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Censorship in the EU as a result of the war in Ukraine. Case T-125/22 *RT France v Council*

Luigi Lonardo[1]

Abstract

The judgment in *RT France* confirmed the validity of a ban on broadcasting of any content by certain Russian-sponsored media companies in the EU territory, because it considered that the Russian Federation engaged in continuous and concerted propaganda against the EU and its Member States. The ban is a highly unusual measure in the context of EU restrictive measures. It was challenged by RT France, a media company based in France but predominantly funded by the Russian Federation.

The case raises complex and novel legal questions within the EU legal framework. This analysis is dedicated to three of them. The first issue concerns EU competence and the legal basis for the ban: can the EU lawfully adopt censorship, inside the EU's territory, through a Common Foreign and Security Policy measure? The second issue involves freedom of expression: can RT France rely on this right in the first place, and is propaganda falls under the umbrella covered by freedom of speech? The third issue centres on the weight of the context (a war in the EU's neighbourhood) as a justification for the measure. In this respect, this analysis argues that the Court convincingly explained why the measure strikes a right balance between the protection of free of speech on the one hand, and the protection of the EU's public order, of public security, and other EU values on the other hand.

Introduction

In March 2022, the Council of the EU banned the broadcasting of any content by certain Russian-sponsored media companies in the EU territory, because it considered that the Russian Federation engaged in continuous and concerted propaganda against the EU and its Member States. The ban was adopted, through a Common Foreign and Security Policy restrictive measure, in the context of the sanctions against Russia, few days after the beginning of the war in Ukraine in 2022. One of the addressees of the measure, RT France (a media company established in France but owned by a Moscow-based association which is almost entirely funded by the budget of the Russian Federation) challenged the measure in a direct action before the General Court of the EU. In its Grand Chamber decision of 22 July 2022, the General Court declared the measure valid, in the light of the exceptional context in which it was adopted, because the ban constitutes a proportionate interference with the freedom of speech of RT France.[2]

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[2] See Section Factual and Legal Background for the procedural history of this case.

The case raises many difficult and important legal issues,[3] some of which are novel in the EU legal order.[4]

The first concerns EU competence and correct the legal basis for the ban: can the EU lawfully adopt censorship through a Common Foreign and Security Policy measure? I will make the case that the General Court should have argued in greater detail why the principle of conferral[5] permits the EU to address disinformation and propaganda through foreign policy competences (that is, under "special rules and procedures"[6]) – as opposed to internal market competences (that is, under the ordinary legislative procedure). This is addressed in the Section *Principle of conferral: does the EU have the power to adopt the contested acts?*

The second concerns the scope and content of the right to freedom of expression.[7] Does the exercise of EU competence restrict a fundamental right of RT France? This means asking whether, *ratione personae*, RT France can rely on it even though the General Court found it is not independent from Russia (could Russia rely on freedom of speech in EU Courts?); and *ratione materiae*, it means asking if propaganda is covered by free speech. These points are addressed in the Section *The existence of freedom of expression*.

The third concerns the weight of the context (a war in the EU's neighbourhood) for the justification of the measure (in itself noteworthy, since for the first time the Council invokes the protection of the *EU's* public order[8]). Once EU competence and the existence of a fundamental right on which RT France is entitled to rely are established, the Court needs to monitor that the exercise of that competence complies with the respect of fundamental rights, and this is done through an assessment of proportionality. Even in the context of a war (in which the EU insist it is not party anyways), freedom of speech should be handled with care. Censorship of the narrative of the "enemy" by invoking public order and public security – as the Council does in the sanction – is very problematic. The link between the TV programmes of RT France and public security is very indirect at best. The reasoning of the General Court is more persuasive. The General Court found that the censorship is justified because RT's programmes in the days after the beginning of the war reveal propaganda for war prohibited by international law; because those programmes revealed "a manifest imbalance in the presentation of the different opposing viewpoints, with the specific aim of justifying and

[3] It is the 'legal difficulty or the importance of the case or special circumstances' that justified the General Court sitting as Grand Chamber. Article 28(1) of the Rules of Procedure of the General Court of 4 March 2015 (OJ L 105, 23.4.2015, p. 1).

[4] In addition to those discussed in this annotation, the novelty concerns the target (an audiovisual media company, not a single journalist), the object of (a ban on broadcasting, not a ban on other activities contemplated in previous acts) and the nature of the measure (ex-post and punitive, not pre-emptive or self-regulatory). Since other comments have addressed the novelty of these measures, this annotation will not touch upon those. See S. Poli, 'Prime riflessioni sulla sentenza del Tribunale "RT France" sulle misure restrittive contro le attività di disinformazione russe' (2022) IV Quaderni AISDUE 111; S. Poli, 'Judicial challenges to EU restrictive measures by individual state organs, 'emanations of non-EU member states' and third countries: the limits to the Council's discretion' in G. Adinolfi, A. Lang, C. Ragni, *Sanctions by and against international organizations* (Edward Elgar, in press); S. Poli and F. Finelli, 'Context specific and structural changes in EU restrictive measures adopted in reaction to Russia's aggression on Ukraine' (2023) 3 Eurojus 19; and V Szep and R Wessel, 'Balancing Restrictive Measures and Media Freedom: RT France v Council' (2023) Common Market Law Review (forthcoming).

[5] Article 5(2) TEU.

[6] Article 24 TEU.

[7] For reasons of space, this case note does not address the other fundamental rights invoked by RT France (on which see Section Factual and Legal Background).

[8] Recital 8 of the contested acts, for the full citation see below (n 16). On this point see S. Poli, 'Prime riflessioni' (n 4) 116 and S. Poli and F. Finelli (n 4) 33.

supporting [the Russian] aggression";[9] because the ban is temporary, reversible, and not total; and because it targets audiovisual programmes, which can be particularly impactful. I argue nonetheless that the reference to the EU public order made by the Council is a recognition of a European 'public sphere for debate', and I suggest that – contrary to what the General Court seems to require – the overall structure of media in that sphere should allow citizens to access information enabling them to form a critical opinion, with the aim to engage in public discourse, without requiring *each* media to be balanced in the presentation of opposing narratives. This draws on a Habermasian conception of the public sphere: "it is not a political choice of direction but a constitutional imperative to maintain a media structure that enables the inclusive character of the public sphere and a deliberative character of the formation of public opinion and will."[10] These issues are discussed in the Section *Proportionality*.

The proportionality of the ban also entails the need for a balancing between EU values (such as democracy and fundamental rights[11]), and other objectives pursued by the Council, namely the promotion of peace,[12] and the protection of the EU's public order.[13] In the circumstances of *RT France*, the censorship arguably pursues both an EU value (the promotion of peace) and the general interest of protecting public order, in so far as it targets the Russian propaganda machine with a view to shield EU citizens from such it – since the propaganda justifies what the EU considers to be a war of aggression. But the pursuit of those objectives may be in contrast with the objective of protecting individual liberty (here, the fundamental right to freedom of expression). When checking the proportionality of the ban, EU Courts need to monitor that the measure adopted by the Council strikes the right balance between those contrasting considerations. This activity the Council (and its control by the EU judiciary) is the manifestation of a process of balancing that is central to the EU constitutional order.[14] While I argue that the General Court was correct in finding the measure to be proportionate, *RT France* can be considered a test for how faithful a society is to its own values: this is in the light of the potential applications of the reasoning, in potential cases on censorship against propaganda in which the contrasts between EU interests and EU values would be even sharper than in *RT France*. This is discussed in the Section *Balancing values and interests.*

Factual and legal background

One of the provisions[15] in the Common Foreign and Security Policy (CFSP) Decisions adopted by the Council of the EU following the 2022 invasion of Ukraine prohibits a number of EU-

[9] RT France para 211

[10] Jürgen Habermas, *Ein Neuer Strukturwandel Der Öffentlichkeit Und Die Deliberative Politik* (Suhrkamp 2022) 67. Translation from https://www.suhrkamp.de/rights/book/juergen-habermas-a-new-structural-transformation-of-the-public-sphere-and-deliberative-politics-fr-9783518587904.

[11] Defined as values in Article 2 TEU.

[12] Article 3(1) TEU.

[13] T-125/22 RT *France v Council* para 54: the Council made clear at the hearing that the measure seeks 'to safeguard the values, fundamental interests, security, independence and integrity of the European Union' and 'to preserve peace, prevent conflicts and strengthen international security'.

[14] See e.g. Takis Tridimas, 'Wreaking the wrongs: Balancing rights and the public interest the EU way' (2023) 29(2) Columbia Journal of European Law 185.

[15] Article 4g of Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 13) as amended by Council Decision

based media companies that have strong ties with Russia from broadcasting any content.[16] The same prohibition is reproduced in the implementing Regulation.[17] The Decision and the Regulation will be referred to as "the contested acts" or collectively as "the measure".

In March 2022, one of the addressees of the acts (RT France), lodged an action for annulment before the General Court, alleging breach of the rights of the defence, freedom of expression and information, freedom to conduct a business and the principle of non-discrimination on grounds of nationality. RT France established in France, its entire share capital is owned by a Russian association almost entirely funded by the budget of the Russian State).

On 30 March 2022, the President of the General Court rejected a request for interim measures submitted by RT France, because there was no urgency (RT France did not show that it would incur serious and irreparable financial damage if the contested act was not suspended[18]), and because the balance of interests in the interim proceedings was in favour of the Council rather of RT. This was the case because, even if RT were to incurr damages if the contested acts were not suspended, these damages could be easily assessed at a later stage; but the same could not said for the Council if the acts were to be suspended.

On 27 July 2022, the General Court, sitting as a Grand Chamber and with an accelerated procedure,[19] delivered its judgment. In June 2023, RT France renounced to the appeal it had lodged before the Court of Justice, and the case in now removed from the Court's registry.[20]

The judgment

The General Court examined first whether the Council had competence to adopt the contested acts. It found that Article 29 TEU empowers the Council to "adopt decisions which shall define the approach of the Union to a particular matter of a geographical or thematic nature". "The approach of the Union" is any decision meeting the three cumulative conditions of relating to a CFSP subject-matter, relating to "a particular matter of a geographical or thematic nature", and not being of an operational character.[21] In particular, "decisions providing for measures

(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 (OJ 2022 L 65, p. 5).

[16] This is the full text of Article 4g of Council Decision 2014/512/CFSP '1. It shall be prohibited for operators to broadcast, or to enable, facilitate or otherwise contribute to broadcast, any content by the legal persons, entities or bodies listed in Annex IX, 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. 2. Any broadcasting licence or authorisation, transmission and distribution arrangement with the legal persons, entities or bodies listed in Annex IX shall be suspended.'

[17] Article 2f of Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (OJ 2014 L 229, p. 1), as amended by 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 (OJ 2022 L 65, p. 1.

[18] Para 39 of the order of 30 March 2022, RT *France v Council* (T-125/22 R, not published) EU:T:2022:199.

[19] In exceptional circumstances, upon request of the *juge rapporteur*, can the General Court decide cases under an accelerated procedure Article 151 paragraph 2 of the Rules of Procedure of the General Court of 4 March 2015 (OJ L 105, 23.4.2015, p. 1).

[20] Order of 28 July 2023 in case C-620/22 P ECLI:EU:C:2023:615. Other actions lodged by RT France have similarly been removed from the Court's registry at the request of RT France itself: see orders in cases T-169/23; T-75/23; T-605/22.

[21] General Court, 27 July 2022, T-125/22 RT *France v Council* para 50.

capable of directly affecting the legal position of individuals may be adopted" pursuant to Article 29 TEU.[22] National authorities cannot guarantee the same effectiveness as EU law can,[23] and it is irrelevant that national law entrusts them to impose sanctions in respect to inappropriate editorial content.[24]

The measure was also compliant with Article 40 TEU (which mandates that TFEU competences and CFSP competences shall not affect each other), even though it could have been adopted under an alternative legal basis, such as an internal market one, contained in the TFEU. TFEU competences and CFSP ones "are not mutually exclusive, but are complementary, each having its own scope, and aim to achieve different objectives".[25]

Turning to the substance of the case, the General Court found that the right of the applicant of defence was not breached because, in light of "the quite exceptional context in which the contested acts were adopted",[26] the Council was not required to hear the applicant before adopting the measures, and the result of the procedure would have likely been the same even if there had been a hearing.[27] The Court also held that the Council also gave sufficient reasons for the measure.[28]

The General Court found that there was a restriction to freedom of expression,[29] a right protected by Article 11(1) of the Charter and Article 10 ECHR. It then examined whether the restriction met the test provided for in Article 52(1) Charter and found that:
First, the restriction was 'provided for by law', because it is contained in sufficiently precise acts founded on the EU Treaties.
Second, the restriction respected the essence of freedom of expression, because it is temporary, reversible,[30] and does not prohibit other other journalistic activities, such as research and interviews, or selling the content to Russia or francophone countries outside the EU.[31]
Third, it effectively met objectives of general interest, recognised as such by the European Union: the protection of the EU's public order and security, the pursuit of peaceful international relations, and the maintenance of international security.[32]
Fourth, the restriction was proportionate. The applicant was deemed to be under the control of Russia, because it failed to substantiate its claims of independence over its editorial policy.[33]
The applicant also engaged in propaganda. The term itself is not defined, but, after examining three days of broadcast (24-27 February 2022), the General Court concluded that "the applicant was broadcasting programmes containing a reading of the events relating to the military aggression against Ukraine that favoured that aggression and the narrative of those events made by the political leaders of the Russian Federation".[34] There was no sufficient "balance", which

[22] Ibid para 51.
[23] Ibid para 58.
[24] Ibid para 57.
[25] Ibid para 61.
[26] Ibid para 92.
[27] Ibid para 99.
[28] Ibid para 114.
[29] Ibid para 143
[30] Ibid para 154.
[31] Ibid paras 156-157.
[32] Ibid paras 161-164.
[33] Ibid para 173.
[34] Ibid para 186.

breached “duties and responsibilities” of journalists, which are particularly important in situations of conflict and tension.[35] The measures are also necessary given the highly sensitive moment.[36] Overall, the Court concluded that the balancing done by the Council was correct in the light of the various interests at stake. The contested measure did not constitute a disproportionate interference with the freedom to conduct business either.[37]

Analysis

Principle of conferral: does the EU have the power to adopt the contested acts?

The General Court found that the censorship could lawfully be adopted under Article 29 TEU, which enables the Council to “define the approach of the Union to a particular matter of a geographical or thematic nature”. The finding that a measure based on Article 29 TEU can directly affect individuals can be criticised as it gives quite a broad power to the EU in the area of CFSP, where the jurisdiction of the Court to solve controversies is severely curtailed by Article 24 TEU and 275 TFEU.[38] In a nutshell, this finding creates a hypothetical situation in a future case in which an individual is affected by a CFSP decision of the Council (because its legal situation is directly modified by it), but the Court may not have jurisdiction on that decision (because the decision may not provide for a restrictive measure against a natural or legal person, as required pursuant to the second paragraph of Article 275 TFEU). In fact, the General Court assumed, rather than demonstrated,[39] that the ban at issue was a restrictive measure against a natural or legal person when it referred to Article 275. An opposite conclusion – that a ban such as those in the contested acts is not a restrictive measure – could be reached by considering that Article 215(1) TFEU requires, for a restrictive measure, ‘the interruption or reduction, in part or completely, of *economic and financial relations*’ (emphasis added) with the target of the measure. There is no economic or financial relations interrupted here, but only a ban on broadcasting and on granting licences. The interruption of economic relations is neither a direct not a necessary consequence of either (RT France could in fact continue with revenue-generating activities other than broadcasting[40]). A literal interpretation of Article 275 TFEU suggests that more attention ought to be paid to the identification of what constitutes a “restrictive measure”.[41] In practice, however, it is settled case law that this specific provision is not to be interpreted literally: Article 215 TFEU was in fact used to enact travel bans as well, which are measures that does not entail directly or necessarily the interruption of financial relations with EU operators.[42]

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[35] ECtHR, 8 July 1999, *Sürek v. Türkiye (No 1)*, CE:ECHR:1999:0708JUD002668295, § 63
[36] General Court, 27 July 2022, T-125/22 RT *France v Council* para 199.
[37] Ibid para 230.
[38] For doctrinal arguments against the finding that CFSP acts can directly (i.e. without need for an implementing Regulation) affect individuals, see L. Lonardo, *Common Foreign and Security Policy after Lisbon: Between Law and Geopolitics* (Springer 2022) 62-63.
[39] The issue was not raised by the parties.
[40] T-125/22 RT *France v Council* para 156.
[41] Joni Heliskoski, ‘Made in Luxembourg: The Fabrication of the Law on Jurisdiction of the Court of Justice of the European Union in the Field of the Common Foreign and Security Policy’ [2018] Europe and the World: A law review.
[42] Similarly, see V Szep and R Wessel (n 12), with reference to the practice of the Council when implementing Article 215 TFEU.

On Article 40 TEU (mandating the non-affectation between CFSP and other EU competences), the Court should have justified in more detail why the contested CFSP decision meets the test of falling within the scope of CFSP and pursuing CFSP objectives: the standard approach is to apply a "centre of gravity" test, that is, generally, to consider the aim and content of the act in order to decide what is the correct legal basis.[43] The General Court mentioned in the judgment that contested acts can be linked to the provisions and to the objectives of Article 3(5), 21, 23 TEU, but these do not related to CFSP specifically, only to EU external action more broadly; and of Article 24 TEU (only this relates to CFSP).[44] This is not to suggest that the General Court reached the wrong conclusion, but that the potential alternative legal bases ought be scrutinised more closely to confirm that the contested decision is correctly adopted under a CFSP legal basis.

For example, the Audiovisual Media Services directive[45] – to whose subject matter the ban relates – is based on Article 53 TFEU. Article 6(1)(a) Audiovisual Media Services directive states that Member States (not the Council) are responsible to ensure that "audiovisual media services provided by media service providers under their jurisdiction do not contain any […] incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter".

Article 114 TFEU is another plausible legal basis for the contested act. In addition to appearing as legal basis for the proposed European Media Freedom Act (on which more is said below), Article 114 TFEU has been used by other initiatives pertinent to the regulation of the media sector, such as the proposal for the Copyright Directive[46] and the proposal for a Regulation on online transmissions and retransmissions.[47] Most recently, the Digital Services Act[48] and the proposal for a Regulation on political advertising[49] were based on Article 114 TFEU.

The reason why compliance with Article 40 TEU is important is also the role of the European Parliament. If the censorship can validly be adopted under CFSP, the Parliament only has a right to be consulted on 'the main aspects and basic choices',[50] whereas it is involved as co-legislator in the cases of the other legal bases surveyed. It is settled case law that participation by the Parliament in the legislative process is the reflection, at Union level, of a fundamental democratic principle that the people should participate in the exercise of power through the intermediary of a representative assembly.[51] It follows that the European Parliament must be

[43] See the discussion in B. Baade 'EU Sanctions Against Propaganda for War – Reflections on the General Court's Judgment in Case T-125/22 (RT France)' (on file with author). On the centre of gravity in external relations law see Guillaume Van der Loo and Peter Van Elsuwege, 'Legal Basis Litigation in Relation to International Agreements: Commission v. Council *(Enhanced Partnership and Cooperation Agreement with Kazakhstan)*' (2019) 56 Common Market Law Review 1333.

[44] T-125/22 RT *France v Council* para 52.

[45] Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.

[46] Proposal for a Directive on copyright in the Digital Single Market, COM/2016/0593 final.

[47] COM/2016/594 final.

[48] COM/2020/825 final.

[49] COM/2021/731 final.

[50] Article 36 TEU.

[51] Case C-263/14 *European Parliament v Council* para 70.

in a condition to exercise the powers conferred to it by the Treaties.[52] In fact 'it is without prejudice to the possibility for the EU, within the scope of its competences, to negotiate harmonisation of such levels of protection [of a public interest that led to the introduction by the EU legislator of regulatory restrictions in the sphere of the internal market] with third countries. Such harmonisation by no means undermines the functioning of the EU as a democratic political system because an international commitment of the EU to that effect is subject to the consent of the European Parliament [Art. 218 (6), first subparagraph, a), TFEU].'[53] In other words, the level of protection of an interests can be set by the legislature as expression of the democratic functioning of the EU because the European Parliament is actively involved in the decision-making process and in the balancing. But if this deference of the Court to the legislature is a reflection of the democratic principle, then it is difficult to square with a similar discretion left to the Council in CFSP. So, the choice of legal basis is a point on which the ECJ in appeal might expand the reasoning of the General Court.

The existence of freedom of expression

Can RT France rely on freedom of expression? One could take the view that, since RT France is 'under the permanent direct or indirect control of the leadership of the Russian Federation'[54] it is in fact an emanation of the Russian state and that, as such, it does not enjoy the fundamental right to freedom of expression. The finding that RT France is an emanation of the Russian state could have been reached by adopting the test existing under ECHR case law. When deciding on the admissibility of an application (rather than on the scope of the right itself) the ECtHR finds that public broadcasting organisations are not a governmental organisation provided that domestic legislation accords them sufficient editorial and institutional independence.[55] This is clearly not the case of RT France.[56]

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[52] Para 71.

[53] Koen Lenaerts, José A Gutiérrez-Fons and Stanislas Adam, 'Exploring the Autonomy of the European Union Legal Order' (2021) 81 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law 47 fn 85. discussing para. 148 *in limine* of Opinion 1/17.

[54] Case T-125/22 *RT France* para 174.

[55] See recently ECtHR, *Croatian Radio-Television v Croatia* (Applications nos. 52132/19 para 102 and case law there cited).

[56] See Case T-125/22 *RT France* para 173: When expressly questioned on that point at the hearing, the applicant was unable to explain whether its editorial independence and institutional autonomy vis-à-vis the RT Group could be inferred from legislation or, in any event, from public acts. However, it is settled case law of the ECJ that 'whilst Article 52(3) of the Charter requires rights contained in the Charter which correspond to rights guaranteed by the ECHR to be given the same meaning and scope as those laid down by the ECHR, the latter does not constitute, as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into European Union law'. Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105 para 44. It is also questionable that the ECtHR is deciding on the scope of the right in cases involving the admissibility of applications lodged by public broadcasting organisations. The rationale of preventing a governmental organisation from lodging a complaint is to avoid a State to be both applicant and respondent before the ECtHR (ECtHR, Application no 54155/16 Slovenia v Croatia, para 61), a concern that does not arise in *RT France*.

However, the General Court's finding that RT's activities are covered, *ratione personae*, by freedom of expression is convincing. It is well established in the case law of the ECJ that even emanations of third countries that are not independent from their governments can challenge restrictive measures adopted under the CFSP.[57] In particular, they may do so by relying on fundamental rights. Article 11 of the Charter[58] states that *'everyone* has the right to freedom of expression'.[59] In addition, following the *Venezuela* judgment, we know that even a State itself may rely on Charter rights to challenge restrictive measures against it.[60]

Is the content broadcasted by RT France covered by freedom of expression? The Court did not state that war propaganda is not covered by freedom of expression *ratione materiae*. The opposite conclusion could have been reached if one qualified the broadcasted content constitutes propaganda for war prohibited by international law[61] (Article 20(1) of the International Covenant on Civil and Political Rights[62]). In the contested acts, the Council did not qualify the content as 'propaganda for war',[63] whereas the General Court considers that, despite it being propaganda for war, RT France's broadcasts are covered by freedom of expression. This seems in line with General Comment 11 on propaganda for war, which reads the prohibition as compatible with freedom of expression (and not as falling entirely outside the scope of that right).[64] Since the prohibition "do[es] not prohibit advocacy of the sovereign right of self-defence or the right of peoples to self-determination and independence in accordance with the Charter of the United Nations", it is important that the General Court's accepts the Council qualification of Russia's war as one of aggression (contrary to Russia's own public justification of the war, which invokes the right of self-defence[65]).

Proportionality

By finding that the activities of RT France are covered by freedom of expression, the General Court then proceeded to treat this case as a "standard" human rights one, where the proportionality of a restriction needs to be monitored by the judiciary.

The objective of legitimate interest.

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[57] See e.g. ECJ, C-266/15 P - Central Bank of Iran v Council ECLI:EU:C:2016:208. See the many examples in S Poli, 'Judicial challenges to EU restrictive measures by individual state organs, 'emanations of non-EU member states' and third countries: the limits to the Council's discretion' in G. Adinolfi, A. Lang, C. Ragni, Sanctions by and against international organizations, Edward Elgar, in press.

[58] Which is binding on the Council under Article 51(1) Charter.

[59] Emphasis added.

[60] Case C-872/19 P *Venezuela v Council* ECLI:EU:C:2021:507.

[61] B Baade, 'The EU's 'Ban' of RT and Sputnik' (*Verfassungsblog* 8 March 2022) available at https://verfassungsblog.de/the-eus-ban-of-rt-and-sputnik/.

[62] Not only the Member States but also the Russian Federation are parties to this Treaty which is one of the international instruments for the protection of human rights of which the Courts of the European Union take account in applying the general principles of EU law. T-125/22 *RT France* para 208.

[63] Poli (n 114) argues that this is because some Member States have reservations to the ICCPR.

[64] General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Art. 20) : . 29/07/1983. CCPR General Comment No. 11.

[65] "Message from the President of the Russian Federation" Office of the President of the Russian Federation (24 February 2022), *http://kremlin.ru/events/president/news/67843* [Accessed 10 April 2022], later notified to the UN Security Council UNSC 'Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General' (24 February 2022) UN Doc S/2022/154.

A restriction of free speech must "genuinely meet objectives of general interest recognised by the Union".[66] The General Court, in confirming that the Council could invoke the protection of the EU's public order to justify the ban, ensures that free speech (which is essential to value pluralism and therefore a constitutive part of the EU value of democracy) is limited by the pursuit of another interest of 'constitutional' status – that is an interest already identified by the Treaties, such as the safeguard the values, fundamental interests, security, independence and integrity of the European Union (Article 21(2)(a) TEU) – and not merely a strategic objective (such as the decision to support Ukraine and oppose Russia in this war).

This is the argument developed in greater detail: one of the objectives of the ban is the protection of the EU's public order, which is elevated to a derogation that the Council wished to rely upon in order not to apply general rules (the notion of EU public order had never been invoked before[67]). The General Court confirms that the Council can do so. The Court reads the protection of the EU's public order as one of the objectives of Article 21(2)(a) TEU, thus anchoring the justification of the restriction to an EU "constitutional" objective explicitly carved in the Treaties (and not merely to a contingent political choice by the Council). The reason why Article 21(2) excludes contingent objectives is that the Article has constitutional status and can only be amended in the ways foreseen by the Treaties; whereas a strategic objective (contained for example in a strategic document issues by the High Representative) may vary depending on the incumbent political majority.
Admittedly, the phrase Union's public order does not appear in Article 21 TEU or anywhere else in the Treaties. Nor are the *EU's security* and the *EU's public order* synonyms: the use of the phrase Union public order in the Recital of the contested act is potentially far-reaching. Derogations for public order are permitted under the Treaties to allow *a Member State* to derogate from the rules on free movement in the internal market (Article 36, 45(3), 52, 65(1)(b) TFEU). The reference to the *Union's* public order is only found in the sanctions adopted after the 2022 invasion of Ukraine, as well as in a Commission's impact assessment of September 2022 accompanying a proposed European Media Freedom Act. The European Media Freedom Act foresees the establishment of a (European) Board on technical or practical aspects of regulation relevant for media independence and pluralism, empowered among others to coordinate measures (taken by national regulators) to protect the EU information space from media services providers (including from third countries) which threaten the Union's public order and security. Given the earlier discussion on possible alternative legal bases for the contested act, is significant that the Media Freedom Act is based on Article 114 TFEU.

I suggest that the invocation of EU public order shows that the sanctions – and the proposed Media Freedom Act – recognise the existence of a European 'public sphere', to use the Habermasian notion[68] of an arena for "the perception, identification, and treatment of problems

[66] Article 52(1) Charter.
[67] The French text of the contested measures and of the judgment has *ordre public*, which in the English version of EU documents is usually *public policy* (see e.g. Article 36 TFEU), but not always (see e.g. Article 72 and 276 TFEU, where the English version is *law and order*). I do not know why in the contested measures it is translated as public order, but what matters is that is refers to the EU's, not to the Member States'.
[68] Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (10. print, MIT Press 1999) 6 I am grateful to Professor Dagmar Schiek for this point.

affecting the whole society";[69] or, with specific reference to the EU "a network that gives citizens of all member states an equal opportunity to take part in an encompassing process of focused political communication".[70] It is not only the security of the Union that is at stake, but also the more elusive notion of the Union's public order, which presupposes the existence of a public sphere to be protected. And that, for the protection thereof, exceptional measures, such as the restriction of fundamental rights, are justified. While the case is dealt with as a "classic" human rights one (is the restriction proportionate to the aim pursued by the legislature?), the novelty of the justification proposed shows that, while the practical relevance of substituting "public order" to "public security" may be limited in this case, the invocation of the EU's public order is politically and simbolically significant.

Proportionality *stricto sensu*: the 'balanced treatment' test.

The General Court requires from RT France "a balanced overall treatment […] of the information relating to the ongoing war".[71] Absent this balanced treatment, the censorship is justified in the light of the context of a war,[72] and it is also justified because it relates to audio-visual media, whose impact is greater and more immediate than that of print.[73] What this shows is that the General Court did not grant discretion to the Council in carrying out a balancing, but was instead very careful in the justification of the proportionality of the measure as mandated by Article 52(1) Charter. However, the requirement that RT presents a 'balanced treatment' of information can be questioned in its operation, source, and rationale.

What is a balanced treatment of a war? The General Court does not mention giving equal time to both viewpoints (so, there is no need to have a "50/50" allocation of time, as in some presidential debates), but it does appear to require *some* balance in the characterisation ('the terms used in those broadcasts, the way in which the words were formulated'[74]). This seems to me incorrect. As the Court itself recognises, what RT France is doing is contrary to international law. Requiring that the presentation of the Russian narrative and of the EU's one be balanced seems therefore nonsensical: it is not *more* weight that can transform war propaganda into lawful content. If anything, one should require an imbalance: if a view is mentioned only to be quickly dismissed as propaganda for war, I think it would be lawful to air it, under the ICCPR standards.

As far as the source of for this balance, the General Court does not provide one. The ECtHR case law to which it refers in the judgment does not support this interpretation, but merely stresses that there are "duties and responsibilities" for journalists, especially at times of war.[75] Journalistic duties and responsibility can be discharged by accounting for the existence of another side, or of contrasting opinions, but this does not require a balance. What is the rationale for the balance? The protection of democratic debate? But democracy does not require

[69] Habermas, J., Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy, MIT Press, Cambridge, MA, 1996 [1962], here p.: 301.
[70] Habermas, J., 'Why Europe Needs a Constitution', New Left Review 11, 2001, pp. 5- 26, here p. 17.
[71] Para 189.
[72] Para 189.
[73] Para 138.
[74] Para 179.
[75] ECtHR, 8 July 1999, *Sürek v. Türkiye (No 1)*, CE:ECHR:1999:0708JUD002668295, § 63.

equal representation of all viewpoints, only fairness in the opportunity to access those viewpoints.

Arguably, there could be less restrictive alternatives than temporary censorship: for example, having a banner on the broadcasting stating clearly that the content is "entirely financed by the Russian government", with viewer's discretion advised. This is what some social media platforms do.

However, the measure seems in fact justified when one considers, as the General Court did, that it is reversible and that it does not prohibit other work by RT France (which could sell its programmes to the francophone world outside the EU). Banning RT France does not do much to prevent those who want to hear Moscow's side of the war from doing so. It also does not place RT France out of business. The ban has therefore a largely a symbolic value, something which affects the proportionality assessment by making the interference with fundamental rights more tolerable.

The context.

The emergency context ("the outbreak of a war at the borders of the Union"[76]) of the contested acts was key in the General Court's reasoning. Millet has argued convincingly that in its decision *in RT France*, the General Court accepted a logic of 'emergency' by endorsing the Council's choice to restrict the fundamental rights of a legal person established in the EU.[77] Poli and Finelli have taken the view that "that the broadcasting ban appears to be context specific; it is adopted in reaction to the propaganda for war carried out by Russia through media which are not independent. These measures seem unlikely to be enacted in other contexts".[78]

RT France thus bears some resemblance to other judgments, such as *Pringle*,[79] because in both instances the Court declared the validity of a highly exceptional measure, adopted in the context of a crisis, in circumstances in which the context was more decisive than the letter of the law.[80] But not all contexts – not all emergencies – justify exceptional measures, and this is inherent in the control of proportionality: in *Landespolizeidirektion*[81] the Court found that Member States could not reintroduce Schengen border controls lasting longer than a certain timeframe, despite the invocation of emergency threats, such as terrorism, by the Member States.

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[76] T-125/22 RT *France v Council* para 92.

[77] 'François-Xavier Millet: «Suspension de RT France, le dilemme entre mesure d'exception et respect de la liberté d'expression»' (*LEFIGARO*, 23 August 2022).

[78] S. Poli and F. Finelli (n 4) 33.

[79] ECJ, 27 November 2012, Case C-370/12 *Pringle* ECLI:EU:C:2012:756

[80] Paul Craig: 'Pringle: Legal Reasoning, Text, Purpose and Teleology' (2013) 20 Maastricht Journal of European and Comparative Law 3: 'The judgment unfolds like a story, and even though the reader knows or can hazard a pretty good guess at the ending - that the Court of Justice of the European Union (CJEU) will find that the ESM is lawful - the story is compelling nonetheless, since the last part of the judgment is also the denouement in which the CJEU saves the ESM from the most potent challenge to its legality. In doing so, the judgment reveals much that is of interest about the nature of legal reasoning, in particular the blend of text, background purpose, and teleology that constitutes the very essence of legal discourse'.

[81] ECJ, 26 April 2022, Case C-368/20 *Landespolizeidirektion Steiermark (Durée maximale du contrôle aux frontières intérieures)* ECLI:EU:C:2022:298.

Balancing values and interests

The judgment may be interpreted as signifying that the EU is not a so-called militant democracy. As a matter of principle, a militant democracy considers that it is not bound by otherwise applicable democratic principles, such as freedom of speech, when it comes to defending itself against attacks aimed at subverting democracy. [82] In other words, in a militant democracy it is allowed to be undemocratic with the undemocratics. This idea of a militant democracy has precedents in the constitutional tradition of some Member States, including Germany or Italy, but the General Court deviates from it: formally, the narrative of the "enemy" still enjoys the same protection as 'our' narrative.

But materially, is this really the case? It was stated that RT France can be considered a test for how faithful a society is to its own values. This can be appreciated by considering potential cases where the conflict between EU interests and EU values is sharper: if an EU Member State went to war (without security Council authorisation and on very dubious grounds of self-defence), could the EU censor a media company funded by that Member State for spreading propaganda? Although that case would most likely not involve CFSP and therefore there may be less doubts on EU competence, the Court should reason in a way similar to what it did in *RT France*, and the answer should be that yes, the EU can censor such a company. If that was not the case, then *RT France* has only a veneer of judicial review and due process, because there would be free speech for the propaganda we like, but not for the propaganda we do not like. This hypothetical scenario entails asking whether the EU itself would consider the war by one of its Member States to be a war of aggression in violation of international law (because such position may contribute to the proportionality of the ban[83]).

What the Council's ban of RT France shows – and their acceptance by the General Court confirms – is that the EU has conducted its foreign policy pursuant to a logic that is more than the 'principled pragmatism' of the 2016 Global Strategy: this 'unprecedented resolve to restore peace in Europe' (to use the word of the 2022 Strategic Compass)[84] is an important concession to *Realpolitik*, in that it accepts that what would be inacceptable in times of peace, is necessary in times of war. Russia does not share the EU's views that international relations should be peaceful, but the EU has not been idle in the face of the threat. Granted, the contested measure at issue is a response 'with the peaceful means at the Union's disposal',[85] but it is a confrontational one nonetheless. This assertive, pragmatic, realist foreign policy contrasts perhaps with the multilateral, principled, liberal vision painted by the objectives and principles for the EU's international affairs found in the fundamental Treaties.[86]

Conclusion

[82] Jan-Werner Müller, 'Militant Democracy' in Michel Rosenfeld and András Sajó, *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012).
[83] This argument is developed in *anonymised*.
[84] Both the 2016 Global Strategy and the 2022 Strategic Compass are strategic documents adopted by the EU High Representative for Foreign Affairs (President of the Foreign Affairs Council) that can be expected to guide the Council's choices in foreign policy.
[85] T-125/22 RT *France v Council* para 164.
[86] See Article 2 TEU, Article 3(5) TEU, Article 21(2)(h) TEU.

In light of its exceptional context and potential applications of the reasoning of the General Court, *RT France* is a case of great significance.

Interference with freedom of expression, which is a right instrumental to the functioning of a democratic society, cannot be taken lightly. EU courts are entrusted with a role in defining the conduct of the EU's diplomacy. Although the Court of Justice has generally been very deferential to the choices of the Council, in RT France the General Court provided a lengthy and detailed explanation of the proportionality of the measure that is ultimately convincing. Less convincing is the reasoning on the competence of the EU to adopt the measure in the first place, a point on which the ECJ may return in the case currently pending in appeal.

That being said, however, the practical effects of the censorship (and of the judgment confirming its validity) are minor if compared to the 'conceptual' importance of the choice of the Council to ban Russian propaganda (would the EU ban propaganda by its own Member States, or does it only the one it does not like?). This is because the ban affects few companies, on a temporary and reversible basis, and since it does not prevent any interested person from hearing the Russian perspective from the many other available sources, it carries rather a symbolic value.