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## THE CONCEPT OF DISINFORMATION IN THE PRACTICE OF INTERNATIONAL ORGANIZATIONS

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**Abstract.** *This paper deals with a conceptual understanding of the term disinformation as it used in the political documents and strategies of international organizations. While fully acknowledging that various risks related to the spreading of disinformation in the “digital ecosystem” are very serious, we find that a precise definition of the term disinformation is difficult to draw. As a consequence of certain ambiguities in the various definitions used by international organizations, there is a high risk of human rights violations, especially of the freedom of expression. Unprecise and ambiguous legal terms leave a broad space for abuse by state bodies. Ultimately, the cure might be worse than the disease.*

**Keywords:** *European convention, human rights, fundamental freedoms*

### Introduction

The Digital Revolution, sometimes also called the Third Industrial Revolution, has fundamentally changed the media sector. As a result of the development of the Internet and the digitalization of communication processes on a global scale, new forms of media emerged which permit the unprecedentedly fast creation and sharing of information. Innovative business models have significantly strengthened this trend. Academic literature sometimes speaks about the so-called digital ecosystem, in which users like “organisms” are connected to each other in online communication (Van De Hoven, Comandè, Ruggieri, Domingo-Ferrer, Musiani et alii, 2021). The definition of the rights and responsibilities of individual actors in this system has become the subject of several legal disciplines. The enormous dynamics of changes have attracted the particular attention, for example, of experts on competition law (Lundqvist, Gal, 2019). However, the areas of human rights protection and public security are equally affected.

In the new digital ecosystem, citizens of European countries have access to a confusing multitude of different resources. The significant increase in the potential to disseminate information may certainly have a positive impact on freedom of expression, which traditionally includes not only the possibility to publicly communicate one's positions, but also the possibility to receive information. However, new communication technologies have also tremendously increased the risks associated with the abuse of freedom of expression and experts point, among other things, to the “viral spread of disinformation and hate speech on an unprecedented scale” (Parcu, Brogi, 2021). This phenomenon not only divides society, but can also undermine the very fundamentals of democracy.

For this reason, the current state of the digital ecosystem is increasingly perceived as a security problem as disinformation may form an integral part of hybrid threats as it is intended to weaken the enemy by disorienting, destabilizing and disrupting its political structures, undermining the functioning of state bodies, and influencing the population's morality (Ivančík, Nečas, 2022). Addressing the risks associated with digital communications is a key challenge for democracies in Europe and other parts of the world. Due to the global nature of current

communication processes, European states are no longer able to manage these risks on their own and, therefore, solutions need to be considered at a pan-European and international level.

In this contribution, we focus on a conceptual understanding of the term disinformation as it appears in the political documents and strategies of international organizations. At the EU level, various tools have been designed and adopted against the spread of disinformation. In the interest of a transparent and effective approach, EU measures should be based upon a clear and generally understandable definition of disinformation not leaving space for abuse. In the context of mass communication, efforts to influence public opinion and the behavior of a large number of people are not a new phenomenon. Therefore, it is questionable which forms of influencing public opinion and which concrete expressions can be subsumed under the concept of illegal disinformation.

With due regard to the principle of legality (*nullum crimen sine lege* and *nulla poena sine lege*) repressive measures such as restrictions on communication or sanctions need to be conceived in a precise and predictable manner. Possible ambiguities connected with the legal definition of disinformation can cause a conflict with basic human rights. This applies all the more if various restrictions shall be imposed not directly by competent state bodies but by private business corporations. It is necessary to clarify according to what criteria operators of digital platforms shall identify and subsequently remove deceptive and dangerous context.

So, the aim of this article is to outline terminological problems related to the concept of disinformation, in particular with a view to the practice of international organizations. We are not going to deal with specific procedures concerning the identification of disinformation and the imposition of legal sanctions as we believe that any legal definition of disinformation needs to be generally valid and it should not depend on the specific goals of international or national institutions applying and interpreting it.

In this article we are going to use a comparative method in order to identify the content of international documents related to the definition of disinformation. Further, we will deal with the relevant elements of a legal definition from an analytical perspective. Academic legal literature will be used as well as reference to human rights case law.

## 1. Historical dimensions of the problem

When it comes to the analysis and categorization of various forms of unwanted influence on the public, legal science is dependent on the findings of academic disciplines which focus on interpersonal communication and its social effects. Within the framework of social sciences, a rich academic literature has been developed on such phenomena like, for example, propaganda, agitation and manipulation. Recently, the new term “fake news” has come into the center of professional and public interest. The exact distinction between these forms of communication is certainly not easy to make as the boundaries between information and disinformation campaigns can be very thin in reality, and their determination may largely depend on the subjective perceptions or moral attitudes of both communicators and recipients.

Academic literature cites numerous historical examples in which untruths were used in order to achieve political or military goals. From ancient Greece, there are stories about the use of targeted manipulation by Athens against Persia an external enemy (Marr, 1995) as well as against Sparta an internal enemy (Gelfert, 2021). In their Short Guide to History of Fake News and Disinformation, Julie Posetti and Alice Matthews (2018) point at the example of the Roman emperor Octavian waging a propaganda campaign against his rival Mark Antony.

After the invention of the printing press, more sophisticated forms of communication led to more sophisticated forms of manipulation of public opinion. Axel Gelfert (2021), a professor at the Technical University of Berlin, dryly noted that in times of war and armed conflicts, adversaries regularly deployed disinformation campaigns and political actors often manipulated the truth when it suited their purposes. Various authors have dealt with the so-called “Great Moon hoax” of 1835 which is supposed to be “the first large scale news hoax” (Ireton, Posetti, 2018). The series of articles on the alleged discovery of civilization on the Moon which was published in the New York newspaper *The Sun* is often seen as a turning point in the development of the American press (Thornton, 2000).

According to Miroslav Mareš and Petra Mlejnková (2021), the historical evolution of propaganda has been driven, among other things, by advancements in communication technologies. Naturally, such technologies as radio, television, mobile phones and wi-fi had a dramatic impact on the spreading of both information and disinformation. Among experts there is a general consensus that the Internet is the communication space which is least immune to false news as anyone can become a sender of a message (Hömberg, 2020). Undoubtedly, in the light of technological progress, propaganda and disinformation have become part of a new threat dimension. A noticeable securitization of communication issues seems to be the logical consequence of this development (Mareš, Mlejnková, 2021).

From a normative point of view, it is noteworthy that propaganda as a form of targeted manipulation was not always perceived negatively. Indeed, the original meaning of the term propaganda was clearly positive when in 1622 Pope Gregor XV established the so-called *Sacra Congregatio de Propaganda Fide* (Sacred Congregation for the Propagation of Faith). Its purpose was to spread Catholicism through well-organized missionary activities (Gregor, Mlejnková, 2021).

One of the founders of the discipline of public relations, Edward Bernays, who was born in Vienna in 1891, in his world-famous book “Propaganda” from 1928 established a rather positive concept of controlling masses of people through targeted manipulation. Bernays argued that the conscious and intelligent manipulation of the organized habits and opinions of the masses is an important element in democratic society and that invisible manipulators constitute the invisible but true ruling power of the country. According to Bernays (1928), democratic society cannot function smoothly without certain manipulation techniques.

However, also undemocratic and totalitarian regimes used the term propaganda with a positive connotation. Whereas in Nazi Germany, the infamous *Reichsministerium für Volksaufklärung und Propaganda* (Ministry for Public Enlightenment and Propaganda) was created, in the Soviet Union, a special propaganda committee of the Communist Party had the task to indoctrinate the educated people by using scientific arguments (Gregor, Mlejnková, 2021). With a view to the Communist (Marxist-Leninist) concept of propaganda and its practical implementation, it is understandable that Western democratic countries avoided to call their official institutions propagandist, and the term propaganda received a negative connotation.

Similarly, the term disinformation, which has been traditionally associated with the activities of the Soviet intelligence service KGB, has acquired a clearly negative meaning. According to Deen Freelon and Chris Wells (2020), the Anglicization of the Russian term “*dezinformatsiya*” dates back to at least 1955. Extensive Western literature on Soviet disinformation emerged during the Cold War (Bittman, 1985). According to Max Holland (2006), disinformation as a covert activity of the Soviet intelligence service was always accorded with overt Soviet propaganda. While overt propaganda turned out to be less

persuasive, defamatory fabrication gained an “aura of authenticity” by wrong reference to Western media. Holland concluded that “the defining characteristic of dezinformatsiya was that it was not deployed simply to defame or confuse an adversary” but that its ultimate purpose “was to cause the adversary to reach decisions beneficial to Soviet interests”.

It seems that propaganda has been very often dealt with in publications on communication science. However, until recently, only a rather small number of historical studies was focusing on the functioning of disinformation as a method used during the Cold War. Only after 2017 social sciences have shown an increased interest in the problem of disinformation. Deen Freelon and Chris Wells (2020) found that, in the period between 2010 and 2019, more than 70% of all publications on disinformation were published after 2017, and they suggested that this rush of interest was due to the alleged manipulation of the 2016 US presidential elections.

In summary, we can state that, from a historical perspective, the use of the term disinformation in legal documents causes considerable embarrassment. It may be true that current technological progress and the rapid development of the digital ecosystem call for new theoretical concepts and new practical solutions. However, it should be noted that various forms of propaganda and manipulation of public opinion have been part of the political struggle for a long time and there has always been uncertainty about the criteria according to which permitted forms of manipulation shall be distinguished from the prohibited ones.

## **2. The concept of disinformation in the practice of universal international organizations**

With a view to these conceptual problems, we will briefly address the problem of disinformation from a universal level. Until the outbreak of the COVID-19 pandemic, the United Nations did not view disinformation as a crucial security problem and did not adopt political resolutions on this issue. When, in 2021, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Irene Khan, presented her report “Disinformation and Freedom of Opinion and Expression” (A/HRC/47/25), she did not make any reference to UN major documents.

As for the definition of disinformation, the UN Special Rapporteur only quoted from a submission from the United Nations Educational, Scientific and Cultural Organization (UNESCO) which found that the lack of clarity and agreement on what constitutes disinformation, including the frequent and interchangeable use of the terms misinformation and disinformation, reduces the effectiveness of responses (para. 14).

According to the report of the UN Special Rapporteur, there is no generally accepted definition of the concept of disinformation as it is inherently political. The report added that the boundary between truth and falsity, as well as the boundary between negligent handling of information and the intent to cause damage, is subject of dispute. Various forms of expression, such as personal opinions and religious beliefs, scientific theories, or parody and satire, do not correspond to the binary model of truth and falsehood. Moreover, in complex communication processes, not everyone who spreads a certain information may be aware of its falsity, and not all communicating entities necessarily act in bad faith (para. 9-10).

In the light of these findings, the UN Special Rapporteur presented a working definition according to which disinformation shall be understood “as false information that is disseminated intentionally to cause serious social harm”. In this sense, disinformation differs from misinformation which means “the dissemination of false information unknowingly” (para. 15).

On 24 December 2021, the UN General Assembly (GA) adopted a resolution with the title “Countering disinformation for the promotion and protection of human rights and fundamental freedoms” (A/RES/76/227). While it is understandable that the GA resolution makes explicit reference to the report of the UN Special Rapporteur, the reference to the so-called United Nations Strategy and Plan of Action on Hate Speech, which had been launched by UN Secretary-General Antonio Guterres in May 2019, is very interesting as this Strategy did not mention at all the issue of disinformation. In the preamble to its resolution of December 2021, the General Assembly explains that “hate speech and disinformation are distinct phenomena which may overlap in some cases”.

Pointing at the security dimension of disinformation, the General Assembly expressed concern about the use of digital technologies which can enable new pathways for intentionally false or misleading information for political, ideological or commercial motives by both State and non-State actors. In the above-mentioned resolution, special attention is paid to the proliferation of disinformation about the COVID-19 pandemic and the GA stressed the importance of providing science- and evidence-based data and information to the public. At the end of its resolution the GA requested the UN Secretary-General to collect the views of relevant stakeholders and to submit a report on best practices in the fight against disinformation (para. 16).

The Secretary-General presented his report “Countering disinformation for the promotion and protection of human rights and fundamental freedoms” in August 2022 (A/77/287). In this report, he recalled that disinformation is not a new concern as, in the past, states did, in various ways, criminalize the propagation of falsehoods. However, he also stressed the new dimension of the phenomenon in the light of innovative technologies “that enable the dissemination of unparalleled volumes of content at unprecedented speeds” (para. 2).

The Secretary-General further recalled that “there is no clear definition of, or shared common understanding and approach to, the term disinformation”. According to the Secretary-General, three elements are characteristic of disinformation: information that is inaccurate, intended to deceive and shared in order to cause serious harm. While recognizing the danger of disinformation, the Secretary-General also recalled that any definition of disinformation must not unduly restrict expressions that take the form of irony, satire, parody or humour and that seek to question or even ridicule individual or societal norms. Censorship under the guise of combating disinformation “risks suppressing artistic, scientific and journalistic work and public debate more generally” (para. 3-4).

With a view to the challenges in defining disinformation, the Secretary-General further pointed out that, in recent years, some states adopted measures which have resulted in undue restrictions on freedom of expression, e.g. by restricting access to information, particularly online, and by targeting journalists, political opponents, whistle-blowers and human rights defenders. Therefore, “vague definitions of disinformation” remain a specific concern for the UN Secretary-General as „many laws fail to define with sufficient clarity and precision what information is within their scope”. Referring to the experiences of UN human rights bodies, the Secretary-General listed a number of problematic cases in which states started to prosecute “false, offensive or harmful information”, “information that may be provoking public opinion”, “information that may be prejudicial to the country’s public tranquillity or public finances”, “information that damages the reputation of public institutions” and “rumours and untrue reports” (para. 41 and 45).

In a resolution of March 2022 (A/HRC/49/L.31/Rev.1), the UN Human Rights Council shared the concern of the Secretary-General when it stated that “condemning and countering

disinformation should not be used as a pretext to restrict the enjoyment and realization of human rights or to justify censorship, including through vague and overly broad laws criminalizing disinformation”. However, the Human Rights Council did not address the specific problem of vague definitions and their application in legal practice. It rather contributed to legal uncertainty when, in the preamble to its resolution, it recalled that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. We find that blurring the boundary between disinformation and hate speech (or hate crime) may have a dangerous effect on freedom of speech.

From the above-mentioned UN documents, it can be concluded that the concept of disinformation remains rather unclear at the universal level. In practice, it is problematic to grasp the individual elements of these definitions, which on the objective side relate to the truth of the information and on the subjective side to the intent to harm. Admittedly, such criteria may take on a more concrete form in a specific political or ideological context. However, it is a question whether the political qualification of a certain speech as disinformation may also serve as a legal definition for the purpose of conceiving restrictive measures.

### **3. The concept of disinformation in the practice of European regional organizations**

#### **3.1 Council of Europe**

If the fight against disinformation shall become a European agenda, the relevant regional organizations must take a transparent and convincing stance on this problem. Besides finding a precise and transparent definition of the term disinformation, it will be crucial to draw a correct balance between security interests and the obligation to protect human rights and fundamental freedoms.

Within the framework of the Council of Europe, the European Convention on Human Rights and the related case law of the European Court of Human Rights serves as the main point of reference. Already in 1986, the European Court of Human Rights, in a case from Austria, found it necessary to carefully distinguish between facts and value judgments. Whereas the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof.<sup>1</sup> This means that, unlike opinions and speculations which fall under the freedom of expression within the meaning of Article 10 ECHR, wrong factual claims are not protected. The failure to make a distinction between facts and value judgments has been repeatedly considered as a violation of Article 10 ECHR.

However, as František Kasl (2021) has pointed out, disinformation cannot be easily categorized in terms of facts and value judgments because very often the authors of disinformation partly manipulate provable facts and, partly, they present value judgements. According to Kasl “most media news consists more of socially agreed truths and reasoned subjective opinions rather than proven absolute truths”, and, therefore, “the issue of truthfulness in disinformation is a matter of scale rather than bipolar assessment”.

The European Court of Human Rights has admitted that value judgments need to be based upon a sufficient factual basis. The link between facts and value judgments is, nevertheless, problematic. In the case of *Feldek v. Slovakia*,<sup>2</sup> the Court was satisfied that the value judgment made by a Czech publicist was based on information which was well-known to the general

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<sup>1</sup> *Lingens v. Austria* (application no. 9815/82).

<sup>2</sup> Application no. 29032/95, judgment of 12 July 2001.

public. In other cases, this link was less convincing. Therefore, there remains a certain degree of uncertainty when it comes to the objective truthfulness of a statement.

As for the subjective element of disinformation, i.e. the intent to harm, the European Court of Human Rights has sometimes referred to the concept of good faith. According to the Court, the safeguard afforded by Article 10 ECHR to journalists is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide reliable and precise information in accordance with the ethics of journalism.<sup>3</sup> In a more recent judgment of December 2018, the Court has dealt with the use of hyperlinks which do not present a concrete content but only draw the attention of the recipients to a specific website. According to the Court, in such cases the domestic courts need to ascertain whether the author of an information acted in good faith and respected the ethics of journalism.<sup>4</sup>

With a view to the criteria established by the European Court of Human Rights, it appears that at least some forms of disinformation may fall under the protection of Article 10 ECHR. Such finding does not exclude that in other cases, maybe even in many cases, measures against disinformation can be adopted out in line with the freedom of expression. However, the proportionality of such interventions needs to be examined with a view to the circumstances of each individual case. In the light of ECHR case law, it is difficult to define specific categories of disinformation that shall be considered illegal under all circumstances.

With reference to an expert study from 2017 (Derakhshan, Wardle, 2017), the Council of Europe started to distinguish between three main forms of unwanted expressions. Firstly, “mis-information” means false information that is not disseminated with the intent to harm, secondly, “dis-information” encompasses false information that is disseminated with the intent to harm and, thirdly, “mal-information” is understood as true information that is disseminated with the intention of harming.

However, in 2019, the Committee of Ministers of the Council of Europe adopted a Declaration on the Manipulative Capabilities of Algorithmic Processes,<sup>5</sup> in which it did not use at all the term disinformation. In the context of the risks related to the use of artificial intelligence technologies, the Committee of Ministers called on Member States to provide guidance on the distinction between “permissible persuasion” and “unacceptable manipulation”, following an open and inclusive public debate. According to the Committee of Ministers, manipulation “may take the form of influence that is subliminal, exploits existing vulnerabilities or cognitive biases, and/or encroaches on the independence and authenticity of individual decision-making” (Article 9c).

Further, the Committee of Ministers explicitly dealt with the issue of disinformation in its Declaration on the Financial Sustainability of Quality Journalism in the Digital Age, which was adopted the same day.<sup>6</sup> In this document, the distinction between disinformation and other forms of unwanted or harmful communication remained unclear. On the one hand, Article 2 of the declaration perceives quality journalism as a counterweight to “propaganda, misinformation and disinformation” spread via social media. On the other hand, Article 10 of the declaration lists “manipulation, disinformation and the spread of hateful messages” side-by-side. Both provisions, however, do not contain any criteria according to which disinformation can be defined and distinguished from the other forms of unwanted content. Finally, Article 13 of the declaration which confronts journalistic quality content with “disinformation and other

<sup>3</sup> Stoll v. Switzerland (application no. 69698/01), judgment of 10 December 2007.

<sup>4</sup> Magyar Jéti ZRT v. Hungary (application no. 11257/16).

<sup>5</sup> Adopted by the Committee of Ministers on 13 February 2019 at the 1337<sup>th</sup> meeting of the Ministers' Deputies.

<sup>6</sup> Adopted by the Committee of Ministers on 13 February 2019 at the 1337<sup>th</sup> meeting of the Ministers' Deputies).

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manipulative, malicious or blatantly false content” does not provide any guidance on this issue either.

In the context of a more recent recommendation of 2022,<sup>7</sup> the Committee of Ministers elaborated on so-called Guidelines on Promoting Quality Journalism in the Digital Age. Article 2.5.4 of the guidelines states that disinformation undermines trust in the media and threatens the reliability of information that influences public debate and democracy. Member States should therefore coordinate their efforts to tackle the problem of “disinformation and propaganda”. However, a more detailed definition of the term disinformation is not included in the document. It is also interesting that the Committee of Ministers, in this new document, did not mention “mis-information” and “mal-information”.

### 3.2 The European Union

In January 2018, the European Commission (EC) set up a high-level expert group on fake news and online disinformation which was tasked to analyze issues arising in the context of false information spread across traditional and social media and to advise the Commission on possible ways to cope with its social and political consequences. In its report of March 2018, the high-level expert group pointed out that the cooperation of all major stakeholders is a condition for the effective handling of disinformation problems in full compliance with freedom of expression. The high-level expert group, further, concluded that since disinformation is a multifaceted and evolving problem not having one single root cause, it won't be possible to find one single solution. According to the high-level expert group, the Commission should avoid simplistic solutions such as censorship or the fragmentation of the internet (European Commission. 2018).

As a first step, the high-level expert group recommended the adoption of a “Code of Practices” to which all relevant stakeholders like online platforms, news media organizations (press and broadcasters), journalists, fact-checkers, independent content creators and the advertising industry should commit. In terms of a self-regulatory approach, such Code of Practices should reflect different roles and responsibilities and promote “an enabling environment for freedom of expression by fostering the transparency and intelligibility of different types of digital information channels” (ibidem, p. 36)).

As for the concept of disinformation, the high-level expert group, using a reference to the above-mentioned Council of Europe study of 2017, defined disinformation as “false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit” (ibidem, p. 10). According to the report, the term disinformation has been distinguished not only from fake news, as in the case of disinformation we often deal with information that is not actually or completely fake but “fabricated”, but also from defamation, hate speech, incitement to violence because these forms of speech are already being criminalized under established law. The high-level expert group further admitted that the character of disinformation depends on the concrete actors involved such as state or non-state political actors, economic entities and groups of citizens and also on the infrastructure of communication involving “news media, platforms, and underlying networks, protocols and algorithms” (ibidem, p. 11).

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<sup>7</sup> Recommendation CM/Rec(2022)4 of the Committee of Ministers to member States on promoting a favourable environment for quality journalism in the digital age (adopted by the Committee of Ministers on 17 March 2022 at the 1429<sup>th</sup> meeting of the Ministers' Deputies)



One month later, in April 2018, the European Commission presented a communication entitled "Tackling Online Disinformation: A European approach".<sup>8</sup> Although the Commission made explicit reference to the work of the high-level expert group and expressed support for the project of an ambitious Code of Practice, it used a slightly modified concept of disinformation. According to the EC, disinformation is understood as a "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". Regarding the false or misleading nature of certain information, the EC added that the concept of disinformation does not include "reporting errors, satire and parody, or clearly identified partisan news and commentary". The communication is further without prejudice to ongoing approaches and actions in relation to illegal content, including terrorist content online and child sexual abuse material. In other words, the concept of disinformation used by the EC does not fall under criminal law. As for the issue of public harm, the EC communication lists "threats to democratic political and decision-making processes as well as public goods, such as the protection of EU citizens' health, the environment or security" (ibidem, Article 2.1).

In December 2018, this concept of disinformation was also supported by a joint communication of the European Commission and the High Representative of the Union for Foreign and Security Policy, which contains an Action Plan against disinformation.<sup>9</sup> However, already in a communication of December 2020, the EC, presenting a European democracy action plan,<sup>10</sup> modified its own definition of disinformation and, in addition to protecting the integrity of elections and strengthening the freedom of the media, the fight against disinformation constituted a key part of the new action plan. Therefore, with a view to the definition of disinformation, the Commission drew attention to the need to distinguish between four different phenomena that are sometimes referred to as disinformation. First, for the concept of "misinformation", the EC explains that false or misleading content can be harmful, even if it is shared without harmful intent. Second, disinformation (in the narrow sense) is understood as "false or misleading content that is spread with an intention to deceive or secure economic or political gain and which may cause public harm". According to the Commission, the third category concerns so-called "information influence operations" which shall be understood as coordinated efforts by either domestic or foreign actors to influence a target audience using a range of deceptive means. Apparently, such operations can take place "in combination with disinformation". The fourth danger is represented by "foreign interference in the information space" which encompasses "coercive and deceptive efforts to disrupt the free formation and expression of individuals' political will by a foreign state actor or its agents" (ibidem).

Obviously, the possible negative influence of foreign actors, i.e. non-EU actors, on the democratic process in European societies is being reflected in this new concept of disinformation to a greater extent. Furthermore, the EC tried to grasp the role of disinformation within broader campaigns, or "operations". In this sense, the 2020 Action Plan represents an important modification of the definition of disinformation. While the use of such concept of disinformation in a political document may not cause problems, it remains questionable whether it shall be the basis of a legal regulation aiming at establishing preventive and sanctioning mechanisms and introducing human rights restrictions.

In the legal context, the new 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

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<sup>8</sup> COM(2018) 236 final.

<sup>9</sup> JOIN(2018) 36 final.

<sup>10</sup> COM(2020) 790 final.

Directive 2000/31/EC (Digital Services Act) is of utmost importance. This regulation shall apply from 17 February 2024. It is interesting to observe that while the preamble of the draft regulation contains several references to risks associated with disinformation (recitals 83, 84 and 88), the normative text of the draft regulation does not use the term disinformation. The central concept of the regulation is "illegal content" which is defined as "any information that, in itself or in relation to an activity, including the sale of products or the provision of services, is not in compliance with Union law or the law of any Member State which is in compliance with Union law, irrespective of the precise subject matter or nature of that law" (Article 2 lit. h).

In view of the fight against disinformation, it will be crucial to clarify whether any specific content which is false and harmful shall be automatically treated as illegal in the sense of the Digital Services Act. In other words, shall harmful information be always considered as an illegal content? Given the ambiguities surrounding the concept of disinformation, such approach would be very restrictive. Unfortunately, the legislative proposal of the EC<sup>11</sup> does not deal with this issue at all.

This legal uncertainty is exacerbated by the fact that in its joint communication of 2020 with the title "Tackling COVID-19 disinformation – Getting the facts right" the Commission confirmed that it is important "to distinguish between illegal content, as defined by law, and content that is harmful but not illegal". According to the Commission misleading healthcare information is not necessarily illegal but can directly endanger lives and severely undermine efforts to contain the pandemic.<sup>12</sup> In a study of November 2021, Ronan Ó Fathaigh, Natali Helberger and Naomi Appelman (2021) found that according to the leading EU policy definitions the concept of disinformation is "outside of current categories of illegal content" and that EU policy seems to make a distinction „between, on the one hand disinformation as harmful content and, on the other, already regulated forms of illegal content“. The authors of the study further pointed out that Lithuania was the only EU member state explicitly criminalizing disinformation in its national law. As the definition of illegal content refers to national legislation, disinformation would fall under the Digital Services Act in Lithuania, but not in other member states.

#### 4. Criticism

A brief overview of several working definitions used at the level of international organizations has shown that the international community is still quite far from a unified and generally recognized concept of disinformation. From a legal perspective, unclear political concepts shall not be used as legal definitions, in particular in the context of criminal prosecution or administrative sanctions. Several key questions need to be answered before so-called disinformation can be countered by a system of legal sanctions and repression. As a common ground, the above-mentioned definitions include three key elements, namely falsity and harmfulness of the content and the bad intention of the communicating subject.

As far as the issue of truthfulness or falsity is concerned, the assessment is definitely not easy. Leaving aside complex philosophical considerations about the concept of truth and ways of finding it, we have to focus on some practical questions. From our brief analysis we have learnt that disinformation very often appears as a mixture of facts, manipulated facts, lies and value judgments. It is at least doubtful if the whole content be declared illegal if it contains a

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<sup>11</sup> COM(2020) 825 final.

<sup>12</sup> JOIN/2020/8 final.

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small part of untruthful statements or errors. There is also uncertainty on how to define the relevant degree of untruthfulness. This problem might be even more compelling when a specific content includes pictures or videos.

We have seen that the case law of the European Court of Human Rights has repeatedly referred to the ethics of journalism and clarified that it may be expected that journalists use reliable sources. However, even the most trustworthy sources may contain errors or inaccuracies. Conversely, sources which are in general less reliable may produce true content. In a Handbook for Legal Practitioners edited by the Council of Europe, Dominika Bychawska-Siniarska (2017) found that, if reasonable efforts are made to verify the facts, the press shall not be liable, even if the respective facts later prove to be untrue. Given such a margin of tolerance in favor of the press, it would be inappropriate if anti-disinformation laws imposed stricter requirements for authors who are no professional journalists.

In any case, it would be quite naïve to believe that all public statements can be properly verified in a scientific manner. A study of 2021, carried out on request by the European Parliament's LIBE Committee, found that whereas some content, e.g. in the context of advertising, may be easier to verify, "the same does not apply to the news media that is not based on unassailable truth claims but on socially negotiated truth-finding processes (Batura, Holznagel, Hartmann, Bayer, Katsirea, Lubianiec, 2021). In other words, professional mechanisms rather focus on the trustworthiness of sources and procedures than the quality of the content itself.

Another issue with facts is that they are open to different interpretations. As a matter of principle, what we understand as political, social, historical and economic facts may be seen from different perspectives. It is a key element of democracy that not only one correct interpretation will be permitted but people are allowed to share interpretations which are less correct and less convincing. We agree with František Kasl (2021) that "the right of each individual to a subjective perception and interpretation of events or actions provides for a democratic divergence of opinions, but it also serves as a protective shield for disseminators of disinformation". In this sense, any removal of this protective shield may put in danger the fundamentals of democracy.

Dealing with the truthfulness of an information we further have to take into account that a strict differentiation between true and false content would be a dangerous simplification of standard communication processes. As has been put by Martin Potthast, Johannes Kiesel, Kevin Reinartz, Janek Bevendorff and Benno Stein (2017), a binary distinction between fake and real news is infeasible, "since hardly any piece of fake news is entirely false, and hardly any piece of real news is flawless". With a view to the efficiency of so-called fact-checking, the authors found that, given this unclarity, specific content was rated "mostly true", "mixture of true and false" and "mostly false". Therefore, content shall be conceptualized rather in terms of a continuum than of simplified models of truth and falsity.

These problems related to the identification of false information are amplified by including so-called "misleading content" into the definition of disinformation because such criterion links the objective quality of a content to its subjective perception by or its effect on the receiving subject. According to Miloš Gregor and Petra Mlejnková (2021), disinformation is misleading information because it creates false beliefs. From this perspective, however, the illegality of a content would need to be defined according to the intellectual capacity of the receivers or their level of education because it is generally assumed that less educated receivers are more vulnerable to manipulation.

As for the harmfulness of the content, the European Commission pointed at threats to democratic political and decision-making processes as well as public goods, such as the protection of EU citizens' health, the environment or security. Without doubt, measures against these threats are, in principle, legitimate. From a human rights perspective, it is the obligation of the state to protect national security, public order and public health. Therefore, we find that this part of the definition is the least problematic. Nevertheless, it is irritating that the EC in its definition of disinformation included also information which is disseminated for economic gain. Such an element widens the scope of anti-disinformation legislation as any type of misleading advertisement might be understood as disinformation (Ó Fathaigh, Helberger, Appelman, 2021). It is certainly for good reasons that the definitions discussed at the level of the UN and the Council of Europe do not contain a reference to economic gain.

Last but not least, the above-mentioned definitions include the intent to harm as a clearly subjective criterion. However, it is unclear whether the malicious intent shall be focused on causing a public harm and, in the case of the Commission's definition, also economic gain, or whether it shall be directed at deceiving the public. Whereas the definition used by the UN Special Rapporteur supports a link between the intention and the harm, it seems that the approach of the European Commission connects the intent of the communicating subject to the deception of the public. It might also be considered whether the malicious intent shall actually include both public harm and the element of deceiving the public.

In any case, it is difficult to identify the subjective intention behind a piece of information when different actors are involved in its production and dissemination. An operable legal definition should clarify this issue as, unlike the definitions used at the UN level and the level of the Council of Europe which explicitly refer to the "dissemination" of harmful content, the Commission's definition includes the designation, presentation and promotion of information. A precise regulation of the legal responsibility of different stakeholders is required in all situations in which the authors of draft legislation do not only want to provide for the removal of disinformation but also want to sanction concrete actors involved. Further, appropriate legislation should also take into account that, as suggested by the UN Special Rapporteur, it may be difficult to distinguish cases of negligent handling of information from a real intent to cause damage or to deceive the public.

## Conclusions

To conclude, various risks related to the spreading of disinformation in the "digital ecosystem" are very serious. The relevant risks have been clearly pointed out by international organizations such as the UN, the Council of Europe and the European Union. There is a legitimate concern that the systematic use of disinformation has the potential to threaten national sovereignty and the public and political order of democratic countries as waves of lies and manipulation may undermine the very fundament of mutual trust on which democratic societies are built upon.

On the other hand, we have found that a precise definition of the term disinformation is difficult to draw. It is revealing that concepts used by various international organization differ in some regards. The distinction between truthfulness and falsity leaves significant grey areas which might cause legal uncertainty for both norm addressees and public authorities applying the norm. In legal practice, also the intent to harm will be difficult to grasp. As a consequence of such ambiguities there is a high risk of human rights violations, especially of the freedom of expression. What is more, unprecise and ambiguous legal terms open a broad space for abuse

by state bodies so that, ultimately, the cure might be worse than the disease. Therefore, international and national stakeholders have to approach the concept of disinformation with great caution.

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