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Regulating health communication in the post-truth era

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Abstract

As a global epidemic of the social media age, COVID-19 has also resulted in an 'infodemic', which means the uncontrolled spreading of false information about the health situation. Spreading of health information is a special intersection point of the freedom of speech, freedom of science, and the fundamental right to life and health. The paper analyses the European and Hungarian legal framework for health communication from multiple perspectives. Regulatory challenges and solutions differ for professional health communication, commercial communication and health communication by laypeople. As with all forms of misinformation, private regulations of platform operators have a significant regulatory role to play in relation to health disinformation. As a result of the analysis, the paper provides a detailed regulatory map that also covers private regulation solutions and explores the factors that need to be considered when designing a comprehensive future regulation.

Keywords: infodemic, disinformation, freedom of speech, private regulation, health communication, consumer protection, scaremongering

1. Phenomenon of infodemic

In the age of 'new media', social risks associated with health-related communication have emerged as a new and vast area of social and communication science studies. Public communication about the COVID-19 pandemic has put the various phenomena surrounding the changes in the informational environment into even sharper relief. These phenomena render it necessary to perform a more comprehensive review and re-conceptualisation of the regulatory framework concerning health communication. The characteristic features of social media, as well as of the network-based communication associated with the latter, in conjunction with the collapse of the previously dominant information gatekeeper system, are all framework conditions that shape the circumstances governing the dissemination and reception of information. The pandemic has drawn attention to the fact that human health does not depend on healthcare services alone but also on the health of the informational environment, on whether people have access to reliable and accurate information which allows them to properly inform themselves on the nature of the threat they face; whether they are equipped with the proper instruments and methods for shielding themselves against it (OSCE, 2020); whether there are

safeguard institutions and procedures in place that guarantee access to relevant information; and whether the informational environment promotes the protection of health.

The unique nature of the pandemic has indisputably put the role of public communication front and centre as it has enhanced and highlighted the significance of access to credible and reliable information. In the absence of vaccines and an effective treatment, the classic public health strategies and non-pharmaceutical interventions (NPI) (such as for example masks, regularly washing hands and social distancing) have played a vital role in containing the spread of the virus. Public awareness of NPIs and their applied practice are also contingent on the effectiveness of public communication, its persuasiveness (Nan & Thompson, 2020).

As a result of the rise of social media, we have seen a concomitant surge in the quantity of user-produced health content being spread in the information environment. These also attract substantial attention and generate massive social media traffic alongside the public service announcements (PSAs) issued on social media by public health organisations. Research shows that an influencer encouraging the public to wear masks – or seeking to dissuade them from doing so, for that matter – often reaches larger swathes of the public than information issued by official bodies (Nan & Thompson, 2020). The widespread use of social media, however, has also resulted in a significant increase in the quantity of false, misleading, or dubious health information in public discourse (Lazer et al., 2017).

As the first global epidemic of the social media age, COVID-19 has also resulted in an 'infodemic'. The information epidemic is described by WHO as follows: 'infodemics are an excessive amount of information about a problem, which makes it difficult to identify a solution. They can spread misinformation, disinformation and rumours during a health emergency. Infodemics can hamper an effective public health response and create confusion and distrust among people' (cited by UN DGC, 2020).

Already at the onset of the pandemic, the WHO called attention to the risks emanating from the informational environment, which have escalated together with the spread of the virus (WHO, 2020a). Already in previous historical periods we saw that epidemics gave rise to the spread of false and unfounded information.[1] What is novel about the current situation is the accelerated pace of proliferation of this type of information and its increased impact due to the larger mass of such information. In other words, existing communication technologies exacerbate the impact of false (unfounded, unproven) and harmful health information. A vast mass of unprocessed information that is allegedly scientific circulates in public and reaches audiences who lack the training to properly parse such information (Viswanath et al., 2020).

King and Lazard believe that the infodemic is a corollary phenomenon: the information environment is inundated with information of varying accuracy and usefulness, which makes the quest for credible information increasingly challenging. These conditions make information scanning exert a questionable influence, and the sharing of information can lead to undesired consequences, such as the spread of misinformation (King & Lazard, 2020). The risks are further exacerbated by the widespread uncertainty in society which leads to lacking protections against misinformation and a growing susceptibility to conspiracy theories (Krekó, 2018).

Another aspect of the emergence of the infodemic was an unusual fusion of organised groups on the internet, united only in their opposition to government measures aimed at limiting the spread of the virus. These include groups espousing conspiracy theories, anti-science groups, pro-gun lobbies and anti-vaxxer groups; these cooperate either deliberately or coincidentally in voicing their convictions. Social media has contributed to the increased risk

1 See Tussay (2021, pp. 123 and 126) for some examples of tackling the issue in early modern England.

of the spread of disingenuous and misleading information. It has elevated the communication of groups that previously communicated in the hidden niches of the internet into the mainstream and has made it part of the public discourse that reaches large swathes of society; this phenomenon is referred to as the mainstreaming of disinformation. What made the current situation unusual was that there are also figures wielding public power – political players – who amplified the voices of the groups that engage in misleading communication (Viswanath et al., 2020).

Misleading, inaccurate or false health information may have critical consequences, since misinformation on health issues can jeopardise people's life and health. Not only of individuals, but of entire societies. Misleading anti-vax campaigns, for example, which lack a scientific basis and are based on fake news, can result in lower rates of immunisation. Furthermore, misinformation also impairs the credibility of health service providers and can lead to the flawed administration of drugs, foods, and vaccinations (Sameer et al., 2019).

The infodemic is a complex social phenomenon which cannot be explained merely with reference to changes in the info-communications environment. To understand and properly manage it, we must at the same time also understand the broader social and political context. Analyses examining the informational environment in the early period of the pandemic – including a study by the Reuters Institute (Brennen et al., 2020) – highlight the fact that political actors and opinion leaders also played an active role in fomenting the spread of false or misleading communication. The study suggests that 20 per cent of the misinformation in the sample collected as part of the research was originally disseminated by leading politicians, celebrities, or other prominent figures of public life; at the same time, however, this subset drew a disproportionate share (69 per cent) of total social media engagements in our sample. These results cast light on the effectiveness of top-down disinformation and the role of mainstream politics in creating informational uncertainty. Among the social consequences of the infodemic, the WHO notes that disinformation polarises the social debate on the pandemic; it increases the prevalence of hate speech in public discourse along with the risks of social conflicts and violence; and in the long run it constitutes a threat to democracy, human rights, and social cohesion (WHO, 2020b).

In discussing infodemic-related phenomena, our emphasis will be on the risks stemming from misleading and false communication. In this context, we examined how far the prevailing regulatory instruments concerning health communication provide adequate protection, and where there might be need for further regulation.

The time since the onset of the pandemic has made clear that the related infodemic is not a homogeneous phenomenon. A multitude of different players with their own motivations disseminate information of highly varied quality (Brennen et al., 2020). The problem is very complex, and does not centre solely on the issue of misleading or false health information. A substantial portion of communications-related challenges stems from equivocal and unclear official (state) communication. A case in point is the official communication during the early phase of the pandemic concerning the wearing of masks. Even though masks are effective in slowing the spread of the virus, during the first phase of the epidemic the U.S. healthcare administration, including for instance the Surgeon General, suggested otherwise in their communication (Noar & Austin, 2020). American immunologist Anthony Fauci, senior healthcare advisor to Joe Biden, did not initially support the wearing of marks, primarily out of concern that rising public demand for masks would create shortages in the supply of healthcare workers. Fauci later modified his communication once the supply of masks had stabilised and

pertinent research further highlighted their effectiveness in stemming the spread of the virus (Noar & Austin, 2020).

Misinformation concerning COVID-19 is as highly varied as information on the subject in general (Brennen et al., 2020). It cannot be reduced to the problem of information that is harmful to human health. Based on research examining the communication environment that emerged around the pandemic, a major portion of false and misleading information emanated from the activities of healthcare organisations or authorities, and hence these constitute a threat to public health broadly understood (Brennen et al., 2020). Since the level of public trust vested in health organisations is a key component of the credibility of epidemiological measures and defensive actions against the pandemic, potential misinformation concerning the latter will have a major impact on the course of the epidemic. At the same time, however, social trust in the latter is by no means independent of the communication activities of health organisations and public bodies, their transparent and clear communication.

Based on these starting points, our research questions are the following:

- What is the status of health information from the point of view of the freedom of expression? What are the fundamental rights standards of regulatory interventions regarding health information in the intersection of free speech, free research and the right to life and health?
- What are the legal guarantees of the credibility of health information concerning the professional, the commercial and the lay communication?
- How far did Hungarian criminal law succeed against the publishing of fake information, and the spreading of untrue health information?
- What is the role of private regulation created and enforced by social media platform operators?

Our research methods were the following:

- Analysing the European and Hungarian human rights framework – EU law, decisions of the Hungarian Constitutional Court and the European Court of Human Rights – regarding health communication.
- Analysing the Hungarian legal and ethical framework of health communication and its practice.
- Analysing the Facebook Community Standards in terms of health information.

Our hypothesis is that the freedom of speech and the freedom of science do not make it possible to forbid the spreading of all kinds of untrue health information, but they oblige the state to guarantee effective legal tools to defend against harmful health information and to access accurate information on the health situation. However, the new media system based on global social media networks make it unavoidable to reframe the role of the state, and to involve social media providers in the creation and enforcement of the rules on health information.

2. Fundamental rights collisions

Of course, when defining the limits of health communication, one cannot ignore that an abuse of freedom of opinion in this case violates or threatens the fundamental human right to life and health. The right to life, as the right at the head of the human rights hierarchy, obviously makes it necessary to restrict freedom of opinion. The more directly a given communication endangers human life, the broader the scope for state intervention to qualify as proportionate restriction. However, the degree of threat to human life depends not only on the content of

the communication. In this case, too, the standard of the Hungarian Constitutional Court is valid, according to which it is not the content of the communication, but its effect that justifies the state intervention. The persuasive power of official information provided on health products, information from a doctor or pharmacist, is enormous: such information compulsively determines the related decisions of lay people. There is a greater individual responsibility for the use of health information from other lay people or from uncontrolled source, such as on social media. A decision based on such information has serious individual and community consequences, so the individual can be expected to be more careful in using making use of the information. However, lay information is also often presented as information from a professional, and individual decision may affect not only the life and health of the individual, but the community as a whole. The state has an obligation to protect public health as well as to create the conditions for free expression. Furthermore, when setting the boundaries of health communication, it should not be overlooked that scientific results are often not final, and that science is taken forward by open debate.

An important starting point for both the freedom of opinion and the freedom of science is that 'the state is not entitled to decide on the issue of scientific truth, only the practitioners of science are entitled to evaluate scientific research.'[2] This primarily means that the conclusion of scientific debates is not a state competence. However, it does not mean that claims confirmed through proper procedures of science cannot be defended by courts or other public bodies against claims to the contrary. It is also obvious that science itself is constantly evolving because of scientific debates. Scientific claims previously considered proven may be questioned as a result of further research, and in that process, the state again has no opportunity or right to take a stand. Complicating matters further is the fact that science has recognized institutions and organizations that legitimize scientific claims, but these institutions also do not enjoy exclusivity in defining scientific truths. In principle, there is nothing to prevent anyone from outside the system of scientific institutions from questioning the results that have already been legitimized, in addition to using a method that was also previously unknown or not used in the field. The present study addresses mostly the relationship between medical scientific research and freedom of opinion, but the same issues arise even more sharply in the social sciences. While the results of science can typically be verified by measurements, the same cannot be said for the social sciences in a significant number of cases.

Responsibility for health communication varies between professionals (doctors, pharmacists) and lay people. Because of the persuasive power of professionals' communications, the impact of a given communication on the audience is quite different than if the same communication is not from an expert. Communication between doctor and patient, or between pharmacist and patient, is a highly asymmetric yet trusting relationship (Lim & Jo, 2009). A key element of this relationship of trust is patient information, which is regulated in detail by both legislation and ethical standards. At the same time, the social impact of professionals' communications in the media is greater, as information published through the media or through any public forum affects many people at once.

American free speech literature treats professional speech as a separate category. According to Haupt, professional speech provides 'insights through the professional to the client, within a professional-client relationship' (Haupt, 2017, p. 159). The U.S. court in the case *King v Governor of New Jersey* found that professional speech is subjected to a higher level of scrutiny. However, the court explained that 'the reason professional speech receives diminished

2 Article X Section 2 of the Hungarian Fundamental Law.

protection under the First Amendment [is] because of the State's longstanding authority to protect its citizens from ineffective or harmful professional practices.'[3] It is constitutional to restrict freedom of opinion in order to protect citizens from harmful or ineffective professional practices. Speaker status thus, according to the U.S. court, justifies a broader restriction on expression.

In connection with the regulation of health communication, the obligation of the state to protect the constitutional institutions arises several times. Not only individual, subjective fundamental rights claims can be deduced from human rights, but also the state's obligation to guarantee the 'abstract value, life situation, freedom' behind the given fundamental right. The so-called objective side of the fundamental rights protects constitutional institutions, imposes an obligation on the state to protect institutions independent of individual fundamental rights requirements. According to the Hungarian Constitutional Court, the right to health is 'a constitutional task performed by the central bodies of the state and [...] local governments.' This constitutional task includes, in addition to maintaining the system of health care institutions, the creation of an economic and legal environment 'which provides the most favorable conditions for a healthy lifestyle of citizens, thus preserving human health [...] ensuring the prevention of diseases; potentially suitable for maintaining a healthy lifestyle.'[4] The Constitutional Court has repeatedly stated that the right to health 'cannot be interpreted as an enforceable fundamental right,' i.e., no concrete, accountable state measures follow from it. However, in the current communication environment, health prevention necessarily involves tackling health misinformation and creating the conditions for authentic health information.

The European Court of Human Rights (ECtHR) has rendered several decisions in which it touched on the issue of the protection of health as a legitimate objective of the limitation of the freedom of opinion. In the case *Vérités Santé Pratique SARL v. France,* for example, it justified the restriction with an explicit reference to the patients' rights not to be exposed to unverified medical information. The health magazine *Vérités Santé Pratique* had disseminated unverified medical information which discredited the conventional treatment given to patients with serious illnesses. For this reason, the joint publications and press agency commission refused to register the paper as a special press product entitled to certain advantages under a special regime specifically applicable to the press, including preferential postal rates and tax relief. Otherwise, the paper was allowed to continue publishing. According to the ECtHR, the public health grounds invoked by the public authorities to justify the given restriction of press freedom were pertinent and sufficient.

In this case, the Court established a specific standard for health communication by stating that 'while nothing prohibits the dissemination of information that offends, shocks or disturbs in a sphere in which it is unlikely that any certainty exists, this may only be done in a nuanced manner.'[5] 'Nuanced manner' is not a well-established standard. What is clear, however, is that the court applies more restrictive standards to opinions concerning health issues as compared to other expressions.

Examining the regulation of tobacco advertising, the Court concluded that the 'fundamental considerations of public health, on which legislation had been enacted in France and the European Union, could prevail [...] even over certain fundamental rights such as freedom of

3 King v. Governor of N.J., 767 F.3d 216 (3d Cir. 2014).

4 Order 3374/2017. (XII. 22.) AB.

5 Vérités Santé Pratique SARL v. France (dec.) (74766/01); Information Note on the Court's case-law No. 81, December 2005.

expression.'[6] The existence of such a 'fundamental consideration' was derived from the fact that there was 'a European consensus' concerning the issue. Correspondingly, the notion of a 'European consensus' may well be dispositive in the assessment of the veracity of any health information. The existence of a 'European consensus' in that specific case was supported by the existence of EU-level legislation, which thus relieves the Court from the burden of having to take a stance on the question of scientific truth.

At the same time, however, in other decisions the ECtHR has emphasised the importance of public debate on health issues. According to its position on *Hertel v. Switzerland*, it is necessary to reduce the extent of the margin of appreciation of the national authorities 'when what is at stake is [a given individual's] participation in a debate affecting the general interest, for example, over public health.'[7] In other words, a regulation may not be so restrictive as to impede free debate on health issues. The Court also claimed in this decision that also in case of health communication, 'it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas.'[8]

In the *Mamère v. France* case, the ECtHR examined a particular aspect of the public health debate.[9] The applicant in the case was found guilty by a French court on the count of slander because the applicant had claimed in a television show in 1999 that the leader of the competent authority had failed to properly inform the public at the time of the Chernobyl nuclear disaster, which resulted in severe health consequences. According to the Court, the case was 'one where Article 10 requires a high level of protection of the right to freedom of expression, for two reasons. The first is that the applicant's remarks concerned issues of general concern, namely, protection of the environment and public health.'[10] The criticisms advanced by the applicant 'were part of an extremely important public debate focused in particular on the insufficient information the authorities gave the population regarding the levels of contamination to which they had been exposed and the public-health consequences of that exposure.'[11]

Thus, the ECtHR extends robust protection to criticism of the state's actions concerning health. In the aforementioned case, the French court even denied the applicant the right to prove the veracity of his claims. At the same time, however, the Court does not protect untrue factual claims. Since in the case at hand it would have been possible to present proper evidence based on the relevant documents, the failure to produce evidence cannot serve as a ground for holding the applicant accountable.

The ECtHR's jurisprudence affirms our original assumption that the limits of health communication are narrower than the general limitations of the freedom of opinion. At the same time, primarily with in terms of the state's health measures, it also emphasises that narrower limits with respect to health information may not serve to preclude public discourse. The difficulty of balancing these two is readily apparent in the fact that the Court itself applies such vague standards as 'nuanced manner' and 'European consensus'. It is impossible to derive a generally applicable standard from the case-law.

6 Société de conception de presse et d'édition et Ponson v. France (26935/05); Information Note on the Court's case-law No. 117, March 2009.
7 Case of Hertel v. Switzerland (59/1997/843/1049), § 47.
8 Case of Hertel v. Switzerland (59/1997/843/1049), § 50.
9 Case of Mamère v. France (12697/03).
10 Case of Mamère v. France (12697/03) § 20.
11 Case of Mamère v. France (12697/03) § 20.

3. Regulatory mapping

Health communication gives rise to such a multifaceted set of problems that it requires complex regulatory solutions. False or even inaccurate health information can lead to mass disaster, as can potentially deficient communication concerning public health crises. In this context, the freedom of expression and the freedom of information square off against the protection of life and physical integrity. One segment of health communication concerns health products (medicinal products and medical equipment) and services, while another is simply part of the general public discourse. The first category marks a distinct area of consumer protection, while the scope of the latter includes, for example, disinformation concerning the public health situation and health products. The need of the public to be properly informed about health issues also gives rise to distinct expectations with respect to the freedom of information: representatives of the state and healthcare organisations bear a major responsibility for providing swift and accurate information. This obligation is especially obvious in the time of pandemics.

3.1 Classification of health communication

We can classify health communication based on two criteria. For one, we distinguish between professional communication and communication by laypeople. A second vital criterion distinguishes between commercial and non-commercial communication. To qualify as professional health communication, a given message must be disseminated by a healthcare professional, typically a physician or a pharmacist. One form of professional communication is the medication guide that accompanies medical or medicinal products. Professional communication may be direct, that is, it may transpire between the physician or pharmacist and the patient, or may be public in situations when it is not addressed to a single or a few selected patients. Any communication outside the range of the aforementioned qualifies as lay communication. Commercial communication is always aimed at the sale of some type of medical product[12] or service. In the absence of such motivation, the given communication does not qualify as commercial.

The significance of these distinctions is that in terms of their impact, they involve very different communicative situations which correspondingly necessitate very different regulatory interventions. The definition of professional communication falls under the scope of regulations concerning healthcare professions – and there is already an existing framework in place there –, while commercial communication is subject to detailed consumer protection rules regardless of the nature of the product or service in question.

The underlying assumption that informs consumer protection regulations concerning medical products or services is that the possibility of labelling a given product or service as one that contributes positively to health substantially increases the desirability of the product or service in question. It is relatively easy in this context to abuse consumers' confidence and their lack of information, which is why corresponding regulations and the application of the law set strict conditions for distributing goods as medicines or as substances having a medicinal effect.

With respect to regulating health communication, it is also relevant to consider who is involved – who the participants are – in a given communicative process. A typical communi-

12 We classify as health products all types of products that have an impact on health, including foodstuffs, nutritional supplements, medications and medical equipment.

cation situation is one in which a healthcare professional conveys something to a lay patient. Such a scenario is highly asymmetric on account of the professional's expert knowledge and the patient's sensitive and vulnerable situation. This asymmetry in their relationship also prevails in a scenario when the lay recipient of the communication does not encounter the information disseminated by the physician/pharmacist directly but through the media or social media.

The media and social media are also involved in the process of health communication. Thus, in principle, they can be subject to specific regulations which account for the unique nature of this particular type of communication; examples include media laws and the regulations of information society services (e-commerce). These regulations reflect – or may reflect – the specific features of the underlying communication platform. The regulation of traditional mass communication platforms – newspapers, radios, televisions, news sites – as well as that of social media primarily focus on the issue of when and in how far the given platform is responsible for the contents they disseminate. While in traditional mass communication media assume responsibility for the contents they disseminate by virtue of the underlying editorial decisions, in the case of social media the platform operator assumes a responsibility for the contents disseminated on their platform by virtue of the fact that the platform provider classifies and filters these contents based on the policies it designed itself, which are enshrined in the terms and conditions of use and implemented with the help of algorithms.

The aspects of health communication that we examined here are primarily manifested in health and consumer protection regulations, both at the EU and the member state level. Some of the phenomena examined in this study are also subject to criminal law provisions. The particular rules that apply to various communication platforms are enshrined in media and e-commerce law.

3.2 Regulating professional health communication

The regulation of communication disseminated by physicians and pharmacists primarily concerns their direct communication with patients. There is also a less extensive corpus of legislation regulating the public communication performed by health professionals. Among the fundamental principles governing these areas, the Hungarian *Health Act*[13] states that everyone has the right to access information/knowledge that will allow them to be informed about the possibilities for preserving and improving their health and to render decisions concerning their health based on appropriate information (Article 5 (3)). Everyone is entitled to receive information on the relevant features of health services provided by healthcare providers; the availability of these services; how they can avail themselves of the latter; as well as the rights of patients and the possibilities for asserting these rights.

The communication of physicians and pharmacists is rather extensively regulated by sectoral legislation and the relevant professional codes of ethics. A key element of the underlying trust-based relationship is the information of patients, which is regulated in detail by both legal provisions and codes of ethics. Among other things, the *Code of Ethics of the Hungarian Medical Chamber* stipulates that information relayed by physicians to their patients must be 'true, objective and sincere' (Article II.5.3). Pursuant to the *Code of Ethics of the Hungarian Chamber of Pharmacists,* a pharmacist must respond with 'increased due diligence' to all ques-

13 Act CLIV of 1997 on Health Issues.

tions a patient may have concerning a medication, other products or a health condition and the related symptoms (Article 8).

The *Code of Ethics of the Hungarian Medical Chamber* dedicates a distinct chapter (Chapter II.27) to the regulation of media appearances by physicians. According to the Code of Ethics, 'information disseminated to the public must be clear, factual and unbiased. Such information may neither trigger unfounded fears or unrest nor arouse unfounded hopes or expectations in society at large or in specific groups or individuals within society' (Chapter II.27 Section 2).

By contrast, the *Code of Ethics of the Hungarian Chamber of Pharmacists* does not include provisions concerning public communication on pharmaceutical drugs.

A physician or pharmacist who communicates in a way that runs afoul of the legal, ethical or professional standards of their respective professions may be guilty of professional misconduct resulting in the endangerment of others. When it comes to health communication, the effectiveness of the applicable general rules depends primarily on the operations of those who enforce the laws.

3.3 Commercial health communication

Most specialised restrictions concerning health communication are set in consumer protection regulations, and these pertain to both commercial practice and commercial communication. In addition to the comprehensive protections extended by the *Unfair Commercial Practices Directive* (UCP directive),[14] there are also numerous product-specific rules in place to govern health communication. The general objective of the UCP directive is to protect the free choice of consumers; it seeks to provide the legal conditions for a market and informational environment in which it is possible for a reasonably well-informed consumer who exercises due diligence to render the optimal decisions for themselves when purchasing a product or service. The consumer's decision is not free when their search for information is unfairly influenced by a corporation. According to the UCP directive, misleading or aggressive commercial practices qualify as unlawful, as does health communication that fails to comply with the requirement of professional due diligence. National oversight authorities which enforce European consumer protections rules can take action in the event of unfair commercial practices that

- attribute protective, preventive or curative effects to products;
- attribute medicinal effects to products that can be marketed as food;
- do not comply with the specific advertising guidelines for the product category in question; claims that suggest an unfounded protective, preventive or curative effect;

Apart from the general rules, the directive includes a special provision aimed specifically at health products. According to the directive's blacklist of typically misleading and aggressive commercial practices, a given item of communication is unlawful if it falsely claims that a product is able to cure illnesses, dysfunction or malformations (Point 17 of Annex I).

Special consumer protection rules apply to the distribution and commercial communication of foodstuffs, medicines, and medical equipment. The goal of the regulation is to provide for the safety of consumers and to ensure with detailed rules that when it comes to claims concerning nutrition, health and curative effects, the prevailing conditions allow consumers to make informed choices in assessing these claims.

14 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

The regulation on nutrition and health claims made on foods is applicable to commercial food communications.[15] The Regulation formulates general principles for all nutrition and health claims, including the requirement that claims concerning nutrition and health may not be false, ambiguous, or misleading. It also lays down general and specific conditions for the use of nutrition and health claims. Among others, the use of nutrition and health claims shall only be permitted if the presence, absence or reduced content in a food or category of food of a nutrient or other substance in respect of which the claim is made has been shown to have a beneficial nutritional or physiological effect, as established by generally accepted scientific data (Article 5 (1) (a)).

European rules set special rules for food supplements. The directive 2002/46/EC[16] lays down rules on the ingredients of food supplements as well as rules concerning the distribution of products and product information. The directive further establishes a prohibition that the labelling, presentation and advertising must not attribute to food supplements the property of preventing, treating, or curing a human disease, or refer to such properties (Article 6).

The European Union has developed an even stricter and more detailed regulatory framework for the distribution of and commercial communication on medicine.[17] It establishes the rules concerning the sale, production, labelling, classification, distribution and advertising of medicinal products for human use in the EU.

The directive lays down prohibitions on the advertising of medicinal products. Thus, for example, it does not allow the advertising to the public of medicinal products that are only available on medical prescription. It also imposes positive and negative rules on the contents of advertising. For example, a positive rule is that all advertising of medicinal products to the public shall be set out in such a way that the product is clearly identified as a medicinal product (Article 89 a)). A negative rule, for example, is the provision in the directive saying that no advertising may suggest that the effects of taking the medicine are guaranteed, are unaccompanied by adverse reactions or are better than, or equivalent to, those of another treatment or medicinal product, or that the advertising of a medicinal product shall not contain, in improper, alarming or misleading terms, claims of recovery (Article 90).

In the area of consumer protection, the pandemic led to active law enforcement and increased control and inspection activities. In the framework of the European Consumer Protection Cooperation Network (CPC Network), the EU member states' consumer protection authorities performed coordinated and simultaneous inspections of products that were being promoted in connection with the COVID-19 pandemic in 2020 (European Commission, 2020a). In the process, the authorities involved also reviewed the activities of webshops and other online platforms, among others. In the case of merchants, they examined whether the various product advertisements aimed at meeting the increased demand generated by the virus for such products contained unfounded claims regarding the given product's efficacy in terms of combatting COVID-19. They also examined whether the information concerning the price of the product, the discounts offered, and the terms of shipping were clear and whether they used unfair methods to nudge consumers towards a purchase, for example by claiming that there was shortage of certain products or that the existing stocks would sell out quickly. At the online platforms (domestic and global) they selected for review, the authorities investi-

15 Regulation (EC) No 1924/2006 on nutrition and health claims made on foods.

16 Directive 2002/46/EC of the European Parliament and of the Council of 10 June 2002 on the approximation of the laws of the Member States relating to food supplements.

17 Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use.

gated those categories of products that were in some way connected to the pandemic, which allowed the authorities to assess the effectiveness of the proactively implemented measures taken by the platforms. Furthermore, the EU initiated active cooperation with the larger platforms in the interest of achieving closer cooperation between the online platforms and the CPC Network, and to induce the latter to take measures that put an end to the unfair commercial practices identified by the authorities (European Commission, 2020b).

The offence of fraud can be a special criminal law dimension of consumer protection. In the event of misleading health communication – for example, the attribution without proper evidence of curative effect to some substance or procedure – it is possible to establish the criminal offence of fraud if all elements of the given offence as it is defined in the law are met. In addition to forging medicines and health products, in the same context criminal law also penalises communication concerning the offer for sale and commercial distribution of such products.[18]

3.4 Health communication by laypersons

The main research question of the present study is what types of restrictions apply to non-commercial and non-professional health communication, that is, whether some type of general restrictions exist against health-related disinformation, or whether any such criteria could be designed in compliance with fundamental rights standards. Based on the Hungarian legal framework currently in force, we can assert that although such general restrictions do exist, they were not primarily designed with the goal of combatting health disinformation in mind. The offence defined in the Criminal Code as 'scaremongering' restricts the dissemination of false facts in specific contexts, including the spread of false health information. The offence as defined in the Criminal Code holds out criminal penalties for the dissemination of false claims at either the location where a public emergency is ongoing or during the period of so-called 'extraordinary legal orders' (a type of emergency law) proclaimed by the government.

According to the Criminal Code, the offence of scaremongering is committed by someone who posits or spreads claims regarding a public emergency that are either false or presented in a distorted manner and which are liable to alarm or agitate a large number of people either in the broader public or at the location where the emergency is ongoing. According to legal practice, a public emergency 'is an objective situation in which one or more persons – the exact number of which is either indeterminable at the time or whose number is large – or objects of significant value could be threatened' (BH1998. 304). In their analysis, Bencze and Ficsor point out that the meaning of 'the location of a public emergency' is not clearly defined (Bencze & Ficsor, 2020). Neither the law itself nor the existing case-law make unequivocally clear whether the location of a global pandemic is the entire country or merely the specific areas where an epidemic is raging within a national jurisdiction. Another source of uncertainty is where the 'location' of an online publication is, which was not published in the exact area where the emergency situation prevails but is nevertheless accessible at that location. In this context, Bencze and Ficsor point out that there is virtually no case-law on the criminal offence of scaremongering.

18 The Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (MEDICRIME Convention). As part of the offence of counterfeiting medical products, the Hungarian Criminal Code also defines punishments for offering and selling fake medications and medical products.

Scaremongering is also realised in situations in which someone makes or spreads claims regarding a public emergency that are either false or presented in a distorted manner, and which are liable to either impede the effectiveness of the defensive measures taken to manage the emergency or to prevent them altogether. The definition of the offence raises numerous questions in terms of its legal application.

The concept of 'defensive measures' – the sum of all the measures taken to combat the emergency – allows for a relatively broad interpretation. The government can argue that during an emergency any legal, economic or communicative measures have a direct or indirect impact on the protective efforts to tackle the emergency. The 'effectiveness of the defence' is not defined either. That is why it is impossible to tell ahead of time which behaviour is liable to impede the defensive measures or induce them to fail. On the whole, the success of the emergency defence can only be evaluated in hindsight, once the emergency is over. In many cases it is far from self-evident what the short and long-term consequences of the defensive measures will be. Furthermore, the offence may be realised even in a situation in which the communication in question 'is liable to endanger the success' of the defensive measures. The reference to distortion of facts also makes it easier to impugn any public communication that runs counter to the official position on the emergency measures taken. Bodolai argues that conclusions and opinions based on actual and true facts can also provide grounds for legal action merely because these conclusions and opinions place the facts in a new context which runs counter to the official interpretation of the given facts (Bodolai, 2020).

In response to a petition filed by an individual, the Hungarian Constitutional Court has ruled that the new criminal law regulation concerning scaremongering is not unconstitutional.[19] According to the underlying complaint, the new legislation restricts the right to freedom of expression and proffers a completely unpredictable and broad scope for the arbitrary applications of the law.

The Constitutional Court held that the dissemination of scaremongering under the disputed regulation applies to a narrow range of communications: it prohibits the communication to the general public of knowingly false or distorted facts, but only if it is used at a time when a special legal order prevails in order to obstruct the protective measures taken to manage the emergency. However, the prohibition only applies to knowingly untrue or distorted statements of fact, not to critical opinions. Further, the regulation does not extend to situations when the alleged perpetrator was unaware that the communication in question contained false facts.

At the same time, in the interest of legal certainty, the Constitutional Court considered it necessary to reaffirm its interpretation that the offence as defined in the law does not unduly violate the freedom of opinion. This so-called constitutional requirement serves as the binding interpretation for all law enforcement bodies. The offence as defined in the law may only extend to the communication of facts which the perpetrator must have known to be either false or distorted at the time when they committed the act and which, in the context of the special legal order, was liable to endanger or derail the defensive measures. It is not a criminal offence to communicate facts that were disputed at the time of the offence and were only proven reliably false in hindsight.

19 Decision of the Constitutional Court Nr. 15/2020. (VII. 8.).

3.5 Regulating channels of communication

The European regulation concerning legacy mass media and the various services associated with the information society do not impose any general restrictions on communications that are potentially harmful to human health. We did not find any general media law rules against misleading or false health communication. At the same time, the Audiovisual Media Services Directive (AVMSD) and the Directive on e-Commerce and certain legal aspects of information society services allow member states to restrict services emanating from other states insofar as the given service constitutes a public health risk. The AVMSD authorises member states to temporarily restrict the reception of audio-visual media services which violate the interests of public health or which constitute a severe and serious risk to the latter. Similarly to these media law rules, member states have the option of taking action against information society service providers in the interest of public health if the operations of the latter seriously and severely threaten public health.

In media regulations we only find provisions aimed at the protection of health in the area of commercial communication. These complement the general consumer protection rules and provide a special media law framework for any commercial communication appearing in the media. The AVMSD bars audio-visual commercial communications from encouraging behaviour that is prejudicial to health or safety. This prohibition allows states to act against misleading or false health communication appearing in commercial communication. The e-commerce directive does not contain such restrictions. In other words, apart from the general consumer protection regulations there are no other European legal requirements with regard to online communication.

3.6 Private regulation solutions by the platform providers

Infodemic has also posed a serious regulatory challenge to operators of social media platforms. As with all forms of misinformation, private regulations of platform operators have a significant regulatory role to play in relation to health disinformation (Balkin, 2018). The Facebook Community Standards do not contain specific rule for handling misleading health information, but the platform, according to its own information related to the pandemic, removes misleading health information that causes imminent physical harm.[20] Facebook has therefore begun to apply the rule set in the Violence and Criminal Behavior chapter of the Community Standards to prevent the spread of misleading information that could endanger health.[21]

According to Facebook's general approach to misinformation, Facebook does not remove false information, only reduce the distribution of these information. If fact-checking organizations commissioned by Facebook classify information as false, Facebook will present that information to users less often, i.e., the visibility of the information will be reduced. As a general rule, Facebook removes false information, if it violates another rule that provides for deletion,[22] e.g., rules against hate speech. In view of the public health emergency posed by COVID-19, an introductory text has been added to Facebook's Community Standards, in which Facebook introduced pandemic protection measures. As part of that, Facebook announced that it would remove misinformation from the platform that 'increases the risk of physical harm.'

20 https://about.fb.com/news/2020/03/combating-covid-19-misinformation/
21 https://www.facebook.com/communitystandards/credible_violence
22 https://about.fb.com/news/2018/05/hard-questions-false-news/

In the Newsroom on the Facebook's own activities, Facebook provides more detailed information about the content to be deleted.

For example, posts that make false claims about cures, treatments, the availability of essential services or the location and severity of the outbreak. According to Facebook's information they update the claims they remove, based on guidance from the WHO and other health authorities. For example, they recently started removing claims that physical distancing doesn't help prevent the spread of the coronavirus, or a post including the false claim that COVID-19 doesn't exist.[23]

From December 2020, after the first vaccinations against COVID-19 became available, Facebook announced that it would also delete false information about vaccinations that pose a direct threat to health. According to Facebook's information, they rely on health experts to assess that. Facebook removes, for example, false claims about the safety, efficacy, ingredients or side effects of the vaccines or false claims that COVID-19 vaccines contain microchips, or anything else that isn't on the official vaccine ingredient list. Furthermore, Facebook also removes conspiracy theories concerning COVID-19 vaccines that are known to be false, for instance, about specific populations being used without their consent to test the vaccine's safety.[24] In addition to removal, the social platform has introduced a number of other measures against misleading health communications.[25]

Representatives of big tech companies and the WHO have already begun to consult on the treatment of infodemic at the beginning of the epidemic (Farr & Rodriguez, 2020). The purpose of the cooperation is to ensure everyone has access to accurate information and to remove harmful content. Facebook has taken several steps to facilitate access to authentic, accurate information: they launched the COVID-19 Information Center, which is featured at the top of News Feed on Facebook and includes real-time updates from national health authorities and global organizations, such as the WHO.

Another measure made by Facebook is informing users who have met false health information. Users receive a notification that says Facebook removed a post they have interacted with for violating Facebook's policy against misinformation on COVID-19. Once users click on the notification, they will see a thumbnail of the post, and more information about where they saw it and how they engaged with it. The notification describes why the information was false and why Facebook removed it.[26]

Facebook flags information that is not deleted but labelled as false information by fact-checking organisations. Facebook distributes such false information on the platform with a label indicating their quality.[27]

In the area of commercial communications, too, Facebook has introduced restrictive measures, primarily on the grounds that people should not be able to take advantage of a health emergency for financial gain. Facebook prohibited people from making health or medical claims related to the coronavirus in product listings on commerce surfaces, including those listings that promise a product will prevent someone from contracting it.[28] In March, Facebook temporarily banned ads and commerce listings for medical face mask hand sanitizer to help

23 https://about.fb.com/news/2020/04/covid-19-misinfo-update/
24 https://about.fb.com/news/2020/12/coronavirus/
25 https://about.fb.com/news/2020/03/combating-covid-19-misinformation/
26 https://about.fb.com/news/2020/04/covid-19-misinfo-update/
27 https://about.fb.com/news/2020/03/combating-covid-19-misinformation/
28 https://about.fb.com/news/2020/12/coronavirus/#exploitative-tactics

protect against scams, inflated prices, and hoarding. The platform later eased strict advertising rules and allowed the advertising of hand sanitizers.[29]

In summary, Facebook's Community Standards alone do not provide clear guidance on what they consider to be misleading health information. Only a study of Facebook's information on content deletion reveals which misleading and false health information is prohibited in platform communications. This information also reveals which rule of the Community Standards is applied by Facebook when removing false health information. Decisions to remove content are based on the consideration of whether the health information could contribute to imminent physical harm. It is up to the decision of Facebook, but Facebook informs that false information, flagged by leading global and local health authorities, that could cause harm to people who believe it, will be removed.[30]

Summary: The framework of future regulation for health communication

In summary, we did not find any normative framework to regulate health communication of the non-professional and non-commercial public variety, neither at the European level nor in the Hungarian legal system. Hungarian criminal law restricts health communication in certain special situations – the place where a public emergency is ongoing or when an emergency law situation is in effect –, but these restrictions are not focused exclusively on the dissemination of health information. Insofar as the given communication does not emanate from a professional and does not serve commercial purposes, there is no generally applicable legal restriction on the communication and dissemination of health communications with untrue content.

Communications in this category are regulated by restrictions in the user policies of social media platforms, determined by the platforms themselves. At the same time, however, the issue of transparency and social control over these rules and their implementation is far from resolved. Neither the user policies we investigated, nor the practices of the platform operators make unequivocally clear what kind of procedures or criteria they use to identify untrue health information. The framework of the cooperation between Facebook and the WHO is not transparent either.

In designing a potential future regulation, the following criteria should be taken into account:

(1) Changes in the communications environment allow a greater mass of health information disseminated by laypersons to reach the public than ever before. Such information reaches vast numbers of users, and some segments of these are users increasingly wrapped up in homogenising bubbles in which the credibility of untrue information cannot even be questioned. In the absence of proper data, we cannot tell with any degree of accuracy what segments and what proportion of users belong into the category of those who are especially exposed to untrue health information. What we can assert, however, is that from a constitutional perspective the risk is substantial.

Health information is always liable to threaten life and health. From a constitutional perspective, therefore, the freedom of expression squares off against the right to life and health. The right to life and health make certain restrictions of the freedom of expression necessary. Yet, this basic insight does not make clear what these restrictions might look like or what their scope ought to be. In such situations, too, the restrictions need to be proportional, the regula-

29 https://about.fb.com/news/2020/12/coronavirus/#banning-ads

30 https://about.fb.com/news/2020/12/coronavirus/#exploitative-tactics

tion should not be allowed to stifle public debates about health. Based on the jurisprudence of the ECtHR, the dissemination of untrue health claims that have been verifiably proven false are not protected by the freedom of expression. That does not at all imply that laypersons who disseminate such information in good faith but carelessly should necessarily be sanctioned. Nevertheless, the removal of such contents from public platforms cannot be construed as a disproportionate intervention.

(2) Based on the practice of the ECtHR, criticisms of the state's health policies enjoy increased protections. This makes the rethinking of the Hungarian regulation of scaremongering necessary, since the effective regulations hold out the prospect of criminal law punishments for a not clearly delineated category of criticisms directed at state policies and actions.

(3) Social media platforms are the primary loci for the public dissemination of health-related disinformation. The transparency of private internal regulations of platform operators needs to be enhanced considerably, and there ought to be room for reviewing their decisions rendered in the context of the aforementioned policies; this is a regulatory responsibility. The cooperation that emerged between providers and international and national public health agencies during the COVID-19 pandemic may prove to be a good starting point for developing the future legal framework for private regulations.

The most effective means of combating health disinformation are not legal prohibitions and sanctions, however. Instead, more proactive communication of international and national public health agencies could serve to counterbalance the spread of untrue or unreliable information. Even if such true items will not necessarily be considered as credible arguments by those groups of users who are most exposed to health disinformation, shoring up freedom of information in the area of health will inevitably reduce uncertainties regarding health information while it will significantly increase the chances of accessing reliable information. Providing the broadest possible scope of health-related freedom of information is a constitutional obligation incumbent on the state. This follows from both, the basic needs of the freedom of expression as well as the obligation of institutional protection stemming from the right to health.

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