

ESTRICTING FREEDOM OF INFORMATION ONLINE IN UKRAINE WITHIN THE RUSSIAN-UKRAINIAN HYBRID WAR

Summary. The article's goal is to examine the Law of Ukraine "On Sanctions" and provide an international law assessment of its application as an instrument for blocking (pro)Russian websites in Ukraine in the context of the Russian-Ukrainian hybrid war. To accomplish the stated goal, two objectives are outlined. Firstly, to investigate the implementation of the Law "On Sanctions" for restricting access to (pro)Russian websites in the Ukrainian segment of the Internet. Secondly, to analyze the Law "On Sanctions" through the prism of three internationally accepted UN- and CoE-based criteria of permissible freedom of information limitations – legality, legitimacy, and necessity.

The article found that since 2017, the Law "On Sanctions" has been employed for wholesale blocking of (pro)Russian websites originating from Russia, Crimea, ORDLO, and Ukraine-controlled territory. These websites have been blocked either temporarily or permanently by imposing sanctions on the associated legal and natural persons. Furthermore, it was determined that the wholesale blocking of (pro)Russian websites by applying the Law "On Sanctions" arguably violates the international standards, because only one of the three required criteria of permissible freedom of information limitations has been met. The blocking fulfills the legitimacy criterion, but fails to satisfy the criteria of legality and necessity.

Keywords: Ukraine, Russia, Internet censorship, freedom of information, Law of Ukraine "On Sanctions", international law, UN, Council of Europe

OGRANICZENIE WOLNOŚCI INFORMACJI ONLINE NA UKRAINIE W RAMACH ROSYJSKO-UKRAIŃSKIEJ WOJNY HYBRYDOWEJ

Streszczenie. Celem artykułu jest zbadanie ukraińskiej Ustawy „O Sankcjach” i dokonanie oceny prawnomiędzynarodowej jej stosowania jako instrumentu blokowania (pro)rosyjskich stron internetowych na Ukrainie w kontekście rosyjsko-ukraińskiej wojny hybrydowej. Aby osiągnąć postawiony cel, nakreślono dwa punkty. Po pierwsze, zbadanie wykonanie Ustawy „O Sankcjach” jako ograniczenia dostępu do (pro)rosyjskich stron internetowych w ukraińskim segmencie Internetu. Po drugie, analiza Ustawy „O Sankcjach” przez pryzmat trzech uznanych na arenie międzynarodowej kryteriów dopuszczalnych ograniczeń wolności informacji opartych na opartych na dokumentach prawnych ONZ i Rady Europy – legalności, legitymizacji i konieczności.

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W artykule stwierdzono, że od 2017 r. Ustawa „O Sankcjach” była stosowana do hurtowego blokowania (pro)rosyjskich stron internetowych pochodzących z Rosji, Krymu, ORDLO i terytoriów kontrolowanych przez Ukrainę. Strony te zostały tymczasowo lub na stałe zablokowane przez nałożenie sankcji na powiązane osoby prawne i fizyczne. Ponadto ustalono, że hurtowe blokowanie (pro)rosyjskich stron internetowych poprzez zastosowanie Ustawy „O Sankcjach” prawdopodobnie narusza międzynarodowe standardy, ponieważ spełnione jest tylko jedno z trzech wymaganych kryteriów dopuszczalnych ograniczeń wolności informacji. Blokada spełnia kryterium legitymizacji, ale nie spełnia kryteriów legalności i konieczności.

Słowa kluczowe: Ukraina, Rosja, cenzura Internetu, wolność informacji, Ustawa Ukrainy „O Sankcjach”, prawo międzynarodowe, ONZ, Rada Europy

ОБМЕЖЕННЯ СВОБОДИ ІНФОРМАЦІЇ ОНЛАЙН В УКРАЇНІ У МЕЖАХ РОСІЙСЬКО-УКРАЇНСЬКОЇ ГІБРИДНОЇ ВІЙНИ

Анотація. Мета статті полягає у вивченні та наданні міжнародно-правової оцінки застосуванню Закону України «Про санкції» як нормативного інструменту для блокування (про)російських веб-сайтів в Україні у контексті російсько-української гібридної війни. Зазначена мета передбачає вирішення двох завдань. Перше завдання – це детермінувати особливості імплементації Закону України «Про санкції» для цензурування (про)російських веб-сайтів в українському сегменті Інтернету. Друге завдання – дослідити застосування Закону України «Про санкції» крізь призму міжнародно-правових критеріїв щодо допустимих обмежень свободи інформації – це критерії законності, легітимності і необхідності.

Виявлено, що внаслідок імплементації Закону України «Про санкції» з 2017 р. відбувається повномасштабне блокування доступу до (про)російських веб-сайтів походженням з Росії, Криму, ОРДЛО і підконтрольних Україні територій. Ці веб-сайти блокуються строково або безстроково шляхом накладення санкцій на пов'язаних з ними юридичних чи фізичних осіб. Також визначено, що повномасштабне блокування (про)російських веб-сайтів внаслідок застосування Закону України «Про санкції» ймовірно порушує міжнародно-правові стандарти, тому що був витриманий лише один з трьох необхідних критеріїв допустимих обмежень свободи інформації: блокування ймовірно відповідає критерію легітимності, але суперечить критеріям законності та необхідності.

Ключові слова: Україна, Росія, Інтернет-цензура, свобода інформації, Закон України «Про санкції», міжнародне право, ООН, Рада Європи

Relevance of the topic. A characteristic feature of the Russian-Ukrainian hybrid war is the inter-state confrontation in the information domain. More specifically, the Internet has become a significant realm for waging information warfare between Russia and Ukraine.

This article examines the issue of restricting access to (pro-)Russian information resources in the Ukrainian segment of the Internet in the context of the hybrid war between Russia and Ukraine. Ukraine has been pursuing an active policy of censoring (pro-)Russian websites since 2017. The main legal instrument employed by Ukrainian authorities to implement the Russian dimension of Ukraine's Internet censorship is the Law of Ukraine "On Sanctions". There is substantial evidence indicating that wholesale blocking of certain categories of (pro-)Russian websites through the application of the Law of Ukraine "On Sanctions" is controversial from the international law perspective.

Therefore, the relevance of this research topic is predicated on accentuating the employment of Ukraine's sanctions mechanism for blocking (pro-)Russian websites throughout 2017-2021 as a part of the Russian-Ukrainian hybrid war. Increased emphasis is given to evaluating the Law of Ukraine "On Sanctions" as Ukraine's Internet censorship instrument. The evaluation is carried out in the perspective of the relevant international law standards for permissible Internet censorship as prescribed by the legal frameworks of the United Nations (UN) and the Council of Europe (CoE).

Presentation of research materials. As of 2021, Ukraine is implementing a controversial (from the international law perspective) policy of website blocking. It is ranked as a "partially free" country on a scale of Internet freedoms². Yet some eight years ago, there were no apparent threats to Internet freedoms in Ukraine. According to the international human rights NGO Freedom House, until 2013, Ukraine was listed among countries with "free" Internet status³. Back then, Ukraine did not have an institutionalized mechanism for introducing online restrictions and website blocking⁴.

Subsequently, however, the escalation of the Russian-Ukrainian hybrid war and its information component, combined with the amplification of anti-Ukrainian and pro-Russian propaganda promoted by the Russian government and mass media⁵, added the issue of establishing control over the information flow online to the agenda of Ukrainian policy-makers.

During the period of armed conflicts, state authorities usually face a dilemma in the field of human rights: which restrictions of fundamental human rights and freedoms can be considered necessary to ensure national security, and which cannot be deemed as such⁶. The Russian armed aggression against Ukraine has facilitated the socio-political discourse on balancing

² Freedom on the Net 2021 - Ukraine. Freedom House. URL: <https://freedomhouse.org/country/ukraine/freedom-net/2021> [01.10.2021].

³ Freedom on the Net 2013 - Ukraine. Freedom House. URL: <https://www.refworld.org/docid/52663acd12.html> [20.09.2021].

⁴ Ibid.

⁵ Freedom on the Net 2014. Tightening the Net: Governments Expand Online Controls. Freedom House, p. 828. URL: https://freedomhouse.org/sites/default/files/FOTN_2014_Full_Report_compressedv2_0.pdf [27.09.2021].

⁶ P. Dam, Y. Gorbunova. In Ukraine, taking three pro-Russia channels off the air raises complex issues. Human Rights Watch. URL: <https://www.hrw.org/news/2021/02/11/ukraine-taking-three-pro-russia-channels-air-raises-complex-issues> [29.09.2021].

the preservation of human rights (including the right to freedom of expression) against the permissible restrictions of these rights due to the need to protect the territorial integrity and national security of Ukraine⁷. Numerous human rights organizations have repeatedly argued that fundamental human rights must be respected even in the context of an armed conflict, particularly concerning the adherence to international standards for freedom of expression⁸. At the same time, state authorities have suggested that freedom of expression should be compromised to protect Ukraine's national security⁹.

When it comes to the freedom of expression on the Internet, Russia's armed aggression has prompted a transformation of the paradigm of legal regulation of the "network of networks" in Ukraine. More explicitly, the state has moved away from the policy of "non-interference" in Internet freedoms, taking on a policy that views the protection of national security and preservation of the freedom of expression online as mutually exclusive rather than complementary concepts¹⁰.

Balancing the need to protect national security against the necessity to guarantee freedom of expression on the Internet within the Russian-Ukrainian hybrid war is further complicated by at least two factors. To be more precise, there is no specialized legal framework in Ukraine that would either regulate the procedure for restricting freedom of expression online for the purposes of protecting Ukraine's national interests¹¹ or establish a general regime of legal regulation of the Internet as such¹².

It should be noted, however, that there are several legal instruments in the Ukrainian legislative field that enable the restriction of access to certain types of online content. The current Ukrainian legislation provides for the possibility of blocking access to online resources in case the websites at issue distribute child pornography¹³, grant access to gambling without a required license¹⁴, or violate copyright and related rights¹⁵. However, none of these norms can be used as a justification for blocking websites in view of protecting the national interests or information security of Ukraine¹⁶.

⁷ Ibid.

⁸ О. Бурмагін, Л. Опришко, Д. Опришко. Свобода вираження поглядів під час збройного конфлікту. Огляд практики Європейського суду з прав людини. Платформа прав людини, с. 5. URL: https://www.ppl.org.ua/wp-content/uploads/2019/11/Draft_Chapter_on_ECHR_preview.pdf [01.10.2021].

⁹ Ibid.

¹⁰ О. Кирилюк. Чи слід Україні скасувати санкції проти російських інтернет-платформ? Freedom House. URL: <https://freedomhouse.org/report/policy-brief/2019/chi-slid-ukraini-skasuvati-sankcii-proti-rosiyskikh-internet-platform> [29.09.2021].

¹¹ М. Дворовий. Санкції та блокування веб-сайтів в Україні: як непомітно відкрити скриньку Пандори. Платформа прав людини, с. 14. URL: https://dslua.org/wp-content/uploads/2021/06/Sanctions_and_Internet_UPD_2.pdf [08.07.2021].

¹² О. Бурмагін, Л. Опришко. Свобода слова в Інтернеті. Практичний посібник. Платформа прав людини, с. 7. URL: <https://www.ppl.org.ua/wp-content/uploads/2019/02/СВОБОДА-СЛОВА-В-ІНТЕРНЕТІ.pdf> [02.07.2021].

¹³ Закон України «Про телесмунікації». Верховна Рада України. URL: <https://zakon.rada.gov.ua/laws/show/1280-15#Text> [15.08.2021].

¹⁴ Закон України «Про державне регулювання діяльності щодо організації та проведення азартних ігор». Верховна Рада України. URL: <https://zakon.rada.gov.ua/laws/show/768-IX#Text> [28.09.2021].

¹⁵ Закон України «Про авторське право і суміжні права». Верховна Рада України. URL: <https://zakon.rada.gov.ua/laws/show/3792-12#Text> [15.08.2021].

¹⁶ М. Дворовий. Санкції та блокування веб-сайтів в Україні, с. 14 (sec n. 11).

Nonetheless, despite the substantial shortcomings in current legislative approaches to ensuring Ukraine's information security and regulating freedom of expression on the Internet, Ukrainian officials are actively pursuing a policy of censoring (pro-)Russian websites. The Russian dimension of Internet censorship in Ukraine was made possible by the re-interpretation of existing domestic legal instruments. The main instruments are represented by the Law of Ukraine "On Sanctions" and certain provisions of the Criminal Code of Ukraine, both of which are used to restrict two constitutive elements of the freedom of expression, respectively – freedom of information (gets restricted by the Law "On Sanctions") and freedom of opinion (gets restricted by certain provisions of the Criminal Code of Ukraine). Although applying these legal instruments to implement the Russian dimension of Internet censorship in Ukraine sits uneasy with both the national and international law¹⁷, the censorship of (pro-)Russian websites does occur fairly frequently. This article sheds light on Ukraine's legislative instrument aimed at restricting freedom of information online within the Russian-Ukrainian hybrid war – that is, the Law of Ukraine "On Sanctions".

The Law of Ukraine "On Sanctions" was adopted by the Verkhovna Rada of Ukraine on 14 August 2014, shortly after the Russian annexation of Crimea and military intervention in Donbas¹⁸. Although the provisions of the Law *de jure* were not aimed specifically at counteracting Russia's policies, *de facto* adoption of the Law of Ukraine "On Sanctions" intended to introduce additional possibilities to repel the Russian Federation's armed aggression¹⁹.

The preamble of the Law of Ukraine "On Sanctions" stipulates that it aims to provide "*immediate and effective response to existing and potential threats to national interests and national security of Ukraine, including hostilities, armed attack by other states or non-state actors*"²⁰. Furthermore, it should be emphasized that sanctions are considered, *inter alia*, as a tool for protecting "*national interests, national security, sovereignty and territorial integrity of Ukraine, countering terrorism*" as per paragraph 1 of Article 1 of the Law of Ukraine "On Sanctions"²¹.

With regard to actors that may be subject to sanctions, paragraph 2 of Article 1 of the Law enshrines the following list of actors: foreign states, foreign legal persons, legal persons controlled by a foreign legal person or a non-resident natural person, foreign nationals, stateless persons, and persons engaged in terrorist activities²².

Article 3 of the Law of Ukraine "On Sanctions" also contains a list of grounds, on the basis of which Ukrainian authorities may decide to introduce special economic and other restrictive

¹⁷ О. Кирилюк. Чи слід Україні скасувати санкції. (see n. 10) ; P. Micek, D. Olukotun. Ukraine's internet ban fights fire with fire: it's still censorship. Access Now. URL: <https://www.accessnow.org/ukraines-internet-ban-fights-fire-fire-still-censorship/> [26.09.2021] ; О. Бурмагін, Л. Опришко, Д. Опришко. Свобода вираження поглядів, с. 5 (see n. 8).

¹⁸ Закон України «Про санкції». Верховна Рада України. URL: <https://zakon.rada.gov.ua/laws/show/1644-18#Text> [03.07.2021].

¹⁹ Ю. Тищенко, Ю. Каздобіна, С. Горобчишина, А. Дуда. Політика щодо Криму. Рекомендації (посібник), Київ 2018, с. 50. URL: <http://www.ucipr.org.ua/publicdocs/posibnyk.pdf> [03.07.2021].

²⁰ Закон України «Про санкції». Верховна Рада України (see n. 18).

²¹ Ibid.

²² Ibid.

measures. These grounds include the activities of foreign actors (states, legal or natural persons) and other actors that pose a threat to Ukraine's national interests, security, sovereignty, territorial integrity, etc.; resolutions of the competent UN bodies (General Assembly and Security Council); regulations and decisions of the EU Council; and the evidence that indicates violations of the Universal Declaration of Human Rights or the UN Charter²³.

It should be noted that the Law provides an inexhaustible list of sanction types that may be imposed by the competent Ukrainian authorities. Article 4 of the Law "On Sanctions" enumerates twenty-four clearly defined types of restrictive measures, which contain no reference to the possibility of website blocking. Be that as it may, the list of sanction types also includes a provision enabling the introduction of *"other sanctions, corresponding to the principles of their application, established by this Law"*²⁴. It should be emphasized that it is the provision on the application of "other sanctions" that has been repeatedly used for blocking access to (pro-) Russian websites in Ukraine²⁵.

Increased attention should be paid to determining the sanctions procedure provided by Article 5 of the Law "On Sanctions". Sanctions are applied in the following manner: initially, the Verkhovna Rada of Ukraine, the President of Ukraine, the Cabinet of Ministers of Ukraine, the National Bank of Ukraine, or the Security Service of Ukraine make proposals for the application of sectoral or personal sanctions²⁶. In the context of the Russian-Ukrainian hybrid war, proposals to apply personal sanctions in the form of blocking access to certain categories of (pro-)Russian websites are usually prepared by the Security Service of Ukraine²⁷. Thereafter, decisions on the feasibility of imposing personal sanctions are made by the National Security and Defense Council of Ukraine and enforced by relevant decrees of the President of Ukraine, while the application of sectoral sanctions or restrictive measures against a foreign state requires additional approval by the Verkhovna Rada of Ukraine²⁸.

Thus, despite the lack of specialized legal regulation of Internet censorship in Ukraine, the responsible Ukrainian authorities re-interpret the Law of Ukraine "On Sanctions" and apply it to restrict access to various Russian and pro-Russian Internet-based information resources as part of the hybrid war between Ukraine and the Russian Federation.

An active campaign of restricting the freedom of information online in Ukraine in the context of the Russian-Ukrainian hybrid war dates back to 2017. On 28 April 2017, the National Security and Defense Council of Ukraine adopted a decision "On application of personal

²³ Ibid.

²⁴ Ibid.

²⁵ М. Дворовий. Санкції та блокування веб-сайтів в Україні, с. 5-6 (сес. п. 11).

²⁶ Закон України «Про санкції». Верховна Рада України (сес. п. 18).

²⁷ Голова СБУ пропонує продовжити заборону російських соцмереж ще на 3 роки. Служба безпеки України. URL: <https://www.facebook.com/SecurSerUkraine/photos/a.1539443172952349/2663913550505300/?type=3&theater> [03.07.2021]; Л. Ганжа. Блокування сайтів і таємні критерії: чому СБУ уникає пояснень про підстави блокування сайтів. Платформа прав людини. URL: <https://www.ppl.org.ua/blokuvannya-sajtiv-i-tayemni-kriteri%D1%97-chomu-sbu-unikaye-poyasnen-pro-pidstavi-blokuvannya-sajtiv.html> [04.07.2021].

²⁸ Закон України «Про санкції». Верховна Рада України (сес. п. 18).

special economic and other restrictive measures (sanctions)²⁹. It urged to introduce restrictive measures against a broad range of Russian legal and natural persons³⁰. The decision was made on the basis of relevant proposals of the Security Service of Ukraine, the Cabinet of Ministers, and the National Bank³¹.

On 15 May 2017, the then President of Ukraine Petro Poroshenko issued a Decree №133/2017 enacting the decision of the National Security and Defense Council of 28 April 2017, on the application of restrictive measures against certain categories of Russian legal and natural persons³². Despite the fact that these restrictive measures were *de jure* classified as economic sanctions, *de facto* they entailed, *inter alia*, significant restrictions on the functioning of Russian information resources as a result of wholesale blocking of various (pro-)Russian websites³³. Among the legal persons subjected to sanctions and subsequent website blocking, there were a number of Russian-based tech companies, anti-virus software developers, and news agencies³⁴. Some of the most famous “victims” of Ukraine’s wave of online censorship in 2017 include the tech companies “Yandex”, “Mail.ru”, “Vkontakte”, and “Odnoklassniki”, websites of anti-virus software developers “Kaspersky Lab” and “Doctor Web”, and mass media, such as the websites of “Rossiya Segodnya”, “Zvezda”, “TNT”, “Pervyi kanal”, “RTR-Planeta”, “Rossiya-24”, “REN-TV” and others³⁵.

It should be noted that the list of websites subjected to sanctions has been thereafter modified and expanded by dint of adopting the relevant presidential decrees of P. Poroshenko and V. Zelensky in accordance with the Law of Ukraine “On Sanctions”. A total of more than 600 (pro-)Russian websites have been blocked by presidential decrees issued during 2017-2021³⁶.

Presidential decrees imposing sanctions are marked by several distinguishing characteristics:

- Firstly, sanctions lists were expanded by subjecting different categories of (pro-)Russian websites to restrictive measures. The categories of blocked websites comprised not the Russian-based websites, but also pro-Russian websites originating from the temporarily occupied territories of Crimea and ORDLO, as well as pro-Russian websites based in Ukraine-controlled territory. For example, Presidential Decree № 126/2018 of 14 May 2018 expanded the sanctions lists to include, *inter alia*, the Russian news agency “RIA Novosti”, «Rossiya Segodnya», as well as the websites of occupation administrations of the so-called “DNR” (mvddnr.ru, mgb-dnr.ru,

²⁹ Указ Президента України №133/2017 від 15.05.2017 «Про рішення Ради національної безпеки і оборони України від 28 квітня 2017 року «Про застосування персональних спеціальних економічних та інших обмежувальних заходів (санкцій)». Офіційне інтернет-представництво Президента України. URL: <https://www.president.gov.ua/documents/1332017-21850> [29.09.2021].

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ О. Кирилюк. Чи слід Україні скасувати санкції (сес п. 10).

³⁴ Указ Президента України №133/2017. Офіційне інтернет-представництво Президента України (сес п. 29).

³⁵ Ibid.

³⁶ М. Дворовий. Санкції та блокування веб-сайтів в Україні, с. 11. (сес п. 11).

minfindnr.ru) and “LNR” (mslnr.su, mu-lnr.su, merlnr.su)³⁷. Regarding the blocking of pro-Russian Ukrainian-based websites, Presidential Decree №43/2021 of 2 February 2021 restricted access to the websites of TV channels “112”, “NewsOne” and “Zik”, which were operating in the Ukrainian domain zone (.ua)³⁸.

– Secondly, access to (pro-)Russian websites was restricted as a consequence of imposing sanctions not only on legal persons, but also on natural persons. For example, the Presidential Decree №82/2019 of 19 March 2019 applied sanctions against “Yandex”, “Roskomnadzor” and other legal persons associated with Russia³⁹. As regards sanctions imposed on natural persons, access to such websites as “tass.ru”, “voloshyna.org.ua”, “ukraine.ru” was limited due to the sanctions against the Deputy Chairman of Russia’s State Duma P. Tolstoy; websites “crimea.izbirkom.ru”, “opcrimea.ru”, “82.mvd.ru”, etc. were blocked on the basis of sanctions applied against the head of the illegal Crimean occupation administration S. Aksonov; «glava-lnr.info», «infovestnik.blogspot.com», «lug-info.com» and others were restricted because of the sanctions imposed on the head of the so-called “LNR” L. Pasichnyk; «debalcevo-dnr.ru», «ilovaisk.ugletele.com», «vsednr.ru» and others were blocked due to the sanctions applied against the head of the so-called “DNR” D. Pushylin⁴⁰.

– Thirdly, access to a considerable amount of (pro-)Russian websites was limited indefinitely. It transpired in May 2021, when the President of Ukraine V. Zelenskyy issued a Decree №203/2021, whereby more than 200 websites of the occupation administrations and media resources operating in ORDLO and Crimea were blocked indefinitely – the examples of permanently blocked websites encompass “crimea-news.com”, “dnr-pravda.ru”, “gktrlnr.su”, etc.⁴¹. All websites subject to indefinite sanctions were incorporated in the sanctions lists through the application of sanctions against natural persons who were acting as heads of the occupation administrations of Crimea and the so-called “DNR” and “LNR” – S. Aksonov, D. Pushylin and L. Pasichnyk, respectively⁴².

³⁷ Указ Президента України №126/2018 від 14 травня 2018 року «Про рішення Ради національної безпеки і оборони України від 2 травня 2018 року «Про застосування та скасування персональних спеціальних економічних та інших обмежувальних заходів (санкцій)». Офіційне інтернет-представництво Президента України. URL: <https://www.president.gov.ua/documents/1262018-24150> [24.09.2021].

³⁸ Указ Президента України №43/2021 від 2 лютого 2021 року «Про рішення Ради національної безпеки і оборони України від 2 лютого 2021 року «Про застосування персональних спеціальних економічних та інших обмежувальних заходів (санкцій)». Офіційне інтернет-представництво Президента України. URL: <https://www.president.gov.ua/documents/432021-36441> [24.09.2021]; Freedom on the Net. Freedom House (see p. 2).

³⁹ Указ Президента України №82/2019 від 19 березня 2019 року «Про рішення Ради національної безпеки і оборони України від 19 березня 2019 року «Про застосування, скасування та внесення змін до персональних спеціальних економічних та інших обмежувальних заходів (санкцій)». Офіційне інтернет-представництво Президента України. URL: <https://www.president.gov.ua/documents/822019-26290> [28.09.2021].

⁴⁰ Ibid.

⁴¹ Указ Президента України №203/2021 від 21 травня 2021 року «Про рішення Ради національної безпеки і оборони України від 14 травня 2021 року «Про застосування персональних спеціальних економічних та інших обмежувальних заходів (санкцій)». Офіційне інтернет-представництво Президента України. URL: <https://www.president.gov.ua/documents/2032021-38949> [26.09.2021].

⁴² Ibid.

With that being said, it should be highlighted that the employment of the Law of Ukraine “On Sanctions” as an instrument of Internet censorship in Ukraine within the framework of the Russian-Ukrainian hybrid is controversial from the perspective of Ukraine’s international human rights obligations. Among the most significant legally binding international instruments regulating the procedure for permissible Internet censorship are the UN’s International Covenant on Civil and Political Rights (ICCPR) and the CoE’s European Convention on Human Rights (ECHR)⁴³. Having ratified the Covenant in 1973⁴⁴ and the Convention in 1997⁴⁵, Ukraine became a state-party to both agreements and the accompanying human rights obligations. Article 19 of the ICCPR and Article 10 of the ECHR set out the criteria of permissible limitations of the freedom of information – these are the criteria of legality, legitimacy, and necessity⁴⁶. It is these three criteria that are further utilized to determine whether or not the sanctions mechanism prescribed by the Law “On Sanctions” complies with international law standards. To interpret the criteria of legality, legitimacy, and necessity, the given research refers to the relevant case law of the European Court of Human Rights (ECtHR).

Concerning the criterion of legality, any restriction of freedom of information on the Internet must be “prescribed by law”⁴⁷. A restriction is “prescribed by law” if it satisfies the following conditions: first and foremost, a restrictive measure applied by the state must be grounded in a proper domestic law basis; in addition, the domestic law basis must provide a sufficient level of “quality of the law”⁴⁸. “Quality of the law” requires that the persons concerned must be able to access well-defined and “foreseeable” legal norms in question⁴⁹. In this respect, even if we assume that the Law “On Sanctions” serves as a relevant domestic law basis for restricting freedom of information, grave concerns arise as to the “quality of the law”. There are reasonable grounds to suggest that the text of the Law is neither clearly formulated nor “foreseeable” as to its consequences.

Firstly, limiting access to certain categories of websites is a type of restrictive measures that is not enshrined in the text of the Law of Ukraine “On Sanctions” and belongs to the category of “other sanctions”. Having said that, it should be pointed out that such arbitrary application of the category “other sanctions” for justifying the application of restrictive measures not

⁴³ P. Burdiak, A. Szalai. Freedom of expression online and Internet censorship: regulatory approaches of the United Nations and the Council of Europe. [in:] European and National Dimension in Research: Electronic collected materials of XIII Junior Researchers’ Conference, ed. Yu. Holubeu [et al.], Novopolotsk 2021, pp. 130-131.

⁴⁴ Міжнародний пакт про громадянські і політичні права. Генеральна Асамблея ООН. URL: https://zakon.rada.gov.ua/laws/show/995_043#Text [01.10.2021].

⁴⁵ Конвенція про захист прав людини і основоположних свобод. Рада Європи. URL: https://zakon.rada.gov.ua/laws/show/995_004#Text [01.10.2021].

⁴⁶ P. Burdiak, A. Szalai. Freedom of expression online and Internet censorship, pp. 130-131 (see n. 43).

⁴⁷ Ahmet Yildirim v. Turkey (18 December 2012, final 18 March 2013), Application no. 3111/10, para. 57 ; Cengiz and Others v. Turkey (1 December 2015, final 1 March 2016), Applications nos. 48226/10 and 14027/11, para. 59 ; Ürper and Others v. Turkey (20 October 2009, final 20 January 2010), Applications nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, para. 28.

⁴⁸ Ibid.

⁴⁹ Ibid.

prescribed by the Law “On Sanctions” is a manifestation of virtually unlimited discretion of the state authorities⁵⁰.

Secondly, the employment of such sanction type as “other sanctions” sits uneasy with the principles of “foreseeability” and legal certainty, considering that those subject to the Law “On Sanctions” cannot regulate their conduct properly as they are not aware of which actions may trigger the application of “other sanctions”⁵¹. Consequently, those subject to the Law cannot regulate their behavior in a manner that would help them avoid possible legal consequences of their actions.

Thirdly, the application of «other sanctions» as a means of website blocking arguably contradicts the initial purpose of the Law of Ukraine «On Sanctions». Taking account of the chronology of the adoption of the Law «On Sanctions», we can state that at the time of its adoption, the initiator of the legislation did not intend to use this Law as a legal instrument for website blocking. To be more precise, the draft Law of Ukraine «On Sanctions» did include a provision enabling «*a restriction or termination of the media and other actors of information activities, including those operating on the Internet*»⁵². However, this provision was later excluded from the final text of the Law «On Sanctions» owing to the respective amendments made by the government. When announcing these amendments during the parliamentary session, the then Prime Minister of Ukraine A. Yatsenyuk stated that «*such decisions [in particular, those related to the website blocking] can be taken only by the courts of Ukraine in accordance with the laws as well as the Constitution*»⁵³.

Fourthly, the criteria used to determine the necessity of sanctions application are non-transparent. Ukrainian human rights organizations assert that the specific grounds for applying sanctions against (pro-)Russian websites are «completely confidential»⁵⁴. Furthermore, there are no publicly available documents that would outline the procedure of submitting proposals for sanctions application to the National Security and Defense Council⁵⁵.

The above-mentioned issues negatively affect the legality of sanctions imposed by the Ukrainian authorities, suggesting that the employment of the Law of Ukraine «On Sanctions» for restricting access to certain categories of (pro-)Russian websites does not meet the legality criterion of permissible freedom of information limitations.

⁵⁰ Коаліція «За вільний Інтернет» та громадські організації закликають Президента України та РНБО забезпечити законність та прозорість при застосуванні санкцій до Інтернет-ресурсів. Платформа прав людини. URL: <https://www.ppl.org.ua/koaliciya-zavilnij-internet-ta-gromadski-organizaci%D1%97-zaklikayut-prezidenta-ukra%D1%97-ni-ta-rnbo-zabezpechiti-zakonnist-ta-prozorist-pri-zastosuvanni-sankcij-do-internet-resursiv.html> [15.10.2021].

⁵¹ Ibid.

⁵² Проект Закону про санкції. Офіційний вебпортал Верховної Ради України, с. 3. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc_34?id=&pf3511=519158&pf35401=310393 [13.08.2021].

⁵³ Стенограма пленарного засідання. Засідання 71. Офіційний вебпортал Верховної Ради України. URL: <https://www.rada.gov.ua/meeting/stenogr/show/5685.html> [12.08.2021].

⁵⁴ Л. Ганжа. Блокування сайтів і таємні критерії. (сес. п. 27).

⁵⁵ Ю. Тищенко, Ю. Казадобіна, С. Горобчишина, А. Дуда. Політика щодо Криму, с. 53 (сес. п. 19).

Concerning the criterion of legitimacy, a restriction of freedom of information online can be considered legitimate if it is aimed at achieving at least one of the legitimate goals set out in the relevant international human rights instruments, namely Article 19 of the ICCPR and/or Article 10 of the ECHR⁵⁶. Such legitimate goals encompass, inter alia, the preservation of national security and territorial integrity, the protection of public order, etc.⁵⁷

Speaking about the legitimacy of restricting access to certain categories of (pro-)Russian websites by virtue of applying the Law of Ukraine «On Sanctions», it should be emphasized that paragraph 1 of Article 1 of the Law clearly stipulates that the purpose of sanctions application may rest upon the necessity to protect national security and interests of Ukraine, guarantee the sovereignty and territorial integrity of the state, respond to terrorist activities, etc.⁵⁸ These purposes of sanctions application are fully in line with the legitimate goals indicated in Article 19 of the ICCPR and Article 10 of the ECHR, which may justify freedom of information limitations.

Yet there is no consensus among the Ukrainian authorities with regard to the interpretation of the legitimate goal of blocking (pro-)Russian websites. For instance, in the case of wholesale blocking of “Mail.ru,” “Vkontakte,” and “Odnoklassniki,” different state bodies gave varying accounts regarding the reasons for imposing sanctions on the stated websites. The Security Service of Ukraine press center reported that the Russian websites were blocked because Russian intelligence services utilized them for the purposes of conducting special information operations against Ukrainians by disseminating content calling for radical armed protests⁵⁹. The former head of the Security Service of Ukraine V. Hrytsak stated that the social media platforms “Vkontakte” and “Odnoklassniki” contained about 800 communities that distributed anti-Ukrainian content⁶⁰. Former Secretary of the National Security and Defense Council O. Turchynov noted that Russia used the restricted online platforms for the illegal collection of information, deployment of information warfare against Ukraine, as well as expansion of the network of its intelligence services⁶¹. Former President of Ukraine Petro Poroshenko claimed that the reasons for blocking Russian websites derived from the employment of the blocked websites for the following purposes: conducting anti-Ukrainian special information operations on the impugned Russian websites; granting unauthorized access to personal data of Ukrainian users to the intelligence services of the Russian Federation; expanding the Russian intelligence

⁵⁶ P. Burdiak, A. Szalai. Freedom of expression online and Internet censorship, pp. 130-131 (see n. 43).

⁵⁷ Міжнародний пакт. Генеральна Асамблея ООН (see n. 44) ; Конвенція. Рада Європи (see n. 45).

⁵⁸ Закон України «Про санкції». Верховна Рада України (see n. 18).

⁵⁹ Заява СБУ щодо використання російськими спецслужбами окремих інтернет-ресурсів у спеціальних інформаційних операціях. Прес-центр СБУ. URL: <http://knt.sm.gov.ua/index.php/uk/potochna-diyalnist/vzaemodiya-organy/6468-zayava-sbu-shchodo-vikoristannya-rosijskimi-spetssluzhbam-okremikh-internet-resursiv-u-spesialnikh-informatsijnikh-operatsiyakh> [25.10.2021].

⁶⁰ СБУ виявила в «Однокласниках» та «Вконтакте» близько 800 антиукраїнських груп. Укрінформ. URL: <https://www.ukrinform.ua/rubric-society/2234953-sbu-viavila-v-odnoklassnikah-ta-vkontakte-blizko-800-antiukrainskih-grup.html> [10.10.2021].

⁶¹ Російські соцмережі блокують через вербування та шпигунство - Турчинов. Укрінформ. URL: <https://www.ukrinform.ua/rubric-politics/2229259-rosijski-socmerezi-blokuut-cherz-verbuvanna-ta-spigunstvo-turcinov.html> [10.10.2021].

network by recruiting Ukrainian users; disseminating content calling for the commission of violent acts with a view to changing the constitutional order in the country, etc.⁶²

At the same time, notwithstanding there was no consensus among the Ukrainian authorities on the interpretation of the legitimate goal of blocking (pro-)Russian websites, there is reason to believe that there was a legitimate basis for introducing restrictive measures. To support this claim, we should recall the ECtHR case law on the restriction of freedom of expression (including the freedom of information) in times of armed conflict. The Strasbourg Court has repeatedly reaffirmed that «the sensitivity of the security situation» on a particular territory, as well as the obligation of public authorities to respond to actions that may lead to additional violence, give state authorities the right to restrict freedom of expression (including freedom of information) in an effort to guarantee national security and territorial integrity of the state, as well as preventing disorder and crime⁶³. Thus, if we were to extrapolate this ECtHR position to the realities of the Russian-Ukrainian hybrid war, we would find that given the sensitivity of the security situation in Crimea and eastern oblast of Ukraine; considering the obligation of the Ukrainian authorities to respond to actions that may lead to additional violence in these territories; and taking into account numerous reports from the responsible Ukrainian authorities about the use of (pro-)Russian websites to propagate calls for violence⁶⁴, disseminate anti-Ukrainian content⁶⁵, expand the network of Russian intelligence services⁶⁶, threaten the information security of Ukraine⁶⁷ etc., we can assume that the introduction of censorship measures against (pro-)Russian websites (primarily, «Mail.ru», «Vkontakte», and «Odnoklassniki» as the selected case-studies in this article, but it is also true for virtually all other categories of blocked websites) pursued a legitimate goal of preserving national interests, national security and territorial integrity of the state, and/or preventing disorder and crime. Therefore, the criterion of legitimacy, albeit not clearly and unambiguously formulated, was arguably met by Ukrainian authorities when blocking (pro-)Russian websites by dint of applying the Law of Ukraine «On Sanctions».

With reference to the necessity criterion, any restriction of freedom of information online must be «necessary in a democratic society»⁶⁸. In its case law, the ECtHR has addressed a number of cases concerning the necessity to impose limitations on freedom of expression (including freedom of information), particularly in the context of an armed

⁶² Відповідь Президента України на електронну петицію № 22/036543-еп «Отменить блокировку интернет-ресурса Вконтакте», розміщену на веб-сайті Офіційного інтернет-представництва Президента України 16.05.2017 громадянином А.А.Ткаченко. Офіційне інтернет-представництво Президента України. URL: <https://petition.president.gov.ua/petition/36543> [10.10.2021].

⁶³ *Başkaya and Okcuoğlu v Turkey* (8 July 1999), Applications nos. 23536/94 and 24408/94, para. 56; *Erdođu and İnce v. Turkey* (8 July 1999), Applications nos. 25067/94 і 25068/94, para. 43.

⁶⁴ Заява СБУ. Прес-центр СБУ (see n. 59).

⁶⁵ СБУ виявила антиукраїнські групи. Укрінформ (see n. 60).

⁶⁶ Російські соцмережі блокують. Укрінформ (see n. 61).

⁶⁷ Відповідь Президента України. Офіційне інтернет-представництво Президента України (see n. 62).

⁶⁸ *Ahmet Yildirim v. Turkey* (18 December 2012, final 18 March 2013), Application no. 3111/10, para. 56; *Cengiz and Others v. Turkey* (1 December 2015, final 1 March 2016), Applications nos. 48226/10 and 14027/11, para. 58

conflict. Accordingly, the Strasbourg Court identifies three conditions under which freedom of expression and information limitations during an armed conflict may be considered «necessary in a democratic society»:

- the existence of a «pressing social need» for introducing a restrictive measure⁶⁹;
- the proportionality of the applied restrictive measure to the pursued legitimate goal⁷⁰;
- relevance and sufficiency of evidence for the application of a limitation⁷¹.

When determining the extent to which the state complies with the aforementioned three conditions for permissible freedom of information limitations, the Strasbourg Court reviews the allegedly illegal content of the impugned websites, taking into consideration the context in which the content was published and public interest in distributing allegedly illegal content⁷². Afterward, the ECtHR tries to strike a balance between the need to preserve freedom of expression and information and the necessity to protect some other right by imposing restrictive measures.

As regards the existence of a «pressing social need» to restrict access to (pro-)Russian websites in the Ukrainian segment of the Internet, it should be noted that it is not possible to assess the text, context, and public interest of the allegedly illegal content distributed at the restricted websites. This is due to the fact that the allegedly illegal content of the (pro-)Russian websites was not specified in the relevant presidential sanctions decrees or their annexes. The only publicly available documents comprise sanctions lists that enumerate (pro-)Russian websites subjected to blocking, as well as multiple varying accounts of Ukrainian officials explaining the rationale for imposing sanctions on some but not all categories of the blocked (pro-)Russian websites, without providing any reference to a specific list of allegedly illegal content disseminated on the impugned websites. Accordingly, by not revealing an adequate contextual assessment and not disclosing a list of allegedly illegal content published on the (pro-)Russian websites subjected to sanctions, the Ukrainian authorities failed to demonstrate the «pressing social need» to block the (pro-)Russian websites through the application of the Law of Ukraine «On Sanctions».

Concerning the proportionality of website blocking, it should be noted that the case law of the ECtHR requires that wholesale blocking of entire websites be considered as the last resort of restricting access to illegal content⁷³. The reason for this is that the wholesale website blocking is usually a manifestation of arbitrary interference with the freedom of information because such measure *«deliberately disregards the distinction between the legal and illegal information the*

⁶⁹ Başkaya and Okçuoğlu v Turkey (8 July 1999), Applications nos. 23536/94 and 24408/94, para. 61 (ii); Erdoğan and İnce v. Turkey (8 July 1999), Applications nos. 25067/94 i 25068/94, para. 47 (ii); Erdoğan v. Turkey (15 June 2000), Application no. 25723/94, para. 53; Şener v. Turkey (18 July 2000), Application no. 26680/95, para. 39 (ii)

⁷⁰ Ibid. paras. 61 (iii); 47 (iii); 60; and §39 (iii) respectively

⁷¹ Ibid.

⁷² Ibid. Paras. 61 (iii) – 66; 47 (iii) – 54; 60 – 72; and 39 (iii) – 46 respectively

⁷³ OOO Flavis and Others v Russia (23 June 2020, final 16 November 2020), Applications nos. 12468/15, 23489/15 and 19074/16, para. 38

website may contain», entailing a collateral restriction of legal content along with the allegedly illegal information disseminated on the blocked website⁷⁴. Consequently, a wholesale blocking of access to a wide array of information resources significantly restricts Internet users' rights⁷⁵. In view of the foregoing, wholesale blocking of the mass media is not proportionate as it goes «beyond any notion of «necessary» restraint in a democratic society»⁷⁶.

Suppose we contextualize Ukraine's blocking of (pro-)Russian websites in light of the above-mentioned ECtHR interpretation for determining the proportionality of freedom of information online limitations. In that case, it should be noted that wholesale blocking of Russian websites by virtue of adopting relevant sanctions decrees of the Presidents of Ukraine represented a disproportionate interference with freedom of information on the Internet. Apart from restricting access to allegedly illegal information, wholesale website blocking also triggered collateral blocking of a significant amount of legal information resources available on the blocked websites. Alternatively, a proportionate response to the dissemination of allegedly illegal content on (pro-)Russian websites could have been exercised in the form of blocking access to specific web-page addresses that contain impugned illegal content, rather than restricting access to entire websites. Therefore, given the disproportionate wholesale blocking of (pro-)Russian websites, considering the inability of Ukrainian authorities to demonstrate the «pressing social need» for restricting access to entire websites, it is reasonable to suggest that the condition of proportionality of a restrictive measure was not met during the wholesale blocking of (pro-)Russian websites.

With regard to the relevance and sufficiency of evidence for restricting freedom of information online by applying the Law of Ukraine «On Sanctions», it should be stressed that we cannot verify the relevance and sufficiency of evidence due to the lack of a publicly available list of the specific content that raised concerns of the state authorities and prompted massive website blocking. Thus, we can claim that Ukrainian authorities failed to provide relevant and sufficient evidence for a wholesale blocking of (pro-)Russian websites.

Having examined whether or not a full-scale blocking of (pro-)Russian websites through the application of the Law «On Sanctions» was necessary in a democratic society, we determined that none of the three conditions of necessity was fulfilled at the time of introduction of freedom of information online restrictions. More precisely, Ukrainian authorities failed to demonstrate a «pressing social need» for massive blocking of (pro-)Russian websites; wholesale blocking of the impugned websites went beyond the notion of proportionate freedom of information limitation; and Ukrainian authorities did not provide relevant and sufficient grounds for

⁷⁴ Ibid. paras. 37, 38

⁷⁵ Ahmet Yildirim v. Turkey (18 December 2012, final 18 March 2013), Application no. 3111/10, para. 66; Cengiz and Others v. Turkey (1 December 2015, final 1 March 2016), Applications nos. 48226/10 and 14027/11, para. 64

⁷⁶ Ürper and Others v. Turkey (20 October 2009, final 20 January 2010), Applications nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, paras. 43 and 44; Ölmez and Turgay v. Turkey (5 October 2010, final 5 January 2011), Applications nos. 2318/09, 12616/09, 23563/09, 26801/09, 26837/09, 26846/09, 26851/09 i 26859/09, para. 16

wholesale website blocking. Given that none of the three conditions of the necessity of a restrictive measure was met, the wholesale blocking of (pro-)Russian websites was arguably not «necessary in a democratic society».

Summing up the results of the analysis of the (pro-)Russian website blocking in Ukraine for the consistency with international criteria of permissible Internet censorship, it should be underlined that the Ukrainian authorities arguably met the legitimacy criterion, but violated the criteria of legality and necessity of freedom of information online limitations.

In view of the fact that any restriction of freedom of information online is in line with international law standards only if all three criteria of permissible Internet censorship are satisfied, it should be emphasized that wholesale blocking of (pro-)Russian websites by dint of applying the Law of Ukraine «On Sanctions» arguably violates Ukraine's international obligations with respect to ensuring freedom of information online, considering that the website blocking in Ukraine did not meet the internationally accepted criteria of legality and necessity.

Conclusions. The information confrontation between Ukraine and Russia in the Internet domain constitutes a significant component of the hybrid war between the two countries. Both states are implementing a policy of Internet censorship aimed at restricting information resources that promote narratives of their respective adversary. In Ukraine, the active policy of blocking certain categories of (pro-)Russian websites has been implemented since 2017. It was in 2017 that the Law of Ukraine «On Sanctions» was first applied to the Internet domain for the purposes of wholesale restriction of access to certain websites. Thereafter, the Russian dimension of Ukraine's Internet censorship has been exercised through the adoption of respective presidential decrees imposing sanctions on (pro-)Russian websites in accordance with the Law of Ukraine «On Sanctions».

Having analyzed presidential sanctions decrees introducing wholesale blocking of (pro-)Russian websites in the Ukrainian segment of the Internet, the article delineated the following characteristic features of Ukraine's Internet censorship: sanctions lists provide for wholesale blocking of not only the websites originating from Russia, but also the pro-Russian websites based and functioning in Crimea, ORDLO and the Ukraine-controlled territory. Furthermore, (pro-)Russian websites are getting blocked either temporarily or permanently by virtue of imposing sanctions on both legal persons and natural persons.

The article also investigated the issue of restricting access to (pro-)Russian websites in Ukraine by applying the Law of Ukraine «On Sanctions» with a view to determining the compliance of this process with international standards for permissible Internet censorship. The internationally accepted standards of the permissible freedom of information limitations include the criteria of legality, legitimacy, and necessity. Concerning the legality criterion, it was found that although sanctions against (pro-)Russian websites were based on the provisions of the Law of Ukraine «On Sanctions», the text of the Law is vaguely formulated and is unforeseeable as to its consequences, which is a violation of the legality criterion. The criterion of legitimacy

of the restrictive measures was arguably met because the Ukrainian authorities blocked access to (pro-)Russian websites on the grounds of protecting the national security and interests of Ukraine and guaranteeing the sovereignty and territorial integrity of the state in light of the unfolding Russian-Ukrainian hybrid war. Finally, the necessity criterion was violated due to the fact that Ukrainian authorities failed to demonstrate a «pressing social need», ensure proportionality or provide relevant and sufficient grounds for wholesale blocking of access to certain categories of (pro-)Russian websites. Consequently, the wholesale blocking of (pro-)Russian websites through the application of the Law of Ukraine «On Sanctions» does not fall in line with Ukraine's international obligations on ensuring freedom of information online, considering that such website blocking arguably violates internationally accepted criteria of legality and necessity of restrictive measures.

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