

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

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I. INTRODUCTION

Disinformation campaigns originating from Russia has 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

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¹ See, e.g., RICHARD SAKWA, *THE RUSSIA SCARE. FAKE NEWS AND GENUINE THREAT* (2022).

² In the case of the United States, see *Foreign Threats to the 2020 U.S. Federal Elections*. Intelligence Community Assessment ICA 2020-00078D. National Intelligence Council, 10 March 2021, <https://www.dni.gov/files/ODNI/documents/assessments/ICA-declass-16MAR21.pdf>; CHRISTOPHER PAUL & MIRIAM MATTHEWS, *THE RUSSIAN “FIREHOSE OF FALSEHOOD” PROPAGANDA MODEL. WHY IT MIGHT WORK AND OPTIONS TO COUNTER IT* (2016) <https://www.rand.org/pubs/perspectives/PE198.html>.

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 the greatest risk in fragile democracies struggling with complex historical, social and economic issues such as Ukraine, undermining the information space for such purposes is destructive to all democracies.⁵ Disinformation also plays a major role in the Russian–Ukrainian war that started in February 2022. The 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,⁶ action against disinformation was also added.

This paper 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 Iron Curtain, media outlets have been banned in Europe. The instrument of prohibition was the European Council Decision and Regulation, while 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.⁷ 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 invasion of Ukraine.⁸ The President announced that the EU would ban the state-owned media outlets Russia Today and Sputnik, as well as their subsidiaries. High Representative Josep Borrell confirmed this in

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

⁴ *The Invasion of Ukraine Is Not the First Social Media War, but It Is the Most Viral. Ukraine Is the Most Wired Country Ever to Be Invaded*, *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 OECD, *supra* note 3, at 2.

⁶ *EU restrictive measures against Russia over Ukraine (since 2014)*, EUROPEAN COUNCIL (2022), <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine>.

⁷ Francisco J. Cabrera Blázquez, *The implementation of EU sanctions against RT and Sputnik*. EUROPEAN AUDIOVISUAL OBSERVATORY (2022), <https://rm.coe.int/note-rt-sputnik/1680a5dd5d>.

⁸ Statement by President von der Leyen on further measures to respond to the Russian invasion of Ukraine (Feb. 27, 2022), https://ec.europa.eu/commission/presscorner/detail/en/statement_22_1441.

another statement,⁹ 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.”

On 1 March 2022, the Council of the EU adopted a Decision¹⁰ pursuant to Article 29 of the Treaty of the European Union (TEU) and a Regulation¹¹ 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 applications, whether new or pre-installed. (Article 1(1))

All broadcasting licenses or authorization, transmission and distribution arrangements with RT and Sputnik were suspended. In June, these measures were extended to other Russian media outlets (Rossiya RTR/RTR Planeta, Rossiya 24/Russia 24 and TV Centre International). 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.

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”.¹² 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”,¹³ and “are essential and instrumental in bringing forward and supporting the aggression against Ukraine, and for the destabilization of its neighboring countries”.¹⁴ 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”.¹⁵ These measures “do not prevent those media outlets and their staff from

⁹ Further measures to respond to the Russian invasion of Ukraine: Press statement by High Representative/Vice-President Josep Borrell (Feb. 27, 2022), https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_22_1463.

¹⁰ Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia’s actions destabilising 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.

¹¹ Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia’s actions destabilising 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.

¹² *Id.* at Recital 6.

¹³ *Id.* at Recital 8.

¹⁴ *Id.* at Recital 9.

¹⁵ *Id.* at Recital 10.

carrying out other activities in the Union than broadcasting, such as research and interviews”.¹⁶ 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”.¹⁷

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.¹⁸ 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.

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”. 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 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.

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). 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,

¹⁶ *Id.* at Recital 11.

¹⁷ *Id.* at Recital 12.

¹⁸ Cabrera Blázquez, *supra* note 7.

sputniknews.lv, sputniknews.gr and sputniknews.cn).¹⁹ As European experts somewhat dramatically put it, “a digital Iron Curtain was put up”.²⁰ 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.²¹

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. 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.²² 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. 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.²³

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.²⁴

Also, social media platforms:

must prevent users from broadcasting . . . any content of RT and Sputnik. That applies both to accounts which 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.²⁵

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.

¹⁹ *BEREC Supports ISPs in Implementing the EU Sanctions to Block RT and Sputnik*, BEREC (Mar. 11 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>.

²⁰ MART SUSI et al. (eds.), *GOVERNING INFORMATION FLOWS DURING WAR: A COMPARATIVE STUDY OF CONTENT GOVERNANCE AND MEDIA POLICY RESPONSES AFTER RUSSIA’S ATTACK ON UKRAINE* (2022), <https://gdhrnet.eu/wp-content/uploads/GDHRNet-Working-Paper-42.pdf>.

²¹ The use of the expression “Iron curtain” as a Cold War symbol is attributed to a speech by Winston Churchill given on 5 March 1946, in Fulton, Missouri. <https://winstonchurchill.org/resources/speeches/1946-1963-elder-statesman/the-sinews-of-peace>.

²² SUSI, *supra* note 20, at 4.

²³ *Id.* at 17.

²⁴ A letter from the European Council to undisclosed recipients, see https://lumendatabase.org/file_uploads/files/5061360/005/061/360/original/6-9267000032260.pdf?1646430529&access_token=w6YC_Vjutt85UvZMLExMag, at 2.

²⁵ *Id.*

Where a media outlet other than Russia Today and Sputnik [and the others, later added to the list] reports about the current Regulation and it[s] 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.²⁶

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.²⁷ This provision makes it clear that any state-imposed orders 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 27 investigations against RT, and the UK’s public service broadcaster BBC halted all content licensing with its Russian customers.²⁸

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).

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.²⁹

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.³⁰

²⁶ *Id.* at 3.

²⁷ 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”).

²⁸ 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/mediase/2022/06/10/understandable-but-still-wrong-how-freedom-of-communication-suffers-in-the-zeal-for-sanctions>.

²⁹ Chris Dziadul, *Switzerland and Norway refuse to ban RT and Sputnik*, BROADBAND TV NEWS (Jun. 14, 2022), <https://www.broadbandtvnews.com/2022/06/14/switzerland-and-norway-refuse-to-ban-rt-and-sputnik>.

³⁰ *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.³¹ 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.³²

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 objective elements, to avoid arbitrariness. "The challenge for democracies is to fight disinformation while preserving freedom of expression" – said Gutiérrez.³³

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." 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) Directive³⁴ 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. The AVMS Directive applies only to freedom of

³¹ Toby Sterling, *Dutch Journalists, Rights Group File Lawsuit Challenging EU Ban on RT, Sputnik*, REUTERS (May 2, 2022), <https://www.reuters.com/business/media-telecom/dutch-journalists-rights-group-file-lawsuit-challenging-eu-ban-rt-sputnik-2022-05-25>.

³² *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>.

³³ *Id.*

³⁴ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 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").

reception and transmission between EU Member States and, 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 they comply with Union law and the international obligations of the EU.

Since 2015, Lithuania and Latvia have suspended the broadcasting of the Russian-language television channel RTR Planeta multiple times. 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. 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.³⁵ 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.³⁶

The issuing of licenses for media outlets, which is governed by a regime that seeks to protect diversity,³⁷ 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 and the audiences’ freedom to receive information – when adopting such sanctions.³⁸

The human rights organization 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 programmes actually constitute a serious and immediate threat to public order and security to justify a ban in all EU Member States”. 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”.³⁹

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),

³⁵ “*Decision of Latvia to suspend broadcast of the TV channel 'Rossiya RTR' compatible with EU law*”, 12 May 2021, <https://digital-strategy.ec.europa.eu/en/news/decision-latvia-suspend-broadcast-tv-channel-rossiya-rtr-compatible-eu-law>.

³⁶ Case C-622/17, *Baltic Media Alliance Ltd v. Lietuvos radijo ir televizijos komisija*, judgment of the Court (Second Chamber) of 4 July 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>.

³⁷ Charter of Fundamental Rights of the European Union, art. 11.

³⁸ Ilaria Buri & Isabel Lereño Monteiro Guedes & Lucas Balluff, “*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>.

³⁹ 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), <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>.

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.⁴⁰ 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 protection of the right to freedom of expression according to the case law of the ECtHR.⁴¹

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 from there to saying the same thing to a journalist with opposition 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 serve 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, but strictly speaking, the media are not in themselves obliged to comply with these standards (not even in Western Europe). They are generally free to be biased, partisan, and follow a certain political line (with some notable exceptions in the 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 up that prior and arbitrary intervention in the process of publication of opinions is

⁴⁰ Buri & Lereno Monteiro Guedes & Balluff, *supra* note 38.

⁴¹ Radio France and Others v. France, App. No. 53984/00 Eur. Ct. H.R. (2004), <https://hudoc.echr.coe.int/eng?i=001-61686> and Österreichischer Rundfunk v. Austria, App. No. 35841/02 Eur. Ct. H.R. (2006), <https://hudoc.echr.coe.int/eng?i=001-78381>; see also Dirk Voorhoof, *EU Silences Russian State Media: A Step in the Wrong Direction*, INFORMM (May 8, 2022), <https://inform.org/2022/05/08/eu-silences-russian-state-media-a-step-in-the-wrong-direction-dirk-voorhoof>.

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.’⁴² 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.⁴³

However, the ECtHR does not, in principle, preclude the application of prior restraint. This is clear from the earlier jurisprudence of the Court⁴⁴ and has been explicitly stated in the judgments in *Sunday Times v. the United Kingdom (No. 2)*⁴⁵ and *Observer and Guardian v. the United Kingdom*.⁴⁶ 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, taking into account 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), and to the case-law of the ECtHR.⁴⁷ 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.⁴⁸ 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.

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

⁴² WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1979 [1765–1769]), Vol. 4, at 151.

⁴³ Examples of the constitutional prohibition of censorship, Grundgesetz (German Constitution), art. 5; Greek Constitution, art. 14; Dutch Constitution, art. 7; Luxembourg Constitution, art. 24.

⁴⁴ *Sunday Times v. the United Kingdom*, App. No. 6538/74 Eur. Ct. H.R. (1980), <https://hudoc.echr.coe.int/eng?i=001-57583>; *Markt Intern Verlag and Klaus Beerman v. Germany*, App. No. 3/1988/147/201 Eur. Ct. H.R. (1989), <https://hudoc.echr.coe.int/eng?i=001-57648>.

⁴⁵ App. No. 13166/87 Eur. Ct. H.R. (1991), <https://hudoc.echr.coe.int/eng?i=001-57708>.

⁴⁶ App. No. 13585/88 Eur. Ct. H.R. (1991), <https://hudoc.echr.coe.int/eng?i=001-57705>.

⁴⁷ See *Jersild v. Denmark* and many other ECtHR decisions, https://www.echr.coe.int/documents/fs_hate_speech_eng.pdf.

⁴⁸ ARTICLE 19, *supra* note 39.

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.⁴⁹

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.” They also permit “direct propaganda operations on the civilian population of the adverse belligerent party”.⁵⁰ However, the ICCPR expressly provides in Article 20(1) that “[a]ny propaganda for war shall be prohibited by law.” 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 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 programmes actually constitute a serious and immediate threat to public order and security to justify a ban in all EU Member States.⁵¹

The recitals of the Decision and the Regulation indicate two reasons for the ban: disinformation and propaganda.⁵² The subjects to be protected by the ban are the citizens and the public of the EU.⁵³ 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).⁵⁴

Under Article 52(1) of the Charter of Fundamental Rights of the European Union (CFR), the interference must pursue “objectives of general interest recognised by the Union”. Hence, the restriction targeting disinformation and propaganda might be in line with the CFR.⁵⁵ 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

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Voorhoof, *supra* note 41.

⁵² Regulation Recitals 3–10, Decision Recitals 4–6 and 10.

⁵³ Regulation Recitals 6 and 7.

⁵⁴ 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>.

⁵⁵ *Id.*

be to stop propaganda for war.⁵⁶ 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.⁵⁷ 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.⁵⁸

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 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.”⁵⁹

Popović also referred to the leading authorities on “propaganda for war” in international human rights law. 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”.⁶⁰ So, as Andrei Richter observes, only “direct incitement to war” qualifies as propaganda for war.⁶¹ 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.⁶² However, an analysis of

⁵⁶ 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>.

⁵⁷ 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>.

⁵⁸ *Id.*

⁵⁹ Popović, *supra* note 54.

⁶⁰ Michael Kearney, *The Prohibition of Propaganda for War in the International Covenant on Civil and Political Rights*, 23 NQHR 551, 568–569 (2005).

⁶¹ 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).

⁶² See the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms.

the ban highlights the limited amount of data available about the actual reach of RT and Sputnik, as well as the lack of consistency in terms of their actual threat across different Member States.⁶³

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”.⁶⁴ 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.”⁶⁵

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”.⁶⁶ Proportionality is also an important concept when it comes to the restriction of human rights under the regime of ECHR.⁶⁷ 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.⁶⁸ In apparent contradiction to this, the ban restricts the 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”.⁶⁹

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.⁷⁰

As Voorhoof concludes,

⁶³ EU Sanctions on Russian Broadcasters, GLOBAL NETWORK INITIATIVE (Aug. 3, 2022), <https://globalnetworkinitiative.org/eu-sanctions-russia-ukraine-foe>.

⁶⁴ Regulation, Recital 10.

⁶⁵ Popović, *supra* note 54.

⁶⁶ Human Rights Committee, General Comment No 34, CCPR/C/GC/34, 12 September 2011, para 34.

⁶⁷ *See, e.g.*, MARK E. VILLIGER, HANDBOOK ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS 514–515 (2023).

⁶⁸ Ahmet Yıldırım 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; and ECtHR 23 June 2020, OOO Flavus and Others v. Russia, App. Nos. 12468/15, 23489/15 and 19074/16 Eur. Ct. H.R. \(2020\), https://hudoc.echr.coe.int/eng?i=001-203178](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; and ECtHR 23 June 2020, OOO Flavus and Others v. Russia, App. Nos. 12468/15, 23489/15 and 19074/16 Eur. Ct. H.R. (2020), https://hudoc.echr.coe.int/eng?i=001-203178).

⁶⁹ GNI, *supra* note 63.

⁷⁰ Popović, *supra* note 54.

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.⁷¹

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.⁷² 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.⁷³ “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.”⁷⁴ 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”.⁷⁵

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 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.⁷⁶

9. Setting a Dangerous Precedent

⁷¹ Voorhoof, *supra* note 41.

⁷² GNI, *supra* note 63.

⁷³ Voorhoof, *supra* note 41.

⁷⁴ ARTICLE 19, *supra* note 39.

⁷⁵ *Switzerland Expands Sanctions Against Russia but Decides Not to Censor Russian Media*, INFOBAE (Mar. 25, 2022), <https://www.infobae.com/en/2022/03/25/switzerland-expands-sanctions-against-russia-but-decides-not-to-censor-russian-media>.

⁷⁶ Helberger & Schulz, *supra* note 28.

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.⁷⁷ The restrictions may also create a pattern also inside the EU to be used in the future in less compelling circumstances.⁷⁸

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.⁷⁹

The ban may also induce a backlash from Russia itself, as 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,⁸⁰ a Kremlin spokesperson responded, “Of course, we will take similar measures of pressure on Western media that operate in our country”, and such measures were indeed taken. He also added that “Europeans are trampling on their own ideals.”⁸¹

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. He 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*,⁸² 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

⁷⁷ GNI, *supra* note 63; *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>.

⁷⁸ SUSI, *supra* note 20, at 27.

⁷⁹ *Id.* at 28–29.

⁸⁰ See Part II.4 *infra*.

⁸¹ 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>.

⁸² Case T-262/15, Dmitrii Konstantinovich Kiselev v. Council of the European Union, judgment of the General Court (Ninth Chamber) of 15 June 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62015TJ0262>.

freedom or significantly interfering with journalistic activity. Moreover, the notions of national security and hate speech should also be interpreted strictly.

The Court dismissed the applicant's action. The Court argued 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."⁸³ 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.⁸⁴

According to the Court, the restrictive measures do not dissuade Russian journalists from freely expressing their views on political issues of public interest,⁸⁵ 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".⁸⁶ No other journalist was included on the list at issue.⁸⁷ As a consequence, the limitations on the right to freedom of expression were necessary and not disproportionate.⁸⁸

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 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.⁸⁹ According to the judgment, the provisional prohibition on broadcasting constitutes interference with the applicant's exercise of its right to freedom of expression within the meaning of Article 11(1) CFR.⁹⁰ 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.⁹¹

According to the Court, the restriction was foreseeable in view of the importance of the media, in particular the audiovisual media, in contemporary society, given that the significant

⁸³ *Id.* at [112].

⁸⁴ *Id.* at [113].

⁸⁵ *Id.* at [116].

⁸⁶ *Id.* at [117].

⁸⁷ *Id.* at [119].

⁸⁸ *Id.* at [120].

⁸⁹ Judgment of the General Court (Grand Chamber) on 27 July 2022, Case T-125/22, *RT France v. Council of the European Union*, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62022TO0125>.

⁹⁰ *Id.* at [143].

⁹¹ *Id.* at [145].

media support for the military aggression of the Russian Federation against Ukraine, provided by a media entity entirely financed from the Russian state budget, through television and internet broadcasts, could be affected by restrictive measures consisting in the prohibition of the broadcasting of propaganda activities supporting such aggression.⁹² The Court affirmed that the condition that restrictions on freedom of expression must be those laid down by law was satisfied.⁹³ 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.⁹⁴

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. It can therefore be concluded, 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.⁹⁵ 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.⁹⁶

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.⁹⁷ 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.⁹⁸ 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.⁹⁹

As regards 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 measure must be chosen and the harm caused must not be disproportionate to the objectives pursued.¹⁰⁰

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. The Court held that the Council had provided a body of "sufficiently

⁹² *Id.* at [151].

⁹³ *Id.* at [152].

⁹⁴ *Id.* at [154].

⁹⁵ *Id.* at [156].

⁹⁶ *Id.* at [157].

⁹⁷ *Id.* at [159].

⁹⁸ *Id.* at [161].

⁹⁹ *Id.* at [162].

¹⁰⁰ *Id.* at [168].

concrete, precise and consistent evidence” showing that RT France was under the “permanent control, direct or indirect, of the leaders of the Russian Federation”.¹⁰¹ 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.¹⁰²

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.¹⁰³ 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. 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.¹⁰⁴

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 capable of establishing, first, that the applicant actively supported the destabilizing and aggressive policy pursued by the Russia against Ukraine before the adoption of the restrictive measures at issue, which ultimately led to a widespread military offensive, and secondly, that the 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.¹⁰⁵

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.¹⁰⁶

It was also necessary to examine whether other, less coercive measures may have enabled the EU to achieve the desired general interest objectives pursued.¹⁰⁷ In this regard, it must be held that, considering the nature of the applicant’s 24-hour news channel, other less coercive restrictive measures, such as the prohibition on broadcasting in certain EU countries or the prohibition on broadcasting programs in certain ways, are not necessary, and the restriction to 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.¹⁰⁸

The handling of the information in question, which involves propaganda activities aimed at justifying and supporting the unlawful, unprovoked and unjustified military aggression

¹⁰¹ *Id.* at [174].

¹⁰² *Id.* at [173].

¹⁰³ *Id.* at [175].

¹⁰⁴ *Id.* at [186].

¹⁰⁵ *Id.* at [188].

¹⁰⁶ *Id.* at [193].

¹⁰⁷ *Id.* at [196].

¹⁰⁸ *Id.* at [197].

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.¹⁰⁹

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.¹¹⁰ Article 20(1) ICCPR provides that “[a]ny propaganda for war shall be prohibited by law.”¹¹¹ The prohibition laid down in Article 20(1), which refers to “all” war propaganda, covers 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.¹¹²

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.¹¹³

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.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶

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. Ronan Ó Fathaigh and Voorhoof published a thorough and thoughtful critique of the decision.¹¹⁷ Here I summarize the main points made by the authors. 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,¹¹⁸ 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

¹⁰⁹ *Id.* at [206].

¹¹⁰ *Id.* at [208].

¹¹¹ *Id.* at [209].

¹¹² *Id.* at [210].

¹¹³ *Id.* at [211].

¹¹⁴ *Id.* at [212].

¹¹⁵ *Id.* at [213].

¹¹⁶ *Id.* at [214].

¹¹⁷ 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), <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>.

¹¹⁸ Case C-345/17 *Buivids v. Datu valsts inspekcija*, judgment of the Court (Second Chamber) of 14 February 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>.

from *NIT S.R.L. v. Moldova*¹¹⁹ 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”.¹²⁰ 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,¹²¹ 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 of “insufficient” procedural guarantees, including no prior court review, with judicial review “not automatic” since it could take place only on application by the publisher to the courts, while the publisher was not entitled to submit oral or written observations “before the order” imposing the ban was adopted.

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”.¹²²

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)”.¹²³ 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. Perhaps most surprisingly, the General Court argues that the essence of the right to freedom of expression is not curtailed by the ban, as 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 arguments every interference with freedom of expression can be justified, as there are always some alternatives left”. 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

¹¹⁹ *NIT S.R.L. v. the Republic of Moldova*, App. No. 28470/12 Eur. Ct. H.R. (2022) [GC], <https://hudoc.echr.coe.int/eng?i=001-216872>.

¹²⁰ In line with this, in *OOO Flavus* (*supra* note 68) 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”.

¹²¹ *Association Ekin v. France*, App. No. 39288/98 Eur. Ct. H.R. (2001), <https://hudoc.echr.coe.int/eng?i=001-59603>.

¹²² *OOO Flavus* (*supra* note 68); *Yıldırım* (*supra* note 68); *Cengiz* (*supra* note 68).

¹²³ Human Rights Committee 102nd Session Geneva, 11–29 July 2011, General comment No. 34 on Article 19: Freedoms of opinion and expression, CCPR/C/GC/34.

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. 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 we 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 framework of the protection of freedom of expression, in the current doctrine, 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, 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.¹²⁴

Secondly, the EU Council's Framework Decision on combating racism and xenophobia in the Member States of the EU¹²⁵ 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.¹²⁶

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.¹²⁷

Fourthly, commercial communication can be regulated in order to protect consumers from false (misleading) statements. The ECtHR, in *Markt Intern and Beerman v. Germany*,¹²⁸ declared that advertisements serving purely commercial interests, rather than participating in

¹²⁴ See *Lingens v. Austria*, App. No. 9815/82 Eur. Ct. H.R. (1986), <https://hudoc.echr.coe.int/eng?i=001-57523>, and the many cases decided by the ECtHR, https://www.echr.coe.int/Documents/FS_Reputation_ENG.pdf.

¹²⁵ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

¹²⁶ See the French Gayssot Act (13 July 1990, amending the Law on the Freedom of the Press of 1881, by adding a new article 24), and the German Criminal Code (StGb), art. 130(3).

¹²⁷ See, e.g., the UK's Representation of the People Act 1983, s 106 (False statements as to candidates).

¹²⁸ *Markt Intern and Beerman*, *supra* note 44.

debates in the public sphere, are also to be awarded the protection of the freedom of speech.¹²⁹ 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.

B. *The Regulation of Online Platforms*

Platform regulation in itself raises serious questions, regardless of the context of the war. I will start with a general overview of these issues, including the consequences 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),¹³⁰ 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 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.¹³¹ 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.¹³² 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.

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. 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).¹³³ The Directive requires all types of intermediaries to remove such materials after they become aware of their infringing nature (Articles 12–14). In addition, the

¹²⁹ *Id.* para. 36.

¹³⁰ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (“Digital Services Act”).

¹³¹ Andrew Marantz, *Facebook and the “Free Speech” Excuse*, NEW YORKER (Oct. 31, 2019), <https://www.newyorker.com/news/daily-comment/facebook-and-the-free-speech-excuse>.

¹³² According to George Soros, Facebook is working directly to re-elect Trump President. *See* George Soros, *Remove Zuckerberg and Sandberg from Their Posts*, FINANCIAL TIMES (Feb. 18 2020), <https://www.ft.com/content/88f6875a-519d-11ea-90ad-25e377c0ee1f>.

¹³³ Directive on electronic commerce, art. 14.

Directive also stipulates that intermediaries may not be subject to a general monitoring obligation to identify illegal activities (Article 15).

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. 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.¹³⁴

Although continuous, proactive monitoring of infringing content is not mandatory for platforms, the CJEU opened up a loophole for it well before the recent Regulation banning Russian media outlets, in 2019, in *Glawischnig-Piesczek v. Facebook Ireland*.¹³⁵ The decision in that case required the platform to delete defamatory statements that had been reported once and removed but which subsequently reappeared. 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”. This is only possible through the use of artificial intelligence, the use of which is encouraged by this decision and even implicitly made mandatory. If we place that 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. The legality of the content is determined by algorithms, which would seem quite risky for freedom of speech.¹³⁶

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

¹³⁴ Christina M. Mulligan, *Technological Intermediaries and Freedom of the Press*, 66 SMU LAW REVIEW 157, 175 (2013).

¹³⁵ Case C-18/18, *Eva Glawischnig-Piesczek v. Facebook Ireland Ltd*, judgment of the CJEU of 3 October 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>.

¹³⁶ Elda Brogi & Marta Maroni, *Eva Glawischnig-Piesczek v Facebook Ireland Limited: A New Layer of Neutrality*, CMPF (Oct. 17, 2019), <https://cmpf.eui.eu/eva-glawischnig-piesczek-v-facebook-ireland-limited-a-new-layer-of-neutrality>.

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.¹³⁷ The Recommendation that followed the Communication reaffirmed the requirement to apply proportionate proactive measures in appropriate cases, which permits the use of automated tools to identify illegal content.¹³⁸

The High Level Expert Group on Fake News and Online Disinformation published a Report on these issues in 2018.¹³⁹ The Report defines disinformation as “false, inaccurate, or misleading information designed, presented and promoted for profit or to intentionally cause public harm”.¹⁴⁰ 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 2018.¹⁴¹ 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.¹⁴²

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

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 Conduct on Disinformation. 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

¹³⁷ Communication on Tackling Illegal Content Online: Towards an enhanced responsibility of online platforms, 28 September 2017, COM(2017) 555 final, 10, s 3.3.1.

¹³⁸ Commission Recommendation of 1.3.2018 on measures to effectively tackle illegal content online (C(2018) 1177 final), ss 12 and 18.

¹³⁹ Final Report of the High Level Expert Group on Fake News and Online Disinformation (2018), <https://ec.europa.eu/digital-single-market/en/news/final-report-high-level-expert-group-fake-news-and-online-disinformation>.

¹⁴⁰ *Id.* at 10.

¹⁴¹ 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, 26 April 2018, COM(2018) 236 final.

¹⁴² *Id.* at 9, s 3.1.1.

accountability for their disinformation policies. It also led to concrete actions and policy changes by relevant stakeholders to help combat disinformation.¹⁴³

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 2022.¹⁴⁴ The updated and strengthened Code aims to deliver on the objectives of the Commission's guidance,¹⁴⁵ 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 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 in 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), empowering users through media literacy initiatives, ensuring greater transparency for platforms' recommendation systems, supporting research into disinformation, and strengthening 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. 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 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".¹⁴⁶ As it transpired, no major online platform has raised any concerns regarding the ban. As David Kaye put it,

¹⁴³ Code of Practice on Disinformation (2018), <https://digital-strategy.ec.europa.eu/en/library/2018-code-practice-disinformation>.

¹⁴⁴ 2022 Strengthened Code of Practice on Disinformation, <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>.

¹⁴⁵ COM(2021) 262 final communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions; European Commission Guidance on Strengthening the Code of Practice on Disinformation, Brussels, 26.5.2021.

¹⁴⁶ Helberger & Schulz, *supra* note 28.

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.¹⁴⁷

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.¹⁴⁸ However, negative PR could be detrimental to a platform, so platforms inevitably make efforts to tackle the spread of disinformation, and even 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.¹⁴⁹ 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.¹⁵⁰

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.¹⁵¹ 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.¹⁵² 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.¹⁵³ The Report suggests that platforms give a

¹⁴⁷ 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>.

¹⁴⁸ Paul Bernal, *Facebook: Why Facebook Makes the Fake News Problem Inevitable*, 69 NI LEGAL QUARTERLY 497, 506–509 (2018).

¹⁴⁹ RICHARD L. HASEN, CHEAP SPEECH AND WHAT IT HAS DONE (TO AMERICAN DEMOCRACY) 226–230 (2017).

¹⁵⁰ Lili Levi, *Real “Fake News” And Fake “Fake News”*, 16 FIRST AMENDMENT LAW REVIEW 285 (2018).

¹⁵¹ Jessica Stone-Erdman, *Just the (Alternative) Facts, Ma’am: The Status of Fake News under the First Amendment*, 16 FIRST AMENDMENT LAW REVIEW 410 (2017–18); Sarah Perez, *Facebook Expands Fact-Checking Program Adopts New Technology for Fighting Fake News*, TECHCRUNCH (Jun. 21, 2018), <https://techcrunch.com/2018/06/21/facebook-expands-fact-checking-program-adopts-new-technology-for-fighting-fake-news/?guccounter=1>.

¹⁵² Catherine Shu, *Facebook will Ditch Disputed Flags on Fake News and Display Links to Trustworthy Articles Instead*, TECHCRUNCH (Dec. 20, 2017), <https://techcrunch.com/2017/12/20/facebook-will-ditch-disputed-flags-on-fake-news-and-display-links-to-trustworthy-articles-instead>.

¹⁵³ High Level Expert, *supra* note 139.

wider range of options for their users to personalize the service they receive. Other measures it suggested, such as that a platform should recommend additional news from reliable sources to its users in addition to popular topics, that it should give more visibility to reliable news sources¹⁵⁴ and that users should be enabled to exercise their right to respond to allegations 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).¹⁵⁵ 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.¹⁵⁶ 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 Ukraine invasion, which involves a limited and temporary change to its hate speech policy.¹⁵⁷

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.¹⁵⁸

¹⁵⁴ *Id.* at 33.

¹⁵⁵ Commission, *supra* note 141.

¹⁵⁶ Munsif Vengattil & Elizabeth Culliford, *Facebook Allows War Posts Urging Violence Against Russian invaders*, REUTERS (Mar. 10, 2022), <https://www.reuters.com/world/europe/exclusive-facebook-instagram-temporarily-allow-calls-violence-against-russians-2022-03-10>.

¹⁵⁷ Emerson T. Brooking, *Meta Meets the Reality of War*, SLATE (Mar. 17, 2022), <https://slate.com/technology/2022/03/meta-facebook-calls-violence-invading-russians.html>.

¹⁵⁸ *Meta’s Ongoing Efforts Regarding Russia’s Invasion of Ukraine*, META (Feb. 26, 2022), <https://about.fb.com/news/2022/02/metass-ongoing-efforts-regarding-russias-invasion-of-ukraine>.

Twitter also announced some changes in its policies related to the war, though the company did not amend its generally applicable hate speech policies.¹⁵⁹

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 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.”¹⁶⁰

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. 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.¹⁶¹ 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 bigger transparency, the obligation to give reasons for a deletion of a content or suspension of an account, the right of independent review).¹⁶²

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 take into account freedom of expression and media pluralism. Article 14(4) states that:

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].

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 regard to very large online platforms in Europe, this will most often be

¹⁵⁹ 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.

¹⁶⁰ Kaye, *supra* note 147.

¹⁶¹ DSA, art. 6.

¹⁶² *Id.* arts 17, 21, 24.

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 take action against disinformation, but only if 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”¹⁶³ and then 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 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 take action 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.¹⁶⁴

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 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

¹⁶³ *Id.* arts 34(1)(b) and 34(1)(c).

¹⁶⁴ Cases C-244/10 and C-245/10 *Mesopotamia Broadcast A/S and Roj TV A/S v. Bundesrepublik Deutschland*, judgment of the Court (Third Chamber) of 22 September 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>.

adequate legal remedies for those whose personality rights have been infringed through false statements.¹⁶⁵ Such regulations are known Europe-wide and typically impose obligations not only on audiovisual media but also on printed and online press alike.¹⁶⁶ 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.¹⁶⁷

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.¹⁶⁸ 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 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 programmes breached the Code.¹⁶⁹

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.” Taking into account a series of breaches by RT of the British broadcasting legislation concerning the due impartiality and accuracy rules, Ofcom revoked these licenses.¹⁷⁰

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.

¹⁶⁵ AVMS Directive, art. 28.

¹⁶⁶ Kyu Ho Youm, *The Right of Reply and Freedom of the Press: An International and Comparative Perspective*, 76 GEORGE WASHINGTON LAW REVIEW 1017 (2008); Andrei Richter, *Fake News and Freedom of the Media*, 8 JIMEL 1, 14–19 (2018–19); András Koltay, *The Right of Reply in a European Comparative Perspective* HUNGARIAN JOURNAL OF LEGAL STUDIES – ACTA JURIDICA HUNGARICA 73 (2013).

¹⁶⁷ 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 Björnstjern Baade, *Fake News and International Law*, 29 THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 1357 (2019).

¹⁶⁸ Ofcom Broadcasting Code, s 5.

¹⁶⁹ 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.

¹⁷⁰ 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 licences TLCS 000881, TLCS 001686 and DTPS 000072 held by ANO TV Novosti, https://www.ofcom.org.uk/__data/assets/pdf_file/0014/234023/revocation-notice-ano-tv-novosti.pdf.

There is also a potential risk of EU bodies overstepping their Treaty powers. It is important to stress that taking action against media companies broadcasting 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 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.