

Douwe Korff

*Emeritus Professor of International Law, London Metropolitan University
Associate, Oxford Martin School, University of Oxford*

THE EU BAN ON RUSSIAN MEDIA & THE CJEU JUDGMENT IN RT FRANCE:

Some worrying implications*

The new Information Cold War

The war in Ukraine has become an Information Cold War, with disinformation and misinformation labelling becoming an important and inflammatory weapon for both sides.¹

A New Cold War between “the West” and Russia appears to be looming – and in the information area can already be said to be occurring: see the box, above. In this context, there are increasing denunciations of “propaganda” and “disinformation” allegedly spread by Russia.²

On 2 March 2024, the EU **imposed sanctions on a number of Russian media organisations allegedly responsible for propaganda and disinformation**,³ on the basis that (in the words of the press release accompanying the Regulation):⁴

The Russian Federation has engaged in a systematic, international campaign of disinformation, information manipulation and distortion of facts in order to enhance its strategy of destabilising both its neighbouring countries and the EU and its member states.

To counteract this, the EU has suspended the broadcasting activities and licenses of several Kremlin-backed disinformation outlets [follows a list of 18 banned outlets].

Russia uses all of these outlets to intentionally spread propaganda and conduct disinformation campaigns, including about its military aggression against Ukraine.

The Council notice added that the bans:⁵

... cover **all means of transmission and distribution in or directed at EU member states**, including cable, satellite, Internet Protocol TV, platforms, websites and apps.

While stressing that:

In line with the Charter of Fundamental Rights, these measures will not prevent those media outlets and their staff from carrying out activities in the EU that do not involve broadcasting, e.g. research and interviews.

There are two issues with this. First of all, while aimed at curtailing the right of the outlets concerned to **“impart”** information and ideas without interference by public authority and regardless of

* This blog was written in the context of the writing of an opinion on the case of *Aivo Peterson*, an Estonian who is charged with *“conspiring to commit treason by non-violent means”*, for disseminating information that is deemed to be “anti-Estonian” because it is allegedly supportive of Russian actions, but that does not involve incitement to hatred or violence or propaganda for war. *Justice pour Tout Internationale*, a Geneva-based NGO. See:

<https://jpti.ch/news.php?id=24> (press release)

<https://jpti.ch/news.php?id=25> (complaint)

<https://jpti.ch/news.php?id=26> (my opinion)

<https://jpti.ch/news.php?id=27> (executive summary)

The blog notes that very similar charges can now be brought in the EU against individuals who (re-)publish even totally innocuous, not hate- or war-related material issued by the banned Russian media outlets, because that can constitute “circumvention of EU sanctions” against Russia.

frontiers”, the bans of course also limit the right of individuals in the EU to “**receive**” such information and ideas: see Article 10 ECHR; Article 11 Charter of Fundamental Rights. In its judgment in the *RT France v. Council* judgment, discussed below, the Court wrongly cursorily dismissed this point.

Secondly, on 12 April 2024, the EU Council adopted a law covering EU-wide minimum rules for the **prosecution of violation or circumvention of the EU sanctions**.⁶ The press release clarifies the rules as follows:⁷

Member states must ensure that violating EU sanctions is punishable by effective and proportionate criminal penalties, which vary depending on the offence. However, **intentional violation of sanctions must give rise to a prison sentence as the maximum penalty. Those who have violated EU restrictive measures may additionally be subject to fines.**

In other words, the sanctions affect not only the banned Russian media outlets, but also anyone in the EU who still access the output of those outlets (which is trivially easy),⁸ and who dares to re-produce some of that output. As noted by Columbia Global Freedom of Expression:⁹

The EU [sanctions] document clarifies that journalists may ‘refer to pieces of news by Russia Today and Sputnik, in order to illustrate the type of information given by the two Russian media outlets concerned with a view to informing their readers/viewers objectively and completely’. But the document also warns that freedom of speech cannot be relied on by other media outlets to circumvent the Regulation and that the non-circumvention equally applies to journalists: ‘*Therefore, if another media outlet or journalist purports to inform its readers/viewers, but in reality its conduct aims at broadcasting Russia Today or Sputnik content to the public or has that effect, it will be in breach of the prohibition laid down in the Regulation*’.¹⁰ Hence, journalists in Europe who are integrating content from RT or Sputnik in their reports on the war in Ukraine or how Russian media cover that war, and if they do so in a way that is not considered ‘objective and complete’ or has the effect of broadcasting RT or Sputnik content to its readers or viewers, risk to be sanctioned for not implementing the EU-ban of RT and Sputnik.

My concern is that the EU rules can easily lead to the use of the criminal law against individuals in the EU for non-violent political speech. In the next section, I discuss them in the light of European human rights law on freedom of expression.

The CJEU judgment in *RT France v. Council*

RT France, which is one of the banned media outlets, challenged the ban in the Court of Justice of the European Union (CJEU). In its judgment in the case, the Court held that the ban on RT France (and by implication the other bans) did not violate Article 11 of the Charter.¹¹

However, in this judgment, the Court focussed entirely on the behaviour of the applicant as a Russian-controlled media organisation and its activities in relation to Russia’s war against Ukraine:¹²

Article 20(1) of [the ICCPR] provides that ‘any propaganda for war shall be prohibited by law’. In that regard, it should be observed that the fact that the prohibition on ‘propaganda for war’ is laid down in a separate paragraph from the prohibition on ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or

violence’, which is laid down in Article 20(2), must be interpreted as being intended to attribute the utmost gravity to ‘propaganda for war’.

In the present case, it must be pointed out that **the propaganda activity put in place by the applicant forms part of the context of an ongoing war, provoked by an act committed by a State and characterised as ‘aggression’ by the international community (...), in breach of the prohibition on the use of force laid down in Article 2(4) of the United Nations Charter.** In that regard, it should be borne in mind that, by resolution 110 (II), reaffirmed by resolution 381 (V), **the United Nations General Assembly condemned ‘all forms of propaganda, in whatsoever country conducted, which is either designed or likely to provoke any threat to the peace, breach of the peace, or act of aggression’.** Furthermore, it should be pointed out that **the scope of the prohibition imposed by Article 20(1) of that covenant, which refers to ‘any’ propaganda for war, includes not only incitement to a future war, but also continuous, repeated and concerted statements in support of an ongoing war, contrary to international law, especially where those statements come from a media outlet under the direct or indirect control of the aggressor State.**

It follows from the foregoing considerations that, **in the context of its activity during the period preceding the Russian Federation’s military aggression against Ukraine and, above all, during the days following that aggression, the applicant engaged in a systematic action of broadcasting ‘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 supporting that aggression.**

In those circumstances, **the Council was correct to consider it necessary to prevent, in compliance with Article 11 of the Charter, forms of expression designed to justify and support an act of military aggression, perpetrated in violation of international law and the United Nations Charter.**

The foregoing considerations suffice, taking account of all of the circumstances set out above and, in particular, of the extraordinary context of the present case, to establish that **the limitations on the applicant’s freedom of expression which the restrictive measures at issue are liable to entail are proportionate, in that they are appropriate and necessary, to the aims pursued.**

As to the argument which the applicant derives, in the alternative, from freedom of expression and information, within the meaning of Article 11 of the Charter, seen from a passive point of view, namely the public’s right to receive information, irrespective of any question concerning the applicant’s interest in relying on that right, **it is sufficient to state that, if the interference with the right to broadcast programmes involving support for an act of aggression is justified and proportionate (...), the same applies a fortiori to the limitation of the public’s right to receive such programmes.**

In the light of all of the foregoing considerations, the second plea [that the ban violated freedom of expression] must be rejected.

In the light of the case-law of the European Court of human Rights, one may doubt whether the Strasbourg Court would reach the same conclusion.¹³ In particular, the Luxembourg Court did not take into consideration the fact that, although the ban was based on war propaganda allegedly being disseminated by RT France, that media outlet of course also produces large amounts of other information – and that other information is now also banned. This raises issues about the proportionality and necessity of the measure that the Luxembourg Court simply skipped over in

the above passage. It also has important implications for third parties, as noted below. Suffice it to note here that the compatibility of the EU and national bans with the Convention (rather than the Charter) has to the best of my knowledge not yet been raised before the Strasbourg Court.

Moreover, crucially, the EU Court did not address the guidance, noted by the Columbia Global Freedom of Expression entity, quoted above, that journalists – and I may add, politicians, or bloggers, or indeed anyone – who integrate content from RT (or Sputnik, etc.) in their reports on the war in Ukraine or on how Russian media cover that war, could be at risk of being considered “sanction-breakers” if the way in which they report is not considered “objective and complete” or has the effect of (re-) broadcasting RT (etc.) content to their readers, viewers or followers. That there is clearly a risk that EU law may be used in this way is manifest from the express confirmation of this risk by the German telecom regulator.¹⁴

Of particular concern is (or should be) the risk of third parties being charged with “sanction-breaking”, even if they do not re-distribute any alleged war propaganda put out by RT France (etc.), but other, not war- or hate-mongering information disseminated by it. That would mean they can be criminally liable for (re-)distributing information that (unlike propaganda for war and hate speech) would otherwise be protected by the various international human rights guarantees of freedom of expression “regardless of frontiers”. In my opinion, that is impossible to justify.

Moreover, the lines in this regard are difficult to draw.¹⁵ Presumably, it is not “propaganda for war” to take the view that the war in Ukraine was provoked by NATO and “the West”.¹⁶ Would it cross the line to say Russia’s military action was (therefore) justified? The point to be made here is that even if such opinions if uttered by individuals of their own accord are protected by the right to freedom of expression, re-distributing materials from RT France that express the same views would constitute the criminal offence of sanction-breaking.

Criticism

The above serves to underline how slippery the slope is on which the EU has embarked. As the current UN Special Rapporteur on freedom of expression, Irene Khan, rightly observed:¹⁷

The banning of a media outlet is a severe restriction of freedom of expression and rarely justified. The European Commission banned several Russian State-owned media outlets on the ground that they constituted a threat to public order and security by spreading disinformation and propaganda. The necessity and proportionality of the ban has been questioned in a region where independent media and fact-checkers are able to challenge disinformation and where other less drastic measures could have been considered.

A footnote to the above paragraph cross-refers to an earlier report by Irene Khan on Reinforcing media freedom and the safety of journalists in the digital age in which she noted the *RT France* judgment but still rightly again stressed that:¹⁸

The total ban of a media outlet is a severe restriction of freedom of expression. While international law permits restriction of freedom of expression to protect public order and national security, it requires the measure to be strictly necessary and proportionate. As disinformation can be addressed without banning media outlets, there is concern about the proportionality of the response of the European Union.

The “concern” in question was expressed in statements referenced by the Special Rapporteur in a footnote to the above paragraph, as follows:¹⁹

The International Press Institute said that:²⁰

[E]ven during times of information warfare, it remains true that the best way to counter state-sponsored disinformation is not through broadcast bans or censorship, but instead through fostering a professional and pluralistic media landscape with thriving, independent journalism which can factcheck falsehoods and insulate citizens from propaganda, in addition to programs for teaching media literacy.

The European Federation of Journalists similarly warned that “*Fighting disinformation with censorship is a mistake*”.²¹

For the first time in modern history, Western European governments are banning media. ...

The real antidote to disinformation is not the banning of the media, but the promotion of a vibrant, pluralistic, professional, ethical and viable media ecosystem, totally independent of those in power.

The media bans also fly in the face of other global standards such as the **Johannesburg Principles on National Security, Freedom of Expression and Access to Information**²² and the **Joint Declaration on Freedom of Expression and “Fake News”, Disinformation and Propaganda**, issued on 3 March 2017 by the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information.²³

Between them, these stress that:

Expression may not be prevented or punished merely because it transmits information issued by or about an organization [including, one may read, a foreign state or organization: see below] that a government has declared threatens national security or a related interest.

(Johannesburg Principles, Principle 8)

And that:

[The common principles underpinning freedom of expression, and the above principle] apply regardless of frontiers so as to limit restrictions not only within a jurisdiction but also those which affect media outlets and other communications systems operating from outside of the jurisdiction of a State as well as those reaching populations in States other than the State of origin.

(Joint Statement on Disinformation, General Principle 1(c))

Conclusion

The EU ban on Russian media outlets, and the Court of Justice judgment in *RT France v. Council* are wrong. The bans violate freedom of expression in that they:

- (i) are not “necessary” or “proportionate” to the aim of countering alleged Russian propaganda:
 - (a) because, as the EFJ stressed, “[t]he real antidote to disinformation is not the banning of the media, but the promotion of a vibrant, pluralistic, professional, ethical and viable media ecosystem, totally independent of those in power”; and this is especially the case in Europe which, as the UN Special Rapporteur noted, is “a region where independent media and fact-checkers are able to challenge disinformation and where other less drastic measures could have been considered”; and
 - (b) because the ban not only censors alleged propaganda for war or aggression and alleged “disinformation” (which is difficult enough to define), but also speech and information that does not constitute hate speech or propaganda for war and that is protected by the right to freedom of information;

and, especially because:

- (ii) the ban and the associated mandatory criminal offences for “circumventing” them pose a real risk of individuals in the EU being prosecuted on the serious charge of “sanction breaking” that carries a custodial sentence for merely re-disseminating materials – including innocuous, non-hate- or war-mongering materials – from the banned media outlets.

The EU Court of Justice cursorily dismissed point (i)(a) and failed to address points (i)(b) and (ii) altogether.

The bans, and the judgment, send a disastrous signal to the rest of the world that in the new Information Cold War (seriously over-)broad censorship can again take place.

If prosecutions of the kind described at (ii) were to occur, one can only hope that the Member States’ courts were to reject them as in violation of the European Convention on Human Rights and the EU Charter of Fundamental Rights (in spite of the *RT France* judgment). If such prosecutions were to nevertheless be pursued, we may only hope that such national courts would put the (not yet addressed) issue to the EU Court of Justice, and that the Luxembourg Court would then rectify its dereliction of duty in its *RT France* judgment. Otherwise, ultimately (after the usual many years’ delays), the rectification would have to be done by the European Court of Human Rights in Strasbourg.

This is a deplorable state of affairs.

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Douwe Korff (Prof.)
Cambridge (UK), July 2024

NOTES:

¹ Ella Startt, *Disinformation, Misinformation Labelling, and the War in Ukraine: A New Information Cold War*, Oxford Political Review, 24 March 2024, emphasis added, available at:

<https://oxfordpoliticalreview.com/2024/03/24/disinformation-misinformation-labelling-and-the-war-in-ukraine-a-new-information-cold-war/>

² As neatly explained by the BBC:

“**Misinformation** is fake news that is created and spread by a MIStake – by someone who doesn’t realise that it’s false. On the other hand, **disinformation** is fake news that is created and spread deliberately – by someone who knows full well that it’s false.” See:

<https://www.bbc.co.uk/bitesize/articles/z3hhvj6>

As explained elsewhere:

“Compared to misinformation, disinformation is a relatively new word, first recorded in 1965–70. It’s a translation of the Russian word *dezinformatsiya*, in turn based on the French *désinformer* (‘to misinform’).” See:

<https://www.dictionary.com/e/misinformation-vs-disinformation-get-informed-on-the-difference/>

In fact, the Russian term goes back at least as far as 1923, “when Soviet Russia created a specialised disinformation office for the ‘disseminat[ion of] false information with the intention to deceive public opinion’.” See Ella Startt (previous note). Others trace the term back even further, to 1901 or even the 1880s, see:

<https://blogs.lse.ac.uk/mediase/2021/10/08/performing-disinformation-a-muddled-history-and-its-consequences/>

For an in-depth discussion of the phenomena, see the 2021 Report of the Special Rapporteur on freedom of expression, Irene Khan, to the UN Human Rights Council on Disinformation and freedom of opinion and expression, A/HRC/47/25, 13 April 2021, Part II, *Conceptual and contextual challenges*, available at:

<https://documents.un.org/doc/undoc/gen/g21/085/64/pdf/g2108564.pdf?token=A9L7PbyKi0uT1Ucu26&fe=true>

See also this Council of Europe site:

<https://www.coe.int/web/campaign-free-to-speak-safe-to-learn/dealing-with-propaganda-misinformation-and-fake-news> (which adds “**malinformation**”, defined as “true information shared intentionally to cause harm”, and adds further useful links).

³ See: Council Regulation (EU) 2022/350 of 1 March 2022 amending Regulation (EU) No 833/2014 concerning restrictive measures in view of Russia’s actions destabilising the situation in Ukraine, OJ L 65/1 of 2 March 2024, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2022:065:FULL&from=EN>

Press release:

<https://www.consilium.europa.eu/en/policies/sanctions-against-russia/sanctions-against-russia-explained/#media>

Actual

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2022:065:FULL&from=EN>

⁴ *Idem*, original emphasis in bold. The reporting on the ban focussed on four main outlets (Voice of Europe, RIA Novosti news agency and Izvestia and Rossiyskaya Gazeta). See:

<https://www.reuters.com/world/europe/eu-bans-distribution-four-russian-news-outlets-2024-05-17/>

However, the Consilium (EU Council) website linked to above lists 18 outlets.

Moscow – which of course has a much longer repressive history of banning media outlets – retaliated by blocking 81 European publications. See: “*Russia blocks dozens of independent media outlets*”, BBC, 25 June 2024, available at:

<https://www.bbc.co.uk/news/articles/c1vvdry5gx7o>

⁵ *Idem*. To date, the ban does not appear to be very effective. A simple search on several search engines for “RT France” led directly to this site: <https://francais.rt.com/>

⁶ Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673, were published in the Official Journal on 29 April 2024, see:

<http://data.europa.eu/eli/dir/2024/1226/oj>

See in particular Article 5, *Penalties for natural persons*.

They came into force on the twentieth day following publication. Member states have 12 months to incorporate the provisions of the directive into their national legislation.

⁷ See:

<https://www.consilium.europa.eu/en/press/press-releases/2024/04/12/council-gives-final-approval-to-introduce-criminal-offences-and-penalties-for-eu-sanctions-violation/>

⁸ See note 5, above.

⁹ Colombia Global Freedom of Expression, *EU silences Russian state media: a step in the wrong direction*, 9 May 2022, available at:

<https://globalfreedomofexpression.columbia.edu/publications/eu-silences-russian-state-media-a-step-in-the-wrong-direction/>

¹⁰ The link provided in the CGFE blog (previous note) does not lead to the document itself. However, the accuracy of the quote is confirmed in the German telecom regulator, *Bundesnetzagentur*,’s explanation of the sanctions (at point 5):

“Media have the freedom to report objectively on current events and to form their opinions thereon, and users have the right to receive objective information on current events. In particular, where a media outlet other than Russia Today and Sputnik reports about the current Regulation and its consequences, it may inter alia provide the content and in that regard it may refer to pieces of news by Russia Today and Sputnik, in order to illustrate the type of information given by the two Russian media outlets concerned with a view to informing their readers/viewers objectively and completely.

At the same time, freedom of speech can be restricted for legitimate public interests in a proportionate manner. Freedom of speech cannot be relied on by other media outlets to circumvent the Regulation. The non-circumvention equally applies to journalists. Therefore, if another media outlet or journalist purports to inform its readers/viewers, but in reality its conduct aims at broadcasting Russia Today or Sputnik content to the public or has that effect, it will be in breach of the prohibition laid down in the Regulation.” See:

https://www.bundesnetzagentur.de/DE/Fachthemen/Digitalisierung/Internet/Netzneutralitaet/DNSSperren/EU-FAQ-SANKTIONEN.pdf?__blob=publicationFile&v=2

¹¹ CJEU [GC] judgment in Case T-125/22, *RT France v. Council*, 27 July 2022, ECLI:EU:T:2022:483, available at:

<https://curia.europa.eu/juris/recherche.jsf?language=en>

On 27 September 2022, RT France lodged an appeal against this judgment, but then, on 6 June 2023, withdrew it, see:

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=276144&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=2411235>

¹² Another issue was whether the Council had competence to impose the bans, but I will not deal with that in this blog.

¹³ Note that in spite of the fact that the third sentence of Article 10(1) ECHR stipulates that *“This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises”*, *“It is now settled [in the case-law] that measures based on [this] third sentence of the first paragraph [of Article 10], including measures dealing with unlicensed operators, must be examined on the basis of the [general] standards [relating to restrictions] developed under Article 10(2).”* Harris, O’Boyle & Warbrick, *Law of the European Convention on Human Rights*, 4th edition, p. 624, with reference to the ECtHR *Groppera* judgment, para. 6, and other cases.

¹⁴ See note 5, above.

¹⁵ On the serious difficulties in the drafting of any special criminal offences relating to “propaganda” and “disinformation”, see also the European Parliament’s LIBE Committee study, *Disinformation and propaganda – impact on the functioning of the rule of law in the EU and its Member States*, 2019, section 6.7, *Criminal rule to prohibit ‘aggressive informational practices’* (with further consideration with reference to the ECtHR case-law in section 3.2), available at:

[https://www.europarl.europa.eu/RegData/etudes/STUD/2019/608864/IPOL_STU\(2019\)608864_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/608864/IPOL_STU(2019)608864_EN.pdf)

Suffice it to note that the charges against Aivo Peterson are clearly not compatible with the standards for possible criminal legislation against “propaganda” and “disinformation”, proposed in this study.

¹⁶ See Benjamin Abelow, *How the West brought war to Ukraine*, Siland Press (USA), 2022, which is freely available also in Europe and indeed praised by Noam Chomsky and Jack F. Matlock, former US Ambassador to the Soviet Union and others.

¹⁷ 2022 *Report of the Special Rapporteur on freedom of expression*, Irene Khan, to the UN Human Rights Council, on *Disinformation and freedom of opinion and expression during armed conflicts*, A/77/288, 12 August 2022, para. 64, emphasis added, available at:

<https://documents.un.org/doc/undoc/gen/n22/459/30/pdf/n2245930.pdf?token=Oh0OUJNvfnWApwBSgx&fe=true>
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¹⁸ 2022 Report of the Special Rapporteur, Irene Khan, to the UN Human Rights Council on Reinforcing media freedom and the safety of journalists in the digital age, A/HRC/50/29, 20 April 2022, para. 62, emphases added, available at:

<https://documents.un.org/doc/undoc/gen/g22/323/44/pdf/g2232344.pdf?token=k2Tc3VP9m2P8xxxyrB&fe=true>

¹⁹ Footnote 93.

²⁰ IPI: Statement on banning of RT and Sputnik, EU bans Russian state media from operating within the bloc, 4 March 2022, available at:

<https://ipi.media/ipi-statement-on-banning-of-rtand-sputnik/>

²¹ EFJ, *Fighting disinformation with censorship is a mistake*, 1 March 2022, available at:

<https://europeanjournalists.org/blog/2022/03/01/fighting-disinformation-with-censorship-is-a-mistake/>

In this statement, the EFJ also expressed concern about the legality of the EU ban, which it felt was outside the competence of the Union. However, in its judgment on the ban, discussed at (c), below, the EU Court of Justice rejected that argument – as well as the substantive argument relating to freedom of expression.

²² Available at: <https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf>

²³ Available at:

<https://www.osce.org/files/f/documents/6/8/302796.pdf>

<https://www.ohchr.org/en/press-releases/2017/03/freedom-expression-monitors-issue-joint-declaration-fake-news-disinformation?LangID=E&NewsID=21287> (click on link)

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