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COMPARATIVE STUDY

ON

BLOCKING, FILTERING AND TAKE-DOWN OF ILLEGAL INTERNET CONTENT

Excerpt, pages 554-569

This document is part of the Comparative Study on blocking, filtering and take-down of illegal Internet content in the 47 member States of the Council of Europe, which was prepared by the Swiss Institute of Comparative Law upon an invitation by the Secretary General. The opinions expressed in this document do not engage the responsibility of the Council of Europe. They should not be regarded as placing upon the legal instruments mentioned in it any official interpretation capable of binding the governments of Council of Europe member States, the Council of Europe's statutory organs or the European Court of Human Rights.

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National reports current at the date indicated at the end of each report.

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I. INTRODUCTION

On 24th November 2014, the Council of Europe formally mandated the Swiss Institute of Comparative Law ("SICL") to provide a comparative study on the laws and practice in respect of filtering, blocking and takedown of illegal content on the internet in the 47 Council of Europe member States.

As agreed between the SICL and the Council of Europe, the study presents the laws and, in so far as information is easily available, the practices concerning the filtering, blocking and takedown of illegal content on the internet in several contexts. It considers the possibility of such action in cases where public order or internal security concerns are at stake as well as in cases of violation of personality rights and intellectual property rights. In each case, the study will examine the legal framework underpinning decisions to filter, block and takedown illegal content on the internet, the competent authority to take such decisions and the conditions of their enforcement. The scope of the study also includes consideration of the potential for existing extra-judicial scrutiny of online content as well as a brief description of relevant and important case law.

The study consists, essentially, of two main parts. The first part represents a compilation of country reports for each of the Council of Europe Member States. It presents a more detailed analysis of the laws and practices in respect of filtering, blocking and takedown of illegal content on the internet in each Member State. For ease of reading and comparison, each country report follows a similar structure (see below, questions). The second part contains comparative considerations on the laws and practices in the member States in respect of filtering, blocking and takedown of illegal online content. The purpose is to identify and to attempt to explain possible convergences and divergences between the Member States' approaches to the issues included in the scope of the study.

II. METHODOLOGY AND QUESTIONS

1. Methodology

The present study was developed in three main stages. In the first, preliminary phase, the SICL formulated a detailed questionnaire, in cooperation with the Council of Europe. After approval by the Council of Europe, this questionnaire (see below, 2.) represented the basis for the country reports.

The second phase consisted of the production of country reports for each Member State of the Council of Europe. Country reports were drafted by staff members of SICL, or external correspondents for those member States that could not be covered internally. The principal sources underpinning the country reports are the relevant legislation as well as, where available, academic writing on the relevant issues. In addition, in some cases, depending on the situation, interviews were conducted with stakeholders in order to get a clearer picture of the situation. However, the reports are not based on empirical and statistical data, as their main aim consists of an analysis of the legal framework in place.

In a subsequent phase, the SICL and the Council of Europe reviewed all country reports and provided feedback to the different authors of the country reports. In conjunction with this, SICL drafted the comparative reflections on the basis of the different country reports as well as on the basis of academic writing and other available material, especially within the Council of Europe. This phase was finalized in December 2015.

The Council of Europe subsequently sent the finalised national reports to the representatives of the respective Member States for comment. Comments on some of the national reports were received back from some Member States and submitted to the respective national reporters. The national reports were amended as a result only where the national reporters deemed it appropriate to make amendments. Furthermore, no attempt was made to generally incorporate new developments occurring after the effective date of the study.

All through the process, SICL coordinated its activities closely with the Council of Europe. However, the contents of the study are the exclusive responsibility of the authors and SICL. SICL can however not assume responsibility for the completeness, correctness and exhaustiveness of the information submitted in all country reports.

2. Questions

In agreement with the Council of Europe, all country reports are as far as possible structured around the following lines:

1. What are the legal sources for measures of blocking, filtering and take-down of illegal internet content?

Indicative list of what this section should address:

- Is the area regulated?
- Have international standards, notably conventions related to illegal internet content (such as child protection, cybercrime and fight against terrorism) been transposed into the domestic regulatory framework?

- Is such regulation fragmented over various areas of law, or, rather, governed by specific legislation on the internet?
- Provide a short overview of the legal sources in which the activities of blocking, filtering and take-down of illegal internet content are regulated (more detailed analysis will be included under question 2).

2. What is the legal framework regulating:

2.1. Blocking and/or filtering of illegal internet content?

Indicative list of what this section should address:

- On which grounds is internet content blocked or filtered? This part should cover all the following grounds, wherever applicable:
  - the protection of national security, territorial integrity or public safety (e.g. terrorism),
  - the prevention of disorder or crime (e.g. child pornography),
  - the protection of health or morals,
  - the protection of the reputation or rights of others (e.g. defamation, invasion of privacy, intellectual property rights),
  - preventing the disclosure of information received in confidence.
- What requirements and safeguards does the legal framework set for such blocking or filtering?
- What is the role of Internet **Access** Providers to implement these blocking and filtering measures?
- Are there soft law instruments (best practices, codes of conduct, guidelines, etc.) in this field?
- A brief description of relevant case-law.

2.2. Take-down/removal of illegal internet content?

Indicative list of what this section should address:

- On which grounds is internet content taken-down/ removed? This part should cover all the following grounds, wherever applicable:
  - the protection of national security, territorial integrity or public safety (e.g. terrorism),
  - the prevention of disorder or crime (e.g. child pornography),
  - the protection of health or morals,
  - the protection of the reputation or rights of others (e.g. defamation, invasion of privacy, intellectual property rights),
  - preventing the disclosure of information received in confidence.
- What is the role of Internet Host Providers and Social Media and other Platforms (social networks, search engines, forums, blogs, etc.) to implement these content take down/removal measures?
- What requirements and safeguards does the legal framework set for such removal?
- Are there soft law instruments (best practices, code of conduct, guidelines, etc.) in this field?
- A brief description of relevant case-law.

3. Procedural Aspects: What bodies are competent to decide to block, filter and take down internet content? How is the implementation of such decisions organized? Are there possibilities for review?

Indicative list of what this section should address:

- What are the competent bodies for deciding on blocking, filtering and take-down of illegal internet content (judiciary or administrative)?
- How is such decision implemented? Describe the procedural steps up to the actual blocking, filtering or take-down of internet content.
- What are the notification requirements of the decision to concerned individuals or parties?
- Which possibilities do the concerned parties have to request and obtain a review of such a decision by an independent body?

4. General monitoring of internet: Does your country have an entity in charge of monitoring internet content? If yes, on what basis is this monitoring activity exercised?

Indicative list of what this section should address:

- The entities referred to are entities in charge of reviewing internet content and assessing the compliance with legal requirements, including human rights – they can be specific entities in charge of such review as well as Internet Service Providers. Do such entities exist?
- What are the criteria of their assessment of internet content?
- What are their competencies to tackle illegal internet content?

5. Assessment as to the case law of the European Court of Human Rights

Indicative list of what this section should address:

- Does the law (or laws) to block, filter and take down content of the internet meet the requirements of quality (foreseeability, accessibility, clarity and precision) as developed by the European Court of Human Rights? Are there any safeguards for the protection of human rights (notably freedom of expression)?
- Does the law provide for the necessary safeguards to prevent abuse of power and arbitrariness in line with the principles established in the case-law of the European Court of Human Rights (for example in respect of ensuring that a blocking or filtering decision is as targeted as possible and is not used as a means of wholesale blocking)?
- Are the legal requirements implemented in practice, notably with regard to the assessment of necessity and proportionality of the interference with Freedom of Expression?
- In the case of the existence of self-regulatory frameworks in the field, are there any safeguards for the protection of freedom of expression in place?
- Is the relevant case-law in line with the pertinent case-law of the European Court of Human Rights?

For some country reports, this section mainly reflects national or international academic writing on these issues in a given State. In other reports, authors carry out a more independent assessment.

ROMANIA

1. Legal Sources

What are the legal sources for measures of blocking, filtering and take-down of illegal content?

A. In Romania, the measures of blocking, filtering and take-down of illegal Internet content can be imposed through a **decision of a competent administrative body (in certain cases)** or through a **court decision**, as a consequence of engagement of criminal liability, civil liability (tort liability in accordance with Chapter IV of the New Civil Code of Romania,[1] article 1.349 paragraph 1 and paragraph 2) and administrative liability.

Romania has adopted or transposed the main international standards, notably the UN Convention for Children's Rights (through Law no 18/1990), the Council of Europe Convention on Cybercrime (through Law no 64/2004) and the UN Convention against Transnational Organized Crime (through Law no 565/2002).

The main internal regulation is ***Emergency Government Ordinance no. 111/2011 on electronic communication***, which constitutes the general framework for activities regarding electronic communications networks and services in Romania, for the authorization regime and measures aimed at encouraging competition in the electronic communications networks and service market. The aforementioned Ordinance regulates the rights and obligations of electronic communications networks and services suppliers and the rights of the end-consumers as well as establishing the relevant national regulatory authority, ANCOM (National Authority for Management and Regulation in Communications, hereinafter, "ANCOM"), which is the competent authority to implement the objectives of the ordinance.

In addition, provisions regulating the blocking of illegal Internet content exist in the legislation regarding **electronic commerce**, **gambling**, **pornography**, **prohibition of fascist, racist or xenophobic organizations and symbols, and products having psychoactive effects** (see section 2 here below).
In is important to note that any restriction of the freedom of speech must be interpreted in light of Article 30 of the Romanian Constitution, which guarantees the **freedom of expression** (see section 2 below).

Finally, we note that Romanian law distinguishes between the Internet service providers' (ISPs) liability and the content providers' liability. In general, liability for illegal or harmful content will be incumbent on the content provider (the author), according to article 11 para. 3 of *Law no. 365/2002 on Electronic Commerce*. According to article 16 *et seq*. of the same law, ISPs however are obliged to report to the relevant authorities any activity or content that seems illegal, carried out by the recipients of their services. The ISPs' activity is placed under the surveillance of the administrative authorities such as the ANCOM. The content providers' liability (civil or criminal) can be established by court decision.

B. In Romania there is no regulation imposing on Internet service providers the obligation to install a filtering system. The Romanian legislator has not transposed into the Romanian legal system the possibility for a state court or an administrative body to impose on Internet service providers the obligation to filter content and prevent the violation of the law; hence in the Romanian legal system the Internet service providers do not have a general obligation to monitor or actively investigate the

[1] Law no. 287/2009 on the Civil Code, republished in the Official Gazette, Section I, no. 505/15.07.2011

facts and circumstances in order to determine whether an activity is illegal according to article 11 of *the Methodological Norms for implementation of the Law no. 365/2002 on Electronic Commerce, approved by Government Decision no 1308/05.12.2002.*[2] Moreover, an obligation to monitor or to actively investigate the facts and circumstances to determine wether an activity is illegal cannot be imposed on internet service providers in relation to a specific situation.

2. Legal Framework

What does the legal framework regulate:

2.1. Blocking and/or filtering of illegal Internet content

As stated before, Romania legislation does not provide for the possibility or obligation to generally filter Internet content.

The illegal or harmful Internet content, recognized as such by an administrative decision or a court order, on a case-by-case basis, can be blocked and/or removed in Romania; the enumeration of the legal grounds for considering Internet content as illegal or harmful is non-exhaustive. Relevant legal grounds for such a blocking/removal measure include the legislation against **pornography, illegal gambling, fascist or xenophobic propaganda, copyright infringement or the protection of one's dignity, honour and privacy** (see details below, section 2.1. A and B). In general, any breach of law perpetrated through Internet communication, recognized as such by a relevant authority or court of law, can trigger such measures through a court injunction, including, without limitation, the protection of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health and morals, the protection of the reputation or rights of others (e.g. defamation, invasion of privacy, intellectual property rights, preventing the disclosure of information received in confidence).

Such measures generally fall within the competence of state courts or, in certain cases, of administrative authorities such as the ANCOM, whose decisions can be appealed before state courts (see also section 3 below).

As a general rule, content proven to be illegal or harmful is to be removed **by the content provider**. Such obligation must be stated in a court judgment or, in certain cases, in an administrative decision (for details on the competent body, see section 3 below). In addition, (notably, in the case of a refusal by the content provider to comply with such judgment or decision), the **ISPs may be required to block and/or remove the said illegal content**, on the basis of Articles 11 to 15 of *Law 365/2002 on Electronic Commerce,* if a final (court) decision acknowledges the illegal character of that content. From a procedural point of view, this possibility can be qualified as an "order to a third party" for the enforcement of a final (court) decision. Such a possibility is permitted by Article 12 para.3 of the EU E-commerce Directive, which allows a court or administrative authority, in accordance with Member States' legal systems, to require the service provider to terminate or prevent an infringement.

As previously mentioned, any restriction on the freedom of speech must respect the conditions set forth in **Articles 30 and 53 of the Romanian Constitution** (concerning the freedom of expression and the restriction on the exercise of certain rights or freedoms).

It is noteworthy that **libel and insult are no longer criminal offenses** underRomanian **punishes** (these were removed from the Romanian Criminal Code by Law 278/2006).

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[2] Entry into force on December 5th 2002, Official Gazette, Section I, no. 877/05.12.2002

A. General regulations:

- **Article 30 of the Romanian Constitution – Freedom of expression:**

"(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 shall 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, privacy of a person, and to 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".

- **Article 53 of the Romanian Constitution – Restriction on the exercise of certain rights or freedoms:**

"(1) 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.

(2) Such restriction shall only be ordered if necessary in a democratic society. The measure shall be proportional to the situation having caused it, applied without discrimination, and without infringing on the existence of such right or freedom".

- **E-commerce regulations**

In Romanian Law, the EU E-commerce Directive was implemented by ***Law no. 365/2002 on Electronic Commerce.***[3]

Articles 11 to 15 of this law provide for the ISPs' liability. According to these articles, in general, the ISPs do not engage their liability for illegal or harmful Internet content, unless it can be proven that the ISPs were aware of the illegal or harmful character of such content. According to Article 14 para. 2 of this Law, the service provider is deemed aware and cannot ignore the illegality of this content, if it was declared illegal by a decision of a public authority (court or administrative body).

Article 16[4] of this law provides for the obligation for internet service providers to report to the competent authorities the alleged illegal activities and temporarily or permanently interrupt the

[3] Entry into force on February 5th 2002, republished in the Official Gazette, Section I, no. 959/29.11.2006

[4] Art. 16 of Law no 365/2002: " The service provider obligations": "(1) The service providers are bound to notify the competent public authorities right away, about activities that seem illegal carried out by the recipients of their services or about information supplied by these ones that seem illegal.
(2) The service providers are bound to communicate the authorities mentioned at paragraph (1) right away, at their request, information that may allow the identification of the recipients of their services with whom these providers have concluded contracts regarding the permanent information storage.

transmission or the storage of the supplied information by the end receiver of the respective service, by taking down the content or by blocking access to this information, access to a communication network or the provision of any other service of informational society, if these measures were imposed by the public authority acting ex-officio or as a result of a notice or complaint of any concerned person.

- **Electronic communications regulations**

As already mentioned, the main internal regulation is ***Emergency Government Ordinance no. 111/2011 on electronic communications,***[5] which constitutes the general framework for activities regarding electronic communications networks and services in Romania, as well as for the authorization regime.

This Ordinance defines the rights and obligations of the electronic communications networks and services suppliers and the rights of the end-consumers and it establishes the competent national regulatory authority, ANCOM.

ANCOM elaborates the general authorization regime for each network and service category, setting up the providing conditions, the rights and obligations of service providers, which, according to article 8 paragraph (2) lit. i) of *Emergency Government Ordinance no. 111/2011 on electronic communications*, may apply to "restrictions regarding the transmission of the illegal and harmful content according to the legal provisions applicable to the electronic commerce and broadcasting". The same article defines illegal and harmful content in accordance with the legal provisions applicable to electronic commerce and broadcasting.

According to the provisions of Article 16 paragraph 1 of Law 365/2002 on Electronic Commerce, ISPs are obliged to immediately inform the relevant public authorities of any apparently illegal activities

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(3) The service providers are bound to interrupt, temporarily or permanently, the transmission into a communication network or the storage information supplied by a recipient of the respective service, especially by eliminating the information or by blocking the access to it, the access to a communication network or the supply of any other information society service, if these measures were required by a public authority, ex-officio or at the receipt of a claim or complaint from any person.
(4) The claim mentioned at paragraph (3) can be made by any person who considers himself (herself) prejudiced by the contents of the respective information. The claim or complaint is made in writing, showing the reasons that substantiate it and will compulsorily be dated and signed. The claim cannot be forwarded if a trial has already been initiated with the same subject and with the same parties.
(5) The decision of the authority must be motivated and is notified to the involved parties within 30 days from the date the claim or complaint has been received or, if the authority acted ex-officio, within 15 days from the date it has been issued.
(6) The interested person can appeal against a decision made according to the provisions of paragraph (3), within 15 days from the notification, to the competent court. The claim is judged in emergency procedure by citing the parties. The sentence is final".

5 Entry into force on December 27th 2011, Official Gazette, Section I, no. 925/27.12.2011, transposing the general Directive 2009/140/EC of the European Parliament and of the Council, amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services and Directive 2009/136/EC of the European Parliament and of The Council amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

exercised by the end users of their service or of apparently illegal information supplied by the end users. According to paragraph 3 of the same article, the ISPs must report to the competent authorities the alleged illegal activities and block access to this information, access to a communication network or the provision of any other service of informational society, if these measures were imposed by the public authority acting ex-officio or as a result of a notice or complaint of any concerned person.

Hence according to the above mentioned provisions, the relevant authority will assess whether the content is illegal and impose the blocking of the Internet content.

The relevant public authority is defined as being any body of the public administration specifically habilitated by the law to take such measures or, as the case may be, courts of law. When elaborating the general authorization regime for each network and service category, ANCOM sets up the conditions for provision of services and the rights and obligations of the Internet service providers, including the restrictions with respect to illegal and harmful content.

The ANCOM monitors and verifies the compliance of website content with the obligations provided in *Emergency Government Ordinance no. 111/2011 on electronic communications*, in the specific legislation regarding electronic communications, in other regulations issued by ANCOM or in the EU regulations, where this monitoring and compliance verifying activity is prescribed as being within its competence.

To this purpose, the service providers are entitled to receive complaints by aggrieved parties (*i.e.* by any person that considers him/herself harmed by the Internet content). The ISPs that have received a complaint or a notice regarding illegal activities exercised by end users of their service or about illegal information supplied by the end users, must inform the competent public authorities within 24 hours, while taking any necessary measures to ensure the preservation of the respective information.

Law on cybernetic security

At the beginning of the year 2015, a law on cyber-security was adopted by the Parliament, without ever entering into force, since it failed the constitutionality check/verification. This was the third attempt to pass the law, which was subject to intense criticism by the media, attorneys and public opinion.

In its decision no. 17 of 21 January 2015, the Constitutional Court ruled that various provisions of the law were unconstitutional and therefore invalidated the law.

The reasons for the Court's ruling were, among others, the following:

- lack of a clear definition of the term "holder of cybernetic infrastructure";
- lack of legal guarantees that competent authorities would have access to relevant information;
- lack of criteria for selecting cybernetic infrastructures of national interest and for establishing such infrastructures;
- lack of specific provisions guaranteeing judicial supervision/verification/appeal of administrative decisions issued under the law by competent authorities, which may harm rights or legitimate interests;
- lack of predictability of provisions instating monitoring and control procedures and of provisions concerning the identification and punishment of violations.

Taking into consideration this decision of the Constitutional Court, the Romanian authorities intend to initiate a new draft law on cyber security.

B. Specific regulations

- Pornographic content

Pornographic content is regulated in two different laws, one concerning the prevention and combatting of pornography and the other concerning the prevention and fighting against trafficking of persons.

The ***Law on prevention and fighting pornography no. 196/2003,***[6] provides for the ANCOM to request Internet service providers to block websites with pornographic content that do not implement the legal obligation to set up passwords for the concerned sites and to collect an access tax for pornographic sites.

According to Article 7 of the Law no. 196/2003 on preventing and fighting pornography, sites with pornographic content must give access only after the payment of the access tax per minute established by the creator of the site and declared to the fiscal authorities. In addition, it is mandatory for sites with pornographic content to [require a password for access]. Article 11 paragraph 2 of the same law provides the the ANCOM is competent to request Internet service providers to block websites with pornographic content if the obligations imposed by article 7 are not respected.

Concerning child pornography, Article 374 of the Criminal Code provides for criminal liability for anyone who produces, possess with the scope of exposure or distribution, purchases, stores, exposes, promotes, distributes, or offers any form of pornographic materials featuring minors.[7] Such actions are punishable by 1 to 5 years' imprisonment, however if they were perpetrated by means of information technology or any other electronic communications means, they are punishable by 2 to 7 years' imprisonment.

In December 2008, , on the basis of Law No. 196/2003, the ANCOM ordered ISPs to block access to 40 websites containing illegal (pornographic) material which was not password-protected nor charged for at a per-minute rate. If an ISP does not execute such a blocking order within 48 hours, it may be sanctioned by an administrative fine. The ANCOM can compel ISPs to block access to any website that does not comply with the provisions of the law stating that pornographic websites must be officially authorized, password protected, and charged for at a per-minute rate (determined by the site's operator). The authority is not required by the legislation to give an appropriate waiting period to website owners to comply with these legal requirements; instead, it can immediately order ISPs to block access. As stated before, the individual decisions issued by ANCOM are administrative-jurisdictional decisions and therefore can be challenged before the Bucharest Court of Appeal, no preliminary procedure or formality being required. Any interested party which has incurred damages as a consequence of a decision may file a demand for its annulment.[8]

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6 Entry into force on June 19th 2003, republished in the Official Gazette, Section I, no. 198/20.03.2014

7 Pornographic materials featuring minors are all materials that present a minor with an explicit sexual behaviour or, which, although not presenting a real person, simulate in a credible manner a minor with such a behaviour.

8 http://www.ancom.org.ro/en/11-decembrie-2008_3483

- **On-line gambling:**

Law no. 124 from 29th of May, 2015, regarding the approval of the Government Emergency Ordinance no. 92/2014 regulating fiscal measures and modification of laws

This recent law was enacted on June 12th, 2015. It amends The Government Emergency Ordinance no. 92 from 29th of December, 2014 regulating fiscal measures and modification of laws.

The most notable amendments for the purpose of this report concern the introduction of "blacklisting" with regard to unauthorized gambling sites.[9]
The Emergency* Government *Ordinance no. 77/2009 on the organizing and exploitation of gambling,[10] Article 10 paragraph (7), states that the internet providers as defined in the Emergency Ordinance no. 111/2011, are obliged to respect the decisions of the Supervision Committee[?] of the National Bureau for Gambling regarding the restriction of access to gambling sites unauthorized in Romania, along with those regarding the advertising of gambling organized by an operator unauthorized in Romania.

Government Decision no. 298/2013,[11] Article 7 paragraph (2), provides that competency the monitoring and surveillance of on-line gambling falls within the competence of the National Bureau for Gambling.'s. Pursuant to paragraph (2) lit c), internet service providers give information regarding the identified unauthorized to this Bureau in order that the Bureau can implement legal measures. The monitoring and surveillance of on-line gambling is put into force through: a) the identification [by ISPs?] of the on-line gambling sites that do not have a license and or an exploitation authorization according to the Romanian legislation; b) the identification of sites that, through marketing or advertising activities, provide a link to on-line gambling sites that are not authorized under Romanian legislation, and c) the transmission of the information regarding these identified unauthorized gambling activities to a Supervision Committee[?] and to the internet service providers with the purpose of implementing the legal measures.

Government Decision no. 823/2011,[12] Article 26, introduces a new article according to which it is the attribution and the duty of the monitoring operator to immediately communicate to the Supervision Committee of the National Bureau for Gambling and to the Internet service providers with the purpose of blocking access to these websites.

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9 The relevant provisions read as follows:
"16. Article I, point 20, let. c), paragraph (4) from Article 15, will be amended to read as follows:
"c) operated remote games of chance as provided for in article 10 paragraph (1) let. h)-n) in Romania and did not declare and payed the due amounts according to this Emergency Ordinance. The gambling websites of remote gambling operators described in article 10 paragraph (1) let. h)-n), which did not pay the license and authorization fees, as well as other due amounts, will be added to a "blacklist" of unauthorized gambling websites in Romania until the situation will be clarified and will be removed from the "black list" only by the decision of the Monitoring Committee of ONJN. The conditions of adding and removing a gambling website to/from the "blacklist" will be regulated by order of the ONJN president."
21. Article I point 27 paragraph (11) of article 17 will be amended to read as follows:
"(11) The ONJN Monitoring Committee will create a "blacklist" of unauthorized gambling websites in Romania. The "blacklist" of gambling websites who are running or who have run unauthorized gambling activities will be drawn up on the proposal of the Specialist Directorates of the ONJN, while approval of additions to and removals from the "blacklist" will be in compliance with the provisions of this Emergency Ordinance and its implementing rules, and by order of the President of the ONJN. The ONJN will publish the "blacklist" on its website."

10 Entry into force on June 26th 2002, Official Gazette, Section I, no 439 din 26.06.2009.

11 Entry into force on May 30th 2013, Official Gazette, Section I, no. 311/30.05.2013.

12 Entry into force on August 31st 2011, Official Gazette, Section I, no. 616/31.08.2011.

According to Article 73[3] paragraph (1) lit. c) of ***Government Decision no. 870/2009***, the monitoring operator has the attribution and the duty to immediately communicate to the Supervision Committee and to the Internet service providers with the purpose of blocking access to these websites. If the Internet service providers do not proceed to block access to the allegedly illegal websites for which the blocking request was sent, the monitoring operator has the obligation to immediately report this fact to the Supervision Committee. The Supervision Committee in exercising its attributions, issues decisions signed by the president of the National Bureau for Gambling, which are mandatory and can be disputed in competent courts.

- **Prohibition of fascist, racist or xenophobic organizations and symbols**

The *Emergency Ordinance no.31/2002 banning organizations and symbols with fascist, racist or xenophobe character* and the cult of persons guilty ofcrimes against peace and humanity (approved by Law no. 107/2006 and most recently modified by Law no. 217/2015) provides, in its Article 4, that the dissemination or display in public (including on the Internet) of fascist, racist or xenophobic symbols shall be punished by imprisonment from 3 months to 3 years and the limitation of certain civil rights. These actions are not punishable if they are performed for a solely artistic, scientific or educational purpose.

According to Article 2b, the definition of fascist, racist or xenophobic symbols includes: flags, emblems, pins, uniforms, slogans, forms of salute, or any other symbols promoting ideas, concepts and doctrines.

At the same time, pursuant to Article 5, public glorification of individuals found guilty of crimes against peace or humanity, as well as publicly promoting fascist, racist or xenophobic ideologies through any means of propaganda shall be punished by imprisonment from 3 months to 3 years as well as and the prohibition of the exercise of certain rights.

According to Article 6, the denial of the Holocaust or of its consequences perpetrated in public shall be punished by 6 months to 3 years of imprisonment or fine, and if it was done by means of information technology it is punishable by 6 months to 5 years' imprisonment.

The definition of the Holocaust is provided in Article 2d: "In this Ordinance, Holocaust means the systematic persecution, endorsed by the State, and the annihilation of European Jews by Nazi Germany and by its allies or collaborators between 1933 and 1945. Also, it includes during the Second World War a part of the Roma population that has been deported and annihilated".

We also note that the rather strict criminal sanctions provided in Emergency Ordinance no.31/2002 have been criticized by members of the private sector[13] but acclaimed by the Council of Europe's Commission against Racial Intolerance.[14]

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13 See : http://www.ziaristionline.ro/2015/08/02/desteapta-te-romane-academicianul-eugen-mihaescu-despre-legea-elie-wiesel-azi-luptatorii-anticomunisti-sunt-prima-tinta-a-tovarasului-florian-cine-urmeaza-maine-mihai-eminescu/

14 Council of Europe – European Commission against Racial Intolerance , Rapport sur la Roumanie du 19 mars 2014, available at: http://www.coe.int/t/dghl/monitoring/ecri/Country-by-country/romania/ROM-CbC-IV-2014-019-FRE.pdf

- **Copyright protection**

According to Articles 139/8, 139/9 and 143 of *Law no. 8/1996 concerning copyright*, making protected works available to the public, including through the Internet, without the approval of the copyright holder is punished with a fine, or imprisonment ranging from one to four years.

- **Products with psychoactive effects:**

The *Law on fighting the activities with products other than those provided in existing legislation, with possible psychoactive effects,*[15] Article 13 paragraph 2, provides for the Ministry of the Informational Society to request Internet service providers to block websites through which the activities with products with possible psychoactive effects (*e.g*. products, substances, plants, etc., similar to drugs or psychotropic substances) are carried out.

According to Article 13 paragraph 2 of the law, the Ministry of the Informational Society requests Internet service providers to block, according to the law, the websites through which activities with products having possible psychoactive effects are carried out. The Ministry of the Informational Society requests the blocking of access to the site when it receives notice from the legal representative of the Health Ministry, of the National Authority for Consumer Protection and of the National Veterinary Sanitary and for the Food Safety Agency. The notice is sent when there is a justified presumption that there is a risk that activities with products with possible psychoactive effects are being performed. The administrative decision imposing the measure can be disputed before the competent courts.

C. Relevant jurisprudence concerning a request to block a website

On 26 May 2008, the limited liability company SC URBAN si ASOCIAȚII SRL lodged a complaint against M.B., before a Bucharest Court of First Instance (sector 3), asking the court to order the suspension of the website www.legi-internet.ro, owned by the defendant M.B. The plaintiff alleged that it was accused on this site of committing abuses and sending spam messages. In addition, the defendant had insulted the plaintiff's employees in a post on this website, using the term "jerks" to refer to the plaintiff company and its lawyers. The request was based on articles 998-999 of the Romanian Civil Code (tort liability). The court rejected the request and held that the conditions prescribed in the aforementioned articles for tort liability were not met. In particular, it considered that no prejudice was proven because the plaintiff did not prove that the defendant's affirmations on this website have in fact altered the public's perception and tarnished the plaintiff's image or reputation. Interestingly, the court noted that, in any case, "such damage cannot be repaired by suspending the defendant's website. Such measure may be imposed in exceptional circumstances as a measure of exceptional gravity and is not justifiable in this case". On appeal, the Bucharest Tribunal upheld the lower court's ruling and stated that suspending the website was not an adequate measure, was ineffective and in any case would be disproportionate in view of the fact that a minor detriment of the right to honour and dignity cannot justify a drastic measure limiting the freedom of speech (Bucharest Tribunal, Civil Section V, Case SC URBAN si ASOCIAȚII SRL v M.B., decision no. 1405 of 22.12.2009).

2.2. Take-down/removal of illegal Internet content

Illegal and harmful content available on the Internet may be removed in Romania on the same grounds and under the same circumstances as those required for blocking access to illegal or harmful content. We thus expressly refer to the discussion in section 2.1 above.

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[15] Entry into force on November 13th 2011, republished in the Official Gazette, Section I, no. 140/26.02.2014

As previously mentioned, the grounds for considering Internet content to be illegal are not provided in an exhaustive enumeration. Therefore, the finding by a relevant authority or court of law that certain content is in breach of the law may trigger the removal of the content only through a court injunction, **which can be addressed to the content provider and/or to the ISP**. rounds for such a finding may include, but are not limited to, the protection of national security, territorial integrity or public safety, the prevention of disorder or crime, the protection of health and morals, the protection of the reputation or rights of others (*e.g.* personal reputation , privacy, intellectual property rights, confidentiality of communications).

As explained in Section 2.1 here above, *Law 365/2002 on Electronic Commerce*, Article 16, obliges ISPs to report alleged illegal activities to the relevant authorities and temporarily or permanently interrupt the transmission or storage of the information by end receivers of the respective service, by taking down the content, if these measures were ordered by the public authority acting ex-officio or following a notice or complaint of any concerned person. In addition, the legal provisions concerning the blocking of illegal Internet content stemming from *Emergency Government Ordinance no. 111/2011 on electronic communications* shall also apply with regard to take-down of illegal Internet content. For details, we refer the reader to the discussion in Section 2.1 above.

A jurisprudential illustration of taking down Internet content can be found in a 2010 court decision issued by the Bucharest Tribunal. On 26 February 2010, Mrs. A.B. lodged a complaint against Mr. I.B., before the Bucharest Tribunal, claiming that, through a relentless denigration campaign, the defendant had defamed her, while violating her rights to image, honour, dignity and private life. In fact, I.B., who was a journalist, had published on a website 17 articles and 22 posts containing alleged information about A.B.'s private life, insinuating that the plaintiff's divorce was imminent and that she had had extramarital affairs. On the 18th of September 2008, an important media scandal erupted following the publishing by the defendant of a series of articles suggesting that the plaintiff was the main character in a pornographic video, which was also displayed on the website. The woman featured in that pornographic video resembled the plaintiff. This media material was further disseminated by major news agencies and TV channels. The plaintiff claimed that the scandal had caused her to give up her candidacy for the Parliament and for a possible seat as Minister of Education, and that her private life was affected. As soon as the plaintiff renounced her candidacy, the defendant stopped posting articles about her private life. Based on articles 998-999 of the Romanian Civil Code (tort liability), on the provisions of Law 193/2003 on prevention and fighting pornography and on article 10 ECHR, A.B. requested the court to issue a decision obliging the defendant to take down all articles, comments and videos that harmed the plaintiff's honour, dignity and image. The court held that defendant's actions had indeed seriously harmed the plaintiff's honour, dignity and image and ordered the defendant to take down from all the websites he owned all those articles, comments and videos. The defendant was ordered to pay Euro 70 000 in damages and the court decision was published in three major newspapers (Bucharest Tribunal, Civil Section III, decision no. 524 of 28.03.2011).

3. Procedural Aspects

What bodies are competent to decide to block, filter and take down the Internet content? How is the implementation for such decision organized? Are there possibilities for review?

The competent bodies to decide to block or take down illegal Internet content are the **courts of law** (which have general competence to order any measures aimed at restoring a lawful situation) and, in

certain cases, the relevant **administrative bodies** (*e.g*. pornographic content, illegal gambling or products with psychoactive effect).

The relevant administrative authorities are mainly the ANCOM (which has a general competence), and the other administrative bodies which may be competent in special matters, such as the Ministry of the Informational Society or the National Bureau for Gambling.

A. A general administrative authority: the ANCOM

As already mentioned before, Romania has created a national administrative authority – the **ANCOM**, Authority for Regulation in Communications and Information Technology – that may request Internet service providers to block access to or to take down illegal or harmful Internet content, based on the provisions of *Emergency Ordinance no. 111/2011 on electronic communications* and *Law 365/2002 on Electronic Commerce*.

The ANCOM can act ex-officio or as a result of a notice or complaint of any concerned person.

According to article 11 of the *Methodological Norms for implementation of the Law no. 365/2002 on Electronic Commerce*, approved by Government Decision no. 1308/05.12.2002, ISPs have the obligation to implement a notice procedure free of charge for complaints or notices from any person regarding apparently illegal activities exercised by end users of their service or about apparently illegal information supplied by end users. This procedure must be available through electronic means and allow the complaints or notices to be received within 48 hours.

According to Article 16 paragraph 1 of *Law no. 365/2002 on Electronic Commerce*, the Internet service providers must report to the competent authorities all allegedly illegal activities. In the absence of a court judgment or an administrative decision, the Internet service supplier may not, and has no obligation to, block the access or take down the allegedly illegal Internet content.

According to paragraph 4 of the same law, the complaint must be filed in writing, mentioning its grounds and must be signed and dated. The administrative authority will not pronounce a solution if a complaint between the same parties having the same object has been previously filed with the state courts. The authority decision stating the grounds will be communicated to the parties within 30 days from the date of the complaint or notice. The parties may challenge this decision before the administrative courts, within 15 days from the day the decision was communicated. The court decision is definitive.

If a final court judgment or an un-appealed administrative decision was issued, acknowledging the illegal character of an Internet content and ordering its blocking or removal, the ISPs that do not comply with such decision and do not implement it *(i.e*. do not block access to the illegal or harmful Internet content or do not take it down), may be sanctioned by an administrative sanction (contravention) pursuant to article 142 of *Emergency Government Ordinance no. 111/2011 on electronic communications*. According to article 141 of this emergency ordinance, in this case the ANCOM sends the supplier a notification mentioning the violation of law and the sanction along with the time-limit for submission of a counter-statement. The decision of the President of ANCOM sanctioning the service provider can be appealed before the Bucharest Court of Appeal.

It is noteworthy that the ANCOM is the competent body for the prevention and combatting of **pornographic content**. According to article 11 paragraph 1 of *Law no. 196/2003 on preventing and fighting pornography*, the **ANCOM** receives the notices regarding the alleged breach of the obligation concerning sites with pornographic content. The ANCOM is competent to request that Internet service providers block websites with pornographic content. If the Internet service supplier does not

implement the ANCOM request and does not block access to the site within 48 hours of receipt of the request, it is liable for an administration sanction (contravention). Such sanction shall be enforced by the police (Ministry of Internal Affairs). The police decision regarding the contravention can be disputed in the competent state courts.

B. Specific administrative authorities

- **On-line gambling:**

In accordance with article 2 paragraph 1 *of Emergency Government Ordinance no. 20/2013 on* establishment *of the* ***National Bureau for Gambling,*** this Bureau, through the Supervision Committee, is competent to monitor and oversee on-line gambling, and can also authorize monitoring operators for a period of 5 years. Such operators are mandated to monitor and oversee on-line gambling according to article 73^2 of *Government Decision no. 870/2009 on the adoption of the methodological norms for the implementation of the Emergency Government Ordinance no.77/2009.* Any legal person fulfilling the conditions prescribed in the ordinance can be authorized as a monitoring operator. Whenever the monitoring operator is a public institution or authority, its attributions and competence are those specified in the legal instruments regulating the respective institution or authority.

When identifying the on-line gambling sites that do not respect the obligations provided in the ordinance, the monitoring operator notifies the Supervision Committeey and the Internet service providers with the purpose of blocking access to these websites. If the Internet service providers do not proceed to block access to the allegedly illegal websites for which the blocking request was sent, the monitoring operator has the obligation to immediately report this fact to the Supervision Committee. The Supervision Committee, in exercising its attributions, may issue a decision signed by the president of the National Bureau for Gambling and sent to the Internet service providers, containing the obligations of the Internet service providers and the time-limit to contest the decision before the competent state courts.[16] In addition to blocking access, the Supervision Committee can include the sites on the "black list of unauthorized sites".

- **Products with psychoactive effects:**

Concerning products with possible psychoactive effects, the **Ministry of the Informational Society** can, in accordance with the law, request that the Internet service providers block, access to the websites concerned upon receipt of notice from the legal representative of the Health Ministry, of the National Authority for Consumer Protection and of the National Veterinary Sanitary and for the Food Safety Agency. The notice is sent when there is a justified presumption that there is a risk that activities with products with possible psychoactive effects are being performed. The administrative decision imposing the measure can be challenged before the competent courts.

[16] A recent decision issued by the Supervision Committee concerns the blacklisting of unauthorized gambling sites : http://www.onjn.gov.ro/blog/2015/07/decizia-nr1926-din-24062015-privind-introducerea-siteurilor-de-jocuri-de-noroc-in-lista-neagra.

4. General Monitoring of Internet

Does your country have any entity in charge of monitoring Internet content? If yes, on what basis is this monitoring activity exercised?

In Romania there is no entity in charge of a general monitoring of the Internet. There are however administrative bodies such as, mainly, the **ANCOM**, which is the regulating authority with regard to electronic communications. The ANCOM is the administrative authority with the broadest competence in this area. For a detailed description of the ANCOM's competence, we refer the reader to the discussions in sections 2 and 3 above. More information can also be found on ANCOM's website, http://www.ancom.org.ro/en. The legal ground for the ANCOM's competence, as previously mentioned, is mainly *Emergency Government Ordinance no. 111/2011 on electronic communications*.

In addition, for **gambling** activities, specifically, and, as previously mentioned, the entity in charge of monitoring the Internet content with the aim of identifying unauthorized online gambling sites is the **Supervision Committee of the National Bureau for Gambling**, through its departments (the General Department for Digitizing and Monitoring Gambling) or the authorized monitoring operators. The monitoring operators can be public institutions or private entities. The legal ground is mainly *Emergency Ordinance no.77/2009 on the organizing and exploitation of gambling,* article 7.

At a private level, it is worth noting that several **hotlines** exist in Romania with regard to illegal content. For example, the EU-funded program Safer Internet Plus is also run in Romania by www.sigur.info, which establishes a helpline and a hotline. The hotline receives complaints regarding illegal and harmful content which are forwarded to the police or to the competent authorities. Complaints received so far relate to child pornography, adult pornography, cyber bullying, grooming and SPAM.

5. Assessment as to the case law of the European Court of Human Rights

Romanian law regarding Internet content is generally considered to be in line with the requirements of the European Court of Human Rights. However, some criticism has been voiced by certain NGOs regarding, in particular, the fact that, under the Law on electronic commerce or under the Law on fighting pornography, the ANCOM (an administrative authority) may allegedly block websites without the intervention of the courts of law. Such criticism seems rather hasty, since it is not unusual for administrative bodies to issue decisions tending to restore a lawful situation (such as blocking orders) and since, at a general level, all administrative decisions can be subject to an administrative appeal in the state courts. Indeed, as previously stated, in accordance with art. 12 para. 5 of Government Emergency Ordinance no.22/2009, all decisions issued by ANCOM may be challenged before the Administrative Law Section of the Bucharest Court of Appeal, without previously undergoing the no-cost procedure provided for in Article 7 of Administrative Law no. 554/2004. Individual decisions may be challenged within 30 days from their communication date.

Specific criticism has been voiced concerning **gambling** regulations. According to article 7 paragraph b) of Government Decision no. 298/2013 on the organization and functioning of the National Bureau for Gambling, the monitoring entity identifies sites that are not authorized according to Romanian legislation. The enactment of Law no. 124/2015 has reinforced this provision. The Association for the defence of Human Rights – Helsinki Committee, has intensely criticized this law as granting the National Bureau for Gambling the power to filter Internet content in general. Certain other representatives of the private sector (the National Association of Internet Service Providers, the Association for the Protection of Human Rights, The Association for Technology and Internet, the

Independent Journalism Center, ActiveWatch)[17] have also voiced their opinions that the National Bureau for Gambling's powers were leading to a general censorship of Internet content. Furthermore, they considered that a major deficiency of the law was the lack of any administrative procedure regarding errors in evaluating suspicious websites.[18]

It seems however that such criticism is unsubstantiated, as the sole purpose of the screening processes it to identify and blacklist unauthorized gambling sites. Such gambling websites being obviously illegal, blocking/removal of such websites may be enforced through a blocking or removal order issued to the relevant ISPs, according to the Law on Electronic Commerce. Moreover, the decisions of the National Bureau for Gambling can be challenged before the state courts, according to Administrative Law no. 554/2004, which decisions will then undergo a full legality and opportunity review.

In conclusion, as explained in Section 3 above, the law grants the power to the ANCOM and the other relevant administrative authorities (the National Bureau for Gambling and the Ministry of the Informational Society) to order the blocking/removal of illegal gambling websites, of pornographic websites not in compliance with the law and of websites commercializing substances with psychoactive effects. The other material grounds for requesting a blocking/removal measure (such as the protection of copyright, the protection of one's dignity, privacy and image, the protection of the public order or of national defence, etc.) can only be examined by a court of law. The court's final decision may then be implemented with the ANCOM's support insofar as the ISPs are concerned, according to the Law on Electronic Commerce.

Furthermore, Romanian law provides for the necessary safeguards to prevent abuse and arbitrariness in line with the principles established in the case-law of the European Court of Human Rights. Thus article 6 of Government Emergency Ordinance no. 22/2009 on the establishment of the ANCOM, approved by Law no.113/2010, provides that ANCOM, in its regulatory work, shall enforce the principles of objectivity, transparency, non-discrimination and proportionality, inter alia, by: a) promoting predictable regulations by ensuring a consistent approach, revised at suitable time intervals; b) ensuring compliance with the principle of non-discrimination in the treatment of the providers of electronic communications networks and services or of postal service providers found in similar circumstances; c) safeguarding competition for the end-users' benefit and promoting, where applicable, infrastructure-based competition; d) promoting efficient investments and innovation in new and improved infrastructures, including by ensuring that any access obligations imposed take into account the specific investment associated risks and allow for cooperation agreements between investors and the persons requiring access, in order to share the investment risks, while ensuring competition in the market and compliance with the non-discrimination principle; e) taking into consideration the various competition environment and users' needs from various geographic areas; f) imposing *ex ante* regulatory obligations only where there is no effective or sustainable competition and loosening up or withdrawing these obligations where these requirements are met. Article 6 is enforceable before Romanian courts of law.

It should also be mentioned that the Constitutional Court plays an equally important role in ensuring that laws and regulations are in accordance with constitutional provisions and their interpretation in the European context. A good example is the Constitutional Court's decision no. 17 of 21 January 2015, where the Court ruled that various provisions of the law on cybersecurity were unconstitutional. This law could not therefore enter into force (see section 2.1 above).

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17 http://www.apador.org/blocarea-unui-site-de-internet-prin-isp-este-o-masura-de-cenzura-2/.

18 http://www.activewatch.ro/ro/freeex/reactie-rapida/accesul-la-internet-e-un-drept-nu-un-joc-de-noroc/.

Finally, we note that Romanian case law with regard to measures of blocking and removal of Internet content is rather limited, but courts seem to have observed the pertinent case law of the European Court of Human Rights. For instance, in the case SC URBAN si ASOCIAȚII SRL v M.B., discussed above in section 2.1.C, the court stated that "suspending the website is not an adequate measure, it is not **effective** and in any case would be **disproportionate** in view of the fact that a minor detriment to the right to honour and dignity cannot justify a drastic measure of limitation on freedom of speech such as suspending a website [would represent]".

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