[271] *TV Vest v Norway* (n 323) para 70.
[272] *Animal Defenders v United Kingdom* (n 327) para 11.
[273] See the Grand Chamber case of *Verein Geen Tierfabriken Schweiz (VgT) v Switzerland (No.2)* Application No 32772/02 (ECtHR, 30 June 2009) where the Court highlighted the need for States to prevent 'a powerful financial group' from 'unduly influencing public opinion or endangering equality of opportunity among the different forces of society' at para 18; And *Bowman vs United Kingdom* (n 316) para 36.

preventing candidates from using their powerful status to unduly influence the electorate.[274] The Court expressly referenced this in *Gitonas* when cautioning how certain powerful actors could acquire 'unfair advantage over other candidates' as regards their political influence 'in the eyes of the ordinary citizen, whose choice of candidate might be influenced.'[275] Moreover, in *Paskas,* the Court identified a legitimate aim under P1-3 to restrict an election candidate who had 'exploited his own status to exert undue influence' for political ends.[276] Informing the Court's approach here is the idea that powerful actors must not unfairly manipulate political debates in pre-election periods. A practical lesson in the online disinformation context is that the ECtHR is more inclined to find that it is necessary for States to prevent the spread of online disinformation that is disseminated by politically and financially powerful individuals. The Court explicitly highlighted this in *Krasnov and Skuratov.*[277] Recalling that case, it was important to the Court's finding of no P1-3 violation that an applicant who had lied to voters had held a prominent position and had lied about information that was significant in 'the voters' eyes.'[278] Relatedly, the ECtHR extends a broad MoA for States to prevent foreign State actors from influencing domestic elections. Recalling the case of *Parti nationaliste basque v France,* the Court accepted that France's restriction on political funding from foreign political parties was an acceptable means of preventing illegitimate election interference.[279] Not only was this a means of ensuring fair political debate but also as a matter of preserving 'national sovereignty' from influence by 'foreign States' in this area.[280] The Court accepted this same aim in *Political Party Patria and Others v the Republic of Moldova,* although in that case the interference was disproportionate due to the lack of evidence of any link between foreign funding and the applicant's election campaign.[281] Notwithstanding this, it can be concluded that the ECtHR generally affords a wide MoA for States to limit the dissemination of online disinformation from individuals and entities that are outside of the State.

A related observation which is instructive in the online disinformation context is that the ECtHR has identified a positive obligation under P1-3 for States to investigate credible

[274] *Gitonas and Others v Greece* (n 234); *Paskas v Lithuania* (n 239) para 110.
[275] *Gitonas and Others v Greece* (n 234) para 40.
[276] *Paskas v Lithuania* (n 239) para 101.
[277] *Krasnov and Skuratov* (n 279).
[278] ibid para 48.
[279] *Parti nationaliste basque v* (n 246).
[280] *Patria and Others v the Republic of Moldova* (n 248) para 47.
[281] Application Nos 5113/15, 14963/15, 15910/1 4. August 2020

accusations of election interference and irregularities. In viewing the State as the 'ultimate guarantor of pluralism,' the Court consistently highlights the need for States to ensure that individuals have access to a wide range of information in pre-election periods.[282] The Court not only interprets this as being necessary under Article 10 ECHR but also for States to ensure the 'free expression' of voters in the choice of the legislature under P1-3.[283] It is vital in the online disinformation context, however, that the Court also acknowledges a positive obligation for States—if confronted with evidence that election results have been tampered with or otherwise falsified—must take some steps to investigate this in fulfilment of free and fair democratic elections under P1-3. In *Davydov and Others v Russia,* the Court found that Russia had failed in its positive obligation under P1-3 by 'ignoring evidence pointing to serious and widespread irregularities' that could have affected the outcome of the election.[284] Moreover, in the Grand Chamber case of *Mugemangango v Belgium,* the Court found that Belgium had violated P1-3 through the State's failure to honour the applicant's request for a re-examination of election results where the applicant had made 'sufficiently serious' allegations of election results being manipulated.[285] As this suggests, the ECtHR not only affords discretion for States to prevent pre-election debate from being distorted by the spread of online disinformation but could potentially find that States have failed positive obligations under P1-3 if failing to make any effort to investigate credible accusations that an online disinformation campaign has influenced an election result.

3.4.2 The Interests for States to Limit the Spread of Anti-democratic Election Propaganda

As Bates argues, the ECHR is based on the 'collective' motivation amongst Contracting Parties to form a 'pact against totalitarianism.'[286] The ECtHR has identified that democracy is the only political model contemplated by the Convention and therefore considers that individuals must not misuse ECHR rights to subvert democracy itself.[287] An important finding here from the ECtHR's application of P1-3 and Article 10 ECHR is that the Court extends a wide MoA for

[282] *Manole and others vs Moldova* (n 109).
[283] *Communist Party of Russia and Others v Russia* (n 330) para 124.
[284] *Davydov and Others v Russia* (n 156).
[285] ibid para 79.
[286] Ed Bates, *The Evolution of the European Convention on Human Rights: From its Inception to the Creation of a Permanent Court of Human Rights* (Oxford University Press, 2010) 608.
[287] *United Communist Party of Turkey and Others v Turkey* Application No 133/1996/752/951 (ECtHR, 30 January 1998).

States to limit the dissemination of anti-democratic propaganda in election periods. As discussed, this can be traced back to the longstanding reluctance of the Strasbourg judicial organs to apply Article 10 ECHR to communications which incite political violence of advocate for regimes which are hostile to ECHR democratic values. Since the early ECommHR admissibility decisions of *Communist Party of Germany v the Federal Republic of Germany* and *BH, MW, HP and GK. v Austria,* Strasbourg judicial organs have categorically identified Communism and Nazism as contrary to the ECHR's democratic values.[288] The effects of such propaganda may be amplified if involving discrimination against vulnerable minorities. Recalling cases such as *Kühnen v Germany* and *Le Pen v France,* the ECtHR placed additional significance on how the applicants' messaging was aimed at denigrating Muslim and Jewish groups.[289] Even if such propaganda is disseminated in the context of heated political debate, the Court is unlikely to afford protection under Article 10 ECHR to discriminatory propaganda on the grounds that the spread of such propaganda undermines the fundamental democratic values on which the ECHR was founded. Of relevance in the online disinformation context here is that the Court has categorically excluded certain propaganda containing misleading conspiracies from the protection of Article 10 ECHR. Recalling cases such as *Garaudy v France*, the ECtHR rejected the applicant's claim that his speech—which contained anti-Semitic lies and Holocaust denial—should be protected on the explicit basis that it ran contrary to a 'clearly established' set of facts.[290] Even in cases such as *M'Bala M'Bala v France*—where Holocaust denial was contained within satirical and comedic settings— the Court rejected admissibility under Article 10 ECHR.[291] A key finding here is that States have wide discretion to prevent the spread of online disinformation containing narratives that call for anti-democratic political regimes or promote racist ideologies. Moreover, the Court's specific reasoning regarding propaganda containing Holocaust denial suggests that States have stronger justifications to limit the dissemination of online disinformation that contravenes an established factual consensus.

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[288] *Communist Party of Germany v the Federal Republic of Germany* Application No 250/57 (Commission decision 20 July 1957); *B.H, M.W, H.P and G.K. v Austria Application No* 12774/87 (ECtHR, 12 October 1999).
[289] *Kühnen v Germany* Application No 12194/86 (ECtHR, 12 May 1988); Le Pen v France, Application No 18788/09 (ECtHR, 7 May 2010).
[290] *Garaudy v France* Application No 65831/01, (ECtHR, 7 July 2003).
[291] *M'bala M'bala vs France* Application No 25239/13 **(**ECtHR, 20 October 2015).

When applying P1-3, the ECtHR is also reluctant to enable individuals from using their right to stand for election as a means of promoting anti-democratic election manifestos. As discussed, this can be traced back to admissibility decisions such as *Glimmerveen and Hagenbeek v the Netherlands*.[292] Recalling that decision, the ECommHR did not even consider whether the applicants—who had been prevented from disseminating election leaflets—had been unjustly prevented by the Netherlands from running for election under P1-3. This was because the applicants had called for the expulsion of non-Whites from the Netherlands.[293] Recalling P1-3 cases such as *Ždanoka vs Latvia*, the Grand Chamber accepted that Latvia could restrict the candidacy of an individual who had promoted extremist viewpoints through his support of a totalitarian Communist regime.[294]Considering the applicant's links to the Communist Party when the Party had attempted to thwart Latvia's breakaway from the USSR, the Court noted how the Communist ideology represented a 'threat to the new democratic order posed by the resurgence of ideas.'[295] Finding this to be pivotal, the Court reasoned that the domestic authorities could justifiably 'presume that a person in the applicant's position had held opinions incompatible with the need to ensure the integrity of the democratic process.'[296] Thus, the ECtHR not only acknowledges that the spread of anti-democratic propaganda constitutes a misuse of Article 10 ECHR but also P1-3.

Aligning with the ECtHR's general approach regarding how pre-election debate must not become unfairly influenced by powerful actors, the Court affords a wider MoA for States to limit the dissemination of anti-democratic election propaganda if such propaganda is disseminated by individuals who hold power or influence over the political populace .For example, in *Feret v Belgium*, it was not only crucial that the applicant had disseminated propaganda in an election context but also that he himself was a political figure who had influence over voters.[297] Moreover, in cases such as *Šimunić v Croatia*, the ECtHR noted that the applicant could not avail of the right to freedom of expression because he had contributed to spreading hateful propaganda while being a 'role model' who 'should have been aware of the possible negative impact of provocative chanting.'[298] As noted in this chapter, the ECtHR

[292] *Glimmerveen and Hagenbeek v Netherlands* (n 219).
[293] ibid.
[294]*Ždanoka v Latvia* (n 68).
[295] ibid para 133.
[296] ibid para 124.
[297] *Feret v Belgium* Application No 15617/07 (ECtHR, 16 July 2009).
[298] *Šimunić v Croatia* Application No 20373/17 (ECtHR, 22 Jan 2019).

applied scrutiny to the whether the two applicants who had disseminated false information to voters when applying P1-3 in *Krasnov and Skuratov v Russia.*[299] The Court distinguished how the first applicant had transmitted false information that was significant in 'the voters' eyes, while the second applicant's false declaration had not been 'capable of misleading voters.'[300] Thus, where assessing State actions to counter online disinformation, the ECtHR is likely to extend a wide MoA for States to limit online disinformation which promotes anti-democratic ideologies and is disseminated by influential and powerful individuals or entities.

3.4.3 The Interests for States' to Prevent Voters from Being Deceived

A further finding from the ECtHR's approaches to P1-3 and Article 10 ECHR relates to the legitimate interests for CoE States to prevent voters from being deceived in election periods. The Court has not only referenced the value of an informed political populace but has explicitly accepted that States have legitimate aims to ensure this under P1-3 and Article 10 ECHR.[301]

Of crucial relevance in the online disinformation context is that the ECtHR appears to apply a test of whether individuals—if having been sanctioned by States for disseminating false information to voters—have attempted to intentionally deceive voters. This is evident in the Court's assessment of false election statements when applying Article 10 ECHR. Recalling *Salov v Ukraine*, the Court explicitly agreed with Ukraine's legitimate aim to provide 'voters with true information' during elections but unanimously found that Ukraine violated Article 10 ECHR.[302] While Ukraine's excessive sanctions were critical in the Court's proportionality assessment, it was highly significant that the applicant had not intentionally sought to deceive voters. He merely received and passed on false information and had himself 'doubted' the 'veracity' of this rumour.[303] As has also been identified, the ECtHR's focus on whether individuals have sought to deceive voters has been crucial to the Court's assessment of Poland's application of summary judicial proceedings for spreading false information in pre-

[299] *Krasnov and Skuratov* (n 279).
[300] ibid para 45.
[301] The ECtHR referenced this in its first finding of an Article 10 ECHR violation in *Sunday Times v United Kingdom* Application No 6538/74 (ECtHR, 26 April 1979) where the Court highlighted how 'by bringing to light certain facts, the article might have served as a brake on speculative and unenlightened discussion' at para 67; And when referencing the legitimate aim of States to ensure voters make 'an informed choice' in *Orlovskaya Irskra v Russia* (n 345) para 127.
[302] *Salov v Ukraine* Application No 65518/01 (ECtHR, 6 December 2005).
[303] ibid para 113.

election periods.[304] In *Kwiecien v Poland*, the ECtHR criticized Poland's application of this law because the applicant's statements had been 'unreservedly' categorized as false statements of fact without having regard to the presence of any intentional deception.[305] The Court found the statements had formed part of a genuine attempt to engage in 'public interest debate' and had not been a 'gratuitous' attempt at spreading false information.[306] In *Brzezinski v Poland*—the first and only case where the ECtHR used the phrase 'fake news'[307] —the Court again criticised the fact that the applicant's statements had been 'immediately classified as lies' by the domestic courts and pointed out that the applicant had been engaging in legitimate political debate.[308] Even in *Kita v Poland,* the finding that the applicant's statements 'lacked a sufficient factual basis' did not mean that he had sought to deceive the electorate.[309] Important here was the Court's focus on how 'the thrust of the applicant's article was to cast doubt on the suitability of the local politicians for public office.'[310]

Where the ECtHR examines false statements under P1-3, the test of whether such statements are intentionally deceptive is crucial to the Court's assessment. Recalling the decision of *Sarukhanyan v Armenia*, the ECtHR accepted that the applicant submitted inaccurate information to an electoral commission but reasoned that this had been caused by genuine misunderstandings as to the applicant's property status and had not been 'an intentional omission' designed to deceive voters.[311] While on the facts this lack of deception was key, it is useful that the Court unequivocally clarified how safeguarding voters from deception was a legitimate aim under P1-3:

> It is also undoubtedly legitimate to ask the candidates that the information submitted be accurate to the best of their knowledge, to avoid the electorate being misled by false representations. Accordingly, requiring candidates for election to the national parliament to submit truthful information on their property status is a legitimate aim for the purposes of Article 3 of Protocol No. 1.[312]

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[304] Section 72, Local Elections Act.
[305] *Kwiecien v Poland* Application No 51744/99 (ECtHR, 9 January 2007).
[306] ibid para 55.
[307] *Brzezinski v Poland* Application No 47542/07 (ECtHR, 25 July 2019) 41.
[308] ibid.
[309] *Kita v Poland* Application No 57659/00, (ECtHR, 8 August 2008).
[310] ibid para 45.
[311] *Sarukhanyan v Armenia* (n 274).
[312] ibid.

While such language illustrates how the ECtHR identifies the legitimate aim under P1-3 for States to ensure that election candidates disseminate accurate information to voters, the Court is more likely to find that States violate the right to free elections if States sanction candidates for disseminating erroneous—as opposed to intentionally deceptive—information. For example, recalling *Melnychencko v Ukraine*, the Court found that Ukraine violated P1-3 where it accepted that the candidate's declaration of residency was falsified out of fear for his personal safety rather than deceptive intent.[313] In *Russian Conservative Party of Entrepreneurs and others v Russia*, it was unacceptable for Russia to delist an entire group of election candidates after several candidates had submitted untrue information when registering as candidates.[314] Recalling that decision, the Court agreed with Russia that a 'requirement to submit information' was an acceptable pre-condition to stand for election as it 'serves to enable the voters to make an informed choice and to promote the overall fairness of elections.'[315] However, the Court took issue with the proportionality of the restriction because Russia had imposed penalties without distinguishing between candidates in the same party who did and did not engage in deceptive communications. The Court's focus on whether individuals have disseminated false election statements in a deceptive manner is most clearly reflected in the above-discussed case of Krasnov *and Skuratov v Russia.*[316] Recalling the facts of this case, the key distinguishing factor between the two applicants was that the Court only identified the first applicant as having deliberately supplied false information to an electoral commission. The critical lesson here is that the Court is more likely to agree with States that impose limitations on the dissemination of false electoral communications which the Court identifies as being intentionally deceptive rather than erroneous or mistaken.

This is an important finding when recalling—as Chapter One discussed—how the concepts of disinformation and misinformation are generally distinguished.[317] While misinformation can involve the dissemination of information which is false but not deceptive, disinformation involves the purposeful spread of false information. While legal ambiguities and definitional

[313] *Melnychencko v Ukraine* (n 271).
[314] *Russian Conservative Party of Entrepreneurs and others v Russia* (n 265).
[315] ibid.
[316] *Krasnov and Skuratov v Russia* (n 279).
[316] ibid para 38.
[317] See Chapter 1, section 1.2.1.

challenges may persist in this area—arguably evidenced by the ECtHR's own reference to 'fake news'—the Strasbourg Court undeniably separates targeted deception from innocent error in the context of imparting false information to voters.[318]In any event, the Court's recognition of safeguarding voters from false electoral information as a legitimate aim is an important development in Strasbourg case law and provides an important starting point for States to justify the necessity of restrictions on false information in the pre-election period.

3.5 Conclusions

This chapter examined ECtHR jurisprudence where the Court has applied the right to free elections under P1-3 and identified the Court's key interpretive approaches which have significance in the online disinformation context. It is now necessary to highlight the key conclusions from this chapter's analysis.

This chapter began by tracing the ECtHR's pivotal role in interpreting—and expanding the application of—the right to free elections under P1-3. As discussed, the ECtHR goes beyond a narrow interpretation of the text of P1-3 when applying the right to free elections. This has led the Court to adopt a practical and flexible interpretation of the positive obligations which States can have to secure free and fair elections under P1-3. As also highlighted, the Court generally considers that States have a wide MoA to arrange national electoral affairs on account of the politically diverse range of national electoral systems in CoE States. This is generally an important finding as it suggests that States have flexibility to develop laws to counter the spread of online disinformation in a manner that may be tailored to their national electoral systems.

This chapter found that the ECtHR places a strong and consistent emphasis on the value of an informed political populace. This chapter first identified this when assessing the Court's approaches to restrictions on the voter franchise when applying P1-3. Where the ECtHR assesses this, the Court has consistently highlighted that States have a wide MoA to ensure that individuals who vote in national elections maintain genuine connections to the State where elections are held. While the ECtHR does not exhaustively define how States must identify this connection between individuals and the State where elections are held, this chapter found that the Court focuses on whether individuals possess a knowledge and understanding of relevant

[318] Recalling *Brzezinski v Poland* (n 414) para 41.

national electoral affairs as part of this assessment. As this chapter also found, the Court has identified a legitimate interest for States to restrict candidates who knowingly supply false information to national election authorities. However, the crucial test in the Court's assessment is whether election candidates attempt to deceive voters. If evidence emerges that election candidates have intentionally misled the electorate, national authorities have discretion to restrict the right to stand for election under P1-3. If candidates have submitted misleading information through genuine errors, the Court is far more reluctant to endorse State actions to restrict the right of individuals to stand for election under P1-3. As this chapter further detailed, this aligns with how the ECtHR—when applying the right to freedom of expression under Article 10 ECHR—is more inclined to agree with State actions to restrict the dissemination of knowingly false factual statements as opposed to misleading statements which convey value judgments.

A related finding is that the ECtHR affords discretion for States to prevent the unfair distortion of elections by powerful and influential electoral participants. As this chapter identified, the Court is more inclined to agree with State actions to restrict the ability of individuals to disseminate false information if such actions are aimed at powerful individuals and groups that hold significant resources or a position of influence over the political populace. Relatedly, the Court is not only concerned with how voters may be influenced by deceptive communications but also whether the effects of this deception may be significant enough to have decisively altered an election result. Where the ECtHR identifies credible evidence that national elections in States have been affected by forms of interference, the Court is likely to find that States are under a positive obligation to investigate this alleged interference.

Of further relevance is that the ECtHR does not afford any protection for individuals to use the right to stand for election under P1-3 as a means to promote anti-democratic propaganda. As this chapter found, the Court generally affords wide latitude for States to identify circumstances where this may occur when applying P1-3. A key standard here—and one which is consistent with the Court's approach to freedom of expression under Article 10 ECHR—is that the need for free and open political debate does not require ECHR Contracting Parties to tolerate the dissemination of racist hate speech in election campaigns. Arguably, Contracting Parties have the widest MoA to limit the spread of online disinformation which contains explicitly xenophobic or fascist narratives.

As the following chapter will proceed to examine, the ECtHR's approaches that Chapter Two and Chapter Three have identified are significant when assessing the applicable standards regarding how the right to freedom of expression and the right to free elections can be balanced in the regulation of online disinformation. To complete an analysis of the applicable European human rights standards to inform how EU institutions and Member States must balance these rights, however, focus must also be given to the relevant standards regarding freedom of expression and free elections that flow from the Charter of Fundamental Rights of the European Union (CFR). The following chapter will examine this.

Chapter 4: Understanding the European Human Rights Standards for Online Disinformation: An Analysis of Interplay Between ECtHR and CJEU Jurisprudence

4.1 Introduction

This chapter examines the obligations under European Union (EU) law for EU institutions and Member States to protect human rights and considers these obligations in the context of online disinformation.[1] This chapter further considers jurisprudence of the Court of Justice of the European Union (CJEU) that has significance in the disinformation context.[2] Mapping the CJEU's reasoning in this jurisprudence, this chapter then considers the interplay between the interpretive approaches of the CJEU and the European Court of Human Rights (ECtHR).[3] Building upon this analysis, this chapter then provides a distillation of human rights standards which should inform the design of EU and EU Member State legislation that regulates the spread of online disinformation in political and electoral settings.

This chapter begins by tracing the development of the Charter of Fundamental Rights of the European Union (CFR).[4] The focus here is on CFR provisions which come into play in the context of the regulation of online disinformation in political and electoral contexts. Laying foundations for further analysis in this chapter, this section also considers how the European Convention on Human Rights (ECHR) supplies interpretive guidance for these CFR provisions. Section 4.3 then analyses CJEU reasoning in case law which has bearing in the online disinformation field. Building from this analysis, section 4.4 then distils common interpretive principles from CJEU and ECtHR approaches in the context of misleading—including not necessarily illegal—online communications.

4.2 The European Union, Fundamental Rights, and Disinformation

[1] The term 'fundamental rights' is used in EU law concerning its internal sphere [Article 6 TEU]. Conversely, 'human rights' is used in EU external relations law [Article 21 TFEU]. Acknowledging this diverse terminology, this chapter uses 'human rights' when analysing common ECtHR and CJEU standards but refers to 'fundamental rights' when referring to the development of the CFR and specific CFR provisions.
[2] Hereinafter 'CJEU'.
[3] Hereinafter ECtHR.
[4] Hereinafter 'CFR' or 'the Charter'.

This section examines the obligations under the CFR for EU institutions and Member States to protect fundamental rights and considers the significance of these obligations in the online disinformation context. Section 4.2.1 first traces the development of the CFR by Union institutions. This section not only examines how the CFR has established protections for fundamental rights under EU law but also considers specific CFR provisions in the online disinformation context. Laying foundations for further analysis in this chapter, section 4.2.2 then identifies a critical relationship between the design of the CFR and the ECHR.[5] The focus here is on how ECtHR jurisprudence supplies guidance on CFR provisions that have bearing in the online disinformation context.

4.2.1 The Charter of Fundamental Rights of the European Union (CFR)

The EU's founding constitutional documents made no explicit reference to fundamental rights.[6] The Treaty of Paris and the Treaty of Rome primarily enshrined economic objectives of the Union's six founding Member States and excluded overt obligations for these Member States to respect fundamental rights.[7] This exclusion was linked to arguments—chiefly advanced by the French national assembly—that inclusions of political objectives in preceding draft Treaties could undermine national sovereignty.[8] Craig and De Búrca posit that the 'omission of any reference' to fundamental rights in the Paris and Rome Treaties was attributable to fears of how these Treaties could 'suffer the same fate as the earlier draft treaties.'[9] However, this omission—which Spaventa describes as a 'fundamental rights gap' in the EU constitutional framework—narrowed significantly throughout the late 1960s and early 1970s.[10]

The CJEU was instrumental in narrowing this gap. Stemming from its identification that EU law had 'supremacy' over conflicting Member State law in *Costa v Enel*, the CJEU had to confront tension regarding how—through the supremacy principle—EU law could be used to

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[5] Hereinafter 'ECHR'.
[6] Although, the Treaty of Paris referenced 'non-discrimination' (Art 66, Treaty of Paris).
[7] The Paris Treaty established the European Economic and Steel Community (ECSC) in 1951. The Treaty of Rome consolidated the European Economic Community (EEC) in 1957; 'Community' was the term used for the EU before 1992.
[8] Namely the Treaty establishing the European Defence Community drafted 24 October 1950 and European Political Community Treaty drafted in 1952; See Josef L Kunz, 'Treaty Establishing the European Defense Community' (1953) 47(2) American Journal of International Law 275–81.
[9] Paul Craig and Gráinne De Búrca, *EU Law, Text, Cases and Materials* (3rd edn, Oxford University Press 2003) 318.
[10] Eleanor Spaventa, 'Fundamental rights in the European Union' in Steve Peers and Catherine Barnard (eds), *European Union Law* (Oxford University Press 2014) 227-309.

undermine fundamental rights guaranteed under national constitutions.[11] Ambiguity on this question was evident in several CJEU rulings wherein applicants unsuccessfully challenged Community actions by invoking nationally guaranteed rights.[12] As Beck posits, such failures reflected an era wherein national courts and the CJEU 'co-existed in a creative ambiguity; each one considering itself to be the final judge.'[13] A pertinent concern here was that 'Member States could use the Communities to circumvent fundamental rights guarantees that had been at the centre of the post-war constitutionalizing effort.'[14] The CJEU attempted to alleviate this concern throughout a series of cases wherein the Court progressively identified a 'respect for fundamental rights' as part of the general principles of Community law.[15] At the time of these cases, the omission of any references to fundamental rights remained in the EU's constitutional documents. However, the CJEU consistently drew inspiration from the 'common constitutional traditions' of Member States.[16] Moreover, the Court explicitly identified the ECHR as a 'source of inspiration' when identifying the Union's respect for fundamental rights.[17] This reflects a vital relationship between the ECHR and CFR which is central to this chapter's inquiry.

The CJEU's identification of 'respect for fundamental rights' was followed by political acknowledgements by Union institutions that gave greater visibility to EU objectives to protect fundamental rights.[18] A notable Treaty development here was the Treaty of Maastricht which established the EU in its current form.[19] As Garcia states, the Maastricht Treaty gave

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[11] Case C-6/64 Costa v ENEL (1964) ECLI:EU:C:1964:66; See also for an overview on the role of German governments in highlighting this tension Leonard F Besselink, 'The member States, the national Constitutions and the scope of the Charter' (2001) 8(1) Maastricht Journal of European and Comparative Law 68-80.

[12] Case C-1/58 Stork v High Authority (1959) ECR 17; Case C-36-40/59 Geitling v High Authority (1960) ECR 425; Case C-40/64 Sgarlata v Commission (1965) ECR 215.

[13] Gunnar Beck, 'The Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There Is No Praetor' (2005) 30 European Law Review 42.

[14] Spaventa (n10) 228.

[15] First in Case C-29/69 Stauder v City of Ulm (1969) ECLI:EU:C:1969:57; Case C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel (1970) ECLI:EU:C:1970:114; Case C-4-73 J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities (1974) ECLI:EU:C:1974:51; Case 44/79 Liselotte Hauer v Land Rheinland-Pfalz (1979) ECLI:EU:C:1979:290.

[16] Case C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel (1970) ECLI:EU:C:1970:114, para 4; Case C-4-73 J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities (1974) ECLI:EU:C:1974:51, para 13.

[17] Case 44/79 Liselotte Hauer v Land Rheinland-Pfalz (1979) ECLI:EU:C:1979:290, paras 17-21; Case C-11/70 Internationale Handelsgesellschaft mbH v Einfuhr-und Vorratsstelle für Getreide und Futtermittel (1970) ECLI:EU:C:1970:114, para 4.

[18] Concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms-Joint Declaration (1977) OJ C103/1; Art 3 of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts (1997) OJ C340/1–144.

[19] Consolidated version of the Treaty on European Union (1992) OJ C191.

'constitutional formality' to the Union's respect for fundamental rights.[20] This was chiefly evident in this Treaty's acknowledgment of the Union's respect for 'democracy and human rights.'[21] Moreover, the Maastricht Treaty proclaimed that Member States and Union institutions were no longer bound by purely economic objectives but also by aims 'to develop and consolidate democracy and the rule of law, and respect for human rights.'[22] While these political acknowledgements signified crucial expansions of the EU's objectives, it was not until the solemn proclamation of the CFR that protection for fundamental rights was formally catalogued into EU law.[23] The CFR, proclaimed in December 2000, included fifty-four articles spanning seven chapters:[24]

- Chapter I: Dignity (basic rights such as the right to life and the right to dignity).
- Chapter II: Freedoms (civil and political rights including freedom of expression).
- Chapter III: Equality (equality before the law and prohibitions of discrimination).
- Chapter IV: Solidarity (social rights including a right to fair working conditions).
- Chapter V: Citizens' Rights (to vote and move between Member States).
- Chapter VI: Justice (right to a fair trial and an effective remedy).
- Chapter VII: (scope and interpretation of the Charter).

The European Council explicitly assigned the CFR with 'a task of revelation rather than creation.'[25] The Council instructed the drafters not to 'innovate' by creating new rights and to instead give 'visibility' to existing rights within the EU legal framework.[26] As referenced above, the CJEU had already identified the Union's respect for fundamental rights from existing common traditions between the Member States. This leads Eeckhout to describe the development of the CFR as a process of 'confirming rather than establishing particular fundamental rights' within the EU.[27]

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[20] See Alonso García, 'General provisions of the charter of fundamental rights of the European Union' (2002) 8(4) European Law Journal 492-514.
[21] Consolidated version of the Treaty on European Union (1992) OJ C191 Article F, 1.
[22] ibid Title V.
[23] Charter of Fundamental Rights of the European Union (2000) OJ C364/01.
[24] ibid.
[25] The drafting body was a 'Convention' (not to be confused with the ECHR); See European Council, Cologne, 3–4 June (1999)—Presidency Conclusions 150/99 7.
[26] Charter drafters were instructed to 'avoid the temptation to innovate at all costs', Commission, Communication on the Charter of Fundamental Rights of the European Union COM (2000) 559.
[27] Piet Eeckhout, 'The EU Charter of Fundamental Rights and the federal question' (200) 39(5) Common Market Law Review 947.

Notwithstanding this conservative instruction by the European Council, commentators generally highlight that the CFR went beyond giving mere 'visibility' to fundamental rights that Union institutions had already acknowledged.[28] As Heringa and Verhey posit, a narrow 'rhetorical' focus on the CFR's 'mere visibility' downplays the 'practical importance of the document.'[29] As Kerikmae illustrates, this is embodied in the CFR's 'dynamic' and 'living' language.[30] For example, the preamble envisages strengthened 'protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments.'[31] Further, Babayev highlights how the CFR contains 'innovative' elements in the contemporary 'provisions that it embeds.'[32] Many of these rights are not explicitly enshrined under international human rights instruments such as the ECHR. For example, the CFR includes a 'prohibition of the reproductive cloning of human beings' and the right to 'personal data.'[33] Accordingly, De Búrca characterises the CFR as a 'creative distillation' and 'progressive consolidation' of rights 'contained in various European and international agreements and national constitutions on which the CJEU had for some years already drawn.'[34]

Further significant is that the CFR introduced legally binding obligations for EU institutions and Member States to protect fundamental rights. This expansion of the CFR's legal status was achieved through the Lisbon Treaty in 2009.[35] This Treaty placed the CFR on the same legal footing as EU Treaties.[36] Significantly, it also introduced mechanisms that paved the way for the CJEU to more frequently probe fundamental rights issues. For example, previous Treaty constraints were removed to empower the CJEU greater capacity to review migration and asylum cases.[37] Moreover, Lisbon provided that the CJEU could scrutinise any act of EU agencies producing 'legal effects' and required the Court to decide with 'minimum of delay'

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[28] Gráinne De Burca, 'The domestic impact of the EU Charter of Fundamental Rights' (2013) Irish Jurist 49-64.
[29] Willem Heringa and Luc Verhey, 'The EU Charter: text and structure' (2001) 8(1) Maastricht Journal of European and Comparative Law 11-32.
[30] Tanel Kerikmäe, 'Introduction: EU Charter as a Dynamic Instrument' in Tanel Kerikmäe (ed) *Protecting Human Rights in the EU*. (Springer, 2014).
[31] See CFR Preamble.
[32] Rufat Babayev, 'EU Charter of Fundamental Rights: What is the Legal Impact of Being Chartered' (2006) 6 Romanian Journal of European Affairs 63.
[33]Under Art 3 and Art 8. These rights are not in the ECHR.
[34] Gráinne de Búrca, *'Human Rights: The Charter and Beyond'* (2001) Jean Monnet Working Paper 10/01, 4 <Human Rights: The Charter and Beyond (jeanmonnetprogram.org)> last accessed 9 July 2023.
[35] Consolidated Version of the Treaty on European Union [2008] OJ C115/13; Hereinafter 'the Lisbon Treaty' or 'Lisbon.'
[36] See Sara Iglesias Sánchez, 'The Court and the Charter: The Impact of the Entry into Force of the Lisbon Treaty On The CJEU's Approach to Fundamental Rights' (2012) 49 Common Market Law Review 1565.
[37] Repealing constraints under former Art 68 of the EC Treaty.

whether preliminary questions from national courts concerning individuals held in custody.[38] These Lisbon mechanisms likely explain why reference to the CFR in CJEU and national courts has expanded significantly since 2009.[39] In its post-Lisbon case law, the CJEU has not only referred to the CFR's provisions more extensively but has interpreted the CFR as primary law alongside Treaty provisions.[40] It is further arguable that the Lisbon Treaty—by giving binding force to the CFR—facilitated a broader understanding amongst EU Member State judiciaries on how the CFR applies domestically and further paved the way for Member State courts to make greater reference to CFR rights.[41] Alluding to this, McCloskey argues that the 'progressively increasing number of CJEU decisions in which the Charter features' demonstrates the CFR's 'post-Lisbon' position as the 'central source of reference as regards Union fundamental rights.'[42] Importantly, however, ECHR standards have continued to supply interpretive assistance for the CJEU on fundamental rights issues even since the entry into force of the Lisbon Treaty.[43] This influence of the ECHR—vital in the online disinformation context—will be further unpacked below.

Of particular significance in the online disinformation context are CFR provisions that—upon the entry into force of the Lisbon Treaty—contain legally binding obligations for EU institutions and Member States to protect the right to freedom of expression and the right to free elections. Article 11 CFR protects the right to freedom of expression and information and states that:

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.

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[38] Art 263 TFEU; Art 267 TFEU.
[39] The CJEU referenced the CFR 27 times in 2010 and 356 times in 2018. National courts (through preliminary questions) invoked the CFR 19 times in 2010 and 84 times in 2018.
[40] Joined cases of Case C-C-297/10 Sabine Hennigs v Eisenbahn-Bundesamt and Case C-298/10 Land Berlin v Alexander Mai (2011) ECLI:EU:C:2011:560; Case C-555/07 Seda Kücükdeveci v Swedex GmbH & Co. KG (2010) ECLI:EU:C:2010:21.
[41] Suzanne Egan, 'The European Convention on Human Rights Act 2003: A Missed Opportunity for Domestic Human Rights Litigation' (2003) 25 Dublin University Law Journal 230.
[42] Bernard McCloskey, 'Asylum, migration, the Lisbon Charter and Brexit' European University Institute Working Paper 2019/40, <https://hdl.handle.net/1814/63247> last accessed 8 July 2023.
[43] See, for example, Case C-145/09 Land Baden-Württemberg v Panagiotis Tsakouridis (2010) ECLI:EU:C:2010:708; Joined Cases of Case C-411/10 N.S. v Secretary of State for the Home Department and Case C-493/10 M. E. and Others C-493/10 v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform (2011) ECLI:EU:C:2011:865.

2. The freedom and pluralism of the media shall be respected.[44]

Recalling Chapter Two, this text closely resembles the language under Article 10 ECHR.[45] One conspicuous difference is that this provision—unlike Article 10 ECHR—explicitly references 'pluralism of the media.'[46] As the CFR was only introduced in 2000—and made legally binding in 2009—it may appear unsurprising that CJEU case law on Article 11 CFR is limited and the CJEU relies heavily on ECtHR jurisprudence when applying the right to freedom of expression.[47]

The right to free elections is protected under Article 39 CFR. This provision states that:

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.[48]

Recalling Chapter Three, the above text also resembles the right to free elections under Article 3 Protocol 1 ECHR.[49] Significantly, however, the application of Article 39 CFR is limited in circumstances that are instructive in the online disinformation context. It must be noted here that this provision only concerns European Parliamentary elections.[50] Also vital here is that EU competences in the field of national elections are extremely limited. Article 223(1) of the Treaty of the Functioning of the European Union (TFEU) confers specific competences on Union institutions to establish uniform procedures for Parliamentary elections but this has thus far not been exercised.[51] The Council has expressly stated that 'electoral procedure' within the Union 'shall be governed in each Member State by its national provisions.'[52] The European

[44] Art 11 CFR.
[45] On the text of Art 10 ECHR; See Chapter 2, 2.2.1.
[46] Art 11(2) CFR.
[47] This will be examined in section 4.3; See Case C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich (2003) ECLI:EU:C:2003:333; Case C-274/99 Bernard Connolly v European Commission (2001) ECLI:EU:C:2001:127.
[48] Art 39 CFR.
[49] See Chapter 3, 3.2.1.
[50] Art 40 CFR, however, also includes a right to vote in 'municipal' elections.
[51] Art 223(1) TFEU.
[52] Council Decision of the representatives of the Member States meeting in the council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage (1976) OJ L/278.

Commission—when explicitly referring to disinformation—has further acknowledged the limited Union competences in the field of national electoral procedures.[53] These limited competencies—alongside the fact that the CFR was only introduced in 2000—partially explain the scarcity of CJEU jurisprudence on Article 39 CFR and the reticence of the Court to review national electoral arrangements in EU Member States.[54] This is sharply contrasted with the ECtHR's extensive jurisprudence in this field and its identification of positive obligations for CoE States to secure free and fair democratic elections.[55] Recalling this vast jurisprudence of the ECtHR, it is unsurprising that the CJEU has relied extensively on Article 3 Protocol 1 ECHR for interpretive guidance in the rare instances where the CJEU has considered Article 39 CFR.[56] Before examining this important interplay between the jurisprudence the ECtHR and the CJEU in the context of online disinfromation, it is first necessary to understand the ECHR's influence in shaping minimum interpretive standards for the CFR.

4.2.2 Conventional Wisdom: ECHR as a Minimum Interpretive Standard for the CFR

As briefly introduced, the CFR is intimately connected to the ECHR. This is not only evident through the text of specific CFR rights but also under CFR provisions which detail how EU institutions and EU Member States must interpret this instrument.[57] Before illustrating this specific connection between the ECHR and CFR frameworks, it is first necessary to outline the CFR's 'scope of application' under Article 51 CFR.[58] This provision states:

> 1. The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.[59]

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[53] Commission, 'Communication from the Commission: Tackling online disinformation: a European Approach' (Communication) COM 236 1 final.
[54] See Case C-145/04 Spain v United Kingdom (2006) ECLI:EU:C:2006:543 para 65.
[55] See Chapter 3, section 3.3.3.
[56] For example, Case C-650/13 Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde (2015) EU:C:2015:648 where CJEU examined permanent voting restrictions on a French national convicted for murder and ruled that the restriction was compatible with Art 39 CFR.
[57] See Art 39 and Art 11 CFR.
[58] Explanations relating to the Charter of Fundamental Rights (2007) OJ C303/17–35.
[59] Art 51(1) CFR.

2. This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.[60]

Reference under Article 51 to Union 'institutions and bodies' is intended to be interpreted broadly. As explanations for this provision clarify, CFR obligations not only bind major EU legislative institutions but also any 'bodies, offices, and agencies' empowered by Treaties.[61] This includes all authorities established by secondary EU legislation.[62] Significantly in the online disinformation context, Article 51 CFR requires that the European Commission cannot initiate legislation in the disinformation field in a manner that fails to protect CFR rights.[63] Moreover, Article 51 empowers the CJEU with competence to judicially review—and potentially set aside—EU legislation that fails to protect CFR rights.[64] A practical significance here is that the CFR not only requires EU institutions to protect fundamental rights when developing legislation but may also be used by the CJEU to 'check' the competencies of Union institutions when legislating in areas that implicate fundamental rights.[65] As Article 51(2) CFR further states, however, the CFR does not 'extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union to modify powers and tasks as defined in the Treaties.'[66] Stated differently, Union institutions cannot legislate to protect CFR rights if there is no legal basis for them to do so in the Treaties.[67] As Chapter Five will outline, this delimitation of Union powers does not arise in the online disinformation context as EU Treaties provide the basis for Union legislation in this field.[68]

Article 51 CFR states that CFR obligations apply to Member States 'only when they are implementing Union law.'[69] This phrasing—while having elicited interpretive problems—

[60] See also, Art 6(1) TEU wording that 'provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.'
[61] Explanations relating to the Charter of Fundamental Rights (2007) OJ C303/17–35.
[62] ibid.
[63] Revisited in Chapter 5.
[64] The Court has often done this but never with respect to the right to freedom of expression. See, for example, Case C-403/09 Jasna Detiček v Maurizio Sgueglia (2009) ECLI:EU:C:2009:810 at para 53 where the CFR was relied upon as an aid to interpretation of Regulation Brussels II bis, OJ [2003] L 338/1).
[65] Valeria Scalia, 'Protection of fundamental rights and criminal law' (2015) The European Criminal Law Association's Forum 100.
[66] Stated under Art 51(2) CFR and Art 6 TEU.
[67] As Chapter Five will highlight, this delimitation does not arise in the disinformation context.
[68] Under Art 114 TFEU.
[69] Art 51(1) CFR.

should be interpreted broadly.[70] For example, Article 51 explanations clarify that 'Member States' not only encompasses national governments but also local and regional authorities.[71] Furthermore, the CJEU—in post-Lisbon case law—has interpreted this phrase as not only applying CFR obligations when Member States are transposing EU law but also when they derogate from EU law and when they exercise discretion in areas where specific EU rules exist.[72] A crucial exception here is that the CFR will not apply in circumstances where Member States are acting in 'purely internal' domestic situations that attract no EU legal obligations.[73] Moreover, the fact that a CFR right may be implicated by a specific area of national legislation does not necessarily mean that CFR obligations apply to Member States.[74] Addressing such situations, the CJEU has clarified that—for CFR obligations to apply to Member States—it is not sufficient that a CFR right may potentially affect an area of national law and there must be some substantive EU law that implicates an affected CFR right. This reflects Sarmiento's description of how the CFR operates under the 'shadow of EU law.'[75] While acknowledging that the phrase 'implementing Union law' has elicited confusion, it is important to state here that Chapter Six of this thesis examines Member State legislation that either transposes EU law or restricts internal market freedoms. Thus, obligations under the CFR will apply to domestic legislation that this thesis assesses.[76]

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[70] See Case C-370/12 Pringle v Ireland (2012) ECLI:EU:C:2012:756 at para 17; See also Leonard F Besselink, 'The member States, the national Constitutions and the scope of the Charter' (2001) 8(1) Maastricht Journal of European and Comparative Law 68; Also Laurent Pech, 'Between judicial minimalism and avoidance: the Court of Justice's sidestepping of fundamental constitutional issues in Römer and Dominguez' (2012) 49(6) Common Market Law Review 1-40.

[71] Explanations relating to the Charter of Fundamental Rights (2007) OJ C303/17–35.

[72] Recalling cases where the CJEU confirmed Charter applicability when Member States transpose EU rules Case C-617/10 Åklagaren v Hans Åkerberg Fransson (2013) ECLI:EU:C:2013:280; Case C-5/88 Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft (1989) ECLI:EU:C:1989:321; And where CJEU confirms Charter applicability when Member States derogate from EU law Case C-260/89 Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others (1989) ECLI identifier: ECLI:EU:C:1991:254.

[73] See Case C-309/96 Daniele Annibaldi v Sindaco del Comune di Guidonia and Presidente Regione Lazio. (1997) ECLI:EU:C:1997:631; On 'purely internal situations Siofra O'Leary, 'The Past, Present, and Future of the Purely Internal Rule in EU law' (2009) 44 Irish Jurist 44 13–46.

[74] See Joined Cases C-609/17 and C-610/17 Terveys- ja sosiaalialan neuvottelujärjestö (TSN) ry v Hyvinvointialan liitto ry and Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Satamaoperaattorit ry (2019) ECLI:EU:C:2019:981.

[75] Daniel Sarmiento, 'Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe' (2013) 50(5) Common Market Law Review.

[76] See Emily Hancox, 'Meaning of Implementing EU Law under Article 51 (1) of the Charter: Akerberg Fransson' (2013) 50 Common Market Law Review 1411; Also Koen Lenaerts, 'Exploring the limits of the EU Charter of Fundamental Rights' (2012) 8(3) European Constitutional Law Review 375-403.

Where the CFR applies to actions by EU institutions or Member States, standards flowing from ECtHR jurisprudence provide minimum interpretive guidance. In referencing 'international obligations common to the Member States', the CFR preamble not only references the Convention but also ECtHR case law.'[77] Importantly, ECHR standards are also explicitly codified in Article 52(3) CFR. This provision, which outlines the CFR's 'scope of guaranteed rights,' states:

> In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.[78]

As the explanations for Article 52(3) CFR state, this provision 'is intended to ensure the necessary consistency between the Charter and the ECHR.'[79] Moreover, Article 52(1) CFR states that Union institutions and Member States can limit the exercise of CFR rights provided that proportionate limitations are 'necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'[80] Recalling Chapter Two, this mirrors language under Article 10(2) ECHR.[81] It is therefore unsurprising that CFR explanations clarify how 'authorised limitations' on the exercise of fundamental rights should be interpreted to mirror ECHR limitation clauses.[82] It may also be highlighted that explanations for Article 52(1) CFR state that the wording of this provision should be interpreted in line with CJEU jurisprudence.[83] This is significant because—as section 4.2.1 referenced—the CJEU has relied extensively on ECtHR case law when interpreting this general derogation clause. Often, the CJEU has held that limitations with CFR rights must be 'provided for by law' and pursue 'legitimate' and 'proportionate' objectives.[84] As section 4.3 will

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[77] CFR preamble.
[78] Explanations relating to the Charter of Fundamental Rights (2007) OJ C303/17–35.
[79] ibid.
[80] Art 52(1) CFR.
[81] Chapter Two, section 2.2.1.
[82] Explanations relating to the Charter of Fundamental Rights (2007) OJ C303/17–35.
[83] ibid.
[84] See Case C-62/90 Commission v Germany (1992) ECLI:EU:C:1992:169, at para. 23; Case C-44/94 Fishermen's Organisations and Others (1995) ECLI:EU:C:1995:325, at para 55; Case C-292/97 Karlsson and Others (2000) ECLI:EU:C:2000:202, at para. 45.

identify, this alignment between CJEU and ECtHR jurisprudence is significant in the online disinformation context.

While Article 52 CFR cements the ECHR as a minimum standard for interpretive guidance on Charter rights, this provision also permits Union institutions and Member States to afford 'more extensive' protection to CFR rights than provided under ECHR standards.[85] This room for interpretive discretion is linked to how the CFR's consistency with ECHR must never compromise 'the autonomy of EU law and of that of the' CJEU.[86] For example, if the ECtHR raises levels of protection for the right to freedom of expression the CJEU is required to reinterpret this right under the CFR to align with the new minimum ECHR standard.[87] Moreover, the CJEU could interpret this right in a manner that could exceed the level of protection afforded by the ECtHR.[88] The CJEU cannot, however, regressively re-interpret CFR rights to lower standards of protection if the ECtHR lowers protection to a level that goes below protections guaranteed by Union law. This is codified under Article 53 CFR which states that CFR provisions must not 'be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised' by Union law.[89] A practical significance of Article 52(3) CFR is that this provision enables the CJEU to diverge—albeit only by offering more extensive protection to human rights—from ECtHR standards regarding the right to freedom of expression and the need for informed elections.

It must finally be highlighted that the actions taken by EU institutions may—at a future point—be subjected to human rights scrutiny by the ECtHR. This was made possible when the Lisbon Treaty mandated EU accession to the ECHR. The CJEU first considered this prospect in 1996—four years preceding the CFR's proclamation—but found no legitimate basis for accession without undermining the autonomy of EU law.[90] To overcome this, the Lisbon Treaty

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[85] Art 52(3) CFR.

[86] Explanations relating to the Charter of Fundamental Rights (2007) OJ C303/17–35.

[87] Koen Lenaerts, 'Exploring the limits of the EU Charter of Fundamental Rights' (2012) 8(3) European Constitutional Law Review 375-403.

[88] The CFR does not allow restricting on the right of political activities of foreign nationals to a greater extent than nationals, (unlike Article 16 ECHR); Paul Lemmens, 'The Relation between the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights–Substantive Aspects' (2001) 8(1) Maastricht Journal of European and Comparative Law 49-67.

[89] Art 53 CFR. See on this 'non-regression clause' Federica Casarosa and Evangelia Psychogiopoulou (eds.) *Social Media, Fundamental Rights and Courts: A European Perspective* (Taylor & Francis, 2023).

[90] See Opinion of the Advocate General on accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1996) 2/94 ECLI:EU:C:1996:140.

stipulated that the Union 'shall accede' to the Convention whilst retaining Union 'competencies as defined in the Treaties'.[91] This mirrored modifications to Protocol 14 ECHR that enabled the EU to 'accede to this Convention.'[92] As De Vries posits, the accession mandate highlights how ratification of the Lisbon Treaty 'brought expansion of the protection of fundamental rights at the level of the European Union to a climax.'[93] Stated differently, Lisbon mechanisms not only enabled an expansion of CJEU fundamental rights jurisprudence but also paved the way for Union institutions to be formally bound by ECHR obligations.[94] Despite these Lisbon mechanisms, accession has not materialised. Significant doubt was cast in 2014 when the CJEU rejected a proposed accession treaty agreed between the EU and the Council of Europe and restated its concern of how accession could undermine the autonomy of Union law.[95] Criticising the continued failure of accession, Lock opines that EU accession to the ECHR—by subjecting EU institutions to 'external' human rights control by the ECtHR—is 'only logical' when considering how EU institutions exercise powers that are transferred by States who are already subjected to scrutiny by the Strasbourg Court.[96] Peers similarly argues that accession could enhance 'protection of human rights within the EU legal order' by ensuring 'effective external control of the failings of the EU and (within the scope of EU law) its Member States as regards human rights.'[97]

At the time of writing, EU accession to the ECHR has still not materialised. As this section has set out, however, the ECHR has long been a key source of interpretive guidance regarding how Union institutions—including the CJEU—must interpret CFR provisions. Importantly, however, the CFR provides explicit scope for the CJEU to diverge from established ECtHR standards when interpreting the right to freedom of expression and the right to free elections

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[91] Art 6(2) TEU.
[92] Art 59(2) ECHR.
[93] Sybe De Vries, 'EU and ECHR: Conflict of Harmony?' (2013) 9:78 Utrecht Law Review 78-79.
[94] ibid.
[95] Opinion 2/13 on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms — Compatibility of the draft agreement with the EU and FEU Treaties (2014) ECLI:EU:C:2014:2454.
[96] Tobias Lock, 'EU Accession to the ECHR: Implications for the Judicial Review in Strasbourg' (2010) 35 European Law Review 777; For more recent commentary see Tobias Lock, 'The Future of EU Human Rights Law: Is Accession to the ECHR Still Desirable?' *Journal of International and Competition Law* 7 (2020) 427.
[97] Steven Peers, 'EU Law Analysis: The CJEU and the EU's accession to the ECHR: a clear and present danger to human rights protection' (EU Law Analysis Blog, 18 December 2014) <http://eulawanalysis.blogspot.com/2014/12/the-cjeu-and-eus-accession-to-echr.html> last accessed 9 July 2023.

under the CFR. Having introduced these important developments, the following section will now proceed to map CJEU jurisprudence that has vital application in the disinformation field.

4.3 Disinformation and Informed Democracies: Mapping CJEU Jurisprudence

This section maps CJEU jurisprudence which provides guidance for the regulation of online disinformation in political and electoral contexts. [98] As noted in the above analysis, case law wherein the CJEU has applied the right to free elections under the CFR is extremely limited. As has also been introduced, ECtHR jurisprudence has provided considerable guidance in the CJEU's interpretation of fundamental rights under Union law.[99] Notwithstanding these analytical limitations, the CJEU has amassed extensive jurisprudence which has significance in the disinformation field. For example, section 4.3.1 examines CJEU case law concerning the right of EU citizens to access information held by Union institutions. This case law is relevant as it demonstrates the CJEU's emphasis on the importance of an informed political populace. Another relevant line of case law is discussed in section 4.3.2 concerning the CJEU's focus on the need to maintain media pluralism in EU Member States. While the case law examined in this section does not directly discuss online disinformation, section 4.3.3 maps CJEU approaches where EU Member States have restricted transmissions of propaganda through traditional media. The focus here is on specific cases involving misleading propaganda and the CJEU's focus on the need for an informed political populace in such cases. As Chapter One has outlined, online intermediaries play a central role in controlling the dissemination of online disinformation. Acknowledging this role, section 4.3.3 then maps how the CJEU has interpreted responsibilities for online intermediaries to restrict access to illegal communications. Importantly, this section focuses on the CJEU's assessment of factors that could justify intermediary responsibilities to limit access to misleading—but not necessarily illegal—communications disseminated in political and electoral settings.

4.3.1 Access to Information

Owing to factors that the above analysis introduced, the CJEU has not developed extensive jurisprudence wherein it has applied the right to freedom of expression under Article 11 CFR

[98] Specifically, to evaluate EU legislation in Chapter 5 and Irish legislation in Chapter 6.
[99] See section 4.2.2.

in political and electoral contexts.[100] Bayer et al. observe that CJEU freedom of expression jurisprudence remains 'underdeveloped and relies heavily on ECtHR case law.'[101] Highlighting this specific dearth, these authors describe a 'creative task' of identifying relevant CJEU jurisprudence which has bearing in the disinformation context.[102] As discussed below, however, there are lines of CJEU jurisprudence that provide analytical insights into how the court considers the need for wide access to—and potential restrictions on—information in democracies.

Instructive here is CJEU case law where the court has analysed the right of EU citizens to freely access information held by EU institutions.[103] Threaded throughout this case law is the Court's reasoning that EU institutions must ensure that citizens have wide access to information that informs how they participate in the political and democratic process. In *Sweden v Commission,* the CJEU annulled the European Commission's refusal to provide an NGO with information pertaining to German industrial projects.[104] Overturning the Commission's refusal, the CJEU clarified that the nature of the information—concerning aerospace and runway expansions—created a pressing 'public interest' for citizens to freely access the information.[105] The Court did not cite Article 11 CFR but reasoned that access to such information:

> Enables citizens to participate more closely in the decision-making process and guarantees that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system.[106]

Such language denotes an important link between wide access to information and effective democratic participation. The CJEU illustrated this link explicitly in *Sweden and Turco v*

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[100] See section 4.2.2.
[101] Judit Bayer and others, 'The fight against disinformation and the right to freedom of expression' (European Parliament, 2021).
[102] ibid.
[103] It should be highlighted here that these cases often involve administrative issues (rather than issues exclusively grounded in fundamental rights under the CFR) whereby the CJEU makes reference to the right to freedom of expression under Article 11 CFR; Primarily under Art 4 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.
[104] Case C-64/05 Kingdom of Sweden v Commission of the European Communities and Others (2007) ECLI:EU:C:2007:802.
[105] ibid para 8.
[106] ibid para 4.

Council and Commission when annulling the Council of the EU's refusal to provide information concerning legal advice on proposed EU asylum legislation.[107] Here, the CJEU accepted that the Council had an interest to avoid legal uncertainty—by withholding details of a legal opinion—but stressed that the information concerned the EU's 'legislative process.'[108] This created an 'overriding public interest in disclosure' and 'openness' of information concerning asylum legislation.[109] Conversely, the Court reasoned that a 'lack of debate and information' on asylum legislation 'could give doubt and erode confidence in respect of the legitimacy of the whole decision-making process.'[110] Access to this information therefore empowered 'citizens to participate more closely in the decision-making process' and strengthened 'the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act.'[111] The CJEU's explicit focus on democracy was also evident in *Access Info Europe v Council of the European Union.*[112] Here, the CJEU stressed how any justifications for Union institutions to withhold access to information must be 'interpreted and applied strictly' if information is 'connected with the democratic nature of those institutions.'[113] Moreover, the Court further considered that the need for wide access to such information had 'particular relevance' where information could shed light on how 'the Council is acting in its legislative capacity.'[114] Such access not only enabled citizens to 'scrutinise' Union institutions but also to actively 'participate' in the EU's 'legislative process.'[115] This connection was further referenced in *De Capitani v Parliament* where the General Court annulled the European Parliament's refusal to provide access to information concerning the Union's co-legislative process.[116] Here, the CJEU even referenced a 'democratic right' of EU citizens to access information and stated that:

> It is precisely openness in the legislative process that contributes to conferring greater legitimacy on the institutions in the eyes of EU citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated.

[107] Joined cases C-39/05 P and C-52/05 Kingdom of Sweden and Maurizio Turco v Council of the European Union (2008) ECLI:EU:C:2008:374.
[108] ibid para 13.
[109] ibid.
[110] ibid.
[111] ibid para 48.
[112] Case T-233/09 Access Info Europe v Council of the European Union (2008) ECLI:EU:T:2011:105.
[113] ibid para 55.
[114] ibid para 56.
[115] ibid para 39.
[116] Case T-540/15 De Capitani v European Parliament (2018) ECLI:EU:T:2018:167.

> It is in fact rather a lack of information and debate capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process.[117]

This reasoning carries weight even where Union institutions refuse to provide access to information due to concerns that providing such access could harm Union interests. In *Stichting Greenpeace Nederland and Pesticide Action Network Europe v Commission*, the CJEU annulled the European Commission's restriction of information concerning glyphosate pesticides.[118] Importantly, the Court acknowledged that disclosing this information could undermine EU commercial interests but still identified that 'an overriding public interest in disclosure exists where the information requested relates to emissions into the environment.'[119] Such matters, the Court reasoned, outweighed the Commission's legitimate considerations that disclosing commercially sensitive information could undermine Union interests.[120]

This is not to suggest that Union institutions must never withhold access to information to EU citizens. Instructive here is *Connolly v Commission* where the CJEU accepted that a confidentiality duty for EU staff outweighed the right of freedom of expression.[121] Here, the CJEU explicitly relied on guidance from Article 10(2) ECHR when referring to the plausible limitations to the right to access information in a 'democratic society.'[122] Moreover, the CJEU also identified how a 'public interest' arose for Union institutions to prevent the publication of information 'liable to harm Community interests.'[123] The CJEU has identified these EU 'interests' in a wide range of circumstances.[124] However, the Court generally requires that Union institutions must demonstrate how providing access to information could undermine specific interests. This was evident in *Gabi Thesing and Bloomberg Finance LP v European*

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[117] ibid para 78.
[118] Case T-545/11 Stichting Greenpeace Nederland and Pesticide Action Network Europe (PAN Europe) v European Commission (2018) ECLI:EU:T:2018:817.
[119] ibid para 74.
[120] ibid.
[121] Case C-274/99 Bernard Connolly v European Commission (2001) ECLI:EU:C:2001:127.
[122] ibid para 44.
[123] ibid.
[124] When assessing how access to information could undermine commercial interests in Case C-28/08 European Commission v Bavarian Larger (2010) ECLI:EU:C:2010:378; When assessing how access to information could undermine the protection of personal data in C-477/10 European Commission v Agrofert Holding (2012) ECLI:EU:C:2012:394.

Central.[125] Here, the CJEU accepted that the European Central Bank (ECB) could restrict information from Bloomberg News concerning derivative transactions in financing deficits. This was justified because the ECB had demonstrated how access to such information could 'harm' Union economic policy.[126] In the subsequent case of *European Commission v Agrofert Holding*, the CJEU agreed with the Commission that providing information on merger proceedings could 'seriously undermine the institution's decision-making process.'[127] Importantly, the Commission demonstrated how this risk was 'foreseeable and not purely hypothetical.'[128] More recently in *Breyer v Research Executive Agency (REA)*, the CJEU upheld the Commission's denial of access to information concerning EU funded projects to develop Artificial Intelligence lie detectors.[129] Here, the Court reasoned that the commercial interests of the projects' developers outweighed the public's right to access information on the content of such projects. This was specifically the case because the EU's AI projects were in early stages and still 'under development'.[130] Had the project been completed and produced 'results' that could be made publicly available, the Court agreed with the applicant that there would be:

> An interest of the public in participating in an informed and democratic public debate on whether control technologies such as those at issue are desirable and whether they must be financed from public funds, and that that interest must be duly safeguarded.[131]

This line of CJEU reasoning is arguably instructive in the online disinformation context. It suggests that the CJEU favours broad access to information that affects how individuals engage with the democratic process. Moreover, the Court appears inclined to draw connections between access to information and the need for an informed political populace. It is notable that even though the CJEU frequently references the right to receive information in the above cases, it has rarely explicitly invoked the right to freedom of expression—including the freedom to receive information—under Article 11 CFR.[132] This reinforces De Búrca's

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[125] Case T-590/10 Gabi Thesing and Bloomberg Finance LP v European Central Bank (2012) ECLI:EU:T:2012:635.
[126] ibid para 63.
[127] C-28/08 European Commission v Agrofert Holding (2012) ECLI:EU:C:2012:394 1 at para 75.
[128] ibid para 79.
[129] Case T158/19 Breyer v Research Executive Agency (REA) (2021) ECLI:EU:T:2021:902.
[130] ibid para 200.
[131] ibid.
[132] Even though several of the above cases have arisen after the entry into force of the EU Charter.

observation that the CJEU often engages with fundamental rights issues without explicitly referencing CFR provisions.[133] While many of the above cases involve the CJEU's scrutiny of the right to access information held by EU institutions as provided for under secondary EU legislation, the CJEU's inconsistent and rare invocation of the right to freedom of expression and information under Article 11 CFR is an unfortunate omission. Crucially, it contributes to the aforementioned scarcity of independent CJEU jurisprudence regarding the scope and content of Article 11 CFR.[134] This relates to how, as section 4.4 will illustrate, the CJEU appears to align with the ECtHR by drawing connections between the right to receive information of relevance to the political populace and meaningful democratic participation. This is particularly evident in how the CJEU uses similar language to the ECtHR surrounding the need for wide access to information that contains 'public interest' elements.[135] As this section has illustrated, however, the CJEU has also reasoned that EU institutions can have justifications under Union law to impose restrictions on the right of individuals to freely access information. As the above cases generally involve the CJEU's identification of specific justifications raised by Union institutions to restrict access to information, further analysis is necessary to outline the Court's approach where EU Member States—and technological intermediaries—restrict access to information in the context of harmful and false communications.

4.3.2 Maintaining Media Pluralism

As outlined, the CJEU encourages EU institutions to preserve wide access to information that contributes to an informed political populace.[136] As also introduced, the right to freedom of expression under Article 11 CFR makes explicit reference to how Union institutions and Member States must ensure that the 'pluralism of the media is respected.'[137] Importantly, however, the Court appears to identify that the free transmission of information may be limited if this could undermine Union interests.[138] Of vital relevance in the online disinformation

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[133] Gráinne De Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a human rights adjudicator?' (2013) 20(2) Maastricht Journal of European and Comparative Law 168-184.
[134] ibid (n 101).
[135] See *Sunday Times v United Kingdom* Application No 6538/74 (ECtHR, 26 Apr 1979) para 65 'account must thus be taken of any public interest aspect of the case'; Also *VgT Verein Gegen Tierfabriken v Switzerland* Application No 32772/02 (ECtHR, 30 June 2009) para 92.
[136] See section 4.3.1.
[137] See section 4.2.2.
[138] ibid.

context is the CJEU's reasoning in cases where the CJEU addresses the tension between the free flow of information and the need for an informed political populace. To unpack this, it is necessary to examine case law wherein the CJEU has identified justifiable factors to limit media pluralism within the EU internal market.[139]

The CJEU has considered issues related to media pluralism in cases that long precede the introduction of the CFR. An overarching principle from this jurisprudence is that Union law should not preclude Member States from limiting retransmissions of audio-visual communications from foreign entities.[140] This can be traced back to *Sacchi* where the CJEU assessed Italian legislation granting a national monopoly on televised advertising.'[141] The Court accepted that the Treaties did not preclude Member States from 'removing radio and television broadcasts from the field of competition by conferring on one or more establishments an exclusive right to carry them out.'[142] The CJEU clarified, however, that technical limitations should not produce 'discriminatory' effects on intra-Community trade and restrictions must stem from 'considerations of a non-economic nature relating to the public interest.'[143] Applying this reasoning, the CJEU accepted that the granting of exclusive broadcasting rights was justified by the 'general interest' to retain vital public functions of broadcasting services.[144] Moreover, the Court highlighted the 'impact' of television broadcasting 'on the formation of public opinion.'[145] The CJEU again focused on 'non-economic' justifications for national broadcasting restrictions in the *ERT* case.[146] Here, the Court reiterated that Union law should not preclude Member States from 'granting a television monopoly' and thereby 'removing' broadcast transmissions 'from the field of competition 'by conferring on one or more establishments an exclusive right to conduct them.'[147] Importantly, however, the Court again highlighted that such removal must only be justified by 'considerations of public interest' of 'a non-economic nature.'[148] As the CJEU acknowledged, the imposition of restrictions in this

[139] Measures that limit retransmissions of information not only engage Charter protections but also Treaty requirements to protect the 'free movement' of goods and services without 'internal frontiers' (Art 26(2) TFEU).
[140] As in other Member States, non-Member States, or corporate entities from other countries.
[141] Case 155-73 Giuseppe Sacchi (1974) ECLI:EU:C:1974:40.
[142] ibid.
[143] ibid para 14.
[144] ibid.
[145] ibid.
[146] C-260/89 Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others (1991) ECLI:EU:C:1991:254.
[147] ibid para 44.
[148] ibid para 12.

field could lead to 'discriminatory' effects to the 'detriment of foreign programmes.'[149] To avoid this, the CJEU not only highlighted the importance of 'public policy' derogations under EU Treaties but also stressed that restrictions must 'be appraised in light of the general principle of freedom of expression' under Article 10 ECHR.[150] This is an important example of how—when specifically engaging with the right to receive information—the CJEU has long defaulted to interpretive principles from ECtHR jurisprudence.

Considering the CJEU's focus on 'non-economic' justifications for Member States to constrain media pluralism in this case law, it is unsurprising that the Court has long afforded discretion for Member States to limit retransmissions of commercially motivated broadcasts from other Member States. In *Vereinigte Familiapress,* the CJEU analysed Austrian legal prohibitions on the dissemination of magazines containing prize competitions.[151] While stressing that Member States must avoid disproportionate restraints on 'intra-Community trade' the CJEU accepted that the prohibition was justified to maintain 'press diversity.'[152] The Court held that the contested prohibitions affected—and could even 'detract' from—freedom of expression as they limited information that citizens could receive.[153] However, drawing inspiration from Article 10 ECHR, the Court accepted that prohibiting prize competitions in magazines could be 'necessary in a democratic society.'[154] Crucial in the Court's reasoning was that an imbalance of commercial power between different publications constituted an 'overriding requirement' to impose restrictions.[155] Addressing this, the CJEU considered:

> Whether newspapers which offer the chance of winning a prize in games, puzzles or competitions are in competition with those small press publishers who are deemed to

[149] ibid para 22.
[150] ibid para 41.
[151] C-368/95 26 June 1997; It may be noted here that the case of *Vereingte Familiapress,* along with several other CJEU cases including that of the following discussed case of *Stichting* primarily address the freedom to provide services which are provided for under EU Treaty provisions. Within these cases, however, the right to freedom of expression and information under Article 11 CFR still informs the CJEU's reasoning. On the interrelated nature of the freedom to provide services and the freedom of expression in the specific context of content moderation of harmful content, see Giancarlo and Christophe Geiger, (2023) 'Taking Fundamental Rights seriously in the Digital Services Act's Platform Liability Regime,' European Law Journal ;see also discussions in Joao Quintais and others, (2023) 'Using terms and conditions to apply fundamental rights to content moderation,' German Law Journal, 24(5), 881-911.
[152] ibid para 18.
[153] ibid para 26.
[154] ibid.
[155] ibid.

> be unable to offer comparable prizes and whom the contested legislation is intended to protect and, second, whether such a prospect of winning constitutes an incentive to purchase capable of bringing about a shift in demand.[156]

Such language bears notable similarity to the ECtHR. Recalling Chapter Two, the ECtHR has consistently reasoned that States have justifiable reasons to limit the ability of commercially powerful entities—particularly those from outside States—to disseminate information if this is necessary to preserve the right of smaller entities to participate in public debate.[157] Notable in the specific context of *Vereingte Familiapress* is the CJEU's reasoning that a prohibition to maintain press diversity—even if this could 'detract' from freedom of expression—was justified to prevent a small number of powerful publications from adopting unfair commercial incentives in a manner that could undermine media pluralism.[158] Similar circumstances arose in *Stichting Collectieve Antennevoorziening Gouda and others.*[159] This again concerned prohibitions imposed by the Netherlands 'on the broadcasting of advertisements' from non-Dutch operators.[160] Addressing such prohibitions, the CJEU reasoned that measures restricting 'audio-visual' communications from 'foreign broadcasting organisations' were not always 'objectively necessary in order to safeguard the general interest.'[161] On an assessment of the facts, however, the CJEU accepted that the restriction pursued aims of 'safeguarding the freedom of expression of the various (in particular, social, cultural, religious and philosophical) components of a Member State.'[162] Moreover, the Court commented that an absence of broadcasting limitations from foreign sources could result in the public being subjected to 'excessive advertising' and that interventions were necessary to 'maintain a certain quality of programming' imparted to citizens.[163] Thus, constraints on broadcasting freedoms were needed to 'secure pluralism' at the domestic level.[164] The CJEU used similar language in the following case of *Commission v The Netherlands.*[165] Here, the CJEU ruled against a technical requirement

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[156] ibid para 28.
[157] See Chapter Two, section 2.3.1.
[158] Ibid.
[159] Case C-6/98 Arbeitsgemeinschaft Deutscher Rundfunkanstalten (ARD) v PRO Sieben Media AG, supported by SAT 1 Satellitenfernsehen GmbH, Kabel 1, K 1 Fernsehen GmbH. (1999) ECLI:EU:C:1999:532.
[160] ibid para 5.
[161] ibid para 4.
[162] ibid.
[163] ibid para 5.
[164] ibid.
[165] Case C-353/89 Commission of the European Communities v Kingdom of the Netherlands (1991) ECLI:EU:C:1991:325.

for foreign broadcasters to obtain resources provided by a public company incorporated under Dutch law. However, the Court still accepted that—in principle— Union law should not preclude Member States from imposing 'conditions affecting the structure of foreign broadcasting bodies' from another Member State.[166] The Court again stipulated that such conditions should only be imposed to 'maintain pluralism of the media' and to ensure that public organisations providing national audio-visual media retain 'non-profit making' functions.[167] Notable from the above cases is that—as Barzanti observes—the CJEU has 'not provided a definition of pluralism' despite addressing this in many judgments.[168] Importantly, however, the Court appears to highlight that EU Member States should have discretion to ensure that pluralism in their national territory does not become distorted by commercially powerful interests.[169]

4.3.3 Limiting the Spread of Propaganda

Importantly from the online disinformation perspective, the CJEU has identified specific justifications under EU law for Member States to limit the spread of various forms of political propaganda in the internal market. This was evident in the joint cases of *Mesopotamia Broadcast A/S METV and Roj TV A/S v Bundesrepublik Deutschland.*[170] Turkey had submitted complaints to Danish broadcasting authorities alleging that the broadcasting company Roj TV disseminated several broadcasts calling for violence between Kurds and Turks.[171] Simultaneously, Germany prohibited the company from broadcasting in Germany based on divisive content in certain programmes.[172] The CJEU accepted that Roj TV had transmitted programmes containing 'incitement to hatred' and defined this as 'any ideology which fails to respect human values, in particular initiatives which attempt to justify violence by terrorist acts against a particular group of persons.'[173] To combat this, the Court held that Germany was not precluded from 'adopting measures' to prevent a foreign broadcaster from disseminating programmes provided that restrictions did not completely 'prevent' retransmission of television

[166] ibid.
[167] ibid para 33.
[168] Fabrizio Barzanti, 'Media pluralism and the European audiovisual space: the role and cooperation of independent regulatory authorities' (PhD thesis, European University Institute, 2015).
[169] On this see Chapter 2, section 2.3.1.
[170] See joined cases of C-244/10 AND C-245/10 Mesopotamia Broadcast A/S and Roj TV A/S v Bundesrepublik Deutschland (2011) ECLI:EU:C:2011:607.
[171] ibid para 18.
[172] ibid para 6.
[173] ibid para 42.

broadcasts from Denmark.[174] In these joint cases, the CJEU focused primarily on how Roj TV's communications had disseminated hate speech and the Court only made indirect reference to 'misleading' aspects of broadcasts.[175] However, the Court addressed this misleading element more closely in the subsequent case of *Baltic Media Alliance Ltd v Lietuvos Radijo Ir Televizijos Komisija.*[176] This involved Lithuania's temporary suspension of cable and satellite transmissions from a Russian broadcaster that had disseminated 'false information' to sow 'tensions and violence between Russians, Russian-speaking Ukrainians, and the broader Ukrainian population.'[177] The contested programmes:

> Incited hostility and hatred based on nationality against the Baltic countries concerning the collaboration of Lithuanians and Latvians in connection with the Holocaust and the allegedly nationalistic and neo-Nazi internal policies of the Baltic countries, policies which were said to be a threat to the Russian national minority living in those countries.[178]

The CJEU reasoned that the relevant EU law—the Audio Visual Media Services Directive—did not preclude Member States from adopting 'measures that impose obligations to broadcast or retransmit a foreign television channel only in packages available for an additional fee.'[179] Lithuania's temporary restrictions—which the Court considered more proportionate than blanket prohibitions—were justified by the 'public policy objective' of limiting the dissemination of false information to citizens in Lithuania.[180] Thus, limiting the reception of such propaganda served a 'public policy objective' under EU law.[181] Crucially, the Court not only appeared concerned with potential eruptions of violence but also with the possibility that the 'active distribution' of the contested propaganda could 'influence' the 'formation of public opinion' and could undermine the 'public interest in being correctly informed.'[182]

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[174] ibid para 49 and 50.
[175] ibid.
[176] Case C-622/17 Baltic Media Alliance Ltd v Lietuvos radijo ir televizijos komisija (2019) ECLI:EU:C:2019:566.
[177] For a three-month period.
[178] ibid para 79.
[179] ibid para 16
[180] ibid.
[181] Ibid para 80.
[182] ibid para 79.

Circumstances in *Mesopotamia* and *Baltic Media Alliance* involved the transmission of propaganda across more than one EU Member State. Thus, these cases involved a cross-border element and therefore engaged secondary EU legislation which the CJEU analysed under Article 114 TFEU.[183] Importantly, however, the Court has further assessed misleading communications as an external threat from non-EU Member States.[184] Notable in these specific cases is the Court's explicit use of the term disinformation. In *Council v Bamba*, the Council of the EU imposed restrictive measures on an Ivorian national on the grounds of her publication of a newspaper.[185] The Council imposed restrictive measures because she had used this newspaper to obstruct 'peace and reconciliation processes through public incitement to hatred and violence and through participation in disinformation campaigns.'[186] Further notable was the CJEU's observation that she had participated in disinformation campaigns 'in connection with a national election.[187] Lonardo highlights that this case—while only 'indirectly related' to EU security and defence—is notable as a rare set of EU 'restrictive measures adopted to tackle disinformation.'[188] Critical here is that the CJEU's specific focus on the role of the third country national in disseminating disinformation. Addressing this, the Court highlighted the Council's argument that she:

> Could not reasonably have been unaware that, by alluding, in the contested acts, to her position as director of the group which publishes the newspaper *Le Temps*, the Council intended to highlight the power to influence and the responsibility which might be supposed to result from that position as regards the editorial line of that newspaper and the content of press campaigns allegedly run by that newspaper during the Ivorian post-electoral crisis.[189]

Such reasoning mirrors the CJEU's assessment of the Council's application of restrictive measures—consisting of individual economic sanctions—on a third country national in *Dmitrii Konstantinovich Kiselev v Council of the European Union.*[190] Here, the General Court reasoned

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[183] Both cases involved the Audio-Visual Media Services Directive.
[184] Which engages the Union's Common Foreign and Security Policy.
[185] C-417/11 Council of the European Union v Nadiany Bamba (2012) ECLI:EU:C:2012:718.
[186] ibid para 20.
[187] ibid.
[188]Luigi Lonardo, 'EU law against hybrid threats: a first assessment' (2021) 2021(2) European Papers-A Journal on Law and Integration' 1075-1096.
[189] Council v Bamba (n 184) para 21.
[190] Case T-262/15 Dmitrii Konstantinovich Kiselev v Council of the European Union (2017) ECLI:EU:T:2017:392.

that the Council did not violate freedom of expression when sanctioning the head of the Russian news agency Rossiya Segodnya (RS) for providing 'active support' for Russia's attempts to destabilise Ukraine by influencing 'public opinion through disinformation techniques.'[191] Moreover, the General Court rejected that the contested sanctions could 'dissuade' other journalists from 'freely expressing their views on political issues of public interest.'[192] Crucial to this rejection was that the sanctioned individual—unlike other journalists—held 'a position which he obtained by virtue of a decree of President Putin himself' and was deliberately installed to disseminate state propaganda.[193] As the sanctions were 'temporary and reversible' the General Court held that the 'substance' of the sanctioned individual's freedom of expression had not been 'impaired.'[194]

As this section has discussed, the CJEU has long reasoned that Union law should not preclude Member States from restricting retransmissions of audio-visual communications. Notably, the CJEU has emphasised that domestic media environments may become distorted by powerful commercial interests—particularly from other Member States—in the absence of national legislative measures to prevent this distortion. Significantly, the CJEU also identifies objectives for Member States—and Union institutions—to temporarily restrict retransmission of audio-visual communications that contain propaganda and frustrate EU democratic values.[195] While the CJEU has explicitly referred to how disinformation and propaganda can threaten to misinform the political populace, the Court has not provided any concrete definition of these concepts. Notably, the CJEU appears highly cautious to enable individuals to disseminate false communications in a manner which—even if not consisting of illegal communications—is heavily targeted and likely to influence groups of the political populace. However, the CJEU has only very rarely invoked the term disinformation.[196] If this omission continues, it will be challenging to justify in light of how—as Chapter Five will proceed to examine—the significant EU institutional developments in the disinformation field.[197] While the CJEU's piecemeal elucidation of these novel concepts is a disappointing aspect of the Court's approach in the above cases, there are instructive elements of the Court's reasoning

[191] ibid para 98.
[192] ibid.
[193] ibid para 118.
[194] ibid para 121.
[195] See Art TEU.
[196] See in Council v Bamba (n 184) para 21.
[197] As Chapter Five will examine, this is seen in the 2022 Code of Practice and the Digital Services Act (DSA).

that align with the ECtHR approach in the specific context of restricting access to misleading communications. Section 4.4 will assess this.

4.3.4 Intermediaries and Misleading Online Communications

Having introduced the CJEU's jurisprudence in the above sections, focus must now be given to the Court's assessment of responsibilities for online intermediaries to limit the dissemination of harmful communications. CJEU jurisprudence in this field is extensive and has key significance in the disinformation context. Recalling discussions in Chapter One, technological platforms hold unprecedented power in mediating the free flow of political information in democracies.[198] Actions taken by intermediaries to moderate content—and legislation which affects these actions—can play a vital role in limiting the effects of online disinformation.[199] Accordingly, it is instructive to evaluate the CJEU's reasoning in cases where it has examined intermediary responsibilities to combat misleading online communications. The focus here is on the Court's application of the right to freedom of expression under Article 11 CFR when assessing intermediary responsibilities to restrict access to information on the grounds of falsity.

4.3.4.1 Preserving Access to Lawful Information

The CJEU has extensively considered the application of legal responsibilities for online intermediaries to limit the dissemination of illegal content. Threaded throughout the Court's reasoning in this case law is a critical distinction between open ended and specified obligations for intermediaries to monitor and filter illegal content on their services.[200] This distinction has long been informed by a requirement—necessitated under Article 11 CFR—for internet users to be able to freely access lawful information. Instructive here is *Scarlet Extended SA v SABAM.*[201] A Belgian management company brought interlocutory proceedings against an internet service provider (ISP) that allowed users to illicitly download copyrighted works from the company's portfolio.[202] The CJEU ruled that national courts could not issue injunctions compelling ISPs to install automated filtering mechanisms to monitor—and prevent

[198] Discussed in Chapter One, section 1.3.
[199] Joan Donovan, 'Social-media companies must flatten the curve of misinformation' (2020) Nature.
[200] On 'filtering' see TJ McIntyre, 'Blocking child pornography on the Internet: European Union developments' (2010) 24(3) International Review of Law, Computers & Technology 209-221.
[201] Case C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) (2011) ECLI:EU:C:2011:771.
[202] Through peer-to-peer software.

dissemination of—illegal copyrighted material.[203] The Court reasoned that automated filtering could undermine commercial freedom and 'potentially undermine' the right to 'receive or impart information' under Article 11 CFR.[204] Key here was that an injunction to compel this monitoring could:

> Potentially undermine freedom of information since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications.[205]

The CJEU's reluctance to embrace general monitoring obligations was again evident in *SABAM v Netlog.*[206] Here, the Court reiterated that 'general' obligations for intermediaries to filter illegally disseminated content 'could potentially undermine freedom of information' as this could encourage monitoring systems that 'might not distinguish adequately between unlawful content and lawful content.'[207] Accordingly, the 'effects' of such measures would 'not be limited to the hosting service provider' and could 'infringe the fundamental rights' of internet users to 'receive or impart' information under Article 11 CFR.[208] Further highlighting this, the Court considered that 'the question' of 'whether a transmission is lawful' often depends on national laws 'which vary from one Member State to another.'[209]

The CJEU is more inclined to approve of tailored intermediary obligations to filter illegal content on the explicit grounds that such obligations are less likely to arbitrarily remove lawful communications. This was exemplified in *McFadden v Sony Music* where the Court held that copyright-holders could seek injunctions to prevent third-party infringements.[210] Critical here was that the injunctions only imposed filtering measures that 'strictly targeted' and brought 'an end to a third party's infringement.'[211] This lessened the possibility of such measures

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[203] As such filtering is prohibited under Art 15, Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L/178.
[204] ibid para 52.
[205] ibid para 52.
[206] Case C-360/10 Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV (2012) ECLI:EU:C:2012:85.
[207] ibid para 50.
[208] ibid para 48.
[209] ibid para 52.
[210] Case C-484/14 Tobias Mc Fadden v Sony Music Entertainment Germany GmbH (2016) ECLI:EU:C:2016:689.
[211] ibid para 93.

undermining Article 11 CFR by adversely 'affecting the possibility of internet users lawfully accessing information using the provider's services.'[212] The CJEU recalled this distinction in *L'Oreal v eBay* when accepting that L'Oreal could seek an injunction to prevent specific infringements on eBay.[213] It was again crucial that the injunction sought in this case did not require measures that compelled eBay to engage in 'an active monitoring of all' user content.[214] Accordingly, the Court reasoned that obligations—particularly for 'economic operators' playing an 'active role' in promoting products—may arise for intermediaries to prevent dissemination of illegal copyrighted content.[215] Notable here is the Court's focus on the financial benefit that 'economic' intermediaries could derive from 'optimising' presentations of goods.[216] Commenting on this, the Court reasoned that liability may arise:

> Where advertising does not enable reasonably well-informed and reasonably observant Internet users, or enables them only with difficulty, to ascertain whether the goods in fact originated from the proprietor.[217]

Informing the CJEU's approach to filtering obligations is the Court's caution that ill-defined obligations could indiscriminately remove lawful content. Arguably, however, the CJEU's reasoning in *Glawischnig-Piesczek v Facebook Ireland* appeared to signal a deviation from this caution.[218] Here, the Court considered Facebook's obligations to remove illegal defamatory posts labelling a politician a 'lousy' and 'corrupt' member of a 'fascist' party.[219] It reiterated that monitoring obligations should pertain to 'specific' content identified as unlawful by national courts.[220] Notably, however, the Court reasoned that 'specific' obligations to remove defamatory posts could compel Facebook to 'terminate or prevent' further infringements by filtering 'identical' or 'equivalent content.'[221] Cavaliere suggests that this signalled a potential 'expansion' of obligations to 'proactively' monitor through restrictions on 'identical'

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[212] ibid.
[213] Case C-324/09 L'Oréal SA and others v eBay International AG and others (2011) ECLI:EU:C:2011:474.
[214] ibid para 139.
[215] ibid para 113.See also Joined Cases C-682/18 and C-683/18 Frank Peterson v Google LLC and Others and Elsevier Inc.v Cyando AG (2021) ECLI:EU:C:2021:503 para 65.
[216] Case C-324/09 para 123.
[217] ibid para 97.
[218] Case C-18/18 Eva Glawischnig-Piesczek v Facebook Ireland Limited (2019) ECLI:EU:C:2019:821.
[219] ibid para 12.
[220] ibid para 31.
[221] ibid Para 67.

content.[222] This is a justified observation when contrasting the CJEU's reasoning with the preceding case of *L'Oreal* and *Tommy Hilfiger v Delta Center A.S.*[223] In those rulings, the CJEU accepted that injunctions could engage ISP obligations 'to take measures which contribute to avoiding new infringements but limited this to further infringements 'of the same nature' and 'by the same market-trader.'[224] Further relevant is *UPC Telekabel Wien v Constantin Film* where the CJEU accepted that injunctions could compel providers to filter unlawful content without specifying 'the measures which that access provider must take.'[225] In that case, however, the injunction only applied to a single offending website.[226] The departing context of *Glawischnig-Piesczek* is that the CJEU instructed that intermediaries should not 'carry out an independent assessment' of the legality of identical content and must instead employ 'automated search tools and technologies' to identify 'elements specified in the injunction.'[227]

Madiega argues that the CJEU's reasoning in *Glawischnig-Piesczek* opens 'the door to obligations being imposed on platforms to proactively monitor' defamatory social media posts on an open-ended range of internet users.[228] This is a timely concern when recalling how—as Chapter One has introduced—disinformation may not always involve the transmission of illegal content.[229] As Keller highlights in this connection, automated filtering without 'nuanced human judgment' can be problematic when applied to harmful but legally ambiguous content.[230] Notwithstanding this concern, it must be highlighted that—at the time of writing—the CJEU's reasoning in *Glawischnig-Piesczek* appears to deviate from the Court's longstanding reasoning e that any legal obligations for intermediaries to filter illegal content must not be designed in a manner that fosters arbitrary restrictions on access to lawful information.'[231] This focus of the CJEU—which Frosio describes as the Court's identification

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[222] Pablo Cavaliere, 'Glawischnig-Piesczek v Facebook on the Expanding Scope of Internet Service Providers' Monitoring Obligations' (2019) 5 European Data Protection Law Review 573.
[223] Case C-494/15 Tommy Hilfiger Licensing LLC and Others v Delta Center (2016) ECLI:EU:C:2016:528.
[224] ibid para 34.
[225] Case C-314/12 UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH (2014) ECLI:EU:C:2014:192 para 42.
[226] ibid para 63. Referencing Art 11 Charter.
[227] ibid para 45.
[228] See Tambiamba Madeiga, 'Reform of the Liability Regime for Online Intermediaries' (European Parliament, 2020).
[229] Chapter One, section 1.3.
[230] ibid.
[231] The CJEU has since clarified that obligations to adopt 'preventive' measures to avoid unlawful user uploads must be 'accompanied by the necessary safeguards to ensure that that obligation is compatible with freedom of

of a 'fundamental right to share lawful content' under the CFR—is critical for the regulation of online disinformation in political and electoral contexts. .[232] Section 4.4 will further unpack this.

4.3.4.2 Informed Internet Users

When considering responsibilities for online intermediaries to limit the dissemination of illegal content, the CJEU has explicitly discouraged intermediaries from presenting information in a manner that could mislead internet users. Recalling *L'Oreal v eBay*, the Court stated that 'economic operators' playing an 'active role' in presenting information for commercial purposes must ensure that users remain 'reasonably well-informed' so as to 'ascertain whether the goods or services referred to' originate 'from the proprietor of the trademark.'[233] This language mirrors the CJEU's reasoning in preceding rulings of *Google France and Google* and *Portakabin Ltd and Portakabin BV v Primakabin*.[234] In those rulings, the Court highlighted that intermediaries that present goods for commercial purposes must 'enable normally informed and reasonably attentive internet users' to understand the 'origin' of goods presented in advertisements.'[235] This reasoning—while applied in the specific factual context of illegal copyrighted material—suggests that the CJEU's perspective on intermediary liability may be informed by a desire for internet users to have access to accurate information.[236]

Significantly in the disinformation context, this is evident in the CJEU's assessment of ISP responsibilities to dereference information from search results. Instructive here is specific reasoning in *Google Spain SL v Agencia Española de Protección de Datos.*[237] This concerned requests for Google to erase information from search results. The Court considered the right to

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expression and information in C-401/19 Republic of Poland v Parliament and Council (2022) ECLI:EU:C:2022:98 para 98.

[232] Giancarlo Frosio, 'Freedom to Share' (2022) 53(8) International Review of Intellectual Property and Competition Law 1145-1148.

[233] Case C-324/09 L'Oréal SA and others v eBay International AG and others (2011) ECLI:EU:C:2011:474 para 90.

[234] Case C-558/08 Portakabin Ltd and Portakabin BV v Primakabin BV (2010) ECLI identifier: ECLI:EU:C:2010:416; Joined Cases Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08) (2010) ECLI:EU:C:2010:159.

[235] Case C-558/08 at para 31 and 32; Joined cases on Google France at para 84 and 85.

[236] On the CJEU's application of this language see Peter Rott, 'Download of copyright-protected internet content and the role of (consumer) contract law' (2008) 31 Journal of consumer policy 441-457.

[237] Case C-131/12 Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González (2014) ECLI:EU:C:2014:317.

protection of personal data alongside the right to access information under the CFR and specifically probed whether the inaccuracy of searchable information could propel obligations for Google to delist search results. Famously identifying a 'right to be forgotten', the CJEU reasoned that individuals could seek:

> Rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data.[238]

Here, it was not the mere inaccuracy of information in search results that justified erasure of information from search results.[239] The information pertained to details on the sale of properties in a manner that engaged 'rights of the data subject' under an EU Directive.[240] Balancing the data subject's right to privacy against the right of internet users to access information found in search results, the CJEU considered several factors which included the 'nature' of the inaccurate information and the 'role' of the individual who the information pertained to.[241] It remains notable, however, that the Court considered the 'inaccurate nature' of the information as a ground to justify an ISP obligation to delist search results containing the information. Further notable is the CJEU's recognition that the posting of the content had been 'initially lawful' and 'accurate.'[242] This acknowledgement notwithstanding, the Court considered that the information had become 'irrelevant' and no longer accurate 'in the course of time.'[243] Crucial here is the Court's focus not on the legality of content posted but on how the content's relevance and accuracy may shift with the passage of time. This focus was further evident in the CJEU's reasoning in *GC and others v CNIL and Google* where the Court again weighed an individual's 'right to be forgotten' alongside the public's right to receive information.[244] This involved the Court's assessment of whether Google—as an ISP—could be obliged to erase

[238] ibid para 92.
[239] With this assessment of accuracy being interpreted under Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.
[240] Case C-131/12 para 70.
[241] ibid para 81.
[242] ibid para 90.
[243] ibid para 93.
[244] Case C-136/17 GC and Others v Commission nationale de l'informatique et des libertés (CNIL) (2019) ECLI:EU:C:2019:773.

information in search results pertaining to past criminal procedures of a data subject. Addressing the need to assess the relevance of the information, the CJEU reasoned that:

> The public had an interest not only in being informed about a topical event, but also in being able to conduct research into past events, with the public's interest as regards criminal proceedings varying in degree, however, and possibly evolving over time according in particular to the circumstances of the case.[245]

The CJEU again accepted that the contested information was 'initially lawful' and accurate when posted.[246] However, this did not absolve Google from a responsibility 'to adjust the list of results in such a way that the overall picture' accurately imparted the applicant's circumstances to internet users.[247] This could require the ISP to ensure 'that links to web pages containing information' reflected the applicant's current legal position.'[248] A notable factor in the above ISP cases is the CJEU's assessment of information in search results that—while becoming irrelevant or inaccurate over the passage of time—was initially lawful and accurate when posted. The Court did not address inaccurate information that was liable to mislead internet users at the time of posting. Significantly, however, such facts were evident in the Advocate General Opinion of *Google (Déréférencement d'un contenu prétendument inexact)*.[249] This opinion was significant because the facts concerned—for the first time in CJEU jurisprudence—an application to erase ISP search results solely predicated on 'the truth of the processed data.'[250] Assessing this, the AG explicitly considered 'the right to inform and be informed' under Article 11 CFR.[251] While the contested search results concerned information of relevance to the public, it was crucial that the information had been intentionally distorted to blackmail companies.[252] Describing the 'falsehoods' at play, the AG opined that:

> The tendency of the right to freedom of expression and information to override the right to private life and the right to protection of personal data where the data subject plays

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[245] ibid para 76.
[246] ibid para 70.
[247] ibid para 78
[248] ibid.
[249] Case C-460/20 Google (Déréférencement d'un contenu prétendument inexact) (2022) ECLI:EU:C:2022:271.
[250] ibid para 4.
[251] ibid para 28.
[252] The article featured four photographs – three of TU and one of RE – in which the applicants were shown driving luxury cars.

> a significant role in public life is reversed where it is established that the information covered by the request for de-referencing is untrue. In such a case, it could probably be argued that in reality the right to inform and the right to be informed do not even come into play since they cannot include the right to disseminate and access falsehoods.[253]

In the CJEU judgment which followed this AG Opinion, the Court did not make explicit reference to falsehoods but mirrored the AG's focus on inaccuracy.[254] Addressing circumstances where an individual sought dereferencing of inaccurate search results, the CJEU reasoned that an individual seeking this must establish 'the manifest inaccuracy of the information.'[255] Elucidating this further, the Court stipulated that the inaccuracy must be 'found in the content or at the very least, of a part – which is not minor in relation to the content as a whole.'[256] The Court clarified that—to prove 'manifest inaccuracy'—individuals 'cannot be required' to produce a national judicial document 'in support of' the dereferencing request as this would impose an 'unreasonable burden' on such individuals.[257] The process of ascertaining 'manifest inaccuracy' also precluded the possibility of ISPs proactively investigating all relevant facts concerning 'the accuracy of the referenced content.'[258] As the CJEU proceeded to illustrate, the appropriate standard here was for individuals making a request to provide 'relevant and sufficient evidence capable of substantiating his or her request and of establishing the manifest inaccuracy of the information.'[259] In such instances, the Court reasoned that ISPs are 'required to accede to that request for dereferencing.'[260] Conversely, the Court highlighted that ISPs would not be required to accede to such requests if inaccuracy was 'not obvious in light of the evidence provided by the data subject.'[261] The CJEU notably did not offer further guidance surrounding what constitutes obvious evidence of manifest inaccuracy. Notably, however, the Court made explicit reference to the ECtHR's distinction between 'factual assertions and value judgments.'[262] Moreover, the Court instructed that ISPs—when assessing inaccuracy—must consider whether 'the information in question is likely to contribute to a

[253] ibid para 30.
[254] Case C-460/20 Google (Déréférencement d'un contenu prétendument inexact) (2022) ECLI:EU:C:2022:962.
[255] ibid para 70.
[256] bid para 68.
[257] ibid.
[258] ibid para 71.
[259] ibid.
[260] ibid para 72.
[261] ibid para 73.
[262] ibid para 66.

debate of public interest.'[263] This reflects an important alignment between CJEU and ECtHR approaches in the online disinformation context. Section 4.4 will now assess this.

4.4 Restricting Access to Online Disinformation: Distilling Key Human Rights Standards from the European Courts

Having mapped CJEU case law which has significance for the regulation of online disinformation, this section now provides a distillation of key human rights standards that are applicable in this field. To identify these standards, this section provides a distillation of key interpretive principles from the jurisprudence of the CJEU and the ECtHR.[264] This distillation of interpretive principles is necessary to develop a framework that can inform the design of appropriate EU and domestic legislation that is designed to combat the spread of online disinformation in political and election contexts, whilst also offering a framework which can be used to assess current laws in this field. This section will now proceed to draw key interpretive principles from common reasoning of the CJEU and the ECtHR which are instructive in this context.

4.4.1 Illegality

The first interpretive principle that can be gleaned from the foregoing analysis in this thesis is that restrictions on access to false or misleading information online must not foster arbitrary limitations on access to lawful communications. This interpretive principle flows from jurisprudence wherein the CJEU and the ECtHR have assessed laws that compel intermediaries to restrict access to illegal communications.[265] Both courts apply higher scrutiny where obligations for intermediaries to restrict access to information are applied to lawful—as opposed to unlawful—communications.[266] Recalling Chapter Two, the ECtHR—when applying the right to freedom of expression under Article 10 ECHR—places a consistent focus on whether restrictions on access to information target communications that have been declared

[263] ibid para 73.
[264] Drawing not only from this chapter but also Chapters Two and Three (regarding ECtHR jurisprudence on Article 10 ECHR and Article 3 of Protocol 1).
[265] *Delfi v Estonia* Application No 64569/09 (ECtHR, 16 June 2015); *Magyar Jeti Zrt v Hungary* Application No 11257/16 (ECtHR, 4 December 2018); Case C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) (2011) ECLI:EU:C:2011:771.
[266] Case C-314/12 UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH (2014) ECLI:EU:C:2014:192, para 56; Also Case C-484/14 Tobias Mc Fadden v Sony Music Entertainment Germany GmbH (2016) ECLI:EU:C:2016:689 para 93; *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* Application no. 22947/13 (ECtHR 2 February 2016) para 82.

illegal under statute.[267] The ECtHR is likely to find that requirements to restrict harmful—but legal—communications violate the right to freedom of expression under Article 10 ECHR.[268] Importantly, this has been the case even where the ECtHR has agreed with CoE States that misleading electoral communications may undermine national interests in maintaining an informed political populace.[269] As section 4.3 discussed, the CJEU has consistently recognised that arbitrary restrictions on access to potentially lawful communications may undermine the right to conduct business under the CFR.[270] However, the CJEU has also identified that arbitrary restrictions in this field risk undermining the right to freedom of expression under Article 11 CFR by disrupting the 'possibility of internet users lawfully accessing information.'[271] This demonstrates a caution from both courts regarding how laws designed to curb harmful communications could lead to excessive restrictions on lawful communications. Such caution is arguably justified. There is evidence that intermediaries erroneously remove lawful communications when adopting measures to limit access to illegal material.[272] This is significant when reflecting on ECtHR and CJEU reasoning regarding the desirability to retain access to lawful online content. The figure below illustrates how the dissemination of online disinformation may not always involve illegal communications.

Figure 8. Distinctions between illegal and potentially legal disinformation.

Examples of Illegal Disinformation	**Examples of Potentially Legal Disinformation**
False information causing damage to the reputation of an electoral candidate or political figure (national defamation law)	False (but not defamatory) information promoting misleading narratives for upcoming referendum (Brexit NHS bus)
False information explicitly inciting hatred against a minority group (national or EU hate speech law)	False (but not hate speech) information falsely attributing economic problems to migrants ('breaking point' Vote Leave poster campaign)

[267] Recalling the ECtHR's emphasis on 'clearly unlawful' hate speech in *Delfi AS v Estonia* Application No. 64669/09 (ECtHR, 16 June 2015) para 114; Or in *Magyar Jeti Zrt v Hungary* Application No 11257/16 (ECtHR, 4 December 2018) on significance that content was not 'clearly unlawful' para 82.
[268] See *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v Hungary* Application no. 22947/13 (ECtHR 2 February 2016) on capability of restrictions on lawful content of 'undermining freedom of the right to impart information on the internet,' para 82.
[269] Recalling Chapter Two, section 2.4 discussion of Jezior v Poland Application No 31955/11 (ECtHR, 4 June 2020).
[270] Case C-70/10 Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM) (2011) ECLI:EU:C:2011:771 para 42; C-401/19 Republic of Poland v Parliament and Council (2022) ECLI:EU:C:2022:98 Para 82.
[271] Case C-484/14 Tobias Mc Fadden v Sony Music Entertainment Germany GmbH (2016) ECLI:EU:C:2016:689, para 93; Case C-324/09 L'Oréal SA and Others v eBay International AG and Others (2011) ECLI:EU:C:2011:474, para 139.
[272] See Chapter One, section 1.4.1; Also, Daphne Keller, 'Empirical evidence of 'over-removal' by internet companies under intermediary liability laws' (Stanford Internet Observatory, 2015).

False information explicitly contradicting established facts of a well-documented historical event (national criminal law)	False information explicitly contradicting (with no evidence) emerging scientific factual consensus about novel global events (Covid-19 vaccines, climate change)

As the above figure illustrates, online disinformation may include both unlawful and also lawful statements which may be exchanged in political and electoral environments.[273] This is significant from a human rights perspective. As identified, the CJEU and the ECtHR not only appear concerned by ill-defined restrictions on lawful communications but also by how arbitrary restrictions may thwart exchanges of sincere political communication.[274] The right to freely access information has critical significance in political environments. As Chapter Five and Chapter Six will detail, the balance between preserving access to political information and curbing the spread of false—but potentially legal—electoral communications is vital when assessing EU and EU Member State legislation in the disinformation field.[275]

A logical question here is whether—under the ECHR and CFR systems—EU institutions and Member State legislators could justifiably introduce new legislation that reclassifies a broader range of disinformation as illegal.[276] As Chapter One discussed, several academic commentators have argued that existing EU and EU Member State laws are inadequately equipped to address the dissemination of false information during election periods.[277] Commentators have further posited that new legislation in this field should not target defamation or hate speech but broader forms of falsehoods to ensure that voters remain informed.[278] In principle, this is a plausibly justified approach for EU institutions and Member State domestic legislators to adopt when recalling how the CJEU and the ECtHR place strong

[273] As this table further demonstrates, disinformation is not always 'harmful but legal' (see Chapter One, 1.4.1 on this academic terminology).
[274] Recalling ECtHR in *Magyar Jeti Zrt v Hungary* Application No. 11257/16 on how liability for hyperlinks (linking to harmful content) 'may have foreseeable negative consequences on the flow of information on the Internet' para 83. Or CJEU in C-136-17 GC and others v CNIL and Google that ISP requirements to erase lawful information undermine the ability of 'the public' to stay 'informed about a topical event' para 76.
[275] As Chapter Five will unpack, there are critical shifts—in EU Member States and through actions by Union institutions—which now blur these distinctions.
[276] As in laws that make the dissemination of potentially legal disinformation (figure 1) illegal.
[277] Maya Brkan, 'EU fundamental rights and democracy implications of data-driven political campaigns,' (2020) 27(6) Maastricht Journal of European and Comparative Law 774-790; Kriztina Rozgonyi, 'Disinformation online: potential legal and regulatory ramifications to the right to free elections–policy position paper.' (2020) Human Computer Interaction and Emerging Technologies 57.
[278] Rachel Craufurd Smith 'Fake news, French Law and democratic legitimacy: lessons for the United Kingdom?' (2019) 11(1) Journal of Media Law 52-81; Adam Krzywoń, 'Summary Judicial Proceedings as a Measure for Electoral Disinformation: Defining the European Standard' (2021) 22(4) German Law Journal 673-688.

emphasis on the need for an informed political populace.[279] However, making broader forms of false electoral communications illegal may be disruptive to the delicate balance between open democratic debate and informed political engagement that the ECtHR and the CJEU emphasise. It is crucial to recall here how the general—and aligning—approaches of both courts is to extend strong protections for broad access to information on topics of relevance to the political populace. The ECtHR consistently justifies its robust protection of political expression on grounds that access to political communication assists in the formation of opinion in democracies.[280] Moreover, the ECtHR extends the right to freedom of expression to offensive—and even factually exaggerated—communications if the ECtHR deems that such communications constitute genuine attempts to contribute to democratic debate.[281] The CJEU—while not having developed a comparatively high volume of case law surrounding the right to disseminate political communications—consistently stresses the need for wide availability of information which may inform the political populace.[282] As functioning democracies require a robust exchange of diverse viewpoints, it is arguable that EU institutions and Member States should avoid making the dissemination of misleading information illegal in contexts where information does not contain defamatory or hate speech elements. However, this thesis argues that EU institutions and Member States can still design obligations for intermediaries to moderate legal communications in a manner that is consistent with human rights obligations under the ECHR and CFR systems. This must now be unpacked in sections (II) and (III) below.

4.4.2 Deception

Tension between open democratic debate and the value of an informed populace is evident in ECtHR and CJEU jurisprudence involving restrictions on access to information. Both courts explicitly recognise that broad access to information facilitates the formation of opinions in

[279] For example, recalling the ECtHR's first ever finding of an Article 10 ECHR violation in *Sunday Times v United Kingdom,* Application No. 6538/74 26 (ECtHR, 18 May 1977) where newspaper revelations brought 'to light certain facts which may have served as a brake on speculative and unenlightened discussion' para 66; Also CJEU in C-136/17 GC and Others v Commission nationale de l'informatique et des libertés (CNIL) (2019) ECLI:EU:C:2019:773 that 'the public had an interest not only in being informed about a topical event, but also in being able to conduct research into past events,' para 76.

[280] See Chapter Two, section 2.3.1.

[281] Epitomised by ECtHR language in *Lopes Gomes da Silva v Portugal* Application No. 37698/97 (ECtHR, 28 September 2000) that 'political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society,' para 34.

[282] Recalling CJEU in Case T-158/19 Breyer v Research Executive Agency (REA) on the 'political and democratic interest' for EU institutions to divulge documents on the Union's emerging AI policy, para 181.

political contexts.[283] However, the ECtHR and the CJEU simultaneously express concern that unrestricted access to information may undermine democratic processes by misinforming voter choice and broader political engagement.[284] The dissemination of false and misleading information—particularly disinformation—is a problem which embodies this tension.

A second interpretive principle here lies in a distinction between intentional deception and mistaken errors. The CJEU and the ECtHR are more likely to find that restrictions on access to misleading information are justified if these relate to information which is disseminated in an intentional or co-ordinated manner. In line with this, both courts are less likely to agree with restrictions on access to misleading information which do not meet this pivotal standard of deceitful intention. This was analysed in Chapter Two when mapping the ECtHR's application of the right to freedom of expression in the context of misleading political communications. Recalling this discussion, the ECtHR consistently draws distinctions between intentionally inaccurate statements and merely erroneous statements in political contexts.[285] The ECtHR's application of this standard is not confined to case law concerning the right to freedom of expression under Article 10 ECHR. As Chapter Three further considered, the ECtHR also applies a test of whether information has been intentionally falsified when interpreting whether State restrictions on electoral candidacy—for disseminating false communications to voters—undermine the right to free elections under Article 3 Protocol 1 ECHR.[286] It is evident from this jurisprudence that the ECtHR extends far stronger protection to misleading statements that are not driven by deceitful intentions. Aligning with this, the ECtHR is more likely to agree that restrictions on access to false electoral communications are justified if these restrictions specifically address deceptive communications. Further recalling a finding from Chapter Three, the ECtHR has even identified positive obligations for States to combat deceptive

[283] Recalling in ECtHR *Lingens v Austria* Application No. 9815/82 (ECtHR 8 July 1986) that 'open political debate lies at the 'very core of' democracy para 42; Also CJEU language in C-28/08 Breyer v Research Executive Agency (REA) on the need for the European Commission to 'duly' safeguard the right of the 'public in participating in an informed and democratic public debate' by providing access to the Union's emerging AI policy, para 68.

[284] Recalling ECtHR language in *Bowman v United Kingdom* Application No 141/1996/760/961(ECtHR 19 February 1998) that open political debate and free elections could 'come into conflict' in a manner that may require 'certain' restrictions on electoral communications para 43; Also CJEU language in Google (Déréférencement d'un contenu prétendument inexact) that accessing information enables 'the right to be informed' but that this does not 'come into play' for a 'right to disseminate and access falsehoods' para 30.

[285] See Chapter Two, section 2.2.3.

[286] Recalling Chapter Three, this was central to the ECtHR's approach in cases such as Krasnov and Skuratov v Russia Application No 17864/04 (ECtHR, 19 July 2007) and Sarukhanyan v Armenia, Application No. 38978/03 (ECtHR, 27 May 2008).

behaviour if national authorities demonstrate how such behaviour will influence electoral outcomes.[287] This will be further considered in section (III).

As this chapter examined in section 4.3, the CJEU has not drawn explicit distinctions between deceptive and mistaken communications in electoral contexts.[288] However, the CJEU has consistently reasoned that EU Member States are justified in restricting the retransmission of political propaganda from other countries.[289] It must be recalled that the CJEU's focus—in existing case law in this context—has generally been the specific context of Russian state propaganda containing illegal hate speech.[290] As discerned, however, the CJEU has expressly recognised deception as an element that can 'aggravate' the potential for Russian propaganda to undermine the basis for an 'informed' political populace.[291] As also highlighted, similar reasoning is emerging where the CJEU has considered whether responsibilities may justifiably arise for Internet Service Providers (ISPs) to dereference inaccurate information.[292]

A notable observation here is that the CJEU and the ECtHR encourage broad access to information in political contexts but place specific limitations on this for identifiably deceptive communications. This has significance when revisiting academic distinctions between the problems of disinformation and misinformation. Recalling Chapter One, disinformation is consistently defined by an intention to deceive while misinformation may often lack this crucial deceptive element.[293] It is evident here that EU institutions and Member States have stronger justifications to restrict access to information which is of an intentionally deceptive nature i.e., disinformation as opposed to misinformation. As Chapter Five and Chapter Six will dissect, this has significance when assessing EU and national legislation which is designed to limit the dissemination of misleading information online in political and electoral settings.

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[287] This will be discussed further in section (III).
[288] Section 4.3 has outlined explanations for the dearth of CJEU jurisprudence in this field.
[289] See this chapter's analysis in section 4.3.2.
[290] Recalling Mesopotamia Broadcast A/S and Roj TV A/S v Bundesrepublik Deutschland (n 169); Baltic Media Alliance Ltd v Lietuvos radijo ir televizijos komisija (n 175).
[291] This was important to the CJEU's reasoning in Baltic Media Alliance Ltd v Lietuvos radijo ir televizijos komisija (n 175) where the court stated that a key element aggravating the incitement to hatred in Russian state broadcast was the propaganda's 'influence' the 'formation of public opinion' and could undermine the 'public interest in being correctly informed,' para 79.
[292] Case C-131/12 Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González ECLI:EU:C: (2014) 2014:317; Case C-460/20 Google (Déréférencement d'un contenu prétendument inexact) (2022) ECLI:EU:C:2022:962.
[293] See Chapter One section 1.2.1.

A logical question—which flows from this key interpretive principle—relates to the factors that inform how the ECtHR and the CJEU identify where 'deception' has occurred. The intention to deceive may often not be easy to discern depending on the context. The ECtHR has expressly highlighted this when articulating limitations of supranational courts to engage in nuanced factual assessments of whether election candidates have disseminated false information in bad faith.[294] As fact-based assessments may often become necessary in this context, it is instructive to extract factors that inform how the ECtHR and the CJEU identify deception. As section 4.3.3 discussed, the CJEU places weight on whether propaganda containing false communications has been disseminated as a form of political interference by Russian state actors.[295] It is further notable that the CJEU has emphasised how deceptive techniques may amplify effects of propaganda that targets vulnerable minorities.[296] Recalling Chapter Three, the ECtHR is more likely to identify deceptive behaviour where the ECtHR discerns that individuals—particularly in positions of influence—have falsified information of high relevance to the political populace.[297] Moreover, the ECtHR appears more likely to find that false information is deceptive if it contradicts a well-established factual consensus.[298] These factors are not only evident where the ECtHR assesses propaganda that targets vulnerable groups but also where the ECtHR analyses false declarations by electoral candidates that are likely to influence voters in their 'choice of the legislature.'[299] A generalisable factor here is that the ECtHR and the CJEU—while not always best positioned to identify bad faith intentions in national contexts—associate deception with the targeting of vulnerable groups or contradicting an established factual consensus on topics of high relevance to the political populace. This is further unpacked below.

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[294] Recalling Krasnov and *Skuratov v Russia,* Application No 17864/04 (ECtHR, 19 July 2007) 'a legitimate interest in ensuring the normal functioning of its own institutional system' Para 44.
[295] Recalling Baltic Media Alliance Ltd v Lietuvos radijo ir televizijos komisija (n 175) on how Russia used disinformation to stoke 'tensions and violence between Russians, Russian-speaking Ukrainians, and the broader Ukrainian population,' para 72; Also Kiselev v Council of the European Union (n 189) wherein the sanctioned individual was in 'a position which he obtained by virtue of a decree of President Putin himself' and was deliberately installed to disseminate state propaganda, para 118.
[296] ibid.
[297] Recalling and *Sarukhanyan v Armenia*, Application No. 38978/03 (ECtHR, 27 May 2008) where a candidate's declaration—while false—was of 'minor importance' to voters,' para 94.
[298] Recalling ECtHR's application of Article 17 ECHR to anti-democratic propaganda (Chapter Two, 2.3.2); Particularly the ECtHR's focus in *Lehideux and Isorni v France,* Application No. 24662/94 on holocaust denial as a 'category of clearly established historical facts' whose 'negation or revision would be removed from the protection of Article 10 by Article 17' para 47.
[299] See ECtHR assessment in *Šimunić v Croatia* Application no. 20373/17 22; *Sarukhanyan v Armenia,* Application No. 38978/03, para 94.

4.4.3 Influence

As the above analysis illustrates, the ECtHR and the CJEU are more likely to find restrictions on access to false information justifiable from a human rights perspective if addressed to false communications which are intentionally deceptive. It remains, however, that misleading information may undermine the basis for an informed political populace even in the absence of identifiably deceitful intentions.[300] In this context, a third interpretive principle is that restrictions on access to false and misleading information are more justifiable if such information is likely to influence political engagement. Significantly, the ECtHR and the CJEU are inclined to find that restrictions on false communications undermine the right to freedom of expression in contexts where misleading information is unlikely to affect voter choice and broader political engagement. Aligning with this, both courts appear less likely to find violations of the right to freedom of expression in circumstances where restrictions on access to false communications are directed at information that will have strong influence on political engagement.[301]

Recalling a key finding from Chapter Two, the ECtHR is less likely to offer protection to the right to freedom of expression under Article 10 ECHR where harmful communications have been disseminated by powerful political leaders with high public influence.[302] This is significant because—in circumstances not involving hate speech or deception—the ECtHR generally extends robust protection for political leaders to freely disseminate ideas.[303] This differential treatment appears to be based on the ECtHR's broader inclination to prevent influential political actors from manipulating the democratic process. As Chapter Three revealed, the ECtHR's focus on influence on voter choice is also central to its assessment of restrictions on false electoral declarations when applying the right to free elections under Article 3 Protocol 1 ECHR.[304] Central to the ECtHR's inclination in such contexts is that

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[300] On this, see Ciara Greene and others, 'Misremembering Brexit: Partisan bias and individual predictors of false memories for fake news stories among Brexit voters' (2021) 29(5) Memory 587-604.

[301] See *Krasnov and Skuratov v Russia,* Application No 17864/04 (ECtHR, 19 July 2007) on whether an election candidate's misleading declarations were a 'matter of indifference to voters' para 52; C-136/17 GC and Others v Commission nationale de l'informatique et des libertés (CNIL) (2019) ECLI:EU:C:2019 on how the public's interest in being 'informed about a topical event may diminish' para 76.

[302] Recalling where the ECtHR did not offer protection under Article 10 to influential leaders in *Feret v Belgium* Application No 15617/07(ECtHR, 16 July 2009); *Le Pen v France* Application No. 18788/09, (ECtHR, 7 May 2010.)

[303] See discussion in Chapter 2 section 2.3.1.

[304] See Chapter 3, section 3.3.1.

restrictions on false information are unlikely to be justified in the absence of a link between the information's falsity and its effects on democratic engagement.[305] This is also evident where the ECtHR identifies a positive obligation requiring States to investigate alleged election interference. Notably, the ECtHR is unlikely to find that States have neglected positive obligations to hold democratic elections if individuals have not demonstrated links between the alleged interference and material effects on electoral outcomes.[306] Thus, the ECtHR not only appears concerned with how misleading information may influence voter choice but also with how this—in turn—may shift electoral results.

It is arguable that the CJEU's reasoning aligns with the ECtHR here. The CJEU places extensive focus on the potential relevance that access to information may have for internet users. As section 4.3.3 considered, the CJEU appears inclined to favour the preservation of free access to information which may assist users in becoming informed on a topic of public interest.[307] Aligning with this, the CJEU appears less likely to protect free access to information under Article 11 CFR where information is likely to misinform internet users. This has most recently been evident where the CJEU—in its assessment of ISP responsibilities to delist search results on grounds of inaccuracy—has explicitly stated that the right of internet users 'to be informed' under Article 11 CFR must not extend to a right to 'disseminate and access falsehoods.'[308] Moreover, the CJEU has reasoned that the relevance of accessing information may diminish with the passage of time.[309] A crucial principle here is that restrictions on access to false or misleading information are more justified in circumstances where this information is capable of influencing voters.[310] Relatedly, justifications for restrictions on false or misleading information are likely to diminish as time passes as the relevance of this information to voters attenuates.

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[305] The ECtHR explicitly referenced in *Krasnov and Skuratov v Russia*, Application No 17864/04 (ECtHR, 19 July 2007) that only one of the candidates lied about information of relevance 'in voters' eyes,' para 48.
[306] Recalling ECtHR in *Babenko v Ukraine*, Application No. 43476/98 (ECtHR, 7 May 2008); and in *Mugemangango v Belgium* Application No. 310/15 (ECtHR, 6 August 2020).
[307] See section 4.3.3.
[308] Case C-460/20 Google (Déréférencement d'un contenu prétendument inexact) (2022) ECLI:EU:C:2022:962.
[309] See Case C-131/12 Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) (2014) and Mario Costeja González ECLI:EU:C:2014:317, para 92.
[310] It is arguable that 'influence' here not should not only be interpreted as encouragement to vote for particular electoral candidates but attempts to suppress votes. On this see Ann Ravel, 'A new kind of voter suppression in modern elections' (2018) 49 University of Memphis Law Review 1019.

Drawing upon the analysis in this section, the figure below presents an overview of key interpretive principles—and associated interpretive factors— that this section has distilled in the context of restricting access to misleading information.

Figure 9. Summary of key interpretive principles from ECtHR and CJEU jurisprudence regarding the restriction of false and misleading information

Key Interpretive Principle	***Interpretive Factor for Factual Assessment***
Restrictions on access to false or misleading information must not foster arbitrary removal of lawful communications.	• Existence and nature of domestic law. • Existence and nature of European Union (EU) law. • Hate speech or defamatory statements (under relevant law).
Restrictions on access to false or misleading information are more justified for deceptive communications.	• Evidence of intention to deceive. • Existence of language targeting vulnerable groups. • Contradiction of established factual consensus.
Restrictions on access to false or misleading information are more justified for communications likely to influence political engagement.	• Proximity to election or referendum. • Relevance of information to political populace. • Prominence of individual (or group) disseminating information.

These above principles—and associated factors—are based on the foregoing analysis of the case law of the ECtHR and the CJEU wherein both courts have considered the right to freedom of expression alongside the need for an accurately informed political populace. These principles, which have vital importance in the online disinformation context, inform the interpretive framework which this thesis now uses when assessing whether laws targeting misleading communications are consistent with applicable human rights standards flowing from the ECHR and CFR. This interpretive framework will be used to assess current developments concerning the regulation of online disinformation by EU institutions and Member States in Chapters Five and Six respectively. As these chapters will demonstrate, this framework not only has an application when informing the design of EU and domestic legislation but also to critically assess whether emerging standards for intermediary liability in this field are likely to undermine the rights to freedom of expression and free elections as protected under the ECHR and the CFR.[311]As Chapter Five will map, EU institutions have introduced secondary legislation which has application to misleading—but potentially lawful—electoral communications.[312] As Chapter Six will investigate, Ireland has introduced legislation which not only requires intermediaries to restrict access to false electoral communications but also gives extensive powers for new statutory bodies to enforce content

[311] As Chapter 5 will highlight, EU institutions have expressly instructed that the 2018 Code of Practice on Disinformation must ensure compatibility with ECtHR and CJEU jurisprudence.
[312] This will be discussed when discussing the Code of Practice on Disinformation and the Digital Services Act (DSA) in Chapter 5.

restrictions in this field. Further, Ireland has introduced new legislation which explicitly targets harmful communications which have not been declared unlawful by statute.[313]

From a practical perspective, the above-detailed interpretive principles—and associated interpretive factors—offer an analytical framework that should be used to assess the extent to which measures to restrict specific misleading communications would be consistent with international human rights standards.[314] To illustrate this, it is useful to briefly recall various examples of alleged instances of disinformation which Chapter One considered.[315] For example, an online post containing the Vote Leave campaign's claim regarding the re-routing of public sector funds to the National Health Service (NHS) would likely be lawful and there may not be readily identifiable evidence of deception. While it is highly likely that such a claim would influence the UK electorate, the lack of identifiable deceptive motives or explicit targeting of vulnerable groups would make it challenging to justify restrictions on such a communication without undermining ECHR and CJEU freedom of expression standards.[316] Conversely, the 'Breaking Point' poster depicting mass movements of migrants into the EU would likely be seen as deceptive based on the above-detailed interpretive factors. Specifically, this would not only be due to the contravention of an established factual consensus that the accompanying image was outside of the EU territory but also because such messaging targeted minority groups.[317] Moreover, Donald Trump's factual claim—as opposed to an opinion—regarding allegations of widespread election fraud in the 2020 US Election could likely be identified as a deceptive message on the grounds that such a claim would strongly contravene the established factual consensus.[318]

As Chapter Five and Chapter Six will further highlight, online intermediaries are envisioned as playing a pivotal role in the interpretation and execution of restrictions on access to online

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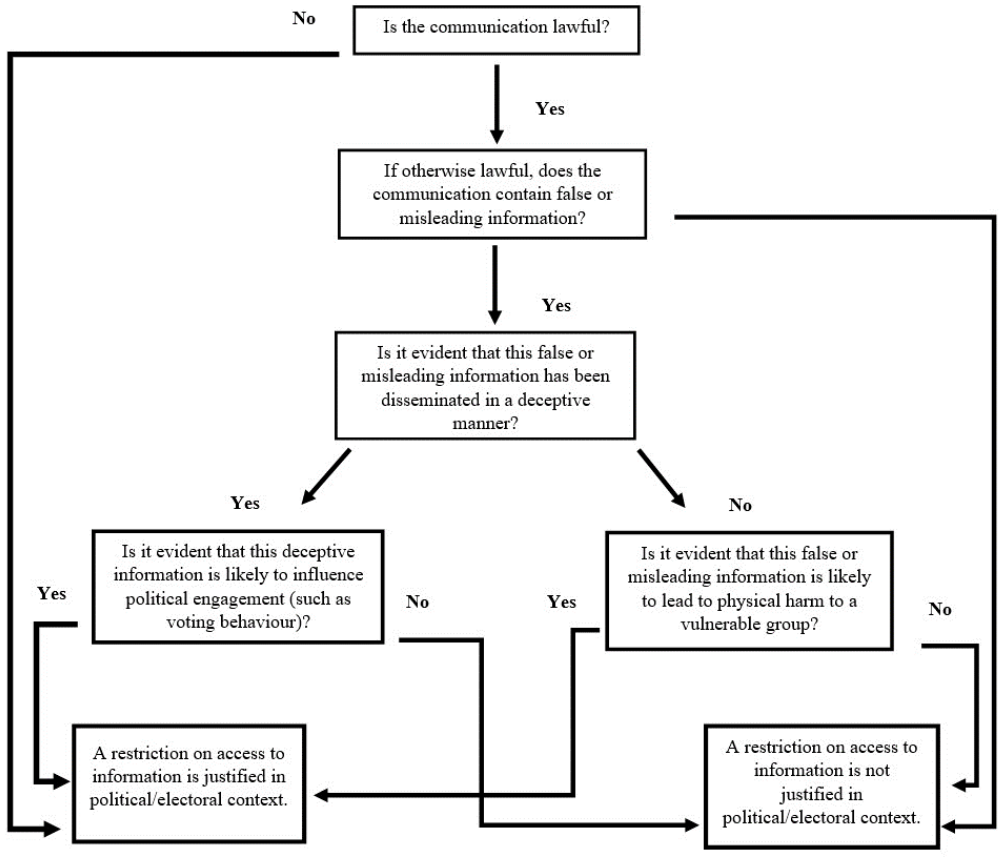
[313] This will be discussed when discussing Ireland's Electoral Reform Act and Online Safety Media Regulation (OSMR) Act in Chapter 6.
[314] In this context, the test would be whether the ECtHR and the CJEU—on the grounds of protecting the right to freedom of expression in the context of political and electoral debate—would be likely to uphold the restriction.
[315] See the discussion in Chapter One, section 1.2.3.
[316] For empirical evidence om this, see the study by Drinkwater and Robinson who find that 'views about NHS underfunding had a relatively small, but statistically significant, effect on leave voting even after controlling for a range of socio-demographic and economic variables', Stephen Drinkwater and Catherine Robinson (2022) 'Brexit and the NHS: voting behaviour and views on the impact of leaving the EU,' British Politics 17(1–22).
[317] Henk Van Houtum and Rodrigo Bueno Lacy, (2017) The political extreme as the new normal: the cases of Brexit, the French state of emergency and Dutch Islamophobia,'
[318] David Cottrell and others, (2018) 'An exploration of Donald Trump's allegations of massive voter fraud in the 2016 General Election,' Electoral Studies 51(123-142).

disinformation under EU and domestic laws. Thus, it is instructive to consider key questions that online intermediaries must engage with in order to ensure human rights compliance with the ECHR and the CFR in this field. Importantly, any content restrictions in this field must be informed by a preliminary assessment of whether content contains illegal communications. Restrictions on access to false—but potentially legal—communications should not only be based on an identification of deception but also by a subsequent assessment of how this deception may influence political engagement. Importantly, however, restrictions on access to non-deceptive communications may still be justified if such communications target vulnerable minority groups. Based on the foregoing analysis, the decision tree diagram below provides a visual representation of these decisions which online intermediaries seeking to implement EU and EU Member States laws may need to consider in the disinformation context.

Figure 10. Visual representation of the interpretive framework[319]



[319] This below figure considers, in particular, how these questions are relevant in the context of restricting access to false information on the grounds of the information being identified as online disinformation.

The above diagram illustrates several key questions which come into play when testing whether measures to restrict access to misleading information may be justified in line with applicable standards set out by the ECtHR and CJEU. As indicated above, these questions have considerable importance when assessing measures to limit the spread of misleading—but not necessarily illegal—communications. Recalling the above-referenced examples of alleged instances of disinformation, the decision factors detailed in figure 10 provide a grounding which could be used to align content moderation decisions (regarding the potential removal of content containing such communications) with international human rights standards. As Chapters Five and Six will demonstrate, the decisions detailed above have vital relevance when assessing legislation that requires—or may indirectly encourage—intermediaries to adopt measures that limit access to online disinformation in political and electoral contexts.

4.5 Conclusions

This chapter examined CFR provisions which have significance for the regulation of online disinformation in political and electoral contexts. This chapter has further mapped the CJEU's reasoning in jurisprudence that has vital application in the disinformation field. Distilling key interpretive principles of the CJEU and highlighting where the CJEU aligns with the ECtHR, this chapter has provided a framework to ensure that EU and domestic laws—designed to limit the spread of online disinformation—are consistent with applicable human rights standards in this field. This concluding section now reflects on this chapter's key findings.

This chapter began by illustrating how ECtHR jurisprudence has long supplied interpretive guidance to the CJEU's assessment of fundamental rights under EU law. Recalling section 4.2, this can be traced back to CJEU case law—preceding the CFR—wherein the CJEU first identified 'respect for fundamental rights' under Union law.[320] As section 4.2 also examined, the ECtHR's influence on EU fundamental rights law is further evident in the design of CFR provisions.[321] A key provision here is Article 52 CFR which states that CFR rights have the same 'meaning and scope' as those 'laid down' by the ECHR.[322] However, this provision also provides that it 'shall not prevent Union law from providing more extensive protection' to

[320] See section 4.2.1.
[321] ibid.
[322] Art 52(3) CFR.

Charter rights that have analogous protections under the ECHR.[323] As highlighted, the practical significance of this is that the CFR enables the CJEU to diverge from ECtHR interpretive principles in case law wherein the CJEU applies the right to freedom of expression in cases involving misleading communications such as online disinformation

As this chapter has found, however, CJEU reasoning has—at the time of writing—appears to align with the key interpretive approaches that this thesis has identified from ECtHR jurisprudence. Section 4.3 highlighted factors which explain this lack of divergence between the CJEU and the ECtHR in case law which has application in the context of online disinformation. Recalling this discussion, Union institutions have limited competences in the field of national elections. Accordingly, the CJEU has had limited engagement with electoral rights under the CFR in circumstances that are instructive in the disinformation context.[324] As section 4.3 also considered, CJEU case law on the right to freedom of expression under Article 11 CFR is not as extensive as ECtHR jurisprudence regarding Article 10 ECHR.[325] Recalling these analytical limitations, it may therefore be unsurprising that this chapter has not identified extensive divergences between CJEU and ECtHR reasoning when examining CJEU jurisprudence in the disinformation field.

Drawing from analysis of the CJEU jurisprudence, this chapter's most significant findings relate to key interpretive principles that have been identified from common CJEU and ECtHR reasoning. Importantly, these key interpretive principles can be used to ensure that EU and domestic legislation is designed in a manner that is consistent with human rights standards that are applicable to online disinformation in political and electoral contexts. As section 4.4 discussed, the CJEU and ECtHR stress how functioning democracies must ensure wide access to information—even if potentially misleading—which has relevance to the political populace. However, both courts simultaneously emphasise the importance of an informed political populace. Identifying the potential for tension between these objectives, section 4.4 distilled key interpretive principles which can assist EU and domestic legislators in resolving this tension when developing laws to limit the spread of online disinformation. The first principle is that (I) restrictions on access to false or misleading information must not foster arbitrary

[323] See section 4.2.2.
[324] See section 4.3.
[325] Recalling how the CFR was only introduced in 2000 and made legally binding in 2009.

removal of lawful communications without a proper legal basis. The second principle is that (II) restrictions on access to false or misleading information are more readily justified in the case of deceptive communications. The third principle is that (III) restrictions on access to false or misleading information are more readily justified for communications likely to influence political engagement.

As considered, these key interpretive principles have vital applications in the context of EU and domestic laws that require—or indirectly encourage—technological intermediaries to limit the spread of online disinformation. These principles therefore supply a crucial interpretive framework which can ensure that EU institutions and Member States design—and apply—laws in this field while maintaining consistency with human rights standards that flow from the ECHR and the CFR. These principles have particular relevance when assessing EU and domestic laws that address misleading—but not necessarily illegal—communications. These principles also have specific relevance when assessing intermediary responsibilities to limit the spread of such communications in the period preceding elections. Accordingly, Chapter Five and Chapter Six of this thesis will now proceed to examine current EU and domestic legislation in the disinformation field in a manner that is informed by the applicable human rights standards that this chapter has analysed.

Chapter 5: Identifying the European Union's Approach to Online Disinformation and Applying a Human Rights Perspective

5.1 Introduction

This chapter provides a critical analysis of tairloed initiatives that European Union (EU) institutions have adopted as part of the Digital Services Act (DSA) package to limit the spread of online disinformation.[1] This chapter's focus is on whether EU approaches to online disinformation are compatible with—or could lead to divergence from—applicable standards under the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (CFR).[2] Section 5.2 begins by assessing the European Commission's development of the 2018 Code of Practice on Disinformation.[3] As this section will consider, the 2018 Code signalled an important step in the EU's efforts to encourage intermediaries to limit the spread of online disinformation in elections. As will be argued, however, the 2018 Code lacks guidance on how intermediaries should adopt measures to limit the spread of misleading—but not necessarily illegal—content. This section will further consider how the 2018 Code may unintentionally cause intermediaries to adopt blunt measures to limit the spread of disinformation and potentially undermine the right to freedom of expression under the ECHR and CFR. This discussion of the 2018 Code provides the background to this chapter's analysis of the EU's Digital Services Act (DSA).[4] Section 5.3 provides an overview of the DSA before examining the application of specific intermediary responsibilities under the DSA for online disinformation. This includes an assessment of how the DSA sets out intermediary responsibilities to limit the spread of misleading—including not necessarily illegal—online communications. This section also analyses the 2022 Code of Practice on Disinformation. Building upon this analysis, this section then evaluates how the design—and potential application—of the DSA could ensure consistency with ECHR and CFR human rights standards regarding freedom of expression and free elections.[5] This is assisted by applying key interpretive principles which this thesis has identified from the jurisprudence of

[1] European Union hereinafter 'EU' or 'the Union'.
[2] Hereinafter ECHR and CFR.
[3] Hereinafter 'the 2018 Code.'
[4] Hereinafter 'the DSA.'
[5] Drawing from analysis in Chapters 2, 3, and 4.

the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).[6]

5.2 The 2018 Code of Practice on Disinformation

This section provides a critical overview of the 2018 Code of Practice on Disinformation (2018 Code).[7] As section 5.2.1 will first set out, the European Commission designed the 2018 Code with explicit reference to the ECHR and CFR. Moreover, the 2018 Code was designed to curtail misleading—but not necessarily illegal—communications in electoral contexts. Section 5.2.2 will show, that intermediaries have implemented the 2018 Code inconsistently. This inconsistency not only stems from a lack of interpretive guidance but also from the Code's limitations as a voluntary initiative. As Section 5.2.3 will further argue, the voluntary design—and piecemeal execution—of the 2018 Code has fostered uncertainty regarding how intermediaries operating in the EU internal market adopt measures to limit the spread of online disinformation. This section considers how this uncertainty could lead intermediaries to adopt blunt measures to curb online disinformation that could undermine the ECHR and CFR.

5.2.1 The European Commission's Development of the 2018 Code

The 2018 Code was spawned by explicit concerns—raised by Union institutions—that online disinformation could undermine 'the integrity of European elections.'[8] The European Commission's initiation of the 2018 Code stems from the creation of the East StratCom Task Force (ESCTF) under the European External Action Service (EEAS) in 2015.[9] As Pollicino and Somaini highlight, the ESCTF was developed in response to the European Council's concerns regarding 'ongoing' Russian attempts to influence European elections and destabilise European integration.[10] Spurred by these concerns, EU institutions initiated a tailored approach for online disinformation in 2018. Accelerating this was a 2017 European Parliament resolution wherein the Parliament urged the Commission:

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[6] See Chapter 4, section 4.4.
[7] Not to be confused with the 2022 Code of Practice on Disinformation (which section 5.3.1 will discuss separately).
[8] Madeline De Cock Buning, 'A multi-dimensional approach to disinformation: Report of the independent high-level group on fake news and online disinformation,' Publications Office of the European Union, March 2018 12.
[9] Hereinafter 'the Commission'; See See 'Countering Disinformation: Questions and Answers about the East StratCom Task Force,' European Union External Action Service 27 October 2021.
[10] Oreste Pollicino and Laura Somaini, 'Online disinformation and freedom of expression in the electoral context: the European and Italian responses,' (2020) Misinformation in referenda.

> To analyse in depth the current situation and legal framework with regard to fake news, and to verify the possibility of legislative intervention to limit the dissemination and spreading of fake content.[11]

Responding to this recommendation, the Commission convened a High-Level Expert Group (HLEG) and instructed this group to explore the development of 'a comprehensive EU strategy for tackling disinformation.'[12] The HLEG recommended that the Commission 'pursue' a 'self-regulatory approach based on a clearly defined multi-stakeholder engagement process' as a 'first step' for EU efforts to curb disinformation.[13] The HLEG further advised the Commission to 'review' and 'ensure the continuous effectiveness' of EU self-regulatory approaches to online disinformation.[14] This language by the HLEG—encouraging the Commission itself to initiate a self-regulatory instrument—epitomises why several commentators refrain from describing the 2018 Code as a form of self-regulation.[15] Industry self-regulation is generally defined by voluntary decisions by groups of private actors to control their actions.[16] However, the 2018 Code was not borne out of autonomous industry collaborations and was initiated by the Commission itself. Accordingly, Bayer et al. call the 2018 Code 'induced self-regulation' while Kuczerawy describes it as a 'co-regulatory scheme.'[17] Similarly, Marsden et. al call the Code an 'EU-orchestrated' method of self-regulation.[18] The 2018 Code could therefore be regarded as a 'unique mechanism' due to the Commission's extensive involvement in developing a self-regulatory framework for technological intermediaries to combat disinformation.[19]

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[11] European Parliament, 'resolution on online platforms and the digital single market,' Communication (2016)2276 (15 June 2017).
[12] Madeline De Cock Buning, "A multi-dimensional approach to disinformation: Report of the independent high-level group on fake news and online disinformation," Publications Office of the European Union, March 2018.
[13] ibid page 6.
[14] ibid page 34.
[15] Tony Prosser, 'Self-regulation, Co-regulation and the Audio-Visual Media Services Directive,' (2008) 31(1) Journal of Consumer Policy 101; Darren Sinclair, 'Self-regulation versus command and control? Beyond false dichotomies,' (1997) 19(4) Law & Policy 532.
[16] Neil Gunningham and Joseph Rees, 'Industry self-regulation: an institutional perspective,' (1997) 19(4) Law & policy 363-414.
[17] Judith Bayer and others, 'Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States,' European Parliament (2019) 105.
[18] Chris Marsden and others, 'Platform values and democratic elections: How can the law regulate digital disinformation?' (2020) 36 Computer Law and Security Review 3.
[19] Iva Nenadić, 'EC's Guidance to Strengthening the Code of Practice on Disinformation: A Mistake with Misinformation,' (European University Institute Centre for Media Pluralism and Freedom, 22 October 2021) accessed 8 August 2023.

The 2018 Code is distinguishable from EU initiatives such as the Code of Conduct for hate speech and the Regulation to prevent terrorist content.[20] As Kuczerawy observes, those initiatives exclusively target online communications which are 'understood as illegal.'[21] Contrasting with these initiatives, the 2018 Code focuses exclusively on 'false or misleading' communications which threaten election integrity but are 'otherwise lawful.'[22] The HLEG acknowledged difficulties associated with imposing intermediary liability with respect to harmful content which is 'not necessarily illegal.'[23] The European Parliament characterised the 2018 Code as a preferable method of tackling 'harmful and manipulative' but lawful content.[24] Addressing such content, the 2018 Code's objectives are broken down into what Vermeulen calls five 'thematic pillars.'[25] These pillars, which apply to technological 'signatories,' entail voluntary commitments to tackle the effects of disinformation by:[26]

- Scrutinising advertising placements to disrupt advertising revenue of accounts and websites that spread disinformation.
- Improving transparency of political advertising and issue-based advertising.
- Improving integrity of services.
- Empowering consumers to report disinformation and access diverse and authoritative content.
- Empowering the research community to monitor disinformation through access to platform data.[27]

The Commission highlighted how these commitments apply to a 'heterogeneous range of stakeholders involved.'[28] For example, initial Code signatories not only included social media platforms—such as Facebook and Twitter (now X)—but also internet search providers (ISP)

[20] See 'The EU Code of Conduct on Countering Illegal Hate Speech Online,' 30 June 2016; Parliament and the Council, 'Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online,' COM (2018) 640.
[21] Aleksandra Kuczerawy, 'The Proposed Regulation on Preventing the Dissemination of Terrorist Content Online: Safeguards and Risks for Freedom of Expression,' (2018) Center for Democracy and Technology.
[22] 2018 Code pg. 1.
[23] HLEG Report pg.7.
[24] European Parliament, 'The Fight Against Disinformation and the Right to Freedom of Expression,' July 2021 9.
[25] Mathias Vermeulen, 'The keys to the kingdom: Overcoming GDPR-concerns to unlock access to platform data for independent researchers,' (2020) OSF Preprints 10.
[26] 2018 Code pg. 1.
[27] 2018 Code pp 5-9.
[28] ibid pg. 1.

such as Google and browsing sites such as Mozilla.[29] When devising the 2018 Code, the Commission further acknowledged that EU institutions have limited competencies to regulate online communications during national elections.[30] This partially explains why the 2018 Code does not prescribe legally binding obligations for its signatories to limit the spread of disinformation. Instead, it sets out several sub-commitments that signatories voluntarily 'commit themselves to adhere to' under the five pillars.[31]

The first pillar of the 2018 Code sets out a commitment for signatories to 'improve the scrutiny of advertisement placements.'[32] This entails a commitment for signatories to disrupt advertising for purveyors of disinformation and not to receive remuneration from manipulative actors for advertising.[33] The 2018 Code contemplates that actions under the first pillar may involve promotion of 'brand safety and verification tools' or engagement 'with third party verification companies.'[34] The second pillar sets out a commitment to improve 'transparency' for political and 'issue-based advertising.'[35] To fulfil this commitment, platforms should inform users on why they are targeted by specific advertisements and clearly differentiate advertisements from 'editorial content.'[36] The third pillar commits signatories to protect 'integrity of platform services,' signatories, whereby signatories are advised to develop 'clear policies regarding identity and misuse of automated bots on their services and to enforce these policies within the EU.'[37] The Code envisages how platforms may pursue 'efforts to close fake accounts' but does not specifically advise this.[38] To empower consumers under the fourth pillar, signatories commit to investing in technological tools for users to access 'diverse news sources' and 'make informed decisions when they encounter online news.'[39] To empower researchers and fact-checkers under the fifth pillar, signatories should not dissuade 'good faith independent efforts to track disinformation and understand its impact.'[40] Signatories further

[29] ibid.
[30] Commission, 'Tackling online disinformation: a European Approach' (Communication) COM/2018/236 final 1.
[31] ibid.
[32] 2018 Code, pg. 4.
[33] ibid.
[34] ibid pg.7.
[35] ibid pg. 5.
[36] ibid.
[37] ibid pg. 7.
[38] ibid pg. 3.
[39] ibid pg. 9.
[40] ibid pg. 8.

commit to supplying the Commission and independent fact-checkers with relevant data to assist this.[41] Measures here may 'include sharing privacy protected datasets, undertaking joint research, or otherwise partnering with academics and civil society organizations if relevant and possible.'[42] As Colliver highlights, these commitments reflect voluntary 'requests' under the 2018 Code which are contingent 'entirely on the will of' signatories to 'institute changes.'[43]

In line with this voluntary design, the 2018 Code provides limited guidance on how signatories should adopt content restrictions on misleading—but not necessarily illegal—communications. Notably, however, the Code references the importance of human rights when regulating such communications. For example, the 2018 Code states that it 'shall apply within the framework' of the ECHR and EU Charter.[44] The Code expressly includes 'case law of the CJEU and ECHR' as part of this framework.[45] Specific reference is made to ECtHR and CJEU jurisprudence 'on the proportionality of measures designed to limit access to and circulation of harmful content.'[46] Relatedly, the 2018 Code cautions against measures that could arbitrarily constrain 'freedom of opinion' and measures that 'delete or prevent access to otherwise lawful content or messages solely on the basis that they are thought to be false.'[47] While the Code makes specific reference to Article 10 ECHR and Article 11 CFR, it makes no reference to the right to free elections under the ECHR or the CFR.[48] However, it describes the right to receive information as 'an indispensable enabler of sound decision-making in free and democratic societies.'[49] It further indicates a desirability for 'well informed citizens' to 'express their will through free and fair political processes' and acknowledges how disinformation can undermine this.[50] Thus, the 2018 Code does not directly reference electoral rights under the ECHR or CFR but identifies the need for an informed political populace as a pre-condition for democratic elections.

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[41] ibid.
[42] ibid.
[43] Chloe Colliver, 'Cracking the code: An evaluation of the EU code of practice on disinformation,' (2020) Institute for Strategic Dialogue.
[44] 2018 Code pg. 3.
[45] ibid.
[46] ibid.
[47] ibid pg. 8.
[48] Under Art 3 of Protocol 1 ECHR or Art 39 EU Charter.
[49] 2018 Code pg. 11.
[50] ibid.

As referenced, the 2018 Code encourages signatories to avoid content restrictions on 'messages solely on the basis that they are thought to be false.'[51] This language—reflecting the Commission's disapproval of intermediaries making subjective content removal decisions—is further reflected in how the 2018 Code ends the EU's previously adopted policy term 'fake news.'[52] Attempting to introduce more circumspect terminology, the 2018 Code defines disinformation as:

> Verifiably false or misleading information which, cumulatively,
>
> > (a) 'Is created, presented and disseminated for economic gain or to intentionally deceive the public'; and
> > (b) 'May cause public harm', intended as 'threats to democratic political and policymaking processes as well as public goods such as the protection of EU citizens' health, the environment or security'.[53]

The 2018 Code clarifies that disinformation 'does not include misleading advertising, reporting errors, satire and parody or clearly identified partisan news and commentary.'[54] It further clarifies that the above definition of disinformation 'is without prejudice to binding legal obligations, self-regulatory advertising codes, and standards regarding misleading advertising.'[55] This delimitation—alongside the 2018 Code's reference to ECtHR and CJEU 'standards'—reflects the Commission's acknowledgement of how arbitrary restrictions on misleading communications can undermine the right to freedom of expression under the ECHR and CFR.[56] The Code defines disinformation as 'verifiably false or misleading information' created and 'disseminated for economic gain or to intentionally deceive the public'.[57][58] Cesarini posits that the focus on 'the element of intentionality eliminates the risk of creating judges of truth.'[59] Importantly, however, the 2018 Code offers no specific guidance on how signatories should identify intentional deception. As authors such as Pielemeier have highlighted,

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[51] ibid pg. 8.
[52] The 2017 resolution referenced 'fake news' and did not mention disinformation; See European Parliament, 'resolution on online platforms and the digital single market,' Communication (2016)2276 (15 June 2017).
[53] 2018 Code, pg.1.
[54] 2018 Code pg. 1.
[55] ibid.
[56] ibid pg. 2.
[57] ibid pg. 1 .
[58] ibid.
[59] Paolo Cesarini, 'Disinformation During the Digital Era: A European Code of Self-Discipline' (2019) 6 Annales des Mines.

additional guidance here could assist signatories on how to interpret content that appears to be intentionally misleading but contains 'nuance' and 'jargon'.[60] Also notable is that—when providing a cumulative definition of disinformation—the 2018 Code broadly defines disinformation as false information that 'may cause public harm.'[61]While the 2018 Code notes that 'public harm' is intended to be construed as 'threats to democratic political and policymaking processes', it also references threats to 'public goods' and 'the environment or security.'[62] Adopting a critical view of this terminology, Galantino notes that the 'Code itself offers no guidance' for how 'the Commission or signatories conceptualise the potential of disinformation to cause public harm.'[63] Relatedly, the 2018 Code encourages actions to limit 'issue-based' messaging but does not define—or require signatories to define—this phrase.[64] The 2018 Code's broad terminology—and how this could potentially lead signatories to adopt measures to combat online disinformation that undermine the ECHR and CFR—will be further assessed in Section 5.2.3.

5.2.2 The Inconsistent Application of the 2018 Code

As introduced, the European Commission designed the 2018 Code with explicit recognition of the 'heterogeneous range' of stakeholders involved.'[65] The Code itself acknowledges the varying 'purposes' and 'technologies' of its signatories.[66] The Commission explicitly embraced possibilities of 'different approaches to accomplishing the spirit' of commitments.[67] Such language—suggesting a need for flexibility in how signatories tackle disinformation—is linked to the varying 'technical capabilities' between signatories which operate in the EU internal market.[68] The Code's development was also preceded by acknowledgements from EU institutions that disinformation may not always consist of illegal content.[69] As Chase posits, these factors explain why the Commission 'acted more like a facilitator' in devising 2018 Code

[60] Jason Pielemeier, 'Disentangling Disinformation: What Makes Regulating Disinformation So Difficult?' (2020) 2020(4) Utah Law Review 923.
[61] 2018 Code pg.1.
[62] ibid.
[63] Sharon Galantino, 'How Will the EU Digital Services Act Affect the Regulation of Disinformation?' (2023) 20(1) ScriptED 98.
[64] ibid pg. 6.
[65] 2018 Code pg. 1.
[66] ibid pg. 2.
[67] ibid.
[68] ibid.
[69] See 5.2.1.

commitments with room for discretionary application.[70] However, the Commission signalled that Union institutions would consider measures 'of a regulatory nature' if the 2018 Code did not yield 'satisfactory' results.[71] To assist in measuring these results, signatories committed to submit self-assessment reports for evaluation by a third party.[72] Additionally, the Commission—assisted by two independent groups—has externally assessed how signatories have applied Code commitments.[73]

Drawing from several periodic assessments of the 2018 Code, the Commission has described this instrument as an 'important and necessary first step' in the EU's efforts to combat disinformation.[74] The Commission has issued specific praise of how all signatories voluntarily adopted measures to label political advertisements in the period preceding European Parliamentary elections in 2019.[75] The Commission has further praised how 'all online platforms have generated accessible ad libraries through public Application Programming Interfaces (APIs).[76] Moreover, several platforms expanded their 'ad transparency tools' from being used in the US context to being used in the 2019 European Parliamentary elections and all platforms adopted measures to clearly label political or 'sponsored' content in this period.[77] Commending these applications of the Code's first pillar commitments, the Commission has specifically praised how platforms continued to roll out political advertisement transparency tools beyond the 2019 elections.[78]

Despite issuing limited positive appraisals, the Commission has identified inconsistencies in how signatories have applied the 2018 Code. As the Commission has observed, this is linked

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[70] Peter Chase, 'The EU Code of Practice on Disinformation: The Difficulty of Regulating a Nebulous Problem' (29 August 2019) Working Paper of the Transatlantic Working Group on Content Moderation Online and Freedom of Expression <https://www.ivir.nl/publicaties/download/EU_Code_Practice_Disinformation_Aug_2019.pdf> last accessed 8 August 2023.
[71] Commission, 'Tackling online disinformation: a European Approach' (Communication) COM/2018/236 final.
[72] ibid.
[73] 2018 Code pg. 9; The Commission has been assisted by the European Group for Audio-visual Media Services (ERGA) and Valdani, Vicari and Associates (VVA).
[74] Commission, 'Assessment of the Code of Practice on Disinformation- Achievements and areas for further improvement,' Staff Working Document (SWD) (2020) 180, accessed 13 August 2023.
[75] See ERGA, 'Report of the activities carried out to assist the European Commission in the intermediate monitoring of the Code of practice on disinformation,' (2019).
[76] An API is code that enables two software programs to communicate. Public APIs enable third parties to bulk access machine-readable datasets to assess a range of topics.
[77] ibid.
[78] SWD (n 78); Twitter (now X) expanded its 'ads transparency centre' to Europe in March 2019 and further restricted political advertising in November 2019.

to the divergent interpretations of this instrument's terminology. For example, the Commission has observed that 'political advertising' is interpreted 'in varying ways by the platforms and is defined differently at Member State level.'[79] Only Facebook provided a definition for 'issue-based' advertising when self-reporting on their measures to honour commitments under the Code's first pillar.[80]

Arguably linked to these interpretive inconsistencies, 2018 Code signatories have self-reported a diverse range of measures designed to limit the spread of disinformation. For example, Facebook and Google have launched measures to label political advertisements with 'paid for' disclosures while Microsoft and Twitter (now X) have prohibited all forms of political advertising.[81] All signatories have reported removals of accounts on the grounds of preventing 'inauthentic behaviour' under the Code's third pillar.[82] Notably, however, signatories have pursued this through a diverse set of policies.[83] For example, Facebook disables accounts that engage in 'co-ordinated inauthentic behaviour' while Google closes accounts that violate its spam policy.[84] Contrasting with this, other signatories have applied commercial policies to combat inauthentic behaviour which pre-date the 2018 Code's development. This includes Google's existing 'misrepresentation policy' and Microsoft's 'various ads policies' that were 'already in place before the Code's initiation.'[85] Acknowledging this variance, the Commission has identified inconsistent 'restrictions on ad accounts sponsoring verifiably false or misleading information' as a 'shortcoming' of the 2018 Code.[86]

These inconsistencies have been exacerbated by the opaque and piecemeal nature of how signatories have self-reported information to the Commission on their application of the 2018 Code. While the Commission has praised signatories for expanding ad libraries through public APIs, it has identified inconsistencies surrounding 'the limited functionalities of APIs, completeness of repositories, and quality of searchable information' regarding 'sponsors'

[79] ibid pg. 13.
[80] See ERGA, 'ERGA Report on disinformation: Assessment of the implementation of the Code of Practice,' (2020) pg. 52.
[81] SWD (n 78) Commission 5.
[82] ibid.
[83] ibid.
[84] See Commission 'First Results of the EU Code of Practice Against Disinformation,' 29 January 2019.
[85] SWS (n 78) 36.
[86] ibid pg. 7.

identity' and targeting criteria.[87] The European Regulators Group for Audio-visual Media Services (ERGA)—which has assisted the Commission in monitoring the Code's effectiveness—has also identified opacity surrounding how signatories justify account removals when implementing commitments under the Code's third pillar. As ERGA has highlighted, signatories have often provided no specific information on whether account removals have been directed at accounts that were active or received high engagement at the time of removal.[88] ERGA has further observed that signatories often supply reports outlining justifications for account removals based on policies that 'have been developed for the USA or published in the USA and have not been adapted or translated yet for the European market.'[89] This is significant when reflecting on how the 2018 Code states that signatories 'shall apply' Code commitments in line with relevant Member State laws and standards under the ECHR and CFR.[90] As Chapter Four considered, standards from ECtHR and CJEU jurisprudence—which the Code expressly references—provide necessary guidance on balancing the right to freely access information and the need for an informed political populace. While signatories may not necessarily have to adopt significant changes in their existing US market-based policies to align with European human rights standards, the lack of references to the ECHR and CFR in signatory reporting suggests that signatories may not fully account for how their policies to counter online disinformation ensure protections for ECHR and CFR rights. Moreover, the potential for signatory self-assessments to focus on the implementation of content restrictions in U.S. jurisdictions also raises questions regarding whether signatories are providing an accurate assessment of their measures to counter online disinformation at the EU Member State level. Recalling Chapter One, persistent European disinformation narratives often originate from campaigns which are concentrated at the domestic level.[91] It is therefore notable that the Commission has explicitly criticised that:

[87] ibid pg. 9.
[88] See ERGA Report (n 84) 47.
[89] ibid pg. 26.
[90] See section 5.2.1.
[91] Trevor Davis and others, 'Suspicious Election Campaign Activity on Facebook: How a Large Network of Suspicious Accounts Promoted Alternative Für Deutschland in the 2019 EU Parliamentary Election' (2019) George Washington University.

> While the platforms provide numbers on, for example, how many accounts were closed/removed, taken action against etc., oftentimes, these are provided on a global scale rather than focusing on the EU.[92]

This links to a broader criticism that the 2018 Code fails to provide an effective framework for third party researchers and fact checkers to independently assess signatory measures to combat disinformation. As highlighted, the fourth and fifth pillars of the 2018 Code involve signatory commitments to support good faith research 'by providing relevant data on the functioning on their services.'[93] This commitment has yielded limited outputs by encouraging signatories to voluntarily collaborate with independent fact checkers and researchers. For example, Twitter (now X) periodically disclosed extensive datasets—on state sponsored disinformation operations—to independent researchers in alignment with this commitment.[94] Relatedly, Google voluntarily shared a large dataset on visual deep-fakes with research stakeholders to assist with the development of detection methods for synthetic videos.[95] However, the Commission has generally criticised that signatories have provided data to independent researchers in an 'episodic and arbitrary' manner.[96] An example which epitomises the Commission's concern is Facebook's collaboration with Social Science One (SS1).[97] This partnership was introduced 'to study the impact of social media on democracy and elections' and 'generate insights to inform policy at the intersection of media, technology, and democracy.'[98] However, academics have criticised how Facebook 'has still not provided academics with anything approaching adequate data access' in these key areas.[99] As authors such as Vermeulen argue, the failure of this partnership is chiefly attributable to Facebook's narrow interpretation of how the 'sharing of personal data with researchers could violate provisions of the General Data Protection Regulation (GDPR).[100]

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[92] SWD (n 78) 45.
[93] 2018 Code pg. 8.
[94] ibid.
[95] Karen Hao, 'Google has released a giant database of deepfakes to help fight deepfakes' *MIT Technology Review* (25 September 2019).
[96] SWD (n 78) 11.
[97] Composed of 83 researchers.
[98] See Social Science One, 'Our Facebook Partnership' (2018) <https://socialscience.one/our-facebook-partnership> accessed 13 August 2023.
[99] See 'Public statement from European Advisory Committee of SS1' (Social Science One Blog, 11 December 2019) accessed 13 August 2023.
[100] Vermeulen, 'The keys to the kingdom' (n 26).

As this section has illustrated, the European Commission has positively appraised how the 2018 Code encourages technological intermediaries to promote veracity in online communications through a wide range of measures. However, the Code's implementation has been inconsistent. Platforms not only vary in their interpretation of the Code's key terminology but also in how they report measures to limit the spread of misleading—but not necessarily illegal—content. As The Commission's assessment of the Code's effectiveness has been hindered by how platforms have provided insufficient access to data points regarding platform measures to combat misleading communications in national electoral contexts. Having outlined these developments, the following section will now consider how the lack of guidance and voluntary design of the 2018 Code could unintentionally cause signatories to adopt measures to limit the spread of online disinformation in a manner contrary to existing ECHR and CFR standards.

5.2.3 Assessing the 2018 Code's Limitations in Light of ECHR and CFR Standards

As introduced, the 2018 Code signalled the first concrete attempt by EU institutions to encourage intermediaries to limit the spread of online disinformation.[101] However, the 2018 Code has been interpreted and applied inconsistently.[102] This section now critically assesses how the Code provides imprecise guidance on how signatories should adopt measures to limit the spread of online disinformation while ensuring compatibility with the right to freedom of expression and the right to free elections under the ECHR and CFR. The focus here is not only on the broad terminology under the 2018 Code but also on the Code's limitations as a voluntary initiative. This section considers how attempts to apply the 2018 Code can potentially lead signatories to restrictions on misleading content that do not are incompatible with applicable human rights standards from ECtHR and CJEU jurisprudence.[103]

An inherent limitation of the 2018 Code is its self-regulatory nature. The Code encourages signatories to limit misleading but 'otherwise lawful' content that undermines democratic elections.[104] However, it introduces no framework for ensuring accountability if intermediaries arbitrarily remove such content. Moreover, the 2018 Code provides no specific guidance regarding how signatories must introduce procedural safeguards that could prevent the removal

[101] See section 5.2.1.
[102] See section 5.2.2.
[103] Drawing from analysis of ECtHR and CJEU jurisprudence in Chapters 2, 3, and 4.
[104] See section 5.2.1.

of misleading content in a manner that is arbitrary and falls short of European human rights standards. It is instructive here to recall broader criticisms of self-regulation as a means of curtailing the dissemination of harmful online content. McNamee posits that the encouragement of the self-regulation of online content by 'internet intermediaries' can lead to content moderation decisions which are shaped by 'radically changing' priorities of online intermediaries.[105] The potentially fluid nature of these priorities means that content restrictions may not always be informed by due process and fundamental rights in light of the 'democratic nature of the internet itself.'[106] Angelopoulos et al.—while acknowledging the potential effectiveness of voluntary initiatives in minimising online 'harms'—posit that self-regulation encourages content moderation that interferes with the right of internet users to access information 'without a clear legal way of redress or appropriate safeguards such as due process.'[107] Raising analogous criticisms, Kuczerawy postulates that the 2018 Code induces a 'delegated private enforcement' of content restrictions on misleading content without viable procedural safeguards to identify unjustified content removals.[108] Moreover, Monti criticises how the Code enables the 'privatisation of censorship' by encouraging signatories to moderate misleading content without due process.[109] As Marsden notes in the online disinformation context, 'a very important factor in accountability for legal content posted may be examples of successful appeals to put content back online.'[110] As the 2018 Code includes no concrete guidance on how signatories could introduce procedural safeguards, this is arguably an element of the Code's design that enables signatories to evade accountability for online content removals that may undermine the ECtHR and CJEU human rights 'standards' which the Code itself alludes to.[111]

This omission of procedural safeguards is significant because the 2018 Code lacks interpretive guidance on how its signatories should adopt measures to limit the dissemination of

[105] Joe McNamee, 'The slide from self-regulation to corporate censorship' (2011) EDRI Discussion paper 01/2011, accessed 12 August 2023.
[106] ibid.
[107] Christina Angelopoulos and others, 'Study of fundamental rights limitations for online enforcement through self-regulation,' (2016) Institute for Information Law (IViR).
[108] Aleksandra Kuczerawy, 'Fighting online disinformation: did the EU Code of Practice forget about freedom of expression?' (2019) 6 European Integration and Democracy Series 10.
[109] Matteo Monti, 'The EU Code of Practice on Disinformation and the Risk of the Privatisation of Censorship,' in *Democracy and Fake News* (Routledge, 2020) 214-225.
[110] Chris Marsden, 'Platform Values and Democratic Elections: How Can the Law Regulate Digital Disinformation?' (2019) 36 Computer Law & Security Review.
[111] See 5.2.1.

misleading—but not necessarily illegal—communications. As referenced, the 2018 Code exclusively targets intermediary commitments 'to limit the spread and impact of otherwise lawful content.'[112] This aspect of the Code's focus is significant from the perspective of ECHR and CFR standards on the right to freedom of expression and the right to free elections. As Chapter Four discussed, the ECtHR and CJEU consistently reason that intermediary responsibilities to limit access to misleading online content must not be ill-defined in a manner that leads to the arbitrary removal of lawful communications.[113] Based on the reasoning of the ECtHR and the CJEU, it is possible for intermediaries to remove access to misleading but lawful electoral communications while remaining compatible with the ECHR and CFR. However, intermediaries are more likely to ensure this compatibility if measures to remove such communications are limited to false information which is deceptive and likely to influence voters.[114] The 2018 Code provides no specific guidance on how signatory measures to remove misleading online content can ensure consistency with such criteria. This omission is striking when considering how the 2018 Code references that voluntary efforts to combat false—but not necessarily illegal—communications should ensure consistency with the 'case law of the CJEU and ECHR' regarding 'measures designed to limit access to and circulation of harmful content.'[115]

Significantly, however, the 2018 Code does not reference any standards from ECtHR and CJEU jurisprudence that could assist signatories in avoiding arbitrary restrictions on access to lawful communications when adopting measures to limit the spread of disinformation. The Code merely advises signatories to be 'mindful' of a 'delicate balance' between limiting misleading content and preserving access to lawful content.[116] The fact that the Code is non-binding does not preclude the possibility that signatories could adopt arbitrary content restrictions on communications which are not illegal at the EU or Member State level. As Chapter One highlighted, there is evidence that intermediaries erroneously remove lawful content when responding to laws to combat harmful online communications.[117] Further relevant here is the Commission's instruction to signatories that EU institutions will consider

[112] 2018 Code pg. 1.
[113] See Chapter 4 section 4.4.
[114] ibid.
[115] 2018 Code pg. 2.
[116] ibid pg. 1.
[117] See Chapter 1 section 1.3.

further 'measures of a regulatory nature' if the 2018 Code is ineffective.[118] Arguably, such language encourages signatories to limit the spread of misleading—but not necessarily illegal—communications to evade further regulation in the disinformation field. This reflects McIntyre's observation regarding the attractiveness of self-regulation as a means for industry stakeholders to 'ward off more intrusive legislative intervention' in how platforms moderate harmful online content.[119] This further reflects Helberger's contention that 'commercial interests and corresponding strategic motives' of intermediaries 'do not always align well with those of public institutions' and democracy.'[120] Applying these observations to the 2018 Code, a key uncertainty is that—by floating the prospect of further regulation while providing imprecise guidance on relevant ECtHR and CJEU standards for tackling legal content—the 2018 Code provides leeway for signatories to unintentionally undermine the ECHR and CFR and provides for no specific safeguards or guidelines to prevent against arbitrary removal of online content.

The lack of guidance in the 2018 Code does not guarantee that signatories will adopt measures that undermine the right to freedom of expression under ECHR and CFR standards. However, this is made possible when considering the potentially wide range of misleading online content that the 2018 Code could be interpreted as applying to. Critical here is that the 2018 Code appears to extend beyond intentionally deceptive content. The Code defines disinformation as false information which is designed 'to intentionally deceive the public.'[121] It further states that disinformation 'does not' include 'reporting errors' or 'political satire.'[122] This exclusion of political satire is beneficial from the perspective of European standards on the right to freedom of expression and informed elections. It must be recalled here that the ECtHR and CJEU offer robust protections to political satire when applying the right to freedom of expression under the ECHR and CFR.[123] These exclusions are also beneficial because the ECtHR and CJEU make important distinctions between intentional deception and mistaken factual errors.[124] As

[118] See section 5.2.1.
[119] TJ McIntyre, 'Child abuse images and cleanfeeds: Assessing Internet blocking systems,' in Ian Brown (ed.) *Research handbook on governance of the Internet* (Edward Elgar Publishing, 2013) 277-308.
[120] Natalie Helberger and others, 'Governing online platforms: From contested to cooperative responsibility,' (2018) 34(1) The information society 1-14.
[121] 2018 Code pg. 1.
[122] See section 5.2.1.
[123] See Chapter 4 section 4.4.
[124] ibid.

Chapter Four illustrated, the ECtHR and the CJEU are more inclined to find that restrictions on misleading communications are justified if applied to intentionally deceptive—as opposed to unintentionally erroneous—communications in political and electoral contexts.[125] It is arguable, however, that the 2018 Code sets out a definition for disinformation in a manner that could be interpreted as going beyond intentionally deceptive communications. As noted, the 2018 Code defines disinformation as 'verifiably false or misleading information that is disseminated 'for economic gain or to intentionally deceive the public' and 'may cause public harm.''[126] However, it does not specify how signatories must identify content which is intentionally deceptive in election contexts. Importantly, the 2018 Code also does not provide for procedural safeguards to ensure that signatories do not interpret deceptive content in an overly zealous manner. This is significant when recalling how the European Commission has already observed that signatories have adopted content restrictions on false communications in electoral contexts when implementing commitments under the Codes' first and third pillars.[127] As the 2018 Code does not provide guidance on how signatories should identify and prioritise deceptive communications, it embeds discretion for signatories to diverge from a key ECHR and CFR standard regarding how intermediary measures to restrict misleading content must prioritise content which is intentionally deceptive.[128]

It is further arguable that the 2018 Code enables divergence from ECHR and CFR standards through its lack of guidance on how signatories should identify disinformation which is likely to influence voter engagement. As Chapter Four has identified, the ECtHR and CJEU place emphasis on the relevance that misleading communication is likely to have to the political populace. Particularly where misleading communications are intentionally deceptive, these courts are more likely to identify that content restrictions on misleading information are unlikely to undermine freedom of expression if targeted at deceptive communications which are likely to influence voter choices.[129] EU institutions developed the 2018 Code out of explicit concerns surrounding co-ordinated influence in European elections by Russian state actors.[130] As Galantino observes, however, the Code provides no guidance surrounding how its

[125] ibid.
[126] 2018 Code pg.1.
[127] See section 5.2.2.
[128] See Chapter 4 section 4.4.
[129] ibid.
[130] See section 5.2.1

signatories should 'conceptualise the potential of disinformation to cause public harm' in electoral contexts.[131] It references that 'public harm' is 'intended' to encompass 'threats to democratic political and policymaking processes as well as public goods such as the protection of EU citizens' health, the environment or security.'[132] However, it supplies no interpretive guidance on how signatories should identify disinformation which is likely to influence voter engagement. By failing to place emphasis on how signatories should probe how misleading content could affect voter choice, the 2018 Code encourages signatories to adopt measures to limit disinformation in electoral contexts but fosters broad content restrictions that could frustrate this key standard from ECtHR and CJEU jurisprudence.

This links to the broader problem that 2018 Code signatories have not consistently provided information to the European Commission on their implementation of Code commitments. As Keller and Leerssen highlight, EU legislative proposals encouraging content moderation 'should be informed by empirically grounded assessments of platforms' capacity to comply and the potential unintended consequences of their compliance efforts.'[133] This is a timely observation in the specific context of the 2018 Code. As noted, the Commission has observed a lack of consistency surrounding how signatories have interpreted the Code's terminology and reported measures taken to combat disinformation.[134] Moreover, ERGA has identified inconsistencies surrounding how signatories have self-reported their adopted measures at a 'country specific' level.[135] As section 5.2.2 further observed, these stakeholders have also found that signatories have often reported measures that pre-date the 2018 Code.[136] These observations—indicating a dearth of 'granular' information on how signatories apply commitments—epitomise the 2018 Code's limitations as a self-regulatory instrument.[137] For example, McIntyre highlights how self-regulatory instruments that encourage removal of harmful online content 'generally escape the publicity which would attach to legislation or judicial decisions.'[138] This opacity can make it 'difficult for customers to understand what

[131] Galantino, (n 67) 98.
[132] 2018 Code pg. 1.
[133] Daphne Keller and Paddy Leerssen 'Facts and where to find them: empirical research on internet platforms and content moderation,' in Nathaniel Persily and Joshua Tucker (eds.) *Social Media and Democracy: The State of the Field and Prospects for Reform* (SSRC, 2020) 220-224.
[134] See section 5.2.2.
[135] ibid.
[136] See 5.2.2.
[137] ibid.
[138] TJ McIntyre, 'Child abuse images and cleanfeeds' (n 126) 277-308.

content is being restricted and by whom.'[139] A critical failure of the 2018 Code is that it has not elicited reporting on how signatories have identified—and adopted content restrictions on—online disinformation in political and electoral contexts at the Member State level. This opacity undermines the ability for EU institutions to obtain data points that shed light on whether signatories are implementing commitments in a manner that is consistent with ECtHR and CJEU standards that the Code acknowledges.

The 2018 Code signified the first concrete step in the EU's disinformation policy. The Commission's initial pursuit of voluntary self-regulatory efforts to limit the effects of online disinformation was understandable when considering complex factors at stake in this area. Union institutions have limited competencies in the field of regulating communications that could undermine national democratic processes.[140] As the Commission also acknowledged when developing the 2018 Code, this instrument was novel in that it addressed the spread of lawful communications and applied to a wide range of 'heterogeneous' stakeholders.[141] As this section has argued, however, the Code's voluntary design—and lack of procedural safeguards—creates uncertainty regarding how signatories could adopt content restrictions that could undermine the right to freedom of expression as set out under the ECHR and CFR. A critical observation here is that the 2018 Code expressly references ECtHR and CJEU standards but provides no interpretive guidance on how signatories should restrict access to misleading communications in a manner which adheres to these standards. It must be acknowledged here that EU institutions—in acknowledging the 'shortcomings' and 'inconsistent application' of the 2018 Code—announced a need to 'strengthen' the Code in 2021.[142] The analysis below will consider how EU institutions have sought to achieve this as part of the Digital Services Act (DSA) package.

[139] ibid.
[140] See Ruairí Harrison, 'Tackling Disinformation in Times of Crisis: The European Commission's Response to the Covid-19 Infodemic and the Feasibility of a Consumer-centric Solution,' (2021) 17(3) Utrecht Law Review.
[141] See section 5.3.2.
[142] Commission, 'Guidance on Strengthening the Code of Practice on Disinformation' (Communication) COM (2021) 262 final.

5.3 Disinformation and the Digital Services Act (DSA)

Having assessed the 2018 Code, this chapter now identifies the EU's approach to online disinformation through the Digital Services Act (DSA).[143] Applying human rights principles from ECtHR and CJEU jurisprudence, the sections below will further assess whether the design—and the potential application—of key DSA obligations are compatible with applicable ECHR and CFR standards regarding freedom of expression and free elections.[144] Section 5.3.1 provides a brief overview of the DSA before identifying DSA provisions which have significance for online disinformation. The focus here is on the relevant DSA obligations for intermediaries to limit the spread of misleading—including not necessarily illegal—content. This section also considers DSA mechanisms which are designed to prevent arbitrary removals of online content. Section 5.3.2 then examines the 2022 Code of Practice on Disinformation. The focus here is on how the 2022 Code updates and expands the voluntary commitments for signatories to combat online disinformation. This discussion also considers how the 2022 Code complements the DSA. Section 5.3.3 then assesses how relevant DSA provisions could be used to limit the spread of online disinformation while maintaining compatibility with the right to freedom of expression and free elections under applicable ECHR and CFR standards.[145]

5.3.1 Understanding Intermediary Responsibilities for Online Disinformation under the DSA

Before examining the relevance of the EU's DSA for online disinformation, it is necessary to first consider the general significance of the DSA. The DSA was adopted and published in the official EU journal on the 19th of October 2022.[146] The DSA was developed to harmonise and update the 'rules for addressing illegal content online' and the 'liability exemptions' which have affected intermediaries operating in the EU's internal market since the introduction of the E-Commerce Directive in 2000.[147] Husovec and Laguna observe that the DSA 'preserves and upgrades the liability exemptions for online intermediaries that exist in the European

[143] Hereinafter 'DSA.'
[144] Drawing from Chapters 2, 3, and 4.
[145] Drawing from Chapter 4 key interpretive principles from ECtHR and CJEU jurisprudence.
[146] European Parliament, 'Digital Services: Landmark rules adopted for a safer, open online environment' (2022) <https://www.europarl.europa.eu/news/en/press-room/20220701IPR34364/digital-services-landmark-rules-adopted-for-a-safer-open-online-environment> accessed 13 August 2023.
[147] See explanatory memorandum, DSA.

framework since 2000.'[148] The DSA additionally 'imposes due diligence obligations concerning the design and operation of' intermediary services in the EU to 'ensure a safe, transparent and predictable online ecosystem.'[149] This is linked to the explicit acknowledgment in the DSA regarding the 'new risks and challenges' spawned by the 'digital transformation' and 'increased use' of intermediary services.[150] The DSA consists of five chapters:

I. General provisions.

II. Liability of providers of intermediary services.

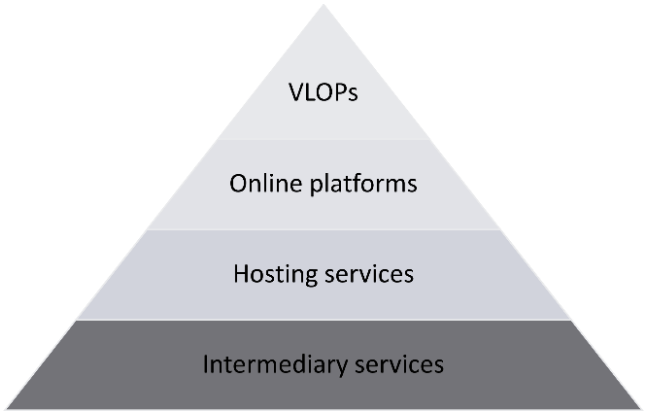
III. Due diligence obligations for a transparent and safe online environment.

IV. Implementation, cooperation, sanctions, and enforcement.

V. Final provisions.

It is important to acknowledge here that the DSA distinguishes between different intermediaries according to their size. Introducing layered 'asymmetric' obligations in a 'tiered' manner, the DSA applies its most extensive obligations for Very Large Online Platforms (VLOPs).[151] Conversely, it sets out its least extensive obligations for 'providers of intermediary services' which sit at the bottom tier of providers under the DSA framework.[152]

Figure 11. Intermediaries under the DSA framework[153]



[148] Martin Husovec and Irene Roche Laguna, 'Digital Services Act: A Short Primer' in Husovec and Roche Laguna (eds.) *Principles of the Digital Services Act* (Oxford University Press, Forthcoming 2023).
[149] ibid.
[150] See DSA (1).
[151] DSA, Art 25-33.
[152] DSA, Art 10-13; Also 'hosting providers' (Articles 15-14) and 'online platforms' (Art 16-24).
[153] Adopted from KU Leuven Centre for Information Technology and Intellectual Property (KULEUVEN) <https://krakenh2020.eu/blog/kraken-marketplace-and-digital-services-act>.

As the sub-sections below will analyse, all of these intermediaries may be subject to DSA obligations that have application to online disinformation. The focus below is not only on DSA provisions which impose liability for intermediaries to remove illegal content but also on DSA obligations for intermediaries to limit the spread of misleading—but not necessarily illegal—online communications. Due to the considerable communicative power that VLOPs—including Meta and Twitter (now X)—hold in ensuring the free flow of information and controlling the spread of online disinformation in political and election contexts, particular focus is on DSA obligations for VLOPs and the potential application of these obligations in the online disinformation context.[154] Further focus is given to mechanisms introduced by the DSA which could be used to prevent the arbitrary removal of lawful online content.

5.3.1.1 Transparency Obligations

The DSA sets out several transparency obligations for intermediaries which have potential application in the online disinformation context. For example, Article 39 DSA introduces 'online advertising transparency' for VLOPs.[155] VLOPs 'that display advertising on their online interfaces' must establish repositories of online political advertisements and maintain these through publicly accessible APIs.[156] Article 39(2) further lists that:[157]

> 2. The repository shall include at least all of the following information:
>
> (a) the content of the advertisement, including the name of the product, service or brand and the subject matter of the advertisement;
>
> (b) the natural or legal person on whose behalf the advertisement is presented;
>
> (c) the natural or legal person who paid for the advertisement, if that person is different from the person referred to in point (b);
>
> (d) the period during which the advertisement was presented;
>
> (e) whether the advertisement was intended to be presented specifically to one or more particular groups of recipients of the service and if so, the main parameters used for that purpose including where applicable the main parameters used to exclude one or more of such particular groups;

[154] DSA Art 34(1) DSA defines VLOPs as platforms providing services 'to a number of average monthly active recipients of the service in the Union equal to or higher than 45 million.'
[155] Art 39 DSA.
[156] ibid.
[157] ibid.

> (f) the commercial communications published on the very large online platforms and identified pursuant to Article 26(2);
>
> (g) the total number of recipients of the service reached and, where applicable, aggregate numbers broken down by Member State for the group or groups of recipients that the advertisement specifically targeted.

Article 39 clarifies that repositories of online political advertisements must not 'contain any personal data of the recipients of the service to whom the advertisement was or could have been displayed.'[158] However, VLOPs must maintain a record of the above-detailed information on political advertisements for 'one year after the advertisement was displayed for the last time on their online interfaces.'[159]

As earlier analysis highlighted, the effectiveness of the 2018 Code of Practice on Disinformation was hindered by the failure of signatories to consistently provide adequate access to data regarding how signatories have addressed online disinformation.[160] Partially informed by this problem, Article 40 DSA requires VLOPs to ensure 'data access and scrutiny.'[161] Specifically, Article 40 requires VLOPs to provide 'access to data that are necessary to monitor and assess compliance with' the DSA.[162] This access is reserved for independent 'vetted researchers' to access data with the 'sole purpose of conducting research that contributes to the identification and understanding of systemic risks' that VLOPs address under the DSA framework.[163] This is significant because—as section (II) will highlight—VLOPs are likely to consider online disinformation as a systemic risk under this framework.

Further important are DSA obligations for intermediaries to provide transparency regarding how their terms of service may inform content removal decisions. Of potential significance in the online disinformation context is Article 14 DSA.[164] This requires 'all 'providers of intermediary services' to provide transparency on 'information on any restrictions that they

[158] ibid.
[159] ibid.
[160] See section 5.2.2.
[161] DSA Art 40.
[162] ibid Art 40(1).
[163] ibid Art 40(4).
[164] DSA Art 16.

impose in relation to' use of their service in their 'terms and conditions.'[165] Specifically, Article 14 requires that this shall include 'information on any policies, procedures, measures and tools used for the purpose of content moderation.'[166] This extends to content moderation involving 'algorithmic decision-making and human review.'[167] Information relating to such policies—insofar as they may be used as the basis for 'any restrictions' on the use of services—must be 'set out in clear and unambiguous language and shall be publicly available in an easily accessible format.'[168] As Quintais et al. observe, Article 14 does 'not only apply to illegal content' but also to 'harmful or undesirable content as defined in terms and conditions of a provider of intermediary services.'[169] However, this provision does not clarify whether 'content moderation' leading to content 'restrictions' merely involves content removal or includes actions to reduce content visibility by 'ranking, recommending or demonetising content.'[170] This ambiguity is significant because Article 14 also requires that terms and conditions must be enforced in a 'diligent, objective, and proportionate manner' with 'due regard' to 'applicable fundamental rights' under the CFR.[171] This is potentially significant in the disinformation context as it appears to compel 'all providers of intermediary services' to apply their own terms and conditions with due regard for 'European fundamental rights standards.'[172] This is suggested where Recital 45 DSA states that Article 14 attempts to prevent 'unfair or arbitrary outcomes' regarding how intermediaries enforce content moderation decisions.[173] While Article 14 explicitly references the right to freedom of expression under the CFR, it only instructs intermediaries to have 'due regard' to CFR rights.[174] Critiquing this language, Appleman et al. posit that Article 14 offers 'little to no guidance' on whether this extends an obligation for intermediaries to have 'due regard' for the 'extensive case law of the ECtHR.'[175]

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[165] DSA Art 12(1).
[166] ibid.
[167] ibid.
[168] ibid.
[169] João Pedro Quintais and others, 'Article 16 DSA: Will platforms be required to apply EU fundamental rights in content moderation decisions?' (DSA Observatory, 31 May 2021) <https://dsa-observatory.eu/2021/05/31/article-12-dsa-will-platforms-be-required-to-apply-eu-fundamental-rights-in-content-moderation-decisions/> accessed 13 August 2023.
[170] ibid
[171] ibid.
[172] João Pedro Quintais and others, 'Using terms and conditions to apply fundamental rights to content moderation,' (2022) 31(1) German Law Journal.
[173] DSA recital 45.
[174] DSA article 14(2).
[175] Quintais and others, (n 187).

5.3.1.2 Addressing Disinformation under the DSA's Systemic Risk and Crisis Mechanism

Crucial in the online disinformation context is the DSA's due diligence obligations for VLOPs to identify and mitigate 'systemic risks.'[176] Article 34 requires that VLOPs 'shall identify, analyse and assess' the emergence of 'any significant systemic risks stemming from the functioning and use made of their services in the Union.'[177] Article 34 lists that the assessment of such risks by VLOPs 'shall be specific to their services and proportionate to the systemic risks' in light of the 'severity and probability' of risks.[178] However, it lists that risks 'shall include' the following:

(a) the dissemination of illegal content through their services;

(b) any actual or foreseeable negative effects for the exercise of fundamental rights, in particular the fundamental rights to human dignity enshrined in Article 1 of the Charter, to respect for private and family life enshrined in Article 7 of the Charter, to the protection of personal data enshrined in Article 8 of the Charter, to freedom of expression and information, including the freedom and pluralism of the media, enshrined in Article 11 of the Charter, to non-discrimination enshrined in Article 21 of the Charter, to respect for the rights of the child enshrined in Article 24 of the Charter and to a high-level of consumer protection enshrined in Article 38 of the Charter;

(c) any actual or foreseeable negative effects on civic discourse and electoral processes, and public security;

(d) any actual or foreseeable negative effects in relation to gender-based violence, the protection of public health and minors and serious negative consequences to the person's physical and mental well-being.

Article 34 does not expressly reference online disinformation. However, it references 'any actual or foreseeable negative effect' on 'civic discourses, electoral processes and public

[176] See DSA Chapter III Art 34.
[177] ibid Art 34(4)
[178] ibid Art 34(1).

security.'[179] Article 34 also states that—when identifying risks—VLOPs must 'also analyse whether and how the risks pursuant to paragraph 1 are influenced by intentional manipulation of their service, including by inauthentic use or automated exploitation of the service.'[180] Clarifying this, Recital 57 DSA explicitly references 'the creation of fake accounts, the use of bots, and other automated or partially automated behaviours' as systemic risks under Article 34.[181] It is further notable that Article 34 identifies risks which entail 'any negative effects' on 'the exercise' fundamental rights.[182] As EU institutions have already identified disinformation as a threat to fundamental rights, dissemination of such content could be considered a risk under this provision's interpretation.[183] Finally, Article 34 addresses 'the dissemination of illegal content' as a risk for VLOPs to identify.[184] As section (III) will consider, this is significant in certain contexts because the DSA defines illegal content as including misleading content which has been made illegal by several EU Member States.[185]

Upon identifying systemic risks, VLOPs must take measures to mitigate these risks. Article 35 DSA sets out requirements for VLOPs to adopt 'effective mitigation measures' that are 'tailored' to risks identified under Article 34.[186] Article 35 does not provide an exhaustive list of 'effective mitigation measures.'[187] However, Article 35it details that such measures 'may include':

(a) adapting the design, features or functioning of their services, including their online interfaces;

(b) adapting their terms and conditions and their enforcement;

(c) adapting content moderation processes, including the speed and quality of processing notices related to specific types of illegal content and, where appropriate, the expeditious removal of, or the disabling of access to, the content notified, in particular

[179] ibid.
[180] ibid Art 34(2).
[181] DSA recital 57.
[182] See section 5.3.3.
[183] See section 5.2.1.
[184] DSA Art 34(1).
[185] Section (III) will discuss this.
[186] DSA Art 35(1).
[187] ibid.

in respect of illegal hate speech or cyber violence, as well as adapting any relevant decision-making processes and dedicated resources for content moderation;

(d) testing and adapting their algorithmic systems, including their recommender systems;

(e) adapting their advertising systems and adopting targeted measures aimed at limiting or adjusting the presentation of advertisements in association with the service they provide;

(f) reinforcing the internal processes, resources, testing, documentation, or supervision of any of their activities in particular as regards detection of systemic risk;

(g) initiating or adjusting cooperation with trusted flaggers in accordance with Article 22 and the implementation of the decisions of out-of-court dispute settlement bodies pursuant to Article 21;

(h) initiating or adjusting cooperation with other providers of online platforms or of online search engines through the Codes of Conduct and the crisis protocols referred to in Articles 45 and 48 respectively;

(i) taking awareness-raising measures and adapting their online interface in order to give recipients of the service more information;

(j) taking targeted measures to protect the rights of the child, including age verification and parental control tools, tools aimed at helping minors signal abuse or obtain support, as appropriate;

(k) ensuring that an item of information, whether it constitutes a generated or manipulated image, audio or video that appreciably resembles existing persons, objects, places or other entities or events and falsely appears to a person to be authentic or truthful is distinguishable through prominent markings when presented on their online interfaces, and, in addition, providing an easy to use functionality which enables recipients of the service to indicate such information.

It is notable that Article 35 explicitly references that VLOPs may 'adapt content moderation practices' as a means of mitigating risks.[188] However, the broadness of the above-listed measures reflects the observation by Fahy et al. that Articles 34 and 35 DSA provide VLOPs with 'considerable leeway' to identify and mitigate risks.[189] This is evident where Article 34 states that VLOPs must identify risks which are 'specific to their services.'[190] Moreover, Article 35 instructs that VLOP 'mitigation measures' shall be 'tailored to the specific systemic risks identified pursuant to Article 34.'[191] Notwithstanding this discretion for VLOPs, Article 35(2) provides scope for the Commission to annually 'publish comprehensive reports' that highlight 'the most prominent and recurrent systemic risks' reported by VLOPs.[192] Article 35(3) further empowers the Commission to publish a set of 'best practices' for VLOPs to 'mitigate' these recurrent risks.[193] Importantly, however, VLOPs are not required to follow these best practices. The key mechanism for assessing how VLOPs comply with DSA obligations to identify and manage risks is the 'independent audit' mechanism under Article 37.[194] This provision requires VLOPs to subject themselves to yearly independent audits to assess their compliance with Articles 34 and 35.[195] Independent auditors—if identifying 'negative' elements of VLOP compliance—can issue 'operational recommendations on specific measures 'to achieve compliance with the DSA's 'systemic risk' provisions.[196] Importantly, however, this does not set out an explicit requirement for VLOPs to adhere to such recommendations. This reflects Leerssen's observation that the independent auditing under Article 37 generally 'revolves around self-assessment.'[197]

While VLOPs appear to have discretion to identify and mitigate online disinformation as a risk under the DSA, the true extent of this discretion is currently uncertain. For example, Article 35 states that the measures taken by VLOPs to address risks may include measures aimed at 'initiating or adjusting cooperation with' the DSA's 'Codes of Conduct and the crisis protocols

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[188] ibid 35(1) c.
[189] Ronan Fahy and Others, 'The perils of legally defining disinformation.' (2021) 10(4) Internet Policy Review.
[190] DSA Art 34(1).
[191] DSA Art 35(1).
[192] ibid Art 35(2).
[193] ibid.
[194] DSA Art 37.
[195] ibid Art 37(1).
[196] ibid Art 37(4).
[197] Paddy Leerssen, 'Counting the days: what to expect from risk assessments and audits under the DSA – and when?' (DSA Observatory Blog, 30 January 2023) < https://dsa-observatory.eu/2023/01/30/counting-the-days-what-to-expect-from-risk-assessments-and-audits-under-the-dsa-and-when/ accessed 13 August 2023.

referred to in Articles 45 and 48 respectively.'[198] Article 45 DSA empowers the European Commission to 'encourage and facilitate the drawing up of voluntary Codes of Conduct at Union level' which are intended to address 'specific challenges of tackling different types of illegal content and systemic risks.'[199] Article 45 provides a basic framework for VLOPs to participate in these Codes of Conduct and to 'take specific risk mitigation measures, as well as a regular reporting framework on any measures taken and their outcomes.'[200] While these Codes of Conduct are voluntary, Recital 104 DSA states that the 'refusal without proper explanation' of VLOPs to 'participate in the application of such a Code of Conduct could be taken into account, where relevant, when determining' compliance of VLOPs to prevent systemic risks under the DSA.[201] The significance of this for online disinformation will be considered in section 5.3.2.

Article 35 DSA also references that VLOPs may address risks to coordinate with the 'crisis protocols' under Article 48 DSA.[202] Article 48 empowers the Commission to 'initiate the drawing up' of 'voluntary crisis protocols for addressing crisis situations.'[203] It is currently unclear whether specific crisis protocols will be drawn up regarding how VLOPs should address online disinformation during elections in times of crises. These voluntary protocols are only intended to be developed in 'extraordinary circumstances affecting public security or public health.'[204] However, Recital 108 clarifies that the Commission 'may initiate the drawing up of voluntary crisis protocols to coordinate a rapid, collective and cross-border response' to crises.[205] Significantly, this also references crisis protocols as potentially being developed by the Commission 'in addition to the crisis response mechanism' for VLOPs.[206] Article 36—which separately establishes the 'crisis response mechanism'—empowers the European Commission to temporarily identify 'crisis situations' related to the EU's 'public security' or 'public health.'[207] Article 36 also empowers the Commission to require that VLOPs 'identify and apply specific, effective and proportionate measures, such as any of those provided for in

[198] DSA Art 35(1) h.
[199] DSA Art 45(1) DSA.
[200] ibid Art 45(2).
[201]DSA recital 104.
[202] DSA Art 35(1) h.
[203] DSA Art 48(1).
[204] ibid.
[205] DSA recital 108.
[206] ibid.
[207] DSA Art 36(1); for a three-month period.

Article 35(1)' as a means of responding to temporary crises.[208] Thus, while VLOPs compliance with crisis protocols under Article 48 is voluntary, it appears possible for the Commission to require VLOPs to take measures against the spread of online disinformation if the Commission identifies a need for such measures as part of a temporary crisis situation under Article 36.

This raises an important question regarding whether the DSA could encourage VLOPs to respond to online disinformation in crises without providing detailed guidance on how such responses could be rights protective. While Article 36 states that the Commission shall 'aim to ensure' that the adoption of such protocols avoids 'any negative effects on the exercise of fundamental rights' when identifying crises under Article 36, no further guidance is provided on this.[209]

5.3.1.3 Disinformation as Illegal Content Under the DSA

As noted, the DSA updates the EU framework for intermediary liability for illegal content. Before focusing on intermediary liability provisions under the DSA, it is first necessary to clarify that Article 3 DSA defines 'illegal content' as:

> Any information, which, in itself or by its reference to an activity, including the sale of products or provision of services is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law.[210]

Recital 12 of the DSA further clarifies that 'it is immaterial whether the illegality of the information or activity results from Union law or from national law that is consistent with Union law and what the precise nature or subject matter is of the law in question.'[211] Importantly, this means that misleading communications which are illegal at the domestic level are to be considered illegal under the DSA. Similar to the E-Commerce Directive, the DSA does not impose any 'general monitoring obligation' for any intermediary to 'seek facts or circumstances indicating illegal activity' on their services.[212] However, the DSA includes several obligations for intermediaries to remove illegal content upon notification from users.

[208] ibid.
[209] DSA Art 36(3) a.
[210] DSA Art 3(g).
[211] ibid.
[212] DSA Art 7.

For example, Article 9 enables Member State judicial authorities to issue specific orders for 'providers of intermediary services' to 'act against' content reported by users as 'illegal.'[213] This provision further requires intermediaries to inform national authorities on the outcome of associated removal decisions 'without undue delay.'[214] Moreover, Article 16 requires providers of hosting services to adopt mechanisms that enable 'any individual or entity to notify them of the presence on their service of specific items of information that the individual or entity considers to be illegal content' and to adopt removal decisions in a 'timely, diligent, and objective manner.'[215] The application of these notice and action obligations is strictly limited to illegal content.

Significantly, however, illegal content under Article 3 DSA includes content which is illegal in Member States. This may involve a diverse range of Member State laws that make the dissemination of misleading communications unlawful in electoral contexts. Illustrative here is France's 2017 law prohibiting the 'manipulation of information' during elections.[216] This legislation enables judges to order immediate suspensions of false information online that is 'likely to affect the sincerity of the ballot.'[217] Poland's Local Elections Act—which Chapter Three has already examined—empowers courts to order restrictions on the dissemination of 'untrue information' within a 24 period during election periods.[218] A further Member State law—which Chapter Six will examine—is Ireland's Electoral Reform Act 2022.[219] This legislation enables courts to order restrictions on access to online communications containing 'any false or misleading online electoral information that 'may cause public harm' and where 'inference arises that it 'was created or disseminated to deceive.'[220] Importantly, however, this law also applies 'whether or not the information was created or disseminated with knowledge of its falsity or misleading nature or with any intention to cause such harm.'[221] Chapter Six will analyse Ireland's Electoral Reform Act 2022 in detail.

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[213] DSA Art 9.
[214] ibid.
[215] DSA Art 16.
[216] French Law no. 2018–1202 on the 'fight against the manipulation of information' See official text here <https://www.assemblee-nationale.fr/dyn/15/textes/l15t0190_texte-adopte-provisoire.pdf>
[217] ibid.
[218] Law of 16 July 1998 on Elections to Municipalities, District Councils and Regional Assemblies, Section 72, Local Elections Act.
[219] See Electoral Reform Act 2022 <https://www.oireachtas.ie/en/bills/bill/2022/37/>
[220] ibid s 144.
[221] ibid.

Further notable are several laws which Member States have recently introduced to criminalise the dissemination of falsehoods. In 2020, Hungary introduced criminal offences prohibiting the publication of 'distorted' statements known 'to be false or with a reckless disregard for its truth…with intent to obstruct of prevent the effectiveness of' public health measures.[222] Very similar provisions were introduced in Romania during the Covid-19 pandemic. This involved a Presidential Decree which gave extensive powers for executive authorities to identify 'false news' and order restrictions on access to such information on multiple websites.[223] Slovakia's criminal code contains offences for disseminating information that 'deliberately creates the danger of serious concerns among the population of a certain location.'[224] Moreover, the Czech Criminal Code criminalises the dissemination of false information 'intentionally causing threats' to a portion of the population by 'spreading alarming news that is untrue.'[225] Significantly, many of these laws are not only criminal but also engage fields—such as national security and public order—where EU competencies are limited. Observing this, Van Hoboken describes a 'concerning' trend towards a 'pseudo-militarization' of disinformation policy in Member States.[226]

5.3.1.4 Potential Safeguards Against Arbitrary Content Removal Under the DSA

Recalling earlier analysis, a key shortcoming in the EU's self-regulatory approach to online disinformation was the lack of any procedural safeguards against arbitrary removal of lawful content in the 2018 Code. It is therefore necessary to highlight DSA mechanisms which enable additional layers of scrutiny on how intermediaries adopt restrictions on content containing online disinformation. For example, Article 17 requires 'providers of hosting services' to issue a 'statement of reasons' to users affected by content removal decisions.[227] Importantly, Article 17 not only concerns removal of illegal content but also content allegedly incompatible with these providers' terms and conditions.[228] Article 17 requires these providers to 'inform' users

[222] See s 337(2) of Hungary's Criminal Code <4c358dd22.pdf (refworld.org)>
[223] Decree no. 195 (2020) on the establishment of the state of emergency, Art. 54.
[224] Section 361 Slovak Criminal Code.
[225] Section 357 Czech Criminal Code.
[226] Joris Van Hoboken and Ronan Fahy. 'Regulating Disinformation in Europe: Implications for Speech and Privacy,' (2021) 6 UC Irvine J. International Transnational & Comparative Law.
[227] DSA Art 17.
[228] ibid.

of 'clear and specific' reasons which form the basis for decisions to 'remove or disable access to specific items of information.'[229] Such reasons may include any 'facts and circumstances relied on in taking the decision' and reference to the 'ground relied on' for removing 'allegedly illegal content' or 'alleged incompatibility of the information with the terms and conditions of the provider.'[230]

Article 17 further references that providers of hosting services should direct users to 'information on the possibilities for redress available' through 'internal complaint-handling mechanisms' and 'out-of-court dispute settlement' mechanisms which the DSA establishes.[231] Article 20 states that online platforms 'shall provide' internet users with 'access to an effective internal complaint-handling system that enables them to lodge complaints' to contest platform decisions to remove content which the platform has deemed as 'illegal' or 'incompatible with its terms and conditions.'[232] This not only pertains to content removal but any decisions to 'restrict visibility' of content.[233] Article 20 further requires platforms to handle complaints in a 'timely, non-discriminatory, diligent, and non-arbitrary manner.'[234] Where complaints contain 'sufficient grounds' for platforms 'to consider that' content removal decisions were unjustified, platforms 'shall reverse' decisions 'without undue delay.'[235] Individuals whose complaints are unresolved may proceed to avail of the 'out of court dispute settlement' mechanism under Article 21.[236] Article 21 empowers individuals to select any 'out-of-court dispute settlement body that has been certified' under the DSA in order to 'resolve disputes relating to' decisions on content restrictions.[237] This requires individuals and platforms to 'engage, in good faith, with the selected certified out-of-court dispute settlement body with a view to resolving the dispute.'[238] Article 21 clarifies that platforms 'may refuse to engage with such an out-of-court dispute settlement body if a dispute has already been resolved concerning the same information and the same grounds of alleged illegality or incompatibility of

[229] ibid.
[230] ibid Art 17(e). This does not apply 'where the information is deceptive high-volume commercial content' (such as spam).
[231] DSA Art 17(3).
[232] DSA Art 20(1).
[233] ibid Art 20(1).
[234] ibid Art 20(4).
[235] ibid Art 20(5).
[236] DSA Art 21.
[237] ibid Art 21(1).
[238] ibid Art 21(2).

content.'[239] Moreover, these dispute settlement bodies have no 'power to impose a binding settlement of the dispute on the parties.'[240] Arguably, however, Article 21 provides a welcome mechanism for scrutinising content removal decisions. Important here is that the out-of-court body must have 'necessary expertise in relation to the issues arising in one or more particular areas of illegal content' or 'the application and enforcement of terms and conditions.'[241] This is also reflected in the DSA's introduction of 'trusted flaggers' under Article 22.[242] This provision requires online platforms to give priority to notices—relating to notice and action mechanisms under Article 16—submitted by 'trusted flaggers.'[243] Trusted flaggers are individuals who act 'within their designated area of expertise' when submitting notices for removal of illegal content.[244] They must have 'particular expertise and competence for the purposes of detecting, identifying and notifying illegal content.'[245] They must also publish annual 'detailed reports on notices submitted in accordance with Article 16.'[246] These reports must include information on illegal content that trusted flaggers have identified and the associated actions taken to remove such content by online platforms.[247]

Central to these mechanisms is the role of Digital Service Coordinators (DSCs).[248] As Article 49 outlines, these are 'competent national authorities' that Member States 'shall designate' with responsibilities for 'all matters relating to supervision and enforcement of' the DSA.[249] DSCs are primarily responsible for ensuring DSA implementation in their own Member State. However, all DSCs are responsible for 'ensuring coordination' of the DSA at the national level 'throughout the Union.'[250] The role of DSCs has potentially vital applications in the context of DSA obligations which this chapter has examined. For example, DSCs have powers to award any entity with the status of 'trusted flagger' in connection with Article 22.[251] DSCs are also entrusted to 'certify' out of court dispute settlement bodies in connection with Article 21.[252]

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[239] ibid.
[240] ibid.
[241] ibid Art 21(3).
[242] DSA Art 22.
[243] ibid Art 22(1).
[244] ibid.
[245] ibid Art 22(2).
[246] ibid.
[247] ibid Art 22(3).
[248] Hereinafter 'DSCs.'
[249] DSA Art 49(2).
[250] ibid.
[251] Provided that this entity meets criteria on relevant expertise and independence in accordance with Art 22(2).
[252] DSA Art 21(4).

Moreover, DSCs can also revoke these certifications if they deem that trusted flaggers or out-of-court bodies no longer fulfil criteria on their competence and independence.[253] Alongside these functions, DSCs have advisory roles. Under Article 35, DSCs assist the European Commission when issuing guidelines 'in relation to specific risks, in particular to present best practices and recommend possible measures, having due regard to the possible consequences of the measures on fundamental rights enshrined in the Charter of all parties involved.'.[254] Under Article 36, DSCs make recommendations regarding whether the Commission pursues the DSA's crisis protocol mechanism.[255] Under Article 45, DSC's not only assist the Commission in the 'drawing up of voluntary Codes of Conduct at the Union level' but also serve as a national point of contact for participants in such codes to report on 'any actions taken and their outcomes' when 'giving effect' to such codes.[256] In practice, DSCs therefore have a potentially important role in advising the European Commission on how VLOPs take steps to counter online disinformation.

5.3.2 The 2022 Code of Practice on Disinformation

While the above-discussed DSA provisions have relevance in the online disinformation context, it is also important to examine how the DSA is complemented by the 2022 Code of Practice on Disinformation.[257] Spurred by 'significant shortcomings' of the 2018 Code, the European Commission communicated in 2021 that a 'strengthening' of this instrument was required.[258] The Commission published a revised Code in 2022 and described this as a 'co-regulatory backstop' to address shortcomings from the 2018 Code 'in view of the adoption of the proposed DSA.'[259] The link between the 2022 Code and the DSA has particular significance for VLOPs. The 2022 Code explicitly states that the revised Code 'aims to become a Code of Conduct under Article 45 of the DSA.'[260] It further states that 'signing up to all commitments relevant and pertinent to their services should be considered as a possible risk mitigation

[253] ibid Art 21(7); Art 22(7).
[254] DSA Art 35(3).
[255] As part of its role on the European Board for Digital Services (Art 61-63).
[256] DSA Art 45(3).
[257] Hereinafter '2022 Code.'
[258] Commission, 'Guidance on Strengthening the Code of Practice on Disinformation' (Communication) COM (2021) 262 final.
[259] Hereinafter 'the 2022 Code'; See 2022 Code <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation>
[260] 2022 Code preamble.

measure' for VLOPs in alignment with Article 35 DSA.[261] This reflects the stated desire of the Commission to ensure that the EU's continued encouragement for intermediaries to voluntarily address online disinformation through self-regulation are made 'credible' by linking the 2022 Code to the DSA as part of the EU's 'toolbox for fighting the spread of disinformation.'[262]

The 2022 Code sets out more extensive commitments than the 2018 iteration and applies to a wider range of signatories.[263] For example, signatories of the 2022 Code now include interactive platforms such as TikTok and Twitch.[264] In outlining renewed commitments, the Commission not only aims to promote greater consistency in the Code's application but also to devise 'an appropriate monitoring mechanism' to assess this through 'key performance indicators (KPIs).'[265] Importantly, several key updates in the 2022 Code are designed to fix shortcomings that the European Commission identified in the 2018 Code.

As noted in section 5.2.2, the Commission and ERGA reported inconsistencies on how signatories implemented 2018 Code commitments to prevent disinformation from being disseminated through political advertising.[266] To promote greater consistency in how signatories achieve this, the 2022 Code sets out a more precise—although still voluntary—framework for signatories to implement Code objectives. For example, the revised Code sets out renewed sub-commitments for signatories to:

- Ensure efficient labelling of political or issue ads.
- Develop a common understanding of political and issue advertising.
- Develop verification commitments for political or issue ads.
- Develop political or issue ad repositories and minimum functionalities for application programming interfaces (APIs) to access political data.[267]

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[261] ibid.
[262] See Commission, 'Disinformation: Commission welcomes the new stronger and more comprehensive Code of Practice on disinformation' 16 June 2022.
[263] The 2018 Code is 12 pages with 15 commitments; the 2022 Code is 48 pages with 44 commitments.
[264] 'Signatories of the 2022 Strengthened Code of Practice on Disinformation' (16 June 2022) <https://digital-strategy.ec.europa.eu/en/library/signatories-2022-strengthened-code-practice-disinformation> accessed 13 August 2023.
[265] Commission, 'Guidance on Strengthening the Code of Practice on Disinformation' (Communication) COM (2021) 262 final.
[266] See section 5.3.3.
[267] 2022 Code pg.10.

Notable here is the 2022 Code's introduction of new commitments for signatories to ensure 'minimum functionalities' for APIs and political ad repositories.[268] This is a specific area where the Commission highlighted inconsistencies in how signatories of the 2018 Code provided access to 'searchable information' and targeting criteria of published political advertisements.[269] Addressing these inconsistencies, the revised Code instructs signatories to include granular data on APIs regarding 'the number of impressions delivered, the audience criteria used to determine recipients,' and 'geographical areas' where political advertisements receive high engagement.[270] From the perspective of VLOP online advertising transparency obligations under the DSA, these commitments under the 2022 Code will complement these DSA transparency obligations with commitments for VLOPs to monitor and limit the spread of online disinformation through online political advertisements.

Of further relevance are the 2022 Code's commitments for signatories to protect 'integrity' of platform services and combat 'manipulative behaviour.'[271] The revised Code retains this objective but introduces new sub-commitments to:

- Develop a common understanding of 'impermissible manipulative behaviour.'
- Introduce transparency obligations for AI systems.
- Ensure co-operation and transparency.[272]

Through these renewed sub-commitments, the Commission has envisaged that the 2022 Code will 'ensure a consistent approach' in how signatories identify 'impermissible manipulative behaviour' across their services.[273] Unlike the 2018 Code, the 2022 Code lists a prospective—although non-exhaustive—range of behaviours that can be considered impermissibly manipulative. These include:

- Creation and use of fake accounts and bot-driven amplification.
- Hack and leak operations.
- Impersonation and malicious deep fakes.

[268] ibid.
[269] 2018 Code pg. 9.
[270] ibid pg.13.
[271] ibid pg.15.
[272] ibid pg.17.
[273] ibid.

- Non-transparent paid messages or promotion by influencers.
- The purchase of fake engagements.
- Use of accounts that participate in coordinated inauthentic behaviour.

Arguably informed by the variations in how 2018 Code signatories previously implemented measures to combat manipulative behaviour, the 2022 Code places more explicit emphasis on the need for 'cross platform' co-operation in this field.[274] For example, signatories are not only encouraged to combat manipulative behaviour on their platforms but also to 'proactively' engage with other platforms when identifying potential 'cross-platform influence operations.'[275]

The Commission has stated that the 2022 Code aims to provide an 'appropriate monitoring mechanism' supported by the introduction of 'key performance indicators (KPIs).'[276] This reflects a criticism raised by the Multi-Stakeholder Forum on Disinformation when providing feedback on the initial 2018 Code.[277] Preceding the development of the 2018 Code, this forum expressed concerns that the 2018 Code 'lacked quantifiable KPIs' as a 'mechanism' to measure compliance.[278] Addressing this perceived omission, the 2022 Code introduces Qualitative Reporting Elements (QREs) and Service Level Indicators (SLIs) to measure signatory implementation of 2022 Code commitments.[279] For example, signatories will identify specific policies adopted 'to implement' commitments to 'combat manipulative behaviour' and provide 'metrics to estimate the penetration and impact that e.g. fake/inauthentic accounts have on genuine users.'[280] Moreover, signatories that commit to maintaining minimal functionalities of public APIs and ad repositories are encouraged to 'detail the availability and features of APIs or other interfaces' and provide 'quantitative information on the usage of the APIs such as

[274] ibid.
[275] ibid.
[276] 2022 Code pg. 1.
[277] Commission, 'Meeting of the Multi-Stakeholder Forum on Disinformation' (11 July 2018) <https://digital-strategy.ec.europa.eu/en/library/meeting-multistakeholder-forumdisinformation> accessed 12 August 2023.
[278] Commission, 'Minutes, Fourth Meeting of the Multi-Stakeholder Forum on Disinformation' (17 September 2018).
[279] QREs are specific policies that platforms implement. SLIs are quantitative details revealing implementations of policies reported under the QRE. Generally, an SLI is ' a carefully defined quantitative measure of some aspect of the level of service that is provided (including request latency-how long it takes to return response to requests).
[280] 2022 Code pg.16.

monthly usage.'[281] Further commitments instruct platforms to quantify engagement of genuine users with 'inauthentic' content during election periods.[282] Crucially, the 2022 Code states that platforms should provide information surrounding various QREs and SLIs in a manner that details measures adopted at the Member State level. Signatories themselves have discretion to identify relevant criteria under QREs and SLIs in a manner that is 'proportionate and appropriate' to their size and range of services offered.[283]

A key shortcoming of the 2018 Code lay in failures of signatories to consistently provide adequate access to information to third party researchers under the 2018 Code's fourth and fifth pillars.[284] To address this, the 2022 Code endorses proposals from the European Digital Media Observatory (EDMO) to develop a Code of Conduct on Access to Platform Data.[285] The revised Code details new commitments for signatories to provide access to 'non-personal and anonymised data' to researchers for disinformation 'research purposes.'[286] Relatedly, signatories commit to provide 'vetted researchers with access to data necessary to undertake research on disinformation by developing, funding, and cooperating with an independent, third-party body that can vet researchers and research proposals.'[287] The 2022 Code explicitly states that signatories 'will align the procedures to vet researchers' as such procedures 'may emerge under the framework' of Article 40 DSA.[288] Signatories further commit to co-operate with 'an independent, third-party body' that will assist in developing a 'governance structure' for accessing data that requires 'additional scrutiny.'[289] This attempts to not only ensure that adequate access is given to 'vetted researchers' in alignment with the DSA but also that any complementary data sharing framework is compliant with 'applicable' EU law such as the GDPR.[290] This development—widely encouraged by academic commentators—reflects an attempt to rectify failures regarding how platforms enable researchers to access crucial data

[281] ibid pg. 14.
[282] ibid pg. 13.
[283] ibid pg. 22.
[284] See section 5.2.3.
[285] 2022 Code pg.26.
[286] ibid pg. 28.
[287] ibid.
[288] ibid.
[289] ibid.
[290] ibid pg. 29.

points which shed light on European disinformation campaigns and associated platform actions.[291]

The 2022 Code—mirroring its 2018 predecessor—references that signatories should not undermine the right to freedom of expression under the ECHR and CFR when operationalising Code commitments. For example, the revised Code states that signatories should:

> Strictly respect freedom of expression and include safeguards that prevent their misuse, for example, the censoring of critical, satirical, dissenting, or shocking speech. They should also strictly respect the European Commission's commitment to an open, safe, and reliable Internet.[292]

Furthermore, the 2022 Code retains language from the 2018 Code stating that signatories should be 'mindful' of the 'delicate balance that must be struck between' the right to freedom of expression and 'effective action to limit the spread and impact of otherwise lawful content.'[293] Notably, however, the 2022 Code provides no specific clarification on how signatories must achieve the Code's objectives in a manner that ensures protection of ECHR and CFR rights.[294] Further notable is that the 2022 Code appears to expand the 2018 Code's definition of disinformation by highlighting that the notion of disinformation includes 'misinformation.'[295] Adopting terminology from the Commission's European Democracy Action Plan (EDAP), the 2022 Code defines that disinformation 'is considered to include misinformation, disinformation, information influence operations and foreign interference in the information space.'[296] This inclusion of misinformation is significant because—as the 2022 Code highlights—the EDAP defines misinformation as 'false or misleading content shared without harmful intent though the effects can be still harmful, (e.g. when people share false information with friends and family in good faith).'[297] The 2022 Code also states that 'impermissible manipulative behaviour' may encompass misinformation as defined in this

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[291] See Axel Bruns, 'After the 'APIcalypse': Social media platforms and their fight against critical scholarly research' (2019) 22(11) Information, Communication & Society 1544-1566.
[292] 2022 Code preamble.
[293] ibid pg.20.
[294] ibid pg.4.
[295] ibid pg. 15.
[296] 2022 Code preamble.
[297] ibid.

manner.[298] This reflects how the 2022 Code references the ECHR and CFR—and cautions against arbitrary removal of lawful content—but retains the 2018 Code's vagueness on how signatories should adhere to the relevant standards for online disinformation under the ECHR and CFR systems.

As this section has considered, the 2022 Code sets out more specific commitments regarding how signatories adopt measures to combat the spread of online disinformation. While compliance with the 2022 Code remains voluntary, it is notable that voluntary commitments under the revised Code appear to complement the DSA. This is not only apparent in how the 2022 is sets out renewed commitments for signatories but also in how the Code provides a framework for VLOPs to identify and mitigate disinformation as a systemic risk under the DSA. Having analysed the 2022 Code alongside that substantive DSA provisions which have likely application to online disinformation, the focus now shifts to the extent to which current EU's approaches to online disinformation are compatible with ECHR and CFR standards regarding freedom of expression and free elections. [299]

5.3.3 Assessing DSA Compatibility with ECtHR and CJEU Human Rights Standards for Online Disinformation

This chapter has thus far examined key obligations under the EU's DSA package which have potential application in the online disinformation context. It is now necessary to assess how these DSA obligations may ensure compatibility with—or undermine—the right to freedom of expression and the right to free elections as set out under the ECHR and CFR.[300] To illustrate this, this section considers the design—and the potential application—of the EU's DSA in light of applicable human rights standards that this thesis has distilled from ECtHR and CJEU jurisprudence.[301]

5.3.3.1 Assessing the Design of Key DSA Obligations Alongside ECtHR and CJEU Human Rights Standards

[298] ibid pg.15.
[299] See Commission, 'Disinformation: Commission welcomes the new stronger and more comprehensive Code of Practice on disinformation' 16 June 2022.
[300] Under Art 10 ECHR and Art 11 CFR.
[301] As illustrated in Chapters 2, 3, and 4.

To assess how the above-studied DSA obligations may ensure compatibility with the right to freedom of expression under the ECHR and CFR, it is necessary to focus on applicable human rights standards that this thesis has identified from ECtHR and CJEU jurisprudence.[302] Recalling Chapter Four, applicable standards in the context of online disinformation can be distilled through the following key interpretive principles:

Figure 9. Summary of key interpretive principles from ECtHR and CJEU jurisprudence regarding the restriction of false and misleading information

Key Interpretive Principle	***Interpretive Factor for Factual Assessment***
Restrictions on access to false or misleading information must not foster arbitrary removal of lawful communications.	• Existence and nature of domestic law. • Existence and nature of European Union (EU) law. • Hate speech or defamatory statements (under relevant law).
Restrictions on access to false or misleading information are more justified for deceptive communications.	• Evidence of intention to deceive. • Existence of language targeting vulnerable groups. • Contradiction of established factual consensus.
Restrictions on access to false or misleading information are more justified for communications likely to influence political engagement.	• Proximity to election or referendum. • Relevance of information to political populace. • Prominence of individual (or group) disseminating information.

When recalling these principles, it is significant that the DSA extends intermediary responsibilities beyond liability for illegal content in a manner that may have potential application in the disinformation context. This shift is epitomised by the design of several key DSA provisions. For example, Articles 34 and 35 require VLOPs to identify 'systemic risks' and adopt 'effective mitigation measures' to prevent such risks.[303] As these provisions explicitly state, such 'risks' not only relate to 'the dissemination of illegal content' but also threats to 'civic discourse' and 'electoral processes.'[304] Moreover, the Commission has extensive powers under Article 36 DSA to influence how VLOPs moderate content on the grounds of any 'crisis' which the Commission identifies.[305] It is further notable that VLOP due diligence obligations appear to be complemented by specific voluntary commitments for VLOPs as signatories of the 2022 Code of Practice on Disinformation. As outlined, this updated Code sets out commitments for signatories—which now include VLOPs such as Meta and Twitter (now X)—to adopt measures against legal content involving 'inauthentic

[302] On freedom of expression (Art 10 ECHR and Art 11 CFR) and free elections (Art 3 Protocol 1 ECHR).
[303] DSA Art 34(1) and 35(1).
[304] DSA Art 34(3).
[305] DSA Art 36(1).

behaviour' in electoral contexts.[306] Further relevant here is Article 14 DSA which imposes a transparency obligation for providers of intermediary services to provide information on 'any restrictions that they impose' in relation to violations of their terms and conditions.'[307] In following these aspects of the DSA, VLOPs appear to be encouraged to combat the spread of online disinformation but also appear to have discretion on how to achieve this through their own terms and conditions.

The potential application of the DSA to misleading—but not necessarily illegal—content in electoral contexts is significant from the ECHR and CFR perspective. As the above table illustrates, a key interpretive principle from ECtHR and CJEU jurisprudence is that is that intermediary responsibilities to limit the spread of online disinformation must not be designed in a manner that leads to arbitrary restrictions on access to lawful communications.[308] DSA provisions make several acknowledgements regarding how intermediaries must consider the right to freedom of expression when limiting harmful content. , For example, Article 14 requires providers of intermediary services to have 'due regard' to fundamental rights such as freedom of expression under the CFR when 'enforcing' content restrictions based on violations of their terms and services.[309] Articles 34 and 35 also instruct VLOPs—when adopting content restrictions to mitigate systemic risks—to have 'due regard' to 'possible consequences' of restrictions on CFR rights.[310] Article 36 further states that the European Commission must take 'account' of a 'possible failure' of content restrictions under the crisis protocol mechanism to 'respect the fundamental rights' under the CFR.[311]However, these DSA provisions all provide limited guidance on how intermediaries must ensure compatibility with CFR standards.[312] The 2022 Code—which has been developed in part to assist VLOPs in mitigating risks—references the importance of protecting the right to freedom of expression as part of measures to limit the spread of lawful content.[313] However, no specific guidance is provided regarding how measures

[306] 2022 Code pg. 16; It must be acknowledged that, at the time of writing, the policies of Twitter (now X) are currently in flux.
[307] DSA Art 14(1).
[308] Chapter 3, section 4.3.3.
[309] DSA Art 14(4).
[310] DSA Art 35(2).
[311] DSA Art 36(8).
[312] See section 5.3.2.
[313] For example, pg. 3 of the 2022 Code references that it 'must not be construed in any way as replacing, superseding or interpreting the existing and future legal framework, and, in particular (but not limited to)' the ECHR and CFR; It also states at pg. 1. the signatories are 'mindful of the fundamental right to freedom of

to combat the spread of online disinformation in elections can be protective of freedom of expression and free elections under the ECHR and CFR.

This limited guidance is important when considering how the above-studied DSA obligations appear to extend beyond deceptive communications. For example, Articles 34 and 35 define an explicit systemic risk of 'any actual or foreseeable effects' to 'electoral processes.'[314] No guidance is provided on how VLOPs should identify and prioritise restrictions on deceptive content under this obligation. Recital 57 DSA confirms that VLOPs must consider 'the creation of fake accounts, the use of bots, and other automated or partially automated behaviours' as risks under this provision.[315] While this suggests that intentionally deceptive behaviour is to be considered a risk that VLOPs must mitigate under the DSA, the DSA provides no specific guidance on how VLOPs should address misleading content which is not deceptive. It is also notable that these provisions consider systemic risks as any 'risks' which may cause 'negative effects for the exercise of fundamental rights' under the CFR.[316] As the right to freedom of expression and free elections are protected under the CFR, this potentially encourages VLOPs to restrict the spread of misleading content to protect these rights. While this could lead to measures by intermediaries that are aimed at protecting these rights, such measures could unintentionally undermine ECHR and CFR standards if applied without any assessment of whether misleading content is intentionally deceptive or merely erroneous. This is significant when recalling how the 2022 Code defines 'manipulative behaviour' in a manner that includes circumstances where 'people share false information with friends and family in good faith.'[317]As outlined, Article 14 requirements for transparency in content moderation make references to fundamental rights but—in practice—leave extensive discretion for providers of intermediary services to go beyond deceptive content if including the dissemination of disinformation as a violation of their own terms and conditions.[318] By enabling discretion for intermediaries to adopt restrictions on a broad range of non-deceptive communications, intermediaries could adopt measures to combat online disinformation when complying with

expression, freedom of information' when 'taking effective action to limit the spread and impact of otherwise lawful content.'
[314] DSA Art 34(1).
[315] DSA recital 57.
[316] ibid.
[317] See section 5.3.1.
[318] See section 5.3.2.

the DSA but could unintentionally undermine the second key interpretive principle which this thesis has identified from ECtHR and CJEU jurisprudence.

A related problem is that the DSA appears to focus on potential harms of disinformation in election contexts without providing guidance on how intermediaries should identify deceptive content which is likely to influence voters. A potentially very potent provision here is the DSA's 'crisis protocol' mechanism under Article 36.[319] This gives the Commission extensive powers to declare crises that threaten EU public security and to influence VLOPs' content moderation practices in response to crises declared. Article 36 references that the Commission should have 'due regard' for the right to freedom of expression.[320] However, it does not elucidate concrete guidance on how the Commission must justify how a hypothetical crisis involving misleading communications involves deception that is likely to influence EU voters in a manner that justifies restrictions. This is significant when considering how the Council of the EU has already imposed extensive restrictions on Russian war propaganda by entirely curtailing cross-border transmission of audio-visual media by the RT and Sputnik media outlets.[321] As Voorhoof argues, such measures 'drastically curtailed the public's right' to receive information in a manner that failed to adhere to European human rights standards.[322] It is also arguable that VLOPs—in identifying and mitigating 'systemic risks' under Articles 34 and 35 DSA—have discretion to target a broad range of misleading content which may not be liable to influence voting in election periods. For example, these provisions offer very limited guidance on how human rights standards should inform how VLOPs identify 'actual or foreseeable' risks to 'electoral processes' or 'civic discourse.'[323] This dearth of guidance is important when recalling the importance that the ECtHR and the CJEU place on whether misleading communications are likely to influence voter choice and political engagement when considering whether restrictions on such communications are justified. As discussed, the renewed 2022 Code provides more concrete guidance on how signatories of this Code provide granular data regarding their actions taken to identify—and adopt measures to limit—content

[319] See section 5.3.2.
[320] DSA Art 36.
[321] Council of the EU, 'EU imposes sanctions on state-owned outlets RT/Russia Today and Sputnik's broadcasting in the EU' (2 March 2022).
[322] Dirk Voorhoof, 'EU silences Russian state media: a step in the wrong direction' (Inform Blog, 8 May 2022) accessed 13 August 2023.
[323] DSA Art 34(1).

containing disinformation during election periods.[324] Moreover, stakeholders under the DSA such as internal auditors and Digital Service Coordinators may have crucial roles in ensuring that VLOPs comply with ECHR and CFR standards by prioritising restrictions on misleading content which is likely to influence voter engagement. This will be considered further below.

It must finally be recalled that DSA obligations for intermediaries to strictly remove illegal content may also apply where online disinformation is made illegal at the Member State level. As outlined, the DSA defines illegal content as content which is illegal at the Member State level.[325] Moreover, Article 16 requires providers of intermediary services and online platforms to swiftly remove content which internet users have identified as illegal under EU or Member State laws.[326] As illustrated, this may compel intermediaries to remove content which is illegal under a diverse set of Member State laws which have been developed in fields where EU institutions have limited competencies.[327] The DSA acknowledges this as problematic as it states that 'Member States are increasingly introducing' national laws addressing 'illegal content, online disinformation or other societal risks' and that 'diverging national laws' in this field 'negatively affect the internal market.'[328] Importantly, this divergence is also significant if Member State laws that address online disinformation in political and election contexts do not meet relevant ECHR and CFR standards regarding freedom of expression and free elections. Chapter Six will provide a specific example of how EU Member State laws may not ensure consistency with such standards when examining Ireland's Electoral Reform Act.

As this section has considered, the DSA introduces several legally binding obligations which have a likely application in the online disinformation context. Importantly, this Regulation sets out intermediary responsibilities to not only limit the spread of illegal content but also misleading—but not illegal—content in political and electoral contexts. It must be highlighted here, however, that these obligations are not designed in a manner that fully ensures compliance with key interpretive principles which this thesis has distilled from ECtHR and CJEU jurisprudence. Significant here is that the DSA sets out intermediary responsibilities that could lead intermediaries to restrict access to content which may be misleading but not deceptive or

[324] See section 5.3.1.
[325] DSA Art 2.
[326] DSA Art 16(1).
[327] See section 5.3.2.
[328] DSA (1).

likely to influence voter engagement. As the table below illustrates, this may implicate the right to freedom of expression under the ECHR and CFR.[329]

Figure 12. DSA provisions which have a potential application to online disinformation

Key DSA Obligation that Could Implicate Freedom of Expression

Potential Applications of DSA Obligation	**Terms and Conditions Obligation (Article 14 DSA)**	**Notice and Takedown Obligations (Article 16 DSA)**	**Systemic Risks Obligations (Articles 34 & 35 DSA)**	**Crisis Response Mechanism (Article 36 DSA ; Assisted by Crisis Protocols under Article 48 DSA)**	**2022 Code of Practice on Disinformation (Intended to become Code of Conduct under Article 45 DSA)**
Key intermediary	Providers of intermediary services	Providers of hosting services/ Online platforms	VLOPs	VLOPs	VLOPs
Application to Misleading Content	✓ Providers of intermediary services can prohibit misleading content under terms and conditions	Dependent on EU/ Member State Law	✓ 'Any actual or foreseeable negative effects' on 'civic discourse' and 'electoral processes'	✓ Commission can Identify 'serious threat'	✓ Commitments to combat 'manipulative behaviour' (application to VLOPs)
Application in Electoral Contexts	✓ Providers of intermediary services can apply terms and conditions in elections	Dependent on EU/ Member State Law	✓ 'Any actual or foreseeable negative effects' on 'civic discourse' and 'electoral processes'	✓ Commission can identify 'serious threat'	✓ Commitments for transparency and platform 'integrity' in elections
Application to Legal Content	✓ Providers of intermediary services can moderate legal content incompatible with terms and conditions	× Information which the 'individual or entity considers to be illegal content'	✓ 'Any actual or foreseeable negative effects' on 'civic discourse' and 'electoral processes'	✓ Commission can identify 'serious threat'	✓ Commitments to limit spread of 'otherwise lawful content.'
Application Beyond Deceptive Content	✓ Providers of intermediary services can moderate misleading content that may not be deceptive under terms and conditions	Dependent on EU/ Member State Law	✓ 'Any actual or foreseeable negative effects' on 'civic discourse' and 'electoral processes'	✓ Commission can identify 'serious threat'	✓ Disinformation includes misleading content 'without harmful intent'
Application Beyond Content Likely to Influence Voters	✓ Providers of intermediary services can moderate misleading but non-influential content under terms and conditions	Dependent on EU/ Member State Law	✓ 'Any actual or foreseeable negative effects' on 'civic discourse' and 'electoral processes'	✓ Commission can identify 'serious threat'	✓ Disinformation includes misleading content 'without harmful intent'

As this table illustrates, the DSA establishes several key provisions which may require—or indirectly encourage—various intermediaries to adopt measures to limit the spread of online disinformation. Crucially, however, these provisions are designed in a manner that could potentially lead intermediaries to restrict lawful content which is not deceptive and may not have influence on voter engagement. This raises uncertainty regarding how intermediaries—when applying the above provisions under the DSA—can ensure consistency with key interpretive principles this thesis has distilled when mapping ECtHR and CJEU

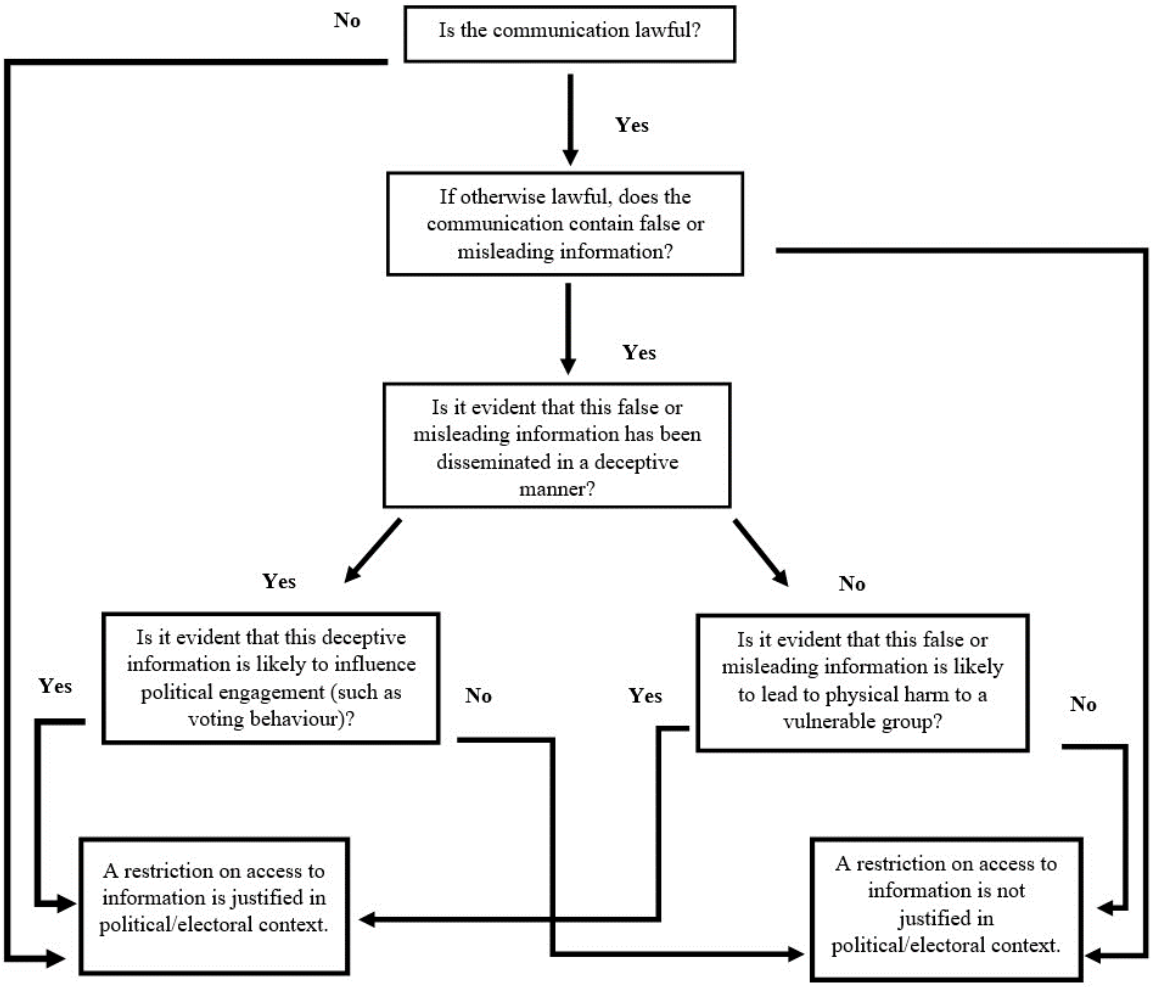
[329] Art 10 ECHR and Art 11 CFR.

jurisprudence.[330] To unpack this further, focus must now be given to the potentially crucial role of stakeholders in ensuring consistency with ECHR and CFR standards when applying DSA provisions in the online disinformation context.

5.3.3.2 Applying DSA Obligations Alongside ECtHR and CJEU Human Rights Standards

When considering how DSA obligations may be met in the context of online disinformation in a manner compliant with ECtHR and CJEU human rights standards, it is necessary to recall some key questions. The below diagram outlines how key decisions regarding the moderation of misleading content in election contexts can ensure compliance with the ECHR and CFR.

Figure 10: Visual representation of framework



[330] See Chapter 4 section 4.4.

As illustrated in section 5.3.3 (I), the DSA is designed in a manner that provides discretion for intermediaries to adopt measures to restrict the dissemination of misleading—including not necessarily illegal—content. To illustrate how this could occur in a manner that could unintentionally frustrate ECHR and CFR human rights standards, it is instructive to consider a hypothetical circumstance regarding the DSA's application in a political and electoral context.

One possibility here is that a VLOP could identify online disinformation as a 'systemic risk' for the purposes of compliance with Article 34 and adopt measures to mitigate this risk as required under Article 35.[331] In identifying online disinformation as a systemic risk, a VLOP could adapt their content moderation practices to disable access to all content that could potentially mislead any individual in the three months prior to European Parliamentary elections.[332] In principle, a VLOP could justify this on the grounds that disinformation poses a threat to 'civic discourse' and 'electoral processes' under Article 34.[333] A VLOP could also theoretically justify this measure as a means of protecting fundamental rights under Article 34.[334] In spite of this potential justification, a VLOP could adopt a measure in a manner that could unintentionally undermine standards set out under ECtHR and CJEU jurisprudence by targeting any information that could potentially mislead individuals as opposed to information which a VLOP identifies as deceptive and likely to influence voters.[335] Significantly, this could limit access to a broad range of political ideas—expressed through lawful communications—which voters ought to have access to in pre-election periods under standards that the ECtHR and CJEU have elucidated.[336] As outlined in section 5.3.1, the Commission and DSCs must not only assess VLOP practices to mitigate systemic risks under Article 35 DSA but also may issue 'guidelines' on 'best practices' for how VLOPs should adopt measures to combat 'recurrent risks.'[337] In this hypothetical scenario, the Commission—aided by DSC cooperation—could issue 'guidelines' on 'best practices' for VLOPs to mitigate online disinformation in a manner that is intended to encourage VLOPs to moderate all forms of misleading information that could have potential effects on elections. In outlining these best

[331] DSA Art 34(1) and 35(1).
[332] ibid Art 35(1) b.
[333] ibid Art 34(1) c.
[334] ibid Art 34(1) b.
[335] See Chapter 4 section 4.4.
[336] ibid.
[337] DSA Art 35(3).

practices, the Commission and DSCs could outline that VLOPs should interpret content containing disinformation insofar as disinformation is defined under the 2022 Code. The 2022 Code—which is intended to become a Code of Conduct under Article 45 DSA—expressly includes misinformation 'without harmful intent' under this definition.[338] Crucially from the ECHR and CFR perspective, this could lead to content moderation of misleading information during elections that is not deceptive or likely to influence voter engagement. The Commission and DSCs are only required to have 'due regard' to fundamental rights as part of this assessment and are not required to consult specific standards regarding freedom of expression and free elections.[339] Moreover, independent auditors have no explicit instructions under Article 37 DSA—when assessing VLOP actions to mitigate systemic risks—to assess whether VLOP measures are consistent with ECtHR and CJEU standards.[340] Thus, VLOPs could apply the DSA's systemic risk obligations in a manner that has potential to frustrate ECHR and CFR standards. The imprecise nature of the requirement for the Commission and DSA to consider potential effects on individual rights could lead to a situation whereby these stakeholders fail to identify this potential inconsistency with the ECHR and CFR.

It remains, however, that VLOPs could ensure fulfilment of Articles 34 and 35 DSA in a manner that is protective of ECHR and CFR standards when identifying online disinformation as a systemic risk. For example, a VLOP could adopt measures to downgrade visibility of—but not permanently disable access to—social media posts containing deceptive communications which originate from prominent social media users and are likely to influence an upcoming election. This would involve a more proportionate intrusion with the right of voters to access information during elections as the focus would be on deceptive content which is likely to influence voters. In communicating these measures to the Commission and DSCs, a VLOP could report that it engages in independent factual assessments which determine whether such downgrading measures are justified and that these assessments consider:

- Whether the account subjected to the measure was highly active in an election period.
- Whether the account subjected to the measure had repeatedly disseminated posts contradicting an established factual consensus.

[338] 2022 Code preamble.
[339] See section 5.3.2.
[340] ibid.

- Whether the account subjected to the measure had repeatedly target vulnerable minorities as part of targeted campaigns.

In including assessment factors as part of criteria to downgrade social media posts in an election period, a VLOP could demonstrate how its systems are protective of human rights under the ECHR and CFR. Crucially, other institutional stakeholders could strengthen this compatibility with human rights by setting these interpretive factors as a standard bearer for VLOP compliance with the DSA. For example, the European Commission and DSCs could identify these hypothetical measures as a best practice method of VLOPs to combat the 'recurrent' systemic risk of electoral disinformation while having 'due regard' to fundamental rights as Article 35 requires.[341] Moreover, independent auditors—in monitoring VLOP compliance with the DSA under Article 37—could identify these measures as 'positive' as part of 'operational recommendations' for VLOP compliance with Articles 34 and 35.[342] Finally, the Commission could provide explicit interpretive guidance regarding how VLOPs identify content which is deceptive and likely to influence voters if the 2022 Code of Practice on Disinformation—as is currently intended—becomes a Code of Conduct under Article 45 DSA.[343] As these prospective examples show, it is vital that DSCs are equipped with expertise in the fields of freedom of expression and applicable standards on the regulation of misleading—but not necessarily illegal—content. This will be considered in Chapter Six when examining Ireland's Media Commission which will serve as Ireland's DSC.

5.4 Conclusions

This chapter has outlined the EU's current tailored intitiatves designed to combat online disinformation and has assessed how these approaches align with relevant human rights standards for freedom of expression and free elections from ECtHR and CJEU jurisprudence. Section 5.2 began by tracing the European Commission's development of the 2018 Code of Practice on Disinformation. Highlighting the limitations of the EU's self-regulatory approach to disinformation from an ECHR and CFR perspective, this chapter then proceeded to evaluate key provisions of the Digital Services Act (DSA) which have potential application in the disinformation context. Section 5.3 not only considered the design of these provisions but also

[341] DSA Art 35(3).
[342] DSA Art 37(6).
[343] See section 5.3.2.

provided an overview of their potential applications in light of key interpretive principles which this thesis has identified from ECtHR and CJEU jurisprudence.

This chapter found that EU law now imposes legally binding responsibilities for intermediaries to limit the dissemination of harmful—but not necessarily illegal—content. The EU's approach to online disinformation has shifted beyond self-regulation and now requires intermediaries to adopt measures to limit the spread of lawful content. As section 5.3 traced, this is epitomised by how the DSA introduces due diligence obligations for VLOPs to mitigate systemic risks. These obligations—which have significance in the online disinformation context—epitomise how the DSA extends the range of EU intermediary responsibilities beyond liability for illegal content and towards more proactive obligations to identify and minimise potentially harmful online content.

EU institutions have consistently referenced the importance of the right to freedom of expression when issuing guidance on how intermediaries should adopt measures to limit the spread of misleading—but not necessarily illegal—content. This was not only examined when discussing the 2018 Code in section 5.2 but also when assessing the DSA in section 5.3. As these sections highlighted, both instruments stress the importance of ECHR and CFR standards but provide minimal interpretive guidance on how intermediaries should adhere to these standards when addressing harmful online content. As this chapter has identified, this lack of concrete guidance is linked to acknowledgements from Union institutions that disinformation may not always consist of illegal content. This lack of guidance may also be attributable to limited EU competencies in the field of regulating online communications in electoral contexts. While these factors may explain the EU's reticence to issue specific guidance on how intermediaries in the internal market should limit the spread of online disinformation, this chapter has consistently argued that the EU's omission of precise guidance in this area leaves extensive room for intermediaries in the internal market to adopt measures against disinformation that may result in excessive restrictions of speech.

This discretion is significant because—as this chapter has further found—current EU approaches to online disinformation could potentially lead intermediaries to restrict lawful content in a manner that undermines standards set out under ECtHR and CJEU jurisprudence. This chapter has examined this by applying key interpretive principles which this thesis has distilled from ECtHR and CJEU jurisprudence that have bearing in the disinformation context.

Crucial here is that the DSA—and the 2022 Code which complements the DSA—provide extensive leeway for intermediaries to restrict misleading content in electoral contexts without assessing whether content is intentionally deceptive and likely to influence voter choice. This is not only epitomised by the broad terminology of these instruments but also in the lack of concrete safeguards that may be used to prevent arbitrary removal of lawful content in electoral contexts. This lack of precision in the EU's evolving framework for disinformation is critical when reflecting on how EU guidance on how intermediaries limit the spread of online disinformation is intended to apply 'within the framework' of ECtHR and CJEU jurisprudence.[344]

[344] See section 5.2.1.

Chapter 6: Ireland's Approach to Online Disinformation: Analysing Current Legislation and Applying a European Human Rights Perspective

6.1 Introduction

As Chapter Five introduced, Ireland has recently adopted legislation with pertinence to online disinformation.[1] Examining these developments, this chapter analyses the relevant provisions of two recently adopted Irish laws which require—or could be used to encourage—intermediaries to limit the dissemination of online disinformation. As part of this analysis, this chapter considers whether these laws are compatible with the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (CFR). Section 6.2 first examines Ireland's Online Safety and Media Regulation Act (OSMRA).[2] As this section will unpack, the OSMRA introduces responsibilities for intermediaries to limit access to harmful—including lawful but harmful—online content. Considering how these responsibilities may apply to content containing online disinformation, this section then assesses whether the OSMRA is compatible with the ECHR and CFR by applying human rights standards which this thesis has distilled from the jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU).[3] Section 6.3 then examines Ireland's Electoral Reform Act. This section analyses specific provisions of the Electoral Reform Act which explicitly require intermediaries to limit the spread of online disinformation in election periods. This section then evaluates whether the design of the Electoral Reform Act ensures compatibility with ECHR and CFR standards regarding freedom of expression and informed elections.[4]

The extent to which Ireland's Online Safety and Media Regulation Act and Electoral Reform Act are compatible with the ECHR and the CFR is of vital relevance to this thesis. As both laws involve the regulation of online communications in a manner which is affected by EU law, compliance with the CFR is required for both laws.[5] As Chapter Four has examined, the

[1] Chapter 5 section 5.3.3.
[2] Hereinafter 'OSMRA.'
[3] Hereinafter ECtHR and CJEU.
[4] Which this thesis has distilled from ECtHR and CJEU jurisprudence.
[5] Both laws affect the transmission of communications and the provision of services in the EU's internal market (thus necessitating compliance with the CFR in line with Article 114 TFEU). It is also notable that the OSMRA transposes EU legislation (specifically, the revised provisions of the EU's Audio-visual Media Services Directive as explained in section 6.2.1).

standards for protecting freedom of expression and protecting free and fair elections under the CFR are heavily influenced by the ECHR.[6] Further relevant here are statutory obligations for Irish courts and public bodies to ensure compliance with ECHR standards. This is provided for under the European Convention on Human Rights Act 2003.[7] As Kilkelly highlights, this legislation was adopted to 'bring about meaningful alignment of Ireland's human rights obligations and domestic law and practice.'[8] Section 2 of the 2003 Act places interpretive obligations for Irish courts and certain public bodies to interpret legislation 'in a manner compatible with the State's obligations under the Convention provisions.'[9] Further, Section 5 enables certain Irish Courts to issue a 'declaration of incompatibility' to the Irish government if courts identify that a domestic 'statutory provision or rule of law is incompatible with the State's obligations under the Convention provisions.'[10]

6.2 The Online Safety Media and Regulation Act 2022

This section critically assesses provisions of Ireland's Online Safety and Media Regulation Act 2022 (OSMRA) which are designed to limit the dissemination of harmful online content.[11] The focus of this section is on how the OSMRA establishes statutory powers for Ireland's Media Commission to standardise how intermediaries moderate harmful content and how these powers could apply to content containing online disinformation. Section 6.2.1 first illustrates the legislative background preceding the OSMRA. The focus here is on Ireland's justifications for introducing the OSMRA and on how Ireland—by introducing the OSMRA—transposes the EU's revised Audiovisual Media Services Directive.[12] Section 6.2.2 then analyses the OSMRA's provisions which are designed to limit the dissemination of harmful online content. The focus here is on how these statutory provisions could be used by Ireland's Media Commission to set out how intermediaries moderate content—including legal content—containing online disinformation. Section 6.2.3 then assesses whether the OSMRA—if applied

[6] There is not only a strong alignment between the ECtHR and the CJEU reasoning in these areas (as Chapter 4 section 4.4 demonstrated) but Art 52 CFR also enshrines the ECHR as minimum standards for the protection of EU fundamental rights under the CFR).
[7] <https://www.irishstatutebook.ie/eli/2003/act/20/enacted/en/print.html>
[8] Kilkelly and others, ECHR and Irish law, (2nd Edn).
[9] Section 2.
[10] Section 5.
[11] Hereinafter 'OSMRA.'
[12] Directive (EU) 2018/1808 (replacing Directive 2010/13/EU).

in the online disinformation context—is sufficiently protective of the ECHR and CFR rights to freedom of expression and free and informed elections.

6.2.1 Legislative background to the OSMRA

At the domestic level, Ireland's OSMRA was informed by several legal and civil society proposals.[13] In 2013, the Minister for Communications convened the Internet Content Advisory Group (ICAG) to identify inadequacies in Ireland's regulatory framework for electronic communications.[14] The ICAG recommended updates to this framework due to the 'effects of technological change on media.'[15] Specifically, the ICAG recommended updates to 'address the issue of availability of age-inappropriate content regarding minors' and a strengthening of powers for Ireland's 'Office for Internet Safety' to achieve this.[16] Following this were recommendations by the Law Reform Commission (LRC) in 2016 to update Ireland's statutory protections for vulnerable internet users against 'harmful digital communications.'[17] These included the LRC's recommendation to introduce a new statutory body to oversee 'an efficient and effective take down procedure in relation to harmful digital communications.'[18] Spurred by these recommendations, the Irish government commissioned an 'open policy debate on online safety' in 2017.[19] The concrete output of this debate was the establishment of the National Advisory Council for Online Safety (NACOS) in 2018.[20] This group was tasked with identifying emerging threats to online safety that required legislative intervention.[21] Recommendations of NACOS—which mirrored the preceding ICAG and LRC recommendations—formed the domestic pretext to the OSMRA.[22] None of these domestic proposals included any specific recommendations relating to online disinformation. Notably, however, the ICAG and LRC proposals highlighted usage of 'fake' accounts as an example of conduct that exacerbates harassment of vulnerable individuals.[23]

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[13] Etaoine Howlett and Ivan Farmer, 'Insights into the OSMR' (2022). <https://data.oireachtas.ie/ie/oireachtas/libraryResearch/2022/2022-02-22_l-rs-note-insights-into-the-osmr-bill-part-1-introduction-and-background_en.pdf>
[14] Department of Communications, Energy and Natural Resources, *Report of the ICAG*, (2014), 5.
[15] ibid 9.
[16] ibid 8-11.
[17] Law Reform Commission, *Report on Harmful Communication and Digital Safety* (LRC 116 – 2016).
[18] ibid para 3.6.6.
[19] See Department of Communications, Climate Action & Environment, *Annual Report* (2017) 15.
[20] Hereinafter 'NACOS.'
[21] See NACOS Annual Report (2019) pg. 2
[22] See NACOS Progress Report May 2020.
[23] ICAG report (n 8) para 3.1.4: LRC Report (n 11) para 3.13.

Also relevant are the revised provisions of the EU's Audio-Visual Media Services Directive (AVMSD) which the OSMRA transposes in Ireland.[24] EU institutions introduced these revisions to address the 'ongoing convergence' between broadcast and online media in the Union's internal market.[25] The revised AVMSD requires EU Member States to extend national broadcasting rules to 'on-demand audio-visual media services' and 'video-sharing platform services (VSPS).'[26] This expands the application of the AVMSD to intermediaries such as YouTube and social media providers where the provision of programmes and user-generated videos constitutes an 'essential functionality' of their service.[27] Importantly, the revised AVMSD requires that Member States 'shall ensure that video-sharing platform providers under their jurisdiction take appropriate measures to protect' users from specific categories of 'harmful content'.[28] The revised AVMSD lists these categories as:

- Programmes, user-generated videos and audio-visual commercial communications which may impair the physical, mental or moral development of minors.[29]
- Programmes, user-generated videos and audio-visual 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.[30]
- Programmes, user-generated videos and audio-visual commercial communications containing content which constitutes an activity which is a criminal offence under Union law, namely public provocation to commit terrorist offences, offences concerning child pornography, and offences concerning racism and xenophobia.[31]

The revised AVMSD instructs that Member States must ensure that consumers of audio-visual media can make 'informed decisions' on accessing content.[32] The revised AVMSD also

[24] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities; Hereinafter 'AVMSD.'
[25] ibid.
[26] ibid.
[27] Commission, 'Guidelines on the practical application of the essential functionality criterion of the definition of a 'video-sharing platform service' under the Audiovisual Media Services Directive' (2020/C 223/02).
[28] AVMSD Recital 47.
[29] ibid Art 28(b) (1) a.
[30] ibid Art 28(b) (1) b.
[31] ibid Art 28(b) (1) c.
[32] ibid Recital 19.

references how audio-visual media services can 'shape public opinion' and must 'inform individuals and society as completely as possible and with the highest level of variety.'[33] However, it does not envisage any measures which Member States must adopt to limit the spread of disinformation when regulating audio-visual content. As Chapter Five detailed, the EU already addresses disinformation through the Code of Practice on Disinformation and the Digital Services Act (DSA).[34] Contrasting with those EU instruments, the revised AVMSD primarily addresses harmful content containing communications which are likely to be illegal under EU and Member State law. An exception to this is that the revised AVMSD addresses content which may not be illegal but 'may impair the physical, mental or moral development of minors.'[35] However, the AVMSD does not issue instructions for Member States—when transposing its revised provisions into domestic law—to regulate legal content which is harmful to adults unless this incites hatred or constitutes a criminal offence. As section 6.2.2 will highlight, this is significant because Ireland's OSMRA regulates a broader range of legal content than the revised AVMSD.

6.2.2 Understanding how the OSMRA could be used to address online disinformation

The OSMRA was enacted on 10 December 2022.[36] The OSMRA not only transposes the revised AVMSD but also updates how Irish law protects vulnerable individuals from exposure to harmful online content.[37] Providing these updates, the OSMRA amends the Broadcasting Act 2009 while establishing a 'new regulatory framework for online safety.'[38] Key OSMRA updates include:

- The establishment of a new Media Commission.[39]
- A register for providers of audio-visual on demand media services.[40]
- Updates to duties, codes, and rules applying to media service providers.[41]

[33] ibid (5).
[34] Chapter 5 section 5.3.2.
[35] AVMSD Recitals 18-22.
[36] See full act <https://www.oireachtas.ie/en/bills/bill/2022/6/>
[37] OSMRA 2022, Explanatory Memorandum pg. 1.
[38] The Broadcasting Act 2009 is the 'Principal Act' under OSMRA.
[39] S6 Broadcasting Act, amended by s8 OSMRA.
[40] S46A Broadcasting Act, amended by s9 OSMRA.
[41] S46 Broadcasting Act, amended by s10 OSMRA.

- Online safety provisions.[42]

The OSMRA establishes a new Media Commission.[43] The Media Commission 'shall have all such powers as are necessary or expedient for the performance of its functions and shall ensure that its functions are performed effectively and efficiently.'[44] The Media Commission replaces—and subsumes core functions of—the Broadcasting Authority of Ireland (BAI).[45] Like the BAI, the Media Commission is empowered to devise codes of practice and enforce compliance with these codes against media providers.[46] The Media Commission further adopts the BAI's—now dissolved—statutory powers to fine broadcasters that fail to disseminate current affairs programmes in an 'objective and impartial' manner.[47] To assist in carrying out previously held BAI functions, the Media Commission includes a 'broadcasting Commissioner.'[48] To assist in carrying out further functions, the Media Commission includes an 'on-demand audio-visual services Commissioner' and an 'online safety Commissioner.'[49] To oversee the funding and development of Ireland's media sector, the new Commission also contains a Media Development Commissioner.[50] The OSMRA does not currently designate any Commissioner with express functions relating to the regulation of online disinformation in Irish media.[51] While Irish Senators Alice Mary-Higgins and Vincent Martin recommended that the OSMRA should expressly empower the Media Commission with such functions, this did not materialise due to prospective conflicts between Irish law and the EU's Digital Services Act.[52] However, the OSMRA enables a future expansion of up to six Commissioners within the Media Commission's structure.[53] This mechanism is designed to allow the Media Commission 'to react and adapt to changing circumstances' in online media.[54]

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[42] S139 Broadcasting Act, inserted by s45 OSMRA.
[43] Or '*Comisiún na Meán.*'
[44] S7 Broadcasting Act, amended by s8 OSMRA.
[45] Established under Broadcasting Act 2009; hereinafter 'BAI.'
[46] S139K Broadcasting Act, inserted by s46 OSMRA; S139ZG Broadcasting Act, amended by s47 OSMRA.
[47] S46 Broadcasting Act, amended by s10 OSMRA.
[48] See 'Structure of the Media Commission <76725_61834cef-c977-4a66-9b97-95cf03216c2c.pdf>; Announced as Celene Craig.
[49] See pt 2 Broadcasting Act, amended by pt 3 OSMRA; Announced as Niamh Hodnett.
[50] Announced as Rónán Ó Domhnaill, see Caitríona Lavelle, 'Commissioner for Digital Services in Coimisiún na Meán to be Appointed' (A&L Goodbody Blog, 20 July 2023) accessed 21 August 2023.
[51] See 'Minister Martin announces forthcoming appointment of Executive Chairperson and Commissioners' (2023) <https://www.gov.ie/en/press-release/1fb7d-minister-martin-announces-forthcoming-appointment-of-executive-chairperson-and-commissioners-in-coimisiun-na-mean/>
[52] See Seanad Eireann debates 22 Feb 2022 <https://www.oireachtas.ie/en/debates/debate/seanad/2022-02-22/10/> accessed 23 August 2023; 31 May 2022 <https://www.oireachtas.ie/en/debates/debate/seanad/2022-05-31/26/> accessed 23 August 2023.
[53] S11 Broadcasting Act, amended by s8 OSMRA
[54] Section 6.2.3 will assess this.

The Media Commission also functions as Ireland's Digital Service Coordinator (DSC) under the EU's DSA.[55] To assist with this, the Media Commission also includes a Digital Services Commissioner to oversee the supervision and coordination of the DSA in Ireland.[56] Recalling Chapter Five, DSCs are competent national authorities responsible for coordinating the DSA's implementation in EU Member States.[57] DSCs also have a role in assisting the European Commission with monitoring compliance with DSA obligations to prevent 'systemic risks' and in advising the European Commission on the adoption of crisis protocols under the DSA.[58] It must be recalled here that DSCs require specific expertise to ensure that enforcement of the DSA is compliant with the ECHR and CFR.[59] Before evaluating how Ireland's Media Commission can carry out its functions in line with the ECHR and CFR, it is first necessary to unpack OSMRA provisions which address harmful content and illustrate how these could apply to misleading content including online disinformation.

6.2.2.1 Classifying harmful content under the OSMRA

The OSMRA establishes definitions of harmful content in a manner which could extend to online disinformation. Section 139A of the Broadcasting Act, as inserted by section 45 of the OSMRA, defines two distinctive types of 'harmful online content.'[60] The first type is 'content that falls within one of the offence-specific categories of online content.'[61] Schedule 3 of the Broadcasting Act, as inserted by section 46 OSMRA, currently lists 42 types of content which—if disseminated online—constitute an offence under Irish law.[62] As this list includes offences related to incitement to hatred, content containing disinformation that incites hatred could be classified as 'offence specific' content under the OSMRA.[63] The second type of 'harmful online content' is content which 'falls within one of the other categories of online

[55] Chapter 5 section 5.2.2.
[56] Announced as John Evans, see Caitríona Lavelle, see 'Commissioner for Digital Services in Coimisiún na Meán to be Appointed' (*A&L Goodbody Blog*, 20 July 2023) accessed 21 August 2023.
[57] Chapter 5 section 5.2.2.
[58] ibid.
[59] ibid.
[60] Pt 8A Broadcasting Act, inserted by pt 11 OSMRA.
[61] S139 (A) (1) a Broadcasting Act, inserted by s45 OSMRA.
[62] S139 (A) (2) a Broadcasting Act, inserted by s45 OSMRA.
[63] Schedule 3 includes content contravening the Prohibition of Incitement to Hatred Act 1989.

content' and meets a 'risk test.'[64] Section 139A (3) of the Broadcasting Act, as inserted by section 45 of the OSMRA, provides that:

> (3) The other categories of online content are:
>
> (a) online content by which a person bullies or humiliates another person.
>
> (b) online content by which a person promotes or encourages behaviour that characterises a feeding or eating disorder.
>
> (c) online content by which a person promotes or encourages self-harm or suicide.
>
> (d) online content by which a person makes available knowledge of methods of self-harm or suicide.
>
> (e) any category specified for the purposes of this paragraph by order under section 139B.

These categories—which are not explicitly addressed in the revised AVMSD—could be interpreted as including certain legal content containing online disinformation. For example, content promoting eating disorders can involve the dissemination of health-related disinformation.[65] It is also possible that content 'by which a person bullies or humiliates' another person could extend to content which misleads the political populace.[66] To be classified as content which is harmful but not offence-specific, content must also meet a 'risk test.'[67] Section 139A (4) of the Broadcasting Act, as inserted by section 45 of the OSMRA, establishes that:

> (4) Online content meets the risk test for the purposes of subsection (1)(b) (ii) if it gives rise to—
>
> (a) any risk to a person's life, or
>
> (b) a risk of significant harm to a person's physical or mental health,
>
> where the harm is reasonably foreseeable.
>
> (5) For the purposes of this Act, any question whether particular online content falls within a category under this section shall be determined on the balance of probabilities.

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[64] S139 (A) (1) b (I) (ii) Broadcasting Act, inserted by s45 OSMRA.
[65] Victor Suarez-Lledo and Javier Alvarez-Galvez, 'Prevalence of health misinformation on social media: systematic review' (2021) 23(1) Journal of medical Internet research 17187.
[66] S139A (3) (a).
[67] S139 (4).

Provided that content meets this risk test, lawful content containing disinformation could be classified as harmful but not offence-specific under this interpretive framework which the OSMRA establishes. For example, content containing legal forms of disinformation could be considered 'harmful online content' if such content is disseminated to humiliate another person and additionally poses a 'risk of significant harm to a person's or mental health, where the harm is reasonably foreseeable.'[68] This is important when considering how disinformation and harassment of political officials may become intertwined in electoral contexts. A notable example—specific to Ireland's context—was seen in September 2022 when extremist groups physically harassed and made false accusations at several Irish politicians.[69] Section 6.2.3 will consider how the OSMRA's existing classifications of harmful online content—if applied to disinformation which is disseminated in political and electoral contexts—are compatible with human rights standards set out under the ECHR and CFR.

6.2.2.2 Specifying new categories of harmful online content under the OSMRA

As O'Dell infers the OSMRA does not strictly define harmful content and instead attempts to 'enumerate descriptions of categories of material that are considered to be harmful online content.'[70] A potent mechanism in the political and electoral context here is that the Media Commission could add online disinformation as an explicit category of 'harmful online content' under the OSMRA.[71] Section 139B (1) of the Broadcasting Act, as inserted by section 45 of the OSMRA, states that:

> (1) If the Commission makes a proposal to the Minister that a category of online content should be specified for the purposes of section 139A (2) (b) or (3) (e), the Minister may make an order giving effect to the proposal.

[68] S139A (4) b.
[69] Mark Hillard, 'Paul Murphy TD says he was assaulted by members of far-right group' *The Irish Times* (14 September 2022).
[70] It must be noted that the author refers to the previous incarnation of the then 'Online Safety and Media Regulation Bill'; Eoin O' Dell, 'The Irish Government's proposed Online Safety and Media Regulation Bill has a surprising omission' (*Inforrm Blog*, 15 January 2020) <https://inforrm.org/2020/01/15/the-irish-governments-proposed-online-safety-and-media-regulation-bill-has-a-surprising-omission-eoin-odell/> accessed 23 August 2023.
[71] Pt 8A Broadcasting Act, inserted by pt 11 OSMRA.

The Media Commission may propose to specify a new 'category of online content' as 'offence-specific' content or under 'other categories' of content.[72] Proposals to specify new categories of offence-specific content must relate to 'content by which a person does a thing contrary to an enactment specified in the proposal' and if 'the thing done is an offence under that enactment.'[73] The Media Commission must only make proposals under section 139B 'if satisfied' that 'giving effect to the proposal' enables it to 'take action against significant risks posed by the content within the proposed category.'[74] The Media Commission must also be 'satisfied' that these 'risks are not sufficiently addressed by available means (including means available to other regulators, providers of relevant online services, or others).'[75] The Media Commission must further be satisfied that it is in the 'public interest to give effect to the proposal.'[76] Section 139B (5) further requires that:

> (5) In deciding whether to make a proposal under subsection (1), the Commission shall have regard in particular to—
>
> (a) levels of availability of any online content on relevant online services,
>
> (b) levels of risk of exposure to any online content when using relevant online services,
>
> (c) levels of risk of harm, and in particular harm to children, from the availability of content or exposure to it,
>
> (d) changes in the nature of online content and in levels of availability and risk referred to in paragraphs (a) to (c),
>
> (e) the impact of automated decision-making in relation to content delivery and content moderation by relevant online services, and
>
> (f) the rights of providers of designated online services and of users of those services.

The Media Commission could propose to specify online disinformation as a new category of harmful—but lawful—content by following this criteria under S139B and by satisfying the above-mentioned risk test under S139A. This is a likely—and not a mere speculative—prospect. For example, several third-party stakeholders advised that disinformation should be

[72] For purposes of s130A Broadcasting Act, inserted by s45 OSMRA.
[73] S139B (3) a, b Broadcasting Act, inserted by s45 OSMRA.
[74] ibid s (4) b.
[75] ibid s139B (4) b.
[76] ibid s139B (4) c.

included as a listed form of harmful content during the OSMRA pre-legislative scrutiny.[77] Several legislators also proposed this inclusion during Oireachtas debates preceding the OSMRA.[78] As later analysis will also show, Ireland has concurrently introduced statutory offences for disseminating online disinformation in pre-election periods.[79]

If the Media Commission proposes to specify a new category of harmful online content, it must obtain an 'order' from the Minister which gives 'effect to a proposal.'[80] Section 139C of the Broadcasting Act, as inserted by section 45 OSMRA, establishes steps which the Media Commission must take before formally submitting proposals to the Minister:

> (1) The Commission may make a proposal under section 139B (1) only if—
>
> (a) the Commission has published a draft of the proposal in a way that it thinks appropriate to bring it to the attention of members of the public,
>
> (b) it has published with the draft a notice stating how members of the public may submit comments to it, and within what time,
>
> (c) it has consulted about the draft any advisory committee it has established for that purpose under section 19,
>
> (d) it has carried out any other consultation that it considers appropriate on the draft, and
>
> (e) it has considered any comments submitted to it in accordance with a notice under paragraph (b) or in consultation under this subsection.

The above steps do not require any external assessments of how proposals to specify new categories of harmful online content may implicate human rights. While the Media Commission must 'have regard' to the rights of users when deciding to make proposals, it is not obligated to consult any human rights or civil society organisation as part of the consultation process detailed under section 139C.[81] Consultations regarding published draft

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[77] Submission by DCU Institute for Future Media, Democracy and Society March 2021 pg. 4; See also, Submission by Irish Human Rights and Equality Commission March 2021 pg. 28.

[78] See Seanad Eireann debates 22 Feb 2022 <https://www.oireachtas.ie/en/debates/debate/seanad/2022-02-22/10/>; 31 May 2022 <https://www.oireachtas.ie/en/debates/debate/seanad/2022-05-31/26/>

[79] For example, offences regarding disinformation under the Electoral Reform Act could become an offence-specific category under the OSMRA.

[80] S139B (1) Broadcasting Act, inserted by s45 OSMRA.

[81] See s139 (5); S139B (1).

proposals must be made with 'any advisory committee' which the Commission has itself established or 'considers appropriate' to consult.[82] If receiving a proposal from the Media Commission, the Minister must consult the Joint Oireachtas Committee and 'consider the proposal in light of that consultation' before responding to the Commission 'within a reasonable time.'[83] The Minister may then 'accept the proposal for consideration by the Government' or 'request the Commission to reconsider the proposal.'[84] An illustration of this process in the context of online disinformation—and hypothetical compatibility with relevant ECHR and CFR human rights standards—will be discussed in section 6.2.3.

6.2.2.3 Establishing Online Safety Codes Under the OSMRA

As highlighted, the OSMRA empowers the Media Commission to potentially designate online disinformation—including lawful forms—as a listed form of harmful content.[85] This is significant when observing how the OSMRA empowers Ireland's Media Commission to set out how intermediaries moderate harmful online content. Section 139K of the Broadcasting Act, as inserted by section 45 OSMRA, empowers the Media Commission to devise 'online safety codes' and apply these to 'designated online services.'[86] The Media Commission may establish these codes to ensure that 'service providers take appropriate measures to minimise the availability of harmful online content and risks arising from the availability of and exposure to such content.'[87] Specifically, these codes may 'provide for:'[88]

> (a) standards that services must meet, practices that service providers must follow, or measures that service providers must take;
> (b) in particular, standards, practices or measures relating to the moderation of content or to how content is delivered on services;
> (c) the assessment by service providers of the availability of harmful online content on services, of the risk of it being available, and of the risk posed to users by harmful online content;

[82] S139C (1) c, d; S19 Broadcasting Act, inserted by s8 OSMRA.
[83] ibid s139C (2) a, b, c.
[84] ibid s139C (3) a, b.
[85] And certain content containing disinformation is already likely to fall under 'offence-specific' or 'other categories' under s139 (A) Broadcasting Act, inserted by s45 OSMRA.
[86] S139K (1) Broadcasting Act, inserted by s45 OSMRA.
[87] ibid s139K (2) a.
[88] ibid s139K (4).

(d) the making of reports by service providers to the Commission;

(e) the handling by service providers of communications from users raising complaints or other matters.

The Media Commission determines whether an 'online safety code' applies to a 'designated online service' or a 'designated category of services that includes the service.'[89] In applying new codes, the Commission must give written notice to services.[90] Section 139M, as inserted by section 45 OSMRA, lists 'matters to be considered' where the Media Commission prepares new safety codes:[91]

> When preparing an online safety code the Commission shall have regard in particular to—
>
> (a) the desirability of services having transparent decision-making processes in relation to content delivery and content moderation,
>
> (b) the impact of automated decision-making on those processes,
>
> (c) the need for any provision to be proportionate having regard to the nature and the scale of the services to which a code applies,
>
> (d) levels of availability of harmful online content on designated online services,
>
> (e) levels of risk of exposure to harmful online content when using designated online services,
>
> (f) levels of risk of harm, and in particular harm to children, from the availability of harmful online content or exposure to it,
>
> (g) the rights of providers of designated online services and of users of those services, and
>
> (h) the e-Commerce compliance strategy prepared under section 139ZF.

While the Media Commission must 'have regard' to the rights of internet users when establishing codes, section 139M issues no specific guidance regarding how the Commission should protect rights when developing codes with a view to standardising how intermediaries

[89] ibid s139L (1) a.
[90] ibid s139L (2) a, b.
[91] ibid s139 (M).

moderate harmful online content that new codes may address.[92] When making new codes, the Commission must 'consult' any 'advisory committee which it has established' and 'any other person the Commission thinks appropriate.'[93] Reflecting the procedure in which the Commission can propose to specify new categories of harmful content, this does not require independent assessment regarding how the Commission's development of new codes implicate rights such as the right to freedom of expression.[94] Upon consulting advisory committees, the Media Commission may 'give a copy of the code to the Minister' who then presents the code to each House of the Oireachtas.[95] The Commission may 'at any time amend or revoke' a code and must 'from time to time review the operation of any online safety code it makes.'[96]

Provided that the Media Commission considered the above matters, it could attempt to introduce safety codes with a view to influencing how intermediaries moderate content containing online disinformation. This may extend to moderation of misleading—including not currently illegal—online content if the Commission determines that the adoption of a new code is necessary under the above-detailed criteria.[97] If the Media Commission successfully establishes safety codes for online disinformation, it is statutorily empowered to ensure compliance with these codes. Section 139O, as inserted by section 45 OSMRA, states that the Commission 'may by notice in writing require the provider of a designated online service to provide the Commission with information relating to the provider's compliance with an online safety code over any period.'[98] Such notices must include 'information to be provided and the period or periods it must relate to' and must also state 'when the information is to be provided.'[99] Section 139P, as inserted by section 45 OSMRA, also empowers the Commission to appoint an independent auditor to 'enable the Commission to assess compliance by the provider with provisions of an online safety code.'[100] This includes an assessment of compliance related 'to the handling of communications by which users raise complaints or other matters relating to designated online services.'[101] Importantly, failure by a provider to

[92] ibid s139 (M) g.
[93] ibid s139N (1) a (i) (ii).
[94] ibid s139B.
[95] ibid s139N (3).
[96] ibid s139N (5).
[97] See criteria under s139K and s139M Broadcasting Act, inserted by s45 OSMRA.
[98] ibid s139O (1).
[99] ibid s139O (2).
[100] ibid s139P (3) a.
[101] ibid.

provide information to the Commission or to comply with safety codes 'shall be a contravention for the purposes' of the OSMRA.[102]

While the OSMRA provides no specific guidance on how the Media Commission must protect human rights when devising 'online safety codes', it empowers the Commission to provide guidance on how the implementation of new codes may ensure compatibility with human rights.[103] Potentially significant in the disinformation context is that section 139Z of the Broadcasting Act, as inserted by section 45 OSMRA, empowers the Commission to develop 'online safety guidance materials and advisory notices.'[104] This provision states that:

> (1) The Commission may issue guidance materials for providers of relevant online services—
>
> (a) on identifying harmful online content, and in particular on the application of subsection (4) of section 139A,
>
> (b) on any other matter relating to the operation of this Part or for which provision may be made by an online safety code, and
>
> (c) otherwise for the protection of minors and the general public from harmful online content and age-inappropriate online content.[105]

The Media Commission must consult any committee which it has established and any other person it deems appropriate when developing 'guidance materials' or issuing 'online safety advisory notices'.[106] The Commission may publish such materials 'in whatever way it thinks appropriate' but must notify the Minster upon publication.[107] When issuing 'guidance materials', however, the new Commission is not required to include any specific guidance on how the implementation of new safety codes should be protective of individual rights. For example, it is unclear whether the Media Commission will consider the protection of human

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[102] Under s139ZZH of the Principal Act (amended by OSMRA), a Category 1 offence includes (a) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months or both, or (b) on conviction on indictment, to a fine not exceeding €500,000 or imprisonment for a term not exceeding 10 years or both.
[103] ibid s139K.
[104] ibid S139Z.
[105] ibid s139Z (1).
[106] S139Z(3) separately empowers the Commission to issue an 'online safety advisory notice' if it 'considers there is an urgent need to bring to the attention of a provider or providers of relevant online services any matter on which guidance materials may be issued under this section.'
[107] ibid s139ZB.

rights as a relevant 'matter relating to' the proper application of online safety codes.[108] In developing 'guidance materials,' the Media Commission is only required to consider how such materials may implicate the rights of users. Section 139ZA, as inserted by section 45 OSMRA, outlines this, stating that:

> In preparing guidance materials or advisory notices under section 139Z, the Commission shall have regard in particular to—
>
> (a) Article 28b of the Directive,
>
> (b) the desirability of services having transparent decision-making processes in relation to content delivery and content moderation,
>
> (c) the impact of automated decision-making on those processes,
>
> (d) the need for any provision to be proportionate having regard to the nature and the scale of the services concerned,
>
> (e) levels of availability of any online content, and of age-inappropriate online content, on relevant online services,
>
> (f) levels of risk of exposure to harmful online content, or of exposure of children to age-inappropriate online content, when using relevant online services,
>
> (g) levels of risk of harm, and in particular harm to children, from the availability of such content or exposure to it,
>
> (h) the rights of providers of relevant online services and of users of those services, and (i) the e-Commerce compliance strategy prepared under section 139ZF.

As this section has analysed, the Media Commission could exercise its statutory powers under the OSMRA to provide standardised guidance regarding the moderation of content—including lawful content—containing online disinformation. This is not only evident in the OSMRA's interpretations of harmful content but also in the Media Commission's powers to set out—and enforce compliance with—measures regarding how intermediaries limit access to harmful content. Importantly, however, the OSMRA provides limited guidance regarding how measures to limit access to harmful content—including content which is not currently unlawful

[108] ibid.

—should protect human rights. The section below now considers how the OSMRA harmful content provisions—if used by the Media Commission to standardise or encourage moderation of content containing online disinformation—could ensure compatibility with ECHR and CFR standards on freedom of expression and informed elections.

6.2.3 Assessing the Compatibility of the OSMRA with ECHR and CFR Human Rights Standards

As the foregoing analysis has outlined, the OSMRA has potential bearing on how intermediaries adopt measures to limit the spread of online disinformation. The OSMRA provisions on 'harmful online content' could extend to content containing illegal—but also legal—forms of disinformation which is disseminated in political and electoral contexts.[109] This section now evaluates whether the OSMRA—if applied in this specific context—could ensure compatibility with the ECHR and CFR. To inform this assessment, this section draws from applicable human rights standards regarding freedom of expression and informed elections which this thesis has distilled from ECtHR and CJEU jurisprudence. The focus here is not only on the current design of the OSMRA but also on how Ireland's Media Commission could develop 'online safety codes' to standardise how intermediaries moderate content containing disinformation.[110]

6.2.3.1 Evaluating whether the Design of the OSMRA Ensures Compatibility with the ECtHR and CJEU Human Rights Standards

As the OSMRA provisions on harmful content could apply to content containing online disinformation, it is crucial to assess whether the design of these provisions ensures compatibility with applicable human rights standards under the ECHR and CFR. To assist with this assessment, it is instructive to recall the key principles that this thesis has distilled from ECtHR and CJEU jurisprudence which are applicable for false and misleading information.

[109] S139A Broadcasting Act, inserted by s45 OSMRA.
[110] ibid s139K.

Figure 9. Summary of key interpretive principles from ECtHR and CJEU jurisprudence regarding the restriction of false and misleading information

Key Interpretive Principle	***Interpretive Factor for Factual Assessment***
Restrictions on access to false or misleading information must not foster arbitrary removal of lawful communications.	• Existence and nature of domestic law. • Existence and nature of European Union (EU) law. • Hate speech or defamatory statements (under relevant law).
Restrictions on access to false or misleading information are more justified for deceptive communications.	• Evidence of intention to deceive. • Existence of language targeting vulnerable groups. • Contradiction of established factual consensus.
Restrictions on access to false or misleading information are more justified for communications likely to influence political engagement.	• Proximity to election or referendum. • Relevance of information to political populace. • Prominence of individual (or group) disseminating information.

As this table illustrates, a key principle from ECtHR and CJEU jurisprudence is that in order to comply with applicable human rights standards measures to limit access to misleading online content must not foster arbitrary removal of lawful communications. The OSMRA could be interpreted in a manner which could potentially undermine this principle but leading to arbitrary removal of lawful content. The OSMRA not only addresses illegal 'harmful online content' but also addresses 'other categories' of content which do not fall under 'offence-specific categories.'[111] Relatedly, the OSMRA establishes statutory powers for Ireland's Media Commission to introduce new categories of harmful content which may not currently be illegal in Ireland.[112] The AVMSD, which the OSMRA transposes into Irish law, only appears to envisage restrictions on legal content 'which may impair the physical, mental or moral development of minors.'[113] Notably, the OSMRA addresses a broader range of harmful—but legal—content than the AVMSD.[114] However, this does not guarantee that the OSMRA—if applied to online disinformation—encourages removal of lawful content in a manner which is incompatible with the ECHR and CFR. Instead, it remains to be seen how the OSMRA will be interpreted and applied in practice. As summarised in the table above, restrictions on access to misleading online content are more likely to remain compatible with the ECHR and CFR if targeted at content which is deceptive. A related principle from ECtHR and CJEU jurisprudence is that restrictions on access to misleading online content are more likely to remain compatible with the ECHR and CFR if targeted at misleading content which is likely to influence voter choice in the electoral process.[115]

[111] ibid.
[112] Through s139B Broadcasting Act, inserted by s45 OSMRA.
[113] As section 6.2.1 discussed, transposition of the AVMSD is not the sole purpose of the OSMRA.
[114] Under s139A Broadcasting Act, inserted by s45 OSMRA.
[115] The 'interpretive factors' in the above table illustrate factors which intermediaries should assess when examining whether content is deceptive or capable of influencing voter choice/ political engagement.

As currently designed, the OSMRA defines 'harmful online content' in a manner which may extend to misleading—but legal—online content which is not deceptive and is not likely to influence political engagement.[116] This is evident in how section 139A of the Broadcasting Act, as inserted by section 45 OSMRA, includes content 'by which a person bullies or humiliates another person' as an explicit category of harmful content.[117] The inclusion of this category could plausibly be interpreted as an attempt to limit co-ordinated harassment against vulnerable individuals in line with initial justifications for the OSMRA.[118] However, this interpretation of harmful content—if applied to misleading communications disseminated in electoral contexts—lacks precision in a manner that could undermine ECHR and CFR human rights standards.[119] For example, online content may be disseminated to humiliate a prominent political official and this may inadvertently mislead certain individuals in the political populace. To ensure compatibility with the ECHR and CFR, however, any measure to restrict such content should involve a factual assessment of whether the content is deceptive and—through this deception—will likely influence political engagement. Without explicit guidance on these factors regarding deception and influence on political engagement, it is possible that content 'by which a person bullies or humiliates another person' could be interpreted as extending to content which could potentially mislead individuals even where no deception or political influence has been identified.[120] It must be recalled here that misleading online content—if interpreted as harmful due to its potential to humiliate another person—must also give 'rise to' a risk to a person's life or 'a risk of significant harm to a person's physical or mental health, where the harm is reasonably foreseeable.'[121] However, this risk test does not require any assessment of factors such as deception and political influence. This risk test therefore does not appear to provide an adequate threshold to ensure that content restrictions —if applied to misleading content that could humiliate another person —will ensure compatibility with undermine ECtHR and CJEU standards on freedom of expression and informed elections.

[116] See section 6.2.2.
[117] S139 (A) 4.
[118] As section 6.2.1 discussed.
[119] S139 (A) 4 Broadcasting Act, inserted by s45 OSMRA.
[120] ibid s139A (3) a.
[121] ibid.

A related problem is that the current definition of content 'by which a person bullies or humiliates another person' leaves considerable leeway for intermediaries to potentially interpret this as applying to sincere exchanges of offensive political criticism.[122] Addressing this specific definition, the Irish Council for Civil Liberties (ICCL) criticised how the OSMRA introduces 'hazardously vague' interpretations of harmful content which could encourage content restrictions that depart from ECtHR principles on freedom of expression.[123] This is a justified criticism which has specific relevance in the context of online disinformation. Recalling Chapter Two, the ECtHR generally extends strong protections under the right to freedom of expression to polemic criticisms—even if containing satirical or factually exaggerated statements—aimed at political officials when applying Article 10 ECHR.[124] In particular, the ECtHR not only offers strong protection to political satire but has also expressly highlighted that factually exaggerated satire can enable informed discussion of political and electoral matters.[125] Stated differently, intention to humiliate political officials may often go hand in hand with sincere criticisms in important democratic contexts.[126] While the ECtHR often considers the need for robust political criticism alongside the need for informed elections, the element of deception is particularly critical in how the ECtHR distinguishes sincere criticism from statements that could misinform the political populace.[127] This is additionally significant when considering how it may often be difficult to readily discern political satire from online disinformation.[128] Factors related to deception and influence on the political populace—which should also inform how intermediaries apply the 'risk test' and 'balance of probabilities'—are not provided in any interpretive guidance under the OSMRA.[129] It should also be recalled here that the LRC—when issuing recommendations on the OSMRA's language—explicitly cautioned against the inclusion of the term 'grossly offensive' under this legislation.[130] Specifically, the LRC cautioned that:

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[122] ibid.
[123] ICCL 'Briefing note: Online Safety and Media Regulation Bill' (2020) <https://www.iccl.ie/wp-content/uploads/2022/09/OSMR.pdf>
[124] Chapter 2 section 2.3.1.
[125] ibid.
[126] ibid.
[127] Chapter 2 section 2.3.3.
[128] Dannagal Young, 'Can Satire and Irony Constitute Misinformation?' (2018) Misinformation and mass audiences 124-139.
[129] S139 (4) Broadcasting Act, inserted by s45 OSMRA.
[130] LRC Report (n 11).

> Communications which are grossly offensive, indecent, obscene, or false and which do not fall into the above (illegal) categories require a high threshold and, in many cases, prosecution will not be in the public interest.[131]

If the Media Commission does explicitly designate online disinformation as harmful content under the OSMRA, it is vital that this is achieved in a manner which ensures alignment with the ECHR and CFR. Section 139B of the Broadcasting Act, inserted by section 45 OSMRA, empowers the Media Commission to propose to 'specify' new categories of harmful online content and to seek a Ministerial 'order giving effect to the proposal.'[132] This is a potentially vital mechanism because it empowers the Media Commission to 'specify' disinformation as a form of harmful content for the purposes of the OSMRA.[133] As highlighted, the Media Commission may attempt to do this if the Commission considers that disinformation poses a high level of 'risk of harm' and if there is a high level 'of availability' of such content.[134] Whether the Commission succeeds in specifying disinformation as a form of harmful content is contingent on whether such a proposal passes through scrutiny by the Joint Oireachtas Committee and public consultation procedure.[135] As currently designed, however, the OSMRA does not ensure that the Media Commission would categorise online disinformation as harmful content in a manner that is aligned with ECHR and CFR standards on freedom of expression and informed elections. To ensure compatibility with such standards, the Commission should define disinformation as false information which is deceptive and—through its deceptive nature—is likely to influence individual political engagement. At present, the Media Commission may attempt to define disinformation in a manner which extends to a broader range of misleading content. Section 139B of the Broadcasting Act, as inserted by section 45 OSMRA, requires the Commission to be 'satisfied' that it is in 'the public interest to give effect to' proposals to specify new categories of harmful content.[136] This provision further requires the Commission to 'have regard' to the rights of users when making such proposals.[137] While this sets out an obligation for the Commission to specify new harmful content in line with human rights, no further guidance is provided in the OSMRA on the applicable standards for

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[131] ibid para 1.78.
[132] S139B (1) Broadcasting Act, inserted by s45 OSMRA.
[133] Specifically for purposes of s139A Broadcasting Act, inserted by s45 OSMRA.
[134] S139B (5).
[135] ibid s139(C).
[136] ibid s139B (4).
[137] ibid s139B (5).

how this must occur. A related problem here is that while the Commission must consult 'any draft advisory committee' when making proposals to specify new content, the Commission is not required to consult any independent human rights body in this process.[138] This limited statutory guidance regarding human rights—and hypothetical implications in the disinformation context—will be further considered below.

The above problems—regarding how the OSMRA provides imprecise guidance on how the Media Commission should develop new categories of harmful content—are crucial when recalling how the OSMRA empowers the Media Commission to establish 'online safety codes.'[139] Section 139K, as inserted by section 45 OSMRA, expressly provides that these codes 'may provide for' specific 'standards, practices, or measures relating to the moderation of content or to how content is delivered on services.'[140] This is significant because it enables the Media Commission to devise specific codes with a view to influencing how intermediaries moderate legal content containing disinformation.[141] As currently designed, however, the OSMRA does not require the Media Commission to consult any specific human rights standards when developing new safety codes. The Commission is required to 'have regard' to the rights of users when developing new codes.[142] The Commission must also consult an advisory committee which it has established or 'thinks appropriate' before making new codes.[143] Importantly, this does not require any substantive independent scrutiny of how the Media Commission sets out standards for moderation of legal content in alignment with ECHR and CFR standards. It may further be recalled here that the Media Commission can issue 'online safety guidance materials and advisory notices' pertaining to how intermediaries should interpret and apply new codes.[144] As highlighted, this is designed to provide interpretive guidance on how intermediaries should identify harmful content and 'any other matter' relevant to compliance with online safety codes.[145] However, it is uncertain whether the Commission will issue any specific guidance—within these guidance materials—regarding balances between regulating harmful content and protecting human rights. As the OSMRA's harmful

[138] See section 6.2.2.
[139] S139K Broadcasting Act, inserted by s45 OSMRA.
[140] ibid s139K (4).
[141] See section 6.2.2.
[142] S139M Broadcasting Act, inserted by s45 OSMRA.
[143] ibid s139N (1).
[144] ibid s139Z.
[145] ibid s139Z (1).

online content provisions may apply to online disinformation, this is an important omission which requires human rights proofing. It is instructive here to summarise how OSMRA provisions on harmful content may apply to online disinformation in a manner which could implicate ECHR and CFR human rights standards.

The OMSRA—as currently designed—could be used to moderate content including online disinformation. Section 139A of the Broadcasting Act, as inserted by section 45 OSMRA, currently defines 'harmful online content' in a manner which already may extend to content containing illegal and legal forms of online disinformation.[146] Under section 139B, the Media Commission may explicitly propose to 'specify' online disinformation as a new category of harmful content for the purposes of section 139A.[147] If the Media Commission pursues this, it may then devise—and enforce—online safety codes under Section 139K to ensure that intermediaries moderate content containing disinformation if there is a high risk of exposure and availability of such content. The below table provides a summary of the OSMRA's key provisions that could apply to online disinformation:

Figure 13. Provisions of the OSMRA that have a potential application to online disinformation

[146] Both as an offence-specific category and under 'other categories.'; For example, an offence-specific category already includes online content by which a person publishes or distributes written material, or a recording of visual images or sounds, contrary to section 2(1) of the Prohibition of Incitement to Hatred Act 1989 (material, images or sounds which are threatening, abusive or insulting and are intended or, having regard to all the circumstances, are likely to stir up hatred). Offences under Ireland's Electoral Reform Act 2022 could be potentially added to the existing list of offences (under Schedule 3 of the Broadcasting Act inserted by s 46 OSMRA).
[147] ibid s139B (1).

Section 139 Broadcasting Act (as inserted by section 45 OSMRA)

	S139A	S139B	S139K
Potential application to online disinformation	Interpretation of 'harmful online content' could extend to online disinformation.	Media Commission could 'specify' disinformation as 'harmful online content' (for purposes of s139A).	Media Commission could develop 'online safety codes' to 'minimise' availability of disinformation.
Only illegal content	✕	✕	✕
Example of standard (potentially justifying content removal)	Disinformation included as 'offence-specific' content; Misleading online content identified as bullying/humiliating another person (3) and posing risk of 'significant harm' which is 'reasonably foreseeable'(4).	Media Commission proposes that disinformation poses high 'level of risk of exposure' and undermines rights of users of services (5).	Media Commission determines that disinformation poses high 'level of risk of exposure' and undermines rights of users of services (5).
Potential human rights safeguard	'Balance of probabilities' (5).	Media Commission must 'have regard' to rights of users (5).	Media Commission must 'have regard' to rights of users (s139M); Media Commission must consult 'advisory committee' (s139N).

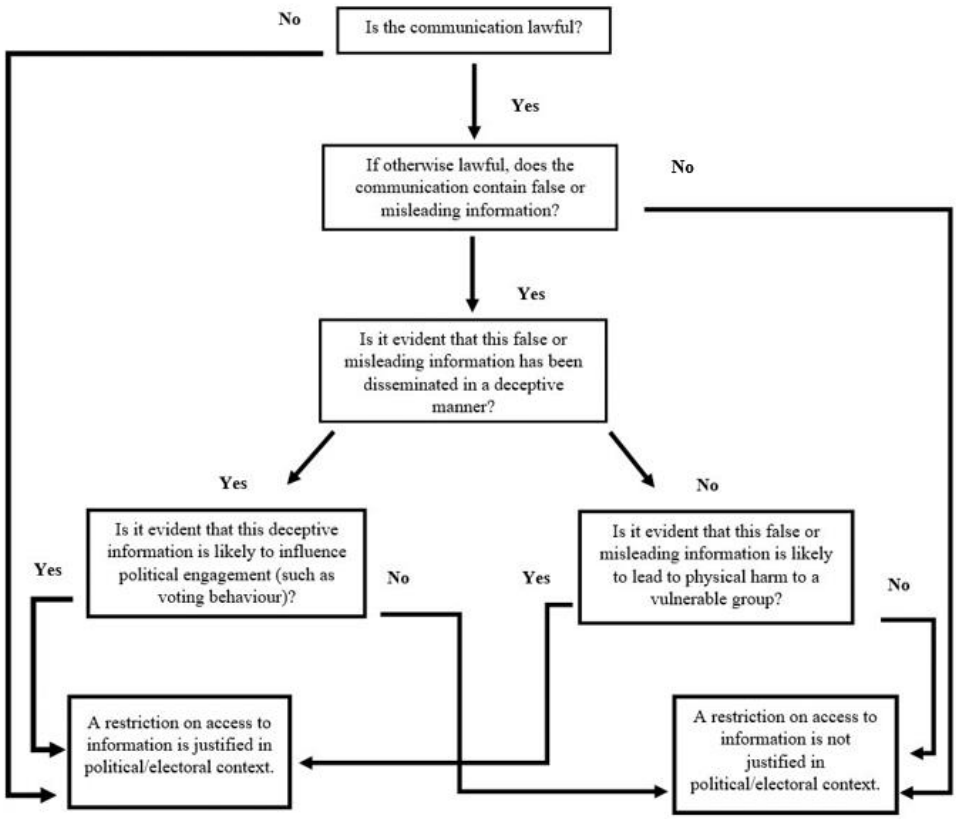
As the above table illustrates, the OSMRA provides insufficient guidance on how the Media Commission—if developing online safety codes for disinformation as a new form of harmful content—can ensure alignment with ECHR and CFR standards on freedom of expression and informed elections. Thus, it is now necessary to illustrate how this alignment could be ensured.

6.2.3.2 Applying the OSMRA: Towards a Human Rights Compliant Approach

The OSMRA not only empowers the Media Commission to 'specify' new categories of 'harmful online content' but also introduce 'online safety codes' to mandate how intermediaries 'take measures to minimise the availability' of content.[148] To consider how Ireland's Media Commission could hypothetically develop safety codes for online disinformation while ensuring compatibility with the ECHR and CFR, it is instructive to recall decisions which should inform restrictions on misleading—but not necessarily illegal—content.[149]

[148] S139B Broadcasting Act, inserted by S45 OSMRA; S139K (2).
[149] In political/electoral contexts (see Chapter 4 section 4.3.4.)

Figure 10. Visual summary of interpretive framework.



Due to the current lack of guidance in the OSMRA regarding how moderation of harmful content must protect human rights, the Media Commission could establish online safety codes for online disinformation—including legal forms—without ensuring that intermediaries engage with the key questions which the above diagram details. In turn, this could mean that intermediaries implement online safety codes for online disinformation in a manner which is incompatible with ECtHR and CJEU standards regarding freedom of expression and informed elections. As an example, the Commission could first 'specify' online disinformation as a listed form of 'harmful online content' under the OSMRA.[150] The Media Commission could justify this on the grounds that there is a 'high risk of exposure' to disinformation during election periods.[151] Within its definition provided for online disinformation, the Commission could include 'online trolling' of electoral candidates which could potentially mislead the public.[152]

[150] As section 6.2.2 outlined, this is only possible if the Minister 'makes an order giving effect to' the Commission's proposal (s139B (1) Broadcasting Act, inserted by s45 OSMRA).
[151] ibid s139B (5) b.
[152] See Phillip Ryan, 'Sinn Féin proposes legislation to expose anonymous online trolls' *Irish Independent* (Dublin 24 March 2022) <https://www.independent.ie/irish-news/sinn-fein-proposes-legislation-to-expose-anonymous-online-trolls/41482774.html>

If the Commission was successful in specifying disinformation as harmful content, it could then seek to publish 'online safety codes' on how intermediaries 'take appropriate measures to minimise the availability' of such content.[153] This could involve the publication of codes which set out 'measures relating to the moderation of content' containing online disinformation in pre-election periods.[154] If these codes included advice that access to any content containing disinformation should be disabled during the week before an election, this would likely undermine the ECHR and CFR. This is possible because intermediaries could interpret the Media Commission's hypothetical definition of disinformation as extending to polemic communications which are not deceptive and are unlikely to influence electoral engagement. If intermediaries disabled access to such content in the week before an election, this could lead to restrictions on misleading—but legal—content that fails to comply with ECtHR and CJEU standards on freedom of expression and informed elections.[155]

It remains possible, however, for the Media Commission to develop specific safety codes for disinformation in a manner which ensures closer compatibility with the ECHR and CFR. For example, the Media Commission could propose to 'specify' online disinformation as 'harmful online content' but strictly define disinformation as misleading information which is intentionally deceptive and likely to influence how individuals vote.[156] The Commission could then establish 'online safety codes' with a view to setting out how intermediaries 'take appropriate measures to minimise the availability' of this content.[157] Through these codes, the Commission could instruct that intermediaries should temporarily limit access to content containing online disinformation if—in the week before an election—intermediaries identify that such content is deceptive and likely to influence voter choice. These codes could further advise that—if these factors are not identified—intermediaries should only label content which may mislead the political populace. As this would likely necessitate a factual assessment of allegedly misleading content, the Commission could issue supplementary 'guidance materials' with explicit guidance on how intermediaries should interpret factors such as deception and influence.[158] This would ensure that the Media Commission—if developing online safety codes

[153] S139k (2) a Broadcasting Act, inserted by s45 OSMRA.
[154] ibid S139K (4).
[155] Which would mean that content restrictions under the OSMRA could be incompatible with the ECHR and CFR.
[156] When defining this under s139B.
[157] ibid s139K (4).
[158] Which the Commission is empowered to do under s139N.

for online disinformation—encourages compatibility with ECHR and CFR standards regarding freedom of expression and informed elections.[159]

As these hypothetical examples illustrate, it is currently uncertain whether the Media Commission will ensure compatibility with the ECHR and CFR if establishing new safety codes to influence how intermediaries moderate content containing online disinformation. This uncertainty is enabled by the imprecise statutory guidance in the OSMRA regarding how measures to limit the spread of harmful content should be reconciled with human rights. As noted, the Media Commission must 'have regard' to the rights of users when attempting to specify new forms of harmful content but it is unclear what rights—and relevant standards to protect rights—the Commission must have regard to.[160] Furthermore, the rights of users form part of 'matters to be considered' whenever the Commission attempts to publish new online safety codes but no further guidance is provided on this.[161] From the perspective of ensuring protection for human rights, greater priority should be given to the importance of human rights and greater specificity should be provided regarding the processes to be followed to ensure that human rights consideration is integrated into the Commission's duties at every stage. The current lack of guidance—and specific rights-proofing measures— provided for in the OSMRA creates issues for compatibility with human rights in the disinformation context. As Chapter Four has set out, the spread of disinformation may undermine the right to free elections while attempts to limit the spread of disinformation may undermine freedom of expression.[162] This reflects an observation from the Irish Human Rights and Equality Commission (IHREC) regarding how the OSMRA's implementation requires a 'careful balancing between competing rights.'[163] It is therefore vital that—if establishing safety codes on how intermediaries moderate content containing disinformation—the Media Commission is required to set detailed guidance on how measures to moderate such content should protect ECHR and CFR standards. This could be achieved by mandating that the Media Commission—when issuing any 'guidance materials' or 'advisory notices' regarding compliance with new safety codes—provides explicit guidance on how new codes should be implemented in a manner that ensures human

[159] As distilled from ECtHR and CJEU jurisprudence.
[160] S139B (5) g.
[161] ibid s139M (g).
[162] Chapter 4 section 4.3.4.
[163] See IHREC-Submission-to-the-Joint-Committee-on-Media-Tourism-Arts-Culture-Sport-and-the-Gaeltacht-on-the-General-Scheme-of-the-Online-Safety-and-Media-Regulation-Bill-FINAL.pdf

rights compliance.[164] To further ensure that the Media Commission defines new categories of 'harmful online content' in a manner which is consistent with the ECHR and CFR, the Media Commission should be required to consult independent human rights expertise as part of this process.[165] This requirement—which is currently lacking in the OSMRA—should also apply where the Commission attempts to introduce new online safety codes.[166] While mandatory consultation with human rights experts must not jeopardise the independence of the Media Commission, this could provide urgently needed external scrutiny regarding how the Commission establishes online safety codes for harmful—but not necessarily illegal—content in a manner which is rights compliant.

To assist in staffing the new Commission with its own human rights expertise, a new Media Commissioner should be introduced to permanently oversee how the OSMRA regulates harmful content in a manner which protects human rights. Authors such as Culloty et.al propose a 'media pluralism Commissioner' to oversee how Ireland's media 'policy and regulatory environment' should be 'best designed to create and maintain a healthy, pluralistic and diverse public sphere.'[167] In light of this section's analysis, this author submits that the inclusion of a new Media Commissioner could assist in overseeing how the regulation of harmful—but not currently illegal—content should maintain compliance with ECHR and CFR standards. Importantly, this expansion of the new Commission would also provide broader guidance—related to human rights compliance—which is necessary to ensure that the Media Commission fulfils its role as Ireland's DSC under the EU's DSA.[168] To ensure that the role of this additional Commissioner does not conflict with the functions of other existing Commissioners—such as the Online Safety Commissioner or the Digital Services Commissioner—it would be beneficial to ensure that any new Commissioner has an explicit human rights function and to clarify the human rights functions of these other existing Commissioners. .

[164] This would require amending s139N Broadcasting Act, inserted by s45 OSMRA.
[165] S139B Broadcasting Act, inserted by s45 OSMRA.
[166] ibid s139N (1) a.
[167] Submission by DCU Institute for Future Media, Democracy and Society March 2021 pg. 4 <https://fujomedia.eu/wp-content/uploads/2021/03/OSMR_Submission_DCU_FUJO_ABC-1.pdf>
[168] Chapter 5 section 5.3.3.

6.3 The Electoral Reform Act 2022

This section critically assesses how Ireland's Electoral Reform Act 2022 (ERA) establishes intermediary responsibilities to limit the spread of online disinformation in electoral contexts.[169] Section 6.3.1 first describes the legislative background which preceded the ERA. The focus here is not only on longstanding arguments for Irish electoral reforms but also on how specific concerns about electoral disinformation have expedited the development of the ERA. Section 6.3.2 then analyses how the ERA establishes intermediary responsibilities to limit the dissemination of online disinformation—including information which is not currently illegal—in electoral contexts. Building upon this analysis, section 6.3.3 then critically assesses how the current design of the ERA ensures compatibility with human rights standards regarding freedom of expression and informed elections which this thesis has distilled from ECtHR and CJEU jurisprudence.

6.3.1 Development of the Electoral Reform Act

The ERA was informed by criticisms of Ireland's fragmented statutory oversight for elections and referendums. Prior to the ERA, this oversight was distributed amongst various statutory agencies. For example, the Referendum Commission has been responsible for promoting public awareness of Irish referendums since the introduction of the Referendum Act 2001.[170] The Standards in Public Office Act 2001 separately empowered the Standards in Public Office Commission (SIPO) to enforce standards on donations to political parties and election expenditure.[171] Commentators have long identified this distribution of Irish election oversight as problematic. Farrell comments that Ireland's election oversight has been 'dispersed' across a 'clutch of different agencies' in a manner that has lagged behind established international best-practice.[172] Buckley and Reidy highlight how responsibilities for Ireland's election management have not only been 'fragmented across a series of agencies' but also across several 'ad hoc' bodies.[173] These authors further argue that Ireland's infrastructure for electoral reform has been hampered by 'the absence of a centralised system reliably operated and provided by

[169] Hereinafter 'ERA.'
[170] See full Act <https://www.irishstatutebook.ie/eli/2001/act/53/enacted/en/html>.
[171] See Standards in Public Office Act 2001 <https://www.irishstatutebook.ie/eli/2001/act/31/enacted/en/html >
[172] David Farrell, 'Conclusion and Reflection: Time for an electoral commission for Ireland' (2015) 30(4) Irish Political Studies 641-646.
[173] Fiona Buckley and Theresa Reidy, 'Managing the Electoral Process: Insights from, and for, Ireland,' Irish Political Studies,' (2015) 30(4) Irish Political Studies 445-453.

the government department with responsibility for election management.'[174] These shortcomings in Ireland's electoral framework have been further exposed by technological developments that have reshaped electoral engagement. For example, Kirk highlights how Irish 'domestic regulatory practices have failed to keep pace' with developments in electoral communications over the last 20 years and explicitly links this to structural gaps in Ireland's statutory oversight of electoral communications through 'online media.'[175]

Threaded throughout these academic criticisms has been a longstanding consensus that Ireland's electoral system would benefit from the introduction of a singular independent electoral management body.[176] Kavanagh posits that the introduction of an independent 'full-time electoral commission' could clarify the 'structural separation between those creating, implementing, and being subject to' electoral rules.[177] Farrell argues that Ireland should follow 'best international practice' by following countries such as Australia and New Zealand by introducing a singular independent commission to 'play a key role in cleaning up and modernizing our archaic registration and vote processes.'[178] As Marsh similarly highlights:

> An Electoral Commission would be proactive in addressing existing problems with electoral administration and, unlike any actor currently involved with electoral administration, electoral administration would be its priority.[179]

In principle, this consensus has been shared by successive Irish governments. Upon being formed, various governments have verbally committed to reforming Ireland's electoral oversight system and developing a statutory electoral management body to assist with this.[180] Importantly, however, successive Irish governments failed to deliver reforms in this area

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[174] ibid.
[175] Niamh Kirk and Lauren Teeling, 'A review of political advertising online during the 2019 European Elections and establishing future regulatory requirements in Ireland,' (2022) 37(1) Irish Political Studies 85-102
[176] This can be traced back to the 'Geary Report', see Sinnott and others, Preliminary Study on the Establishment of an Electoral Commission (UCD Geary Institute, 2008).
[177] ibid.
[178] Farrell (n 167).
[179] Michael Marsh, 'Presentation to the Convention on the Constitution, Fourth Report of the Convention on the Constitution,' (2013) 62.
[180] See, for example, Private Members Bills 'Electoral Commission Bill 2008 (PMB) — Bill Number 26 of 2008' Bills. Oireachtas; Electoral Commission Bill 2012 (PMB) — Bill Number 100 of 2012' Bills.

throughout the last two decades in a manner that sharply contrasts with developments in a range of European states.[181]

As this background illustrates, academic proposals for Irish electoral reforms long precede contemporary debates regarding online disinformation in Irish elections. However, the heightened academic and media focus on political disinformation in 2016 rejuvenated Oireachtas debates regarding the need to modernise Ireland's election system.[182] This was evidenced by the attempt to introduce the Online Advertising and Social-Media (Transparency) Bill 2017.[183] The 2017 Bill—which proposed criminal sanctions for the use of 'automated' accounts—was explicitly informed by concerns regarding the use of automated fake social media accounts for political purposes.[184] Parallel to this legislative development were extensive polling results that indicated concerns amongst Irish voters regarding the veracity of electoral information from online sources.[185] Such concerns were justified in the Irish electoral context. For example, Murphy identifies that the dissemination of false information in the week preceding Ireland's 2018 abortion referendum led to voters recalling 'false memories' of fabricated news stories about the referendum.[186] Partially spurred by such concerns, the Department of An Taoiseach commissioned an independent study in 2018 to assess Irish electoral security.[187] This review was explicitly informed by 'rising concern over the spread of disinformation online and recent international experience of interference in political processes.'[188] The general findings of this study concluded that the risk to Ireland's electoral security was 'relatively low.'[189] Crucially, however, the report identified 'cyber attacks' from foreign actors and the rapid 'spread of disinformation online' as 'substantial risks' to Irish

[181] Camile Bedrock and others, 'Institutional Change in Advanced European Democracies: An exploratory assessment,' (2012) European Union Democracy Observatory; Caroline van Ham and Staffan Lindberg, 'When Guardians Matter Most: Exploring the Conditions Under Which Electoral Management Body Design Affects Election Integrity,' (2015) 30(4) Irish Political Studies.
[182] See Chapter 1 section 1.3.
[183] Accessible here <https://www.oireachtas.ie/en/bills/bill/2017/150/>
[184] See first debate on this Bill (as proposed by Deputy James Lawless) <https://www.oireachtas.ie/en/debates/debate/dail/2017-12-06/26/>
[185] Increase in number of Irish media consumers concerned about 'fake news' on the internet – Reuters Digital News Report 2019 (Ireland) <https://www.bai.ie/en/increase-in-number-of-irish-media-consumers-concerned-about-fake-news-on-the-internet-reuters-digital-news-report-2019-ireland/>
[186] Gillian Murphy and others, 'False memories for fake news during Ireland's abortion referendum' (2019) 30(10) Psychological science 1449-1459.
[187] First Report of the Interdepartmental Group on the Security of Ireland's Electoral Process and Disinformation (Department of An Taoiseach, September 2018).
[188] ibid pg. 3.
[189] ibid.

election integrity.[190] This study identified a need for Ireland to curtail online communications designed 'to influence voter opinions' through disinformation.[191] Thus, this 2018 study recommended Irish governmental stakeholders to 'expedite' the introduction of an independent electoral commission to spearhead urgently needed reforms.[192] It may also be noted that—in previous work—the author of this thesis called for any proposed Electoral Commission to be statutorily empowered with explicit functions to combat electoral disinformation.[193]

A concrete breakthrough in Ireland's road to an independent electoral commission was made in January 2020. This came when the then newly elected coalition government published its Programme for Government (PfG) and committed to reforming Ireland's rules for online electoral communications and 'illegitimate election influence.'[194] The newly elected government announced plans to finally 'regulate online political advertising in the public interest.'[195] The PfG further outlined plans to review—and potentially reform—existing legislative standards to 'ensure that donations and resources from individuals outside the State are not being utilised to influence our elections and political process.'[196] This PfG further committed the new government to formally establish an independent electoral commission to oversee the management of Irish elections and referendums.[197] As referenced, this was not the first occasion in which a newly formed Irish government made this commitment. Importantly, however, it was the first occasion wherein a new Irish government published an explicit outline of proposed functions for a new Electoral Commission. These were initially envisaged to include:

- Providing independent oversight of elections and referendums.
- Informing the public about elections and referendums.

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[190] Overview- Regulation of Transparency of Online Political Advertising in Ireland, Department of the Taoiseach (14 Feb 2019) <https://www.gov.ie/en/policy-information/7a3a7b-overview-regulation-of-transparency-of-online-political-advertising-/>

[191] Interdepartmental Group Report (n 182) 3.

[192] See 'International Grand Committee on Disinformation and 'Fake News' that convened at the Oireachtas in Dublin in November 2019 <https://data.oireachtas.ie/ie/oireachtas/committee/dail/32/joint_committee_on_communications_climate_action_and_environment/other/2019/2019-11-08_signed-declaration_en.pdf>

[193] Ethan Shattock, 'The electoral commission, disinformation and freedom of expression' (2020) 71 Northern Ireland Legal Quarterly 675.

[194] Hereinater 'PfG' see <https://www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/>

[195] ibid pg. 120.

[196] ibid.

[197] ibid.

- Updating and maintaining the electoral register.[198]

The 2020 PfG did not explicitly reference disinformation. However, it opened the possibility for new legislative developments—and potential roles for the newly proposed Electoral Commission—in this area. This was further made possible by the publication of the General Scheme for the Electoral Reform Bill 2020.[199] This General Scheme reaffirmed commitments to provide reforms for Ireland's electoral system and to establish an independent Electoral Commission.[200] Since the publication of this General Scheme, the Electoral Reform Act (ERA) has been signed into law by the President of Ireland. As will now be analysed, the final Act not only references online disinformation but establishes explicit statutory responsibilities for intermediaries to address this problem.

6.3.2 Understanding how the ERA Addresses Online Disinformation

The ERA was signed into law on 25 July 2022.[201] The ERA provides for a broad range of updates to modernise how Irish elections are administered.[202] To oversee this modernisation of Ireland's electoral process, the ERA establishes a permanent statutory body known as the Electoral Commission.[203] The ERA empowers the Electoral Commission with a broad range of statutory functions. These include:

- Referendum functions (Chapter 5 of Part 2).
- Registration of political parties functions (Chapter 6 of Part 2).
- Research, advisory, and voter education functions (Chapter 9 of Part 2).
- Functions to regulate online political advertising (Part 4).
- Functions to regulate electoral process information, online electoral information and manipulative or inauthentic behaviour (Part 5).

The ERA tasks the new Electoral Commission with explicit statutory roles to inform Ireland's electorate. As part of these roles, the Electoral Commission subsumes 'referendum functions'

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[198] ibid pg. 120.
[199] See General Scheme for the Electoral Reform Bill 2020 <https://assets.gov.ie/118345/15ac22d0-1d73-438a-a1f8-4958bdacafa6.pdf>
[200] ibid pg.1.
[201] Hereinafter 'ERA.'
[202] See ERA Explanatory Memorandum.
[203] As s8 (1) ERA states, this body is also referred to as An Coimisiún Toghcháin.

which have previously been held by the Referendum Commission.[204] Section 31 ERA requires that the Electoral Commission must 'prepare a statement or statements containing a general explanation of the subject matter of the proposal for the referendum concerned and of the text thereof in the relevant Bill and any other information relating to those matters that the Commission considers appropriate.'[205] The Electoral Commission must also 'publish and distribute such statements' in a manner which the new Commission 'considers most likely to bring them to the attention of the electorate and to ensure as far as practicable that the means employed enable those with a sight or hearing disability to read or hear the statements concerned.'[206] Section 31 further requires the Electoral Commission to 'promote public awareness of the referendum and encourage the public to vote at the referendum.'[207] In carrying out this function, however, the Electoral Commission must not 'advocate or promote a particular result at a referendum.'[208] This is to ensure that the Electoral Commission does not use its influence to affect voter choice with potentially partisan or biased messaging.[209]

These statutory duties under section 31 have previously been held by the Referendum Commission in the specific referendum context.[210] However, the ERA also empowers the new Electoral Commission with a broad range of functions related to reforming Irish electoral policy and educating Ireland's electorate.[211] For example, the ERA sets out functions for the new Electoral Commission to conduct research on Irish electoral policy and provide educational materials to voters in advance of all Irish elections.[212] The ERA also provides the Electoral Commission with specific roles to advise the Irish government on relevant matters regarding potential reforms in Irish electoral policy.[213] The below analysis does not place specific focus on broader functions of the Electoral Commission to conduct research and

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[204] Under the Referendum Act 1998, as amended by the Referendum Act 2001.
[205] ERA s31 (1) a.
[206] ibid s31 (1) b.
[207] ibid s31 (1) c.
[208] ibid s31 (2) a, b; S31 (3).
[209] Important national pretext here is key reasoning from the Irish Supreme Court case of McKenna v An Taoiseach (No. 2) [S.C. Nos. 361 and 366 of 1995] The Court ruled that governmental use of funds to advocate for one side of a (divorce) referendum was unconstitutional. See Hamilton CJ, 'As the guardians of the Constitution and in taking a direct role in Government either by amending the Constitution or by refusing to amend, the people by virtue of the democratic nature of the State enshrined in the Constitution are entitled to be permitted to reach their decision free from unauthorised interference by any of the organs of State that they, the People, have created by the enactment of the Constitution.'
[210] Under the Referendum Act 1998, as amended by the Referendum Act 2001.
[211] Detailed under ERA Pt 2.
[212] See s64 for the Commission's 'research function.' S67 on the Commission's 'education function.'
[213] See s67 on the Commission's 'advisory role.'

initiate Irish electoral reforms.[214] The analysis below also does not focus on Part 4 ERA which establishes specific intermediary responsibilities to verify the identity of individuals who purchase political advertisements.[215] While this author acknowledges the verification requirements for political advertising under Part 4, Part 4 does not specifically address how intermediaries must moderate—and remove access to—content containing online disinformation in election periods. To focus on ERA provisions which are within the key inquiry of this thesis, the below analysis is limited to provisions under Part 5 which introduce explicit intermediary responsibilities to limit the dissemination of online disinformation in election periods.

6.3.2.1 Defining Online Disinformation under Part 5 ERA

Part 5 ERA addresses the 'regulation of electoral process information, online electoral information and manipulative or inauthentic behaviour.'[216] Part 5 commences by outlining relevant definitions and setting out the Electoral Commission's statutory role to protect Ireland's electoral process from being polluted by false and misleading information. Part 5 explicitly defines disinformation by stating that:

> "Disinformation", for the purposes of this Act, means any false or misleading online electoral information that—
> (a) may cause public harm, and
> (b) by reason of the nature and character of its content, context or any other relevant circumstance gives rise to the inference that it was created or disseminated in order to deceive.[217]

This definition specifically refers to 'false or misleading online electoral information.'[218] Section 144 clarifies that 'online electoral information' consists of any information relating to a 'candidate in an election' or 'a political party that has candidates standing in an election.'[219] Section 144 further states that 'online electoral information' includes 'any online content'

[214] While acknowledging that these were persistent concerns preceding the 2022 Act (outlined above).
[215] ERA ss121-126.
[216] ibid pt 5.
[217] ibid s144. This provision does not have sub sections and lists definitions of the ERA.
[218] ibid.
[219] ibid.

relating to 'issues that are of relevance' to an election or referendum.'[220] Additionally, 'online electoral information' consists of 'any online electoral process information.'[221] Section 144 separately defines 'online electoral process information' as 'online content of a factual nature relating to the holding of an election or referendum.[222] This includes—but is not limited to—content relating to 'the registration or voters or candidates' and 'times and locations' of voting.[223] Importantly, 'online electoral process information' also includes 'any other factual content relating to the holding of a particular election or referendum or to elections or referendums more generally.'[224] Disinformation—as defined under section 144—not only applies to 'online electoral information' but also applies to 'online electoral process information.'[225] Also relevant is that section 144 defines 'manipulative or inauthentic behaviour:'[226]

> "Manipulative or inauthentic behaviour" means tactics, techniques and procedures that—
>
> (a) constitute the deceptive use of services or features provided by an online platform, including user conduct having the object of artificially amplifying the reach or perceived public support of particular content,
>
> (b) are likely to influence the information visible to other users of that platform,
>
> (c) by reason of their nature and character, context or any other relevant circumstance, give rise to the inference that they are intended to result in the dissemination, publication or increased circulation of false or misleading online electoral information, and
>
> (d) may cause public harm.

As the above definitions illustrate, Part 5 ERA not only refers to disinformation but also to other forms of misleading conduct.[227] Notable here is that definitions for 'disinformation' and 'manipulative or inauthentic behaviour' both focus on deceptive conduct.[228] Resembling the

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[220] ibid.
[221] ibid.
[222] ibid.
[223] ibid.
[224] ibid.
[225] ibid.
[226] ibid.
[227] Evident in how 'manipulative or inauthentic behaviour' involves 'tactics' and techniques' to amplify content.
[228] Evident in how 'disinformation' involves information that is 'created or disseminated in order to deceive' and in how 'manipulative or inauthentic behaviour' involves 'deceptive use of services.'

EU's revised Code of Practice on Disinformation, Part 5 also references information or behaviour which 'may cause public harm.'[229] Importantly, however, section 144 specifically defines 'public harm' as 'any serious threat to the fairness or integrity of an election or referendum.'[230] The above definitions under Part 5 therefore appear to focus on intentional attempts to deceive Ireland's electorate. This is a positive development from an ECHR and CFR perspective. Importantly, however, section 144 further provides a definition for misinformation and states that:

> "Misinformation", for the purposes of this Act, means any false or misleading online electoral process information that may cause public harm, whether or not the information was created or disseminated with knowledge of its falsity or misleading nature or with any intention to cause such harm.

This definition only applies to 'false or misleading online electoral process information that may cause public harm.'[231] Part 5 therefore only appears to address misinformation which relates to the 'holding of an election or referendum.'[232] However, this definition for misinformation expressly references information where there may not be 'knowledge of its falsity or misleading nature or with any intention to cause such harm.'[233] Significantly, this includes information which could be disseminated without any deceptive intentions.

As these definitions under section 144 illustrate, Part 5 extends to information and conduct which may not currently be illegal under Irish law. This is significant because Part 5 sets out explicit statutory duties for the Electoral Commission to not only monitor but also 'combat' the above listed forms of false and misleading information.[234] Providing an overview of the Electoral Commission's role in this specific context, section 145 outlines that:

> (1) The Commission shall—

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[229] ibid
[230] ibid.
[231] ibid.
[232] See above definition for 'online electoral process information.'
[233] S144 definition of misinformation.
[234] ERA s145.

(a) protect the fairness and integrity of elections and referendums in accordance with this Part.

(b) monitor, investigate and combat the dissemination of— (i) disinformation, and (ii) misinformation,

(c) monitor, investigate, identify and combat manipulative or inauthentic behaviour,

(d) monitor, investigate and identify trends in respect of— (i) disinformation, (ii) misinformation, and (iii) manipulative or inauthentic behaviour,

(e) promote public awareness of misinformation, disinformation and manipulative or inauthentic behaviour and it may establish, facilitate or promote educational or information programmes for the purpose of the performance of its functions under this Part.[235]

In carrying out the above-detailed statutory functions, the Electoral Commission can seek assistance from new stakeholders which Part 5 makes provision for. For example, section 146 requires that the new Commission 'shall establish an online electoral information advisory board.'[236] This 'advisory board'—which the new Commission bears responsibility for selecting—is required to provide advice to the new Commission on 'the nature and effect of disinformation and misinformation' and 'the use by the Commission of its powers' under Part 5.[237] Section 146 further requires that:

(3) The Advisory Board shall comprise not more than 6 persons, to be appointed by the Commission, and each of whom shall have expertise in all or any of the following—

(a) electoral processes (including referendums) in the State,

(b) promoting fairness and integrity in elections and referendums, or

(c) the use of information technology and online dissemination of information in the context of elections and referendums.[238]

In addition to this requirement, section 147 provides that the Electoral Commission 'shall, from time to time' also establish a 'stakeholder council.'[239] The stated purpose of this council is to

[235] ibid s145 (1).
[236] ibid s146 (1) calls this 'the advisory board.'
[237] ibid s146 (2) a, b.
[238] ibid s146 (3).
[239] ibid s147 (1).

'provide advice and opinions to the Commission generally and in relation to the preparation and use of codes of conduct' which Part 5 ERA also makes provision for.[240] Section 147 requires that the 'composition' of stakeholder councils must 'reflect the views of members of the Oireachtas as well as those of print, broadcast and online media.'[241] While these codes will be analysed below, it is important to acknowledge here that Part 5 does not expressly require the 'advisory board' or 'stakeholder council' to independently scrutinise how the Electoral Commission executes its responsibilities with respect to online electoral information.[242] Moreover, Part 5 does not expressly require that these stakeholders possess any human rights expertise. While this will be further assessed in section 6.3.3, it is first necessary to analyse how Part 5 imposes explicit responsibilities for intermediaries to limit the dissemination of misleading information in Irish electoral contexts.

6.3.2.2 Obligations for Online Platforms under Part 5 ERA

Part 5 ERA establishes obligations which are designed to limit the dissemination of misleading information during election periods.[243] These apply to 'online platforms' which section 144 defines as:

> 'Any host, operator or provider of a website, web application or digital application accessible to the general public or a section of the public where the website, web application or digital application—
> (a) has at least 100,000 unique monthly users in the State for a period of not less than 7 months during the 12 months immediately preceding the date of the making of a polling day order, and
> (b) displays any content that has political purposes, including but not limited to online political advertisements.[244]

Not all obligations under Part 5 require platforms to moderate—or remove access to—content. For example, section 148 requires platforms to 'notify the Commission' if platforms are

[240] ibid.
[241] ibid s147 (2).
[242] The Commission selects members of the advisory board (up to 6 members) and selects members of the stakeholder council (up to 15).
[243] S144 defines 'electoral period' as 'the period of time commencing on the day of the making of a polling day order and ending on polling day.'
[244] ibid.

'satisfied from information of which' they are aware that their services 'may be being used for the purposes of disinformation.[245] Section 148 further requires platforms to notify the Commission if platforms are satisfied that 'there may be misinformation' or 'manipulative or inauthentic behaviour' on their services.[246] This includes a separate obligation for platforms with over one million 'unique monthly users in the State' to 'prepare and transmit' reports to the Commission which specify 'any significant risks to the fairness or integrity of an election or referendum posed by disinformation, misinformation, or manipulative behaviour' on their services.[247] Under section 149, all platforms must 'put mechanisms in place to allow any individual, entity, or person to notify it of the presence on the platform of information that the individual or entity considers to' fall under any Part 5 categories of misleading information.[248] This requires platforms to process the 'validity' of notifications 'without undue delay' and does not expressly require any measures to moderate or limit access to misleading online content.[249] Recalling Chapter Five's discussions, however, platforms which are already subject to 'systemic risk' obligations under the EU's DSA are likely to adopt such measures.[250]

Crucially, sections 152-158 explicitly empower the Electoral Commission to request—and potentially mandate—that online platforms take steps to limit visibility of misleading content. Section 152 first instructs how the Electoral Commission must exercise these powers:

> (1) The Commission shall only exercise its powers under sections 153, 154, 155, 156, 157 or 158 where the Commission is satisfied that it is in the public interest to do so, having regard to all the circumstances including the rights of any person whom the Commission considers may be affected by the exercise of such powers.
> (2) Without prejudice to subsection (1), the Commission shall, in considering the exercise of its powers under sections 153, 154, 155, 156, 157 or 158 give due weight to the following matters:
> (a) the right to freedom of expression;
> (b) the right to freedom of association;

[245] ibid s148 (1) a.
[246] ibid s148 (1) b, c.
[247] ibid s148 (2).
[248] ibid s149 (1) a, b; s160 also enables that the Commission 'may' establish its own reporting mechanism.
[249] ibid s149 (3).
[250] See Chapter 5 section 5.3.3.

(c) the right to participate in public affairs; and
(d) the obligation on the State to defend and secure the fairness and integrity of elections and referendums.

The explicit obligation for the Electoral Commission to 'give due weight' to these rights under section 152 is a positive development.[251] It is particularly positive that the Commission is required to consider the State's obligation 'to defend and secure the fairness and integrity of elections and referendums' when considering how this is a well-established obligation under Article 3 Protocol 1 ECHR.[252] A limitation of this positive development, however, is that section 152 lacks specific clarity regarding how the Electoral Commission should balance the right to freedom of expression with 'the obligation' of the State to 'secure the fairness and integrity of elections and referendums.'[253] However, this provision requires the new Commission to 'prepare and publish guidance to inform' the proper exercise of' its powers under sections 153-158.[254]

Sections 153-158 empowers the Electoral Commission to issue a set of orders and notices which are designed to limit the dissemination of false and misleading information online. Section 153 first establishes powers for the new Commission to issue a 'take-down notice.'[255] This provision states that:

(1) Where—
(a) during an election campaign period, the Commission is satisfied from the information available, whether obtained through its monitoring, or otherwise, of online electoral information or provided by any other person or otherwise, that any online electoral information constitutes disinformation, or
(b) at any time, the Commission is satisfied from the information available, whether obtained through monitoring, or otherwise, of online electoral information or provided by any other person or otherwise, that any online electoral process information constitutes misinformation,

[251] S152 (2).
[252] Chapter 3 section 3.3.
[253] S152 (2) d.
[254] ibid s152 (4).
[255] ibid s153.

> and the Commission is satisfied that the issuing of such a notice is necessary to protect the fairness or integrity of the election or referendum, the Commission may issue a take-down notice requiring any natural or legal person, including any online platform, to remove, within a specified period, the content to which the take-down notice relates.[256]

When issuing a 'take-down notice', the Electoral Commission must not only provide a 'statement of reasons for the Commission's opinion' but must also 'include the precise online location' of the information which is the subject of the notice.[257] The Electoral Commission must also 'inform the person to whom the notice is addressed of the right to appeal the notice' within five days of issuing the notice.[258] Section 153 further obliges the Electoral Commission to outline why 'it was necessary to require the removal or the information in order to protect the fairness or integrity of the election or referendum.'[259] This design under section 153 provides a template for further notices and orders which the Commission is empowered to issue under Part 5. For example, section 154 follows the above wording where it establishes that the Electoral Commission 'may issue a correction notice' relating to information where the Commission 'is satisfied' that the information constitutes disinformation or misinformation.[260] This requires the Electoral Commission to issue a statement 'setting out in what respects the content was false or misleading' and to provide 'a correct statement of information.'[261] In turn, platforms must communicate correction notices 'to all persons who access the online platform.'[262] Section 155 provides that the new Commission—under the same criteria as detailed in section 153(1)—may 'issue a labelling order requiring the online platform to state that the subject content is currently being investigated by the Commission pursuant to this Part to determine whether or not it constitutes disinformation or misinformation.'[263] Section 156 further enables the new Commission to issue an 'access-blocking order' whereby platforms must 'take reasonable steps to disable access to the online location' containing disinformation or misinformation.[264] Section 156 not only addresses content containing disinformation and

[256] ibid s153 (1).
[257] ibid s153 (2).
[258] ibid s153 (2) e; this is assessed further below.
[259] ibid s153 (3) c.
[260] ibid s154 (1).
[261] ibid s154 (4).
[262] ibid s154 (1).
[263] ibid s154 (1).
[264] ibid s156 (1) c.

misinformation but also 'bot activity that constitutes manipulative or inauthentic behaviour.'[265] This is also addressed where section 157 separately empowers the new Commission to issue a 'manipulative or inauthentic behaviour (including bot activity) notice.'[266] This notice may not only require platforms to 'publish a statement informing all users' of manipulative or inauthentic activity but can also require platforms to 'take reasonable steps to prevent or prohibit such behaviour or use.'[267]

Section 158 empowers the Electoral Commission to 'apply to the High Court for an order directing compliance' with any of the above listed notices or orders.[268] Section 165 separately establishes that failure to comply with any notices or order under section 153-157 'shall be an offence' for the purposes of Part 5.[269] Any person found guilty of this offence can be liable 'on summary conviction, to a class A fine or to imprisonment for a term not exceeding 12 months or to both.'[270] Persons guilty 'on conviction on indictment' are liable to 'a fine or to imprisonment for a term not exceeding 5 years or to both.'[271] This is accompanied by similar offences for individuals who publish statements containing disinformation or misinformation under section 166.[272] Thus, Part 5 not only imposes platform obligations with respect to information which is not currently illegal but also establishes new offences for disseminating disinformation and misinformation under Irish law. This means that content containing disinformation and misinformation could be classified as 'offence-specific' harmful content for the purposes of the OSMRA if offences under the ERA are added to offences detailed under the OSMRA.[273]

6.3.2.3 Potential safeguards against arbitrary content restrictions under Part 5 ERA

As detailed above, sections 153-158 ERA can all extend to misleading content which is not currently illegal under Irish law. It is also vital to recall that all sections 153-158 relate not only to disinformation but also misinformation. This is significant because misinformation—as

[265] ibid s156 (1) c.
[266] ibid s157.
[267] ibid s157 (3); although 'reasonable steps' are not defined.
[268] ibid s159 (1).
[269] ibid s165 (1).
[270] ibid s157 (2) a.
[271] ibid s157 (2) b.
[272] ibid s166 (1).
[273] If the Media Commission adds the ERA to Schedule 3 Broadcasting Act, inserted by S46 OSMRA.

defined under section 144—includes information which may not be deceptive.[274] An important question thus arises as to whether Part 5 ERA—as currently designed—provides safeguards against arbitrary removal of legal content. One potentially vital mechanism is that section 161 requires the Electoral Commission to 'from time to time, establish an appeal panel' in respect of any notice or order issued under sections 153-158.[275] Any panel must be 'comprised of one or more members of the Commission and shall be independent of the original decision-maker.'[276] Appeals can be made not only by 'any natural or legal person' but also by online platforms.[277] Appeals must be made in writing 'through a portal provided on the Commission's website' and must also 'state all of the grounds on which the appeal is made.'[278] Appeals—which must be 'heard and determined as soon as is practicable'—could lead to cancellations of notices or orders under sections 153-158.[279] Appeals under section 161 must be made 'not later than 5 days' after the date upon which a notice or order is issued.[280] During these five days, however, the 'operation' of notices or orders remain unaffected 'unless the appeal panel otherwise directs.'[281] In practice, this means that an order to remove potentially false—but not deceptive or influential—communications could be issued in the critical days preceding an election. Section 6.3.3 will consider this further.

Aside from this appeals mechanism under section 161, other provisions under Part 5 could have practical uses in preventing arbitrary restrictions on legal content. As previously referenced, section 152 requires the Electoral Commission to 'prepare and publish guidelines to inform the proper exercise' of powers to issue notices and orders under sections 153-158.[282] This is significant because—as discussed above—section 152 explicitly requires the new Commission to 'give due weight' to freedom of expression and 'the obligation on the State' to secure fairness in Irish elections.[283] In principle, the new Commission could publish specific guidelines under section 152 regarding how the Commission must protect the right to freedom of expression by not encouraging measures that could result in arbitrary restrictions on legal content in election

[274] S144.
[275] ibid ss161 (1) and (2).
[276] ibid s161 (1).
[277] ibid s161 (2) b.
[278] ibid s161 (3).
[279] ibid s161 (14); (9).
[280] ibid s161 (2) a.
[281] ibid.
[282] ibid s152 (4).
[283] ibid s152 (2).

periods. However, section 152 only currently requires the new Commission—when developing such guidelines—to ensure that its powers are exercised transparently and 'in accordance with international best practice and in the public interest.'[284] No further reference is made to how 'international best practice' and 'public interest' must incorporate human rights principles.

Of further relevance is that section 163 ERA empowers the Electoral Commission to publish 'codes of conduct in respect of online electoral information or online electoral process information.'[285] New codes—which must be laid before both Houses of the Oireachtas if published—can be addressed not only to online platforms but also to any individual.[286] Section 163 does not prescribe any specific content which must be included in codes of conduct and appears to give the Electoral Commission discretion on this matter. This is significant because this provision explicitly empowers the Electoral Commission to 'determine whether a code of conduct is an optional code of conduct or a mandatory code of conduct.'[287] Before publishing any new code of conduct, the Electoral Commission must 'have regard to the following' factors:[288]

(a) the need to protect democratic values in society;
(b) the public interest in having a well-informed electorate;
(c) the threat posed to democratic values by misinformation and disinformation;
(d) the right to freedom of expression;
(e) the right to freedom of assembly.

These factors explicitly require the new Commission—in making new codes of conduct—to 'have regard' to rights which have relevance in the context of securing informed elections.[289] The obligation for the new Commission to consider the right to freedom of expression alongside democratic values and the need for an informed political populace is a positive inclusion under the ERA. It remains unclear, however, whether this obligation will ensure that the new Commission will develop new codes that are sufficiently rights-protective. The new Commission 'may' consult with the 'advisory board, the stakeholder council or any other group

[284] ibid sS161 (5).
[285] ibid s163 (1).
[286] ibid s163 (2).
[287] ibid s163 (4).
[288] ibid s163 (6).
[289] ibid.

convened by the Commission for that purpose.'[290] A crucial limitation here is that the new Commission is not explicitly required to consult independent human rights stakeholders to obtain independent scrutiny or—or guidance—regarding how codes of conduct under section 163 can ensure compatibility with European human rights standards under the ECHR and the CFR.. Section 6.3.3 will assess this further.

Part 5 ERA includes several provisions which are designed to limit the dissemination of disinformation in Irish electoral periods. As examined, Part 5 not only addresses online disinformation but also applies to other listed forms of misleading—including not currently illegal—content which is disseminated in electoral contexts. Section 6.3.3 will now assess whether the design—and hypothetical application—of these provisions under Part 5 can ensure compatibility with relevant human rights standards under the ECHR and CFR.

6.3.3 Assessing the Compatibility of the ERA with ECHR and CFR Human Rights Standards

Part 5 ERA provides the Electoral Commission with explicit statutory powers to ensure that Irish elections and referendums do not become polluted by false and misleading information. As analysed above, these include powers for the Electoral Commission to mandate that intermediaries take steps to reduce visibility of misleading—including not currently illegal—content which is disseminated in electoral contexts. The section now assesses whether the above-detailed provisions under Part 5 ensure consistency with human rights principles—regarding freedom of expression and informed elections—which this thesis has distilled from ECtHR and CJEU jurisprudence.

6.3.3.1 Evaluating Whether the Design of Part 5 ERA Ensures Compatibility with ECtHR and CJEU Human Rights Standards

As the foregoing analysis has illustrated, Part 5 ERA sets out provisions which Ireland's Electoral Commission may use to request—and potentially mandate—that online platforms take steps to limit access to misleading information in electoral contexts. Importantly, these provisions under Part 5 apply to content which is misleading but may not currently be illegal under Irish law. To ensure whether these provisions are designed in a manner which ensures

[290] S163 (3).

compatibility with the ECHR and CFR, it is necessary to recall relevant interpretive principles which this thesis has distilled from ECtHR and CJEU jurisprudence:

Figure 9. Summary of key interpretive principles from ECtHR and CJEU jurisprudence regarding the restriction of false and misleading information

Key Interpretive Principle	***Interpretive Factor for Factual Assessment***
Restrictions on access to false or misleading information must not foster arbitrary removal of lawful communications.	• Existence and nature of domestic law. • Existence and nature of European Union (EU) law. • Hate speech or defamatory statements (under relevant law).
Restrictions on access to false or misleading information are more justified for deceptive communications.	• Evidence of intention to deceive. • Existence of language targeting vulnerable groups. • Contradiction of established factual consensus.
Restrictions on access to false or misleading information are more justified for communications likely to influence political engagement.	• Proximity to election or referendum. • Relevance of information to political populace. • Prominence of individual (or group) disseminating information.

The first principle in the above table indicates how the ERA—to ensure compatibility with the ECHR and CFR—must not set out obligations which lead to arbitrary restrictions on access to lawful communications.[291] As the second principle from the above table demonstrates, the ERA is less likely to lead to restrictions on misleading but lawful content which are incompatible with the ECHR and the CFR if the ERA focuses on misleading communications which are deceptive. As Part 5 ERA applies to lawful content—including content which may currently be lawful under EU law—, it is vital to recall relevant Part 5 definitions to assess the extent to which Part 5 places focus on deceptive communications when outlining intermediary responsibilities to misleading content in elections.[292] One positive observation here is that the ERA defines 'disinformation' and 'manipulative or inauthentic behaviour' in a manner which explicitly targets intentional deception.[293] Section 144 states that disinformation involves misleading information which is 'created or disseminated in order to deceive.'[294] Section 144 further states that 'manipulative or inauthentic behaviour' involves 'deceptive use of services.'[295] It could plausibly be argued—as Chapter Five has argued—that the concept of 'public harm' is vague when outlining intermediary responsibilities to curb disinformation.[296] Crucially, however, section 144 specifically defines 'public harm' as 'any serious threat to the

[291] For example, Pt 5 definitions do not reference content containing defamation or hate speech.
[292] Under s144.
[293] ibid.
[294] ibid
[295] ibid.
[296] Chapter 5 section 5.2.3.

fairness or integrity of an election or referendum.'[297] This precision is welcome from an ECHR and CFR perspective because it defines 'public harm' in the specific context of misleading information which undermines fair elections by deceiving Ireland's electorate.[298] As Chapter Three has found, the ECtHR has consistently reasoned that States have positive obligations to protect their electoral process from deceptive information—and conduct—which deceives voters.[299] When recalling this, it is also welcome that Part 5 references the State's obligation 'to defend and secure the fairness and integrity of elections and referendums.'[300]

While this focus on electoral deception is positive, Part 5 provisions do not only apply to deceptive communications. For example, section 144 references how deception should be identified 'by reason of the nature and character of its content, context or any other relevant circumstance gives rise to the interference that it was created or disseminated in order to deceive.'[301] It can be acknowledged here that—as the above table illustrates—the ECtHR and CJEU generally emphasise that misleading online content may often require an assessment of contextual factors which could infer deceptive intentions.[302] However, Part 5 provides no explicit guidance on applicable factors to discern deception. Relatedly, section 144 also defines misinformation in a manner which includes misleading content 'whether or not the information was created or disseminated with knowledge of its falsity of misleading nature or with any intention to cause such harm.'[303] In the electoral context, State measures to restrict this type of information are more likely to undermine ECtHR and CJEU standards on freedom of expression by restricting access to content which may potentially mislead but is not deceptive.[304] As Chapter Four argued, case law of the ECtHR and the CJEU has shown that it is still possible to justify restrictions on non-deceptive content if such content is misleading and likely to influence the political populace in a manner that threatens vulnerable groups.[305]

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[297] ERA s144.
[298] ibid.
[299] Chapter 3 section 3.3.
[300] ERA s152 (2) d.
[301] ibid s144.
[302] Such as contradictions of an established factual consensus or targeting of vulnerable groups.
[303] S144; although technically only applying to 'online electoral process information.'
[304] See Chapter 4 section 4.3.4.
[305] See Chapter 2 section 2.3.2; Chapter 4 section 4.3.3; As case law of the ECtHR has also shown, it may also be important to consider whether the spread of non-deceptive but communications could be misleading and undermine another ECHR right (such as Art 8 ECHR). On this see *Brzeziński v Poland* Application No 47542/07 (ECtHR, 25 July 2019); *Kita v Poland* Application No 57659/00 (ECtHR, 8 July 2008).

As currently designed, however, Part 5 offers insufficient interpretive guidance regarding how misleading information may influence the electorate.[306]

As outlined in the foregoing analysis, sections 148 and 149 first impose obligations for platforms to implement notification mechanisms and provide information to the Electoral Commission regarding the presence of disinformation and misinformation on platforms' services.[307] This requires several platforms already subject to the EU's Code of Practice on Disinformation to monitor how disinformation may be used on their services in a national electoral context in Ireland.[308] This is welcome because—as Chapter Five discussed—the EU's Code of Practice on Disinformation has been hampered by a lack of such data at the Member State level.[309] It is currently unclear whether these provisions—in practice—will lead platforms to adopt arbitrary restrictions on lawful content. While sections 148 and 149 do not explicitly encourage content removal, Chapter Five outlined that the DSA mandates that certain intermediaries moderate content under their own terms of service in line with fundamental rights.[310] Moreover, the DSA defines 'systemic risk' obligations in a manner which could encourage large intermediaries to remove misleading content which is not illegal.[311] To avoid platforms processing notifications under sections 148 and 149 in a manner which leads to content removal that is incompatible with the ECHR and CFR, Part 5 of the ERA should provide explicit guidance on this.

The most crucial provisions of Part 5 from an ECHR and CFR compliance perspective are sections 153-157 which empower the Electoral Commission to request—and potentially mandate—that online platforms take steps to limit access to misleading information during elections. The Electoral Commission—as empowered by these provisions—can serve notices and orders for platforms to moderate misleading content in election periods. As analysed, sections 153-157 apply in the context of disinformation but also to misinformation which may not be deceptive. This is significant because sections 153 and 156 empower the Electoral Commission to issue 'take-down' notices and 'access-blocking' orders to platforms in election

[306] S144 merely references 'manipulative or inauthentic behaviour' that is 'likely to influence the information visible to users.'
[307] S148; 149.
[308] See s148 (2).
[309] See Chapter 5 section 5.2.3.
[310] ibid
[311] ibid.

periods.[312] To issue these, the Electoral Commission must be 'satisfied from the information available, whether obtained through its monitoring, or otherwise.'[313] As the Electoral Commission can seek a High Court order to compel compliance with these notices and orders under section 158, Part 5 empowers the Electoral Commission to mandate removal of misleading online content which is not deceptive.[314]

This is problematic when recalling how the ECtHR and CJEU are unlikely to agree with State actions to remove misleading online content if the ECtHR and CJEU identify that content could potentially be misleading but constitutes a sincere attempt to convey criticism of elected officials through satire.[315] Even where content does not contain attempts to convey sincere political criticism, the ECtHR and CJEU consistently emphasise that State actions to curtail the effects of misleading content are more likely to undermine the right to freedom of expression if States have not identified that such content has been disseminated with deceptive intentions.[316] Thus, the Electoral Commission should only apply more intrusive notices and orders under Part 5—namely take-down notices and access-blocking orders—to content containing disinformation.[317] To address misinformation—which as section 144 defines may not be deceptive—, the Electoral Commission should issue 'correction' notices and 'labelling' orders as provided for under sections 154 and 155 respectively.[318] Measures to correct and label false information—as opposed to permanently restraining the dissemination of false information—are less intrusive on the right to freedom of expression. For example, the ECtHR has generally attached importance to where States choose the 'least restrictive means' of interfering with an individual's right to freedom of expression when applying the proportionality test under Article 10 ECHR.[319] In applying sections 153-157 in this manner, the new Commission would ensure greater consistency with ECtHR and CJEU standards

[312] ERA ss153-156.
[313] ibid s153 (1) a.
[314] ibid s158.
[315] Chapter 4 section 4.4.
[316] ibid.
[317] As this is defined as deceptive under s144.
[318] S154; S155.
[319] See *Perincek v Switzerland* Application No 27510/08 (ECtHR, 15 October 2015) at para 273; *Mouvement Raelien Suisse v Switzerland* Application No 16354/06 (ECtHR, 13 July 2012) at para 75; *Faber v Hungary* Application No 40721/08 (ECtHR, 24 July 2012) at para 43; See also the ECtHR's caution against 'prior restraints' in *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* [GC] (Application no. 32772/02) at para 92.

regarding freedom of expression and informed elections when executing these powers under Part 5.

A related problem is that the Electoral Commission—when executing powers under sections 153-157—is not required to prioritise the issuing of orders and notices to misleading content which is likely to influence voter choice. As the above table illustrates, the ECtHR and the CJEU are more inclined to find that State actions to restrict access to misleading online content will undermine the right to freedom of expression if content affected by a restriction is not capable of influencing the political populace by misleading individuals.[320] While Part 5 specifically addresses misleading information which is disseminated in close proximity to elections and referendums, it does not provide precise guidance on how the Electoral Commission should justify why content restrictions are necessary due to the potential that misleading information could affect election outcomes.[321] This is an important omission when recalling how the ECtHR and CJEU are more concerned by intentionally false communications that are likely to shape voter opinions and influence election outcomes.[322] Conversely, the ECtHR and CJEU have consistently stressed that—in the absence of deceptive or discriminatory elements—polemic electoral communications may have important value in the democratic process by shaping voter opinions. Without guidance on how the Electoral Commission should apply sections 153-157 in alignment with this standard, the new Commission could issue notices and orders for platforms to remove content which is not deceptive and may still have a positive influence on the electorate by informing voters on issues of relevance in a pre-election period. Section 161 provides for the Electoral Commission to establish an appeal panel to enable individuals to appeal any notices or orders after these have been issued under sections 153-157.[323] However, this mechanism may not ensure the prevention of orders and notices that lead to restrictions which are s problematic from an ECHR and CFR standpoint. For example, appeals must be heard from within five days of being initiated to the Electoral Commission.[324] During these five days, however, any order to restrict access to electoral information must continue to be upheld pending appeal outcomes.[325] As

[320] Chapter 4 section 4.4.
[321] For example, in the 'statement of reasons' under ss153-157.
[322] Chapter 4 section 4.4.
[323] ERA s161.
[324] ibid ss153-156.
[325] ibid s161 (2) (a).

discussed, section 158 also empowers the Electoral Commission to 'apply to the High Court for an order directing compliance with' notices and order under sections 153-157.[326] While the extent to which the Commission will apply for courts orders is currently uncertain, this remains a potentially significant mechanism.[327] The practical significance of these provisions under Part 5 of the ERA is that the ERA could lead to removals of non-deceptive communications at a time when the need for voters to access a wide range of political information becomes most urgent.

Figure 14. Summary of how the ERA could potentially apply to online disinformation

ERA provisions which implicate ECHR and CFR standards on freedom of expression and informed elections

	Definitions for False and Misleading Information (Section 144)	**Platform Obligations to Provide Information to Electoral Commission (Section 148/149)**	**Platform Obligations to Correct/Label Misleading Information (Sections 154/155)**	**Platform Obligations to Remove Access to Misleading Information (Sections 153/156)**
Application to Misleading Content in Elections	✓	✓	✓	✓
Application to Legal Content	✓	✓	✓	✓
Application Beyond Deceptive Content	✓	✓	✓	✓
Application Beyond Content likely to influence voters	✓	✓	✓	✓

As the above table summarises, Part 5 ERA provides Ireland's Electoral Commission with statutory powers that could unintentionally lead to removal of legal content in a manner that is incompatible with ECHR and CFR standards. This is made possible because Part 5—as currently designed—could be applied to misleading content which is not deceptive and is not likely to influence voter choice. Importantly, however, the new Commission could exercise its powers under Part 5 in a manner which is protective of ECHR and CFR rights. As the foregoing analysis has illustrated, several provisions under Part 5 provide explicit—albeit not

[326] ibid s158 (1).
[327] It should also be acknowledged that S162 states that 'nothing in this Part shall be construed as limiting the entitlement of a person affected by a decision of the Commission to apply to the High Court to seek relief by way of an application for judicial review.'

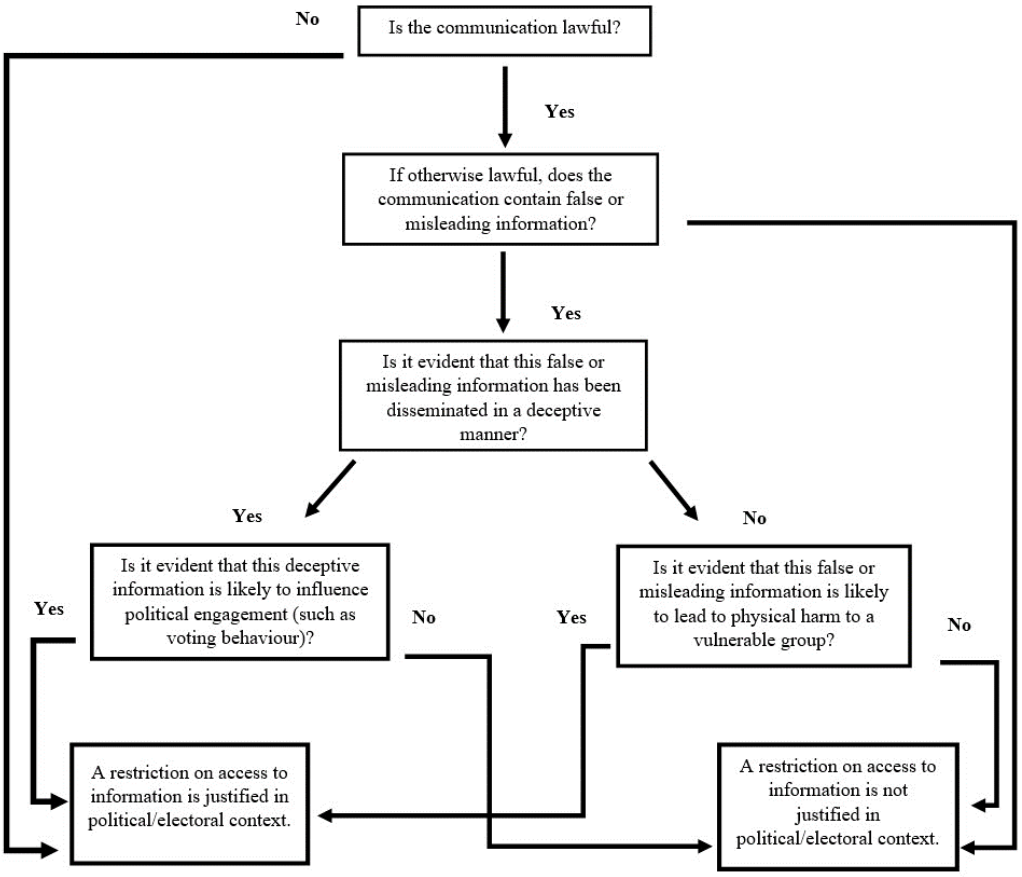
comprehensive—guidance on how the Electoral Commission must exercise powers under Part 5. For example, section 152 not only instructs the Electoral Commission to 'give due weight' to the right to freedom of expression but also requires the Commission to 'prepare and publish guidelines to inform the proper exercise' of its statutory powers.[328] It must further be recalled that Electoral Commission 'may publish codes of conduct in respect of online electoral information or online electoral process information.'[329] In publishing any 'codes of conduct', the Electoral Commission must not only 'have regard' to the right to freedom of expression' but also to 'the need to protect democratic values' and 'the public interest in having a well-informed electorate.'[330] While these provisions do not offer precise guidance on how the Electoral Commission should execute its statutory powers under Part 5 in a manner which aligns with human rights, the following section will now illustrate how alignment with ECHR and CFR standards could occur.

6.3.3.2 Applying Part 5 ERA: Towards a Human Rights Compliant Approach

As the foregoing analysis has shown, Part 5 ERA enables the Electoral Commission to mandate the removal of misleading content in a manner which could undermine ECtHR and CJEU standards regarding freedom of expression and informed elections. It must be recalled, however, that the ERA was signed into law in July 2022. The Electoral Commission has not yet issued orders or notices under sections 153-158. Moreover, the new Commission has not yet published any codes of conduct under section 163. It is therefore instructive to illustrate how the Electoral Commission could ensure that their application of the ERA is compatible with the ECHR and CFR when executing relevant powers under Part 5 ERA. To assist with this, it is necessary to recall decisions which should inform restrictions on misleading—but not necessarily illegal—content in electoral contexts.[331] The below diagram outlines how key decisions regarding the moderation of misleading content in election contexts can ensure compliance with the ECHR and CFR.

[328] ibid s152 (2); S152 (4).
[329] ibid s163.
[330] ibid.
[331] Chapter 4 section 4.4.

Figure 10: Visual representation of interpretive framework



Through Part 5 ERA, the Electoral Commission could mandate that an online platform removes misleading content in a manner that fails to ensure that the platform—or the Commission itself—adheres to the decisions as detailed above. There is currently a lack of certainty regarding whether the Electoral Commission will exercise its powers under Part 5 in a manner that ensures human rights compliance. Section 152 requires the Electoral Commission—when exercising powers to issue orders and notices under sections 153-157—to 'give due weight' to rights including the right to freedom of expression and 'the right to participate in public affairs' in addition to 'the obligation on the State to defend and secure the fairness and integrity of elections and referendums.'[332] This is positive as it requires the Commission to consider the need for open electoral debate alongside the need for an informed political populace. However, due to the limited guidance on how the Commission must balance these rights, it is advisable for the Electoral Commission to provide guidance on this in line with its obligation under

[332] ibid s152 (2).

section 152 to 'prepare and publish guidelines to inform the proper exercise' of its powers to issue notices and orders under sections 153-157.[333] Specifically, the Commission should provide guidance that the most restrictive orders and notices under section 153-157 are to be issued for misleading content which is deceptive and likely to influence voter engagement. In line with this, the Commission should also issue guidance that the least restrictive measures under sections 153-157 should be applied to misleading content which is not deceptive or capable of influencing voter engagement during an election or referendum. This would assist in promoting a greater understanding of how the Electoral Commission can ensure compliance with the ECHR and the CFR when exercising its powers to secure informed elections under Part 5 ERA. To further ensure that platforms themselves remain rights compliant when moderating misleading content, the Electoral Commission should also publish 'codes of conduct' under section 163 to issue advice to platforms about the need for platforms to assess whether content is deceptive and capable of influencing voter choice.[334] It is also vital that the Commission generally receives external independent guidance on human rights. Currently, Part 5 requires the Commission to establish an 'advisory board' and 'stakeholder council' to assist the Commission on the use of its powers and in the preparation of codes of conduct.[335] However, neither of these stakeholders are required to hold expertise in human rights. This should be amended to explicitly require that the 'advisory board' and 'stakeholder council' comprise at least one member with expertise in this field.[336] These general steps are needed to ensure that the application of Part 5 ERA is compliant with human rights in practice.

Without more explicit human rights guidance, Part 5 ERA currently leaves open the possibility that the Electoral Commission could instruct platforms to remove access to misleading—but legal—content in a manner that fails to ensure compatibility with the ECHR and CFR. For example, the Electoral Commission could become 'satisfied from the information available' that an online platform is disseminating content containing 'online electoral process information' which 'constitutes misinformation.'[337] Hypothetically, this could include content conveying a voter's opinion about a political official which contained minor factual

[333] ibid S152 (1).
[334] ibid s163.
[335] ibid ss147-S148.
[336] For example, an expert in the regulation of harmful-but legal-content would be preferable.
[337] See wording of s153 (1); The Commission could become aware of this through its direct reporting facility as provided for under s160.

exaggerations for comedic purposes. In attempting to give 'due weight' to rights listed under section 152, the Electoral Commission could determine that the platform should remove access to the content to avoid misleading the electorate.[338] To ensure this, the Commission could then order a 'take-down notice' under section 153 for the platform to remove the content in the week preceding an election.[339] In providing a 'statement of reasons' explaining its issuance of this notice, the Commission could simply state that the information was capable of misleading voters about an election candidate.[340] While the platform could appeal this notice under section 161, it would still be required to ensure that 'the operation of the notice' was not affected.[341] This could result in a restriction on access to legal content—during an election period—without any substantive assessment of whether the content was deceptive or capable of influencing voters. In practice, this would involve a State body mandating content removal that would be incompatible with the ECHR and CFR.

It remains possible, however, for the Electoral Commission to exercise its statutory powers under Part 5 while ensuring compatibility with the ECHR and CFR. Remaining with a hypothetical situation, the new Commission could receive information from a member of the public—through the direct reporting facility provided for under section 160—regarding content on an online platform which is 'suspected' to contain disinformation through its reporting facility.[342] Before deciding on an appropriate action, the Commission could assess the contested content while giving 'due weight' to the right to freedom of expression alongside 'the obligation of the State' to secure fair elections as required under section 152.[343] As part of this, the Commission could consider that the content allegedly containing disinformation was capable of misleading the electorate through a lack of urgently needed contextual information but was not disseminated in an intentional manner. To address this misleading content, the Electoral Commission could refrain from ordering the platform to remove the content and instead could issue a correction notice or labelling order with a view to providing this context to voters who could encounter the misleading content. By refraining from issuing an order to permanently remove access to content that has been identified as misleading but not deceptive,

[338] ibid s152 (2).
[339] ibid s153.
[340] ibid.
[341] ibid s161.
[342] See s160 where the Commission may establish a reporting facility.
[343] ibid s152 (2).

the Commission could ensure that it encourages platforms to adopt measures that are less likely to undermine ECHR and CFR standards regarding freedom of expression and informed elections. In addition to providing specific guidance regarding how platforms should identify whether misleading content is deceptive and capable of influencing voter engagement, the Commission should complement this by issuing educational resources to Irish voters regarding how voters should identify—and ensure resilience against—misleading content.[344] An instructive example of such infrastructure is provided for by the Australian Electoral Commission (AEC).[345] The AEC promotes participation in the electoral process but also informs voters on key issues surrounding disinformation and encourages voters to 'take time' to consider the veracity of key electoral information.[346] For example, the AEC website includes several voter education sources that provide objective information surrounding how voters should 'stop and consider' sources of electoral information and also contains a 'disinformation register' that identifies and corrects 'prominent pieces of disinformation' throughout the election process.'[347] The AEC states to voters that it is not 'the arbiter of truth regarding political communication' but merely highlights and corrects persistent false narratives without censoring political viewpoints.[348] The Electoral Reform Act currently provides the basis for this infrastructure by empowering Ireland's Electoral Commission to conduct research and provide voter education programmes to the public on a wide range of topics.[349] Ireland's Electoral Commission should adopt this type of educational—but not rights-invasive—infrastructure.

6.4 Conclusions

This chapter has analysed and critically assessed provisions of Ireland's OSMRA and the ERA. By applying relevant standards which this thesis has distilled from ECtHR and CJEU jurisprudence, this chapter has assessed whether the current design—and potential application

[344] S159 provides for this.
[345] Established under the Commonwealth Electoral Act 1918.
[346] See 'Disinformation and Misinformation' (AEC) <eiat-disinformation-factsheet.pdf (aec.gov.au)> accessed 10 August 2023.
[347] See 'Disinformation Register' <Disinformation register - Australian Electoral Commission (aec.gov.au)> accessed 10 August 2023.
[348] ibid.
[349] For example, s67 ERA explicitly empowers the Commission to promote voter education 'through educational and information programmes promote public awareness of, and participation in, the State's electoral and democratic processes and encourage the public to vote at electoral events.'

in practice—of the OSMRA and ERA ensures compatibility with applicable ECHR and CFR standards regarding freedom of expression and informed elections.

As this chapter has found, the OSMRA and ERA both establish new statutory bodies which have the potential to influence how intermediaries moderate online content which may be misleading but not currently be illegal. As section 6.2 discussed, the OSMRA empowers the Media Commission to publish 'online safety codes' to set out how 'service providers' adopt measures to limit visibility of 'harmful online content' which could include disinformation.[350] As section 6.3 analysed, the ERA empowers the Electoral Commission to issue notices and orders requiring 'online platforms' to limit visibility of content containing online disinformation in election periods.[351] Thus, statutory powers under both laws could be used to mandate how intermediaries take steps to moderate—and remove access to—legal content containing online disinformation in election periods.

These statutory powers are significant because—as this chapter has identified—they could be exercised in a manner that encourages intermediaries to moderate—and potentially remove access to—lawful information which is misleading but not deceptive and not likely to influence voter engagement. As has been argued, this is not only evident in the terminology that the OSMRA and ERA employ but also by imprecise statutory guidance regarding how the Media Commission and Electoral Commission must ensure human rights compliance when exercising their powers to standardise and improve moderation of content. As section 6.2 discussed, the Media Commission must 'have regard' to the rights of users when developing new categories of harmful content and developing online safety codes but no specific guidance is provided on how the Media Commission must balance the regulation of harmful content with the protection of the right to freedom of expression.[352] In a more positive manner, the ERA explicitly requires the Electoral Commission to 'give due weight' to human rights when exercising its statutory powers and expressly references freedom of expression and the need for an informed political populace. While it is positive that the Electoral Commission is required to develop its own guidelines which must inform these powers, the ERA provides limited guidance regarding how the Electoral Commission should balance these rights when setting out how intermediaries

[350] S139K Broadcasting Act, inserted by s45 OSMRA.
[351] ERA ss153-158 ERA; And publish codes of conduct under s163.
[352] S139B Broadcasting Act, inserted by s45 OSMRA.

should limit the spread of misleading electoral content.[353] As this chapter has argued, the practical significance of this imprecise guidance is that the Media Commission and Electoral Commission—if setting out standards for how intermediaries must moderate content containing disinformation—are empowered to set guidance that may be ill-defined and could unintentionally cause intermediaries to restrict misleading content in a manner that undermines ECHR and CFR standards on freedom of expression and informed elections.

This chapter has generally argued that the limited guidance—and potential discretion for the statutory bodies under the under the OSMRA and ERA—could lead to content removal that is problematic from a human rights perspective. However, it has also illustrated hypothetical steps that the Media Commission and Electoral Commission could take to ensure compatibility with the ECHR and CFR. As argued, such steps relate to how these statutory bodies should encourage the least intrusive content moderation measures for legal content which is misleading but not deceptive and unlikely to influence voter choice. Recalling specific examples, section 6.2 argued that the Media Commission—if attempting to 'specify' disinformation as a new category of harmful content—should only define disinformation in a manner which targets misleading content is deceptive and likely to influence electoral engagement.[354] The Media Commission should then publish 'online safety codes' setting out specific guidance on how intermediaries must identify these factors.[355] As section 6.3 then argued, the Electoral Commission should only issue orders to remove content containing misleading content which is deceptive and likely to influence voter choice. The Electoral Commission should instead issue notices and orders to label or correct online content containing information which is misleading but does not meet these factors. In following this basic guidance, both bodies are more likely to ensure compliance with the ECHR and CFR if using their statutory powers to encourage moderation of content containing disinformation. As further discussed, specific amendments of the OSMRA and the ERA could provide an additional layer of oversight to ensure human rights compliance. For example, the OSMRA should be amended to require that the Media Commission consults an independent human rights body when developing new 'online safety codes.'[356] The ERA should be amended to require that Ireland's Electoral Commission consults an independent human rights body when

[353] ERA s153.
[354] Under s139B Broadcasting Act, inserted by s45 OSMRA.
[355] Under s139K Broadcasting Act, inserted by s45 OSMRA.
[356] See section 6.2.

issuing its powers under Part 5 ERA and when developing any codes of conduct under the ERA.[357] The inclusion of stronger independent human rights scrutiny of the Media Commission and the Electoral Commission could provide assistance regarding how these statutory bodies ensure closer compliance with human rights compliance generally. Such amendments could also ensure that the OSMRA and ERA—if applied in a manner that encourages intermediaries to remove access to content containing disinformation—are likely to ensure compliance with human rights under the ECHR and the CFR.

[357] See section 6.3.

Conclusion

(1) Overview of the thesis

The problem of online disinformation has attracted considerable scrutiny in recent years. Particular concerns have been raised regarding how the uncontrolled spread of false information can harm democracy by distorting the political information environment and affecting the ability of individuals to make informed electoral choices. In response to this problem, EU institutions and Member States have developed legislation in an effort to ensure that technological intermediaries reduce the spread of misleading online information as a means of protecting the integrity of democratic elections.

Addressing these contemporary developments, this thesis provides a timely and vital distillation of the applicable standards which can be used to understand—and reconcile—tensions between competing human rights in the regulation of online disinformation. Specifically, this thesis has provided an in-depth analysis of the jurisprudence of the ECtHR and the CJEU that has bearing for the regulation of online disinformation in political and electoral contexts. Building from this analysis, this thesis has identified novel insights that can be used as the basis to interpret whether legislation—designed to limit the spread of misleading political communications such as online disinformation—is compatible with the right to freedom of expression and the right to free elections under the ECHR and CFR systems. Demonstrating the timely application of these novel insights, this thesis has further provided an in-depth and tailored assessment of whether—at the time of writing—current EU and Irish legislative responses to online disinformation are compliant with the ECHR and the CFR.

(2) Summary of the major contributions of the thesis

This thesis began by posing two overarching research questions (RQs):

RQ 1: What are the applicable requirements under European human rights law which have bearing for the regulation of online disinformation in political and electoral contexts?

RQ 2: To what extent do current EU and EU Member State legislative initiatives comply with applicable requirements under European human rights law which have bearing for the regulation of online disinformation in political and electoral contexts?

Chapter One provided a comprehensive review of relevant academic literature regarding the problems that the spread of false and misleading information online can pose for democracy. In doing so, this thesis pinpointed a specific dearth of in-depth literature regarding how the spread of online disinformation in political and election contexts—and attempts to control this—can implicate the right to free elections as interpreted alongside the right to freedom of expression under the European human rights framework. Based on the analysis of ECtHR and CJEU jurisprudence in Chapters Two to Four, this thesis addressed this gap by providing a distillation of the key standards to interpret how the right to freedom of expression and the right to free elections can be balanced as part of the regulation of online disinformation in political and election contexts. Using these human rights standards as a novel interpretive framework, Chapters Five and Six subsequently provided an in-depth analysis of specific EU and Irish legislative responses to online disinformation. The tailored focus of the analysis in Chapters Five and Six was on whether such legislation sets out intermediary responsibilities to limit the spread of false—including not necessarily illegal—information in a manner that ensures ECHR and CFR compliance. Having concluded these substantive chapters, it is now necessary to condense the overarching contributions which the analysis and findings of this thesis provide.

Major contribution 1: Identification of applicable human rights principles for the regulation of online disinformation

The central contribution of this thesis stems from the analysis of ECtHR and CJEU jurisprudence that was conducted in Chapters Two to Four. These chapters developed an in-depth understanding regarding how the ECtHR and the CJEU balance tensions between the right to freedom of expression and the right to free elections under the ECHR and the CFR systems. The analysis in Chapter Two and Chapter Three revealed that, where the ECtHR applies the right to freedom of expression (Article 10 ECHR) and the right to free elections (Article 3 Protocol 1 ECHR), the Court emphasises the legitimate aim for CoE States to secure an accurately informed political populace in political and election contexts. Based on the analysis of relevant jurisprudence where the ECtHR applies these rights, in particular Article 3 Protocol 1 ECHR, this thesis found that the Court extends wider latitude for States to adopt measures to restrict the dissemination of misleading electoral communications that are

intentionally deceptive as opposed to misleading communications which do not meet this crucial threshold of intentional deception. This thesis further identified that the ECtHR affords more discretion for States to limit the spread of misleading information—including misleading propaganda that the Court deems as hostile to ECHR democratic values—if such information is likely to affect voter choice and broader individual political engagement. Building from these findings, Chapter Four investigated the CJEU's interpretive approaches which have specific relevance for the regulation of online disinformation. As identified, there is a limited availability of relevant jurisprudence wherein the CJEU has balanced the right to freedom of expression (Article 11 CFR) and the right to free elections (Article 39 CFR) in factual circumstances involving the spread of misleading online political communications. It was also revealed that there is potential for EU institutions—including the CJEU—to diverge from the approaches of the ECtHR by providing more extensive protection to the right to freedom of expression and the right to free elections under the CFR than is currently provided for under the ECHR. Crucially, however, this thesis found that the interpretive reasoning of the ECtHR and the CJEU currently aligns where these courts mediate tensions between the free flow of information and the need for an informed political populace. The key findings here were expressed by providing a distillation of interpretive principles—and relevant factors which provide guidance for these principles—wherein the reasoning of the ECtHR and the CJEU align. These common principles are:

Figure 9. Summary of key interpretive principles from ECtHR and CJEU jurisprudence regarding the restriction of false and misleading information

Key Interpretive Principle	***Interpretive Factor for Factual Assessment***
Restrictions on access to false or misleading information must not foster arbitrary removal of lawful communications.	• Existence and nature of domestic law. • Existence and nature of European Union (EU) law. • Hate speech or defamatory statements (under relevant law).
Restrictions on access to false or misleading information are more justified for deceptive communications.	• Evidence of intention to deceive. • Existence of language targeting vulnerable groups. • Contradiction of established factual consensus.
Restrictions on access to false or misleading information are more justified for communications likely to influence political engagement.	• Proximity to election or referendum. • Relevance of information to political populace. • Prominence of individual (or group) disseminating information.

The key interpretive principles—and associated interpretive factors—which this table displays have a timely application when examining EU and EU Member State legislative responses to online disinformation in political and electoral contexts. Specifically, the above-detailed principles can be used to assess how current legislation to combat online disinformation can adequately balance the right to freedom of expression with the right to free elections under the

ECHR and the CFR. Due to the particular relevance of these human rights principles for assessing legislation that establishes responsibilities for technological intermediaries to control the spread of online disinformation, this thesis further provided a visual decision tree diagram to aid understanding of the relevant steps that must be considered in the context of moderating the spread of misleading—including not currently illegal—information in political and electoral contexts.[1]

Major contribution 2: Application of human rights principles as part of assessing the EU legislative approach to online disinformation

The second major contribution of this thesis relates to the application of the above-mentioned ECtHR and CJEU human rights principles to assess the EU's current legislative responses to online disinformation. The specific focus of this assessment in Chapter Five was on whether the EU's Digital Services Act (DSA)—in establishing intermediary responsibilities which have bearing for online disinformation—are compatible with the ECHR and CFR standards that were distilled in Chapter Four.[2] Providing an in-depth examination of the DSA—in addition to considering the DSA's hypothetical application in the online disinformation context—, it was found that there is potential for the DSA to be applied in a manner that is compliant with the right to freedom of expression and the right to free elections under the ECHR and the CFR. As also revealed, however, it is currently uncertain whether the DSA is sufficiently protective of these rights. This raises questions about the compatibility of the DSA itself with the CFR. To alleviate uncertainty in this area, additional human rights proofing is necessary to ensure that the DSA ensures ECHR and CFR compliance. In particular, it is vital that the relevant institutional stakeholders—including the European Commission and the Digital Services Co-ordinators under the DSA's framework—provide tailored human rights guidance regarding how Very Large Online Platforms (VLOPs) should interpret the DSA's systemic risk obligations to combat online disinformation in a manner which prioritises the removal of online content which is intentionally deceptive and likely to influence voter choice and broader political engagement.

[1] See figure 10.
[2] Regarding the right to freedom of expression (Article 10 ECHR; Article 11 CFR) and the right to free elections (Article 3 Protocol 1 ECHR; Article 39 CFR); The 2022 Code of Practice on Disinformation was also assessed as a tool of compliance under the DSA package.

Major contribution 3: Application of human rights principles as part of assessment of the Irish legislative approach to online disinformation

The third major contribution of this thesis relates to the application of the above-mentioned ECtHR and CJEU human rights principles to assess current Irish legislative developments which have relevance for online disinformation. Specifically, Chapter Six provided an in-depth examination of Ireland's recently adopted Online Safety and Media Regulation Act (OSMRA) and Electoral Reform Act (ERA). As revealed, both the OSMRA and the ERA establish statutory responsibilities for intermediaries to limit the spread of harmful—including not necessarily illegal—online communications in a manner that could extend to online disinformation. In particular, the ERA sets out intermediary responsibilities which are specifically designed to combat the spread of online disinformation in political and election settings. As was demonstrated by applying the human rights framework developed in Chapter Four, both laws contain limited statutory guidance regarding how intermediaries must moderate online content in a manner that ensures human rights compliance. In practice, this could lead to unintended consequences whereby intermediaries—in adapting their practices to moderate online disinformation to comply with the OSMRA and ERA—could diverge from applicable standards regarding freedom of expression and free elections as set out by the jurisprudence of the ECtHR and the CJEU. As also highlighted, however, there remains potential for the OSMRA and the ERA to be applied in a manner that is sufficiently protective of these rights under the ECHR and the CFR. To ensure that this is adequately provided for, additional human rights proofing must be applied and tailored guidance should be drafted regarding how newly established Irish statutory bodies—namely the Media Commission and the Electoral Commission—can encourage human rights compliance where intermediaries adopt measures to limit the spread of misleading online content in political and electoral settings. Crucially, given the current nascent stages regarding the ongoing development of codes of conduct under the OSMRA and the ERA—and construction of statutory bodies associated with these laws—, the interpretive principles that this thesis has identified from ECtHR and CJEU jurisprudence can be used to ensure that intermediaries do not unintentionally undermine ECHR and CFR human rights standards when adopting measures to curb the spread of misleading online content such as online disinformation.

(3) Concluding comment

In providing an in-depth and systematic exploration of the ECtHR and CJEU jurisprudence that has relevance for the regulation of online disinformation in political and election contexts, this thesis has not only distilled an interpretive framework that can be used to assess whether legislative responses to online disinformation are human rights compliant but has also demonstrated the application of this framework in practice. In identifying and applying novel insights, the focus of this thesis has been to provide a tailored assessment of current EU legislative responses to online disinformation while also examining Ireland as a national case study example of an EU Member State that has developed legislation to combat online disinformation. Crucially, however, the insights of this thesis have a timely application by illustrating key standards that can be used to inspect whether a broader set of legislative measures—at the EU and national level—can ensure compliance with the ECHR and the CFR by adequately balancing the right to freedom of expression and the right to free and informed elections as part of future efforts to curb the spread of online disinformation in political and electoral contexts.

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