Send Not to Know for Whom the Bell Tolls… as Long as It's the Court Playing

Traugott-Ickeroth and the Fate of Free Speech in a "Military" Union

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Perhaps due to the notable impact of climate change on the ongoing summer, the delivery on C-67/25 by the Court of Justice has gone relatively unnoticed hitherto. The brevity of the judgment conflicts with the thunderous effects it may unleash, which have potential to open a definitive breach in the Union's constitutional *acquis*. Noteworthily, this rupture is being perpetrated in alleged defence of Art. 2 TEU values: the lynchpin of the Union as a "militant" democracy is being deployed on the external front-line, too, against the Russian "enemy" and his "infiltrated" accomplices.

Prequel

Four years ago, another sultry summer, the General Court dismissed the claim raised by *RT – Russia Today* France against Regulation 350/2022 amending Regulation 814/2014 to impose restrictive measures in response to Russia's invasion of Ukraine. The judges held that such measures, which forbade allegedly Russia-directed media outlets to broadcast whatever content, rested on appropriate legal bases and were proportionate under Art. 52(1) of the Charter.

Legal bases were: a CFSP Decision based on Art. 29 TEU, and Art. 215 TFEU. The Court endorsed an admittedly "broad" interpretation of the term "approach of the Union" and accorded the Council a "broad discretion" in determining the content of the restrictions concerned.

The proportionality scrutiny found that such restrictions were justified by objectives of general interest and respected the essence of the right concerned – freedom of expression, recognised, *inter alia*, by Art. 11 of the Charter. The justification invoked necessity: "other less onerous… measures" would not be "as effective in achieving the objectives pursued… putting an end to the direct threats to the Union's public order and security" which jeopardise the Union values.

The essence of free speech was respected as those restrictions were "temporary": they could continue "until the aggression against Ukraine is put to an end" and until Russia "cease to conduct propaganda actions against the Union and its Member States". "Propaganda" did not refer to specific contents but to entire broadcasters, pursuant to a three-step test: such broadcasters are directed-funded by a State; their managers declare to support Russia's reasons-positions; their commentators mostly support Russia's reasons-positions, only occasionally in contradictory with others.

Implications were serious, perhaps underrated. By deploying one-sided, incommunicable arguments, the Court undermined "public reason" as a Union law standard. *Universalizability* as a result of *communicative action* is law's ordinary code in pluralist democratic regimes; that ruling sacrificed it on the altar of geopolitics to follow a "friend-foe" code in Schmitt-like fashion. The bias was obvious in the meaning attributed to terms such as "aggression" ("special military operation" for the counterpart) and "propaganda": if applied contrariwise, how many Union-based broadcasters would pass the test the Court imposed?

In legal terms, these are fallacies: whether a conduct is "aggression" or "propaganda" is part of the question and cannot be ground for the answer. Geopolitically, they are endorsements of the Union's position against the Russian "enemy". The Court considered the facts from the Union standpoint only and provided no

constitutional tool to review the concerned measures and to *include* the position of the "*other*". Therefore, the choices the Union executives made to oppose Russia, and the reasons deployed to back such choices, passed as lawful with no real scrutiny on legal basis or substance. Likewise, the sacrificed positions received little consideration: *RT* was labelled as propaganda regardless of the content broadcast; journalists were restricted in their job independently of what they produced; Union citizens were *a-priori* deprived of certain sources of information.

This latter point was crucial, *inter alia*, to interpret Art. 11 of the Charter as minimising the "right to be informed". This occurred in two steps. That right was interpreted as overlapping with the duty of correct information – hence, with the correspondent journalist's responsibility; then, it was rephrased as a need of defending the Union from Russia's alleged propaganda.

Fast-Forward

Germany. Three persons are suspected of participation in a criminal association for broadcasting contents from *RT*. They are not professionals, but individuals circulating contents via the blog "Live-Ticker", freely accessible on www.traugott-ickeroth.com and funded by volunteer donors.

Article 2f(1) Regulation 833/2014, as amended by Regulation 350/2022, forbids "operators to broadcast or to enable, facilitate or otherwise contribute to broadcast, any content" from the cited media. The *Außenwirtschaftsgesetz* (Law on Foreign Trade, 6 June 2013), Paragraph 18, sub-paras. (1)(1)(a-b) and (7)(2), punishes (from three months to five years) anyone who infringes a prohibition laid down in a directly applicable Union legal act and implementing a CFSP economic sanction which refers to "trade in goods, import, export, transfer, supply, transit, forwarding or transport of goods, or sale or purchase of goods" and is performed by "technical assistance, services related to brokerage or insurance, or others related to the action or to the goods referred to above". Thus, if a ban on Russian media is regarded as an "economic sanction" and broadcasting informative content qualifies as one of the actions listed in the cited law, the three guys would be convicted for the concerned offence so long as they are "operators" under the abovementioned Article 2f(1) albeit their activity was not commercial-professional in nature.

As the latter condition – whether someone doing a non-commercial broadcasting activity is an "operator" *ex* Art. 2f(1) – requires an interpretation of Union law, it was deferred to the Court of Justice under Art. 267 TFEU by the Saarbrücken Public Prosecutor Office.

Notably, the Commission had issued *FAQs* to clarify the scope of the anti-Russia sanctions. At page 372/490 of the document, Point 6 highlighted that "operator" referred to any person, entity or body exercising a commercial or professional activity that broadcasts or enables, facilitates or otherwise contributes to the broadcasting of unauthorised content.

However, the Court of Justice (2 July 2026) answered in the affirmative. The "operator" interpretation under Union law follows three criteria: literal, contextual, teleological. Literal interpretation considers the "usual meaning in everyday language" as the word has no specific scope in Union law. As referred to "operating equipment" or "carrying out technical operations", it covers natural-legal persons who broadcast a certain content, irrespective of whether their activity is economic in nature.

Contextual interpretation supports this view, as the word is "used without being paired with the adjective 'economic' in the vast majority of the language versions" of Article 2f(1). The Court stresses that the Commission's *FAQs* cannot introduce a requirement which is not in the act's text: being "merely a working document drawn up by the Commission's services", they "are not legally binding" and "cannot alter the scope" or "be decisive for the interpretation" of that provision.

Last comes teleology. Although the other arguments suffice to support the broadest notion of "operator", the Court strongly emphasised it. Teleology seems deployed as a powerful, purposeful argument to force the Union on the path from a *tolerant-peaceful* polity to a *militant-military* one. The ban on Russian media is attributed the following objective:

> *"... to protect public order and security in the European Union, which are threatened by the systematic, international campaign of media manipulation, distortion of facts and propaganda carried out by the Russian Federation."*

Following the General Court, this paragraph outlines a systematic-teleological reasoning whose rhetorical redundancy exceeds law's administration to display a Foucault-like narrative of truth. This infuses the evaluations on the blog's voluntary funding with an ill-concealed negative bias: voluntary funding "hinders the ability to trace the origin of the funds", which elevates the risk of Russian "infiltration". Yet, this passage also has a law-producing function: it links "Union's public order and security" with "effectiveness" to pave the way for a possible *juridification* of the former. For the Court, a narrow reading of "operator"

> *"...would deprive that prohibition of its effectiveness and would run counter to the objectives referred to [above] ... Indeed, such an interpretation would allow operators who derive no income... freely to broadcast the content ...thereby actively contributing to disinformation and destabilisation campaigns ... and thereby threatening public order and security in the European Union."*

A restrictive interpretation would deprive of effectiveness the Union measure concerned: it would counter its objectives, which would eventually result in a threat to the Union's public order and security. Thus, under the effectiveness umbrella, this latter notion, still a merely empirical element, sets forth on a path towards possible juridical conceptualisation.

Effectiveness, indeed, features with increasing regularity in the Court's case-law. In this passage, as much as in other rulings concerning direct application of Union values, it seems to match *effet utile* with direct effect to push the latter beyond its constitutional boundaries when the very existence of the Union as a legal order is held under threat. Thus, it looks like a sort of doomsday weapon the Court deploys to ensure that Union law measures apply with full uniformity. It is an ultimate claim to obedience, a request of unconditioned loyalty which, as all such requests, leaves little room for negotiation, particularly with national judiciaries.

A Normative Union Public Order?

The link between effectiveness and "Union public order" may enhance the latter's legal substance to make it a normative concept. An overwhelming pressure would push national courts towards consistent interpretation, or prior application of Union law however justified. This may lead to a guilt sentence for the *Traugott-Ickeroth* bloggers, which would be problematic for (at least) four reasons.

This criminal punishment would be based on a national legislative measure that makes reference to Union law. Yet, the latter relies on a legal basis admittedly given a "broad interpretation" to allow the Council to a "broad discretion". A possible *ultra vires* case?

The relation between the span of legal basis and the sensitivity of the effects entailed looks unbalanced. In German constitutional law, a *Wesentlichkeitsprinzip*, or essentiality principle – the more sensitive a decision for fundamental rights at stake, the more robust its anchorage to a legal basis – governs the relationship between legislative and statutory law, as well as, according to some, national and Union law. As referring to Articles 1 and 20, this principle could substantiate an identity review.

The criminal measure would encroach on a fundamental right Art. 5 *Grundgesetz* clearly protects as a right to inform and be informed. The national balancing of rights-interests would probably be stricter towards the Union stance.

The legality principle – law's foreseeability, precision, non-retroactivity – looks jeopardised. Considering the whole chain from Union's to national law, the criminalised conduct seems insufficiently predetermined. Furthermore, Commission's *FAQs* expressly excluded that Article 2f(1) applies out of professional-economic activities, which offers no legal certainty – as *FAQs* lack formal binding value – but surely brings additional uncertainty. Notably, in *Taricco-II*, "the principle that offences and penalties must be defined by law" has enabled national courts not to apply Union

law even if this "allowed a national situation incompatible with EU law to be remedied".

Nevertheless, there are reasons to believe that a normative Union Public Order calling for protection under a value-made law would have numerous supporters. Direct application of Art. 2 would act as a two-sided sword against both internal oppositions and external enemies, which would consolidate the Union as a uniform legal area. A "militant" Union domestically, a "military" Union on the international scene, yet in the name of "common values".

This would bring a *qualitative* constitutional turn. Speech would stay free unless it hinders Union interests; rights would be no longer recognised but *octroyés* as mere reflexes of such interests; militarism would add to militancy to exacerbate anti-Russia narratives. Coherently, opinions that criticise the current escalation towards an existential war on European soil against a nuclear superpower (and key commercial partner) would be treated as lethal threats to the Union's public order-security and punished by criminal law as violating the Union values.

Is the Union ready to become an *alter-ego* of the autocratic, warmongering State it once wanted to dismantle?

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