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Disinformation in the EU Law: Moral Theories and the Context

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In recent years, there have been scandalous cases of information warfare acts in the Western world committed by hostile foreign governments. The effect of such acts is dramatically amplified by the widespread use of the internet media and ongoing military conflicts. Accordingly, the EU has taken steps in the battle against disinformation. The legal definition of disinformation contains attributes that need further explanation, particularly, lying and deception. Philosophical theories contain valuable insights on the morality of lying and deception, which can be adapted for interpretation of the disinformation concept.

Keywords: law and security, information warfare, disinformation, legal theory.

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Introduction

Not all disinformation is untruthful and, conversely, not all lies are disinformation. This is apparent in the light of a publicly accepted truism – that some lies can be regarded as “white lies”. Accordingly, in some of the prominent theories of morality, the falsehood of information does not make an act of lying immoral.¹ The complexity of the concept of lies can further be illustrated by a folklore paradox: is it a lie or truth, if someone says, “I am lying”? Although it cannot be truth, because the statement indicates otherwise, simultaneously, it cannot be a lie, because then it would be truth. This demonstrates that concepts of truth and lie can be insufficient. A common

¹ Most notably, utilitarianism, as presented further in this article.

addition to them is the concept of deception, which can be used to describe statements that are not lies in a strict sense, but may lead the recipient to an untruthful belief. The described paradox is neither truth, nor a lie, as paradoxes are wont to be. Therefore, the speaker who says “I am lying”, leads the listener to believe something that is untruthful. A similar description can be applied to lying by omission. Consider an example, where a spouse has been unfaithful on a work trip, and the other spouse asks, “What did you do on your trip?”. If the answer is detailed but fails to mention the fact of infidelity, what was the wrongdoing – is the spouse guilty only of cheating or, also, of not admitting it? Some might call this misleading or lying by omission, although, technically, no false statement has been given. A relevant real-life example is the publication of truthful information under a false name – once again, it is not lying in the strict sense. Nonetheless, it might be considered a deception, because a person implicitly lies about her identity. This could have significant ramifications, if one pretends to be a public figure, e. g. an important politician. The issue becomes even more complicated when we begin to consider what sort of lying and deception should be outlawed (perhaps, some could be left to self-regulation by social norms). Overly extensive tolerance for lying can lead to a state of constant uncertainty, where we never know which information can be trusted, and this can form a very attractive ground for hostile foreign governments to carry out their information warfare.

This illustrates how complex is the concept of lying. Legal relevance of this concept is highly amplified by emerging cases of information warfare in the Western countries committed by hostile foreign governments.(e.g., the authorities of the United States have indicted Russian citizens for the interference with the elections of US President,² acts of information warfare by Russia have been documented in the British Intelligence and Security Committee of Parliament “Russia Report”,³ by the Atlantic Council, which highlights Russia’s foreign disinformation campaigns,⁴ the Center for Strategic and International Studies (CSIS),⁵ the Council on Foreign Relations,⁶ and others). One of the central issues in the legal battle against is that applying the same concept of lying for them and the domestic citizens can lead to results that were not intended. EU law provides a definition of disinformation but there is a need to clarify how it must be interpreted in different cases. So far, the European Court of Justice has not had cases regarding this matter and the academic publications on disinformation⁷ has not dealt with the particular matter discussed in this paper.

² Russian troll farm, 13 suspects indicted in 2016 election interference. Washington Post. Available: https://www.washingtonpost.com/world/national-security/russian-troll-farm-13-suspects-indicted-for-interference-in-us-election/2018/02/16/2504de5e-1342-11e8-9570-29c9830535e5_story.html [last viewed 09.06.2024].

³ Russia Report. Intelligence and Security Committee of Parliament of Great Britain. Available: https://isc.independent.gov.uk/wp-content/uploads/2021/01/20200721_HC632_CCS001_CCS1019402408-001_ISC_Russia_Report_Web_Accessible.pdf [last viewed 09.06.2024].

⁴ Atlantic Council. Undermining Ukraine: How Russia widened its global information war in 2023.. Available: <https://www.atlanticcouncil.org/in-depth-research-reports/report/undermining-ukraine-how-russia-widened-its-global-information-war-in-2023/> [last viewed 09.06.2024].

⁵ CSIS. Going on the Offensive: A U.S. Strategy to Combat Russian Information Warfare. Available: https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/181002_Russia_Active_Measures_FINAL1.pdf [last viewed 09.06.2024].

⁶ Council on Foreign Relations. Why the U.S. Ramped Up Its Information War with Russia. Available: <https://www.cfr.org/in-brief/why-us-ramped-its-information-war-russia> [last viewed 09.06.2024].

⁷ For example, *Bennett, W. L., Livingston, S.* The disinformation age: politics, technology, and disruptive communication in the United States. Cambridge University Press, 2021; *Leber, A., Abrahams, A.* A Storm of Tweets: Social Media Manipulation During the Gulf Crisis. *Review of Middle East Studies*, 53(2), 2019, pp. 241–411; and other works mentioned in the following sections of this paper.

The aim of the present research is to establish how the concept of disinformation in the EU law can be interpreted. The methods for the analysis are the philosophical method, contextual, and teleological methods of legal interpretation. They are used, firstly, by describing the *modus operandi* of disinformation. It provides the context and clarifies the aim of the law for battling disinformation – by defining what the law should seek to eradicate. Secondly, EU law is analysed in the aspect of how it defines disinformation. Lastly, the EU law on disinformation is calibrated with the most prominent philosophical views on the morality of lying⁸. This means that the philosophical criteria for determination whether lying is immoral, are distinguished and adapted for the context of disinformation with necessary amendments. The necessary amendments are carried out according to the previously described *modus operandi* of disinformation.

1. Psychological effects

One of the conventional methods of legal reasoning is the purposive interpretation.⁹ In the battle against disinformation, the purpose might seem obvious, however, to fully comprehend it, purposes and forms of disinformation must be taken into account. There is a plethora of mechanisms for how disinformation functions, but one of the ways to understand it is through the phenomenon of the so-called “herd mentality”, which disinformation might seek to manipulate.

The famous Solomon Asch conformity experiments from the 1950s are useful in understanding the core mechanism of disinformation effects. In one of those experiments, participants were shown a drawing of lines and were asked which two lines were of the same length. The task was simple, but the key factor was that the room contained other pretend “participants” who were secret collaborators of the researchers, and they intentionally provided the wrong answer. Following their wrong answers, many of the actual participants conformed to their view and gave the wrong answer, although it was quite obviously false.¹⁰

In understanding disinformation, it is crucial to bear in mind this psychological conformity effect, because it might be the most important tool of hostile foreign actors who commit acts of information warfare. Modern psychology has formulated a related term – “metacognitive myopia”, which describes an obstacle to thinking rationally – our judgments often follow the given information uncritically, even when it is easy to find out that information samples are misleading or invalid.¹¹ Because of this, even when we receive information that we clearly perceive as false, it still might affect our perception. Cass Sunstein described it with an example of the scandal in US President election regarding leaked e-mails of the candidate Hillary Clinton: according to him, even her sympathizers who might not have believed the accusations, afterwards

⁸ The foundations of utilitarianism, as well as deontology – in the section “Criteria to evaluate lies”.

⁹ Barak, A. Purposive Interpretation in Law. Princeton, 2005.

¹⁰ Asch, S. E. Effects of group pressure upon the modification and distortion of judgments. In: Groups, leadership and men; research in human relations, Guetzkow H. (Ed.). Carnegie Press: 1951, pp. 177–190; Asch, S. E. Opinions and social pressure. Scientific American, Vol. 193, No. 5, 1955, p 31–35; Asch, S. E. Studies of independence and conformity: I. A minority of one against a unanimous majority. Psychological Monographs: General and Applied, 70(9), 1956, pp. 1–70.

¹¹ Fiedler, K., Schott, M., Kareev, Y., Avrahami, J., Ackerman, R., Goldsmith, M., Mata, A., Ferreira, M. B., Newell, B. R., Pantazi, M. Metacognitive myopia in change detection: A collective approach to overcome a persistent anomaly. Journal of Experimental Psychology: Learning, Memory, and Cognition, 46(4), 2020, pp. 649–668; Fiedler, K., Prager, J., & McCaughey, L. Metacognitive Myopia: A Major Obstacle on the Way to Rationality. Current Directions in Psychological Science, 32(1), 2023, pp. 49–56.

might have had a subconsciously less favourable picture of the candidate as a result of metacognitive myopia.¹²

C. Sunstein also noted another study regarding the influence of public information that focused on the COVID-19 pandemic:¹³ research by Leonardo Bursztyn, Akaash Rao, Christopher Roth, and David Yanagizawa-Drott that explored COVID-19 repercussions among viewers of certain television programs. The study examined the two most popular cable news shows in the United States: Hannity and Tucker Carlson Tonight. These shows were aired back-to-back on the same network (Fox News) and had relatively similar content prior to January 2020, yet differed sharply in their coverage of the COVID-19 pandemic. The host of one of these shows T. Carlson from early February warned viewers that the coronavirus might pose a serious threat, while the host of the other show, S. Hannity, first ignored the topic on his show and then dismissed the risks associated with the virus, claiming that it was less concerning than the common flu. The study found a disturbing fact that the “greater exposure to Hannity relative to Tucker Carlson Tonight increased the number of total cases and deaths in the initial stages of the coronavirus pandemic”¹⁴.

2. How it works

Perhaps the most dangerous disinformation occurs as a result of information warfare by hostile foreign governments. However, foreign information warfare takes plenty of forms, only a part of which includes the spread of false information. Besides various forms of individual psychological operations (often called “PsyOps”), information warfare can occur as a spread of information that is not verifiably false or directly misleading¹⁵ but is intended to polarize society and disrupt its proper functioning.

In January of 2024, it was announced that there was a Germany oriented pro-Russia disinformation campaign on the social network “X”. According to media sources, more than 1 million German-language posts were sent from an estimated 50 000 fake accounts. The posts contained messages suggesting that the German government was neglecting the needs of Germans as a result of its support for Ukraine, both in terms of weapons and aid, as well as by taking in more than a million refugees; the analysts reported that they were convinced the source of the campaign was in Russia; operators of the message-sending system appeared to take breaks at the weekends and on Russian holidays – on those days, the number of posts noticeably decreased; the analysts found that the tone and rhetoric of messages was similar to the one used by far-right political party “Alternative für Deutschland”¹⁶. In some sources, this form of information warfare is called cognitive intrusion, which might

¹² Sunstein, C. R. *Liars: Falsehoods and Free Speech in an Age of Deception*. Oxford Academic, 2021, pp. 73–76.

¹³ *Ibid.*, pp. 109–111.

¹⁴ Bursztyn, L., Rao, A., Roth, C., Yanagizawa-Drott, D. *Misinformation during a Pandemic*. Becker Friedman Institute, Working Paper No. 2020-44, 2020.

¹⁵ These are the defining attributes of disinformation established by EU law. This definition is explored in greater detail in the following chapters.

¹⁶ Spiegel Politik. Baerbocks Digitaldetektive decken russische Lügenkampagne auf [Baerbock's digital detectives uncover Russian campaign of lies]. Available: <https://www.spiegel.de/politik/deutschland/desinformation-aus-russland-auswaertiges-amt-deckt-pro-russische-kampagne-auf-a-765bb30e-8f76-4606-b7ab-8fb9287a6948> [last viewed 11.03.2024]; The Guardian. Germany unearths pro-Russia disinformation campaign on X. Available: <https://www.theguardian.com/world/2024/jan/26/germany-unearths-pro-russia-disinformation-campaign-on-x> [last viewed 11.03.2024].

occur as the deliberate manipulation of individual and collective mental processes to promote political violence within a liberal democratic society.¹⁷

An avalanche of such opinions can manipulate the aforementioned psychological effects of conformity or metacognitive myopia and result in a higher spread of such opinion among the citizens of the targeted country – after seeing many supporters of the view (pushed by a hostile foreign government), an undecided citizen can succumb to it, just as the participants in the Asch experiments surrendered to the opinion which directly contradicted what was in front of their eyes, merely because they had the impression that this opinion was held by others. Such phenomena of foreign influence on EU domestic affairs are hardly compatible with the principles of democratic governance and national sovereignty.

From the teleological point of view, a vitally important factor is that the purpose of disinformation by hostile foreign governments might be different depending on the targeted country. For example, disinformation by agents of the Russian government might have certain goals in such countries as Germany, France, the United Kingdom, and wholly different goals in Ukraine, Moldova, Georgia, or the Baltic states. It is recognized in the mass media that there is a threat of some extent to see a Russian military invasion in the latter countries (and in some of them, it already has occurred, as demonstrated by the NATO policy to strengthen its military presence in the Eastern flank in the Vilnius Summit Communiqué¹⁸). Among other goals of disinformation, in these countries it might be seeking to convince people to support the Russian government instead of their own. Watching the events in Ukraine that unfolded since 2014, it can be seen that it served Russia's interest – as a result, there was a considerable amount of people in Donbass who supported the Russian annexation of Ukrainian territories. This might serve a vital military purpose – since the times of Machiavelli, it has been well known that conquering and holding an occupied territory are two separate challenges. Without any supporters, it might be nearly impossible to hold an occupied foreign territory, therefore foreign disinformation might be one of the preparatory steps toward this goal. Obviously, foreign disinformation by the Russian government does not have such a goal in Germany, France, or the United Kingdom. This difference repeatedly affirms the necessity for different approaches in the battle against disinformation – the countries that might be more militarily vulnerable (e.g., Eastern European countries) might require stricter measures against disinformation than their Western partners.

3. Legal definition of disinformation

26.4.2018. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of The Regions “Tackling online disinformation: a European Approach” defines disinformation, as follows:

¹⁷ *Tzu-Chieh, H., Tzu-Wei, H.* How China's Cognitive Warfare Works: A Frontline Perspective of Taiwan's Anti-Disinformation Wars. *Journal of Global Security Studies*, 7(4), 2022, pp. 1–18; *Kubica, L.* Eastern Partnership countries in flux: From identity politics to militarization of foreign relations. *The European Centre of Excellence for Countering Hybrid Threats*, 2023; *Leber, A., Abrahams, A.* A Storm of Tweets: Social Media Manipulation During the Gulf Crisis. *Review of Middle East Studies*, 53(2), 2019, pp. 241–411; *Lebrun, M.* Anticipating cognitive intrusions: Framing the phenomenon. *The European Centre of Excellence for Countering Hybrid Threats*, 2023.

¹⁸ Vilnius Summit Communiqué (Issued by NATO Heads of State and Government participating in the meeting of the North Atlantic Council in Vilnius 11 July 2023). Available: https://www.nato.int/cps/en/natohq/official_texts_217320.htm [last viewed 09.06.2024].

[d]isinformation is understood 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**. Public harm comprises threats to democratic political and policy-making processes as well as public goods such as the protection of EU citizens' health, the environment, or security. Disinformation does not include reporting errors, satire, and parody, or clearly identified partisan news and commentary.¹⁹

The aforementioned information warfare acts do not necessarily operate with verifiably false or misleading information. Stating that it is displeasing how the government provides support to a foreign country and “neglects the needs” of its citizens might be immoral, cynical, unreasonable, but legally it is hard to prove that such a statement is “verifiably false or misleading”. Therefore, such information in its nature does not fall within the EU definition of disinformation in a strict sense, because the definition tends to hold that disinformation is either false, or misleading information.

Besides other attributes, the difference between “false” and “misleading” can be addressed first. Misleading is a concept that is somewhat related to deception, which was compared with lying by T. L. Carson. He defined deception as (1) a “successful” act resulting in someone having false beliefs, and (2) not necessarily involving falsehoods – whereas a lie must be a false statement, a deception need not involve making a false statement; true statements can be deceptive, and many forms of deception do not involve making statements of any sort.²⁰ Thus, many instances of deception do not constitute lying. The first of these differences is not necessarily applicable to the concept of misleading information since it does not naturally require success. A commonality here is that neither deception nor misleading requires information to be false. A *mutatis mutandis* relevant concept is widely used in the law on advertising. Article 2 of the Directive 2006/114/EC concerning misleading and comparative advertising contains a prohibition on misleading advertising, which is defined as “any advertising which in any way, including its presentation, deceives or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour or which, for those reasons, injures or is likely to injure a competitor”.²¹

It might be challenging to prove that information is likely to deceive because for any piece of misleading information we can find people who will be deceived by it and people who will not. Accordingly, it is worth to *mutatis mutandis* take into account a provision from the Unfair Commercial Practices Directive regarding a question who is likely to be misled by a commercial practice: according to the Article 6 of this directive, “A commercial practice shall be regarded as misleading if it contains false information and is therefore untruthful or in any way, including overall presentation, deceives or is likely to deceive the average consumer, even if the information is factually correct, in relation to one or more of the following elements, and in either

¹⁹ European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Tackling online disinformation: a European Approach. EUR-Lex, COM(2018) 236 final, 2018. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0236> [last viewed 09.06.2024].

²⁰ Carson, T. L. *Lying and Deception: Theory and Practice*. Oxford, 2010, p. 4.

²¹ Directive 2006/114/EC of 12 December 2006 concerning misleading and comparative advertising. OJ L 376, 27.12.2006. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0114> [last viewed 09.06.2024].

case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise [...]”.²² An important element here is the standard of an average consumer – this has the potential to be applied in disputes, where doubts are raised about whether misleading information can be regarded as disinformation. The smartest person will likely recognize the deceptive nature of information and, conversely, someone who has very little knowledge on a relevant subject can be misled. In such instances, opposing parties of the dispute will point to different people and claim different conclusions. It would not be easy to refute one of these conflicting reasons without *mutatis mutandis* using the aforementioned rule that information can be regarded as misleading when an average person can be reasonably expected to be deceived by it.

Another relevant document in the EU law is the Action Plan against Disinformation laid out in 5.12.2018 Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions.²³ It repeats the same definition of disinformation with a reference to the Communication on Tackling online disinformation. The Code of Practice on Disinformation (hereinafter referred to as “Code”) contains certain indications about how the authors of the code perceived the concept of disinformation. The Code’s commitment 23 contains provisions stating that “Signatories commit to provide users with the functionality to flag harmful false and/or misleading information that violates Signatories policies or terms of service”; “Signatories recognize and agree with the European Commission’s conclusions that “[t]he exposure of citizens to large scale Disinformation, including misleading or outright false information, is a major challenge for Europe.” These excerpts underscore the importance of the aforementioned two prerequisites – the information is (1) false and/or misleading, and (2) can be harmful.

However, the Code also accounts for the aforementioned acts of information warfare as manipulative acts of “coordinated inauthentic behaviour” (detailed in the Code’s commitment 14). The Code indicates another form of malevolent online behaviour: according to the Code, signatories recognize the importance of intensifying and demonstrating the effectiveness of efforts to ensure the integrity of services by implementing and promoting safeguards against both misinformation and disinformation, including impermissible manipulative behaviours and practices across their services. The Code states that such behaviours and practices include:

- The creation and use of fake accounts, account takeovers and bot-driven amplification,
- Hack-and-leak operations,
- Impersonation,
- Malicious deep fakes,
- The purchase of fake engagements,

²² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council. OJ L 149, 11.6.2005. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32005L0029> [last viewed 23.08.2024].

²³ European Commission, Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Action Plan against Disinformation, EUR-Lex, JOIN(2018) 36 final, 2018. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=JOIN:2018:036:FIN> [last viewed 09.06.2024].

- Non-transparent paid messages or promotion by influencers,
- The creation and use of accounts that participate in coordinated inauthentic behaviour,
- User conduct aimed at artificially amplifying the reach or perceived public support for disinformation.²⁴

4. The issues

It appears that the EU definition of disinformation has been designed according to the principle “one size fits all”, and, as a result, it can be too strict for application to domestic citizens, and too lenient for malicious foreign actors. A direct textual application of this definition for domestic citizens might restrict various forms of self-expression which is protected as a basic human right and is important for a free democracy; furthermore, a direct application for malicious foreign actors would omit various forms of information warfare attacks. This is a serious inadequacy that leaves no other way but to apply the definition of disinformation contextually, with the whole assortment of methods of legal interpretation, first of all – the purposive interpretation, which would account for a comprehensive understanding of information warfare forms and their impact, as well as the principles of democracy and the right to self-expression.

This paper does not seek to raise doubt that the discussed legal regulation is a positive step in the right direction. Instead, it attempts to raise a question – what is the next step?

It was already briefly shown that the concept of untruthfulness is complicated. What follows is the necessity to develop criteria for evaluation, whether a piece of information is truth or disinformation, whether it is protected by the freedom of expression or illegal. Besides the lack of legal certainty, a concrete problem that will be discussed further is that disinformation is not differentiated according to the source – whether it came from a domestic citizen or from a hostile foreign government as a part of psychological operation in the information warfare. When it is the latter, does it actually matter, whether it is truth in a strict sense? Satire, that is not strictly untruthful, can demoralize and result in many sorts of negative consequences, among them: to increase the number of citizens who try to avoid the military draft; to decrease the confidence in law and public institutions, etc. It is difficult to find any reason to treat any sort of such activity by a hostile foreign government as legal, even if it does not strictly match all the general features of disinformation. It would hardly serve the purposes of legal regulation to apply the same standards of permissible level of truthfulness both to foreign agents who are executing a psychological operation (hereinafter – PsyOp) and to *bona fide* citizens. Any sort of attempt to do it would lead either to tolerance of various PsyOp information, or to disproportionately restricting the citizen’s freedom of expression. However, the current EU legal definition of disinformation is the same concerning these two groups.

²⁴ European Commission. Strengthened Code of Practice on Disinformation. EUR-Lex, 2022. Available: <https://digital-strategy.ec.europa.eu/en/policies/code-practice-disinformation> [last viewed 09.06.2024].

5. Criteria to evaluate lies

There is perhaps no better place to search for a bird's eye view of the discussed issue than the theories of morality. They contain various, often – contrasting views on discerning whether an act of lying is immoral.

Plato

One of the earliest prominent views in this regard has been expressed in Plato's "Republic".²⁵ Plato promoted personal virtues of wisdom, courage, justice, temperance and encouraged such organization of the state, where everyone performs their own work that is best suited for each individual. Plato's political model of the state is quite paternalistic and far from liberal, hence, it requires a lot of social engineering. The means to achieve the best possible political model include a thorough attention to the upbringing of children:

*a young person cannot judge what is allegorical and what is literal; anything that he receives into his mind at that age is likely to become indelible and unalterable; and therefore it is most important that the tales which the young first hear should be models of virtuous thoughts.*²⁶

Furthermore, Plato famously included a suggestion to spread a "white" lie to grown-ups in order to ensure that everyone performed their own work and did not desire to veer to an unsuited position²⁷ – he offered to devise a "needful" falsehood, according to which some of the citizens would have the power of command, and, according to Plato, in the composition of these citizens the gods have mingled gold, whilst others they have made of silver to be auxiliaries; yet others, who are to be husbandmen and craftsmen have been composed of brass and iron.²⁸ This Plato's suggestion resonates with his view expressed in the third book of the "Republic", where Socrates states:

...if any one at all is to have the privilege of lying, the rulers of the State should be the persons; and they, in their dealings either with enemies or with their own citizens, may be allowed to lie for the public good. But nobody else should meddle with anything of the kind; and although the rulers have this privilege, for a private man to lie to them in return is to be deemed a more heinous fault than for the patient or the pupil of a gymnasium not to speak the truth about his own bodily illnesses to the physician or to the trainer, [...] If, then, the ruler catches anybody beside himself lying in the State, [...] he will punish him for introducing a practice which is equally subversive and destructive of ship or State²⁹.

This demonstrates that Plato did not set a universal standard for permissibility of a lie – it was differentiated according to the person that is expressing false information and the person's purpose. The ultimate objective that persuasively justified lying was the main goal of Plato's theory, – the fair and prosperous republic. His test led to a result where only the elite was permitted to lie but not the governed citizens, however, only when the goal justified these means. These criteria can be useful, since,

²⁵ Plato. Republic. Translation by Jowett, B. Roman Roads Media, 2013.

²⁶ Ibid., p. 79 (377b).

²⁷ According to Plato, the "correct" position for each person should have been mostly determined not by gods, but rather by a careful selection in the education process, which considered person's abilities.

²⁸ Plato. Republic, pp. 124–125 (414c).

²⁹ Ibid., p. 90 (389c).

by altering the standard of how “high up the ladder” the person is and the standard of how noble his purpose is, these criteria can be used in a different context.

Consequentialism

An extremely amplified version to justify lying can be found in N. Machiavelli’s “The Prince”.³⁰ Although his propositions have been based on a noble purpose, they do not seem noble themselves – in this book, it is suggested that “a leader doesn’t have to possess all the virtuous qualities [...] but it’s absolutely imperative that he seems to possess them [...] It’s seeming to be virtuous that helps”.³¹ Toleration of lying is pervasive throughout the entire book, and in chapter 18 Machiavelli has addressed it directly by noting that it is worth lying, when it is useful. According to him, “a sensible leader cannot and must not keep his word if by doing so he puts himself at risk, and if the reasons that made him give his word in the first place are no longer valid”.³²

Similar criteria have been expounded in J. S. Mill’s “Utilitarianism”, although his conclusion, after applying these criteria, is vastly less radical. Being a utilitarianist, Mill, of course, recognized the principle of utility, that dictates morality of acts depending on how they increase overall happiness and decrease the suffering. However, in the moral evaluation of lying, he introduced a factor of a similar kind that was used by Machiavelli. Mill noted:

*...even unintentional, deviation from truth, does that much towards weakening the trustworthiness of human assertion, which is not only the principal support of all present social well-being, but the insufficiency of which does more than any one thing that can be named to keep back civilisation, virtue, everything on which human happiness on the largest scale depends.*³³

However, utilitarianism justifies exceptions and, according to Mill, an overarching exception is withholding some fact, when such concealment “would preserve some one (especially a person other than oneself) from great and unmerited evil, and when the withholding can only be effected by denial”³⁴. The qualitative similarity with a view of Machiavelli here is not only the suggestion to weigh the risks and benefits of lying, but also the insight that the act of lying can be harmful in itself. This is reflected in Machiavelli’s theory as a danger that when a lie is revealed, it damages the good image of the ruler. Mill saw the harm of lying that was more deeply rooted and abstract. Meanwhile, a common denominator is that lying can create mistrust, leading to uncertainty about the truth, and this must be included into consideration as part of the harm brought about by a particular lie. This has potential for practical application because a different person and different sort of lie can exacerbate public mistrust to a different extent and manner: a lie involving an ordinary citizen has a lesser effect in this regard than a deepfake video depiction of a high-ranking official propagating lies.

³⁰ Machiavelli, N. *The Prince*. Translation by Parks, T. Penguin Random House UK: 2009.

³¹ *Ibid.*, p. 70.

³² *Ibid.*, pp. 69–70.

³³ Mill, J. S. *Utilitarianism*. 1879 edition. The Floating Press, 2009, p. 41.

³⁴ *Ibid.*

Deontology

Immanuel Kant's elaborate contemplation on the morality of lying contains a particularly illuminating point in the comment on the "murderer at the door" dilemma. This is found in his essay "On a supposed right to lie from philanthropy".³⁵ This essay was a rebuttal, offered after Kant's moral theory received some criticism by Benjamin Constant, who wrote that "The moral principle 'it is a duty to tell the truth' would, if taken unconditionally and singly, make any society impossible. We have proof of this in the very direct consequences drawn from this principle by a German philosopher, who goes so far as to maintain that it would be a crime to lie to a murderer who asked us whether a friend of ours whom he is pursuing has taken refuge in our house".³⁶

In his reply, Kant defined a lie as an intentionally untrue declaration to another, and noted that a person who lies contributes to an outcome "that statements (declarations) in general are not believed, and so too that all rights which are based on contracts come to nothing and lose their force; and this is a wrong inflicted upon humanity generally".³⁷ Kant's view is that a lie is always harmful – even when it does not harm a particular individual, it harms humanity in its entirety, as much as it makes "the source of right unusable".³⁸ This resonates with his famous commentary on a case of taking a financial loan without intent to return it³⁹ – such a deed is likely to contribute to public mistrust. However, to Kant, this is not a matter of weighing the extent of harm against the benefits – to him, lying is always wrong; according to T. L. Carson, Kant argues that lying (in the ethical sense) is (or can be) wrong, even if it does not harm others;⁴⁰ and one ought not lie, no matter how great the benefits to himself or others might be;⁴¹ according to Kant's definition of lying (in the ethical sense), lying in the sense bearing on right requires an additional condition – the intentional untruthful statement (that purports to express one's thoughts and is intended to deceive another person) must violate another person's right.⁴² Additionally, it is worth noting that some interpretations regard the harm of lying in a wider sense than just the harm occurring after a particular act of lying – it is rather that the system of right is constituted by a set of laws that are universally valid; it is contrary to the very concept of right that it could be right to make an untruthful declaration when the truthfulness of that declaration is required by rational laws of right.⁴³

Directly following Kant's view would likely be as utopian as achieving the state of perpetual peace described by Kant. Digital space is not likely to be devoid of lies in the foreseeable future, but an adaptable takeaway from Kant's contemplations is similar to the implication from the aforementioned authors: that lying creates public mistrust. Instances of false information create a state of uncertainty, in which we are in constant

³⁵ Kant, I. On a supposed right to lie from philanthropy (1797). In: Practical Philosophy. The Cambridge Edition of the Works of Immanuel Kant, Gregor, M. J. (ed.). Cambridge University Press, 1996.

³⁶ Ibid., p. 611.

³⁷ Ibid., p. 612.

³⁸ Ibid., pp. 605–616.

³⁹ Kant, I. Groundwork of the metaphysics of morals (1785). In: Practical Philosophy. The Cambridge Edition of the Works of Immanuel Kant, Gregor, M. J. (ed.). Cambridge University Press, 1996, p. 72.

⁴⁰ Carson, T. L. Lying and Deception, p. 72.

⁴¹ Ibid., p. 73.

⁴² Ibid., p. 72.

⁴³ Wood, A. W. What Is Kantian Ethics? In: Groundwork for the Metaphysics of Morals, Wood, A. W. (ed.). Yale University Press, 2008, pp. 157–182.

doubt about whether the information in front of our eyes is truthful. Naturally, in different cases, the impact on this point can be vastly different. A casual internet user's untruthful comment does not have the same consequences triggering public mistrust as a high-ranking government official's blatant lie. Turning back to the EU definition of disinformation, one of its attributes is public harm which can manifest itself as "threats to democratic political and policy-making processes". The connection between these concepts is the possibility that democratic processes can be affected by the state of public mistrust. Accordingly, certain cases of disinformation could be regarded as a threat to these processes (i.e., causing public harm) if they significantly contribute to public mistrust, in certain steps or background of democratic processes.

Modern theories

Unsurprisingly, there are views that lying is sometimes permissible and more criteria are offered to back these notions. Besides the utilitarian test, a way to distinguish the permissible cases is to ascertain the conflict between relevant duties. It is reasonable to infer that the duty to tell the truth to a murderer is in conflict with (and, likely, outweighed by) the duty to help others, *inter alia*, by protecting people from murderers. As H. Sidgwick puts it, if we are allowed to kill in defence of ourselves and others, it is strange if we may not lie for such cause.⁴⁴ This perspective is pervasive in the contemporary Western legal thought, where typically legality of a restriction on a certain human right (such as the freedom of expression) is ascertained according to its balance with competing values (e.g., interests of national security, public safety, prevention of disorder or crime, the protection of health or morals, etc.). This sort of framing corresponds with the theory by W. D. Ross on the *prima facie* duties: he suggested this concept (which he also called a "conditional duty") as a characteristic (quite distinct from that of being a duty proper) which an act has, in virtue of being of a certain kind (e.g., the keeping of a promise), of being an act which would be a duty proper if it were not at the same time of another kind, which is morally significant.⁴⁵ In other words, moral duties could be regarded as presumably mandatory, and this presumption can be denied, if there are strong reasons against it (such as competing duties). As Carson put it, Ross thinks that it is wrong to tell a lie in order to bring about a very small amount of good or prevent a very small amount of bad; one would not be justified in telling a lie to spare a momentary distress or embarrassment; on the other hand, Ross is not an absolutist; he thinks that lying can be justified, if it is necessary to produce a great good or avoid a great evil.⁴⁶ What follows is a theory where the morality of an act is not to be evaluated by how it contributes to common happiness (as in utilitarianism) but is grounded on self-sustaining moral grounds. Under this interpretation, a lie can still be moral even if telling the truth would benefit common happiness more and, conversely, a lie could be immoral if it benefits common happiness more than telling the truth. For the context of legal measures against disinformation, this distinguishing feature of Ross's theory could imply that no single reason (which either justifies the disputed information, or condemns it) should be treated as decisive – a decision regarding whether certain information is illegal, should be made on the whole entirety of relevant reasons and their weight could vary based on specific nuances. This principle might presuppose that information could be legal even when it fits all the characteristics of punishable

⁴⁴ Sidgwick, H. *The Methods of Ethics*. Dover, 1966, p. 315.

⁴⁵ Ross, W. D. *The Right and the Good*. Oxford University Press, 1930, p. 21.

⁴⁶ Carson, T. L. *Lying and Deception*, p. 105.

disinformation. Such a conclusion might be necessary because it can be impossible to predict all the subtle nuances which might be morally relevant, therefore, without an exhaustive list of them, in every new set of circumstances it must be checked, whether it does not require an exception of previously established rules.

Another relevant view is scepticism,⁴⁷ which has a relation with, perhaps, the most difficult attribute of disinformation to determine – whether the information in dispute “may cause public harm”. Without a deeper dive, moral scepticism can be described as raising doubts about whether we actually know or are able to identify the contents of morality and determine the morality of a certain act. The same can be said about the prediction, whether an act may cause public harm – it is a matter of forecasting the future which would be confidently possible for those who master the time travel. The verb “may” lightens the burden (as opposed to the verb “will”), and enables us to recognize disinformation without the necessity to be certain that harm will be caused – instead, it requires to prove the likelihood of it. The essential questions here are (1) what can be regarded as harm, and (2) what is the required likelihood of it.

The latter question is difficult, because any sort of act can possibly result in good or bad consequences. Saving a child’s life would be a good deed, but if it turns that the child were Adolf Hitler, it logically follows that saving him has indirectly resulted in public harm – the holocaust. And, conversely, imprisoning V. Lenin or J. Stalin for their political views in the early days might seem like an immoral restriction on freedom of expression but it may had led to a positive outcome by alleviating the world from communist atrocities. Therefore, without a certain reasonable standard of likelihood, the attribute “may cause public harm” would be meaningless. When disinformation is used as a psychological operation in information warfare, its purpose might be to demoralize society, public officials, military personnel, to spread political views which are useful for an external aggressor state government, influence election or referendum results, etc. As the previously described examples show, such campaigns can be massive, and the likelihood of one single act of disinformation to cause public harm can be incredibly small. On the other hand, when an independent political opposition leader is sharing views which can result in similar consequences, even when they are more likely, restricting her speech could be detrimental to the foundations of democracy (unless it is proven that her actions were a result of a cooperation with a hostile foreign government). Accordingly, a rigid universal standard for the likelihood of public harm could either lead to disproportional restrictions of free speech, or toleration of foreign information warfare attacks. This danger could be avoided if the disinformation definition was amended or the discussed standard (for the likelihood of public harm) would be determined in each case individually, depending on the context.

The same can be said about the nature of harm. The definition of disinformation provides a specification of the public harm concept: it “comprises threats to democratic political and policy-making processes as well as public goods such as the protection of EU citizens’ health, the environment or security”.⁴⁸ No rational person could deny that politicians and their team members occasionally include lies in their electoral

⁴⁷ Joyce, R. *The Myth of Morality*, Cambridge University Press, 2001; Mackie, J. L. *Ethics: Inventing Right and Wrong*, Penguin, 1977; Sinnott-Armstrong, W. *Moral Scepticisms*. Oxford University Press, 2006.

⁴⁸ European Commission. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Tackling online disinformation: a European Approach, EUR-Lex, COM(2018) 236 final, 2018. Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0236> [last viewed 09.06.2024].

political campaigns. As much as we would like to outlaw such actions, politicians cannot be punished for spreading disinformation solely because their lies somehow influence democratic political and policy-making processes. However, it is hard to find any reason to tolerate the same act by information warfare agents. Consequently, applying a uniform standard for the interpretation of the public harm concept would be just as counterproductive as with the previously described likelihood of harm.

Presumptive truth

Turning back to the essence of scepticism, the usual solution to the problem of uncertainty about truth is the presumptive truth. In criminal law, the suspect is presumed innocent until proven otherwise. Presumptions similarly function in other branches of public law and the same applies to the restrictions on freedom of expression. A presumption is a rational way to avoid dangers that we use both in law and in our everyday lives. We might not presume that the ice is too thin to walk on, if it covers a shallow puddle. Conversely, if the ice covers a deep river, it is reasonable to assume that it is thin until proven otherwise – we sometimes alter presumptions, if the consequences of a mistake are very harmful.

Additional complication is presented by the growing importance of internet media. While we can confide in courts to properly adjudicate disputes in this field, since the judges have no other significant motive, besides to adopt a fair judgment, private corporations operate social media platforms with the intention to gain monetary profit, which is completely understandable. However, sometimes this might not be in harmony with the best interests of the battle against disinformation. Profits might be negatively impacted by the emergence of cases where social media platform violates the law. In this context, the relevant violation could be the failure to fulfil their duties regarding disinformation or manipulative behaviours and practices – these are the main duties prescribed by law. However, legal liability for such failure would not be very probable, because the law can be described as raising the duties to invest reasonable efforts into reaching this goal. The platform can be charged with a violation of the law when its actions or inactivity is unlawful in the sense contained in the letter of law, not in the sense of nuanced, delicate interpretation of law. The more profitable choice, naturally, does not necessarily coincide with the nuanced interpretation, but with the text of the law and other paths which correlate with higher profits. An obvious example of such paths is high user engagement, which has been widely associated with controversial online content and can lead to colossal amplification of engaging news and opinions, regardless of their source – perhaps even when the source is a hostile foreign government.

In this context, regarding presumptions, the difficulty is that the model for battling disinformation is more complicated than giving a monetary fine: it involves intricate schemes where private subjects – internet intermediaries – have certain duties. Should they follow a presumption that certain information is not disinformation? Or should the public institutions follow a presumption that internet intermediaries act lawfully (either by restricting, or allowing some information)? The overall spirit of free speech should favour a presumption that information is legal, therefore, if an internet intermediary restricted it, a logical presumption would be that the intermediary acted unlawfully. However, taking into account their incentives, such presumption would likely lead to a situation where the information warfare perpetrated by foreign agents thrive. In order to avoid it, presumptions could be set according to specific conditions. For example, if there would be factual grounds for reasonable suspicion that a social

network profile is fake, information that has been shared could be presumed to be disinformation. The source for a set of facts which could lead to such presumption could be sought in the Code of Practice on Disinformation and other documents, which reveal the functioning of disinformation. However, this particular aspect requires elaborate further research because of the numerousness of different sorts of duties that are assigned for internet intermediaries.

Conclusions

1. It appears that the EU definition of disinformation was designed according to the principle “one size fits all”, but it would be in conflict with the purposes of law and would not be in harmony with the relevant context to outlaw disinformation with rigidly universal standards. The other cases, where the EU legal definition of disinformation needs differentiation, include the context of targeted countries: the same standard is not suitable in countries which are at war, or can be regarded as militarily vulnerable, and in countries where the threat of military aggression is negligible. The need for a differentiated definition of disinformation also emerges when the nature of the person expressing himself is taken into account: it is too strict to apply to the country’s citizens who participate in public discussions, and too lenient to apply to hostile foreign governments that commit acts of information warfare.
2. This inadequacy leaves no other way to either amend the definition, or to apply it contextually, with the whole assortment of methods of legal interpretation, amongst them, firstly, the purposive interpretation that would account for a comprehensive understanding of information warfare forms and their impact, as well as the principles of democracy and the right to self-expression. The issue could also be aided by the theories of moral philosophy.
3. Moral philosophy and teleological legal interpretation offer criteria which can help to properly enforce the legal instruments against disinformation: these include (1) applying the standard of an average person in the evaluation, whether information is misleading (information can be regarded as misleading when an average person can be reasonably expected to be deceived by it). Also, (2) permissibility of untruthful information can be evaluated by taking into account the goal of the person who is expressing it; (3) in the evaluation, whether information may cause public harm to democratic processes, it might be relevant, whether disinformation significantly contributes to public mistrust, in certain steps or background of democratic processes; (4) no single reason (which either justifies the disputed information, or condemns it) should be treated as decisive – information could be legal even when it fits all the characteristics of punishable disinformation, thus, in every new set of circumstances it must be checked, whether it does not require an exception of previously established rules; (5) battle against disinformation in the digital context and involvement of internet intermediaries requires complex principles for presumptions (and, consequently, distribution for burden of proof) that requires further research.

Summary

EU has defined 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. The two main issues with it are

(1) the uncertainty of the concepts of lying and deception, and (2) its mismatch for different contexts. If the definition is not amended or explained in greater detail, both of these issues can be at least partly remedied by employing teleological interpretation and the philosophical theory on the morality of lies.

Disinformation can be a very impactful tool, and a good illustration of how it influences people is provided by the psychological effects of herd mentality and metacognitive myopia. Disinformation can manipulate these effects and create consequences that may be desired by foreign hostile governments, which initiate the spread of disinformation or directly create and distribute it.

It shows the necessity to differentiate legal measures on disinformation according to the source – whether the information has come from a domestic citizen or from a hostile foreign government as a part of psychological operation in the information warfare. In the latter case, it might not even matter whether it is truth in a strict sense. Satire, which is not strictly untruthful, can demoralize and result in many sorts of negative consequences, among them an increase in the number of citizens who try to avoid the military draft; a decrease in the confidence in law and public institutions, etc. It is difficult to find a reason for treating any sort of such activity by a hostile foreign government as legal, even if it does not strictly match all the general features of disinformation. It would hardly serve the purposes of legal regulation to apply the same standards of permissible level of truthfulness both to foreign agents who are executing a psychological operation and to domestic citizens. Any sort of attempt to do it would lead either to tolerance of various psychological operations or to a disproportional restriction of citizen's freedom of expression. However, the current EU legal definition of disinformation for these different cases is the same.

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