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How to draw a line between journalism and propaganda in the information wars era?

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Case note on the Judgment of the General Court of 15 June 2017 in Case T-262/15 *Dmitrii Konstantinovich Kiselev v Council of the European Union*

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Introduction

In recent years, we have been able to observe a shift in the EU's sanctions policy from broad economic sanctions, affecting the entire population of the country, to more targeted sanctions, directed at individuals connected to problematic political regimes¹. Those restrictive measures have immediate effects on the individuals concerned and are, at times, capable of jeopardising their lives.

A number of cases, including the seminal judgement in the *Kadi and Al Barakaat*² cases, have shown that those sanctions can be challenged before the Court of Justice of the EU (CJEU) from a fundamental rights perspective and that EU standards in relation to the right to a hearing, judicial protection and property cannot be abrogated.³

The recent *Kiselev*⁴ case provides a good opportunity to analyse how the EU is coping with its difficult task of striking a balance between different competing interests: foreign policy objectives, international law obligations and fundamental rights. Following the settled case-law on sanctions, the General Court had to analyse whether the freedom of expression, as one of the fundamental rights protected by EU law and by the European Convention on Human Rights (ECHR), could be restricted in the interest of foreign policy objectives. The *Kiselev* judgment follows the line of recent similar judgements on sanctions and can be viewed, to some extent, as a missed opportunity to further analyse the differences between propaganda and journalism.

(i) **Facts of the case**

On 17 March 2014, as a reaction to the Ukrainian crisis and the annexation of Crimea, the Council of the EU (Council) adopted, on the basis of Article 29 TEU, Decision 2014/145/CFSP concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. This Common Foreign and Security Policy (CFSP) Decision was implemented on the same date via Council Regulation 269/2014 adopted on the basis of Article 215(2) of the Treaty on the Functioning of the European Union (TFEU).⁵

Mr Kiselev's name was included on the list of persons subject to the restrictive measures due to him being identified as a "*central figure of the government propaganda supporting the*

¹ Piet. Eeckhout, *EU External Relations Law*, Oxford University Press, Second edition, 2011, p. 502.

² Judgment of the Court (Grand Chamber) of 3 September 2008, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461 (*Kadi*).

³ T. Tridimas and J. A. Gutiérrez-Fons, "EU Law, International Law and Economic Sanctions against Terrorism: The Judiciary in Distress?", *Research papers in Law 3/2008, European Legal Studies*.

⁴ Judgment of the General Court (Ninth Chamber) of 15 June 2017, *Dmitrii Konstantinovich Kiselev v Council of the European Union*, Case T-262/15, ECLI:EU:T:2017:392 (*Kiselev*).

⁵ The current practice of the adoption of sanctions consists in two steps approach: the Council first adopts CFSP decisions on the basis of Article 29 TUE laying down the overall sanctions and then they are translated into a regulation on the basis of Article 215 TFEU.

deployment of Russian forces in Ukraine”.⁶ The criterion was subsequently amended and now Mr Kiselev is listed amongst natural persons supporting actions or policies undermining the territorial integrity and stability in Ukraine.⁷

Dmitry Kiselev is a Russian journalist, appointed by the Russian president as a head of the news agency “Rossiya Segodnya” (“RS”) or “Russia Today” (“RT”). He is also the host of “News of the Week,” an allegedly favourite TV show of Putin’s.⁸ His strong comments regarding the conflict in Ukraine received controversial reactions in the Russian speaking countries and his statements that “Russia is the only country capable of turning the USA into a radioactive ash”⁹ became an internet meme. The foreign media often accused him of being the main propagandist of Putin’s regime.

Mr Kiselev contested the restrictive measures adopted by the Council in his regard and focused his main pleadings before the General Court on the basis of a breach of EU-Russia Partnership and Cooperation Agreement (EU-Russia PCA) (ii) and an infringement of the right to freedom of expression (iii-iv).

(ii) Breach of the EU-Russia PCA

It is worthwhile to note that the PCA, establishing the legal framework of EU-Russia relations, dates back to 1997¹⁰ and was initially concluded for ten years. As established by the CJEU in *Simutenkov*¹¹, one of the most important judgements on the EU-Russia PCA, some of its provisions have direct effect with the result that individuals may rely on them before the courts of the Member States.¹²

The PCA, renewed every year since 2007 pursuant to its Article 106, was supposed to be upgraded through a comprehensive framework for bilateral trade and investment relations.¹³ However, the negotiations of a new text, launched in 2008, are now completely blocked along with the talks on visa liberalisation with Russia following the Ukrainian conflict.

In his pleadings before the Court, Mr Kiselev, referred to the violation of some provisions of the PCA related to the free movement of capital between the EU and Russia.¹⁴ This echoes the pleas of the Russian¹⁵ oil company *Rosneft*¹⁶, which was targeted by substantial

⁶ *Kiselev, supra* 4, para. 3.

⁷ Decision 2014/145/CFSP and Regulation (EU) No 269/2014 were subsequently amended by Decision 2014/499/CFSP and Regulation (EU) No 811/2014. In 2015 they were amended by Decision (CFSP) 2015/1524 (OJ 2015 L 239, p. 157) and by Implementing Regulation (EU) 2015/1514 (OJ 2015 L 239, p. 30) (‘the September 2015 measures’). And further amended on 10 March 2016, by Decision (CFSP) 2016/359 (OJ 2016 L 67, p. 37) and by Implementing Regulation (EU) 2016/353 (OJ 2016 L 67, p. 1) (‘the March 2016 measures’).

⁸ Evan Osnos, David Remnick, Joshua Yaffa, “Trump, Putin, and the New Cold War, What lay behind Russia’s interference in the 2016 election—and what lies ahead?”, *Annals of Diplomacy*, March 6, 2017 Issue.

⁹ “Russia can turn US to radioactive ash - Kremlin-backed journalist”, Reuters, March 16, 2014, available at: <https://www.reuters.com/article/ukraine-crisis-russia-kiselyov/russia-can-turn-us-to-radioactive-ash-kremlin-backed-journalist-idUSL6N0MD0P920140316> (last accessed on 12/04/2018).

¹⁰ The PCA was concluded in 1994 and entered into force on 1 December 1997.

¹¹ Judgment of the Court (Grand Chamber) of 12 April 2005, *Igor Simutenkov v Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, Case C-265/03, ECLI:EU:C:2005:213 (*Simutenkov*).

¹² *Ibid.*, para 29.

¹³ European Commission, Trade, Policy, Countries and regions, Russia, available at: <http://ec.europa.eu/trade/policy/countries-and-regions/countries/russia/> (last accessed on 04/05/2018).

¹⁴ *Kiselev, supra* 4, para. 28.

¹⁵ Opinion of Advocate General Wathelet delivered on 31 May 2016(1), ECLI:EU:C:2016:381, *Rosneft* case, para. 21:

“The majority (69.5%) of Rosneft shares are held by Rosneftegaz OJSC, a limited company wholly owned by the Russian Federation. A minority of its shares (19.75%) are held by BP Russian Investments Ltd., a subsidiary of BP plc, the British oil company. The remaining 10.75% of the issued share capital is publicly traded.”

¹⁶ Judgment of the Court (Grand Chamber) of 28 March 2017, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others*, C-72/15, ECLI:EU:C:2017:236 (*Rosneft*).

restrictive measures¹⁷ and also claimed their incompatibility with the EU-Russia PCA provisions.¹⁸

The alleged breach of the EU-Russia PCA, invoked in the *Kiselev* and *Rosneft* cases, reminds us of one of the main difficulties the EU has faced in the past: how to put aside an agreement with your trading partner, if the latter does not respect human rights and undermines stability in the region? What is the best way to strike the right balance between EU's obligations under international law and its CFSP objectives of, as stated in Article 21(2)(c), "*preserving peace, preventing conflicts and strengthening international security*"?

The first time that the European Community's (EC) faced a similar dilemma was in the *Racke*¹⁹ case where the EC decided to unilaterally suspend the Cooperation Agreement with Yugoslavia following the start of military activities in the region. However, according to Article 60 of the Cooperation Agreement with Yugoslavia, while either party may denounce it, the Agreement ceases to apply only six months after the notification thereof. This prevented the EC to proactively handle the escalation of the crisis in the region and pushed it to have recourse to alternative ways to immediately suspend the Agreement, such as the Vienna Convention on the Law of Treaties (VCLT). The VCLT provides some exceptions to the *pacta sunt servanda* rule, notably "*impossibility of performance of treaty obligations*" (Article 61) or "*fundamental change of circumstances*" (Article 62). The Council relied on the latter in 1991 when it unilaterally suspended the Cooperation Agreement with Yugoslavia.

The above-mentioned lack of a legal basis for an immediate suspension of treaties concluded with third countries, as revealed by the *Racke* case, was tackled by the EU by the insertion of so-called "*essential element*" clauses in trade and cooperation agreements signed since the beginning of the 1990s. As Miller notes, the Council decided to include this suspension mechanism in all the agreements concluded by the EU with third countries, allowing the EU to react immediately in the event of violation of some essential elements of those agreements.²⁰

Russia was not an exception, and Article 2 of the PCA and a Joint Declaration in relation to Article 107²¹ appended to the PCA establish that respect for human rights constitutes an "*essential element*" of this Agreement. And as such the violation of the "*essential element*" clause constitutes a "*material breach of the Agreement*",²² allowing the other party to take appropriate measures in accordance with Article 107 of the PCA.

It should be noted that the EU already made reference to the "*essential element*" clause in order to freeze the ratification of an interim cooperation agreement with Russia following the intervention of the Russian forces in the Republic of Chechnya in 1994.²³ Moreover, in reaction to the second Russian Chechen campaign it was decided to delay the signature of the Scientific and Technological Agreement with Russia.²⁴ In addition, the European Council published its Declaration on Chechnya in 1999, where it proposed to suspend some of the EU-Russia PCA's provisions and apply strictly some trade provisions.²⁵

¹⁷ Namely Decision 2014/512 and Regulation No 833/2014.

¹⁸ *Rosneft*, *supra* 16, para. 108.

¹⁹ Judgment of the Court of 16 June 1998, *A. Racke GmbH & Co. v Hauptzollamt Mainz*, C-162/96, ECLI:EU:C:1998:293 (*Racke*).

²⁰ Vaughne Miller, "*The Human Rights Clause in the EU's External Agreements*", Research paper 04/33, International Affairs and Defence, House of Commons Library, 16 April 2004, p. 15.

²¹ Non execution clause in the EU-Russia PCA.

²² Christophe Hillion, "*The evolving system of European Union external relations as evidenced in the EU partnerships with Russia and Ukraine*", Leiden, 2005, p. 73.

²³ Anna-Sophie Maass, *EU-Russia Relations, 1999-2015 : From courtship to confrontation*, London/New York, Routledge, 2016.

²⁴ Christophe Hillion, *supra* 22, p. 74.

²⁵ Helsinki European Council, 10 December 1999, Conclusions of the Presidency, "*Declaration on Chechnya*", available at: http://www.europarl.europa.eu/summits/hel2_en.htm (last accessed on 09/05/2018).

When comparing EU's reactions to the Chechen war and the current Ukrainian crisis, one might ask why the EU is not willing to invoke the "essential element" clause violation in order to suspend the PCA. As Maresceau notes, "suspending (or denouncing) an agreement might blow up all the bridges" and lead to a loss of the EU's influence on the other contracting country.²⁶ Therefore, the practice of formal suspension of a bilateral agreement on the basis of this clause is almost reduced to zero with some rare exceptions, such as the temporary suspension of economic and trade cooperation with some African, Caribbean and Pacific (ACP) States on the grounds of serious violations of human rights and democracy clause of the Cotonou Agreement.²⁷

Moreover, in the *Kiselev* and *Rosneft* cases the EU found another less "nuclear" possibility for opting out from some provisions of the PCA and fully applying its sanctions policy without violating the PCA text: Article 99(1)(d) of the PCA itself. This safeguard clause can be invoked unilaterally by one of the parties in order to put aside some obligations under the Agreement with the aim of protecting its essential security interests and maintaining peace and international security, notably "in time of war or serious international tension constituting threat of war".²⁸

The recourse to Article 99(1)(d) of the EU-Russia PCA is an interesting example of the extension of the EU's system of political conditionality; and it seems that the General Court is willing to provide a large interpretation to this safeguard clause.

The wording of that provision was first interpreted by The Court of Justice in the earlier mentioned *Rosneft*²⁹ judgment by stating that 'war' or 'serious international tension constituting a threat of war' should not be limited to a war directly affecting the territory of the EU, but may include events taking place in a country bordering the European Union.³⁰

The General Court adds in the *Kiselev* case further clarification to the use of Article 99(1)(d) of the PCA, saying that the adoption of some restrictions can be supported by the considerations of exerting pressure on the Russian Federation and urging it to cease its activities undermining the sovereignty of Ukraine.³¹

In consequence, the General Court considers that the sanctions are compatible with the security exemptions laid down in Article 99(1) of the PCA and rejects the applicant's plea claiming the breach of the PCA.³²

(iii) Interplay between sanctions and freedom of expression

While it is true that the Council has a broad discretion for designating persons subjected to restrictive measures, all the criteria used should be compatible with the primary law of the EU.

Mr Kiselev claims that the sanctions in his regard breach his right to freedom of expression, guaranteed by Article 11 of the Charter³³, which, according to Article 6(1) TEU, has equal

²⁶ Marc Maresceau, "Unilateral termination and suspension of bilateral agreements concluded by the EC" in *Views of European law from the mountain : liber amicorum Piet Jan Slot*, Pieter J. Slot, M. K. Bulterman, 2009, p. 464.

²⁷ James Mackie, Julia Zinke, "When Agreement Breaks Down, What Next?", *Discussion Paper № 64A, August 2005*.

²⁸ Article 99(1)(d) of the Agreement on Partnership and Cooperation establishing a partnership between the European Communities and their Member States, of the one part, and the Russian Federation, of the other part, L327, 28/11/1997, p. 3, 24/06/1994, Corfu.

²⁹ *Rosneft*, *supra* 16.

³⁰ *Ibid.*, para. 112.

³¹ *Kiselev*, *supra* 4, para. 33.

³² *Ibid.*, para. 34.

³³ 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected. (Article 11 of the Charter).

legal value to the Treaties. In addition, Mr Kiselev makes reference to Article 10 of the ECHR³⁴, from which the CJEU draws inspiration and which has special significance according to well-established case-law of the CJEU.³⁵

However, the right to freedom of expression is not absolute and, as provided in Article 52(1) of the Charter, any limitation on the exercise of the rights and freedoms must respect three conditions. First of all, they should be provided for by law, in other words there should be a legal basis. Secondly they must be genuinely necessary to achieve an objective of general interest recognised by the EU. And thirdly, they must respect the principle of proportionality. Similar provisions are set out in the ECHR³⁶ and the European Court of Human Rights (ECtHR) in its case-law followed a similar three-fold analysis in its assessment of limitations on the freedom of expression.³⁷

First, the General Court considers whether the restriction on Mr Kiselev's freedom of expression is 'provided for by law'. While it is easy to establish that restrictive measures have a proper legal basis in EU law, notably Article 29 TEU and Article 215 TFEU, the criterion for the listing at issue is not so straightforward. It refers to a vaguer concept of "active support".³⁸ There is no clear definition what kind of activities can be viewed as an active support for actions undermining the territorial integrity of Ukraine.³⁹

Kiselev is not the first case where the General Court had to examine sanctions in relation to a journalist or propagandist depending on the definition criteria applied on both sides. The lawyers of Mr Kiselev were most probably inspired by a successful pleading by a Belarusian journalist who was delisted after the General Court stated that there was no sufficient evidence provided by the Council to conclude that Mr Mikhalchanka was responsible for the violation of electoral standards in Belarus.⁴⁰

Similarly to Mr Kiselev, Mr Mikhalchanka was included on the sanctions list, as "a *journalist of the state TV channel ONT and as the anchorman of the program "That is how it is"*, which was considered by the Council as an instrument of the state propaganda on TV⁴¹. The Council noted that this program played a crucial role in presenting the opposition in a negative way using falsified information.⁴²

³⁴ 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. (Article 10 of the ECHR).

³⁵ See Opinion 2/13 of the Court (Full Court) of 18 December 2014, ECLI:EU:C:2014:2454 para. 37: "In addition, according to settled case-law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance."

³⁶ The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. (Article 10(2)).

³⁷ *Perinçek v. Switzerland*, ECtHR, 15 October 2015, CE:ECHR:2015:1015JUD002751008, para. 124.

³⁸ Article 1 of the Regulation (EU) No 783/2014 of 18 July 2014 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 214, 19.7.2014, pp. 2–3.

³⁹ Kirill Entin, "Autonomous restrictive measures against third countries in the case-law of the European Union Court of Justice", *Mejdunarodnoe pravosudiye*, N° 1(17), 2016, pp. 95-103.

⁴⁰ Judgment of the General Court (First Chamber) of 10 May 2016, *Aliaksei Mikhalchanka v Council of the European Union*, T-693/13, ECLI:EU:T:2016:283 (*Mikhalchanka*).

⁴¹ Council Decision 2012/642/CFSP of 15 October 2012 concerning restrictive measures against Belarus and Council Implementing Regulation (EU) No 1054/2013 of 29 October 2013 implementing Article 8a(1) of Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus.

⁴² *Mikhalchanka*, *supra* 40, para. 71.

Contrary to *Kiselev*, in *Mikhalchanka* the General Court did not assess the interplay between sanctions and freedom of expression, and annulled the Council regulation on the basis of an error of assessment, as the Council failed to present reliable evidence of Mr Mikhalchanka's influence on the breach of international electoral norms in Belarus during the presidential elections in 2010 and the serious violations of human rights.⁴³ Moreover, the General Court did not see any link between Mr Mikhalchanka's activities as a journalist and a commentator on the state TV, and the violation of electoral standards and human rights in Belarus.

Mr Kiselev's lawyers tried to interpret the *Michalchanka* case in such a way that the concept of "active support" applies to the work of a journalist only when his remarks have a concrete impact. However, the General Court did not support this statement and concluded that taking into account the whole context and, in particular the importance of the audio-visual media in our society, the large-scale support of Mr Kiselev for Russia's actions in Ukraine could fall under the criterion based on the concept of "active support".⁴⁴

Therefore the General Court concludes that the first condition of the limitations on the freedom of expression, such as it must be laid down by law, is fulfilled. The second condition of the pursuit of an objective of general interest is straightforward and consists in exerting pressure on the Russian authorities, which is consistent with the objectives of the CFSP.

The analysis of the third criteria, notably of the necessity and appropriateness of restrictive measures will be carried out in the next section, as it is argued here that it goes along with the question whether Mr Kiselev's activities can be defined as propaganda.

(iv) What is propaganda?

The *Kiselev* judgment constitutes an interesting example of how the General Court, despite the lack of any proper definition of propaganda in the EU, comes to the conclusion that Mr Kiselev's activities at issue are capable of constituting propaganda.

The terminology relating to propaganda is rather vague in the European and international context.⁴⁵ Propaganda was not always considered as a negative phenomenon. American author Edward Bernays defined propaganda as "a consistent, enduring effort to create or shape events to influence the relations of the public to an enterprise, idea or group"⁴⁶ and described different benefits of propaganda, provided that the government adequately uses it. On the European continent, the word propaganda acquired negative connotation in a reaction to Goebbels's Ministry of Propaganda.⁴⁷

The issue of this "definitionally" problematic term was also addressed by the European Parliament in its resolution on "EU strategic communication to counteract anti-EU propaganda by third parties"⁴⁸, where it notes that "information warfare is not only an external EU issue but also an internal one". And in this regard the Parliament calls on the EU institutions to address the current lack of clarity on propaganda and disinformation.⁴⁹

The General Court in its reasoning makes reference to the resolution adopted by the Russian Public Collegium for Press and the decisions of the Latvian National Electronic Mass Media Council and of the Radio and Television Commission of Lithuania, approved by the Vilnius Regional Administrative Court, alleging that the "Vesti Nedeli" program broadcast

⁴³ *Mikhalchanka*, *supra* 40, para. 104.

⁴⁴ *Kiselev*, *supra* 4, para. 76.

⁴⁵ *Propaganda and Freedom of the Media*, Non-paper of the OSCE Office of the Representative on Freedom of the Media, Vienna, 2015, p. 31.

⁴⁶ *Ibid.*, p. 31.

⁴⁷ *Ibid.*, p. 31.

⁴⁸ European Parliament resolution of 23 November 2016 on EU strategic communication to counteract propaganda against it by third parties, P8 TA PROV(2016)0441, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2016-0441+0+DOC+XML+V0//EN>. (last accessed on 04/04/2018).

⁴⁹ *Ibid.*

presented events in a biased way, was contrary to the journalistic principles of social responsibility⁵⁰, contained war propaganda⁵¹, incited hatred between Russians and Ukrainians and justified the Russian military intervention in Ukraine.⁵²

The General Court considers that all the above-mentioned findings from two Member States are sufficient to constitute solid evidence that the applicant engaged in propaganda activities in support of the Russian government⁵³ and consequently the alleged restrictions of his right to freedom of expression are not disproportionate.⁵⁴

At the same time, the General Court establishes that as a Russian citizen, residing in Moscow, Mr Kiselev can continue his journalistic activities in Russia without the substance of his rights to freedom of expression being impaired by the sanctions relating to his economic resources and his transit ban in the EU. Here, the General Court followed the reasoning stemming from another sanctions case concerning Mr Sarafraz, an Iranian journalist, targeted by sanctions as a chief of Islamic Republic of Iran Broadcasting, accused of cooperating with the Iranian security services and diffusing forced confessions of prisoners.⁵⁵ In both cases temporary and reversible effect along with a constant review of EU's sanctions is emphasised by the General Court in order to comply with the proportionality test.⁵⁶

Finally, the General Court estimates the potential dissuasive impact of restrictive measures on other Russian journalists' freedom of expressing their views on political issues. Such a chilling effect on the exercise of journalistic freedom of expression would be a detrimental consequence for society as a whole.⁵⁷ In this respect, the General Court concludes that the situation of Mr Kiselev has some specific features, since Mr Kiselev, as Head of RS, has the means and powers, which are not available to other Russian journalists. Moreover, this position was obtained by virtue of a decree of President Putin himself. Therefore, other journalists expressing their views, even views that may shock, offend or disturb, are not in a situation comparable to that of the applicant.⁵⁸

Conclusion

After the end of the Cold War no one could imagine that there will be a need for finding an agreed definition of propaganda and that in 2015 *East StratCom Task Force*⁵⁹ will be launched to respond to Russia's ongoing disinformation campaigns.

In our era of information wars and post-truth, where lies the thin line between news and propaganda? The lack of a proper definition of the word propaganda can be compared to a black box, where one can insert different elements depending on particular circumstances. As such, from Moscow's perspective "RT" is not different from "The Voice of America" in presenting respectively Russian or American policies to the outside world.

In the analysed case the General Court avoids providing its own understanding of propaganda and instead refers to the decisions of three different bodies, such as the Television Commission of Lithuania, the Latvian National Electronic Mass Media Council and the Russian Public Collegium alleging that "*Vesti Nedeli*" program with Mr Kiselev's participation contained some elements of propaganda. The General Court relies on the

⁵⁰ *Kiselev, supra 4*, para. para. 98.

⁵¹ *Ibid.*, para. 105.

⁵² *Ibid.*, para. 106.

⁵³ *Ibid.*, para. 107.

⁵⁴ *Ibid.*, para. 112.

⁵⁵ Judgment of the General Court (Second Chamber) of 4 December 2015, *Mohammad Sarafraz v Council of the European Union*, Case T-273/13, ECLI:EU:T:2015:939, para. 190, (*Sarafraz*).

⁵⁶ *Kiselev, supra 4*, para. 124; *Sarafraz, supra 55*, para. 189.

⁵⁷ ECtHR, *Cumpănă and Mazăre v. Romania*, 17 December 2004, CE:ECHR:2004:1217JUD003334896, para. 114.

⁵⁸ *Kiselev, supra 4*, para. 118.

⁵⁹ The East StratCom Task Force is focused on better explaining EU policies in the Eastern Partnership countries and reports on disinformation trends.

findings presented by the latter bodies to conclude that since the applicant engaged in propaganda activities, the alleged restrictions of his right to freedom of expression are not disproportionate.

One might ask what would be an outcome of the proportionality test if the General Court came to a different conclusion and rejected the qualification of the applicant's activities as propaganda. As such the General Court does not explain in a sufficiently detailed manner the link between the proportionality of a restrictive measure and the qualification of the applicant's activities as propaganda. And if this link has a substantial importance for the final decision, more clarity on the definition of propaganda would be welcome.

Moreover, according to the ECtHR "*freedom of expression is one of the essential foundations of a democratic society*", and it applies also to issues that offend, shock or disturb.⁶⁰ The applicant's allegations that propaganda is indeed covered by the freedom of expression are also passed under silence by the General Court, leaving us in uncertainty as to how the proportionality test could be applied to similar situations in the future.

Despite the silence of the General Court on the precise definition of what constitutes propaganda, the *Kiselev* case sets a precedent regarding the concept of "*active support*" by a TV presenter and manager contributing to the policies of Russia destabilising Ukraine. In particular, the General Court notes that this concept may refer to all forms of support in the further destabilisation of the situation in Ukraine⁶¹, and "*is not limited to material support*".⁶² It is an important detail for drawing a line between journalism and propaganda where the latter is associated with exerting pressure and influence on the audience by changing their perception of events, whereas the main function of journalism is to serve and inform the society.

When journalism finds itself at the forefront in the battle between facts and fake news, someone has to provide more guidance and legal certainty. The *Kiselev* case was a perfect opportunity for the General Court to draw a line between guardians of veritas and opinionators. Nevertheless, we are left with more questions than answers to these fundamental issues, of what exactly can be considered as propaganda.

At the same time, we should take into account the case-law of the ECtHR alleging that it is not always possible to attain absolute precision in the framing of laws and it is sometimes pragmatic to avoid rigidity in order to adapt to quickly changing circumstances.⁶³

For this very reason, it would be rather short-sighted to see the *Kiselev* case only as a missed opportunity to further analyse the difference between journalism and propaganda. The fact that this issue was examined before the General Court is an important incentive for the EU rule-makers to bring forth EU's own approach towards this controversial and insufficiently defined issue of propaganda.

⁶⁰ ECtHR, 15 October 2015, *Perinçek v. Switzerland*, *supra* 37, para. 196(i).

⁶¹ *Kiselev*, *supra* 4, para. 114.

⁶² *Ibid.*, para. 115.

⁶³ ECtHR, 15 October 2015, *Perinçek v. Switzerland*, *supra* 37, para. 133.



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