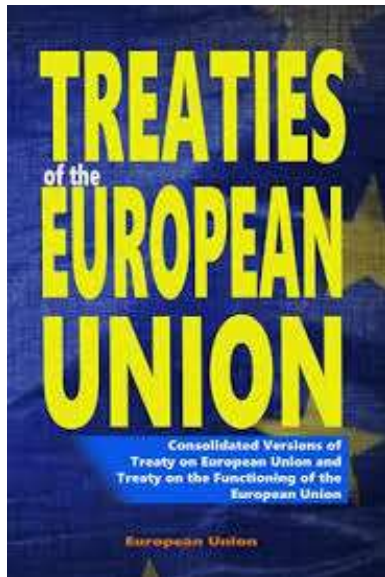


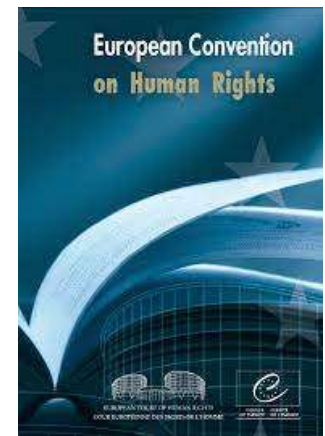
The EU ban on Russian media outlets and the right to freedom of expression and information



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Conference Eureastplatform / Ghent University
Stibbe, Brussels, 9 June 2023



Panel 4: EU sanctions against Russia – stretching the limits of the law?

[Conference 'EU Sanctions against Russia: Impact and Implementation Challenges' — Ghent University \(ugent.be\)](https://www.ugent.be)

- Which Russian media are banned?
- Scope of the ban
- Legal basis and the legitimate aim
- The EU Council Decision/Regulation criticized
- Analysis of EU General Court 27 July 2022
- Disclaimer
- Take away



Which Russian media outlets are banned?

- Russia Today (English/UK, France, Spain, Germany)
- Sputnik
- Rossiya RTR / RTR Planeta
- Rossiya 24 / Russia 24
- Rossiya 1
- TV Centre International
- NTV/NTV Mir
- REN TV
- Pervyi Kanal
- RT Arabic and Sputnik Arabic



What is the scope of the EU ban ?

- **Suspension of the broadcasting licences** or permits and the transmission and distribution arrangements
- **Prohibition for operators** from broadcasting the content of these Russian media outlets, to **enable, facilitate or otherwise contribute to broadcast their content**, including through **transmission or distribution by any means** such as cable, satellite, IP-TV, internet service providers, internet video-sharing platforms or applications, whether new or pre-installed

Measures to be maintained until the aggression against Ukraine is put to an end, and until the Russian Federation, and its associated media outlets, cease to conduct propaganda actions against the Union and its Member States.

EC website FAQs Media ban : https://finance.ec.europa.eu/system/files/2023-06/faqs-sanctions-russia-media_en.pdf



Legal basis

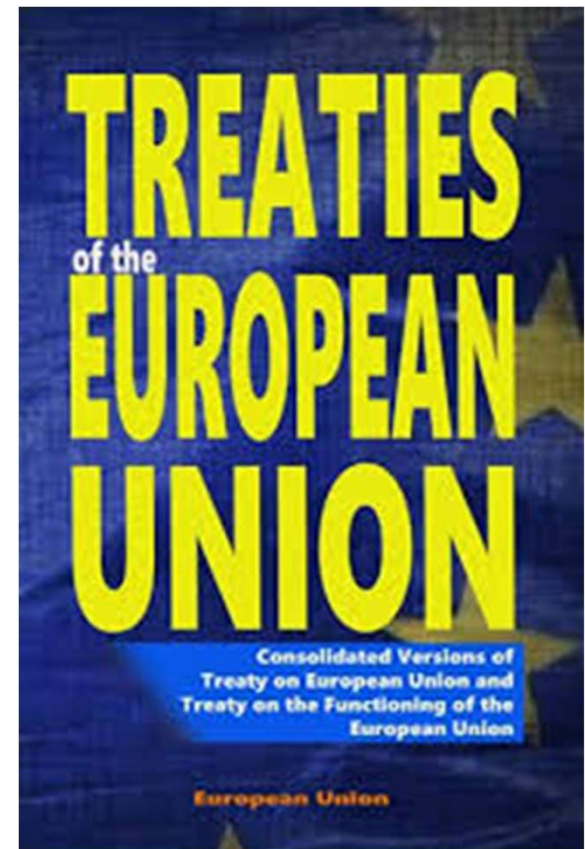
Article 29 TEU + 215 TFEU

EU's common **foreign and security policy**

Empowers the Council to adopt a decision defining the approach of the Union to a particular matter of a geographical or thematic nature and expects Member States to ensure that their national policies conform to the positions of the Union and to impose “**restrictive measures**” against persons, groups, or non-State entities, and to adopt the “**necessary measures**” for the interruption or reduction of economic and financial relations with third countries.

Article 3(5) and (6) TEU,

in its relations with the wider world, the Union shall uphold its values and interests, and the EU shall contribute to **peace, security**, the sustainable development of the Earth, solidarity and mutual respect among peoples, and the **protection of human rights**.



Legitimate aim

In order to justify and support its aggression against Ukraine, the Russian Federation has engaged in **continuous and concerted propaganda actions** targeted at civil society in the Union and neighbouring countries, gravely distorting and manipulating facts.

Those **propaganda actions** have been channelled through **a number of media outlets under the permanent direct or indirect control of the leadership of the Russian Federation.**

Such actions constitute a ***significant and direct threat*** to the Union's ***public order and security.***

Those media outlets are essential and instrumental in bringing forward and **supporting the aggression against Ukraine, and for the destabilisation of its neighbouring countries.**



Justification necessity in light of Article 11 EU Charter

In view of the gravity of the situation, and in response to Russia's actions destabilising the situation in Ukraine, ***it is necessary, consistent with the fundamental rights and freedoms recognised in the Charter of Fundamental Rights***, in particular with the right to freedom of expression and information as recognised in **Article 11** thereof, to introduce further ***restrictive measures to urgently suspend the broadcasting activities of such media outlets in the Union***, or directed at the Union.



The EU Council decision(s) criticized



- 1. No/weak legal basis
- 2. No procedural guarantees / no (fair) trial
- 3. Disproportionate measure (less restrictive, not necessary in whole EU)
- 4. Violates Article 11 EU Charter / Article 10 ECHR
- 5. Competence of national states and their IMRA's
- 6. Paternalist approach
- 7. No more access for experts/researchers/journalists/interested citizens
- 8. EU in bad company/history (NAZI-Germany – BBC / USSR jamming western media)
- 9. Perfect alibi for the Russian Government to take action against western media
- 10. Problem to enforce ban adequately



EU brushed off critics

Euronews, 8 March 2022

Speaking at the European Parliament during a debate on foreign interference and disinformation, the EU's top diplomat **Josep Borrell brushed off critics** who say the EU is threatening freedom of information with the ban on Sputnik and RT/Russia Today.

“They are not independent media, they are assets, they are **weapons**, in the Kremlin's manipulation ecosystem,” Borrell told lawmakers.

[EU officials defend move to ban RT and Sputnik amid censorship claims | Euronews](#)



euronews.

The EU Court in RT France v Council

27 July 2022

EU Court dismissed complaint of RT France

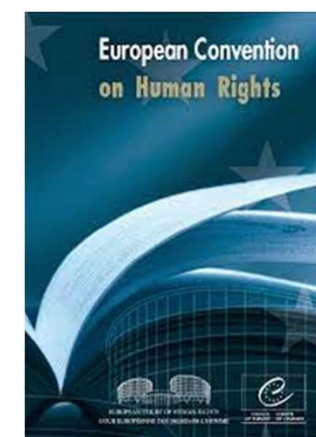
EU ban / perspective of freedom of expression and information in accordance with EU law

- (a) “provided by law”
- (b) respects the “essence” of freedom of expression
- (c) meeting an “objective of general interest”
- (d) proportionate.

EU Court : these conditions correspond to the **case law of the ECtHR** under Article 10 of the European Convention on Human Rights, which guarantees freedom of expression. In this regard, the General Court noted that Article 11 Charter must be given the “same meaning and scope” as **Article 10 ECHR**, as required under Article 52 EU Charter.

Appeal against this judgment of the EU General Court before the CJEU is still pending (case C-620/22) / uncertain – insolvency RT France ?

Also pending at EU General Court : RT France v Council (cases T-605/22, T-75/2 and, T-169/23) ?



The EU Court in RT France v Council, 27 July 2022

A critical analysis (1-3)



- **Inappropriate application** of judgment ECtHR in the case of *NIT S.R.L. v. the Republic of Moldova* (essence: lack of procedural safeguards, only “ex post”, must be “ex ante” by a court or other independent adjudicatory body (not a government or political body) (see also *OOO Flavus a.o. v. Russia*).

- **Selective use** of case law ECtHR regarding Article 10 ECHR: no reference to “prior restraint” case law (*Association Ekin v. France*).

- EU Council’s measures adopted by an executive body, are not consistent with international law (**General Comment nr. 34, Art. 19 ICCPR**) : broadcasting rights can only be withdrawn where content disseminated by a broadcaster had been held by a “court of law or another independent, authoritative and impartial oversight body” in breach of the law.

(..)

The EU Court in RT France v Council, 27 July 2022

A critical analysis (4-5)

- The Council's approach, and the General Court's judgment, undermine the long-established **procedural guarantees** in the **EU's Audiovisual Media Services Directive** for restricting broadcasts by independent regulators **in the MS, at the domestic level** (IMRA's)

- **Weak legal basis:** the TEU and TFEU, contain no provisions on "propaganda" and banning of media outlets, and the concept of propaganda is nowhere defined in EU law. Also lawful content is banned. One judgment the General Court refers to as justification was not a ban of a media outlet, but a measure against a person (*Kiselev v Council* Case T-262/15, General Court, 15 June 2017). The ECtHR has never held that a ban imposed by an executive or government body on media outlets was in accordance with Article 10 ECHR. Prior restraint requires strict scrutiny and procedural guarantees in the law (*Ass. Ekin v. France, RTBF v. Belgium (no.1)*).

(..)



The EU Court in RT France v Council, 27 July 2022

A critical analysis (6-7)

- **Weak justification** : a “significant and direct threat” to the public order and security in, and the integrity of, the EU, remains *as such* a **vague legal basis**, and creates a **real risk of arbitrary application** in the hands of a **government body**
- **Weak justification** of a significant and direct threat to public order and security in the EU also *in concreto*: limited distribution and impact of Russian outlets in most EU countries, while in EU countries where the impact is or was more manifest, IMRA’s have withdrawn the licences and restricted the distribution of a series of Russian media outlets.

(..)



The EU Court in RT France v Council, 27 July 2022

A critical analysis (8)



General Court echoes the argument of the Council and the European Commission that the essence of the right to freedom of expression is not curtailed by the ban, as other possibilities remain open, such as **research and interviews by journalists of RT France, production of programmes,** and distribution of their programmes **outside the EU.**

Almost cynical: without having the possibility of making information public and available to others, the right to freedom of expression of media outlets and journalistic reporting is curtailed in its **very essence** in the EU.

(..)

The EU Court in RT France v Council, 27 July 2022

A critical analysis (9-10)

- General Court overstates the **“temporary and conditional character”** of the interference: already from 1/2/2022 to 31/7/2024, without any short-term perspective that this measure will no longer be maintained. **Unclear when, by whom, how** it will be decided that the Russian Federation, and its associated media outlets **will eventually have ceased to conduct propaganda actions** against the Union and its Member States.

- **The approach by the General Court** as if such a measure has only a temporary character with minor impact on the right to freedom of expression, **contrasts firmly with the approach by the ECtHR** which on several occasions has clarified that “news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest” (*Observer and Guardian v. UK, Sunday Times v. UK (no.2) and Sanoma Uitgevers BV t. the Netherlands (Grand Chamber)*).





Focus of analysis is on the **one-sided approach, and arguably flawed application**, by the General Court of the right to freedom of expression, and its **selective application of ECtHR case law on Article 10 ECHR**.

The General Court's judgment in *RT France* risks **eroding the fundamental right of freedom of expression and information as a cornerstone for a democratic society, respect for the rule of law, and media freedom "without frontiers"**; while these principles and values are "the bedrock of our society and our common identity".

We condemn in the strongest way the **military aggression by the Russian State** against Ukraine. The critical remarks in this analysis should **not be interpreted as giving any support to the Russian state media concerned**.

The discussion is open ...

also from a media-users and internet-providers' perspective.

Pending case EU Court: A2BConnect a.v. v Council

[Case T-307-22](#)

Applicants: **A2B Connect BV, BIT BV , Freedom Internet BV (The Netherlands)**

Defendant: **Council of the European Union**

The applicants claim that the Court should pursuant to Article 263 TFEU, **annul** Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine and Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine

Arguments (focusing on obligation by ISPs to block any content by the listed Russian media outlets or by other parties which repeats or report their content or could be seen as circumventing the Measure)

- Article 29 of the TEU and Article 215 of the TFUE **do not provide a lawful basis** for the contested decision and the contested regulation, respectively, and/or the defendant acted **outside its competence** as enshrined the Treaties, in particular Title V of the TEU.
- The contested regulation and the contested decision **violate Article 11 and Article 52 of the Charter** of Fundamental Rights of the European Union.
- The contested regulation and the contested decision **violate Article 41 of the Charter** of Fundamental Rights of the European Union, and constitute an infringement of rules of law relating to the application of the Treaties, more specifically the general principles of **good administration**.

Take away



Statement on banning of RT and Sputnik

[IPI](#), 4 March 2022

Even during times of information warfare, it remains true that **the best way to counter state-sponsored disinformation is not through broadcast bans or censorship**, but instead through fostering a **professional and pluralistic media landscape** with thriving, independent journalism which can factcheck falsehoods and insulate citizens from propaganda, in addition to programs for teaching media literacy. Our focus should therefore be on **investing in sustainable and long-term defence mechanisms against all forms of propaganda.**

More information

Dirk Voorhoof, “EU silences Russian state media: a step in the wrong direction”, on [Inform’s Blog](#), *The International Forum for Responsible Media Blog*, 8 May 2022 and [Columbia University Global Freedom of Expression](#) / Publications, 9 May 2022)

Ronan Ó Fathaigh and Dirk Voorhoof, “Freedom of Expression and the EU’s ban on Russian Today. A Dangerous Rubicon Crossed”, *Communications Law – The Journal of Computer, Media and Telecommunications Law*, 2022/4, 186-192 and on SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4322452 and [Inform’s Blog](#), *The International Forum for Responsible Media Blog*, 19 August 2022.

Mark Cole, “Update on EU sanctions against Russian Broadcasters”, IRIS online legal newsletter of the European Audiovisual Observatory, [IRIS 2023-6:1/22](#)