The Truth in Fake News: How Disinformation Laws Are Reframing the Concepts of Truth and Accuracy on Digital Platforms

*Paolo Cavaliere | ORCID: 0000-0002-0314-3133*
Senior Lecturer, University of Edinburgh Law School, Edinburgh, United Kingdom
paolo.cavaliere@ed.ac.uk

**Abstract**

The European Union’s (EU) strategy to address the spread of disinformation, and most notably the Code of Practice on Disinformation and the forthcoming Digital Services Act, tasks digital platforms with a range of actions to minimise the distribution of issue-based and political adverts that are verifiably false or misleading. This article discusses the implications of the EU’s approach with a focus on its categorical approach, specifically what it means to conceptualise disinformation as a form of advertisement and by what standards digital platforms are expected to assess the truthful or misleading nature of the content that they distribute because of this categorisation. The analysis will show how the emerging EU anti-disinformation framework marks a departure from the European Court of Human Rights’ consolidated standards of review for public interest and commercial speech and the tests utilised to assess their accuracy.

**Keywords**

disinformation – journalism – advertising – digital platforms – freedom of expression – media freedom
Introduction: the European Union’s Strategy Against Disinformation, from the Code of Practice to the Digital Services Act

In recent years, attempts to counter the spread of disinformation have multiplied at the national and supranational levels. Among such attempts, the European Union (EU) has devised a multi-layered framework: the Communication on Tackling Online Disinformation,¹ adopted in April 2018, the Code of Practice on Disinformation (the Code or the Code of Practice), first launched in April 2018² and then revised in June 2022,³ the Action Plan Against Disinformation,⁴ announced in December 2018, the European Democracy Action Plan,⁵ presented in December 2020, the Proposal for an Initiative on Greater Transparency in Sponsored Political Content,⁶ launched in January 2021, and the forthcoming Digital Services Act (the DSA).⁷ These various initiatives are all expressly focused on or partially concerned with curbing the spread of disinformation. They are also characterised by a distinct focus on the roles and responsibilities of digital platforms.

The present article aims to contribute to the academic and policy discussion on the EU’s strategy to address the spread of disinformation, including the forthcoming DSA and Regulation on the Transparency and Targeting of Political Advertising, by analysing how this developing framework conceptualises disinformation and envisages the practical task of assessing the truthfulness of information. As detailed below, the Code of Practice tasks digital

¹ Commission, ‘Tackling Online Disinformation: A European Approach’ (Communication) com(2018) 236 final (the Communication).
² EU Code of Practice on Disinformation 2018: <https://digital-strategy.ec.europa.eu/en/library/2018-code-practice-disinformation> (the 2018 Code of Practice).
³ The Strengthened Code of Practice on Disinformation 2022: <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation> (the 2022 Code of Practice, or the Strengthened Code of Practice).
⁴ Commission, ‘Action Plan Against Disinformation’ (Joint Communication) JOIN(2018) 36 final (the Action Plan Against Disinformation).
⁵ Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the European Democracy Action Plan’ (Communication) com(2020) 790 final (the Democracy Action Plan).
⁶ Commission, ‘Proposal for an Initiative on Greater Transparency in Sponsored Political Content, and Other Supporting Measures’ (Inception Impact Assessment) Ares(2021)622166 (the Proposal on Transparency of Political Advertising).
⁷ Commission, ‘Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC’ (Communication) com(2020) 825 final (the Digital Services Act).
platforms with a range of actions to minimise the distribution of issue-based and political adverts if they are verifiably false or misleading. The questions that public authorities and digital platforms now face concern society at large in the era of post-truth: what standards of validation and proof do we deem valid to ascertain the truth in the political realm, and how do we select them among the several possible methods that are often specific to different institutions or disciplines?8

This article will discuss the implications of the Code and the upcoming EU approach, specifically what it means to define disinformation as a form of advertisement and by what standards digital platforms are expected to assess the truthful or misleading nature of the content that they distribute because of this categorisation. This analysis aims to assess whether and to what extent the emerging EU anti-disinformation framework could mark a departure from the European Court of Human Rights’ (ECtHR, European Court, or Court) approach.

To answer these questions, the study proceeds as follows. The next two sections will describe the developing EU framework. Section 2 will analyse how the framework conceptualises disinformation from a theoretical perspective, and section 3 will identify the actions that are expected from digital platforms.

Following this, the analysis will turn to the issue of defining disinformation for policy and legal purposes. The Code of Practice focuses on disinformation distributed through paid-for advertising. However, the original version separated political advertisements that deliver electoral messages from issue-based advertisements (arguably of a political nature, although individual platforms would be expected to define these more precisely), whereas the strengthened version of 2022 considers the two together. Section 4 will discuss whether the European Convention on Human Rights’ (ECHR) system supports such an approach. First, section 4.1 will analyse how the ECtHR distinguishes between public interest and commercial expression, and how its approach compares to that envisaged in the EU’s disinformation framework. Then, section 4.2 will investigate whether and how the ECtHR’s case law acknowledges a distinction between issue-based and political advertisements, and what practical consequences, if any, follow from that distinction.

Having understood the contours of each of these categories of expression, the study will then discuss the standards that the European Court uses to assess the truthful or misleading nature of the three relevant categories of

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8 See, S Rosenfeld, Democracy and Truth: A Short History (University of Pennsylvania Press 2019) 15.
content: expression in the public interest (section 5.1), commercial advertising (section 5.2), and political advertising (section 5.3). It will then discuss whether any of the standards would be suitable in principle to apply to the case of disinformation.

Finally, the concluding section will offer some considerations on the impact and significance of the proposed EU framework to tackle disinformation.

The categorisation of disinformation distributed on platforms as advertising bears practical consequences because the European Court has applied different standards of review and assesses the accuracy of information with tests that differ depending on the category. The categorisation suggested in the EU framework appears to differ significantly from the approach taken by the European Court, which tends to treat content bearing political significance (in a broad sense) as information in the public interest irrespective of its format or whether it is being paid for.

2 Defining Disinformation: the Theoretical Framework

In the Communication on Tackling Online Disinformation, the EU authorities have defined the concept of disinformation as ‘verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm’.9 The same definition was repeated in the Action Plan Against Disinformation10 and in both the 201811 and 202212 versions of the Code.

However, the EU was not the first major regional institution to formulate a definition of disinformation. In 2017, a report prepared for the Council of Europe (CoE Report) proposed a three-fold categorisation comprising distinct concepts of mis-, dis-, and mal-information. These are respectively defined as information that is false but not harmful, false and ‘knowingly shared to cause harm’, and genuine but nonetheless harmful.13

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9 Communication (n 1) para 2.1.
10 Action Plan Against Disinformation (n 4) i.
11 2018 Code of Practice (n 2) Preamble.
12 2022 Code of Practice (n 3) 1 and the sources cited therein: footnote 8.
13 C Wardle and H Derakhshan, ‘Information Disorder: Toward an Interdisciplinary Framework for Research and Policy Making’ (Council of Europe Report, 27 September 2017) DGI(2017)09 5. It is worth noting, however, that the Democracy Action Plan later introduced a substantively different definition of misinformation, defined as ‘false or misleading content shared without harmful intent though the effects can still be harmful’ (Democracy Action Plan (n 5)).
The CoE Report proved helpful by consolidating previous efforts to define the boundaries of the concept. Earlier studies had suggested conceptualising ‘fake news’ as a diverse spectrum that could also extend to the likes of parody and satire,14 or they had focused largely on text-based and journalistic information15 whilst affording little attention to visual or other types of content. The CoE Report offered a categorisation broad enough to include the most popular and influential types of content, such as tweets and memes, but narrow enough to exclude other forms of expression unlikely to deserve regulatory attention, such as satire. It also proved highly influential, triggering a widespread shift in language. Shortly after its publication, other national and regional institutions16 followed suit and adopted similar terminology, in some cases abandoning the language of ‘fake news’ altogether.

The definition proposed by the EU authorities evidently builds on the CoE Report; however, it also seems to add further elements to better define the boundaries of the concept. For example, the CoE Report had omitted to define what it meant by ‘false’ information, apparently accepting the concept of falseness as self-explanatory. In contrast, the Communication on Tackling Online Disinformation offers further elements to clarify the concept, indicating that false information does not include ‘reporting errors’ (nor satire, parody, or clearly identified partisan news and commentary).17 The Action Plan Against Disinformation also clarifies the scope of applying the different proposed measures, explaining that they would only target ‘disinformation content that is legal under Union or national law’.18

The EU framework thus adds three new elements to the definition of disinformation and its relationship with the concept of falseness: the falsity of the information needs to be verifiable or the information needs to be misleading (the two circumstances seem to be alternative but equally sufficient). Reporting mistakes are, however, insufficient to constitute falsity, and, as a category, false information includes content that is otherwise lawful.

14 D Tambini, ‘Fake News: Public Policy Responses’ (Media Policy Project, London School of Economics and Political Science, March 2017): <https://core.ac.uk/download/pdf/83787497.pdf?fbclid=IwAR2plmI40dVowxOs>.
15 EC Tandoc Jr, Z Wei Lim, and R Ling, ‘Defining “Fake News”. A Typology of Scholarly Definitions’ (2017) 6 Digital Journalism 137.
16 See, for example, European Broadcasting Union, ‘Position Paper on ‘Fake News’ and the Information Disorder’ (18 April 2018): <https://www.ebu.ch/files/live/sites/ebu/files/News/Position_Papers/open/EBU-Position-EN-Fake_News_Disinformation-18.04.2018.pdf>; Digital, Culture, Media and Sport Committee, Disinformation and “Fake News”: Final Report (HC 2017–19, 1791).
17 Communication (n 1) 4.
18 Action Plan Against Disinformation (n 4) 1.
3 Countering Disinformation: the Operational Framework

The main instrument setting out platforms’ obligations regarding disinformation is the Code of Practice, a voluntary scheme signed by online platforms such as Facebook, Google, TikTok, and Twitter. Other signatories include the technology company Microsoft (owner of the search engine Bing), the software community Mozilla, and various members of the advertising industry. Throughout 2021, as many as 26 new participants, including civil society groups, software companies, and marketing agencies, joined in, until eventually a total number of 34 entities signed up to the 2022 Strengthened Code of Practice.

Signatories are expected to ‘defund’ the dissemination of disinformation by adopting measures such as ‘avoiding the publishing and carriage of harmful disinformation’. Another commitment deals specifically with the issue of disinformation circulating ‘in the form of advertising messages’, and requires that signatories prevent the dissemination of such content by devising and enforcing ‘appropriate and tailored advertising policies’, potentially in partnership with fact-checking organisations, source rating organisations, or services providing indicators of trustworthiness. Advertisements that do not comply with advertising policies in respect of disinformation should not be displayed through or on signatories’ services, pursuant to their ad verification and review systems.

Political or issue advertisements, in particular, need to be ‘clearly labelled and distinguishable as paid-for content’ so that users can understand the nature of such content, and their sponsors must be identifiable.

Notably, the original version of the Code dedicated an entire section to political advertising and issue-based advertising, where political advertising was defined as ‘advertisements advocating for or against the election of

19 M Killeen, ‘Code of Practice on Disinformation Revision Extended into 2022’ (Euractiv, 6 December 2021): <https://www.euractiv.com/section/digital/news/code-of-practice-on-disinformation-revision-extended-into-2022/>.
20 European Commission, ‘Signatories of the 2022 Strengthened Code of Practice on Disinformation’ (16 June 2022): <https://digital-strategy.ec.europa.eu/en/library/signatories-2022-strengthened-code-practice-disinformation>.
21 2022 Code of Practice (n 3) Commitment 1.
22 Ibid Measure 1.1.
23 Ibid Commitment 2.
24 Ibid Measure 2.1.
25 Ibid Measure 2.2.
26 Ibid Measure 2.3.
27 Ibid Commitment 6.
28 Ibid Measure 6.2.
a candidate or passage of referenda in national and European elections’. In contrast, the Code demanded that platforms formulated their own ‘working definitions’ of issue-based advertising in a way that would ‘not limit reporting on political discussion and the publishing of political opinion and excludes commercial advertising’. The language of this paragraph was ambiguous. On the one hand, the use of both expressions in the title of the paragraph (political and issue-based advertisements) suggested that they were not in the same category. On the other hand, inviting platforms to define the latter category in a way that protects the freedom to report on political issues suggested that issue-based advertisements are still somehow related to the broader sphere of political communication.

In fact, the definition of political and issue-based advertisements proved to be a contentious issue. The European Regulators Group for Audiovisual Media Services (ERGA) noted that the lack of clear and uniform definitions was hindering the practical implementation of the Code. EU member states offer diverging definitions of political advertising, and in most cases there is no definition of issue-based advertising at the state level. Moreover, most signatories failed to define issue-based advertising so far. Research showed that the platform signatories of the Code defined issue-based advertising differently and deployed different approaches to handle it.

In light of these ongoing issues and despite the efforts of European authorities and the Code’s signatories, the overall framework produced mixed results. One overarching difficulty was identified in the fragmentation of electoral laws at the state level. The Proposal for an Initiative on Greater Transparency in Sponsored Political Content (the Proposal) recognised that electoral competitions are largely regulated at the state level and that national laws regulating political advertising and communications differ widely. While these national laws ‘diverge in their scope, content and effect’ and impose a range of different restrictions, the distribution of political advertising online raises a further level of concern as it can more easily take place outside of designated electoral and campaign periods as compared to offline advertising. The Proposal concluded that the efforts made so far by digital platforms were ‘ineffective,

29 2018 Code of Practice (n 2) ii.B.
30 Ibid Commitment 4.
31 European Regulators Group for Audiovisual Media Services, ‘ERGA Report on Disinformation: Assessment of the Implementation of the Code of Practice’ (2020): <https://erga-online.eu/wp-content/uploads/2020/05/ERGA-2019-report-published-2020-LQ.pdf> 18.
32 See, I Nenadić and K Bleyer-Simon, ‘Issue-BasedAdvertising’ (European Digital Media Observatory Technical Report, 2021): <http://hdl.handle.net/1814/74326>.
33 Proposal on Transparency of Political Advertising (n 6) 2.
inconsistent and implemented non-transparently, and have had the effect of partitioning the internal market or otherwise undermining its functioning’.34 The absence of clear and relevant national rules and EU-wide standards for transparency in political advertising were identified as negatively affecting the democratic process in Europe.35

On a different but related level, an assessment of the implementation of the Code, run by the Commission in 2020, revealed several shortcomings. For example, the inconsistent and incomplete application of the relevant commitments from platforms and member states, a lack of uniform definitions, the insufficient scope of the current measures (in that several issues and criticalities of the online ecosystem remain unaddressed), and other limitations inherent to the self-regulatory nature of the Code were found.36

Therefore, EU authorities worked to develop further mechanisms to intensify their efforts to curb the spread of disinformation. In the European Democracy Action Plan, the Commission expresses its intention to revise and strengthen the Code of Practice ‘with clear commitments and […] appropriate oversight mechanisms’.37 Subsequently, in May 2021, the Commission issued guidance on strengthening the Code,38 recommending that commitments in all areas of the current Code become ‘stronger and more specific’,39 and that their reach is expanded to new signatories such as smaller social media, search services, private messaging services, and different stakeholders in the advertising industry.40 Amid several new signatories joining in, the overlap with the legislative process for the DSA and, subsequently, Russia’s military aggression against Ukraine, the revision was extended into 2022,41 until a ‘[s]trengthened’ version of the Code of Practice was eventually presented on 16 June 2022.42

34 Ibid 3.
35 Ibid 4.
36 Commission, ‘Assessment of the Code of Practice on Disinformation – Achievements and Areas for Further Improvement’ (Commission Staff Working Document) swd(2020) 180 final 7–19.
37 Democracy Action Plan (n 5) 22.
38 Commission, ‘Commission Guidance on Strengthening the Code of Practice on Disinformation’ (Communication) com(2021) 262 final (the Guidance on Strengthening the Code of Practice).
39 Ibid 4.
40 Ibid 5.
41 Killeen (n 19); European Commission, ‘Disinformation: Online Platforms Continue the Code of Practice Revision in Light of the War in Ukraine and Report on First 2022 Actions to Fight COVID-19 Disinformation’ (31 March 2022): <https://digital-strategy.ec.europa.eu/en/news/disinformation-online-platforms-continue-code-practice-revision-light-war-ukraine-and-report-first>.
42 European Commission, ‘Disinformation: Commission Welcomes the New Stronger and More Comprehensive Code of Practice on Disinformation’ (16 June 2022): <https://
In parallel with the revision of the Code, the Commission has announced a forthcoming package of measures to increase the transparency of online political advertising. In late 2021, the Commission proposed a Regulation on the Transparency and Targeting of Political Advertising, introducing new rules on the transparency and identification of political advertisements and targeting amplification practices based on the use of personal data. Most notably, the proposed regulation provides a new two-prong definition of political advertisement: the advertiser must be a politician (or the advertisement ought to be distributed on their behalf) and the advertisement needs to be capable of producing a certain effect (i.e., influencing ‘the outcome of an election or referendum, a legislative or regulatory process or voting behaviour’). A further – and, as will be discussed below, crucial – requirement is that the advertisement should not be of a private or commercial nature. Interestingly, this definition seems to blend the notions of political and issue-based advertisements outlined in the 2018 Code of Practice. It covers advertisements aimed at influencing elections or referendums (as in the political advertising definition above) and advertisements concerning a regulatory or legislative process, supposedly before a parliament or regulatory body, thus akin to the notion of issue-based advertisement as understood by some signatories of the Code.

The Strengthened Code of Practice follows this latter approach. The signatories are now expected to provide a common definition of ‘political and issue advertising’, however, this ought to be devised ‘in line with the definition of “political advertising” set out in the European Commission’s proposal for a Regulation on the transparency and targeting of political advertising’. A separate and specific commitment requires signatories to apply ‘a consistent approach’ to advertising policies and to clearly and publicly indicate the extent

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43 European Commission, ‘Political Advertising – Improving Transparency’: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12826-Political-advertising-improving-transparency_en>.
44 Commission, ‘Regulation on the Transparency and Targeting of Political Advertising’ (Communication) COM(2021) 731 final.
45 Ibid Article 2.2.
46 For instance, Facebook was noted to link issue-based advertising to ‘heavily debated and highly politicized sensitive topics that can influence many people and may impact the outcome of an election or result in legislation’, while Google defined it as ‘ads containing informational content relating to a debate of general interest’. See, Nenadić and Bleyer-Simon (n 32).
47 2022 Code of Practice (n 3) Commitment 4 and Measure 4.1.
to which they permit or prohibit political and issue advertising, by deploying appropriate labelling, transparency, and verification principles.\textsuperscript{48}

An important development emerging in these discussions is the Commission’s intention to set up a co-regulatory framework to tackle disinformation.\textsuperscript{49} In this respect, the draft text of the DSA, provisionally agreed by the EU co-legislators in April 2022,\textsuperscript{50} continues to envisage platforms taking up a standard-setting role by drawing up EU-wide codes of conduct with other relevant stakeholders.\textsuperscript{51} Compliance which such codes would be one of the indicators to assess platforms’ performances in managing and mitigating systemic risks,\textsuperscript{52} which include ‘information which is not illegal, but contributes to the systemic risks [such as] misleading or deceptive content, including disinformation’\textsuperscript{53} and ‘actual or foreseeable negative effects on democratic processes, civic discourse and electoral processes’.\textsuperscript{54} The Strengthened Code of Practice expressly envisages becoming one of such co-regulatory instruments.\textsuperscript{55}

In particular, providers of very large platforms will be expected to ‘deploy the necessary means to diligently mitigate the systemic risks’,\textsuperscript{56} such as ‘adapting content moderation processes ... and, where appropriate, the expeditious removal of or disabling access to the content notified; ‘as well as adapting any relevant decision-making processes and dedicated resources for content moderation,’\textsuperscript{57} ‘testing and adapting their algorithmic systems, including their recommender systems’,\textsuperscript{58} ‘adapting their advertising system and adopting targeted measures aimed at limiting or adjusting the presentation of advertisements in association with the service they provide’,\textsuperscript{59} or ‘improving the visibility of authoritative information sources.’\textsuperscript{60}

The Code of Practice and the forthcoming package of new provisions share a distinct categorical approach to the issue of disinformation in that they require digital platforms to fulfil certain obligations in respect of information

\textsuperscript{48} Ibid Commitment 5 and Measure 5.1.
\textsuperscript{49} European Commission, ‘Digital Services Act: Commission Welcomes Political Agreement on Rules Ensuring a Safe and Accountable Online Environment’ (23 April 2022): <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2545>.
\textsuperscript{50} European Commission, ‘Digital Services Act: Commission Welcomes Political Agreement on Rules Ensuring a Safe and Accountable Online Environment’ (23 April 2022): <https://ec.europa.eu/commission/presscorner/detail/en/IP_22_2545>.
\textsuperscript{51} Digital Services Act (n 7) Article 35(1)-(2).
\textsuperscript{52} Ibid Article 35(3)-(4).
\textsuperscript{53} Ibid Recital 57.
\textsuperscript{54} Ibid Recital 57b.
\textsuperscript{55} 2022 Code of Practice (n 3) Preamble (i).
\textsuperscript{56} Digital Services Act (n 7) Recital 58.
\textsuperscript{57} Ibid Article 27(1)(c).
\textsuperscript{58} Ibid Article 27(1)(ca).
\textsuperscript{59} Ibid Article 27(1)(d).
\textsuperscript{60} Ibid Recital 58b.
that belongs to a certain ‘type’. An alternative approach would be to focus primarily on the impact or consequences of any type of expression, irrespective of its format. This approach is followed, for instance, by the recent French Law 2018–1202.61 By opting for the former approach, the EU strategy to counter disinformation revives a question that has loomed in the background of the academic debate since the issue of disinformation first came to prominence in around 2016: should policy- and decision-makers (including the signatories of the Code) treat disinformation as (a) an instance of political speech, due to it usually being focused on current news and political affairs, such that it is in the public interest, or (b) a different kind of expression, due to it appearing on digital platforms, often as paid-for content?

4 Public-Interest and Commercial Speech: a Categorical Conundrum

Attempts to define the exact category to which disinformation belongs are not just a theoretical exercise. Concrete consequences depend on how policymakers and lawmakers categorise specific instances of expression.

Efforts to define categories of expression and assign them different levels of protection or standards of review are particularly associated with the jurisprudence of the US Supreme Court. The categorical approach entails that the category to which an expression can be ascribed is fundamental to determining whether and to what degree it deserves legal protection. In its original and simplest form, the principle would distinguish between two tiers of expression,62 one deserving legal protection and the other simply void of it. Examples of this latter tier would typically include the likes of fighting words, profanity, obscenity, and threats.63

Since the 1970s, the principle has developed into a more complex mechanism, distinguishing between coverage and protection of the First Amendment and drawing a distinction between three – rather than just two – tiers. In the first tier, some forms of speech are not covered by the First Amendment (e.g., obscene material) and can be restricted by regulation, as long as this meets

61 The French Law applies to ‘inexact or misleading allegations or imputations of fact’ transmitted on a mass scale over a publicly accessible online communication service in the three months leading to an election. See, R Craufurd Smith, ‘Fake News, French Law and Democratic Legitimacy: Lessons for the United Kingdom?’ (2019) 11 Journal of Media Law 52.
62 See, DA Farber, ‘The Categorical Approach to Protecting Speech in American Constitutional Law’ (2009) 84 Indiana Law Journal 917.
63 See, ussc, Chaplinsky v New Hampshire, 315 US 568 (1942).
the rather low threshold of bare rationality. In the second tier, some forms of speech are covered by the First Amendment but may not always be protected (e.g., commercial advertising). Restrictions may be permissible if they are both justified by a strong governmental interest and well-designed to advance that interest. In other words, restrictions on this second form of speech are subject to a stricter standard of review. Finally, in the third tier, speech is covered and protected by the First Amendment (typically, core political speech) and may not lawfully be restricted.64

Notably, over the years, the approach has undergone some fundamental changes. The boundaries between the tiers are not set in stone, and there have been cases of spillage from one tier to another. A significant example is commercial speech, considered outside of the scope of protected speech until the late 1970s. In the 1980 *Central Hudson* case,65 the US Supreme Court developed a four-part analysis that established the non-misleading character of commercial expression as the first prerequisite for First Amendment protection.66 Although considered a ‘doctrinal anomaly’ by prominent academic commentators,67 this decision allows courts to review state regulation constraining this type of expression using a less stringent standard than applied to restrictions on political speech.

The ECtHR does not operate in terms of categories in a way comparable to the US Supreme Court, at least in a formal sense. Its typical approach is granting member states a certain margin of appreciation to assess the necessity and the scope of an interference with freedom of expression, depending, among other considerations, on the nature of the legitimate aim in whose pursuit the interference is imposed. Jacob Rowbottom has observed that instead of classifying expressions into different categories, European and UK courts use the ‘value’ of an expression as an indicator of the level of protection that it ought to be granted (e.g., expressions concerning matters of political importance would normally be deemed of high value, and therefore any interference would be subject to the most rigorous standard of review). However, this method bears little practical difference from the categorical approach, so much so that the terminology of high/low value itself was originally developed

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64 M Tushnet, ‘The Coverage/Protection Distinction in the Law of Freedom of Speech – An Essay on Meta-Doctrine in Constitutional Law’ (2017) 25 *William & Mary Bill of Rights Journal* 1073, 1076.
65 USSC, *Central Hudson Gas & Electric Corp v Public Service Commission*, 447 US 557 (1980).
66 Ibid para 14.
67 Tushnet (n 64) 1080.
in US legal scholarship.68 Like the American approach, the European tradition thus grants heightened protection to information deemed to be in the public interest, although the boundaries of the category are, in practice, rather fluid.

Both the US and European approaches acknowledge and protect the category of commercial speech to some extent, but less so than political speech.69 The ECtHR has explicitly stated that the Convention covers commercial expressions (noting that the fact that ‘freedom [of expression] is exercised other than in the discussion of matters of public interest does not deprive it of the protection of Article 10’),70 although the standard of review would be less strict and more deferent towards national authorities’ stances on the issue (because the ‘margin of appreciation appears essential in commercial matters, in particular in an area as complex and fluctuating as that of unfair competition’).71

The categorisation of different forms of speech thus carries practical consequences for the different standards of judicial review in Europe and the US. Unsurprisingly then, the definition of the boundaries of each category has proven contentious through the years. The US Supreme Court’s first tier of highest protection has progressively broadened, moving from a relatively narrow focus on political speech as a form of expression that concerns ‘the free discussion of governmental affairs [including] discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes’,72 to embracing a wider notion of speech ‘on public issues’ that includes ‘any matter of political, social, or other concern to the community’.73 Admittedly, the US Supreme Court had to concede that ‘the boundaries of what constitutes speech on matters of public concern are not well defined’.74 The ECtHR has long held a position similar to the latter, explicitly acknowledging from the early 1990s that ‘there is no warrant in its case-law for distinguishing … between political discussion and discussion of other matters of public concern’,75 and that both deserve the same high level of protection since ‘there is little scope under

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68 J Rowbottom, ‘To Rant, Vent and Converse: Protecting Low Level Digital Speech’ (2012) 71 Cambridge Law Journal 355, 368.
69 Beh Johnson and K Ho Youm, ‘Commercial Speech and Free Expression: The United States and Europe Compared’ (2009) 2 Journal of International Media & Entertainment Law 159.
70 Jacubowski v Germany 15088/89 (ECtHR, 23 June 1994) para 25.
71 Ibid para 26.
72 USSC, Mills v Alabama, 384 US 214 (1966).
73 USSC, Snyder v Phelps, 562 US 443 (2011).
74 Ibid.
75 Thorgeir Thorgeirson v Iceland 13778/88 (ECtHR, 25 June 1992) para 64.
Article 10 para. 2 ... for restrictions on political speech or on debate of questions of public interest’.

The contours of the notion of commercial speech have proven even more elusive to define. The US Supreme Court characterised it in *Central Hudson* as ‘expression related solely to the economic interests of the speaker and its audience’. Eric Barendt noted that this definition implies that both parties in a communication need to have an economic interest that is the only purpose of the expression. These two conditions narrow down the scope of the category to a specific set of communications, effectively excluding the whole range of communications with mixed purposes.

It is interesting to note that, in contrast to the US Supreme Court, the European Court has not developed and theorised a discrete category of commercial expression as such. Several early decisions shaping the approach of the European Court to this type of content have focused on a particular kind of expression with mixed elements of a commercial and non-commercial nature. The lack of a strong theorisation has been particularly apparent in what seems like a recurring difficulty or reluctancy to draw a clear line between the notions of commercial speech and advertising. Moreover, academic commentators have acutely noted that the two concepts do not perfectly coincide, as there can be cases of commercial speech in formats other than advertisement and cases of advertisement of a non-commercial nature.

Confronted with the issue as to whether advertisement ‘as such’ is protected by the Convention, the ECtHR in *Barthold* initially chose to sidestep the general question and focused instead on the specificities of the newspaper article at stake in the case. The article presented a combination of both political and commercial elements that were ‘not possible to dissociate’ from each other, although the presence of the former alone was considered enough to engage Article 10. When the Court finally explicitly acknowledged that commercial expressions fall under the scope of Article 10 in *Markt Intern*,

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76 *Wingrove v the United Kingdom* 1749/93 (ECtHR, 25 November 1996) para 58.
77 *Central Hudson Gas & Electric Corp* (n 65) para 8.
78 E Barendt, *Freedom of Speech* (2nd edn, Oxford University Press 2007) 396.
79 See, RA Shiner, *Freedom of Commercial Expression* (Oxford University Press 2003) 96.
80 See, D Voorhoof, ‘Restrictions on Television Advertising and Article 10 of the European Convention on Human Rights’ (1993) 12 *International Journal of Advertising* 189, 203.
81 CR Munro, ‘The Value of Commercial Speech’ (2003) 62 *Cambridge Law Journal* 134, 150.
82 *Barthold v Germany* 8734/79 (ECtHR, 25 March 1985) para 42.
83 Ibid.
the expression involved came in the form of an information bulletin rather than an advertisement.84

The issue concerning the difference between commercial speech and advertisement resurfaced in Casado Coca, when the government tried to dispute the applicability of Article 10 on the grounds that the expression involved was ‘simply advertising’ rather than information of a commercial nature (suggesting, as a criterion to distinguish the two, that ‘an advertisement did not serve the public interest but the private interests of the individuals concerned’).85 However, the Court lumped the two together again and simply used its precedent in Markt Intern (which did not concern advertising) to affirm that the Convention covers both advertising and information of a commercial nature.86 Furthermore, the Court did not seem to pay any great regard to the fact that the impugned advertisements in Casado Coca concerned the provision of legal services, an example of professional advertising that Barendt excludes from the scope of commercial speech in its most exact sense due to it involving interests other than economic interests (e.g., personal welfare).87

Despite this difficulty in separating the two notions, it is interesting to note that in Barthold (another case concerning the provision of professional services, thus not ‘pure’ commercial speech), the Court distinguished between the ‘manner of presentation’ and the ‘substance’ of an expression,88 with a suggestion that it was the former element that essentially characterised the expression as of a commercial nature. Just four years later, however, the Court defined commercial expressions as ‘not intended to influence or mobilise public opinion, but to promote the economic interests of a given group of undertakings’,89 thus focusing instead on the purpose of the communication. However, as Jan Oster correctly observes, there is a difference between the content and the form of expressions, which are two different methods of categorisation that may well overlap. For instance, an expression might qualify as artistic due to its form, whilst also conveying political content and thus deserving strong protection.90

84 Markt Intern Verlag GmbH and Klaus Beermann v Germany 10572/83 (ECtHR, 20 November 1989).
85 Casado Coca v Spain 15450/89 (ECtHR, 24 February 1994) para 33.
86 Ibid para 35.
87 Barendt (n 78) 396.
88 Barthold (n 82) para 42.
89 Markt Intern Verlag GmbH and Klaus Beermann (n 84) para 25.
90 J Oster, Media Freedom as a Fundamental Right (Cambridge University Press 2015) 79, footnote 51.
As a result of the frequent conflation of advertising and commercial speech, the ECtHR’s approach to defining commercial expressions has at times been ambiguous on whether commercial expressions would be defined by their form or content. In contrast to this ambivalence, EU law has engaged with the notions of commercial communications and advertising in more detail. Article 2(a) of the Directive on Misleading and Comparative Advertising defines advertising as:

the making of a representation in any form in connection with a trade, business, craft or profession in order to promote the supply of goods or services, including immovable property, rights and obligations.\(^9\)

Alongside this more general provision (covering all forms of advertising irrespective of the medium used to distribute it), other sector-specific rules apply to information society services or broadcasting. Article 2(f) of the e-Commerce Directive defines commercial communications as:

any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person pursuing a commercial, industrial or craft activity or exercising a regulated profession.\(^2\)

This definition is also reprised in Article 1(h) of the Audiovisual Media Services Directive (AVMSD) as last amended in 2018,\(^3\) where audiovisual commercial communications are described in the same terms with minor adjustments related to the nature of the medium involved. Article 1(i) defines ‘television advertising’ as:

any form of announcement broadcast whether in return for payment or for similar consideration or broadcast for self-promotional purposes by a public or private undertaking or natural person in connection with

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\(^9\) European Parliament and Council Directive 2006/114/EC Concerning Misleading and Comparative Advertising [2006] OJ L 376.

\(^2\) European Parliament and Council Directive 2000/31/EC on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market [2000] OJ L 178.

\(^3\) European Parliament and Council Directive 2010/13/EU on the Coordination of Certain Provisions Laid Down by Law, Regulation or Administrative Action in Member States Concerning the Provision of Audiovisual Media Services [2010] OJ L 995.
a trade, business, craft or profession in order to promote the supply of goods or services … in return for payment.

Article 2(n) of the proposed DSA defines advertisement as:

information designed to promote the message of a legal or natural person, irrespective of whether to achieve commercial or non-commercial purposes, and presented by an online platform on its online interface against remuneration specifically for promoting that information.

Irrespective of their general or medium-specific nature, the definitions from the Directive on Misleading and Comparative Advertising, the e-Commerce Directive, and the AVMSD share a distinct focus on commercial pursuits, including the provisions of professional services. The AVMSD includes a further feature requiring any promoted goods or services to be provided against a remuneration. Compared to these older legislative definitions, the DSA marks a significant departure in the direction of widening the scope of the notion as it explicitly acknowledges that advertisements can be of a non-commercial nature.

As the Regulation on the Transparency and Targeting of Political Advertising is expressly intended to complement the DSA, the category of political advertising could likely be considered a narrower subset than the more general category of advertisement defined in the DSA. The provision in Article 2.2(a) of the proposed regulation, indicating that advertisements would be excluded from its scope if ‘of a purely private or a purely commercial nature’, suggests that a political advertisement could be either of a non-commercial nature or a cross-breed category with some, but not full, overlap with the category of commercial expressions.

Recent literature has seemed to struggle with the concept of disinformation and, in particular, with finding a suitable category to discuss it. Eugene Volokh has compared disinformation spread during electoral campaigns to financial fraud, because false statements made in this context ‘involve candidates seeking a paying job’;\(^{94}\) which would ground a strong governmental interest in preventing the deception of voters. Irini Katsirea has discussed the possibility of treating disinformation as quasi-commercial speech based on the observation that the publishers of such content typically primarily aim to skew the public

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94 E Volokh, ‘Freedom of Speech and Knowing Falsehoods’ (The Volokh Conspiracy, 28 June 2012): <http://volokh.com/2012/06/28/freedom-of-speech-and-knowing-falsehoods/>.
debate rather than address matters of political relevance.\textsuperscript{95} Natali Helberger, Tom Dobber, and Claes de Vreese suggested that, although in their view online political advertising ought to be considered political and not commercial speech, the traditional division between the two categories is increasingly less evident, so much so that the upcoming framework for political advertising could borrow some regulatory elements from commercial advertising at the EU level.\textsuperscript{96} Undoubtedly, newly emerging dynamics of public communication on digital media, such as the monetisation of political speech on social media through hidden political advertising on influencers' profiles,\textsuperscript{97} have helped to blur the lines between political and commercial speech in the last few years.

Amid the uncertainty within the academic literature about how disinformation should be categorised and regulated, the remainder of this article will discuss whether the ECHR system supports the approach of the emerging EU framework, which has decidedly moved towards tackling disinformation through the prism of the notion of advertising. In particular, the next section will examine how the ECtHR treats information that sits at the intersection of commercial and political speech and what specific indicators, if any, it uses to attribute expression to each category. Following this, as the Code of Practice requires platforms to take action against content that is verifiably misleading or false, the following three sections will consider whether the ECtHR’s case law has also provided guidance on whether the truthfulness of different categories of information should be assessed or verified according to the same or different standards.

4.1 Public-Interest and Commercial Speech in the ECHR Legal System
This section will investigate how the ECtHR has treated expressions that combine elements of different categories and could thus be categorised as commercial speech or information in the public interest. The following section will discuss whether the distinction, originally envisaged in the original Code of Practice but then superseded in the 2022 revision, between issue-based and political/electoral advertisements – whether categorised, entirely or primarily,
as public interest or commercial speech – is acknowledged, in any appreciably similar terms, by the European Court.

‘Political speech’ remains a widely used term, but it is now clear that it fails to fully capture the broader and more varied scope of the kind of information to which both the US and ECHR legal systems offer the highest degree of protection. For this reason, and to avoid confusion with the categories of political and issue-based advertising introduced with the Code of Practice, the term ‘public interest’ information will be used in the remainder of this article to refer to the kind of expressions focusing on matters of public concern at large (rather than governmental affairs alone) in line with the orientation of these two legal systems.

With respect to the first issue, the European Court tends to apply the general analytical framework that it uses for public interest speech, rather than commercial advertisements, to advertisements focused on issues of relevance to the public debate. This approach has been followed fairly consistently since X and Church of Scientology in 1979, when a useful criterion for distinguishing between public interest and commercial speech was provided for the first time. The applicant was a religious organisation and therefore claimed that its advertisement qualified as a manifestation of religious beliefs within the meaning of Article 9(1) of the ECHR. The then European Commission of Human Rights instead focused on the content and purpose of the expression, distinguishing ‘between advertisements which are merely “informational” or “descriptive” in character and commercial advertisements offering objects for sale’.98 In the latter case, regardless of the central involvement of religious concerns, an advert would still qualify as commercial speech if the ‘manifestation of a desire to market goods for profit’ is more central than ‘the manifestation of a belief’.99

For this reason, the Commission decided to base its assessment on the general framework for commercial freedom rather than religious freedom. Therefore, noting that in most European countries expressions of a commercial nature can be restricted to protect consumers from misleading or deceptive practices, the Commission considered that ‘the test of “necessity” in the second paragraph of Article 10 should … be a less strict one when applied to restraints imposed on commercial “ideas”’.100

The same approach was followed again in Lehideux and Isorni, a case concerning a one-page advertisement in the newspaper Le Monde depicting

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98 X and the Church of Scientology v Sweden 7805/77 (ECmHR, dec, 5 May 1979) page 72.
99 Ibid.
100 Ibid 73.
Marshal Philippe Pétain, the chief of state of Vichy France, in favourable terms. The Commission explicitly decided to disregard the formal element that the information was ‘represented in the form of a separate advertisement and contained repeated phrases calculated to arrest the reader’s attention’,\textsuperscript{101} and instead focused on the substantive element that the expression’s ‘content and purpose did not bring it within the competitive or commercial domains’.\textsuperscript{102}

Later, the Court noted in \textit{VgT} that a film about animal experiments and industrial animal production would fall ‘outside the regular commercial context inciting the public to purchase a particular product’ and would instead qualify as political in nature because it ‘reflected controversial opinions pertaining to modern society in general’.\textsuperscript{103} In the follow-up case, \textit{VgT (No 2)}, the Court reasoned that because the advert related to issues such as ‘consumer health, …animal and environmental protection’, it was ‘undeniably in the public interest’.\textsuperscript{104} Most importantly, for present purposes, it ought to be noted that the Court set out the analytical framework by drawing from landmark decisions in public interest speech, including \textit{Lingens, Castells, and Thorgeir Thorgeirson}.\textsuperscript{105}

In \textit{tv Vest}, a case concerning television advertisements for a small political party, the Court also took an explicit stance on the criteria for distinguishing between the two categories of commercial and public interest speech, affirming that:

\textquote{irrespective of the fact that it was presented as a paid advertisement rather than as part of journalistic coverage of a political debate, the content of the speech in question was indisputably of a political nature. Thus...the impugned advertisement obviously fell outside the commercial context of product marketing, an area in which States traditionally have enjoyed a wide margin of appreciation.}\textsuperscript{106}

This decision gives a strong indication that, in identifying the relevant legal category for political advertising, the Court focuses more on the content than on the form of the expression. The outer limits of this framework were tested in

\textsuperscript{101} \textit{Lehideux and Isorni v France [GC] 24662/94} (ECtHR, 23 September 1998) para 44.
\textsuperscript{102} Ibid.
\textsuperscript{103} \textit{Verein Gegen Tierfabriken (VgT) v Switzerland 24699/94} (ECtHR, 28 June 2001) para 70.
\textsuperscript{104} \textit{Verein Gegen Tierfabriken Schweiz (VgT) v Switzerland (No 2) [GC] 32772/02} (ECtHR, 30 June 2009) para 92.
\textsuperscript{105} Ibid.
\textsuperscript{106} \textit{TV Vest AS and Rogaland Pensjonistparti v Norway 21132/05} (ECtHR, 11 December 2008) para 64.
Murphy, a case concerning a broadcast advertisement announcing a religious event, in which the Court confirmed that the traditionally broader margin of appreciation granted to state authorities with respect to commercial speech can also apply to speech involving moral or religious convictions.\(^{107}\)

This general approach of looking at the content rather than the presentation of information was tested and confirmed in two cases, Barthold v Germany and Stambuk v Germany, which academic commentators regard as more complex from a definitional perspective, as the expressions involved were of a ‘hybrid nature, containing both commercial and non-commercial elements’\(^{108}\) and did not come in the form of advertisements. In Barthold, the European Court considered that the presence of some ‘publicity-like’ elements in an interview (written by a journalist on a topic of general interest, such as animal care) would speak ‘more to manner of presentation than to substance’.\(^{109}\) In the Court’s view, all the ‘various components overlap to make up a whole, the gist of which is the expression of “opinions” and the imparting of “information” on a topic of general interest’.\(^{110}\) Crucially, the Court rejected the national court’s argument that the ‘intent to act for the purposes of commercial competition’, which in its view characterised the impugned article, would need to be ‘entirely overridden by other motives’ in order to activate the higher threshold of protection granted to public-interest speech.\(^{111}\) Instead, the European Court, while acknowledging that the article could potentially give publicity to the interviewee’s clinic and thus unfairly disadvantage his competitor veterinarians, considered that this possible effect would be ‘altogether secondary’ to the public interest nature of the principal content of the article and the nature of the issue discussed.\(^{112}\)

Similarly, in Stambuk, a case involving a newspaper interview with an ophthalmologist, the Court found that it would not be possible to isolate specific passages promoting a medical doctor’s private practice from an article aimed at informing the general public on healthcare-related topics. As a result, the national law provision banning advertising in the medical profession would not apply.\(^{113}\)

\(^{107}\) Murphy v Ireland 44179/98 (ECtHR, 10 July 2003) para 67.
\(^{108}\) MH Randall, ‘Commercial Speech Under the European Convention on Human Rights: Subordinate or Equal?’ (2006) 6 Human Rights Law Review 53, 64.
\(^{109}\) Barthold (n 82) 42.
\(^{110}\) Ibid.
\(^{111}\) Ibid 58.
\(^{112}\) Ibid.
\(^{113}\) Stambuk v Germany 37928/97 (ECtHR, 17 October 2002) para 48–50.
In Murphy, however, the Court elaborated further on whether the coverage of the same matters could be subject to different restrictions, depending on whether it was through general programming or purchased advertising. In this respect, the Court accepted that while programming can be subject to requirements of impartiality (which national law required for broadcast programmes concerning matters of religious faith, as in the case at stake), advertising tends to have a ‘distinctly partial objective’ and cannot be subject to the same principle of impartiality. However, this distinction can justify restrictions imposed on purchased advertisements, provided that the group represented has other means to express their views.¹¹⁴

Overall, the Court’s approach focuses on the primary content and purpose of the expression rather than on extrinsic elements, such as whether it is paid for or its formal presentation. Focusing on the primary content and purpose means that where there is a mixture of relevant commercial elements (e.g., typically being paid for) and relevant political elements, if the latter are predominant, the whole of the expression in question (and not just part of it) will attract the heightened protection offered to expression in the public interest. Nonetheless, the distinction between paid-for and editorial political content bears some practical significance in that the two types of content can be subject to different restrictions or obligations, either based on content (as in the case of imposing a requirement of impartiality on broadcasters but not on advertisers) or of a structural nature (as in the case of limiting access to advertising time or space to dominant groups).

### 4.2 Issue-Based and Political Advertisements in the ECHR Legal System

With respect to the second question – whether a distinction can be drawn between advertisements of general relevance to the public interest and those that specifically concern election campaigns – the European Court’s case law also provides some relevant guidance.

The Court discussed the conflictual dynamic surrounding electoral speech and public interest expression in most detail in Bowman, a case concerning leafleting rather than advertising. The Court acknowledged that, although the rights to free elections and freedom of expression are ‘inter-related and operate to reinforce each other’, they can also:

> in certain circumstances...come into conflict and it may be considered necessary, in the period preceding or during an election, to place certain

¹¹⁴ Murphy (n 107) para 74.
restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure “the free expression of the opinion of the people in the choice of the legislature”.

This decision thus clarifies that additional restrictions can be imposed during an electoral campaign and left to state authorities to determine. However, the Court only provides one guiding principle: restrictions must serve the aim of letting voters form their opinions about voting preferences. It does not clarify whether such limitations could target the content of expression in any way or should be content-neutral.

In Animal Defenders, the European Court considered this possible distinction in electoral adverts (as opposed to general, non-paid-for electoral speech). The case concerned national legislation prohibiting paid political advertising outside of electoral periods. The applicant contested the relevance of precedents such as Bowman on the basis that the case in dispute concerned restrictions prior to and during elections. The Court responded that, because ‘the democratic process is a continuing one to be nurtured at all times’, a measure that applied more broadly beyond electoral periods did not appear disproportionate to the aim pursued.

Orlovskaya concerned a regulation requiring transparency around the sponsorship of campaigning material for a parliamentary election. The state party expressly aimed to protect voters from being misled about the identity of the campaign’s sponsors. In this decision, the Court took the opportunity to define the framework applicable to campaigning material, as opposed to general coverage of campaigns on news media. The state party had tried to define campaigning material as publications that ‘predominantly contain information about one candidate’ (incidentally, amounting to negative comments in the case at stake). Such material would be subject to an obligation to identify the person or entity who had commissioned it, whether with or without paying a fee.

The Court focused upon whether the publication retained its editorial control or whether such decisions were instead passed onto the entity that had paid for the content. It found that a situation in which a news publication was formally affiliated with a political party and was prepared to publish material

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115 Bowman v the United Kingdom [GC] 24839/94 (ECtHR, 19 February 1998) paras 42–43.
116 Animal Defenders International v the United Kingdom [GC] 48876/08 (ECtHR, 22 April 2013) para 111.
117 Orlovskaya Iskra v Russia 42911/08 (ECtHR, 21 February 2017) para 99.
118 Ibid 94.
on behalf of this party or related candidates did not equate to paid-for political advertisement.\textsuperscript{119} The Court acknowledged that, in electoral campaigns:

> the balancing exercise could take account, under the heading of the “rights of others”, of the general public interest, for instance relating to absence of distortion of the electoral process, including fair competition between the candidates.\textsuperscript{120}

The Court thus accepted that electoral advertisements can be subject to broader structural (seemingly non-content-based) limitations as compared to advertisements on issues of public interest.

The case law of the European Court has thus consistently considered the category of advertisements on issues of public interest as fundamentally equivalent to public interest speech. The Court has consistently applied this category by looking primarily at whether the expression, because of its content, would be able to contribute to a public debate rather than at its format or whether it was paid for. Moreover, paid-for content can still qualify as public interest speech and be protected as such if found to contribute to societal debate. However, the Court has accepted that different standards could apply with respect to structural and content obligations.

The difference between issue-based and electoral (i.e., political, as the 2018 Code defined them) advertisements, initially put forward in the first version of the Code of Practice, is not strongly theorised in the case law. Nonetheless, the case law reveals that the Court has at times distinguished these two kinds of content. The category of political ads was originally defined in the Code as related to electoral campaigns. Accordingly, if the category of issue-based ads – which the Code had left for the platforms to define – is understood along the lines of the Court’s practice, it should then be interpreted as paid-for content that primarily aims to discuss, even from a non-neutral perspective, a topic of relevance to the public debate outside of the electoral context. However, the definition of political advertising offered in the proposed Regulation on the Transparency and Targeting of Political Advertising blurs the line between the two groups. It would also cover issues considered in a legislative process rather than in an upcoming vote, which in turn would likely be regarded as issue-based rather than political advertisements in the Code. Irrespective of the shifting line between the two, a key point is that despite being advertisements, both types of content would still be treated as public interest rather than commercial

\textsuperscript{119} Ibid 120.
\textsuperscript{120} Ibid 103.
speech under the ECHR system. However, platforms are required to verify the misleading nature of both political and issue-based ads. This requirement, in turn, begs the further question of what specific tests or indicators platforms would deploy to determine whether a political or issue-based advertisement amounts to disinformation.

5 Assessing the Accuracy of Expressions: a Question of Standards

The next three sections will discuss whether, following on a categorical approach, specific and different standards for assessing the accuracy of information ought to apply to the different categories of public interest, commercial, and political (i.e., electoral) speech. These sections will thus analyse how the obligations of platforms would practically differ, depending on which categorisation is ultimately adopted.

5.1 Standards of Accuracy in Public Interest Expression

The ECtHR has famously upheld a distinction between facts and opinions. It is its consolidated approach that opinions cannot be ‘proven true’, and that any such obligation would constitute an infringement on media freedom. The Court has refrained from stating the same principle, in comparably explicit terms, with regard to factual statements. However, analysing its now rich body of decisions on the issue, it emerges that, even in those cases where the Court has stressed a general expectation regarding the ‘essential nature of the veracity of the disseminated information’, it has not required plain, objective truth. The Court has instead approached the issue through the prism of good faith and the ‘fairness of the means used to obtain information and reproduce it for the public and the respect shown for the person who is the subject of the news report’.

In much the same vein, the Court has recently highlighted the issue of respect for appropriate procedures to establish objective narratives, holding that an assessment of the balance between media freedom and the right to respect for private life should consider, among other criteria, ‘the method of

121 See, Lingens v Austria 9815/82 (ECtHR, 8 July 1986) para 46; Oberschlick v Austria (No 1) 11662/85 (ECtHR, 23 May 1991) para 63.
122 Couderc and Hachette Filipacchi Associés v France [GC] 40454/07 (ECtHR, 10 November 2015) para 134.
123 Ibid 131.
124 Ibid 132.
obtaining the information and its veracity’. Using appropriate methods was defined as acting ‘in good faith and on an accurate factual basis’ and abiding by the ‘obligation to verify factual statements that are defamatory of private individuals’. The ‘veracity’ of the statements was defined as “reliable and precise” information in accordance with the ethics of journalism. When faced with the question of whether the publication of incorrect information had infringed on the rights of others, such as privacy or reputation, the Court’s assessment of whether the media had acted in conformity with its duties formed part of a balancing exercise between competing rights rather than a duty per se.

When examining the admissibility of a restriction on media freedom and assessing the veracity of a statement plays a role in the determination, the Court customarily looks into whether working methods and procedures prescribed by professional ethics were respected rather than focusing on the objective truthfulness of a statement. In *Fressoz and Roire*, for instance, the Court was more concerned with whether the applicant had made efforts to verify the authenticity of certain documents than with whether the information provided was eventually true. In *Halldórsson*, the Court noted that the applicant journalist only sought confirmation from the public prosecutor about an ongoing investigation after being sued before a domestic court, which contributed to the ECtHR finding no violation of Article 10. In *Bédat*, another case decided in favour of the government party, the Court criticised the ‘almost mocking tone’ used in a story covering a road incident.

The decision in *Stoll* is where the Court had the opportunity to reflect on such aspects in the most explicit terms. The judges focused on formal ‘shortcomings’, such as the ‘reductive and truncated’ presentation of the

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125 *Halldórsson v Iceland* 44322/13 (ECtHR, 4 July 2017) para 40.
126 Ibid 50.
127 Ibid.
128 Ibid.
129 *Bladet Tromsø and Stensaas v Norway* [GC] 21980/93 (ECtHR, 20 May 1999) para 63.
130 See, *Fressoz and Roire v France* [GC] 29183/95 (ECtHR, 21 January 1999) para 54; *Pedersen and Baadsgaard v Denmark* [GC] 49017/99 (ECtHR, 17 December 2004) para 78; *Stoll v Switzerland* [GC] 69698/01 (ECtHR, 10 December 2007) para 103; *Bédat v Switzerland* [GC] 56925/08 (ECtHR, 29 March 2016) para 58; *Halldórsson v Iceland* 44322/13 (ECtHR, 4 July 2017) para 50; *Fuchsmann v Germany* 71233/13 (ECtHR, 19 October 2017) para 42; *Frisk and Jensen v Denmark* 19657/12 (ECtHR, 5 December 2017) para 70.
131 *Fressoz and Roire* (n 130) para 55.
132 *Halldórsson* (n 130) para 52.
133 *Bédat* (n 130) para 60.
134 *Stoll* (n 130) para 147.
135 Ibid.
circumstances of the case, the inappropriately ‘sensationalist style’,¹³⁶ ‘inaccurate and misleading’¹³⁷ writing, and even anti-Semitic language.¹³⁸ In this decision, the Court also included a few interesting reflections on the nature of the assessment, stating that the duty to respect the ethics of journalism includes at least two aspects: the manner of obtaining information and the form of the articles. In the Court’s view, the latter carries greater weight and on the balance between professional and legal obligations (stressing that neither domestic courts nor the European Court can ‘substitute their own views for those of the press as to what technique of reporting should be adopted by journalists’).¹³⁹

Following this line of reasoning, the Court decided against limitations on expression even where the statements in question were objectively untrue. This was so in cases such as *Fuchsmann*, where a decisive circumstance was that the journalists involved had based their articles on ‘sufficiently credible sources’ such as an official report,¹⁴⁰ *Frisk and Jensen*, where the applicants had conducted ‘substantive and significant journalistic research...over a period of approximately one year’¹⁴¹ in compliance with their ethical duties, thus publishing incorrect information despite their best efforts and in good faith, and *Ólafsson*, where the applicant journalists had interviewed ‘several relevant persons’¹⁴² and presented the (nonetheless incorrect and defamatory) allegations ‘with certain counter-balancing elements’.¹⁴³

The emphasis on the correctness of the procedure, rather than on the content, is also confirmed by the policy positions adopted by the Council of Europe. As early as 1993, the Council’s Resolution on the Ethics of Journalism described the principle of truthfulness (on which news broadcasting should be based) as ‘ensured by the appropriate means of verification and proof, and impartiality in presentation, description and narration.’¹⁴⁴ More recently, the Parliamentary Assembly returned to this point, reaffirming that inaccurate (i.e., substantively untrue) statements should not be penalised where certain procedural conditions are met (i.e., lack of knowledge on the journalists’ side

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¹³⁶ Ibid para 149.
¹³⁷ Ibid par 150.
¹³⁸ Ibid para 148.
¹³⁹ *Stoll* (n 130) para 146.
¹⁴⁰ *Fuchsmann* (n 130) paras 44–45.
¹⁴¹ *Frisk and Jensen* (n 130) para 74. An almost identical argument was also made in the earlier case *Prager and Oberschlick v Austria* 15974/90 (ECtHR, 26 April 1995) para 37.
¹⁴² *Ólafsson v Iceland* 58493/13 (ECtHR, 16 March 2017) para 54.
¹⁴³ Ibid para 55.
¹⁴⁴ Parliamentary Assembly of the Council of Europe, ‘Ethics of Journalism’ (1 July 1993) Resolution 1003 (1993) para 4.
of the inaccuracy of the statements made; lack of conscious intention to cause harm; and proper diligence in checking the truthfulness of the statements).145

5.2 Standards of Accuracy in Commercial Advertising

The Court’s approach to commercial advertising is characterised by two fundamental features relevant to the present analysis. First, the Court consistently grants a broader margin of appreciation to state authorities in the regulation of commercial speech than political speech.146 Second, the regulation of advertising is to a large extent harmonised at the EU level, which means that state authorities, even in exercising the margin of appreciation granted by the Court, often follow similar approaches in practice. As the following section will show, these two points prove relevant when identifying the standard of accuracy that the Court applies to commercial advertising.

In the seminal case *X and Church of Scientology*, the Commission based its necessity test on the standard of ‘misleading or deceptive practices’ as commonly applied in most European countries.147 Extending this line of reasoning, the Court specified the parameters to assess the accuracy of commercial speech in more detail in *Casado Coca*, indicating that the purpose of advertising is to offer consumers ‘a means of discovering the characteristics of services and goods offered’ to them and it could be restricted, amongst other reasons, when ‘untruthful or misleading’ – 148 an approach more recently confirmed in *Krone*.149 As noted by authoritative commentators, the Court’s decision that commercial speech could be restricted for being untruthful or misleading marks a major departure from its approach to political information, where restrictions on these grounds are typically rejected.150 This change is apparent when comparing the two cases mentioned above with *Hertel*, where the Court refused to apply the same standard for misleading advertisements to a commercial communication concerning the effects of microwaves on human health. This decision was based on the consideration that the advert in question would form part of a debate on a matter of general interest.151

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145 Parliamentary Assembly of the Council of Europe, ‘Media Responsibility and Ethics in a Changing Media Environment’ (24 June 2015) Resolution 2066 (2015) para 6.
146 Markt Intern Verlag Gmbh and Klaus Beermann (n 84) para 33; Casado Coca (n 85) para 53; Mouvement Raëlien Suisse v Switzerland [GC] 16354/06 (ECtHR, 13 July 2012) para 61.
147 X and the Church of Scientology (n 98) 73.
148 Casado Coca (n 85) para 51.
149 Krone Verlag GmbH & Co KG v Austria (No 3) 39069/97 (ECtHR, 11 December 2003) para 31.
150 P Wragg, ‘Advertising, Free Speech and the Consumer’, in *European Consumer Protection: Theory and Practice*, J Devenney and M Kenny (eds), (Cambridge University Press 2012) 333, 327–329.
151 Hertel v Switzerland 25181/94 (ECtHR 25 August 1998).
Across the EU, state legislation on this subject – to which the Court refers in granting state authorities a broader margin of appreciation – is based on the Unfair Commercial Practices Directive,152 which defines as ‘misleading’ any commercial practice that ‘contains false information and is therefore untruthful or in any way...deceives or is likely to deceive the average consumer’.153 The Directive has been implemented in the UK through the Business Protection from Misleading Marketing Regulations154 and the Consumer Protection from Unfair Trading Regulations155 of 2008. In addition, a self-regulatory system administered by the Advertising Standards Authority (ASA) and the Committee of Advertising Practice (CAP) regulates all forms of commercial communication, albeit under two different regimes for broadcast and non-broadcast advertisements.

The relevant rules require all non-broadcast (including online) marketing communications to be ‘honest and truthful’,156 and, as in the case of public interest information, they also distinguish between facts and opinions.157 The former are usually subject to more stringent requirements of accuracy, although, in the case of advertising, the dividing line is often considered thin.158 The CAP Code provides guidance on this notion, clarifying that slightly different regimes apply to subjective and objective claims; while a requirement not to mislead the consumer applies to both, ‘documentary evidence’ may be required to substantiate objective claims.159 Official guidance from the CAP Executive further clarifies the distinction, reiterating the need for objective claims to be ‘always...supported by evidence’, whilst subjective claims are described as ‘opinions’ or based on ‘personal...preferences’.160 Advertisements

152 European Parliament and Council Directive 2005/29/EC Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2005] OJ L 149/22 (the Unfair Commercial Practices Directive).
153 Ibid Article 6.1.
154 Business Protection from Misleading Marketing Regulations 2008, s1 2008/1276.
155 Consumer Protection from Unfair Trading Regulations 2008, s1 2008/1277.
156 Committees of Advertising Practice, 'The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing' (12th edn, August 2010): <https://www.asa.org.uk/static/4eb51e7-028d-4509-ab3c0f882ec9a3c4/4869041b-06d3-4745-b209d2a5c37500b3/The-Cap-code.pdf> Rule 1.1 (the ‘CAP Code’).
157 Ibid Article 12.
158 JP Nehf, 'Misleading and Unfair Advertising', in Handbook of Research on International Consumer Law, G Howells, I Ramsay, and T Wilhelmsson (eds), (2nd edn, Edward Elgar 2018) 90, 92.
159 CAP Code (n 156) Rules 3.6–3.7.
160 Advertising Standards Authority, 'Matters of Opinion' (28 November 2019): <https://www.asa.org.uk/advice-online/matters-of-opinion.html>.
should always make the distinction between the two categories clear to customers, such as by using quotation marks as appropriate.

Nonetheless, the lines between the two categories will likely often remain blurry, and the distinction could, at times, depend on context. Advertisers can rely on different techniques to substantiate their claims. The CAP Executive advises that opinions expressed in testimonials, although useful, may not suffice and should ideally be backed with independent evidence to prove their accuracy. More detailed guidance is available about what kind of ‘high level of robust evidence’ is expected to support medical and scientific claims.

Quite evidently, despite similarities in language, in the use of concepts like ‘accuracy’ and in the distinction between facts and opinions, the professional techniques typically used by journalists to ensure the accuracy of their stories (e.g., reliance on documentary sources, official records, and independent sources; interviews; and correct attribution of quotes) are far removed from those of advertisers. The professional standards of accuracy expected from advertisers appear, in comparison, scant and less thoroughly defined.

Most relevantly, while in the journalism context respect for appropriate procedures can exonerate even factually false statements, the case law of the Court of Justice of the European Union has ruled out the possibility of a professional diligence defence for misleading advertising. In the news industry, omissions traditionally fall within the professional discretion of journalists and editors, who are considered to be in a position to evaluate the newsworthiness of individual elements of any story. In contrast, in the advertising context, omissions can be found to be misleading both at the domestic level in the UK, if they hide material information from the consumers, and at the EU level, if they are likely to alter consumers’ decisions.

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161 Ibid.
162 Advertising Standards Authority, ‘Substantiation’ (9 June 2016): <https://www.asa.org.uk/advice-online/substantiation.html>.
163 Ibid.
164 F Caronna, ‘Tackling Aggressive Commercial Practices: Court of Justice Case Law on the Unfair Commercial Practices Directive Ten Years On’ (2018) 43 European Law Review 880.
165 CAP Code (n 156) Rule 3.3. Rule 3.2 of the UK Code of Broadcast Advertising (BCAP Code) provides a similar principle, requiring that broadcast advertisements do not mislead consumers ‘by omitting material information [or] hiding material information or presenting it in an unclear, unintelligible, ambiguous or untimely manner’. See, Committees of Advertising Practice, ‘The UK Code of Broadcast Advertising’: <https://www.asa.org.uk/static/846f25eb-f474-47c1-ab3f571e3db5910/f2291db-85df-42a4-bf38d5213826ec/BCAP-Code-full.pdf> (the BCAP Code).
166 Unfair Commercial Practices Directive (n 152) Article 7.1.
Looking in more detail at the dynamics of factual falseness as a ground for restrictions on speech, advertising law effectively seems to engage very little with the value of truth at the domestic or EU level. Domestic provisions in the UK allow advertisers to advance claims that are ‘obviously’ exaggerated\(^{167}\) or even, as the CAP Executive explains, that amount to ‘obvious untruths’,\(^{168}\) provided that they are not misleading and not likely to be taken literally. Conversely, the Directive provides that misleading advertising can fall foul of the law even when the information is factually correct if it is nonetheless likely to deceive the average consumer.\(^{169}\) In either case, the relevant provisions consider the value of truth as a means rather than an end, the real goal being the protection of consumers and, in the case of the EU Directive, the functioning of the internal market.\(^{170}\)

Comparing this approach with public interest expression, the standard of accuracy expected of speakers is significantly different. Accuracy in the news industry, in relation to public interest expression, is largely defined and assessed in procedural terms. In contrast, for advertisements the focus is more on the effects of the expression than on the procedures followed to gather and present it. In particular, the standard of ‘misleadingness’ is defined primarily as the impact of the expression on customers’ purchasing decisions.

5.3 Standards of Accuracy in Political Advertising

A further question is what standards of accuracy the ECHR legal system would require for expressions made during election campaigns and whether different standards would apply depending on which form the communication takes, namely whether it comes in the form of an advertisement.

Article 3 of Protocol No 1 to the Convention protects the right to free elections and acknowledges both an active (the right to vote) and a passive (the right to stand for election) aspect. The scope is typically limited to national elections for the state’s legislature; local elections and referendums are excluded, at least in principle.\(^{171}\) The Court’s case law indicates that in this context, the main duty of state authorities is not just one of non-interference, as is most common in the context of civil and political rights, but a positive obligation to hold

\(^{167}\) CAP Code (n 156) Rule 3.2.
\(^{168}\) Advertising Standards Authority (n 162).
\(^{169}\) Unfair Commercial Practices Directive (n 152) Article 6.1.
\(^{170}\) J Stuyck, ‘The Court of Justice and the Unfair Commercial Practices Directive’ (2015) 52 Common Market Law Review 721, 724.
\(^{171}\) Recent decisions of the ECtHR have held that local bodies’ elections would fall under the scope of the Protocol when such bodies have broad legislative powers. See, for instance, Repetto Visentini v Italy 42081/10 (ECtHR, 9 March 2021); Miniscalco v Italy 55993/13 (ECtHR, 17 June 2021).
democratic elections and create the conditions for them to be fair.\textsuperscript{172} However, the rights enshrined in Article 3 are not absolute, and there is room for implied limitations. Such limitations do not even have to undergo strict scrutiny, including the tests of legitimacy and necessity, but only a lower threshold of non-arbitrariness and non-interference with freedom of expression.\textsuperscript{173}

Crucially, Article 3 of Protocol No 1 was never designed to regulate all aspects of the electoral process. As a result, state authorities enjoy a considerable margin of appreciation in organising electoral systems.\textsuperscript{174} Compared to purely commercial advertising, electoral advertising is scarcely harmonised at the EU level. Two recommendations of the Council of Europe\textsuperscript{175} provide some general guidance to state authorities in regulating electoral campaigns. State-owned print outlets and broadcasters (both public and private) should bear an obligation to ‘cover electoral campaigns in a fair, balanced and impartial manner’.\textsuperscript{176} If they accept paid political advertising in their publications, media outlets owned by public authorities should ensure equal and non-discriminatory access to such spaces for all political contenders and parties that request the purchase of advertising space.\textsuperscript{177}

Against the backdrop of these two (non-binding) recommendations, comparative analyses of state laws on electoral advertising in Europe have noted a high degree of diversity, with some states not even using the terminology of ‘electoral advertising’, and most states generally allowing paid political ads only during election campaigns. In general, beyond the question of access (notably, the only aspect explicitly covered in the two recommendations), the literature reveals a ‘considerable variety in the way electoral or media laws regulate what campaigners can do with the time they get allocated for free or the time they buy on television’\textsuperscript{178} or other media.

\begin{itemize}
\item \textsuperscript{172} Namat Aliyev v Azerbaijan 18705/06 (ECtHR, 8 April 2010) para 88; Uspaskich v Lithuania 14737/08 (ECtHR, 20 December 2016) para 93; Mugemangango v Belgium [GC] 310/15 (ECtHR, 10 July 2020) para 69.
\item \textsuperscript{173} Yumak and Sadak v Turkey [GC] 10226/03 (ECtHR, 8 July 2008) para 109.
\item \textsuperscript{174} Communist Party of Russia and Others v Russia 29490/05 (ECtHR, 19 June 2012) paras 109–110.
\item \textsuperscript{175} Committee of Ministers, ‘Recommendation No. R (99) 15 of the Committee of Ministers to Member States on Measures Concerning Media Coverage of Election Campaigns’ (9 September 1999) Recommendation No R (99) 15; Committee of Ministers, ‘Recommendation cm/Rec(2007)15 of the Committee of Ministers to Member States on Measures Concerning Media Coverage of Election Campaigns’ (7 November 2007) cm/Rec(2007)15.
\item \textsuperscript{176} Recommendation No R (99) 15 (n 175) I.2 and II.1.
\item \textsuperscript{177} Ibid I.2 and 11.4.
\item \textsuperscript{178} C Holtz-Bacha, ‘Regulation of Electoral Advertising in Europe’, in Political Advertising in the 2014 European Parliament Elections, C Holtz-Bacha, E Novelli, and K Rafter (eds), (Palgrave Macmillan 2017) 27, 33.
\end{itemize}
Although the rights to freedom of expression and free elections are in principle interrelated, in certain circumstances, they may come into conflict.\(^\text{179}\) The ECtHR has characterised the relationship between freedom of expression and electoral rights in ambivalent terms. On the one hand, the Court has affirmed that all opinions need to be able to circulate freely during electoral campaigns. On the other, it has stated that electoral contests justify limitations that would not be acceptable under different circumstances if necessary to ensure the free formation of the popular will. It has explicitly remarked that freedom of expression and the right to free elections can either mutually reinforce or conflict, depending on the circumstances. The Mathieu-Mohin decision further clarifies that during elections, state authorities need to ensure that free expression of people’s opinions is made possible.\(^\text{180}\)

In its case law, the ECtHR has consistently confirmed its traditional distinction between statements of fact and value judgments, with the former susceptible to being proven true or false. For the latter, although they are not susceptible to proof, there should at least be a sufficient factual basis for the statement. Moreover, the Court has confirmed that the distinction should apply during election campaigns and that ‘value judgments used in the course of political rhetoric...are not susceptible of proof.’\(^\text{181}\)

For instance, in Salov, the Court considered a case of dissemination in a newspaper of false information about the alleged death of a presidential candidate. It found that, although factually inaccurate, the information contained in the contested article ‘concerned the elections as such and the ability of the electorate to support a particular candidate [and] may give rise to a serious public discussion in the course of the elections.’\(^\text{182}\) As a result, the same ‘principles concerning the scope of political debate’\(^\text{183}\) would apply irrespective of whether the information was factually incorrect, including where the distributor of the information ‘strongly suspected’\(^\text{184}\) that it was untruthful.

Following the same line of reasoning, the Court has tended, especially in more recent judgments, to evaluate expressions made during election campaigns against the same standards of accuracy required for any expressions in the public interest. As a general principle, the Court has generally confirmed that the ‘methods of objective and balanced reporting may vary

\(^{\text{179}}\) Bowman (n 115) 43.

\(^{\text{180}}\) Mathieu-Mohin and Clerfayt v Belgium 9267/81 (ECtHR, 2 March 1987) para 54.

\(^{\text{181}}\) Ukrainian Media Group v Ukraine 72713/01 (ECtHR, 29 March 2005) para 66.

\(^{\text{182}}\) Salov v Ukraine 65518/01 (ECtHR, 6 September 2005) para 111.

\(^{\text{183}}\) Ibid.

\(^{\text{184}}\) Ibid para 113.
considerably, depending among other things on the media in question\(^{185}\) and that it would not be for courts, either at the national or supranational level, to substitute their own assessment for media operators’ editorial decisions. Even more recently and in more explicit terms, the ECtHR has stated that when a speaker is:

> clearly involved in a public debate on an important issue he should not be required to fulfil a more demanding standard than that of due diligence [or else] the obligation to prove the factual statements may deprive the applicant of the protection afforded by Article 10.\(^{186}\)

On this basis, in *Staniszewski*, a case concerning a free monthly newsletter accusing a small-town mayor running for re-election of financial malfeasance, the Court accepted that no violation of Article 10 had occurred because:

> the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism.\(^{187}\)

The court further observed that:

> [i]t is clear from the minutes of the hearing at first instance that the applicant did not rely on any particular evidence in support of the veracity of his statements or request the court to admit new evidence … He limited himself to stating that the information was in the public domain or came from official sources, without naming them. The applicant cannot therefore claim that his statements of facts have been supported by the material he had gathered.\(^{188}\)

The case law thus indicates that the context of an election or voting campaign would not normally change the criteria for considering expressions in the public interest and the standards by which their accuracy is assessed. However, a further question concerns whether the criteria might change when an expression comes in the form of an advertisement or is made by, or on behalf of, a politician.

\(^{185}\) Orlovskaya Iskra (n 117) para 109.
\(^{186}\) *Staniszewski v Poland* 20422/15 (ECtHR, 14 October 2021) para 45.
\(^{187}\) Ibid para 48.
\(^{188}\) Ibid para 49.
In *Krasnov and Skuratov*, the Court considered the case of two individuals whose applications for registration to stand as candidates in the general elections to the lower chamber of parliament had been turned down on the grounds that they had submitted false information in their application forms. The first candidate had mistakenly presented himself as the head of a district council, a position that he had held in the past but did not hold at the time of his registration. The second candidate had allegedly misrepresented both his professional standing within his university department and his affiliation with the Communist Party (which was only proven by a defective membership form). The requirement for candidates to submit accurate personal information served to ‘enable voters to make an informed choice with regard to the candidate’s professional and political background’,\(^{189}\) which the Court accepted as a legitimate aim. The Court considered, as a criterion to assess the proportionality of the interferences, whether the substantially untrue information was capable of misleading the voters. It found that one of these three instances of inaccuracy (the professional standing of the first applicant) was enough to justify a restriction because the information at stake was relevant to the local residents and could influence their voting behaviour. Concerning the second applicant, the Court instead found that there had been a violation of Article 3 of Protocol No 1 because the contested inaccuracies were of minor relevance and unlikely to mislead the voters.

In this specific instance, by focusing on Article 3 of Protocol No 1, the Court identified a specific interest worthy of protection in the voters’ ability to make an informed choice without being misled. Interestingly, the Court paid attention to the effect on voters’ choices to determine whether the information could qualify as misleading. At the same time, though, it is also apparent that submitting candidates’ personal information to the electoral register did not constitute an exercise of freedom of expression, such that Article 10 of the Convention was not engaged.

Another decision of the UK High Court also concerned the issue of electoral lies possibly misleading voters along similar lines. The Representation of the People Act prohibits, before or during an election, ‘any false statement of fact in relation to [a] candidate’s personal character or conduct’.\(^{190}\) The provision applies to statements that refer to the personal character or conduct of a candidate and are either negligent or dishonest. The provision does not regulate advertising as such. UK law prohibits political advertising on broadcast media; it is allowed on other types of media but excluded from ASA rules when its

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\(^{189}\) *Krasnov and Skuratov v Russia* 17864/04 and 21396/04 (ECtHR, 19 July 2007) para 44.

\(^{190}\) Representation of the People Act 1983 (c 2), s 106.
The principal function is to influence voters.191 ASA recently explained the exclusion of political advertising from its own remit by reasoning that communication ‘that forms part of the democratic process’ requires different rules to traditional advertising.192 Rather, it is aimed at communications with a similar purpose to the category of political advertising as defined by ASA (i.e., ‘affecting the return of any candidate at the election’).193

The High Court had the opportunity to discuss the purpose and scope of the statute in the landmark Woolas case.194 Quoting Madden J in North Louth, the Court affirmed:

The primary object of this statute was the protection of the constituency against acts which would be fatal to the freedom of election. There would be no true freedom of election, no freedom of opinion of the constituency if votes were given in consequence of the dissemination of a false statement as to the personal character or conduct of a candidate.195

Despite the focus on election integrity and not just on personality rights, the Court was keen on narrowing its interpretation of the scope of the statute to statements on the private character of a candidate, as opposed to their public stances. Otherwise, the Court reasoned that the ‘width’ of such a prohibition would impinge too severely on the ‘ordinary cut and thrust of political debate’.196

Irini Katsirea observed that this concern for the free flow of the political debate was in line with the greater protection that the ECtHR grants to public interest speech.197 In the years after the decision, several other scholars have discussed the possible significance of this precedent and the interpretation that the High Court gave of the ECtHR case law and Article 3 of Protocol No 1 in light of judicial efforts to counter the spread of disinformation.198 Like Krasnov

191 CAP Code (n 156) Rule 7.
192 ‘Why We Don’t Cover Political Ads’ (ASA and CAP News, 15 Aug 2019): <https://www.asa.org.uk/news/why-we-don-t-cover-political-ads.html>.
193 Representation of the People Act (n 190) s 106.
194 Woolas, R (on the application of ) v The Speaker of the House of Commons [2010] ewhc 3169 (Admin).
195 Ibid para 87.
196 Ibid para 113.
197 Katsirea (n 95) 182.
198 See, F Hoar, ‘Public or Personal Character in Election Campaigns: A Review of the Implications of the Judgment in Watkins v Woolas’ (2011) 74 Modern Law Review 607; J Rowbottom, ‘Lies, Manipulation and Elections – Controlling False Campaign Statements’ (2012) 32 Oxford Journal of Legal Studies 507; Craufurd Smith (n 61); J Horder, ‘Criminal
and Skuratov, however, this decision presents some specificities to consider when discussing whether it could serve as an influential precedent.

Alongside its dual nature as a provision aimed at electoral speech but modelled on defamation laws, with a further layer of protection especially devised for political candidates, a fundamental feature of the Representation of the People Act is its penal nature, which requires an appropriate standard of certainty that the statements were negligent, even if they were made or published honestly. The defence available to the speaker is, however, slightly different than under libel laws; it requires them to prove a reasonable belief rather than due diligence. Commentators have noted how this defence would still leave ample room for defendants to succeed by providing ‘good evidence of efforts they had made to check the veracity of sources for their statements’, though at the same time warning that a simple reiteration of the Reynolds defence available in defamation cases (where defendants can normally defend their statements by showing evidence of reasonable steps taken to verify them) would be ill-suited for the particular need of secrecy of electoral campaigns.

The Woolas decision is an interesting example of how it could be possible, at least in theory, for state authorities to protect the value of electoral integrity on balance with freedom of expression. However, the High Court still resorted to deploying a test of accuracy based on procedures (although with a higher threshold than mere due diligence) rather than effects, as in the case of misleading advertising.

More recently, the ECtHR considered a similar type of communication as Woolas in a case involving a candidate running for councillor in a local election who had published a brochure criticising the incumbent mayor for failing to implement his electoral promises. The national court found the information contained in the brochure to be ‘malicious and ... beyond acceptable forms of electoral propaganda’. The ECtHR declined to examine the factual basis for the restriction (i.e., whether the information presented in the booklet was sufficiently precise and credible), arguing that domestic authorities were in a better position to assess this. However, the ECtHR expressly qualified

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199 See, Rowbottom (n 198) 510–512.
200 Hoar (n 198) 615–616.
201 Brzeziński v Poland 47542/07 (ECtHR, 25 July 2019) para 20.
202 Ibid para 56.
the brochure as an exercise of ‘freedom of expression in the field of political speech or questions of general interest’.\textsuperscript{203}

Most relevant to the present analysis, the Court paid attention to the circumstance that the applicant was speaking in his capacity as a candidate in an election and considered that this gave a specific political connotation to his expression, which in turn limited the scope of the state authorities’ margin of appreciation.\textsuperscript{204} It also considered that placing the burden of proof on the plaintiff to evidence the truthfulness of the information published in their booklet would be disproportionate,\textsuperscript{205} and that, as a matter of principle, the information provided in the booklet would be ‘within the limits of exaggeration or provocation eligible, under the ordinary tone and register of the political debate’\textsuperscript{206} anyway. Furthermore, requiring the applicant to meet more stringent requirements than due diligence constituted an unjustified interference.\textsuperscript{207}

\textit{Krasnov and Skuratov, Woolas, and Brzeziński} together offer a clearer perspective on how the ECHR legal system treats communications with the characteristics indicated in the Code of Conduct and the upcoming framework (being capable of influencing the outcome of an election as indicated in the Code of Practice and the Regulation on the Transparency and Targeting of Political Advertising; distributed by or on behalf of a politician and not of a private or commercial nature as indicated in the regulation). The \textit{Krasnov} precedent demonstrates in the ECHR legal system a discrete interest in the fairness of elections. As a result, protecting voters from misleading communications that might alter their voting choices is a legitimate aim for national authorities to pursue. The Court looked at the capacity of the communication to mislead voters as a test to assess the accuracy of the expression in a way that resembles the approach to commercial advertising in the Unfair Commercial Practices Directive.

\textit{Krasnov} does not shed light on how this interest might be balanced against possible contrasts with freedom of expression. \textit{Woolas} was an example of national authorities trying to solve these frictions by leveraging their leeway due to the low level of EU-wide harmonisation in political advertising. The decision illustrates the hybrid nature of electoral advertising, the different interests at stake, and how the High Court eventually resorted to a standard of accuracy based on procedures more than effects, more akin to the approach

\textsuperscript{203} Ibid para 53.
\textsuperscript{204} Ibid para 54.
\textsuperscript{205} Ibid para 58.
\textsuperscript{206} Ibid para 59.
\textsuperscript{207} Brzeziński (n 201) para 58.
expected in the journalistic context, though with the higher threshold of reasonable belief. The recent Brzeziński decision suggests that, even in the context of its reluctance to define standards of accuracy, the European Court’s prevailing orientation is to assess electoral advertising by the same standards as public interest expression, to the point that even a higher threshold than due diligence, as the High Court required in Woolas, would be considered a violation of Article 10.

6 Concluding Remarks

Overall, the foregoing analysis indicates that the approach devised by the Code of Practice, which the forthcoming DSA intends to reprise in its theoretical foundations, marks quite a change from the established practices in the ECHR legal system.

In the first place, the use of a categorical approach (specifically, the fact that the EU intends to treat disinformation in paid-for content that is issue-based or political as commercial advertising rather than public interest expression) elicits a few questions. The definition of political advertising originally offered in the 2018 Code focuses on two elements – the aim to promote a service and being paid for – which featured in other EU law provisions defining the concept of advertising at various points in time. The Directive on Misleading and Comparative Advertising, the e-Commerce Directive, and the AVMSD all concerned commercial advertising. The DSA and the Regulation on the Transparency and Targeting of Political Advertising acknowledge that advertising can be of a non-commercial nature. This is a newly introduced notion that could effectively capture recent trends in online communications that blur the lines between public interest and commercial expressions.

However, the analysis of the ECtHR case law reveals that a distinct notion of advertising as a specific category of expression, irrespective of its commercial or non-commercial nature, has not emerged. On the contrary, the Court has largely treated expressions on the basis of their value (i.e., their capacity to contribute to a debate in the public interest or else a commercial pursuit), irrespective of their form (e.g., whether they were presented as advertisement). As such, the Code marks a distinct change in the elements that take priority in determining the category to which different expressions belong. This change is one of method, even more than content. The practical consequences might not be as effective for the aim that the EU authorities are trying to pursue.

In the second place, the requirement that the false character of disinformation be verifiable raises the question of which standards should be used
to make this assessment. The analysis of the case law of the European Court has shown how different standards apply to the different categories considered. Regarding public interest speech, the Court applies a higher level of scrutiny of interferences which, in turn, leaves a lesser margin of appreciation to state authorities. It has allowed the Court to develop a coherent and distinctive approach to assessing the accuracy of this type of content. It consistently assesses the accuracy of information in the public interest from a procedural perspective, most often using the respect of journalistic professional practices as a test to determine whether the expression in question deserves protection. In contrast, in commercial speech, the Court has traditionally shown more deference to state authorities and their own scrutiny.

The regulation of commercial communications is largely harmonised within the EU. Under the Unfair Commercial Practices Directive, EU member states have developed generally similar approaches to the concept of misleading and unfair ads, which are primarily based not on procedural considerations but the impact of advertisements on consumers’ purchasing choices. Similarly, the Court also grants state authorities a broad margin of appreciation in electoral advertising, with the difference that this field is not harmonised at the EU level. As a result, national practices vary greatly, and the Court has had few opportunities to develop its own standards to assess accuracy for this category.

The language used in the Code, which requires platforms to take action against information that is ‘false or misleading’, could suggest that the EU framework envisages political and issue-based ads being assessed according to the same (or similar) standards of misleading communications as commercial speech. This again would mark a substantial departure from the practices so far established under the ECHR.

From a purely theoretical perspective, it could be possible to draw a parallel between misleading commercial advertising (advertisements considered misleading based on their impact on consumers’ purchasing choices) and misleading electoral advertising (defined as advertisements capable of unduly influencing voters’ choices). The European Court has identified, at least in one case, electoral integrity as a protected interest and paid attention to the potentially misleading effect on voters as a criterion to assess the proportionality of a restriction. In this specific case, however, the Court did not have the opportunity to consider how electoral integrity would balance out against freedom of expression. The recent Brzeziński decision suggests that the Court would be willing to take a similar approach to the one that it has taken for public interest speech. Doing differently and opting for different standards that lower the protection of expression in the public interest could raise concerns over both
the Article 10 safeguards for electoral campaigns and granting authorities at the state level enough leeway to regulate campaigns.

In the recent Action Plan, it was correctly noted that electoral campaigns are regulated according to significantly diverging standards across EU member states, and that this is hampering the effectiveness of the anti-disinformation framework. A future policy or even regulatory intervention aiming to provide a higher degree of harmonisation could offer a partial solution to the problem. More immediately, however, it should be clarified whether the misleading nature of advertisements should be assessed on procedural grounds (as for public interest speech) or their effects on voters (as for commercial speech). The proposed Regulation on the Transparency and Targeting of Political Advertising and the Strengthened Code of Practice blend the two notions of political and issue-based advertising originally introduced as separate categories in the 2018 Code of Practice. This might be a misstep because it could curtail any possibilities of further exploring the interplay between electoral integrity and freedom of expression and whether Article 3 of Protocol No 1 could allow to introduce a more stringent discipline, in terms of standards of accuracy, for electoral communications distributed by or on behalf of politicians. The opportunity to blend the two notions of political and issue-based advertising might warrant careful consideration. It could prove more effective to retain a separate notion for advertisements that potentially impact voting processes and thus engage with a separate protected interest.

The most recent developments, however, suggest that the EU authorities will push further in this later direction. At present, the Code of Practice is signed by a broad range of entities, including advertisers. The Guidance on Strengthening the Code of Practice had already envisaged new signatories joining from the online advertising industry and bringing in their ‘specific expertise’,208 which in all likelihood is another sign of the EU framework moving further towards applying standards and tests typical of commercial expression to content that, by the European Court’s practices, ought to be deemed in the public interest and assessed differently. Pursuant to the Code, the signatories are expected to collaborate towards developing ‘a set of common best practices and examples for marks and labels on political or issue ads’.209 While adjustments of this kind will probably make the Code more effective, they will also bring the EU framework to combat disinformation further afar from the standards and practices established in the ECHR legal system.

208 Guidance on Strengthening the Code of Practice (n 38) 6.
209 2022 Code of Practice (n 3) Measure 6.1.
Once the framework scales up from a self-regulatory to a co-regulatory mechanism, the issue of diverging standards between the two European legal systems will become all the more relevant, leading to possible clashes. Departures from the consolidated practice of the ECtHR should, therefore, be considered carefully; the Code itself indicates that its measures should not be ‘construed in any way as replacing, superseding or interpreting’ the case law of the ECtHR, while careful consideration should also be given to the risk of offering a lower level of protection to freedom of expression and the media than the ECHR legal system, thus running in breach of Article 52(3) of the EU Charter of Fundamental Rights.

This could raise some challenges if and when the Code of Practice, the DSA or any measures mandated by the upcoming framework are challenged before the relevant enforcement authorities, whether the Digital Services Coordinators or the European Commission (in the case of very large platforms), or even the judicial remedies available under national laws. Platforms’ content moderation decisions will need to be assessed for their compliance with the level of protection of freedom of expression required by the ECHR, which could likely frustrate the intentions of the EU authorities. For the narrower category of political (i.e., electoral) advertisements aimed at influencing voters’ choices and the results of elections (not of any legislative or regulatory process as indicated in the Regulation on the Transparency and Targeting of Political Advertising), it might be possible, at least in principle, to elaborate standards of review focusing on the misleading effect on voters within the limits of due diligence as indicated by the ECtHR, so as to offer protection to the interest of election integrity and the voters’ ability to make informed choices without being misled. Outside this specific case, however, paid-for content focused on issues of general interest would still need to be treated as public interest expression and its accuracy assessed by the same standards rather than those typical of commercial advertising.

Assessing the accuracy of content distributed on digital platforms and minimizing the detrimental impact of disinformation remains central to the functioning of democracy and the EU’s continuing effort to address the problem is certainly commendable. However, questions on the right methods remain open and difficult to answer. As the EU authorities continue working towards reviewing and refining their policy and regulatory mechanisms, they should consider more carefully the issue of consistency with the ECHR and avoid
creating any obligations for platforms and other key stakeholders in the relevant industries that are not completely in line with Strasbourg jurisprudence.

Moreover, because the Commission envisages collaborating with experts from different industries to strengthen its action against disinformation, a prudent way forward would be to maintain a close focus on journalism and its professional standards, and to draw up guidance from the procedural conditions – respect of professional methods and ethical obligations, fair means to obtain and present information, or verification procedures – which the European Court and the Council of Europe have traditionally emphasised over objective truthfulness. A first major challenge that rule makers and stakeholders in the relevant industries have to face is thus how to turn ethical principles into a set of practical obligations, as precise and concrete as possible, which actors from different industries can apply with a satisfactory degree of consistency.

At the same time, journalism standards might seem insufficient, in the current context of digital communications, to adequately take into account the users’ interest in receiving accurate and reliable information, especially in the run-up to an election or vote. In this respect, the advertising industry standards, with their emphasis on the effects that expressions may have (possibly misleading the receiver) rather than on how information is gathered and presented, might offer an opportunity to reflect on the merits of offering stronger protection to the right to receive information, enshrined in Article 10 of the European Convention.

Combining the ample protection that journalistic standards offer to the active side of freedom of expression with the protection of the rights of those at the receiving end, to which other industries such as advertising traditionally offer better protection, is thus another complex and difficult challenge, but one that must be met to sustain the quality of democracy in the years to come.