

OVERVIEW OF EU LEGISLATION ON POLITICAL CAMPAIGNING IN THE LIGHT OF THE EUROPEAN COURT OF HUMAN RIGHTS CASE LAW

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Abstract: *In this paper, we examine the issue of political speech in the EU legal context, with a particular focus on campaign periods. The paper can be divided into three main parts: (1) situating the conceptual foundations of political speech as a protected value; (2) discussing the general approach to political speech in the case law of the European Court of Human Rights, especially in cases dealing specifically with the issue of political speech during campaign periods; and (3) exploring future polemics and challenges to political speech in the EU framework. The paper will also present relevant literature, orientations, and principles of political speech, case studies, and EU legal instruments on political speech and political advertising. It attempts to provide a comprehensive account of the diverse but not uncontroversial nature of political speech through a synthesis of theory and practice.*

Keywords: ECHR, EMFA, campaign period, freedom of expression, political speech

INTRODUCTION

Perhaps the period that can have the most significant impact on voters' opinions is the election campaign. In democratic societies, this period – measured in a few weeks, a month, or two – is typically dominated by very intense political communication. In addition to current public issues, candidates and candidate organizations try to convince the public of their own competence and the incompetence of their opponents. Open public debates require that the expression of opinion is restricted to the minimum necessary to enable democratic decision-making. However, this does not mean that freedom of expression is free of all restrictions.

In this paper, we take into account the aspects of the European Court of Human Rights (ECtHR) jurisprudence on political speech that define the framework of freedom of expression during the election campaign period. Given the increasing shift in campaigning towards social networking sites and the online world in general, with the rise of digitalization, the paper will also focus on these aspects of the reasoning alongside the most recent judgments. Given that two draft European Union (EU) regulations focus on (or at least significantly affect) the regulation of campaigning, our paper will also assess current trends from this perspective. Finally, the paper considers the likely impact of future regulations, considering the principles consolidated by ECtHR case law.

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I. POLITICAL SPEECH AS A PROTECTED VALUE

An essential condition for creating and maintaining productive public debate is to limit political speech as little as possible.¹ Indeed, one of the cornerstones of democracy is the guarantee of free discourse, which enables members of society to form their own opinions on certain issues and to express them freely, subject only to the most necessary and most reasonable restrictions. According to Owen Fiss, referring to the formula made famous by US Supreme Court Justice Brennan in the *Sullivan* case,² democracy promises collective self-determination – the right of people to decide their own fate – and thus implies a debate on public issues that is „uninhibited, robust, and wide-open.”³ The broad protection afforded to the expression of political issues has already been recognized in a number of court decisions and statutory provisions.⁴

Such communication is free from restrictions because it is intended to facilitate discourse between members of society (the electorate), as it is, amongst individuals and those who govern the state, beneficial to the functioning of constitutional democracy.⁵ For a similar reason, potentially offensive speech on public policy issues – which, if directed at individuals, might even constitute defamation or libel – may be afforded special protection, as it is considered to be a *citizen's participation in government* and, as such receives a broader range of protections, such as the First Amendment in the United States.⁶ Political speech also has a prominent role in ECtHR practice.⁷

At the same time, statements that are offensive or untrue in the context of political expression are also an integral part of public discourse, and even if they do not enjoy unlimited protection, they cannot be excluded from the fora of public debate simply because of that nature. As Frederick Schauer puts it, generally, speech is protected not because it does no harm but because it does so.⁸

II. RESTRICTIONS ON POLITICAL SPEECH DURING THE CAMPAIGN PERIOD

A specific feature of democratic legal systems is that they seek to ensure access to positions of public power through elections, which are surrounded by a number of guarantees. The political campaign is a very short, but all the more effective and intense, period and tool for persuading voters. Its primary aim is to shape and formulate public opinion on public issues and to enable (voters) to vote well-founded and freely, having

¹ BARENDT, E. *Freedom of Speech. 2nd revised edition*. Oxford: Oxford University Press, 2005, pp. 154–197.

² *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

³ FISS, O. M. *Liberalism Divided. Freedom of Speech and the Many Uses of State Power*. Boulder, Colorado: Westview Press, 1996.

⁴ ROWBOTTOM, J. In the Shadow of Big Media: Freedom of Expression, Participation and the Production of Knowledge Online. *Public Law*. 2014, Vol. 491.

⁵ BARENDT, E. *Freedom of Speech. 2nd revised edition*.

⁶ MEIKLEJOHN, A. The First Amendment is an Absolute. *Supreme Court Review*. 1961, pp. 245–266, 259.

⁷ For a summary of the relevant case law of the Court of Justice, see. HARRIS, D., O'BOYLE, M., WARBRICK, C. *Law of the European Convention on Human Rights. 3rd edition*. Oxford: Oxford University Press, 2014, pp. 629–631.

⁸ SCHAUER, F. Free speech and the argument from democracy. *NOMOS: American Society for Political and Legal Philosophy*. 1983, Vol. 25, pp. 241–256.

been informed of all the options and having all the relevant information.⁹ Furthermore, in order to ensure the richness of public debate, the right of voters to be informed: „What is essential is not that everyone shall speak, but that everything worth saying shall be said.”¹⁰

The legislators' task in this area is to ensure a proper (level) playing field. Still, in doing so, the right to free elections inevitably conflicts with freedom of expression, i.e., the freedom of parties and nominating organizations to form and communicate their opinions.¹¹ Restrictions on messages appearing during an election campaign take various forms. One of the areas where these fundamental rights come into conflict is campaign financing, where it is questionable whether the amount of money spent during an election campaign, the contribution to a political party (or candidate) that citizens consider worthy of support - and thus also of the position of power they wish to see them in - can be restricted, and whether specific individuals or organizations can be excluded from even very remote, indirect participation in the campaign. Indeed, there is no doubt that the more money available to a candidate, the greater the reach of his message and the wider the range of public issues he will be able to address.¹²

Unjustified restrictions on messages during an election campaign do not solely affect the freedom of expression of the speaker: preventing offensive but not unlawful messages from being published also ultimately harms the interests of society as a whole.¹³ Negative political advertising works against participation in these processes, and *speech about politics* differs from *speech that serves politics*.¹⁴ A further detrimental effect of offensive speech on the democratic public sphere is that candidates focus on their own chances of winning rather than on informing society.¹⁵ Another argument against negative campaign messages is demobilization, the phenomenon whereby voters are turned away not only from politicians but also from politics itself, and as their interest in public issues wanes, so does their interest in elections. Moreover, a drop in voter turnout may ultimately undermine faith in democracy, although some empirical research has shown the opposite.¹⁶

⁹ FISS, O. *Liberalism Divided. Freedom of Speech and the Many Uses of State Power*.

¹⁰ MEIKLEJOHN, A. *Political Freedom: The Constitutional Powers of the People*. Oxford: Oxford University Press, 1965, p. 26.

¹¹ Not to mention the fact that, if we consider that a very significant segment of electoral campaigns takes place in the media, we can also mention the fundamental right of freedom of the press.

¹² As Owen Fiss points out, some liberals advocate public regulation of campaign finance to prevent the wealthier from oppressing the less well-off, while at the same time ensuring that the quality of public discourse is not compromised by such (financial) inequalities. See FISS, O. *Liberalism Divided. Freedom of Speech and the Many Uses of State Power*.

¹³ O'NEIL, R. M. Regulating Speech to Cleanse Political Campaigns. *Capital University Law Review*. 1992, Vol. 21, pp. 575, 577.

¹⁴ CALVERT, C. When First Amendment Principles Collide: Negative Political Advertising and the Demobilization of Democratic Self-Governance. *Loyola of Los Angeles Law Review*. 1997, Vol. 30, No. 4., pp. 1497, 1530.

¹⁵ ZENOR, J. A Reckless Disregard for the Truth? The Constitutional Right to Lie in Politics. *Campbell Law Review*. 2016, Vol. 38, No. 1., pp. 41, 47.

¹⁶ See for example GARVEY, S. A Positive Look at Negative Campaigns. *LBJ Journal of Public Affairs*. 1996, Vol. 8., No. 1., pp. 13–18.

III. THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON POLITICAL SPEECH

Political speech before the ECtHR is of particular importance for two critical reasons: it is a matter of principle in European legislation, and it serves as a significant interpretation of Article 10 of the European Convention on Human Rights (ECHR) on freedom of expression. Political expression is a crucial European value; it is a vital element of democratic societies, facilitating open dialogue, public discourse, and exchange of ideas.¹⁷ The ECtHR sought to ensure this European value and has played a crucial role in shaping the protection and necessary restriction of political expression in Europe.¹⁸ In the following, the case law of the Court is examined, analyzing the fundamental principles and landmark cases that have significantly impacted the interpretation of political speech in the context of human rights. Here, the assessment of the ECtHR's practice is divided into two main sections.

On the one hand, we analyze the general principles of the ECtHR with regard to political speech, and on the other hand, we point out the consistent or even inconsistent judgments of the ECtHR concerning political speech. On the other hand, we present two cases of particular relevance, dealing specifically with political speech and expression during the campaign period. In this respect, the recent ECtHR decision in *Sanchez v. France*, which, according to more critical voices, could fundamentally change the Court's jurisprudence, which has been generally consistent so far, is particularly noteworthy.

III.1 General values and main guidelines in the Court's practice

In the Strasbourg Court's jurisprudence on political speech, one of the main – and overriding – principles is that the guarantees of freedom of expression as a fundamental right extend to political speech.¹⁹ Under Article 10 ECHR, individuals are guaranteed the right to freedom of expression and to receive and impart information and ideas without interference by public authority, subject to certain limitations prescribed by law and necessary in a democratic society. It is worth stressing that the protection of political speech concerns a wide range and quality of communications, i.e., the protection is „form independent“. Political speech can be political speech, and therefore, a campaign slogan, a humorous drawing or illustration,²⁰ but also an appeal to fellow citizens to abstain from voting is political speech.²¹ One reason for this is that in the majority of its judgments, the

¹⁷ COMELLA, V. F. *Freedom of Expression in Political Contexts: Some Reflections on the Case Law of the European Court of Human Rights: Political Rights Under Stress in 21st Century Europe*. Oxford: Oxford University Press, 2006, pp. 84–87.

¹⁸ Cf. BAYER, J. Some of the main points of the case law of the European Court of Human Rights on Article 10. *State and Law*. 2017, Vol. 58, No. 4., pp. 117–128.

¹⁹ Freedom of Political Speech: An Imperative for Democracy, Council of Europe, Information Documents, SG/Inf(2022)36, 6 October 2022.

²⁰ GODIOLI, A., YOUNG, J., FIORI, B. M. Laughing Matters: Humor, Free Speech and Hate Speech at the European Court of Human Rights. *International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique*. 2022, Vol. 35, No. 3., p. 2241; Müller and Others v. Switzerland, No. 10737/84, judgment of 24 May 1988, para. 27.

²¹ *Teslenko and Others v. Russia*, no. 49588/12, 65395/12, 49351/18, 50424/18, Judgment of 5 April 2022, para. 133. Regarding the Hungarian case law, see AB Decisions 19/2016 (X. 28.) and 20/2016 (X. 28.), and for a critical assessment of the decision, see SZIKORA, T. A területi kampánytilalom alkotmányossági kérdései. *In Medias Res*. 2018, Vol. 1., pp. 117–129.

ECtHR has emphasized that political speech, regardless of whether it is often provocative or even offensive or insulting in a particular case or situation,²² plays a vital role in promoting public debate and discourse, and also provides a space for questioning the political situation in a given country or the legitimacy of its leadership.²³

It can, therefore, be stated that political expression, as a value of freedom of expression and democracy in Europe, is a key protection under Article 10 ECHR.²⁴ In any event, as mentioned above, political expression is not unrestricted. The Court of Justice has repeatedly underlined that legitimate restrictions on political speech may be imposed to protect other competing rights and interests.²⁵ These restrictions may include a myriad of rights and legitimate interests, including, but not limited to, the protection of the reputation and rights of others (in particular public figures),²⁶ the preservation of national security and the maintenance of law and order,²⁷ and the prevention of the spread of hate speech and incitement to violence.²⁸

In considering competing rights, the ECtHR takes a careful approach to determining permissible restrictions on political speech. The Court takes into account, among other things, the context, content, and impact of the speech in question, as well as the status of the person expressing the political opinion.²⁹ Another key principle guiding the ECtHR's practice is the *margin of appreciation*, a specific European legal construction.³⁰ Its particular importance in the context of political speech lies in the fact that states have a degree of leeway to restrict political speech.³¹ The exercise of discretion in the context of political speech also facilitates a discretionary appreciation of the different political, cultural, and historical contexts across Europe, allowing Member States to take different approaches to balancing competing rights and interests, considering their particular circumstances and national values.³² As with political expression, discretion is not unlimited:³³ the ECtHR ensures that exercising this discretion by national courts does not undermine the right to freedom of expression and that any restrictions imposed are necessary and proportionate in a democratic society.

²² MCHANGAMA, J., ALKIVIADOU, N. Hate Speech and the European Court of Human Rights: Whatever Happened to the Right to Offend, Shock or Disturb? *Human Rights Law Review*. 2021, Vol. 21., No. 4., p. 1008.

²³ See *Wingrove v. the United Kingdom*, no. 17419/90, judgment of 25 November 1996.

²⁴ KOLTAY, A. The Clear and Present Danger Doctrine in Hungarian Hate Speech Laws and the Jurisprudence of the European Court of Human Rights. In: Russell L. Weaver – Mark D. Cole – Steven I. Friedland (eds.). *Comparative Perspectives on Freedom of Expression*. Durham: Carolina Academic Press, 2017, p. 23.

²⁵ *Stoll v. Switzerland*, no. 69698/01, judgment of 10 December 2007; *Castells v. Spain*, no. 11798/85, judgment of 23 April 1992.

²⁶ *Palomo Sánchez and Others v. Spain*, no. 28955/06, 28957/06, 28959/06, 28964/06, judgment of 12 September 2011.

²⁷ *Pentikäinen v. Finland*, no. 11882/10, judgment of 20 October 2015.

²⁸ *Féret v. Belgium*, no. 15615/07, judgment of 16 July 2009.

²⁹ See The Rabat Plan of Action, Office of the High Commissioner for Human Rights, 5 October 2012.

³⁰ FRANTZIOU, E. The Margin of Appreciation Doctrine in European Human Rights Law. *UCL Policy Briefing*. 2014.

³¹ *Alekseyev v. Russia*, no. 4916/07, 25924/08, 14599/09, judgment of 21 October 2010.

³² Cf. *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, judgment of 13 April 2013, paragraph 123; *Bowman v. the United Kingdom* [GC], no. 24839/94, judgment of 19 February 1998.

³³ *Norris v. Ireland*, no. 10581/83, judgment of 26 October 1988, paragraph 45.

III.2 The election campaign as a key contextual element in political communication-critical cases from ECtHR practice

From the point of view of political communication, special treatment is given to communications made during the campaign period. As a general principle, it is worth highlighting the proposition, reaffirmed in several cases, that in the pre-election period, the free flow of opinions, expressions, and information of all kinds must be allowed³⁴ – regardless of the nature of the election.³⁵ Restrictions on freedom of expression must be interpreted narrowly, both in relation to candidates³⁶ and those who speak about them.³⁷ However, a narrow restriction does not mean absolute freedom of expression; as the ECtHR emphasized in *Bowman v. the United Kingdom*, in certain circumstances, it may be considered necessary, in the period before or during an election, to impose restrictions on freedom of expression which are not generally permissible in order to ensure the free expression of the people in the election of a legislative body.³⁸

However, the ECtHR also proposes specific guidelines in its practice, which are very wide and varied in this respect. Among the components of this diversity are the campaign as a contextual element, the campaign period as an event of significant importance for journalism and journalists' rights,³⁹ and the assessment of candidacy as a status in the context of political communication. In the case of *Ólafsson v. Iceland*, for example, the ECtHR examined the question of editorial freedom;⁴⁰ the facts were that two women published an article on an Icelandic website about a candidate (who was, incidentally, a relative of the authors) in which the candidate was accused of child molestation. Although the case was mainly concerned with editorial responsibility, in particular in the light of the question of whether a communication from a journalist is protected under Article 10 if the author published the article in compliance with professional obligations and rules, the judgment also raised the issue of candidacy in several places. The ECtHR has held that by standing as a candidate in an election, an individual inevitably and knowingly enters the public sphere and that the limits of criticism of him must, therefore, be wider than in the case of an individual.⁴¹

As in the Icelandic case, in *Mediengruppe Österreich GmbH v. Austria*, the Court examined the question of the nominee's status and connection with the nominee.⁴² The case concerned the publication by an Austrian daily newspaper of a photograph with the caption „convicted neo-Nazi” of a person indirectly associated with the campaign of a political candidate in the run-up to the presidential elections. The publication of the article contested by the applicant took place more than 20 years after the conviction. The Court accepted the conclusion of the national courts that there was no objective justification for

³⁴ *Orlovskaya Iskra v. Russia*, No. 42911/08, judgment of 21 February 2017, paragraph 40; *Bowman v. the United Kingdom* [GC], No. 24839/94, judgment of 19 February 1998, paragraph 42.

³⁵ *Cheltsova v. Russia*, No. 44294/0, judgment of 13 June 2017, paragraph 96; *Kwiecień v. Poland*, No. 51744/99, judgment of 15 March 2005, paragraph 48.

³⁶ *Kudeshkina v. Russia*, no. 29492/05, judgment of 26 February 2009, paragraph 87.

³⁷ See *Lopes Gomes da Silva v. Portugal*, No. 37698/97, judgment of 28 December 2000, paragraph 33.

³⁸ *Bowman*, paragraphs 41–43.

³⁹ *Orlovskaya Iskra* (Ij. 34), para. 130.

⁴⁰ *Ólafsson v. Iceland*, No. 58493/13, judgment of 21 February 2017.

⁴¹ *Ibid.*, paragraphs 50–52.

⁴² *Mediengruppe Österreich GmbH v. Austria*, No. 37713/1, judgment of 26 April 2022.

the reference to the conviction of the person concerned and that the publication did not contribute to the electoral debate in the absence of a direct link between the person and the political candidate concerned (paragraph 57).

Political campaigning also creates a particular distinction between factual and value judgments.⁴³ As the ECtHR has underlined in several judgments, the distinction between the two is less relevant when the challenged statements are made during a political debate.⁴⁴ In addition to the foregoing, the case law on the possibility and justifiable restriction of the publication of political advertisements during election campaigns deserves mention.⁴⁵ However, one of the most relevant and vital issues of campaigning and political communication for the purposes of this study is hate speech in political communication during the election period. At the center of the controversy is the very narrow possibility of restrictions on speech, as detailed above, which could potentially give room for a candidate to disseminate hate speech without restriction by framing it as campaigning. Two key cases are briefly presented here to highlight the specific relationship between campaigning, political speech, and hate speech.

A) Féret v. Belgium⁴⁶

The facts of the case allege that Daniel Féret, president of the Belgian far-right Front National party, distributed leaflets and posters on several occasions between 1999 and 2001 during the election campaign. The leaflets mainly contained racist, xenophobic, and anti-immigrant texts and statements (e.g., “Stop the Islamisation of Belgium” and “Save our people from the dangers of conquering Islam”). The national court charged Féret with incitement to violence, sentenced him to community service for the integration of immigrants and a suspended prison sentence, and declared him unfit to hold any political office for ten years. In its judgment, the ECtHR underlined that although political speech enjoys broad protection under Article 10 ECHR, overtly exclusionary and hateful political expressions (including those made during campaigns) constitute a threat to social peace. The Court found that Féret’s political statements did not contribute to political discourse but incited hatred against immigrants, especially Muslims.⁴⁷ From the point of view of the campaign period and hate speech, paragraph 76 of the judgment stands out, in which the Court emphasized, in particular in the context of the election period, that the exclusionary messages disseminated by Féret and his party in the form of leaflets during the election period were a form of expression aimed at the broader electorate, i.e., the population as

⁴³ With regard to political campaigns, the difference between factual statements and the expression of opinion is also a very important issue in the context of fake news, see PAPP, J. T. A hamis hírek alkotmányos helyzete és szerepe a demokratikus nyilvánosság befolyásolásában. *In Medias Res*. 2020, Vol. 1., pp. 141–164.

⁴⁴ Lombardo and Others v. Malta, no. 7333/06, judgment of 24 April 2007; Dyuldin and Kislov v. Russia, No. 25968/02, judgment of 31 October 2007. As regards the distinction between statements of fact and statements of opinion on political issues, see. ATV Zrt v. Hungary, No. 61178/14, judgment of 28 April 2020.

⁴⁵ See e.g. Vgt Verein gegen Tierfabriken v. Switzerland (No. 1), No. 24699/94. judgment of 28 June 2001; Vgt Verein gegen Tierfabriken v. Switzerland (No. 2), No. 32772/02. judgment of 30 June 2009; TV Vest AS and Rogaland Pensjonistparti v. Norway, No. 21132/05. judgment of 11 December 2008; Animal Defenders International v. the United Kingdom, No. 48876/08. judgment of 22 April 2013.

⁴⁶ Féret (lj. 28).

⁴⁷ *Ibid.*, para. 73.

a whole. Here, broad reach was associated with racist and xenophobic discourse, and its discriminatory slogans and stereotypical formulations were capable of taking precedence over reasoned arguments. The impact of racist and xenophobic discourse can be greater and more damaging, and therefore, given the nature of their political communication, they cannot be afforded broad protection.

B) Sanchez v. France⁴⁸

The Sanchez v. France judgment is a novelty in every respect, as the case broke with consistent jurisprudence on hate speech, liability for online expression, legal issues concerning social media, and political speech.⁴⁹ The global context of the judgment should also be underlined, as the European platform liability issue can also be seen as a significant shift from the US Supreme Court's favourable rulings in *Gonzalez v. Google* and *Taamneh v. Twitter*.⁵⁰

According to the facts, in 2011, Julien Sanchez was the candidate of the French far-right political party Front National in the Nîmes constituency in the parliamentary elections. During the campaign period, Mr Sanchez published a post on his public Facebook page reflecting on his political opponent, which attracted around 15 comments. The comments on the case included comments from a user, "S.B.", who expressed himself in a racist and Islamophobic manner.⁵¹ "L.R." also posted remarks concerning the difficulties and challenges facing the city, for which he blamed the Muslim population. Sanchez, "S.B.", and "L.R." were prosecuted for the remarks, after which Sanchez posted a notice warning commenters against offensive language on his Facebook page.⁵² The national courts convicted Sanchez on the grounds that the politician was aware of the comments and their content, however, he did not remove them and deliberately made his Facebook page public in order to reach a wider audience during the election campaign. As concluded by the national court, in light of the fact that he was a political actor, he should have been more vigilant at this time, especially with regard to hateful comments.

The Fifth Section of the ECtHR upheld the national courts' decision, arguing that Sanchez, as the "operator" of the Facebook page, was responsible for removing the hate messages from his page. The case was subsequently referred to the ECtHR Grand Chamber, which handed down its decision in May 2023. Concerning the election period, the judges specifically examined the role of the political context in relation to hate speech. The Grand Chamber made clear that when Sanchez made his Facebook page publicly available during the campaign period, Sanchez must have been aware that his page could become a source of controversy, especially in light of the fact that the French election campaign was not without tension. The Grand Chamber, therefore, upheld the Fifth Chamber's decision and found that the interference with Sanchez's freedom of expression was lawful, served a legitimate purpose, was necessary and proportionate.

⁴⁸ Sanchez v. France, No. 45581/15, judgment of 15 May 2023.

⁴⁹ GOSZTONYI, G., LENDVAI, G. F. Az Emberi Jogok Európai Bíróságának Nagykamara ítélete a Sanchez kontra Franciaország-ügyben, avagy felelős-e egy politikus a közszereplő a Facebook-falára érkezett írt kommentekért? *Állam- és Jogtudomány*. 2023, Vol. 2. (forthcoming).

⁵⁰ GOSZTONYI, G., LENDVAI, G. F. Twitter kontra Taamneh és Gonzalez kontra Google, avagy ki a felelős az online platformokra feltöltött tartalomért? *Magyar Jog*. 2023, Vol. 10.

⁵¹ Sanchez, para. 15.

⁵² *Ibid.*, para. 19.

Gergely Gosztonyi and Ferenc Gergely Lendvai examined the long-term effects of the ruling.⁵³ It could create a polemical situation or even a *chilling effect* if politicians and public figures, especially during election periods, have to take on additional obligations by monitoring the communications of users accessing their platforms in addition to their own.⁵⁴

IV. THE FUTURE AND REGULATION OF POLITICAL SPEECH DURING THE CAMPAIGN PERIOD

EU legislation identifies political advertising as the main category of political speech to be regulated. European Member States do not have a common or harmonized approach to regulating political advertising. In some European countries, political commercials or political advertising is a relatively unrestricted form of public communication, while in many places, political advertising is only allowed in the run-up to elections or is banned altogether.⁵⁵ In 1999, the Council of Europe's Committee of Ministers issued a Recommendation on measures concerning media coverage of election campaigns, which aimed to ensure that Member States establish a framework for media coverage of elections that is based on the principles of fairness, balance, and impartiality and contributes to free and democratic elections. The Recommendation stated that where paid political advertising is allowed, Member States should ensure that all political candidates and parties are treated equally and without discrimination and that the public is adequately informed whether a particular message is paid political advertising.⁵⁶ The 2007 Recommendation update reiterated the previous Recommendation's provisions,⁵⁷ adding that Member States should apply the principles and rules on „fair, balanced and impartial” media to non-linear audiovisual media services in the public service media. The regulation of online political advertising was brought back to the fore in 2017 when the Parliamentary Assembly of the Council of Europe voted a resolution on the challenges and accountability of online media,⁵⁸ and the Council of Europe published a comprehensive report on information disorder.⁵⁹

⁵³ GOSZTONYI, G., LENDVAI, G. F. Twitter kontra Taamneh és Gonzalez kontra Google, avagy ki a felelős az online platformokra feltöltött tartalomért? *Magyar Jog*. 2023, Vol. 10.

⁵⁴ In this context, there is also the risk of “*digital authoritarianism*”, which means, among other things, that state actors deliberately manipulate democratic discourse through the use of various digital platforms, and in the context of the above case, may even eliminate diversity of opinions. For more on this, see MANTELLASSI, F. Digital Authoritarianism: How Digital Technologies can Empower Authoritarianism and Weaken Democracy. In: *GPCS* [online]. 16. 2. 2023 [2023-09-30]. Available at: <<https://www.gcsp.ch/publications/digital-authoritarianism-how-digital-technologies-can-empower-authoritarianism-and>>.

⁵⁵ Notions of Disinformation and Related Concepts. Report of the European Regulators Group for Audiovisual Media Services, 2022, pp. 43-45. In: *ERGA* [online]. [2023-09-30]. Available at: <<https://erga-online.eu/wp-content/uploads/2021/03/ERGA-SG2-Report-2020-Notions-of-disinformation-and-related-concepts-final.pdf>>.

⁵⁶ Recommendation No. R (99) 15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns, 9 September 1999.

⁵⁷ Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns.

⁵⁸ PACE. Parliamentary Assembly of the Council of Europe, Resolution 2143 (2017) Online media and journalism: challenges and accountability. In: *PACE* [online]. 25. 1. 2017 [2023-09-30]. Available at: <<https://pace.coe.int/en/votes/36331>>.

⁵⁹ WARDLE, C., DERAKHSHAN, H. Toward an interdisciplinary framework for research and policy making. Council of Europe DGI (2017). In: *Information Disorder* [online]. [2023-09-30]. Available at: <[https://rm.coe.int/information-disorder-report-november-2017/1680764666?ct=t\(\)](https://rm.coe.int/information-disorder-report-november-2017/1680764666?ct=t())>.

IV.1 Draft regulation on transparency in political advertising

“Strengthening European democracy” is one of the pillars of the European Commission’s strategy for 2019-2024.⁶⁰ This sets out the European Democracy Action Plan, which touches on several points concerning political campaigns and political speech in general. The first part of the Action Plan aims to promote free and fair elections, as part of which the Commission aims to preserve fair elections and open democratic debate and to adapt democratic safeguards to the specificities of the new digital age, not only for EU elections but for all national elections. In this context, the Commission has presented a draft regulation on transparency in political advertising at the end of 2021.⁶¹ The aim of the proposal is twofold: to contribute to the proper functioning of the internal market for political advertising and related services and to protect persons concerning the processing of their personal data.

The proposal aims to ensure greater transparency and accountability in political advertising in the EU, both online and offline. To this end, it sets out different obligations for different actors in the advertising value chain, such as political advertisers, political advertising service providers, online platforms, and competent authorities. The proposal defines political advertising as the preparation, placement, promotion, publication, or dissemination of a message by any means for the benefit of or on behalf of a political actor (except where it is of a purely private or purely commercial nature) which is liable to influence the outcome of an election or referendum, a legislative or regulatory process or voting behaviour. Political advertisement is defined as a specific instance of political advertising, and political advertising campaigns are defined as the preparation, placement, promotion, publication, or dissemination of a series of linked advertisements in the course of a contract for political advertising on the basis of common preparation, sponsorship or funding. The draft focuses on the political advertising service provided in connection with the placement, publication or dissemination of a political message, even without remuneration.⁶²

In particular, the draft sets out transparency requirements for political advertising services, such as the identification,⁶³ retention, and transmission of specific data on advertisers and advertisements⁶⁴ and the reporting of potentially infringing political advertising.⁶⁵ Another critical part of the draft Regulation deals with the targeting and amplification of political advertising, requiring political advertisers and political advertising services to comply with specific data protection conditions when using targeting or amplification techniques such as microtargeting or artificial amplification for political advertising.⁶⁶ According to the proposed Regulation, targeting or amplification techniques are

⁶⁰ European Commission. A new push for European democracy. In: *EC* [online]. [2023-09-30]. Available at: <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy_hu>.

⁶¹ Proposal for a Regulation of the European Parliament and of the Council on the transparency and targeting of political advertising. In: [online]. [2024-05-23]. Available at: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0731>>.

⁶² *Ibid.*, Article 2.

⁶³ *Ibid.*, Article 5.

⁶⁴ *Ibid.*, Articles 6, 10, 11.

⁶⁵ *Ibid.*, Article 9.

“techniques that are used either to address a tailored political advertisement only to a specific person or group of persons or to increase the circulation, reach or visibility of a political advertisement.”⁶⁷

The definitions of the Regulation have been widely criticized. According to Joan Barata, the proposed definition of political advertising is problematic mainly because it restricts a particularly protected area of freedom of expression: the dissemination of political speech.⁶⁸ Daniel Holznagel also believes that a narrowing of the definitions is necessary but that this could defeat one of the main aims of the regulation, as certain messages circulating online would not be covered.⁶⁹ Some authors argue that the proposal could potentially restrict freedom of expression. The broad definition of political advertising, which includes messages that influence electoral behaviour, could lead to a system that encourages (self-)censorship and places a disproportionate burden on political actors.

The Regulation requires advertisers to declare whether their advertisements are political in nature and to provide details of their identity and how the advertisement is financed. The concept of political advertising covers messages from politicians and campaigns and advertising by any actor that could influence elections or voter behaviour, so the concept is very broad. Civil society organizations and individuals involved in public debates may be negatively affected, as they have to label their messages as political advertisements, face extensive transparency obligations, and find their target audience much more difficult. This regulation, although designed to strengthen the democratic process by ensuring fairness and transparency in political advertising, has the potential to lead to overregulation and may infringe on freedom of expression.⁷⁰

Various organizations, such as the European Regulators Group for Audiovisual Media Services (ERGA) and the European Partnership for Democracy, have suggested that, in addition to further clarification of the concepts, the draft should include live monitoring of advertisement libraries.⁷¹ Others argue that the rules on amplifying political messages are also inappropriate, as they only apply to amplification techniques based on sensitive data. Researchers at the University of Amsterdam argue that while the focus on sensitive data makes sense from a data protection point of view, it is both excessive and insufficient to address democratic problems. It is excessive because it limits targeted advertising based on political opinions and different ideological beliefs, which have a clear political relevance and can, in fact, reinforce the content and relevance of targeted political advertising. In addition, restricting targeting on the basis of racial or ethnic origin and religious

⁶⁶ *Ibid.*, Articles 12–13.

⁶⁷ *Ibid.*, Article 2(8).

⁶⁸ BARATA, J. Regulation of Online Political Advertising in Europe and Potential Threats to Freedom of Expression. In: *LSE* [online]. 9. 3. 2023 [2023-09-30]. Available at: <<https://blogs.lse.ac.uk/medialse/2023/03/09/regulation-of-online-political-advertising-in-europe-and-potential-threats-to-freedom-of-expression/>>.

⁶⁹ HOLZNAGEL, D. Political Advertising and Disinformation. In: *Verfassungsblog* [online]. 25. 3. 2023 [2023-09-30]. Available at: <<https://verfassungsblog.de/political-advertising-and-disinformation>>.

⁷⁰ VAN DRUNEN, M. et al. The EU is Going Too Far with Political Advertising! In: *DSA Observatory* [online]. 16. 3. 2023 [2023-09-30]. Available at: <<https://dsa-observatory.eu/2023/03/16/the-eu-is-going-too-far-with-political-advertising/>>.

⁷¹ EPD Reaction to the Commission Proposal for a Regulation on the Transparency and Targeting of Political Advertising. In: *European Partnership for Democracy* [online]. [2024-05-23]. Available at: <https://epd.eu/wp-content/uploads/2021/11/epd-reaction-to-the-commission-proposal-on-political-advertising_25_11_2021.pdf>.

beliefs puts parties representing such minority groups at a disadvantage, which does more harm than good to pluralism in political discourse. The solution adopted falls short because it ignores information such as personal characteristics or anxieties, the use of which offers much more apparent opportunities for manipulation.⁷²

Google's statement in response to the draft regulation expressed concern that the text defines political advertising too broadly and that many online expressions of political speech could fall within this definition. Others have pointed out that the legislation in its current form places too much responsibility on online platforms and does not provide enough protection against abusive reporting of political advertising, and its sections on transparency and recommender systems make effective political advertising in the online space almost impossible.⁷³ The proposal is currently at the trilogue stage of negotiations, with the aim of reaching an agreement on the text before the 2024 European Parliament elections.⁷⁴

IV.2 European Media Freedom Act

On 16 September 2022, the European Commission adopted a draft regulation, the European Media Freedom Act (EMFA), which aims to reduce public or private interference regarding the independence of the media sector.⁷⁵ The EMFA includes provisions to prevent interference in editorial decisions and surveillance against journalists, to support independent and adequately funded public service media, to increase transparency in media ownership, audience measurement systems, and the distribution of state advertising, and to ameliorate the protection of content uploaded by media service providers to online platforms.⁷⁶

Through coordination at the EU level, the proposal aims to ensure that independent national authorities take a consistent approach to the concepts of media pluralism and media independence when assessing media market concentrations. The proposal aims to protect EU citizens and businesses more effectively from illegal and harmful content and third-country services that do not comply with EU media standards and to promote the provision of quality media services by reducing the risk of state and private interference in editorial freedom. The proposal aims to promote the freedom of journalists and editors to work without interference, including the protection of their sources.

⁷² VAN DRUNEN, M. et al. Transparency and (No) More in the Political Advertising Regulation. In: *Internet Policy Review* [online]. 25. 1. 2022 [2023-09-30]. Available at: <<https://policyreview.info/articles/news/transparency-and-no-more-political-advertising-regulation/1616>>.

⁷³ KROEBER-RIEL, A. Five Considerations for the EU's New Political Ads Rules. In: *Google* [online]. 23. 2. 2023 [2023-09-30]. Available at: <<https://blog.google/around-the-globe/google-europe/five-considerations-for-the-eus-new-political-ads-rules/>>.

⁷⁴ European Parliament. MEPs vote for tougher rules on political advertising. In: *European Parliament* [online]. 2. 2. 2023 [2023-09-30]. Available at: <<https://www.europarl.europa.eu/news/en/press-room/20230130IPR70208/meps-vote-for-tougher-rules-on-political-advertising>>.

⁷⁵ European Commission. New rules to protect media pluralism and independence. In: *European Commission* [online]. [2023-09-30]. Available at: <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/european-democracy-action-plan/european-media-freedom-act_en>.

⁷⁶ Proposal for a Regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU (EMFA).

The legal basis of the draft regulation is highly questionable. The draft contains regulation on many elements of the media sector but also includes several regulatory elements (in particular, control of media concentration, the operation of public service media, state advertising, and the powers of EU bodies) that constitute direct interference in the functioning of the media system in each Member State. The development of a pluralistic media system and the protection of media pluralism is essentially a matter for the Member States to regulate. Of course, these matters could also impact the EU market, but that alone should not be a basis for a general extension of media regulation at the EU level.⁷⁷

One of the many controversial aspects of the draft is ensuring a transparent and equitable allocation of public resources with regard to state advertising. The proposal claims to ensure transparency and fairness in state advertising to the media in order to minimize the risk of misuse of public funds, thereby also promoting fair competition in the internal media market. Article 2 (15) of the EMFA defines state advertising as „the placement, publication or dissemination, in any media service, of a promotional or self-promotional message, normally in return for payment or for any other consideration, by, for or on behalf of any national or regional public authority, such as national, federal or regional governments, regulatory authorities or bodies as well as state-owned enterprises or other state-controlled entities at the national or regional level, or any local government of a territorial entity of more than 1 million inhabitants”.⁷⁸ In this respect, the draft states that „public funds or any other consideration or advantage granted by public authorities to media service providers for the purposes of advertising shall be awarded according to transparent, objective, proportionate and non-discriminatory criteria and through open, proportionate and non-discriminatory procedures.”⁷⁹ Public institutions with a population of more than 100,000 must publish an annual report on the amount of advertising they have commissioned or published and the media services through which they have done so.⁸⁰

While some welcome the new regulatory proposal on state advertising,⁸¹ others criticize it. Jascha Galaski suggests that the Commission should lower the 100,000 threshold and introduce an advertising expenditure threshold above which advertisers would have to comply with reporting obligations. The report should also explain why the public body chose the advertising outlet in question.⁸² The European Partnership for Democracy proposes amendments on several points, including the creation of an EU-wide database on state advertising, the requirement for public bodies to report at least quarterly rather than annually, the definition of specific criteria for the conditions under which a public body

⁷⁷ NYAKAS, L. A médiapluralizmus nyomában. Elméleti alapvetések az Európai Unió médiapolitikájának tanulmányozásához. In *Medias Res*. 2013, Vol. 2, pp. 345–346.

⁷⁸ EAFRD Article 2(15).

⁷⁹ *Ibid.*, Article 24(1).

⁸⁰ *Ibid.*, Article 24(2).

⁸¹ NENADIĆ, I. What Is State Advertising, and Why Is It Such a Big Problem for Media Freedom in Europe? In: *CMPF* [online]. 15. 11. 2022 [2023-09-30]. Available at: <<https://cmpf.eu.eu/what-is-state-advertising-and-why-is-it-a-problem-for-media-freedom>>.

⁸² GALASKI, J. Liberties' Take To Make Media Freedom Stronger In The EU: EMFA Policy Brief. In: *Liberties* [online]. 19. 1. 2023 [2023-09-30]. Available at: <<https://www.liberties.eu/en/stories/media-freedom-act-policy-paper/44625>>.

may publish advertising in a given medium and the development of a new monitoring mechanism.⁸³

The European Telecommunications Network Operators' Association points out that the definition of state advertising in the draft regulation applies, *inter alia*, to state-owned enterprises or other entities under state control. Still, the regulation does not specify the issue concerning such undertakings, and further clarification is needed in this area, in particular, to ensure that the obligations are precisely focused on the objectives of the proposed regulation.⁸⁴

ERGA explains in its position paper that the problem with state advertising is twofold: on the one hand, unfairly distributed state advertising can have a negative impact on competition in the media market, but on the other hand, it can potentially have a negative impact on the editorial independence of these media companies. ERGA is, therefore, of the opinion that only reporting obligations should be prescribed regarding state advertising that does not impose a disproportionate burden on state actors and does not undermine the protection of the trade secrets of individual companies. In addition, ERGA also suggests that principles or standards should be set in the EMFA to ensure the independence of editorial staff involved in state advertising.⁸⁵ Others argue that the EMFA could directly restrict freedom of expression, that the transfer of some of the powers in the field of media regulation from Member States to the Commission could jeopardize national laws that ensure the independence of media organizations, and that it may not be able to promote strong protection of media pluralism without jeopardizing systems that are already working well in this area.⁸⁶

CONCLUSION

Healthy political communication during campaigns is an integral part of the democratic process. Through these speeches, candidates do not only present their visions, values, and policy proposals to the public, *i.e.*, they are not mere campaign tools, but also manifestations that contribute to the proper development and fulfilment of democratic discourses. The importance of protecting political expression is underlined by the ECtHR judgments cited above, as is the need to limit such expressions in order to ensure that political publicity is appropriately developed. However, in setting these limits, it is challenging to find a balance between the need to ensure the most accessible possible flow of political discourse - and thus the most active public life and the most informed electorate - and the general guarantees of freedom of expression. Election campaigns are a vital period in pub-

⁸³ SMITH, L. Transparency of State Advertising in the proposal for a European Media Freedom Act (EMFA). In: *European Partnership for Democracy* [online]. [2023-09-30]. Available at: <<https://epd.eu/2023/02/23/transparency-of-state-advertising-in-the-proposal-for-a-european-media-freedom-act-emfa/>>.

⁸⁴ ETNO. European Media Freedom Act. ETNO Position Paper, p. 3. In: *ETNO* [online]. [2024-05-23]. Available at: <https://etno.eu/downloads/positionpapers/etno%20position%20paper%20on%20emfa_publication.pdf>.

⁸⁵ Open Public Consultation for the European Media Freedom Act (EMFA). ERGA position paper, p. 7. In: *ERGA* [online]. [2024-05-23]. Available at: <https://erga-online.eu/wp-content/uploads/2022/03/2022-03-EMFA-ERGA-position-paper-for-the-public-consultation-final_adopted.pdf>.

⁸⁶ BALL, L. B. The European Media Freedom Act: What's at Stake? In: *GFMD* [online]. 6. 12. 2022. [2023-09-30]. Available at: <<https://gfmd.info/emfa-whats-at-stake/>>.

lic life, and the statements made during them can only be weighed against specific criteria. A single EU regulation can help set the benchmarks for applying these criteria. Still, it should also be borne in mind that each European Member State has its own specific political culture and environment and its own democratic processes, so it is not easy to create a uniform solution that can be applied in the same way in all countries. Therefore, theory and practice must continue to go hand in hand to strike a balance between curbing harmful speech in political campaigns and ensuring free discourse, which is essential for society.