

EU silences Russian state media: a step in the wrong direction

Dirk Voorhoof, Human Rights Centre Ghent University and Legal Human Academy

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Columbia University Global Freedom of Expression / Publications, 9 May 2022,

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Shortly after the Russian military invasion of Ukraine on 24 February, the European Union announced a series of sanctions to hit the Putin regime. One of these measures is the blocking in the EU of the Russian state media RT (Russia Today) and Sputnik ([link](#)). Also the transmission or facilitation of the programmes or content of RT and Sputnik is banned, while the ban also affects journalistic reporting by European media outlets. The European Federation of Journalists (EFJ) strongly opposed the measure. 'Combating disinformation with censorship is a mistake' the EFJ protested ([link](#)). Also a few legal scholars and blogs criticised the EU sanctions against Russia media ([link](#), [link](#) and [link](#)). More critical voices opposed the EU ban on Russian media when the EU announced on the 4th of May ([link](#)), the day after World Press Freedom Day, that it would extend the ban on three other state-controlled Russian media outlets. This blog highlights and further develops some of the main points of criticism on the EU-ban we formulated earlier in an article in *De Juristenkrant*, a bi-weekly legal journal in Flanders, Belgium (Dirk Voorhoof, 'EU legt Russia Today en Sputnik het zwijgen op: twee maten en twee gewichten', *De Juristenkrant* 2022/448, 16-17). The criticism focusses on the problematic relation between the EU-ban on Russian state media and the right to freedom of expression and media freedom as protected under Article 10 ECHR and Article 11 of the EU Charter on Fundamental Rights.

First there was the EU's robust press statement on 27 February promising a measure that had never been taken before. European Commission President Ursula Von der Leyen then announced: '*We will ban in the EU the Kremlin's media machine. The state-owned Russia Today and Sputnik, as well as their subsidiaries will no longer be able to spread their lies to justify Putin's war and to sow division in our Union. So we are developing tools to ban their toxic and harmful disinformation in Europe.*' Shortly thereafter came Council Decision (CFSP) 2022/351 amending Decision 2014/512/CFSP and Council Regulation (EU) 2022/350 amending Regulation (EU) 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine ([link](#)). The Decision and Regulation of 1 March 2022 prohibited operators from broadcasting the content of RT and Sputnik or to enable, facilitate or otherwise contribute to broadcast their content, including through transmission or distribution by any means such as cable, satellite, IP-TV, internet service providers, internet video-sharing platforms or applications, whether new or pre-installed. It was also decided to suspend the broadcasting licences or permits and the transmission and distribution arrangements

with RT and Sputnik. It was specified that Sputnik, RT UK/English, RT France, RT Germany and RT Spain were targeted ([link](#)).

The justification given was that the restrictive measures were introduced 'to urgently suspend the broadcasting activities of such media outlets in the Union, or directed at the Union. These 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'. The measure was also motivated by a reference to Russia's international media manipulation as part of a strategy to destabilise the EU and its Member States. Specific reference was made to the aggression against Ukraine and the fact that Russia sought to justify and support that aggression by engaging 'in continuous and concerted propaganda actions targeted at civil society in the Union and neighboring countries, gravely distorting and manipulating facts'. It was clarified that this propaganda is spread through a number of media outlets that are under 'the permanent direct or indirect control of the leadership of the Russian Federation. Such actions constitute a significant and direct threat to the Union's public order and security' ([link](#)). Already the next day, the EU-ban was welcomed and supported by ERGA, the European Regulators Group of Audiovisual Media Services. In its press release of 2 March 2022 commenting the EU-ban on RT and Sputnik, ERGA made clear that it stood 'united' and that it was 'committed to contribute to the swift and effective implementation of the measures by all stakeholders' ([link](#)). A report of the European Audiovisual Observatory 'The implementation of EU sanctions against RT and Sputnik', published in March 2022, explained and contextualised the EU-ban, describing, but not critically assessing the legal and institutional framework of the EU sanctions, and without taking a position on the appropriateness of the ban on RT and Sputnik ([link](#)). EU's top diplomat Josep Borrell brushed off critics who argued that the EU is threatening freedom of information with the ban on RT and Sputnik ([link](#)).

Russian propaganda

The EU action is considered to be in line with Article 3(5) and (6) of the Treaty on European Union (TEU), which states, inter alia, that in its relations with the wider world, the Union shall uphold its values and interests, and that the EU shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, and the protection of human rights. The EU shall also contribute to the strict observance and the development of international law, including respect for the principles of the United Nations Charter. The EU pursues these objectives 'by appropriate means', commensurate with the competences which are conferred upon it in the EU Treaties. The Decision of 1 March 2022 has its basis in Article 29 TEU, more specifically in Chapter 2 on the EU's common foreign and security policy. That article gives the Council the power to adopt a decision defining the approach of the Union to a particular matter of a geographical or thematic nature and expects Member States to ensure that their national policies conform to the positions of the Union. As soon as a Council decision in application of this Article provides for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, the Council, acting by a qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission, shall adopt the necessary measures in application of Article 215 of the Treaty on the Functioning of the EU (TFEU) ([link](#)). The European Parliament is informed, but is not involved, in the promulgation of these measures. These measures are laid down in a Regulation and may be directed against natural or legal persons, groups or non-State entities. With regard to the competence of the European Union to take such restrictive measures, the Regulation explains that they 'fall within the scope of the

Treaty and, therefore, in particular with a view to ensuring their uniform application in all Member States, regulatory action at the level of the Union is necessary’.

Since the 2014 Russian occupation of Crimea in Ukraine, a long series of sanctions have been imposed interrupting or reducing economic and financial relations with Russia. One of these measures was directed against Dmitrii Konstantinovich Kiselev as head of the Russian news agency Rossiya Segodnya (RS). The EU motivated the sanction against Kiselev because he played a central role in '*the government propaganda supporting the deployment of Russian forces in Ukraine*'. Kiselev protested against this sanction because, in his opinion, it was an unjustified interference with his freedom of expression as protected by Article 11 of the EU Charter of Fundamental Rights and Article 10 of the ECHR. The General Court of the EU rejected his application for annulment and held that the sanctions against Kiselev constituted a legal, necessary and proportionate restriction of his freedom of expression. The Court also considered that these sanctions did not impair the essence of his freedom of expression, as they were restricted to prevent his entry into, or transit through the EU and froze all of his funds and economic resources in the EU. The General Court emphasized that the EU sanctions could not only target the persons responsible for the actions and the policy of the Russian Government, but could also be directed against the persons who support those actions or policies. The Court also found that the specific measures against Kiselev did not dissuade Russian journalists from freely expressing their views on political issues of public interest, such as the actions and policies of the Russian Government destabilising Ukraine. The measure was only targeting Kiselev as the Head of RS engaging in propaganda in support of the actions and policies of the Russian government destabilising Ukraine by using the means and power available to him as Head of RS, a position which he obtained by virtue of a decree of President Putin himself. Other journalists who wish to express their views, even views that may shock, offend or disturb on issues that fall within the realm of political discourse and are of public interest, such as the actions or policies of the Russian Government destabilising Ukraine, were not in a situation comparable to that of the Kiselev, the Court reasoned. The Court was also of the opinion that there was no need to examine the other evidence on which the Council relied showing that Kiselev incited violence or engaged in hate speech (General Court EU 15 June 2017, T262/15 ([link](#))).

With the ban on RT and Sputnik, the EU went obviously a big step further and it took a measure not against an individual who helps shape the Putin regime's state propaganda, but against some news media that support the policies or actions of the Russian government. The EU ban limited the right to freedom of expression 'regardless of frontiers' of RT and Sputnik in all EU countries, and at the same time drastically curtailed the public's right to receive their programmes. As far as the first aspect is concerned, it can be argued that RT and Sputnik are under the direct control of the Russian government. This means that RT and Sputnik, as state broadcasters, without sufficient editorial autonomy and without journalistic independence, cannot claim the protection of the right to freedom of expression according to the case law of the ECtHR (ECtHR *Radio France a.o. v. France* (Dec.), 23 September 2003 ([link](#)) and ECtHR 7 December 2006, *Österreichischer Rundfunk v. Austria* ([link](#))). But the second aspect remains problematic: citizens in the EU, including media editors, journalists, political analysts, academics, researchers, military personnel, interested citizens and politicians can no longer have access to the content of the RT and Sputnik programmes and cannot learn about the way in which they try to mislead or manipulate public opinion. Also internet providers, social media and search engines are limited in their freedom of expression, transmission and reception, because they are no longer allowed to transmit or facilitate RT and Sputnik programmes. An explanatory document of the EU under the title 'Restrictions on Russian State-owned Media (Article 2f of Regulation 833/2014) – Frequently asked questions – As of 23 March 2022' further explains that the Regulation is also applicable on journalists when integrating in their

reporting content created by the targeted entities. The EU-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' ([link](#)). 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 on RT and Sputnik.

EU shoots itself in the foot

To be clear: the EU is not at war with Russia and Ukraine is not a Member State of the EU. There must therefore be very strong reasons for justifying the EU ban on RT and Sputnik as relevant, proportionate and necessary. After all, the measure is reminiscent of the Nazi regime's ban on receiving broadcasts from the BBC during World War II, or the jamming that took place during the Cold War to prevent the reception of Western radio and television broadcasters in Eastern Europe and the Soviet Union. Moreover, the EU Audiovisual Media Services Directive ([link](#)) provides for the possibility of suspending or withdrawing the licenses of audiovisual media services by means of an appropriate (and contradictory) procedure via the national media regulators, under the supervision of the European Commission, if the programmes contain (repeated) incitement to violence or hatred towards a group of people or a member of a group. On that basis, a number of media regulations had already revoked the licences of some Russian media channels, including RT ([link](#)). The British OFCOM recently did the same after an urgent procedure, also taking into account a series of breaches by RT of the British broadcasting legislation concerning the '*due impartiality and accuracy rules*'. OFCOM found in particular the volume and potentially serious nature of breaches in RT's news and current-affairs coverage of Russia's invasion of Ukraine a reason to revoke RT's licensee, ANO TV Novosti ([link](#)). In some countries, broadcasters were already prosecuted and sentenced for inciting (terrorist) violence. At the same time, the licence of these broadcasters was revoked. Such procedures based on specific legislation and conducted in accordance with the rule of law, imposed by an independent court or regulatory body, can stand the test of the fundamental right to freedom of expression, insofar as the interference pursues a legitimate aim and is necessary in a democratic society in accordance with Article 10 § 2 ECHR and Article 11 in conjunction with 52 of the EU Charter of Fundamental Rights. A television broadcaster who incites terrorist violence cannot itself claim freedom of expression in application of the so-called abuse clause of Article 17 ECHR (ECtHR 24 May 2018 (Dec.), *ROJ TV A/S v. Denmark* ([link](#))).

The fact that the EU is taking such a far-reaching measure via a Decision and a Regulation, and that political and not judicial authorities impose a ban on certain media outlets, on the basis of rather vague and ambiguous grounds, is unprecedented. Especially the justification that it concerns media channels that carry out propaganda against the EU and its member states, that RT and Sputnik in their reporting on Ukraine '*seriously distort and manipulate*' the facts, or that it concerns '*toxic and harmful disinformation*', are not sufficiently pertinent arguments to silence these media. This is also the viewpoint of the European Federation of Journalists (EFJ), which immediately criticised the EU decision of 1 March. According to the EFJ, regulation of the media is a competence of the member states and it is not up to the (government of the) EU to grant or revoke authorisations or licenses.

The decision of the EU is therefore a radical break with democratic and constitutional principles: '*For the first time in modern history, Western European governments are banning media*'. The EFJ does not believe that banning RT and Sputnik is the best way to combat disinformation or propaganda, but that it is up to the media and journalism in the EU itself to expose the misreporting and manipulation of these broadcasters and to thoroughly inform the citizens of the EU about the Russian invasion of Ukraine. According to the EFJ 'it is always better to counteract the disinformation of propagandist or allegedly propagandist media by exposing their factual errors or bad journalism, by demonstrating their lack of financial or operational independence, by highlighting their loyalty to government interests and their disregard for the public interest' ([link](#)). By banning RT and Sputnik the EU is shooting itself in the foot, because it is setting aside the basic principles that the EU upholds. After all, Article 11 (2) of the EU Charter of Fundamental Rights states: 'The freedom and pluralism of the media shall be respected'. Over and above the EU ban can be qualified as 'an acute informational paternalism', as the EU has decided that a large section of the world's population should not be able to see for themselves what Putin's propaganda machine is pumping out, for fear that, in their ignorance, they may regard that propaganda as the truth. Aren't EU citizens not in a position to analyse that propaganda critically, having access to a wide array of (online) media and different channels of journalistic reporting? As Anya Proops wrote in her blog on 17 March 2022 such paternalism seems 'to be very much at odds with Western liberal values, and the long-standing tradition of cherishing the free expression doctrine, no matter the circumstances' ([link](#)).

Public order and security in the EU

The EU's argument that RT and Sputnik constitute a 'significant and direct threat' to the public order and security of the Union may justify government interference in application of Article 10 § 2 of the ECHR and Article 11 in conjunction with Article 52 of the EU Charter of Fundamental Rights. But the legal basis is vague and due to a lack of procedural safeguards it creates a real risk of arbitrary application. Furthermore the justification on the basis of public order and security is not pertinently convincing, given the limited distribution and impact of the RT and Sputnik broadcasts in most EU countries. There are no indications that RT and Sputnik's programmes actually constitute a serious and immediate threat to public order and security to justify a ban in all EU Member States. It has also been argued that the EU can draw an argument and justification for the sanctions against RT and Sputnik from the obligation arising from Article 20 of the UN International Covenant on Political and Civil Rights (ICCPR) that forbids war propaganda ([link](#)). But the concept of war propaganda is a particularly vague one and also quickly threatens to lead to arbitrary applications, certainly if it is interpreted by political authorities. For this reason, for example, CNN could have been banned in the EU as a result of the war reports on Iraq. Moreover, the ban on RT and Sputnik will only be lifted if these media channels stop their propaganda against the EU and its Member States. How and by whom this will be determined is also a particularly thorny issue. It also implies that the EU ban on RT and Sputnik is not only a sanction for the Russian invasion of Ukraine, but also a reaction to Russian anti-EU propaganda and disinformation by Russian state media about the EU and its member states.

Arbitrary and disproportionate

The EU ban on RT and Sputnik seems to have been taken more or less hastily and shows characteristics of an arbitrary and particularly disproportionate interference by the EU with the right to freedom of expression and information 'regardless of frontiers' as protected by Article 10 ECHR and as a denial of the freedom of the media as guaranteed by Article 11 of the EU Charter of Fundamental Rights. The ECtHR has already ruled that the total prohibition or blocking of news media, websites or internet platforms on account of certain (journalistic) content is soon in violation of Article 10 ECHR (ECtHR 18 December 2012, *Ahmet Yildirim v. Turkey* ([link](#)); ECtHR 1 December

2015, *Cengiz and Others v. Turkey* ([link](#)); and ECtHR 23 June 2020, *OOO Flavus and Others v. Russia* ([link](#)). The ECHR also refers in its case law to the principle '*that targeting online media or websites with blocking measures because they are critical of the government or political system can never be considered a necessary restriction on freedom of expression*'.

In the announcement of a sixth package of sanctions against Russia, Von der Leyen however repeated that those alleged to be spreading disinformation about the war in Ukraine would be targeted. 'We are banning three big Russian state-owned broadcasters from our airwaves. They will not be allowed to distribute their content anymore in the EU, in whatever shape or form, be it on cable, via satellite, on the internet or via smartphone apps,' she said ([link](#)). Von der Leyen branded the television channels 'as mouthpieces that amplify Putin's lies and propaganda aggressively. We should not give them a stage anymore to spread these lies' (see also [link](#)). On the day of the publication of this blog the sixth package of EU sanctions against Russia was not approved yet by all member states, while it was reported that anyway the existing ban against RT and Sputnik would be extended to also include RTR Planeta, Rossiya 24 and TV Centre ([link](#)).

By adding in the sixth package of EU sanctions against Russia the ban on three more Russian media outlets, the EU persists in a too superficial approach of the issue, creating a much too wide justification for banning media outlets and opening the gate for more arbitrary applications of this kind, without sufficient procedural safeguards. The EU also totally neglects the criticism that fighting disinformation with censorship is a mistake. Indeed, 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', as earlier stated by the EFJ. According to Aidan White (Ethical Journalism Network) 'banning biased journalism from Russia makes no sense. It puts ethical news media and courageous reporters from around Europe at further risk and is a step towards a news blackout'.

Whether from a legal perspective the EU ban on the Russian media actually and pertinently pursues a legitimate aim (the protection of public order and safety) and is also proportionate and necessary, is ultimately up to the EU courts (Court of Justice and/or the General Court) to determine or adjudicate. In assessing the legality, proportionality and necessity of the EU-ban against the five Russian media outlets the EU General Court or the Court of Justice might take into consideration an important principle formulated in the case law of the European Court of Human Rights: 'Article 10 of the Convention as such does not prohibit discussion or dissemination of information received even if it is strongly suspected that this information might not be truthful. To suggest otherwise would deprive persons of the right to express their views and opinions about statements made in the mass media and would thus place an unreasonable restriction on the freedom of expression set forth in Article 10 of the Convention' (ECtHR *Salov v. Ukraine*, 6 September 2005 ([link](#))).

It is noteworthy that the request by RT France for suspension of the prohibition was rejected by the President of the General Court because of the non-urgent nature of this application for interim measures. RT France invoked, inter alia, the violation of Article 11 of the Charter of Fundamental Rights of the EU and the right of expression, information and media freedom guaranteed therein. However, the President of the General Court did not find that the blocking of RT France's programmes in the EU justifies an urgent assessment in interim relief proceedings and finds that the restriction of the freedom of expression and media does not cause serious and irreparable prejudice to RT France (President General Court EU 30 March 2022, T-125/22 R) ([link](#)). In a recent interim decision, the ECtHR did order the Russian government to refrain from any action or decision aimed at blocking and terminating the activities of the news platform Novaya Gazeta ([link](#)). The ECtHR held

that blocking or terminating the activities of Novaya Gazeta presented a real risk of irreparable harm to the exercise of freedom of expression by Novaya Gazeta (ECtHR 10 March 2022, *ANO RID Novaya Gazeta and Others v. Russia*) ([link](#) and [link](#)). It is a bad sign that the Luxembourg EU General Court seems to be less concerned than the Strasbourg European Court of Human Rights about the urgency of evaluating and eventually stopping the blocking of media outlets.

That the approach by the EU risks to devalue the European values of media freedom and the rule of law is also reflected in the position of Norway, as a non-EU state with a very close relationship with the EU as an EFTA/EEA-member. In a statement presented at the Norwegian Parliament on 18 March 2022, Prime Minister Jonas Gahr Støre emphasized that the threshold for restricting freedom of expression is high and he announced that the Norwegian government would conduct thorough assessments of the legal and constitutional dilemmas before reaching a conclusion whether or not to implement the EU-ban against RT and Sputnik. A few weeks later, on 26 April 2022, The Minister of Culture, Anette Trettebergstuen, communicated that Norway would not implement such sanctions in Norway: 'The threshold to restrict freedom of expression under the Constitution's Article 100 is high, and we do not currently see that a general blocking of these actors could be legitimised by the threats imposed to basic societal functions in Norway'. The firm position of the Norwegian Government in support of journalism and media freedom might also explain why Norway, again, is number 1 in the press freedom ranking 2022 of Reporters without Borders ([link](#)). The Norwegian government's decision is also in line with the recommendations made by the Norwegian Media Authority (NMA) who earlier stated: 'Russian aggression in Ukraine and the horror of war require a firm response from the EU and EFTA. The way Putin's regime exploits information is a risk for several of Russia's neighboring countries. However, freedom of expression is under the competency of the member state of the EEA. Our assessment is that Norwegian society and the public are able to resist manipulation attempts from Russian state-owned media' ([link](#)). Indeed, the EU did not leave the possibility of such a decision to each of the competent authorities of the EU-member states. By imposing a ban against some Russian media in all EU-member states, the EU Council and Commission might have opened a box of Pandora to the detriment of its own crucial values of democracy, the rule of law and media freedom.