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MEETING DOCUMENT

From: General Secretariat of the Council
To: Horizontal Working Party on Enhancing Resilience and Countering Hybrid Threats
Subject: Presentation - Restrictive measures in response to disinformation and FIMI

Delegations will find in the annex the slides of the presentation given during the Horizontal Working Party on Enhancing Resilience and Countering Hybrid Threats on 6 June 2023.
RESTRICTIVE MEASURES

IN RESPONSE TO DISINFORMATION AND FIMI:

LESSONS FROM THE CASE LAW OF THE CJEU
OUTLINE

1. Legal framework and key principles of restrictive measures

2. Relevant case-law on restrictive measures targeting individuals and certain media outlets

3. Scope of EU competence

4. Listing criteria

5. Compliance with fundamental rights

6. The way forward
1. **Legal framework and key principles**

**Legal basis**

- **Article 29 TEU** (CFSP)
  
  “The Council shall adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature. Member States shall ensure that their national policies conform to the Union positions.”

- **Article 215 TFEU** (restrictive measures)
  
  - EU level implementation of CFSP Decision
  - Council Regulation adopted by QMV on joint proposal of HR/Commission
1. Legal framework and key principles

Key principles

- Restrictive measures can cover third countries, entities or individuals

- Restrictive measures must be consistent with CFSP objectives (art. 21 TEU)
  - Safeguard EU values, fundamental interests, security, independence and integrity;
  - Consolidate and support democracy, rule of law, human rights and principles of international law;
  - Preserve peace, prevent conflicts and strengthen international security […]

- They must respect human rights and fundamental freedoms, in particular due process and the right to an effective remedy. The measures imposed must always be proportionate to their objective.
2. Relevant case law

- **Targeting of individuals** (journalists, directors of news agencies, etc)
  - T-693/13 (*Mikhalchanka*)
  - T-262/15 (*Kiselev*)
  - T-579/21 (*Gusachenka*)

- **Targeting of certain media outlets**
  - C-622/17 (*Baltic Media Alliance v. Lietuvos radijo ir televizijos komisija*)
  - T-125/22 (*RT France v. Council*)
3. Scope of EU competence

- The *regulation of media content*
  - Art. 167 TFEU (cultural policy)
  - Audiovisual Media Services Directive
    - MS can adopt public policy measures against incitement to hatred and war propaganda
      - See: Case C-622/17 and Commission Decision C(2021) 3162 final

- The competence of national regulatory authorities to adopt sanctions regarding inappropriate editorial content *does not preclude* the Council to adopt *restrictive measures* designed to temporarily ban broadcasting activities as *part of the CFSP* (Case T-125/22, *RT France*, § 57)
3. Scope of EU competence

- **Broad interpretation of art. 29 TEU** (*RT France*, § 51)
  - Not only measures of a programmatic nature or declarations of intent but also decisions directly affecting the legal position of individuals

- **Broad margin of discretion for the Council** to define restrictive measures within the CFSP (§52)
  - Propaganda and disinformation campaigns are capable of undermining the foundations of democratic societies
  - A temporary ‘broadcasting ban’ for certain media outlets can be enacted as a restrictive measure under Art. 29 TEU

- **CFSP competences and TFEU provisions are not mutually exclusive** but complementary (§61)

- Adoption of an EU Regulation pursuant to Art. 215(2) TFEU is necessary to ensure the **uniform application** of the temporary broadcasting ban (§ 63)
4. **Listing criteria**

- The Council’s choice of which persons to target is “*based on clear and distinct criteria*” which are “*tailored to the specifics of each restrictive measure*” (Council Sanctions Guidelines, 5564/18)

- Wide margin of discretion in the designing and wording of listing criteria (provided that they are consistent with CFSP objectives)
4. Listing criteria

- Countering ‘propaganda’ as an ancillary activity in support of the behaviour of the sanctioned States
  
  - Listing criteria do not allude to propaganda (and/or disinformation) – references to propaganda/disinformation can be found:
    
    ➢ In the statements of reasons supporting an individual’s listing (e.g. Belarus, Iran, restrictive measures linked to Ukraine’s territorial integrity)
    
    ➢ In the preamble of the CFSP decision/TFEU regulation imposing (new) restrictive measures (e.g. Council Decision (CFSP) 2022/351 imposing the broadcast ban against RT France)

  - CJEU case law:
    
    ➢ Listings of individuals: no definition of the notions of propaganda/disinformation – verification that the targeted individual’s activities fall within the scope of the listing criteria (*Mikhalchanka, Gusachenka, Kiselev*)
    
    ➢ Listings of media outlets/RT France: elements of definition by reference to Art. 20 of the ICCPR
5. **Compliance with fundamental rights**

- **Procedural requirements**

  - Rights of defence
    - measures adopted “in an extraordinary context of extreme urgency” (*RT France*, §85)
    - effectiveness of the restrictive measures (*RT France*, §91)
  - Statement of reasons
  - Sufficiently solid factual basis (e.g. *Mikhalchanka*)
5. Compliance with fundamental rights

- **Substantive requirements**

  - *Freedom of expression and information* (art. 11 CFR)
    - Limitations are possible if they:
      - are ‘provided by law’;
      - respect the essence of the freedom of expression;
      - meet an objective of general interest;
      - are proportionate (§145)
Provided by law
- Art. 29 TEU – 215 TFEU
- in view of the important role by media in modern society, it is ‘foreseeable’ that large-scale media support for the military aggression against Ukraine is subject to restrictive measures (para. 151)

Respect the essence of the freedom of expression
- The temporary and reversible nature of the measure (until 31 July 2022)
- Maintenance is subject to 2 cumulative criteria: aggression against Ukraine and propaganda actions against the EU and its Member States (§155)
- Activities other than broadcasting are allowed
- No effect with respect to broadcasting outside the EU

The objective of general interest
- Protection of the EU’s public order and security
- Exerting maximum pressure on Russia to end the military aggression against Ukraine

Proportionality
- The extraordinary context and extreme urgency
- Art. 20 of the ICCPR – prohibition on propaganda for war
A CRITICAL VIEW

– What room for the ECtHR case law?
   - NIT, SRM v. Republic of Moldova (28470/12)
   - OOO Flavus and Others v. Russia (13468/15)

– Compliance with Article 19 of the ICCPR (protection of the freedom of expression)?

– What assessment of the temporality of the broadcast ban?
[NO] Sanctions on RT and Sputnik not to be adopted in Norway

IRIS 2022-5:1/5

Audun Aagre

Freedom of expression has a high level of protection under the Norwegian Constitution. Based on a constitutional assessment, the Norwegian government has decided not to adopt sanctions on Russian state-controlled media.

In a statement presented at the Norwegian Parliament on 18 March 2022, Prime Minister Jonas Gahr Støre stressed that media literacy should, as far as possible, be the main tool to fight disinformation. The Prime Minister also expressed concerns that sanctions against the Russian controlled media outlets, Russia Today (RT) and Sputnik could be exploited by Putin’s regime to legitimise further restrictions on media freedom, and on national and international editorial media in Russia. The threshold for restricting freedom of expression is high under the Norwegian Constitution, and the Prime Minister concluded that the government would conduct thorough assessments of the legal and constitutional dilemmas before reaching a conclusion.

Source: IRIS Legal Observations of the European Audiovisual Observatory
<https://merlin.obs.coe.int/download/9488/pdf>
6. The way forward

– Towards a new horizontal sanctions regime?

– The experience of restrictive measures against cyber-attacks (and of other horizontal sanctions regimes)

– Added value in comparison to country-specific sanctions regimes?
CONCLUDING REMARKS

- Different dimensions
  - Media legislation vs. CFSP
  - Individual measures vs. media bans

- Countering propaganda is ancillary to the objective of the restrictive measures

- The ambiguity of the concepts