

Making Europe Fit for the Digital Age?

The EU's Approach to Regulating Online Disinformation through the Lens of Article 10 ECHR

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I. Introduction

More than 2,000 years ago, Octavian spun a vicious disinformation campaign to destroy his rival Mark Anthony and eventually become the first Roman emperor Augustus Caesar. Since those ancient times, information has been fabricated and manipulated to win wars, advance political ambitions, avenge grievances, hurt the vulnerable and make financial profit.¹

With these words, Irene Khan, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, opened her report to the United Nations Human Rights Council (HRC) on April 13, 2021. In her report, she described the inherent dangers posed by the escalating proliferation of disinformation, encompassing both evidently false and misleading information,² to human rights and democratic governance in the era of rapid digital advancement.³ While disinformation has historically been predominantly associated with state-controlled propaganda disseminated through traditional media,⁴ this phenomenon is now assuming a new global dimension within the context of the current ‘digital transformation,’⁵ i.e. the process of societal change driven by digitalisation.⁶ Notably, the digital era has democratised the tools necessary for such activities, enabling a broader array of actors – including foreign state actors, non-state actors, or even influential individuals – to engage in disinformation campaigns.

Contemporary technological advancements in the field of online communication have given rise to novel platforms enabling and facilitating the articulation and dissemination of individual views and ideas. These developments have had a substantial impact on the exercise of freedom of expression and information, as protected under Article 10 of the European Convention on Human Rights (ECHR or the Convention) and Article 11 of the Charter of Fundamental Rights of the

¹ Human Rights Council (HRC), Disinformation and freedom of opinion and expression: Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (13 April 2021), A/HRC/47/25, para. 1.

² There is still no universally accepted definition of disinformation. For the conceptual elements developed in a number of European initiatives, see chapter II.A.2) of this paper.

³ HRC, (13 April 2021), A/HRC/47/25, paras. 2, 4 and 22 ff.

⁴ Cf. Vuorinen, *Enemy Images in War Propaganda* (Newcastle upon Tyne, 2012) 6.

⁵ Hoffmann-Riem, *Recht im Sog der digitalen Transformation: Herausforderungen* (Tübingen, 2022) 1 ff.

⁶ United Nations General Assembly (UNGA), Resolution adopted by the General Assembly on 24 December 2021: Countering disinformation for the promotion and protection of human rights and fundamental freedoms (10 January 2022), A/RES/76/227, 2; cf. also UNGA, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (12 August 2022), A/77/288, paras. 2 ff.

European Union (CFR). Social media platforms, in particular, amplify the new digital communication and active participation opportunities introduced by the ‘Web 2.0’.⁷ Their technical features, including low-threshold access, allow users to disseminate information and ideas on an unprecedented scale within a very short time, thereby enhancing political participation for all individuals. However, recent global states of emergency, in particular the COVID-19 pandemic⁸ as well as continuing armed conflicts, such as the Russian Federation’s war of aggression against Ukraine⁹ and the Gaza conflict,¹¹ have led to an increase in the distribution of harmful content. This includes deliberate disinformation and unintentional misinformation on social media. Similarly, disinformation and misinformation have been extensively disseminated during recent elections.¹² For example, in the context of the 2024 European Parliament Elections, the Russian ‘Doppelgänger’ campaign, which first emerged in 2022,¹³ distributed disinformation by impersonating credible European media outlets and creating inauthentic media outlets as well as fake accounts on social media.¹⁴ The prevalence of online disinformation and misinformation has also been

⁷ Beck, ‘Web 2.0: Konzepte, Technologie, Anwendungen’ (2014) *HMD* 5 (5 ff).

⁸ Pabel, ‘Internet und Kommunikationsfreiheiten im Licht der EMRK’ (2020) *JRP* 101 (101).

⁹ Carley, ‘A Political Disinfodemic’, in Gill and Goolsby (eds.), *COVID-19 Disinformation: A Multi-National, Whole of Society Perspective* (Switzerland, 2022) 1 (1 ff).

¹⁰ Daniel, ‘Interne (sic!) Dokumente zeigen laut Bericht russische Desinformationsdoktrin’ (*Die Zeit*, 5 July 2024) <<https://www.zeit.de/politik/ausland/2024-07/russische-desinformation-kampagnen-deutschland-berichte-geheimdienstpapiere>> all internet sources were last accessed on 15 May 2025.

¹¹ Sabbagh, ‘Israel-Hamas fake news thrives on poorly regulated online platforms’ (*The Guardian*, 11 November 2023) <<https://www.theguardian.com/world/2023/nov/11/israel-hamas-fake-news-thrives-on-poorly-regulated-online-platforms>>.

¹² Schinkels, ‘Wie uns Russland in die Netzwerke funkt’ (*Die Zeit*, 29 May 2024) <<https://www.zeit.de/digital/internet/2024-05/russische-desinformation-fake-news-superwahljahr-manipulation>>.

¹³ Connolly, ‘Germany unearths pro-Russia disinformation campaign on X’ (*The Guardian*, 26 January 2024) <<https://www.theguardian.com/world/2024/jan/26/germany-unearths-pro-russia-disinformation-campaign-on-x>>.

¹⁴ European Beck, ‘Web 2.0: Konzepte, Technologie, Anwendungen’ (2014) *HMD* 5 (5 ff).

¹⁴ Pabel, ‘Internet und Kommunikationsfreiheiten im Licht der EMRK’ (2020) *JRP* 101 (101).

¹⁴ Carley, ‘A Political Disinfodemic’, in Gill and Goolsby (eds.), *COVID-19 Disinformation: A Multi-National, Whole of Society Perspective* (Switzerland, 2022) 1 (1 ff).

¹⁴ Daniel, ‘Interne (sic!) Dokumente zeigen laut Bericht russische Desinformationsdoktrin’ (*Die Zeit*, 5 July 2024) <<https://www.zeit.de/politik/ausland/2024-07/russische-desinformation-kampagnen-deutschland-berichte-geheimdienstpapiere>> all internet sources were last accessed on 15 May 2025.

¹⁴ Sabbagh, ‘Israel-Hamas fake news thrives on poorly regulated online platforms’ (*The Guardian*, 11 November 2023) <<https://www.theguardian.com/world/2023/nov/11/israel-hamas-fake-news-thrives-on-poorly-regulated-online-platforms>>.

notably significant in the context of the United States presidential elections in 2016¹⁵, 2020¹⁶, and 2024¹⁷.

Depending on the specific context, the reach, and the content of the disseminated disinformation and misinformation, the potential for harm can be considerable. Electoral disinformation,¹⁸ for instance, is ascribed to pose a particular risk of shaping public discourse in a manner detrimental to democracy in several ways, ranging from the disruption of elections¹⁹ and the obstruction of human rights to the complete erosion of trust in political institutions.²⁰ According to the global survey on the impact of online disinformation and hate speech by UNESCO in 2023, 87 percent of the citizens of the surveyed countries expressed concern about the potential impact of disinformation on the upcoming elections in their countries.²¹ Notwithstanding the potential for harm and prevailing concerns, the precise statistical reach of online disinformation remains a subject of ongoing scientific inquiry. Prior research focusing on selected European countries as well as the United States suggests that the actual reach of disinformation may be less extensive than previously anticipated.²²

¹⁴ Schinkels, 'Wie uns Russland in die Netzwerke funkt' (*Die Zeit*, 29 May 2024) <<https://www.zeit.de/digital/internet/2024-05/russische-desinformation-fake-news-superwahljahr-manipulation>>.

¹⁴ Connolly, 'Germany unearths External Action Service, "Technical Report on FIMI Threats: Doppelganger strikes back: FIMI activities in the context of the EE24' (*EUvsDisinfo*, June 2024) 3 <https://euvsdisinfo.eu/uploads/2024/06/EEAS-TechnicalReport-DoppelgangerEE24_June2024.pdf>.

¹⁵ Carlson, 'Fake news as an informational moral panic: the symbolic deviancy of social media during the 2016 US presidential election' (2020) *iCS* 374 (375).

¹⁶ Starbird, DiResta and DeButts, 'Influence and Improvisation: Participatory Disinformation during the 2020 US Election' (2023) *SM+S* 1 (2).

¹⁷ Leingang, 'AI and misinformation: what's ahead for social media as the US election looms?' (*The Guardian*, 10 February 2024) <<https://www.theguardian.com/us-news/2024/feb/10/social-media-ai-misinformation-election-2024>>.

¹⁸ See further chapter III.D.2) of this paper.

¹⁹ 'Human rights must be at the core of generative AI technologies, says Türk' (*Office of the High Commissioner for Human Rights*, 14 February 2024) <<https://www.ohchr.org/en/statements-and-speeches/2024/02/human-rights-must-be-core-generative-ai-technologies-says-turk>>.

²⁰ HRC, Role of States in countering the negative impact of disinformation on the enjoyment and realization of human rights (8 April 2022), A/HRC/RES/49/21, 1 f.

²¹ UNESCO, 'Survey on the impact of online disinformation and hate speech' (*UNESCO*, September 2023) 6 <https://www.unesco.org/sites/default/files/medias/fichiers/2023/11/unesco_ipsos_survey.pdf>.

²² Fletcher et al, 'Measuring the reach of "fake news" and online disinformation in Europe' (2018) *AiPol* 25 (25); Nelson and Taneja, 'The small, disloyal fake news audience: The role of audience availability in fake news consumption' (2018) *New Media Soc.* 3720 (3727 f).

Despite the existing uncertainties concerning the actual reach of disinformation, the response of platforms to such online content has continuously been criticised as insufficient,²³ considering the potential amplification²⁴ of disinformation through social media in particular. In view of the aforementioned risks, the importance and responsibility of private companies in connection with the regulation of legal yet harmful content disseminated online has increasingly become the focus of attention of the European legislator. Against this backdrop, the European Union (EU) has been progressively implementing measures against disinformation since 2015.²⁵ Contrary to the earlier reliance on platform operators engaging exclusively in ‘self-regulation’,²⁶ the EU has recently adopted a hybrid model of private-public regulation. This approach, commonly referred to as ‘co-regulation’²⁷ or ‘regulated self-regulation’,²⁸ is exemplified by the adoption of the Regulation of the European Parliament and of the Council on a Single Market for Digital Services²⁹ (DSA) on October 19, 2022. Building upon the regulatory framework established by the E-Commerce Directive³⁰ (EC Directive) concerning the regulation of illegal content,³¹ the DSA extends its scope to address risks associated with lawful but harmful content, such as disinformation.³² Notably, the DSA imposes specific obligations on Very Large Online Platforms (VLOPs) to implement risk management measures, as

²³ ‘Rise of disinformation a symptom of “global diseases” undermining public trust: Bachelet’ (*UN News*, 28 June 2022) <<https://news.un.org/en/story/2022/06/1121572>>.

²⁴ McKay and Tenove, ‘Disinformation as a Threat to Deliberative Democracy’ (2021) *PRQ* 703 (705).

²⁵ For a comprehensive overview of the developments and measures, see European Commission, ‘Factsheet: Tackling Disinformation and Misinformation’ (*European Commission*, 10 June 2024) 3 f <https://ec.europa.eu/commission/presscorner/api/files/attachment/878789/Tackling%20Disinformation_Factsheet_EN.pdf>.

²⁶ Cf. Gostomzyk and Meckenstock, ‘Von der Selbstregulierung zur Risikoprävention: Der Digital Services Act als wirksames Bollwerk gegen Desinformation?’, in Prinzing et al (eds.), *Regulierung, Governance und Medienethik in der digitalen Gesellschaft* (Wiesbaden, 2024) 121 (122).

²⁷ Marsden, *Internet Co-Regulation: European Law, Regulatory Governance and Legitimacy in Cyberspace* (Cambridge, 2011) 58 f.

²⁸ Hoffmann-Riem, *Recht im Sog* 115 and 121 ff.

²⁹ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1 [hereinafter: DSA]; all European legislation can be accessed via <https://eur-lex.europa.eu/homepage.html> with their ECLI, case number or party names.

³⁰ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L178/1 [hereinafter: EC Directive].

³¹ See e.g. EC Directive, Recital 40.

³² DSA, e.g. explicitly in Recitals 5, 62, 68 and 104.

outlined in Articles 34 and 35 DSA. Simultaneously, the European Court of Human Rights (ECtHR or the Court) has developed an extensive body of case law on freedom of expression. This case law holds relevance for the DSA, not least due to Article 11 CFR, sharing the same ‘scope and meaning’ as Article 10 ECHR pursuant to Article 52(3) CFR. Although the ECtHR has rarely explicitly referred to ‘disinformation,’ its case law, nevertheless, establishes several fundamental principles that are pertinent to the restriction of freedom of expression in the context of combating disinformation and misinformation. These principles include, for instance, the critical distinction between facts and value judgments.³³

Considering that the DSA does not clearly delineate the categories of content it seeks to regulate, there is a considerable risk that its scope may also encompass misinformation, including certain forms of value judgments. This ambiguity raises concerns in relation to Article 10 ECHR and the permissible boundaries of legitimate restrictions on freedom of expression. These concerns are particularly relevant in view of Article 35 DSA, which could potentially lead to an increased moderation of information that is false or misleading but shared as an expression of personal opinion, i.e. value judgments based on – albeit false or misleading – facts. Thus, a more thorough examination of the definitional boundaries of the DSA in light of the right to freedom of expression and information as well as the relevant case law of the ECtHR appears warranted to ultimately assess the conformity of the DSA with Article 10 ECHR.³⁴

The focus on the ECHR and the related case law of the ECtHR rather than on the CFR and the Court of Justice of the European Union (CJEU) jurisprudence is chosen for several reasons. First, the ECHR and the ECtHR’s longstanding, in-depth body of case law on freedom of expression provide a well-established interpretive framework. Although both the CFR and the ECHR protect freedom of expression, the ECtHR’s jurisprudence is more extensive, detailed, and directly relevant when delineating the scope of legitimate restrictions and balancing conflicting interests. Moreover, the CFR itself explicitly acknowledges in Article 52(3) that the rights it contains corresponding to those in the ECHR must be given the same ‘meaning and scope’ as their Convention counterparts.³⁵ In other words, the CFR’s interpretation

³³ As famously established in *Lingens v. Austria* App no 9815/82 (ECtHR, 8 July 1986) para. 46: ‘As regards value-judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 (art. 10) of the Convention.’

³⁴ HRC, (13 April 2021), A/HRC/47/25, para. 14.

³⁵ See chapter III.A) of this paper.

of freedom of expression is largely guided by ECtHR standards. Given that there is comparatively less CJEU case law clarifying Article 11 CFR — at least in the same depth and consistency as the ECtHR’s work under Article 10 ECHR — it is more practical and illuminating to rely on ECtHR jurisprudence as the primary reference point. In the context of the DSA, ensuring consistency with well-established ECtHR principles helps to anchor the new regulatory standards in a coherent legal landscape. By drawing directly on the ECtHR’s case law, the DSA’s approach to moderating online content and safeguarding user rights can rely on a robust, widely recognised interpretive tradition, thereby enhancing legal certainty and protecting freedom of expression in a manner consistent with Europe’s broader human rights framework.

A. Research Interest

The first chapter introduces the facts, the background relating to the research interest and the key definitions (I.). The second chapter then examines the conceptual elements of ‘disinformation’ within the non-binding initiatives of the EU prior to the DSA as well as the conceptual scope of the DSA in regard to the mandatory self-regulatory measures enshrined in Articles 34 and 35 DSA (II.). This analysis aims to determine whether the DSA encompasses a broader conceptual scope compared to previous European initiatives. In light of the absence of a legally binding definition of ‘disinformation’ within the DSA and the potential inclusion of misinformation under its scope, the question arises as to whether disinformation in the broader sense and misinformation is covered by the ECHR, which is also substantially binding for the EU. In particular, this analysis builds on the conceptual understanding of ‘disinformation’ within the framework of the DSA and explores the extent to which disinformation in the broader sense and misinformation are covered by Article 10 ECHR (III.). This paper first determines the scope of protection under Article 10 ECHR concerning disinformation in its broader sense and misinformation, including considerations related to Article 17 ECHR, focusing on the case of Holocaust denial. It then examines the issue of how initially protected disinformation in the broader sense and misinformation may, nonetheless, be restricted in line with Article 10(2) ECHR. After briefly introducing general justification narratives for freedom of expression, this paper discusses key aspects to be considered when restricting disinformation in the broader sense and misinformation in accordance with Article 10(2) ECHR. In particular, the third chapter then focuses on the legitimate aims and the question of proportionality. Assuming that the conceptual scope of the DSA may also encompass misinformation, it is necessary to evaluate whether misinformation receives special protection under the ECHR. The EU’s approach in the DSA is contrasted with these legal considerations relating to Article 10 ECHR, in particular

due to the emphasis on the right to freedom of expression also within the DSA. This ultimately leads to the question as to whether the DSA can be considered in conformity with Article 10(2) ECHR regarding its approach to disinformation in the broader sense and misinformation. The final chapter concludes with a brief summary and an outlook (IV.).

B. Definitions

It should be noted at the outset that the terms relevant to this paper, including ‘social media’ and ‘harmful content,’ are notoriously difficult to define and lack EU-wide recognised definitions. Consequently, the definitions provided in this chapter are working definitions established solely for the purposes of this paper. The third chapter addresses, in particular, the European understanding of ‘disinformation’ prior to the DSA as well as within the DSA.³⁶

1. Social Media

There are numerous approaches to defining ‘social media.’ Social media is often referred to as social networks, social media platforms, or the social web. It is often at least identified by its conceptual elements; however, no consensus has yet emerged in literature or legal practice.³⁷ This lack of agreement is also evident within the EU, as seen in the widely divergent definitions developed in the case law of EU Member States.³⁸ In general, the selected terminology should be interpreted against the backdrop of the internet’s transition to the ‘Web 2.0.’ While the internet originally had structures and functions similar to traditional mass media, the defining characteristic of the ‘Web 2.0’ is the active participation and content creation by platform users, commonly referred to as ‘user-generated content.’ This shift marks a development from pure information consumption towards the possibility of information creation, highlighting one of the core elements that characterise social media.³⁹

For the purposes of this paper, ‘social media’ refers to private companies that create a public digital space, governed by private law rules, business models, and economic

³⁶ See chapter II.A.2) and II.B.2) of this paper.

³⁷ See e.g. Obar and Wildman, ‘Social Media Definition and the Governance Challenge: An Introduction to the Special Issue’ (2015), *Tel. Pol.* 745 (747 ff); DeNardis and Hackl, ‘Internet governance by social media platforms’ (2015), *Tel. Pol.* 761 (762).

³⁸ van der Donk, ‘Circumventing Ambiguous Qualifications and National Discrepancies: A European Roadmap to Define Social Media Platforms’ (2022), *SSRN* 7 ff.

³⁹ Hohlfeld et al, ‘Das Phänomen Social Media’, in Hornung and Müller-Terpitz (eds.), *Rechtshandbuch Social Media* (Berlin, Heidelberg, 2021) 13 (13).

goals. In this space, users can actively disseminate and store self-generated content while simultaneously disclosing their personal data, forming the basis of the ‘service for data’ business model⁴⁰. Although social media platforms may be categorised as a sub-category of information intermediaries⁴¹, in that they do not themselves produce the content disseminated, they are nevertheless not regarded as entirely neutral actors; their extensive moderation of user-generated content assigns them an influential role in the information ecosystem.⁴² Thus, while the digital infrastructure of social media platforms is based on private design, management, and rules, they, simultaneously, assume a state-like role, first in promoting public discourse, and, second, in weighing conflicting interests in the course of the moderation of content.

2. Harmful and Illegal Content

Online content can generally be categorised into legal, harmful, and illegal content, although distinguishing between these categories can be challenging. According to the DSA, illegal content is defined as unlawful at the EU or national level provided that domestic law is in line with EU law.⁴³ At the EU level, this includes, for instance, material involving child sexual abuse,⁴⁴ violations of data protection⁴⁵ or copyright

⁴⁰ Denga, ‘Plattformregulierung durch europäische Werte: Zur Bindung von Meinungsplattformen an EU-Grundrechte’ (2021) *EuR* 569 (571); for more details on the business model ‘service for data,’ see e.g. Metzger, ‘Dienst gegen Daten: Ein synallagmatischer Vertrag’ (2016) *AcP* 817 (817 ff).

⁴¹ DeNardis and Hackl, (2015), *Tel. Pol.* 761 (766): ‘social media, while technically “content-neutral” exerts significant influence on the flow of information online, thereby employing a crucial ‘gatekeeping position.’ Denga, (2021), *EuR* 569 (571): the content offer is designed unilaterally by the platforms on the basis of the General Terms and Conditions. Holoubek, ‘Plattformregulierung aus grundrechtlicher Perspektive’, in Grabenwarter, Holoubek and Leitl-Staudinger (eds.), *Regulierung von Kommunikationsplattformen* (Vienna, 2022) 29 (35); Leitl-Staudinger, ‘Meinungsfreiheit als demokratisches Grundrecht’, in Grabenwarter, Holoubek and Leitl-Staudinger (eds.), *Grundfragen der Medien- und Kommunikationsfreiheit* (Vienna, 2023) 61 (65 ff).

⁴² McKay and Tenove, (2021), *PRQ* 703 (705).

⁴³ DSA, Article 3(h).

⁴⁴ Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography and replacing Council Framework Decision 2004/68/JHA (consolidated version) [2011] OJ L335/1.

⁴⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1.

laws,⁴⁶ terrorist content,⁴⁷ and certain forms of hate speech.⁴⁸ At the national level, this encompasses, for example, defamation.⁴⁹

Conversely, harmful content is not necessarily illegal.⁵⁰ Harmful content includes disinformation and misinformation, which is characterised by its potential to cause societal harm⁵¹ and includes content which, for example, impairs democratic processes. Nonetheless, a number of EU member states continue to classify ‘disinformation’ as illegal under their national legislation.⁵² The EU itself, however, has intentionally refrained from providing a more detailed definition of this term within the DSA.⁵³ Legal but harmful content may become illegal if, for instance, the disseminator uses this information to incite hatred, discrimination, or violence,⁵⁴ or if it is classified as unlawful by national legislation.⁵⁵

Although the answer may appear straightforward at first glance, it remains uncertain whether illegal content, including hate speech or defamation, can also be classified as harmful. This determination hinges on the definition of ‘harm.’ If one assumes that the potential for extensive societal damage is a prerequisite for classifying content as

⁴⁶ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L30/92.

⁴⁷ Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online [2021] OJ L172/79.

⁴⁸ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law [2008] OJ L328/55, Article 1.

⁴⁹ In Austria, for instance, defamation is prosecuted under § 297 of the Austrian Criminal Code (Strafgesetzbuch, StGB) Austrian Federal OJ 1974/60.

⁵⁰ Commission, *A multidimensional approach to disinformation: Report of the independent High-level Group on fake news and online disinformation* (Publications Office of the European Union, 2018) 10 f <<https://op.europa.eu/en/publication-detail/-/publication/6ef4df8b-4cea-11e8-be1d-01aa75ed71a1/language-en>>; Shattock, ‘Free and Informed Elections? Disinformation and Democratic Elections Under Article 3 of Protocol 1 of the ECHR’ (2022) *Hum. Rights Law Rev.* 1 (2) (with further references).

⁵¹ van der Donk, (2022), *SSRN* 3 ff.

⁵² For an overview, see Fahy et al, ‘The EU’s regulatory push against disinformation’ (*Verfassungsblog*, 5 August 2022) <<https://verfassungsblog.de/voluntary-disinfo/>>; Ó Fathaigh et al, ‘The perils of legally defining disinformation’ (2021) *IPR* 7 ff.

⁵³ See also Peukert, ‘On the Risks and Side-Effects of the Digital Services Act (DSA)’ (28 March 2022) *EuCritQ*, *Forthcoming*, para. 30.

⁵⁴ See chapter III.C) of this paper.

⁵⁵ However, it should be generally noted that classifying a statement or information as ‘unlawful’ under national legislation – considering the significance of the interpretative context – can already be challenging due to ‘open-ended’ legal concepts; see further Deng, (2021), *EuR* 569 (572).

‘harmful,’ this criterion would initially preclude the simultaneous categorisation of illegal content as harmful content. This is due to the fact that not all illegal content necessarily entails the potential to extensive societal harm, but may instead cause harm to only small parts of society or individuals. Nevertheless, the potential threat to social peace and democratic order is frequently highlighted in discussions of illegal content, in particular hate speech. Nonetheless, this potential threat is arguably not explicitly regarded – at least by the UN – as a necessary conceptual element for the qualification of a statement as hate speech.⁵⁶ These considerations imply that the categories of (unregulated) harmful content and illegal content essentially exist alongside each other. Consequently, this would result in a distinction between legal, illegal, and harmful content, which can be illustrated as follows:

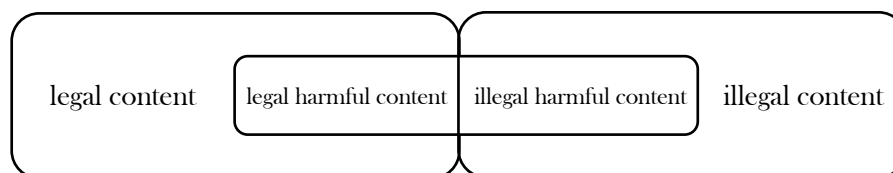


Figure 1. Legal, harmful, and illegal content

3. Regulation

A general distinction can be drawn between the ‘regulation by platforms’ or private self-regulation, including content moderation measures based on the platforms’ General Terms and Conditions (GTC), and the ‘regulation of platforms’ which is primarily conducted through state orders.⁵⁷ The latter can be further broken down into direct ‘state regulation,’ such as state mandates to block specific online content, and state-imposed self-regulation. State-imposed self-regulation includes, i.e. ‘regulated self-regulation.’ This constitutes a combination of the ‘regulation of platforms’ and the ‘regulation by platforms,’ as exemplified by the DSA.⁵⁸ Occasionally, more nuanced concepts have also been developed.⁵⁹ For the purposes of this paper, the conceptual differentiation is made as follows:

⁵⁶ For the United Nations’ understanding of the key attributes of hate speech, see ‘What is hate speech?’ (*United Nations*) <<https://www.un.org/en/hate-speech/understanding-hate-speech/what-is-hate-speech>>.

⁵⁷ DeNardis and Hackl, (2015), *Tel. Pol.* 761 (762).

⁵⁸ Holoubek, ‘Plattformregulierung’, 29 (36).

⁵⁹ For a more nuanced terminology, i.e. a distinction between sovereign regulation, regulated self-regulation, and non-sovereign self-regulation, see Hoffmann-Riem, *Recht im Sog* 113 ff.

Regulation of platforms		Regulation by platforms
State regulation	Regulated self-regulation	Private regulation or self-regulation
Direct state decision on the restriction of specific online content	Involvement of sovereign actors in the development of self-regulatory measures, whether in the form of ‘soft law’ or ‘hard law’	Private measures and decisions, e.g. the development of codes of conduct, the drafting of the GTC, or the selection of a particular business model

Figure 2. State regulation, regulated self-regulation, and self-regulation

II. The EU’s Approach to Online Disinformation

A. The EU’s Approach to Online Disinformation Prior to the DSA

1. Non-Binding European Initiatives Relating to Online Disinformation: An Overview

Prior to the enactment of the DSA on November 16, 2022, the EC Directive was the principal legal framework governing the liability of internet service providers for the dissemination of illegal online content. Under the EC Directive, digital service providers were held liable for illegal content disseminated through their platforms if they had actual knowledge of the content or if they became aware of it through other relevant facts or circumstances – interpreted as an ‘ought to have known’ standard – and subsequently failed to remove the content expeditiously upon acquiring such knowledge. This liability regime is commonly referred to as ‘conditional immunity.’⁶⁰

In light of the developments since the adoption of the EC Directive 24 years ago – notably, the proliferation of disinformation online and increasing reliance by individuals on social media to share personal opinions and receive information – the EU has intensified its efforts to address not only illegal content but also other forms of content that, while not necessarily unlawful, are harmful, with a specific emphasis on disinformation. This led to a series of non-binding communications and recommendations from the EU, as well as the establishment of self-regulatory codes

⁶⁰ See e.g. Husovec, ‘Rising Above Liability: The Digital Services Act as a Blueprint for the Second Generation of Global Internet Rules’ (2023) *BTJLJ, Forthcoming* 101 (101).

of conduct⁶¹: Subsequent to the Report of the High-Level Expert Group,⁶² the European Commission (Commission) issued a Communication on tackling online disinformation⁶³ (Communication). This was followed by the European Council's Conclusions⁶⁴ of June 28, 2018, which invited the High Representative and the Commission to present an action plan to address the EU's response to disinformation. In October 2018, major online platforms such as Facebook and X, formerly known as Twitter, followed by Microsoft and TikTok, collaborated with the EU and agreed for the first time to adopt voluntary self-regulatory standards aimed at addressing both illegal and harmful content, including disinformation.⁶⁵ Shortly thereafter, on December 5, 2018, the Commission adopted the Action Plan against Disinformation⁶⁶, which further underscored the necessity for binding measures to combat online disinformation. This plan was subsequently elaborated upon in the Commission's Report on the implementation of the Action Plan against Disinformation⁶⁷. Additionally, in 2020, the Commission adopted the European Democracy Action Plan⁶⁸, which similarly identified the containment of disinformation as a key objective in safeguarding democratic processes and independent media. Contrary to the original approach of purely non-governmental self-regulation by platform operators, there has been a clear shift towards regulated self-regulation. This shift increasingly involves governmental participation in the fight against harmful online content and culminated in the adoption of the DSA. This new reliance on sovereign regulation of the platforms' self-regulation appears to stem, at least in part, from the limited control that state authorities can exercise over digital media, which are organised as private businesses.⁶⁹

⁶¹ Code of Practice on Disinformation (October 2018) <2018_Code_of_Practice_on_Disinformation_14DbpCSGHOU3e1vYe0Dbzq669k_87534.pdf>; Strengthened Code of Practice on Disinformation (2022) <2022_Strengthened_Code_of_Practice_Disinformation_TeAETn7bUPXR57PU2FsTqU8rMA_87585.pdf>.

⁶² Commission, *A multidimensional approach to disinformation* 10 f.

⁶³ Commission, 'Tackling online disinformation: a European Approach' (Communication) COM (2018) 236 final.

⁶⁴ European Council, European Council meeting (28 June 2018) - Conclusions, EUCO 9/18, CONCL 3, 6.

⁶⁵ Code of Practice on Disinformation (October 2018).

⁶⁶ Commission, 'Action Plan against Disinformation' (Joint Communication) JOIN (2018) 36 final.

⁶⁷ Commission, 'Report on the implementation of the Action Plan Against Disinformation' (Joint Communication) JOIN (2019) 12 final.

⁶⁸ Commission, 'On the European democracy action plan' (Communication) COM (2020) 790 final.

⁶⁹ Denga, (2021), *EuR* 569 (569).

2. The EU's Understanding of 'Disinformation' Prior to the DSA

Pursuant to the majority of the aforementioned European non-binding measures on disinformation, 'disinformation' is understood as 'verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public and may cause public harm.'⁷⁰ Accordingly, the core conceptual elements encompass, first, the dissemination of demonstrably incorrect or misleading information; second, the intention of the disseminator to make a profit or deceive; and third, the potential to cause public harm. A distinction has been drawn on the level of the Council of Europe (CoE) in light of these elements. The CoE differentiates between the dissemination of evidently false information with the intent to make a profit or deceive, i.e. disinformation in the stricter sense, and the dissemination of accurate but misleading information with the intent to make a profit or deceive, i.e. malinformation, for example, by distorting facts or altering the context.⁷¹ This differs from false or misleading information disseminated intentionally but without the intent to deceive or make a profit, as in the case of satire.⁷² Due to the shared element of intent to make a profit or deceive, disinformation in the stricter sense and malinformation can be collectively referred to as disinformation in the broader sense. Furthermore, a distinction is made between disinformation in the broader sense and misinformation. Misinformation involves the dissemination of demonstrably false or merely misleading information without the intent to make a profit or deceive and is, thus, spread unintentionally by individuals acting or distributed in good faith.⁷³ This distinction can be illustrated as follows:

	Disinformation in the broader sense		Misinformation
	Disinformation in the stricter sense	Malinformation	
Evidently false	■		■
True but misleading		■	■
Intention to make a profit or deceive	■	■	
Potential public harm	■	■	■

Figure 3. Disinformation, misinformation, and malinformation

⁷⁰ See Commission, COM (2018) 236 final; JOIN (2019) 12 final; JOIN (2018) 36 final; Code of Practice on Disinformation (October 2018).

⁷¹ This may include content created or manipulated using artificial intelligence, such as deep fakes.

⁷² See e.g. Commission, COM (2018) 236 final, 4.

⁷³ See Wardle and Derakhshan, 'Information Disorder: Toward an interdisciplinary framework for research and policy making' (Report) DGI (2017)09, 20.

In conclusion, it can be inferred that the definition used in the majority of non-binding European measures encompasses ‘disinformation’ in two forms: first, verifiably false disinformation with the corresponding intention, i.e. disinformation in the stricter sense, and second, information that is misleading regardless of its truthfulness and disseminated with the intent to deceive or make a profit, i.e. malinformation. Misinformation, on the other hand, is excluded from this definition due to the absence of an intent to deceive or make a profit. While considering that identifying the intent of the distributor can, in practice, be a particularly challenging task in the online context, this typology offers a valuable framework for conceptualising ‘disinformation.’ In view of this, it is necessary to examine the conceptual approach adopted within the DSA, particularly as to whether the ‘systemic risks’ addressed by the DSA also encompass misinformation.⁷⁴

B. The EU’s Approach to Online Disinformation Within the DSA

1. The DSA’s Risk-Based Approach to ‘Disinformation’

In response to the various non-binding initiatives aimed at mitigating online disinformation in the broader sense, several EU member states opted to enact their own legislative measures.⁷⁵ The resulting divergence in national laws led to a significant fragmentation of regulatory frameworks at the national level.⁷⁶ The European legislator explicitly acknowledged this fragmentation in the DSA as to impeding the functioning of the internal market. Consequently, this prompted the European legislator to address the issue through the DSA – an instrument which

⁷⁴ See chapter II.B.2) of this paper.

⁷⁵ In France, a law was enacted to prevent the dissemination of false information during electoral campaigns, see Law No. 2018-1202 of 22 December 2018 on combating the manipulation of information, JORF No. 0297 of 23 December 2018, Text No. 1 <<https://www.legifrance.gouv.fr/loda/id/JORFTE XT000037847559/>>. In Hungary, the Criminal Code was amended by the Coronavirus Protection Act in 2020, see Act C of 2012 on the Criminal Code, Article 337(2) <<https://njt.hu/jogszabaly/en/2012-100-00-00>>.

⁷⁶ See also further national legislation addressing disinformation, see e.g. Republic of Lithuania Law on the Provision of Information to the Public, No. I-1418, adopted on 2 July 1996, as last amended on 15 April 2021, Article 19(1)(1) <<https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/b90a7c321c7b11eca d9fbbf5f006237b>>; Criminal Code of Malta, adopted on 10 June 1854, as last amended on 21 February 2025, Article 82 <<https://legislation.mt/eli/cap/9/eng/pdf>>. For an overview, see Betzel et al, ‘Notions of Disinformation and Related Concepts’ (ERGA Report, 2020) 32 f <<https://erga-online.eu/wp-content/uploads/2021/03/ERGA-SG2-Report-2020-Notions-of-disinformation-and-related-concepts-final.pdf>>.

some have described as a ‘quantum leap,’⁷⁷ ‘watershed moment,’⁷⁸ or ‘bombshell’⁷⁹ for the development of platform regulation.

Pursuant to Article 1(1), the DSA aims to establish a ‘safe, predictable and trusted online environment that facilitates innovation’ while simultaneously upholding the fundamental rights enshrined in the CFR.⁸⁰ The primary objective of the DSA is to create a harmonised and legally binding framework that applies to all internet service providers offering specific online services to users within the EU, irrespective of their place of establishment or their location,⁸¹ including social media platforms. In addition to imposing legally binding obligations on intermediary services regarding illegal content,⁸² the DSA – unlike the EC Directive – seeks to address the societal risks associated with the dissemination of ‘disinformation’ and other harmful content.⁸³ In doing so, the European legislator is relying on conditional liability exemptions, as established in the E-Commerce Directive (EC Directive).⁸⁴ The DSA is also imposing specific due diligence obligations,⁸⁵ including the duty to assess and mitigate ‘systemic risks’ for very large online platforms (VLOPs) in Articles 34 and 35 DSA. Finally, the DSA contains detailed provisions for the implementation and enforcement of the regulation.⁸⁶

‘Disinformation’ is addressed in the DSA in several contexts, including in relation to advertisements⁸⁷. The inclusion of different types of ‘disinformation’⁸⁸ – though rarely

⁷⁷ Peukert, (2022), *EuCritQ* para. 3 (with further references).

⁷⁸ ‘European Union: Digital Services Act agreement a “watershed moment” for Internet regulation’ (*Amnesty International*, 23 April 2022) <<https://www.amnesty.org/en/latest/news/2022/04/european-union-digital-services-act-agreement-a-watershed-moment-for-internet-regulation/>>.

⁷⁹ Denga, (2021), *EuR* 569 (569).

⁸⁰ DSA, Recital 2.

⁸¹ DSA, Recital 7.

⁸² See e.g. the obligation to establish ‘notice and action mechanisms’ according to Article 16 DSA.

⁸³ DSA, e.g. Recital 9.

⁸⁴ DSA, Articles 4–10.

⁸⁵ DSA, Articles 11–48.

⁸⁶ DSA, Articles 49–88.

⁸⁷ DSA, Recital 2.

⁸⁸ For the purposes of this paper, a content-related distinction is made between disinformation in the broader sense and misinformation that is ‘inciting,’ disinformation in the broader sense and misinformation that is ‘democracy-related’ – including ‘election-related’ and ‘electoral’ disinformation in the broader sense and misinformation – as well as those that are ‘science-related,’ including ‘medical’ disinformation in the broader sense and misinformation. If such information is ‘democracy-related,’ it aims to undermine democratic processes – including elections – in a wider sense and to erode trust in democratic institutions. If it is ‘science-related,’ it seeks to diminish confidence in

explicitly – can, in particular, be inferred from the DSA’s ‘risk categories’⁸⁹ as addressed within the risk assessment obligation under Article 34 and the risk mitigation obligation under Article 35 DSA. For instance, illegal ‘disinformation’ is encompassed within the first category, as enshrined in Article 34(1)(a) DSA.⁹⁰ The second category, laid down in Article 34(1)(b) DSA, broadly pertains to ‘disinformation’ that poses an ‘actual or foreseeable’ risk to fundamental rights.⁹¹ In addition, Article 34(1)(c) DSA is relevant with respect to electoral ‘disinformation,’⁹² while Article 34(1)(d) DSA addresses, among others, medical ‘disinformation.’⁹³ In particular, Article 34(1) requires VLOPs to ‘identify, analyse, and evaluate’ systemic risks, including those related to ‘disinformation.’ Consequently, platforms are obligated to assess the risks that arise from their services, including the algorithms they employ, in relation to the spread of ‘disinformation.’ If such risks are identified, for example, where algorithms amplify the dissemination of ‘disinformation,’ VLOPs are mandated under Article 35(1) of the DSA to implement ‘appropriate, proportionate, and effective risk mitigation measures,’ which respect fundamental rights. These measures could include, for instance, the adjustment of content moderation processes pursuant to Article 35(1)(c). According to Article 74(1) of the DSA, the Commission is authorised to impose fines on VLOPs for intentional or negligent non-compliance with one or more provisions of the DSA.

The provisions outlined in the DSA demonstrate the EU’s commitment to a more comprehensive regulation of online ‘disinformation’ by establishing an obligation for VLOPs to adopt certain self-regulatory measures under the threat of sanctions. In this regard, the DSA represents the culmination of the shift from non-governmental corporate self-regulation by platforms to increasingly governmental regulation by the

scientific knowledge, including in the field of medicine. ‘Inciting’ disinformation in the broader sense and misinformation as forms of illegal content refer to false or misleading information that incites hatred, violence, or discrimination. The boundaries between these forms can be fluid, and these categories are not exhaustive. Moreover, these classifications can also be applied to malinformation. Depending on the legality of the information in question, those types can further be differentiated between legal and illegal types.

⁸⁹ DSA, Recitals 80–83.

⁹⁰ DSA, Recital 80 and Article 34(1)(a): ‘the dissemination of illegal content through their services.’

⁹¹ DSA, Recital 81 and Article 34(1)(b): ‘any actual or foreseeable negative effects for the exercise of fundamental rights [...]’

⁹² DSA, Recital 82 and Article 34(1)(c): ‘any actual or foreseeable negative effects on civic discourse and electoral processes, and public security.’

⁹³ DSA, Recital 83 and Article 34(1)(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.’

EU.⁹⁴ In addressing the spread of ‘disinformation,’ the EU, through the DSA, seeks to codify an ambitious solution to the complex relationship between freedom of expression and ‘disinformation’ in a legally binding form.

2. The EU’s Understanding of ‘Disinformation’ Within the DSA

To comprehensively understand the conceptual scope of the DSA with regards to ‘disinformation,’ this chapter addresses the key conceptual elements embedded within the DSA. Initially, the consideration of the first conceptual element within the DSA is examined, namely ‘demonstrably false or misleading information.’ While the European documents prior to the DSA define disinformation as ‘demonstrably false or misleading information,’ the DSA refers – somewhat more vaguely – to ‘misleading or deceptive content, including disinformation,’⁹⁵ as well as ‘inaccurate or misleading information.’⁹⁶ Both definitions of the European non-binding documents on the one hand and the DSA on the other thus extend to information that is demonstrably false, as well as to information that, although factually accurate, may nevertheless be misleading.

Regarding the second conceptual element, namely the ‘intention to make a profit or deceive,’ prior non-binding European measures explicitly incorporated the intention to deceive or make a profit within their definition of disinformation (‘for economic gain or to intentionally deceive the public’), thereby excluding misinformation from their conceptual scope. In contrast, the DSA provides less clarity on this conceptual element. In the DSA, disinformation is particularly addressed in the context of systemic risks: according to Recital 104 of the DSA,

[a]nother area for consideration is the possible negative impacts of systemic risks on society and democracy, such as disinformation or manipulative and abusive activities or any adverse effects on minors. This includes coordinated operations aimed at amplifying information, including disinformation, such as the use of bots or fake accounts for the creation of *intentionally* inaccurate or misleading information, sometimes with a purpose of obtaining economic gain, which are particularly harmful for vulnerable recipients of the service, such as minors.⁹⁷

⁹⁴ Meyers, ‘Will the Digital Services Act save Europe from disinformation?’ (*Centre for European Reform*, 21 April 2022) <<https://www.cer.eu/insights/will-digital-services-act-save-europe-disinformation>>.

⁹⁵ DSA, Recital 84.

⁹⁶ DSA, Recital 104 (‘unrichtig’ German translation).

⁹⁷ DSA, Recital 104 (emphasis added).

Accordingly, disinformation is mentioned as one example of a systemic societal risk ('such as'), which arguably does not necessarily have to be 'manipulative' or 'abusive' ('disinformation or manipulative and abusive activities'). Coordinated operations, including those amplifying disinformation, are particularly highlighted as a societal risk. However, in this regard, it remains unclear whether 'intention to deceive or make a profit' is a necessary criterion for information to be classified as 'disinformation' under the DSA, or if intention is mentioned solely in relation to the actions which are deemed 'coordinated.' Additionally, Recital 84 of the DSA states that providers should 'pay particular attention on how their services are used to disseminate or amplify misleading or deceptive content, including disinformation.'⁹⁸ If misinformation is understood as demonstrably false, inaccurate, or merely misleading information disseminated without the intention to deceive the public or make a profit, misinformation could also fall under the broader category of 'misleading and deceptive content.' Furthermore, Recital 2 of the DSA refers to 'online disinformation or other societal risk,' and Recital 9 mentions 'societal risks that the dissemination of disinformation or other content may generate.' They both, thus, suggest a potentially broader understanding of the content addressed by the DSA, i.e. the potential inclusion of misinformation within the conceptual scope of the DSA. A similar conclusion can be drawn from Articles 34 and 35 DSA: the risk assessment aims to identify 'systemic risks.' However, the extent to which misinformation must also be considered in this context is not clearly specified. In this regard, Article 34(2) states that

[t]he assessments shall 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, as well as the amplification and potentially rapid and wide dissemination of illegal content and of information that is incompatible with their terms and conditions.⁹⁹

The assessment of whether 'intentional manipulation' of systems has occurred is, therefore, 'also' to be taken into account by platform providers. Consequently, non-intentional 'manipulation' which may constitute a systemic risk is, arguably, not categorically excluded, as can be inferred by *argumentum e contrario*.

The third conceptual element concerns the 'potential for public harm.' While the prior non-binding European measures require the possibility of public harm ('may cause public harm'), the DSA refers to a 'societal risk' in the sense of a 'systemic risk'

⁹⁸ DSA, Recital 84.

⁹⁹ DSA, Article 34(2) (emphasis added).

in connection with disinformation. According to the Communication, for instance, public harm exists in the context of ‘threats to democratic political and policy-making processes as well as public goods such as the protection of EU citizens’ health, the environment or security.’¹⁰⁰ Again, under the Communication’s definition, such a threat does not necessarily have to be present; rather, a potential threat is sufficient.¹⁰¹ This conceptual element is similarly reflected in the DSA, which addresses the ‘societal risks’ that may affect fundamental rights enshrined in the CFR, as well as the ‘societal debate and electoral processes and public security.’ It also encompasses concerns related to ‘gender-based violence, the protection of public health and minors, and serious adverse consequences for a person’s physical and mental well-being.’ The DSA stipulates that such a risk must be ‘real’ and ‘foreseeable,’ without further specifying these terms. However, it could be argued that ‘real’ and ‘foreseeable’ risks require a sufficient proximity between the information or expressions distributed and the anticipated impacts to warrant proper consideration under Article 34 DSA. Conversely, purely ‘potential’ risks may arguably not require a similar proximity.

C. Interim Conclusion

It can be inferred that the definition of ‘disinformation’ used in the majority of the non-binding European measures initially presented in this chapter encompasses disinformation in two forms: first, verifiably false information intentionally disseminated, i.e. disinformation in the stricter sense, and, second, accurate information that is misleading, disseminated with the intent to deceive or make a profit, i.e. malinformation. Misinformation, on the other hand, is excluded from this definition due to the absence of the intent to deceive or make a profit. In contrast, the DSA does not necessarily require intent to deceive or make a profit, which would also include the *bona fide* dissemination of false or misleading information, i.e. misinformation. Therefore, the DSA, from its language, appears to grant a broader scope of protection than the previous European initiatives. Given the conceptual ambiguities within the DSA due to its terminological openness – potentially including misinformation – and the risk mitigation obligations as enshrined in Article 35 DSA, the question arises as to the extent to which freedom of expression protects both disinformation in the broader sense and misinformation. Furthermore, assuming that misinformation does fall within the scope of protection, the question then arises as to

¹⁰⁰ Commission, COM (2018) 236 final, 4.

¹⁰¹ Commission, COM (2018) 236 final, 3 f.

the extent to which the DSA may, nevertheless, impose restrictions on this type of information.

III. The Regulation of Online Disinformation Under the DSA in Light of Article 10 ECHR

A. On the Binding Nature of the ECHR for the European Union

It is first essential to elaborate on the extent to which the ECHR and the case law of the ECtHR are relevant to the EU and its institutions in relation to the DSA. While the EU itself is not yet a contracting party to the ECHR, and, thus, not formally bound by the Convention, it is nonetheless subject to its substantive obligations¹⁰² due to the following reasons: first, Article 53 ECHR establishes that the ECHR sets the minimum standard for human rights within the CoE and its member states, including EU member states, all of which are parties to the ECHR. Furthermore, the rights enshrined in the ECHR constitute general principles of EU law according to Article 6(3) of the Treaty on European Union¹⁰³ (TEU),¹⁰⁴ according to which the CFR must be interpreted in the light of the ECHR.¹⁰⁵ This is also reflected in the DSA, which states that the ‘Regulation should be interpreted and applied in accordance with those fundamental rights,’ namely ‘the fundamental rights recognised by the Charter and the fundamental rights constituting general principles of Union law.’¹⁰⁶ Additionally, Article 52(3) CFR clarifies that the fundamental rights of the CFR align with the human rights of the ECHR in terms of both ‘meaning and scope.’ Accordingly, ‘the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR.’¹⁰⁷ Consequently, the meaning and scope of the right to freedom of expression and information, as enshrined in Article 11 CFR, corresponds to those

¹⁰² Merli, ‘Funktionen des europäischen Grundrechtsschutzes’, in Funk et al (eds.), *Der Rechtsstaat vor neuen Herausforderungen: Festschrift für Ludwig Adamovich zum 70. Geburtstag* (Vienna, 2002) 449 (449); Frenz, ‘EGMR-Klimaurteil und EU-Umweltgesetzgebung: die EU-RenaturierungsVO’ (2024) *NuR* 361 (364 f).

¹⁰³ Consolidated Version of the Treaty on European Union [2012] OJ C326/13.

¹⁰⁴ Cf. Haratsch et al, *Europarecht*, 13th edn. (Tübingen, 2023) para. 680.

¹⁰⁵ Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, Article 52.

¹⁰⁶ DSA, Recital 153.

¹⁰⁷ Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17, Article 52.

guaranteed by Article 10 ECHR.¹⁰⁸ Simultaneously, Article 52(3) CFR stipulates that EU law may offer more extensive protection than that provided by the ECHR, while still upholding the Convention's minimum standard of human rights protection. The ECtHR has developed an extensive body of case law pertaining to the right to freedom of expression compared to the CJEU. This jurisprudence is relevant for the EU in achieving a clearer understanding of the scope and justifiable limits of Article 11 CFR. The ECHR and the case law of the ECtHR would become particularly relevant if the EU were to accede to the ECHR, as envisioned in Article 6(2) TEU, since the Convention would then become formally binding for the EU. These considerations¹⁰⁹ warrant the focus on the ECHR in the following discussion.

B. The Scope of Protection of Article 10 ECHR

The right to freedom of expression, as enshrined in Article 10 ECHR, encompasses the right to hold opinions, as well as to receive and impart information and opinions, i.e. the freedom of opinion, the freedom of information and the freedom of expression. In principle, Article 10 ECHR safeguards all types of expressions, regardless of their content. Accordingly, facts, value judgments, as well as 'value-laden facts'¹¹⁰ – i.e. fact-based value judgments¹¹¹ – are initially protected by Article 10 ECHR,¹¹² even if they are perceived to be hurtful, shocking, or disturbing.¹¹³ Additionally, the truthfulness of a statement is not a determining factor in whether it

¹⁰⁸ See also e.g. CJEU Case C-163/10 *Aldo Patriciello* (Criminal Proceedings against), 6 September 2011, EU:C:2011:543, para. 31; decisions of the CJEU can be accessed via <https://curia.europa.eu/juris> with their ECLI, case number or party names.

¹⁰⁹ See further Shattock, 'Lies, liability, and lawful content: Critiquing the approaches to online disinformation in the EU' (2023) *Common Mark. Law Rev.* 1313 (1326 ff).

¹¹⁰ *Karsai v. Hungary* App no 5380/07 (ECtHR, 1 December 2009) para. 33.

¹¹¹ *Kobenter and Standard Verlags GmbH v. Austria* App no 60899/00 (ECtHR, 2 November 2006) para. 30; see also Koziol, 'Einleitung: Einige aktuelle Grundfragen', in Koziol (ed.), *Tatsachenmitteilungen und Werturteile: Freiheit und Verantwortung* (Vienna, 2018) 3 (9): expressions of opinion often contain factual claims, which may also be incorrect.

¹¹² Muzak, 'Art 10 MRK', in Muzak (ed.), *B-VG*, 6th edn. (Vienna, 2020) para. 3.

¹¹³ *Handyside v. the United Kingdom* App no 5493/72 (EComHR, 7 December 1976) para. 49; *Lingens v. Austria* App no 9815/82 (ECtHR, 8 July 1986) para. 41; *Sanchez v. France* App no 45581/15 (ECtHR, 15 May 2023) para. 145; Altman, 'Freedom of Expression and Human Rights Law: The Case of Holocaust Denial', in Maitra and McGowan (eds.), *Speech & Harm: Controversies Over Free Speech* (Oxford, 2012) 24 (30): this broad understanding of freedom of expression corresponds to the American 'Principle of Viewpoint Neutrality,' according to which an expression about general issues 'of political, ethical, social, and historical significance' cannot be restricted merely on the basis of the 'viewpoint' it conveys.

falls within the scope of protection of Article 10 ECHR.¹¹⁴ Consequently, misinformation and even intentional, evidently false, or merely misleading statements, i.e. disinformation in the broader sense are initially covered by Article 10 ECHR.¹¹⁵

While the right to hold opinions enjoys ‘an almost absolute’ protection under Article 10 ECHR,¹¹⁶ freedom of expression may be restricted under the conditions set forth in Article 10(2) ECHR provided that the expression in question has not already been excluded from the protection of Article 10 ECHR based on Article 17 ECHR, commonly referred to as the ECHR’s ‘abuse clause.’¹¹⁷ Article 10 ECHR imposes both negative obligations on states to refrain from interference and positive obligations to actively protect the right.¹¹⁸ Article 10 ECHR even extends to interactions between private individuals (‘horizontal positive obligations’),¹¹⁹ which also particularly characterise the distribution of expressions and information on social media platforms.

C. The ‘Guillotining’ of Certain Forms of Disinformation Under Article 17 ECHR: The Case of Holocaust Denial

While the Court has regularly emphasised the value of freedom of expression within democratic societies,¹²⁰ it does, however, set certain limits. Pursuant to the ECHR’s

¹¹⁴ *Salov v. Ukraine* App no 65518/01 (ECtHR, 6 September 2005) para. 113. Epping et al, *Grundrechte*, 10th edn. (Berlin, Heidelberg, 2024) para. 215 (with further references); in contrast, the established case law of the German Federal Constitutional Court holds that deliberately or evidently false information is not protected by the right to freedom of expression, as enshrined in Article 5(1) of the German Constitution.

¹¹⁵ Pabel, (2020), *JRP* 101 (103); Pöschl, ‘Neuermessung der Meinungsfreiheit’, in Koziol (ed.), *Tatsachenmitteilungen und Werturteile: Freiheit und Verantwortung* (Vienna, 2018) 31 (41); Bezemek, ‘Überlegungen zur sachlichen Reichweite freier Meinungsäußerung’ (2012) *JRP* 253 (253 ff) (with further references); Struth, *Hassrede und Freiheit der Meinungsäußerung* (Heidelberg, 2018) 357 f and 369.

¹¹⁶ Bychawska-Siniarska, *Protecting the Right to Freedom of Expression under the European Convention on Human Rights: A Handbook for Legal Practitioners* (Council of Europe, 2017) 13 (with further references) <<https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814>>.

¹¹⁷ See chapter III.C) of this paper.

¹¹⁸ On the differentiation between negative and positive rights, see first Berlin, *Four Essays on Liberty* (Oxford, 1990).

¹¹⁹ Florczak-Wątor, ‘The Role of the European Court of Human Rights in Promoting Horizontal Positive Obligations of the State’ (2017), *International and Comparative Law Review (ICLR)* 39 (39 ff).

¹²⁰ *Handyside v. the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) para. 49; *Lingens v. Austria* App no 9815/82 (ECtHR, 8 July 1986) para. 41.

abuse of rights clause, enshrined in Article 17 ECHR, certain forms of expression are excluded from the protection of the ECHR's rights, including Article 10. Accordingly, the rights guaranteed by the Convention do not include 'any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms'¹²¹ enshrined therein. Any exercise of a right enshrined in the ECHR, in particular the pursued aim of such exercise,¹²² must be consistent with the underlying aim for which the right is granted.¹²³ Due to the main purpose of Article 17 ECHR, which is to withhold protection from expressions that attempt to reinforce a totalitarian regime,¹²⁴ Article 17 ECHR has, thus far, only been applied by the ECtHR and the former European Commission of Human Rights (ECmHR) in exceptional circumstances.¹²⁵ It has primarily been applied in cases involving statements aiming at the justification or promotion of terrorism, war crimes, or totalitarian ideologies, statements inciting violence or hatred, denials of the Holocaust, or similar threats to constitutional order.¹²⁶ Nevertheless, the approach of the Court in applying Article 17 ECHR remains inconsistent: in several cases, the Court has directly applied Article 17 ECHR to declare a complaint incompatible *ratione materiae*, rendering it inadmissible.¹²⁷ At times, the Court has referred to Article 17 as a means of interpretation of the Convention's substantive provisions¹²⁸. In other similar circumstances, however, the Court has refrained from applying Article 17 and instead rejected a complaint as manifestly ill-founded under Article 35(3)(a) and (4) ECHR.¹²⁹

¹²¹ ECHR, Article 17.

¹²² *Kilin v. Russia* App no 10271/12 (ECtHR, 11 May 2021) para. 72. For an overview of objectives prohibited by Article 17 ECHR, see European Court of Human Rights (ECtHR), 'Guide on Article 17 of the European Convention on Human Rights, Prohibition of abuse of rights' (*ECHR-KS*, 28 February 2025) para. 29 <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_17_eng>.

¹²³ *S.A.S. v. France* App no 43835/11 (ECtHR, 1 July 2014) para. 66.

¹²⁴ *W.P. and Others v. Poland* App no 42264/98 (ECtHR, 2 September 2004) (with further references); Lobba, 'Holocaust Denial before the European Court of Human Rights: Evolution of an Exceptional Regime' (2015) *Eur. J. Int. Law* 237 (248).

¹²⁵ *Pastörs v. Germany* App no 55225/14 (ECtHR, 3 October 2019) para. 37.

¹²⁶ ECtHR, 'Guide on Article 17', paras. 95 ff.

¹²⁷ E.g. *Belkacem v. Belgium* App no 34367/14 (ECtHR, 27 June 2017) para. 37.

¹²⁸ E.g. *Perinçek v. Switzerland* App no 27510/08 (ECtHR, 15 October 2015) para. 115.

¹²⁹ E.g. *Smajić v. Bosnia and Herzegovina* App no 48657/16 (ECtHR, 16 January 2018) para. 42; see also, more generally, *Pastörs v. Germany* App no 55225/14 (ECtHR, 3 October 2019) para. 36.

Given the inconsistencies in the ECtHR's case law regarding the application of Article 17 ECHR in general¹³⁰ and the limited instances where the Court explicitly addressed online disinformation¹³¹ or 'fake news',¹³² the following discussion will focus on specific types of disinformation in the broader sense or misinformation as a form of 'incitement' ('inciting disinformation') in the context of Holocaust denials. These forms of incitement have regularly been excluded by the ECtHR from the scope of protection under Article 10 ECHR by virtue of Article 17 ECHR since *Lehideux and Isorni v. France*¹³³, provided that the facts of the individual case support such a denial or revision.¹³⁴ Thus, the following discussion aims to exemplify instances of false or misleading information that are likely already excluded from the scope of protection of Article 10 ECHR, particularly considering the Court's recent jurisprudence.

Notably, in *Zemmour v. France*, the Court emphasised that calls for discrimination, violence, and hatred constitute 'one of the limits that must never be exceeded in the exercise of freedom of expression.'¹³⁵ The Court and the EComHR have reiterated that these limits have been exceeded in relation to denials of 'the reality of clearly established historical facts, such as the Holocaust.'¹³⁶ Thus, with regard to the Holocaust in particular, the Court has developed the category of 'clearly established historical facts,' the 'negation or revision [of which] would be removed from the protection of Article 10 by Article 17.'¹³⁷ The Court did not, however, elaborate on

¹³⁰ Struth, *Hassrede* 185; in particular, with regard to the treatment of incitement as a necessary condition for the application of Article 17.

¹³¹ *Sanchez v. France* App no 45581/15 (ECtHR, 15 May 2023) para. 185.

¹³² For the first time *Brzeźński v. Poland* App no 47542/07 (ECtHR, 25 July 2019) para. 35; see also European Digital Media Observatory, 'Case law for policy making: an overview of ECtHR principles when countering disinformation' (*Centre for Media Pluralism and Media Freedom*, January 2022) 4 <<https://cmpf.eui.eu/wp-content/uploads/2023/04/Case-law-for-policy-making-Report-2022.pdf>>.

¹³³ *Lehideux and Isorni v. France* App no 24662/94 (ECtHR, 23 September 1998); Lobba, (2015) *Eur. J. Int. Law* 237 (241 ff).

¹³⁴ E.g. *Garaudy v. France* App no 65831/01 (ECtHR, 24 June 2003); *Witzsch v. Germany* (No. 2) App no 7485/03 (ECtHR, 13 December 2005); see also Mchangama and Alkiviadou, 'Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb?' (2021) *Hum. Rights Law Rev.* 1008 (1020 f).

¹³⁵ *Zemmour v. France* App no 63539/19 (ECtHR, 20 December 2022) para. 50 [DeepL translation]; *Baldassi and Others v. France* App nos 15271/16 and others (ECtHR, 11 June 2020) para. 64 (with further references); the Court, however, emphasised that 'inciting different treatment is not necessarily tantamount to inciting discrimination' [DeepL translation].

¹³⁶ *Garaudy v. France* App no 65831/01 (ECtHR, 24 June 2003).

¹³⁷ *Monnat v. Switzerland* App no 73604/01 (ECtHR, 21 September 2006) para. 57 (with further references); see also Struth, *Hassrede* 168 f.

which historical facts can be considered as ‘clearly established.’¹³⁸ In several cases concerning instances of denials of the Holocaust or related aspects, the Court declared complaints under Article 10 ECHR incompatible *ratione materiae* based on Article 17 ECHR.¹³⁹ On other occasions, however, similar expressions were not excluded from the protection of Article 10, in particular as the expression was not deemed by the Court to constitute ‘incitement.’¹⁴⁰ Since *Lehideux and Isorni v. France*, the Court has repeatedly held that Holocaust denial or revisionism activate the ‘guillotine effect’¹⁴¹ of Article 17 ECHR.¹⁴² Accordingly, these types of statements are automatically excluded from the Convention’s protection, irrespective of its inherently ‘inciting’ nature.¹⁴³ The decisive factor is rather the inherently antidemocratic nature of such statements, undermining ‘the very spirit of the Convention.’¹⁴⁴ In contrast, according to *Perinçek v. Switzerland*, other similar statements must fulfil the criterion of ‘incitement’ to trigger such an effect.¹⁴⁵

Consequently, the ‘guillotine effect’ might apply to Holocaust denial in the form of disinformation, malinformation, as well as misinformation, if intentionally or – in the case of misinformation – non-intentionally disseminated. If a person intentionally shares evidently false information by denying the historical reality of the Holocaust to deceive the public, i.e. disinformation in the stricter sense, such statement will fall

¹³⁸ But *Fatullayev v. Azerbaijan* App no 40984/07 (ECtHR, 22 April 2010) para. 87 (with further references); critical Struth, *Hassrede* 362 ff.

¹³⁹ *Lehideux and Isorni v. France* App no 24662/94 (ECtHR, 23 September 1998); *Garaudy v. France* App no 65831/01 (ECtHR, 24 June 2003); *Witzsch v. Germany* (No. 2) App no 7485/03 (ECtHR, 13 December 2005) para. 3; *M'Bala M'Bala v. France* App no 25239/13 (ECtHR, 20 October 2015) paras. 40 ff.

¹⁴⁰ *Perinçek v. Switzerland* App no 27510/08 (ECtHR, 15 October 2015) para. 280.

¹⁴¹ European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) 1950, 213 UNTS 221.

¹⁴² Lobba, (2015), *Eur. J. Int. Law* 237 (239).

¹⁴³ ECtHR, ‘Guide on Article 17’, para. 191; *Remer v. Germany* App no 25096/94 (EComHR, 6 September 1995). In contrast, the Court occasionally held that Holocaust denial is defamatory, see *Pastörs v. Germany* App no 55225/14 (ECtHR, 3 October 2019) paras. 46 and 48: the applicant ‘intentionally stated untruths in order to defame the Jews.’ In other cases, the Court declared Holocaust denial both defamatory and inciting, see *Garaudy v. France* App no 65831/01 (ECtHR, 24 June 2003): the denial of crimes against humanity, including the Holocaust, constitute ‘one of the most serious forms of racial defamation of Jews and of incitement to hatred of them.’ See also Altman, ‘Freedom of Expression’, 24 (33); *Perinçek v. Switzerland* App no 27510/08 (ECtHR, 15 October 2015) para. 234. Otherwise Struth, *Hassrede* 367: the scope of protection encompasses Holocaust denial.

¹⁴⁴ E.g. *Garaudy v. France* App no 65831/01 (ECtHR, 24 June 2003).

¹⁴⁵ *Perinçek v. Switzerland* App no 27510/08 (ECtHR, 15 October 2015) para. 234; see also Lobba, (2015), *Eur. J. Int. Law* 237 (250).

outside the scope of protection of Article 10 ECHR. A hypothetical example of such an online statement might appear as follows:

Newly uncovered documents prove that the Holocaust was a fabricated event. The so-called ‘death camps’ were actually just labour camps, and the death toll was greatly exaggerated. Historians and the Jewish community have been lying to us for decades to manipulate and control us! #FakeHistory #HolocaustHoax

The same will apply for true information intentionally taken out of context and shared to deny the historical reality of the Holocaust with the goal of misleading the audience. Even though the following fictional post does not negate the existence of the camps as such, it aims to create doubt about the Holocaust by focusing on isolated instances and taking them out of context to deny a practice by the Nazis within the death camps:

Here’s a photograph of Jewish prisoners playing soccer at Auschwitz. If it was truly a ‘death camp,’ why would the prisoners be allowed to play sports? The Holocaust narrative doesn’t add up. #QuestionHistory

Finally, in the context of fact-based value judgments, including misinformation when the facts are false or misleading, there is a possibility that an individual may have consumed false, or merely misleading information and subsequently shared an opinion that reflects a value judgment based on such facts. While the person does not intend to deceive, the person relies on evidently or misleading information to support their opinion. In the context of denials of the Holocaust, an example of such a statement might be as follows:

Just read an article saying that only 30,000 people died in the Holocaust, not six million!!! Seems like the history books had me fooled!

The latter statement differs in that it constitutes an assessment of false information as a value judgment, which raises the question of the extent to which a person can ‘assess’ the Holocaust as a ‘clearly established historical fact’ within the scope of protection under Article 10 ECHR. In the case of ‘clearly established historical facts,’ particularly the Holocaust, it can be presumed that the person making the statement could ‘reasonably assume the untruth’ of their statement.¹⁴⁶ As the Holocaust constitutes a ‘clearly established historical fact,’ which, according to the Court, is ‘not the subject of debate between historians,’¹⁴⁷ the distributor can reasonably be expected to recognise the falsehood of the facts on which the value judgment was based.

¹⁴⁶ Struth, *Hassrede* 194 (with further references).

¹⁴⁷ *Garaudy v. France* App no 65831/01 (ECtHR, 24 June 2003).

Therefore, in cases of Holocaust denial or revisionism as a form of misinformation, the distributor should still have been aware of the falsehood, in the sense of an ‘ought to have known’ requirement, even if the denial or revision is not intentionally spread to deceive.

In conclusion, while the extent of what is considered ‘clearly established’ remains open to interpretation, the Holocaust has been unequivocally established as a historical fact. Anyone who denies the Holocaust through disinformation, malinformation, or misinformation cannot invoke freedom of expression, as such distributors either know or at least must be presumed to know that their claims are unfounded.

In other cases not related to the Holocaust, but similar in nature, the determination depends on whether the statement constitutes ‘incitement,’ albeit ‘incitement’ alone may not be sufficient to trigger Article 17 ECHR. If the statement also carries an anti-democratic sentiment, Article 17 ECHR is, however, likely to be applied directly. Otherwise, Article 17 ECHR can also be used as a tool for interpretation at the justification level.

Further expressions that promote or justify extremist objectives – comparable to Holocaust denial or the rejection of other ‘clearly established historical facts’ that incite hatred, discrimination or violence¹⁴⁸ – are likewise excluded from the ambit of Article 10 under the Court’s jurisprudence. However, the majority of disinformation in the broader sense and misinformation disseminated is unlikely to contain such extreme messages¹⁴⁹ and will, thus, not fall outside the scope of protection of Article 10 ECHR. Instead, the majority of disinformation in the broader sense and misinformation – particularly in the context of democratic processes – will likely be legal types, not aiming to establish a totalitarian regime, or to undermine the basic values of the ECHR.

D. Justifiable Limits Under Article 10(2) ECHR

It has been demonstrated thus far that certain – albeit limited – content disseminated as a form of disinformation in the broader sense and misinformation is commonly excluded from the protection of freedom of expression on the basis of Article 17 ECHR.¹⁵⁰ This raises the question of the extent to which disinformation in the broader sense, as well as misinformation, can be justifiably restricted through

¹⁴⁸ Struth, *Hassrede* 183 f.

¹⁴⁹ Shattock, (2022), *Hum. Rights Law Rev.* 1 (2).

¹⁵⁰ See also European Digital Media Observatory, (January 2022), 7.

legislative measures in accordance with Article 10(2) ECHR. The Court frequently invokes Article 10(2) ECHR to justify the restriction of the distribution of opinions and information initially covered by the protection of Article 10 ECHR. Article 10(2) ECHR sets forth the conditions justifying state interferences with freedom of expression which, accordingly, have to be prescribed by law and necessary in a democratic society while pursuing a legitimate aim, including the protection of public interests such as national or public security, public health, or the rights of others.

This chapter first offers a brief introduction on the justification grounds of freedom of expression. It then turns to the legitimate public interests that may justify restricting of freedom of expression in the disinformation context, as well as the aspect of proportionality. Against this backdrop, the chapter proceeds to a comparative analysis of the DSA's approach to disinformation in the broader sense and misinformation and the standards developed under Article 10 ECHR. It ultimately addresses the question as to whether the DSA's approach can be considered in conformity with Article 10 ECHR.

1. Justifying Freedom of Speech Before Justifying Its Limits

Before examining the general principles that states must take into account when imposing restrictions on the right to freedom of expression, it is essential to address the common underlying narratives that justify the right itself.¹⁵¹ Several distinct rationales have been developed to explain the specific significance attributed to the right to freedom of expression, as also reflected in the case law of the ECtHR.¹⁵² According to the 'truth justification,' opinions, ideas, and facts should circulate freely within the 'marketplace of ideas,' allowing the most persuasive ones to ultimately prevail.¹⁵³ Thus, even the dissemination of false information may contribute to public enlightenment, as it can be countered with accurate information, ultimately allowing the truth to predominate. Similarly, in *Garaudy v. France*, the ECtHR held that

¹⁵¹ Wiederin, 'Warum Meinungsfreiheit?', in Grabenwarter, Holoubek and Leitl-Staudinger (eds.), *Grundfragen der Medien- und Kommunikationsfreiheit* (Vienna, 2023) 1 (2 ff); Holoubek, 'Plattformregulierung', 29 (42 ff); Pöschl, 'Neuvermessung', 31 (31 ff); Garton Ash, *Redefreiheit: Prinzipien für eine vernetzte Welt* (New Haven, London, 2016) 113 ff.

¹⁵² Holoubek, 'Plattformregulierung', 29 (42 ff); Pöschl, 'Neuvermessung', 31 (33).

¹⁵³ First Milton, *Areopagitica: A Speech of Mr. John Milton for the Liberty of Unlicenc'd Printing, to the Parliament of England* (London, 1644) 45: 'Let her [the truth] and Falshood grapple; who ever knew Truth put to the worse, in a free and open encounter? Her confuting is the best and surest suppressing'; for further discussion of Milton's argument, see Wiederin, 'Warum Meinungsfreiheit?', 1 (3 ff); see also Holoubek, 'Plattformregulierung', 29 (43); Pöschl, 'Neuvermessung', 31 (32 ff); Marshall, 'The Truth Justification for Freedom of Speech', in Stone and Schauer (eds.), *The Oxford Handbook on Freedom of Speech* (Oxford, 2021) 83 (83 ff).

‘[t]here can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, [...], does not constitute historical research *akin to a quest for the truth*.’¹⁵⁴ Thus, the ECtHR implicitly ascribes significance to the dissemination of information insofar as it facilitates the discovery of truth and establishes boundaries for specific forms of information that do not contribute to truth-finding. The ‘autonomy justification’ views freedom of speech as central to individual autonomy,¹⁵⁵ whereas the ‘democracy justification’ considers freedom of speech as the main prerequisite for the functioning of democracies.¹⁵⁶ Both narratives have been regularly reproduced by the ECtHR, which held that ‘[f]reedom of expression constitutes one of the essential foundations of a *democratic society* and one of the basic conditions for its progress and for each *individual’s self-fulfilment*.’¹⁵⁷ Furthermore, the ‘dignity justification’ — sometimes mentioned alongside with the ‘autonomy justification’¹⁵⁸ — views human beings as inherently social, and argues that without the ability to express one’s opinions, the most inherent aspect of dignity would be at risk.¹⁵⁹ In the context of Article 10 ECHR, the Court touched upon dignity, for instance, in the realm of the right to reply. Accordingly, the Court reiterated

that the aim of the right to reply is to afford everyone the possibility of protecting him or herself against certain statements or opinions disseminated by the mass media that are likely to be injurious to his or her private life, honour or *dignity* [...], in particular] false information published about them in the press.¹⁶⁰

¹⁵⁴ *Garaudy v. France* App no 65831/01 (ECtHR, 24 June 2003) (emphasis added).

¹⁵⁵ Holoubek, ‘Plattformregulierung’, 29 (43); Pöschl, ‘Neuvermessung’, 31 (32); Mackenzie and Meyerson, ‘Autonomy and Free Speech’, in Stone and Schauer (eds.), *The Oxford Handbook on Freedom of Speech* (Oxford, 2021) 102 (103 ff).

¹⁵⁶ Holoubek, ‘Plattformregulierung’, 29 (43); Pöschl, ‘Neuvermessung’, 31 (32); Bhagwat and Weinstein, ‘Freedom of Expression and Democracy’, in Stone and Schauer (eds.), *The Oxford Handbook on Freedom of Speech* (Oxford, 2021) 130 (130 ff).

¹⁵⁷ E.g. *Stoll v. Switzerland* App no 69698/01 (ECtHR, 10 December 2007) para. 101; *Steel and Morris v. the United Kingdom* App no 68416/01 (ECtHR, 15 February 2005) para. 87; *Delli AS v. Estonia* App no 64569/09 (ECtHR, 16 June 2015) para. 131 (emphasis added); see also *Handyside v. the United Kingdom* App no 5493/72 (ECtHR, 7 December 1976) para. 49; *Sanchez v. France* App no 45581/15 (ECtHR, 2 September 2021) para. 76: ‘freedom of expression constitutes one of the essential foundations of [democratic] society, one of the basic conditions for its progress and for the development of every man’ (emphasis added).

¹⁵⁸ Holoubek, ‘Plattformregulierung’, 29 (43).

¹⁵⁹ Grimm, ‘Freedom of Speech and Human Dignity’, in Stone and Schauer (eds.), *The Oxford Handbook on Freedom of Speech* (Oxford, 2021) 161 (165 ff).

¹⁶⁰ *Axel Springer SE v. Germany* App no 8964/18 (ECtHR, 17 January 2023) para. 34 (emphasis added).

In this context, dignity is, however, not invoked as an independent justification for the exercise of freedom of expression; rather, it serves as a legitimate basis for imposing restrictions on specific expressions, particularly where such expression disseminates, incites, promotes, or justifies hatred rooted in intolerance.¹⁶¹ Although human dignity is not explicitly invoked as a justification for freedom of expression, it constitutes the ‘very essence’¹⁶² of the entire Convention and, by extension, of the freedom of expression itself.

In addition, some authors argue that freedom of expression can also be based on the justification of ‘peaceful management of diversity,’ wherein social differences and tensions are addressed through the exercise of free speech.¹⁶³ A similar approach can be identified in the ECtHR’s case law on Article 10 ECHR. The Court emphasises that ‘in a democratic society based on the rule of law, political ideas which challenge the existing order and whose realisation is advocated *by peaceful means* must be afforded a proper opportunity of expression.’¹⁶⁴

2. Legitimate Aims to Restrict Disinformation and Misinformation

Under the ECHR, the imposition of restrictions on human rights must be justified by reference to one or more recognised ‘legitimate aims.’ These aims serve as benchmarks against which the compatibility of any interference with protected freedoms is assessed. These aims are exhaustively enumerated in the Convention’s substantive provisions and have been elucidated through the jurisprudence of the ECtHR. Legitimate aims commonly include concerns such as national security, public safety, the protection of public order, health, morals, and the rights and freedoms of others. Such aims serve as normative benchmarks guiding the Court’s assessment of whether a given limitation on a Convention right is compatible with the fundamental values of a democratic society. The Court’s ‘necessary in a democratic society’ test ensures that states must not only identify a legitimate objective but also demonstrate a proportional relationship between that objective and the measures employed. Through this careful scrutiny, legitimate aims function as critical guardrails, preventing arbitrary or excessive state interference and preserving the core essence and purpose of the protected right.

¹⁶¹ *Erbakan v. Turkey* App no 59405/00 (ECtHR, 6 July 2006) para. 56.

¹⁶² *Pretty v. the United Kingdom* App no 2346/02 (ECtHR, 29 April 2002) para. 65.

¹⁶³ First Garton Ash, *Redefreiheit* 227; see also Pöschl, ‘Neuvermessung’, 31 (33).

¹⁶⁴ *United Macedonian Organisation Ilinden and Others v. Bulgaria* (No. 2) App no 34960/04 (ECtHR, 18 October 2011) para. 36 (emphasis added).

It remains to be determined which of these legitimate aims, if any, are genuinely furthered by the regulation of disinformation. The precise extent and impact of online disinformation and misinformation remain subjects of ongoing debate and scientific inquiry.¹⁶⁵ There does, however, appear to be a broad consensus among scholars and politicians that disinformation, particularly in its broader sense, has at least the abstract potential to manipulate public opinion, especially in the context of electoral processes ('electoral disinformation'), as well as to pose a risk to public health ('medical disinformation').¹⁶⁶ Although restrictions on 'inciting disinformation' particularly serve the prevention of disorder or crime as well as the protection of national security, public security, and the rights of others,¹⁶⁷ this type of disinformation is most likely already excluded from the scope of protection of Article 10 ECHR. Consequently, legislation that both aims to restrict these types of disinformation and endeavours to safeguard the public interests affected can be regarded as pursuing a legitimate aim as required by Article 10(2) ECHR. The same holds true for misinformation in the respective contexts.

According to Article 34(1)(b) DSA, VLOPs have to assess the 'negative effects for the exercise of fundamental rights.' This also applies, pursuant to Article 34(1)(c) DSA, to 'negative effects on civic discourse and electoral processes, and public security,' as well as, according to Article 34(1)(d) DSA, to '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.' If the initial assumption is accepted that the broad wording of the DSA and the missing definition allows for the conceptual inclusion of misinformation, Article 34 DSA appears to address both electoral disinformation and misinformation ('electoral processes'), as well as medical ('public health') and inciting disinformation and misinformation ('public security,' and 'person's physical and mental well-being'). In this regard – and in view of Article 10(2) ECHR – Article 34 DSA primarily serves to protect health,

¹⁶⁵ Fletcher et al, (2018), *AiPol* 25 (25 ff); Nelson and Taneja, (2018), *New Media Soc.* 3720 (3720 ff); see also Nenadić and Verza, 'European Policymaking on Disinformation and the Standards of the European Court of Human Rights', in Psychogiopoulou and de la Sierra (eds.), *Digital Media Governance and Supranational Courts* (Cheltenham, Northampton, 2022) 175 (178).

¹⁶⁶ The paper adopts a three-part taxonomy: 'inciting' disinformation; 'democracy-related' disinformation – which encompasses 'election-related' and 'electoral' disinformation; and 'science-related' disinformation, including 'medical' disinformation. For a fuller discussion of this classification, see above (n 88).

¹⁶⁷ These rights may encompass, for example, Article 8 ECHR, i.e. the right to respect for an individual's private and family life, home and correspondence, as potentially affected in defamation cases, or Article 2 ECHR, i.e. the right to life, which could, additionally, be affected in cases of 'medical disinformation.'

the rights of others, public safety, and prevent disorder or crime. Despite the exhaustive list of legitimate public interests in Article 10(2) ECHR, the ECHR does not explicitly mention the integrity of civic discourse or democratic processes — including electoral processes — as a legitimate aim in its substantive provisions.¹⁶⁸ Both interests can, nevertheless, be understood as legitimate aims under the Convention. First, democracy is a value underlying the entire ECHR,¹⁶⁹ and, second, the ECHR is not always confined to exhaustive lists of legitimate aims, such as in Articles 8 to 11 ECHR. Rather, the ECHR allows the inclusion of other legitimate public interests.¹⁷⁰

3. Necessary Restrictions of Disinformation and Misinformation

Having established the significance of freedom of expression, as well as the legitimate aims for restricting this freedom, we can proceed to address the considerations that states must observe when imposing limitations on the right to freedom of expression in light of the case law of the ECtHR. This is ultimately significant in determining the extent to which the EU has considered these issues in relation to the DSA and in the context of limiting the distribution of misinformation as well as the distribution of disinformation in the broader sense.

Notably, the question of necessity presupposes the existence of a ‘compelling social need’ which, according to the ECtHR, has to be ‘convincingly’ demonstrated by the states exercising their margin of appreciation.¹⁷¹ According to the Court, the legislator must consider, among others,¹⁷² the likelihood that the statements which might be restricted could cause harm in addition to the statements’ actual reach, their context, as well as the relevant fundamental rights affected by the regulation. Given that the EU is substantially yet not formally bound by the provisions of the Convention, the Commission emphasised the necessity to rely on the case law of the ECtHR on the

¹⁶⁸ Shattock, (2022), *Hum. Rights Law Rev.* 1 (3).

¹⁶⁹ See already the preamble of the ECHR: ‘fundamental freedoms which [...] are best maintained on the one hand by an *effective political democracy*’ (emphasis added).

¹⁷⁰ ECtHR, ‘Guide on Article 3 of Protocol No. 1 to the European Convention on Human Rights, Right to free elections’ (*ECHR-KS*, 31 August 2024) <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_3_protocol_1_eng> para. 12: the right to free elections allows for ‘implied limitations.’ See also Article 1 of Protocol No. 1 to the Convention: ‘[n]o one shall be deprived of his possessions except in the *public interest* and subject to the conditions provided for by law and by the general principles of international law’ (emphasis added).

¹⁷¹ See e.g. *Stoll v. Switzerland* App no 69698/01 (ECtHR, 10 December 2007) para. 101; Muzak, ‘Art 10 MRK’, para. 17.

¹⁷² Cf. the factors developed in the context of hate speech, *Perinçek v. Switzerland* App no 27510/08 (ECtHR, 15 October 2015) paras. 204 ff.

aspect of proportionality when limiting access to and the dissemination of harmful content.¹⁷³

Regarding the likelihood of harm, the Court has accepted that the ‘risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms [...] is certainly higher than that posed by the press.’¹⁷⁴ Accordingly, the technological features of platforms – including anonymity and speed of the distribution of content – are frequently viewed as potential sources of abuse and harm.¹⁷⁵ The DSA accounts for this concern when it says that ‘[o]nline platforms are particularly sensitive environments for such practices [disinformation campaigns and discrimination] and they present a higher societal risk.’¹⁷⁶ The actual risks to human rights and freedoms posed by ‘inciting disinformation’ and ‘medical disinformation’ are arguably easier to purport, given the potential harm to personal integrity for those who may believe such false information.¹⁷⁷ However, the risk of harm to the exercise of human rights becomes more debatable in the context of ‘electoral disinformation.’ There is, notably, considerable discussion regarding the actual capacity of disinformation to influence election outcomes in particular.¹⁷⁸ Some empirical studies suggest that the actual reach of disinformation and misinformation remains limited in total,¹⁷⁹ while others theorise potential harms in the digital context without measuring the actual impact.¹⁸⁰ In the context of the 2016 US elections, research has revealed that 400.000 bots were responsible for 20 percent of election-related tweets,¹⁸¹ and that false information was 70 percent more likely to be retweeted than the truth.¹⁸² At the same time, studies have shown that 70 percent of Russian troll

¹⁷³ Code of Practice on Disinformation (October 2018) 3.

¹⁷⁴ ECtHR, ‘Guide on Article 10 of the European Convention on Human Rights, Freedom of expression’ (*ECtHR-KS*, 31 August 2024) para. 191 <https://ks.echr.coe.int/documents/d/echr-ks/guide_art_10_eng>; *Delfi AS v. Estonia* App no 64569/09 (ECtHR, 16 June 2015) para. 133. In the context of hate speech, see *Savva Terentyev v. Russia* App no 10692/09 (ECtHR, 28 August 2018) para. 79.

¹⁷⁵ Koziol, ‘Einleitung’, 3 (10).

¹⁷⁶ DSA, Recital 69.

¹⁷⁷ ‘Gefährlicher Hype um ein Wurmmittel Ivermectin’ (*Die Zeit*, 30 November 2021) <<https://www.zeit.de/news/2021-11/30/gefaehrlicher-hype-um-ein-wurmmittel-ivermectin>>.

¹⁷⁸ McKay and Tenove, (2021), *PRQ* 703 (703).

¹⁷⁹ Fletcher et al, (2018), *AIPL* 25 (25); Nelson and Taneja, (2018), *New Media Soc.* 3720 (3727 f).

¹⁸⁰ McKay and Tenove, (2021), *PRQ* 703 (713).

¹⁸¹ Bessi and Ferrara, ‘Social bots distort the 2016 U.S. Presidential election online discussion’ (2016), *First Monday* 5.

¹⁸² Vosoughi et al, ‘The spread of true and false news online’ (2018), *Science (American Association for the Advancement of Science)* 1146 (1149).

content during the election was seen by only one percent of users, many of whom were already predisposed to support President Donald Trump.¹⁸³ These numbers have also been reflected in the European context. A 2018 study which focused on the reach of disinformation in France and Italy also suggests that most of such information reached less than one percent of the population.¹⁸⁴ In line with remaining uncertainties, additional studies imply the necessity to further investigate the actual risks and impact of bot-generated or troll-generated content. The distribution of disinformation in the lead-up to the British exit from the EU ('Brexit'),¹⁸⁵ however, indicates that disinformation has at least some actual influence in the context of electoral processes.¹⁸⁶

The DSA outlines in Article 34 that VLOPs have to consider the 'severity and probability' of systemic risks when assessing them,¹⁸⁷ and asserts, albeit somewhat vaguely, that only 'actual' or at least 'foreseeable' negative effects must be considered in the risk assessment.¹⁸⁸ This can be understood as a deliberate limitation concerning the need to remove certain statements that are likely to result in an immediate negative consequence. Considering the ongoing debate regarding the actual reach and impact of online disinformation and misinformation, this limitation seems appropriate, despite remaining uncertainties about its terminology. The uncertainty regarding the actual reach and impact of harmful content, including disinformation, may also be implicitly considered in the DSA, which emphasises that

[g]iven the importance of very large online platforms or very large online search engines, in view of their reach and impact, their failure to comply with the specific obligations applicable to them may affect a substantial number of recipients of the services across different Member States and may cause large societal harms, while *such failures may also be particularly complex to identify and address.*¹⁸⁹

Furthermore, states must consider the relevant human rights affected by regulations limiting the exercise of the right to freedom of expression. Notwithstanding other

¹⁸³ Eady et al, 'Exposure to the Russian Internet Research Agency foreign influence campaign on Twitter in the 2016 US election and its relationship to attitudes and voting behavior' (2023) *Nat. Commun.* 3.

¹⁸⁴ Fletcher et al, (2018), *AiPol* 25 (25).

¹⁸⁵ See further Parnell, 'Brexit and Disinformation', in Maci et al, *The Routledge Handbook of Discourse and Disinformation* (London, 2023) 187 (187 ff).

¹⁸⁶ See also Koziol, 'Einleitung', 3 (4).

¹⁸⁷ DSA, Article 34(1).

¹⁸⁸ DSA, Article 34(1)(b-d).

¹⁸⁹ DSA, Recital 137 (emphasis added).

relevant human rights¹⁹⁰ which need to be considered when regulating false or misleading information – including the right of social media platforms to conduct a business – the following discussion will focus specifically on the human rights positions affected by any regulation targeting online misinformation and disinformation in a broader sense in the context of Article 10 ECHR. The first human rights position discussed is the distributor’s right to freedom of information, including the right to disseminate information and the right to freedom of expression. This right encompasses the right to disseminate facts-based opinions as well as to hold specific opinions based on – albeit false or misleading – facts. The second position discussed is the recipient’s right to receive information and opinions of others. The third right in question is the platform’s right to express their opinions through content moderation.

First, one must consider the negative aspect of freedom of expression, namely the right of platform users to be informed. This right encompasses the right to receive information. It is important to note that it remains contested whether the right to freedom of information implies a right to receive only accurate information.¹⁹¹ From the standpoint of freedom of information, permitting the dissemination of false information – particularly within political debate – may, however, be justified. This can be argued, for instance, on the basis that the intentional spread of false or misleading information by politicians, followed by scrutiny through counter-speech and fact-checking, has the potential to foster comprehensive clarification and, not least, to allow for the evaluation of the credibility of the politicians involved. Similarly, the ECtHR emphasised that the public has a vested interest in accessing information from diverse sources and that comprehensive information is especially important in the context of freedom of information. This was particularly highlighted in the context of one specific aspect of Article 10, namely the right to reply. According to the Court, the right to reply ‘flows from the need not only to be able to contest untruthful information, but also to ensure a plurality of opinions, especially in matters of general interest such as literary and political debate.’¹⁹²

In this context, the EComHR also held in an earlier decision that

Article 10 of the Convention could not be interpreted as guaranteeing the right of communication companies to publish only information which they consider to reflect the truth, still less as conferring on such companies powers to decide what is

¹⁹⁰ For an overview, see Denga, (2021), *EuR* 569 (592).

¹⁹¹ In favour Koziol, ‘Einleitung’, 3 (7).

¹⁹² *Melnychuk v. Ukraine* App no 28743/03 (ECtHR, 5 July 2005) para. 2.

true before discharging their obligation to publish the replies which private individuals are entitled to make.¹⁹³

Accordingly, it follows from Article 10 that the right to receive information encompasses a broad spectrum of information, even from sources that may be controversial or contest the original narrative. This includes the freedom to reply to information received, promoting the idea that freedom of expression includes the right to respond to criticisms and false information, thus contributing to a more informed public. In this context, communication platforms, including social media platforms, do not have the right to control or filter information based solely on their perception of truth. It also implies that social media platforms should allow users who have been criticised or misrepresented the right to respond, thereby contributing to a more diverse and open flow of information. The case law, thus, emphasises the importance of protecting the public's access to varied viewpoints, rather than allowing any single entity to act as the gatekeeper of 'truth.'

Second, and with a view to the distributor's right to disseminate information, the Court – predominantly in defamation cases – has repeatedly underscored the importance of differentiating between factual statements and mere value judgments, as only the former can be verified.¹⁹⁴ Accordingly, when balancing interests, statements of fact are subject to stricter scrutiny than value judgments.¹⁹⁵ This is specifically important with regard to misinformation, which is spread in good faith, thereby blurring the boundaries between fact and opinion in the sense of an individual assessment of – albeit false or misleading – facts. While the assessment of a statement as a fact or as a value judgment falls within the margin of appreciation of national courts in particular,¹⁹⁶ the ECtHR has emphasised that legislation or court decisions requiring the proof of a value judgment's truth are running against freedom of opinion as part of Article 10 ECHR.¹⁹⁷ The ECtHR has emphasised that political speech enjoys particular protection, meaning that states have a narrower margin of appreciation when regulating such speech. This includes fact-based value judgments that may involve misinformation, which are considered, thus, more 'worthy' of

¹⁹³ *Ediciones Tiempo v. Spain* App no 13010/87 (ECtHR, 12 July 1989) para. 2.

¹⁹⁴ *Oberschlick v. Austria* (No. 1) App no 11662/85 (ECtHR, 23 May 1991) para. 63; *Lingens v. Austria* App no 9815/82 (ECtHR, 8 July 1986) para. 46; *McVicar v. the United Kingdom* App no 46311/99 (ECtHR, 7 May 2002) para. 83; see also Koziol, 'Einleitung', 3 (3) (with further references).

¹⁹⁵ Struth, *Hassrede* 369.

¹⁹⁶ *Peruzzi v. Italy* App no 39294/09 (ECtHR, 30 June 2015) para. 48.

¹⁹⁷ *Lingens v. Austria* App no 9815/82 (ECtHR, 8 July 1986) para. 46; *Grinberg v. Russia* App no 23472/03 (ECtHR, 21 July 2005) paras. 29 f; *Oberschlick v. Austria* (No. 1) App no 11662/85 (ECtHR, 23 May 1991) para. 63.

protection within the context of political debate. In this context, the Court has further underlined that statements about matters of public interest may, in case of doubt, constitute value judgments rather than statements of fact.¹⁹⁸ The Court does not require participants in public debate ‘to fulfil a more demanding standard than that of due diligence,’ even if a statement is considered to constitute one of facts.¹⁹⁹ Accordingly, misinformation – disseminated without the intention to deceive or make a profit – enjoys particular protection under Article 10 ECHR in the context of political debate.

The DSA places significant emphasis on safeguarding users’ fundamental rights in the context of platform content moderation and establishes important safeguards against excessive content removal, such as the platforms’ obligation to implement an internal complaint mechanism that allows users to challenge content moderation decisions. Nevertheless, these principles are not adequately reflected in the broader framework of the DSA. Specifically, the Regulation appears to lack sufficient attention to the nuanced considerations required when moderating online opinions that are based on – although false or misleading – information.

Third, the freedom of VLOPs to ‘express their views’ through content moderation has to be considered when obligating them to moderate online content, including disinformation and misinformation. Notably, the consideration of the rights of platform providers, including their corporate freedom, has already been criticised as insufficient with regards to the Proposal²⁰⁰ for the DSA.²⁰¹ Focusing on the obligation of VLOPs to mitigate identified risks as enshrined in Article 35 DSA, the Regulation explicitly refers to mitigation measures that must be ‘reasonable, proportionate and effective.’²⁰² Although the DSA does not explicitly address the rights of platforms in Articles 34 and 35, the latter can be interpreted as to imply that the rights of the platforms are considered in assessing the proportionality of the mitigation measures, encompassing the process of weighing contradicting human rights, including those of the platforms themselves. Furthermore, the rights of platforms can be considered relevant in the context of Article 35, particularly in paragraph 3, which stipulates that

¹⁹⁸ *Patuvel v. France* App no 54968/00 (ECtHR, 22 December 2005) para. 37.

¹⁹⁹ *Makraduli v. the former Yugoslav Republic of Macedonia* App nos 64659/11 and 24133/13 (ECtHR, 19 July 2018) para. 75.

²⁰⁰ Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC’ COM (2020) 825 final.

²⁰¹ Denga, (2021), *EuR* 569.

²⁰² DSA, Article 35(1).

guidelines issued by the Commission regarding the implementation of Article 35(1) must take into account ‘the possible consequences of the measures on the fundamental rights enshrined in the Charter *for all parties involved*.’²⁰³

E. Interim Conclusion

This chapter has examined whether, and under which conditions, restrictions on freedom of expression in the context of false or misleading information can be justified, and how the EU has addressed these considerations within the DSA. The EU undoubtedly pursued legitimate aims in line with Article 10(2) ECHR – in particular the protection of public health or the rights of others – in its approach to different types of disinformation in Article 34 DSA. These include illegal disinformation, such as inciting disinformation, as well as other forms, such as electoral or medical disinformation. The same reasoning applies to its approach to misinformation in these respective contexts. This is specifically reflected in Article 34(1)(b-c) DSA.

Regarding the question of necessity, and, in particular, in light of the required existence of a ‘compelling social need’ for the restriction in question, the Court has stressed that states have to consider the likelihood of harm caused by statements to be restricted, their actual reach and context, as well as the relevant fundamental rights affected by the regulation. In view of the likelihood of harm, the DSA emphasises that ‘[o]nline platforms [...] present a higher societal risk.’ It further limits the risk assessment obligations of Article 34 DSA to either ‘actual’ or at least ‘foreseeable’ negative effects, which can be understood as a deliberate limitation concerning the need to remove certain statements that are likely to result in an immediate negative consequence. This limitation seems appropriate, despite remaining uncertainties concerning its terminology.

Furthermore, human rights affected by the restriction have to be taken into account by the states as well as by the EU. These rights include the distributor’s right to freedom of information, expression, and opinion, the recipient’s right to receive information and opinions of others, as well as the platform’s right to express their opinions through content moderation. While the Regulation places particular emphasis on safeguarding users’ fundamental rights, the rights of platforms occupy a comparatively subordinate position in the context of the risk management obligations set out in Articles 34 and 35 of the DSA. Nonetheless, these rights are not entirely disregarded. They are considered to some extent, notably in Article 35(1) DSA

²⁰³ DSA, Article 35(3).

through the requirement of proportionality. They are also taken into account in Article 35(3) DSA, which mandates consideration of the consequences of the measures on the Charter-enshrined fundamental rights of all parties involved.

The DSA's avoidance of broadly restricting content classified as disinformation in a broad sense or as misinformation – i.e. false or misleading information – is consistent with the ECtHR's jurisprudence on Article 10 ECHR and its principle of content-neutrality. The Court's case law nonetheless suggests that lawful forms of misinformation, particularly those expressed as value judgments, should be subject to separate and more lenient treatment. Value judgments, as opposed to factual statements, enjoy greater protection under Article 10 when justifying state interference. The ECtHR requires that the gravity and negative impact of such expressions be convincingly demonstrated to justify their treatment on par with broader notions of disinformation. However, the DSA appears to lack sufficient attention to the nuanced distinctions between factual statements and value judgments.

IV. Conclusion and Outlook

Disinformation has continuously manifested as societal phenomena – wherever there have been societies, there have been attempts to manipulate public opinion. An observable increase in such content has been recorded in the digital context, notably on social media platforms. Such instances have risen in particular against the backdrop of recent crises. However, the actual impact and reach remain indeterminate. In response to these developments, the EU via the DSA has evinced a strong commitment to effectively combatting such online content, with the overarching aim of bolstering the integrity and 'trustworthiness' of digital platforms and upholding the CFR within the digital sphere. The adoption of the DSA thereby marks a departure from the era of 'self-governance' and 'self-regulation by private platforms' during the nascent stages of internet development in favour of a model of regulated self-regulation. While the DSA places significant responsibilities on VLOPs, including the obligation to proactively undertake risk management measures to address potential 'systemic risks,' it simultaneously leaves them grappling with vague categorisations and the inherent risk of conflicts of interest, as they must weigh their own commercial considerations against the public interest.

The majority of the non-binding European measures concerning online 'disinformation' prior to the DSA address disinformation in the broader sense. These measures characterised disinformation by the underlying intent to deceive the public or make a financial profit, thereby excluding misinformation from their definitions. In contrast, the DSA does not necessarily require an intent to deceive or make a

profit. According to the wording of the DSA, this would also include the *bona fide* dissemination of false, inaccurate or misleading information, i.e. misinformation. Therefore, the wording of the DSA indicates that it appears to grant a broader scope of protection in comparison to the previous European initiatives concerning online disinformation.

While specific forms of disinformation in the broader sense and misinformation might already fall outside the scope of protection of Article 10 ECHR in view of Article 17 ECHR, the majority of respective content is covered by the right to freedom of expression. Thus, any restriction has to be prescribed by law and is necessary in a democratic society pursuing specific legitimate aims as outlined in Article 10(2) ECHR. The EU is bound by the substantive obligations enshrined in the ECHR, as further developed by the case law of the ECtHR. However, Article 52(3) CFR stipulates that EU law may offer a more extensive protection than that provided by the ECHR. The EU's approach within the DSA was examined in light of the general principles developed in the case law of the ECtHR. Regarding the legitimate aims as exhaustively listed in Article 10(2) ECHR, the DSA refers, in particular, to public interests, such as national or public security, public health, or the rights of others as legitimate aims in line with Article 10(2) ECHR. At the same time, the ECHR, including the exhaustive list of legitimate public interests in Article 10(2) ECHR, does not refer to the integrity of civic discourse or democratic processes as legitimate aims in its substantive provisions. The integrity of civic discourse or democratic processes can, however, be considered as legitimate interests under the ECHR, as democracy is a value underlying the entire ECHR, and as the ECHR is not, generally, confined to exhaustive lists of legitimate aims. Thus, the pursued aims in the DSA's approach to disinformation as well as misinformation can be considered in line with Article 10(2) ECHR. In addition, according to the case law of the ECtHR, the legislator has to consider the actual reach, the likelihood of harm, and the context of the statements to be restricted, as well as the relevant fundamental rights affected by the restriction. Considering that further research will be needed to assess the exact reach and harm of online disinformation in its broader sense and misinformation to allow effective regulatory responses, limiting the risk management obligations to statements with an 'actual' and 'foreseeable' impact can be, thus, considered appropriate. While the Regulation places particular emphasis on the fundamental rights of users, the rights of platforms are given a relatively subordinate role; however, they are still considered to some extent in relation to risk management obligations. Although, considering the aspects discussed, there are currently few concerns regarding the compatibility of the DSA with the ECHR. The DSA's conceptual vagueness, which potentially encompasses misinformation, could, however, become

problematic with regards to freedom of expression in light of the general principles established by the ECtHR. The EU does not impose legal consequences based solely on information being false or misleading, but instead adopts an approach that focuses on the actual or foreseeable harm that such information may cause. The EU thereby preserves the principle of content-neutrality of Article 10 ECHR. Nevertheless, the definitional ambiguity and the potential inclusion of misinformation under its conceptual scope, as well as the potential overestimation of the actual impact of false and misleading information in the digital and particularly the electoral context may prove counterproductive to the objective of safeguarding freedom of expression and information. Here, further research on the actual reach and negative impact of such content, as well as definitional guidance by the Commission providing clarification while paying due regard to the case law of the ECtHR on the terms of harmful content and disinformation will prove decisive. As the EU continues to strengthen the DSA's co-regulatory framework, and in light of such research and guidance, public oversight will have the crucial task of ensuring that platforms refrain from moderating value judgments – particularly electoral misinformation – solely on the assumption that such content is false or misleading. This safeguard is essential in view of the heightened protection afforded to fact-based opinions under Article 10 ECHR.

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