

## DESIGNING EFFECTIVE ONLINE REGULATION FOR MOLDOVA: LESSONS AND BEST PRACTICES FROM ABROAD

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### Introduction

In Moldova, as in many other countries, the search for a balanced form of online regulation continues. Currently, there are a number of conflicting trends in the regulation of the country's online environment and the absence of a unified state policy in this area. Driven by fear of security risks, Moldovan authorities are increasingly attempting to expand state oversight of online spaces and increase their influence over the internet, putting the freedom of expression and the right to privacy at risk.<sup>1</sup> Implementation of laws designed to protect citizen's rights and privacy and activities of the media is largely ineffective, and there are few checks and balances in place to prevent authorities from taking a more aggressive stance in policing internet content.

Moving forward, it is crucial that Moldova forms a favorable legal environment for the online space and develops legislation that considers international recommendations, experience, and best practices, while maintaining a balance between security issues and civil liberties. This policy brief offers an examination of trends in regulation of the online environment in Moldova, considering the country's observance of international norms related to freedom of expression, reception and dissemination of information, and limitations on accessing online content. It calls for the development and application of common principles, norms, and decision-making procedures governing the online environment that are based on a broad multistakeholder approach and consider economic, political, and socio-cultural dimensions.

### International Guidelines for Online Regulation

Moldova is a full member of the international community, and is a member of the United Nations,<sup>2</sup> Council of Europe (CoE),<sup>3</sup> Organization for Security and Cooperation in Europe,<sup>4</sup> and signatory to the Association Agreement with the EU.<sup>5</sup> As such, Moldova is obligated to adhere to the standards established by international organizations and regulatory bodies regarding regulation of the online space. According to the UN Secretary General's Digital Cooperation Roadmap, "the

internet has to provide a safe space for information-sharing, education, expression, mobilization and participation... Member states ... should advocate for transparent and accountable content governance frameworks that protect freedom of expression, avoid incentives for overly restrictive moderation practices and protect the most vulnerable."<sup>6</sup>

A number of relevant documents are in force in the EU, including, most notably, the EU Human Rights Guidelines on Freedom of Expression Online and Offline.<sup>7</sup> The CoE

Declaration on Freedom of Communication on the Internet<sup>8</sup> proclaims basic principles of freedom protection on the web, underlining that the internet should not be subject to stricter restrictions than those applicable to conventional media, and that any censorship on the web can only be voluntary.

The CoE has also formulated guiding principles for respecting fundamental freedoms and human rights, democratic standards and the rule of law.<sup>9</sup> The CoE calls on governments to promote and protect the free flow of information on the internet, ensure that content blocking is not in conflict with human rights, avoid overly strict internet rules, and work together to develop a common internet filtering strategy.

Transparency, predictability, and accountability to the public are the principles on which governments should base all bans and restrictions on access to information on the web. Regulatory bodies also ask officials to discretely measure “crime” and “punishment” and to give preference to the least destructive measures of control in the fight against illegal content or activities on the internet. The adoption of any restrictions or bans should be done only after public discussion. It is internationally acknowledged that national policies, commercial activities, and technologies that interfere with internet traffic or restrict content lead to inconsistent and contradictory rules and bans. Measures adopted or promoted by states should therefore be regularly reviewed to determine their practical effectiveness and whether they are still necessary or proportionate. Self-regulation is the ideal that governments should encourage.

As the CoE notes, “the provisions on rights and freedoms set out in the European Convention on Human Rights (ECHR)<sup>10</sup> and Article 19 of the International Covenant on Civil and Political Rights<sup>11</sup> apply equally online and offline.”<sup>12</sup> Thus, the CoE member states have negative and positive obligations to respect, protect, and promote human rights and fundamental freedoms on the internet. Any national decision or regulatory action restricting human rights and fundamental rights on the internet must be rooted in law and comply with international obligations. Democratic states must fully respect the principles of proportionality and guarantee access to remedies and the right to be heard and to appeal with safeguards for due process.

Even in times of emergency, such as the COVID-19 pandemic, measures to combat misinformation cannot justify restrictions on people’s freedom of expression and access to information, or obstruct the legitimate work of media.<sup>13</sup> Such measures must be necessary, proportionate, and regularly monitored by parliamentary bodies and national human rights institutions.

## Emerging Approaches to Effective Online Regulation

While the international regulatory framework provides clear guidelines for governments in developing policy on online media, the translation of international standards to national legislation is not always straightforward. Information dissemination is too often blocked by political, economic, technological and sometimes even cultural factors. This has been even more true during the pandemic, which has witnessed accelerating declines in internet freedom around the world as governments have grappled with new and serious threats to the integrity of the online information environment.<sup>14</sup> The 2021 World Press Freedom Index<sup>15</sup> indicates that citizens’ access to information has “sharply deteriorated,” and that there have been increasing obstacles to the work of media.

Gaps in national legislative frameworks and the lack of universal enforcement mechanisms at the international level mean that what is illegal in one country may be considered perfectly legal in another. For example, governments are generally unanimous when it comes to child pornography and crimes against minors. However, when it comes to xenophobia, legislation may differ. Some states, such as Germany, apply very strict sanctions to material that promotes racial intolerance, while the same material may not contradict the laws of other countries.

Despite these discrepancies, Europe has built a large-scale, evolving mechanism of online regulation that carries important lessons for Moldova. Although they do not always succeed, many governments strive to maintain a balance between guaranteeing rights and freedoms and protecting national security. More countries are finding that a balanced regulation of the internet can only be possible with the cooperation of multiple government agencies, private sector companies, civil society, and media and end users, especially when it comes to the regulation of harmful or hateful content that threatens national security.

At the same time, stricter laws controlling online information have recently come into effect to counter terrorist activity and radical or hateful content. National regulatory bodies are requiring companies to automate the process of identifying illegal content and expedite its blocking or removal, as well as provide access to encrypted traffic. For example, in April 2021, the European Parliament passed a law<sup>16</sup> requiring internet companies to remove or disable access to content marked as “terrorist” within one hour of notifying national authorities.<sup>17</sup> Notably, the law explicitly excludes the removal of information that is part of any educational, artistic, journalistic, or academic material. In addition, internet companies are not required to proactively monitor or filter their content, as proponents of stricter measures have insisted. In November 2020, for example, a joint statement<sup>18</sup> by EU interior ministers suggested that companies should

more closely monitor content in-house and remove terrorist and other radical messages as soon as they are discovered.

Another piece of legislation that could be constructive in the Moldovan context is the Digital Services Act,<sup>19</sup> which focuses on increasing the responsibility of internet companies for the distribution of illegal content on the internet. It involves a large-scale reform of the regulation of online platforms and the formation of unified rules within the EU. The act, which is still being finalized, will create tools for more effective public control, as there is currently no special regulator of platforms that supervises the moderation of content or transparency of advertising. Under this law, EU authorities seek to make the work of internet companies and social media networks more transparent to prevent the spread of political propaganda, incitement to hatred, and fake news.

## National Legal Challenges and Trends

In Moldova, freedom of expression is at a critical juncture, especially in the digital space.<sup>20</sup> According to the Office of the Ombudsman, amid the 2020 pandemic, Moldova witnessed an “ongoing deterioration” in terms of freedom of expression and registered a “lack of progress” related to the right of access to information.<sup>21</sup> This trend was evident in March–June 2020<sup>22</sup> and March–April 2021<sup>23</sup> when Parliament declared a state of emergency due to the coronavirus pandemic. The Information and Security Service (SIS) unilaterally blocked dozens of news sites that it claimed were disseminating online content containing misinformation about the COVID-19 pandemic.<sup>24,25</sup> In doing so, the Moldovan authorities violated the international right to freedom of expression and the right to “search, receive, and transmit information and ideas.”<sup>26</sup>

Expert and statistical analysis of legislative activity in recent years indicates that Moldova has taken a strict approach to the formation of the legal framework governing the online space, without always considering international experience and recommendations in this area. Draft laws have included overly general wording and lacked clear criteria for interference in rights and freedom, thereby increasing the risk of misinterpretation and abuse of the laws. Moreover, the development of the legal framework on these topics has not always been transparent to the public. For example, a bill announced by the Ministry of Justice in July 2020 that aims to counteract the phenomenon of spreading false information that affects national security<sup>27</sup> has not yet been presented for public discussion. The public is also currently awaiting the release of a draft of the Digital Code,<sup>28</sup> which promises to systematize and unify regulations in the field of information technology and address some issues related to information security.

From 2014–18, law enforcement agencies supported controversial legislative initiatives known as “Security Mandate” and “Big Brother,” which would introduce special procedures for investigations in the information space

by the SIS and provide for the expansion of its powers. Lawmakers proposed this legislative agenda to amend national legislation in the field of information security and to combat cybercrime and crimes against children on the internet. While the writers of the draft law claimed a desire to bring laws in line with European law, in reality the proposed changes provided for excessively strict control of the internet by the state and ignored the practices of other countries that have experience in this area.<sup>29</sup>

Local civil society organizations have repeatedly expressed their concern about the potential negative consequences of this legislative initiative.<sup>30</sup> In their opinion, the initiative grants a very broad range of rights for law enforcement institutions without guaranteeing due respect for the principle of privacy and freedom of expression. In addition, drafters of the bill pass the entire burden of implementing the legislation on to service providers without a preliminary analysis of the costs and effectiveness of such measures. This may lead to a substantial increase in cost for access to internet services. Civil society organizations acknowledge the importance of combating child sexual abuse and terrorism and do not dispute the need to improve the legal framework in these areas, but stress that the bill far exceeds the pursued objectives and leaves room for abuse.

Civil society experts also recommended the government reject proposed articles that would imply mass surveillance measures, conduct detailed examination of legislation that extends the limitation of fundamental rights, and waive the obligations to block users’ access to web pages. The blocking of web pages by internet service providers represents interference users and websites, which violates freedom of expression and the right to privacy by creating a layer of censorship.<sup>31</sup>

Observers also cite Germany’s Network Enforcement Act (NetzDG)<sup>32</sup> and a similar Turkish law as a cautionary tale for Moldova. Passed in January 2018, the NetzDG cites sections of the German Criminal Code<sup>33</sup> which details illegal speech online to oblige large network platforms to promptly delete “illegal content.” Human rights groups say the law essentially shifts censorship to social media administrators and sets a dangerous precedent for other states that seek to restrict freedom of expression online. In Turkey, a similar law was passed in 2020 to strengthen authorities’ control over social networks. This development has been described by international human rights watchdogs as “the nail in the coffin for online freedom of speech” in Turkey and “a move toward cyber-authoritarianism.”<sup>34</sup>

Both national and international experts have urged Moldovan lawmakers to avoid haste in this complex reform process.<sup>35</sup> In order to comply with European standards, Moldovan national authorities should ensure full compliance with international conventions, review and refine the framework governing the blocking of internet access in accordance with the guarantees of fundamental rights enshrined in the ECHR and the relevant case law and standards in this field, and clarify

legal terminology to reduce confusion in the interpretation and application of the law.<sup>36</sup>

Following heated criticism of the amendment package from civil society, the media, and electronic communications service providers, the draft legislation ultimately failed to reach a final reading in Parliament. However, the regulation of Moldova's online space will continue to be of critical and growing importance, and in November 2020 the SIS announced its intention to revisit this legislative initiative against the backdrop of increased cases of misinformation during the COVID-19 pandemic.<sup>37</sup>

## Recommendations for Government, Civil Society and the Internet Community:

Moldova's legal framework needs to be revised to create a logical link between policy and conceptual documents and current realities, to develop clear terminology based on international experience, and to respond to new challenges arising in the digital space. This should be preceded by a thorough and comprehensive analysis of the need for **legislative reforms that uphold fundamental rights**, especially freedom of expression, the right to receive and disseminate information and the right to privacy.

The development and application of national policies and decision-making procedures governing the online environment should be based on a **multilateral, transparent, and inclusive approach** that takes into account the **economic, political, and socio-cultural aspects** of the process. A good start would be to create a multilateral working group dedicated to these issues. To ensure a wide range of perspectives, the working group should be composed of experts from civil society, international organizations, academia with expertise in regulating freedom of expression, as well as with the private sector (service providers and companies in the field of IT and electronic communications) and relevant government agencies including the SIS, the Ministry of Internal Affairs, and the General Prosecutor's Office.

When shaping the legal framework for effective online regulation, Moldovan officials should be guided by the legitimate interests of society in terms of free exchange of information, pluralism of opinions and the media, the right to freedom of expression, and freedom of information in the digital age. **Excessive restrictions and rules on blocking and filtering content should be avoided.** Likewise, Moldovan lawmakers must **ensure clarity and consistency of future legislation** in terms of concepts and procedures in order to avoid such arbitrary and abusive interpretations and practices. Regulators for their part should work in unison with other stakeholders to develop internet behavior norms. This would ensure the protection of children, private and family life, and personal data in the fight against cybercrime and disinformation, while not infringing

on the freedom of expression or rights to receiving and disseminating information.

The adoption of any restrictions and bans, especially those regulating public rhetoric and access to information, should be made only after public discussion and their development should be rooted in the principles of **transparency, predictability, and public accountability** and comply with the main international legal documents in this field, including the ECHR. This will help avoid a mass violation of rights that would lead to lawsuits against Moldova in the European Court of Human Rights.

Mechanisms for regulating online content should contain **transparent procedures** and provide **adequate safeguards**. These safeguards should include notification of the restriction and its reasons and the possibility to appeal to a court regarding any relevant decisions to obtain judicial redress. Restricting access to information deemed "false" or "unreliable" on the basis of a decision of a state body, without establishing in an open and independent judicial process the proper balance between freedom of speech, freedom of information, and other rights, deprives the information sphere of a pluralism of opinions. Platforms such as NewsGuard,<sup>38</sup> which provides evaluations of thousands of websites based on criteria including funding transparency, journalistic integrity, and editorial record of accomplishment, can play a significant role in this process.

The current draft laws on the regulation of the online environment should be accompanied by a preliminary **analysis of the costs and economic effects** of their implementation in order to avoid a significant increase in the cost of access to electronic communications services resulting from the additional costs caused by the requirements for the implementation of new regulations. In addition, there should be a **sufficient transition period** between the adoption and official publication of laws and their entry into force, so that all those involved in its implementation can take preparatory measures.

Finally, the Moldovan government should offer **media and digital literacy programs** to teach users to make informed decisions and respect the rights and freedoms of others. Additionally, it is important to promote access to and use of educational, cultural, scientific, media, and other content. Programs should be implemented by both civil society and the media, as well as by government agencies at national and local levels. An example Moldova could follow is the Digital Europe 2021–2027 program<sup>39</sup> approved by the Council of the EU. The program is designed to complement many other programs supporting digital transformation, such as Horizon Europe and the European Digital Decade 2030. Program managers implement educational programs that include long and short-term courses and internships in the workplace which enhance the digital literacy of citizens and assist them in making informed decisions and respect the rights and freedoms of others.

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