

Case law for policy making: an overview of ECtHR principles when countering disinformation

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1 Introduction

In the last few years, different EU and national authorities have been developing policies aimed at tackling the phenomena of disinformation, misinformation and manipulation online. Among these policies, we find the 2018 [Code of Practice on Disinformation](#) issued by the European Commission, a self-regulatory tool signed by a number of online players (e.g. online platforms, relevant advertising groups). The Preamble to the Code mentions that all the measures envisaged should apply within the framework of ‘the case law of the European Court of Justice of the European Union (CJEU) and European Court of Human Rights (ECtHR) on the proportionality of measures designed to limit access to and circulation of harmful content’.

More generally, anti-disinformation policies are rarely inspired by judicial activity and case law concerning limitations of speech and expression, and little elaboration can be found in the academic literature at this point. This article is therefore aimed at proposing a review of the relevant European Court of Human Rights (ECtHR) case law applicable to the phenomenon of online disinformation, and to comment on it in light of the relevant literature on the topic.

There are no rulings of the European Court of Human Rights (ECtHR) that directly address the issue of disinformation. However, **there are many judgments dealing with issues that are tangent to that of disinformation and whose reasoning can be adapted to the online ecosystem**; as a matter of fact, ‘courts play an important role, through the judicial process of translating something new into the language of past legal models by means of the judicial framing technique’ (Pollicino and Soldatov, 2019).

The notion of *false* news is not unprecedented in the jurisprudence of the ECtHR. For instance, [Raëlien Suisse v. Switzerland](#) (2012) is a prominent case of non-digital dissemination of disinformation, dealing with a poster campaign aimed at convincing people about the existence of aliens. Also, there have been cases involving genocide denials and hate speech. The ECtHR itself used the problematic term ‘fake news’ for the first time in the 2019 case of *Brzezinski v. Poland*. Neither the Polish government, nor the applicant used the term in their submissions, with the Court itself introducing the term and attracting the [criticism](#) of various commenters.



2 A question of balancing

The protection of freedom of expression offered by Article 10 of the European Convention of Human Rights (ECHR) is not absolute, but needs to be balanced with conflicting policy objectives such as the fight against illegal or harmful content. However, to be subject to limitation, **a particular expression (and thus, the dissemination of alleged disinformation) must directly contribute to social harm and there should be a 'pressing social need'** (in the terminology of the ECtHR) to restrict such expression. Such limitations must pursue one of the legitimate aims enumerated in human rights instruments, and be necessary and proportionate.

In the wording of Art. 10 (2), freedom of expression *'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary'*.

The risk of harm may be even more consistent in today's information environment, given the potentially unlimited extent of digital communications. According to the ECtHR itself, **compared to the non-digital past, the Internet as a medium amplifies the threat to fundamental rights**: 'The risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect private life, is certainly higher than that posed by the press. Therefore, the policies governing reproduction of material from the printed media and the Internet may differ. The latter, undeniably, have to be adjusted according to the technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned' (Editorial Board of PravoyeDelo and Shtekel v Ukraine, 2011).

At the same time, however, the ECtHR case law also stresses the Internet's role in enhancing the public's access to news and facilitating the dissemination of information in general; 'user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression' (Cengiz and Others v. Turkey, 2016, para. 52). Moreover, according to ECtHR case law, the right to freedom of expression also covers 'information' or 'ideas' that 'offend, shock or disturb', rather than only those 'that are favourably received or regarded as inoffensive or as a matter of



indifference’ (Handyside v the United Kingdom, 1976), in order to meet the demands of pluralism, tolerance and broadmindedness characterising a ‘democratic society’.

Another relevant issue regarding the judicial approach to disinformation deals with well-established case law regarding the **high protection, under a freedom of expression perspective, granted to value judgments and personal opinions**—which, therefore, would fall outside the concept of disinformation, if they are not based predominantly on fact descriptions. Through its distinction between facts and value judgements, the ECtHR has pointed out that **opinions are less ‘susceptible of proof’** and must therefore be protected more robustly than false assertions of fact (Lingens vs Austria, 1986). This ECtHR principle becomes particularly relevant when speaking of **misinformation rather than disinformation, where the former is shared without the person knowing that the information is false** (Wardle and Derakhshan, 2017). Thus, according to the generally agreed definition of misinformation, the latter—unlike disinformation—asserts the culpability of the individuals concerned.

The [2021 Commission Guidance on Strengthening the Code of Practice on Disinformation](#) expanded the scope of commitments to include actions to reduce the risks of misinformation, further to those posed by disinformation, ‘when there is a significant public harm dimension’. It is however hard to imagine how platforms and other Code signatories could determine, in all possible cases, whether there is an intention to deceive or to do harm with the spread of content that is false or misleading (Nenadic, 2021).

It is important in this regard to reflect on the *motives* of the sources and spreaders of misinformation. Most of the *spread* itself is innocent and organic: the key legal point here is that innocent spread cannot be adequately addressed by criminal sanctions, because of the culpability of the individuals concerned. On the other hand, this attempt of limiting the punishability of disseminating false or harmful news only to cases where culpability is involved automatically **paves the way for limitations in ‘automated- run expression’**: when disinformation is not expressed by natural persons, but rather, by automated and bot accounts. In times of elections especially, these methods of ‘disinformation by design’ for content-spreading need to be viewed as methods of sophisticated computational propaganda, and not as legitimate forms of speech or expression (Krafft and Donovan, 2020).



3 The abuse clause of Art. 17 ECHR

On another note, in tackling certain hate speech, the ECtHR has often argued that **Art. 10 is not meant to protect specific categories of expression, but applies [instead an 'abuse clause' under Art. 17 ECHR, on the 'prohibition of abuse of rights'](#)** (Hannie and Voorhoof, 2011). In this case, it addresses the abuse of the right to freedom of expression when strongly impacting on others' fundamental rights. This was the case for the dissemination of hateful, racist, and discriminatory ideas, when the defendants made applications based on alleged Article 10 violations (e.g. B.H, M.W, H.P and G.K. v. Austria, 1989; Nachtmann v. Austria, 1998).

Once again, however, the ECtHR interpretation of which speech to condemn and when it could cause harm is very dependent on the contingent context; while it generally dismisses applications challenging prosecutions for Holocaust denial, implicit in these dismissals is the assumption that, in Europe, the Holocaust denier is actually engaging in a form of hate speech. Yet in [Perinçek v. Switzerland](#) (2015) the Court did not uphold the restriction of the speech of an individual who denied the Armenian genocide, on the basis that it was not established that, in doing so, the person was calling for hatred, violence or intolerance (paras. 229-241). Therefore, in this case, [Art. 17 was not applied](#). The Perinçek case counts as an attempt at systematisation too. In fact the Court has analytically isolated eight relevant factors for evaluating cases involving hate speech, namely: i) the nature of the statements; ii) the geographical, historical, and temporal context; iii) the extent to which the statement affects the competing rights; iv) the existence of a consensus; v) the possibility that the interference is prescribed by the international obligation assumed by the state; vi) the method employed by the state to justify the conviction; vii) the severity of the interference; and (viii) the final weighing of freedom of expression against the right to private life. These context-related variables might represent useful tips for the national and European legislator when approaching anti-disinformation policies.

However, it has to be noted that the abuse clause under art. 17 ECHR should not be used as a blunt tool to combat disinformation; as noted by Hannie and Voorhoof (2011), the clause's application is undesirable, since it tends to set aside substantial principles and safeguards that are characteristic of the European speech-protective framework. Even when focusing exclusively on disinformation (and not misinformation), it must also be acknowledged that **not all forms of disinformation are unlawful**, either under domestic law or EU law, such as the E-Commerce Directive and the incoming Digital Services Act (DSA). Therefore, policy makers would **need to address the legitimate aims under which**



restrictions on disinformation can be justified, and how to balance these interferences with the right to freedom of expression in a proportional way.

4 Commercial v. non-commercial expression

In the ECtHR case law, **the margin of appreciation that is available to EU states when regulating disinformation might be wider if such news were considered to be akin to advertising** (Katsirea 2018, Sardo, 2020), meaning that ‘false news’ publishers create fabricated stories with the predominant aim of increasing viewers’ attention and therefore being more palatable for advertising companies (Tambini, 2017). This occurred in the *Raëlien Suisse* case (Katsirea, 2018), where the Court held, by a narrow majority, that the ban of a poster campaign on aliens was justified. The Court reasoned that the speech in question was closer to commercial speech than to political speech per se, as it did not seek to address matters of political debate in Switzerland but had a certain proselytising function (para 62). The dissenting judges instead argued that the introduction of a new category of ‘lower-level’, ‘quasi commercial’ speech diminished the protection of speech without offering compelling reasons. In fact, the equation of disinformation with quasi-commercial speech harbours definitional risks that are not normally present in the case of purely commercial speech (e.g. misleading advertising).

On the other hand, the pernicious effect of disinformation on the quality of public debate was taken into consideration by the ECtHR; a wider margin of appreciation afforded to the state would not, in itself, justify the restriction of ‘false news’ in the area of paid political advertising, when required by a ‘pressing social need’ (91TV Vest AS and Rogalandpensjonistparti v Norway, 2009); *Animal Defenders v International United Kingdom*, 2013).

The **commercial character of the purveyors of expression**, rather than of the expression itself, was, instead, [considered relevant by the ECtHR](#) with respect to the **liability, duties and responsibilities of Internet intermediaries**, such as online platforms. In this sense, the [2015 Delfi AS v. Estonia](#) judgment considered the monitoring and removal of user comments made on initiative of the provider of an online platform with user-generated content (UGC) as the necessary way to protect the rights of others, at least in cases where it concerned ‘hate speech’, including incitement to violence¹. The ECtHR emphasised the **professional and commercial character** of the news platform at issue as a crucial

¹ The Grand Chamber at the same time tried to limit the impact of its judgment by excluding the extension of such judgment to fora where comments can be posted by any input from the forum’s manager. (e.g. social media platforms where the platform provider does not offer any content).

argument in order to justify the liability of the internet news portal for their readers' offending comments; the economic interest of the company in the posting of comments was therefore underlined. *Delfi* was not acting merely as a disinterested service provider; it allowed the publication of false, offensive comments that were not protected by freedom of expression in order to gain economic benefits. The ECtHR applied the same rationale in [MTE Index v. Hungary](#) (2016), which, in this instance, led to the opposite solution because the relevant facts were radically different. MTE was a non-profit service provider therefore it was not economically interested in the number of comments.

5 The 'passive dimension' of freedom of expression: the right to receive information

Article 10 of the European Convention and also Article 11 of the Charter of Fundamental Rights of the European Union and Article 19 of the International Covenant on Civil and Political Right also emphasise a [passive dimension](#) of the right to freedom of expression, i.e. the **right to seek and receive information**. It could also be defined as '**freedom of opinion**'— to form a free and independent opinion. This is the case in the 2021 Report '[Disinformation and freedom of opinion and expression](#)' by the UN's Special Rapporteur Irene Khan in 2021, which states that 'Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights guarantee the right to hold opinions without interference and to seek, receive and impart information and ideas of all kinds, regardless of frontiers and through any media. [...] The state has a duty to refrain from interfering with that right and also an obligation to ensure that others, including businesses, do not interfere with it' (p.6). According to the Report, 'the right to freedom of opinion comprises two dimensions: an internal dimension closely connected to the right to privacy and freedom of thought and an external dimension related to freedom of expression. While the latter aspect is discussed frequently, the former has begun only recently to gain attention as a result of greater awareness and understanding of the manipulative techniques used by social platforms, State actors and others online to influence individuals in ways that could infringe their freedom of opinion' (p. 7).

The right to seek and receive information is linked to the concept of 'public interest' content; as a matter of fact, the ECtHR has often granted higher protection to those forms of expression that can be considered of public interest and contributing to a debate of general interest for the community. (Council of Europe, 2021). Accordingly, there is **little scope for restrictions on political speech** (*Castells v. Spain*, § 43; *Wingrove v. the United Kingdom*, § 58). In the Court's view, public interest ordinarily relates to matters which affect the public to such an extent that it may legitimately take an interest in



them, especially in that these matters **affect the well-being of citizens or the life of the community**. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about (Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [GC], § 171).

One interesting aspect of the ECtHR case law for the sake of anti- disinformation policies concerns the **high protection granted to freedom of the press**. The Court has recognised that journalists who report on matters of public interest should be ‘acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism’. The requirement of **accuracy and the obligation of verification** are established in the Court’s case law (Katsirea, 2018)².

These considerations on the ECtHR’s interpretations of what ‘public interest content’ is particularly relevant for the scope of this paper. In fact, one of the Code of Practice commitments requires the Code’s signatories to respect the principle of ‘empowering the consumers’, and more specifically that the ‘relevant Signatories commit to invest in features and tools that make it easier for people to find diverse perspectives about topics of public interest’.

The concept of public interest therefore engages with issues related to the prioritisation of content online (namely, ‘the range of design and algorithmic decisions that positively discriminate and promote content by making it more discoverable or prominent’, Mazzoli and Tambini, 2020). This is often proposed as a solution to disinformation: however, in some cases, these decisions are driven by private interest, economic incentives, and purely commercial transactions (Mazzoli and Tambini, 2020) rather than by human rights’ guarantees.

6 Need for case-by-case evaluation

The real challenge in Europe is then *how* disinformation can be tackled in order to avoid a disproportionate restriction on the fundamental rights at stake. **As adumbrated above, in future analogous cases, the Court might wish to consider a more extensive set of variables directly related to ‘fake news’ in order to move beyond the decisional strategy, based solely on the dichotomy of**

² McVicar v UK (2002) 35 EHRR 21; Tønsberg Blad AS and Marit Haukom v. Norway (2008) 46 EHRR 30; Bladet Tromsø and Stensaas v Norway (2000) 29 EHRR 125; Selistö v Finland (2006) 42 EHRR 8; Fuchsmann v Germany, application no. 71233/13, nyr, para 45.

commercial/non-commercial. We must consider that the vast majority of on-line service providers are economically motivated entities.

There are various **categories of ‘web-expression’ that should be periodically systematised and should be evaluated accordingly**, as the ECtHR has already partially ensured. For example, in [Magyar Jeti Zrt v. Hungary](#) (2019), the Court found a violation of Art. 10 ECHR in which the applicant company was found liable for posting a hyperlink to a YouTube video which contained defamatory content. The ECtHR distinguished the use of hyperlinks from traditional publishing; hyperlinks direct people to available material rather than provide newly created content, thus an individual assessment would be necessary in each case, to query: i) did the journalist endorse the impugned content; ii) did the journalist repeat the impugned content (without endorsing it); iii) did the journalist merely include a hyperlink to the impugned content (without endorsing or repeating it); iv) did the journalist know or could the journalist reasonably have known that the impugned content was defamatory or otherwise unlawful; v) did the journalist act in good faith, respect the ethics of journalism and perform the due diligence expected in responsible journalism?’. In the aforementioned case, the Court found that the Hungarian **domestic law prescribing an objective liability for use of a hyperlink could undermine the flow of information on the Internet**. This would dissuade article authors and publishers from using such links, since they could not control the information the links led to. Therefore, the law and its enforcement could have a chilling effect on freedom of expression on the Internet. Similarly, in [Jersild v. Denmark](#) (1994), the ECtHR set a standard with regard to **interviews**, stating that the ‘punishment of a journalist for assisting in the dissemination of statements made by another person in an interview would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so’ (Verlagsgruppe News GmbH v Austria, 2006); Becker v Norway, 2017).

7 Conclusions

Above are examples that question whether the Code of Practice on Disinformation’s signatories are prepared to scrutinise each category of speech in order to ensure that counter-disinformation and misinformation measures would not infringe upon the right to freedom of expression, as elaborated through ECtHR case law.

Many lessons can be drawn from the ECtHR approach to harmful or false speech, allowing governments to create or develop the existing policies from an advanced point of reasoning on the speech and expression dynamics in a democratic society, beginning on a case- by- case evaluation.



The characterisation of disinformation would therefore depend primarily on the nature and magnitude of the social harm that it causes, on the directness of the causal nexus between the speech and the harm and on the purpose of the agents who engaged in the spread of misinformation. That analysis would necessarily be highly contextual, while the nature of legal regulations is, due to their nature, often vague and abstract.

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