EU Sanctions Against Propaganda for War – Reflections on the General Court's Judgment in Case T-125/22 (*RT France*)

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Abstract

In the wake of the 2022 Russian war against Ukraine, the European Union adopted several packages of restrictive measures. Banning the 'broadcasting activities' of certain Russian media outlets may have been the most controversial of these measures, raising difficult questions regarding the Union's competences and the human rights involved. This article discusses the General Court's judgment that dismissed an action for annulment against the ban. The Court of Justice, before which an appeal is pending, is likely to uphold it. But the Court should refine the argument regarding the legal basis (and its limits), state clearly that only the prohibition of propaganda for war could serve as a justification for the measure, and address the fundamental rights capacity of companies that are considered an 'emanation of a state'.

Keywords

Propaganda for War – Restrictive Measures – Russia – legal certainty – fundamental rights capacity

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I. Introduction

Less than a week after Russia commenced its invasion of Ukraine on 24 February 2022, the Council of the European Union adopted a decision and a regulation respectively banning the 'broadcasting activities' of certain media outlets financed by the Russian state in the territory of the Union. Initially, national offshoots of the RT Group (formerly: Russia Today) and Sputnik were sanctioned.[1]

This measure is not entirely without precedent. It builds on a practice that the Union and its Member States developed in recent years against forms of 'hybrid warfare' which employ disinformation and propaganda.[2] Under the sanctions regime that the Union put in place following Russia's purported annexation of Crimea in 2014,[3] restrictive measures were imposed on individuals for their propaganda activities.[4] Similarly, Baltic Member States temporarily suspended the retransmission of certain Russian tv channels under the Audiovisual Media Services Directive (AVMS Directive).[5] In terms of its scope, however, a comprehensive 'broadcasting ban' of certain media providers in the entire Union is a novelty. Its adoption as a restrictive measure within the ambit of the Common Foreign and Security Policy (CFSP) likewise breaks new ground.

In its judgment of 27 July 2022, the General Court's Grand Chamber rejected an action for annulment brought by RT France under Art. 263 of the Treaty on the Functioning of the European Union (TFEU).[6] The judgment's

1 In June 2022, after the Court had rejected an application for interim relief by RT France (Order of the President of the General Court of 30 March 2022), the bans were extended to 'RTR Planeta', 'Russia 24' and 'TV Centre International': Council Regulation 2022/879/EU of 3 June 2022 amending Regulation 833/2014/EU concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. In December 2022 and February 2023 respectively, NTV/NTV Mir, Rossiya 1, REN TV, Pervyi Kanal, as well as RT and Sputnik Arabic were added to the list.

2 See only: European Parliament resolution of 23 November 2016 on the EU's strategic communication to counteract propaganda against it by third parties (2016/2030(INI)).

3 For a detailed overview of the new sanctions see: Luigi Lonardo, *Russia's 2022 War Against Ukraine and the Foreign Policy Reaction of the EU: Context, Diplomacy, and Law* (Cham: Palgrave Macmillan 2023), 68 et seq.

4 See below in the *Kiselev* case.

5 Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services, OJ L 95, 15 April 2010, 1-24. For details see below.

6 CJEU, *RT France v. Council of the European Union*, judgment of 27 July 2022, T-125/22, ECLI:EU:T:2022:483. The Court may exceptionally review such measures, even under the CFSP, if the legality of restrictive measures against natural or legal persons is at issue according to Art. 275 TFEU: Friedrich Erlbacher, 'Art. 215 TFEU' in: Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford: Oxford University Press 2019), para. 29.

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result and central parts of its reasoning are convincing. Nonetheless, it raises fundamental questions concerning the Union's competences, as well as regarding the rule of law and fundamental rights. These issues will undoubtedly resurface in the appeal proceedings pending before the Court of Justice (C-620/22 P).

This article will analyse the ban's legal basis in European Union (EU) sanctions law (II.), its determinacy (III.), and its substantive justification, which can be found in the prohibition of propaganda for war (IV.). The General Court's interpretation of media content (V.), and its failure to address the fundamental rights capacity of RT France (VI.) will be examined.

II. The 'Broadcasting Ban' as a Restrictive Measure

RT France and legal commentators expressed concerns about whether a 'broadcasting ban' for certain media outlets could be enacted as a restrictive measure according to Art. 29 Treaty on European Union (TEU) and Art. 215 (2) TFEU.[7] If not, the measure would violate the principle of conferred powers under Art. 5 (3) TEU. In particular, it was pointed out that the regulation of media content is generally understood to be a matter for the Member States. It is considered to be a part of their cultural policy within the meaning of Art. 167 TFEU, which largely reserves this area for Member States, precluding in particular any harmonisation in paragraph 5.[8] RT France contended accordingly that only the French authorities were competent to regulate its content.[9]

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7 In favour of the Union's competence in the present case: Hans Peter Lehofer, 'Überwachen, Blocken, Delisten: Zur Reichweite der EU-Sanktionen gegen RT und Sputnik', Verfassungsblog of 21 March 2022. Against: Frederik Ferreau, 'Sendeverbot durch Sanktionen: Das EU-Verbot russischer Staatsmedien aus der Perspektive des Medienrechts', Verfassungsblog of 10 March 2022. Likewise critical: Luigi Lonardo, *EU Common Foreign and Security Policy After Lisbon Between Law and Geopolitics* (Cham: Springer 2023), 63.

8 Markus Kotzur, 'Art. 167' in: Rudolf Geiger, Daniel-Erasmus Khan and Markus Kotzur (eds), *European Union Treaties* (Munich: C.H. Beck 2015), 674-676 (para. 12); Frederik Ferreau, Das Vorgehen gegen russischen Staatsrundfunk auf nationaler und unionaler Ebene, Zeitschrift für Urheber- und Medienrecht 66 (2022), 505-512 (511-512). The AVMS Directive and the current proposal for a Media Freedom Act are based on legal provisions relating to the internal market, Arts 53, 62 and Art. 114 TFEU respectively. Regarding the latter, it is controversial whether this basis is sufficient.

9 The suspension of the retransmission of Russian tv channels by Lithuania and Latvia since 2014 within the framework of the AVMS Directive is an example for national regulation. See below.

EU sanctions have been in place against Russia since its purported annexation of Crimea in 2014. Until now, this sanctioning framework was used to freeze financial assets, and to impose travel and trade bans.[10] Decision (CFSP) 2022/351 and Regulation (EU) 2022/350 (in the following: the Regulation and the Decision) expand the existing sanctions by imposing a ban on all 'broadcasting activities' by RT France and other Russian state-sponsored media.[11] Following its established sanctioning practice, the Council adopted the (intergovernmental) CFSP Decision under Art. 29 TEU and the Regulation under Art. 215 (2) TFEU. This Regulation is not itself a part of the CFSP, but a link or 'bridge' to other (supranational) Union policies. Art. 215 (2) TFEU is meant to implement Council decisions as long as this implementation falls within the Union's competences.[12] If a CFSP decision concerns matters outside the Union's (other) competences, Member States need to act according to their national law to implement it.

The Grand Chamber of the General Court has now confirmed, for the first time, that a broadcasting ban could also be based on Art. 29 TEU and Art. 215 (2) TFEU. The Council enjoys a wide margin of discretion in determining what issues concern the CFSP, and also the restrictive measures it deems necessary.[13] The broadcasting ban did not exceed this margin. On the one hand, with this measure the Council was allowed to protect public order and security in the Union. On the other hand, it could employ the measure as part of an overall strategy to exert the greatest possible pressure on Russia to end its efforts to destabilise Ukraine, as well as its armed attack. In this manner the Council could pursue the objectives of the CFSP as set out in Art. 21 (2) (a) and (c) TEU, and the objectives of the Union as set out in Art. 3 (1) and (5) TEU: in particular, the preservation of the values of the Union, its fundamental interests, its security, its independence and integrity, as well as the preservation of peace, the prevention of conflicts, and the strengthening of international security. In short, one legitimate aim of the measure was the protection of European public order and security. The other

10 Lonardo (n. 3), 68 et seq.; see generally for the EU's sanctioning practice: Aurel Sari, 'Art. 29' in: Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on the European Union (TEU): A Commentary* (Berlin: Springer 2013), para. 20.

11 Regulation 833/2014/EU, as amended on 1 March 2022 by Council Regulation 2022/350/EU; Council Decision 2022/351/CFSP of 1 March 2022 amending Decision 2014/512/CFSP; see generally on the legal framework for targeted or 'smart' sanctions: Hans-Holger Herrnfeld, 'Rechtsgrundlage für "smart sanctions" zur Bekämpfung des Terrorismus', EuR 48 (2013), 87-107 (95).

12 See Enzo Cannizzaro, 'The EU Antiterrorist Sanctions' in: Piet Eeckhout and Manuel López-Escudero (eds), *The European Union's External Action in Times of Crisis* (Oxford: Hart Publishing 2016), 531-546 (537).

13 Erlbacher (n. 6), paras 11-12; Sari (n. 10), para. 13.

aim of the ban was to contribute to an 'overall strategy […], which is designed to put an end, as quickly as possible, to the aggression suffered by Ukraine'.[14]

It goes without saying that the CFSP competence of the Council is not affected by competences of national authorities under national law.[15] The Court held that other competences of the Union do not conflict with this CFSP competence either. According to Art. 40 TEU, not only do the competences under the TFEU remain unaffected by the TEU's CFSP, but conversely the competences of the CFSP remain unaffected by the policies of the TFEU. For example, legal acts under the CFSP that affect the regulation of the internal market are not precluded. The fact that measures could have been taken against media outlets based on the content of their programme by national authorities under the AVMS Directive, or under national law,[16] is therefore not an argument against a similar CFSP Council competence. The Decision and the Regulation are simply lex specialis with regard to the AVMS Directive.[17] The competences under the CFSP and under Part Three of the TFEU are not mutually exclusive, but complement each other by virtue of their different areas of application and their objectives.[18]

The Court's confirmation that the restrictive measure could be taken under Art. 29 TEU and Art. 215 TFEU is likely to be upheld on appeal, but the argument should be refined. The Court ruled that restrictive measures can not only be imposed *on account of* media content, as it had already done in *Kiselev*[19] and other cases,[20] but that media content can be the sanction's *object*. This expands previous sanctions practice and leads to an overlap with the regulation of media content, which is indeed largely reserved for Member States' cultural policies under Art. 167 TFEU.[21]

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14 CJEU, *RT France* (n. 6), paras 52-55.

15 CJEU, *RT France* (n. 6), paras 57-58.

16 See, e. g. CJEU, *Mohammad Sarafraz v. Council of the European Union*, judgment of 4 December 2015, T-273/13, ECLI:EU:T:2015:939, para. 14.

17 See mutatis mutandis on restrictive measures concerning the freedom of movement and the Union Citizens Directive 2004/38/EC: CJEU, *Adib Mayaleh v. Council of the European Union*, judgment of 5 November 2014, T307/12 and T408/13, ECLI:EU:T:2014:926, paras 198-199.

18 CJEU, *RT France* (n. 6), paras 60-61.

19 CJEU, *Kiselev v. Council of the European Union*, judgment of 15 June 2017, T-262/15, ECLI:EU:T:2017:392; see below in detail.

20 CJEU, *Sarafraz* (n. 16), paras 97 et seq.; see also Baptiste Charvin, 'Good Bye, Putin! La guerre informationnelle a-t-elle sonné le glas du pluralisme? Réflexion sur l'arrêt du Tribunal de l'Union européenne relatif à la suspension de RT France (aff. n° T-125/22, 27 juillet 2022)', La Revue des droits de l'homme, Actualités Droits-Libertés, 22 January 2023, <http://journals.openedition.org/revdh/16174>, para. 5.

21 See above n. 8.

While the dissemination of media content is an economic activity which can in general be the subject of restrictive measures,[22] the literature correctly highlights that restrictive measures are, under Art. 29 TEU and Art. 215 TFEU, usually directed *outwards* against external threats in order to exert economic pressure on state or non-state actors outside the Union, not *inwards* in order to avert an internal danger to public order or security.[23] According to this point of view, only that part of the justification which understands the ban as part of an overall package to exert pressure on Russia to end its war of aggression is supported by the legal basis: the protection of public order and security *in* the Union could not be pursued via this legal basis. Otherwise, more far-reaching media regulations would be possible within the CFSP framework – which would clearly stretch thin this competence, rooted as it is in foreign policy. It would excessively affect Member States' cultural competences within the framework of Art. 167 (4) and (5) TFEU.[24] The mere reference by the Court to the fact that the CFSP and the TFEU shall not affect each other's powers and competences according to Art. 40 TEU would not solve this problem.

But the Janus-faced motivation and justification of the restrictive measure under scrutiny here is not without precedent either. Sanctions against terrorists, for which Art. 215 (2) TFEU was introduced in the first place, will usually aim both outwards and inwards. Freezing the financial assets of, and imposing travel bans on, members of terrorist organisations on the basis of Art. 29 TEU (and Art. 215 (2) TFEU) serve, on the one hand, to exert pressure on this state or non-state actor, but unquestionably they also serve to ensure security within the Union.[25] In delimiting Art. 215 (2) TFEU from Art. 75 TFEU, which both allow for the freezing of funds destined for terrorist purposes, the Court of Justice has in the past refused to strictly distinguish between 'external' terrorists, whose actions are directed 'mainly against one or more third countries or against the international community in general', and 'internal' terrorists, who presumably act within the Union. As the Court of Justice indicated in this case concerning restrictive measures against bin Laden and others:

22 Burkhard Schöbener, 'Art. 215' in: Matthias Pechstein, Carsten Nowak and Ulrich Häde (eds), *Frankfurter Kommentar*, Vol. 3 (Tübingen: Mohr Siebeck 2017), (para. 18).

23 Ferreau (n. 8), 511; see Cannizzaro (n. 12), 540; Juliane Kokott, 'Art. 215' in: Rudolf Streinz, *EUV/AEUV* (3rd edn, Munich: C. H. Beck 2018), (para. 215).

24 Ferreau (n. 8), 511-512.

25 See Herrnfeld (n. 11), 94.

> 'While admittedly the combating of terrorism and its financing may well be among the objectives of the area of freedom, security and justice, as they appear in Article 3(2) TEU, the objective of combating international terrorism and its financing in order to preserve international peace and security corresponds, nevertheless, to the objectives of the Treaty provisions on external action by the Union. […] Moreover, the Parliament's argument that it is impossible to distinguish the combating of "internal" terrorism, on the one hand, from the combating of "external" terrorism, on the other, does not appear capable of calling in question the choice of Article 215(2) TFEU as a legal basis of the contested regulation.'[26]

Rather, Art. 215 (2) TFEU is the correct legal basis if, 'in the light of both its objectives and its content, the contested regulation relates to a decision taken by the Union under the CFSP' and the activities that the measure addresses 'affect *fundamentally* the Union's external activity'.[27] With English as the language of the case, the French and German versions are nonetheless even clearer, stating that the external activity must be affected 'primarily' (*essentiellement/hauptsächlich*). As Advocate General Yves Bot had argued, the 'CFSP Dimension' is decisive.[28] The legal basis thus depends on the centre of gravity of the measure.[29] Based on this, the legal basis must 'rest on objective factors which are amenable to judicial review, including in particular the aim and the content of the measure'.[30]

The measure's purpose must thus clearly lie within the ambit of the CFSP. But this does not prevent the Council from also pursuing the aim of protecting order and security in the Union. As the Grand Chamber of the Court of Justice later ruled:

> 'If an examination of a European Union measure reveals that it pursues a twofold purpose or that it comprises two components and if one of these is identifiable as the main or predominant purpose or component, whereas the other

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26 CJEU, *EP v. Council of the European Union (restrictive measures against bin Laden and others)*, judgment of 19 July 2012, C-130/10, ECLI:EU:C:2012:472, paras 61, 74; see also: Hans-Joachim Cremer, 'Art. 215 TFEU' in: Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV* (6th edn, Munich: C. H. Beck 2022), (para. 5).

27 CJEU, *EP v. Council* (n. 26), paras 76, 78 (emphasis added); see also: Erlbacher (n. 6), para. 9; Herrnfeld (n. 11), 96.

28 CJEU, *EP v. Council (restrictive measures against bin Laden and others)*, opinion of GA Bot of 31 January 2021, ECLI:EU:C:2012:50, paras 67 et seq.

29 Lonardo (n. 7), 84; Thomas Ramopoulos, 'Art. 40 TEU' in: Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford: Oxford University Press, 2019), (para. 4).

30 CJEU, *Tay Za v. Council of the European Union* (Grand Chamber), judgment of 13 March 2012, C-376/10 P, ECLI:EU:C:2012:138, para. 46.

is merely incidental, the act must be based on a single legal basis, namely that required by the main or predominant purpose or component.'[31]

If the purpose of protecting public order and security *in* the Union is *also* pursued at the same time, this does not change the legal basis, as long as the measure's centre of gravity continues to rest clearly on the Union's external action. Policies based in other areas may, as the Court of Justice had occasion to rule, also touch on cultural questions, as long as it takes account of these cultural aspects, as required by Art. 167 (4) TFEU.[32]

Like all 'centre of gravity' tests, this assessment requires weighing competing indicators. Uncertainties cannot be completely avoided. Since the General Court and the Court of Justice recognise that the Council has a wide margin of discretion in this area, they will tend to correct only assessments that are evidently erroneous. Nevertheless, there is no reason to fear an intolerable expansion of the Union's competences. The unanimity requirement of Art. 30 (1) TEU will prevent such an expansion in practice.

In order for the 'broadcasting ban' at issue here to 'affect fundamentally the Union's external activity', it is crucial to classify RT France as a media outlet 'directly or indirectly' controlled by the Russian government. Generally, if a state actor is the ultimate target of a restrictive measure, any natural person or entity targeted must have a sufficient link to that state.[33] If RT France were merely a media outlet like any other based in the Union, the centre of gravity would clearly tilt towards the protection of public order and security in the Union from certain media content, not towards a CFSP dimension. The measure would primarily affect the regulation of media content within the ambit of Art. 167 TFEU and indeed fall outside the scope of Art. 29 TEU and Art. 125 (2) TFEU.

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31 CJEU, *Parliament/Commission v. Council of the European Union* (Grand Chamber), judgment of 14 June 2016, C-263/14, ECLI:EU:C:2016:435, para. 44. Only if no purpose is incidental and both are 'inextricably linked', then, exceptionally, two legal bases might be applicable. See also Susanna Fortunato, 'Art. 40' in: Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on the European Union (TEU): A Commentary* (Berlin: Springer 2013), (paras 16, 21).

32 CJEU, *Commission v. Belgium*, judgment of 10 September 1996, C-11/95, ECLI:EU:C:1996:316, paras 46-50; see critically: Hans-Joachim Cremer, 'Art. 40 EUV' in: Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV* (6th edn, Munich: C.H. Beck 2022), (para. 12); cf. Hermann-Josef Blanke, 'Art. 167' in: Christian Calliess and Matthias Ruffert (eds), *EUV/AEUV* (6th edn, Munich: Beck 2022), 1749-1761, (paras 16, 23).

33 Blanke (n. 32), para. 64: 'a sufficient link between the persons concerned and the third country targeted by the restrictive measures'; see also: Erlbacher (n. 6), para. 16.

III. The Ban's Determinacy: Lost in Translation?

Since the scope of the 'broadcasting' ban is anything but obvious from its wording, the Court should have explicitly interpreted the Decision and the Regulation, and then addressed the requirement of legal certainty.[34] While the Court held that the application of Art. 29 TEU and Art. 215 (2) TFEU was sufficiently foreseeable as a legal basis,[35] its judgment does not address whether the ban imposed by these legal acts is itself sufficiently determinate.

The Decision and the Regulation prohibit all 'operators' from 'broadcasting or enabling, facilitating or otherwise contributing to the broadcasting' of content that originates from sanctioned media, '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'.[36] The German wording misleadingly speaks of content not being allowed to be broadcasted 'by' the sanctioned media ('durch'), but in other languages it becomes clear what is meant: the content 'of' the sanctioned media. The prohibition is thus addressed not only at RT France and the other sanctioned media outlets, but at internet service providers, social media, and any other 'operator'.[37]

At first glance, it seems sensible to interpret the terms employed in the Decision and Regulation according to their meaning in the Union's media law, or at least starting from it. Building on the terminology of Art. 1 (1) (b), (e) and (g) of the AVMS Directive, 'broadcasting' could have been understood as applying to linear and possibly non-linear audiovisual content; online reporting on websites in the form of texts and photos does not seem to be covered.[38] The special suggestive power of audiovisual formats, which is generally emphasised in media law, and also by the General Court, could have argued in favour of this differentiation.[39]

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34 Likewise: Ferreau (n. 8), 511.

35 CJEU, *RT France* (n. 6), para. 151.

36 In June 2022, advertising in the content of the sanctioned media was also prohibited: Council Regulation 2022/879/EU of 3 June 2022 amending Regulation 833/2014/EU concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. Furthermore, broadcasting licences of the sanctioned media shall be suspended. No person shall knowingly or intentionally engage in circumvention of these prohibitions. In December 2022, the assets of RT's parent company 'ANO TV-Novosti' were frozen for supporting Russia's war of aggression with propaganda and disinformation: Council Implementing Regulation 2022/2476/EU of 16 December 2022, Annex ('Entities'), no. 158.

37 Thus rightly: Lehofer (n. 7).

38 Ferreau (n. 7); Björnstjern Baade, 'The EU's "Ban" of RT and Sputnik', Verfassungsblog of 8 March 2022.

39 See also: Ferreau (n. 8), 508.

The Commission and the Council understood the term 'broadcasting activity' more broadly. Ultimately, they meant the ban to apply to *any* content, even pure text content on a website. The fact that Sputnik was also sanctioned, which operates websites and a radio service but does not broadcast any audiovisual content, is compelling evidence that radio broadcasting was intended to be covered too.[40] Even more, the sanctions law context allows for the term 'broadcasting' to be understood completely differently than that of media law. Under Art. 215 TFEU, the sanctioned economic activity is generally intended to be covered 'as completely as possible'.[41]

The General Court did not address this question of interpretation. Even though the Decision and the Regulation can be considered to meet the requirements of the rule of law with regard to their determinacy (their meaning being determinable with sufficient certainty by way of interpretation), the Court should have made it transparent that such an act of interpretation was necessary.

With a view to good practices of legislation, from a legisprudence perspective, the term 'broadcasting' does not seem well-chosen to denote the activity to be sanctioned. Using terms established in other areas of law in a new context can make good sense if it draws on the meaning established in that other area. It can also make sense to employ a term if it is used in everyday language and simply describes the phenomenon to be regulated. In both cases, the fact that the term is used in a new context can certainly justify divergent interpretations of the term in details. However, the meaning ultimately attached to 'broadcasting' seems to go not only beyond its meaning in the AVMS Directive, but also well beyond the everyday meaning of the term. No one would say that a website is being 'broadcasted', or that a social media company is 'broadcasting' user-generated content. Yet, all of this is covered, according to the Commission, which emphasises a 'very broad' meaning of the term.[42] The choice of the term 'broadcasting' seems so unusual that it would undoubtedly have been better to choose a different one. To interpret 'broadcasting activity' as broadly as possible here in order to secure the practical effectiveness of the legal acts seems quite unsatisfactory. The fact that a similarly generous interpretative operation is required to understand the German version of

40 Lehofer (n. 7).

41 Lehofer (n. 7).

42 Unofficial letter from the Commission dated 4 March 2022, which was published in Google's Lumen database: <https://lumendatabase.org/notices/26927483>. See also: Igor Popović, 'The EU Ban of RT and Sputnik: Concerns Regarding Freedom of Expression', EJIL:Talk! of 30 March 2022.

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the term 'operator', i. e. 'Betreiber', as an 'economic actor', reinforces these concerns.[43]

All of these difficulties immediately vanish when you read the French version of the Decision and the Regulation. This indicates that the legal acts were drafted in that language and that the translation, unfortunately, does not convey the meaning clearly enough. 'Diffuser un site Web' sounds entirely natural. In fact, 'diffusion de contenus' should have been simply translated as 'disseminating content', 'Inhalte verbreiten', and so forth. This would have carried the intended broad meaning, leaving no room for doubt. The same goes for the translation of the Regulation's term 'operator'. In French and also in English, you can speak of an 'opérateur economique' or 'economic operator' to denote someone taking part in any economic activity. In German, the corresponding term would have been 'Wirtschaftsteilnehmer'. 'Betreiber' implies that *something* is operated, e. g. a tv channel or a website.

Good lawmaking practice, but also the value of the rule of law in Art. 2 TEU and the principle of legal certainty following from it, demand more legal clarity.[44] How could this have been achieved? Most likely, including authoritative definitions in the Regulation would have been the best option. Then, it would have become clear that 'broadcasting' was way too narrow a translation of 'diffuser' in the present context.

IV. The Prohibition of Propaganda for War as the Only Viable Justification

Regarding the measure's substantive justification, RT France naturally rejected any accusations of propaganda activities. It argued that, on the contrary, its fundamental rights, in particular its freedom of expression under Art. 11 Charter of Fundamental Rights (CFR), had been blatantly violated.[45] But the Court found the interference with RT France's freedom of expression to be justified. As required by Art. 52 (1) CFR, the restriction was provided

43 Lehofer (n. 7).

44 Erlbacher (n. 6), para.17.

45 CJEU, *RT France* (n. 6), paras 116-129. The restriction of RT's freedom to conduct a business under Art. 16 CFR was likewise held to be justified, largely referencing the reasoning under Art. 11 CFR: CJEU, *RT France* (n. 6), paras 216-231. The prohibition to discriminate on account of one's nationality under Art. 21 (2) CFR was, following long established case law, held to be applicable only to nationals of Member States, and thus inapplicable with regard to RT's argument that it was only targeted because of the Russian origin of its shareholders.

for by law in the legal acts of the Decision and the Regulation.[46] The restriction was held to respect the essence of this fundamental right[47] and to be proportionate.

In doing so, the Court further develops previous Union practice with regard to propaganda for war. Regarding its scope, the restrictive measure taken against RT France and other media is a novelty, prohibiting all 'broadcasting activities' of these media outlets in the Union until further notice. The measure's rationale, however, follows a longstanding practice of the EU and its Member States; this continuity should be stressed.[48]

Member States have suspended media outlets because they disseminated war propaganda before, and the Council has sanctioned an individual because of his role in disseminating propaganda for war. Since 2015, on several occasions Lithuania and Latvia have suspended the retransmission of Russian-language television programmes. These measures were based on Art. 3 (2) of the AVMS Directive and the prohibition of incitement to hatred on the grounds of nationality in Art. 6 of that Directive. In substance, this prohibition overlaps with the prohibition of propaganda for war as understood in general public international law.[49] Persons speaking on these television programmes made blatant calls for the 'annihilation' of the Baltic states and the violent resurrection of the Soviet Union. In 2014, the Council sanctioned Dimitri Kiselev as a 'central figure in government propaganda for the deployment of Russian forces in Ukraine'. The Court confirmed this restrictive measure and referred to the fact that the broadcasts in which Kiselev participated were, according to the findings of Latvian and Lithuanian authorities, propaganda for war that justified Rus-

46 Since it is based on formally legal acts: CJEU, *RT France* (n. 6), paras 144-151.

47 Examining whether the essence of freedom of expression was affected, the General Court focused on the 'nature or extent' of the measure and emphasised that the measure was not tantamount to a complete ban of any professional activity. It was, in fact, 'temporary and reversible'. Neither RT France nor its employees were prohibited from all journalistic activities; research, interviews, and 'other lucrative activities' were still allowed. In particular, the production of content and its broadcasting outside of the Union was not prohibited. As a result, the essence of the right was held not to be violated: CJEU, *RT France* (n. 6), paras 153-159. The relationship of this requirement to the proportionality analysis remains unclear. See generally on the provision's purpose: Tobias Lock, 'Art. 52 CFR' in: Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford: Oxford University Press 2019), (paras 7-9).

48 But it would be too much to say that the judgment does not develop the law at all: Charvin (n. 20), para. 3: 'Cet arrêt n'a en effet rien de surprenant […], n'innove pas'.

49 See: UNGA Res 2625(XXV) of 24 October 1970, A/Res/2625(XXV), para. 1; Michael G. Kearney, *The Prohibition of Propaganda for War in International Law* (Oxford: Oxford University Press 2007), 21-79.

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sian aggression and the annexation of Crimea; they also incited hatred between Ukrainians and Russians.[50]

In its judgment in *RT France,* the General Court builds on this previous practice. It had to because only the prohibition of propaganda for war could provide a sufficient justification for this restrictive measure, without risking a walk on the slippery slope towards excessive infringements on the right to freedom of expression in future cases. This becomes clear in the court's judgment, even though the Court does not explicitly say so.

As we have seen, the recitals of the Decision and the Regulation advance two strands of justification: the contribution to the aim of peace, *and* the public order and security of the Union. Referring to Article 21 (2) (a) and (c) TEU, the Court approves both – the protection of public order and security in Europe, *and* the objective of bringing to an end the Russian aggression – as 'objectives of general interest' recognised by the Union and thus capable of restricting fundamental rights according to Art. 51 (1) CFR. But the 'ultimate objective' of the ban, the Court states, is to exert the greatest possible pressure on Russia to end the destabilisation of Ukraine and the military attack against it. Overall, the Court understood the measure as a reaction to Russia's violation of Art. 2 (4) UN Charter.[51] It also considered the measure suitable and necessary to achieve its aims, pointing to the Council's 'wide discretion' and taking into account that the measure in question was part of a coordinated response to the Russian aggression.[52] Less restrictive but equally suitable measures, which had been suggested in the literature as well,[53] were not available according to the Court. Only banning the broadcasts in certain Member States, or only certain broadcasting modalities, or requiring a 'warning label' in RT's programme would not have been equally effective. To merely prohibit the broadcasting of certain content would not have been practically feasible, given the nature of a continuous news channel. The Court also took into account that the measure was taken in a context of extreme urgency.[54] Therefore, the Court argued, it was not necessary to try less restrictive means first.[55] Having regard for RT's connection to the aggressor state and its previous reporting, the Court's assessment that less restrictive measures would not have been sufficiently effective does not seem unreasonable.

50 CJEU, *Kiselev* (n. 19), para. 105. See on all this in detail: Björnstjern Baade, 'Das Verbot der Kriegspropaganda im Recht der Europäischen Union', EuR 55 (2020), 653-683 (660 et seq.).

51 CJEU, *RT France* (n. 6), paras 160-167, 226.

52 CJEU, *RT France* (n. 6), paras 193, 52.

53 Popović (n. 42).

54 CJEU, *RT France* (n. 6), paras 196-200.

55 In that direction: Popović (n. 42).

It becomes most evident that the prohibition of propaganda for war was decisive in justifying the ban when, approving the ban's proportionality in a narrow sense or in the 'balancing of interests', the Court *only* refers to the aim of ending the propaganda activity in favour of the Russian attack. This aim, the Court emphasised, could justify significant negative consequences for certain economic actors.[56]

Pointing to the ratification of the United Nations (UN) Covenant on Civil and Political Rights (ICCPR) by all EU Member States, the Court recognises the prohibition of propaganda for war as a general principle of law.[57] General principles of law derive from Member States' constitutional traditions and important treaties, such as the European Convention on Human Rights (ECHR) and the ICCPR.[58] While neither the ECHR nor most Member State constitutions contain such a prohibition, Art. 20 (1) ICCPR enshrines it in international human rights law: 'All war propaganda shall be prohibited by law.' All EU Member States being parties to the ICCPR, the few reservations and interpretative declarations by Member States (not addressed by the Court) do not stand in the way of recognising the prohibition as a general principle of law in the Union's legal order.[59] Consequently, it was not necessary to address a possible abuse of rights within the meaning of Art. 54 CFR, which had been suggested by commentators.[60] Propaganda for war can be understood as a special form of abuse of the right to freedom of expression, constituting lex specialis.

This prohibition, the Court ruled, extends to *all* war propaganda, i. e. not only propaganda meant to incite an audience to a future war of aggression, but also to propaganda justifying an ongoing war of aggression, especially if the media outlet in question is directly or indirectly controlled by the aggressor state. In the present case, RT France systematically selected information, 'including manifestly false or misleading information, revealing a manifest imbalance in the presentation of the different opposing viewpoints, with the specific aim of justifying and

56 CJEU, *RT France* (n. 6), para. 202.

57 Also agreeing: Tahireh Setz and Linda Seyda, 'Der Umgang der EU mit Propaganda und Desinformation russischer Staatsmedien in Zeiten des Ukrainekriegs', ZD-Aktuell 12 (2022), 01167.

58 CJEU, *European Parliament v. Council of the European Union*, judgment of 27 June 2006, C-540/03, ECLI:EU:C:2006:429, paras 35-37.

59 Only four Member States (Denmark, Finland, the Netherlands and Sweden) entered reservations because they feared unwarranted restrictions on freedom of speech: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&clang=_en>. On all this, see: Baade (n. 50), 660 et seq.

60 Thus the proposal by: Lehofer (n. 7); in agreement: Setz and Seyda (n. 57).

supporting that aggression'. Overall, and in view of the 'extraordinary context of the present case', the balance struck was held to be appropriate.[61]

That the decisive justification for the ban is to be found in the prohibition of propaganda for war is also made clear by the point in time at which the measures must end. According to the Court, the broadcasting ban is tied to the two *cumulative* conditions that Russia continues its propaganda in general *and* its war of aggression. So, if the attack ended but the propaganda continued, the ban would still have to be lifted. A different reading that requires Russia to stop the war *and* the propaganda before the measure is lifted would have been possible,[62] but was rejected by the Court. Pointing to the recitals and freedom of expression, the Court stated that the measures would be lifted when Russia ended *either* the attack *or* its propaganda.[63] Because then, the Court must be understood to say, the reporting would lose its character as propaganda for war concerning the ongoing conflict for which the broadcasting ban had been enacted.

The dissemination of 'mere' disinformation and 'propaganda' is thus correctly considered as insufficient to justify the ban; even though the Court does not say so explicitly.[64] Disinformation or 'fake news',[65] i. e. deliberately false or misleading statements of fact, only violate legal prohibitions in exceptional cases.[66] The dissemination of disinformation thus defined would not be so serious a threat as to allow the prohibition of a media outlet from conducting journalistic activities to the extent done here. Even tabloids that regularly fail to respect journalistic standards, and even outlets guilty of defamation in several cases, could not be banned in the manner RT France has been banned. The right to freedom of expression and the special protection that media rightly enjoy would not allow for it.

'Propaganda' in a general sense is not only an extremely vague concept, but almost exclusively employed in the criminal law of authoritarian states

61 CJEU, *RT France* (n. 6), paras 201-214.

62 Popović (n. 42) reads it like this. Charvin (n. 20), para. 9, apparently still reads it like this.

63 CJEU, *RT France* (n. 6), para, 155.

64 But see Charvin (n. 20), paras 7, 10, who puts less emphasis on Art. 20 (1) ICCPR and more on the content's character as disinformation.

65 Disinformation is preferred by many scholars and also by the EU because the term 'fake news' has been abused by many, although there seems to be little difference in substance: Björnstjern Baade, 'Don't Call a Spade a Shovel: Crucial Subtleties in the Definition of Fake News and Disinformation', Verfassungsblog of 14 April 2020.

66 Marko Milanovic, 'Viral Misinformation and the Freedom of Expression: Part I', EJIL: Talk! of 13 April 2020.

and dictatorships.[67] One can begin by defining the concept as communication meant to influence a target audience in its opinions and actions.[68] But defined like that, basically all forms of strategic communication would be propaganda, even advertising and election campaigns. What characterises propaganda, apart from its focus on political issues and the fact that it addresses the general public, is its instrumental relationship with the truth.[69] George Orwell has already pointed out that the 'primary aim of propaganda is, of course, to influence contemporary opinion […] [with an] [i]ndifference to objective truth'.[70] The concept comprises not only lies and contradictory value judgments but many statements that are undoubtedly protected by freedom of expression and could not be lawfully restricted. Even entirely accurate statements of fact and coherent or even laudable value judgments can be employed by propaganda.[71]

Consequently, propaganda cannot be identified by looking at a single statement (which might well be true and reflect value judgments that many would share). The concept refers to the conduct of an actor over time. Does the actor use anything (true or false, consistent or contradictory) that serves to convince (or disorient) an audience? Knowing that an actor is disseminating propaganda in this manner is important for political purposes and social science research. It is important for the general public to know that this actor seeks to manipulate public discourse using all means available. Legally, however, true statements of fact and value judgments must generally be tolerated – even if they 'offend, shock or disturb the State or any sector of the population', as the European Court of Human Rights (ECtHR) has held for decades.[72] This is true even if they are made to further a propaganda campaign, one must add.

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67 A prominent example is the interpretation of Art. 6 of the Constitution of the 1949 Constitution of the German Democratic Republic, which prohibited, among others, propaganda for boycott and war ('Boykotthetze' and 'Kriegshetze'), and was used to silence dissent. See Moritz Vormbaum, *Das Strafrecht der Deutschen Demokratischen Republik* (Tübingen: Mohr Siebeck 2015), 124.

68 John B. Whitton, 'Propaganda and International Law', RdC 72 (1948), 545-670 (547); see also Charvin (n. 20), para. 10.

69 See Kearney (n. 49), 3; Gilbert-Hanno Gornig, *Äußerungsfreiheit und Informationsfreiheit als Menschenrechte* (Berlin: Duncker & Humblot 1988), 261.

70 George Orwell, 'Notes on Nationalism' in: Sonia Orwell and Ian Angus (eds), *The Collected Essays, Journalism and Letters of George Orwell*, Vol. III (London: Secker & Warburg 1968), 361, 371.

71 *Whitton* (n. 68), 547: 'unprincipled', but '[…] even Goebbels preferred the truth, if possible, for the simple reason that he considered it more effective'; Manfred Nowak, *U. N. Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, Kehl: Engel 2005), Art. 20 para. 11; Baade (n. 50), 656-658.

72 ECtHR, *Handyside v. The United Kingdom* (Plenary), judgment of 7 December 1976, no. 5493/72, para. 49.

The prohibition of propaganda in Art. 20 (1) ICCPR is nonetheless compatible with the requirements of human rights and legal determinacy because it prohibits propaganda for one thing only: war. 'War' within the meaning of Art. 20 (1) ICCPR covers all wars of aggression under public international law. What constitutes an act of aggression must, according to the UN General Assembly's Friendly Relations Declaration, 'be considered in the light of all the circumstances of each particular case'. Only a violation of Art. 2 (4) UN Charter that is 'of sufficient gravity' counts as aggression,[73] or in the terms of the International Criminal Court's statute: a violation which 'by its character, gravity and scale' constitutes a manifest violation of the prohibition of the use of force[74]. Contrary to what the Human Rights Committee argued in General Comment No. 11, a mere 'breach of peace' (cf. Art. 39 UN Charter) would not be sufficient.[75] Otherwise, it would not be possible to express opinio juris that develops law on the use of force. Rather, even though certain uses of force in grey areas, such as defence against non-state actors and humanitarian intervention, might be taken to violate the prohibition on the use of force by some, they would not be sufficiently serious violations to count as aggression.[76]

While mere disinformation and propaganda would not have sufficed to justify this interference with RT France's freedom of expression, the prohibition of propaganda for war does. This prohibition not only encompasses false factual statements meant to incite or justify a war of aggression, but it also prohibits to express the opinion (even based on entirely true facts) that a war of aggression, evidently in violation of international law, should be waged.[77] Advocating for Russia's war of aggression, waged to annex another State's territory, is certainly covered by the prohibition of propaganda for war. The Court of Justice should elaborate more clearly on this justification in its appeal judgment.

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73 UNGA, Res 3314(XXIX) of 14 December 1974, A/Res/3314(XXIX), preamble, Art. 22. See also Yoram Dinstein, *War, Aggression and Self-Defence* (6th edn, Cambridge: Cambridge University Press 2017), paras 381 et seq., 865.

74 Art. 8bis (1) Rome Statute of the International Criminal Court of 17 July 1998, 2187 UNTS 3.

75 Human Rights Committee, 'General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred' (Art. 20), 29 July 1983, para. 2.

76 See Jennifer Trahan, 'Defining the "Grey Area" Where Humanitarian Intervention May Not Be Fully Legal, but Is Not the Crime of Aggression', Journal on the Use of Force and International Law 2 (2015), 42-80 (54-62). Of course, merely pretending to act for humanitarian purposes (against all available facts) does not suffice. See on this: Christian Marxsen, 'The Crimea Crisis: An International Law Perspective', HJIL 74 (2014), 367-391.

77 Lonardo (n. 3), 72.

V. The Interpretation of Media Content and Its 'One-Sidedness'

Previous decisions of the Commission and of the Court in the context of propaganda for war tended to have an insufficient depth of reasoning. While it is true that their reasoning was always sufficient enough to enable the measures' addressees to understand the reasons and decide on legal remedies, neither the Commission nor the Court explained in their decisions what exactly the 'propaganda' consisted of. The Court even deemed it sufficient to state that Kiselev's propaganda activities were 'common knowledge'.[78] This is problematic because a decision's reasoning is also addressed at a wider audience: media, scholars, and the general public. Decisions that cannot be completely understood from their reasoning lack legitimacy.

This inadequacy is corrected by the General Court in *RT France*. The judgment does not leave it to the imagination or the suspicions of the readership to decide what the propaganda for war consists of. Rather, it discusses specific statements and their context, as is always necessary when restrictively regulating speech.[79] RT's reporting and the conversations between guests were meant to portray the attack as self-defence, or even as a humanitarian intervention to prevent genocide by a Ukrainian government supposedly consisting of Nazis.[80] Both are based on (evidently) false factual allegations.[81] The Court referred to examples of RT's reporting from before and after 24 February 2022, as submitted by the Council. In these stories the war was described as a 'special operation' provoked by NATO and Ukraine, intended to defend the 'republics of Donetsk and Luhansk', as well as to prevent an 'encirclement' of Russia. The Ukrainian state was said to not exist because it was not effective, at least in 'separatist areas'. According to a banner that it showed, RT also reported from the 'Republic of Donetsk', which accepted the Russian recognition of this entity.[82] All this, the Court ruled, demonstrated a one-sidedness that as a whole sought to

78 CJEU, *Kiselev* (n. 19), para. 97.

79 CJEU, *RT France* (n. 6), para. 179.

80 See also *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), pending before the International Court of Justice.

81 See *mutatis mutandis* on Russia's justification for its purported annexation of Crimea: Marxsen (n. 76); Anne Peters, 'The Crimean Vote of March 2014 as an Abuse of the Institution of the Territorial Referendum' in: Christian Calliess (ed.), *Herausforderungen an Staat und Verfassung: Liber Amicorum für Torsten Stein* (Baden-Baden: Nomos 2015), 278-303.

82 CJEU, *RT France* (n. 6), paras 175-186.

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justify the Russian war of aggression.[83] Other reporting submitted by RT was not considered sufficient by the Court to prove a 'balanced coverage' of the ongoing war.[84] The Council therefore had not committed an error of assessment in this regard.[85]

Again, this makes it clear that only the prohibition of propaganda for war could justify the broadcasting ban. The mere fact that a media outlet's reporting is not considered sufficiently 'balanced' or too 'one-sided' cannot normally lead to the banning of individual content, not to mention banning an entire outlet.[86] To the contrary, it is a fundamental part of freedom of expression and the freedom of the press and media to decide what to report on and with what focus. Of course, media should heed the 'tenets of responsible journalism'.[87] Reporting that infringes on someone's privacy rights does have to be based on a 'sufficient factual basis',[88] complying with the due diligence obligation to ascertain the truth of an assertion.[89] In that context, the ECtHR also takes into account whether a report considered indications against the truth of the statement, i. e. whether the presentation is 'balanced' in that regard. But the ECtHR rightly emphasises that

> 'it is not for the national authorities, nor for the Court for that matter, to review the press's own appreciation of the news or information value of an item […] or to substitute their views for those of the press on what methods of objective and balanced reporting should be adopted by journalists'.[90]

The 'one-sidedness' at issue here does not only concern the factual truth of RT's assertions. RT's statements are criticised as 'one-sided' in the same sense that disinformation can employ not only statements that are outright false, but also 'misleading'. Misleading statements use true facts and argue that their selection and presentation is appropriate. Such an argument, however, is a normative judgment, an opinion. Like with all opinions, you cannot show this selection and presentation of facts to be false.[91] The

83 CJEU, *RT France* (n. 6), para. 190.
84 CJEU, *RT France* (n. 6), para. 189.
85 CJEU, *RT France* (n. 6), para. 191.
86 But see, emphasising the 'biased' character of RT's information: Charvin (n. 20), para. 7.
87 ECtHR, *Bédat v. Switzerland* (Grand Chamber), judgment of 29 March 2016, no. 56925/08, para. 50.
88 EGMR, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* (Grand Chamber), judgment of 27 June 2017, no. 17224/11, para. 107.
89 ECtHR, *Björk Eidsdóttir v. Iceland*, judgment of 10 July 2012, no. 46443/09, para. 81.
90 Most recently: ECtHR, *NIT S. R. L. v. The Republic of Moldova* (Grand Chamber), judgment of 5 April 2022, no. 28470/12, para. 193.
91 Baade (n. 65).

freedom to decide what to report on and what arguments to advance in support of one's normative proposition may be used in good faith by citizens and media contributing to the public discourse in a democracy. It can also be abused in bad faith, even for propaganda. It is for those who disagree to argue that the criticism is normatively incorrect and convince citizens of their assessment.[92]

Traditionally, more exacting requirements concerning a balanced coverage may be imposed when it comes to linear audiovisual media. More recently, the ECtHR even accepted the revocation of a TV broadcasting licence due to a media outlet's failure to heed reasonable requirements of 'internal pluralism' (a balanced coverage of political parties). But the Court considered it to be 'of particular importance [in the context of the measure's proportionality] that the measure did not prevent [the media outlet] […] from using other means, such as the Internet, to broadcast its programmes'.[93] The ban against RT France, which encompasses any content and all modes of distribution, would not have been possible under this jurisprudence. Only, the prohibition of propaganda for war can justify it. It not only prohibits false factual statements in favour of a war of aggression, but also opinions in its favour – no matter how one attempts to justify them.

VI. The Independence and Fundamental Rights Capacity of RT France

Finally, a major gap seems to loom in the General Court's judgment with regard to the independence of RT. As we have seen, the question of whether RT France is controlled by Russia is essential for the choice of the legal basis. It might also be relevant for RT France's capacity to rely on fundamental rights. While the operators' right to disseminate RT content and the general public's right to receive it are undoubtedly protected by Art. 11 CFR, the same is not necessarily true for RT.

In its judgment, the Court upholds the Council's assessment that RT France is directly or indirectly controlled by the Russian state and advances three arguments to support this: First, the entire share capital of the 'simplified single-shareholder joint-stock company' (*société par actions simplifiée à*

92 But see n. 93.

93 ECtHR, *NIT S. R. L.* (n. 90), para. 223. This case law is likely to be further refined in the future. See the joint dissenting opinion of judges Lemmens, Jelić and Pavli in that case for criticism and proposals.

associé unique) as which RT France is registered under French law is held by an autonomous non-profit association based in Russia, which in turn is almost entirely financed from the Russian state budget.[94] Secondly, the editor-in-chief of the RT group is quoted as stating that RT was, among other things, an information weapon in the event of war. Thirdly, when asked at the court hearing, RT France was not able to explain how the editorial independence it claims (despite being indirectly owned and financed by the Russian state) is guaranteed by law.[95]

If RT France can be considered directly or indirectly controlled by the Russian state in its editorial decisions, the question arises why, and to what extent, it can invoke fundamental rights. Under the ECHR, which in accordance with Art. 52 (3) CFR constitutes the minimum standard for the interpretation of the fundamental rights enshrined in the Charter, state-owned enterprises can indeed invoke fundamental rights in certain cases. According to the ECtHR, an overall assessment based on the legal status of the organisation, its competences, the nature of its activities, and its independence from state influence is decisive for determining whether the organisation is 'non-governmental' within the meaning of Art. 34 ECHR, and can thus raise a complaint before the ECtHR. For the public broadcaster Radio France, the ECtHR ruled:

> 'Thus, although Radio France has been entrusted with public-service missions and depends to a considerable extent on the State for its financing, the legislature has devised a framework which is plainly designed to guarantee its editorial independence and its institutional autonomy […] In this respect, there is little difference between Radio France and the companies operating "private" radio stations.'[96]

According to this case law, if RT France lacked editorial independence, it could not have successfully filed an application with the ECtHR. But the issue is more complicated than that: The ECtHR reaffirmed, in *Islamic Republic of Iran Shipping Lines v. Turkey*, that 'public-law entities can have the status of a "non-governmental organisation" in so far as they do not exercise "governmental powers", were not established "for public-administration purposes" and are completely independent of the State'. But it also held that 'the idea behind this principle [to deny governmental bodies or public corporations under the strict control of a State human rights protection] is to prevent a Contracting Party [from] acting as both an applicant and

94 CJEU, *RT France* (n. 6), para. 2.

95 CJEU, *RT France* (n. 6), paras 170-174.

96 ECtHR, *Radio France and Others v. France*, decision of 23 September 2003, no. 53984/00, para. 26. See in detail: Jochen Rauber, *Zur Grundrechtsberechtigung fremdstaatlich beherrschter juristischer Personen* (Tübingen: Mohr Siebeck 2019), 58-68, 76-77.

a respondent party before the Court'.[97] Might non-Contracting State entities thus rely on the ECHR more than Contracting State entities? Be that as it may, the Court clearly implied that if the application were 'effectively brought by the Islamic Republic of Iran, which is not a party to the Convention', it would have been inadmissible. An additional argument for this might be that only Contracting States may bring inter-state disputes under Art. 33 ECHR.

In any case, the ECHR only constitutes a minimum standard. The CFR may provide more protection, even to 'emanations of a non-member State'. In the past, the General Court has indeed ruled so in two cases: *Bank Mellat* and *Bank Saderat Iran*. Rejecting the argument advanced by the Council and the Commission, the Court noted that there are no provisions in the Treaties or the Charter that exclude 'legal persons which are emanations of States', i. e. 'an entity which participated in the exercise of governmental powers or which ran a public service under governmental control', from fundamental rights protection. Rather, many Charter rights are explicitly guaranteed to 'everyone'. Art. 34 ECHR, the General Court held, is merely a procedural provision inapplicable of its own proceedings. The ECtHR's rationale, that a State should not at the same time be an applicant and respondent, did not apply here: 'the fact that a State is the guarantor of respect for fundamental rights in its own territory is of no relevance as regards the extent of the rights to which legal persons which are emanations of that same State may be entitled in the territory of other States'.[98] On appeal, the Court of Justice did not accept the Council's argument that states cannot ever enjoy fundamental rights as a matter of principle.[99] The specific rights at issue in these cases, namely rights of defence and to effective judicial protection, as well as procedural requirements like the right to a reasoned decision, could be relied on by any legal entity, the Court of Justice held.[100] That '*such* rights may be invoked by any natural person or *any* entity',[101] even by emanations of a non-Member State, does

97 ECtHR, Case of *Islamic Republic of Iran Shipping Lines v. Turkey*, judgment of 13 December 2007, no. 40998/98, para. 81.

98 CJEU, *Bank Mellat v. Council of the European Union*, judgment of 29 January 2013, T-496/10, ECLI:EU:T:2013:39, paras 35-46; CJEU, *Bank Saderat Iran v. Council of the European Union*, judgment of 5 February 2013, T-494/10, ECLI:EU:T:2013:59, paras 33-44.

99 CJEU, *Bank Mellat v. Council of the European Union,* opinion of GA Sharpston of 26 February 2015, C-176/13 P, ECLI:EU:C:2015:130, para. 43.

100 CJEU, *Bank Mellat v. Council of the European Union*, judgment of 18 February 2016, C-176/13 P, ECLI:EU:C:2016:96, paras 49-50; CJEU, *Bank Saderat Iran v. Council of the European Union*, judgment of 21 April 2016, C-200/13 P, ECLI:EU:C:2016:284, paras 46-50.

101 CJEU, *Bank Mellat* (n. 100), para. 49 (emphasis added). See also on this: Rauber (n. 96), 77.

not, however, mean that 'emanations of a state' can or should be able to rely on *all* human rights.[102]

This point needs to be addressed by the Court of Justice in its appeal judgment. It should be recognised that the primary purpose of fundamental rights is to protect individuals from the state. This is also the rationale why (private) legal persons are protected.[103] Basic rule of law requirements, like the right to be heard, are so fundamental to the value of the rule of law enshrined in Art. 2 TEU that they may not be discarded even when dealing with non-Member States and their emanations. But beyond such basic requirements of the rule of law, it is not clear why a media company editorially controlled by a non-Member State should be able to rely on the right to freedom of expression. It should have access to judicial protection of its legally protected interests. But it seems rather unwarranted to elevate these interests (of non-Member States) by allowing them to rely on all human rights.[104] There may be no express provision in the Charter to that effect, but the purpose of fundamental rights is to protect human rights, not state rights, and clearly points in that direction.

At any rate, the Court of Justice should bear in mind that the question of RT France's independence from the Russian Government is not only relevant for RT's capacity to rely on fundamental rights, but also for the ban's legal basis: Russia's influence on RT France served as a basis for the measure in the CFSP, as we have seen. If even fully state-controlled media companies enjoy full human rights protection, as the General Court can be understood, no problem arises. Sanctions law is applicable as a legal basis because RT France is controlled by the Russian state and it can nonetheless rely on freedom of expression, which has been lawfully restricted. But, maybe, it would be more in line with the spirit of human rights protection and more systematically coherent to say that if RT France is considered to be under the influence of the Russian government in such a way that the CFSP is the appropriate legal basis, then RT France cannot invoke freedom of expression as an emanation of that state either. Even then, the prohibition of propaganda for war remains important: as the justification for the interference with the rights of the 'operators' disseminating RT content and of the general public to receive this information.

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102 See Matthew Happold, 'Who Benefits from Human Rights Treaties?' in: Isabelle Riassetto, Luc Heuschling and Georges Ravarani (eds), *Liber Amicorum Rusen Ergeç* (Luxembourg: Pasicrisie Luxembourgeoise 2017), 117-127 (125).

103 See BVerfGE 143, 246-396, para. 195.

104 Jörg Gundel, 'Europäischer Grundrechtsschutz für (dritt-)staatliche Propagandasender? – Anmerkung zum Urteil des EuG v. 27.7.2022, Rs. T-125/22 (RT France/Rat)', EuR 58 (2023), 110-118 (114-117).

VII. Outlook

The sanctions against RT and other media funded by the Russian state are only a small component of the Union's comprehensive response to Russia's attack on Ukraine. But these sanctions raise serious legal questions. In my assessment, the General Court got a crucial aspect right in the judgment of its Grand Chamber. Substantively, the case at hand concerns the prohibition of propaganda for war within the meaning of Art. 20 (1) ICCPR in an ongoing war of aggression. This is the 'extraordinary context of extreme urgency' that the General Court emphasises again and again. With regard to the independence of RT and its ability to rely on fundamental rights, however, the Court of Justice should develop an even more stringent argumentation in the appeal proceedings. The interaction between fundamental rights capacity and the choice of legal basis should be taken into account. The limits of the legal basis should be worked out more clearly.

The pressure of time under which the Decision and the Regulation were drafted can certainly explain and excuse the indeterminacy of their wording. For future practice, however, the appropriate lessons should be drawn: The Commission and Council should strive for more clarity, precisely when time is of the essence.

Opinions certainly diverge regarding the policy question of whether the ban was a wise decision. Doesn't it make sense to say that one can only critically engage with propaganda for war if one knows it? While other outlets can still report on the sanctioned media content,[105] the ban seeks to prevent any unmediated access. Shouldn't the public be able to hear 'the other side' directly if they want to?[106] Isn't that what pluralism requires?[107] Shouldn't one trust in the power of free public discourse to expose falsehoods?[108]

Generally, in democracies it is indeed imperative that citizens form their own views in a free public discourse. How our societies can build resilience to 'information operations'[109] is in my opinion not a question that can be

105 See e. g. the various instalments of Arte's 'Fake News' programme: <https://www.arte.tv/de/videos/RC-022858/fake-news/>. On this restrictive interpretation of the ban see the Commission's unofficial letter above (n. 42).

106 Popović (n. 42).

107 See Charvin (n. 20), paras 6, 9, 11.

108 Rolf Schwartmann, 'Krieg mit Informationen', MMR-Aktuell 2022, 447734; Viktoria Kraetzig, 'Europäische Medienregulierung – Freiheit durch Aufsicht?', NJW 76 (2023), 1485-1490 (1489).

109 Setz and Seyda (n. 57).

answered entirely, not even primarily, with legal regulation. However, this does not mean that law cannot play a role. No one claims that calling for a genocide, or even serious crimes to be committed, is speech that cannot be restricted.[110] No one thinks that this unbearably limits public discourse. Taking repressive action against media that clearly calls for or justifies a war of aggression in evident violation of international law seems likewise justified.

110 See Art. III (c) Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.