Transnational Legal Theory

ISSN: 2041-4005 (Print) 2041-4013 (Online) Journal homepage: www.tandfonline.com/journals/rtlt20

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To cite this article: Christopher Phiri (2026) A legal definition of disinformation, Transnational Legal Theory, 17:2, 479-513, DOI: 10.1080/20414005.2026.2700124

To link to this article: https://doi.org/10.1080/20414005.2026.2700124

Published online: 07 Jul 2026.

TRANSNATIONAL LEGAL THEORY
2026, VOL. 17, NO. 2, 479–513
https://doi.org/10.1080/20414005.2026.2700124

Routledge
Taylor & Francis Group

OPEN ACCESS

A legal definition of disinformation

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ABSTRACT
Recent years have witnessed a growing trend towards regulating disinformation, particularly online disinformation. Regulatory efforts in this regard are especially prominent at the European Union level. This is the case even though there is currently no 'European' legal definition of disinformation. The European Union has thus effectively leapfrogged the foundational question of what precisely distinguishes disinformation from other forms of semantic content and proceeded to make policy decisions on how to regulate it, thereby running a real risk of undermining freedom of expression on the Internet. Drawing on relevant literature, primarily at the intersection of linguistics, the philosophy of language and law, this article argues that, in order to effectively discriminate it from other forms of semantic content that may legitimately fall within the protective scope of freedom of expression, disinformation should be legally defined as misleading information that is communicated with intent to mislead and that may cause harm.

ARTICLE HISTORY Received 18 August 2025; Accepted 20 January 2026

KEYWORDS Legal definitions; online disinformation; freedom of expression; due diligence obligations; Digital Services Act

1. Introduction

Recent years have witnessed a growing trend towards regulating disinformation, particularly online disinformation.[1] By all accounts, however, disinformation lies in the eye of the beholder. What constitutes disinformation, in other words, is not a question of fact but purely a verbal question. The discrepancies in existing definitions proposed by scholars and policymakers alike themselves confirm that the word 'disinformation' has no fixed

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[1] Samuel Cipers, Trisha Meyer and Jonas Lefevere, 'Government Responses to Online Disinformation Unpacked' (2023) 12(4) *Internet Policy Review* 1; Ronald J Krotoszynski Jr, András Koltay and Charlotte Garden, *Disinformation, Misinformation, and Democracy: Legal Approaches in Comparative Context* (Cambridge University Press 2025).

meaning in common usage, not least in the English language. By the same token, users of ordinary language cannot be assumed to be in no doubt or confusion about the meaning of disinformation. Existing definitions of disinformation are thus 'stipulative' in nature; they merely assign an 'arbitrary' meaning to the word.[2] The meanings specified in these definitions can accordingly be contrasted with those specified in lexical definitions, which are 'used to report the meaning that a word already has in a language'.[3] Typically, as with all stipulative definitions, existing definitions aim to provide the intended audience with an interpretation of the word 'disinformation', since its meaning might otherwise be unclear or unknown.[4] They can thus serve as practical guidelines for effective communication.

Given that there is no such thing as a 'true' or 'false' stipulative definition, however, existing definitions of disinformation neither automatically command assent nor invariably deserve respect.[5] As illustrated by the examples discussed in section 3 of this article, none of these definitions can be deemed inherently right or wrong, since none of them establishes, as a matter of fact, what disinformation is.[6] Indeed, generally speaking, there is no such thing as an intrinsically 'proper' or 'improper' meaning of a word.[7] Every word in any human language, regardless of how natural it may seem, acquires its meaning through general acceptance among language users rather than through a natural connection between the word and its meaning. There would likely be only one universal human language if words were derived from nature.[8] The meaning of any given word is therefore 'simply a consensus among its users to deploy it in a certain way'.[9] Otherwise, in principle, everyone is free to define words as they please. This holds true even with respect to the word 'disinformation' itself.

[2] See Patrick J Hurley, *A Concise Introduction to Logic* (Wadsworth Publishing, 7th edn 2000) 94 (noting that 'a stipulative definition is a completely arbitrary assignment of a meaning to a word' in the sense that the assigned meaning does not correspond to what is 'really' the case, so that one can justify the definition by proving a connection between the word defined and an independently existing reality).

[3] *Ibid*.

[4] Roy Harris and Christopher Hutton, *Definition in Theory and Practice: Language, Lexicography and the Law* (Bloomsbury Publishing 2007) 19.

[5] Hurley (n 2) 94; Harris and Hutton (n 4) 19.

[6] For some examples of definitions of disinformation in existing scholarly literature, see generally Eleni Kapantai and others, 'A Systematic Literature Review on Disinformation: Toward a Unified Taxonomical Framework' (2021) 23 *New Media & Society* 1301: Sille Obelitz Søe, 'A Unified Account of Information, Misinformation, and Disinformation' (2021) 198 *Synthese* 5929. See also João Pedro Baptista and Anabela Gradim, 'Understanding Fake News Consumption: A Review' (2020) 9 *Social Sciences* 185; Mark Verstraete, Jane R Bambauer and Derek E Bambauer, 'Identifying and Countering Fake News' (2022) 73 *Hastings Law Journal* 821 (discussing the term 'fake news', which is often used interchangeably with the word 'disinformation' in existing scholarship).

[7] Glanville L Williams, 'International Law and the Controversy Concerning the Word "Law"' (1945) 22 *British Year Book of International Law* 146, 148.

[8] John Locke, *An Essay Concerning Human Understanding* (Vol II, Book III, Alexander Campbell Fraser ed, Clarendon Press 1894) 8.

[9] Jeremy Waldron, 'Vagueness in Law and Language: Some Philosophical Issues' (1994) 82 *California Law Review* 509, 530.

The social need to craft reasoned and persuasive stipulative definitions may nonetheless arise in the context of public policymaking, in particular because such definitions are liable to be misused in verbal disputes.[10] A person may, for example, covertly employ the word ‘disinformation’ in a peculiar way and then proceed to assume that everyone else uses the word in the same way. In such circumstances, the person would be using the word ‘stipulatively’, and the assumption that others ought to accept this usage would rarely be justifiable. This is particularly true when a stipulative definition of disinformation is used, as has often been the case lately, to single out certain forms of semantic content for purposes of censorship.[11] Any restriction on the dissemination of disinformation, whether imposed by a public authority or a private actor, cannot be justified in a democratic society governed by the rule of law unless the definition adopted clearly discriminates disinformation from other forms of semantic content that may legitimately fall within the protective scope of freedom of expression.[12] Therefore, while it is true that anyone is generally free to define disinformation as they please, no one has the right to adopt a legislative stance and attempt to dictate what disinformation should mean for others.[13]

Against this backdrop, this article aims to develop a legal definition of disinformation that is suitable for regulatory purposes. In view of the current trend towards regulating disinformation through legal means, the article proceeds on the assumption that there exists a social need for such regulation and thus for a legal definition of disinformation. It focuses only on the question of definition in order to give it the due attention it deserves and does not therefore delve into other related questions, such as those concerning how exactly disinformation should be regulated, whether at the national, supranational, regional or international level. Specifically, the article considers only the question of how disinformation can be legally defined in a manner that is consistent with relevant international standards on freedom of expression.

The article’s analysis in this connection builds on, and is consistent with, the definition put forward in the book *Political Disinformation and the Law*, according to which disinformation should be understood as misleading information that is communicated with intent to mislead and that may cause harm.[14] Its novel scholarly contribution thus derives primarily from the distinct cross-disciplinary theoretical lens through which it examines and elaborates on the suitability of this definition for regulatory purposes. More specifically, the article draws mainly on cross-disciplinary literature,

[10] Hurley (n 2) 94.
[11] Christopher Phiri, *Political Disinformation and the Law: Safeguarding Freedom of Expression in Europe* (Routledge 2026) 68.
[12] *Ibid*, 68–69.
[13] *Ibid*, 68.
[14] *Ibid*, 74.

at the intersection of linguistics, the philosophy of language and law, relating to definitions and meanings of words or terms used in human communication. The significance of the article's contribution to the legal literature in this regard is particularly evident within the pan-European context.

It is now common knowledge that the European Union (EU) has already effectively leapfrogged the foundational question of what precisely distinguishes disinformation from other forms of semantic content, proceeding to make policy decisions on how to regulate it in the absence of a concrete legal definition. In particular, the EU's Digital Services Act (DSA) imposes 'due diligence obligations' on operators of 'very large' online platforms and 'very large' online search engines—defined as online platforms and online search engines which have an average number of monthly active users in the EU equal to or higher than 45 million—to identify, analyse, assess and mitigate any actual and foreseeable systemic risks within the EU that may arise from the dissemination through their platforms of illegal content and other forms of harmful content.[15] The systemic risks thus envisaged include, among others, those arising from the dissemination of disinformation online.

In selecting the appropriate mitigation measures, the online platform operators concerned 'can' take into account 'industry best practices, including as established through self-regulatory cooperation, such as codes of conduct, and should take into account the guidelines' issued by the European Commission (EC).[16] The DSA specifically refers to the 2022 edition of the Code of Practice on Disinformation, now known as the Code of Conduct on Disinformation (as amended in October 2024), as one of the 'self-regulatory' instruments already established at the EU level, whose legal basis is now the DSA itself.[17] Although the DSA characterises the Code of Conduct on Disinformation as a 'self-regulatory' instrument, and compliance with any guidelines on mitigation measures issued by the EC in relation to specific risks posed by online disinformation is portrayed as not legally mandatory, the online platform operators concerned must both implement the code and follow the guidelines issued by the EC, or else run the risk of being fined for non-compliance with their due diligence obligations under the DSA.

The DSA explicitly states in its recitals that a 'refusal without proper explanations' by an online platform operator to accept the EC's invitation to participate in the implementation of the Code of Conduct on Disinformation or any other relevant code of conduct could be taken into account when

[15] 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 (DSA), arts 33(1), 34 and 35; and recitals 2, 9 and 80–83.

[16] *Ibid*, art 35(3) and recital 89.

[17] *Ibid*, art 45 and recital 106. See Code of Conduct on Disinformation <https://disinfocode.eu/assets/pdfs/2025_Code_of_Conduct_on_Disinformation.pdf>.

determining whether that operator has infringed the due diligence obligations laid down by the DSA.[18] Furthermore, the EC itself underlines that any online platform operator concerned which does not follow its guidelines must undertake alternative measures and demonstrate to it that those measures are equally effective in mitigating the risks posed by online disinformation. It warns that, should it receive information casting doubt on the suitability of such alternative measures, it may commence formal infringement proceedings under the DSA against the online platform operator concerned.[19]

It is therefore evident that, in reality, both participation in the implementation of the Code of Conduct on Disinformation and compliance with the EC's guidelines by operators of 'very large' online platforms is not voluntary but coerced, as there are direct legal consequences that may attend any failure to do so. This serves only to underscore the fact that both the Code of Conduct on Disinformation and the guidelines issued by the EC are *de facto* mandatory for the online platform operators concerned. Even those who may not agree with this view cannot deny that the due diligence obligations under the DSA at least both legitimise and encourage private censorship of alleged disinformation.

Indeed, the DSA, as read together with the Code of Conduct on Disinformation in particular, envisages various private censorship techniques that the online platform operators concerned may employ to address online disinformation. These range from the demotion, demonetisation, disabling of access to or removal of alleged disinformation to the deplatforming of alleged purveyors of disinformation, by either terminating or suspending their online accounts. In effect, EU law clothes private actors with the jurisdiction to make legal judgments regarding the scope of the freedom of expression of users of online platforms whenever a user is suspected or accused of posting disinformation.[20]

This regulatory approach is, of course, all the more difficult to reconcile with existing standards on freedom of expression in the absence of a concrete legal definition of disinformation. The applicable law on freedom of expression protects the right to receive and impart information, whether in the form of facts, opinions or ideas, without drawing a distinction between different types of information. Both article 10 of the European Convention on Human Rights (ECHR) and article 11 of the Charter of

[18] DSA, recital 104,

[19] European Commission, 'Commission publishes guidelines under the DSA for the mitigation of systemic risks online for elections' (*Press Release*, 26 March 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1707>. See Communication from the Commission—Commission Guidelines for providers of Very Large Online Platforms and Very Large Online Search Engines on the mitigation of systemic risks for electoral processes pursuant to Article 35(3) of Regulation (EU) 2022/2065 [2024] OJ C/2024/3014.

[20] Phiri (n 11) 144.

Fundamental Rights of the European Union (the Charter) guarantee 'everyone' the right to freedom of expression, including 'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'.[21]

It is worth recalling at the outset that the freedom of expression enshrined in article 11 of the Charter has the same meaning and scope as the freedom of expression guaranteed in article 10 of the ECHR, as interpreted by the case law of the European Court of Human Rights (ECtHR).[22] Therefore, when implementing national law and EU law alike, member states of the Council of Europe, including all EU member states, are bound to respect the right to freedom of expression provided for in article 10 of the ECHR as a minimum legal standard.[23] This holds true regardless of whether any regulatory interference with expressive activity is enforced directly by public authorities or through delegation to private bodies. The ECtHR has already made it clear that 'the State cannot absolve itself from responsibility by delegating its obligations to private bodies or individuals'.[24]

The actual wording of both article 10 of the ECHR and article 11 of the Charter creates a legal presumption that people are entitled to receive and impart information of any kind whatsoever unless the law specifically provides otherwise.[25] It follows that any attempt at regulating disinformation must begin with a concrete stipulative definition that clearly discriminates disinformation from other forms of semantic content that may legitimately fall within the protective scope of freedom of expression. Otherwise, in the absence of such a definition, any regulatory restriction on the dissemination of disinformation would necessarily encroach upon freedom of expression.

This article thus uses the foregoing pan-European legal framework on freedom of expression as its main point of reference in developing its argument for the legal definition of disinformation it advocates. The remainder of the article is accordingly organised as follows. Section 2 provides context by outlining the article's cross-disciplinary theoretical framework. It draws on relevant literature, primarily at the intersection of linguistics, the philosophy of language and law, to explain the nature and purpose of stipulative legal definitions in general. Section 3 elaborates on why, particularly given the practical linguistic uncertainties and resultant misinterpretations that may

[21] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950, entered into force on 3 September 1953) (ECHR), art 10(1); Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (Charter), art 11(1).

[22] Charter, art 52(3). See Explanations Relating to the Charter of Fundamental Rights [2007] OJ C303/17. See also, among other cases, Case C-547/14 *Philip Morris Brands and Others* [2016] ECLI:EU:C:2016:325, para 147; Case C-401/19 *Poland v Parliament and Council* [2022] ECLI:EU:C:2022:297, para 44.

[23] cf *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland* App no 45036/98 (ECtHR [Grand Chamber], 30 June 2005), paras 155–6.

[24] *Costello-Roberts v the United Kingdom* App no 13134/87 (ECtHR, 25 March 1993), para 27.

[25] Phiri (n 11) 69.

arise from existing policy definitions of disinformation that the EU is currently using to regulate online disinformation, it has now become all the more necessary within the European context to formulate a legal definition of disinformation. Section 4 then proceeds to consider and flesh out the legal definition advocated in this article. Section 5 concludes the article.

2. Legal definitions and why we need them

The adoption of a law by or on behalf of a public authority is a form of communication in the sense that the lawmaker proclaims certain information content that it intends to establish as the new law.[26] This communication serves not only to guide the conduct of the addressee of the new law but also to inform them of the legal consequences that may attend non-compliance.[27] Legal definitions play a role in communicating the law regardless of the form in which the law is conveyed to the addressee. This article, however, focuses only on the role of legal definitions in communicating the law in the form of legislative instruments. The term 'legal definition' is thus used in a narrow sense to refer specifically to legislative definitions rather than to definitions provided in other sources of law, not least precedent-setting judicial decisions.[28]

2.1. Communicating the law

Within the context of legislative communication, the legislative authority being the lawmaker or the author of the law serves as the communicator or addresser. The audience or addressees include all persons, whether natural or juristic, expected to comply with legislative provisions, including the general public the law is directed at and public officials or bodies charged with the responsibility of interpreting and implementing those provisions. It is noteworthy that the persons expected to comply with legislative provisions may include not only private actors and members of the executive and the judiciary but also members of the legislature itself, thus making the legislature both the addresser and addressee of the law.[29] In any event, as with other forms of communication, successful legislative communication depends on the extent to which the addressee is able to decipher the legislature's intended message.

[26] Mark Van Hoecke, *Law as Communication* (Bloomsbury Publishing 2002) 7; Andrei Marmor, *The Language of Law* (Oxford University Press 2014) 11. See also generally Deborah Cao, 'Legal Speech Acts as Intersubjective Communicative Action' in Anne Wagner, Wouter Werner and Deborah Cao (eds), *Interpretation, Law and the Construction of Meaning: Collected Papers on Legal Interpretation in Theory, Adjudication and Political Practice* (Springer 2007).

[27] Viktor Knapp, 'Some Problems of Legal Language' (1991) 4 *Ratio Juris* 1.

[28] Gary Slapper and David Kelly, *The English Legal System* (Routledge, 18th edn 2017) ch 3.

[29] Cao (n 26) 76.

Legislative intent cannot, however, be understood as the subjective mental state of legislative drafters. No matter how careful we may be in reading a particular provision, there is no guarantee that our understanding of that provision is correct.[30] Legislative intent is always a matter of conjecture: we can never be sure we have discovered the real subjective intentions of the drafters at the time of drafting any given piece of legislation.[31] It follows that legislative intent should be understood objectively as the intention that a reasonable addressee, possessing relevant contextual knowledge, would infer from the legislative provision in question within the context of its application.[32] In simpler terms, legislative intent is the interpretation or meaning that the addressee assigns to the provision under consideration, which, at best, represents the most probable legislative intent for reasonable decision-making.[33] But the standard of reasonableness to be applied itself is not fixed. What exactly constitutes legislative intent can thus always be a matter for contestation. This serves only to underscore the importance of considering the relevant context, including relevant facts and linguistic cues, in arriving at a socially or politically acceptable meaning to assign to any given legislative provision.

It follows that the meaning of a single term (that is, word or phrase) used in a legislative provision cannot in and of itself serve as evidence for determining the meaning or legislative intent of the provision in question. Rather, the context and relevant facts of the case ultimately determine the pragmatic meaning or interpretation supposedly intended by the legislature. But the meaning assigned to individual terms nonetheless serve as basic linguistic cues that aid in determining the meaning of a particular provision within the context of its application. These cues can be found, for example, in a dictionary or in other texts that explain how people use the words employed in the legislative text under interpretation. A term used in a legal provision may also acquire a technical meaning either by custom in the legal system or by stipulation in a piece of legislation.[34] Indeed, it is common practice for legislative drafters to attempt to preclude or at least minimise possible misinterpretations of statutory provisions by stipulating the intended definitions of key terms in the legislative text itself.

[30] Moshe Azar, 'Transforming Ambiguity into Vagueness in Legal Interpretation' in Wagner, Werner and Cao (eds) (n 26) 122.

[31] Maarten Henket, 'Contracts, Promises and Meaning: The Question of Intent' (1989) 2 *International Journal for the Semiotics of Law* 129, 131.

[32] MBW Sinclair, 'Statutory Reasoning' (1997–98) 46 *Drake Law Review* 299, 303. See also John R Searle, 'Collective Intentions and Actions' in Philip R Cohen, Jerry Morgan and Martha E Pollack (eds), *Intentions in Communication* (MIT Press 1990) 401.

[33] Steven Knapp and Walter Benn Michaels, 'Against Theory' in WJT Mitchell (ed), *Against Theory: Literary Studies and New Pragmatism* (University of Chicago Press 1985) 30; Henket (n 31) 131.

[34] Timothy Endicott, 'Vagueness and Law' in Giuseppina Ronzitti (ed), *Vagueness: A Guide* (Springer 2011) 172.

To define a term is simply to declare or stipulate its intended meaning.[35] In legislative drafting, this stipulation can derive either from the common usage of the word being defined or the specific meaning intended by the drafters for a specific legislative purpose.[36] The specific purposes of legal definitions can indeed be diverse and multifaceted, ranging from purely formalistic to more substantive purposes.[37] However, notwithstanding other purposes, a central and perhaps the most important purpose of legal definitions is to prevent possible misinterpretations of legislative intent, thereby maximising legal certainty, an essential feature of the democratic principle of the rule of law.[38] For this purpose, a legal definition need not be a verifiable statement of fact. Legislative drafters may give terms a technical meaning that is limited and more precise and sometimes even at odds with their ordinary meaning.[39]

This explains why the vocabulary of the law is generally rich. It includes not only terms that are used in ordinary language but also those that either carry different meanings in legal contexts or are not used at all in ordinary language.[40] Legislative drafters in particular often serve as legal lexicographers, creating a specialised lexicon for specific legal purposes, including neologisms.[41] It is, however, imprudent for legislative drafters to attempt to define ordinary terms in a sense that is dramatically different from how they are normally understood by the persons to whom the law is addressed.[42] Such definitions may not help prevent misinterpretations because the ordinary understanding of terms used in legislative provisions typically influences the meaning that a reasonable addressee ultimately assigns to them.[43]

2.2. Tackling ambiguity and vagueness

Notable linguistic sources of misinterpretation of legislative intent that may necessitate specific legal definitions of certain terms include ambiguity and vagueness. Ambiguous and vague terms can render a legal provision

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[35] John Stuart Mill, *A System of Logic, Ratiocinative and Inductive: Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation* (Harper & Bros 1846) 91.
[36] *Ibid*.
[37] See Yaniv Roznai, '"A Bird is Known by its Feathers"—On the Importance and Complexities of Definitions in Legislation' (2014) 2 *The Theory and Practice of Legislation* 145, 151–2.
[38] Lon L Fuller, *The Morality of Law* (Yale University Press, 2nd edn 1969) ch 2.
[39] Antonin Scalia and Bryan A Garner, *Reading Law: The Interpretation of Legal Texts* (Thomson West 2012) 225; Ralf Poscher, 'Ambiguity and Vagueness in Legal Interpretation' in Lawrence M Solan and Peter M Tiersma (eds), *The Oxford Handbook of Language and Law* (Oxford University Press 2012) 132.
[40] Peter M Tiersma, *Legal Language* (University of Chicago Press 1999) 86.
[41] *Ibid*, 117.
[42] Reed Dickerson, *Fundamentals of Legal Drafting* (Little, Brown and Co, 2nd edn 1986) 144 [7.3]. For an illustration in this regard, see Bryan A Garner, *Garner's Dictionary of Legal Usage* (Oxford University Press, 3rd edn 2011) 258.
[43] Scalia and Garner (n 39) 232.

unclear, thereby making it difficult for the addressee to decipher the legislative intent underlying the provision. The distinction between ambiguous and vague terms is worth underlining.[44] Both ambiguous and vague terms can lead to difficulties in deciphering the message that the legislature intended to communicate to the addressee (that is, the meaning of the provision under consideration), thus resulting in legal uncertainty. But there is a significant difference between these two possible sources of legal uncertainty. A term is ambiguous if it can be reasonably assigned two or more distinct meanings, thereby making the provision in which it appears susceptible of two or more possible interpretations.[45] A term is vague if, even when its meaning and the facts to which its applicability is disputed are known, it makes it uncertain whether or not the provision in which it appears applies at all to particular cases.[46]

Some terms can be both ambiguous and vague. The word 'child', for example, is ambiguous in that it represents two distinct concepts: an 'immature offspring' and an 'offspring' regardless of the level of maturity.[47] In ordinary language, people might employ this term to describe an individual who has not yet attained puberty or to refer to an individual of any age in relation to their parents. A fifty-year-old woman, for example, can still be referred to as a child in relation to her parents. The word 'child' is also vague in relation to the concept of an immature offspring in the sense that it presents borderline cases in the dimension of maturity.[48] Childhood ends at different times for different individuals, since adulthood depends on maturity rather than only on age.[49] Thus, while there is a point when it is clearly true that an individual is a child (for example, at the age of five years) and a point when it is clearly false that an individual is a child (for example, at the age of fifty years), there are also cases when it is neither clearly true nor clearly false that an individual is a child (for example, at the age of fifteen years).

It is also possible for an ambiguous term to make a legislative provision unclear without necessarily making it vague.[50] If, for example, it is unclear in a mortgage statute whether the word 'party' in a particular provision refers to the mortgagee or the mortgagor, the reference is ambiguous rather than vague.[51] Such a provision would allow for two possible

[44] For a detailed discussion in this connection, see generally Azar (n 30).

[45] Reed Dickerson, *The Interpretation and Application of Statutes* (Little, Brown and Co 1975) 49; Poscher (n 39) 129.

[46] *Ibid*. See also Endicott, 'Vagueness and Law' (n 34) 174. On vagueness and statutory interpretation, see further HLA Hart, *The Concept of Law* (Oxford University Press 1961).

[47] Poscher (n 39) 130.

[48] *Ibid*.

[49] Endicott, 'Vagueness and Law' (n 34) 174–5.

[50] Dickerson, *The Interpretation and Application of Statutes* (n 45) 49.

[51] *Ibid*.

interpretations, raising an 'either-or' type of uncertainty rather than uncertainty about whether or not the provision applies at all.[52] Conversely, a vague term can make a provision unclear without necessarily making it ambiguous.[53] The word 'adult', for example, can render a legislative provision vague unless a specific age is defined for adulthood. It may be particularly difficult to determine the extent to which such a provision would appropriately apply to borderline cases involving, for example, teenagers over sixteen years old. Such uncertainty would arise not from ambiguity but rather from the vagueness of the word 'adult'.

Legal definitions can minimise and, depending on the possible sources of lexical indeterminacy in particular cases, eliminate certain forms of both ambiguity and vagueness. Common sources of ambiguity in legal interpretation include generality, homonymy, polysemy and synonymy.[54] A term is general if it can denote multiple concepts or objects while preserving the same meaning.[55] A term is homonymous if it has two or more semantically unrelated meanings. Polysemy refers to the coexistence of two or more semantically related meanings for a term. Synonymy is the opposite of polysemy: it occurs when several terms can convey the same meaning. As observed in existing literature, however, it is doubtful that there exists in the general basis of any natural language fully and perfectly synonymous terms.[56]

The recognition of a term as a source of ambiguity in a legislative provision might enable the addressee to disambiguate the disputed provision, through contextualisation or by considering pragmatic factors, thus deciphering the legislative intent within the relevant context in which the provision is invoked.[57] This should partly explain why ambiguity, particularly ambiguity resulting from homonymous terms, is rarely an issue in statutory interpretation.[58] Even so, there is no justification for deliberately adopting ambiguous legislative provisions.[59] Any actual, apparent or potential ambiguity in a legislative provision should be eliminated or at least minimised once recognised.

Legislative ambiguity can be eliminated or minimised not only by explicitly defining ambiguous terms where possible but also by carefully selecting more precise terms. Providing specific legal definitions may not entirely

52 *Ibid*.
53 *Ibid*.
54 See Knapp (n 27) 7–10; Azar (n 30) 126; Heikki ES Mattila, 'Legal Vocabulary' in Solan and Tiersma (eds) (n 39) 30–31.
55 Irving M Copilowish, 'Border-Line Cases, Vagueness, and Ambiguity' (1939) 6 *Philosophy of Science* 181, 182.
56 Knapp (n 27) 9.
57 Azar (n 30) 126. For an illustration in this regard, see Poscher (n 39) 129.
58 Lawrence M Solan, 'Vagueness and Ambiguity in Legal Interpretation' in Vijay K Bhatia and others (eds), *Vagueness in Normative Texts* (Peter Lang 2005) 79.
59 Dickerson, *The Interpretation and Application of Statutes* (n 45) 48.

eliminate ambiguity arising from generic and homonymous terms but it can surely eliminate polysemy and synonymy, and it is almost always necessary to do so in order to ensure legal certainty.[60] Both polysemy and synonymy can be effectively eliminated, in particular not only by explicitly defining any polysemous or synonymous terms used in a legislative provision but also by selecting more precise terms.

Unlike ambiguity, which can and should be eliminated whenever possible, vagueness is not only an intrinsic feature of both ordinary and legal language but is also often valuable.[61] The vagueness associated with certain terms can and should indeed be eliminated by legal definitions. To illustrate, it is important to first draw a distinction between vagueness involving only borderline cases, or what is known in the philosophical lexicon as the Sorites Paradox, and more complex, multidimensional cases of vagueness.[62] The vagueness arising from a Sorites sequence can be effectively eliminated by a stipulative definition that sets a certain cut-off point in the sequence.[63] For example, assuming there was a consensus as to the point at which one becomes a human being, the borderline cases associated with the concept of immaturity denoted by the word 'child' can be eliminated by defining a child as any human being below the age of eighteen years.[64]

Multidimensionally vague terms could also give rise to borderline cases but are not susceptible of precise definition by the stipulation of a cut-off point.[65] They are not susceptible of precise definition because they implicate multiple, incommensurable constitutive elements and the relation between those elements is such that it is not true that one of them is better or worse than the others, nor is it true that they are on a par with each other on every possible occasion.[66] It follows that the meaning to be assigned to multidimensionally vague terms depends on a multidimensional evaluation of the relevant constitutive elements of the disputed term.

The word 'reasonable', a common feature in English legal vocabulary, for example, is multidimensionally vague and is thus not susceptible of precise definition. What is reasonable on any given occasion is a question to be determined in light of all relevant facts and circumstances. One must evaluate the facts of each case to determine whether, for example, behaviour *x* is reasonable. There is simply no linguistic rule that would help determine what constitutes reasonable behaviour. Nor is there a common denominator that

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[60] Knapp (n 27) 9.

[61] Dickerson, *The Interpretation and Application of Statutes* (n 45) 49; Endicott, 'Vagueness and Law' (n 34) 177.

[62] Endicott, 'Vagueness and Law' (n 34).

[63] Marmor (n 26) 89–90.

[64] Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990), art 1.

[65] Marmor (n 26) 90.

[66] *Ibid*, 89.

would allow a quantitative comparison of the various factors that one should consider to determine what sort of behaviour is reasonable in all cases. Ultimately, one must make their own value judgment to determine whether, considering all relevant factors in a given case, behaviour x is reasonable. What is reasonable, to use a more familiar expression, is to be determined 'on a case-by-case basis' rather than by a fixed linguistic or legal rule.

It is important to underline that every legal system necessarily regulates human conduct through some vague provisions. First, a certain degree of vagueness, whether resulting from the use of generic terms, multidimensionally polysemous terms or any other sources of uncertainty,[67] is necessary not only to regulate complex patterns of human conduct which can only be effectively addressed in a general rather than precise manner but also to accommodate changing circumstances.[68] Second, a perfectly precise language is but an idealisation that can never be fully realised. While skilful legislative drafting can indeed help mitigate vagueness in legal language, absolute precision is unattainable. Attempts at achieving precision through stipulative definitions in particular will inevitably result in the stipulations themselves being expressed in less than perfectly precise terms, thereby inheriting some level of vagueness.[69]

Even the legal certainty that the democratic principle of the rule of law itself demands cannot therefore be understood as requiring the elimination of vague laws. It is not necessarily a failure in the rule of law when there is a legal dispute and the letter of the law provides no conclusive reason for a particular decision. A failure in the rule of law occurs when the law, due to vagueness or other reasons, fails to communicate to the subjects of the law and to the institutions of the legal system, standards that are sufficiently determinate of the actual purpose of the law.[70] Some might object to this claim on the ground that vague laws lead to arbitrary outcomes. But that objection would be misguided. Not only vague provisions can lead to arbitrariness. Both vagueness and precision can result in arbitrary outcomes.[71]

Vague laws may lead to arbitrariness in the sense that they may provide little guidance to decision-makers, leaving them with no clear justification for favouring one decision over another. But striving for precise regulation, not least through stipulative definitions, could result in even more pervasive forms of arbitrariness by constraining decision-makers from considering all relevant factors in each case. Therefore, while precise regulation is feasible, in particular where there is an appropriate relation between a measurable

[67] David Lanius, *Strategic Indeterminacy in the Law* (Oxford University Press 2019) 34.
[68] Endicott, 'Vagueness and Law' (n 34) 178.
[69] Timothy Williamson, *Vagueness* (Routledge 1994) 1.
[70] Endicott, 'Vagueness and Law' (n 34) 188.
[71] Timothy Endicott, 'The Value of Vagueness' in Andrei Marmor and Scott Soames (eds), *Philosophical Foundations of Language in the Law* (Oxford University Press 2011).

criterion—such as a person's age—and the regulatory objective,[72] care must be taken to prevent the rigidity and inflexibility of precise regulation leading to arbitrary and socially undesirable outcomes in complex cases. The challenge for lawmakers is to assess whether, in a given regulatory context, the arbitrariness likely to arise from precision outweighs the arbitrariness likely to arise from the application of a vague law.[73]

2.3. The bottom line

Overall, legal definitions are both socially desirable and necessary for the effective communication of laws, albeit not necessarily with respect to all terms used in legislative provisions. They are particularly needed to mitigate the inherent ambiguity and vagueness of ordinary language, which is the primary medium through which laws are communicated to the addressees. While it is true that legal definitions may not in and of themselves eliminate all forms of legal uncertainty, they normally serve as linguistic cues that assist both private actors and public officials in understanding laws and determining whether a given act or omission falls within the scope of the legal rules governing human conduct related to that act or omission. In effect, unlike other stipulative definitions that may command neither assent nor respect, legal definitions constitute rules of law.[74] By the same token, if lawmakers were to adopt a legal definition of disinformation, they would effectively not only establish a legal rule regarding what constitutes disinformation but also communicate to everyone subject to the law the types of semantic content that fall within the regulatory boundaries set by the definition.

3. Why we need a legal definition of disinformation

Etymology suggests that the word 'disinformation' is a comparatively recent entry into the English language, although it is not necessarily a neologism. According to one account, an early and perhaps the first instance of the word 'disinformation'—inferring deliberate intent to mislead—appeared in *The Lincoln Star* newspaper in 1941, with reference to a Moscow trick known in international military intelligence as *дезинформация* (transliterated as *dezinformatsiya*).[75] The word 'disinformation' was thus assimilated into the English vocabulary as a translation of *дезинформация* from Russian.[76] Notwithstanding recent English dictionary entries, however, this

[72] Endicott, 'Vagueness and Law' (n 34) 178.
[73] Endicott, 'The Value of Vagueness' (n 71) 23.
[74] Huntington Cairns, 'A Note on Legal Definitions' (1936) 36 *Columbia Law Review* 1099, 1103.
[75] Hadley R Newman, 'Information Warfare: Leveraging the DMMI Matrix Cube for Risk Assessment' (2022) 21 *Journal of Information Warfare* 84, 85.
[76] *Ibid*, 86.

word is often conflated with other types of 'problematic information' in popular conversations, scholarly analyses and policy decisions alike.[77]

Existing definitions of disinformation are thus characterised by both ambiguity and vagueness. It should suffice for illustrative purposes to refer to seminal policy definitions put forward at the pan-European level. There are currently several differently worded policy definitions of disinformation adopted by the EC and by the Committee of Ministers of the Council of Europe. Whether by accident or by design, the EC alone has adopted three different definitions.

The origins of the EC's definitions of disinformation can be traced back to the findings of its consultations with European citizens and stakeholders. Notably, in late 2017, the EC established a thirty-nine-member High-Level Expert Group (HLEG) on 'fake news and online disinformation' to advise it on policy initiatives aimed at countering the spread of fake news and disinformation online. In its report, delivered in March 2018, the HLEG avoids using the term 'fake news'. It contends that this term is both inadequate to capture the complex phenomenon in view and 'misleading, because it has been appropriated by some politicians and their supporters, who use the term to dismiss coverage that they find disagreeable, and has thus become a weapon with which powerful actors can interfere in [the] circulation of information and attack and undermine independent news media'.[78] The HLEG thus favours the term 'disinformation'. It defines disinformation as 'false, inaccurate, or misleading information designed, presented and promoted to intentionally cause public harm or for profit'.[79] The HLEG also distinguishes disinformation from misinformation, defining the latter as 'misleading or inaccurate information shared by people who do not recognize it as such'.[80]

For its part, the EC does not appear to fully endorse the HLEG's definition of disinformation, or at least not the specific wording of that definition. Its first definition of disinformation appears in its communication on Tackling Online Disinformation, published in April 2018 following receipt of the HLEG's report. In that communication, the EC defines disinformation 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'.[81] Thus, unlike the HLEG, which depicts disinformation

[77] Fabio Giglietto and others, '"Fake News" is the Invention of a Liar: How False Information Circulates within the Hybrid News System' (2019) 67 *Current Sociology Monograph* 625; Deen Freelon and Chris Wells, 'Disinformation as Political Communication' (2020) 37 *Political Communication* 145, 145.
[78] High Level Expert Group on Fake News and Online Disinformation, 'Report to the European Commission on a Multi-Dimensional Approach to Disinformation' (European Union 2018) 10.
[79] *Ibid*.
[80] *Ibid*.
[81] European Commission, 'Tackling Online Disinformation: A European Approach' (Communication) COM (2018) 236 final, 3–4.

simply as false, inaccurate or misleading information, the EC qualifies its description of the information in view with the adverb 'verifiably' and does not include 'inaccurate information' as part of its definition. It is also noteworthy that the EC reproduces this definition in its Action Plan Against Disinformation, which it prepared jointly with the High Representative of the Union for Foreign Affairs and Security Policy and published in December 2018.[82]

The EC's second definition of disinformation appears in its subsequent communication on a European Democracy Action Plan (EDAP), published in December 2020. In that communication, the EC defines disinformation 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'.[83] One can only wonder why, among other changes made to the wording of its 2018 definition, the EC drops the adverb 'verifiably' and introduces the concept of 'political gain' in this 'new' definition. The EC itself stops short of providing an explanation for these changes.

It is also noteworthy that, like the HLEG, the EC draws a distinction between disinformation and misinformation in the EDAP. It defines misinformation as 'false or misleading content shared without harmful intent though the effects can still be harmful, eg, when people share false information with friends and family in good faith'.[84] This definition of misinformation is somewhat similar to that of the HLEG but the actual wording is evidently not identical.

What is even more striking is that the EC fails to maintain its own distinction between disinformation and misinformation in its third definition of disinformation. In its Guidance On Strengthening the Code of Practice on Disinformation published in May 2021, the EC uses the term 'disinformation' to refer not only to both disinformation and misinformation as defined in the EDAP but also to what the EC itself terms 'information influence operations' and 'foreign interference in the information space'.[85] In the EC's own words, an 'information influence operation refers to coordinated efforts by either domestic or foreign actors to influence a target audience using a range of deceptive means, including suppressing independent information sources in combination with disinformation', whereas

> foreign interference in the information space, often carried out as part of a broader hybrid operation, can be understood as coercive and deceptive

[82] European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Action Plan Against Disinformation' (Communication) JOIN(2018) 36 final, 1.

[83] European Commission, 'European Democracy Action Plan' (Communication) COM(2020) 790 final, 18.

[84] *Ibid*.

[85] European Commission, 'European Commission Guidance on Strengthening the Code of Practice on Disinformation' (Communication) COM(2021) 262 final, 5.

> efforts to disrupt the free formation and expression of individuals' political will by a foreign state actor or its agents.[86]

The ensuing Code of Conduct on Disinformation thus reaffirms in its preamble that the term 'disinformation' as used therein 'is considered to include misinformation, disinformation, information influence operations and foreign interference in the information space'.[87]

Efforts to define disinformation within the context of the Council of Europe on the other hand can be traced back to the oft-cited independent expert report on Information Disorder, prepared by Claire Wardle and Hossein Derakhshan and published by the Council of Europe in October 2017. Wardle and Derakhshan identify three types of what they term 'information disorder': disinformation, misinformation and malinformation. They define disinformation as information 'that is false and deliberately created to harm a person, social group, organization or country', misinformation as information 'that is false, but not created with the intention of causing harm' and malinformation as information 'that is based on reality, used to inflict harm on a person, organization or country'.[88] They also regret that much of the discourse surrounding 'fake news' conflates these three phenomena.

The Committee of Ministers of the Council of Europe does not, however, appear to endorse Wardle and Derakhshan's definition of disinformation, or at least not the specific wording employed therein. In its 2022 recommendations in the field of media and information society, the Committee of Ministers defines disinformation as 'verifiably false, inaccurate or misleading information deliberately created and disseminated to cause harm or pursue economic or political gain by deceiving the public'.[89] This definition bears some resemblance to the EC's 2018 definition but the actual wording differs significantly. Most notably, whereas the Committee of Ministers' definition includes reference to 'inaccurate information', the EC's definition explicitly refers only to 'verifiably false information' and 'misleading information'.

The foregoing examples should suffice to illustrate the point that the word 'disinformation', as generally understood in common usage, suffers from a significant lack of shared understanding. The terms 'false information',

[86] COM(2020) 790 final (n 83) 18.

[87] Code of Conduct on Disinformation, preamble (footnotes omitted).

[88] Claire Wardle and Hossein Derakhshan, *Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making* (Council of Europe Publishing 2017) 20.

[89] Recommendation CM/Rec(2022)11 of the Committee of Ministers to member states on principles for media and communication governance (adopted by the Committee of Ministers on 6 April 2022 at the 1431st meeting of the Ministers' Deputies), appendix, para 4; Recommendation CM/Rec(2022)12 of the Committee of Ministers to member states on electoral communication and media coverage of election campaigns (adopted by the Committee of Ministers on 6 April 2022 at the 1431st meeting of the Ministers' Deputies), appendix, para 7.

'misleading information' and 'inaccurate information' often associated with this word in particular are both ambiguous and vague. Indeed, existing policy definitions of disinformation in Europe are characterised by not only unnecessary ambiguities but also excessive vagueness.

3.1. Unnecessary ambiguities

There is no gainsaying that it is possible for a piece of information to be false, inaccurate and misleading at the same time. Information may be misleading either due to falsity or inaccuracy, or indeed due to both falsity and inaccuracy. Therefore, just as it may be perfectly acceptable in appropriate cases to use the words 'alcohol' and 'drink' interchangeably, there are cases where it may be perfectly acceptable to use the terms 'false information', 'inaccurate information' and 'misleading information' as synonyms. However, as noted above, it is doubtful that there exists in the general basis of any natural language fully and perfectly synonymous terms.[90]

It is particularly evident that the terms 'false information', 'inaccurate information' and 'misleading information' are neither fully nor perfectly synonymous. Just like not every drink is alcohol, not every piece of false or inaccurate information is misleading. False information may not be misleading, just as misleading information may not be false. Even inaccurate information may not necessarily be misleading. Significantly, information need not be false to mislead people. Doctored videos and deepfakes, for example, may be misleading but do not necessarily constitute false information.[91] They do not literally say that 'Black is white' or that 'One plus one equals five'. Doctored videos may mislead people due to the decontextualisation of their information content, while deepfakes may mislead people simply because their information content is not real. Similarly, a true statement lacking certain material details (or a half-truth) is not false information but may nonetheless be misleading.[92] It is also a truism that even statements of opinion or value judgments lacking a correct factual basis can mislead people and thus cause harm.[93]

All indications suggest that, whether wittingly or unwittingly, policymakers and academics alike are in fact concerned about misleading information rather than false or inaccurate information per se. False or otherwise inaccurate information as such cannot be a cause for public

[90] Knapp (n 27) 9.
[91] Cass R Sunstein, *Liars: Falsehoods and Free Speech in an Age of Deception* (Oxford University Press 2021) 41.
[92] Sille Obelitz Søe, 'Algorithmic Detection of Misinformation and Disinformation: Gricean Perspectives' (2018) 74 *Journal of Documentation* 309, 322–4.
[93] See generally W Page Keeton, 'Fraud: Misrepresentations of Opinion' (1937) 21 *Minnesota Law Review* 643; Jeffrey L Kirchmeier, 'The Illusion of the Fact-Opinion Distinction in Defamation Law' (1988–89) 39 *Case Western Reserve Law Review* 867.

concern.[94] Neither false nor inaccurate information is likely to cause harm unless it is also misleading. This holds true regardless of whether the falsity or inaccuracy of the information in question is verifiable or not. Whether a given piece of information can be verified as false or inaccurate does not tell us anything about whether it is likely to cause harm. It should therefore be unsurprising that the HLEG explicitly states in its report that its definition of disinformation does not include 'other forms of *deliberate but not misleading distortions of facts such [as] satire and parody*', even though its definition also refers to false and inaccurate information.[95] The fact that the EC underlines that its definition of disinformation 'does not include … *satire and parody, or clearly identified partisan news and commentary*' is also further evidence that even the EC itself is, in reality, concerned about misleading information as opposed to false information as such.[96]

It is thus evident that existing policy definitions of disinformation are needlessly ambiguous. There appears to be no justification for conflating misleading information with other types of information if policymakers are in fact concerned about protecting people from misleading information. Existing definitions are therefore both overinclusive and underinclusive insofar as they refer to false and/or inaccurate information. They are overinclusive in that they inadvertently capture false or inaccurate information which is characteristically harmless, such as jokes, satire, irony and parody. Indeed, the prevailing tendency to equate disinformation with false or inaccurate information flies in the face of existing legal standards on freedom of expression. The ECtHR leaves no doubt in its case law that such information content falls within the protective scope of freedom of expression.

In particular, the ECtHR has consistently emphasised that satire constitutes a legitimately protected form of artistic expression and social commentary within the scope of article 10 of the ECHR. Satirical forms of expression relating to topical issues, in the ECtHR's own words, 'play a very important role in open discussion of matters of public concern, an indispensable feature of a democratic society'.[97] The ECtHR thus maintains that 'any interference with the right of an artist—or anyone else—to use this means of expression should be examined with particular care'.[98] More generally, the ECtHR considers that article 10 of the ECHR 'as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful'.[99] To hold

[94] Phiri (n 11) 74.
[95] High Level Expert Group on Fake News and Online Disinformation (n 78) 11 (emphasis added).
[96] COM (2018) 236 final (n 81) 4; JOIN(2018) 36 final (n 82) 1 (emphasis added).
[97] *Eon v France* App no 26118/10 (ECtHR, 14 March 2013), para 61.
[98] *Ibid*, para 60.
[99] *Salov v Ukraine* App no 65518/01 (ECtHR, 6 September 2005), para 113.

otherwise, according to the ECtHR, is to 'deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression' enshrined in article 10.[100] This position is made even more unequivocal in a subsequent separate joint concurring opinion of three judges, maintaining that 'the power to sanction allegedly "untrue" statements, even when justified by the need to protect public health, [cannot] be said to pursue a legitimate aim' within the meaning of article 10(2) of the ECHR.[101]

It is noteworthy that the term 'untrue' or 'false' information is itself ambiguous in that the concept of truth or falsity may be understood either in a literal sense or in a pragmatic sense. The Gricean theory of meaning teaches us that the truth or falsity of what is said does not determine the truth or falsity of what is pragmatically meant or implicated in a given communication context. What is said may be false, while what is implicated may be true; just as what is said may be true, while what is implicated may be false.[102] A half-truth or otherwise decontextualised information, for example, may be literally true but may implicate something false and may thus be misleading. It is therefore imperative in practice to draw a distinction between what one says and what one means or implicates (implies, indicates, suggests, etc).[103] What one means on a given occasion

> may be either *conventionally* implicated (implicated by virtue of the meaning of some word or phrase which he has used) or *non-conventionally* implicated (in which case the specification of the implicature falls outside the specification of the conventional meaning of the words used).[104]

While Grice himself appears to use the term 'conventional implicature' to denote an implicature determined by linguistic meaning, implicatures can also be conventional in a non-technical sense, whereby a certain word or phrase acquires a different arbitrary meaning from its linguistic meaning based on usage. New users of a language often pick up such conventions from prior users without formal instruction.[105]

Even the concept of 'verifiably false information', which implies 'fact-checked information', is therefore largely an illusion.[106] A given statement

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[100] *Ibid*.
[101] *Avagyan v Russia* App no 36911/20 (ECtHR, 29 April 2025), joint concurring opinion of Judges Ktistakis, Kovatcheva and Đurović, para 4.
[102] H Paul Grice, 'Logic and Conversation' in Peter Cole and Jerry L Morgan (eds), *Syntax and Semantics, Volume 3: Speech Acts* (Academic Press 1975) 58.
[103] H Paul Grice, 'Utterer's Meaning, Sentence-Meaning, and Word-Meaning' (1968) 4 *Foundations of Language* 225, 225.
[104] *Ibid* (emphasis original).
[105] Wayne Davis, 'Implicature' in Edward N Zalta and Uri Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (Spring 2024 Edition) <https://plato.stanford.edu/archives/spr2024/entries/implicature/>.
[106] Kirchmeier (n 93); Otávio Vinhas and Marco Bastos, 'Fact-Checking Misinformation: Eight Notes on Consensus Reality' (2022) 23 *Journalism Studies* 448.

can have different meanings in different contexts. What may be considered a false statement of fact may in fact constitute true information by conventional or non-conventional implicature, or indeed may be a mere opinion. Where a losing candidate in an election claims that the election was rigged, for example, that candidate could be making either a deliberate false statement of fact or merely expressing an honest opinion that they would have won the election had it not been rigged. Existing empirical studies also confirm that fact-checkers not only tend to be politically biased but also often disagree among themselves as to whether or not particular statements should be characterised as false.[107]

It should therefore come as no surprise that the ECtHR underlines in its case law that the task of distinguishing between assertions of fact and opinions or value judgments is all the more delicate if freedom of expression on matters of public importance is to be maintained. In the ECtHR's own words,

> [in] order to distinguish between a factual allegation and a value judgment it is necessary to take account of the circumstances of the case and the general tone of the remarks … , bearing in mind that *assertions about matters of public interest may, on that basis, constitute value judgments rather than statements of fact*.[108]

It can thus be particularly challenging to maintain freedom of expression in a society that empowers private actors to make such a delicate distinction. This serves only to underscore the fact that even so-called private 'fact-checking' cannot be relied upon to make political judgments about what constitutes false information in relation to important matters of public interest.[109]

Existing policy definitions of disinformation are also underinclusive in that falsity and inaccuracy are only some of the possible reasons why information may be misleading. Half-truths, true information with false implicatures, deepfakes, doctored videos and other forms of decontextualised information can all mislead people, even though none of these forms of misleading information can be aptly characterised as literally or verifiably false.[110] As noted above, deepfakes and doctored videos in particular may be misleading not due to *falsity* but due to *fakery*; their essence is not that they are *false* but that they are *phony*.[111] It is obvious that even those who

[107] Chloe Lim, 'Checking How Fact-Checkers Check' (2018) 5(3) *Research & Politics* 1; Charles Louis-Sidois, 'Both Judge and Party? Investigating the Political Unbiasedness of Fact-Checkers' (2025) *Journal of the European Economic Association*, https://doi.org/10.1093/jeea/jvaf011.

[108] *Morice v France* App no 29369/10 (ECtHR [Grand Chamber], 23 April 2015), para 126.

[109] Vinhas and Bastos (n 106).

[110] Grice, 'Logic and Conversation' (n 102) 58; Søe, 'Algorithmic Detection of Misinformation and Disinformation' (n 92) 322–4; Sunstein (n 91) 115; Phiri (n 11) 76–77.

[111] For a further illustration of this point, see Harry G Frankfurt, *On Bullshit* (Princeton University Press 2005) 46ff.

define disinformation by reference to falsity have these forms of information in mind.

The potential social harm that may result from such information serves only to reinforce the view that the policy discourse should focus on misleading information rather than on false or inaccurate information as such. Fortunately, even the ECtHR already recognises that the dissemination of misleading opinions or value judgments lacking a 'sufficient factual basis' can be duly restricted by law without undermining freedom of expression.[112] A definition of disinformation that focuses on misleading information would therefore not only help address the unnecessary ambiguities in existing policy definitions but would also be responsive to the social reality that information need not be false to mislead people.

3.2. Excessive vagueness

All existing policy definitions of disinformation are also characterised by excessive vagueness, primarily due to the needless ambiguities in those definitions. The terms 'false information', 'inaccurate information' and 'misleading information' are all vague. Existing definitions do not specify the degree to which information must be false, inaccurate or misleading in order to qualify as disinformation. It is thus possible that information that is only minimally false or inaccurate, and substantially true and accurate, may be considered disinformation under existing definitions. The concepts of 'information influence operations' and 'foreign interference in the information space' recognised by the Code of Conduct on Disinformation as specific forms of 'disinformation' are even more nebulous. As indicated above, the definitions of these concepts provided by the EC in the EDAP are so loose and so vague that any controversial piece of information originating from a foreign source in particular can potentially be interpreted as disinformation merely by virtue of its origin.

Even the reference to the underlying motivations or intentions of those who produce and/or communicate alleged disinformation in existing policy definitions does not appear to help matters. No one can know another person's intentions in the absence of an honest disclosure. There is simply no science or DNA evidence that can penetrate the mind of an individual to determine with certainty what they were actually thinking at the time of communicating any given piece of information. This holds true regardless of whether the communicator's subjective intention was to promote a particular political or ideological belief, or indeed to advance other personal interests, economic or otherwise. As with legislative intent,

[112] *Morice v France* (n 108), para 126; *Khural and Zeynalov v Azerbaijan (no 2)* App no 383/12 (ECtHR, 19 January 2023), para 47.

the subjective intentions of those who communicate alleged disinformation are always a matter of conjecture unless those intentions are honestly disclosed by the communicators themselves.

Any extrajudicial attempts to establish the objective—rather than subjective—intentions of the communicator based on relevant evidence can be especially difficult in the online context. Online communication is often divorced from relevant cues such as body language, vocal tone and other factors that could help decipher what the communicator likely intended when they posted a specific piece of content online. The distinction that existing policy definitions of disinformation attempt to draw between the intention to cause harm and the intention to secure economic or political gain thus serves only to complicate matters further. It is therefore overly optimistic for policymakers to expect private actors to make reliable judgments about the intentions of online communicators.

There is a particularly high risk under the EU's current regulatory model that allegedly false or misleading information will be censored irrespective of the underlying communicative intentions, and regardless of whether the information in question is in fact false or misleading. Such indiscriminate censorship could affect virtually any piece of controversial content posted on major online platforms. Given the diversity of users and the sheer volume of content posted on such platforms, online platform operators do not generally have the investigative capacity or private economic incentives to ascertain the veracity of user-generated content, let alone the intentions of individual users. It follows that, from the standpoint of operators of all major online platforms, the most practical and efficient way to avoid liability under the DSA for non-compliance with the due diligence obligations envisaged in the Code of Conduct on Disinformation and the guidelines issued by the EC is simply to censor as disinformation any piece of user-generated content they deem either false or misleading, or both false and misleading, whether on their own initiative or upon receiving a notice from an interested party.[113]

The concept of harm envisaged in existing policy definitions of disinformation is equally vague. Unless one can provide conclusive evidence of a causal link between a particular piece of information and the harm it has actually caused, any attempt to restrict the circulation of information on the ground that it 'may' cause harm to others is contestable. Indeed, depending on how one interprets and uses it, even good and reliable information may cause harm. It follows that virtually any piece of information that one considers unfavourable may be deemed disinformation insofar as existing definitions characterise disinformation as potentially harmful information.

[113] Sharon Galantino, 'How Will the EU Digital Services Act Affect the Regulation of Disinformation?' (2023) 20 *SCRIPTed* 89, 128.

This serves only to further underscore the social need to eliminate, at the very least, the ambiguities in existing policy definitions and to focus only on the attribute that makes information characteristically harmful, namely misleadingness, rather than falsity, inaccuracy or indeed the mere fact that a particular piece of information originates from a foreign source.

4. A legal definition of disinformation

The ECtHR has reiterated on many occasions that the purpose of the ECHR, 'as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory'.[114] It goes without saying that the guarantee of freedom to receive information in particular would be largely theoretical and illusory if people had a right to deliberately disseminate misleading information in the name of exercising freedom of expression. The ECtHR thus duly recognises that the guarantee of freedom to receive information under article 10 of the ECHR implies 'the right of the public to be properly informed', which engenders a corresponding duty requiring those who seek to exercise freedom to impart information to provide reliable information.[115] This is also consistent with the actual wording of article 10(2) of the ECHR, according to which the exercise of freedom of expression 'carries with it duties and responsibilities' and may therefore be 'subject to such formalities, conditions, restrictions or penalties' as may be prescribed by law for the protection of certain common values, including the rights of others.

It is therefore a settled principle of law that 'all persons, including journalists, who exercise their freedom of expression undertake "duties and responsibilities", the scope of which depends on their situation and the technical means they use'.[116] The ECtHR has reiterated on many occasions that the legal protection afforded to journalists in relation to reporting on matters of public interest in particular is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.[117] Significantly, the ECtHR considers that 'the same principle must apply to others who engage in public debate'.[118] This holds true even though, as already intimated, the ECtHR acknowledges

[114] *Magyar Helsinki Bizottság v Hungary* App no 18030/11 (ECtHR [Grand Chamber], 8 November 2016), para 121.
[115] *The Sunday Times v the United Kingdom (no 1)* App no 6538/74 (ECtHR, 26 April 1979), para 66.
[116] *Stoll v Switzerland* App no 69698/01 (ECtHR [Grand Chamber],10 December 2007), para 102.
[117] See, among many other cases, *Fressoz and Roire v France* App no 29183/95(ECtHR [Grand Chamber], 21 January 1999), para 54; *Stoll v Switzerland* (n 116), para 103; *NIT S.R.L. v the Republic of Moldova* App no 28470/12 (ECtHR [Grand Chamber], 5 April 2022), para 180.
[118] *Steel and Morris v the United Kingdom* App no 68416/01 (ECtHR, 15 February 2005), para 90; *Marcinkevičius v Lithuania* App no 24919/20 (ECtHR, 15 November 2022), para 91.

that private individuals who are not professional journalists may not be bound by the article 10 'duties and responsibilities' to the same extent as those required by the ethics of journalism.[119]

The duty to provide reliable information relating to matters of public interest must also necessarily apply to information provided by public bodies. Even the ECtHR shares this view. It considers that the right of access to information held by public bodies as a specific component of freedom of expression may be violated not only when access to information is denied but also when a public body, while being under a statutory obligation to provide information, provides information that is disingenuous, inaccurate or insufficient.[120] Indeed, more generally, the ECtHR acknowledges that 'the circulation of disinformation or misinformation could potentially interfere with the right to receive information inherent in Article 10' of the ECHR.[121]

All indications suggest that those who intentionally or recklessly disseminate misleading information relating to matters of public interest cannot claim legal protection in the name of freedom of expression if public authorities intervene in a targeted and proportionate manner to prevent such antisocial behaviour. Practical cases in which the ECtHR has made this point clear abound. For example, the ECtHR has previously held that the decision by a domestic court to convict an applicant for merely discussing false information about the death of a presidential candidate in the absence of proof that the applicant was 'intentionally trying to deceive other voters and to impede their ability to vote' during the presidential election amounted to a violation of the applicant's right to freedom of expression under article 10 of the ECHR.[122] The ECtHR has also held that a law-based disciplinary sanction imposed on a practising medical doctor, in the form of a suspended fine of a relatively low amount, for making scientifically untenable statements about the ineffectiveness of vaccines on his website in the context of the global COVID-19 pandemic did not exceed what was 'necessary in a democratic society' to achieve the legitimate aims of protecting 'health' and 'the rights of others' within the meaning of article 10(2) of the ECHR.[123]

In a related case involving an applicant who had been convicted by a domestic court for allegedly disseminating 'untrue information' through social media denying the existence of COVID-19 cases in her region, the ECtHR acknowledged that 'combating disinformation during a public health

[119] *Wojczuk v Poland* App no 52969/13 (ECtHR, 9 December 2021), para 102.
[120] *Association BURESTOP 55 and others v France* Apps nos 56176/18 and 5 others (ECtHR, 1 July 2021), paras 85 and 108.
[121] *Bradshaw and Others v the United Kingdom* (ECtHR, 22 July 2025), para 161.
[122] *Salov v Ukraine* (n 99), para 113.
[123] *Bielau v Austria* App no 20007/22 (ECtHR, 27 August 2024), paras 38–46.

emergency may be a valid objective' to limit the scope of freedom of expression.[124] The ECtHR itself stopped short of clarifying what it meant by disinformation on this occasion but, bearing in mind that the applicant was not a medical expert, cited the domestic court's 'perfunctory approach' to the establishment of the applicant's culpability and its 'failure to establish deliberate falsity' as the main reasons why it concluded that the applicant's conviction could not be considered 'necessary in a democratic society' within the meaning of article 10(2) of the ECHR.[125]

Even the Court of Justice of the European Union (CJEU) appears to recognise that the imposition of proportionate legal sanctions on those who intentionally or recklessly disseminate misleading information relating to matters of public interest is fully compatible with the freedom of expression enshrined in article 11 of the Charter. Thus, consistent with the ECtHR's case law, the CJEU has previously held that the adoption of non-penal, temporary and reversible restrictive measures against a journalist who had been reporting 'in a manner which was biased and contrary to the journalistic principles of social responsibility, harm minimisation, truth, impartiality and justice, in order to manipulate Russian public opinion through disinformation techniques' could not 'be regarded as a disproportionate restriction of his right to freedom of expression' under article 11 of the Charter.[126]

The foregoing examples should suffice to demonstrate that both the ECtHR and the CJEU would in principle accept the imposition of legal restrictions on the dissemination of misleading information, including when the misleadingness is due to falsity, in cases where it can be established that the applicant was deliberately or intentionally 'trying to deceive others', was deliberately or intentionally 'trying to impede the ability' of others to exercise their rights or was otherwise deliberately or recklessly using certain information techniques 'in order to manipulate public opinion'. It follows that, if prudently framed, a law specifically designed to protect people from those who deliberately disseminate misleading information relating to matters of public interest would be fully compatible with freedom of expression. The unnecessary ambiguities in existing policy definitions can therefore be effectively eliminated, and the vagueness substantially mitigated, by legally defining disinformation as misleading information that is communicated with intent to mislead and that may cause harm.

This definition is particularly apt for regulatory purposes if the misleading information in question relates to a matter of public interest. This is so not only because those who knowingly disseminate misleading information

[124] *Avagyan v Russia* (n 101), para 37.
[125] *Ibid*, para 39. cf *Bielau v Austria* (n 115).
[126] Case T-262/15 *Kiselev v Council* [2017] ECLI:EU:T:2017:392, paras 98 and 112. See also Case T-125/22 *RT France v Council* [2022] ECLI:EU:T:2022:483.

relating to matters of public importance flout the duty to act in good faith in order to provide reliable information but all the more so because observance of this duty is a matter of social necessity if the legal protection of freedom of expression itself—particularly freedom to receive information or, more specifically, the right of the public to be properly informed—is to be practical and effective, not merely theoretical or illusory.

The legal definition of disinformation advocated here is also consistent with the etymology alluded to above, according to which the word 'disinformation' was assimilated into the English vocabulary as a translation of *дезинформация* (transliterated as *dezinformatsiya*), which refers to a Moscow trick in international military intelligence, implying 'deliberate intent to mislead'.[127] It thus also captures what the EC calls 'information influence operations' and 'foreign interference in the information space'. Indeed, the proposed definition is broad enough to capture deliberately misleading information, whether disseminated by domestic or foreign actors, and irrespective of whether the disseminator is to be characterised as a private or state actor. This holds true even though it may be necessary to devise different regulatory strategies to effectively address different types of disinformation actors, such as anonymous, pseudonymous and foreign actors.[128]

The fact that the three main elements of the proposed definition of disinformation—namely misleading information, the intent to mislead and the potential to cause harm—are somewhat vague does not in and of itself negate the suitability of the proposed definition for regulatory purposes. As already noted, some degree of vagueness is not only inevitable in law but may also be valuable. Even the ECtHR recognises that absolute precision in the framing of laws is often practically impossible to attain, or may otherwise result in excessive rigidity, particularly in fields in which the prevailing circumstances may evolve over time. It thus fully acknowledges the reality that 'many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice'.[129] Indeed, as the ECtHR itself points out, '[the] role of adjudication vested in the national courts is precisely to dissipate such interpretational doubts' as may arise from the inevitably vague language used in legal provisions.[130]

4.1. Misleading information

Some commentators who prefer to equate disinformation with false information contend that the term 'misleading information' which appears in

[127] Newman (n 75) 85. See also generally Thomas Rid, *Active Measures: The Secret History of Disinformation and Political Warfare* (Farrar, Straus and Giroux 2020).
[128] In this connection, see Phiri (n 11) 143ff.
[129] *NIT S.R.L. v the Republic of Moldova* (n 117), para159.
[130] *Ibid*, para 160.

existing policy definitions should be criticised because it 'invites a subjective criterion' for determining what constitutes disinformation.[131] These commentators thus suggest that the term 'false information' represents a more objective concept. But this is somewhat misguided. As noted above, even if a given piece of information were characterised as false according to an objective criterion, that alone would not tell us anything about whether that information is likely to cause harm, or indeed whether it should be *legally* treated as a false statement of fact or as a mere opinion. The term 'false information' is not only ambiguous and vague but also oversimplifies the information phenomenon under consideration. It is already clear from the foregoing discussion that this term is both overinclusive—particularly due to its inherent ambiguity and vagueness, making the term inadvertently capture socially harmless information that is false but non-misleading—and underinclusive, in that it fails to capture certain forms of information which cannot be neatly characterised as false but may nonetheless mislead people and thus cause harm.

Evidently, the term 'misleading information' represents a more pragmatic and suitable concept if disinformation is to be regarded as a serious social phenomenon that warrants a public regulatory response. It is indeed possible to determine whether a given piece of information is misleading in the relevant communication context using objective evidence rather than subjective criteria. Perhaps the only relevant policy challenge in this connection lies in deciding whom to entrust with the responsibility for determining what constitutes misleading information for regulatory purposes. As with the task of determining what constitutes 'false information', the foregoing analysis suggests that this responsibility is too delicate to be left in private hands, let alone in the hands of executive officials. All indications suggest that it would be highly perilous to assign this responsibility to anyone other than competent judicial authorities.

4.2. Intent to mislead

The element of intent in the proposed definition of disinformation is all the more important as it would help ensure a socially optimal degree of legal certainty if policymakers were to impose restrictions on the dissemination of misleading information relating to matters of public importance. Those who seek to communicate information relating to matters of public interest in good faith would rest assured that the risk of being held legally liable remains low unless they are certain that the information they seek to communicate is misleading. This would also serve as an incentive for those

[131] Ronan Ó Fathaigh, Natali Helberger and Naomi Appelman, 'The Perils of Legally Defining Disinformation' (2021) 10(4) *Internet Policy Review* 1, 18.

who may wish to communicate potentially misleading information for a purpose other than to mislead the public to indicate that other purpose, either directly or indirectly, thereby reducing the risk of misleading others.

As already noted above, subjective communicative intentions may not be known in the absence of an honest disclosure. It follows that, like legislative intent, the intent to be established for the purpose of the legal definition advocated in this article must be based on objective rather than subjective evidence. Indeed, there is nothing extraordinary about this approach. Legal doctrines across jurisdictions already distinguish between subjective intent, which refers to the actual mental state of an actor, and objective intent, 'which considers outward or external manifestations of intent and then determines how a reasonable person would understand the actor's intentions based on those manifestations'.[132] It goes without saying that, as elaborated in section 2.2 of this article, the test of reasonableness in determining objective intent is itself multidimensionally vague. But the communicator's intent to mislead in particular can be inferred from the relevant context in which the communication occurs.

The relevant intent may be established, for example, by demonstrating that the communicator knew or ought to have known at the time of communication that the information in question was misleading. In other words, the intent to mislead may be justifiably imputed where it can be shown that the communicator acted in bad faith or with actual malice by disseminating misleading information with knowledge that it was misleading or with reckless disregard of its misleading nature.[133] On this account, even those who knowingly use misleading information as clickbait for personal financial gain would be presumed to have the relevant intent to mislead. This would also obviate the need to attempt to make an extrajudicial distinction between financial and ideological motivations for disseminating misleading information, as existing policy definitions of disinformation do.

Critics may argue that the element of intent renders the proposed definition of disinformation deficient in that it fails to account for the fact that misleading information is potentially harmful regardless of the underlying communicative intentions.[134] Indeed, in its 2021 Guidance on Strengthening the Code of Practice on Disinformation, the EC uses this very argument as justification for its decision to conflate its definition of disinformation not only with misinformation but also with what it calls 'information influence operations' and 'foreign interference in the information space'. It observes that the so-called 'infodemic' around the COVID-19

[132] Verstraete, Bambauer and Bambauer (n 6) 829. See also generally R George Wright, 'Objective and Subjective Tests in the Law' (2017) 16 *University of New Hampshire Law Review* 121.

[133] cf *New York Times Co v Sullivan* 376 US 254, 279–80 (1964).

[134] See, for example, Kalina Bontcheva and Julie Posetti (eds), *Balancing Act: Countering Digital Disinformation While Respecting Freedom of Expression* (International Telecommunication Union 2020).

pandemic in particular 'demonstrated that misinformation (false or misleading information spread without a malicious intent) can also pose substantial public harm if it becomes viral', hence the need for the signatories of the ensuing code to 'commit to have in place appropriate policies and take proportionate actions to mitigate the risks posed by misinformation'.[135] In fact, there are several other practical difficulties associated with an intent-based definition of disinformation, particularly in the online context, when devising regulatory strategies. Some of these have already been addressed in existing academic literature and need not be rehashed here, as this article is not concerned with the choice of effective regulatory strategies for the information phenomenon it envisages.[136]

Suffice it to say that the element of intent effectively excludes from the legal definition of disinformation advocated in this article any misleading information that is communicated without intent to mislead. On this account, even misleading content generated by large language model-based chatbots, whether characterised as 'bullshit'[137] or indeed as 'botshit',[138] cannot be seen as disinformation unless the communication of the content in question can be attributed to a particular person whose intent to mislead can be established through objective evidence. Whether chatbots themselves can be considered to have the intent to mislead in their own right is an interesting question but appears to have little practical relevance for now. Targeted legal measures aimed at addressing the information phenomenon in view would apply only to moral agents or persons, whether natural or legal, that are capable of being held legally accountable in their own right, with the intention of changing their behaviour and influencing the behaviour of other persons.[139] Chatbots do not appear to qualify as such agents or persons, at least not for the time being, even though they make it easy and low-cost for people to generate disinformation.[140]

[135] COM(2021) 262 final (n 85) 4–5.
[136] See generally Phiri (n 11).
[137] Michael Townsen Hicks, James Humphries and Joe Slater, 'ChatGPT is Bullshit' (2024) 26 *Ethics and Information Technology* 38. cf David Gunkel and Simon Coghlan, 'Cut the Crap: A Critical Response to "ChatGPT is Bullshit"' (2025) 27 *Ethics and Information Technology* 23. For further details on the concept of 'bullshit', see generally Harry Frankfurt, 'Reply to G. A. Cohen' in Sarah Buss and Lee Overton (eds), *The Contours of Agency: Essays on Themes from Harry Frankfurt* (MIT Press 2002); Frankfurt, *On Bullshit* (n 111).
[138] Timothy R Hannigan, Ian P McCarthy and André Spicer, 'Beware of Botshit: How to Manage the Epistemic Risks of Generative Chatbots' (2024) 67 *Business Horizons* 471.
[139] Rita C Manning, 'Corporate Responsibility and Corporate Personhood' (1984) 3 *Journal of Business Ethics* 77.
[140] Rob Reich, Mehran Sahami and Jeremy Weinstein, *System Error: Where Big Tech Went Wrong and How We Can Reboot* (Hodder & Stoughton 2021) 237; Anuj Puri and Esther Keymolen, 'The Doors of Janus: A Critical Analysis of the Socio-Technical Forces Eroding Trust in the Rule of Law' (2025) 43 *Cardozo Arts & Entertainment Law Journal* 135, 156–8.

In any event, if any regulatory restrictions on the dissemination of misleading information are to comply with established legal standards on freedom of expression, the mere fact that misleading information may cause harm regardless of communicative intentions does not detract from the social necessity of drawing a distinction between accidentally misleading information (termed 'misinformation') and intentionally misleading information (termed 'disinformation'). As noted above, it is settled law that journalists and everyone else who engages in public debate enjoy full legal protection when they inadvertently communicate false, inaccurate or indeed misleading information, provided they are acting in good faith in order to provide accurate and reliable information. The ECtHR has consistently emphasised that

> an applicant who was clearly involved in a public debate on an important issue should not be required to fulfil a more demanding standard than that of due diligence, as in such circumstances an obligation to prove factual statements may deprive the applicant of the protection afforded

by article 10 of the ECHR.[141]

An effective legal response to misleading information targeted at communicators as such would therefore require an intent-based, or at least a negligence-based, distinction of such information from other forms of semantic content. Indeed, like natural disasters and other accidents, the accidental sharing or communication of misleading information cannot be entirely avoided no matter how careful people may try to be. Freedom of expression would thus be largely elusive if the state attempted to impose a restriction on the dissemination of misleading information simply because such information may be harmful. Misleading information disseminated unintentionally can be addressed through alternative legal strategies, for example, by making provision for rapid correction mechanisms, including provisions that guarantee the right of reply to those affected by such information.[142]

The right of reply is particularly suited to addressing misleading information in general, whether characterised as misinformation or disinformation, as it constitutes an essential component of freedom of expression itself within the scope of article 10 of the ECHR. This right, as the ECtHR points out, 'flows from the need not only to be able to contest untruthful [or, more precisely, misleading] information, but also to ensure a plurality of opinions, especially in matters of general interest such as literary and political debate'.[143] But there still appears to be no moral or social necessity for a commitment to afford legal protection to those who intentionally

[141] *Udovychenko v Ukraine* App no 46396/14 (ECtHR, 23 March 2023), para 44.
[142] See Phiri (n 11) ch 5.
[143] *NIT S.R.L. v the Republic of Moldova* (n 117), para 200.

disseminate misleading information, even if the right of reply may help mitigate the risks of social harm posed by such information.

The vagueness of the element of intent in the proposed legal definition of disinformation serves only to reinforce the contention that only courts of competent jurisdiction are in pole position to make judgments about what constitutes misleading information for regulatory purposes. Indeed, it is a truism that the task of discerning communicative intentions is one of the routine functions of public courts across the globe, not only in criminal cases but also in civil matters. For example, as Roger Shuy observes, public courts

> constantly try to discover the intention of a statute, what a contract writer may have intended by the wording in that document, what makers of their last will and testaments intended to leave to their heirs, and what people intended by what they said in tape-recorded conversations.[144]

It is thus undeniable that public courts in all developed legal systems already possess the necessary experience to be able to reliably distinguish between those who disseminate misleading information intentionally and those who do so by accident.

4.3. Potential to cause harm

Misleading information, whether characterised as disinformation or misinformation, may cause harm due to its propensity to lead people astray in the exercise of their options. Those who are actually misled generally risk acting in a manner that could be harmful not only to themselves but also to others. Misleading information can thus cause harm not only to the actual recipients of such information but also to the public at large.[145] But those who intentionally disseminate misleading information, namely purveyors of disinformation, are liable to cause additional—albeit somewhat indirect—social harm by eroding people's trust in information generally, thereby inhibiting their ability to share information effectively with one another.[146]

This erosion of trust can itself be specifically intended. Purveyors of disinformation do not always seek to get people to believe the misleading information they spread. They sometimes merely aim to sow distrust and undermine public confidence in the integrity of public discourse and democratic processes by polluting the information environment with misleading

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[144] Roger W Shuy, 'Discourse Analysis in the Legal Context' in Deborah Tannen, Heidi E Hamilton and Deborah Schiffrin (eds), *The Handbook of Discourse Analysis* (John Wiley & Sons, 2nd edn 2015) 827.
[145] COM (2018) 236 final (n 81) 3–4; JOIN(2018) 36 final (n 82) 1.
[146] Don Fallis, 'The Varieties of Disinformation' in Luciano Floridi and Phyllis Illari (eds), *The Philosophy of Information Quality* (Springer 2014) 136. See also generally Puri and Keymolen (n 140).

content,[147] thereby making it difficult for people to distinguish reliable information from misleading information. Russian state actors are particularly notorious for promoting disinformation campaigns against other states as part of Russian military doctrine, not necessarily to deceive people but rather to get people to distrust information that they receive from the media.[148]

It is worth emphasising that disinformation always puts people at risk of suffering epistemic harm and other forms of harm that may arise from a lack of knowledge or reliable information.[149] The more disinformation is produced, the more likely it is that people will receive misleading information. This holds true regardless of whether such information is disseminated as disinformation, by the original creators or other purveyors of misleading content, or as misinformation, by those who honestly but mistakenly believe it to be accurate and non-misleading.

As noted above, however, it is often a matter of conjecture whether a given piece of allegedly misleading information is in fact likely to cause harm unless there is concrete evidence of actual harm. Indeed, even when online speech leads to harm in the form of physical violence, the question of 'how to determine whether the speech was the cause of real-world acts of violence' is often difficult.[150] It would therefore be necessary to develop a more robust theory of harm for regulatory purposes in order to mitigate the risk of regulators relying on ambiguous, overly vague or empirically deficient notions of harm, such as the predominant claim that disinformation threatens democracy.[151]

All indications suggest that the complex and multifaceted nature of the phenomenon of disinformation calls for a holistic regulatory approach that focuses on protecting the right of the public to be properly informed on matters of public interest in general. Other, more specific risks of public harm posed by disinformation—including threats to democracy, public health and public security—stem from the failure of existing legal regimes to effectively safeguard this basic right, both offline and online. While it is true that the right of the public to be properly informed is itself somewhat vague, there is no shortage of viable legal strategies for safeguarding this right.

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[147] See generally Richard Stengel, *Information Wars: How We Lost the Global Battle against Disinformation* (Grove Atlantic 2019).

[148] Kay Mathiesen, 'Fake News and the Limits of Freedom of Speech' in Carl Fox and Joe Saunders (eds), *Media Ethics, Free Speech, and the Requirements of Democracy* (Routledge 2019) 168. See COM (2018) 236 final (n 81) 2.

[149] Don Fallis, 'What is Disinformation?' (2015) 63 *Library Trends* 401, 406.

[150] Reich, Sahami and Weinstein (n 140) 201.

[151] Chris Tenove, 'Protecting Democracy from Disinformation: Normative Threats and Policy Responses' (2020) 25 *International Journal of Press/Politics* 517; Andreas Jungherr and Ralph Schroeder, 'Disinformation and the Structural Transformations of the Public Arena: Addressing the Actual Challenges to Democracy' (2021) 7(1) *Social Media + Society* 1.

One possible legal strategy, already referred to above, is the adoption of relevant provisions on the right of reply. Another possible strategy would be to impose direct sanctions on purveyors of disinformation in cases where it can be shown that a particular piece of disinformation has infringed, or threatens to infringe, specific individual rights that depend on the right of the public to be properly informed, such as the right to reputation and other personality rights, the right to life, the right to health, the right to free elections and other relevant rights. Such a rights-based theory of harm would help ensure that any laws intended to address disinformation as such serve the clear and compelling aim of protecting 'the rights of others', including the right to freedom of expression itself, within the meaning of article 10(2) of the ECHR and, indeed, article 52(1) of the Charter.

5. Conclusion

Existing policy definitions of disinformation in both the EU and the Council of Europe appear to be both overly ambiguous and vague, rendering them unsuitable to serve as a basis for policymakers to empower either public authorities or private actors to impose restrictions on the dissemination of disinformation, whether online or offline. The ambiguities and vagueness in existing policy definitions, to put it differently, engender excessive legal uncertainty. Thus, any reliance on those definitions to interfere with expressive activity poses a potent threat to freedom of expression.

This article argues that, for any regulatory purposes, disinformation should be defined as misleading information that is communicated with intent to mislead and that may cause harm. Although some degree of vagueness is both inevitable and valuable in both ordinary and legal language, this definition not only effectively eliminates the excessive vagueness and unnecessary ambiguities in existing policy definitions but also appears to closely align with existing European legal standards on freedom of expression.

The case law of both the ECtHR and the CJEU cited in this article confirms that the imposition of proportionate legal restrictions on those who intentionally or recklessly disseminate misleading information relating to matters of public importance is fully compatible with the freedom of expression enshrined in article 10 of the ECHR and article 11 of the Charter, respectively. Such restrictions are in fact necessary to protect freedom of expression itself, particularly freedom to receive information, which implies the right of the public to be properly informed. Indeed, there appears to be no moral or social necessity for a commitment to afford legal protection to those who intentionally disseminate misleading information in the name of promoting freedom of expression.

Current attempts at regulating online disinformation at the EU level in the absence of a legal definition of disinformation serve only to underline the view already highlighted in existing literature, namely that the state has a duty to regulate the phenomenon in view,[152] and the attendant social need for a legal definition of disinformation. Some form of regulation is evidently becoming rapidly inevitable, not least in the online context, where virtually anyone with an Internet 'connection can pump whatever they like into the digital public sphere, leading to an explosion of … [deliberately misleading information] alongside all kinds of genuine creativity and expression'.[153]

The appropriateness of regulating the phenomenon in view at the EU, regional or international level may be debatable but the legal definition of disinformation advocated in this article appears to be suitable for regulatory purposes. Indeed, as indicated in the introduction, this article does not delve into the intricacies of the knotty question of how exactly to regulate disinformation based on the legal definition it advocates in a manner that is both proportionate and effective, whether at the national, EU, regional or international level. This question remains open to further debate.[154] Space and time constraints do not permit this article to do justice to it.

Disclosure statement

No potential conflict of interest was reported by the author(s).

Funding

This research has been produced within the framework of the Dynamics of Digital Rights in Europe project, funded by the Research Council of Finland (Grant No. 362853).

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152 Phiri (n 11) 102ff.
153 Reich, Sahami and Weinstein (n 140) 193–4.
154 For existing research addressing this question in a comprehensive and holistic manner, see generally Phiri (n 11).