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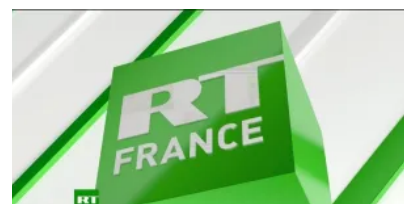
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# Case Law, EU: RT France v. Council: General Court finds ban on Russia Today not a violation of right to freedom of expression – Ronan Ó Fathaigh and Dirk Voorhoof

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On 27 July 2022, in [RT France v. Council](#), the General Court of the European Union found that the ban on RT France in the EU did not violate



the right to freedom of expression and media freedom, under Article 11 of the EU Charter of Fundamental Rights. Notably, the General Court sought to apply principles from case law of the European Court of Human Rights and international human rights law.

However, there are serious questions to be raised over the General Court's reasoning in *RT France*, and the judgment arguably represents a deeply problematic application of European and international free expression principles.

## Facts

The case arose on 1 March 2022, following Russia's illegal invasion of Ukraine, when the Council of the EU, a body consisting of government ministers from EU member states, adopted a [Decision](#) and [Regulation](#), prohibiting the broadcasting of "any content" of six broadcasters, including RT France, and suspended its broadcasting licence in the EU. Further, it was prohibited to distribute "any content" by RT France "by any means", including through cable, satellite, internet service providers, or video-sharing platforms.

Importantly, the ban was initiated under [Article 29](#) of the Treaty on EU, and [Article 215](#) of the Treaty on the Functioning of the EU, which concern EU foreign policy, and allow the Council to adopt "restrictive measures" against persons, groups, or non-State entities, and to adopt the "necessary measures" for the interruption or reduction of economic and financial relations with third countries. As justification for the ban, it was mentioned that the Russian government had engaged in "concerted propaganda" and "gravely distorting and manipulating facts" to "justify and support its aggression against Ukraine". Those propaganda actions have been "channelled through a number of media outlets under the permanent direct or indirect control of the leadership of the Russian Federation", and are qualified as a "significant and direct threat" to the EU's "public order and

security” (see our [blog](#)). In June 2022, the Council expanded the ban against [other](#) Russian media outlets, and on 26 July 2022, the Council [prolonged](#) its sanctions, including the ban against the listed Russian media outlets, by six months, until 31 January 2023.

Already on 8 March 2022, RT France lodged an appeal against the ban with the General Court, arguing that the Council had no competence to impose such a ban, and violated the EU Charter of Fundamental Rights. This included violations of the rights of defence and the adversarial principle (Articles 41 and 48), freedom to conduct a business (Article 16), and the right to freedom of expression (Article 11). On 30 March 2022, the General Court’s President [rejected](#) RT France’s application for an urgent assessment in interim relief proceedings. On 27 July 2022, the General Court, sitting as the Grand Chamber, rejected RT France’s main appeal in its entirety. RT France has announced it will [appeal](#) to the EU Court of Justice. This post focuses on the General Court’s finding that there had been no violation of free expression.

## Judgment

The Court began by holding there had been an “interference” with RT France’s right to freedom of expression under Article 11 Charter, finding that RT France had been subject to a “temporary ban” on the “dissemination of content” (para. 142). And to comply with EU law, any interference with free expression must meet four conditions: (a) be “provided by law”, (b) respect the “essence” of freedom of expression, (c) meet an “objective of general interest”, and (d) be proportionate. According to the Court, these conditions correspond to the [case law of the ECtHR under Article 10](#) of the European Convention on Human Rights, which guarantees freedom of expression. In this regard, the General Court noted that Article 11 Charter must be given the “same meaning and scope” as Article 10 ECHR, as required under Article 52 Charter.

First, the Court held that the interference was “prescribed by law,” under

Article 29 TEU and Article 215 TFEU. Crucially, having regard to the “wide discretion” enjoyed by the Council to adopt restrictive measures, it was sufficiently “foreseeable” restrictive measures in the form of a prohibition on the “dissemination of propaganda” could be adopted against RT France, given the “extensive media support” for Russia’s invasion provided during programmes broadcast by a medium “entirely financed” by the Russian government (para. 151). Second, on respecting the “essence” of free expression, the Court noted the ban was “temporary and reversible”, as it applied until 31 July 2022, and was subject to “constant monitoring” (para. 154). Further, the ban did not prevent RT France from carrying out activities “other than broadcasting”, such as “research and interviews”; while the ban did not “prohibit the applicant from broadcasting its content outside the European Union” (para. 157). Third, on meeting an “objective of general interest”, the Court held the measures served at protecting the EU’s “public order and security”, and “preserve peace, prevent conflicts and strengthen international security”, in accordance with the UN Charter, as provided in Article 21(2) TEU (para. 163-167).

The Court then examined the proportionality of the measures. First, the Court examined whether the “evidence” produced by the Council was “capable of justifying” its conclusions on the “control” of RT France. The Court held the Council had provided a body of “sufficiently concrete, precise and consistent evidence” showing that RT France was under the “permanent control, direct or indirect, of the leaders of the Russian Federation” (para. 174). This included RT France’s share capital being owned by TV Novosti, which is “entirely financed by the Russian State budget”; statements from Russian government officials about RT, and RT France not presenting any “regulatory and institutional” framework demonstrating its “editorial independence” and “institutional autonomy” from its Russia-based parent (para. 173).

Next, the Court examined whether the Council was correct to consider RT France had engaged in a “continuous and concerted propaganda actions” targeted at civil society in the EU, aimed at “justifying and supporting”

Russian's aggression against Ukraine (para. 175). The Court noted the Council had submitted a "number of items of evidence" in support of its Decision and Regulation, in the form of references to various articles and videos published by RT France. And in paragraphs 177-185, the Court runs through these publications. For example, the Court references RT France articles from February 2022, "claiming that many jihadist groups had landed on the front line on the Ukrainian side and that provocations were taking place" (para. 177); television broadcasts where contributors referred to Russia's invasion as "defensive" and a "special military operation", and was "obviously not an invasion," like the "European Union and the NATO, tried to demonstrate it" (para. 180); while during another programme, "several guests continued to present military aggression as a legitimate intervention aimed at protecting the self-proclaimed republics of Donbass and responding to a Western threat" (para. 185).

Following this review, the Court held that the Council was correct to consider the various publications constituted a "body of sufficiently concrete, precise and consistent evidence" capable of showing RT France "actively supported" the "destabilising" policy pursued by the Russian Federation with regard to Ukraine, "which ultimately led to a major military offensive", had "disseminated information justifying" Russia's military invasion of Ukraine (para. 188), and had used "similar, if not identical, vocabulary" to that used by the Russian government (para. 186). Further, a "great deal of space" was given to commentators who "tended to justify" Russia's military aggression against Ukraine. Notably, the Court held that if "at times, their opinions were counterbalanced by other opinions expressed by different speakers, this is not enough to rebalance statements expressing a narrative largely in favour" of the military invasion (para. 187). Indeed, other broadcasts were not sufficient to demonstrate RT France's coverage was "balanced", in compliance with the principles relating to the "duties and responsibilities" of audiovisual media (para. 189), citing the ECtHR's judgment in [NIT S.R.L. v. the Republic of Moldova](#).

Further, on the appropriateness of the measures, the Court held that given

the Council enjoyed “broad discretion”, it could “validly consider” the restrictive measures at issue, which targeted “media outlets controlled by the Russian Federation” were “likely” to protect “public order and security” and “the integrity of public debate in a democracy” (para. 193). Next, on the necessity of the measures, and whether there were other “less restrictive measures”, the Court agreed with the Council that “other measures would not have achieved the same result,” such as banning “certain content,” as it would have been “practically impossible” to implement. While other measures, such as an obligation to “display a banner” or warning, would have been of “limited effectiveness” (para. 197).

Finally, the Court noted that international human rights law should be followed when interpreting EU law, especially for the purposes of the “interpretation and application” of Article 11 Charter (para. 207). In this regard, the Court specifically highlighted that Article 20 of the International Covenant on Civil and Political Rights provided that “[a]ny propaganda for war shall be prohibited by law” , and should be taken into account, as argued by the Council (para. 208). As such, the Court held the Council was right to consider it necessary to prevent, consistent with Article 11 Charter, forms of expression “intended to justify and support an act of military aggression, perpetrated in violation of international law” (para. 212). In conclusion, the Court held the restriction on RT France’s freedom of expression was proportionate, finding no violation of Article 11 Charter. The Court also held, without expressing a view on RT France’s interest in invoking it, that there had also been no violation of the public’s right to receive information, as the EU measures were found to be justified and proportionate in order to ban programmes in support of an act of violence (para. 214).

## Comment

It is worth pausing to consider the holding in *RT France*: an executive authority, comprised of EU government ministers (under the chair of the Council president), can issue an order that a media outlet, licenced by

France's media regulator, can be subject to a six-month ban, when that executive authority considers the media outlet is, directly or indirectly, controlled by a non-EU government, and is engaged in "propaganda actions" to justify and support an illegal war. And this is supposedly consistent with EU law, when finally reviewed by a court four days before the ban was set to end (or be extended), and the broadcaster has been offline in the EU for nearly six months. It is no exaggeration to say the *RT France* judgment sets an extremely dangerous precedent for free expression in Europe, and there are a number of fundamental criticisms to be levelled at the judgment.

First, as the EU Court of Justice confirmed in *Buivids v. Datu valsts inspekcija*, Article 11 Charter is to be given the "same meaning and the same scope" as Article 10 ECHR, "as interpreted by the case-law of the European Court of Human Rights" (see also [here](#)). However, the General Court in *RT France* arguably fails to properly apply ECtHR case law in a number of respects. In the first place, of the handful of ECtHR case law the General Court cites, it mainly relies upon *NIT S.R.L. v. the Republic of Moldova*, applying it repeatedly (para. 90, 133, 136-138, 150 and 206) mainly for the propositions that free expression is not "unrestricted"; audiovisual media have enhanced "duties and responsibilities", while media "can also suggest, by the way in which they present the information, how it is to be assessed"; and "in a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance".

However, what is remarkable about the General Court's reliance upon *NIT S.R.L.* is that the Court ignores the substantially different characteristics of *NIT S.R.L.*, and completely omits to mention fundamental principles from *NIT S.R.L.* which would fatally undermine the General Court's conclusion in *RT France*. Notably, *NIT S.R.L.* concerned a broadcaster having its broadcast licence revoked by Moldova's *media regulator* for "repeated" violations of the broadcasting code, including for failure to ensure "balance, fairness and



objectivity”. Crucially, the ECtHR reviewed the compatibility of the revocation with Article 10 ECHR, and held that “procedural safeguards” play a “particularly important role” where a measure “as intrusive” as revocation of a broadcasting licence has “immediate effect upon” publication. In finding the licence revocation was consistent with Article 10 ECHR, the Court emphasised that the measure was implemented by a “specialist body which was established by law”, and “stresse[d]” the need to ensure such a body’s “independence”, and concluding that Moldova’s law “secure[d]” the regulator’s independence and protected its “decision-making process against political pressures and interference”. Further, the broadcaster could submit comments before the revocation, and a preliminary challenge to the regulator’s decision.

This is entirely consistent with earlier case law, such as [OOO \*Flavus and Others v. Russia\*](#), where the ECtHR found a violation of Article 10 ECHR over the banning of a media outlet which had not being sanctioned “by a court or other independent adjudicatory body”. It is very difficult to see how the Council’s decision to impose a six-month ban on RT France, which is already extended by another six months, would satisfy the requirements of Article 10’s procedural safeguards, especially given that it is a body comprised of political officials, non-independent, and non-specialist. It is very problematic for the General Court in *RT France* to fail to apply these principles from *NIT S.R.L.* Indeed, it was remarkable for the General Court to state at paragraph 99 that RT France failed to demonstrate there would have been a “different result” had it been given a prior hearing or reasons communicated beforehand. This holding completely undermines the principle of procedural safeguards in cases involving free expression, and contrasts with the finding of the ECtHR in *OOO Flavus and others* that prior notice allows the “opportunity to remedy the supposed breach” of law, and failure to give prior notice is “arbitrary” under Article 10 ECHR.

Second, there is a further gaping hole in the General Court’s judgment that is difficult to understand: nowhere in the 245-paragraph judgment is there any mention that the interference at issue was a “prior restraint”, imposed

without a court order or by another independent authority, and nowhere is the ECtHR's case law on this fundamental principle of Article 10 ECHR jurisprudence mentioned. Indeed, it is difficult to understand how the General Court overlooks the entire line of landmark judgments on prior restraints, which are directly applicable to *RT France*. The ban at issue was ordered by a body comprised of EU government ministers, and yet, the Court failed to apply the landmark *Association Ekin v. France* judgment, which similarly concerned an order from a government minister banning a publication of "foreign origin", deeming it a threat to "public order", as it argued the "violence of the Spanish State justified the ETA terrorist organisation's 'proportionate counter-offensive'".

Crucially, the ECtHR held that the legislation conferring "wide-ranging" powers on a government minister to issue administrative bans was a "prior restraint". The ECtHR applies its highest standard of scrutiny – "most careful scrutiny" – to prior restraints, due to the "inherent dangers" prior restraints represent for free expression. Notably, the ECtHR in *Association Ekin* unanimously found that the administrative-ban mechanism violated Article 10 ECHR, because of "insufficient" procedural guarantees, including no prior court review, with judicial review "not automatic" since it could take place only on application by the publisher to the courts; and the publisher was not entitled to submit oral or written observations "before the order" imposing the ban was adopted. The General Court's failure to apply *Association Ekin* is particularly problematic, and it is very difficult to consider that the Council's measures would pass such a strict standard of scrutiny, especially given the wide-ranging discretion of the Council, and judicial review not being automatic.

Moreover, the Court wholly fails to apply ECtHR case law to the question whether a total ban on broadcasting was proportionate, and accepting without any scrutiny the Council's argument that measures such as banning "certain content," would have been "practically impossible" to implement. Again, this finding it difficult to square with seminal prior-restraint case law, such as *OOO Flavus and Others*, where the Court found

“wholesale blocking” of media outlets violated Article 10, being an “extreme measure”, and “deliberately disregards the distinction between the legal and illegal information”, and “renders inaccessible large amounts of content which has not been identified as illegal”. The wholesale blocking of broadcasting, distribution and access, as implemented against RT France, indeed has the practical effect of extending the scope of the ban far beyond the allegedly unlawful content which is targeted. It is hard to maintain that the ban, with its far-reaching impact, constituted the least intrusive measure available from the perspective of the right to freedom of expression under Article 10 ECHR.

Third, the General Court rightly noted that international human rights law should be followed for the “interpretation and application” of Article 11 Charter (para. 207), but curiously goes on to *only* rely upon Article 20(1) ICCPR, which provides that “[a]ny propaganda for war shall be prohibited by law”. However, this is a wholly inadequate reference to international human rights, and it in no way follows from Article 20(1) ICCPR that it is consistent with international law for an executive authority to ban a media outlet for broadcasting propaganda for war, without an order from a court. Curiously, the Court fails to apply any international freedom of expression standards relating to the banning of a broadcaster, and makes no mention of the standards under Article 19 ICCPR, which guarantees freedom of expression. As the Human Rights Committee has [stated](#), restrictions justified under Article 20 “must also comply with Article 19”. Indeed, the General Court fails to apply the fundamental principle under Article 19 ICCPR, that broadcasting rights can only be withdrawn where content disseminated by a broadcaster had been held a “court of law or another independent, authoritative and impartial oversight body” to be in “serious and persistent breach of a legitimate restriction on content” ([here](#)). As the UN Special Rapporteur on freedom of expression had [stated](#), content removals must only be undertaken “pursuant to an order by an independent and impartial judicial authority, and in accordance with due process and standards of legality, necessity and legitimacy”. Again, it is

difficult to see how the Council's measures, without any court order, and adopted by an executive body, are consistent with international law. Even more so, the Council's approach, and the General Court's judgment, completely undermine the long-established procedural guarantees in the [EU's Audiovisual Media Services Directive](#) for restricting broadcasts by independent regulators.

Fourth, and a further perplexing element to the General Court's analysis, is its failure to properly review whether the interference was "prescribed by law", in particular the Council's claim that it was legitimate to ban a broadcaster for publishing "continuous and concerted propaganda actions" targeted at civil society in the EU, aimed at "justifying and supporting" Russian's aggression". Crucially, the legal basis for the Council's measures, the TEU and TFEU, contain absolutely no provisions on "propaganda", and the concept is nowhere defined in EU law. The Court utterly fails to admonish the Council for basically making up a standard on propaganda, and then applying it to RT France's broadcasts and publications. This runs completely afoul of the Article 19 ICCPR principle that a law "may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution"; and must provide "sufficient guidance" to ascertain "what sorts of expression are properly restricted and what sorts are not" ([here](#)). Similarly, the General Court failed to apply *Association Ekin*, which found French legislation allowing a minister to impose bans on publications of foreign origin violated Article 10, including for not defining the concept of "foreign origin", and not giving "any indication of the grounds on which a publication deemed to be foreign may be banned". In another landmark judgment in [RTBF v. Belgium](#), the ECtHR unanimously found that a legislative framework in Belgium for urgent-application bans on broadcasting violated Article 10 ECHR, because it did not provide "any clarification" as to the "type of restrictions" allowed.

It is difficult to see how the Council's measures against RT France are consistent with both *Association Ekin* and *RTBF*, given that EU law merely provides that the Council may adopt "restrictive measures" against

persons, groups, or non-State entities, with no definition of “restrictive measures” and no indication of when a media outlet can be banned. Indeed, the ban on RT France appears to be an extension outside the scope of financial and economic measures under Article 29 TEU and Article 215 TFEU, while there is nowhere a reference in EU law that the Council can impose a ban on media, and there is no example in EU case law that the Council has this competence. One judgment the General Court refers to as justification, *Kiselev v. Council*, was not a ban of a media outlet, but a measure against a person. While the ECtHR has never held that a ban imposed by an executive or government body on media outlets was in accordance with Article 10 (see, e.g., *ANO RID Novaya Gazeta and Others v. Russia*).

Fifth, the argument that RT France constitutes a “significant and direct threat” to the public order and security in, and the integrity of, the EU, remains a vague legal basis, and due to a lack of procedural safeguards, creates a real risk of arbitrary application in the hands of a government body. Furthermore, the justification on the basis of public order, security and integrity is not convincing and very speculative, given the limited distribution and impact of RT France (and the other banned Russian media outlets) in most EU countries, while in EU countries where the impact is or was more obvious, the media authorities have withdrawn the licences and restricted the distribution of a series of Russian media outlets. That the ban on RT France was part of a series of extremely urgent (economic and financial) measures against the Russian Federation that were meant to dissuade the Russian Federation to continue its military aggression and to protect the frontiers of the EU (par. 198-199), is neither a pertinent justification for the specific ban in the EU of certain Russian media outlets, considering the completely other nature and more solid legal basis of the other economic and financial measures imposed by the Council on the Russian Federation.

Sixth, the General Court echoes the argument of the Council and the European Commission that the essence of the right to freedom of

expression is not curtailed by the ban, as other possibilities remain open, such as research and interviews by journalists of RT France, production of programmes, and distribution of their programmes outside the EU. With this kind of arguments every interference with freedom of expression can be justified, as there are always some alternatives left. It is almost cynical to suggest that the essence of the rights of journalists is not substantially restricted or endangered as long as journalists can conduct interviews and do research, without having the possibility to make these interviews and the findings of their research reach a public. Without having the possibility of making information public and available to others, the right to freedom of expression is curtailed in its very essence. The same observation can be made with regard to the General Court's consideration that the ban on RT France does not affect the possibility that its programmes can be distributed outside the EU. Also, the finding by the General Court that there is no violation of the public's right to receive information (para. 214) is a remarkable statement, especially given that another application, invoking *inter alia* the impact of the ban the public's right to receive information, [is pending before the General Court](#), requesting the annulment of the Council's Decision and Regulation.

Seventh, the General Court over-stresses the weight given to the so-called temporary and conditional character of the interference. The judgment was delivered on 27 July 2022, while on 26 July, it was made [public](#) that the measures are prolonged by another six months until 31 January 2023. Still the General Court, at several occasions, emphasised the temporary character of the ban until 31 July 2022. Furthermore, Article 9 of the [Council Decision](#) 2022/327 of 25 February 2022 states that this measure shall be renewed, or amended as appropriate, if the Council deems that its objectives have not been met. At the same time Recital 10 of the Council's [Regulation](#) 2022/350 of 1 March 2022 provides that “[t]hese measures should be maintained until the aggression against Ukraine is put to an end, and until the Russian Federation, and its associated media outlets, cease to conduct propaganda actions against the Union and its Member States”. This

provision the General Court interprets as a set of cumulative conditions confirming the temporarily character of the ban. The reality is however that the ban of RT France is applicable for (at least) a period of year, without any short-term perspective that this measure will no longer be maintained. The approach by the General Court as if such a measure has only a temporary character with minor impact on the right to freedom of expression, contrasts firmly with the approach by the ECtHR which at several occasions has clarified that “news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest” (see [Sanoma Uitgevers B.V. v. the Netherlands](#), para. 70; and also [Observer and Guardian v. the United Kingdom](#), para. 60; [Sunday Times v. the United Kingdom \(no. 2\)](#), para. 51, and [Association Ekin](#), para. 56).

Finally, the authors of this blog condemn in the strongest way the military aggression by the Russian State against Ukraine. The comments in this blog should not be interpreted as giving any support to the Russian state media concerned. As expressed in this blog, our concerns focus on the one-sided approach, and arguably flawed application, by the General Court of the right to freedom of expression, and its selective application of ECtHR case law on Article 10 ECHR. The General Court’s judgment in *RT France* risks eroding the fundamental right of freedom of expression and information as a cornerstone for a democratic society, respect for the rule of law, and media freedom “without frontiers”; while these principles and values, also according to [the EU Rule of Law Report 2022](#), are “the bedrock of our society and our common identity”.

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[Broadcasting](#), [EU](#), [France](#), [Freedom of expression](#), [Media](#)