KNOWLEDGE OF DECEPTION: INTERMEDIARY LIABILITY FOR DISINFORMATION UNDER IRELAND'S ELECTORAL REFORM ACT

Ethan Shattock, Maynooth University

Abstract

This article applies a critical perspective to provisions of Ireland's Electoral Reform Act which introduce responsibilities for online intermediaries to restrict access to online disinformation. This perspective is not only informed by European Union (EU) standards for intermediary liability but also by human rights principles which have applications in this field. Ireland's Electoral Reform Act introduces several key provisions under Parts 4 and 5 which attempt to curtail the spread of false and misleading electoral communications. This article's focus is on how the design of these provisions diverges from established EU standards surrounding intermediary liability for harmful communications. Identifying how the application of these provisions may undermine the right to freedom of expression under EU law, this article further gleans applicable principles surrounding how access to information may be limited in the context of false electoral communications. This article maps these principles by mapping relevant case law of the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). Drawing from analytical approaches of these courts to false electoral communications, this article not only assesses how Ireland's Electoral Reform Act may undermine the right to freedom of expression but also provides a distillation of applicable human rights standards which should inform EU and Member State legislation in the disinformation field.

Keywords: Disinformation, Elections, Digital Services Act, Charter, Freedom of Expression

1. Introduction

The development of Ireland's Electoral Reform Act has long been proposed. Chiefly informing this has been criticism surrounding how oversight of Irish elections has long been distributed amongst various statutory agencies. Since 2001, the Referendum Commission has held sole responsibility for promoting public awareness of referendum questions.[1] The Standards in Public Office Commission (SIPO) has been entrusted to enforce standards surrounding political donations and election expenditure.[2] Other electoral issues—including the redrawing of constituency boundaries for European Parliament elections—have been overseen by a range of independent Constituency Commissions. As Farrell surmises, Ireland's election oversight has been 'dispersed' across a 'clutch of different agencies' in a manner that has lagged significantly behind established international best-practice.[3] Buckley and Reidy further posit that effective electoral reforms have been adversely affected by Ireland's 'absence of a centralised system reliably operated and provided by the government department with responsibility for election management.'[4] Spurred by these persistent criticisms, successive Irish governments have pledged to introduce a statutory electoral commission to spearhead

[1] Through the Referendum Act 2001 <https://www.irishstatutebook.ie/eli/2001/act/53/enacted/en/html>
[2] Electoral Act 1997 <https://www.irishstatutebook.ie/eli/1997/act/25/enacted/en/html>
[3] Farrell, "Conclusion and Reflection: Time for an Electoral Commission for Ireland" (2015) Irish Political Studies, 30:4, 641-646.
[4] Buckley & Reidy, "Managing the electoral process: insights from, and for, Ireland" (2015). Irish Political Studies, 30(4), 445-453.

reforms.[5] However, these pledges had failed to materialise until Ireland's Electoral Reform Act was finally signed into law in 2022.[6]

Expediting the 2022 Act were concerns surrounding Ireland's resilience to online disinformation in elections. Concerns surrounding misleading electoral propaganda in the 2016 US election and the Brexit referendum were explicitly cited in Irish parliamentary debates preceding the 2022 Act.[7] Parallel to these debates have been extensive polling data indicating the electorate's concerns surrounding the veracity of digital electoral information.[8] In the Irish electoral context, these concerns are not hypothetical. For example, Murphy traces how the dissemination of dubious claims in the week preceding Ireland's 2018 abortion referendum led voters to recall 'false memories' of fabricated news stories about this referendum.[9] As Kirk further highlights, Ireland's vulnerabilities to electoral falsehoods have been exacerbated by a failure of 'domestic regulatory practice' on electoral advertising to 'keep pace' with technological developments.'[10] Explicitly acknowledging these vulnerabilities, a 2018 governmental study recommended to 'expedite' the introduction of an independent electoral commission to spearhead urgently needed reforms.[11]

Having been signed into law in July 2022, the Electoral Reform Act contains several provisions which seek to promote veracity in Ireland's electoral communications. These provisions are not only addressed in Part 4 of the 2022 Act—concerning political advertising—but also under Part 5 which addresses the dissemination of false 'electoral information.'[12] Both Parts may require online intermediaries to restrict access to false or misleading information in electoral contexts. It must briefly be highlighted here that liability thresholds under Part 4 provisions have elicited criticism from the European Commission. The Commission issued a detailed opinion in July 2022 which specifically addressed Part 4 requirements for 'online platforms' to verify identities of advertisement purchasers.[13] As the Commission observed, this Part may require platforms to withhold placement of online political advertisements where platforms have 'reasonable grounds' to believe that purchasers have contravened any requirements under Part 4.[14] Significantly, the European Commission correctly identified that this involves potential 'imposition of liability' which may be triggered by a lower knowledge standard than 'actual knowledge' of illegal activity under the E-commerce Directive.[15]

This narrow—but salient—critique from the European Commission inspires several elements of this article's inquiry. The Commission scrutinised Part 4 provisions under Ireland's

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[5] For example, Private Members Bills "Electoral Commission Bill 2008 (PMB) — Bill Number 26 of 2008". Bills; "Electoral Commission Bill 2012 (PMB) — Bill Number 100 of 2012". Bills.

[6] Hereinafter "2022 Act."

[7] For example, see 2017 Online Advertising (Social-Media) Transparency Bill; Also First Report of the Interdepartmental Group on the Security of Ireland's Electoral Process and Disinformation.

[8] See Broadcasting Authority of Ireland (BAI) "Increase in number of Irish media consumers concerned about 'fake news' on the internet – Reuters Digital News Report 2019 (Ireland)" <https://www.bai.ie/en/increase-in-number-of-irish-media-consumers-concerned-about-fake-news-on-the-internet-reuters-digital-news-report-2019-ireland/>

[9] Murphy, "False memories for fake news during Ireland's abortion referendum." (2019) Psychological science 30.10: 1449-1459.

[10] Kirk & Teeling "A review of political advertising online during the 2019 European Elections and establishing future regulatory requirements in Ireland" (2022) Irish Political Studies, 37:1, 85-102.

[11] Overview- Regulation of Transparency of Online Political Advertising in Ireland, Department of the Taoiseach (14 Feb 2019) <https://www.gov.ie/en/policy-information/7a3a7b-overview-regulation-of-transparency-of-online-political-advertising-/>

[12] Part 4- Electoral Reform Act; Part 5.

[13] See Part 4.

[14] Ibid Section 123.

[15] OP 2022/184/IRL at p.3.

Electoral Reform Act which requires online intermediaries to verify purchasers of political advertisements. Notably, however, the Commission refrained from commenting on—and did not even reference—Part 5 of the 2022 Act which expressly imposes obligations for platforms to restrict access to a range of false electoral communications. As this article will identify, Part 5 introduces extensive but ill-defined intermediary obligations in this field. The design of these obligations not only diverges from established EU intermediary liability standards but may also frustrate human rights principles which have key applications in this area. Analysis of these standards is vital when considering how—as this article will further proceed to illustrate—EU standards surrounding intermediary liability for electoral disinformation are in flux. This is not only evidenced by Member State divergence in this area but also in provisions of the new Digital Services Act (DSA). Mapping applicable EU fundamental rights standards which engage the problem of electoral disinformation, this article provides a critical perspective which not only has applications to Member State laws—such as Ireland's 2022 Act—but also future Union legislation which may be designed to curtail false electoral communications.

2. Liability for Disinformation Under the Electoral Reform Act

There are several ways in which the Electoral Reform Act may be used to promote veracity and combat disinformation during Irish elections and referendums.[16] Establishing a permanent Electoral Commission, the 2022 Act requires this body to promote public awareness on referendum subject matter.[17] It further empowers this Commission with 'research, advisory, and voter education functions.'[18] These functions not only empower the new Commission to 'conduct research on electoral policy or procedure' but also to 'conduct 'post electoral event reviews' following Irish 'electoral events.'[19] These functions do not explicitly concern the dissemination of false or misleading electoral communications such as disinformation. Crucially, however, Part 4 and Part 5 of this Act introduce specific intermediary obligations in this field.

2.1 *Part 4*

For the first time under Irish law, the 2022 Act introduces statutory rules for online political advertising. Part 4 applies to the 'purchase for placement, display, promotion or dissemination, directly or indirectly including through an intermediary, of an online political advertisement during an electoral period.'[20] Section 125 categorically restricts any online political advertisement from being 'directly or indirectly placed, displayed, promoted, or disseminated' in the state by any actor outside of the state.[21] Section 121 further requires online platforms to ensure that all advertisements are conspicuously labelled as a 'political advert' and contain hyperlinks to a 'transparency notice.'[22] These notices must contain names and postal addresses of advertisement purchasers and information surrounding the use of any microtargeting in

[16] Not all of which are the subject of this article's substantive inquiry.
[17] Section 31, Chapter 5.
[18] Chapter 9, 2022 Act.
[19] Section 68(1).
[20] Section 119.
[21] Section 125.
[22] Section 121.

advertisements.[23] Part 4 further requires online platforms to maintain 'real time' public archives documenting political advertisements and corresponding transparency notices.[24] It may be noted here that these requirements—surrounding labelling of advertisements and maintenance of ad repositories—mirror existing voluntarily commitments under the European Commission's Code of Practice on Disinformation.[25]

Kavanagh describes these requirements under the 2022 Act as 'taking the essence of the rules on posters on lampposts and applying them to banner adverts on websites.'[26] Importantly, however, Part 4 goes beyond a mere application of offline rules for online communications. Notable here are several verification requirements surrounding the veracity of material in political advertisements. For example, Section 124 requires purchasers to submit accurate material that platforms may use to verify their identity and funding sources for proposed political advertisements.[27] This provision establishes an offence for purchases that submit information which they 'know, or ought to reasonably know, is false or misleading.'[28] In turn, Section 122 requires platforms to apply 'measures required to verify' purchasers by obtaining 'necessary and appropriate' information surrounding their identity and funding sources.[29] Platforms must further request 'any additional information' if 'for any reason' purchasers have provided 'insufficient' information and must withhold placement of ads until this can be rectified.[30] Section 123 further requires platforms to make additional inquiries into the 'accuracy' and 'veracity' of purchaser information.[31] Crucially, this provision requires platforms to 'immediately' remove advertisements if the platform:

> 'Becomes or is made aware of information on which there are reasonable grounds to consider that a buyer of an online political advertisement or a person providing the funds to the buyer is prohibited by virtue of this Part from purchasing an online political advertisement for placement, display, promotion or dissemination in the State.'[32]

As the Commission has highlighted, this represents a potentially far-reaching intermediary liability standard under the 2022 Act which deviates from established EU standards.[33] Platforms—irrespective of their size or actual knowledge of illegal behaviour—may be subjected to offences for failing to comply with any of the above-mentioned requirements under Part 4.[34] The significance of this liability threshold will be further unpacked in Section 3.

2.2 *Part 5*

[23] Ibid; On 'microtargeting' see Borgesius, "Online political microtargeting: Promises and threats for democracy." Utrecht Law Review 14.1 (2018): 82-96.
[24] Section 121(3).
[25] See 2022 Code at p.10. <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation> (last visited 9 January 2023); The development of this Code will be assessed in Section 3.
[26] Kavanagh, "Balance of power" (2022) Law Society Gazette <https://www.lawsociety.ie/gazette/in-depth/balance-in-the-electoral-reform-bill> (last visited 8 January 2023).
[27] Section 124, 2022 Act.
[28] Section 124 (6).
[29] Section 122(2).
[30] Ibid.
[31] Section 123.
[32] Section 123(8).
[33] See detailed opinion.
[34] Section 123(9).

Of vital relevance in the disinformation context are provisions under the 2022 Act which introduce intermediary obligations to remove access to false and misleading electoral communications. Part 5 introduces several statutory powers for the Ireland's incoming Electoral Commission to 'monitor, investigate, identify, and combat the dissemination of' a range of misleading 'electoral information.[35] For the purposes of Part 5, Section 144 defines 'electoral information' as encapsulating:

- Disinformation, defined as 'any false or misleading online electoral information that 'may cause public harm and, by reason of the nature and character of its content, context or any other relevant circumstance gives rise to the inference that it was created or disseminated to deceive.
- Misinformation, defined as 'any false or misleading online electoral process information that may cause public harm, whether or not the information was created or disseminated with knowledge of its falsity or misleading nature or with any intention to cause such harm.'
- Manipulative behaviour, defined as 'tactics, techniques and procedures that constitute the deceptive use of services or features provided by an online platform, including user conduct having the object of artificially amplifying the reach or perceived public support of particular content, or are likely to influence the information visible to other users of that platform, or by reason of their nature and character, context or any other relevant circumstance, give rise to the inference that they are intended to result in the dissemination, publication or increased circulation of false or misleading online electoral information.[36]

The above language is considerably broad. Notably, Part 5 not only applies to disinformation but also to misinformation and any communications that may 'give rise to an inference' of deceptive behaviour.[37] It is vital here to acknowledge established scholarly distinctions between the problems of disinformation and misinformation. As Wardle and Derakhshan delineate, 'misinformation' involves 'information that is false, but the person who is disseminating it believes that it is true.'[38] Conversely, these authors state that 'disinformation is information that is false, and the person who is disseminating it knows it is false.'[39] Katsiera posits that the difference between disinformation and other forms of misleading communications sits 'on a scale according to the degree of the intent to deceive.'[40] Stated differently, misinformation may be shared in good faith but disinformation is generally considered to involve an intention to mislead or deceive. Feltzer demarcates this by stating that the difference between these concepts lies in 'having an agenda' to mislead.[41]

As the language under Part 5 illustrates, the definition of false 'electoral information' under the 2022 Act is not limited to intentionally deceptive communications. Applications of Part 5 provisions can extend to false information 'whether or not the information' is disseminated with 'knowledge of its falsity' and irrespective of 'any intention to cause such harm.'[42] This is

[35] Section 145.
[36] Section 144.
[37] Ibid.
[38] Wardle & Derakhshan, "Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making" (2017) Council of Europe.
[39] Ibid.
[40] Katsirea, (2018). "Fake news: reconsidering the value of untruthful expression in the face of regulatory uncertainty" (2018) Journal of Media Law, 10(2), 159-188.
[41] Fetzer, "Disinformation: The use of false information." (2004) Minds and machines 14.2 231-240.
[42] Section 144 definition of 'misinformation.'

significant when identifying the range of intermediary obligations to combat false communications under Part 5. For example, Section 148 requires online platforms to notify the new Electoral Commission 'without undue delay' if platforms become 'satisfied' that their services 'are being used' to disseminate any above-mentioned variation of false electoral communications.[43] Platforms with over 1 million monthly users in the state must provide written reports to this Commission detailing 'any significant risks' to election integrity that may be posed by disinformation, misinformation, or manipulative behaviour on its services.'[44] Moreover, Section 149 requires platforms to introduce notification mechanisms that enable 'any individual, entity or person to notify it of the presence on the platform of information that the individual or entity considers to be' disinformation or misinformation.[45] Platforms must assess the validity of notices 'without undue delay' and must retain a record of all notices for period of 2 years following each electoral period.[46] Part 5 further enables the Commission itself to devise 'a direct reporting facility on its website to allow members of the public to report' disinformation and misinformation.[47] These mechanisms will not—in principle—always require intermediaries to remove access to electoral communications. Significantly, however, the Electoral Commission may issue a series of notices or orders requiring platforms to restrict access to online information. Delineated under sections 153-156, these include:

- 'Take down' notices that require removal of content that the Commission considers as disinformation or misinformation during the election period.
- 'Correction notices' that require corrections of content that the Commission considers as disinformation or misinformation during the election period.
- 'Labelling orders' that require labelling of content that the Commission considers as disinformation or misinformation during the election period.
- 'Access blocking orders' that require reasonable steps to block access to content that the Commission considers as disinformation or misinformation during the election period.[48]

All notices and orders can be judicially compelled. Section 158 empowers the new Commission to petition Ireland's High Court to 'direct compliance' with requirements under sections 153-156.[49] High Court orders can also be sought if the Commission wishes to ensure compliance with mandatory 'codes of conduct' that the Commission may publish under Section 163.[50] This provision enables the Commission to publish 'codes of conduct in respect of online electoral information or online electoral process information' and to make these 'optional or mandatory.'[51] These Codes—which require parliamentary scrutiny—may not only address online platforms but also election candidates and political parties.[52] Also affecting individuals are 'offences for disinformation or misinformation' under Section 166.[53] Under this provision, no individuals may disseminate:

- A false statement of the withdrawal of a candidate for election from that election.

[43] Section 148(1), 2022 Act.
[44] Section 148(2).
[45] Section 149(1).
[46] And to make this available upon request to the new Commission at 'reasonable notice' (Section 149(6)).
[47] Powers here are referenced under Section 150 (to monitor and investigate disinformation) and Section 160 (to create a reporting mechanism on the Commission's website).
[48] Sections 153-156.
[49] Section 158(1).
[50] Section 163.
[51] Section 163(1).
[52] Section 163(2).
[53] Section 166.

- A false statement of fact (including but not limited to a statement of misinformation) with the intention of causing one or more voters to abstain from voting in the election or referendum, or
- A statement, online, that purports to be from another person.[54]

Any individual or online platform failing to comply with above sections may receive a class A fine or imprisonment for a term not exceeding 5 years (or to both).[55] This is not to suggest that Part 5 contains no procedural safeguards against arbitrary restrictions on access to information. For example, Section 152 states that the new Commission shall exercise its powers under Part 5 with 'due regard' to the right to freedom of expression.[56] The Commission must also provide a list of reasons as to why platforms or individuals are being served with notices or orders to restrict access to online information under sections 153-156.[57] It must further be highlighted that Section 161 establishes an appeals mechanism for any individual or platform to contest instructions which may result from notices or orders under sections 153-156.[58] However, any established appeal panel must involve 'one or more' members of the Commission and there are no provisions that require independent human rights expertise on this panel. Furthermore, any appeals under Section 161 must be heard from within five days of the issuing of a notice and there must be no change or cancellation of an issued notice during this period.[59] This may leave potentially unjustified restrictions on electoral communications to continue during the sensitive days preceding an election. This significance of these standards will be unpacked in sections 4 and 5.

3. Lies and Liability: Shifting Standards for Disinformation from EU Member States and Institutions

As previous sections have now introduced, Ireland's Electoral Reform Act imposes several requirements for online platforms to restrict access to false and misleading electoral communications. Recalling the European Commission's detailed opinion on the 2022 Act, Part 4 may apply responsibilities for platforms to withhold placement of political advertisements without actual knowledge of illegal activity. Moreover, Part 5 may be applied in a manner that fosters restrictions on a wide range of potentially misleading electoral information. Having introduced these domestic provisions, this section now considers shifting standards surrounding intermediary liability for false electoral communications in the EU legal context. Focus here is not only given to relevant EU Member State legislation but also to approaches by Union institutions in this field.

3.1 EU MEMBER STATES

Ireland is not the only EU Member State which has introduced legislation that prohibits the dissemination of misleading electoral communications. Notable here is France's 2017 law prohibiting 'manipulation of information' that could influence elections.[60] This legislation

[54] Section 166(1)
[55] Section 165(2)(a) and Section 166(2)(a).
[56] Section 152(2)(b).
[57] Section 153(2), 154(2), 155(2), 156(2).
[58] Section 161(3).
[59] Ibid.
[60] https://www.assemblee-nationale.fr/dyn/15/textes/l15t0190_texte-adopte-provisoire.pdf

enables judges to order immediate suspensions of false information online that is 'likely to affect the sincerity of the ballot.'[61] Austria's criminal code has several prohibitions on electoral 'fraud.'[62] These do not explicitly reference disinformation but include offences for causing 'another to be mistaken as to the content of his declaration upon casting his vote.'[63] This accompanies Austria's new Communication Platforms Act which imposes obligations on online platforms to restrict access to content within 24 hours when it is 'already evident to a legal layperson that the content it illegal 'without further investigation.'[64] It must also be flagged here that Poland's Local Elections Act empowers national courts to order restrictions—within a 24 hour period—on the dissemination of 'untrue information' in election periods.[65] A novelty of Ireland's 2022 Act is that this legislation—unlike analogous Member State legislation—expressly defines terms such as disinformation and misinformation.

Arguably spurred by public health emergencies during COVID-19, several EU Member States have now criminalised the dissemination of various forms of falsehoods.[66] In 2020, Hungary introduced criminal offences prohibiting the publication of 'distorted' statements known 'to be false or with a reckless disregard for its truth…with intent to obstruct of prevent the effectiveness of' public health measures.[67] Similar provisions were introduced in Romania where a Presidential Decree introduced extensive powers for executive authorities to identify 'false news' and order restrictions on multiple websites.[68] Slovakia's criminal code contains offences for disseminating information that 'deliberately creates the danger of serious concerns among the population of a certain location.'[69] Moreover, the Czech Criminal Code criminalises the dissemination of false information 'intentionally causing threats' to a portion of the population by 'spreading alarming news that is untrue.'[70] Notable here is that not all of these Member State laws focus on intentionally deceptive communications. For example, Cyprus has criminal offences for sharing 'false news' which may 'potentially harm civil order or the public's trust towards the State.'[71] Recalling Part 5 of Ireland's 2022 Act, provisions addressing disinformation also apply to misinformation irrespective of any intention to deceive.[72] Civil society organisations have consistently raised concerns surrounding how domestic EU Member State laws in this field may be misused by political actors to arbitrarily suppress criticism of governmental actors.[73] Justification for these concerns is reflected by Russia's application of criminal laws on false information to constrain journalistic freedoms.[74]

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[61] Ibid.
[62] Articles 107-108
[63] 108a.
[64] https://ec.europa.eu/growth/tools-databases/tris/en/search/?trisaction=search.detail&year=2020&num=544
[65] Section 72, Local Elections Act.
[66] In a manner that goes beyond clearly established forms of defamatory claims.
[67] See Section 337(2) of Hungary's Criminal Code; Romania's Presidential Decree no. 195 (2020); Section 357 of Czech Republic Criminal Code.
[68] Decree no. 195 (2020) on the establishment of the state of emergency, Art. 54.
[69] Section 361, Slovak Criminal Code.
[70] Criminal Code (Czech Republic), Sec. 357.
[71] Article 50.
[72] Part 5.
[73] See "Rush to pass 'fake news' laws during Covid-19 intensifying global media freedom challenges" (2020) International Press Institute.
[74] Jack, "Russia expands laws criminalizing 'fake news'" (2022) Politico; Global news media on defensive after Putin signs 'fake news' law (2022) Reuters.

A further domestic trend is that several European states have introduced legislation which imposes intermediary obligations to remove harmful—but not necessarily illegal—online communications. Instructive here is the United Kingdom's proposed Online Safety Bill. This legislation—while no longer concerning an EU Member State—proposes duties of care for 'category 1' and 'category 2' intermediary services to combat harmful communications.[75] Significantly, this legislation not only proposes duties for Category 1 providers to restrict illegal material but also to remove lawful communications that pose a risk of harm to children and adults.[76] These duties are triggered when providers have 'reasonable grounds to believe' that content poses a 'material risk of significant harm' to adult or child safety.[77] Returning to the Irish domestic context, this threshold mirrors Part 11 of Ireland's newly passed Online Safety and Media Regulation (OSMR) Act which can require intermediaries to remove lawful communications by which a person 'bullies' or 'humiliates' another person.[78] This provision further enables an unspecified range of potentially lawful content to be restricted if platforms identify 'risk of significant harm to a person's physical or mental health, where the harm is reasonably foreseeable.'[79] These thresholds—largely connected to perceived risk of harm rather than knowledge of illegality—has elicited academic criticism. For example, Smith posits that the UK's legislation introduces a 'duty-triggering threshold' that 'expressly bakes in over-removal' of lawful communications.[80] Moreover, Harbinja and Leiser highlight that 'risk' based liability thresholds facilitate content removal decisions driven by platforms' 'subjective view about the desirability of what is to be gained or lost by the decision.'[81]

Notable here is the diverse range of laws which may potentially apply intermediary responsibilities for false and misleading electoral communications. As O'Fathaigh at al. identify, there is no 'clear' or 'uniform' legal definition of concepts such as disinformation in EU Member State legislation.[82] However, there remains a wide—and diverse—range of Member State laws that have potential applications in electoral contexts. As this section has mapped, some Member States make the dissemination of false information a criminal offence on the grounds of protecting national security. Van Hoboken observes this as a 'concerning' trend towards a pseudo-militarization of disinformation policy in Member States.[83] Further notable is the emergence of domestic legislative requirements for online intermediaries to restrict access to harmful—but not necessarily illegal—communications on the grounds of perceived risk or harm. It is critical to acknowledge this emergent standard when recalling the European Commission's detailed opinion on Part 4 of Ireland's Electoral Reform Act.[84] It must further be highlighted, however, that EU institutions are developing secondary legislation which appears likely to blur distinctions between illegal communications and potentially lawful

[75] Outlined in Chapters 2 and 3 of the UK Bill; *Category 1 involves* 'user to user' services (hosting user-generated content); *Category 2* involves search engine services.
[76] Section 54.
[77] Ibid 54(1)(3)(a).
[78] Section 139A.
[79] Section 139B.
[80]Graham Smith, Mapping the Online Safety Bill (Cyberleague, 27 March 2022) <https://www.cyberleagle.com/2022/03/mapping-online-safety-bill.html>
[81] E Harbinja, & M R Leiser (2022). [Redacted]: This Article Categorised [Harmful] by the Government, SCRIPTed, 19, 88.
[82] https://policyreview.info/pdf/policyreview-2021-4-1584.pdf
[83]J Van Hoboken & Fathaigh, R. O. (2021). Regulating Disinformation in Europe: Implications for Speech and Privacy. UC Irvine J. Int'l Transnat'l & Comp. L., 6, 9.
[84] See detailed opinion 2022/184/IRL.

forms of disinformation. To illustrate this, it is now necessary to unpack new legislation—and the broader policy approach to electoral disinformation—that Union institutions have developed in this field.

3.2 EU INSTITUTIONS

EU institutions have opted to address the problem of electoral falsehoods through self-regulatory initiatives since 2018. Seminal amongst these initiatives was the European Commission's Code of Practice on Disinformation.[85] This instrument—which was updated and expanded to a wider range of stakeholders in 2022—sets out voluntary commitments for technological platforms to label political advertisements, empower consumers to report false information, and engage with independent fact-checkers.[86] Significantly, however, this Code imposes no legally binding responsibilities under EU law for its technological 'signatories' to restrict access to electoral disinformation. This contrasts with secondary EU legislation such as the E-Commerce Directive, the Code of Conduct for hate speech, and the Regulation to prevent terrorist content.[87] Conversely, those instruments impose liability for intermediaries to restrict access to content 'understood as illegal.'[88] Union institutions have been reluctant to expressly introduce intermediary liability for electoral disinformation through secondary EU legislation. A key observation here—which underpins this reluctance—is that disinformation does not always consist of illegal communications. Acknowledging this, Union institutions appear concerned by prospects that arbitrary removals of legal online communications may undermine the right to freedom of expression.[89] For example, the European Parliament characterised the Code as the Union's preferred method of tackling 'harmful and manipulative' lawful content while protecting the freedom of expression online.[90] The 2018 Code itself cautions against platform measures that restrict 'freedom of opinion' and deters measures that 'delete or prevent access to otherwise lawful content or messages solely on the basis that they are thought to be false'.[91] Concerns surrounding arbitrary restrictions on legal communications are justified. There is extensive empirical evidence that online intermediaries already engage in 'over-removal' of legal communications when attempting to fulfil obligations to curtail access to illegal communications.[92] It is therefore unsurprising that EU institutions have—thus far—predicated their approach to disinformation on a key distinction between illegal and potentially lawful political communications.[93]

One critical shift—which casts uncertainty on the EU's continued self-regulatory approach to disinformation—are elements of the newly passed Digital Services Act (DSA) which

[85] See Code of Practice 2018, <https://digital-strategy.ec.europa.eu/en/library/2018-code-practice-disinformation>
[86] Ibid pages 5-9.
[87] Code of Conduct on Countering Illegal Hate Speech Online. See also European Commission, Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online, Brussels, 12 September 2018, COM (2018) 640.
[88] Kuczerawy, "The Proposed Regulation on Preventing the Dissemination of Terrorist Content Online: Safeguards and Risks for Freedom of Expression," 6 December 2018.
[89] See Report on the High-Level Expert Group (HLEG) on Disinformation (European Commission, 2018) p 5.
[90] The Fight Against Disinformation and the Right to Freedom of Expression (European Parliament 2019) pg. 9.
[91] Pg. 8.
[92] Townend, J. (2014). Online chilling effects in England and Wales. Internet Policy Review, 3(2); Urban, Jennifer M. and Quilter, Laura, Efficient Process or 'Chilling Effects'? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act (May 23, 2006).
[93] (N 89).

arguably blur distinctions between electoral disinformation and illegal communications. The DSA—replacing the E-Commerce Directive as the EU's orthodox intermediary liability regime—does not directly address disinformation and appears to retain intermediary liability for illegal content.[94] Significantly, however, Article 2 of the DSA classifies illegal content as:

> 'Any information, which, in itself or by its reference to an activity, including the sale of products or provision of services is not in compliance with Union law or the law of a Member State, irrespective of the precise subject matter or nature of that law.'[95]

This wording means that the DSA's definition of illegal content encapsulates many of the above-mentioned EU Member State laws that already make the dissemination of false electoral communications unlawful.[96] This is significant as it means that several DSA intermediary obligations for illegal content may—in practice—have applications for online platforms to comply with Member State legislation that addresses false electoral communications. Article 14 of the DSA requires Very Large Online Platforms (VLOPs) to adopt mechanisms that enable 'any individual or entity to notify them of the presence on their service of specific items of information that the individual or entity considers to be illegal content' and to adopt removal decisions in a 'timely, diligent, and objective manner.'[97] Moreover, Article 8 allows national judicial authorities in Member States to issue specific orders for platforms to 'act against' content that is reported by users as 'illegal.'[98] This provision also requires platforms to inform national authorities on the outcome of associated removal decisions 'without undue delay.'[99]

As Van Hoboken et al. identify, the trend of EU Member States making disinformation illegal underscores divergences from an overarching Union policy 'premise' that disinformation often does not consist of illegal communications.[100] It may be also argued, however, that Union institutions are themselves deviating from this premise by and blurring distinctions between online disinformation and illegal communications under the DSA. Crucial here are the DSA's due diligence obligations which may have applications to false electoral communications. For example, Article 26 requires very large online platforms (VLOPs) and large platforms to identify 'systemic risks' which may arise from use of their services.[101] This provision expressly lists that such 'risks' may include 'intentional manipulation of their service' with 'actual or foreseeable effects related to electoral processes.'[102] Article 27 further requires VLOPs to adopt 'effective mitigation measures' that are 'tailored' to risks identified under Article 26.[103] This may include reconfiguration of 'content moderation or recommender systems', and adaption of platform 'terms and conditions' or 'targeted measures' to limit the display of advertisements.'[104] Finally, Article 27 grants the Commission extensive powers to identify and enforce 'crisis' protocols which expedite ad hoc guidelines for platforms to modify

[94] Hereinafter DSA.
[95] Article 2(g), DSA.
[96] See Section 337(2) of Hungary's Criminal Code; See also Romania's Presidential decree Decree no. 195 (2020) on the establishment of the state of emergency, Art. 54.
[97] Article 14.
[98] Article 8.
[99] Ibid.
[100] Van Hoboken & O' Fathaigh "Regulating Disinformation in Europe: Implications for Speech and Privacy." (2021) UC Irvine J. International Transnational & Comparative Law 6.
[101] Article 26 DSA; Under Article 25, very large online platforms (VLOPs) are defined as platforms providing services 'to a number of average monthly active recipients of the service in the Union equal to or higher than 45 million.
[102] Ibid.
[103] Article 27.
[104] Ibid.

content recommendation systems.[105] Article 27 specifies that the implementation of crisis protocols must be 'proportionate' but offers no specific guidance on how the Commission must avoid arbitrary restrictions on the right to freedom of expression.[106] This is significant because the Council of the EU has already imposed extensive restrictions on Russian war propaganda by entirely curtailing cross-border transmission of audio-visual media by the RT and Sputnik media outlets.[107] As authors such as Voorhoof posit, such measures 'drastically curtailed the public's right' to receive information in a manner that failed to adhere to European human rights standards.[108] Informed by these developments under the DSA—and shifting distinctions between disinformation and illegal content—the following section now identifies the applicable human rights principles which interact with these legislative developments.

4. Conventional Wisdom for Disinformation: Mapping Human Rights Principles from ECtHR and CJEU Approaches

This article now shifts focus to applicable human rights principles which should inform the design and application of intermediary obligations to restrict access to electoral disinformation. As the above sections of this article have mapped, Ireland's Electoral Reform Act not only imposes intermediary liability at a standard below actual knowledge of illegality but also addresses a wide range of false and misleading information in electoral contexts. As has further been identified, there is evidence that online intermediaries now have a potentially wide range of responsibilities for false—but also potentially lawful—electoral communications. This is not only seen in several EU Member State laws but also in key provisions of the DSA.

The shifting—and potentially wide range of—liability thresholds for false electoral communications requires a distillation of applicable human rights standards in this area. As the European Commission has explicitly stated, EU or Member State legislation requiring intermediaries to restrict access to electoral disinformation must carefully follow standards surrounding the right to freedom of expression and permissible restrictions on 'access to and circulation of harmful content.'[109] The right to freedom of expression is not only protected under Article 11 of the EU Charter but also under Article 10 of the European Convention of Human Rights (ECHR). Importantly, however, these human rights instruments identify limitations on the exercise of this right.[110] Of vital relevance to Ireland's Electoral Act—and the broader corpus of laws across the EU which address disinformation—are whether the right to freely disseminate and access information may be curtailed on the grounds of preventing false electoral communications. As the European Commission has acknowledged, these standards require consultation with case law of the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU).[111] To illustrate key standards in this field, it is therefore instructive to map key interpretive approaches of these courts.

The sections below do not attempt to survey all case law from the ECtHR and CJEU which has potential relevance in the disinformation field. Specific focus here is limited to

[105] Ibid.
[106] Ibid.
[107] Council of the EU "EU imposes sanctions on state-owned outlets RT/Russia Today and Sputnik's broadcasting in the EU" 2 March 2022 <https://www.consilium.europa.eu/en/press/press-releases/2022/03/02/eu-imposes-sanctions-on-state-owned-outlets-rt-russia-today-and-sputnik-s-broadcasting-in-the-eu/> (last visited 9 January 2023).
[108] Voorhoof, "EU silences Russian state media: a step in the wrong direction" (2022), Inform Blog.
[109] 2018 Code of Practice on Disinformation at p. 3.
[110] See Article 52 of the Charter; Article 10(2) ECHR.
[111] Ibid.

jurisprudence wherein these courts have considered justifications for States to impose restrictions on the right to freedom of expression on the grounds of false and misleading communications. While the focus of the below sections is on the application of human rights standards in electoral contexts, an analytical limitation is the lack of available case CJEU case law surrounding false electoral communications. As Bayer et al. stress, independent CJEU jurisprudence surrounding the right to freedom of expression under Article 11 of the Charter remains 'underdeveloped' in areas surrounding restrictions on false political communications.[112] This may be contrasted with the ECtHR's extensive jurisprudence wherein the ECtHR has applied the right to freedom of expression under Article 10 ECHR.[113] The scarcity of CJEU jurisprudence also exists with respect to CJEU case law surrounding the right to free elections under Article 39 of the Charter. This provision primarily relates to EU Parliamentary elections and the CJEU has had extremely limited engagement with substantive elements of this right in the relevant context of election propaganda.[114] As the European Commission further highlighted when addressing potential EU legislation in the disinformation field, Union institutions also have limited competence in the field of national elections.[115] By contrast, the ECtHR boasts an extensive set of case law wherein this court has interpreted the right to free elections under Article 3 of Protocol 1 of the ECHR. Significantly, the ECtHR has also engaged extensively with questions surrounding the application of this provision in the context of false electoral communications. Finally, it must be highlighted that interpretive principles flowing from the ECtHR's case law in this area provide minimum human rights standards under EU law. It is not only important that all 28 EU Member States have ratified the ECHR but also that the EU Charter expressly incorporates the Convention as forming part of the 'constitutional traditions and international obligations common to the Member States.'[116] Moreover, Article 52 of the EU Charter provides that this instrument 'contains rights which correspond to rights' under the Convention and that its provisions should be given the same 'meaning and scope of' Convention rights.[117] The Convention's influence is also seen in how ECtHR jurisprudence has long provided baseline thresholds in the CJEU's development of fundamental rights jurisprudence. This not only stems from foundational cases wherein the CJEU drew inspiration from ECtHR case law but also in CJEU case law involving the right to freedom of expression.[118] As the ECHR's influence is extensive in this area, primary focus will be on applicable standards for limitations on false electoral communications from ECtHR case law. Importantly, however, focus is also given to case law wherein interpretive approaches of the ECtHR and CJEU align in this field.

4.1 *Access to Lawful Information*

The CJEU has extensively considered legal responsibilities for intermediaries to restrict access to harmful online content. Threaded throughout the CJEU's reasoning on this topic is the

[112] Bayer and others, "The fight against disinformation and the right to freedom of expression" (2021) European Parliamentary Research Service.
[113] Cite over 1000 cases, longevity too.
[114] See Case C-145/04, *Spain v United Kingdom* ECLI:EU:C:2006:543 at para 65.
[115] European Commission "Communication from the Commission: Tackling online disinformation: a European Approach" 236, Brussels, 26 April 2018, p. 1.
[116] Charter preamble.
[117] Explanation on Article 52.
[118] C-11/70 *Internationale Handelsgesellschaft* December 1970, Para 4.
See also Case 69/85 Wünsche Handelsgesellschaft (1986) ECR I-0947 (Solange II):The CJEU has had limited substantive engagement with Article 11 but has long invoked the 'special significance' of ECtHR standards surrounding Article 10 ECHR.

principle that ill-defined obligations to restrict access to online content will lead to unjustifiable removal of legal communications. This principle is evident in the CJEU's distinction between open-ended and specified obligations for intermediaries to remove access to illegal communications. *Scarlet Extended SA v SABAM* concerned interlocutory proceedings against an internet service provider (ISP) that allowed users to illicitly download copyrighted works from the company's portfolio without authorization.[119] The CJEU ruled that national courts could not issue injunctions compelling ISPs to install automated filtering mechanisms to prevent unlawful sharing of copyrighted material. Identifying how the contested injunction could 'potentially undermine' the right to 'receive or impart information,' the Court reasoned that proactive monitoring 'might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications.'[120] The CJEU reiterated this trepidation in *SABAM v Netlog* when examining an injunction containing indefinite filtering obligations for harmful content.[121] Highlighting a requirement for monitoring systems to clearly decipher lawful from unlawful content, the CJEU considered how 'the question' of 'whether a transmission is lawful' often depends on national laws 'which vary from one Member State to another.'[122] Thus, it was problematic that the 'contested filtering system' involved 'monitoring all or most of the information stored by the hosting service provider concerned' as this could incorrectly filter lawful content and undermine 'freedom to receive or impart information.'[123]

The CJEU has more keenly embraced intermediary obligations to filter specific content which has expressly been declared illegal under EU or domestic law. In *McFadden v Sony Music,* this court held that copyright-holders could seek injunctions to prevent third-party infringements.[124] Crucial to this was that the associated injunctions imposed filtering measures that 'strictly targeted' and brought 'an end to a third party's infringement.'[125] This mitigated the possibility of undermining Article 11 of the Charter by carrying less risk of 'affecting the possibility of internet users lawfully accessing information using the provider's services.'[126] The CJEU recalled this distinction in *L'Oreal v eBay* when accepting that L'Oreal could seek an injunction to prevent specific infringements on eBay.[127] It was again important here that the contested injunction sought did not require measures that would compel eBay to engage in 'an active monitoring of all' user content.[128] Provided this criteria was met, the Court accepted that obligations—particularly for 'economic operators' playing an 'active role' in promoting products—may arise to prevent unlawful use of content.[129]

Epitomising the CJEU's approach here are concerns that ill-defined filtering obligations may undermine the right to freedom of expression by encouraging excessive removal of lawful communications. Arguably, however, the CJEU has not always been consistent in illustrating

[119] Case C-70/10, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* ECLI:EU:C:2011:771.
[120] Para 52.
[121] Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* ECLI:EU:C:2012:85.
[122] Para 52.
[123] Para 51.
[124] Case C-484/14 *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH* ECLI:EU:C:2016:689
[125] Para 93.
[126] Ibid.
[127] Case C-324/09 L'Oréal SA and Others v eBay International AG and Others ECLI:EU:C:2011:474.
[128] Para 139.
[129] Para 113. See also joined Cases C-682/18 and C-683/18 *Frank Peterson v Google LLC and Others and Elsevier Inc.v Cyando AG* ECLI:EU:C:2021:503 where the CJEU stated that removal obligations for user uploads must consider the "particular importance of the internet to freedom of expression and information" at para 65.

this caution. *Glawischnig-Piesczek v Facebook Ireland* involved Facebook's obligations to remove defamatory posts labelling a politician a 'lousy' and 'corrupt' member of a 'fascist' party.[130] The CJEU reiterated that monitoring obligations must pertain to 'specific' content identified as unlawful by national courts.[131] Here, however, the Court reasoned that 'specific' obligations to remove defamatory posts could compel Facebook to 'terminate or prevent' further infringements by filtering 'identical' or 'equivalent content.'[132] This suggested a potential 'expansion' of monitoring obligations to 'proactively' monitor through restrictions on 'identical' content.[133] This also deviated from preceding reasoning in *UPC Telekabel Wien v Constantin Film.*[134] In that ruling, the CJEU accepted that injunctions could compel providers to filter unlawful content without specifying 'the measures which that access provider must take.'[135] Importantly, however, the injunction only applied to one specific website.[136] In *Glawischnig-Piesczek,* by contrast, the Court instructed that intermediaries should not 'carry out an independent assessment' of the legality of identical content and even considered that intermediaries must instead employ 'automated search tools and technologies' to identify 'elements specified in the injunction.'[137] Such reasoning is arguably disconcerting in the context of false—but not necessarily illegal—online communications. As Madiega observes, it appears to potentially open 'the door to obligations being imposed on platforms to proactively monitor' social media posts containing false information about political figures.[138] As Keller highlights, automated filtering without 'nuanced human judgment' can be problematic when applied to harmful but legally ambiguous content in political contexts.[139] Arguably, however, the CJEU's reasoning in *Glawischnig-Piesczek* was an unusual deviation from its consistent distinction between general and specific monitoring. Central to this distinction is the Court's concern—justified by empirical evidence—that imposing unclear or vague limits to intermediary liability for harmful online content may have deleterious effects for freedom to access lawful information and thereby undermine the right to freedom of expression.[140]

Significantly in the disinformation context, the ECtHR aligns with CJEU reasoning on the need to avoid blunt restrictions on lawful communications. In cases where the ECtHR has considered duties for online intermediaries to restrict access to harmful communications under Article 10 ECHR, the Court has consistently urged caution against arbitrary restrictions on access to lawful communications. In the Grand Chamber case of *Delfi AS v. Estonia,* Estonia held an online news portal liable for defamatory comments posted on the portal's comment section.[141] The comments contained insults and corruption allegations against a well-known shipping company and had remained online for six weeks before the applicant removed them upon explicit request from the company's representatives. However, the applicant did not pay the company requested damages. The ECtHR found that Estonia had not violated Article 10 by holding *Delfi* liable for the comments. Critical was that the comments had been 'clearly

[130] Case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited* ECLI:EU:C:2019:821.
[131] Para 31.
[132] Para 67.
[133] Cavaliere, "Glawischnig-Piesczek v Facebook on the Expanding Scope of Internet Service Providers Monitoring Obligations" (2019)', European Data Protection Law Review, 5:4, p. 573-578.
[134] Case C-314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* ECLI:EU:C:2014:192.
[135] Para 42.
[136] Para 63.
[137] Para 45.
[138] Madeiga, "Reform of the EU liability regime for online intermediaries" (2020) European Parliament at p.7.
[139] Ibid.
[140] Keller, "Empirical evidence of 'over-removal' by internet companies under intermediary liability laws." (2015). See also Case C-401/19 26 para 98.
[141] No. 64669/09 16 June 2015.

unlawful' and 'on their face' were 'tantamount to an incitement to hatred or to violence.'[142] The ECtHR's finding may be contrasted with the subsequent case *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary.*[143] Here, the ECtHR found that Hungary had violated Article 10 for holding applicant news portals liable for defamatory user comments which had criticised well-known real estate companies.[144] The Strasbourg Court distinguished the circumstances from *Delfi* by highlighting that 'the incriminated comments did not constitute clearly unlawful speech and they certainly did not amount to hate speech or incitement to violence.'[145] Absent of this crucial element, the Court reasoned that the imposition of objective liability amounted to 'to requiring excessive and impracticable forethought capable of undermining freedom of the right to impart information on the Internet.'[146] The ECtHR again focused legality when it found Hungary to have violated Article 10 in *Magyar Jeti Zrt v. Hungary.*[147] Here, the applicant had been held liable for posting a hyperlink on its online portal which directed users to a YouTube interview containing defamatory statements surrounding involvements of right-wing politicians in the harassment of Roma students by football fans.[148] The Court again distinguished the circumstances from Delfi by focusing on how the 'utterances' in the linked interview 'could not be seen as clearly unlawful' by the journalist who had initially posted it.[149] Without this 'clearly unlawful' element, the Court opined that the application of liability 'may have foreseeable negative consequences on the flow of information on the Internet.'[150]

ECtHR and CJEU approaches to intermediary liability are instructive when reflecting on Ireland's Electoral Reform Act 2022. As this section has observed, both courts place extensive focus on distinctions between illegal and potentially lawful communications when interpreting how intermediary responsibilities to restrict harmful communications may undermine the right to freedom of expression. Importantly, both courts caution that ill-defined—or over-inclusive—intermediary obligations to filter content may lead to removal of lawful information that ought to remain openly available. This provides substance as to the European Commission's criticism surrounding how Part 4 of the 2022 Act may compel intermediaries to remove political advertisements where platforms have grounds to believe—rather than actual knowledge—that purchasers have unlawfully submitted inauthentic information. More broadly, the reasoning of this courts casts an unfavourable light on legislation—which now exists at the Union and Member State level—imposing duties for intermediaries to restrict access to content on subjective risk-based grounds. This will be further assessed in section 5.

4.2 *Deception vs. Mistake: A Critical Distinction for Informed Democracy*

The EU Charter and TEU make explicit references to principles and values of democracy.[151] It is therefore unsurprising that the CJEU appears inclined to protect access to information which may inform the political populace on relevant democratic issues. This is evident in the CJEU's

[142] Para 114.
[143] Application no. 22947/13.
[144] Para 42.
[145] Para 64.
[146] Para 82.
[147] Application no. 11257/16.
[148] Para 8.
[149] Para 82.
[150] Para 83.
[151] Article 2 TEU, Charter preamble.

assessment of restrictions on access to information held by Union institutions. Case law in this field—while not always involving the CJEU's application of the right to freedom of expression under Article 11 of the EU Charter—is instructive in the context of false electoral communications. In *Sweden and Turco v Council and Commission,* the CJEU annulled the Council's refusal to provide information surrounding proposed EU asylum legislation.[152] The Court accepted the Council's legitimate interests to avoid legal uncertainty by withholding a legal opinion but highlighted that the information concerned the EU's 'legislative process.'[153] This element created an 'overriding public interest in disclosure' and 'openness' of information concerning asylum legislation.[154] In line with this, the CJEU reasoned that a 'lack of debate and information' on asylum legislation 'could give doubt and erode confidence in respect of the legitimacy of the whole decision-making process.'[155] Thus, access to the information empowered 'citizens to participate more closely in the decision-making process' and strengthened 'the democratic right of European citizens to scrutinize the information which has formed the basis of a legislative act.'[156] The CJEU's focus on 'democratic' participation was also evident in *Access Info Europe v Council of the European Union.*[157] Here, the ECJ stressed the decision of EU institutions to withhold access to information must be construed narrowly wherever the information is 'connected with the democratic nature of those institutions.'[158] The Court acknowledged that it was not always practical for citizens to have the 'widest possible access' to all information held by Union institutions but opined that access was crucial if requested information could shed light on the democratic functioning of EU institutions.[159] Such access, the ECJ reasoned, not only enabled citizens to 'scrutinise' Union institutions but also to 'participate' in the EU's 'legislative process.'[160] This connection was further referenced in *De Capitani v. Parliament* where the General Court annulled the European Parliament's refusal to provide access to information concerning the Union's co-legislative process.[161] Here, the Court again referenced the 'democratic right' to receive information and opined:

> 'It is precisely openness in the legislative process that contributes to conferring greater legitimacy on the institutions in the eyes of EU citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated. It is in fact rather a lack of information and debate capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process.'[162]

This focus on the need for wide access to information on democratic issues is also evidenced in ECtHR jurisprudence where this court applies Article 10 ECHR to political criticism. Illustrative here is the case of *Lingens v Austria* which concerned a journalist who had been convicted for defaming Austrian politician Bruno Kreisky.[163] The applicant's articles condemned Kreisky's 'immoral' and 'undignified' support of former SS members participating in Austrian politics.[164] The ECtHR accepted that Austria's defamation penalty had been

[152] *C-39/05* 1 July 2008.
[153] Para 13.
[154] Ibid.
[155] Ibid.
[156] Para 48.
[157] *T-233/09* 3 December 2008.
[158] Para 55.
[159] Para 55.
[160] Para 39.
[161] *T-540/15* 22 March 2018.
[162] Para 78. See also C-157/21 2022.
[163] ECtHR *Lingens v Austria*, Appl no. 9815/82, judgment of 8 July 1986.
[164] Para 9.

prescribed by law and based on legitimate aims to protect Kreisky's reputation.[165] Vital, however, was the applicant's role as a 'political journalist' commenting on 'political issues of public interest' in Austria.[166] The Court opined that the 'limits of acceptable criticism' are wider when directed as politicians—such as Kreisky—who 'knowingly' expose themselves 'to close scrutiny' by journalists and the wider public.[167] Finding a violation of Article 10, the ECtHR further highlighted that open political debate lies at the 'very core of' democracy and 'prevails throughout the Convention.'[168] The ECtHR again focused on the roles of politicians in *Castells v. Spain* when examining Spain's criminal conviction of a Senator who publicly alleged that state officials facilitated abuses of Basque dissidents.[169] The ECtHR found a violation of Article 10 because the applicant had been convicted without being given any opportunity to substantiate his claims.[170] This had particular significance because the applicant was a member of the political opposition who had accused political officials in a 'dominant position' of holding elected office.[171] Again highlighting the wider 'limits of permissible criticism' directed at politicians, the ECtHR clarified that 'actions or omissions' of political officials require 'close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion.'[172] The Court further addressed the need for public scrutiny of political officials in *Manole and Others v. Moldova* where applicants were editors of public media company.[173] They alleged that the company's programming had been edited censored due to state interference with editorial decisions surrounding political coverage.[174] Agreeing that Moldova violated Article 10, the ECtHR reasoned that pluralism in democracy requires 'diverse' political viewpoints even if certain viewpoints 'call into question the way a State is currently organised, provided that they do not harm democracy itself.'[175]

Underpinning the ECtHR's approach to freedom of expression is that functioning democracies require tolerance of offensive—and even factually exaggerated—information which is disseminated in political contexts. This is crucial in the context of political satire. In *Vereinigung Bildender Künstler v. Austria,* the ECtHR found a violation of Article 10 after an applicant was ordered to suspend an art exhibition depicting public figures in sexually explicit positions.[176] The ECtHR highlighted that the exhibition did not intend to convey realistic portrayals but conveyed a 'caricature of the persons concerned using satirical elements.'[177] Highlighting the value of political satire in democracy, the Court stressed that:

> 'Satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care.'[178]

[165] Para 36.
[166] Para 37.
[167] Para 42.
[168] Ibid.
[169] ECtHR *Castells v Spain*, Appl. No. 11798/85, judgment of 23 April 1992.
[170] Para 46.
[171] Ibid.
[172] Para 46.
[173] ECtHR *Manole and Others v Moldova*, Appl. No. 13936/02 judgment of 17 September 2009.
[174] Teleradio-Moldova" (TRM).
[175] Ibid 95.
[176] ECtHR *Vereinigung Bildender Künstler v. Austria* Appl. No. 68354/01, judgment of 25 January 2007.
[177] Para 33.
[178] Para 33.

Notable here is the ECtHR's explicit recognition that even factual 'exaggeration' and 'distortion of reality' may still have value in democracies.[179] This was further evident where the Court found a violation of Article 10 in *Alves da Silva v. Portugal*.[180] The applicant was convicted for displaying a puppet at a festival depicting a mayor 'unlawfully' receiving sums of money.[181] The ECtHR accepted that Portugal had an interest in protecting the mayor's reputation but noted the crucial factor that the applicant's depiction was 'quite clearly satirical in nature.'[182] The Court further delineating political satire as a form of 'social commentary' that involved an 'exaggeration and distortion of reality' which required tolerance in democracies.[183] Such tolerance is of vital importance considering the 'greater degree of tolerance towards criticism' of political officials.[184]

A crucial question in the disinformation context is whether the CJEU and ECtHR courts identify limitations to political communications in circumstances whereby political communication may misinform the political populace. A pivotal standard here is that both courts are reluctant to extend protection to intentionally deceptive communications. The CJEU has focused on the element of deception when assessing Member State restrictions on propaganda from foreign state actors. In the joint cases of *Mesopotamia Broadcast A/S METV and Roj TV A/S v Bundesrepublik Deutschland,* Turkey had submitted complaints to Danish broadcasting authorities alleging that the broadcasting company Roj TV disseminated several broadcasts calling for violence between Kurds and Turks.[185] The CJEU accepted that Roj TV had transmitted programmes containing 'incitement to hatred' and defined this as 'any ideology which fails to respect human values, in particular initiatives which attempt to justify violence by terrorist acts against a particular group of persons.'[186] To combat this, the Court held that Germany was not precluded from 'adopting measures' to prevent a foreign broadcaster from disseminating programmes provided that restrictions did not completely 'prevent' retransmission of television broadcasts from Denmark.[187] As such reasoning suggests, the CJEU's core focus was on hate speech and the Court only made passing reference to 'misleading' aspects of broadcasts.[188] However, the CJEU drew more explicit connections between deception and democracy in *Dmitrii Konstantinovich Kiselev v Council of the European Union.*[189] Here, the General Court found that the Council had not violated freedom of expression when sanctioning a journalist who provided 'active support' for Russia's attempts to destabilise Ukraine by influencing 'public opinion through disinformation techniques.'[190] The General Court further rejected that contested sanctions could 'dissuade' other journalists from 'freely expressing their views on political issues of public interest.'[191] Crucial to this rejection was that the sanctioned individual—unlike other journalists—held 'a position which he obtained by virtue of a decree of President Putin himself' and was deliberately installed to disseminate state propaganda.[192] As the sanctions were 'temporary and

[179] Ibid.
[180] ECtHR *Alves da Silva v. Portugal* Appl. No. 41665/07, judgment of 22 May 2009.
[181] Ibid.
[182] Ibid.
[183] Ibid.
[184] Ibid
[185] Joined cases C-244/10 and C-245/10 *Mesopotamia Broadcast A/S METV (C-244/10) and Roj TV A/S (C-245/10) v Bundesrepublik Deutschland* ECLI:EU:C:2011:607.
[186] Para 42.
[187] Para 49 and 50.
[188] Citing C-34/95 and C-36/95 *De Agostini and TV-Shop* [1997] ECR I-3843.
[189] Case T-262/15 *Dmitrii Konstantinovich Kiselev v Council of the European Union* ECLI:EU:T:2017:392
[190] Para 98.
[191] Ibid.
[192] Para 118.

reversible' the General Court held that the 'substance' of the sanctioned individual's freedom of expression had not been 'impaired.'[193] The CJEU again assessed Member State restrictions on Russian disinformation in *Baltic Media Alliance Ltd v Lietuvos Radijo Ir Televizijos Komisija.*[194] Lithuania had temporarily suspended cable and satellite transmissions from a Russian broadcaster that had disseminated disinformation to sow 'tensions and violence between Russians, Russian-speaking Ukrainians, and the broader Ukrainian population.'[195] The contested programmes not only 'incited hostility based on nationality' but also disseminated 'false information'—surrounding alleged 'neo-Nazi internal policies of the Baltic countries' which were designed to 'influence negatively and suggestively the opinion of that social group relating to the internal and external policies' of Lithuania.'[196] Considering this deception, the CJEU accepted that Member States were not precluded from adopting 'measures that impose obligations to broadcast or retransmit a foreign television channel only in packages available for an additional fee.'[197] Crucially, the Court not only appeared concerned with potential eruptions of violence but also with the possibility that the 'active distribution' of the contested propaganda could 'influence' the 'formation of public opinion' and could undermine the 'public interest in being correctly informed.'[198]

The ECtHR also places extensive focus on the element of deception when illustrating limits to acceptable boundaries of political debate in the context of false electoral communications. *Salov v. Ukraine* concerned an applicant who was prosecuted for disseminating a false rumour about the death of a Presidential election candidate.[199] The ECtHR explicitly identified Ukraine's desire to provide 'voters with true information' during elections as a legitimate aim underpinning the interference.[200] However, the Court observed that Article 10:

> 'Does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention.'[201]

Pivotal here is not only the ECtHR's language surrounding suspected false information but also the Court's focus on the applicant's intention. The rumour was false but had not been 'produced or published by the applicant himself' and had been 'referred to by him in conversations with others.'[202] Further, he had 'doubted its veracity' and had merely passed on the rumour rather than producing it himself.[203] The ECtHR placed similar focus on the intention to deceive in *Kwiecień v. Poland* where an applicant had been convicted for publishing an open letter containing spurious allegations of misconduct by an election candidate.[204] Finding a violation of Article 10, the ECtHR focused squarely on the applicant's motivations and discerned that his 'general aim' had been to 'attract the voters' attention to the suitability of' an

[193] Para 121.
[194] Case C-622/17 *Baltic Media Alliance Ltd v Lietuvos radijo ir televizijos komisija* ECLI:EU:C:2019:566
[195] For a three-month period.
[196] Para 70.
[197] Para 16.
[198] Para 79.
[199] ECtHR *Salov v Ukraine*, Appl. No. 65518/01, judgment of 6 Sept 2005.
[200] Para 110.
[201] Para 113.
[202] Para 113.
[203] Ibid.
[204] ECtHR *Kwiecień v. Poland* Appl. No. 51744/99, judgment of 9 January 2007.

election candidate whom the applicant believed to be unfit for office.[205] The 'thrust of his argument' was not to lie about the politician but to 'cast doubt' on his electoral suitability.[206] This aspect of the applicant's intention—even if some of his comments may have appeared 'far-fetched'—required close scrutiny due to the political context of his claims.'[207] The Court again focused on the applicant's intention when finding a violation of Article 10 in *Kita v. Poland.*[208] The applicant had publicly accused high ranking municipality officials of misusing public funds.[209] The ECtHR agreed with Poland that the applicant's statements had not been 'based on precise or correct facts' but still found a violation of Article 10.[210] Crucial was the Court's interpretation that the 'thrust of the applicant's article was to cast doubt on the suitability of the local politicians for public office.'[211] The ECtHR again applied this reasoning but modified key language in *Brzeziński v. Poland* where the applicant election candidate had been convicted for defamation after publishing a booklet accusing politicians of receiving unlawful subsidies.[212] Significantly, the Court explicitly accepted that Poland—and other Contracting Parties—had legitimate aims to 'ensure that 'fake news' did not undermine the 'reputation of election candidates' or 'distort' election results.[213] However, the Court still found a violation of Article 10 because Polish courts had 'immediately classified' his statements as 'malicious' lies without any delineation between confected allegations and good faith criticism of political officials.[214] This may be contrasted with *Staniszewski v. Poland* where the ECtHR finally found that Poland's application of its electoral law did not violate Article 10.[215] The applicant journalist alleged that a local Mayor had chosen a specific village for a regional harvest festival solely to generate support for his electoral candidacy. Identifying Poland's legitimate aim to protect 'the integrity of the electoral process' from 'false information' that could affect voting results, the Court noted that the applicant had not attempted to substantiate his 'untrue' claims in good faith.[216] This lack of good faith was crucial even though the applicant had disseminated his statements in an electoral—and therefore political—context.[217]

Further instructive—but under studied—is that the ECtHR also places extensive focus on deception when drawing limits to acceptable behaviour from election candidates under Article 3 of Protocol 1 ECHR. For example, *Antonenko v. Russia* concerned an election candidate who was disqualified on the grounds that he had submitted 'substantially untrue' information to an election commission regarding his campaign expenditures.[218] The applicant's main argument was that his disqualification had been announced one day before the election and that insufficient information about his disqualification had been provided to voters. Crucially, he did not contest that the information he submitted was false and accepted that the relevant law was based on a need to ensure transparency and 'fair election campaigning'.[219] His argument was connected with narrow procedural aspects of his de-registration but he had not contested the deliberate inaccuracy of his submitted materials. Thus, the Court found no violation of

[205] Para 51.
[206] Ibid.
[207] Para 51.
[208] ECtHR *Kita v Poland*, Appl. No. 27710/05, judgment of 22 July 2008.
[209] Para 8.
[210] Para 28.
[211] Para 51.
[212] ECtHR *Brzeziński v. Poland,* Appl. No. 47542/07, judgment of 25 July 2019.
[213] Para 35.
[214] Ibid.
[215] ECtHR *Staniszewski v. Poland* Appl. No. 20422/15, judgment of 14 October 2021.
[216] Para 19.
[217] Para 51.
[218] ECtHR *Antonenko v. Russia* Appl. No. 42482/02, judgment of 23 May 2006.
[219] Para 5.

Article 3 of Protocol 1. This may be contrasted with *Melnychenko v. Ukraine* where an election candidate submitted untrue information to an electoral commission related to his 'habitual' residence.[220] The applicant did not dispute that he had submitted misleading information to authorities. Importantly, however, he explained that he had only misrepresented his residency status due to his 'fear of persecution in Ukraine.'[221] Thus, he had not lied to deceive the electorate but merely to avoid compromising his 'personal safety or physical integrity.'[222] Thus, the ECtHR found that Ukraine had violated the right to free elections as there was a justifiable reason—which was not grounded in intentional deception—for the applicant's misrepresentation. The ECtHR's focus on electoral deception was firmly demonstrated in *Krasnov and Skuratov v. Russia* where two election candidates had both been disqualified from standing in general elections after submitting untrue information to election authorities.[223] The ECtHR accepted Russia's legitimate aim to ensure that election candidates submit accurate information to prevent voters from being misinformed.[224] However, the Court highlighted key distinctions between the first and second applicant. Both applicants had misrepresented their employment status but only the first applicant was deemed to have done so in a deceptive manner. He had claimed to be head of a district council even though he no longer held the position.[225] The Court reasoned that he had knowingly provided 'substantially untrue information' and 'cloaked himself in the authority associated in the voters' eyes with a position he no longer held.'[226] Accordingly, the Court accepted that his 'submission of untrue information' could have 'adversely affected' voters' 'ability to make an informed choice.'[227] Conversely, however, the Court did not identify deceptive conduct by the second applicant who had listed his position as acting head of a law department while merely employed as a professor in the department. The Court disagreed with the 'inconsistent findings' of domestic authorities as to the misleading nature of his submission and observed how 'the place of work he listed in his nomination form matched the most recent entry in his employment record.'[228] He therefore could have plausibly believed that he was required to list his most recent and senior position. Differentiating this submission from the first applicant's, the Court found it crucial that 'nothing' in this declaration suggested that he had 'acted in bad faith.'[229] Thus, the ECtHR found Russia's interference to be justified for the first applicant but not for the second applicant.

The approaches of the ECtHR and CJEU are instructive in the context of electoral disinformation. Crucial here is that both courts appear keen to preserve access to legitimate political communications but draw the line at communications which they identify as intentionally deceptive. The distinction between good faith and intentional deception is central to how these courts interpret restrictions on false political communications. A key standard here is that legislation which requires intermediaries to restrict potentially misleading information may fail to meet applicable European human rights standards as suspicions of falsity may not sufficiently justify restrictions on access to information in political and democratic contexts. The focus must always be on deception. As section 5 will assess, Ireland's

[220] ECtHR *Melnychenko v. Ukraine* Appl. No. 17707/02, judgment of 19 October 2004 at para 20.
[221] Para 46.
[222] Para 65.
[223] ECtHR *Krasnov and Skuratov v. Russia*, Appl. Nos. 17864/04 and 21396/04, 19 July 2007.
[224] Para 38.
[225] Para 48.
[226] Ibid.
[227] Ibid.
[228] Para 60.
[229] Para 61.

Electoral Reform Act—and potentially a broader range of EU and Member State legislation—fails to meet this standard.

4.3 *Election Influence*

A natural question which flows from above analysis is whether specific intermediary responsibilities may be justified to prevent the electorate from being deceived. As Union institutions have limited competencies in the field of national elections, this question has crucial significance for Member States legislation—such as Ireland's Electoral Reform Act—which must ensure compliance with the right to free elections under Article 3 of Protocol 1 ECHR. It is also important to recall here that the element of deception—while crucial in ECtHR and CJEU approaches—may not always be readily discernible in the context of misleading communications. Moreover, false communications may undermine informed electoral engagement even when not disseminated with identifiably deceitful intentions.

One important analytical standard here is that restrictions on access to false electoral communications must generally correspond to the potential for communications to influence voters. In *Sarukhanyan v. Armenia,* the ECtHR found a violation of Article 3 of Protocol 1 where that applicant election candidate had been disqualified for submitting false information to an election commission. The Court highlighted how the falsified information—surrounding technical details on his property status—was of 'minor importance' to voters.[230] The Court identified his declaration to be untrue but disagreed that factual discrepancies were 'seriously capable of 'misleading the electorate.'[231] Recalling *Krasnov and Skuratov v. Russia,* the Court opined that the first applicant's status as a district council member 'was not a matter of indifference for the voters' and that his falsification 'could have adversely affected their ability to make an informed choice.'[232] Conversely, the second applicant's discrepancy was incapable of 'misleading the voters' with decisive electoral effects.[233] The ECtHR's focus on electoral influence is further illustrated in cases involving election tampering. *Babenko v. Ukraine* concerned an election candidate's allegations that 'ballots of different candidates had been mixed up' in a manner that influenced an election outcome to his detriment.[234] The Court rejected the application on the grounds that he failed to demonstrate how the alleged irregularities had 'specifically affected' voting outcomes.[235] As the applicant had received ten thousand votes fewer than the winning candidate, the Court doubted that any alleged distortions had shifted the election in a manner that decisively affected results.[236] This may be contrasted with *Davydov and Others v. Russia* where applicant election candidates complained that electoral commissions had 'falsified the results of the elections by ordering recounts' that 'systematically' increased the ruling party's share.[237] Crucial here was that these allegations were corroborated by a third-party election observer. Finding a violation of the right to free elections, the ECtHR reasoned that attempts to investigate alleged tampering were limited to 'trivial questions of formalities' while 'ignoring evidence pointing to serious and widespread irregularities' that could plausibly have affected the outcome of the election.[238] A similar

[230] ECtHR *Sarukhanyan v. Armenia* Appl. No. 38978/03, judgment of 27 May 2008 at para 94.
[231] Para 49.
[232] Para 50.
[233] Para 62.
[234] ECtHR *Babenko v Ukraine*, Appl. No. 43476/98, judgment of 4 May 1999.
[235] Ibid.
[236] Ibid.
[237] ECtHR, *Davydov and Others v. Russia* Appl. No. 75947/11, judgment of 30 May 2017.
[238] Ibid.

finding arose in the Grand Chamber decision of *Mugemangango v. Belgium* where the applicant had failed to win a seat in parliamentary elections by just fourteen votes.[239] He called for re-examinations of votes in his constituency on the grounds that thousands of votes were declared spoilt and that some votes may have been erroneously disqualified. The Grand Chamber found that the new parliament's refusal to allow this had constituted a violation of the right to free elections. It was not only pivotal that the applicant's allegations were 'sufficiently serious' but also that there was a significant likelihood of him winning the election if recounts had occurred.[240]

Important links between the falsity and relevance of information are also evidenced in CJEU reasoning where this court has pondered intermediary responsibilities to dereference inaccurate information. Instructive here is specific CJEU reasoning in *Google Spain SL v. Agencia Española de Protección de Datos.*[241] This concerned requests for Google to erase information from search results which affected a person's reputation. The Court considered the right to protection of personal data alongside the right to access information under the Charter and specifically probed whether the inaccuracy of searchable information could propel obligations for Google to delist search results. Famously identifying a 'right to be forgotten', the CJEU reasoned that individuals could seek:

> 'Rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data.'[242]

Here, mere inaccuracy of information was not sufficient to justify erasure and the Court considered several factors when balancing potential erasure against the right to freely access information. These included the 'nature' of contested information and the 'role' of the individual who the information pertained to.[243] However, the Court expressly considered that the interests of preserving access to inaccurate information—even if initially lawfully posted—may shift as time passes and the relevance of public access to that information diminishes.[244] The CJEU expressed similar reasoning in *GC and others v CNIL and Google* where it again weighed an individual's 'right to be forgotten' alongside the public's right to receive information.[245] Considering whether Google could be obliged to erase information concerning past criminal procedures, the CJEU reasoned that:[246]

> 'The public had an interest not only in being informed about a topical event, but also in being able to conduct research into past events, with the public's interest as regards criminal proceedings varying in degree, however, and possibly evolving over time according in particular to the circumstances of the case.'[247]

Crucially, the fact that contested information had been initially lawful when posted did not absolve Google's responsibilities 'to adjust the list of results in such a way that the overall

[239] Application no. 310/15, 10 July 2020.
[240] Para 79.
[241] Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* ECLI:EU:C:2014:317.
[242] Para 92.
[243] Para 81.
[244] Para 94.
[245] C-136-17 GC and Others v Commission nationale de l'informatique et des libertés (CNIL) ECLI:EU:C:2019:773.
[246] ECtHR, *M.L. and W.W. v. Germany*, Appl. Nos. 60798/10 and 65599/10 judgment of 28 June 2018.
[247] Para 76.

picture' accurately imparted the applicant's circumstances to internet users.[248] This could require 'that links to web pages containing information' reflected the applicant's current legal position.'[249] Further addressing this, the Court considered that information may be initially considered accurate but that this may shift over time.[250] The above cases engaged information which had initially been lawful and of public interest. Contrasting facts arose in *Google (Déréférencement d'un contenu prétendument inexact)*.[251] This concerned an application to erase ISP search results based on a lack of 'truth of the processed data.'[252] Here, the Court was recognised that the information lacked veracity and had been intentionally distorted to blackmail companies.[253] Notably, the Court endorsed the preceding Advocate General Opinion that the 'tendency of the right to freedom of expression' to 'override the right to private life and the right to protection of personal data' is 'reversed where it is established' that contested information 'is untrue.'[254] The Court further clarified that in such circumstances the 'right to be informed' could not come into play as this did not extend a right to 'disseminate and access' falsehoods.[255]

The CJEU's reasoning in the above cases consistently referred to instances wherein inaccurate information could harm the rights or interests of an individual. Such circumstances may not always arise in the disinformation context. It remains, however, that the converging focus between the ECtHR and CJEU on the relevance and influence of false information on recipients of information is vital in electoral contexts. This standard—along with key conclusions from this article—will be assessed below.

5. Conclusions

This article has identified provisions of Ireland's Electoral Reform Act which address electoral disinformation and has considered applicable human rights standards which have applications to these provisions. This article has also considered how these human rights standards may have applications to divergent—and shifting—standards surrounding intermediary responsibilities for false electoral communications under EU and Member State legislation. Focus must now be given to how Ireland's 2022 Act—and analogous legislative developments—may diverge from these standards.

As discussed in the introduction, the European Commission directed criticism at Part 4 of Ireland's Electoral Act which may require online intermediaries to restrict political communications. As this article has identified, the Commission's criticism is unsurprising when dissecting CJEU and ECtHR reasoning on intermediary liability. As was discussed, these courts are reluctant to endorse intermediary liability thresholds which fall below actual knowledge of illegality. Underpinning this reluctance are concerns that lower thresholds may not only arbitrarily restrict legal content but also may constrain access to information which ought to be accessible. This has utmost significance in political contexts when considering how both courts are keen to protect access to legitimate forms of political communications. As Part 4 of the 2022 Act directly addresses political communications, the Commission's criticism of

[248] Para 78
[249] Ibid.
[250] Para 74. Citing Google Spain at Para 94.
[251] Case C-460/20 ECLI:EU:C:2022:962.
[252] Para 4.
[253] The article featured photographs depicting applicants driving luxury cars.
[254] Para 65.
[255] Ibid.

this legislation is not only justified under EU intermediary liability orthodoxy but also when considering applicable human rights standards in this area. It is further arguable that risk-based provisions which may compel intermediaries to restrict access to information should not be applied in electoral contexts when considering potentially legitimate communications that may be restricted in such contexts.

A further finding is that intermediary responsibilities to restrict access to false information should only address identifiably deceptive communications in electoral contexts. As this article has identified, the ECtHR and CJEU draw explicit limits to political communications if these courts identify intention to deceive citizens. Conversely, however, restrictions should be more seldomly applied to misleading electoral information if no deceptive intent is judicially identified. As the ECtHR has explicitly stated in the electoral context, mere suspicion of the falsity of information does not justify restrictions on access to electoral information unless deception is identifiable.[256] This is instructive when assessing potential obligations under Part 5 of Ireland's Electoral Act for false 'electoral information.'[257] This legislation makes no meaningful distinction between deception and good faith errors. Part 5 not only encompasses misinformation but also states that intention to deceive voters carries no relevance in potential intermediary responsibilities to restrict access to misinformation in electoral contexts. It may also be recalled here that several Member State laws do not include intentional deception as criteria for restrictions on access to false electoral communications.[258] This is significant as restrictions on misleading—but genuinely held—opinions are likely unjustified in electoral contexts.

One further finding is that restrictions on access to false electoral communications should be informed by such communications may influence voter choice. As uncovered, the element voter influence is crucial to the ECtHR's interpretation of restrictions on false electoral communications. This Court appears not only concerned with deceptive intentions underlying false communications but also in whether such communications have potential to influence voter choice and electoral outcomes. Deceptive communications with high potential to influence votes may be more prone to restrictions. Conversely, however, statutory authorities must exercise more restraint when ordering intermediaries to restrict access to false information in electoral contexts if contested information is unlikely to carry significant weight in the eyes of voters. Crucially, the CJEU appears to be informed by elements of influence and political relevance when assessing restrictions on access to inaccurate search results by intermediaries. The CJEU has expressly reasoned that there may be more justification to retain access to information where it has the purpose of potentially informing internet users on a subject of public interest. Conversely, this Court has reasoned that the justifications for restricting access to false information may increase if the relevance of false information may diminish with time. Part 5 of Ireland's Electoral Reform Act fails to meet this standard. This Part not only makes no distinction between irrelevant and influential false information but allows for the new Electoral Commission to compel intermediaries to restrict access to false information in periods preceding elections based on risk— and not material evidence—that contested information is deceptive and likely to influence electoral outcomes. This lack of distinction between irrelevant and potentially influential disinformation should be avoided in subsequent legislation at the EU and Member State level.

[256] See section 4.
[257] See section 2.
[258] See section 3.1.