

JOURNAL OF INTERNATIONAL MEDIA & ENTERTAINMENT LAW

PUBLISHED BY THE DONALD E. BIEDERMAN ENTERTAINMENT
AND MEDIA LAW INSTITUTE OF SOUTHWESTERN LAW SCHOOL
IN ASSOCIATION WITH THE
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SYMPOSIUM

IN THE SHADOW OF TERRITORIAL CONFLICT:
LEGACIES OF SOVIET-ERA MEDIA CONTROL AND SPEECH NORMS

EDITOR'S NOTE

DEDICATION

To Professor Michael D. Scott
Michael M. Epstein

ARTICLES

Censorship as a Tool Against State Disinformation:
The Freedom of Expression Implications of the Russian-Ukrainian War
András Koltay

International Legal Responses to "Propaganda For War" in the Modern Warfare
Andrei Richter

An Explanatory Comparative Study on Misinformation and Disinformation
In Visegrad Countries and Beyond
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Mission Statement: The *Journal of International Media & Entertainment Law* is a semi-annual publication of the Donald E. Biederman Entertainment and Media Law Institute of Southwestern Law School in association with the American Bar Association Forums on Communications Law and the Entertainment and Sports Industries. The *Journal* provides a forum for exploring the complex and unsettled legal principles that apply to the production and distribution of media and entertainment in an international, comparative, and local context. The legal issues surrounding the creation and dissemination of news and entertainment products on a worldwide basis necessarily implicate the laws, customs, and practices of multiple jurisdictions. The *Journal* examines the impact of the Internet and other technologies, the often-conflicting laws affecting media and entertainment issues, and the legal ramifications of widely divergent cultural views of privacy, defamation, intellectual property, and government regulation.

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IN THE SHADOW OF TERRITORIAL CONFLICT:
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Editor's Note

Armed conflicts between Armenia and Azerbaijan between 2020 and 2023 over Nagorno-Karabakh, also known as Artsakh, are tragic examples of a long-running ethnic and geo-political dispute that became a flashpoint for war after the Soviet Union collapsed. The conflict is frequently contextualized from a historical perspective among other protracted territorial conflicts that have re-escalated into war in former Soviet Republics in Eastern Europe and Central Asia, including in Georgia, Chechnya, the annexation of Crimea by Russia, and the 2022 invasion of Ukraine by Russia and its attempt to set up a separatist-backed state in the Donbas region.

In 2023, the *Journal of International Media & Entertainment Law* organized a global symposium conference entitled *In the Shadow of Territorial Conflict: Legacies of Soviet-Era Media Control and Speech Norms*. The symposium's Call for Papers sought scholars proposing to examine the role of media institutions, government censorship, and social media speech norms in areas scarred by post-Soviet-era disputes over land and ethnicity. Is there a shared legacy of Soviet-era media control and speech censorship that informs speech norms and media practices in the region today? The research papers that were accepted to this symposium, which form the basis for the articles in this and the next two issues, set out to address this question.

Leading off this issue is "Censorship as a Tool Against State Disinformation: the Freedom of Expression Implications of the Russian-Ukrainian War," by Dr. András Koltay. Dr. Koltay is a professor of law at both the University of Public Service and Pázmány Péter Catholic University in Budapest, Hungary. Dr. Koltay argues with nuance that the European Union's ban on Russian media may lead to unintended impacts and consequences in the debate over the Ukraine war. Dr. Koltay currently serves as the president of the National Media and Infocommunications Authority in Hungary.

Dr. Andrei Richter, Professor Researcher at Comenius University in Bratislava, Slovakia, was the keynote speaker at the *In the Shadow of Territorial Conflict* conference. His symposium article, "International Legal Responses to Propaganda for War in the Modern Warfare," analyzes evolving understandings of what constitutes "propaganda for war" in the digital era, with an eye on the Ukraine War and other post-Soviet armed conflicts, as well as military attacks by radicals in the Middle East. From 2016-2022, Dr. Richter served as Senior Media Advisor at the Organization

for Security and Co-operation in Europe (OSCE) in Vienna. His keynote address is being revised as an essay for a subsequent issue.

Rounding out this issue is “An Exploratory Comparative Study on Misinformation and Disinformation in Visegrad Countries and Beyond,” by Dr. Andrej Škol kay. Dr. Škol kay is Research Director of the School of Communication and Media in Bratislava, Slovakia. Dr. Škol kay offers a qualitative analysis of keywords in mainstream newspaper databases and diplomats’ social media pages related to regional conflicts involving the Russian state.

My thanks to our faculty peer reviewers, and to our hard-working student editors, led this year by Adam Arnold. As always, the *Journal* welcomes feedback from its readers.

Michael M. Epstein
Supervising Editor

Michael D. Scott

Volume 10 of the *Journal of International Media & Entertainment Law* is dedicated in memory of Southwestern Law Professor Michael D. Scott, who passed away on October 26, 2023 at age 77. Mike Scott was not only a beloved member of the Southwestern faculty; he was also a committed member of the Journal's editorial board. With his health failing, Mike decided to retire last summer. Over Zoom, a frail Mike was able to attend one last faculty meeting. I was honored to represent his colleagues with a tribute that has been revised and edited below.

Michael Scott was a colleague of few words, but great accomplishment. If you do an internet search for Michael Scott, you can find evidence of Mike's trailblazing career as a tech lawyer going back decades, even after excluding results for *The Office*. Mike was a computer lawyer before computers were in people's homes. Mike had a stellar legal career; he burnished his reputation as a partner for all things tech at Perkins-Coie, before coming to Southwestern full time in 2003. It is a measure of his longevity as a leader in his field that Mike was teaching computer law at Southwestern in 1976, when computer law was not taught at law schools.

Mike was a wonderful colleague whose prodigious work speaks for itself. As a media law professor, I remember the moment when I realized that he was the same Michael Scott who authored a popular telecom treatise. It had simply not occurred to me that his expertise overlapped so well with mine. But that was Mike; he was a savant who spoke softly but wrote boldly.

Mike's street cred as a techie drew students to him in droves. Mike didn't just have students; he had groupies. He loved "dropping knowledge" in and out of the classroom. He helped our students land jobs in the tech sector, contributed to the success of the Biederman Entertainment and Media Law Institute at Southwestern, and helped pave the way to our pathbreaking Concentration in Technology Law and Entrepreneurship.

Professor Robert C. Lind, the founder of Southwestern’s entertainment law program, describes Mike Scott as “truly, the grandfather of computer law.” Professor Lind recalls that Mike’s input was sought after on many issues at the dawn of the digital age, including whether the internet should have an email function, when others advocated for continued reliance on the telephone. “Mike brought tremendous credibility to Southwestern’s entertainment and media law curriculum,” says Professor Lind. “He had the gravitas of someone highly respected in his field.”

As I reflect on Mike’s time at Southwestern, one moment speaks to his dedication as a colleague. He and I were both in London on July 7, 2005, when bombers attacked the city’s mass transit system. Southwestern’s summer entertainment program was blocks away from two of the explosions, and we knew that Mike would be on a bus enroute to his class. Within an hour, we had accounted for everyone—except Mike, who was staying outside of town. With transit and communications shut down, students and teachers grew increasingly worried for his safety. But the terrorist attack did not deter Mike; he simply walked for two hours—through emergency barricades and first responders—to reach us. That is real commitment.

Mike Scott loved this job—and the Southwestern faculty loved having him as a colleague. We will miss him keenly.

Michael M. Epstein
Supervising Editor

CENSORSHIP AS A TOOL AGAINST STATE DISINFORMATION: THE FREEDOM OF EXPRESSION IMPLICATIONS OF THE RUSSIAN–UKRAINIAN WAR

András Koltay*

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* Research Professor, University of Public Service, and Professor of Law, Pázmány Péter Catholic University (both Budapest, Hungary).

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I. INTRODUCTION

Disinformation campaigns originating from Russia have been a frequently debated subject in the recent years.¹ Systematic information manipulation and disinformation have been applied by the Russian government in many countries,² including as an operational tool in its assault on Ukraine. According to an OECD Report, “Russia’s war of aggression against Ukraine is notable for the extent to which it is being waged and shared online.”³ Social media is changing the way war is presented.⁴

Russia’s disinformation campaigns deliberately confuse and undermine the information environment. They are designed to create confusion, hinder the building of consensus and gain support for Russia’s goals, as well as to erode the legitimacy of Ukraine’s response. While such efforts may pose greater risk in fragile democracies such as Ukraine, undermining the information space is destructive to every democracy.⁵ Disinformation also plays a major role in the Russian–Ukrainian war that started in February 2022.⁶ The

¹ See generally, RICHARD SAKWA, *THE RUSSIA SCARE: FAKE NEWS AND GENUINE THREAT* (2023).

² See *Foreign Threats to the 2020 U.S. Federal Elections*, OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE at 4 (Mar. 16, 2021),

<https://www.dni.gov/files/ODNI/documents/assessments/ICA-declass-16MAR21.pdf>; See also Christopher Paul & Miriam Matthews, *The Russian “Firehose of Falsehood” Propaganda Model Why It Might Work and Options to Counter It*, RAND 1, 1 (2016), <https://www.rand.org/pubs/perspectives/PE198.html>.

³ *Disinformation and Russia’s War of Aggression Against Ukraine: Threats and Governance Responses*, OECD at 1 (Nov. 3, 2022) [hereinafter *Disinformation*], <https://www.oecd.org/ukraine-hub/policy-responses/disinformation-and-russia-s-war-of-aggression-against-ukraine-37186bde/>.

⁴ See *The Invasion of Ukraine is not the First Social Media War, but it is the most Viral*, ECONOMIST (Apr. 2, 2022), <https://www.economist.com/international/the-invasion-of-ukraine-is-not-the-first-social-media-war-but-it-is-the-most-viral/21808456>.

⁵ *Disinformation*, supra note 3, at 2.

⁶ See *EU Restrictive Measures against Russia over Ukraine (since 2014)*,

EUROPEAN COUNCIL, <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine> (last visited Apr 10, 2023).

issue has been on the agenda in the European Union in recent years, so it is not surprising that to the many sanctions the EU introduced against Russia,⁷ action against disinformation was also added.

This essay sets out to describe the previously unprecedented ban on Russian media service providers, including the problems the provision creates for freedom of expression (Part II). In particular, it will examine the content of the Decision and the Regulation, which prohibited the distribution of the Russian media outlets concerned (Part II.1) and the consequences of the EU legislation (Part II.2), before going on to critically analyze the provisions from the perspective of freedom of expression (Part II.3), and finally, the relevant judgments of the Court of Justice of the European Union (CJEU) (Part II.4). The paper will then analyze the European approach to the restriction of disinformation (Part III), with particular reference to the issues of freedom of expression in general (Part III.1), the regulation of online platforms (Part III.2) and media regulation (Part III.3) in relation to the problem under consideration.

II. THE EU DECISION AND REGULATION BANNING RUSSIAN MEDIA OUTLETS ACROSS THE UNION

For the first time since the fall of the communism, media outlets have been banned in Europe. The instrument of prohibition was the European Council Decision and Regulation, and the ban could have far-reaching consequences beyond the specific provisions.

A. The Decision and the Regulation and their Legal Background

The overview published by the Council of Europe describes in detail what happened after the outbreak of the Russian–Ukrainian war in terms of media regulation.⁸ On 27 February 2022, the President of the European Commission, Ursula von der Leyen, released a statement outlining certain measures it planned to take in response to the Russian

⁷ *Id.*

⁸ See generally Francisco J. Cabrera Blázquez, *The Implementation of EU Sanctions against RT and Sputnik*, EUROPEAN AUDIOVISUAL OBSERVATORY (2022).

invasion of Ukraine.⁹ The President announced that the EU would ban the state-owned media outlets Russia Today and Sputnik, as well as their subsidiaries.¹⁰ High Representative Josep Borrell confirmed this in another statement, in which he affirmed that the EU was “taking a crucial step to turn off the tab for Russia’s information manipulation in Europe by banning Russia Today and Sputnik from broadcasting in the Union” and that the EU would “continue working actively in Ukraine and our neighborhood to fight their attempts to distort reality and seed confusion and uncertainty.”¹¹

On 1 March 2022, the Council of the EU adopted a Decision¹² pursuant to Article 29 of the Treaty of the European Union (TEU) and a Regulation¹³ pursuant to Article 215 of the Treaty on the Functioning of the European Union (TFEU) by which it is prohibited for:

operators to broadcast or to enable, facilitate or otherwise contribute to broadcast, any content by the legal persons, entities or bodies listed in Annex XV [RT–Russia Today English, RT–Russia Today UK, RT–Russia Today Germany, RT–Russia Today France, RT–Russia Today Spanish, and Sputnik news agency], including through transmission or distribution by any means such as cable, satellite, IP-TV, internet service providers, internet video-sharing platforms or

⁹ See generally *Statement by President von der Leyen on further Measures to Respond to the Russian Invasion of Ukraine*, EUR. COMM’N (Feb. 27, 2022), https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1441.

¹⁰ *Id.*

¹¹ *Further Measures to Respond to the Russian Invasion of Ukraine: Press Statement by High Representative/Vice-President Josep Borrell*, EUR. COMM’N (Feb. 27, 2022),

https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_1463.

¹² Council Decision 2022/351, 2022 O.J. (L65/5) amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia’s actions destabilizing the situation in Ukraine, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.065.01.0005.01.ENG&toc=OJ%3AL%3A2022%3A065%3ATOC.

¹³ Council Regulation 2022/350, 2022 O.J. (L65) (EU) amending Regulation 833/2014 concerning restrictive measures in view of Russia’s actions destabilizing the situation in Ukraine [hereinafter Regulation], https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.065.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A065%3ATOC.

applications, whether new or pre-installed (Article 1(1)).

All broadcasting licenses or authorization, transmission and distribution arrangements with RT and Sputnik were suspended.¹⁴ In June, these measures were extended to other Russian media outlets (Rossiya RTR/RTR Planeta, Rossiya 24/Russia 24 and TV Centre International).¹⁵ On 16 December 2022, the Council of the European Union adopted a Decision (CFSP) 2022/2478 banning four further media outlets to the list of Russian broadcasters prohibited in the EU.¹⁶

According to the Recitals of the EU Decision and Regulation, the Russian Federation “has engaged in a systematic, international campaign of media manipulation and distortion of facts in order to enhance its strategy of destabilization of its neighboring countries and of the Union and its Member States.”¹⁷ Furthermore, “[t]hose propaganda actions have been channeled through a number of media outlets under the permanent direct or indirect control of the leadership of the Russian Federation. Such actions constitute a significant and direct threat to the Union’s public order and security,”¹⁸ and “are essential and instrumental in bringing forward and supporting the aggression against Ukraine, and for the destabilization of its neighboring countries.”¹⁹ The abovementioned restrictive measures will “be maintained until the aggression against Ukraine is put to an end, and until the Russian Federation, and its associated media outlets, cease to conduct propaganda actions against the Union and its Member States.”²⁰ “These measures do not prevent those media outlets and their staff from carrying out other activities in the Union than broadcasting,

¹⁴ Foo Yun Chee, *EU Bans RT, Sputnik over Ukraine Disinformation*, REUTERS (Mar. 2, 2022, 5:43 AM PST) <https://www.reuters.com/world/europe/eu-bans-rt-sputnik-banned-over-ukraine-disinformation-2022-03-02/>.

¹⁵ Counsel Decision 2022/C 219 I/03 O.J. (CI 219/5) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022XG0603%2803%29>.

¹⁶ Counsel Decision 2022/2478 O.J. (LI 322/614) [hereinafter Decision], <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.LI.2022.322.01.0614.01.ENG&toc=OJ%3AL%3A2022%3A322I%3AFULL>.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

such as research and interviews.”²¹ Clarifying the competence of the EU to take such restrictive measures, the Regulation explains that they “fall within the scope of the Treaty and, therefore, in particular with a view to ensuring their uniform application in all Member States, regulatory action at the level of the Union is necessary.”²²

These sanctioning rules derive directly from the TEU. “The Council of the EU used the prerogatives under Title V TEU concerning the general provisions on the EU’s External Action and the specific provisions on the Common Foreign and Security Policy.”²³ According to Article 21(2)(c) TEU:

2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to:

(c) preserve peace, prevent conflicts and strengthen international security, in accordance with the purposes and principles of the United Nations Charter, with the principles of the Helsinki Final Act and with the aims of the Charter of Paris, including those relating to external borders.²⁴

Article 29 TEU empowers the Council of the EU to “adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature.”²⁵ Following a Decision of the Council of the EU pursuant to Article 29 TEU, the restrictive measures of Article 215 TFEU apply:

1. Where a decision, adopted in accordance with Chapter 2 of Title V of the Treaty on European Union, provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High

²¹ *Id.*

²² *Id.*

²³ Blázquez, *supra* note 8, at 9.

²⁴ *Id.*

²⁵ *Id.*

Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures. It shall inform the European Parliament thereof.

2. Where a decision adopted in accordance with Chapter 2 of Title V of the Treaty on European Union so provides, the Council may adopt restrictive measures under the procedure referred to in paragraph 1 against natural or legal persons and groups or non-State entities.

3. The acts referred to in this Article shall include necessary provisions on legal safeguards.²⁶

The regulatory group of European communications authorities (BEREC) confirmed in a statement on 4 March 2022 that the blocking of RT and Sputnik by internet service providers does not constitute an obstacle to the enforcement of net neutrality rules (as it serves to comply with an EU legislative act).²⁷ In a statement issued on 11 March 2022, BEREC affirmed that it is ready to provide technical assistance to national regulatory authorities to ensure the compliance of internet access providers with the EU Regulation, explaining that its scope covers all domains, including their sub-domains (e.g., www.rt.com, francais.rt.com, sputniknews.com, sputniknews.lv.com, sputniknews.gr and sputniknews.cn).²⁸ As European experts somewhat dramatically put it, “a digital Iron Curtain was put up.”²⁹ The re-installation of any iron curtains brings back bad memories for those who lived through the Communism in the Central and Eastern parts of Europe.³⁰

²⁶ *Id.* at 9-10.

²⁷ *BEREC: Open Internet Regulation is not an Obstacle in Implementing EU Sanctions to Block RT and Sputnik*, BEREC (Mar. 04, 2022), <https://www.berec.europa.eu/en/news-publications/news-and-newsletters/berec-supports-isps-in-implementing-the-eu-sanctions-to-block-rt-and-sputnik>.

²⁸ *Id.*

²⁹ GOVERNING INFORMATION FLOWS DURING WAR: A COMPARATIVE STUDY OF CONTENT GOVERNANCE AND MEDIA POLICY RESPONSES AFTER RUSSIA’S ATTACK ON UKRAINE (Mart Susi et al. eds. 2022).

³⁰ *See The Sinews of Peace ('Iron Curtain Speech')*, INTERNATIONAL CHURCHILL SOCIETY <https://winstonchurchill.org/resources/speeches/1946-1963-elder-statesman/the-sinews-of-peace> (finding the use of the expression “Iron curtain” as a Cold War symbol is attributed to a speech by Winston Churchill given on March 5, 1946, in Fulton, Missouri) (last visited on Apr. 10, 2023).

B. *The Consequences of the Regulation*

In Finland, private media outlets acted quickly on their own initiative after the start of the military aggression against Ukraine to suspend the distribution of Russian news channels.³¹ “In five countries—Belgium, Estonia, Latvia, Lithuania and Poland – the national authorities issued instructions to suspend Russian media outlets shortly after the invasion...even before the President of the European Commission announced...[its] intention to implement such a measure across the EU.”³² Access to certain “Russian media outlets was suspended within a very short period all over the EU as a result of coordinated activity between national authorities and private actors.”³³ “A small number of EU Member States also introduced legislative changes, for example, by introducing a state of emergency that extends to the control of broadcasting and social media platforms, such as in Lithuania, or by conferring additional powers on security agencies to monitor the media coverage of the war, such as in Moldova.”³⁴

The scope of the Regulation is broader than it seems after its first reading. According to the official interpretation of the somewhat ambiguous text,

providers of Internet search services must make sure that i) any link to the Internet sites of RT and Sputnik and ii) any content of RT and Sputnik, including short textual descriptions, visual elements and links to the corresponding websites do not appear in the search results delivered to users located in the EU.³⁵

Also, social media platforms:

must prevent users from broadcasting . . . any content of RT and Sputnik. That applies both to accounts which

³¹ SUSI, *supra* note 29, at 4.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 17.

³⁵ Letter from the European Council to Undisclosed Recipients (Mar. 4, 2022), https://lumendatabase.org/file_uploads/files/5061360/005/061/360/original/6-9267000032260.pdf?1646430529&access_token=w6YC_Vjutt85UvZMLExMag.

appear as belonging to individuals who are likely to be used by RT/Sputnik and to any other individuals. Moreover, social media accounts that either formally or *de facto* belong to RT and Sputnik or their affiliates must be suspended.³⁶

According to the clarification provided by the relevant EU bodies, there is still some scope for using the content broadcast by the banned outlets by other European outlets.

Where a media outlet other than Russia Today and Sputnik [and the others, later added to the list] reports about the current Regulation and its consequences, it may *inter alia* provide the content and in that regard it may refer to pieces of news by RT and Sputnik, in order to illustrate the type of information given by the two Russian media outlets concerned with a view to informing their readers/viewers objectively and completely. The right of free speech of other media outlets can however not be used to circumvent the Regulation: under Article 12, “It shall be prohibited to participate, knowingly and intentionally, in activities the object or effect of which is to circumvent prohibitions in this Regulation.” Therefore, if another media outlet purports to inform its readers/viewers, but in reality its conduct aims at broadcasting Russia Today or Sputnik content to the public or has that effect, it will be in breach of the prohibition laid down in the Regulation.³⁷

Even so, the scope of the measure is unprecedented, as it covers all types of audiovisual media and social media content. The ban is also a departure from the general monitoring ban in Article 15 E-Commerce Directive.³⁸ This provision makes it clear that any state-imposed orders

³⁶ *Id.*

³⁷ *Id.* at 3.

³⁸ Council Directive 2000/31/EC, 2000 O.J. (L178), On certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

on social media platforms (referred to in the Directive as host services) to monitor users' content are not compatible with European law (more on European platform regulation later). The majority of non-EU member European states have not imposed any sanctions, apart from the United Kingdom. There, the media regulator Ofcom opened 29 investigations against RT, and the UK's public service broadcaster BBC halted all content licensing with its Russian customers.³⁹

Norway and Switzerland have both taken a different stance to the EU Member States. In the case of Norway, on April 26 the government announced that "no sanctions would be taken against RT and Sputnik, in line with recommendations made by the Norwegian media regulator (NMA)."⁴⁰

NMA and the Norwegian government have assessed that "the Norwegian society and the public are able to resist manipulation attempts from Russian state-owned media." Freedom of expression enjoys a strong protection under the Norwegian constitution and both the government and NMA considered that the threshold to restrict freedom of expression was not reached, as RT and Sputnik do not pose threats to basic societal functions in Norway. In this context, NMA's view is that media literacy is the best tool against Russian propaganda.⁴¹

Meanwhile, the Swiss Federal Council also decided not to restrict access to RT and Sputnik. The Federal Council considered "that opposing false information with facts is more efficient than banning its publication."⁴²

³⁹ Natali Helberger & Wolfgang Schulz, *Understandable, but Still Wrong: How Freedom of Communication Suffers in the Zeal for Sanctions*, LSE (Jun. 10, 2022), <https://blogs.lse.ac.uk/medialse/2022/06/10/understandable-but-still-wrong-how-freedom-of-communication-suffers-in-the-zeal-for-sanctions>.

⁴⁰ Chris Dziadul, *Switzerland and Norway Refuse to Ban RT and Sputnik*, BROADBAND TV NEWS (Jun. 14, 2022, 9:40 AM), <https://www.broadbandtvnews.com/2022/06/14/switzerland-and-norway-refuse-to-ban-rt-and-sputnik>.

⁴¹ *Id.*

⁴² *Id.*

After the Regulation came into force, the Dutch journalists' union filed a lawsuit challenging the ban as a violation of European citizens' rights to freedom of information.⁴³ A lawsuit was also initiated by RT France (see the judgment of the General Court of the EU, *infra*, Part II.4).

C. Analysis and Critique of the Regulation from the Perspective of Freedom of Expression

The legislation has been welcomed by the European public and political actors without much debate, but has been the subject of serious criticism from those concerned with press freedom and media law. The legal problems raised by the EU's move are discussed below.

1. *The Competences of the EU*

Ricardo Gutiérrez, the General Secretary of the European Federation of Journalists (EFJ) pointed out that:

media regulation does not fall within the competence of the European Union. We believe the EU has no right to grant or withdraw broadcasting licenses. This is an exclusive competence of the states. In our liberal democracies, it is independent regulators, never the government, that are allowed to manage the allocation of licenses. The EU's decision is a complete break with these democratic guarantees. For the first time in modern history, Western European governments are banning media.⁴⁴

In its statement, "the EFJ recalled the case law of the European Court of Human Rights (ECtHR), which states that banning of a media outlet is a serious act, which must be based on solid legal grounds and

⁴³ Toby Sterling, *Dutch Journalists, Rights Group File Lawsuit Challenging EU Ban on RT, Sputnik*, REUTERS (May 2, 2022, 8:20 AM), <https://www.reuters.com/business/media-telecom/dutch-journalists-rights-group-file-lawsuit-challenging-eu-ban-rt-sputnik-2022-05-25>.

⁴⁴ *Fighting Disinformation with Censorship is a Mistake*, EFJ (Mar. 1, 2022), <https://europeanjournalists.org/blog/2022/03/01/fighting-disinformation-with-censorship-is-a-mistake>.

objective elements, to avoid arbitrariness.”⁴⁵ “The challenge for democracies is to fight disinformation while preserving freedom of expression” – said Gutiérrez.⁴⁶

As Dirk Voorhoof, the leading authority on ECtHR jurisprudence reminded us, “the EU is not at war with Russia and Ukraine is not a Member State of the EU.”⁴⁷ There must therefore be very strong reasons for justifying the EU ban on Russian media outlets. As we have seen above, the EU’s Audiovisual Media Services (AVMS) Directive⁴⁸ provides for the possibility of suspending or withdrawing the licenses of audiovisual media services by means of an appropriate procedure via the national media regulators, under the supervision of the European Commission, if the programs broadcast on such services contain repeated incitement to violence or hatred towards a group of people or a member of a group (Article 6).

In a normal situation, the EU does not have the competence to impose on Member States restrictions on the activities of a broadcaster under media law. The main EU regulatory instrument in the media field, the AVMS Directive, governs EU-wide coordination of national legislation on all audiovisual media — traditional TV broadcasting, video-on-demand services, as well as video-sharing platform services.⁴⁹ The AVMS Directive applies only to freedom of reception and transmission between EU Member States and,⁵⁰ depending on which country has jurisdiction over the infringing media outlet, the procedure for adopting restrictive measures against the transmissions of a media outlet can be difficult.

With regard to audiovisual media services which come from third countries and do not fall under the jurisdiction of an EU Member State, Recital 54 of the AVMS Directive provides that Member States are free to take whatever measures they deem appropriate, provided that

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Dirk Voorhoof, *EU Silences Russian State Media: A Step in the Wrong Direction*, INFORRM (May 8, 2022), <https://inform.org/2022/05/08/eu-silences-russian-state-media-a-step-in-the-wrong-direction-dirk-voorhoof>.

⁴⁸ See Council Directive 2010/13/EU, 2010 O.J. (L95/1), On the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) [hereinafter AVMS].

⁴⁹ *Id.*

⁵⁰ *Id.*

they comply with Union law and the international obligations of the EU.⁵¹

Since 2015, Lithuania and Latvia have suspended the broadcasting of the Russian-language television channel RTR Planeta multiple times.⁵² These decisions were based on Articles 3(4)(a)(i) and 6 AVMS Directive which allow for the suspension of television broadcasts if they incite hatred based on certain criteria.⁵³ The European Commission confirmed that Lithuania and Latvia correctly considered TV shows that called for the occupation and annihilation of various states to be propaganda for war and that this justified suspending the broadcasts.⁵⁴ In the case of Baltic Media Alliance, the General Court of the EU recognized that countering incitement to hatred on the basis of nationality in the form of propaganda for war constitutes a legitimate public policy objective.⁵⁵

The issuing of licenses for media outlets, which is governed by a regime that seeks to protect diversity,⁵⁶ falls under the competence of the EU Member States. Under normal circumstances, the revoking of such licenses is also the Member States' competence. It remains highly questionable whether this general scheme of competences should be affected by Article 215 TFEU on the Council's decisions concerning restrictive measures against third countries, natural or legal persons and groups or non-state entities. Moreover, even where such EU competence existed, it is clear that the EU institutions are still bound by fundamental rights—namely freedom of expression, media freedom

⁵¹ *Id.*

⁵² *Decision of Latvia to Suspend Broadcast of the TV Channel 'Rossiya RTR' Compatible with EU Law*, EUR. COMM'N (May 12, 2021), <https://digital-strategy.ec.europa.eu/en/news/decision-latvia-suspend-broadcast-tv-channel-rossiya-rtr-compatible-eu-law>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Case C-622/17, *Baltic Media Alliance Ltd v. Lietuvos radijo ir televizijos komisija*, ECLI:EU:C:2019:566, (July, 4, 2019). <https://curia.europa.eu/juris/document/document.jsf?jsessionid=6538B04E014C6CDF5CBEC18CD0461795?text=&docid=215786&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=917>.

⁵⁶ Charter of Fundamental Rights of the European Union, art. 11, 2007 O.J. 303/7, <http://fra.europa.eu/en/eu-charter/article/11-freedom-expression-and-information#:~:text=1.,authority%20and%20regardless%20of%20frontiers>.

and the audiences' freedom to receive information—when adopting such sanctions.⁵⁷

The Human Rights Organization's Article 19 also notes that the EU is not directly engaged in an armed conflict with Russia, arguing in a statement that: "the EU should demonstrate that RT and Sputnik's programs actually constitute a serious and immediate threat to public order and security to justify a ban in all EU Member States."⁵⁸ It further notes "that in democratic countries and under the international freedom of expression standards, suspending or cancelling licenses for audiovisual media should be decided by independent regulators and not by political institutions."⁵⁹

2. *Can State Media Enjoy Media Freedom?*

According to some opinions, although RT has appealed the Regulation, RT and Sputnik may not be able to invoke Article 10 of the European Convention on Human Rights (ECHR), which protects freedom of expression, as they could be considered similar to state agencies. On the other hand, private parties may rely on their right to access information and invoke Article 10 ECHR.⁶⁰ It has been argued that RT and Sputnik do not qualify as media, but are the prolonged arm of the Russian Government, and as such cannot enjoy freedom of expression rights. It is a well-founded suspicion that RT and Sputnik are under the direct control of the Russian Government. This means that RT and Sputnik, as state broadcasters, without sufficient editorial autonomy and without journalistic independence, cannot claim the

⁵⁷ Ilaria Buri ET AL., "*The European Union's RT and Sputnik Ban: Necessary and Proportionate?*", DSA OBSERVATORY (Apr. 22, 2022), <https://dsa-observatory.eu/2022/04/22/the-european-unions-rt-and-sputnik-ban-necessary-and-proportionate>.

⁵⁸ Response to the Consultation of the UN Special Rapporteur on Freedom of Expression on Her Report on Challenges to Freedom of Opinion and Expression in Times of Conflicts and Disturbances, ARTICLE 19 (Jul. 19, 2022), [hereinafter ARTICLE 19]

<https://www.ohchr.org/sites/default/files/documents/issues/expression/cfis/conflict/2022-10-07/submission-disinformation-and-freedom-of-expression-during-armed-conflict-UNGA77-cso-article19.pdf>.

⁵⁹ *Id.*

⁶⁰ Buri, *supra* note 57.

protection of the right to freedom of expression according to the case law of the ECtHR.⁶¹

This may raise the question of whether a media outlet influenced, financed and controlled by a government (or a certain state body) can claim the protection of press freedom at all. However, excluding from media freedom those outlets that are serving the aims of a government, or even those which directly or indirectly controlled by it, would be as arbitrary and detrimental to media freedom as categorically excluding anyone else from exercising that right. It presupposes a decision that determines who has the right and who does not, whereas the fundamental tenets of human rights are universality and equality. Imagine a court ruling that says: “Pro-government journalists are not entitled to exercise media freedom.” This sounds terrifying, all the more so because it would only be one step to say the same thing to a journalist with opposing sympathies.

The duplication of media freedom is pointless, not only because the court rulings on the limits of free expression take into account aspects of a completely different nature than categorizing the media according to its sympathies or world-view, but also because it would have the opposite effect to that intended. When media freedom in Europe is separated from freedom of expression, it is precisely in order to ensure democratic publicity, including the right of the media under the law to keep the identity of its sources secret, the tolerance of otherwise unlawful acts in the course of an investigation, and the right to be independent of the owner or advertiser. These rights come to life and are necessary when the media serves democracy. What would be the point of depriving pro-government media of these rights, thereby limiting their ability to exercise influence in the democratic public sphere? If a pro-government newspaper or a journalist wants to raise their voice or to investigate public issues (even by exposing opposition politicians), why should the legal system prevent them from doing so?

Admittedly, the Russian media concerned do not operate according to democratic standards of media freedom. On the other hand, the media generally are not legally obliged to act in the public interest (not even in Western Europe). This means that they are generally free to be

⁶¹ See *Radio France and Others v. France*, App. No. 53984/00, Eur. Ct. H.R. (2004), <https://hudoc.echr.coe.int/eng?i=001-61686>; *Österreichischer Rundfunk v. Austria*, App. No. 35841/02, Eur. Ct. H.R. (2006), <https://hudoc.echr.coe.int/eng?i=001-78381>; See also Voorhoof, *supra* note 47.

biased, partisan, and follow a certain political line (with some notable exceptions in the stricter regulation of media services). A denial of their freedom cannot be justified on this ground alone, but only on the basis of the illegality of the content they publish. All forms of speech enjoy freedom of expression protection, sometimes even disinformation and some forms of propaganda that are not declared unlawful by national laws. There are reasons to argue that all media, even RT and Sputnik, are entitled to the protection of media freedom.

3. *The Problem of Censorship and Prior Restraints*

During the historical development of the notion of the freedom of the press, a consensus has grown that prior and arbitrary intervention in the process of publication of opinions is impermissible, whereas *a posteriori* accountability or prosecution for the publication of unlawful content is acceptable, subject to appropriate legal safeguards. Formally, making the publication of newspapers conditional on a license ended in England in 1694, and thus the practice of official censorship ceased to exist, and since William Blackstone, it has become a generally accepted view that the liberty of press means the absence of prior restraints: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published."⁶² The prohibition of prior and arbitrary interference has become so fundamental to freedom of the press across Europe that it is seldom enshrined separately in individual state constitutions and laws.⁶³

However, the ECtHR does not, in principle, preclude the application of prior restraint. This is clear from the earlier jurisprudence of the Court⁶⁴ and has been explicitly stated in the

⁶² WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1979), Vol. 4, at 151.

⁶³ See Grundgesetz für die Bundesrepublik Deutschland [Constitution] May 8, 1949, art. 5 (Ger.); Syntagma tis Elladas [Constitution] Jun. 11, 1975, art. 14 (Greece); Grondwet voor het Koninkrijk der Nederlanden [Constitution] Aug. 24, 1815, art. 7 (Neth.); Constitution du Grand-Duché de Luxembourg [Constitution] Oct. 17, 1868, art. 24 (Lux.).

⁶⁴ *Beerman v. Germany*, App. No. 3/1988/147/201 Eur. Ct. H.R. (1989), <https://hudoc.echr.coe.int/eng?i=001-57648>.

judgments in *Sunday Times v. the United Kingdom (No. 2)*⁶⁵ and *Observer and Guardian v. the United Kingdom*.⁶⁶ In order to ensure that a restriction does not violate the freedom of speech and the freedom of the press as granted by Article 10 ECHR, however, the Court is required to examine such cases with the utmost care.

The Regulation does not respond in substance to the question of the prohibition of censorship, but considering the specific circumstances and the content to be prohibited, it is taken for granted that a prior and general restriction is permissible in the present case. This can only be considered compatible with the European approach to media freedom if the other general grounds for the restriction (in particular, necessity and proportionality) are well-founded.

4. *The Legitimate Aim of the Ban*

European or international law does not prohibit disinformation *per se*. Where disinformation constitutes illegal hate speech, states may be under an obligation to prohibit it pursuant to Article 20 of the International Covenant on Civil and Political Rights (ICCPR)⁶⁷, and to the case-law of the ECtHR.⁶⁸ Although states are not obliged to combat disinformation, the international rules and doctrines of freedom of expression allow for the restriction of disinformation if the test of legality, legitimacy, necessity and proportionality set under Article 19(3) ICCPR or Article 10(2) ECHR is met. The mere falsity or misleading nature of certain information does not satisfy the requirements under the test.⁶⁹ The restriction of disinformation needs to be connected to one of the specific legitimate aims under Article 19(3) or Article 20 ICCPR and Article 10(2) ECHR.

⁶⁵ *Sunday Times v. United Kingdom*, App. No. 6538/74 Eur. Ct. H.R. (1980), <https://hudoc.echr.coe.int/eng?i=001-57583>.

⁶⁶ *Observer and Guardian v. United Kingdom*, App. No. 13585/88 Eur. Ct. H.R. (1991), <https://hudoc.echr.coe.int/eng?i=001-57705>.

⁶⁷ G.A. Res. 2200A (XXI), at art. 20 (Dec. 16, 1966).

⁶⁸ *See Jersild v Denmark*, App. No. 15890/89 Eur. Ct. H.R. (1994), <http://hudoc.echr.coe.int/eng?i=001-57891>; *See also* Press Unit, Fact Sheet—Hate Speech, for other Eur. Ct. H.R. decisions, (Jan. 2023), https://www.echr.coe.int/documents/fs_hate_speech_eng.pdf.

⁶⁹ ARTICLE 19, *supra* note 58.

Like disinformation, “state propaganda” is not *per se* prohibited under international law. In fact, most forms of propaganda are protected by freedom of expression. For example,

from the perspective of a State against which an armed attack has occurred, propaganda is considered a legitimate act of self-defense as it may maintain unity, loyalty and confidence within the population at home and increase support from other States. However, not all propaganda is permissible under international law – in the context of armed conflicts it may be restricted . . . but only in narrow, specific instances.⁷⁰

International human rights standards are generally permissive of propaganda activities, with only scarce and non-systematic limitations. “It is notably permitted to engage in operations that qualify as so-called ruses of war—acts intended to mislead the adversarial party or to induce adverse forces to act recklessly.”⁷¹ They also permit “direct propaganda operations on the civilian population of the adverse belligerent party.”⁷² However, the ICCPR expressly provides in Article 20(1) that “[a]ny propaganda for war shall be prohibited by law.”⁷³ The prohibition extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the UN Charter.

According to Voorhoof,

the EU’s argument that RT and Sputnik constitute a “significant and direct threat” to the public order and security of the Union may justify government interference in application of Article 10(2) of the ECHR and Article 11 in conjunction with Article 52 of the CFR. But the legal basis is vague and due to a lack of procedural safeguards it creates a real risk of arbitrary application. Furthermore, the justification on the basis

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ G.A. Res. 2200A (XXI), at art. 20 (Dec. 16, 1966).

of public order and security is not pertinently convincing, given the limited distribution and impact of the RT and Sputnik broadcasts in most EU countries. There are no indications that RT and Sputnik's programs actually constitute a serious and immediate threat to public order and security to justify a ban in all EU Member States.⁷⁴

The recitals of the Decision and the Regulation indicate two reasons for the ban: disinformation and propaganda.⁷⁵ The subjects to be protected by the ban are the citizens and the public of the EU.⁷⁶ As Igor Popović notes,

these reasons cannot per se fall under the aims regarded as legitimate for restricting speech as prescribed by ICCPR or ECHR; the mere fact that speech is objectively false is not sufficient to restrict it. But by producing some specific harms, the spreading of falsehoods by the two Russian outlets may fall within the scope of one of the legitimate aims, e.g. public order or national security (spreading of false news undermining public order).⁷⁷

Under Article 52(1) of the Charter of Fundamental Rights of the European Union (CFR), the interference must pursue “objectives of general interest recognized by the Union.”⁷⁸ Hence, the restriction targeting disinformation and propaganda might be in line with the CFR. But, according to Björnstjern Baade, the EU should not invoke the prohibition of disinformation or propaganda as a legitimate aim, as they may be protected expressions. An alternative aim would be to stop

⁷⁴ Voorhoof, *supra* note 47.

⁷⁵ See Regulation, *supra* note 13, at recitals 3–10; Decision, *supra* note 16, at recitals 4–6, 10.

⁷⁶ *Id.* at recitals 6 and 7.

⁷⁷ Igor Popović, *The EU Ban of RT and Sputnik: Concerns Regarding Freedom of Expression*, EJIL: TALK! (Mar. 30, 2022), <https://www.ejiltalk.org/the-eu-ban-of-rt-and-sputnik-concerns-regarding-freedom-of-expression>.

⁷⁸ *Id.*

propaganda for war.⁷⁹ The prohibition of propaganda for war is enshrined in Article 20 ICCPR. As all the EU Member States have ratified the ICCPR, this prohibition can also be considered a generally accepted principle of EU law.

As Baade notes, “the justification for the ban imposed on RT and Sputnik in the current situation cannot rely solely on the character of their content as ‘propaganda’ and not even as disinformation.”⁸⁰ As we have already mentioned, propaganda is generally protected by freedom of expression, with certain exceptions.

What distinguishes it from legitimate political speech, but also from disinformation, is that it has an instrumental relationship with the truth. Propaganda can employ false but also entirely true information for its ends, which is legally relevant. False statements may be regulated more easily under human rights law, even in a repressive manner, to protect sufficiently weighty individual and public concerns, including national security and territorial integrity . . . Opinions (i.e. value judgments) and true statements generally enjoy much stronger protection. The bare concept of ‘propaganda’ thus comprises statements that are without a doubt protected by freedom of speech and could not possibly be lawfully regulated on their own.⁸¹

When Russia started the war against Ukraine, and RT and Sputnik started to disseminate outright propaganda for war, the situation changed. The EU could lawfully ban propaganda for war under the regime of the ICCPR, and in line with European human rights instruments. However,

it seems that the link of the outlets’ content with propaganda for war is loose or indirect. The outlets (RT

⁷⁹ See Björnstjern Baade, *Don't Call a Spade a Shovel: Crucial Subtleties in the Definition of Fake News and Disinformation*, VERFASSUNGSBLOG (Apr. 14, 2020), <https://verfassungsblog.de/dont-call-a-spade-a-shovel>.

⁸⁰ Björnstjern Baade, *The EU's "Ban" of RT and Sputnik: A Lawful Measure Against Propaganda for War*, VERFASSUNGSBLOG (Mar. 8, 2022), <https://verfassungsblog.de/the-eus-ban-of-rt-and-sputnik>.

⁸¹ *Id.*

at least) do not clearly advocate for war by providing misleading content; their language is subtle and allusive. False statements made by Russian outlets might fit the concept, but only if such statements incite or encourage the illegal war. Misleading content might not be enough to reach the war propaganda threshold.⁸²

Popović also referred to the leading authorities on “propaganda for war” in international human rights law.⁸³ Thus, in Michael Kearney’s opinion, the classification of “the dissemination of false news” as propaganda for war seems to be “an unwarranted and oppressive restriction on freedom of expression.”⁸⁴ So, as Andrei Richter observes, only “direct incitement to war” qualifies as propaganda for war.⁸⁵ Imposing a complete ban would require proof that such content appears regularly or repeatedly in the content of the service providers concerned.

5. *The Necessity of the Ban*

Restrictions on freedom of expression should demonstrate a clear and direct connection between the expression and the threat being addressed (in this case, the propaganda of war), as well as the necessity of the restriction to achieve a legitimate aim.⁸⁶ However, an analysis of the ban highlights the limited amount of data available about the

⁸² Popović, *supra* note 77.

⁸³ *Id.*

⁸⁴ Michael Kearney, *The Prohibition of Propaganda for War in the International Covenant on Civil and Political Rights*, 23 NQHR 551, 568–569 (2005).

⁸⁵ Andrei Richter, *The Relationship between Freedom of Expression and the Ban on Propaganda for War* in EUROPEAN YEARBOOK ON HUMAN RIGHTS 15 (WOLFGANG BENEDEK et al. eds, 2015).

⁸⁶ *See generally* G.A. Res. 2200A (XXI), (Dec. 16, 1966) (International Covenant on Civil and Political Rights), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>; European Court of Human Rights & Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms*, https://www.echr.coe.int/documents/convention_eng.pdf.

actual reach of RT and Sputnik, as well as the lack of consistency in terms of their actual threat across different Member States.⁸⁷

Theoretically, the necessity of the ban may be justified by its temporary nature (a six-month period which can be prolonged, as already happened in August 2022). According to the Regulation, the “measures should be maintained until the aggression against Ukraine is put to an end, and until the Russian Federation, and its associated media outlets, cease to conduct propaganda actions against the Union and its Member States.”⁸⁸ Thus, even if the aggression ends, the ban will still stand until the cessation of propaganda against the EU and its Member States. As Popović argues, “the sanctions do not seem to be purely about the war, but general propaganda and disinformation as well, thus weakening the argument that the prohibition of war propaganda serves as a legitimate aim.”⁸⁹

6. *The Proportionality of the Ban*

According to Article 19(3) ICCPR, restrictions on freedom of expression must “be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected.”⁹⁰ Proportionality is also an important concept when it comes to the restriction of human rights under the regime of ECHR.⁹¹ According to well-established case-law of the ECtHR, the total prohibition or blocking of news media, websites or internet platforms on account of certain content is in violation of Article 10 ECHR.⁹² In apparent contradiction to this, the ban restricts the

⁸⁷ See Global Network Initiative Statement: EU Sanctions on Russian Broadcasters, Global Network Initiative (Aug. 3, 2022), [hereinafter GNI], <https://globalnetworkinitiative.org/eu-sanctions-russia-ukraine-foe>.

⁸⁸ Regulation, *supra* note 13, at recital 10.

⁸⁹ Popović, *supra* note 77.

⁹⁰ U.N. Hum. Rts. Comm., General Comment No 34, CCPR/C/GC/34, (Sept. 12, 2011), para 34, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>.

⁹¹ See, e.g., MARK E. VILLIGER, HANDBOOK ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 514–515 (2023).

⁹² Ahmet Yildirim v. Turkey, App. No. 3111/10 Eur. Ct. H.R. (2012), <https://hudoc.echr.coe.int/eng?i=001-115705>; Cengiz and Others v. Turkey, App. Nos. 48226/10 and 14027/11 Eur. Ct. H.R. (2015), <https://hudoc.echr.coe.int/eng?i=001-159188>; *OOO Flavus and Others v. Russia*,

transmission of a significant amount of content that is unrelated to the war in Ukraine. The relevant authorities could have considered “whether less intrusive means may be available to address content that may be legitimately restricted, while minimizing the amount of unrelated expression that is otherwise affected.”⁹³

Legitimate interference into the right to freedom of expression usually targets a certain type of speech only, for instance, hate speech, advocacy for terrorism or incitement to violence. Again, Popović admits that:

one could argue that RT and Sputnik are persistent lawbreakers due to the fact that the Union has already “put sanctions on leadership of RT” and “it is only logical to also target the activities the organizations have been conducting within” (Borell) the EU. We have also witnessed fines and sanctions taken against RT in Member States. This is a valid argument, but not without weaknesses . . . In addition, putting sanctions on journalists or editors . . . is not the same as banning the whole media since the latter has a broader and deeper impact.⁹⁴

As Voorhoof concludes,

the EU ban on RT and Sputnik seems to have been taken more or less hastily and shows characteristics of an arbitrary and particularly disproportionate interference by the EU with the right to freedom of expression and information “regardless of frontiers” as protected by Article 10 ECHR and as a denial of the freedom of the media as guaranteed by Article 11 of the EU Charter of Fundamental Rights.⁹⁵

App. Nos. 12468/15, 23489/15, 19074/16, Eur. Ct. H.R. (2020), <https://hudoc.echr.coe.int/eng?i=001-203178>.

⁹³ GNI, *supra* note 87.

⁹⁴ Popović, *supra* note 77.

⁹⁵ Voorhoof, *supra* note 47.

7. *The Questionable Effectiveness of the Ban*

It is not clear that the sanctions have been effective in countering the threat of war propaganda. Recent research highlights how content from RT remains accessible within Europe in somewhat diffuse and obfuscated forms.⁹⁶ Of course, the possibility of circumventing the rules does not in itself render the action unjustified, because it is quite possible to successfully enforce the ban through media distributors (cable and satellite companies) and internet service providers, even if this may not be complete.

8. *The Dangers of Paternalism*

The ban can be qualified as a paternalistic measure. By introducing the restriction, the EU has decided that Europeans should not be able to see the products of the Russian propaganda machine. “Aren’t EU citizens not in a position to analyze that propaganda critically, having access to a wide array of (online) media and different channels of journalistic reporting?”—Voorhoof rightly asks.⁹⁷ “The ban prevents access to information for individuals in the EU, including journalists and researchers, which are precluded from developing a first-hand understanding of the narratives of Russian propaganda and from reporting on it.”⁹⁸ It also makes any counter-speech or other responses more difficult. Switzerland took a different path than the EU, as “even if these channels are tools of Russian propaganda and misinformation, we are convinced that to combat inaccurate and harmful claims it is more effective to confront them than to prohibit them.”⁹⁹

As Natali Helberger and Wolfgang Schulz argue,

European citizens, policymakers and journalists have a legitimate interest in seeking an authentic impression of the narratives of Russian propaganda. One of the

⁹⁶ GNI, *supra* note 88.

⁹⁷ Voorhoof, *supra* note 47.

⁹⁸ ARTICLE 19, *supra* note 58.

⁹⁹ *Switzerland Expands Sanctions Against Russia but Decides Not to Censor Russian Media*, INFOBAE (Mar. 25, 2022, 12:50 PM), <https://www.infobae.com/en/2022/03/25/switzerland-expands-sanctions-against-russia-but-decides-not-to-censor-russian-media>.

historical roots of freedom of information in Europe lies in the experience of prohibiting the listening of “enemy broadcasters” by oppressive regimes. A problematic side effect of such a ban is that it forces RT and Sputnik content into the shadow, preventing EU citizens and the media to recognize and formulate a resilient response to wrongful propaganda, and affecting their right to receive information.¹⁰⁰

9. *Setting a Dangerous Precedent*

According to some opinions, there is a danger that the ban will be used by other governments as a justification to restrict access to independent media outlets.¹⁰¹ The restrictions may also create a pattern also inside the EU to be used in the future in less compelling circumstances.¹⁰²

These abstract concerns regarding the capability of governments to abuse their powers to limit freedom of expression in future situations, where the need for such limitations is less obvious, are countered by statements that there will not be far-reaching threats to the freedom of expression simply because the majority of governments have not abused their powers before, although they had the capability of doing so.¹⁰³

The ban may also induce a backlash from Russia itself, as it has already started to happen. In March, Russia cut access to some Western media outlets (such as the BBC and the Deutsche Welle) whom they accused of spreading “false information” and “anti-Russian” views about the war in Ukraine. After the General Court upheld the EU’s ban of RT and Sputnik,¹⁰⁴ a Kremlin spokesperson responded, “Of course, we will take similar measures of pressure on Western media that

¹⁰⁰ Helberger & Schulz, *supra* note 39.

¹⁰¹ GNI, *supra* note 87; See also *The Fundamental Rights Consequences of the EU Media Ban*, EDRI (Apr. 1, 2022), <https://edri.org/our-work/edri-statement-the-fundamental-rights-consequences-of-the-eu-media-ban>.

¹⁰² SUSI, *supra* note 29, at 27.

¹⁰³ *Id.* at 28–29.

¹⁰⁴ See *infra* Part II.4.

operate in our country,” and such measures were indeed taken.¹⁰⁵ He also added that “Europeans are trampling on their own ideals.”¹⁰⁶

D. Judgments of the General Court of the EU

Following RT’s appeal, the General Court of the EU, as the court of first instance of the CJEU, also examined the ban. Prior to that, the General Court had already issued a relevant decision in a similar case. The earlier decision concerned an individual who was the head of a Russian news agency who was personally sanctioned for his role in the dissemination of disinformation.

1. The Kiselev Case

Before analyzing the decision of the General Court in the case of RT France, it is worth examining the Court’s judgment in *Kiselev v. Council of the EU*,¹⁰⁷ concerning sanctions on Dmitrii Konstantinovich Kiselev, Head of the Russian Federal State News Agency Rossiya Segodnya (RS). In 2014, Kiselev had been included on the lists of persons subject to restrictive measures for being a central figure of the government propaganda supporting the deployment of Russian forces in Ukraine since 2014.

The applicant requested that the CJEU annul the measures against him, on the grounds that they infringe his freedom of expression, as set out in Article 11 CFR and Article 10 ECHR. Kiselev argued that the limitations of that right should be provided for by law, having regard to the principle of legal certainty, that they pursue an objective of general interest and that they are necessary and proportionate to that objective, without impairing the substance of that freedom or significantly interfering with journalistic activity. Moreover, the notions of national security and hate speech should also be interpreted strictly.

¹⁰⁵ Jacob Mchangama, *In A War of Ideas, Banning Russian Propaganda Does More Harm than Good*, TIME (Aug. 12, 2022), <https://time.com/6205645/russian-propaganda-censorship-history>.

¹⁰⁶ *Id.*

¹⁰⁷ Case T-262/15, Dmitrii Konstantinovich Kiselev v. Council of the European Union, Judgment of the General Court (Ninth Chamber) June 15, 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015TJ0262>.

The Court dismissed the applicant's action. The Court reasoned that "[t]he Council's adoption of restrictive measures relating to the applicant because of his propaganda in support of the actions and policies of the Russian Government destabilizing Ukraine cannot be regarded as a disproportionate restriction of his right to freedom of expression."¹⁰⁸ Otherwise,

the Council would be unable to pursue its policy of exerting pressure on the Russian Government by addressing restrictive measures not only to persons who are responsible for the actions and policies of that government as regards Ukraine or to the persons who implement those actions or policies, but also to persons providing active support to those persons.¹⁰⁹

According to the Court, the restrictive measures do not dissuade Russian journalists from freely expressing their views on political issues of public interest,¹¹⁰ as the applicant is in a unique situation, since he engaged "in propaganda in support of the actions and policies of the Russian government destabilizing Ukraine by using the means and power available to him as Head of RS, a position which he obtained by virtue of a decree of President Putin himself."¹¹¹ No other journalist was included on the list at issue.¹¹² As a consequence, the limitations on the right to freedom of expression were necessary and not disproportionate.¹¹³

2. *The RT France Case*

The Regulation concerns media outlets (legal persons) rather than individuals, and its scope affects freedom of expression much more widely than in the case of Mr. Kiselev. This type of legislation is directly applicable throughout the EU, and it is subject to judicial review by the CJEU and the General Court of the EU in Luxembourg. Accordingly, as previously mentioned, RT France initiated legal

¹⁰⁸ *Id.* at 112.

¹⁰⁹ *Id.* at 113.

¹¹⁰ *Id.* at 116.

¹¹¹ *Id.* at 117.

¹¹² *Id.* at 119.

¹¹³ *Id.* at 120.

proceedings, immediately after the ban took effect, against the Council of the EU and against the EU Decision and Regulation.

In its decision, the Court dismissed RT France's application.¹¹⁴ According to the judgment, the provisional prohibition on broadcasting constitutes no interference with the applicant's exercise of its right to freedom of expression within the meaning of Article 11(1) CFR.¹¹⁵ For an infringement of freedom of expression to be compatible with EU law, four conditions must be satisfied. First, the restriction in question must be "prescribed by law," in the sense that an institution of the Union which adopts measures that may restrict the freedom of expression of a natural or legal person must have a legal basis for doing so. Secondly, the restriction in question must respect the essential content of freedom of expression. Thirdly, the restriction must in fact meet an objective of general interest recognized as such by the Union. Fourth, the restriction in question must be proportionate.¹¹⁶

According to the Court, the restriction was foreseeable in view of the importance of audiovisual media in contemporary society, and given that significant media support for the military aggression of the Russian Federation against Ukraine, by a media entity entirely financed from the Russian state budget, could be affected by restrictive measures in the prohibition of the broadcasting of propaganda activities supporting such aggression.¹¹⁷ The Court affirmed that the condition that restrictions on freedom of expression must be those laid down by law was satisfied.¹¹⁸ Furthermore, the restrictive measures in question are temporary and reversible, since it follows from Article 9 of Decision 2014/512, as amended, that that decision is to apply until 31 July 2022 and that it is subject to continuous review.¹¹⁹

The contested measures do not constitute an obstacle to all the activities relating to freedom of information and expression. The temporary prohibition on broadcasting imposed on the applicant does not prevent it from carrying on activities other than broadcasting in the EU, such as research and interviewing. Therefore, it can be concluded,

¹¹⁴ Case T-125/22, RT France v. Council of the European Union, 2022, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62022TO0125>.

¹¹⁵ *Id.* at 143.

¹¹⁶ *Id.* at 145.

¹¹⁷ *Id.* at 151.

¹¹⁸ *Id.* at 152.

¹¹⁹ *Id.* at 154.

in agreement with the Council, that the applicant and its journalists continue to be entitled to engage in certain activities related to freedom of information and expression and that the said prohibition does not, in principle, prevent the applicant from engaging in other potentially income-generating activities.¹²⁰ The contested acts do not prohibit the applicant from broadcasting its content outside the EU, so that the restrictive measures at issue do not infringe its right to exercise its freedom of expression outside the EU.¹²¹

The judgment further states that the nature and scope of the temporary prohibition in question respect the essential content of freedom of expression and do not in themselves jeopardize that freedom.¹²² The Council's objective is to protect public policy and the security of the EU, which are threatened by the systematic international propaganda campaign conducted by Russia through media outlets under the direct or indirect control of its leadership, aimed at destabilizing the EU and its Member States and supporting the military aggression of Russia against Ukraine. The adoption of restrictive measures against media outlets entrusted with carrying out such propaganda activities is in line with the objective of protecting the values, fundamental interests, security, independence and integrity of the EU referred to in Article 21(2)(a) TEU.¹²³ Since propaganda and disinformation campaigns are capable of calling into question the foundations of democratic societies and form an integral part of the modern instruments of war, the restrictive measures in question also fit into the framework of the EU's pursuit of the objectives set for it by Articles 3(1) and (5) TEU, including those relating to peace.¹²⁴

Regarding the proportionality of the restrictions in question, it must be recalled that the principle of proportionality requires that the restrictions which the Union's acts may entail on the rights and freedoms provided for in the CFR must not exceed what is appropriate and necessary to attain the legitimate aims pursued and to protect the rights and freedoms of others, which means that, where there is a choice between several appropriate measures, the least restrictive

¹²⁰ *Id.* at 156.

¹²¹ *Id.* at 157.

¹²² *Id.* at 159.

¹²³ *Id.* at 161.

¹²⁴ *Id.* at 162.

measure must be chosen and the harm caused must not be disproportionate to the objectives pursued.¹²⁵

The Court then examined the proportionality of the measures. First, the Court examined whether the “evidence” produced by the Council was “capable of justifying” its conclusions on the “control” of RT France.¹²⁶ The Court held that the Council had provided a body of “sufficiently concrete, precise and consistent evidence” showing that RT France was under the “permanent control, direct or indirect, of the leaders of the Russian Federation.”¹²⁷ This included RT France’s share capital being owned by TV Novosti, which is “entirely financed by the Russian State budget,” statements from Russian government officials about RT, and RT France not presenting any “regulatory and institutional” framework demonstrating its “editorial independence” and “institutional autonomy” from its Russia-based parent.¹²⁸

Next, the Court examined whether the Council was correct to consider that RT France had engaged in “continuous and concerted propaganda actions” targeted at civil society in the EU, aimed at “justifying and supporting” Russian’s aggression against Ukraine.¹²⁹ The Court noted that the Council had submitted a “number of items of evidence” in support of its Decision and Regulation, in the form of references to various articles and videos published by RT France.¹³⁰ On the basis of the evidence examined, the Council could validly conclude that the applicant broadcast programs containing a reading of the events relating to the military aggression against Ukraine which supported that aggression and the narrative of the political leader of Russia in relation to it.¹³¹

The Council was therefore entitled to find that the various pieces of information referred to above constituted a sufficiently concrete, precise and consistent set of probable circumstances. These circumstances are capable of establishing that the applicant actively supported the destabilizing and aggressive policy pursued by Russia against Ukraine before the adoption of the restrictive measures at issue (which ultimately led to a widespread military offensive), and that the

¹²⁵ *Id.* at 168.

¹²⁶ *Id.*

¹²⁷ *Id.* at 174.

¹²⁸ *Id.* at 173.

¹²⁹ *Id.* at 175.

¹³⁰ *Id.* at 186.

¹³¹ *Id.*

applicant disseminated information justifying, *inter alia*, military aggression against Ukraine (which was capable of constituting a significant and imminent threat to public policy and security in the EU).¹³²

The Council, bearing in mind the wide discretion which it enjoys in this area, was entitled to consider that the restrictive measures at issue, which concerned media outlets controlled by Russia and engaged in propaganda activities in support of the latter's military invasion of Ukraine, were capable of contributing towards protecting public order and security in the EU and of preserving the integrity of the democratic debate in European society, peace, and international security.¹³³

It was also necessary to examine whether other, less coercive measures may have enabled the EU to achieve the desired general interest objectives pursued.¹³⁴ The restriction to only certain types of content or the obligation to display a banner or even a warning, would not make it possible to achieve the objectives pursued by the contested acts with the same effectiveness, namely to eliminate the direct threat to public order and security in the EU and to exert maximum pressure on the Russian authorities to put an end to the military aggression against Ukraine.¹³⁵

The handling of the information in question, which involves propaganda activities aimed at justifying and supporting the unlawful, unprovoked, and unjustified military aggression of Russia against Ukraine, cannot be said to have been of such a nature as to require the enhanced protection afforded to media freedom by Article 11 CFR.¹³⁶

Account must also be taken of the ICCPR, to which not only the EU Member States but also the Russian Federation are parties, and which is one of the international treaties for the protection of human rights which the CJEU takes into account when applying the general principles of EU law.¹³⁷ Article 20(1) ICCPR provides that “[a]ny propaganda for war shall be prohibited by law.”¹³⁸ The prohibition laid down in Article 20(1), which refers to “all” war propaganda, covers

¹³² *Id.* at 188.

¹³³ *Id.* at 193.

¹³⁴ *Id.* at 196.

¹³⁵ *Id.* at 197.

¹³⁶ *Id.* at 206.

¹³⁷ *Id.* at 208.

¹³⁸ *Id.* at 209.

not only incitement to a future war but also statements made in a continuous, repeated and concerted manner in favor of an ongoing war that is contrary to international law, in particular where those statements come from a media outlet under the direct or indirect control of the aggressor state.¹³⁹

It follows from the foregoing considerations that the applicant, in the context of its activities in the period preceding the military aggression of Russia against Ukraine and, in particular, in the days following the outbreak of that aggression, carried out systematic activity aimed at disseminating “selected” information, including manifestly false or misleading information, characterized by a manifest imbalance in the presentation of the various opposing positions, specifically with a view to justifying and supporting that aggression.¹⁴⁰

In those circumstances, the Council could reasonably have considered it necessary to prevent forms of expression aimed at justifying and supporting military aggression in violation of international law and the Charter of the United Nations.¹⁴¹ The foregoing considerations are sufficient, in the light of all the circumstances set out above and, in particular, in the exceptional circumstances of the present case, to establish that the restrictions on the applicant’s freedom of expression which the restrictive measures in question may contain are proportionate to the objectives pursued, since they are sufficient and necessary to achieve them.¹⁴² The Court also held, without expressing a view on RT France’s interest in invoking it, that there had also been no violation of the public’s right to receive information, as the EU measures were found to be justified and proportionate in order to ban programs supporting of an act of violence.¹⁴³

In September 2022, the judgment was appealed by the applicant, so the European Court of Justice (as the court of second instance) will have the final say in the case.¹⁴⁴ Ronan Ó Fathaigh and Voorhoof

¹³⁹ *Id.* at 210.

¹⁴⁰ *Id.* at 211.

¹⁴¹ *Id.* at 212.

¹⁴² *Id.* at 213.

¹⁴³ *Id.* at 214.

¹⁴⁴ Case C-620/22P, 2022 RT France v. Council of the European Union, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62022TO0125>.

published a thorough and thoughtful critique of the decision.¹⁴⁵ Although the EU Court of Justice confirmed that Article 11 CFR is to be given the same meaning and the same scope as Article 10 ECHR, as interpreted by the case-law of the ECtHR,¹⁴⁶ the General Court in *RT France* arguably failed to properly apply ECtHR case law. In the first place, the Court omitted to mention fundamental principles from *NIT S.R.L. v. Moldova*¹⁴⁷ which concerned a broadcaster having its broadcast license revoked by the Moldavian media regulatory body. While finding that the measure was consistent with Article 10 ECHR, the Court also emphasized that it was implemented by a “specialist body which was established by law,” and “stresse[d]” the need to ensure such a body’s “independence.”¹⁴⁸ However, it should be noted that the European Council is in fact a body comprised of political officials, which is non-independent, and non-specialist.

As the authors observe, nowhere in the judgment is there any mention that the interference at issue was a “prior restraint,” imposed without a court order or by another independent authority. The Court failed to apply precedent set by the *Association Ekin v. France* judgment,¹⁴⁹ where the ECtHR held that the legislation conferring “wide-ranging” powers on a government minister to issue administrative bans was a “prior restraint.” The ECtHR in *Association Ekin* found that the administrative ban mechanism violated Article 10 ECHR, because the procedural guarantees were insufficient, such as

¹⁴⁵ Ronan Ó Fathaigh & Dirk Voorhoof, *Case Law, EU: RT France v. Council: General Court Finds Ban on Russia Today Not a Violation of Right to Freedom of Expression*, INFORRM (Aug. 19, 2022, 10:04 AM), <https://inform.org/2022/08/19/case-law-eu-rt-france-v-council-general-court-finds-ban-on-russia-today-not-a-violation-of-right-to-freedom-of-expression-ronan-o-fathaigh-and-dirk-voorhoof>.

¹⁴⁶ Case C-345/17, *Buivids v. Datu valsts inspekcija*, ECLI:EU:C:2019:122, ¶ 65 (Feb. 14, 2019), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=210766&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5745>.

¹⁴⁷ *NIT S.R.L. v. Republic of Moldova*, App. No. 28470/12, Eur. Ct. H.R. (2022), <https://hudoc.echr.coe.int/eng?i=001-216872>.

¹⁴⁸ In line with this, see *OOO Flavus*, *supra* note 92 where the ECtHR found a violation of Article 10 ECHR over the banning of a media outlet which had not being sanctioned “by a court or other independent adjudicatory body.”

¹⁴⁹ *Assoc. Ekin v. France*, App. No. 39288/98, Eur. Ct. H.R. (2001), <https://hudoc.echr.coe.int/eng?i=001-59603>.

the lack of prior court review, and the fact judicial review is not automatic.

According to Ó Fathaigh and Voorhoof, the judgment also failed to apply ECtHR case law to the question of whether a total ban on broadcasting was proportionate, and accepted without any scrutiny the Council's argument that measures such as banning "certain content" would have been "practically impossible" to implement. Again, this finding is difficult to square with seminal prior-restraint case law, where the Court found "wholesale blocking" of media outlets violated Article 10 to be an "extreme measure," which "deliberately disregards the distinction between the legal and illegal information," and "renders inaccessible large amounts of content which has not been identified as illegal."¹⁵⁰

The authors find it problematic that, apart from referring to Article 20 ICCPR, the Court made no mention of the standards under Article 19 ICCPR, which guarantees freedom of expression. As the Human Rights Committee stated in its General Comment No. 34, restrictions justified under Article 20 "must also comply with Article 19(3)."¹⁵¹ The General Court also failed to properly review whether the interference was "prescribed by law". The legal basis for the Council's measures, the TEU and TFEU, contain absolutely no provisions on "propaganda," and the concept is not defined anywhere in EU law. The Council basically made up a standard on propaganda, and then applied it to RT France's broadcasts.

For Ó Fathaigh and Voorhoof, the justification made on the basis of public order, security and integrity is not convincing and very speculative, given the limited distribution and impact of RT France (and the other banned Russian media outlets) in most EU countries.¹⁵² Perhaps most surprisingly, the General Court argues that the essence of the right to freedom of expression is not curtailed by the ban, as

¹⁵⁰ *OOO Flavus*, *supra* note 92; *See also Yildirim and Cengiz*, *supra* note 92.

¹⁵¹ U.N. Hum. Rts. Comm. 102nd Session Geneva, 11–29 July 2011, General comment No. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, <https://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf>

¹⁵² Ronan Ó Fathaigh & Dirk Voorhoof, *Case Law, EU: RT France v. Council: General Court Finds Ban on Russia Today Not a Violation of Right to Freedom of Expression*, INFORRM (Aug. 19, 2022, 10:04 AM), <https://inform.org/2022/08/19/case-law-eu-rt-france-v-council-general-court-finds-ban-on-russia-today-not-a-violation-of-right-to-freedom-of-expression-ronan-o-fathaigh-and-dirk-voorhoof>.

other possibilities remain open, such as research and interviews by journalists of RT France, the production of programs, and the distribution of their programs outside the EU. As Ó Fathaigh and Voorhoof notes, “with this kind of argument every interference with freedom of expression can be justified, as there are always some alternatives left.”¹⁵³ It is implausible to suggest that the essence of the rights of journalists is not substantially restricted or endangered as long as journalists can conduct interviews and do research, without having the possibility to make these interviews and the findings of their research reach a public.

III. LEGAL TOOLS AGAINST DISINFORMATION IN EUROPE

The need to tackle disinformation and its compatibility with the protection of freedom of expression has been a long-standing concern for European policy makers. Although, while in the extreme situation of the war, none of the possible legal instruments can provide a quick and reassuring solution, it is not entirely futile to review them. As one will see, European state bodies and online platform providers have tried to use their own means to prevent the spread of Russian disinformation.

A. *The Legitimate Restrictions on Untruthful or Misleading Speech*

Within the current doctrinal framework of the protection of freedom of expression, lying (publishing untruthful information) may not be prohibited in general. This does not mean that it is not permissible in certain circumstances to prohibit false factual statements, but that a general prohibition is usually understood to be incompatible with the doctrine of freedom of speech.

First, defamation law and the protection of reputation and honor seek to prevent unfavorable and unjust changes being made to an individual’s image and evaluation by society. These regulations aim to prevent an opinion published in the public sphere concerning an individual from tarnishing the “image” of an individual without proper grounds for it, especially when it is based upon false statements. The approaches taken by individual states to this question differ noticeably,

¹⁵³ *Id.*

but their common point of departure is the strong protection afforded to debates on public affairs and as such the weaker protection of the personality rights of public figures when compared to the protection of the freedom of speech.¹⁵⁴

Secondly, the EU Council's Framework Decision on combating racism and xenophobia in the Member States of the EU¹⁵⁵ places a universal prohibition on the denial of crimes against humanity, war crimes, and genocides. Most Member States of the EU have laws prohibiting the denial of the crimes against humanity committed by the National Socialists, or the questioning of these crimes or watering down their importance.¹⁵⁶

Thirdly, a number of specific rules apply to statements made during election campaigns. These can serve two purposes. On the one hand, communication in the campaign enjoys robust protection: political speech is the most closely guarded core of freedom of expression, and what is spoken during a campaign is as closely linked to the functioning of democracy and democratic procedures as any speech can be. On the other hand, these procedures must also be protected so that no candidate or community party distorts the democratic decision-making process and ultimately damages the democratic order.¹⁵⁷

Fourthly, commercial communication can be regulated in order to protect consumers from false (misleading) statements. The ECtHR, in *Markt Intern and Beerman v. Germany*,¹⁵⁸ declared that advertisements serving purely commercial interests, rather than participating in debates in the public sphere, are also to be awarded the

¹⁵⁴ See *Lingens v. Austria*, App. No. 9815/82 Eur. Ct. H.R. (1986), <https://hudoc.echr.coe.int/eng?i=001-57523>; See also Press Unit, Fact Sheet – Protection of Reputation, (Jan. 2023), for many other cases decided by the ECtHR, https://www.echr.coe.int/Documents/FS_Reputation_ENG.pdf.

¹⁵⁵ See Council Decision 2008/913/JHA, 2008 O.J. (L328/55) on combating certain forms and expressions of racism and xenophobia by means of criminal law, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008F0913>.

¹⁵⁶ See the French Gayssot Act (July, 13 1990), (amending the Law on the Freedom of the Press of 1881, by adding a new article 24); See also the German Criminal Code (StGb), art. 130(3).

¹⁵⁷ See, e.g., the U.K. Representation of the People Act 1983, s 106 (False statements as to candidates).

¹⁵⁸ *Markt Intern Verlag GMBH & Beerman v. Germany*, App. No. 3/1988/147/201 Eur. Ct. H.R. (1989), <https://hudoc.echr.coe.int/eng?i=001-57648>.

protection of the freedom of speech.¹⁵⁹ Nevertheless, this protection is of a lower order than that granted to “political speech.” The application of general and well-established restrictions on freedom of expression does not, of course, constitute a reassuring solution in a war situation.

Fifthly, in some jurisdictions, “scaremongering,” i.e., the dissemination of false information that disturbs or threatens to disturb public order, may also be punishable.¹⁶⁰

B. *The Regulation of Online Platforms*

Platform regulation in itself raises serious questions, regardless of the context of the war. It is also essential to distinguish, in the case of platforms, between traditional legal (“state”) regulation and regulation created and implemented by online platforms themselves (“private regulation”). The latter has the potential to restrict freedom of expression much more broadly, and thus also to ensure a more effective response to disinformation (along with the potential risks of such a response for freedom of expression). It is important to underline that the new EU regulation, the Digital Services Act (DSA),¹⁶¹ seeks to bring platforms under closer supervision, both in terms of the implementation of state regulation and the application of private regulation. The DSA aims both to protect the freedom of expression of platform users and to reduce the risks to them from harmful or dangerous content—but it is not possible to serve these two masters in a satisfactory way in all respects. While the DSA is not yet applicable and therefore cannot help in the context of the current war, a number of lessons emerge from reviewing it.

1. *State Regulation*

False claims are spreading across different online platforms at an unprecedented rate and at the same time to a massive extent. Disinformation is being distributed on social media platforms which

¹⁵⁹ *Id.* at para 36.

¹⁶⁰ See András Koltay, *On the Constitutionality of the Punishment of Scaremongering in the Hungarian Legal System*, 9 HUNGARIAN YEARBOOK OF INTERNATIONAL LAW AND EUROPEAN LAW 23 (2021) (That is the case in Hungary).

¹⁶¹ Council Regulation 2022/2065 of Oct. 19, 2022, on a Single Market For Digital Services and Amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277).

consciously focuses on electoral campaigning, for political reasons (political parties with conflicting interests, other states acting against a particular state and so on). Initially, the platforms defended themselves by claiming that they were neutral players in this communication.¹⁶² It became increasingly obvious, however, that they are actively able to shape the communication on their interfaces, and that they have an economic interest in its vigor and intensity and hence that the spread of false news is not clearly contrary to their interests.¹⁶³ Under EU law, online platforms are a type of host providers, whose liability for infringing content which appears in their services is limited, but by no means excluded.¹⁶⁴

According to the Directive on electronic commerce, if these platforms provide only technical services when they make available, store or transmit the content of others (much like a printing house or a newspaper stand), then it would seem unjustified to hold them liable for the violations of others (“illegal activity or information”), as long as they are unaware that such violations have occurred.¹⁶⁵ However, according to the European approach, gatekeepers may be held liable for their own failure to act after becoming aware of a violation (if they fail to remove the infringing material).¹⁶⁶ The Directive requires all types of intermediaries to remove such materials after they become aware of their infringing nature (Articles 12–14).¹⁶⁷ In addition, the Directive also stipulates that intermediaries may not be subject to a

¹⁶² Andrew Marantz, *Facebook and the “Free Speech” Excuse*, THE NEW YORKER (Oct. 31, 2019), <https://www.newyorker.com/news/daily-comment/facebook-and-the-free-speech-excuse>.

¹⁶³ See George Soros, *Remove Zuckerberg and Sandberg from Their Posts*, FINANCIAL TIMES (Feb. 18, 2020), (According to George Soros, Facebook is working directly to re-elect Trump President.) <https://www.ft.com/content/88f6875a-519d-11ea-90ad-25e377c0ee1f>.

¹⁶⁴ See generally Eur. Parl. Study (Feb. 2021) (Liability of Online Platforms), [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656318/EPRS_STU\(2021\)656318_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656318/EPRS_STU(2021)656318_EN.pdf).

¹⁶⁵ Directive 2000/31/EC, of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), 2000 O.J. (L 178) 0001.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

general monitoring obligation to identify illegal activities (Article 15).¹⁶⁸

While this system of legal responsibility should not necessarily be considered outdated, things have certainly changed since 2000 when the Directive was enacted: there are fewer reasons to believe that today's online platforms remain passive with regard to content and perform nothing more than storage and transmission. While content is still produced by users or other independent actors, the services of gatekeepers select from and organize, promote, or reduce the ranking of such content, and may even delete it or make it unavailable within the system.¹⁶⁹ This notice and takedown procedure applies to the disinformation that appears on the platforms, but the prospect of actual removal of content is reserved for disinformation that is illegal under the legal system of the state in question (slander, terrorist propaganda, denials of genocide, and so on). Generally speaking, false claims are not subject to the removal obligation as they are not illegal. Similarly, even if a piece of content is infringing but no one reports it to the platform, there is no obligation to remove it.

The notion of "illegal activity or information" raises an important issue, as the obligation to remove offending content is independent of the outcome of an eventual court or official procedure that may establish that a violation has been committed, and the host provider is required to take action before a decision is passed (provided that a legal procedure is initiated at all). This means that the provider has to decide on the illegality of content on its own, and its decision is free from any legal guarantee (even though it may have an impact on freedom of expression). This rule may encourage the provider concerned to remove content to escape liability, even in highly questionable situations. It would be comforting (but probably inadequate, considering the speed of communication) if the liability of an intermediary could not be established unless the illegal nature of the content it has not removed is established by a court.¹⁷⁰

Although continuous, proactive monitoring of infringing content is not mandatory for platforms because the CJEU opened a loophole for them well before the recent Regulation banning Russian media outlets,

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Christina M. Mulligan, *Technological Intermediaries and Freedom of the Press*, 66 SMU L. REV. 157, 175 (2013).

in 2019, in *Glawischnig-Piesczek v. Facebook Ireland*.¹⁷¹ The decision in that case required the platform to delete defamatory statements that had been reported and removed, but subsequently reappeared.¹⁷² Likewise, the hosting provider may be obliged to “remove information which it stores, the content of which is identical to the content of information, which was previously declared to be unlawful, or to block access to that.”¹⁷³ This is only possible through the use of artificial intelligence, the use of which is encouraged by this decision and even implicitly made mandatory.¹⁷⁴ If one places the decision in a broader context, it seems that platforms are required to act proactively against unlawful disinformation (or any unlawful content), even given the purported continued exclusion of monitoring obligations. Therefore, the legality of the content is determined by algorithms, which would seem quite risky for protecting freedom of speech.¹⁷⁵

European jurisdictions allow actions against disinformation, defined as action on the grounds of defamation or violating the prohibition of hate speech or scaremongering, while platforms, being hosting service providers, can be required to remove infringing content. However, these measures in and of themselves seem inadequate to deal with such threats in a reassuring manner. Concerns of this nature have been addressed by the EU in various documents produced by it since 2017.

The Communication on tackling illegal content online introduced a requirement for platforms to take action against violations in a proactive manner and even in the absence of a notice, even though the platforms are still exempted from liability.¹⁷⁶ The Recommendation that followed the Communication reaffirmed the requirement to apply

¹⁷¹ Case C-18/18, *Eva Glawischnig-Piesczek v. Facebook Ir. Ltd.*, ECLI:EU:C:2019:821, ¶¶ 37-38 (Oct. 3, 2019), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=218621&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7924>.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Elda Brogi & Marta Maroni, *Eva Glawischnig-Piesczek v. Facebook Ireland Limited: a New Layer of Neutrality*, CENTRE FOR MEDIA PLURALISM AND MEDIA FREEDOM (Oct. 17, 2019), <https://cmpf.eui.eu/eva-glawischnig-piesczek-v-facebook-ireland-limited-a-new-layer-of-neutrality>.

¹⁷⁶ *Commission Communication on Tackling Illegal Content Online: Towards an enhanced responsibility of online platforms*, at 10, COM (2017) 555 final (Sept. 28, 2017).

proportionate proactive measures in appropriate cases, which permits the use of automated tools to identify illegal content.¹⁷⁷

The High Level Expert Group on Fake News and Online Disinformation published a Report on these issues in 2018.¹⁷⁸ The Report defines disinformation as “false, inaccurate, or misleading information designed, presented and promoted for profit or to intentionally cause public harm.”¹⁷⁹ While this definition might be accurate, the Report refrains from raising the issue of government regulation, and it is limited to providing a review of the resources and measures that are available to social media platforms and which they may apply voluntarily. Based on the Report, the European Commission published a Communication on tackling online disinformation in 2018.¹⁸⁰ While this document reaffirms the primacy of means that are applied voluntarily by platform providers, it also displays restraint when it comes to compelling the service providers concerned to cooperate (in a forum convened by the Commission). If the impact of voluntary undertakings falls short of the expected level, the necessity of actions of a regulatory nature might arise.¹⁸¹

Later in 2018, online platforms, leading technology companies and advertising industry players agreed, under pressure from the European Commission, on a self-regulatory code of conduct to tackle the spread of online disinformation.¹⁸² The 2018 Code of Practice on Disinformation was designed to achieve the objectives set out in the Commission’s 2018 Communication, setting out commitments in areas ranging from transparency in political advertising to the demonetization of disinformation spreaders. The Code of Practice was signed in October 2018 by the online platforms Facebook, Google,

¹⁷⁷ See Commission Recommendation 2018/334 (Mar. 1, 2018) (measures to effectively tackle illegal content online, 2018 O.J. (L 63/50).

¹⁷⁸ *Final Report of the High Level Expert Group on Fake News and Online Disinformation*, EUR. COMM’N (Mar. 12, 2018) [hereinafter High Level Expert], <https://digital-strategy.ec.europa.eu/en/library/final-report-high-level-expert-group-fake-news-and-online-disinformation>.

¹⁷⁹ *Id.*

¹⁸⁰ *Commission Communication on Tackling online disinformation: A European Approach*, COM (2018) 236 final (Apr. 26, 2018) [hereinafter Commission].

¹⁸¹ See *id.* at 9.

¹⁸² See *2018 Code of Practice on Disinformation*, EUR. COMM’N (June 16, 2022), <https://digital-strategy.ec.europa.eu/en/library/2018-code-practice-disinformation>.

Twitter, and Mozilla, as well as advertisers and other players in the advertising industry, and was later joined by Microsoft and TikTok.¹⁸³

The online platforms and trade associations representing the advertising industry submitted a report in early 2019 setting out the progress they had made in meeting their commitments under the Code of Practice on Disinformation.¹⁸⁴ In the first half of 2019, the European Commission carried out targeted monitoring of the implementation of the commitments by Facebook, Google, and Twitter, with a particular focus on the integrity of the European Parliament elections. The Commission published its evaluation of the Code in September 2020. The evaluation found that the Code provided a valuable framework for structured dialogue between online platforms and ensured greater transparency and accountability for their disinformation policies. It also led to concrete actions and policy changes by relevant stakeholders to help combat disinformation.¹⁸⁵

Subsequently, a review of the Code was launched, leading to the signing of the Strengthened Code of Practice on Disinformation by 34 signatories in June 2022.¹⁸⁶ The updated and strengthened Code aims to deliver on the objectives of the Commission's guidance,¹⁸⁷ presented in May 2021, by setting out a broader range of commitments and measures to combat online disinformation. While the Code has not been officially endorsed by the Commission, the Commission has set out its expectations in its guidance and considers that the Code meets these expectations overall. Since the guidance sets out the Commission's expectations in imperative terms ("the Code should," "the signatories should," etc.), it is not an exaggeration to say that the fulfilment of the commitments is seen as an obligation for the platforms, which, if fulfilled, could avoid the imposition of strict legal regulation. Consequently, it is correct to consider the Code not as a self-regulatory, but a co-regulatory mechanism, which is not created and operated purely by the free will of industry actors but by a public

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See *2022 Strengthened Code of Practice on Disinformation*, EUR. COMM'N (June 16, 2022), <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>.

¹⁸⁷ *Communication from European Commission Guidance on Strengthening the Code of Practice on Disinformation*, COM (2021) 262 final (May 26, 2021).

body (in this case, the EU Commission) working in cooperation with industry players.

The Strengthened Code of Practice on Disinformation includes 44 commitments and 128 concrete measures. The Code aims to regulate the areas of demonetization (reducing financial incentives for the disseminators of disinformation), transparency of political advertising (provisions to allow users to better identify political ads through better labelling), ensuring the integrity of services (steps against manipulative behavior such as the use of spam or disinformation), and the protection of the integrity of services (e.g., measures to curb manipulative actions such as fake accounts, bot-driven amplification, impersonation and malicious deep spoofing). It also requires attempts to empower users through media literacy initiatives, ensure greater transparency for platforms' recommendation systems, support research into disinformation, and strengthen the fact-checking community. These measures will be supported by a strengthened monitoring framework, including Service-Level indicators to measure the implementation of the Code at EU and Member State level. Signatories will submit their first reports on the implementation of the Code to the Commission by early 2023. Thereafter, very large online platforms as defined in the DSA will report every six months, while other signatories will report annually. The strengthened Code also includes a clear commitment to work towards the establishment of structural indicators to measure the overall impact of the Code on disinformation.

Returning to the narrower subject of the current ban on Russian media outlets, it should be borne in mind that the scope of the measure established in the Regulation is unprecedented, covering not only broadcast media but also social media platforms. The ban is a fundamental departure from strict legal regulation, namely the general monitoring ban in Article 15 of the Directive on electronic commerce.

After the enactment of the Regulation, many prominent social media platforms banned access to RT and Sputnik.¹⁸⁸ As Helberger and Schulz note, “the Council’s decision can and has been read in the spirit of ‘finally the platforms take responsibility,’ but it can also be

¹⁸⁸ Elizabeth Culliford, *Facebook Owner Meta will Block Access to Russia’s RT, Sputnik in EU*, REUTERS (Feb. 28, 2022, 1:44 PM), <https://www.reuters.com/business/media-telecom/facebook-owner-meta-will-block-access-russias-rt-sputnik-eu-2022-02-28/>.

read as an open invitation to platforms to question some of the critical tenets of responsible content moderation that Europe has tried to impress on them.”¹⁸⁹ As it transpired, no major online platform has raised any concerns regarding the ban. As David Kaye put it,

the opacity of recent actions suggests [social media platforms] still seem unprepared to acknowledge that their massive power requires something more than *ad hoc* rule changes and inconsistency with respect to demands in other zones of conflict and repression. In the case of the EU ban, few if any seem to be complaining, and most – if not all – seem to have rolled over in compliance. Their human rights policies would seem to lead them to challenge the ban, which would enable the articulation of guidelines for when state authorities have the power to restrict access to state media of hostile governments. It could provide space for civil society and the companies to argue for alternatives to bans and enhance company credibility when they challenge government orders in other countries.¹⁹⁰

2. *Private Regulation by the Platforms*

It is difficult to halt the spread of disinformation by means of legal regulation. It also seems unlikely that the rules and regulations applied by the platforms themselves could provide a comprehensive and credible solution to this problem, because, as Paul Bernal has pointed out, the spread of scare stories, insults and bad-spirited gossip is not a fault but an inevitable consequence of the features of their systems.¹⁹¹ However, negative PR could be detrimental to a platform, so platforms inevitably make efforts to tackle the spread of disinformation, and even

¹⁸⁹ Helberger & Schulz, *supra* note 39.

¹⁹⁰ David Kaye, *Online Propaganda, Censorship and Human Rights in Russia's War Against Reality*, 116 AJIL UNBOUND 140 (2022), <https://www.cambridge.org/core/journals/american-journal-of-international-law/article/online-propaganda-censorship-and-human-rights-in-russias-war-against-reality/359EF362F588AC8F601FE6C28260AD83>.

¹⁹¹ See generally Paul Bernal, *Facebook: Why Facebook Makes the Fake News Problem Inevitable*, 69 N. IR. LEGAL Q. 497, 506–509 (2018).

surpass their legal obligations requiring them to do so. Measures taken in this regard might include raising tariffs for or reducing the prominence in the news feed of sites that present false and fictitious statements as news.¹⁹² Other options could be to increase transparency in connection to paid advertisements and sponsored content, so that users are aware of who paid for the dissemination of a given piece of content.¹⁹³

It has also been suggested that social media platforms should recruit fact-checkers to verify pieces of content and either designate pieces of disinformation as such or, alternatively, inform the platforms of such news, so that they could demote the ranking of such websites or even ban them.¹⁹⁴ Ironically, designating a piece of news as disinformation (as Facebook has attempted to do) only increases the popularity and reinforces the credibility of the false information among users.¹⁹⁵ The activities of fact-checkers are indeed quite similar to news editing, and this increases the similarities between social and traditional media even further.

Essentially, the Report by the High Level Expert Group on Fake News and Online Disinformation builds its strategy against disinformation on the basis of reinforcing the private regulation performed by social media platforms.¹⁹⁶ The Report suggests that platforms give a wider range of options for their users to personalize the service they receive. Other measures it suggested are that a platform should recommend additional news from reliable sources to its users in addition to popular topics, that it should give more visibility

¹⁹² See Richard L. Hasen, *Cheap Speech and What It Has Done (To American Democracy)*, 16 FIRST AMEND. L. REV. 200, 226–30 (2017).

¹⁹³ See Lili Levi, *Real “Fake News” And Fake “Fake News”*, 16 FIRST AMEND. L. REV. 285 (2018).

¹⁹⁴ See Jessica Stone-Erdman, *Just the (Alternative) Facts, Ma’am: The Status of Fake News under the First Amendment*, 16 FIRST AMEND. L. REV. 410 (2017); Sarah Perez, *Facebook Expands Fact-Checking Program Adopts New Technology for Fighting Fake News*, TECHCRUNCH (Jun. 21, 2018, 7:59 AM), <https://techcrunch.com/2018/06/21/facebook-expands-fact-checking-program-adopts-new-technology-for-fighting-fake-news/?guccounter=1>.

¹⁹⁵ See Catherine Shu, *Facebook will Ditch Disputed Flags on Fake News and Display Links to Trustworthy Articles Instead*, TECHCRUNCH (Dec. 20, 2017, 7:55 PM), <https://techcrunch.com/2017/12/20/facebook-will-ditch-disputed-flags-on-fake-news-and-display-links-to-trustworthy-articles-instead>.

¹⁹⁶ See generally High Level Expert, *supra* note 178.

to reliable news sources,¹⁹⁷ and that users should be enabled to exercise their right to respond to allegations. These suggestions would further increase the similarities between platform moderators and traditional news editors, as well as those between social media platforms and traditional news media.

The Communication published by the European Commission in 2018 takes a similar approach. Essentially, it seeks to encourage private regulation by platforms while pointing out that the introduction of legal obligations might follow if private regulation fails to deliver the desired outcome (even though the indirect liability regime established by the Directive on electronic commerce would not be changed).¹⁹⁸ In a sense, this document represents a milestone in EU media regulation. It does not simply encourage self-regulation (which is not an absolute novelty in media policy), where a non-governmental organization, which does not form part of the regulated media landscape itself, supervises the operation of the media, but it reinforces private regulation in practice (i.e., the regulation of content by the platforms themselves) by also suggesting the possibility of obliging social media platforms to implement such regulations. In this approach, platforms must decide on the permissibility of various content themselves—and even decide whether to go beyond the provisions of the common EU law. By taking this step, a government would hand over almost all regulatory responsibilities to social media platforms while retaining only the control of this rather peculiar supervisory regime.

After the Regulation came into force, the largest social media companies relaxed the enforcement of their rules involving threats against Russian military personnel in Ukraine.¹⁹⁹ According to a leaked internal letter, Meta allowed Facebook and Instagram users to call for violence against the Russian and Belarusian leaders, Vladimir Putin and Alexander Lukashenko, so long as the violence was nonspecific (without referring to an actual plot), as well as violence against Russian soldiers (except prisoners of war) in the context of the

¹⁹⁷ *Id.* at 33.

¹⁹⁸ See Commission, *supra* note 180.

¹⁹⁹ See Munsif Vengattil & Elizabeth Culliford, *Facebook Allows War Posts Urging Violence Against Russian invaders*, REUTERS (Mar. 10, 2022, 9:04 PM), <https://www.reuters.com/world/europe/exclusive-facebook-instagram-temporarily-allow-calls-violence-against-russians-2022-03-10>.

Ukraine invasion, which involves a limited and temporary change to its hate speech policy.²⁰⁰

There is no explicit mention of this change of policies in the official communication of Meta, apart from a statement by Nick Clegg, the Global Affairs President of Meta, which presumably referred to this change of policy:

Our policies are focused on protecting people’s rights to speech as an expression of self-defense in reaction to a military invasion of their country. The fact is, if we applied our standard content policies without any adjustments we would now be removing content from ordinary Ukrainians expressing their resistance and fury at the invading military forces, which would rightly be viewed as unacceptable. To be clear, we are only going to apply this policy in Ukraine itself. We have no quarrel with the Russian people. There is no change at all in our policies on hate speech as far as the Russian people are concerned. We will not tolerate Russophobia or any kind of discrimination, harassment or violence towards Russians on our platform.²⁰¹

Twitter also announced some changes in its policies related to the war, though the company did not amend its generally applicable hate speech policies.²⁰²

The right of platforms to change the boundaries of free speech at will, without any constitutional guarantee or supervision, is an extremely dangerous development. Their propensity to make changes in a less transparent way, avoiding any meaningful public debate on the proposed changes, further increases the risks to freedom of expression. According to Kaye, “neither the public communication of

²⁰⁰ Emerson T. Brooking, *Meta Meets the Reality of War*, SLATE (Mar. 17, 2022, 10:16 AM), <https://slate.com/technology/2022/03/meta-facebook-calls-violence-invading-russians.html>.

²⁰¹ *Meta’s Ongoing Efforts Regarding Russia’s Invasion of Ukraine*, META (Feb. 26, 2022), <https://about.fb.com/news/2022/02/metas-ongoing-efforts-regarding-russias-invasion-of-ukraine>.

²⁰² See Sinéad McSweeney, *Our ongoing approach to the war in Ukraine*, TWITTER (Mar. 16, 2022), https://blog.twitter.com/en_us/topics/company/2022/our-ongoing-approach-to-the-war-in-ukraine.

human rights policies and risk assessment nor the transparent adoption and enforcement of rules has been an obvious element of company practice since the Russian invasion of Ukraine. But it is not too late to change.”²⁰³

3. *The Digital Services Act*

The EU’s new DSA, which aims to regulate online platforms in a more detailed and nuanced way, and which will come into force in 2023 and 2024 does not change the most important foundations of European regulation of online platforms.²⁰⁴ The response of the EU to the problem of disinformation is to legislate for more societal responsibility for very large online platforms, but it still leaves it to the discretion of the platforms themselves to decide if and how to deal with any systemic risks to freedom of expression.

The DSA retains the essence of the notice and takedown procedure, and platforms still cannot be obliged to monitor user content (Articles 6 and 8), but if they receive a notification that a certain piece of content is illegal, they will be obliged to remove it, as set out in the Directive on electronic commerce.²⁰⁵ The DSA will also seek to protect users’ freedom of expression. It requires users to be informed of the content removed by platforms and gives them the possibility to have recourse to dispute resolution mechanisms in their own country, as well as to the competent authorities or courts if the platform has infringed the provisions of the DSA, provisions which seek to strengthen the position of users, in particular by providing procedural guarantees (most importantly, through more transparency, the obligation to give reasons for a deletion of a content or suspension of an account, the right of independent review).²⁰⁶

The democratic public sphere is protected by the DSA (Article 14(4)), which states that the restrictions in the contractual clauses (Article 14(1)) must consider freedom of expression and media pluralism. Article 14(4) states that:

²⁰³ Kaye, *supra* note 190, at 144.

²⁰⁴ Council Regulation 2022/2065 of Oct. 19, 2022, on a Single Market For Digital Services and Amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277).

²⁰⁵ *Id.* at art. 6.

²⁰⁶ *Id.* at art. 17, 21, 24.

Providers of intermediary services shall act in a diligent, objective and proportionate manner in applying and enforcing the restrictions . . . with due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom and pluralism of the media, and other fundamental rights and freedoms as enshrined in [CFR].²⁰⁷

Where platforms do not act with due care, objectivity, and proportionality in applying and enforcing restrictions when deleting user content, taking due account of the rights and legitimate interests of all interested parties, including the fundamental rights of users of the service, such as the rights to freedom of expression, freedom and pluralism of the media, and other fundamental rights and freedoms as set out in the CFR, the user may have recourse to the public authorities. In regards to very large online platforms in Europe, this will most often be the designated Irish authority, to which other national authorities must also refer complaints they receive concerning these platforms, for which the European Commission has also reserved certain powers (it is for the Commission to decide whether to act itself or to delegate this power to the Irish authority).

The DSA does not explicitly act against disinformation, unless it constitutes an infringement (war propaganda, which can be conducted through misinformation, can of course constitute an infringement). However, since disinformation alone does not constitute an infringement in national jurisdictions, the DSA does not introduce any substantive change in this respect. Furthermore, very large online platforms and very large online search engines must identify and analyze the potential negative effects of their operations (in particular their algorithms and recommendation systems) on freedom of expression and on “civil discourse and electoral processes”²⁰⁸ and then they must take appropriate and effective measures to mitigate these risks (Article 35). In addition, the DSA’s rules on codes of conduct also encourage the management of such risks and promote the enforcement of codes (including, for example, the Code of Practice on

²⁰⁷ *Id.* at art. 2.

²⁰⁸ *Id.* at art. 34(1)(b) and 34(1)(c).

Disinformation). These tools also provide an indirect means of tackling misinformation.

Article 36 of the DSA introduces a new “crisis response mechanism.” Crisis in this legislation means “extraordinary circumstances” that “lead to a serious threat to public security or public health in the Union or in significant parts of it” (Article 36(2)). Very large online platforms will need to assess to what extent and how the functioning and use of their services significantly contribute to a serious threat, or are likely to do so, then to identify and apply specific, effective and proportionate measures, to prevent, eliminate or limit any such contribution to the serious threat identified (Article 36(1)).

C. Media Regulation

Hate speech can also be tackled through media regulation. The AVMS Directive requires Member States to prohibit incitement to violence or hatred directed against a group of persons or a member of a group based on grounds of race, sex, religion, or nationality as well as public provocation to commit terrorist offences in linear and non-linear, television and other audiovisual media services (Article 6). Member States have transposed these provisions into their national legal systems. Under the Directive, only the authority of the State in which the media service provider is broadcasting has jurisdiction to verify whether the conduct in question constitutes hate speech, and to ensure that the broadcasts of the media service provider do not contain incitement to hatred or violence. If the media service provider is not established in an EU Member State, it is not subject to the provisions of the Directive, and the national authorities can act against it under their own legal systems. According to the well-established case law of the CJEU and the ECtHR, a television broadcaster which incites terrorist violence cannot itself claim freedom of expression.²⁰⁹

Some other (indirect) tools can also be applied against disinformation in media regulation. Based on the right of reply, access to the content of a media service provider is granted by the legislator

²⁰⁹ See Cases C-244/10 and C-245/10, *Mesopotamia Broadcast A/S METV and Roj TV A/S v. Bundesrepublik Deutschland*, ECLI:EU:C:2011:607, ¶ 55 (Sept. 22, 2011), <https://curia.europa.eu/juris/document/document.jsf?text=&docid=109941&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=9565>; *Roj TV A/S v. Denmark*, App. No. 24683/14 Eur. Ct. H.R. (2018), <https://hudoc.echr.coe.int/eng?i=001-183289>.

based not on an external condition but in response to content published previously by the service provider. The AVMS Directive prescribes that EU Member States should introduce national legal regulations with regard to television broadcasting that ensure adequate legal remedies for those whose personality rights have been infringed through false statements.²¹⁰ Such regulations are known Europe-wide and typically impose obligations not only on audiovisual media but also on printed and online press alike.²¹¹ The promotion of media pluralism may include the requirement for impartial news coverage, on the basis of which public affairs need to be reported impartially in programs which provide information on them. Regulation may apply to television and radio broadcasters, and it has been implemented in several states in Europe.²¹²

In July 2022, the British media regulator Ofcom published its decisions on 29 programs which were broadcast on RT between 27 February 2022 and 2 March 2022. The license for the RT service was, at the time of broadcast, held by Autonomous Non-Profit Organization TV-Novosti. The programs had raised issues warranting investigation under the due impartiality rules.²¹³ According to Ofcom's communication,

when dealing with matters of major political controversy and major matters relating to current public policy, such as wars or areas of conflict, . . . all Ofcom

²¹⁰ See AVMS Directive, *supra* note 48 at art. 28.

²¹¹ See Kyu Ho Youm, *The Right of Reply and Freedom of the Press: An International and Comparative Perspective*, 76 GEO. WASH. L. REV. 1017 (2008); Andrei Richter, *Fake News and Freedom of the Media*, 8 J. INT'L MEDIA & ENT. L. 1, 14–19 (2018); András Koltay, *The Right of Reply in a European Comparative Perspective* HUNGARIAN JOURNAL OF LEGAL STUDIES-ACTA JURIDICA HUNGARICA 73 (2013).

²¹² See, e.g., the German regulations (Rundfunkstaatsvertrag, ss 25–34) and the UK regulation (ss 319(2)(c) and (d), 319(8) and 320 of the Communications Act 2003, and s 5 of the Broadcasting Code) (The 1936 International Convention on the Use of Broadcasting in the Cause of Peace and the 1953 Convention on the International Right of Correction would also provide for action against communications from state bodies that have a detrimental effect on international relations, but they are hardly applicable in this case.) See also Björnstjern Baade, *Fake News and International Law*, 29 THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 1357 (2019).

²¹³ Ofcom Broadcasting Code, section 5, <https://www.ofcom.org.uk/tv-radio-and-on-demand/broadcast-codes/broadcast-code/section-five-due-impartiality-accuracy>.

licensees must comply with the special impartiality requirements in the Code. These rules require broadcasters to take additional steps to preserve due impartiality – namely by including and giving due weight to a wide range of significant views. In accordance with our published procedures, Ofcom has decided that all of the programs breached the Code.²¹⁴

Under Section 3(3) of the Broadcasting Act 1990 and of the Broadcasting Act 1996, Ofcom “shall not grant a license to any person unless satisfied that the person is a fit and proper person to hold it” and “shall do all that they can to secure that, if they cease to be so satisfied in the case of any person holding a license, that person does not remain the holder of the license.”²¹⁵ Considering a series of breaches by RT of the British broadcasting legislation concerning the due impartiality and accuracy rules, Ofcom revoked these licenses.²¹⁶

IV. SOME CONCLUSIONS

Although the EU-wide ban on state-sponsored Russian media has received widespread support in Europe, it risks becoming a model for similar bans in the future. If the EU bodies concerned continue to be consistent in their efforts to protect freedom of expression and of the media, this risk can be mitigated.

There is also a potential risk of EU bodies overstepping their Treaty powers. It is important to stress that taking action against media companies who broadcast infringing content has so far been the exclusive competence of Member States. War, as a special situation, has been exempted from this rule under the Regulation and under other exceptional circumstances (such as a pandemic or a grave economic crisis, e.g.) it could serve as a model for the EU to curtail the

²¹⁴ Ofcom’s Broadcast and On Demand Bulletin (Jul. 18, 2022), https://www.ofcom.org.uk/_data/assets/pdf_file/0019/241723/RT-News-RT-various-dates-and-times.pdf.

²¹⁵ Notice of a Decision Under Section 3(3) of the Broadcasting Act 1990 and Section 3(3) of the Broadcasting Act 1996 in Respect of Licenses TLCS 000881, TLCS 001686 and DTSP 000072 held by ANO TV Novosti, https://www.ofcom.org.uk/_data/assets/pdf_file/0014/234023/revocation-notice-ano-tv-novosti.pdf.

²¹⁶ *Id.*

competence of Member States in the future, which should be avoided at all costs.

Action against disinformation is two-fold: on the one hand, the EU and its Member States are wary of treating disinformation as an offence in itself, and on the other, they expect online platforms to act. This inconsistency is dangerous for two reasons. First, it blurs the line between the responsibility of states and that of the EU to address the problem and, secondly, it places the initiative and decision-making on an important public issue in the hands of private companies (the online platforms), which are only narrowly bound by legal guarantees.

Media organizations, including social media platforms, must operate with respect for human rights. They should not become the *de facto* final arbiter of fundamental rights. They cannot ignore the fact that, under the current doctrine of freedom of expression, lying and disinformation in themselves cannot be prohibited, or even that, in the absence of additional circumstances that would require restriction (such as the dissemination of war propaganda or defamation), freedom of expression includes protecting such expressions. The tragedy of the Russian–Ukrainian war should not lead to a strengthening of the regulatory powers of social media platforms.

INTERNATIONAL LEGAL RESPONSES TO “PROPAGANDA FOR WAR” IN MODERN WARFARE

Andrei Richter*

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I. INTRODUCTION

Despite initial hopes, the fall of the Soviet Union at the end of 1991 and the resulting end of the Cold War have not necessarily brought stable democracy, freedom of press, peace and security, or prosperity to the newly independent nations. In fact, with time, the tensions and aggression in the region have only increased. Post-Soviet history is abundant with examples of funneling such aggression, incitement of racism, and intolerance, giving rise to military hostilities, mutual accusations of genocide, and crimes against humanity. The full-scale war in Ukraine, and the armed conflict over Nagorno-Karabakh between Armenia and Azerbaijan are just the most recent examples of long-running disputes between governments and nations.

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“Propaganda and distorted narratives from various parties in the conflict area and outside have hindered conflict resolution and peace processes for decades,”—noted the UN Secretary-General in her global 2022 report the UN Special Rapporteur on freedom of expression. Interestingly enough, to support her view, she gave the protracted conflict in Nagorno-Karabakh as an example.¹

This essay examines international political and legal responses and remedies for propaganda for war in the context of the current armed conflict in Ukraine, reviews the scope of the prohibition of such propaganda through the context of the modern understanding of war, and discusses the current capabilities of propaganda. Disinformation is considered here as an instrument of propaganda rather than “an evil” in itself. The role of *state* propaganda in funneling armed conflicts remains of particular importance due to its contradiction with the universal understanding of freedom of expression and independence of the media. While the European Union provides the most comprehensive approach to Russian propaganda and disinformation, with international ‘restrictive measures’ targeting media actors. These EU sanctions and the subsequent case law challenged the infallible status of media freedom in the regulatory debate on harmful media content, involving the arguments on impermissibility of (inter-)state censorship, and on the limits of the power to interfere with media content. A counteraction to propaganda and disinformation in the form of sanctions is a new tool, first employed by Ukraine and other Eastern European countries, and now—the EU.

II. DEFINITIONS OF PROPAGANDA FOR WAR

In 1928, the now classical U.S. author on propaganda, Edward Bernays, not only defined propaganda as “a consistent, enduring effort to create or shape events to influence the relations of the public to an enterprise, idea or group,” but also described at length the benefits of propaganda for social benefits, education and emancipation of women.

¹ U.N. Secretary-General, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *Disinformation and Freedom of Opinion and Expression During Armed Conflicts*, A/77/288 (Aug. 12, 2022) at 9 [hereinafter *Disinformation and Freedom of Opinion*], <https://www.ohchr.org/en/documents/thematic-reports/a77288-disinformation-and-freedom-opinion-and-expression-during-armed>.

He drew the following conclusion: “Only through the wise use of propaganda will our government, considered as the continuous administrative organ of the people, be able to maintain that intimate relationship with the public which is necessary in a democracy.”²

Bernays, described the U.S. government’s “wise use of propaganda” during the First World War in the following way:

They not only appealed to the individual by means of every approach—visual, graphic, and auditory—to support the national endeavor, but they also secured the cooperation of the key men in every group—persons whose mere word carried authority to hundreds or thousands or hundreds of thousands of followers. They thus automatically gained the support of fraternal, religious, commercial, patriotic, social and local groups whose members took their opinions from their accustomed leaders and spokesmen, or from the periodical publications which they were accustomed to read and believe. At the same time, the manipulators of patriotic opinion made use of the mental cliches and the emotional habits of the public to produce mass reactions against the alleged atrocities, the terror and the tyranny of the enemy.³

Following the Second World War, however, the term “propaganda” became taboo because it was connected with the Nazis and Goebbel’s evil manipulation of the masses. This negative approach to the term and its meaning became appropriate at the start of the Cold War due to public concern about the aggressive propaganda of an “imminent” new world war. In light of this concern, the United Nations, from its first steps, through repeated Resolutions and Declarations, committed itself to stopping such malicious propaganda to prevent new wars.⁴

² Edward L. Bernays, *Propaganda (1928)*, HISTORY IS A WEAPON (Mar. 27, 2023, 9:49 PM), <http://www.historyisaweapon.org/defcon1/bernprop.html>.

³ *Id.*

⁴ See MICHAEL G. KEARNEY, THE PROHIBITION OF PROPAGANDA FOR WAR IN INTERNATIONAL LAW 78-79 (2007).

As a result, in 1966, with the adoption, of the International Covenant on Civil and Political Rights (ICCPR), “propaganda for war” became an internationally established and recognized violation of human rights. While the provisions and possible limitations of ICCPR’s Article 19 on freedom of expression are well-researched and rehearsed around the world, serving as a model for national law, there has been less academic and political focus on its Article 20, which stipulates: “Any propaganda for war shall be prohibited by law.”⁵

The limited academic research given in the past decades to the interpretation and practical implementation of the ban on such media-driven propaganda in both international law and policy is probably best explained by the scarcity of caselaw on such propaganda in the democratic states and an absence of consensus as to how such propaganda can be stopped, without injury to freedom of expression.

With time, the importance of efforts to prevent wars in relation to the values of human rights became widely understood and better formulated. Propaganda for war results in abuses of the core human rights stipulated in the ICCPR, such as the right to life. In fact, as an exercise of freedom of expression, propaganda for war has a direct or collateral aim at humanity itself. We see that both West and East, and North and South have agreed on these postulates, but their interpretations of what constitutes propaganda for war have differed somewhat.⁶

Unsurprisingly, in the communist world, the phenomenon assumed a clearly ideological meaning. In the definitional discussion, it is worth noting a set of eight legal acts, national laws known as “On the Protection of Peace” which were adopted in 1950-1951 by a number of socialist countries, from Albania to Mongolia.⁷ These statutes and the relevant national penal provisions were in fact directed at

⁵ G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 20 (Dec. 16, 1966), <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>.

⁶ See Andrei Richter, *The Relationship between Freedom of Expression and the Ban on Propaganda for War*, EUROPEAN YEARBOOK ON HUMAN RIGHTS, 489-503 (2015), (discussing the interplay of propaganda for war and freedom of expression).

⁷ See On the Protection of Peace (Mar. 12, 1951), for a USSR Statute which was annulled only in December 2012; See also (Fundamental Law) of the Union of Soviet Socialist Republics [Constitution], (a ban on propaganda of war has even become part of the USSR Constitution); Compare, with Russian Federation’s Constitution of 1993 (not transposed into the succeeding current Russian Constitution).

propaganda for war and nothing else.⁸ Formally, they were adopted in response to the Second World Peace Congress' call to the parliaments of the world to outlaw "propaganda favouring a new war."⁹

The World Peace Movement of the times was strongly supported by the USSR, as well as Western, left-leaning organizations and intellectuals. The Movement was extremely outspoken on the need to diminish the threat of atomic weapons and to stop war propaganda—two topics which have prominently returned in today's news agenda.

The Movement then suggested particular mechanisms to achieve its aims. For example, a resolution of the World Peace Congress in Warsaw called upon "all honest men and women" in the world "to maintain a firm boycott against all individuals, organizations, publishing houses and film-producing companies, press organs, broadcasting stations which directly or indirectly spread 'propaganda for war' and "to protest against all forms of art and literature which foster such propaganda."¹⁰ Beyond this global *boycott* of propaganda for war and protest actions, the Congress suggested *education* in a spirit of international cooperation and respect for other nations.¹¹ Moreover, the media workers were specifically called upon to *refrain* from being used "as instruments of propaganda for war, of propaganda of slaughter and hatred amongst the nations" and rather engage "in spreading the principles of peace and mutual understanding amongst the peoples."¹² Naturally enough, most of these calls were addressed to the West, not the East.

⁸ *E.g.*, in Russia: Art. 71 of the 1960 Crim. Code (imprisonment from 3 to 8 years), *Compare, with* Art. 354 of the 1996 Crim. Code (maximum penalty—five years' imprisonment).

⁹ *See* WE CAN SAVE PEACE: STORY OF THE SECOND WORLD PEACE CONGRESS WARSAW 10 (1950), BRITISH PEACE COMMITTEE [hereinafter WE CAN SAVE PEACE]; *See also* Address to the U. N. para. 5, BRITISH PEACE COMMITTEE ("We appeal to the Parliaments of all countries to enact a 'Law for the Protection of Peace' which shall render all propaganda for a new war, whatever form it may take, liable to criminal prosecution.") (Additionally, its *Address to the United Nations*, para. 5, proclaims: "We appeal to the Parliaments of all countries to enact a 'Law for the Protection of Peace' which shall render all propaganda for a new war, whatever form it may take, liable to criminal prosecution.").

¹⁰ *See* WE CAN SAVE PEACE, *supra* note 9, at 12

¹¹ *Id.*

¹² *Id.*

The three tools—boycott, education, and restraint—will reverberate once there is a modern response to propaganda. In practice, however, the communist laws for the protection of peace were generally used to stop dissemination of critical Western narratives from abroad as “warmongering” and to punish political dissidents as “acolytes” of the “blood-thirsty” militarists and imperialists.¹³ It was for these formal reasons that the USSR started jamming Western radio stations in late 1940s, a practice that would last till the late 1980s.¹⁴ Conveniently enough, the laws “On the protection of peace” were elusive and overbroad as to the definition of the “propaganda for war.”

On the other hand, Western countries including Belgium, Denmark, Finland, Iceland, Malta, Netherlands, New Zealand, Norway, Sweden, Switzerland, the U.K., and the U.S., have all made reservations as to their obligations from ICCPR’s Article 20 to enact restrictive national norms on the production and dissemination of propaganda for war, often citing, that such a prohibition could limit freedom of expression in their countries.¹⁵

Despite the East-West controversy, several early resolutions of the UN General Assembly (UNGA) were still adopted at the earlier stage of the global efforts to stop propaganda for war, and they read today as if they were written recently, not 70 years ago.

UNGA Resolution 290 (IV) from 1949 suggested to promote “full freedom for the *peaceful* [*italics are mine* - AR] expression of political opposition” and to “remove the barriers which deny to peoples the free exchange of information and ideas”—but only as long as it is “essential to international understanding and peace.”¹⁶ It also called on the five permanent members of the UN Security Council to “exercise restraint in the use of the veto” power in order to make this body an effective “instrument for maintaining peace.”¹⁷

¹³ See Richter, *supra* note 6.

¹⁴ See Kristin Roth-Ey, *Listening Out, Listening For, Listening In: Cold War Radio Broadcasting and the Late Soviet Audience*, 79 *The Russ. Review* 556, 561-562 (2020).

¹⁵ See International Covenant on Civil and Political Rights, *Declarations and Reservations*, U.N. TREATY COLLECTION (Dec. 16, 1966), https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND.

¹⁶ G.A. Res. 290 (IV), *Essentials of Peace*, (Dec. 1, 1949), <http://www.un-documents.net/a4r290.htm>.

¹⁷ *Id.*

In another resolution, the UNGA gave a rather distinct definition to war propaganda by saying that it “[c]ondemns all forms of propaganda, in whatsoever country conducted, which is either designed or likely to provoke or encourage any threat to the peace, breach of the peace, or act of aggression.”¹⁸ The UN thus invoked an intent or a threat of hostilities as the criteria for the illegal act.

It is important to note that the UN General Assembly then further elaborated on the definition of propaganda for war by stating that it also includes “propaganda against peace,” that is, “measures tending to isolate the peoples from any contact with the outside world, by preventing the Press, radio and other media of communication from reporting international events, and thus hindering mutual comprehension and understanding between peoples.”¹⁹ Thus, an intrinsic element of such propaganda became the activities by governments “tending to silence or distort the activities of United Nations in favour of peace or to prevent their peoples from knowing the views of other States Members.”²⁰

By establishing a link between propaganda and suppression of free speech, the UN General Assembly pointed out that propaganda’s success is generally possible when the media are monopolized or deprived of their freedom to report on relevant events and dissenting opinions.

In the Helsinki Final Act (1975), that laid foundation to international *detente* and the Organization on Security and Co-operation in Europe (OSCE), the participating states, by consensus, committed themselves, *inter alia*, to promote in their relations with one another “a climate of confidence and respect among peoples consonant with their duty to refrain from propaganda for wars of aggression” against another participating State.²¹ Although the OSCE commitments are not legally binding they establish or confirm statements of principle.

¹⁸ G.A. Res. 110 (II), Measures to be Taken Against Propaganda and the Inciters of a New War, (Nov. 3, 1947), <http://www.un-documents.net/a2r110.htm>.

¹⁹ G.A. Res. 381 (V), Condemnation of Propaganda Against Peace, at (2) (Nov. 17, 1950).

²⁰ *Id.* at (3).

²¹ Conference on Security and Co-operation in Europe Final Act, Helsinki (Aug. 1, 1975), <https://www.osce.org/files/f/documents/5/c/39501.pdf>.

Any distinct formula of propaganda will follow the 1947 UNGA resolution and will have to take into account the scope of the crime suggested by the UN Human Rights Committee (UNHRC) in its General comment No. 11, which is dedicated to interpretation and lack of compliance with Article 20. This 30-years-old, one-page document notes that the prohibition extends to all forms of propaganda threatening or resulting in an act of aggression or breach of the peace contrary to the Charter of the United Nations and aims both to the internal and external public to the State concerned.²²

At the same time, it makes an important exclusion from the “all forms” scope of the crime by saying that ban on propaganda for war does not “prohibit advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations.”²³ By “self-defence,” the Charter means exclusively measures taken by a Member of the United Nations “if an armed attack occurs against” it.²⁴ It is important to note the comment of the UNHRC that, for the ban, it does not matter “whether such propaganda or advocacy has aims which are internal or external to the State concerned.”²⁵ This conclusion underlines the transborder nature of the prohibition.

The leading expert on the issue, Michael Kearney from UK, states that the meaning of propaganda for war is “only as imprecise as states wish it to be.”²⁶ He considers that the key issue of the definition is whether the term is limited to direct “incitement to war” or whether it additionally encompasses propaganda which serves either as a means of preparation for a future war or to preclude peaceful settlement of disputes.²⁷ ARTICLE 19, a global freedom of expression campaign, for example, found the latter part of the interpretation as being “too broad” by pointing to all States, which “routinely convey a narrative

²² See Off. of the U.N. High Comm’r for Hum. Rts., General Comment No. 11, Prohibition of Propaganda for War and Inciting National, Racial or Religious Hatred (art. 20), para. 2 (Sept. 7, 1983) [hereinafter General Comment No.11], <http://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo11.pdf>

²³ *Id.*

²⁴ U.N. Charter art. 51.

²⁵ See General Comment No. 11, *supra* note 22, at para. 2.

²⁶ MICHAEL G. KEARNEY, THE PROHIBITION OF PROPAGANDA FOR WAR IN INTERNATIONAL LAW 189 (2007).

²⁷ *Id.* at 5-6.

that portrays their own war efforts in a favorable light.”²⁸ It seems to be a weak argument, since portraying an *aggressor* state as a mighty power and a victor does not necessarily mean undermining—through propaganda—the very possibility of finding a peaceful solution.

Recently doubts were also voiced as to whether prohibition of propaganda for war can be applied during an armed conflict, or is appropriate only in times of peace. The UN Special Rapporteur in her global report noted that the prohibition “is understood to be applicable only in relation to aggression or breach of peace contrary to the Charter of the United Nations and limited to incitement of war and not to propaganda during war.”²⁹ Her limited understanding of the prohibition refers to the submission of ARTICLE 19 and the author’s earlier article.³⁰ Still, none of the referred sources actually give grounds to a claim that propaganda for war is allowed during war. This understanding is shared by Carrillo, Clinical Professor of Law and founding Director of the Civil and Human Rights Law Clinic at the George Washington University Law School, who says that the ban on propaganda for war is “a norm that by definition can only apply in times of peace.”³¹ He refers in this regard to General Comment 11, but its text does not reveal grounds for such an understanding.³²

Perhaps, such a limited understanding is rooted in the concept that during war the rules of the International Humanitarian Law (IHL) prevail, and the International Human Rights Law (IHRL) is shadowed while the parties to the war derogate from its provisions under the ICCPR (including under its Art. 20). But it is broadly recognized today “that both IHL and IHRL apply during armed conflicts and that they provide complementary and mutually reinforcing protection. This means that while the emergence of an armed conflict triggers the

²⁸ Article 19 Submission, Response to the Consultation of the U.N. Special Rapporteur on Freedom of Expression on Her Report on Challenges to Freedom of Opinion and Expression in Times of Conflicts and Disturbances (July 19, 2022) [hereinafter Response to the Consultation], <https://www.ohchr.org/sites/default/files/documents/issues/expression/cfis/conflict/2022-10-07/submission-disinformation-and-freedom-of-expression-during-armed-conflict-UNGA77-cso-article19.pdf>.

²⁹ *Disinformation and Freedom of Opinion*, *supra* note 1, at para. 39.

³⁰ *See generally* Richter, *supra* note 6.

³¹ Arturo J. Carrillo, *Between a Rock and a Hard Place? ICT Companies, Armed Conflict, and International Law*, 46 *Fordham Int'l L.J.* 57, 118 (2023).

³² *See generally* General Comment No. 11, *supra* note 22.

applicability of IHL, it does not suspend the applicability of IHRL.”³³ In addition, modern aggressor states, do not typically declare wars, martial law, or derogation from the ICCPR.

As for the methods employed by propaganda that would allow courts to distinguish it from other forms of speech, Manfred Nowak, the principal interpreter of the ICCPR, pointed out that they constitute “intentional, well-aimed influencing of individuals by employing various channels of communication to disseminate, above all, incorrect or exaggerated allegations of fact. Also included thereunder are negative or simplistic value judgements whose intensity is at least comparable to that of provocation, instigation, or incitement.”³⁴ Frederick Lumley, in 1933, put the set of methods laconically: they are a combination of “suppression, distortion, diversion and fabrication.”³⁵

III. ROLE OF THE STATE

In the modern world, international conflicts are typically intensified and inflated with the use of broadcasting and social media, which have become mighty instruments of manipulation, disinformation, and propaganda, especially in the hands of authorities, which see a military solution to conflicts as a way to rally public support within their countries, to denigrate and stigmatize the opposition, legitimize their hold of power, and eventually extend their rule beyond all time limits. Alas, the national courts and traditional media institutions in many cases fell prey to these policies. As a result, we see state media control and speech censorship on the rise, replacing media freedom with propaganda, including its most dangerous form: propaganda for war.

Some scholars argue that while powerful media corporations are indeed able to use their own initiative and means to disseminate such propaganda, a beleaguered government torn by civil strife cannot counteract, and the dissemination is unlikely to be “launched without at least implicit support of a third state.”³⁶ Therefore, the operation and

³³ Response to the consultation, *supra* note 28, at 3. *See also Disinformation and Freedom of Opinion*, *supra* note 1, at 33-35.

³⁴ MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS CCPR COMMENTARY, 472 (2nd rev. ed. 2005).

³⁵ FREDERICK E. LUMLEY, THE PROPAGANDA MENACE 116-117 (1933).

³⁶ *See* Kearney, *supra* note 26, at 101, 134, 142-145, 168.

dominance of the loyal media operated or controlled by the State, such as in some of the post-Soviet countries,³⁷ is in itself a legacy of the communist times of thought control, that seem to enable and legitimize the phenomenon.

The role of the authoritarian state in times of dominant traditional media remains prevalent in the modern world through its tremendously significant use of social media, blogging, and citizen journalism. Without trolls and DDoS-attacks sponsored by governments, manipulating users' minds would not be as effective today—if effective at all.³⁸

Although Article 20 of the ICCPR establishes an obligation for states to prohibit propaganda for war in domestic legislation, it means also that the states not only have an obligation to address propaganda for war by others, but also should refrain from engaging in such propaganda through the media that it controls or otherwise. Such a conclusion is supported by the U.N. Joint Declaration on Freedom of Expression from four Special Rapporteurs appointed by international organizations, which condemns governments making, sponsoring, encouraging or further disseminating statements, “which they know or reasonably should know to be false (disinformation) or which demonstrate a reckless disregard for verifiable information (propaganda).”³⁹ This follows the idea, previously expressed by one of the rapporteurs that “[t]oday in the 21st century, as it was in the past, state media is the main vehicle of propaganda.”⁴⁰ These rapporteurs also directly pointed to the propaganda for war by the Russian

³⁷ Such post-Soviet states are: Azerbaijan, Belarus, Kazakhstan, Kyrgyzstan (which in 2022 replaced its PSB by the state broadcaster), Russian Federation, Tajikistan, Turkmenistan, and Uzbekistan.

³⁸ See Richter, *supra* note 6, at 494.

³⁹ *Joint Declaration on Freedom of Expression and “Fake News,” Disinformation and Propaganda*, United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information (Mar. 3, 2017), <http://www.osce.org/fom/302796?download=true>.

⁴⁰ Dunja Mijatović, *Communiqué by OSCE Representative on Freedom of the Media on Propaganda in Times of Conflict*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (Apr. 15, 2014), <https://www.osce.org/fom/117701>.

authorities when in 2022, calling, “to immediately refrain from these unlawful practices.”⁴¹

IV. SCOPE OF MODERN WAR AND ITS PROPAGANDA

Today, propaganda benefits from a wide use of modern technologies that enable it to multiply its messages and instantly deliver them to targeted audiences around the world. Thus, what was considered propaganda just years ago has new dimensions that must be considered when countering its harmful effects. While disinformation remains the key instrument of any malicious propaganda, its influence has increased due to the decline of the traditional standard-based press and a wide application of technological innovations, such as “deep fakes.” Moreover, the scale of propaganda and disinformation has increased manifold, as millions of Internet users worldwide have started to play an important role in international conflicts simply by posting text or image to a website.⁴² Social media plays a major role in modern conflicts. It enables people to remain connected to family, friends and the outside world, as well as access to a wide range of information, which includes disinformation, propaganda and hate speech.⁴³

The notion of “war” has also been expanded in the past few years. In the past, a military attack was a clearly-understood concept. Such a violent attack inflicted injury, damage, and destruction resulting in an armed conflict, a likely counterattack, defensive actions, or—in one word—a war.

Unlike in the past, wars in today’s “real-world” no longer begin with a formal ultimatum or declaration of war handed down by an ambassador of the aggressor state. Neither do they typically end with a formal peace treaty, thus mitigating wars into the category of “frozen

⁴¹ Off. of the U.N. High Comm’r for Hum. Rts., *Ukraine: Joint Statement on Russia’s Invasion and Importance of Freedom of Expression and Information* (May 4, 2022) [hereinafter Ukraine], <https://www.ohchr.org/en/statements-and-speeches/2022/05/ukraine-joint-statement-russias-invasion-and-importance-freedom>.

⁴² Kenneth Geers, *Cyberspace and the Changing Nature of Warfare*, COOPERATIVE CYBER DEFENCE CENTRE OF EXCELLENCE, at 3.0 (2018), https://ccdcoe.org/uploads/2018/10/Geers2008_CyberspaceAndTheChangingNatureOfWarfare.pdf.

⁴³ *Disinformation and Freedom of Opinion*, *supra* note 1, at para. 3.

conflicts.” Modern wars have a more thorough use of information as a weapon that they employ. The key elements of the weapon are *cyberwars, information operations, information warfare and hybrid wars*.

Digital wars take place in cyberspace, presenting significant threats to national security. Such a *cyberwar* is defined as “operations against a computer, a computer system or network, or another connected device, through a data stream, when used as means or methods of warfare in the context of an armed conflict.”⁴⁴ Cyber warfare raises questions about how certain provisions of law concerning armed conflict or International Humanitarian Law, apply to these operations, and whether it might require further development. For example, there is “a host of new and unique questions around what cyber activities rise to the level of an [armed] ‘attack’ and, by extension, how states have to comply with IHL.”⁴⁵ Are cyberattacks simply varying types of commonly understood “traditional” wars, or are they stand-alone phenomena that should be treated differently than “traditional” wars in the law?⁴⁶

An academic military project called “Tallinn Manual” elaborates a lot on this question.⁴⁷ The project’s experts remind that traditionally only significant injury or physical damage allows to qualify an armed attack.⁴⁸ Typically, a hostile cyber operation does not permit a non-cyber defensive action, although it indicates that there is a right to self-

⁴⁴ The Int’l Comm. of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Recommitting to Protection in Armed Conflict on the 70th Anniversary of the Geneva Conventions*, 2020, at 26, https://www.icrc.org/sites/default/files/document/file_list/challenges-report_new-technologies-of-warfare.pdf.

⁴⁵ Jonathan Horowitz, *Cyber Operations under International Humanitarian Law: Perspectives from the ICRC*,

24 AMERICAN SOCIETY OF INT’L LAW (May 19, 2020), https://www.asil.org/insights/volume/24/issue/11/cyber-operations-under-international-humanitarian-law-perspectives-icrc#_ednref8.

⁴⁶ See *Merck & Co. v. Ace Am. Ins. Co.*, No. UNN-L-2682-18, 2021 N.J. Super. LEXIS 4566, at 14 (Dec. 6, 2021), where the latter was the argument in a U.S. court.

⁴⁷ See Charlie Dunlap, Int’l Law and Cyber Ops: Q & A with Mike Schmitt About the Status of Tallinn 3.0, LAWFIRE (Oct. 03, 2021, 6:57 PM), <https://sites.duke.edu/lawfire/2021/10/03/international-law-and-cyber-ops-q-a-with-mike-schmitt-about-the-status-of-tallinn-3-0/>.

⁴⁸ *Id.*

defense in cyber space. However, in 2019, France suggested to categorize cyber as an armed attack if it “caused substantial loss of life or considerable economic damage.”⁴⁹ Thus, the experts see “a degree of movement” here.⁵⁰

Another expert in cyber defense, Kenneth Geers, even equates cyberattacks with propaganda. He describes propaganda as “often both the easiest and the most powerful cyber-attack.”⁵¹ He explains:

Digital information, in text or image format—and regardless of whether it is true—can be instantly copied and sent anywhere in the world, even deep behind enemy lines. And provocative information that is removed from the Web may appear on another website in seconds.⁵²

Geers provides an example from April 2007, when a Russian DDoS attack on Estonia’s government, law enforcement, banking, media, and Internet infrastructure; at the same time a hacker defaced the Estonian ruling political party website, changing the homepage text into a threatening note.⁵³ Indeed, propaganda, inasmuch as a cyberattack, can make serious and lasting harm to the civilian population. A person’s mental health is traumatized by the extreme endurance of fear or grief, through developed paranoia caused by conspiracy theories, and so on.

Still, the author’s view is that cyberspace warfare should be separated from digital propaganda—the key element of an “information warfare” and “information [special] operations”—and treated differently. “*Information operations*,” are understood as “campaigns by States or political actors to influence the views, attitudes and behavior of adversaries or the public in order to achieve political and military objectives.”⁵⁴ Information instruments of war, such as propaganda and disinformation, including propaganda for war—among troops, civilian population, potential friends and foes in

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ See Geers, *supra* note 42, at 2.2.

⁵² *Id.*

⁵³ *Id.* at part 7.

⁵⁴ *Disinformation and Freedom of Opinion*, *supra* note 1, at para. 15.

the international arena—have traditionally belonged to an armed conflict's toolbox. These days they are definitely “cyber-enabled.” While cyberattacks *per se* are effectively responded to with strengthening cyber defense, temporary internet shutdowns, or with cyber counterattacks, “government counter-propaganda” is not considered by media experts an appropriate answer to malicious propaganda.⁵⁵

“*Information warfare*” should also be separated from the “hybrid war” although the former can be—but not necessarily is—an integral part of the latter. Internationally, the hybrid war is defined as “a combination of military and non-military measures of a covert and overt nature, deployed to destabilize the political, economic and social situation of a country under attack.”⁵⁶ Russian military doctrine, for example, explicitly recognizes information warfare as one of its domains.⁵⁷

In their turn, modern *hybrid wars* necessarily include cyberwars, inasmuch as information warfare is an element of a modern armed conflict. In both hybrid war and armed conflict, arms are used, thus they might truly qualify as wars. At the same time, however, information war and cyberwar are unlikely to be qualified today in the same manner. To summarize, is propaganda for “information war” a form of propaganda for war as understood by the ICCPR? Likely not. Are calls for “cyber aggression” a propaganda to be prohibited? Probably, yes.

V. MODERN RESPONSE TO PROPAGANDA

Aggressive propaganda and propaganda of aggression broke into the international agenda with the start of the conflict in and around

⁵⁵ OSCE The Representative on Freedom of the Media, *Propaganda and Freedom of the Media*, 2015, at 7, [hereinafter *Propaganda and Freedom*], <https://www.osce.org/files/f/documents/b/3/203926.pdf>.

⁵⁶ EUR. PARL., *European Parliament Resolution of 23 November 2016 on EU Strategic Communication to Counteract Propaganda Against it by Third Parties* (2016), at para. D [hereinafter *European Parliament*], <https://tinyurl.com/ydyfy89k>.

⁵⁷ MICHAEL KOFMAN ET AL., *Russian Military Strategy: Core Tenets and Operational Concepts*, CENTER FOR NAVAL ANALYSES, Aug. 1, 2021, at 24, https://www.cna.org/archive/CNA_Files/pdf/russian-military-strategy-core-tenets-and-operational-concepts.pdf.

Ukraine in 2014. A reassessment of how to address them jumped high in the agenda of the states and intergovernmental organizations. First came “Propaganda and Freedom of the Media,” a discussion paper for the OSCE participating States, published by its Representative on Freedom of the Media.⁵⁸ Therein this author attempted to bring the issue of propaganda for war back to the attention of scholars, diplomats and politicians.⁵⁹ In 2016, though, despite significant efforts of their delegations, the OSCE participating States failed to reach a consensus on a Ministerial Council decision as to propaganda for war and hatred, mostly because of an opposition from the U.S. and the Holy See (Vatican) delegates.⁶⁰

At about the same time the Estonian, Lithuanian, Danish and British Foreign Ministers⁶¹ initiated an intense revamping of the institutions of the European Union (EU) on disinformation, including in the context of propaganda for war. As a result, in 2015-22, consistently adopted—and implemented,—were a number of resolutions, strategic communications, and action plans directed, in particular, to set perimeter barriers for war propaganda and hybrid aggressions. They comprised perhaps the most comprehensive political response among all intergovernmental organizations. It consists of the *Action Plan on Strategic Communication*⁶² the European Parliament’s resolution on *EU strategic communication to counteract propaganda against it by third parties*,⁶³ the *Communication Tackling online disinformation: A European*

⁵⁸ See generally *Propaganda and Freedom*, *supra* note 55.

⁵⁹ *Id.*

⁶⁰ See OSCE, PERMANENT MISSION OF THE HOLY SEE TO THE ORGANIZATION FOR SECURITY AND COOPERATION IN EUROPE (2022), <https://www.osce.org/files/f/documents/1/9/522652.pdf>.

⁶¹ *Estonia, Lithuania, UK, Denmark call for EU Action on Russian Information Warfare; Latvia Refuses to Join*, THE BALTIC TIMES (Jan. 15, 2015), https://www.baltictimes.com/estonia_lithuania_uk_denmark_call_for_eu_action_on_russian_information_warfare_latvia_refuses_to_join/.

⁶² *EU Action Plan on Strategic Communication* (June 22, 2015), https://www.eas.europa.eu/sites/default/files/action_plan_on_strategic_communication.docx_eas_web.pdf.

⁶³ See EUR. PARL., *supra* note 56.

approach,⁶⁴ *Code of Practice on Disinformation*,⁶⁵ the European Commission's *Action Plan against Disinformation*,⁶⁶ the European Commission's *European Democracy Action Plan*,⁶⁷ and—last but not the least—the 2022 *Digital Services Act*,⁶⁸ that transforms the *Code of Practice on Disinformation* into *Strengthened Code of Practice*.⁶⁹

The 2022 Digital Services Act created a “crisis mechanism,” which enables the European authorities, in times of crisis involving threats to national security, to impose “a state of emergency on social media sites, search engines, and online marketplaces” and “to intervene in platforms’ policies.”⁷⁰ These documents speak of “propaganda warfare” rather than of “propaganda for war,” the latter, however, being duly noted in the references made to Article 20 of the ICCPR. They also underline that incitement of war “cannot ‘hide’ behind freedom of expression.”⁷¹

⁶⁴ *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*, at 18, COM (2018) 236 final (Apr. 26, 2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52018DC0236>.

⁶⁵ EU Policy and Legislation, *2018 Code of Practice on Disinformation* (June 16, 2022), <https://digital-strategy.ec.europa.eu/en/library/2018-code-practice-disinformation>.

⁶⁶ *Action Plan against Disinformation*, Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, JOIN(2018) 36 final (Dec. 5, 2018), https://www.eeas.europa.eu/node/54866_en.

⁶⁷ *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*, at 25-26, COM (2020) 790 final (Dec. 3, 2020), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2020%3A790%3AFIN&qid=1607079662423>.

⁶⁸ 2022 O.J. (L 277) 1, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32022R2065>.

⁶⁹ EU Policy and Legislation, *2022 Strengthened Code of Practice on Disinformation* (June 16, 2022), <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>.

⁷⁰ Morgan Meaker, *Ukraine War Prompts Europe's New Emergency Rules for the Internet*, WIRED (Apr. 26, 2022), <https://wired.me/business/ukraine-war-prompts-europes-new-emergency-rules-for-the-internet/>.

⁷¹ See EUR. PARL., *supra* note 56, at para. 35.

VI. REINTERPRETATION OF WAR PROPAGANDA TO INTRODUCE INTERNATIONAL SANCTIONS

A. *Kiselev Case*

In parallel to the above response mechanisms, since March 2014, the Council of the EU has progressively imposed restrictive measures in respect of actions undermining the territorial integrity, sovereignty, and independence of Ukraine. In particular, Dmitrii Kiselev, a popular TV host and Director-General of the international news agency Rossiya Segodnya (RS), was included on the lists of persons subject to the sanctions for the following reason:

Appointed by Presidential Decree on 9 December 2013
Head of the Russian Federal State news agency
‘Rossiya Segodnya’. Central figure of the government
propaganda supporting the deployment of Russian
forces in Ukraine.⁷²

Mr. Kiselev’s attempt to challenge his sanctions was dismissed by the European Court of Justice (CoJ), pointing to the fact that the applicant was not a regular Russian journalist. On the contrary, the Court reasoned he engaged in propaganda “by using the means and power available to him as head of RS, a position which he obtained by virtue of a decree of President Putin himself.”⁷³

It is important to note that in its decision, the CoJ cited a ruling of a Latvian media regulator that the Council of the EU was presumably aware of. The Court explained that the national electronic media regulator examined “Vesti nedeli” TV programs anchored by Mr. Kiselyov and considered those programs to “contain war propaganda justifying the Russian military intervention in Ukraine, comparing

⁷² Council Implementing Regulation (EU) No 284/2014 of 21 March 2014, implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, at point 5, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014R0284&from=FR>.

⁷³ *Dmitrij Konstantinovič Kiseľov v. Council of the European Union*, at para. 117, 2017 E.C.R. T-262/15, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62015TJ0262&from=EN>.

defenders of Ukrainian democracy to Nazis.⁷⁴ Additionally, EU personal sanctions against Kiselyov started a chain reaction in Estonia and Latvia where governments used them as a reason to sanction “non-designated entities”: national media affiliates of the news agency that he manages, as economic resources controlled by the targeted person. In another set of national cases the “restrictive measures” against Bank Rossiya were also applied, in the Baltics, to its media company and subsidiaries.⁷⁵

B. *RT & Sputnik Cases*

Following the full-scale invasion of Ukraine by the armed forces of the Russian Federation in March 2022, the EU banned the state-owned media outlets RT and Sputnik, and their subsidiaries, through sanctions or “special economic measures” in response to the conflict.⁷⁶ The EU justified the ban, reasoning those media outlets have been targeted as “essential and instrumental in bringing forward and supporting the aggression against Ukraine.”⁷⁷ Since then, the ban was expanded to include several other Russian national TV channels under state control, mostly Russian-language programmes.

Both the European Commission and the Council of the EU stated then that the sanctions were compatible with the European freedom of expression standards,⁷⁸ apparently meaning that the restrictions met the three-part test of legality, legitimate aim, and necessity and proportionality required by international human rights law.⁷⁹ As to the proportionality, the Regulation pointed that these measures “do not prevent those media outlets and their staff from carrying out other

⁷⁴ *Id.* at para. 104-105.

⁷⁵ See Francisco Cabrerar Blázquez, *The Implementation of EU Sanctions Against RT and Sputnik*, European Audiovisual Observatory, at 15, 18 (2022); See also Andrei Richter, *Sanction law against Russian and Belarusian audiovisual media*, EUROPEAN AUDIOVISUAL OBSERVATORY 1-29 (2022), <https://rm.coe.int/iris-extra-2022-sanction-law-against-russian-and-belarusian-audiovisua/1680a8ff9f>.

⁷⁶ Council Regulation 2022/350, O.J., (L65/1) of Mar. 1, 2022, Amending Reg. No 833/2014, *Concerning Restrictive Measures of Russia's Actions Destabilizing the Situation in Ukraine* (EU) [hereinafter *Concerning Restrictive Measures*] <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0350>.

⁷⁷ *Id.* at para. 9.

⁷⁸ *Id.* at para. 10.

⁷⁹ See Response to the Consultation, *supra* note 28.

activities in the Union than broadcasting, such as research and interviews,” nor did it ban their operation outside of the EU.⁸⁰

C. Interpretation

In 2022, the restriction was based, additionally, on an indirect interpretation of “propaganda for war,” by the European institutions. For example, the European Council referred to Russia’s “continuous and concerted propaganda actions” to “justify and support its aggression against Ukraine.”⁸¹ In its turn, the European Commission substantiated the sanctions by referring to the “massive propaganda and disinformation” of the Russian media outlets in relation to “*this outrageous attack on a free and independent country,*” and that they pour “*their toxic lies justifying Putin’s war,*” and pose a “significant and direct threat to the Union’s public order and security.”⁸²

According to the EU documents, the Russian Federation “has engaged in a systematic, international campaign of media manipulation and distortion of facts in order to enhance its strategy of destabilisation of its neighbouring countries and of the Union and its Member States.”⁸³ Those actions “have been channelled through a number of media outlets under the permanent direct or indirect control of the leadership of the Russian Federation. Such actions constitute a significant and direct threat to the Union’s public order and security,” and “are essential and instrumental in bringing forward and supporting the aggression against Ukraine, and for the destabilisation of its neighboring countries.”⁸⁴

It is prohibited for “operators to broadcast or to enable, facilitate or otherwise contribute to broadcast [in the EU], any content by the legal persons, entities or bodies [on the banned media list], including through transmission or distribution by any means such as cable, satellite, IP-TV, internet service providers, internet video-sharing platforms or applications, whether new or pre-installed.”⁸⁵ Further, the

⁸⁰ See *Concerning Restrictive Measures*, supra note 76 at para. 11.

⁸¹ *Id.* at para. 7.

⁸² European Commission Press Release IP/22/1490, Ukraine: Sanctions on Kremlin-backed Outlets Russia Today and Sputnik (Mar. 2, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1490.

⁸³ *Concerning Restrictive Measures*, supra note 76, at para. 6-9.

⁸⁴ *Id.*

⁸⁵ *Concerning Restrictive Measures*, supra note 76, at para. 1.

regulation states any “broadcasting licence or authorisation, transmission and distribution arrangement with the legal persons, entities or bodies [on the banned media list] shall be suspended.”⁸⁶ While it was also prohibited to “participate, knowingly and intentionally, in activities the object or effect of which is to circumvent prohibitions,”⁸⁷ there are reports of successful flouts by the Russian state media of the bans.⁸⁸

The abovementioned restrictive measures, said the EU, will be maintained “until the aggression against Ukraine is put to an end, and until the Russian Federation, and its associated media outlets, cease to conduct propaganda actions against the Union and its Member States.”⁸⁹

Such a tense narrative even allowed some authors to refer to the Regulation as restrictions of “[pro-war] propaganda” by inserting the attribution in square brackets.⁹⁰ In another interpretation of the reasoning behind the sanctions, the Denis Diderot Committee,⁹¹ in France, said:

The comments made on these channels, in particular on Rossiya 1, go beyond the ‘false narratives and disinformation’ mentioned in the documents of the European Council. In addition to legitimizing the rhetoric of aggression against Ukraine, they broadcast calls for the kidnapping and even the assassination of foreign leaders visiting Ukraine, statements inciting the genocide of Ukrainians, homophobic and antisemitic statements, legitimization of possible use of nuclear weapons against ‘40 Nazis States,’ announcement that

⁸⁶ *Id.*

⁸⁷ *Id.* at para. 3.

⁸⁸ Mark Scott, *Russian State Media Flouts European Sanctions*, POLITICO (July 20, 2022, 1:00 PM), <https://www.politico.eu/article/russia-europe-sanctions-social-media-rt/amp/>.

⁸⁹ *Concerning Restrictive Measures*, *supra* note 76, at para. 11.

⁹⁰ *See Carrillo*, *supra* note 31, at 83.

⁹¹ *See* COMITÉ DENIS DIDEROT DENIS DIDEROT COMMITTEE (a French NGO that aims at excluding war propaganda and disinformation in the Russian and Belarus electronic media, <https://www.denisdiderot.net/about> (last visited Mar. 27, 2023)).

World War III has begun and that Russia must ‘demilitarize NATO.’⁹²

The legality of the sanctions against the Russian media was confirmed by the Court of Justice of the European Union (CJEU).⁹³ In dismissing the claims of the RT branch in France, it treated the ban in Article 20(1) of the ICCPR quite broadly by saying that propaganda for war includes (1) propaganda “in favour of the military aggression against Ukraine targeted at civil society in the [European] Union and neighbouring countries”, (2) broadly understood propaganda *at war*, described as propaganda being “part of the context of an ongoing war”, started by an aggressor State, “in breach of the prohibition on the use of force”, and (3) “not only incitement to a future war, but also continuous, repeated and concerted statements in support of an ongoing war”, unleashed contrary to international law, “especially where those statements come from a media outlet under the direct or indirect control of the aggressor State.”⁹⁴ In this way, the Court also rejected the vision that propaganda for war is legitimate once the war began.

Speaking of the sanctions in the context of freedom and pluralism of the media, guaranteed by the EU Charter, the Court noted that the importance of the objectives pursued by the sanctions outweigh the negative consequences, however considerable, of these measures for the applicant media.⁹⁵ In its decision, the CJEU failed to address the arguments of the complainant on censorship or prior restraint that was introduced by the sanctions on the media concerned.

The EU sanctions against the Russian media were met with certain criticism by the international mandate-holders on freedom of

⁹² *Sanctions Against Three Russian State Channels—Rossiya 24, RTR Planeta and TV Centr International*, COMITÉ DENIS DIDEROT DENIS DIDEROT COMM, <https://www.denisdiderot.net/3russianstatetv> (last visited Mar. 27, 2023).

⁹³ *RT France v. Council of the European Union*, at para. 202, 210, 2022 E.C.R. T-125/22, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62022TJ0125>.

⁹⁴ *RT France v. Council of the European Union*, at para. 202, 210, 2022 E.C.R. T-125/22, <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62022TJ0125>.

⁹⁵ *Id.* at 202, 226.

expression,⁹⁶ scholars,⁹⁷ and human right organizations⁹⁸ as damaging the recognized interpretation of freedom of the media. Others, however, believed that they were appropriate as they “paled” by comparison “when contrasted with the Kremlin’s iron-fisted repression and blocking of all independent media inside Russia.”⁹⁹ It is worth noting that the EU sanctions were modeled, to a degree, after similar sanctions introduced earlier by Ukraine and some other Eastern European states.¹⁰⁰

The 2022 report of the Special Rapporteur on freedom of expression to the UN Human Rights Council and the General Assembly was intended to be an important modern response to war propaganda. Titled “Disinformation and freedom of opinion and expression during armed conflicts,”¹⁰¹ it is based on a number of formal submissions by the UN member states, academia, and human rights NGOs, and thus provides a broad context on the issue. Generally, it stays away from going deep into the propaganda for war issues by noting a “confusion among some States and companies about [the] scope [of propaganda for war], which underlines the need for further clarification.”¹⁰² The Report of the UN Special Rapporteur also questions the necessity and proportionality of the ban of Russian channels in Western Europe, “a region where independent media and fact-checkers are able to challenge disinformation and where other less drastic measures could have been considered.”¹⁰³

⁹⁶ See Ukraine, *supra* note, 41.

⁹⁷ Igor Popović, *The EU Ban of RT and Sputnik: Concerns Regarding Freedom of Expression*, EJIL BLOG (Mar. 30, 2022), <https://www.ejiltalk.org/the-eu-ban-of-rt-and-sputnik-concerns-regarding-freedom-of-expression/>.

⁹⁸ *Fighting Disinformation with Censorship is a Mistake*, EUR. FED’N OF JOURNALISTS (Mar. 1, 2022), <https://europeanjournalists.org/blog/2022/03/01/fighting-disinformation-with-censorship-is-a-mistake/>; IPI: *Statement on Banning of RT and Sputnik*, INT’L PRESS INST. (Mar. 4, 2022), <https://ipi.media/ipi-statement-on-banning-of-rtand-sputnik/>; Response to the Consultation, *supra* note 28, at 10-11.

⁹⁹ See Carrillo, *supra* note 31, at 85.

¹⁰⁰ See generally Andrei Richter, *Sanction law against Russian and Belarusian audiovisual media*, EUROPEAN AUDIOVISUAL OBSERVATORY 1-29 (2022), <https://rm.coe.int/iris-extra-2022-sanction-law-against-russian-and-belarusian-audiovisua/1680a8ff9f>.

¹⁰¹ *Disinformation and Freedom of Opinion*, *supra* note 1, at para. 26.

¹⁰² *Id.* at para. 39.

¹⁰³ *Id.* at para. 64.

As propaganda for war is present within social media as well, it is important to assess the actions made by social media companies to restrict or demote it. It turns out that the community standards, opinions, and legal reasoning of Meta’s oversight board have so far failed to address the propaganda issues beyond propaganda of terrorism despite some interest in hate speech.¹⁰⁴

Still, with the start of the full-scale Russian aggression in Ukraine, Meta responded to requests from the governments of Ukraine, the U.K., and the European Union to take steps relating to Russian state-controlled media. “[G]iven the exceptional circumstances,” Meta restricted access to RT and Sputnik accounts across the EU, downranked posts from other Russian state-controlled media, showed people a notice before they share content from these accounts, to let them know that the content comes from Russian state-controlled media, etc.¹⁰⁵

Meta also stopped removing content posted from ordinary Ukrainians expressing their resistance and fury at the invading military forces, which under different circumstances would be considered “hate speech” towards the Russian people.¹⁰⁶ Still it said it would not “tolerate Russophobia or any kind of discrimination, harassment or violence towards Russians on [its] platform.”¹⁰⁷

V. CONCLUSION

Until 2022, Western liberal democracies seemed to be still suffering from the Cold War syndrome when the idea to prohibit propaganda for war and hatred was met by them with a lukewarm response due to fears of harming free expression and suspicion of any ideas coming from the Eastern bloc.¹⁰⁸ In particular, the US officials

¹⁰⁴ Joan Barata, *The Decisions of the Oversight Board from the Perspective of International Human Rights Law*, GLOB. FREEDOM OF EXPRESSION COLUM. UNIV., 1, 4 (2022), <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2022/10/The-Decisions-of-the-OSB-from-the-Perspective-of-Intl-Human-Rights-Law-Joan-Barata-.pdf>.

¹⁰⁵ *Meta’s Ongoing Efforts Regarding Russia’s Invasion of Ukraine*, META (Mar. 8, 2022, 8:00 AM), <https://about.fb.com/news/2022/02/metas-ongoing-efforts-regarding-russias-invasion-of-ukraine/>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See Kearney, *supra* note 26, at 78-79, 111.

commented at *travaux preparatoires* of the ICCPR that the problem of propaganda and incitement was best treated by the “freest possible flow of information making facts available to the people,” as well as by individual self-discipline, “rather than by the enactment of laws that played into the hands of those who would attempt to restrict freedom of speech entirely.”¹⁰⁹ Only the current Russian aggression in Ukraine has provided enthusiasm for concerted international action to curb war propaganda.

If enforced in a judicial manner that is complacent with the rule of law, prohibition of propaganda for war and hatred assists, and does not restrict further enjoyment of freedom of expression. To make this manner effective it should firmly rely on clear-cut definitions and a solid basis in normative acts. So far the practice fails to prove this is the case.

Propaganda, when pervasive, massive, and systematic, is detrimental to freedom of the media. Propaganda destroys the core of the profession of journalism. It makes journalists hostages of sort, typically the government's, and thus hitting at the independence of the media. Journalists are forced or corrupted to be a mere conduit of the messages. If dominant in a given country, propaganda becomes an instrument to establish authoritarianism, thus, distorting not just pluralism of the media but other basic foundations of a democracy. Meanwhile, it affects the public trust in the free media, in the values and the meaning of the profession.¹¹⁰

Dangers of propaganda become a useful excuse for authoritarian governments to restrict or even ban all hostile messages coming from abroad, whether actual or potential. Since about 2015, National media regulators and standard-setting intergovernmental organizations have begun referring to “propaganda for war” when devising ways to block this evasive phenomenon. Propaganda threats give pretext for wider intervention of even the most liberal governments in the media and social media matters, e.g. thru licensing, regulation of transfrontier broadcasting, regulation of political advertising, co-regulation of oversight, and now—sanctions. They also test these tools against the global commitments on freedom of expression, freedom of information, and media freedom.

¹⁰⁹ *Id.* at 103, 119.

¹¹⁰ *See generally Propaganda and Freedom, supra* note 55.

Finally, propaganda is especially dangerous when emanating from the state-owned and state-run, also by proxy, media outlets. The use of public funds to impose a one-sided view is a corrupt practice. The two world wars and the Cold War that followed have proven that media in the hands of governments is a dangerous instrument.¹¹¹

Taken together, the changing phenomena of what is “propaganda” and what is “war” give grounds to redefine and expand the understanding of what is “propaganda for war.” The current war in Ukraine and other post-Soviet armed conflicts, military attacks by the radicals in the Middle East are typically accompanied by aggressive propaganda, providing certain urgency in researching this issue.

The contemporary response reminds of the early ideas on countermeasures against propaganda for war. The suggestions by the World Peace Congress of *boycott* can be linked to the European Commission’s ban (or sanctions, “special economic measures”) on propaganda broadcasters. The call to further *education* is visible in the “empowering users” through “media information literacy,” while the historical call for journalists to *refrain* from being involved in propaganda—in the particular promotion of the “integrity of services” and support for “quality journalism” today.¹¹²

“The prohibition of propaganda for war should be interpreted narrowly to ensure that it does not infringe on the right to protest and criticize,”—calls the Report by the UN Special Rapporteur.¹¹³ This study of the international law and policy on propaganda pitches for the first step to be a clearer distinction between propaganda for war, which may and should be prohibited, and any other propaganda which is not banned in the IHRL. The next step should indeed be a reinterpretation of war propaganda in full compliance with the existing international norms, and taking into consideration modern means of propaganda. Only then the governments could engage in negotiations, as to what should be done with other harmful propaganda.

As to the correlation of the ban on war propaganda and ban on disinformation, these seem to be different issues demanding various approaches. Any propaganda content, including incitement to

¹¹¹ *Id.*

¹¹² Council of Europe Press Release, *Council of Europe Calls on States to Support Quality Journalism: New Guidelines*, (Mar. 17, 2022), <https://www.coe.int/en/web/portal/-/council-of-europe-calls-on-states-to-support-quality-journalism-new-guidelines>.

¹¹³ *Disinformation and Freedom of Opinion*, *supra* note 1, para. 105.

aggression, might contain disinformation, be based on disinformation, or conspiracy theories, or on truthful facts. “True or false?” here neither plays a crucial role nor provides a definite response. It is another reason why disinformation should not be banned as such. States should not prohibit or restrict it unless it meets the requirements of legality, necessity, and legitimate aims as set out in Article 19 or unless propaganda, instrumentalized with falsities, amounts to incitement prohibited by Article 20 of the ICCPR.¹¹⁴

Politicians create confusion with their ideas of overbroad bans and safety nets; they create ambiguities, uncertainties, and perceived gaps in international legal standards. Those standards perhaps could be finetuned in the future, but first they should be strictly implemented.

¹¹⁴ *Id.* at para. 113.

AN EXPLORATORY COMPARATIVE STUDY
ON MISINFORMATION AND
DISINFORMATION
IN VISEGRAD COUNTRIES AND BEYOND
Andrej Školkay*

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ABSTRACT

This article is a comparative exploratory analysis of significant and symptomatic occurrences of misinformation and disinformation in foreign policy. The thematic foreign policy focus is on the Caucasus region and Russia. The examples analyzed were found in both the legacy media and on social media. They were produced by authorities/politicians, journalists/media, diplomats, experts and fact-checking/debunking initiatives within the EU in general, and in Czechia, Hungary, Poland and Slovakia, collectively known as the (“Visegrad Four”) or (“V4”). The examples found, in particular, those including coverage, commentaries and analyses of the 2008 Georgian-Russian war and the Smolensk air crash in 2010, were then compared with the most recent legislative initiatives aimed at targeting “fake news” (misinformation and disinformation) or freedom of speech on social media in these countries.

On the one hand, there are peculiar cases of foreign policy issues that have been misinterpreted. This misinterpretation, understood either as misinformation or disinformation, is being kept unchanged and continues to be further disseminated within specific foreign policy discourses among specific groups of stakeholders.

On the other hand, there have been interesting correlations identified between these foreign policy misinformation and disinformation tendencies, and the approaches towards tackling misinformation and disinformation at more general levels. In essence, the more the authorities produce or disseminate misinformation and disinformation, the less they are willing to tackle misinformation and disinformation in their regulatory approaches.

Initially, there was a radical trend favoring freedom of speech on platforms in both Hungary and Poland. However, there is a specific case in Czechia where any regulation of free speech on platforms is seen in the context of prioritizing freedom of speech in general. Thus, these findings uniquely bridge foreign policy events and regulatory policies in more than a decade, and do so with a focus on both domestic and foreign issues.

There are rather significant theoretical (academic) and political (foreign policy) implications originating from this study. For the former, there are implications for media/journalists and foreign policy analysts, and for the latter, there are implications for politicians and

diplomats. There are general legal issues to tackle for lawyers interested in international law and regulatory legislation. Specifically, how should foreign policy misinformation and disinformation produced by national authorities, including Parliament, be analyzed from a legal perspective? Accordingly, the study presents several follow-up research questions that have been identified but not yet fully explored.

I. INTRODUCTION

Following the Russian invasion of Ukraine, there was a rather quickly introduced EU-wide ban on five Russian media outlets operating within the EU.¹ The explanation offered was that: “Russia uses all these state-owned outlets to intentionally spread propaganda and conduct disinformation campaigns, including about its military aggression against Ukraine.”² Clearly, within international communication, the major attention is focused on the impact of malign foreign actors on the domestic and foreign policy of EU Member States³ (“EU M.S.”), and other liberal democracies, including, for example, Ukraine.⁴

Only occasionally are international or nationwide media from liberal-democratic countries mentioned as producers or disseminators

¹ Initially, the first Russian media outlets banned were RT English, RT UK, RT Germany, RT France, and RT Spanish, subsequently Rossiya RTR/RTR Planeta, Rossiya 24/Russia 24, TV Centre International were also banned. See Council of the European Union Press Release, EU Imposes Sanctions on State-Owned Outlets RT Russia Today and Sputnik’s Broadcasting in the EU (Mar. 2, 2022, 12:40 PM), <https://www.consilium.europa.eu/en/press/press-releases/2022/03/02/eu-imposes-sanctions-on-state-owned-outlets-rt-russia-today-and-sputnik-s-broadcasting-in-the-eu/>; Counsel of the European Union, *EU Sanctions Against Russia Explained*, <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/#individual>.

² See Counsel of the European Union, *EU Sanctions Against Russia Explained*, <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/#individual>.

³ See, e.g., Ireneusz Ciosek, *Aggravating Uncertainty, Russian Information Warfare in the West*, TORUN INT’L STUD. 57, (2020).

⁴ See generally Elina Lange-Ionatamišvili et al., *Analysis of Russia’s Information Campaign Against Ukraine* RIGA (2015).

of fake news.⁵ On the other hand, some governments tend to abuse citizens constitutional rights if they feel threatened by fake news producers.

Foreign policy thinking, communication, and execution face legal, constitutional, and empirical-practical problems. These problems are often associated with controversial definitions and labeling of large amounts of news, speeches, statements, or calls as being, partly or wholly based on, fake news or disinformation/misinformation. There are many academic and country-specific policy debates and studies about proper approaches to regulating either social media (as a major source or the main disseminator of disinformation and misinformation) or regulating “fake news” in general.⁶ However, a paradoxical problem, usually ignored—but certainly exists—that deserves more systematic academic attention is that there is an issue of production and dissemination of disinformation/misinformation, or indeed, mal-information, produced by the EU M.S., the EU authorities, experts, journalists/media, and ironically, fact-checking initiatives themselves within the foreign policy field. This is the key issue discussed in this article. There is somehow sidelined an issue of more systematic production and/or dissemination of sometimes rather fundamental misinformation, disinformation, and mal-information in foreign policy thinking, policymaking, and analysis by governmental authorities, experts, media, and fact-checking initiatives. Still, as the Russian invasion of Ukraine demonstrates, foreign policy is in no way an unimportant issue for smaller or medium-sized states. Moreover, some foreign policy issues such as those in the Caucasus region, or those with a focus on Russia, are either blurred for local audiences (e.g.

⁵ See Adrian-Viorel Dragomir et. al., *An Analysis of the Events that Led to the Exacerbation of the Black Sea Crisis in the Last Decade and the Role of Disinformation and Misinformation*, 66 INTERNAL AUDITING RISK & MGMT. 1, 28 (2022) (Monthly brief no. 16—EDMO fact-checking network argued “A new anti-Russia disinformation narrative emerged in September, with many false news reports exaggerating or caricaturing the phenomenon of young Russian males fleeing the country to escape the mobilization.”).

⁶ See Amy Kristin Sanders, et. al., *Stemming the Tide of Fake News: A Global Case Study of Decisions to Regulate*, 8 No. 2 J. INT'L MEDIA & ENT. L. 203, 207 (2019); See also Andrei Richter, *Fake News and Freedom of the Media*, 8 No. 1 J. INT'L MEDIA & ENT. L. 1, 1-3 (2018); Andrej Školkay, *An Exploratory Study of Global and Local Discourses on Social Media Regulation*, 10 GLOB. MEDIA J. GERMAN EDITION (2020).

Georgia-Russia War of 2008) and/or they are politically or ideologically interpreted and thus instrumentalized (e.g. the Smolensk air crash in 2010). Most often, audiences get familiar with these foreign policy issues through media reporting, or increasingly, through discussions on social media.

These issues are perhaps even more pronounced in democracies that slide towards autocracies, and/or within ideologically conservative regimes such as Hungary and Poland. For example, the public service media (“PSM”) in Poland are often seen as disseminating fake news, or in old terms, pro-governmental propaganda.⁷ This can be seen in a rather bizarre criminal defamation court case in 2019 where PSM TVP (“Polish Television”; one of the key TV stations in Poland) unsuccessfully sued a law professor who criticized a group of the Polish media as “Goebbels media.”⁸ Similarly, in Hungary, the government and its affiliated entities (including pro-governmental PSM) are seen by some observers as an occasional source of fake news or even producers and certainly disseminators of disinformation campaigns.⁹

In the case of Hungary, “the channels used to distribute pro-government propaganda . . . are not automated Twitter bots or untraceable Facebook accounts, but media outlets supported with government money, including widely read newspapers dependent on state advertising, online news sites teeming with government-funded banners, and morning talk shows on the public television channel.”¹⁰

⁷ See Andrzej Krajewski, *Monitoring of the 2019 European Parliament Election Campaign in the Main News Programme of Polish Public TV*, CITIZENS OBSERVATORY (2019); Krzysztof Bobiński & Andrzej Krajewski, *Polish Public Television: Propaganda Instead of News*, TOWARZYSTWO DZIENNIKARSKIE (Mar. 28, 2022), <http://towarzystwodziennikarskie.pl/en/2022/03/28/polish-public-television-propaganda-instead-of-news/>.

⁸ Daniel Tilles, *Polish State TV Loses Case Against Law Professor Who Described it as “Goebbels Media”*, NOTES FROM POL. (Dec. 7, 2022), <https://notesfrompoland.com/2022/12/07/polish-state-tv-loses-case-against-law-professor-who-described-it-as-goebbels-media/>.

⁹ See Patrik Szicherle & Péter Krekó, *Disinformation in Hungary: From Fabricated News to Discriminatory Legislation*, HEINRICH BÖLL STIFTUNG (June 7, 2021), <https://eu.boell.org/en/2021/06/07/disinformation-hungary-fabricated-news-discriminatory-legislation>.

¹⁰ Márton Bede, *Analysis: Hungarian Taxpayers Fund Unique ‘Fake News’ Industry* INT’L PRESS INST. (Jan. 1, 2021), <https://ipi.media/analysis-hungarian-taxpayers-fund-unique-fake-news-industry/>; Attila Bátorfy & Ágnes Urbán, *State*

In that sense, the Hungarian model is unique in the EU in that it is government-managed and government-funded. Finally, “the fact that the Orbán government has . . . gradually silencing independent media makes this model especially terrifying and effective.”¹¹

It is precisely this paradoxical international and regional political and media context that makes this comparative exploratory study of disinformation/misinformation/mal-information in foreign policy discourses of Czechia, Hungary, Poland and Slovakia both needed and challenging. How is it possible that Hungary and Poland, countries that had been seen as forerunners in political and economic reforms in the 1990s, currently seem to be so much involved in producing and/or disseminating foreign policy misinformation and disinformation at governmental and pro-governmental (media sector) levels? But do Czechia and Slovakia fare much better here, or can one identify disinformation and misinformation with a focus on foreign policy in these countries produced by authorities, and in the media sector, too? And if the latter is the case, what does it tell us about this issue?

Additionally, as will be shown, and perhaps expected, there are many challenges with respect to the correct interpretation of events and policies that concern foreign policy towards Russia or of Russia towards its neighbors. This interpretation issue was, until the Russian invasion of Ukraine in 2014, perhaps the most pronounced in the Caucasus region, and from the perspective of the EU M.S., in Poland and Hungary. At a very practical level, in some countries, perhaps ironically, “Government propaganda, media concentration, self-censorship and the failure of the democratic left are more of a threat than the global “fake news” as put by Aleksandra Eriksson in 2018.”¹²

This article further discusses these issues in the following parts. Initially, it further clarifies the research questions, the methodology used, and the case selection procedure. Then, it reviews previous research on the topic(s). This review could be done in a limited way only because there is no specific research that covers selected issues here in a systematic comparative way, or indeed, in all covered research fields. Moreover, this review could be done from many

Advertising as an Instrument of Transformation of the Media Market in Hungary, 36:1 EAST EUR. POL. 44, 49-50 (2020).

¹¹ *Id.*

¹² Aleksandra Eriksson, *The Pitfalls of Censoring Fake News*, 2 VISEGRAD INSIGHT 40 (2018).

different perspectives. Therefore, this section contains only a single controversial issue for an in-depth discussion.

What follows explains how fake news, hoaxes, disinformation and misinformation are understood and defined (either legally, or in professional-political discourses) in V4 countries. This allows us to understand why there have been different approaches chosen to malign threats alleged to be the same. Additionally, the author discusses different roles of local initiatives against fake news/misinformation / disinformation in V4, as well as tentatively discusses identified (officially or unofficially, or explicitly versus tacitly) major sources that have been labeled as originators of fake news, misinformation/disinformation in V4 countries. In particular, this overview allows us to understand why individual governments have enacted (or did not enact) certain regulatory measures and legislative initiatives against fake news, misinformation/disinformation.

What follows is a major part of this contribution—selected symptomatic examples of misinformation, disinformation and mal-information produced and/or disseminated by authorities, journalists/media, diplomats, experts and fact-checking/debunking initiatives. These examples raise the question of how it is possible that some untrue interpretations of well-known international events exist and are unchallenged. Finally, the author concludes with an analytical interpretation of these complex findings and provide suggestions for follow-up research, including topics for more specific and/or in-depth research.

II. RESEARCH QUESTIONS, METHODOLOGY AND THE CASE SELECTIONS PROCEDURE

This comparative research is based on a case study methodology and exploratory approach.¹³ For the case studies, a relatively

¹³ See *Exploratory Research: Types & Characteristics*, QUESTION PRO (June 7, 2023, 4:30 PM), <https://www.questionpro.com/blog/exploratory-research/> (“Exploratory research is defined as a research used to investigate a problem which is not clearly defined. It is conducted to have a better understanding of the existing problem, but will not provide conclusive results. For such a research, a researcher starts with a general idea and uses this research as a medium to identify issues, that can be the focus for future research. An important aspect here is that the researcher should be willing to change his/her direction subject to the revelation of new data or insight.”).

homogenous sample was selected—four democracies in Central-East Europe that are part of a loosely defined regional foreign policy lobby group—the V4. As mentioned, the members of this informal lobby group are Czechia, Hungary, Poland, and Slovakia. The V4 self-defines its purpose as “to work together in a number of fields of common interest within the all-European integration.”¹⁴

Moreover, the selection of this foreign policy lobby group is relevant from the point of methodology, since it allegedly represents a rather homogeneous sample. This can be confirmed further by V4’s self-description that they “have always been part of a single civilization sharing cultural and intellectual values and common roots in diverse religious traditions, which they wish to preserve and further strengthen.”¹⁵ However, as will be documented herein and already documented at the level of national regulatory authorities,¹⁶ approaches to tackle fake news/misinformation/disinformation in these four countries are significantly heterogenous, in spite of allegedly shared cultural values. The Hungarian government holds a radically different—less radical and the least anti-Russian foreign policy within the EU. In contrast, there is the most anti-Russian foreign policy in Poland, which is certainly the most radical within V4 and possibly within the EU, too (maybe with the exceptions of the Baltic states). This juxtaposition of the two countries actually puts this case selection into the category of the most diverse cases.

As is typical for an exploratory approach, the goal of this contribution is to identify problems, clarify concepts, and suggest hypotheses.¹⁷ By ‘identify[ing] problems’ the author searches to understand (a) whether and why there is an issue with fake news/disinformation/misinformation in foreign affairs within V4 bloc?; (b) How serious is this issue—are there extreme cases of /disinformation/misinformation found in foreign policy in V4 countries?; (c) Can the main sources of important fake news/disinformation/misinformation in this area be, (e.g.,

¹⁴ *About the Visegrad Group*, VISEGRAD GROUP, <https://www.visegradgroup.eu/about> (last visited May 31, 2023).

¹⁵ *Id.*

¹⁶ Andrej Školkay, *Social Media Regulation from the Perspectives of National Media Regulatory Authorities in V4*, 14 *MEDIÁLNÍ STUDIA*, 188 (2020).

¹⁷ See PERTTI ALASUUTARI, ET AL., *THE SAGE HANDBOOK OF SOCIAL RESEARCH METHODS* 2 (2009).

governments, parliaments, diplomats, media, etc.); (d) If this is so, how is it possible that fake news/disinformation/misinformation are produced not only by “foes,” but also by those players (e.g. governments or ministries of foreign affairs) where one would not expect that to be the case in a liberal democracy? (e) What possible lessons can be learned?

The term “clarifying concepts” requires the following inquiries: (a) What is the definition of fake news/disinformation/misinformation? (b) Who defines the terminology for fake news /disinformation/misinformation and their producers, and on what criteria within the selected countries chosen for the study? (c) What is meant by “vulnerability” to foreign (specifically, Russian) influence?

By “suggesting hypotheses,” the author aims to tentatively answer at least some of the above-mentioned questions. There is some hypothesis suggesting—that there exists some contextualized and temporal direct relationship between enforcing freedom of speech on platforms while, at the same time, believing in some conspiratorial tendencies and promoting/disseminating misinformation. Be that as it may, as it is typical for exploratory research, one ends up with more questions than answers—thus providing a fertile research ground for more qualitative or quantitative follow-up research.

As mentioned, the issues of fake news and hoaxes/disinformation/misinformation have become politically and scientifically relevant not only regionally, but also at the EU level. However, there is a relative lack of interest and a related paucity of academic analysis of the local production of misinformation and disinformation at the high political level. In any case, these issues are usually tackled as single case studies, and discussed from the perspectives of psychology or history, and tend to be rather descriptive. The author mentions such examples when discussing the Smolensk tragedy. This, in turn, justifies the use of the exploratory and comparative approach. It is the task of science, as well as the strength of democracy, to have a critical look at its own failures. Finally, the Russian invasion of Ukraine highlights the importance of foreign policy based on factually correct information and analysis.

It should be mentioned that the author uses the terms fake news, hoaxes, disinformation or misinformation, and mal-information as, by and large, synonyms throughout the article (with conceptual differences specified if needed and possible). This is so because

sometimes it is difficult to argue whether one item should be called misinformation, disinformation, mal-information, or a hoax. For example, it can be rationally assumed that some Polish politicians honestly believe that the Russian state caused the Smolensk tragedy.

A. *Previous Research on The Topic: Challenging “Vulnerability” Concept*

Considering the complexity and scope of this exploratory analysis, there are many possible ways to approach this overview. On the one hand, there was no identified comparative research with this specific focus (topics, geography, actors, time span, etc.). On the other hand, some of the discussed topics (e.g., the Georgia-Russia War, and the Smolensk Tragedy) have been extensively researched and discussed. Therefore, also due to space limitations, just one specific issue that seems to be relevant for a comparative focus and that broadens our knowledge (if reviewed critically) has been included in this review part. This so-called “Vulnerability Index” defines and identifies vulnerability towards foreign malign influence. If correct, such data may be found very useful for this type of analytical comparative study. In 2021, the Vulnerability Index, analyzed “the vulnerabilities” of selected countries towards foreign malign influence in five dimensions: public attitudes, political landscape, public administration, information landscape, and civic and academic space.¹⁸

Although this article primarily deals with domestic production, dissemination and interpretation of selected foreign policy narratives, this index (and other further cited similar indices) is still useful as an anchoring tool. However, the author interprets “anchoring” here differently than the authors of the Index. It should be perhaps corrected that this Index is not so much about “vulnerability.”¹⁹ In the author’s interpretation, it is specific to the Hungarian case and is about the increased level of tolerance or even symbiosis (congruence) between the discourses and policies in two (or more) countries (in this case, Hungary and Russia, and to lesser degree China). In that sense, it could

¹⁸ See VULNERABILITYINDEX, <http://www.vulnerabilityindex.org/> (last visited June 20, 2023).

¹⁹ *Id.* (explaining vulnerability is understood as “the quality or state of being exposed to the possibility of being attacked or harmed, either physically or emotionally”).

perhaps be called the “Congruence Index.” This important difference in the terminological specification (in contrast to the original authors’ perception) reflects indicators used (as cited above, with the important impact of the political landscape and public administration) as well as reflects in general rather skeptical long-term research results on the possible direct impact of propaganda of any type. For example, an important variable is missing in this index—general quality and quantity of foreign news as perceived by experts, the public, or ideally, as presented in qualitative and quantitative studies. On the other hand, there are some indicators whose analytical usefulness may be seen as questionable—e.g., cyber security capacity.²⁰

There are other indicators that would benefit from revisions, too. For example, within the cumulative indicator “Perception of Russia,” there are sub-indicators: “Russian military is better,” “Russia provokes conflicts,” “Russia is aggressive,” and “Russia is a threat.” First, it is strange that there is only one sub-indicator for China—“China is a threat.” Second, on what basis can an average analyst or non-expert assess Russia’s military abilities/qualities? Similarly, what is the difference between the last three sub-indicators (provokes conflicts, aggression, and a threat)? Be that as it may, how can one correctly assess whether Russia is aggressive when there are indeed wide misperceptions of some key recent relevant and related historical events? Third, it would be interesting to have included a sub-indicator such as “Russia is a political model to follow,” which would possibly be a better indicator of how vulnerable countries are to Russia’s (or China’s) influence. Additionally, there are many other variables and indices that would also deserve critical discussion.

On a scale of 1-100 (0 is the most resilient and 100 the most vulnerable) the Vulnerability Index revealed the vulnerabilities towards Russia’s and Chinese’s influence in Czechia (at 29 points), Slovakia (at 32) and Hungary (at 44) (data for Poland was unavailable).²¹ An earlier Vulnerability Index, in 2017 identified Hungary (at 57 points) as the most vulnerable country, closely followed by Slovakia (51), then followed with distance by both

²⁰ See generally *Vulnerability Index 2021*, GLOBSEC (2021), http://www.vulnerabilityindex.org/downloads.html/Globsec_VI_Methodology.pdf.

²¹ See VULNERABILITYINDEX, *supra* note 18.

Czechia (38) and Poland (30).²² Similarly, based on a different methodology, the Kremlin Influence Index, also in 2017 identified Hungary (61) (compared with Czechia-48, Georgia-54, and Ukraine-49) as the most vulnerable country to the capacity of Russia to influence (initiate, change) the processes in the information space (production, exchange and consuming of information).²³

The author considers all these indices to be more likely indicators of discourses and policy congruence rather than indicators of vulnerability or as a source of influence in the process of information elaboration. Based on this brief critical overview and conceptual/terminological clarifications, one can assume that Hungary is not that susceptible to foreign malign influence. Rather, one can assume that foreign policy issues may be most often and/or most successfully *internally* instrumentalized in Hungary for misinformation and disinformation purposes (aiming primarily at internal audiences) by local actors.

But why is there a relatively and comparatively high congruence with Russian foreign policy in Hungary, as seen in domestic instrumentalization? The answers to this fundamental question differ. For example, William Natrass argues that Hungary's "pro-Russia" stance is the result of historical and recent political factors, many of which have been shaped by Orbán himself.²⁴ Others include the energy dependency and the political model of Russia's illiberal state as the reason for Orbán's positive (or at least not as critical) attitude towards Russia.²⁵ Professor Péter Krekó, director of the Political Capital Institute, found four main factors here: "energy ties, business deals and corrosive capital, intelligence penetration, and information

²² Daniel Milo & Katarína Klingová, *Vulnerability Index: Subversive Russian Influence in Central Europe*, GLOBSEC (2017), <https://www.globsec.org/sites/default/files/2017-08/globsec-vulnerability-index.pdf>.

²³ Tamar Kintsurashvili et al., *Kremlin Influence Index*, MEDIA DEV. FOUND. (2017).

²⁴ See William Natrass, *Hungary's 'Pro-Russia' Stance Was Inevitable*, POLITICO (Sept. 15, 2022, 4:04 AM), <https://www.politico.eu/article/hungary-pro-russia-stance-inevitable/>.

²⁵ See Amanda Coakley, *Putin's Trojan Horse Inside the European Union*, FOREIGN POLICY (Aug. 3, 2022, 11:09 AM), <https://foreignpolicy.com/2022/08/03/hungary-orban-russia-conservative-politics/>.

influence.”²⁶ Others see this as just the distinct foreign policy path that was announced by the Hungarian Ministry of Foreign Affairs in 2012 to pursue a multivector diplomatic and economic foreign approach based mainly on the economic interests of Hungary’s—so-called “Eastern Opening.”²⁷

Some authors rightly point to the increased vulnerability, but *as a result of chosen policies*: “What the Hungarian government could really offer in return for the Chinese and Russian diplomatic support and some of these business deals favoring governmental oligarchs was increased vulnerability, starting with the Hungarian public sphere and ending with national security issues.”²⁸ Indeed, Balázs Orbán, political director to Prime Minister Viktor Orbán, has written in his book that Germany, Russia, USA, and China, together with Turkey (understood as historical Ottoman Empire) have been the most significant partners of Hungary. Moreover, among the key ideas he expressed that “states pursue their own interests” and “the most important actors in foreign policy are states.”²⁹

Within this context, it may be true that the most disinformation during the elections campaign before the 2019 European Parliament elections among EU member states was disseminated in Hungary.³⁰ This trend seemed to continue in Hungary, where news spread by the Russian media was often picked up without any criticism by the media in Hungary.³¹ It also should be explained that the Russian media does

²⁶ Péter Krekó, *Russian Influence in Hungary*, ING2 Committee Hearing on *Russian Interference in the EU: The Distinct Cases of Hungary and Spain*, EUROPEAN PARLIAMENT (Oct. 27, 2022).

²⁷ Zsuzsanna Végh, *Hungary’s “Eastern Opening” Policy Toward Russia*, 24 INT’L ISSUES & SLOVAK FOREIGN POL’Y AFF. 47 (2015); István Tarrósy & Zoltán Vörös, *Hungary’s Global Opening to an Interpolar World*, 28 POLITEJA 139 (2014); Abby Innes, *Hungary’s Illiberal Democracy*, 114 CURRENT HISTORY 95 (2015).

²⁸ Lóránt Györi, *Hungary Gives Up Its Fierce Pro-Kremlin Stance At Last*, VSQUARE (Mar. 3, 2022), <https://vsquare.org/hungary-gives-up-its-fierce-pro-kremlin-stance-at-last/>.

²⁹ BALÁZS ORBÁN, *THE HUNGARIAN WAY OF STRATEGY 180-182* (2021).

³⁰ See Lóránt Györ, *Putin’s Propaganda came from the Hungarian Government Media in the EP Campaign*, ATLATSZO (May 24, 2019), <https://pcblogger.atlatszo.hu/2019/05/24/putyin-propagandaja-szolt-a-hazai-kormanymediabol-az-ep-kampanyban/>.

³¹ Kafkadesk Budapest Office, *Meet Lakmusz, the Fact-checking Squad Debunking Fake News in Hungary*, Kafkadesk (Feb. 3, 2022),

not play a significant role in any dissemination of Russia's preferred narratives among foreign audiences. Rather, they are a source of narratives for the local pro-Russian media, in particular fringe media.³² It is useful to cite an expert opinion that, although not focused specifically on the Hungarian situation, it is quite helpful here:

The media, described as a tool of "Russian propaganda," do not offer much more as an alternative than support for some of the Kremlin's power moves abroad, for example in Syria or Ukraine. They do not present the existing model of political and socio-economic organization in the Russian Federation as a positive alternative. On the other hand, they concentrate various frustrations of a large part of the public, either from socio-economic development or from the wars led by the US and other Western states in various parts of the world, the legitimacy of which is at least questionable.³³

The argument is that Hungarian authorities tolerate "alternative" fringe news outlets, including those produced by foreign actors (e.g., Russia), precisely for identified reasons. This is simply because the Hungarian authorities and Hungarian pro-governmental media, occasionally instrumentalize these sources, and moreover, they themselves are involved in the production of misinformation and disinformation. Perhaps most importantly, the government enforces foreign affairs policies and communications that are more in line with (or less critical to) policies of certain foreign actors than in the other three V4 countries (or the EU as such).

Indeed, there are many studies, some already cited (including the Vulnerability Index that uses data from the V-Democracy Index), that point to misinformation and disinformation produced by authorities

<https://Kafkadesk.Org/2022/02/03/Meet-Lakmusz-The-Fact-Checking-Squad-Debunking-Fake-News-In-Hungary/>.

³² See Kintsurashvili, *supra* note 23, at 8.

³³ Juraj Marušiak, *Not Only About Russian Propaganda*, PRAVDA (Jan. 3, 2017, 8:00 AM), <https://nazory.pravda.sk/analyzy-a-postrehy/clanok/415537-nielen-oruskej-propagande/>.

and pro-governmental outlets in Hungary and Poland.³⁴ Even more so, “fake news accusations have been instrumentalised as a discursive strategy to discredit the rival understanding of ‘good journalism.’”³⁵ There has also been, for over a decade, a Polish PiS (Law and Justice) party “promoting a heterodox explanation model for the Smolensk tragedy—in other words, a conspiracy theory.”³⁶ What matters is that for this phenomenon, indeed, congruence or self-induced vulnerability (to irrational thinking lead by emotions in the Polish case) is a better word than vulnerability. It is not just a matter of the words used—it is a totally different analytical concept and perspective. It is a paradigmatic change. One can indirectly support this novel finding (and suggested terminological corrections as well as resulting in different analytical interpretations) with results from a comparative survey and three country-specific national surveys.

The first survey shows attitudes towards Ukrainian refugees. Only Polish respondents showed a more generous approach towards them (only 15% would allow “none or only a few”). This “negative” data for Czechia, Hungary and Slovakia was actually identical (and as different from Poland): approximately 40%.³⁷ The more ambiguous question (“satisfaction with government actions towards Ukrainian refugees”) showed more diverse results: Slovakia (3.7 out of 10), Czechia (4.1), Hungary (5.2) and Poland (5.5). It is unclear whether governments were doing enough or should do more. Finally, there was a question about the moral duty to (help) Ukraine/Ukrainian refugees. Perhaps surprisingly, the majority of Hungarians (59%) felt they have somewhat of an extreme duty towards Ukraine, in contrast to about a third of Czechs and Slovaks each. Poles were somewhere in between,

³⁴ See, e.g., Patrik Szicherle & Péter Krekó, *Disinformation in Hungary: From Fabricated News to Discriminatory Legislation* (June 7, 2021), <https://eu.boell.org/en/2021/06/07/disinformation-hungary-fabricated-news-discriminatory-legislation>.

³⁵ Péter Bajomi-Lázár & Kata Horváth, *Two Journalistic Cultures in One Country. The Case of Hungary in the Light of Journalists’ Discourses on Fake News*, JOURNALISM PRACTICE (2023), <https://www.tandfonline.com/doi/full/10.1080/17512786.2023.2223173>.

³⁶ ALOIS STREICHER, TRUTH AND FICTION: CONSPIRACY THEORIES IN EASTERN EUROPEAN CULTURE AND LITERATURE 297 (2020).

³⁷ Lenka Dražanová & Andrew Geddes, *Attitudes Towards Ukrainian Refugees and Governmental Responses in 8 European Countries*, ASILE (Sept. 6, 2022), <https://www.asileproject.eu/attitudes-towards-ukrainian-refugees-and-governmental-responses-in-8-european-countries/>.

reaching about 45%. Clearly, the attitudes of Hungarians towards Ukrainians do not show any impact or susceptibility to Russian propaganda.³⁸

The second survey, in July 2022 showed that more than half of Slovaks would welcome a military victory of Russia over Ukraine in autumn 2022.³⁹ The third survey from September 2022 (based on a different methodology) showed that 47% of Slovak respondents would prefer the victory of Ukraine while the victory of Russia would prefer only 19% of respondents.⁴⁰ It is unknown what would be the results for Hungary, but this national data (although a bit inconsistent), as well as already available comparative data, questions the hypothesis about the higher vulnerability of Hungarians (or Hungary, for that matter) towards foreign misinformation. This can be confirmed in other surveys, too. For example, the April-May 2022 survey found that Ukraine and Russia were both quite negatively perceived and judged by Hungarians, with Ukraine perceived more favorably.⁴¹

The lesson from this overview is that, apparently, there is an analytical confusion or unacknowledged conceptual merger between “vulnerability” and “congruence.” Congruence suggests a more active approach and, in effect, a policy choice. It also suggests the limited impact of propaganda (or fake news and disinformation). In contrast, vulnerability paints rather passive actors, possibly a huge impact of propaganda, and limited foreign policy choices. In general, there appear to be rather questionable variables used for various indices. Many of these variables expect in-depth knowledge in many different areas—which is an unrealistic goal. Moreover, sometimes contradictory, or at least of little consistency, the results from public

³⁸ The study surveyed a combined total of 8525 respondents in the eight countries between May 25th and June 6th 2022 with nationally representative samples of approximately 1000 respondents.

³⁹ Michal Hudec, *Most Slovaks Want Russia to Win Ukraine War*, EURACTIV (Sept. 14, 2022), https://www.euractiv.com/section/politics/short_news/most-slovaks-want-russia-to-win-ukraine-war/.

⁴⁰ Lukáš Kovalčík, *Vojna na Ukrajine: Takmer štvrtine Slovákov je jedno, kto zvíťazí. Alarmujúci je aj počet ľudí, ktorí fandia Rusku*, STARTITUP (Apr. 10, 2022), <https://www.startitup.sk/vojna-na-ukrajine-takmer-stvrtine-slovakov-je-jedno-kto-zvitazi-almujuci-je-aj-pocet-ktory-fandi-rusku/>.

⁴¹ Andrea Szabó & Zsolt Enyedi, *Opposition Voters do not Share Their Parties' Pro-Ukraine Stance*, TELEX (May 27, 2022, 10:17 AM), <https://telex.hu/english/2022/05/27/opposition-voters-do-not-share-their-parties-pro-ukraine-stance>.

opinion surveys do not contribute to analytical clarity either. This all leads to rather controversial analytical conclusions as well and it does not promote the best follow-up foreign policy options for those actors who follow the original interpretation of this index. In contrast, alternative and correct terminology (and change in analytical perspective) allows us to frame and explain divergent Hungarian findings in a proper analytical and comparative context.

This *pars pro toto* overview actually revealed a rather serious problem in how the impact of foreign misinformation/disinformation or other seemingly relevant factors among some analysts is understood.⁴²

III. UNDERSTANDING FAKE NEWS, HOAXES AND DISINFORMATION/ MISINFORMATION IN V4

Although V4 countries are seen as culturally homogeneous, there have been “drastically different approaches to understanding and tackling fake news”⁴³ in the past. There was no clear consensus about the best regulatory approaches to social media either.⁴⁴ In Poland, the concept of “disinformation,” has been defined in the Draft Act on the Protection of Freedom of Speech in Online Social Networks. Disinformation should be understood as “false or misleading information produced, presented and disseminated for profit or violation of a significant public interest or causing personal injury or property damage.”⁴⁵ In Article 3(6), the draft clearly states that disinformation is unlawful. Unlike the EU Code on disinformation, the Polish drafter covered not only public damage, but also damage caused

⁴² The initial partial findings were sent to the key coordinators of Vulnerability Index: Dominika Hajdu & Katarína Klingová, however, although the email was acknowledged, there was no interest in discussing this issue further.

⁴³ Maryia Sadouskaya-Komlach, *Fake News in Visegrad: Overused and Underestimated*, GREEN EUR. J. (2018), <https://www.greeneuropeanjournal.eu/fake-news-in-visegrad-overused-and-underestimated/>.

⁴⁴ See generally Andrej Školkay, *Social Media Regulation from the Perspectives of National Media Regulatory Authorities in V4*, J. FOR CRITICAL MEDIA INQUIRY (2020),

https://www.researchgate.net/publication/342599396_Social_Media_Regulation_from_the_Perspectives_of_National_Media_Regulatory_Authorities_in_V4.

⁴⁵ Homeland Defence Act (2022 r. DZ. U. poz. 655).

to specific persons.⁴⁶ In addition, when it comes to public damage caused by disinformation, there is only regulation combating the dissemination of false information in connection with the election campaign as defined in the Electoral Code.

In Czechia, the Ministry of Interior refers to the “ABC approach” when identifying disinformation. There are three criteria: the accuracy of factual statements, balance in reporting, and the credibility of the sources chosen.⁴⁷ In contrast, Manipulatori NGO defined disinformation as “lying, deceptive, false information that aims to influence the judgment and opinion of an individual, several persons or the entire society.”⁴⁸ This definition was adapted and used in annual 2022 security situation report.⁴⁹ Furthermore, NGO Manipulatori defined fake news as “false, distorted news.” It involves the deliberate dissemination of misinformation through traditional or online media.⁵⁰ Similarly, a hoax is defined as “a deliberately created deception masquerading as the truth. In a broader sense, it can also mean false news, mystification, alarm news, but also a joke.”⁵¹

In Slovakia, the Police defined disinformation indirectly. The “main goal of primary disinformation creators was to cause chaos in society and undermine trust in the state, which was directly related to spread of hatred and mistrust of state institutions. Disinformation has become a hybrid tool in a form of attack on the Slovak Republic interests as well as the security of its citizens.”⁵² The 2018 Act on

⁴⁶ Xawery Konarski, *Online Disinformation—How to Understand it and what are the Legal Means of Combating it in Poland and the EU*, TKP (Apr. 26, 2022), <https://www.traple.pl/dezinformacja-online-jak-ja-rozumiec-i-jakie-sa-srodki-prawne-jej-zwalczania-w-polsce-i-ue/>; Marcin. Wielec, *Criminal Law Aspects of Combating Fake News in Poland* 1(2) EUR. INTEGRATION STUD. 179-192 (2021), <https://doi.org/10.55073/2021.2.179-192>.

⁴⁷ See Ben Nimmo, *Identifying Disinformation: an ABC*, *Inst. of Eur. Stud.* (Feb. 1, 2016), http://aei.pitt.edu/82522/1/PB_2016_01_Ben_Nimmo.pdf.

⁴⁸ *Disinformation*, MANIPULATORI, <https://manipulatori.cz/lexikon/dezinformace/> (last visited June 1, 2023).

⁴⁹ See Ministry of Interior, Ministry of Justice and Ministry of Defence, *Analýza připravenosti České republiky čelit závažné dezinformační vlně*, 2022, at 17.

⁵⁰ *Fake News*, MANIPULATORI, <https://manipulatori.cz/lexikon/fake-news/> (last visited June 1, 2023).

⁵¹ *Hoax*, MANIPULATORI, <https://manipulatori.cz/lexikon/hoax/> (last visited June 1, 2023).

⁵² *Communication and Prevention Department of the Presidium of the Police Force, Police Force Report on Disinformation of the Slovak Republic in 2021*, 5

Cybersecurity includes a definition of “harmful content” as “an activity, data or program resource that has or may result in damage or threat to security, foreign policy or economic interests of the Slovak Republic and is a form of hybrid threat.”⁵³

In Hungary, interestingly, following the COVID-19 pandemic in 2020, the local independent media, the opposition and “international liberals” became accused of producing fake news by PSM radio. The authors called this type of discourse about fake news right-wing and populist.⁵⁴ On the official website, koronavirus.gov.hu, there is a list of governmental definitions of which we put two (untrue, panic-inducing information type of fake news or prank mostly received by e-mail) into Table 1.

In addition, the National Media and Communication Authority (NMHH) defined five hallmarks of fake news in Table 1. [See <https://perma.cc/4294-U9WT> to Access Table].

Clearly, there is no consensus on key definitions within V4 countries. At a governmental level, there are different approaches, whether one should use a key label “disinformation” (Poland), “fake news” (Hungary), or “harmful content” (Slovakia).

A. *Initiatives Against Fake News / Disinformation / Misinformation in V4*

Regarding fact-checking and debunking, it should be noted that “science supporting its efficacy is at best, mixed.”⁵⁵ Some even argue that the consequences of disinformation can be mitigated, but disinformation is not a solvable problem.⁵⁶ Similarly, some results are “inconsistent with a simple hypothesis that fake news crowds out hard

(2022), https://www.minv.sk/swift_data/source/images/slovak-republic-report-dezinfo-2021.pdf.

⁵³ National Council of the Slovak Republic (Jan. 30, 2018), https://www.sk-cert.sk/wp-content/uploads/2018/03/2018_69-Act-on-Cybersecurity.pdf.

⁵⁴ Jenő Bódi et. al., *Az álhír fogalmának átalakulása a közszolgálati híradóban* (The changing concept of fake news in public service news. An analysis of Hirado.hu’s content on fake news, 2010–2020), *MEDIAKUTATO* 7-26, (2022), https://www.mediakutato.hu/cikk/2022_01_tavasz/01_az_alhir_fogalmanak_atalakulasa.pdf.

⁵⁵ David Lazer et al., *The Science of Fake News*, *SCIENCE* 359 (2018).

⁵⁶ See generally BRANDON VALERIANO ET AL., *CYBER STRATEGY: THE EVOLVING CHARACTER OF POWER AND COERCION* (2018).

news consumption.”⁵⁷ In other words, fake news consumption seems to be heavily concentrated among a small group of news consumers.⁵⁸ Moreover, it seems logical that in heavily polarized political and media systems (such as Hungary and Poland) pro-government supporters are not necessarily interested in critical opinions that would challenge their deeply rooted ideas.⁵⁹ Nonetheless, there is quite extensive but asymmetric network of governmental, private and non-governmental initiatives in this area and in this region. The following summary is incomplete, but still rather extensive. There is the Central European Digital Media Observatory that includes eight partners from Czechia, Poland and Slovakia.⁶⁰ There are some attempts to employ AI in the process of debunking.⁶¹

In Czechia, there are about ten fact-checking initiatives: manipulatori.cz, demagog.cz, hoax.cz, Kremlinwatch.eu, HlídaciPes.org and Neovlivni.cz.⁶² There is also a single fact checker from AFP.⁶³ Among these, Kremlinwatch.eu, followed by HlídaciPes.org and StopFake.cz tackle Russian disinformation. There was also a governmental plenipotentiary for disinformation, as well as the Centre against Terrorism and Hybrid Threats affiliated with the Ministry of Interior. However, this position was abolished in February 2023.

⁵⁷ Andrew Guess et al., *Selective Exposure to Misinformation: Evidence from the Consumption of Fake News During the 2016 U.S. Presidential Campaign*, EUR. RSCH. COUNS. 26 (Jan. 9, 2018), <https://about.fb.com/wp-content/uploads/2018/01/fake-news-2016.pdf>.

⁵⁸ *Id.*

⁵⁹ See Luca Bertuzzi & Vlad Maksimov, *EU Funds Fact-checking Website in Hungary Ahead of Crucial Elections*, EURACTIV (Jan. 17, 2022), <https://www.euractiv.com/section/media/news/eu-funds-fact-checking-website-in-hungary-ahead-of-crucial-elections/>.

⁶⁰ See CEDMO, <https://kinit.sk/project/cedmo-central-european-digital-media-observatory/> (last visited Apr. 19, 2023).

⁶¹ *About Project*, KINIT, <https://oznacuj-dezinfo.kinit.sk/> (last visited Apr. 19, 2023).

⁶² See Katarzyna Giereło-Klimaszewska, *Political Fact-checking in the Czech Republic on the Example of Demagog.cz and Manipulatori.cz Portals*, 3(1) MEDIATIZATION STUDIES, 115–135 (2019), <https://journals.umcs.pl/ms/article/view/8364>

⁶³ See *Facebook has News Launches Fact-checking in Slovakia and the Czech Republic (VIDEO)*, O MEDIACH, (Feb. 11, 2022), <https://www.omediach.com/hoaxy/17165-facebook-ma-novinku-na-slovensku-a-v-cr-spusta-fact-checking-video>.

In Slovakia, Hoaxes and Scams the Facebook page of the Police claims to be the most followed page in Slovakia focused on misinformation with almost 150,000 followers in 2023. One of the most common disinformation narratives that it debunked was related to foreign affairs that the pandemic is a secret plan by the powerful to rule/destroy humanity. Significantly, the 2021 Report raised the issue of foreign actors' involvement: "It is possible that their actions were trying to support the foreign policy interests of state powers abroad. Foreign state powers tried to spread their narratives through their own or befriended media, or fictitious independent activists, often communicating in different way within their own state."⁶⁴

In the private sector, there is just a single fact checker from AFP.⁶⁵ Additionally, there are also some NGOs that are involved in monitoring and debunking as presented in Table 2.

In Hungary, there has been a fact-checking website named Lakmusz since January 2022.⁶⁶ Interestingly, it was almost immediately attacked for "[t]he Soros networks and methods behind this project."⁶⁷ Earlier initiatives included the investigative journalism nonprofit and a watchdog NGO *atlatszo.hu*.⁶⁸ The NMHH regards increasing consumer (which includes terminologically citizens) awareness against misinformation as its primary goal.⁶⁹ There also was a pro-Russian, pro-government Facebook page called Numbers (Számok)—the antidote to left-wing fake news, which claims to debunk the liberal propaganda/fake news.⁷⁰ There are *urbanlegends.hu*, and campaigns by *buvosvolgy.hu* and *kekvonat.hu*

⁶⁴ See *Communication and Prevention*, *supra* note 52 at 5.

⁶⁵ See Martin Hodás, *It Verifies Messages for Facebook: You Can Make Up a Hoax in 10 Minutes. We Refute Him for Days*, ZIVE (May 9, 2020), <https://zive.aktuality.sk/clanok/146760/overuje-spravy-pre-facebook-hoax-vymyslite-za-10-minut-vyvraciame-ho-cele-dni/>.

⁶⁶ See *Kafkadesk Budapest*, *supra* note 31.

⁶⁷ OJIM, *A Hungarian-fact Checker in Partnership with European Commission and AFP: Soro's Shadow* (Feb. 14, 2022), <https://visegradpost.com/en/2022/02/22/a-hungarian-fact-checker-in-partnership-with-the-european-commission-and-afp-soros-shadow/>.

⁶⁸ ATLATZO, <https://english.atlatszo.hu/about-us/> (last visited Apr. 19, 2023).

⁶⁹ *About Us*, NMHH, <https://english.nmhh.hu/the-nmhh> (last visited July 1, 2023).

⁷⁰ See Számok—a baloldali álhírek ellenszere, FACEBOOK, https://www.facebook.com/szamokadatok/?locale=it_IT (last visited Sept. 23, 2023) (announcing termination of its further activities in March 2023, with over 100,000 followers).

(teaching plan, the campaign “recognizing fake news for 17-18 y. olds”), oszd okosan (“share wisely,” people can check whether it is worth sharing a link), Tudatos Net (Conscious Net), Idea Foundation (teaching material), and Álhírvadász (fake news hunter).⁷¹

In Poland, there were eight fact-checking initiatives in 2019 (Demagog, Konkret24, Demaskator24, Trudat, “Keyboard Warriors”, OKO.press, Sprawdzam AFP and Antyfake).⁷² Among these, the majority tackle Russian disinformation. In addition, the Polish Platform for Homeland Security (PPHS) was governmental. [See <https://perma.cc/4294-U9WT> to Access Table].

The Hungarian case appears to represent the least governmental effort to tackle disinformation. Czechia and Slovakia are the most active in this area, while Poland seems to be located somewhere in between Hungary and Slovakia and Czechia. A major leveraging role seems to play the European Commission with its indirect funding of new fact-checking and debunking initiatives. This finding supports the argument of congruence rather than vulnerability in the case of Hungary. This finding is supported by data from Table 3. The data in Table 3 strongly suggests that Czechia and Slovakia seem to feel that they are the most vulnerable to foreign disinformation campaigns. There is a specific and identical situation in both Hungary and Poland. Although there are no “alternative” disinformation/fake news-specific sources banned or targeted legally, both governments and pro-governmental media believe and argue that oppositional politicians, critical media, and liberals in general produce fake news and disinformation. [See <https://perma.cc/4294-U9WT> to Access Table].

B. Legislation Targeting Fake News and Hoaxes in V4

⁷¹ Ivan Marinov, *Source analysis: Szamokadat.hu*, URBAN LEGENDS (Nov. 3, 2022), <https://www.urbanlegends.hu/2022/03/forraslemzes-szamokadatok-hu/>; *Fake News Hunting: Engaging Teenagers in the FakeHunter Game in Libraries*, KIT hírlevél, http://www.kithirlevel.hu/index.php?kh=alhirvadaszat_tizenevesek_bevonasa_a_fa_kehunter_jatekba_a_konyvtarakban (last visited July 1, 2023).

⁷² Michał Kuś & Paulina Barczyszyn-Madziarz, *Fact-checking Initiatives as Promoters of Media and Information Literacy: The Case of Poland*, CEJC 2, 249-265 (2020).

Following the Russian invasion of Ukraine in February 2022, in addition to the EU-central ban on certain Russian outlets,⁷³ two V4 countries (Czechia and Slovakia) banned some local news and current affairs websites that were seen as—in general and often not in openly acknowledged terms—a threat to national security. In local conditions, these websites were listed among 262 “controversial” outlets, according to the local vigilante initiative.⁷⁴ However, as it is clear from the list, those banned websites were not selected based solely on their ranking in this list of controversial websites. It seems that (in addition to controversial content) a combination of “intensity” and “popularity” was used when considering their blocking. In fact, the official reasons used for the temporary ban were not very transparent and supported by evidence, and certainly widely seen as controversial from a legal–constitutional point of view. In short, there were arguments concerning the legality of these acts when considering the European Court of Human Rights case law. Moreover, it was not certain whether there has not been re-introduced (preventive) censorship in both cases, especially in the Czech case.⁷⁵ The Czech Constitution allows limits on freedom of expression and freedom to disseminate information only under specific conditions laid by the law. This clearly did not happen. A non-state body introduced the ban without any legislative support.

In the Slovak case, the hastily passed law was used, but arguments used for banning certain websites were seen as insufficient and publicly available evidence justifying that such an approach was entirely missing. Interestingly, new temporary legislation passed by the Slovak Parliament in 2022 brought more transparency and legality into the process, but it could still be seen as a legally constitutionally problematic approach.

⁷³ See Press Release, EU Imposes Sanctions on State-owned Outlets RY/Russia Today and Sputnik’s Broadcasting in the EU, U.N. Press Release (Mar. 2, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/03/02/eu-imposes-sanctions-on-state-owned-outlets-rt-russia-today-and-sputnik-s-broadcasting-in-the-eu/>.

⁷⁴ *Introduction*, KONSPIRATORI, <https://konspiratori.sk/zoznam-stranok> (last visited July 3, 2023).

⁷⁵ See Tomáš Munzar, *Dezinformace jako výzva pro demokratický právní stát v České republice* (Jun 29, 2023), *Advokátní denník*, <https://advokatnidenik.cz/2023/06/29/dezinformace-jako-vyzva-pro-demokraticky-pravni-stat-v-ceske-republice/>.

In contrast, about three years ago, Hungary and Poland showed some intentions to find balance in regulating social media (seen as a key tool for disseminating fake news and hoaxes). That time, though, Poland was aiming more at protecting free speech on social media (following the banning of President Trump on Facebook and Twitter—now X). Interestingly, there was no mention of fake news and hoaxes in the Hungarian draft proposal, save for the electoral campaign. However, while Hungary remained rather passive in this legal initiative, Poland moved further and presented a less radical proposal than its initial draft. It allows quicker decision-making than in the Slovak case and more protection for individual users against platform interventions.

All in all, the issue of fighting fake news and hoaxes seems to be rather relevant. At the same time, it shows rather heterogeneous approaches within V4 countries. Moreover, these approaches are seen as controversial from regulatory and constitutional perspectives.

1. *Poland*

There was no specific legislation yet as of late 2022. However, in late 2020, the Ministry of Justice drafted provisions that allegedly effectively implement the constitutional right of freedom of expression and help protect against fake news.⁷⁶ One interesting aspect of this draft legislation was the “John Doe lawsuit” approach. If an unknown individual infringed upon someone’s personal rights, he should be able to file a lawsuit to protect these rights without naming the defendant. To file the lawsuit effectively, it would be enough to cite a URL with offensive content, as well as the dates and times of publication and the user’s profile name or login.

However, the 2022 version of the draft act is less radical.⁷⁷ It envisages the appointment of the so-called Freedom of Speech Board, which would safeguard the constitutional freedom of expression on social networking sites. The Board would comprise law and new media

⁷⁶ See *A Breakthrough Law on Freedom of Expression on the Internet*, MINISTRY OF JUSTICE REPUBLIC OF POLAND (Dec. 17, 2020), <https://www.gov.pl/web/justice/a-breakthrough-law-on-freedom-of-expression-on-the-internet>.

⁷⁷ Marcin Wielec, *Criminal Law Aspects of Combating Fake News in Poland*, 1 (2) *EUROPEAN INTEGRATION STUD.*, 179-192 (2021), <https://doi.org/10.55073/2021.2.179-192>.

experts and it would be appointed by the lower chamber of the Polish Parliament for a six-year term of office, by a 3/5 majority. The draft act also provides that if a website blocks an account or deletes a certain item, even though its content does not violate/infringe upon the law, the user can lodge a complaint with the service provider. The provider must confirm that the complaint has been received and it must be considered within 48 hours. If the provider dismisses the complaint, the user has the right to appeal to the Freedom of Speech Board, which will have to make a final decision within seven days.

2. Slovakia

There are two related regulations: Act on Media Services (2022) and Cybersecurity Act Update (2022). In the first case, the Media Services Board can only take action if potentially illegal content is being spread online.⁷⁸ These include, for example, child pornography, extremist materials, posts inciting terrorism or national, racial and ethnic hatred, posts denying or approving the Holocaust and crimes against humanity, or posts defaming a nation, race or belief. Before people turn to the regulatory authority, they must notify the operators of the page on which the illegal content is being spread. Of course, the operators must also react if they find problematic content on their own. Potentially illegal content will be decided by the board's three-member senates. If the Board concludes that the content in question is illegal and at the same time its dissemination threatens the public interest or represents a significant interference with individual rights citizens, will issue a decision to prevent its spread. If the platform operators do not remove the illegal content and prevent it from spreading further, they can be fined between 2,500 and 100,000 euros by the Board.

In the second case, the National Security Authority (NSA) could block (until September 30, 2022) “harmful activity...that causes or may cause...serious misinformation.”⁷⁹ It was possible to block not only websites, but also accounts on social networks or communication

⁷⁸ European Commission Press Release, Commission Welcomes Political Agreement on European Media Freedom Act (Dec. 15, 2023).

⁷⁹ Dušan Vanek, *The Slovak National Security Authority May Be Granted Greater Powers Regarding Cyber Security*, CMS LAW-NOW, (Mar. 31, 2021), <https://cms-lawnow.com/en/ealerts/2021/03/the-slovak-national-security-authority-may-be-granted-greater-powers-regarding-cyber-security>.

platforms. The NSA only acted based on a “reasoned proposal” from the state’s security services, for example, the police, State intelligence or military intelligence. Blocking (in an updated version) required the consent of the Supreme Administrative Court, which had to decide within 15 days. Blocking could last for a maximum of nine months. The first rules (in operation between the spring and summer of 2022) did not even give site operators a chance to defend themselves, for example, by removing problematic content and refraining from further similar actions. This regulation (in two phases or versions) raised several legal questions, including those of a constitutional nature—whether it re-establishes post-censorship practice in the country.

It should be explained that this initiative followed the controversial ban on selected “alternative” outlets (see Table 3) in March 2022, immediately after the Russian invasion of Ukraine in February 2022 until the end of June 2022. This blocking was widely seen as controversial from a legal point of view, specifically, as too vaguely justified and in breach of ECtHR case law—OOO Flavus and others against Russia.⁸⁰

This intervention was done by the NSA and justified vaguely as “blocking of harmful activity.” More specifically, it was stated that the NSA “has identified harmful activity that can cause serious disinformation.” No further specific evidence or arguments were mentioned or made available. These were classified as “sensitive” (dôverné) and “secret.” The law did not define “serious disinformation.” The director of the NSA further justified blocking and its scope, arguing that “blocking should be effective, with purpose and adequate to possible risks associated with blocking.”⁸¹

⁸⁰ See Peter Šamko, *Blocking of Websites and its Possible Contradiction with the Jurisprudence of the European Court of Human Rights*, PRAVNE LISTY (Feb. 26, 2022), <http://www.pravnelisty.sk/clanky/a1062-blokovanie-webovych-stranok-a-jeho-mozny-rozpor-s-judikaturou-europskeho-sudu-pre-ludske-prava>. Martin Husovec, *The Current Blocking of Disinformation Sites is Constitutionally Problematic. What About That*, RUBRIKY (April 22, 2022, 12:32 PM), <https://dennikn.sk/2818631/sucasne-blokovanie-dezinformacnych-stranok-je-ustavne-problematicke-co-s-tym/>.

⁸¹ Jaroslav Daniška & Juraj Hajko, *Director of the NBU: Shutting Down the Main News was Justified and Appropriate. We Act on the Basis of One Article*, ROZHOVORY (Mar. 15, 2022), https://standard.sk/181496/riaditel-nbu-vypnutie-hlavnych-sprav-bolo-opodstatnene-a-primerane-nekoname-na-zaklade-jedneho-clanku/?cookie_status=accept.

3. *Czechia*

In Czechia there was no specific legislation.⁸² However, the Czech social media users already have the right—as defined in the law on Certain Services of the Information Society—to defend themselves with a lawsuit against the operator of the social network against the unauthorized blocking or deletion of a post. Or, on the contrary, for an undeleted post that he feels has been harmed. Yet, it is a relatively complicated legal process.

The responsibility lies with the operator. This responsibility is not excluded if the content of the server contains the statement of a third party. However, the condition for the emergence of liability is at least slight negligence in relation to the illegality of the published information. In the case of digital media, the acquirer's knowledge that illegal information is stored on its infrastructure plays a key role. The operator must, therefore, usually be notified of the illegality. After that, he must delete the information, otherwise, he bears responsibility for its content. However, there are types of information whose illegality is obvious. In such a case, the operator's responsibility arises even without notification by a third party. An example can be the promotion of fascism or a gross insult.

In 2019, there was a draft amendment to the Penal Code. According to it, operators or administrators of internet platforms with more than 100,000 users would face up to three years in prison for deleting user contributions. This draft law, based on an initiative of an obscure MP, did not pass through the Parliament. It should be mentioned that on February 25, 2022, the Association CZ.NIC (Združenie CZ.NIC), national manager of Czech domains, after the call from Czech national security authorities (in particular, National Center of Cybernet Operations—Národní centrum kybernetických operací (NCKO), and following generally formulated Decision of the Government—not legally binding!), blocked eight controversial websites (see the Table 3). In early March 2022, six more were added to blocked websites. Initially, more than twenty controversial websites were targeted upon request by state authorities.

Both decisions were based on the internal rules of the association. Blocking was extended twice for a month and finally ended after three

⁸² See generally Ministry of Interior, *supra* Note 49.

months. The association asked national authorities to provide a relevant court order or decision of the Police or other relevant state bodies. No such order or decision was made available. The association explicitly stated this was an extraordinary and unprecedented measure, subject to regular revisions on a monthly basis. The ending of blocking was explained as “there is no immediate threat to national or international computer security associated with these domains.”⁸³

Interestingly, two local NGOs, Otevřená společnost and Institute H21, sued the Ministry of Defense in administrative court cases as a result of this blocking. They argue that the approach by the state was illegal. In their view, blocking was not an independent decision of private subjects.⁸⁴

There was a brief political discussion about the criminalization of disinformation from late 2022 through early 2023. It was based on a legal recommendation suggested by Michal Klíma, a governmental plenipotentiary for disinformation. However, this idea—as well as the plenipotentiary—was dismissed.⁸⁵

4. Hungary

There was no specific legislation save for similar (but more extensively considered) the Slovak Press Act and the Polish Press Act. In other words, there is reference to factually false statements being published in any media content.⁸⁶ Moreover, following the COVID-19 outbreak, there was a new update to the law on the Crime of Scaremongering, that criminalizes the spreading of misinformation

⁸³ Jan Pokorný, *Šlápli jsme na záchrannou brzdu. Dezinformační weby musí dále řešit vláda, říká ředitel CZ.NIC FiliP*, TITLE (Mar. 6, 2022, 3:32 PM), https://www.irozhlas.cz/zpravy-domov/dezinformace-weby-legislativa-zruseni-blokovani-propaganda-rusko-cesko-domena_2203061532_pik.

⁸⁴ Upřesňující prohlášení k žalobě – Institute H21 a Otevřená společnost X (Jun 16, 2022), <https://www.otevrenaspolecnost.cz/aktuality/8064-upresnujici-prohlaseni-k-zalobe-institute-h21-a-otevrena-spolecnost-x>.

⁸⁵ Anna Dohnalová, Klíma končí jako zmocněnec pro oblast médií a dezinformací. U vlády ztratil důvěru, Aktuality.cz, (Feb 15, 2023, 2:49 PM), <https://zpravy.aktualne.cz/domaci/michal-klima-konci-ve-funkci-zmocnence-pro-oblast-medii-a-de/r~29719f02ad2711eda25a0cc47ab5f122/>.

⁸⁶ Miroslava Kernová, *Slovakia: Government Pushes Ahead with Ambitious Media Reform Program*, INTERNATIONAL PRESS INSTITUTE (Oct. 24, 2022), <https://ipi.media/slovakia-government-pushes-ahead-with-ambitious-media-reform-program/>.

deemed to undermine the authorities' fight against the COVID-19 virus with fines up to five years in prison.⁸⁷

The Ministry of Justice started drafting a new bill that aims to make big platforms comply with the law and operate transparently in 2021.⁸⁸ The Ministry of Justice has also set up the Digital Freedom Committee, which aims to make the operation of transnational technological companies transparent.⁸⁹ The Committee produced a "White Paper" in 2020, however, it does not tackle fake news and hoaxes in connection with the election campaign. The last session of the Committee was in January 2021.⁹⁰ There was a public promise that a concept (a draft) on regulating social media would be prepared by the Ministry of Justice and sent to the members of the Committee for review, including consultations with the platforms. However, nothing happened for almost two years since. The Minister of Justice had a meeting with the EC, and they informed her about the possible DSA/DMA regulation, and Hungary withdrew its plans to regulate alone.⁹¹

The overview of legislative efforts is presented in Table 4 in a more transparent way. This overview also includes related regulations. For example, it includes the Slovakia 2022 Act on Publications, which allows for the demand of corrections in the case of "untruthful statements." In Hungary, the 2011 Press Act allows for demanding corrections to false factual statements published in any media content. Similarly, in Poland, the Press Act allows factual correction of inaccurate or untrue press material. As mentioned, in Poland, there is a law to combat disinformation in connection with the election campaign. According to Art. 111 §1 of the Electoral Code, the candidate has the right, among other things, to apply to the District

⁸⁷ See Csaba Gyory, *Fighting Fake News or Fighting Inconvenient Truths*, VERFASSUNGSBLOG (Apr. 11, 2020), <https://verfassungsblog.de/fighting-fake-news-or-fighting-inconvenient-truths/>.

⁸⁸ See *Justice Minister: Govt Preparing Regulation of Big Tech in Hungary*, HUNGARY TODAY (Jan. 26, 2012), <https://hungarytoday.hu/justice-minister-varga-govt-preparing-regulation-big-tech-hungary/>.

⁸⁹ See WEBSITE OF DIGITAL FREEDOM COMMITTEE, <https://digitalisszabadsag.kormany.hu/en>, (last visited Oct. 30, 2023).

⁹⁰ "White Paper" of the Digital Freedom Committee, FEHÉR KÖNYV https://digitalisszabadsag.kormany.hu/download/0/41/a2000/Feh%C3%A9r_k%C3%B6nyv_EN_20200702.pdf.

⁹¹ See Melinda Rucz, *The DSA Proposal and Hungary*, DSA OBSERVATORY (Mar. 11, 2022), <https://dsa-observatory.eu/2022/03/11/the-dsa-proposal-and-hungary/>.

Court for a ban on disseminating such information. Such a request shall be examined within 24 hours in a non-administrative procedure. The time limit for appealing against such a decision with the Court of Appeal is equally short, and the publication of a correction, either a reply or an apology, must take place within 48 hours at the expense of the obligated party (Art. 11 (3) and (4)). [See <https://perma.cc/4294-U9WT> to Access Table].

After examining this broader context reflecting governments' lead or supported efforts in tackling misinformation, disinformation and mal-information, it may be enlightening to see whether, when, and why there was misinformation, disinformation and mal-information produced and/or disseminated in or by the legacy media and on social media by authorities, journalists, diplomats, experts and fact-checking/debunking Initiatives in the V4 countries. This is not meant to put on the same footing long-term propaganda campaigns in captured media in authoritarian countries such as China or Russia. Yet, clearly, such reflection may be useful, although it may be painful for some involved actors. In any case, it is an interesting exploration from an academic research point of view.

IV. MISINFORMATION/DISINFORMATION/MAL-INFORMATION PRODUCED OR DISSEMINATED BY JOURNALISTS, DIPLOMATS, EXPERTS AND FACT-CHECKING/DEBUNKING INITIATIVES

Essentially, this part focuses on some incorrect (false) descriptive and causal ideas (thoughts about how the world works and why) in foreign policy. These beliefs can be assessed according to logical consistency and factual accuracy. This idea was inspired by the thought that: "Some bad ideas masquerade as neutral fact, only to be exposed later on. Others worm their way into strategic doctrines, guiding a wide range of policies that long outlast the original thought. Good ideas, meanwhile, can have bad effects—and bad ideas can be used for good."⁹²

Furthermore, this reflects upon the idea that "the concept of mistakes is necessarily linked to agents or their choices playing a substantial role in negative outcomes, and "on the individual level of

⁹² Charli Carpenter, *When U.S. Foreign Policy Went Wrong*, FP, (Jan. 15, 2021, 10:23 AM), <https://foreignpolicy.com/2021/01/15/worst-ideas-past-50-years-foreign-policy/>.

analysis, a particularly rich history of scholarship has put mistakes in IR down to cognitive biases and limitations of decision-makers.”⁹³ In other words, if one assumes that information disorder produced and/or disseminated by some journalists or media, experts and diplomats, as well as fact-checking and debunking authorities is first of all the result of mistakes. Thus, it can be correctly labeled as misinformation. However, this assumption is challenged in some cases by persistent adherence to some of these mistakes even when confronted with facts, as it happened in some further discussed cases. Thus, some actors continue to adhere to wrong ideas despite the fact that the opposite evidence is available to them and they know about this evidence. One can assume they produce disinformation or even mal-information. The latter case can be seen as an example of a domestic campaign that actually hurts the image of external actors. Many of these examples can be illustrated at through coverage and commentaries of the Georgia-Russia War of 2008 in the following years.

A. *The Georgia-Russia War of 2008*

The Georgia-Russia 2008 War is often perceived as a turning point when Russia returned to its expansionist imperial foreign policies.⁹⁴ It has been seen as a foreign policy event by many media analysts and diplomats. Some analysts did not consider this war to be a turning point in Russia’s foreign policies.⁹⁵ Others agreed that the conflict “may

⁹³ ANDREAS KRUCK, ET AL., POLITICAL MISTAKES AND POLICY FAILURES IN INTERNATIONAL RELATIONS 1-30, 33 (2018).

⁹⁴ See Jan Eichler, *The War Between Georgia and the Russian Federation as an Important Milestone*, MILITARY OUTLOOK (2019), <https://www.vojenskerozhledy.cz/kategorie-clanku/ozbrojene-konflikty/valka-gruzie-ruska-federace>; Lukáš Dyčka & Pavel Faus, *Arming Georgia in the Context of its Efforts to Join NATO* 4 VOJENSKÉ ROZHLEDY, 74, 74 (2016); Oksan Bayulgen & Ekim Arbatli, *Cold War Redux in US–Russia Relations? The Effects of US Media Framing and Public Opinion of the 2008 Russia–Georgia War*, 419 COMMUNIST AND POST-COMMUNIST STUD. 513, 523 (2013); Simbal Khan *Russia-Georgia War and NATO: Implications for European Security*, 28/29 STRATEGIC STUD. 1, 1-14 (Winter 2008 & Spring 2009).

⁹⁵ See generally Jacek Raubo, *Wpływ doświadczeń z konfliktu Gruzjińsko-Rosyjskiego z 2008 roku na wizję współczesnego bezpieczeństwa międzynarodowego*; Wybrane pPŁAszczyzny, [The Influence of the 2008 Conflict in Georgia on a Modern Vision of International Security], SELECTED ASPECTS 115-131 (Dec. 2011).

have been a turning point, but in a very different direction. It indicates the end of the 'unipolar moment' and the beginning of a new era in the international system, in which the imperative for recognition and respect of newly emerging or resurgent powers has come into its own."⁹⁶ Former Russian president Dmitry Medvedev considers it as one of two points of no return in the global order.⁹⁷ Therefore, this brief military conflict deserves a full and in-depth analytical attention. As a case study, the Georgia-Russia 2008 war has generated divergent opinions among foreign policy experts on who was the aggressor: [See <https://perma.cc/4294-U9WT> to Access Table].

The above overview suggests some surprising findings.⁹⁸ There is no unanimous consensus on a very basic and, at the same time, fundamental issue—who shot first? It should not be a problem to answer this question if one uses the statements of witnesses, global satellite technologies and other intelligence tools and sources. Yet, one should know the answer to this fundamental question if he is involved in analytical work. In fact, some analysts used rather apologetic or ambiguous language. For example, "Georgian troops were ordered to restore order in the breakaway region of South Ossetia and launched an assault on the city of Tskhinvali, where Russia had a contingent of peacekeepers"⁹⁹ Nonetheless, despite this lack of unanimous consensus, most of the analysts more or less clearly and/or indirectly

⁹⁶ Jorge Heine, *The Conflict in the Caucasus: Causing a New Cold War?*, 65 INDIA QUARTERLY 55, 55 (2009).

⁹⁷ Dmitry Medvedev, *Points of No Return*, IZVESTIJA (Feb. 27, 2023, 12:01 AM), <https://iz.ru/1475574/dmitrii-medvedev/tochki-nevozvrat>.

⁹⁸ See 64 *Georgia—Conflict with Russia*, EU SECURITY AND DEFENCE: CORE DOCUMENTS 2008, 296, 296 (Jul. 1, 2009), <http://www.jstor.com/stable/resrep06971.68>; Aschot Manutscharjan, *Abkhazia & South Ossetia—Russia's Intervention in Georgia* (Aug. 2008), KONRAD ADENAUER STIFTUNG (2008); Constantin-Gheorghe Balaban, *Caucasus War—The End of the Cold War or a New Cold War?*, STRATEGIC IMPACT (2008); Viljar Veebel, *Escaping the Imperial Grip of Russia: Ukraine, Belarus, Armenia, and Georgia*, CROSS BORDER J. FOR INT'L. STUD. (2016); David Darchiashvili, *Russo-Georgian War Of August 2008: Clash of Ideologies and National Projects in the Era of Hybrid Warfare*, SÖJATEADLANE (2018); Ionel Nițu, *Provocări la adresa analizei strategice. Studiu de caz: Implicațiile războiului ruso-georgian asupra echilibrului de putere în Eurasia* [Challenges of the Strategic Analysis. Case 5 study: Implications of the Russo-Georgian War over the Balance of Power in Eurasia], ROM. INTEL. STUD. REV. (2010).

⁹⁹ Jakub M. Godzimirski, *What Makes Dialogue Work or Not? The Russia–Georgia Case*, NORWEGIAN INSTITUTE OF INTERNATIONAL AFFAIRS (NUPI) 1, 19 (2012).

and reluctantly acknowledged that it was Georgia who started this war.¹⁰⁰ Most importantly, two official EU reports, (EUISS 2009 and IFFMCG 2009) confirmed Georgia's military initiative here. Within this context, it legally and normatively does not matter whether Georgia was "provoked" into this intervention.¹⁰¹ Rather, long-term rearmament of the Georgian military leading up to 2008 indicates the opposite—Georgia actively worked to reintegrate breakaway provinces forcefully.¹⁰² Indeed, between 2003 to 2008 Georgia's military expenditures reached its peak. However, Georgia's military acquisitions did not reflect the country's inclination towards the West and NATO, as one would assume.¹⁰³

Similarly, it is irrelevant whether one could consider this military intervention as a legitimate and legal action since there was still formally recognized control of that territory as part of Georgia proper. At that time, South Ossetian, Russian, and Georgian peacekeeping units were present in South Ossetia. Furthermore, it is both normatively and logically questionable whether the Russian military's initial and/or follow-up actions, which included further invasion into Georgian territory, can be referred to without hesitation as "aggression" against Georgia, as it is frequently interpreted.¹⁰⁴ In fact, a detailed study acknowledged long-term ethnic tensions in those regions of Georgia and concluded that "although it is obvious that Russia played a strategic-political game especially in the later phase of the conflict with Georgia and significantly contributed to the victory of the separatists, but to the resulting conflict situation it responded *ad hoc* rather than creating it directly."¹⁰⁵ Similarly, Cory Welt suggested

¹⁰⁰ See Maurizio Carbone, *Russia's Trojan Horse in Europe? Italy and the War in Georgia* 24 ITALIAN POLITICS 135, 141 (2009) (For example, Carbone wrote bluntly, "In August 2008, Georgia launched a large-scale attack to retake control of South Osseti.").

¹⁰¹ See generally Charles King, *The Five-Day War: Managing Moscow After the Georgia Crisis*, 6 FOREIGN AFF. 2-11 (2008).

¹⁰² See *Jak Gruzie, Georgia: How Was Prepared*, BRITSKE LISTY (Dec. 8, 2008), <https://legacy.blisty.cz/art/42034.html>.

¹⁰³ See Lukáš Dyčka & Pavel Faus *Arming Georgia in the Context of its Efforts to Join NATO*, 4 VOJENSKÉ ROZHLEDY, 74, 74 (2016).

¹⁰⁴ Magdalena Fričová, Michal Thim, & Luboš Veselý, *Ruská válka v Gruzii: Jak dál? Russian War in Georgia: Where Do We Go From Here?*, Policy Paper 4/2008 (2008).

¹⁰⁵ Emil Souleimanov & Tomáš Baranec, *Rusko a občianska vojna v Gruzínsku. Limity gruzínskej nezávislosti na začiatku 90-tych rokov*, DISKUSIA 59, 74 (2008),

“how a mix of limited offensive intentions, insecurity, uncertainty, and cognitive shortcuts and misperceptions had the capacity to lead to inadvertent war between Russia and Georgia over South Ossetia.”¹⁰⁶ Within this context, it is instructive and probably not too surprising to see how differently V4 countries interpreted this war in 2008.

In search of a cause of the Georgian-Russian conflict, Slovakia sided with the conflict rather on the side of Russia, while Poland presented a pro-Georgian position. The Czech representation was divided on this issue; while Prime Minister Mirek Topolánek accepted the arguments of Georgia, President Václav Klaus rather, supported the Russian side. The ruling Hungarian socialist party was relatively cautious in assessing the situation. Later, however, it came around rather on the side of Georgia as an unequivocal supporter of Georgia and a critic of Russia. This was the typical position of the strongest opposition Fidesz party.¹⁰⁷ In fact, “Although initially Western discourse and media coverage took at face value Georgia's version of the unfolding of the war, subsequent evidence has disproved the latter. Russia only reacted to an unprovoked attack on South Ossetia in the middle of the night.”¹⁰⁸

B. *Journalists/Media and Fake News*

Analysis of fake news produced or disseminated by journalists and media during the 2008 Georgia-Russia war suggests that media can be powerful in constructing a certain narrative of an international conflict. This, in turn, can impact public and expert perceptions of the same country or of other countries, as shown within this context in a US example. Specifically, survey results demonstrated that increased media exposure in two major US newspapers (Wall Street Journal and The New York Times) increased the likelihood of blaming Russia exclusively in the conflict. Not surprisingly, the framing of the conflict

https://fmv.euba.sk/www_write/files/dokumenty/veda-vyskum/medzinarodne-vztahy/archiv/2012/1/2012-1_souleimanov_baranec.pdf.

¹⁰⁶ Cory Welt, *The Thawing of a Frozen Conflict: The Internal Security Dilemma and the 2004 Prelude to the Russo-Georgian War*, 62 EUROPE-ASIA STUD., 63 (2010).

¹⁰⁷ See generally Peter Brezáni, *Ročenka zahraničnej politiky Slovenskej republiky 2008*, Výskumné centrum Slovenskej spoločnosti pre zahraničnú politiku, BRATISLAVA (2009).

¹⁰⁸ Jorge Heine, *supra* note 96, at 55.

was anti-Russian, especially in the initial stages of the conflict.¹⁰⁹ Another study suggested that selected Russian, Georgian, and Western print media displayed distinct patterns of either balanced reporting or partisan attitudes towards the coverage of this war, which also varied over time.¹¹⁰

A study focused on Polish media showed that two Polish newspapers (*Dziennik* and *Rzeczpospolita*) more likely supported Georgia in the conflict with Russia, while two others (*Gazeta Wyborcza* and *Fakt*), took a more balanced or neutral approach but nonetheless favored Georgia.¹¹¹ In general, the study claims that the Polish journalists (and political elites) responded to the conflict in line with the past negative experience of the relations between Poland and Russia. However, the study did not answer the question to whom these four newspapers attributed primary responsibility for the war. Indirectly, considering the overall attitude in their coverage, it can be assumed that Russia was primarily blamed for this war. In fact, the very biased nature of the Polish media coverage of this conflict is in itself a serious problem for the reputation of the national press.

Media coverage analysis is not available for other countries within our regional focus. Even less systematic analysis reveals the quality and argumentative inconsistency of coverage. For example, Slovak conservative online newspaper *Postoj* once clearly attributed responsibility for the 2008 war to Georgia.¹¹² However, in another

¹⁰⁹ Spe Oksan Bayulgen & Ekim Arbatli, *Cold War Redux in US–Russia Relations? The Effects of US Media Framing and Public Opinion of the 2008 Russia–Georgia War*, 419 *COMMUNIST AND POST-COMMUNIST STUD.* 513, 523 (2013)

¹¹⁰ See generally Hans-Georg Heinrich & Kirill Tanaev, *Georgia & Russia: Contradictory Media Coverage of the August War*, 3 *CAUCASIAN REV. OF INT’L AFF.*, 3 (2009).

¹¹¹ See generally Agnieszka Stêpińska, *The Polish Newspapers Coverage of the Russian-Georgian Conflict in 2008*, *ZESZYTY PRASOZNAWCZE*, 59-75 (2011) (This was not only an editors/journalists’ attitude—it was also about a position taken by those who are covered or quoted in the news, interviews, or comments. Altogether, these are all opinions presented in a particular newspaper).

¹¹² See Jaroslav Daniška, *Who Lost the Georgian-Russian War*, *DENNÍK POSTOJ* (Aug. 7, 2018), <https://www.postoj.sk/v-skratke/2073/kto-prehral-gruzinsko-rusku-voju>.

article it mentioned, “Russian invasion to Georgia in 2008.”¹¹³ Liberal newspaper Denník N published an article by Georgian ambassador in which he claimed that there was a “full scale military aggression of Russia against Georgia” in 2008.¹¹⁴ Similarly, liberal newspaper SME usually attributed aggression to Russia in commentaries, while its news reporting it was more objective.¹¹⁵ The Czech newspaper Lidové noviny seemed to blame mostly Georgia, but it did publish foreign opinions that blamed Russia.¹¹⁶ The Czech liberal newspaper MF DNES also seemed to blame mostly Georgia for the conflict, but it did publish foreign opinions that blamed Russia for the conflict.¹¹⁷

The Hungarian liberal news website index.hu was less objective in its coverage of the conflict mentioning Russia as the attacking side: “The Russian attack, which has claimed more and more victims, is a response to Georgia's sending armed forces to restore constitutional order in the breakaway South Ossetia province, which has been under constant attack from Georgians.”¹¹⁸ The news website origo.hu

¹¹³ Christian Heitmann, *Diplomacy as Couple Therapy / How the War in Ukraine Can End*, DENNÍK POSTOJ (Nov. 2, 2002), <https://www.postoj.sk/117721/ako-sa-moze-skoncit-vojna-na-ukrajine>.

¹¹⁴ Revaz Beshidze, *We Have Another Year After the War of August 2008. Russian Occupation of Georgian Territories Continues*, DENNIKN (Aug. 6, 2021), <https://dennikn.sk/2495284/mame-dalsi-rok-po-vojne-z-augusta-2008-ruska-okupacia-gruzinskych-uzemi-pokracuje/>.

¹¹⁵ See Mykolka Riabčuk, *I Still Remain Czech and Slovak*, SME (Aug. 24, 2018), <https://komentare.sme.sk/c/20898717/stale-zostavam-cechom-a-slovakom.html#ixzz5PCRhmK4>; See also Oskar Bardiovsky, *Distortion of History*, SME (Aug. 11, 2018, 3:59 PM), <https://blog.sme.sk/bardiovsky/politika/skreslovanie-dejin>.

¹¹⁶ František Šulc, *Miška v ruské pasti*, (Aug. 3, 2008); Lidové Noviny & Petra Procházková, *Saakašviliho, triumph “–přežil*, (Aug. 6, 2009); Lidové Noviny, *Rusko překračuje Rubikon*, Project Syndicate (Aug. 16, 2008).

¹¹⁷ See *For the First Time Since the War in August 2008, a Plane Left Georgia for Russia*, iDNES (Jan. 8, 2010, 3:02 PM), https://www.idnes.cz/zpravy/zahranicni/z-gruzie-poprve-od-valky-v-srpnu-2008-odletlo-letadlo-do-ruska.A100108_130204_zahranicni_ash; *Georgia and Russia Remember the Bloody Conflict a Year Later, Tensions Continue*, iNDES (Aug. 7, 2009, 7:42 PM), https://www.idnes.cz/zpravy/zahranicni/gruzie-a-rusko-po-roce-vzpominaji-na-krvavy-konflikt-napeti-trva.A090807_101621_zahranicni_anv; *Russians and Georgians Opened a Common Land Border After Three Years*, iNDES (Mar. 1, 2010, 7:15 PM), https://www.idnes.cz/zpravy/zahranicni/rusove-a-gruzinci-otevrelipo-trech-letech-spolecnou-pozemni- hranici.A100301_071551_zahranicni_ipl.

¹¹⁸ Index, *Orosz-grúz háború* (Aug 7, 2008), <https://index.hu/kulfold/gruzpp/>.

published an article marked as “analysis of an international lawyer” which clearly stated that Georgia was the aggressor.¹¹⁹ However, in other news articles it was less one-sided. One of these articles cited the BBC, and another article was a summary of the events day by day.¹²⁰ According to the latter, “Georgian troops attacked the pro-Russian breakaway South Ossetia”, and “Russian troops quickly intervened alongside the South Ossetian rebels, and Georgia found itself facing Russia the next day.”¹²¹ [See <https://perma.cc/4294-U9WT> to Access Table].

C. Diplomats/Foreign Service and Fake News

It should be noted that the European Parliament in its 2018 Statement, mentioned the military aggression of Russia against Georgia in 2008.¹²² Nonetheless, it is too strong to claim that somebody who was attacked should be seen as an aggressor if they continue with military operations on the territory of the opponent. Yet, this public statement may explain why the author identified the following examples of questionable content produced by foreign services in this area. First, it was the Slovak Embassy in France that claimed on Facebook in August 2022 that it was Russia that had attacked Georgia in 2008. Following the same reasoning, the Slovak Ambassador in the UK claimed on Facebook that it was Russia that attacked Georgia in 2008.¹²³ In fact, although the official position of

¹¹⁹ Origo, Hiába szidják, nem vétett Grúziában Oroszország (Aug 13, 2008, 4:12 PM), <https://www.origo.hu/nagyvilag/20080811-deloszetia-nemzetkozi-jogasz-elemzi-a-haborus-helyzetet.html>.

¹²⁰ Origo, Harcolnak a grúzok az oroszokkal Dél-Oszétiában (Aug 8, 2008, 6:16 PM), <https://www.origo.hu/nagyvilag/20080807-nem-nyugszik-a-helyzet-deloszetiaban.html>.

¹²¹ Origo, A grúz-orosz háború napról napra (Aug 12, 2008, 10:56 AM), <https://www.origo.hu/nagyvilag/20080812-deloszetia-gruzorosz-haboru-naprol-napra.html>.

¹²² EUR. PARL. Press Release, Parliament Calls on Russia to End the Occupation of Georgian Territories (June 14, 2018), <https://www.europarl.europa.eu/news/sk/press-room/20180607IPR05245/parlament-vyzyva-rusko-na-ukoncenie-okupacie-gruzinskych-uzemi>.

¹²³ Evidence is available; however, the journal does not publish scanned documents. Exact wording of public statement by Igor Slobodník, ambassador of Slovakia to France, was: “That one anniversary is 7 August 2008, when Georgia was attacked by neighbouring Russia“ (Aug 8, 2022). Robert Ondrejcsák,

the Ministry of Foreign Affairs and European Integration of Slovakia was identical,¹²⁴ an Independent International Fact-Finding Mission on the Conflict in Georgia found out that it was Georgia that initiated that conflict.¹²⁵ There are many cited studies that—sometimes reluctantly—accept that this time Russia was not an aggressor, or at least not the first one to shoot.¹²⁶ Selected examples of alternative explanation of causes of Georgia-Russian 2008 War are thus typical evidence of a situation when “bad ideas can hold fast once embedded in institutions and national narratives.”¹²⁷

D. Governments and Fake News

An instructive example of a national government’s high-level deceptive interpretation of a collective EU foreign policy decision is Hungary’s 12th “national consultation” on October 14, 2022.¹²⁸ The government claimed its call for popular mobilization aimed to correct flawed EU sanctions against Russia. The government claimed that “Brussels decided to introduce oil sanctions, . . . Brussels leaders want to extend the sanctions to gas deliveries as well.”¹²⁹ However, this decision was enacted not by “Brussels” or “Brussels leaders,” but by the European Council or by the Council of Ministers.¹³⁰ The European Council consists of the heads of state or government of the EU’s member states, together with its President and the European

ambassador to the UK, wrote similar statement the same day on Facebook: Open aggression of Russia against its neighbours started already in 2008, by attack on Georgia.”

¹²⁴ E-mail from Michal Slivovic, Director of Department of States of Eastern Europe, Southern Caucasus and Central Asia (Nov. 8, 2022) (on file with author).

¹²⁵ See generally EUR. CT. H.R., O.J. (L 323/66),

https://www.echr.coe.int/Documents/HUDOC_38263_08_Annexes_ENG.pdf.

¹²⁶ See Jan Eichler, *The war between Georgia and the Russian Federation as a major divide* (2019), <https://www.vojenskerozhledy.cz/kategorie-clanku/ozbrojene-konflikty/valka-gruzie-ruska-federace>.

¹²⁷ See Carpenter, *supra* note 92.

¹²⁸ Nemzeti Konzultáció, *Hét Kérdés A Brüsszeli Szankciókról [National Consultation: Seven Questions about Brussels Sanctions]* (Oct. 14, 2022, 12:32 PM), <https://kormany.hu/hirek/nemzeti-konzultacio-het-kerdes-a-brusszeli-szankciokrol>.

¹²⁹ *Id.*

¹³⁰ See *European Council Conclusions*, EUR. COUNCIL (June 24, 2022).

<https://www.consilium.europa.eu/media/57442/2022-06-2324-euco-conclusions-en.pdf>.

Commission President. It defines the EU's general political direction and priorities.¹³¹ The Council of Ministers consists of ministers from EU M.S. who share the same portfolio—energy or economy. In that sense, it is clearly and grossly misleading to call it a “Brussels” or “Brussels leaders” decision.¹³²

This Brussels' blaming narrative (“Brussels decided to introduce oil sanctions,. . . Brussels leaders want to extend the sanctions to gas deliveries as well”) became part of official speeches of Hungarian authorities in the following period.¹³³ As put by Gabriella Szabó, political scientist from the Hungarian Academy of Sciences: National Consultations are one of the direct marketing tools of Fidesz.¹³⁴ It is often labeled, by Fidesz, as a survey, although technically and purposely, the national consultations are one of the political communication techniques often employed. They started in 2005, and since Fidesz came into power in 2010, eleven rounds of National Consultations have been initiated and completed.¹³⁵

In the Fidesz/Government's rhetoric, “Brussels” is the collective name of the enemy, an empty signifier. Sometimes, it refers to the European Commission, the European Parliament, and occasionally to those foreign figures and institutions who are critical of the Hungarian government. It is not surprising that the National Consultation is not using the correct term and is biased because National Consultation is a political action that aims to mobilize public support. As a political marketing tool, National Consultation is not objective and not neutral, but subjective, emotionally arousing (including negative tonality), and open for

¹³¹ *What is the Council?*, COUNCIL OF THE EUR. UNION, <https://www.consilium.europa.eu/en/council-eu/what-is-the-council/> (last visited Apr. 11, 2023).

¹³² E-mail communication to Embassy of Hung (Dec. 9, 2022) (on file with author).

¹³³ See A nehéz gazdasági helyzet a szankciós politika következménye - jelentette ki a Miniszterelnöki Kabinetiroda parlamenti államtitkára pénteken Szegeden, egy lakossági fórum előtt tartott sajtótájékoztatón, MAGYARORSZÁG KORMÁNYA, (Dec. 2, 2022, 7:32 PM), <https://kormany.hu/hirek/a-nehez-gazdasagi-helyzet-a-szankcios-politika-kovetkezmenye>.

¹³⁴ *Id.*

¹³⁵ See Edit Inotai, *Hungary Launches “National Consultation” Targeting The EU, Migrants and Ukraine*, REPORTING DEMOCRACY (Nov. 20, 2023), <https://balkaninsight.com/2023/11/20/hungary-launches-national-consultation-targeting-the-eu-migrants-and-ukraine/>.

collective interpretation.”¹³⁶ Zsolt Gál, a political scientist from Comenius University in Bratislava, Slovakia, expressed an essentially identical opinion: “This probably should be seen as a symbolic identification of a new power center of the EU (“Brussels is a new Moscow”), and it is likely an effort to create the impression that Hungarian politicians do not participate at adopted decisions.”¹³⁷

Thus, one can safely argue that the government—and uncritical PSM media—disseminate disinformation, or indeed, mal-information related to foreign affairs, under the pretext that they want to hear the opinion of the people.¹³⁸ In effect, National Consultation that initially started as a deliberative process was transformed into a political tool employed to achieve political gains.¹³⁹ It is a part of an earlier academic debate, whether and how much could National Consultations be seen from the viewpoint of deliberation or rather as a direct marketing instrument that one can find in the literature on the marketing relationship.¹⁴⁰

To conclude, less than 1.4 million of Hungary’s 8.2 million registered voters participated in the consultation process. The European Commission then dismissed the results of Hungary’s government consultation on the EU sanctions against Russia.¹⁴¹

E. *The Smolensk Tragedy*

¹³⁶ E-mail from Gabriella Szabó, PhD., Senior Rsch. Fellow TK PTI, Dep’t of Pol. Behav., (Dec. 9, 2022, 10:39 AM) (on file with author).

¹³⁷ E-mail from Zsolt Gal, PhD., Assistant Professor of Comenius U., Dep’t of Pol. Sci. (Dec. 9, 2022, 10:40 AM) (on file with author).

¹³⁸ See Dorka Takacsy, *Hungary’s Propaganda Campaign*, VISEGRAD INSIGHT (Dec. 15, 2022), <https://visegradinsight.eu/hungarys-propaganda-campaign>; Péter Hunčík, *Bad Boy Viktor Orbán’s Peacock Dance*, DENNÍK N (Dec. 20, 2022), <https://dennik.sk/3159742/pavi-tanec-zleho-chlapca-viktora-orbana/>.

¹³⁹ See generally Daniel Oross & Paul Tap, *Using Deliberation for Partisan Purpose: Evidence from the Hungarian National Consultation*, 5 EUR. J. OF SOC. SCI. RSCH. 803, 803-820 (2021).

¹⁴⁰ Bene Márton, et. at., *The Years of Centralization, Pol. Comm’n in Hung. 2006-2015*, SOC. SCI. RSCH. CENTER OF THE HUNGARIAN ACAD. OF SCI. (2019), <https://politikatudomany.tk.hu/uploads/files/Centralizacioevei.pdf>.

¹⁴¹ Alexandra Brzozowski, *EU Brushes Off Results of Hungary’s National Consultation on Russia Sanctions*, EURACTIV (Jan. 16, 2023), <https://www.euractiv.com/section/global-europe/news/eu-brushes-off-results-of-hungarys-national-consultation-on-russia-sanctions>.

In 2010, a Polish military plane with the official delegation on board crashed near the Russian city of Smolensk. Since then, the Smolensk tragedy seems to be a reference point for questions of self-definition and cultural identity of many Poles.¹⁴² It also seems to be a rather significant event for Polish-Russian relations regarding national politics as well. For the former, some authors initially claimed that a joint commemoration rite in Katyn in 2010 symbolically created a change in the bilateral relationship between Russia and Poland.¹⁴³ However, this is probably too strong of a claim—in particular, if one considers the long term foreign policy of Poland.¹⁴⁴ In fact, the opposite seems to be true. In any case, this tragedy also has strongly impacted domestic party politics. Since the Smolensk tragedy, the Law and Justice Party (PiS) has been experimenting with its long-term ideological project of an alternative vision of history.

The objective is to impose “alternative” truth.¹⁴⁵ In short, it was nourishing conspiracy theories about Russian involvement in the disaster that killed the Polish president and many other officials. The tragedy “intensified division between liberal and enlightened establishment and unenlightened clerical mass.”¹⁴⁶ This extreme alternative approach to reality culminated in December 2022, when the Polish Sejm (Lower Chamber, 231 deputies voted for the resolution, while 226 parliamentarians did not participate in the vote) passed a resolution declaring Russia a “state sponsor of terrorism.” In addition, it explicitly and directly blamed Russia for the 2010 crash of a Polish

¹⁴² See generally Maria Kobielska, *Endless Aftershock. The Katyn Massacre in Contemporary Polish Culture*, TRAUMATIC MEMORIES OF THE SECOND WORLD WAR AND AFTER, (Jason Crouthamel & Peter Leese eds., 2016).

¹⁴³ See generally Michel André Horelt, *The Power of Ritual Ceremonies in State Apologies: An Empirical Analysis of the Bilateral Polish-Russian Commemoration Ceremony in Katyn in 2010*, In: On the Uses and Abuses of Political Apologies, PALGRAVE MACMILLAN (Mihaela Mihai & Mathias Thaler eds., 2014).

¹⁴⁴ See generally Patryk Tomaszewski, *A Comparative Discursive Analysis of the Polish Foreign Ministers’ Speeches Regarding Poland’s Security Policy and Its Cooperation with Ukraine, the Republic of Belarus, and the Russian Federation in the Period 2011-2019*, 21 ROMANIAN POL. SCI. REV. 79, 79-100 (2021).

¹⁴⁵ Francois Bafoil, *The Law and Justice Party in Poland: Family Romances, National Romances*, In: The Politics of Destruction, SCI. POL. SERIES IN INT’L REL. AND POL. ECON. 55, 55 (2021).

¹⁴⁶ Szymon Wróbel, *Mourning Populism. The Case of Poland*, 4 Polish Socio. Rev. 437, 453 (2011).

Air Force flight in Smolensk.¹⁴⁷ This was not the first time that the Polish Sejm passed a resolution concerning the interpretation of history.¹⁴⁸ Clearly, the conspiratorial vision of events seems to correlate with the political vision in which there is no relevant political/ideological alternative.¹⁴⁹ One does not need to know all the details about the investigation of this crash. If there was any evidence of Russian involvement, the opposition would certainly have no problem in supporting this declaration.

Additionally, media and communication tools have been impacted by the “ideologization” of this tragedy. For example, the Polish press has published relatively little “transparent” journalistic photography with a focus on the crash in Smolensk. Moreover, these photographs were often read contrary to the intentions of the photographs because the texts gave another meaning to the pictures.¹⁵⁰ There were differences noticed in how the conservative media (Gazeta Polska, Radio Maryja, TV Trwam) and the left-wing and liberal media (Gazeta Wyborcza, TVN) interpreted the tragedy and surrounding events.¹⁵¹

F. *Fact-checking/Debunking Initiatives and Fake News*

Even though fact-checking/debunking initiatives are specifically intended to double-check others relevant statements, sometimes they produce inaccurate information or interpretations. For example, one report claimed that Russia acknowledged its policy of “energy

¹⁴⁷ Voting No. 44 at the 68th session of the Sejm, SEJM (2022).

¹⁴⁸ See Resolution of the Sejm of the Republic of Poland Against the Manipulation and Falsifying of History by High Ranking Russian Politicians, GOV.PL (Jan 14, 2020), <https://www.gov.pl/web/qatar/resolution-of-the-sejm-of-the-republic-of-poland-against-the-manipulation-and-falsifying-of-history-by-high-ranking-russian-politicians>.

¹⁴⁹ Juraj Marušiak, Conspiracies as an Accompanying Phenomenon of the Crisis, PRAVDA (Jan. 21, 2021, 2:00 PM), <https://nazory.pravda.sk/analyzy-a-postrehy/clanok/575281-konspiracie-ako-sprievodny-jav-krizy/>.

¹⁵⁰ Magdalena Mateja, Informacja, interpretacja czy ideologizacja? Katastrofa pod Smoleńskiem na fotografiach dziennikarskich [Information, Interpretation or Ideologization? The Catastrophe Near Smolensk in Journalistic Photographs], 103 FOLIA (2011), <https://rep.up.krakow.pl/xmlui/handle/11716/9697>.

¹⁵¹ See generally Przemysław Żukiewicz, *The Smolensk Tragedy and Its Importance for Political Communication in Poland after 10th April, 2010 (Focusing on the Political Incidents in Front of the Presidential Palace)*, SP 1'15 RESEARCHGATE 63 (2015).

blackmail” towards the EU, although the argument used by the Russian spokesperson was rather different. The Russian President’s spokesperson talked about the technical impact of sanctions, not about the political circumstances or political intentions of Russia.¹⁵²

Indeed, a month later, Russian President Putin still talked about Russia’s interest in supplying oil and gas to the EU.¹⁵³ In spite of the fact they became aware of this information via communication with the author of this article, the fact-checking organization had no interest in correcting its previous statement.

V. CONCLUSIONS

The primary goal of this research was to identify contentious reporting, commentary, commemoration, and generally questionable interpretations of selected but relevant foreign policy issues. These outputs are commonly called misinformation and disinformation, or in the most negative interpretation, mal-information.¹⁵⁴ The focus was on issues originating from the Caucasus region and Russia. The search area included the EU in general, however, a more specific focus was on selected East-Central European countries. Selected political and media discourses revealed tentative findings that were then examined in light of local efforts to tackle misinformation/disinformation and mal-information. The samples comprising Czechia, Hungary, Poland, and Slovakia were supposed to represent culturally and geographically close countries joined in an *ad hoc* regional foreign policy lobby group.

However, despite this selection based on the “most similar cases” approach, the results suggest rather diverse results. It was possible to

¹⁵² See *Pro-Kremlin Propaganda Running Out of Gas*, EU VS DISINFO (Sept. 08, 2022), <https://euvsdisinfo.eu/pro-kremlin-propaganda-running-out-of-gas/?highlight=%22political%20blackmail%22#>.

¹⁵³ See Vladimir Soldatkin & Oksana Kobzeva, *Putin moots gas hub in Turkey with Nord Stream supplies*, REUTERS, (Oct. 13, 2022, 7:26 AM) (Putin moots gas hub in Turkey with Nord Stream supplies - Business Recorder (brecorder.com))

¹⁵⁴ See Media Defense, *Misinformation, Disinformation and Mal-Information*, (last visited Oct. 24, 2023),

<https://www.mediadefence.org/ereader/publications/introductory-modules-on-digital-rights-and-freedom-of-expression-online/module-8-false-news-misinformation-and-propaganda/misinformation-disinformation-and-mal-information/>, (Malinformation is truth, or stems from the truth but is often exaggerated in a way that misleads and causes potential harm on a person, organization or country.).

identify some recent (Hungary, fact-checking portal EUvsDisinfo) or long-term (Poland, Slovakia) examples of mis/disinformation produced by authorities, diplomats or the media (pro-governmental media in Hungary and Poland or independent media in Slovakia), or by an EU-funded fact-checking organization. Interestingly, in all these examples, in one way or another, Russia can be identified as a central, although not necessarily unambiguously negative, actor.

Generally, it seems that “the truth” in foreign affairs can be contextual, ideological, or source-dependent. The media’s reporting, and in particular, its commenting, is often biased, yet it seems that it serves as background material for issuing politically severe declarations and, sometimes, for making foreign policy decisions. However, political declarations define reality anew. Moreover, it was found that there are two different approaches concerning local efforts tackling misinformation/disinformation and mal-information within this regional informal foreign lobby state group.

The first approach can be called “repression of the alternative media in an emergency situation,” addressing “occasional misinformation produced by alternative media,” or “other bodies are tolerated or dealt with mostly by fact-checking and debunking NGOs and only in extreme situations by state authorities.” This was the approach used in Slovakia and Czechia. At the same time, in Slovakia, the government (the Ministry of Foreign Affairs) and the independent (especially mainstream) media (including PSM) occasionally produce what one can call misinformation (no intention to produce disinformation, but nonetheless, they occasionally produce such outputs). In the Slovak case, mainstream media and authorities (diplomats) have no problem producing and sticking to misinformation, which is, in fact, disinformation. However, alternative media produces much more misinformation and disinformation, whose outputs remind more of gossiping. However, these alternative versions of local and especially foreign events produced (or, perhaps more precisely, using a “copy, translate and paste” method) by alternative media occasionally broaden perspectives offered by mainstream media.

The Slovak government, as well as the Czech government, reacted quickly (and most likely unconstitutionally) towards selected alternative media, effectively silencing them for a few months during what was seen as an emergency situation and part of a hybrid war

(immediately after the Russian invasion of Ukraine). The Czech government also considered stricter regulation of fake news/hoaxes in late 2022 through early 2023. However, this was found to be a problematic approach in a more liberal Czech society.

The second approach can be called, metaphorically speaking, “alternative reality is the King, and freedom of the speech on platforms is the Queen.”¹⁵⁵ This situation was identified in Hungary and Poland. However, Poland seemed to be moving towards some restrictions to freedom of speech on the platforms, too. The Polish and Hungarian governments and government-friendly or captured media have no problem with the occasional production and further dissemination of disinformation. From their perspective, it is usually true and correct opinion or fact. The most known and long-term notorious example in Poland is the Smolensk Tragedy. This crash accident is commonly interpreted by the PiS Party, authorities, and friendly or captured media not as an accident, but as a pre-planned and secretly executed mass murder of the Polish elite by Russians. This conspiratorial vision of world events culminated in late 2022, when the slight majority of the Polish Lower Chamber of the Parliament passed a resolution that vindicated Russia from this accident in an official and malicious way.¹⁵⁶ As a result, this act can be classified as misinformation or even mal-information. In addition, the Georgian-Russian War was commonly perceived as Russian aggression by Polish elites within a major part of the media.

In Hungary, the government initiates “national consultations” that, more often than not, include biased formulations. The 2022 initiative included an effort to undermine the EU’s common foreign policy goals towards Russia in the eyes of the local public. For that purpose, rather incorrect terminology was used; in fact, it is more of a norm than an exception to use such ultimately negative nicknames as “Brussels” and “Brussels leaders.” Although it was technically true that the decision

¹⁵⁵ This metaphor draws inspiration from the game of chess. To win, a player must capture the opponent's king, but the queen has more freedom (mobility) on the chess board. In that sense, the queen is the most powerful piece. On the other hand, the king, has more value because if you lose the king you lose the game.

¹⁵⁶ See Jan Cienski, *Polish Opposition Denounces New Commission To Probe Russian Influence*, POLITICO (May 27, 2023, 4:26 PM), <https://www.politico.eu/article/polish-opposition-denounces-new-commission-to-probe-russian-influence/>.

was geographically made in Brussels, it was done at the meeting by ministers or prime ministers and presidents of EU M.S.

In this context, some variables should be corrected or replaced, and the name and the analytical meaning of the Vulnerability Index should be changed. This index seems to be relevant in particular for Hungary (either in its original meaning or in a newly suggested re-labeling and re-interpretation), with a more suitable name of “Congruence Index.”¹⁵⁷ As previously stated, Hungary is not vulnerable to foreign influence; rather, certain (especially business and sanctions) policies are aligned to some extent with some countries (particularly Russia) that are viewed as highly problematic by other EU M.S. (or, indeed, rated as a top enemy by Poland). Interestingly, both Hungary and Poland are countries that, a few years ago tended to discourage any regulation of social media platforms, allegedly with a focus on defending to the freedom of speech on social media. Poland drafted an earlier version of such a regulation, but the 2022 draft can be considered more moderate. Hungary remained rather passive in that regard, allegedly waiting for a pan-European solution, the Digital Services Act and the Digital Market Act. There was a common perception among governments in both countries that social media platforms tend to limit freedom of speech. Neither government was found to have actually attempted to limit oppositional or critical voices in PSM and other critical legacy media.

The tentative overview of media coverage of the Russian-Georgian 2008 War showed even more heterogeneous results. The least problematic media coverage was found in Czechia, while arguably the most biased coverage one could find in Poland. Slovak and Hungarian media coverage could tentatively be located between these poles. It should be specified that, for example, Slovak media tend to inform correctly in news, but have no problem allowing misinterpretation in commentaries. This was similar to the situation in the Czech media, where certain foreign authors' comments appeared biased. However,

¹⁵⁷ The authors of the original index (dominika.hajdu@globsec.org & katarina.klingova@globsec.org) were contacted, but there was no response either to these criticisms or suggestions.

even respected international media outlets occasionally make mistakes in their foreign coverage.¹⁵⁸

In conclusion, some incorrect reporting and interpretations of important foreign events can penetrate deeply into the foreign policy thinking and discourses of political spectrum and diplomacy segments, including those of foreign policy experts and media in Hungary, Poland, and Slovakia, though less so in Czechia. This occurrence is probably related to cognitive biases and mistakes (Slovakia), ideological biases (mainly among some Czech, Polish, and Slovak foreign policy experts), (negative) historical legacies and memories (Poland), and more recent utilitarian political instrumentalization (Hungary). In that sense, one could see an alternative reality nourished by the Polish political conservative spectrum and some media probing into (in part) absurd ideological declarations made by a chamber of the Polish Parliament in 2022.

An alternative, partial focus on the Georgia-Russian war in 2008 by some Slovak diplomats, supported by an official but incorrect interpretation of that event, resulted in the dissemination of misinformation by Slovak diplomats on Facebook. It could perhaps be justified by an identically misleading understanding of the Georgia-Russian war by the European Parliament on the tenth anniversary of this war. Hungary is a different case in point. There, the government knowingly produces misinterpretations of foreign policy (and, sometimes at the same time, domestic policy) in orchestrated campaigns covered as “national consultations” or in captured media for local audiences. Paradoxically, in Hungary in particular, and less so, but still, in Poland, misinformation (The Smolensk Tragedy) and disinformation as well as mal-information (2022 “national consultation”) and captured media (especially in Hungary) seem to be more threatening to a healthy media eco-system and foreign policy efforts than the Russian or Chinese misinformation and disinformation efforts. This can also be seen in the attention paid to fact-checking and debunking initiatives. In Hungary, except for some minor local fact-checking initiatives produced by journalists and their organizations, a major push for debunking came directly or indirectly (via pressure on social media platforms) from the EU. In contrast, Slovakia and Czechia

¹⁵⁸ See *The Times and Iraq*, N.Y. TIMES (May 26, 2004), <https://www.nytimes.com/2004/05/26/world/from-the-editors-the-times-and-iraq.html>.

more actively and widely support debunking and fact-checking initiatives. Poland seems to be located here, somewhere in between these two poles. These are all important tentative findings that should be explored further.

Why are some foreign policy analysts, politicians, and diplomats unable or unwilling to stick to the facts in the face of major foreign policy events? Tentatively, one sees that at least some of them must rely either on biased media coverage (do we have a vicious circle here?) or show some deeply-rooted biases and prejudices (especially in the Polish case). How is it possible that the editors of foreign policy or security studies accept the publication of some articles based on clearly wrong premises? Consequently, how can Russian or other foreign diplomats understand, in part, absurd interpretations (narratives) of some foreign policy events? How can one understand and interpret the incongruity of Slovak diplomacy with the official conclusions of the fact-finding mission of the EU as well as other internal analytical materials in the case of the Georgia-Russia war? How is it possible that members of the European Parliament ignored the same findings from the EU-funded report and other internal analytical materials? Or can one see (and prioritize) an extension of military intervention into the territory of an aggressor as “aggression” by those initially attacked? How can the Polish Parliament (Lower Chamber) pass a political statement contradicting facts (The Smolensk Tragedy)?

How can this “alternative interpretation of reality,” which blames another state for something it did not do, be understood by the Russian foreign service? What are the possible legal consequences of political declarations? If anyone questions the validity of these declarations, can he be seen as disseminating misinformation? How come the Hungarian government has no problem launching a deceiving nationwide campaign that misinterprets foreign policy reality and hurts the image of the EU? What can be done, if anything, concerning clearly biased conservative and PSM media in Hungary and Poland and a section of partially biased liberal private and PSM media in the Czechia and Slovakia in their reporting and especially their commenting on some foreign events?¹⁵⁹ Is it possible to design an

¹⁵⁹ See generally Josef Trappel, & Talas Tomaz, *Democratic Performance of News Media: Dimensions and Indicators for Comparative Studies*. In: *The Media for*

analytically more relevant congruence index? Can we as scientists avoid including too many very specific questions that can be naturally answered only based on biased media reporting or following the political interpretation or exploitation of certain events? How is it possible that the EU-wide fact-checking and debunking initiative is unwilling to correct its wrong interpretation that concerns the Russian foreign policy goal that, if correct, has fundamental consequences for the EU's foreign policy?

These are all interesting research questions that deserve further exploration. Perhaps there is already a very useful and universal answer to all of these issues, as suggested by a former politician: "In politics, facts matter less than how they are actually perceived."¹⁶⁰

Democracy Monitor 2021: How Leading News Media Survive Digital Transformation | NORDICOM UNIV. OF GOTHENBURG 11-58 (2021).

¹⁶⁰ Ivan Miklos, *As Ivan Mikloš Reads It: The War Between Russia and Ukraine will be Decided in Crimea*, DENNIKN (Jan. 17, 2023, 12:28 PM), <https://e.dennikn.sk/3195194/ako-to-cita-ivan-miklos-vojna-medzi-ruskom-a-ukrajinou-sa-rozhodne-na-kryme/>.