

MEDIA REGULATION, DEMOCRACY AND THE RULE OF LAW IN THE EUROPEAN UNION

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1. Introduction

In the Preamble to the Treaty on European Union is the way in which the cultural, religious and humanist inheritance of Europe provided the basis on which the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law have developed¹. These values constitute the founding legal-political axioms of the entire structure of normative principles and rules that underpin the process of integration and union of the European peoples. The process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen, as referred to in article 1 of the TEU, must, at the same time, rely on defensive protection and the active promotion of human rights, democracy and the rule of law.

The Constitutions of the Member States of the European Union have long paid tribute to these values and principles in their first articles. Likewise, the first part of article 2 of the TEU expressly states that “the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights”. This is not a mere proclamation of political liturgy or an

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¹ Treaty of the European Union, Preamble § 2.

official formula, to be enunciated in the ceremonies that mark important dates of the European integration processes. Rather, these are normative propositions that generate legal imperatives that are binding on EU law and the national law of each Member State. The violation of these values and principles cannot fail to have legal consequences. First, they must be protected, respected and promoted by all institutions, bodies and agencies of the EU. Second, all political, legislative and administrative institutions of the Member States must guarantee the primacy and effectiveness of these values. Third, national courts, in conjunction with the Court of Justice of the European Union, have a fundamental role in neutralizing all national acts that constitute a violation of them.

As can be seen from article 7 of the TEU, the existence of a clear risk of serious violation of the values referred to in article 2 can be, with certain assumptions verified, determined by a majority of 4/5 members of the Council. On the other hand, the European Council, by unanimous deliberation, under certain political and procedural pre-suppositions, can verify the existence of a serious and persistent violation, on the part of a Member State, of these same values, with the possibility of suspending some of the rights resulting from the application of the Treaties to the Member State concerned, including the right to vote of the representative of the Government of that Member State in the Council, in accordance with the principles of adequacy, necessity and proportionality. It is no wonder, furthermore, that the European Court of Justice (ECJ) has been called upon several times to proclaim and defend the values inherent in the rule of law. In this brief article we will try to highlight a normative fact that has long been established in the law of the media: the protection and promotion of the various communicative freedoms, namely, of expression, information, press, broadcasting and social networks, constitutes a fundamental element of the structure of human rights, democracy and the rule of law. European and national institutions and procedures that are concerned with safeguarding these values must necessarily be concerned with guaranteeing those freedoms.

2. EU regulation of the audiovisual sector

2.1. Normative framework

The European Union's interference in the regulatory framework of the audiovisual media has been a reality for several decades, prior to the Maastricht Treaty itself, which created the EU. It focused mainly on two angles of the single market. On the one hand, it was expressly recognized that television, radio and telecommunications constituted the provision of services at a distance, which could be extended to the normative scope of the freedom to provide services and to the corresponding normative rule prohibiting restrictions and discrimination². On the other hand, it was clear that these communicative activities were inseparable from the freedoms of movement of goods, workers, establishment and movement of capital. They also are inextricably connected to topics such as intellectual property and taxation. In addition, EU competition law and the corresponding rules on agreements between companies, abuses of a dominant position, mergers and State aid applied to them. Many legal cases in the ECJ dealt with conceptual and technical issues concerning this broad normative framework³.

In these areas, Articles 28, 45, 49, 56, 63, 101, 102, 106 and 107 of the TFEU apply today, in so far as they have to do with issues concerning the media. However, it was already clear that European media regulation could not only obey economic and market criteria, but should also favour non-economic interests, of a political, social and cultural nature, related to the guarantee of freedom of expression – enshrined in Article 10 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms ratified by all Member States – of the access to political and socially relevant information, the integrity, diversity and European origin of media content and the protection of minors and right of reply. The EU supports, coordinates and completes the action of States in the fields of culture, contributing

² Television Without Frontiers Directive (TVWF Directive), Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities.

³ See for instance, C-445/19, *Viasat Broadcasting UK Ltd*, 25.01.2020; C-347/14 *New Media Online GmbH* of 21.10.2015; C-403/08 and C-429/08 *Football Association Premier League*, 04.10.2011.

to cultural and linguistic diversity. In the last three decades, the European Union has developed an important activity for the promotion, strengthening and protection of European audiovisual production⁴. The protection of the European cultural and linguistic heritage justifies the unanimity rule when it comes to agreements signed with third States in the scope of audiovisuals.

Among the relevant TFEU articles, 6, 165, 167 and 207 stand out. Protocol No 29, on the public broadcasting service of the Member States adheres to the principle that public service broadcasting in the Member States is directly associated with the democratic, social and cultural needs of each society, as well as with the need to preserve pluralism in the media. It upholds the power of Member States to provide funding for public service broadcasting, in so far as such funding is granted to broadcasters for the purpose of carrying out their public service mission, as entrusted, defined and organized by each Member States, and in so far as such financing does not affect trading conditions or competition in the Union in a way that would be contrary to the common interest, account should be taken of the fulfilment of that public service mission. The enshrining of the right to freedom of expression in Article 11 of the European Union Charter of Fundamental Rights definitively establishes the relationship between freedom of expression and democracy and the rule of law. Freedom of expression, opinion and information is recognized for all individuals, without interference by public authorities and without regard to borders. At the same time, respect for freedom and pluralism of the media is affirmed. As we will see below, these are fundamental rights and principles in a democratic rule of law.

2.2. Communicative freedoms in a democratic society

Freedom of expression in a broad sense has deeply subjective roots, as an expression of dignity, rational and moral-practical autonomy,

⁴ According to the EU Commission, “[s]ince 1991, Creative Europe MEDIA has invested over €2.6 billion in the film and audiovisual industries to support the development, promotion and distribution of European works within Europe and beyond”. Creative Europe: 30 Years of Support to European Films and creative media works, Press Release, 21.01.2021, available at <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_104>, accessed on 25.08.2021. As an example of the litigation in this area, see T-369/84 and T-85/95, DIR International Film Srl, et. al, 19.02.1998.

authenticity and integrity of the human being. Since the latter is uniquely endowed with the capacity for abstract thinking and cultural creation itself, communicative freedoms are inseparable from the free development of personality and the flourishing of each individual. However, these fundamental rights have a strong objective dimension. On the one hand, it is essential for the search for truth and knowledge, allowing the formulation of hypotheses and refutations and testing, in a dialogical and critical way, the validity and truth of arguments and counter-arguments. On the other hand, it ensures the free development of all social activities, in so far as politics, law, economics, religion, science, art and culture are structured in a communicative way. In addition, freedom of expression in a broad sense is indispensable for the protection of democracy and the rule of law.

Communication is something inherent in democratic political process and the dialectic between political majorities and minorities. Democracy presupposes an open and plural discussion of issues of public interest, in terms that allow the early diagnosis of problems, the argumentative consideration of alternative solutions, the public elaboration and justification of public policy choices and the critical evaluation of the results achieved. At the same time, it assumes the possibility of electing, evaluating and deposing the political actors to whom democratic authority is delegated. In all these moments, the availability of information on the data relevant to the self-government of the community is essential, together with the freedom to propose different interpretations and evaluations of these data and to formulate proposals for collective action. The universal vote and democratic dialogue only make sense if the rights of thought, opinion, expression and information are guaranteed, because only in this way is it possible to form public opinion and political will in a free and informed manner.

Freedom of expression is also of crucial importance for guaranteeing the rule of law. Journalists and the media play a supervisory role, on behalf of the entire political community, and they are required to exercise permanent vigilance that allows the detection and public denunciation of the pathologies of all social powers (e.g. arrogance, arbitration; corruption; nepotism; incompetence, waste, bad governance) and contributing to the accountability of government officials to public opinion. Some recent cases have shown how even in Europe investigative journalism can be a risky and lethal activity. To this end,

European Union law must be concerned with the regulatory conditions of the Member States in terms of guaranteeing freedom, independence, pluralism and transparency of the ownership of media companies. Journalists must be given legal guarantees of independence and confidentiality of the newsroom, editorial freedom and confidentiality of sources of information. The protection of whistleblowers must also be ensured⁵.

When fulfilling their informative function, media companies must be duly protected from judicial actions, of a criminal or civil nature, instituted with the sole or main objective of intimidating and silencing journalists and media companies, removing them from their function, surveillance and referring them to culturally empty and civic anaesthetizing forms of entertainment. The activity of journalists duly accredited and subject to a code of ethics in the newsroom, based on truth, rigour and objectivity, must be protected in relation to all those who, taking advantage of social networks, deliberately intend to disseminate false news and disinformation in order to serve political, economic or ideological agendas, sometimes at the service of non-European political and economic forces. The guarantee of the European Union as a community of values and law, calls for special attention to be paid to the role of media regulation.

3. Regulatory challenges

3.1. Television, radio and internet

As previously mentioned, at the end of the 1980s, with the 1989 TVWF Directive⁶, the European Economic Community began to regulate radio and television activity, framing it as an economic service with freedom within the single market. At the same time, it was fundamental for the affirmation of European identity and cultural unity, with special rules for the production, promotion and dissemination of culturally diverse European audiovisual content⁷, as a response to American and Latin-American content. The rule was the freedom to

⁵ Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law.

⁶ Council Directive 89/552/EEC of 3 October 1989.

⁷ Arts. 4 ff of Directive 89/552/EEC.

provide audiovisual services, although with some restrictions, namely those concerning advertisements and the protection of human dignity, equality, ideological pluralism, health, safety and the environment, as well as the protection of minors⁸. Especially interesting was the guarantee of the right of reply⁹. It gave individuals the right to respond to any erroneous statements of fact produced by a programme broadcast by any broadcaster under the jurisdiction of a Member State. This right had, from the beginning, a subjective function, to protect the good name and reputation, and an objective function, to contribute to the truth and the reliability of speech in the public sphere. This aspect is very significant, in so far as it rejects falsehood and manipulation as legitimate forms of public discourse.

The regulatory system was improved, through the adoption of a new television directive, in 1997, addressing issues such as jurisdiction, tele-shopping and the protection of minors. Particular attention was paid to the dissemination of programmes of special interest to society, although the emphasis was on sporting events, such as the final of the European football championship or the Olympic Games¹⁰. Topics such as protection of the public interest in terms of television's role as the provider of news and information, education, culture and entertainment, along with the guarantee of pluralism of the media were left to the States, provided they did not violate EU Law.

The development of digital technologies and the convergence of audiovisual outlets gradually brought forward the need for new changes in the regulation of the media, which would happen, after extensive consultations, in 2007, with Directive 2007/65/EC¹¹. Its main goal was to adapt the existing regulatory framework to the structural impact of the spread of information and communication technologies (ICT) and new technological developments and business models,

⁸ Arts. 12 ff and 22 of Directive 89/552/EEC.

⁹ Art. 23 of Directive 89/552/EEC.

¹⁰ Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

¹¹ Directive 2007/65/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities.

optimizing competitiveness and legal certainty for Europe's media, as well as respect for cultural and linguistic diversity. This Directive affirmed the connection between the audiovisual sector the Charter of Fundamental Rights of the European Union, in particular Article 11. It recognized the internal connection between the media and the constitutional principles of democracy and the rule of law, leaving it for the Member States to apply their constitutional rules relating to freedom of the press and freedom of expression in the media.

Although audiovisual media services are perceived as essentially cultural and economic services, they are very important for societies and democracy. Media regulation should ensure freedom of information, diversity of opinion and media pluralism. This same idea was later reaffirmed by Directive 2010/13/EU¹². Gradually, the political and constitutional dimension of the media took its prominent place alongside the economic, social and cultural dimensions. This trend was to be considerably enhanced, some years later, with Directive (EU) 2018/1808, the New Audiovisual Media Services Directive (AVMS-D)¹³. This normative instrument reinforced the independence of audiovisual regulators, by ensuring that they are legally distinct from their government and functionally independent from the government and any other public or private body. This institutional guarantee of independence of national media regulatory bodies, with requirements similar to those normally associated with the courts or the public prosecutor's office, expresses the recognition that media regulation is inseparable from the guarantee of fundamental rights, democracy and the rule of law.

The protection of equal dignity and freedom of all members of the political community, from which peaceful and democratic coexistence depend, can also be perceived in the increased protection, on TV and video on demand, against incitement to violence or hatred and public

¹² 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)

¹³ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU 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) in view of changing market realities.

provocation to commit terrorist offences. These positive developments should translate, in the future, into tighter normative requirements, at European level, of aspects of media regulation such as ownership, pluralism, transparency, editorial autonomy, editorial pluralism, the provision of news on issues of general interest at local, regional, national or European level, the legal status of journalists and the protection of investigative journalism.

3.2. Social media

In the digital environment, the same audiovisual content can be transmitted through different platforms, which is why the structural and regulatory distinction traditionally existing between them has lost much of its *raison d'être*. The 2018 revised AVMSD¹⁴ extended certain audiovisual content rules to video sharing platforms (e.g. Youtube) and social media platforms (e.g. Facebook). Among these are rules concerning appropriate measures to protect people from incitement to violence or hatred and content constituting criminal offences.

The AVMSD also ensured stronger protection of minors against harmful content in the online world, including video-on-demand services and video-sharing platforms. However, despite the enormous possibilities of inclusive communication that they created, social networks and video sharing platforms have proved to be a very serious threat to democracy and the rule of law, far beyond inciting radicalization, extremism, hatred and violence. They have come to allow and facilitate orchestration, often in a subtle and insidious way, of systematic campaigns to spread misinformation, manipulation, conspiracy theories, fake news and alternative facts.

There is now abundant evidence of the destabilizing and disintegrating power of systematic disinformation campaigns. It is possible to create fake profiles and form highly organized digital militias, with the objective of sowing confusion and distrust in the public sphere, thereby eroding the decision-making capacity, credibility and legitimacy of legislative, administrative and judicial institutions and of the main

¹⁴ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU 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) in view of changing market realities.

political and social actors. In some cases, the pursuit of conjunctural political or electoral objectives at national level may be at stake, as was the case with the spread of populist and nationalist ideas around before and after Brexit. In other cases, power games and hybrid threats may be at stake, in the pursuit of geo-political and geo-strategic objectives, with structural impact on the Member States and the European Union as a whole, with external political, economic and social actors committed to achieving the goal.

The 2018 Joint Action Plan Against Disinformation¹⁵ shows that EU institutions and bodies are well aware of the challenges to be faced, requiring a coordinated response. It calls for “urgent and immediate action to protect the Union, its institutions and its citizens against disinformation”. While recognizing that “[f]reedom of expression is a core value of the European Union enshrined in the European Union Charter of Fundamental Rights and in the constitutions of Member States”, the Action Plan goes on to define disinformation as “verifiably false or misleading information that is created, presented and disseminated for economic gain or to intentionally deceive the public, and may cause public harm”. In this context, public harm includes “threats to democratic processes as well as to public goods such as Union citizens’ health, environment or security”. The threat to the integrity of the European Union is also included in this category. Most importantly, disinformation does not include “inadvertent errors, satire and parody, or clearly identified partisan news and commentary”. While freedom of expression is essential to the free formation of public opinion and political truth, disinformation prevents this process from occurring in an informed and authentic manner. A political system based on lies and deception is incompatible with democratic ideas of citizenship and popular self-government and with the substantive and formal dimensions of the rule of law.

The Action Plan stressed the key role played by civil society and the private sector (notably social media platforms) in tackling the problem of disinformation, and lead online platforms and the advertising industry to agree on a Code of Practice in September 2018. Among

¹⁵ Joint Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 5.12.2018 JOIN (2018) 36 final.

its most salient points are the creation of an independent network of fact-checkers, the implementation of a rapid alert system, the promotion of media literacy, the cooperation with national election networks, fostering a secure, trust-worthy and accountable on-line ecosystem, as well as support to independent media and quality journalism. Even before the Covid-19 pandemic, misinformation in the field of health and vaccination was already a serious problem in the EU, expressly dealt with in the 2018 Action Plan. With it, the problem became much more pressing.

Although voluntary self-regulation in the private sector can play an important role, it is most probably insufficient. It is important that the public authorities of the various Member States adopt a more hands-on approach, based on the effective protection of digital citizenship rights against manipulation and disinformation.¹⁶ Special attention must be paid to the conduct of social media platforms in different areas such as transparency, reporting obligations, provision of information, algorithmic design and content selection, indicators of trustworthiness or professional requirements.

The intentional and systematic dissemination of facts proven to be false, beyond any reasonable doubt, with the aim of achieving political, ideological or economic objectives can and should be restricted, provided that in accordance with the principles of legality, equality, the protection of legitimate expectations and proportionality. This demands greater determination in the coordinated response to disinformation at the level of media regulation requires a greater dependence on co-regulation and hetero-regulation at the European level, in order to ensure the application of a more structured regulatory framework and to promote fact-based and effective communication in all media outlets. Stronger cooperation between Member States' media regulation bodies and EU's institutions is needed.

It is in this context that it is important to stress the importance of recent proposals by the European Union to systematically regulate the

¹⁶ In Portugal, Act n.º 27/2021, of 17.05, approved the Charter of Human Rights in the Digital Age, building on the European Union Action Plan. According to its article 6º/2 disinformation is defined as “any demonstrably false or misleading narrative created, presented and disseminated to obtain economic benefits or to deliberately mislead the public, and which is likely to cause public harm, namely threat to democratic political processes, to policy-making processes public goods and public goods.”

online content of digital platforms, including major search engines and live-streaming services, within the framework of the future Digital Markets Act and the Digital Services Act¹⁷. The aim is to strengthen the protection of the fundamental values of the European Union by creating a regulatory framework on digital content that is clear, adequate, attentive to risks, transparent, and independently applicable. Pursuing this objective makes the institutional dialogue that has been established on this matter within the scope of ERGA, involving national media regulators, decisive¹⁸.

3.2. ERGA

With the aim of assuring the coherent application of Directive 2010/13/EU and of developing the internal market for audiovisual media services, the Commission established, in 2014, the European Regulators Group for Audiovisual Media (ERGA) as an advisory body¹⁹. ERGA, composed of national independent regulatory bodies in the field of audiovisual media services, intends to facilitate a closer and regular cooperation between the competent independent regulatory bodies of the Member States and the Commission.

Article 30 of Directive (EU) 2018/1808 came to establish the principle that all Member States should establish a media regulatory body that is legally autonomous, impartial, transparent and totally independent from political and economic power. The main regulatory objectives are ensuring “media pluralism, cultural and linguistic diversity, consumer protection, accessibility, non-discrimination, the proper functioning of the internal market and the promotion of fair competition.” Member-States must provide regulatory bodies with the material and human resources necessary for the effective performance of their functions and their contribution to the work of ERGA. Article 30b of the Directive (EU) 2018/1808 establishes ERGA, giving it the status of an entity created by EU legislative act.

¹⁷ The Digital Services Act Package, available at <<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>>.

¹⁸ ERGA Statement on the European Commission’s proposals for a ‘Digital Services Act’ (DSA) and a ‘Digital Markets Act’ (DMA), March 29th 2021, available at <https://erga-online.eu/wp-content/uploads/2021/03/ERGA-DSA-DMAStatement_29032021.pdf>.

¹⁹ Commission Decision, Brussels, 3.2.2014, C (2014) 462 final.

Initially, ERGA's activity was designed to assume a predominantly economic and cultural dimension, with special attention to topics such as the audiovisual market, cross-border distribution, on-demand services and consumer rights. However, little by little the need to pay attention to the dimensions of media regulation related to democracy and the rule of law has intensified. The growing awareness of the way conventional media and social media have been used, in various countries (e.g. USA, UK) by powerful interest groups, both internal and external, to polarize and deceive public opinion, undermine electoral processes and erode the democratic legitimacy of political institutions, has led ERGA to openly discuss the need for greater regulation in areas such as transparency in political advertising and fake news²⁰. The 2018 Joint Action Plan Against Disinformation, envisions that ERGA will play a critical role monitoring the implementation of the Code of Practice and in the assessment of its overall effectiveness²¹.

Considering the various relevant cross-border issues regarding on-line content regulation, the possibility that ERGA will evolve in the future to become a European media regulator is not excluded. However, until this happens, it is clear today that the European Union cannot fail to pay attention to conventional media operators and social media platforms which, while ostensibly abusing freedom of expression and information, promote national and transnational agendas of deliberate and systematic attack on democracy, the rule of law and the stability of the political system of the European Union and its Member States.

4. Protecting democracy and the rule of law

The principles of respect for human rights, democracy and the rule of law are positively constitutive of the European political and legal order. For this reason, they must structure the European regulation of the press, audiovisual communication and social media, which are

²⁰ ERGA calls for uniform definitions and European rules for transparency of political advertising ERGA's contribution to the public consultation on political advertising, 16.04.2021, https://erga-online.eu/wp-content/uploads/2021/04/210416_PR_ERGA_PoliticalAdvertising.pdf

²¹ ERGA Report on disinformation: Assessment of the implementation of the Code of Practice, available at <<https://erga-online.eu/wp-content/uploads/2020/05/ERGA-2019-report-published-2020-1Q.pdf>>.

increasingly brought together by digitalization and the convergence of technologies. The political and legal dimensions of communicative freedoms must be considered alongside the economic, social and cultural dimensions. This requires a robust protection of the freedoms of information, thought and expression and the guarantee of the smooth functioning of the free marketplace of ideas²². However, it also needs recognition of the existence of market failures and the adoption of reasonable corrective measures by the public authorities. Within EU law freedom is the rule and the restriction on freedom is the exception. For this reason, restrictions on freedom of expression and information must be exceptional, substantively limited, duly justified and subject to restrictive interpretation. Even so, they are inevitable in a marketplace of ideas invaded by deliberate and systematic disinformation. This reality raises difficult but unavoidable legal issues for the European Union's legislative and judicial powers.

No one doubts that a democratic society welcomes a variety of world views or ideologies and different and even contradictory opinions. This results in legitimate differences of opinion in areas such as freedom, equality, dignity, solidarity, authority, family, sexuality or gender. Democratic political discourse is inherently dialogical, dialectical and confrontational. In many cases it is important to agree to disagree and seek compromise solutions, rather than polarizing and radicalizing. In an open society, there will be intense discussions about which set of facts should be considered relevant, the extent of their relevance and the possibility of different interpretations of the same facts. Likewise, various hypotheses, theories, models, value-judgements or proposals for public policy will be based on the same facts. In some cases, hypotheses, theories and models are deliberately presented as facts or naively confused with them. In some cases, ideology will attempt to deny some facts and distort others. History has also taught us that, in different areas (e.g. politics, economics, religion or science) the

²² “But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.” Oliver Wendell Holmes, *Abrams v. US*, 250 U.S. 616 (1919).

minority may turn out to be correct and the majority may be wrong. In a liberal democracy, the imposition of a single line of thought by the public or private power must be rejected outright. Discussion and confrontation of ideas should be accepted as something normal and beneficial. The political community must be open to discussion and very cautious in its restriction. Each idea must be able to be tested against opposing ideas.

However, this is only possible if there is a common pre-commitment to the investigation and rigorous dissemination of the factual truth and to the logical validity of the arguments. Media regulation must guarantee a wide diversity of ideas and opinions. Ideas that were once considered erroneous and absurd have turned out to be correct and self-evident. The reverse is also true. However, regulation must also be attentive to public and private conduct that may distort the functioning of the market for ideas. This aspect is of great importance considering the attempts to control, intimidate and weaken the public radio and television services, as have occurred in countries as different as Poland, Hungary, Sweden, The Netherlands or Slovenia²³.

Most importantly, some have denounced the worrying trend in some conventional, very powerful media, such as that dominated by the Murdoch family, of having created a “market for crazy”²⁴, in the United States, Australia and Europe, being deliberately committed to the broadcasting of propaganda, strategic lies, disinformation, alternative facts and alternative realities, thereby undermining public trust in electoral processes and democratic political institutions and constituting a serious threat to democracy and the rule of law. It has rightly been pointed out that Brexit was, to a significant extent, the result of Murdoch’s powerful media manipulation²⁵. The COVID-19 crisis,

²³ “Europe’s Public Broadcasters, The people’s voice”, *The Economist*, April 10th, 2021.

²⁴ ‘A market for crazy’: Turnbull serves cold fury for the Murdochs”, *The Sydney Morning Herald*, Tony Wright, April 12, 2021 — 4.10pm first published at 2.43pm available at <<https://www.smh.com.au/politics/federal/a-market-for-crazy-turnbull-serves-cold-fury-for-the-murdochs-20210412-p57ihc.html>>, 19.04.2021.

²⁵ “Murdoch and his children have toppled Governments on two continents and destabilized the most important democracy on earth. What do they want?”, Jonathan Mahler, Jim Rutenberg, *New York Times Magazine*, April, 2019, available at <<https://www.nytimes.com/interactive/2019/04/03/magazine/rupert-murdoch-fox-news-trump.html>>.

increasing the appetite for disinformation and conspiracy theories, only worsened this situation. It is clear that the problem of manipulation does not arise only in relation to social media, but also in newspapers, radio, television and websites. In the domain of private media, this requires greater attention to the problems of media concentration and pluralism, transparency of ownership, subjecting journalists to codes of ethics, and ensuring the independence of the newsroom from media owners, advertisers and sponsors.

Regarding the public media, respect for human rights, democracy and the rule of law currently requires the strengthening of national and European public radio and television services, guaranteeing the factual objectivity of their reporting, the pluralism of ideas and opinions, the diversity of points of view, the openness to the majority and opposition and the independence of investigative journalism, trying, in this way, to avoid, at all costs, their capture by political power, be it liberal or illiberal, or by populist forces and fighting propaganda, disinformation and manipulation. A public television service cannot be a government or state propaganda agency. In this context, the existence of a broadcasting fee is important because it protects the public service from government political pressure.

On the other hand, a public service is an important counter-power in relation to large private mass media groups who do nothing more than promote their ideological agenda and their own political interests, of a different nature, even when it implies sowing disinformation and political instability in the states where they operate, as is currently observed in the United States and the United Kingdom. It is important to ensure European coordination of all public television services, placing them at the service of European identity and integration, and to strengthen the European Union's public television service. National communication regulators must be institutionally structured with guarantees of independence from political and economic power, and ERGA should act proactively as a surveillance and control system.

5. Conclusion

The European Union has undergone major structural changes in the field of audiovisual communications. On the one hand, these have proved early on to be important instruments of economic integration,

inseparable from an internal market. On the other hand, they were immediately seen as fundamental pillars for the rapprochement and mutual knowledge of the European peoples and for the consolidation of European cultural identity, in its internal and external aspects. The media no longer had a national interest, scope and legal regime, appearing as fundamental elements in the construction of European unity. Traditional regulatory issues such as ownership, transparency and media independence or positive and negative norms about content and its limits have acquired a European relevance. Added to this is the profound technological transformation of audiovisuals resulting from the digitization and convergence of technologies and the generalization of social media. If it is true that this facilitated communication between people and access to information, it is also true that it had a disruptive effect on media companies, public and private, and created new opportunities for manipulation and disinformation, very dangerous for the viability and legitimacy of democratic processes. This reality created new legal and political problems, of a European constitutional nature, forcing a much more intense collaboration and articulation of European institutions and Member States in regulating the media, in order to preserve fundamental rights, democracy and the State of law throughout the European Union.