

## FREEDOM OF SPEECH, PROPAGANDA AND EU AT WAR: CASE OF RUSSIA TODAY FRANCE

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**Abstract:** *The unprovoked Russian invasion of Ukraine in 2014 triggered the need for a European response. With unprecedented speed, the Union adopted a series of restrictive measures limiting trade with the Russian Federation, freezing the assets of individuals, and restricting their activities in the Single Market. The Union also had to address the issue of the undermining of European unity and society by Russian media houses based in Member States. Restrictions on the broadcasting of Russia Today France were subsequently challenged in the European General Court. This was the first time the Court had ruled on restrictions on the activities of an entire editorial office. The days of innocence are coming to an end and days of hard choices are becoming the norm as the Union begins to assume its geopolitical responsibilities.*

**Keywords:** *Restrictive measures; Ukraine; sanctions; freedom of expression; judicial review*

### INTRODUCTION

European integration has faced the challenge of a fragmented foreign policy among its Member States, resulting in a lack of a unified voice. As US Secretary of State Henry Kissinger once lamented, there was no single telephone number to call in Europe. Over time, European foreign policy has progressed from simple information sharing to coordination and developing a Common Foreign and Security Policy (“CFSP”).<sup>1</sup> In 1993, the European Union formally established its competence, followed by the launch of the European External Action Service in 2011 under the High Representative.<sup>2</sup> The High Representative for the Common Foreign and Security Policy heads the service and is responsible for unifying the positions of the Union’s institutions in the post-Lisbon set-up to ensure its coherence. For this reason, they serve as both a vice-president of the European Commission and permanent chair of the Foreign Affairs Council. Although the Member States have retained their own foreign policies, the need for a common approach has led to their Europeanisation.<sup>3</sup>

Russia’s invasion of Ukrainian territory is the most significant threat to peace in Europe since World War II and poses an unprecedented challenge to the European Union. A swift and united response has raised hopes that a coherent European foreign policy can counter this threat. The European Union has progressively implemented a range of restrictive measures and other instruments to address the threat to international peace.<sup>4</sup> No longer

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<sup>1</sup> WESSEL, R. A. *Lex Imperfecta: Law and Integration in European Foreign and Security Policy*. *European Papers*. 2016, Vol. 1, No. 2, pp. 439–468.

<sup>2</sup> Council Decision of 26 July 2010 no. 2010/427/EU establishing the organisation and functioning of the European External Action Service.

<sup>3</sup> WEISS, T. *Europeizace a zahraniční politika: prostor pro další výzkum*. *Central European Political Studies Review*. 2013, Vol. 15, No. 4, pp. 268–283.

<sup>4</sup> See LONARDO, L., ed. *Russia’s 2022 war against Ukraine and the foreign policy reaction of the EU: context, diplomacy, and law*. Cham: Palgrave Macmillan, 2023. LIPOVSKÝ, M. *Nový (zvláštní) mezinárodní trestní tribunál pro zločin agrese vůči Ukrajině nebo „staré“ cesty? Jurisprudence*. 2023, Vol. 31, No. 2, pp. 12–22.

focused solely on economic prosperity and growth, the Union is asserting its role in the geopolitical arena. The Donald Trump presidency has led to a shift away from the security guarantees of the US and an increased emphasis on European strategic autonomy.<sup>5</sup> However, *Luuk van Midelaar* warns that assuming the role of a geopolitical actor means making difficult choices and losing innocence,<sup>6</sup> which is why the European response to Russian aggression has also raised many legal questions. You can only make the omelettes by breaking the eggs, but it is essential to stick with the rule of law even in times of crisis. This paper will focus on the sanctions imposed on audiovisual broadcast companies controlled by the Russian Federation and following accusations of the Union of censorship.

## I. LEGAL BACKGROUND

The legal framework of the Common Foreign and Security Policy was established in 1993 by the intergovernmental pillar of the Maastricht Treaty. In 2009, however, it underwent significant changes with the Treaty of Lisbon. Like its predecessor, the European Communities, the European Union has acquired a legal personality at the international level<sup>7</sup> and has become an actor in international politics. With the abolition of the pillar structure, the Common Foreign and Security Policy (“CFSP”) has become an integral part of the normal functioning of the EU while retaining some specificities. Prior to this, European institutions were already authorised to impose restrictive measures, which necessitated a review of their legality. It is worth noting that the “Solange moment” of the European Court of Human Rights (“ECtHR”), which defined its position towards the European Union’s action, occurred during the review of the EU sanctions against Yugoslavia.<sup>8</sup> In the Kadi saga, the Court of Justice<sup>9</sup> rejected the possibility of excluding its jurisdiction and set the basic standard of review for EU sanctions, overriding the text of the Treaty.<sup>10</sup> The ECJ insisted that a community based on the rule of law (*Rechtsgemeinschaft*) cannot interfere with the rights and obligations of an individual without judicial review. The Member States have accepted this position and added an exception to the jurisdictional reservation in Article 275 TFEU to allow for the review of restrictive measures. However, the review of general acts determining the external relations of the EU is still excluded from the jurisdiction of the CJEU.

*Pavel Svoboda* identifies three basic regimes of restrictive measures: the implementation of UN Security Council sanctions under Chapter Seven of the UN Charter, the implementation of measures to achieve the objectives of UN Security Council sanctions, and autonomous sanctions of the European Union related to the implementation of its foreign policy.<sup>11</sup> The Common Foreign and Security Policy is founded on the gen-

<sup>5</sup> HOFFMEISTER, F. Strategic autonomy in the European Union’s external relations law. *Common Market Law Review*. 2023, Vol. 60, No. 3, pp. 667–700.

<sup>6</sup> VAN MIDELAAR, L. *Alarums and Excursions: Improvising Politics on the European Stage*. Agenda Pub, 2019.

<sup>7</sup> Art. 47 TEU.

<sup>8</sup> ECtHR decision *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v Ireland*, complaint no. 45036/98.

<sup>9</sup> Bellow, the following abbreviations will be used: the Court of Justice of the EU (“CJEU”) consists of two judicial bodies - the Court of Justice (“ECJ”) and the General Court (“EGC”).

<sup>10</sup> Judgment of the ECJ of 3 September 2008 in joined cases C-402/05 P and C-415/05 P *Kadi* and *Al Barakaat*.

<sup>11</sup> SVOBODA, P. Contrôle juridictionnel des sanctions internationales de l’UE devant la Cour de justice de l’UE. *Acta Universitatis Carolinae Iuridica*. 2023, Vol. 69, No. 1. pp. 19–27.

eral values of the Union, specifically Article 2 TEU and any acts adopted must align with those values, as per Article 23 TEU. The CFSP operates autonomously from other Union policies under Article 40 TEU, with a general decision first being taken under Article 29, whereby the Council defines its position on a particular issue. Member States then apply this policy both internally and externally. In order to ensure the consistent application of the European common position, the Council may adopt specific restrictive measures based on Article 215 TFEU. Measures adopted based on Article 215 TFEU are subject to full review by the CJEU. As we can see, the Council composed of national ministers holds decision-making power over both general and specific measures due to the extreme sensitivity that the CFSP still holds for the Member States. Although there is a common Union foreign policy in place, its impacts on individual Member States vary.<sup>12</sup> Member States are aware of this and weigh the benefits and costs of Europe-wide solutions. That is why the general position under Article 29 TEU requires unanimity, while the implementing act under Article 215 TFEU is adopted by the Council by a qualified majority only.

The European Union, like other international actors, is using a new generation of targeted “smart” sanctions. These target specific actors such as politicians, companies, or banks that organise, support, or finance illegal situations. These restrictive measures may include travel bans, asset freezes, or commercial activity restrictions. For instance, some Russian banks have been excluded from the SWIFT banking system. These types of sanctions are different from old-style “blunt” sanctions, which often have unintended consequences for others, including worsening the humanitarian situation of victims of conflict. According to *K. Meissner and C. Graziani*, the humanitarian aspect of the CFSP is significant and has a major influence on the design of the sanction instruments used by the EU. In some cases, the import or export of certain goods aggravating the situation is subject to sanctions. For example, restrictions on the import of arms or dual-use technologies could be considered blunt sanctions, although their humanitarian impact is minimal. Alternatively, restrictions can be applied to goods or services that finance illegal situations, which can impact ordinary people. The European Union has imposed restrictions on imports of oil, natural gas, and other natural resources from Russia as part of its measures to restrict Russian finances.

The CJEU has historically defined several aspects for reviewing CFSP acts. This specific policy area provides the Council with a wide margin of discretion.<sup>13</sup> Therefore, the CJEU limits itself to checking the due process and proportionality of restrictive measures, particularly their impact on affected individuals. In the past, the ECJ has declined to adopt sanctions imposed by the UN Security Council due to inadequate protection of individuals’ rights.<sup>14</sup> Article 47 of the Charter of Fundamental Rights of the European Union (“EU Charter”) guarantees the right to a fair trial, which raises the issue of balancing the adversarial nature of the proceedings, particularly the right to familiarise with the evidence

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<sup>12</sup> GIUMELLI, F. The Redistributive Impact of Restrictive Measures on EU Members: Winners and Losers from Imposing Sanctions on Russia. *Journal of Common Market Studies*. 2017, Vol. 55, No. 5, pp. 1062–1080.

<sup>13</sup> Judgment of the EGC of 27. July 2022 in case T-125/22 *Russia Today France*, para 52.

<sup>14</sup> Judgment *Kadi*, para 285.

which might conflict with the diplomatic or intelligence origin of the provided information. Even in such situations, the evidence must be available for inspection by the Court.<sup>15</sup> Even then, the CJEU insists on specific justifications for the listing rather than general features.

### I.1 T-124/22: Russia Today France

Although the CJEU has dealt with several actions against restrictive measures in the past, the EGC's decision in case T-125/22 is revolutionary in many respects. In February 2022, the Council responded to the disinformation campaign spread by Russian broadcast companies in Europe and banned the Russia Today group and Sputnik group from broadcasting on European territory. Based on a joint proposal by the European Commission and the High Representative, on 1 March 2022 the Council adopted Decision (CSFP) 2022/351,<sup>16</sup> which sets out the list of broadcasters covered by the ban. The ban was comprehensive in comparison with other instruments of broadcasting prohibition in European law:

*It shall be prohibited for operators to broadcast, or to enable, facilitate or otherwise contribute to broadcast, any content by the legal persons, entities or bodies listed in Annex IX, including through transmission or distribution by any means such as cable, satellite, IP-TV, internet service providers, internet video-sharing platforms or applications, whether new or pre-installed.*<sup>17</sup>

The content of the Decision was executed by legally binding Council Regulation 2022/350.<sup>18</sup> The ban was limited to the distribution of audiovisual content as well as suspension of broadcasting licenses so as not to affect the right of media houses to carry out other journalistic activities, such as interviews or research, or to broadcast to countries outside the European Union. The actions of the Common Foreign Policy thus primarily affected European companies established under the laws of the Member States, which were to be controlled by the Russian Federation, to contribute to the dissemination of the pro-Russian narrative of the conflict in Ukraine and to undermine the European response to the violation of the international peace.

Both restrictive measures were challenged before the General Court by a French member of the Russia Today group. The applicants put forward four main pleas in law. These can be divided into two categories: lack of competence and infringements of the EU Charter - the rights of defence, non-discrimination, the right to conduct a business, and the right to freedom of expression. Although the application for interim measures was rejected, the case itself was decided within record time.

<sup>15</sup> See Chapter 7 of the Rules of Procedure of the General Court, OJ L 105, 23.4.2015, pp. 1–66.

<sup>16</sup> Council Decision (CFSP) 2022/351 of 1 March 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, OJ L 65, 2.3.2022, pp. 5–7.

<sup>17</sup> *Ibidem*. Art. 2.

<sup>18</sup> 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, 2.3.2022, pp. 1–4.

## II. COUNCIL COMPETENCE

The first plea raised by the applicant was that the Council lacked the competence to regulate audiovisual broadcasting on the basis of Article 29 TEU. That provision is the legal basis for the competence to adopt common positions on matters of foreign policy. It cannot, therefore, be used to adopt specific measures concerning certain persons. However, the General Court rejected that argument on the basis of a systematic reading of Chapter 2 of the TEU as a whole since Article 29 is clearly to be read broadly in the sense that it also provides for the adoption of specific measures reflecting the Union's general foreign policy positions. This is also suggested by Article 275(2) TFEU, which provides for the review of such acts and, ergo, confirms the power to adopt them.

An even more interesting question is the relationship between Article 215 TFEU and the specific legal basis for the regulation of broadcasting under Single Market policies, such as Articles 53(1) and 62 TFEU.<sup>19</sup> Russia Today France's complaint is that the French regulatory authority has never objected to the content of the programme or its ideological balance. The ECJ has previously addressed a similar issue in *Parliament v Council* (Osama bin Ladin),<sup>20</sup> where the ECJ examined the relationship between Article 75 TFEU (AFJS), which was used as a basis for legislation aimed at combating the financing of terrorism, and Article 215 TFEU (CFSP), which was used as a basis for restrictive measures against certain entities supporting terrorism. The principle of conferral requires the Union legislator to choose the legal basis most consistent with the act's objectives and enabling a judicial review.<sup>21</sup> The Court of Justice has held that the Union's policies are not exclusive but complementary and that it is, therefore, possible to regulate a similar policy area using different legal bases.<sup>22</sup>

As far as Council Regulation (EU) 2022/350 is concerned, the aim is to force the Russian Federation to stop its military aggression in Ukraine and to limit its ability to undermine the unity of Europe through propaganda for war.<sup>23</sup> The Regulation was not intended to regulate the market for audiovisual content, which was only a secondary consequence of the implementation of the CFSP Decision. However, the primacy of the CFSP over general Single Market regulation implies an inherent complementarity. As a result, Article 215 TFEU can potentially serve as a legal basis for significant intervention in other EU policies within the limits of the CFSP. In such a case, the European Union provides a guarantee for the protection of the rights of its Member States through the unanimity requirement for the adoption of a common position on the basis of Article 29 TEU. However, there is a risk that the use of the CFSP legal basis could create an inter-institutional imbalance, in particular threatening the prerogatives of the European Parliament, which could be excluded from the decision-making process. Another risk is the unequal treatment of different

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<sup>19</sup> See 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, 15.4.2010, pp. 1–24.

<sup>20</sup> Judgment of the ECJ on 19 July 2012 in case C-130/10 *Parliament v Council*.

<sup>21</sup> For example, judgment of the ECJ on 8 September 2009 in case C 178/03 *Commission v Parliament and Council*, para 41.

<sup>22</sup> Judgment C-130/10 *Parliament v Council*, para 79.

<sup>23</sup> Recital no. 8 of the Council Decision (CFSP) 2022/351 of 1<sup>st</sup> March 2022.

broadcasters in the context of current international developments. Russia Today France has argued this point, pointing out that the French national regulator Arcom (*l'Autorité de régulation de la communication audiovisuelle et numérique*) has never found its actions to be incompatible with the Audiovisual Media Services Directive,<sup>24</sup> so it is only the identity of its shareholders that is behind the ban. Any other hypothetical French media house without Russian financial involvement would be able to continue the same activities.

### III. TRADITIONAL PLEAS – THE RIGHT TO CONDUCT A BUSINESS AND THE FAIR TRIAL

The right to conduct a business is a more than expected plea in the context of the review of restrictive measures, as most restrictions are aimed at freezing funds and property and prohibiting the pursuit of business activities. The EGC recalled, in line with established case law, that the right to conduct a business is not an absolute right and may be restricted if the restriction pursues an objective of general interest and is proportionate.<sup>25</sup> Moreover, the restrictive measure must be laid down by law, in accordance with Article 52(1) of the EU Charter, in order to respect the principle of legality. In this particular case, the Court found that also the restrictions are not absolute - Russia Today France can still carry out its journalistic activities outside the EU and to a limited extent within the EU.<sup>26</sup> Moreover, the restrictions are time-limited, and their necessity is constantly reviewed. In addition, the EGC found that the applicant had not provided any evidence to support the argument that the ban on broadcasting would have a liquidating effect on the broadcaster. In particular, the Court noted that the company is financed by the Russian state budget, which allows the remaining activities to continue.

The right of defence, in particular the right to be heard, is also a traditional plea for which there are also several pre-decisions. The main issues that the CJEU has to deal with is the inability of the person concerned to participate in the decision-making sanction process in advance and to attempt to defend themselves before the sanctions are imposed. Restrictive measures are therefore imposed on their addressees without prior notice. Moreover, justifications can only be indicative without individualising specific persons, so in this case, the French company argued that the decisive element for its inclusion in the sanctions list was not its individual conduct but its mere affiliation to the Russia Today group. According to RTF, it was placed on the sanctions list only on the basis of general characteristics common to all members of the consortium.<sup>27</sup> There was no published evidence of specific and individual violations caused by RTF, on which it was not even given the opportunity to comment. On the other hand, a participatory approach would have limited the effectiveness of the sanctions, as it would have delayed the whole procedure. The mere notification of an intention to restrict the rights of a particular person would have created the risk of mitigating restrictive measures, such as the transfer of the sanc-

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<sup>24</sup> Judgment T-125/22 RTF, para 123.

<sup>25</sup> Judgment of the ECJ on 6 March 2001 in case C-274/99 P *Connolly*, para 40.

<sup>26</sup> Judgment T-125/22 RTF, para 157.

<sup>27</sup> *Ibidem*, paras 172-173.

tioned assets.<sup>28</sup> It is settled case law that the right to a prior hearing does not apply in the case of CFSP restrictive measures,<sup>29</sup> and the judicial review is invoked only retrospectively and only on motion. Although such a procedure is logical, in the present case, it results in the specific reasons for the restriction of RTF's broadcasting being set out ex-post only in the Council's reply to the pleas in law.<sup>30</sup> The company also pointed out that the sanctions had a negative effect on its reputation, leading to secondary restrictions on its enterprise, for example, in the form of denial of access to press conferences and other factual restrictions formally unaffected by the Council acts.<sup>31</sup>

#### IV. INTERFERENCE WITH THE RIGHT TO IMPART AND RECEIVE INFORMATION

Freedom of expression is a fundamental right guaranteed by Article 11 of the EU Charter and is the precondition for the functioning of a democratic society.<sup>32</sup> Although the Council has in the past adopted some restrictive measures in relation to the dissemination of information by so-called journalists,<sup>33</sup> this case is unique in that it is the first time that the ECJ has examined restrictions imposed on an entire media house in order not to punish but to prevent media activities. A group of editorial offices was prevented by an EU law from disseminating its own version of wartime events because it was deemed by the Council to be war propaganda. Such a measure inherently bears the hallmarks of censorship and could potentially have a significant self-censoring chilling effect throughout the whole media market.

The EGC accepted the applicant's argument that Article 11 of the EU Charter applied to the exercise of its activities, recalling that this provision corresponds to Article 10 of the European Convention on Human Rights (hereafter "ECHR"),<sup>34</sup> as indicated by references in the case law of the ECtHR. It is clear from the provision itself and from the case law of both the CJEU and the ECtHR that freedom of expression is an essential right for the functioning of a pluralistic society. For this reason, the provision also protects critical, scandalous, and possibly even defamatory speech. However, the protection afforded to such speech may be reduced and may need to be weighed against other rights. At the same time, freedom of expression is not an absolute right, and restrictions are subject to the rules set out in Article 52(1) of the EU Charter. Such a restriction must be provided for by law, the restriction must protect a general interest or an individual right, it must be proportionate to the interest protected, and it must respect the essence of freedom of expression. These four conditions are cumulative.

A restriction on freedom of expression imposed by a legislative act sets out specific characteristics that such a restriction must fulfil. The legislation must have a legal basis in EU

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<sup>28</sup> Judgment of the ECJ on 11 October 2007 in case C-117/06 *Möllendorf and Möllendorf – Niehuus*, para 63.

<sup>29</sup> Judgment C-402/05 P and C-415/05 P *Kadi*, para 338.

<sup>30</sup> Judgement T-125/22 *RTF*, para 125.

<sup>31</sup> *Ibidem*, para 127.

<sup>32</sup> ECtHR decision *Handyside v United Kingdom*, complaint no. 5493/72, para 49.

<sup>33</sup> Judgment of the EGC of 15 June 2017 in case T-262/15 *Kiselev*.

<sup>34</sup> Judgment of the ECJ of 26. April 2022 in case C-401/19 *Poland v Parliament and Council*, para 44.

law, i.e., the power to impose such a restriction. This requirement is based on the general rule of legality, which is reinforced in Union law by the principle of conferred powers, i.e., that the Union institutions can only exercise such powers in such a way and to such an extent as the Member States have conferred on the Union. At the same time, such an act must be formally published and sufficiently comprehensible to enable individuals to familiarise themselves with the norm and adapt their behaviour. For the individual who is the target of such restrictions, this implies the prior possibility of learning the procedure and the rules under which they can defend themselves against the sanction. In the present case, the EGC finds that Article 29 TEU, read in conjunction with Article 215 TFEU, provides a sufficiently clear legal basis for the Council to adopt such a restrictive measure. Although the Council has wide discretion as to whom it restricts, to what extent and on what grounds, its procedure is governed by primary law. As a result, the CJEU is limited to a review of the proportionality and legality of the procedure, since the Council's broad discretion prevents the Court from assessing the evidence itself. According to the EGC, the fact that sanctions have not been applied to a broadcaster in the past does not violate the requirement of foreseeability because there has already been a restriction for broadcasting war propaganda, so that this paradigm shift falls within the scope of the Council's discretion. It should be noted that in the *Kiselev* case, to which the EGC refers, sanctions were indeed imposed for the dissemination of pro-Russian disinformation, but these were ex-post in nature, whereas the RTF restrictions were partly prospective for the future.

The general interest protected by the restrictive measures is based on the general principles of the CFSP as formulated in Article 21(1) TEU and, indirectly, in Article 2 TEU. The obligation to protect the principles contained in the UN Charter includes, *inter alia*, respect for the territorial integrity of states - in this case, Ukraine. Condemnation of the violation of Ukrainian sovereignty is then a reason of general interest that can justify restrictive measures against individuals whose statements support or advocate such aggression. This is further supported by the fact that the UN General Assembly has found that the Russian Federation has violated Article 2 of the UN Charter.<sup>35</sup> Therefore, the restriction of the enterprises controlled by the Russian Federation is aimed at putting an end to such violations of international law, which is an obligation of Member States arising not only from primary law but also from *ius cogens* of public international law. By restricting the activities of RTF, the Council is protecting public order since war propaganda is aimed at undermining the foundations of democratic society, disrupting public debate, and creating internal conflicts.

Any limitation of rights must be restricted to protect the substance of the right concerned. The EGC was satisfied with the Council's arguments that the restrictions still allowed some journalistic work to be carried out, that the restriction was temporary, and that the necessity of its duration would be kept under review. Although a television channel can no longer publish audiovisual content in the European Union, its journalists can continue to conduct interviews and surveys. In addition, the broadcaster may continue to broadcast to francophone markets outside the European Union. Due to the particularly

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<sup>35</sup> United Nation General Assembly Resolution from 18 March 2022, no. A/RES/ES-11/1 "Aggression against Ukraine", para 2.



effective form of communication by audiovisual content, the prohibition applies to audiovisual broadcasting only and not to written text.<sup>36</sup> The time limitation of the restrictive measures is also interesting. The restrictions will cease to apply either on 31 July 2022 or on the date on which it is established that Russia has ended its aggression against Ukraine and Russian propaganda in the European Union has ceased. While the first condition is relatively easy to verify, the second depends on the specific definition of propaganda. While we can rely on US Supreme Court Justice Stevens' formula "I know it when I see it",<sup>37</sup> the acts carrying out restrictive measures need a specific definition. At the same time, it raises the question of who should stop the spreading of Russian propaganda – the RTF is likely to find it challenging to cease anything, given the restrictions on its activities. If the restriction refers to the Russian Federation as a whole, to entities subordinate or controlled by it, and to entities that disseminate the Russian narrative without direct control by the Kremlin, then such a condition is impossible to meet. Moreover, the rights of a specific person are restricted without that person being able to influence the fulfilment of the conditions. It follows that the Council's argument of limited temporality is rather formalistic. Perhaps that is why the EGC reads the conditions as an alternative while the Council understands them as cumulative.<sup>38</sup>

The restrictive measure must be proportionate to the interests protected. In particular, the least burdensome measure capable of effectively achieving the objective of the restrictions must be chosen. There are two related issues here - control by the Russian state and participation in Russian propaganda activities. In relation to the first issue, the Council has provided evidence that the sole owner of RTF is TV Novosti, which is fully financed by the Russian state budget. At the same time, the editor-in-chief of the RT group repeatedly referred to the members of the group as "our" TV channels,<sup>39</sup> which serve to promote the Russian narrative. Internally, members of the RT group shared programmes and documentaries with each other, and TV Novosti bought television programmes for the group. This cooperation within the group and with the parent company went so far that RTF admitted in the proceedings that it automatically obtained programmes from TV Novosti without the channel being interested in them.<sup>40</sup> The EGC thus accepted that RTF was not an independent entity within the group. Moreover, RTF was unable to produce any documents or internal guidelines to demonstrate its editorial independence from the RT group or Russian state media.<sup>41</sup>

However, being entity controlled by the state outside the EU poses no immediate threat to European public order. Only the accusation that RTF spreads Russian war propaganda

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<sup>36</sup> Judgment T-125/22 *RTF*, para 138.

<sup>37</sup> Supreme Court of the United States' decision of 22. June 1964 in case *Jacobellis v Ohio*, 378 U.S. 184, p. 378.

<sup>38</sup> BAADE, B. EU Sanctions Against Propaganda for War – Reflections on the General Court's Judgment in Case T-125/22 (*RT France*). *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*. 2023, Vol. 83, No. 2, pp. 257–282.

<sup>39</sup> Judgment T-125/22 *RTF*, para 172.

<sup>40</sup> BRUNO, W. Analysis: "EU judges look into restrictive measures against Russian media – Four critical questions from the hearing in *Russia Today France v Council* (T-125/22)" by Walter Bruno. In: *EU Law Live* [online]. 14. 6. 2022 [2023-12-17]. Available at: <<https://eulawlive.com/analysis-eu-judges-look-into-restrictive-measures-against-russian-media-four-critical-questions-from-the-hearing-in-russia-today-france-v-council-t-125-22-by-walter-bruno/>>.

<sup>41</sup> Judgment T-125/22 *RTF*, para 173.

makes it a legitimate target for EU sanctions. In this case, the Council has provided a number of examples where RTF broadcasts have included fabricated accusations of genocide in Ukraine, the justification for the Russian army's protection of separatist republics and the occupation of Ukraine by the United States.<sup>42</sup> After the Russian invasion of Ukraine began in February 2022, RTF adopted the terminology of the Russian Ministry of Defence and reported the events as a preventive or defensive special or police operation. RTF's broadcasts accused European society of Russophobia and aggressiveness and defended the actions of the Russian government without giving space to opposing views. The key fact is that RTF actively defended the actions of the Russian Federation, which were described by the international community as a violation of Ukraine's territorial integrity, unjustified use of force and, therefore, a violation of the principles of the UN Charter.

The intervening Member States also argued that RTF's behaviour was incompatible with the International Covenant on Civil and Political Rights. The Covenant has been signed by all Member States and, therefore, forms part of the human rights reference framework for interpreting the general principles of EU law, which include respect for human rights.<sup>43</sup> In contrast to the relative limitations on hate speech, Article 20(1) of the Covenant unconditionally prohibits war propaganda. This should not be considered as speech protected by freedom of expression under the Covenant. It can probably be agreed that advocacy of unlawful conduct, which has myriad implications for the human rights situation in Ukraine, thus falls within the gravity of Article 54 of the EU Charter, which prohibits abuse of rights. In addition, the EGC provides some of its own clarification of what it considers to be war propaganda: advocacy of the preparation or continuation of a state's war activities in violation of international law, particularly when such advocacy is carried out through a state-owned or state-controlled medium.<sup>44</sup> In contrast, given the existence of the state's right to self-determination and self-defence, the promotion of the defence of Ukraine's territorial integrity is not prohibited as propaganda, as the condition of illegality is not met. Moreover, war propaganda offers the EGC an opportunity to distinguish RTF conduct from the more general and less dangerous activity of disinformation dissemination.

## V. REFLECTION AND COMMENTS

The first comment ought to be made about the use of the legal basis of Article 29 TEU in conjunction with Article 215 TFEU. These provisions were applied correctly by the Council and in accordance with the jurisprudence of the CJEU. It is unacceptable to claim that the Council cannot impose sanctions in the context of the implementation of the CFSP. Such a view would negate the entire post-Maastricht development in CFSP policies. But the question is reversed - where does the CFSP end, and where do general Union policies such as the Single Market or the Area of Freedom, Security, and Justice begin? It may seem that

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<sup>42</sup> *Ibidem*, paras 180-185.

<sup>43</sup> Judgment of the ECJ of 14 May 1974 in case 4/73 *Nold*.

<sup>44</sup> Judgment T-125/22 *RTF*, para 210.

Article 29 TEU and Article 215 TFEU together form the master switch legal basis for almost any regulation in the Union's area of competence. The Audiovisual Media Service Directive is based on TFEU articles on freedom of establishment and free movement of services. However, its scope is limited by Article 167 TFEU, which guarantees the cultural self-determination of the Member States and constitutes an additional limit to the Union's regulatory competence. If the implementation of other Union policies is not exclusive but complementary to the CFSP, what is the relationship between the limits of the Single Market policy and the CFSP? The CFSP is usually directed externally, but the Council can also use foreign policy competencies to regulate the Union's internal affairs. The strict distinction between external and internal actions of the Union in the fight against terrorism has been rejected by the Court of Justice in the past.<sup>45</sup> Security is not external and internal either, but only one. However, CFSP might serve as a tool for the expansion of EU competencies.

A second comment deserves to be made about the use of the ECtHR case law on freedom of expression. As this was the first time that the General Court had to deal with restrictions on the activities of an entire media house, it could only rely indirectly on the case law of the ECJ. Therefore, it looked all the more to the ECtHR, which had already dealt with similar cases, for inspiration. In particular, the EGC referred many times to *NIT s.r.l. v Moldova*<sup>46</sup> decision, in which the ECtHR upheld the compatibility of the broadcasting ban with Article 10 ECHR. In this decision, the ECtHR drew attention to the ethical responsibility of journalists for the objectivity of news reporting, which is increasing in an era of general information overload. However, *Ronan Ó Fathaigh and Dirk Voorhoof* point out that the EGC did not take into account the different situation of the NIT.<sup>47</sup> Specifically, this was the revocation of a broadcasting licence by an independent regulator (1) because of repeated unheeded warnings (2) about the unbalanced broadcasting of a pro-communist TV station. It should be noted that NIT's position is diametrically different to that of RTE. NIT was repeatedly warned that its broadcasting license could be withdrawn if it violated the rules of balanced discussion. Moreover, the restrictive measure was taken by an independent expert body. It is very difficult to describe the Council, an EU body composed of the ministers of the Member States, as apolitical or expert. In this context, *Ronan Ó Fathaigh and Dirk Voorhoof* draw attention to another ECtHR decision, *OOO Flavius and Others v Russia*,<sup>48</sup> in which the ECtHR rejected the imposition of restrictive sanctions against the media by other than independent or judicial bodies. An earlier decision against France even stated that administrative interference with freedom of publication without prior opportunity for defence was contrary to Article 10 ECHR.<sup>49</sup> As the General Court recalled, such an understanding should then be the minimum standard for interpreting Article 11 of the EU Charter. The General Court has cherry-picked convenient parts of ECtHR jurisprudence, and as the EU's geopolitical activities increase, it will likely need

<sup>45</sup> Judgment C-130/10 *Parliament v Council*, para 74.

<sup>46</sup> ECtHR decision *NIT s.r.l. v Moldova*, complaint no. 28470/12.

<sup>47</sup> FATHAIGH, R. Ó., VOORHOOF, D. Freedom of Expression and the EU's Ban on Russia Today: A Dangerous Rubicon Crossed. *Communications Law*. 2022, Vol. 27, No. 4, pp. 186–193.

<sup>48</sup> ECtHR decision *Ooo Flavius and Others v Russia*, complaints no. 12468/15, 23489/15 and 19074/16,

<sup>49</sup> ECtHR decision *Association Ekin v France*, complaint no. 39288/98.

to strengthen its arguments in the future. Unfortunately, we are not able to know the point of the ECJ - the appeal of the RTF has been withdrawn due to the dissolution of the media company.<sup>50</sup>

## CONCLUSIONS

The risk of using a “master switch” legal basis to regulate all EU policies poses a general risk to the inter-institutional balance and the principle of conferred powers. However, such an extension would be subject to constant scrutiny, particularly by the Member States, and its legality would be subject to review by the Union’s judicial institutions. This aspect is mostly dangerous for its creeping nature.

Media manipulations and attempts to influence public opinion from outside have been part of warfare for centuries. But there have been changes in technology that make it much easier to shape the opinions of the people of Lisbon, or of any other European city, from Murmansk. At the same time, the human rights guarantee of freedom of speech has changed and is much more restrictive for those who have good intentions. The concept of defensive democracy is in a more difficult position than before, where institutions and authorities need to weigh carefully whether rights need to be infringed. Indeed, as we have seen with US anti-terrorism legislation after 9/11, it is easy for a defensive democracy to become a restrictive democracy. Nevertheless, the enemy of democracy does not allow itself to be bound by such restrictions, so its attacks are often more effective and more challenging to counter. The RTF decision is the first case in which the CJEU has examined the validity of prospective restrictions on the activities of a broadcaster under hostile state control in the European media market. As the EU gradually and assertively assumes its geopolitical role, it is going to lose its innocence and will have to make more difficult choices, both in the political and judicial spheres. Both groups of actors will have to compromise with ‘good weather’ legal standards.

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<sup>50</sup> Order of the President of the Court of 28 July 2023 in case C-620/22 P *Russia Today France*.