



Audiovisual Media Regulation during the COVID-19 Pandemic – Measures Undertaken by the Romanian Authorities during the State of Emergency

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Abstract. The present study aims to offer a review of measures taken by the Romanian authorities in the field of audiovisual media regulation during the state of emergency instituted in March 2020 following the COVID-19 outbreak. The legal framework has been adjusted, drawing both from extant norms, such as the 2003 Constitution of Romania, and from newly adapted legal norms such as the Presidential Decree declaring the state of emergency. Also, the competent authorities have been invested with additional powers, this being the case of the National Audiovisual Council and the National Authority for Management and Regulation in Communications. These institutions have faced multiple challenges regarding the clash between freedom of opinion and freedom of speech and the right to correct information of the public and the campaigns to counter misinformation.

Keywords: audiovisual media regulation, fundamental rights, right to correct information, COVID-19, Romania, sanctions for disinformation

1. Introduction

Scientific literature on human rights and fundamental rights during the COVID-19 pandemic is abundant although barely more than a year has passed since the World Health Organization (WHO) made the assessment on 11 March 2020 that COVID-19 could be characterized as a pandemic.¹ The declaration of the Director-General of the WHO ‘called (...) for countries to take urgent and aggressive action’

¹ Naming here only a very few from the year 2020, selected from various reviews after a quick browsing of academic databases such as Spadaro 2020. 315–325; Sándor 2020. 385–412; Joseph 2020. 1–21.

and to take a whole-of-government, whole-of-society approach built around a comprehensive strategy to prevent infections, save lives, and minimize impact.²

This prompted states worldwide to adopt measures tailored to their respective national legal backgrounds and their population, while all the same bearing in mind that provisions of certain international treaties remain effective. A great deal of research articles focus on restrictions of human rights and fundamental rights during the period which is commonly defined at present as the ‘first wave’ of COVID-19 (February–June 2020), but only a few works deal with the case-law comprising the response of the national bodies or national regulating agencies.

The present study aims to offer a review of measures taken by the Romanian authorities in the field of audiovisual media regulation during the state of emergency instituted in March 2020 following the COVID-19 outbreak. The legal framework has been adjusted, drawing both from extant norms, such as the Constitution of Romania, and from newly adapted legal norms such as the Presidential Decree declaring the state of emergency. Also, competent authorities have been invested with additional powers, this being the case of the National Audiovisual Council (Consiliul Național al Audiovizualului – CNA) and the National Authority for Management and Regulation in Communications (Autoritatea Națională pentru Administrare și Reglementare în Comunicații – ANCOM). These institutions have faced multiple challenges regarding the clash between freedom of opinion and freedom of speech and the right to correct information of the public and the campaigns to counter misinformation.

The timeframe referring to the problem raised in this study is well defined by the Presidential Decree following the declaration of the general pandemic, issuing the state of emergency in Romania starting from 16 March 2021 and its conclusion on 14 May 2021.

From a legal viewpoint, the most challenging issues to examine in this paper are the efficiency of the national law-making and national regulating authorities in offering an adequate response to a new and unprecedented situation where swiftness and flexibility are considered key elements.

2. The General Framework of Legal Norms Covering Audiovisual Media Content in Romania

The protection of fundamental rights in Romania, comprising – among other rights – also the freedom of opinion and freedom of speech as well as the right to

2 *World Health Organization*. https://www.who.int/emergencies/diseases/novel-coronavirus-2019/interactive-timeline?gclid=CjwKCAjwy42FBhB2EiwAJY0yQnetQvmJoncXLbeb4AX_poDosAVF3dqkQhskegr8-nmmxrWSiTnFCxoCikwQAvD_BwE#! (accessed on: 18.05.2021).

any information of public interest – which are of interest in the present paper – are enshrined in the amended Constitution of Romania (2003).³ The constitutional protection of fundamental rights is reconfirmed also in various other primary sources of law (such as the Civil Code of Romania⁴) and in normative acts of different public authorities.

Article 30 of the Constitution of Romania states the following:

- (1) Freedom of expression of thoughts, opinions, or beliefs, and freedom of any creation, by words, in writing, in pictures, by sounds, or other means of communication in public are inviolable.
- (2) Any censorship shall be prohibited.
- (3) Freedom of the press also involves the free setting up of publications.
- (4) No publication may be suppressed.
- (5) The law may impose upon the mass media the obligation to make public their financing source.
- (6) Freedom of expression shall not be prejudicial to the dignity, honour, or privacy of a person and the right to one's own image.
- (7) Any defamation of the country and the nation, any instigation to a war of aggression, to national, racial, class, or religious hatred, any incitement to discrimination, territorial separatism, or public violence as well as any obscene conduct contrary to morality shall be prohibited by law.
- (8) Civil liability for any information or creation made public falls upon the publisher or producer, the author, the producer of the artistic performance, the owner of the copying facilities, radio or television station, under the terms laid down by law. Indictable offences of the press shall be established by law.⁵

Moreover, Article 31 of the Constitution of Romania states the following:

- (1) A person's right of access to any information of public interest cannot be restricted.
- (2) The public authorities, according to their competence, shall be bound to provide for correct information of the citizens in public affairs and matters of personal interest.

3 Act No 429/2003 on the revision of the Constitution of Romania, published in the Official Gazette of Romania, Part I No 758 of 29 October 2003, republished.

4 Act No 287/2009 on the Civil Code of Romania, published in the Official Gazette of Romania, Part I No 511 of 24 July 2009, modified by Act No 71/2011 published in the Official Gazette of Romania, Part I No 427 of 17 June 2011, and in the Official Gazette of Romania, Part I No 489 of 8 July 2011.

5 English translations from the *Chamber of Deputies*. <http://www.cdep.ro/pls/dic/site.page?id=371> (accessed on: 28.05.2021).

(3) The right to information shall not be prejudicial to the measures of protection of young people or national security.

(4) Public and private media shall be bound to provide correct information to the public opinion.

(5) Public radio and television services shall be autonomous. They must guarantee any important social and political group the exercise of the right to be on the air. The organization of these services and the parliamentary control over their activity shall be regulated by an organic law.⁶

Examined in the broader context of media landscape, these fundamental rights draw also on legal provisions contained in civil law as well as in administrative codes of national regulating authorities (such as the Code of the National Audiovisual Council⁷ or the Statutes of the National Authority for Management and Regulation in Communications). Ample case-law in the field of personality rights as well as the substantial body of decisions issued by regulating authorities as part of their monitoring and sanctioning attributes complement the existing theoretical aspects with the necessary practical aspects of jurisprudence.

However, several issues arise upon a closer examination of the scope of the national regulatory framework that is to be applied in this case. For instance, in Article 253(3)(b), the new Romanian Civil Code grants people who suffered a prejudice in their personality rights ‘any means deemed necessary by instances’ in order to cease the perpetuation of the illicit action or to restore the prejudice caused. It must be said that the expression ‘any means deemed necessary’ is a very generally and broadly worded formula that presents a challenge when trying to apply it to social media or to online platforms (such as personal blogs).⁸ The fact that there is precedent in Romanian jurisprudence where social media (Facebook) is assimilated with public spaces⁹ indicates that posting content to social media platforms equals with expressing views in public sphere.

A particular issue in dealing with the problem of monitoring and regulating audiovisual media content in the Romanian perspective in the indicated timeframe (March–May 2020) was the problem of online content. Though effective European legislation would ensure competences and power of exercise for national authorities also in the field of online audiovisual media content, as the main media policy tool of the European Union, the Audiovisual Media

6 Ibid.

7 Decision No 220 of 24 February 2011 regarding the Code of Audiovisual Content.

8 See a decision by the High Court of Justice and Cassation of Romania regarding a sanction applied to the administrator of a website for failing to remove content deemed offensive. Î.C.C.J., s. civ. dec. civ. nr. 3216/19.11.2014.

9 See a decision by the High Court of Justice and Cassation of Romania regarding the quality of Facebook as public space. Î.C.C.J., s. cont. admin. și fisc. dec. civ. nr. 4546/27.11.2014.

Services Directive (AVMSD)¹⁰ establishes the legal framework for a convergent media landscape and covers all services of audiovisual content irrespective of the technology used to deliver the content, Romania has not yet succeeded in transposing the Directive into its national law after the conclusion of the revision process in December 2018. In consequence, this means that the material scope of the AVMSD, which now extends certain audiovisual rules to video-sharing (online) platforms (VPS-s), such as YouTube, and user-generated content shared on social media services, such as Facebook, could not yet be applied by Romanian lawmakers or legal practitioners in the timeframe of our study.

3. The Framework of Legal Norms Covering Audiovisual Media Content in Romania during the State of Emergency

The legal background for instituting the state of emergency in Romania in March 2020 was based on three pillars: the Constitution of Romania, the Emergency Ordinance No 1/1999 issued by the Romanian Government regarding the institution of the state of siege or state of emergency,¹¹ and the Presidential Decree No 195/2020 regarding the institution of the state of emergency.¹²

What will be of interest to our paper is to examine if these provisions were able to offer a solid and at the same time versatile base of interpretation to be applied to cases discussed during the period of state of emergency and, ultimately, if they were successful in accommodating the need of public authorities to contain the pandemic by protective and preventive measures and also in accommodating the need of the general population to exert their fundamental rights and to be correctly and objectively informed on matters of public interest.

The first pillar for the special ‘COVID-19 Regulation’ is comprised by Article 93(1) of the Constitution of Romania, stating that the President of Romania shall, according to the law, institute the state of siege or state of emergency to the entire

10 Directive 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13 on the coordination of certain provisions laid down by law, regulation, or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities. O.J., L 303 of 28.11.2018, p. 69.; Directive 2010/13/EU of 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 (Audiovisual Media Services Directive) (codified version) OJ L 095 15.4.2010, p. 1.

11 Government Emergency Ordinance No 1/1999 regarding the state of siege and state of emergency. Published in the Official Gazette of Romania, Part I No 22 of 21 January 1999.

12 Presidential Decree No 195/2020 for instituting the state of emergency on the territory of Romania. Published in the Official Gazette of Romania, Part I No 212 of 16 March 2020.

country or in some territorial-administrative units and ask for the Parliament's approval for the measure adopted, within 5 days of the date of taking it, at the latest.

It is important to remember that, as Article 49(1) states it, the exercise of certain rights or freedoms may only be restricted by law and only if necessary, as the case may be, for: the defence of national security, of public order, health, or morals, of the citizens' rights and freedoms; conducting a criminal investigation; preventing the consequences of a natural calamity, disaster, or an extremely severe catastrophe.

Proportionality and non-discrimination are key issues when dealing with restrictions of rights, as they should be ordered only if necessary in a democratic society. Article 49(2) formulates that the measure shall be proportional to the situation having caused it, applied without discrimination and without infringing on the existence of fundamental rights or freedoms.

As one can see, the relevant articles in the text of the Constitution offer general guidelines and deal mainly with the material scope of these provisions.

Secondly, Article 3(1) of the Emergency Ordinance states that the state of emergency represents the ensemble of exceptional measures in the field of politics, economy, and public order, applicable to the entire territory of the country or in some administrative-territorial units, and it is instated in the following situations:

- a) the existence of acute or imminent grave danger regarding national security or the functioning of constitutional democracy;
- b) the need to prevent, reduce, or eliminate the consequences of a disaster in case of imminent calamity or a calamity that has taken place.¹³

Articles 3¹ and 3² shed further light on these provisions and state that:

Art. 3¹

The state of siege and the state of emergency can be instituted and maintained only to the extent the situation in case requires it and respecting the obligations Romania has assumed according to international law.

Art. 3²

During the state of siege and the state of emergency, it is forbidden to:

- a) restrict the right to life, with the exception of cases where death is the result of explicit acts of war;
- b) inflict torture and punishment or inhuman or degrading treatments;
- c) convict for acts not punishable by national or international law;
- d) restrict free access to justice.

13 Translation by the author. Unless otherwise specified in the footnotes, all translations are by the author.

Article 4 of the Ordinance continues in the same note, stating that during the state of siege or the state of emergency exercise of certain rights and fundamental liberties can be restricted, excepting human rights and fundamental rights listed under Article 3² only to the extent the situation in case requires it and respecting Art. 53 of the Constitution of Romania.

A more defined set of rules, procedures, and provisions relating to obligations and responsibilities of authorities is given in Article 20:

In applying the provisions of the present emergency ordinance as well as the provisions contained in the decree instituting the state of siege or the state of emergency, the military authorities as well as the other public authorities listed in Art. 7(1) have the following competences and responsibilities:

(...)

k) to temporarily suspend the edition or the distribution of certain publications or radio or television programmes.

As it becomes clear from the above-cited norms, the text of the first two pillars in the general framework for audiovisual media legislation during the state of emergency in Romania refers only to classic channels of distribution of mass media: radio or television programmes.

The third pillar of the framework is comprised by the Presidential Decree of March 2020, stating in Article 2 that in order to prevent COVID-19 infection and to ensure damage control during the evolution of the epidemiological situation, the exercise of the following rights is restricted during the state of emergency, in proportion with the level of fulfilment of the criteria defined in Art. 4(4) of this Decree:

- a) *freedom of movement;*
- b) *right to intimate, family, and private life;*
- c) *inviolability of one's home;*
- d) *right to study;*
- e) *right to gathering;*
- f) *right to private property;*
- g) *right to strike;*
- h) *economic liberty.*

The framework laid down by the provisions of the Presidential Decree for audiovisual media during the state of emergency in Romania offers well-defined sets of procedures to address the specific issues of media content distribution in exceptional times. While, by its nature, the text of the Constitution offers a more general, theoretical background, which is neutral as far as IT/C technology is concerned, the Presidential Decree addresses the most pertinent problem during

the state of emergency, that is, the problem of fake news and disinformation via online platforms and offers solutions by investing a public authority (acting as a national regulating agency) with additional competences.

We will cite here the provisions referring to media content in their entirety as they are worded in Article 54 of the Decree, given the fact that they have constituted the bases for a series of decisions issued during the state of emergency:

Art. 54

(1) Public institutions and public authorities as well as private operators contribute to the campaign of public information regarding measures adopted and activities conducted at the national level.

(2) In the case of fake news propagated in mass media and in the online media regarding the evolution of COVID-19 as well as measures of protection and prevention, public institutions and authorities undertake the necessary methods to inform the population correctly and objectively.

(3) The National Authority for Management and Regulation in Communications is empowered to emit motivated decisions requiring hosting service providers and content providers to immediately interrupt the transmission of certain content in electronic communication networks or to suppress it at its source if by such content fake news is propagated regarding the evolution of COVID-19 and the means of protection and prevention.

(4) In case suppression at the source of the content indicated at para (3) is not feasible, the National Authority for Management and Regulation in Communications is entitled to emit motivated decisions requiring providers of electronic communication networks designated for the public to immediately block the indicated content and to inform their users.

(5) The National Authority for Management and Regulation in Communications is empowered to emit motivated decisions requiring providers of electronic communication networks designated for the public to immediately block access for Romanian users to content propagating fake news regarding the evolution of COVID-19 and the means of protection and prevention in case the content is transmitted via electronic communication networks by persons listed under para (3) who do not fall under the jurisdiction of national law.

4. Case-Law regarding Audiovisual Media Content during the State of Emergency

The investment of the National Authority for Management and Regulation in Communications – ANCOM – with a temporary new competence in restricting the transmission of media content has resulted in a number of decisions issued in the timeframe of 20 March and 14 May 2020.

In close collaboration with the Group for Strategic Communication (a taskforce operating under the Department for Emergencies of the Ministry of Internal Affairs), ANCOM has reviewed several websites promoting fake news or content provoking panic and unrest or undermining the attempts made by Romanian authorities in preventing the infection.

In its new capacity, ANCOM issued its first decision on 20 March 2020,¹⁴ following a notification by the Group for Strategic Communication. The notification indicated that the website *stiridemoment.ro* had published several articles meant to induce panic in the general population, operating with clickbait titles and unsubstantiated claims or truncated excerpts from statements by doctors, politicians, or others. In this case, ANCOM did not issue a decision as the assessment conducted proved that the site had already shut down, thus rendering the procedure redundant.

More notifications followed suit, the ANCOM having cases where it was necessary to suppress the content from the source page and also cases where the servers were operated from overseas, and only a block was possible. The reviewed websites were: *bpnews.ro*, *breackingnews.xys*, *www.cohortaurbana.ro*, *blacktopics.wordpress.ro*, *genocid.ro*, *bn-news-romania.info*, *ortodoxinfo.ro*, *www.justitiarul.ro*, and *danielvla.wordpress.com*. For instance, in a decision of 26 March 2021, ANCOM reviewed an article published on 20 February, falsely claiming to identify a cure for COVID-19.¹⁵ After reviewing the claim and after obtaining an official point of view of denial from Cantacuzino Institute, the administrator of the website was summoned to interrupt the transmission of the article in electronic communication networks.

In a case of 6 May 2021, ANCOM deemed unfeasible the elimination of a series of articles able to produce panic and to promote conspiracy theories among the general population.¹⁶ So, after having established that the sites were operating from IP addresses outside of Romania, originating from the United States of America, a decision was taken to block access to the site from Romania. The national regulator for the audiovisual sector in Romania, the National Audiovisual Council of Romanian (CNA), has issued a guide regarding proper communication about

14 ANCOM – Decision No. 431 of 20 March. 2020 Decizia ANCOM 431 din 20 martie 2020.

15 ANCOM – Decision No. 453 of 26 March 2020. Decizia ANCOM 453 din 26 martie 2020.

16 ANCOM – Decision No. 523 of 6 May 2020. Decizia ANCOM 523 din 6 mai 2020.

the novel coronavirus on 16 March 2020.¹⁷ This guide (designed to be used during the state of emergency) asserted the *obligation* for audiovisual media content providers to broadcast the decree instituting the state of emergency following its entry into effect, the obligation to *broadcast only official information received from the Group for Strategic Communication* in their entirety. Priority was to be given also to official information received from public authorities implicated in crisis management during the state of emergency.

The CNA has required providers of audiovisual media services to apply all necessary editorial means in order to fulfil their legal obligation to correctly inform the general public by:

- editing and presenting news responsibly and accurately, avoiding clickbait titles and ‘overabundance of news’ that can produce confusion;
- disseminating information only from national or international official or trustworthy sources in order to efficiently combat fake news spreading on social media platforms;
- fact-checking all information directly or indirectly related to coronavirus;
- respecting ethical rules and treating every broadcast responsibly, without playing on emotions, panic, or the uncertainties of the general public.

4. Conclusions

One of the main issues to be determined in this paper by the examination of the generated legal background and of the case-law was to determine whether it constituted a solid and yet flexible enough instrument for public authorities in dealing with an unprecedented situation.

The exceptional nature of the timeframe in question (state of emergency) means that solutions applied are not automatically applicable after the lifting of restrictions. However, it offers in retrospect a good chance to examine whether the swiftly constituted legal background was able to accommodate the needs of the public authorities. After examining the provisions of the Constitution and those of the Emergency Ordinance, completed by the Presidential Decree, it is our opinion that it offered a solid background.

Another key issue was the response to online formats – not having transposed the revised AVMSD, this could have presented a complication, but the temporary investiture of ANCOM has dealt with the problem efficiently.

As a conclusion, the response offered by the Romanian authorities indicates a generally swift and flexible though, of course, perfectible response.

¹⁷ 2nd Guide of the CNA for 2020. https://cna.ro/IMG/pdf/INSTRUCTIUNEA_nr_2_din_16_martie_2020.pdf (accessed on: 28.05.2021).

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