The EU regulation of speech. A critical view

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Abstract

The article challenges a series of recent acts, proposals and decisions by EU institutions which progressively limit freedom of speech by individuals, entrusting it to the algorithmic regulation of online platforms and to self-proclaimed guardians of a safe Internet.

Summary

Keywords

freedom of speech – content regulation – online platforms – Digital Services Act – disinformation

1. Introduction

As the Latin saying goes, "*mala tempora currunt*" for freedom of expression in the European Union.

And "bad times" are really running (and not simply walking) if one looks at the sequence and timing of a series of acts and documents issued in the last year by the EU:

a) the Digital Services Act (Regulation (EU) 2022/2065 issued in October 2022);
b) the "Strengthened Code of Practice on Disinformation 2022" (published in June 2022);
c) the proposal for a Regulation called the "European Media Freedom Act" presented in September 2022;
d) the decision by EU Tribunal July 27,2022 in the T-125/22 Case (*Russia Today France v. Commission*).

In these few pages I wish to point out that the EU institutions, both at their executive and judicial level, have a deformed notion of what freedom of expression is and what are its functions in a democratic society. In a nutshell, expression is seen not as a freedom – in the sense we have forged this notion over the centuries, and in particular over the last two centuries – but a regulated activity, similar to the production of

goods or the provision of services. This view is repugnant to the European liberal tradition and as a result will increase even more the cleavage between the EU as a whole and its citizens it should – and must – represent[1].
I will try to present my arguments combing through the four texts I have mentioned before, referring also to previous EU normative materials.

2. The "Digital Services Act"

Regulation (EU) 2022/2065 on a "Single Market for Digital Services", commonly called "Digital Service Act" (DSA) replaces the, by now, obsolete directive 2000/31/EC.
The DSA however does not limit itself to regulate the activities that are conducted in a digital environment through public telecommunication networks, but disciplines in depth speech through these networks.
The novel four letter words that are targeted are "hate" [speech] and "fake" [news] which must be banned. The declared objective is that of «ensuring a safe, predictable and trustworthy online environment» by adopting a broad notion of illegal content (Recital 12).
Normative provisions on "hate speech" have been issued over the last years by EU institutions, generally through a "fruit salad" approach which puts together terrorism, child pornography, copyright infringement, deceitful consumer information and «illegal hate speech» (see *e.g.* the Commission Recommendation 2018/334 "on measures to tackle illegal content online").
The first striking feature is putting within the same framework («illegal content») completely different phenomena from a political, economic and social point of view. In a non-digital environment copyright infringement is countered by copyright laws; unfair commercial practices by consumer protection laws; terrorist promotion and abetting and child pornography by provisions in penal codes.
One can legitimately doubt the wisdom of clustering such different conducts simply because they are all put into place through the Internet.
However, the most troubling aspect is the repeated – throughout the DSA and other EU legal instruments – expression «illegal hate speech». Although an experienced lawyer has been trained to face fuzzy EU legal notions, here the ambiguity of the terms is astounding.
In the first place because speaking of «illegal hate speech», makes one think that there are forms of "hate speech" which are "legal". But paramount to this basic logical distinction, the notion of "hate speech" is a portmanteau expression that can be filled with any content: from verbal aggression towards an ethnical or religious group; to the frequent banners or choruses one sees or hears at the football stadium addressed towards the other team and its supporters; the political party or movement one despises;

[1] For similar criticisms see A. Koltay, *Freedom of expression and the regulation of disinformation in the European Union*, Discussion paper for the 2023 Free Speech Discussion Forum - University of Luxembourg - June 2023 (forthcoming)

and the list could be endless.

Not only the notion of "hate speech" is without a reasonably clear definition[2], but a lawyer should react strongly against the attempt to import in the legal arena – in which each word has, and must have, one and only one meaning – terminology picked up from social and press jargon. And the attempt to norm "hate" – an inherent psychological state – appears as fruitless as the attempt to norm its opposite "love". To express the idea with a literary expression, most often "hate" is "in the eyes of the beholder", rather than in the words or acts themselves. An individual or a group vocally complains that it is being "hated", and this self-proclamation is sufficient to ban the speech and shame the author.

All these objections are brushed aways by the DSA through a simple *jeu-de-mots*. What needs to be countered is not "illegal" content but "harmful" content.

Any continental lawyer who has learnt – in his first-year courses – the basic notions of extracontractual obligations has very clear the distinction between "harmful" and "illegal". In the non-digital world, we encounter every minute millions of harmful acts which in no way can be legally prevented or sanctioned because they do not violate some law or regulation or another person's rights. On the Internet, instead, speech must be curtailed because it is «illegal or otherwise harmful» (recital 68) and it is necessary to prevent the «spread of unlawful or otherwise harmful information» (recital 5).

The equalizing – from an effects point of view – of "illegal" and "harmful" not only demolishes basic legal principles (which have never been very much considered in the EU functionalist approach: norms are simply tools *bons-à-tout-faire* to reach a purpose) but entails immediate and vast reaching consequences on speech.

This is because the DSA – faced with the impossibility of monitoring «illegal or otherwise harmful» speech – has outsourced its control and contrast to "Internet intermediary providers" and to the "very large online platforms".

The first technique adopted is that of establishing a principle, but subsequently emptying it through an exception. Art. 6 of DSA – following the E-Commerce Directive of 2000 – states that an information society service provider is not liable for information stored provided that it «does not have actual knowledge of illegal content» and «is not aware of facts or circumstances from which the illegal content is apparent».

This principle is strengthened by the confirmation of the e-commerce rule that providers of intermediary services are not under an obligation to monitor or actively verify illegal content. However, these rules are set aside by the subsequent art. 16 which mimics the "notice and take-down" procedures common to online copyright infringement. When an individual or an entity notifies a provider of hosting services the presence of information that they «consider to be illegal content», such notices «shall be considered to give rise to actual knowledge or awareness» with the consequent loss of the immunity laid out in art. 6.

The shift of liability on internet providers is completed – in a radical way – towards what are qualified as «very large online platforms», which are easily identifiable in Google, Meta, Twitter, Instagram and Tik-Tok, at least for what concerns the dissemination of information and, more in general, speech.

[2] For the multiple notions see I. Spigno, *Discorsi d'odio: modelli costituzionali a confronto*, Milan, 2018.

To make short the very long normative provision contained in arts. 34, 35 and 36, the «very large online platforms» will have to put into place – and more than a legal obligation it is economically based decision – algorithmic systems which will prevent *ab initio* «the dissemination of illegal content through their services».

One has already experimented the results – often ludicrous – of such algorithmic screening that have erased from the Internet breast-feeding Madonnas, putti, paintings and sculptures of Venus, towns and people whose name fell into the politically incorrect primitive vocabulary of Facebook. And the frequent suspension of email or other personal communication services through the detection of messages and photographs which the algorithm considers inappropriate.

The «very large online platforms» are therefore entrusted with a policing role that public authorities are not able to perform. In substance, a fundamental right such as that of expression that in our technological environment can be put into practice only through the Internet and intermediary services and platforms will be subject to algorithmic preventive censorship[3].

But the DSA does not limit itself to vesting «very large online platforms» with such public roles – which in most European Constitution are under a double – legal and judicial – reserve, but adds to them what one could call – using a Wild West expression – a "private posse", to ensure compliance with the Regulation and its contrast to «illegal or otherwise harmful» content.

With this objective the DSA creates the figure of «trusted flaggers».

Again, there is no definition of such completely novel entity apart from the fact that it should have «particular expertise and competence for the purpose of detecting. identifying and notifying illegal content» (art. 22, para. 2, a).

The objective of the creation of such semi-public entities (because the status is conferred by the national "Digital Services Coordinator") is that «action against illegal content can be taken more quickly and reliably where providers of online platform take the necessary measures to ensure that notices submitted by trusted flaggers […] are treated with priority» (recital 61).

If one considers the freezing effects of art. 16 which has been previously mentioned, it is reasonable to expect that the "notice and take-down" requests presented by such «trusted flaggers» shall be automatically processed.

Again, the Regulation puts together extremely different phenomena: terrorist content, child pornography, «illegal racist and xenophobic expressions». But if one extends the scope to the vast area of «discriminatory speech» – which falls within the «otherwise harmful» category – one can already see the multitude of organizations which, purporting the defense of minoritarian groups, ask for the removal of speech or other forms of expression which they consider offensive. It is sufficient to look at the aggressive campaigns conducted under the flags of trans-Atlantic movements ("Me-Too", "Cancel Culture", "Black Lives Matter", "Last Generation", LBGT+whatever, etc.) to understand what the effects of such private internet militia can be on freedom

[3] The point is thoroughly examined and challenged by G.E. Vigevani, *Piattaforme digitali private, potere pubblico e libertà di espressione*, in *Rivista di diritto costituzionale*, 61(1), 2023, 41 ss.

of expression[4].

3. The "Strengthened Code of Practice on Disinformation"

The second four-letter word targeted by the EU institutions is "fake" news. Again, the EU transfers in the legal vocabulary journalistic jargon which is completely undetermined. When it comes to news the ample case-law uses precise parameters such as the falsity or the partiality of a news, or its unsubstantiated source. At any rate such news is sanctioned if it violates somebody's right (typically, reputation).
The EU's attempt is, instead, all encompassing: news, just as the environment or a drug, must comply with certain requirements normatively set.
The perspective does not change if one uses the more educated term of "disinformation", which is the object of innumerous EU interventions since 2016[5].
In this case, however, there is an attempt to define what "disinformation" is: «Disinformation is understood 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. Public harm comprises threats to democratic political and policymaking processes as well as public goods such as the protection of EU citizens' health[6], the environment or security».
It should be noted that the "Strengthened Code of Practice on Disinformation 2022", although substantially drafted under the supervision of the EU Commission is presented as a text which is attributed to the Signatories and to which they voluntarily agree. A voluntary acceptance which reminds of the often-quoted phrase from "The Godfather": «An offer which one cannot refuse».
Most of the Code concerns practices put into place in commercial advertising and in clearly deceptive practices, such as fake accounts, impersonation, BOT amplification, use of influencers.
However, the forty pages Code inevitably spills over in the field of individual speech, in particular in the case in which an individual or a group of individuals advocate unconventional ideas which clash with majoritarian views. The bottom line is the question on what content «may cause public harm».

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[4] Obviously there are authors who, quite at the opposite, welcome the DSA for imposing on the "very large platforms" the respect of fundamental rights. This would enhance speech by "minority and marginalized groups" (J. P. Quintais - N. Appelman - R. Fahy, *Using Terms and Conditions to Apply Fundamental Rights to Content Moderation,* in *German Law Journal,* 24, 2023).

[5] See The Communication by the Commission "Tackling online disinformation: a European Approach" (COM 2018/236); the Joint Communication of the Commission and the High Representative "Action Plan against Disinformation" (Join 2018-36) and the ERGA 2019 "Report on Disinformation: Assessment of the Implementation of the Code of Practice". All these texts are amply commented by G. Pitruzzella - O. Pollicino, *Disinformation and Hate Speech. A European Constitutional Perspective*, Milan, 2020.

[6] During the COVID-19 pandemic the dissemination of misleading information has been of general concern on both sides of the Atlantic, albeit with diverging decisions. See the cases decided by the Italian Telecommunications Authority and administrative tribunal, and by the FCC published in *Diritto dell'informazione e dell'informatica,* 2020, 520 ss., with a critical comment by V. Zeno-Zencovich, *La disciplina della comunicazione in base al suo contenuto. Una proposta di inquadramento sistematico.*

Clearly this hypothetical question to some, limited, degree can find an answer when one is faced with a product or a material activity, but it is practically impossible (with maybe a few exceptions, such as financial markets) to predict the adverse consequences of news, information or ideas.
The problem is that this uncertainty is resolved by entrusting the "verification" of the content to a self-proclaimed «fact-checking community» which, incidentally, should be financed by the providers of intermediary online information-services.
To sum all this up, the dissemination by individuals of content through the Internet is once again subject to scrutiny and censorship by private groups. One must insist on the fact that speech is not a consumer product whose functionality can be ascertained. And while control over a product is aimed at protecting health and wealth of consumers and promoting competition, regulation of speech encroaches a fundamental right. Further, one should add that the fact-checking militia which is "empowered" by the Code adds itself to the "*trusted flaggers*" instated by the DSA.

4. The "European Media Freedom Act"

The summit of Commission's invasion of the field of freedom of expression is represented by its proposal for a regulation «establishing a common framework for media services in the internal services», laudatorily called the "European Media Freedom Act".
From an institutional point of view, one witnesses how the Commission subverts the subsidiarity exception set in art. 5 of the Treaty, turning it in a *carte blanche* to regulate areas that in no way are of the competence of the EU.
To be even more clear, the fact that the EU Charter on Fundamental Rights affirms at its art. 11 the fundamental right of freedom of expression cannot be read in the sense that it implies the right of the Commission to regulate such freedom[7].
While it is obvious that the European tradition has never been that of the First Amendment to the US Constitution ("Congress shall make no law abridging freedom of speech, or of the Press") and has always pointed in a different direction (suffice it to mention the contemporary art. 11 of the French Declaration of the Rights of Men and Citizens), the proposed regulation goes well beyond.
The proposal aims at creating a "European Board for Media Services" which replaces the Regulators Group (ERGA) established by the AudioVisual Media Services Directive (2010/13/EU) and extends its control to the press. Following a common tendency, the Board is a centralized body under the substantial and formal control of the Commission. Although the proposal proclaims the "independence" of the Board from any institution or body, when one goes through the text one finds multiples cases in which the Board can act only if "in agreement" with the Commission.
Further, the Commission shall define "Key performance indicators" to measure the compliance of the European media services to the regulation and set Guidelines.

[7] In the contrary sense, see G. Muto, *European Media Freedom Act: la tutela europea della libertà dei media*, in *Rivista di diritto dei media,* 3, 2022, 209 ss. (at 225).

Member States will have to submit to the Commission "*any legislative, regulatory or administrative measure*" in the field of media services providers.
It is clear that media companies are businesses like any other business and therefore are aiming at making a profit. Therefore they should not be granted any privilege – such as the mystifying appellative of "watch-dogs" – but, at the same time, in an age in which every communication has an informational content, the intention of regulating "media services providers" is simply a way of extending – completely *ultra vires* – the competences of the Commission, which at the end of the day, would be the final decision maker in all events concerning this vital sector.

5. The "*Russia Today*" decision

Following the Russian invasion of Ukraine, the EU has adopted a number of sanctions against Russia, its enterprises and several prominent officials and businessmen. These measures were coupled with significant embargoes of Russian products and services.
Among these measures is decision 2022/350 of the EU Council which has prohibited the broadcast and the dissemination of programs by Russian controlled media outlets present in Europe ("Russia Today" in its English, French, German, Spanish versions, and "Sputnik").
The activities of these outlets are qualified as «hybrid threats» to the Union and its member States under the form of «disinformation», «systematic, intentional campaigns of media manipulation and distortion of facts to enhance [the Russian] strategy of destabilization» «targeted at civil society in the Union». This activity «constitutes a significant and direct threat to the Union's public order and security».
The Regulation was challenged by "Russia Today France" in front of the EU General Court which in a lengthy decision by the Grand Chamber (27 July 2022, in case T 125/22) rejected the claim and confirmed the Regulation.
One hundred of the 250 paragraphs of the decision are devoted to the question raised by RT France of the infringement of freedom of expression and information.
According to the Tribunal the activities of RT France constitute «propaganda actions against the Union and its Member States» which «are capable of undermining the foundations of democratic societies and are an integral part of the arsenal of modern warfare».
The Tribunal further enters in a textual analysis of several broadcasts by RT France, concluding that they were not "balanced" and therefore would have produced «a significant harmful effect on public opinion in the EU, by its operations involving manipulation and hostile influence».
One does not wish to enter into further details of the decision (which has been appealed in front of the Court of Justice)[8]. However, one cannot avoid noting that the decision is argued as if there were a war between the EU and Russia.
The point one wishes to make is different. The decision instead of being founded sim-

[8] For a broader critical comment see S. Sassi, *La soft war dell'Unione Europea: il caso RT-France vs. Consiglio*, in *Diritto dell'informazione e dell'informatica,* 2022, 1265 ss.

ply on the application of art. 20 of New York Covenant on Civil and Political Rights which States that «any propaganda for war shall be prohibited by law» (to which the decision devotes only three paragraphs, from 208 to 210) sets out an impressive array of *rationes decidendi* which will inevitably constitute a precedent in the future in completely different cases.
In particular, the fuzzy notions of «propaganda», «manipulation», «harmful effects», the lack of «balance» can be easily applied in other circumstances, completely different from the Russian aggression of Ukraine. Doing so the Tribunal has paved the way to further significant restrictions of public speech by the EU institutions.

6. A few conclusions

We live totally immersed in information societies, and every minute of our lives we produce and consume information. This is possible because of the existence of telecommunication networks and of the thousands of enterprises that operate on it. Over 25 years ago the US Supreme Court in its landmark decision *Reno v. ACLU* [9] quoted approvingly the statement made by District Judge Dalzell: Internet is «the most participatory form of mass speech yet developed».
In this eco-system there are surely actual and clear risks and dangers, such as our modern societies faced when electricity became the energy for everybody, when railways, motorcars, and aircrafts allowed forms of large-scale transportation, when the whole economy shifted from self-production and self-subsistence to consumerism.
Being aware of such risks and dangers, however, does not vouchsafe responses that, in the present case, impinge on freedom of thought and of expression.
The texts one has analysed in the previous pages present a common intellectual flaw *viz.* the idea that risks and dangers of the information society can be prevented, curbed and eventually repressed, through the authority of the law.
But as it is impossible to control the immense information eco-system by human activity, the only way to enforce the mastodontic legislation issued is by resorting to automated processes governed by Al, which notoriously does not operate on a case-by-case basis but via inferential logic, which is completely insensitive towards diversity.
And freedom of expression by individuals is – in our democratic societies – a question of diversity which cannot, and should not, be curtailed by majoritarian opinions on what is good and what is bad (in the EU words "harmful") for our minds, our feelings, our intellectual well-being.

[9] 521 U.S. 844 (1997).