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## **The Freedom of Expression and the Right to Information – Fundamental Rights Affected by Fake News?**

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**Abstract.** The present paper seeks to function as an incentive for debate on the extent in which – in the context of a disturbing expansion of the fake news phenomenon – a law of the press is needed in Romania. It invokes the interdependency between the right to information and the freedom of expression, it presents the constitutional requirements concerning these fundamental rights, including those about restricting their exercise in exceptional circumstances. It observes the duties of the actors belonging to the mass media ecosystem as provided in the Recommendation CM/Rec(2011)7 of the Council of Europe and it invokes the relevant case law of the European Court of Human Rights. Without arrogating solutions, it argues that a legislative intervention may well degenerate into an abuse against the freedom of expression, that a law of the press cannot completely protect against disinformation, whereas the development of public policies – in which all actors responsible for fighting the fake news phenomenon ought to be engaged – is not only welcome, but necessary.

**Keywords.** freedom of expression, right to information, fake news, European Commission

### ***1. Preliminary remarks***

Information - "the respite of democracy", is of the basis/nucleus of social progress whereas the dissemination and reception encompasses the "raw material" of a democratic society. The words of the German philosopher Marx, "*information is the most valuable asset*" entail the core meaning of a society.

The right to access an item of information along with the freedom of speech do represent constitutional entitlements - that are enshrined and guaranteed by international and regional documents and present within constitutions of democratic states. The socio-political rights function in interdependence and compliance with the evolution of the society as a whole.

If free expression is inextricably related to freedom of consciousness, the right to information is closely related to the freedom of expression, as thoughts, religious, spiritual beliefs constitute part of the legal circuit only if they are externalized. Maurice Duverger – has suggestively uttered the cogitation according to which "*the machine/instrument for reading thoughts has not yet been invented and that is the reason for the prerogative of thought to depict*

*the exemption of expression or a freedom as regards the formation of reasoning/perspective. The inside of the individual remains inviolable.*"<sup>1</sup>

The entitlement in point of being informed – as a fundamental right, information and news are not to be classified/catalogued as similar nor interfere, if particular aspects are to be considered.

News construe specific information that is communication via press or electronic means. "News" – the translation of the term into English, assumes the role of an acronym of the four directions in respect of the objective or target that are to be diverted unto- *North (North), East (East), West (West) and South (South)* . Fake-news phenomenon as well as news impart a significant length of time, being identified as follows: diversion, disinformation, propaganda.

The scholars with regard to communication incline towards *disinformation* over the phrase "*fake news*" and distinguish/differentiate among: a) disinformation (information that might be false, incomplete, vague, yet not being created to cause harm or damage, for example, journalistic errors, data from poorly documented or undocumented sources); b) disinformation (false information or fabricated content that is deliberately constructed to harm a person, a social group, a country or an organization); c) flawed or defective information, that has as basis real facts, yet in good conscience and strategically shared in order to misuse a person, government, social group, organization (press leaks, information out of context).<sup>2</sup>

The application of the classical definitions as regards disinformation requires attention when analyzing inaccuracy/misrepresentation that is targeted towards the digital environment and online social networks, where disinformation embraces the most diverse forms, with a consistent impact on society ( the cases of "Cambridge Analytica", "Brexit", "Bell Pottinger" and "Report of the United States Senate Committee on Intelligence on the Russian campaign of active measures and interference in the 2016 American elections").<sup>3</sup>

European concerns as regards counter fake news in order to save democracy – have intensified during the COVID 19 epidemic and perceived at the national level.

## ***2. Constitutional requirements with regard to the freedom of expression and the right to information***

### ***2.1. Free speech***

Over the course of time, one of the earliest civic liberties namely, the lack of censorship – due to its corresponding importance, is regulated within international and union documents: the Universal Declaration of Human Rights (Article 19), the International Covenant on Civil

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<sup>1</sup> M. DuvergEr," Droit public" , p.178 apud I.Muraru, "Constitution of Romania. Comment on articles" . Edition 3, Ed.C.H.Beck, Bucharest, 2022, p.257.

<sup>2</sup> Alina Bărgăoanu, " Building trust in times of mistrust", Interview with professor SNSPA Alina Bărgăoanu available on the site <https://snspa.ro/en/building-trust-in-times-of-mistrust-interview-with-snspa-professor-alina-bargaoanu/>

<sup>3</sup> B.Oprea, "Disinformation in the digital age. Concepts and approaches.", in Revista Sociologie Românească, 2021, vol. 19, Issue 1, p.83.

and Political Rights (Article 19), the Convention for the Protection of Fundamental Rights and Freedoms (Article 10);<sup>45</sup> The European Union Charter of Fundamental Rights (Art. 11).<sup>6</sup>

The constituent legislature of 1991 has retrieved international and union regulations, thus providing consecration to freedom of expression in Article 30<sup>7</sup> from the Constitution.

The first paragraph of the of the constitutional text consecrates as follows: a) the forms as regards the freedom of expression: via word of mouth, writing, images, sounds or other means of communication in public and b) the content of these forms, that can be expressed, respectively: thoughts, opinions, beliefs and the liberty of creation. The legal content of the above mentioned latitude is defined by the expression of thoughts, opinions and beliefs in public.

The constitutional text that ensures the freedom of expression is to encompass special regulations in relation to the activity of the institutions being in charge with making public the thoughts and opinions, namely– mass-media. There are *two forms of freedom of expression that are consecrated, the latitude and freedom of the press along with two bans are explicitly established: a) censorship of any kind and b) suppression of any publication.* The aspect according to which the constituent legislator has admitted that – by law, the obligation to make public the source of the funding may be imposed on the media, but not on the journalistic source, whose protection is one of the fundamental conditions in relation to the freedom of press. The freedom of press, latitude have certain limitations, which concern either the rights, liberties of other persons (limits that are provided for in paragraph no 6) or the state, public values (limits established in paragraph no 7).

In terms of the limitations that are established by the constituent legislator with regard to the freedom of expression, the Constitutional Court – by *decision no.629 of November 4, 2014*,<sup>8</sup> assesses the following cogitation: "The limits concerning the freedom of expression, provided for in art. 30 para. (6) from the Constitution of Romania is consistent with the notion of freedom, which is not and cannot be perceived as an absolute right. *The juridical-philosophical conceptions to be promoted by democratic societies admit that the freedom of one individual ends or comes to a final in the moment that the liberty of another person begins*

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<sup>4</sup> Art.19 DUDO:"Any individual has the right to freedom of opinion and expression; this right includes the liberty to have opinions without interference from beyond along with the freedom to search, to receive and disseminate Information or ideas irrespective of state borders".

<sup>5</sup> According to art.10 para.1 of the Convention:" Everyone has the right to free speech. This right encompasses the freedom in point of opinion and the liberty to receive or communicate Information or ideas without taking into account the interference of public authorities and frontiers. The current article should not prevent states to submit companies of broadcasting, cinematography or television under an authorisation regime".

<sup>6</sup> Art.11.Freedom of expression and information "Everyone has the right to freedom of expression, thus encompassing the freedom of opinion and liberty to receive or impart information/ideas without interference by public authorities and regardless of frontiers. 2. The freedom and pluralism of the media ought/are to be respected."

<sup>7</sup> Art.30. Right to express uncensored expressions. "1) Freedom of expression of thoughts, opinions or belief, by word of mouth, writing, images, and sounds or by other means of communication in public, are inviolable. (2) Censorship under any form is prohibited. (3) Freedom of the press implies the liberty to set up publications. (4) No publication can be suppressed. (5) The law may impose on the media the obligation to make public the financing source. (6) Freedom of expression may not prejudice dignity, honor, the private life of the person nor the right to personal identity. (7) Defamation as regards the state and nation is prohibited by law, the call to war of aggression, to hatred national, racial, class or religious, incitement to discrimination, territorial separatism or violence publish, as well as obscene manifestations that are contradictory to good morals. (8) Civil liability in point of information or for work/creative form that is brought to public knowledge constitutes the responsibility of the publisher or producer, the author, the organizer of the artistic manifestation, the owner of the means of multiplication, of the radio or television station, in compliance with the law. Any act of offence in terms of press are to be established by law.

<sup>8</sup> Decision No. no. 629 of 4 November 2014on objection of unconstitutionality a Provisions Law on abrogation art. 276 of Law nr. 286/2009 on the Criminal Code, published in M.Of.932 of 21 December 2014

(...)"'. The Court argues that the constitutional regulation in respect of the freedom of expression, as a fundamental right with a complex content has determined the establishment of the limits within it can be exercised, whereas the exceeding of the constitutional framework, the abusive exercise of the right determines the legal liability. With reference to the legal sanctions for the infringement in relation to the limits of expression, the Court stipulates that in absentia „the legal obligations would be reduced to the significance of simple desideratum, without any practical result within social relations, being annulled the reason/purpose of the legal regulation in point of these relations.”

The constituent legislator indicates the subjects of civil liability (the publisher or producer, the author, the organizer of the artistic event, the owner of the means of broadcasting/dissemination, of the radio or television station) and mentions that the press offenses are established by law.

At the institutional level, the guarantor of the public interest in the field of audiovisual communication is the National Audiovisual Council (C.N.A.) - an autonomous public authority under parliamentary control. Relations between the Parliament and the C.N.A. – regulated by Law no. 504/2004 of the audiovisual<sup>9</sup>, is important not only from the perspective of the relations between the Parliament and the public radio and television companies, but also of the relations between the Parliament and the private companies in the field, since the audiovisual license is issued / is lifted, based on a Decision of the Council, under the terms of the law, that is, of a regulation of the legislative forum

On the basis of the constitutional text an infraconstitutional legislation has been adopted.<sup>10</sup> There is not, at present, a law in terms of press, still the question 'is a need for a media law?' has generated debates, that have not been still concluded up to present time. The reserved attitude towards the adoption of a press law is generated by the extremely fragile line of demarcation that exists between an adequate legislative regulation in the field and possible disproportionate interferences.

It is worth mentioning that the Media Law of the Socialist Republic of Romania – Law no. 3/1974<sup>11</sup> was repealed only in 2012 – by Law no. 95/2012<sup>12</sup>, its provisions being invoked as a basis in law for the motivation of the numerous court decisions – issued after 1991, by means of which the liability in point of press offense has been assumed.<sup>13</sup>

## ***2.2. The Right to information***

The access to information -inextricably related to the freedom of expression is capitalized by each person in order to to be able to participate in good conscience to the facts as regards the economic, social, cultural, political life, etc.

In Europe, from the perspective of the tradition of regulating the right of access to public information, Sweden is one of the first states to introduce into its Constitution, as early as 1766, provisions dedicated to the access to public information.

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<sup>9</sup> Published in M.Of.534 of 22 July 2002.

<sup>10</sup> Law no. 19/2003 on the organization and functioning of the National Press Agency AGERPRESS; Audiovisual Law no.504/2002; Law no. 41/1994 on the organization and functioning of the Romanian Radio Company and the Romanian Television Society.

<sup>11</sup> Published in B.Of. no.48 of April 1, 1974, republished in B.Of.no.3 of 19 January 1978

<sup>12</sup> Published in M.Of.no.453 of July 6, 2012

<sup>13</sup> For example, the decision of the HCCJ, Civil Section I, no.3309/2013 – published in [www.scj.ro](http://www.scj.ro) of 13 June 2013; Cluj Court of Appeal, Dec.civ. no.714/A/2015, published in [portal.just.ro](http://portal.just.ro) of April 9, 2015.

A foray into the constitutional history of Romania has revealed that until the consecration by the 1991 Constitution, the right to obtain information did not have an express regulation in terms of previous constitutions.

The Romanian Constitution of 1991 has enacted the right to information – being regulated by article 31<sup>14</sup> via international legal instruments in the field<sup>15</sup>.

The constitutional approach with regard to the right to information entails three coordinates: a) to ensure access to information that is of communal interest; b) the obligation of authorities to inform citizens about civic affairs and issues of personal interest; c) the compulsion of media to correctly inform the public opinion.

The access to information being respected, the constitutional norm concerns only *information of public interest*, thus marking exactly the dimensions of this right.

The provisions of the constitutional norm are detailed by *law no. 544/2001 on free access to information of public interest*.<sup>16</sup> The right of any person to information of public interest has three dimensions: a) the right to be informed, *ex officio*, by the public institutions/authorities about important aspects of their functioning; b) the right to request information; c) the right to be informed by the media about various important aspects of the public sphere.

### ***2.3. The containment in relation to the freedom of expression and of the right to information in exceptional circumstances***

The constitutional procedural and substantive requirements that must be fulfilled in order to restrict the exercise of fundamental rights and freedoms are part of *Article 53 of the Constitution*<sup>17</sup>: a) only by means of law; b) if it is necessary, as the case may be, for: the protection of national security, public order, health or morals, the rights and freedoms of citizens; the conduct of criminal investigation; the prevention of the consequences of a natural disaster, a disaster or a particularly serious disaster; c) not to prejudice the existence of the right or freedom in its essence, not to harm its existence; (d) be proportionate to the corresponding

<sup>14</sup> Art.31.Right to Information :"(1) The right of the person to have access to any information of public interest cannot be restricted. (2) Authorities public, according to skills they are obliged to ensure the correct information of the citizens on public affairs and on matters of personal interest. (3) Right to Information must not prejudice the protection of young people or security National. (4) Media, public and privately, are obliged to ensure that public opinion is properly informed. (5) Public radio services and Television are autonomous. They must guarantee social groups and important political exercise of the right to the antenna. Organisation of these services and parliamentary control over Activity they are regulated by organic law."

<sup>15</sup> Resolution adopted by the UN General Assembly in its first session in 1946 states that "the freedom of information is a fundamental human right and the cornerstone of all freedoms whose Protection Nations Unite is committed to securing."

Art 19 paragraph 2 on the International Pact as regards civil and political rights ensures that "everyone has the right to receive, to find and spread Information, ideas, regardless of borders, in oral, written, printed or artistic form or by any other means of his choice."

Art.19 of the Universal Declaration of Human Rights: "Every individual has the right to receive, to seek and disseminate information, ideas, regardless of state borders"

Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms: the right to free information includes the freedom (...) to receive or communicate information or ideas without interference by public authorities and without regard to borders (...)'

Article 11 of the Charter of Fundamental Rights of the European Union: "the freedom (...) to receive or impart information or ideas without interference by public authorities and regardless frontiers. Freedom and the pluralism of the media ought to be respected."

<sup>16</sup> Published in M.Of. no.663 of October 23, 2001.

<sup>17</sup> Art. 53 – Restriction Exercise rights or Freedoms (1) Exercise rights or Freedoms may be restricted only by law and only if it is required, as the case may be, for: National Security, of order, of health or public morals, rights and the freedom of citizens; conduct criminal instruction; prevent consequences of a natural calamity, of a disaster or of a particularly serious sinister. 2. A restriction may be ordered only if it is necessary in a democratic society. The measure must be proportional with situation which gave rise to it, to be applied in a non-discriminatory manner and notwithstanding existence right or freedom.

situation ; e) the measure by which the restriction operates to be non-discriminatory (concretization of the principle of equality).

In the specialized doctrine – judiciously, it has been argued that "the limitations or conditionings brought to some fundamental rights/freedoms are carried out on the basis of the constitutional text that regulates them, precisely because they are related to the naturalness of their content, constituting, at the same time, a constant of the fundamental right/freedom".<sup>18</sup>

The constitutional text largely reproduces the provisions of paragraphs 2 of Articles 8 to 11 of the European Convention on Human Rights, in the interpretation of which the European administrative court has established the conditions according to which an interference in the exercise of a right must be abide in order to be considered as compliant with the Convention, namely: a) the interference must be provided for by law; b) the interference must pursue a legitimate aim; (c) interference must be necessary in a democratic society.

The tackled issues<sup>19</sup>, the constitutional requirement of correct information of the public opinion – desirable to manifest itself at all times, is invoked more strongly in exceptional situations, when the fight against disinformation is absolutely legitimate and necessary. However, the state of siege or state of emergency ought not to be a pretext for government control in terms of information, for the provision of truncated information or for lack of transparency.

### ***3. Approaches to counter fake news to save democracy***

The concern over the rebound/recoil in democracy, the effect of fake news, have determined both the institutions of the European Union and those of the Council of Europe have strengthened their efforts to find the<sup>20</sup> legal instruments necessary to combat fake news.

Over the course of time, the Council of Europe has developed significant media standards. The Recommendation *CM/Rec (2011) 7* of the Committee of Ministers of the Council of Europe for Member States on a new notion of media<sup>21</sup> has highlighted the need to protect and promote freedom of expression, diversity and pluralism, but also the compulsion to identify the duties and responsibilities of all actors that are involved in the media ecosystem, subject to the strict limits provided for in Article 10 of the Convention European Human Rights, as is presented in the relevant case law of the European Court of Human Rights.

A particular and thorough analysis of the article 10( 2) of the ECHR, denote the fact according to which- in addition to the provision aimed at "respecting the reputation and the rights of others", there are listed a large number of exceptional circumstances that may justify the restriction of the exercise of expression, namely: interests of national security, territorial integrity, public safety, prevention of disorder, prevention of crime, protection of health, protection of morals, prevention of disclosure of information received on a confidential basis, maintenance of judicial authority and of the impartiality of the judiciary.

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<sup>18</sup> Mona-Maria Pivniceru, Karoly benke, "Reception of the principle of proportionality in the case-law of the Constitutional Court of Romania. German Constitutional Influences", in *Constitutional Law Magazine*, nr. 1/2015, p. 63.

<sup>19</sup> In point of further details, see A.J.Nita, "Constitutional and legal enshrinement of the right to information. The impact of curfew/state of emergency on the right to information", in *Revista de Drept Constitutional* no. 2/2019, pp.132-135

<sup>20</sup> The Council of Europe is composed of 46 Member States and monitoring nations, yet independent with regard to the European Union, being different from [The European Council](#) or [The Council of the European Union](#)

<sup>21</sup> Adopted by the Committee of Ministers on 21<sup>st</sup> of September 2011 at the 1121 meeting of the Deputies of Ministers, available on the website of the

[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cc2c0](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0)

Freedom of expression and the Internet constitute a special section of the *Guide on Article 10 of the European Convention in respect to Human Rights*. Freedom of expression, within the content of which the paragraph 5 there are regulated "Duties, responsibilities" and press publications on the Internet.

The Court has assessed the principle of increased accountability of internet press publications, with an emphasis on the conception that, in a world where the individual is faced with a consistent flow of information, either in traditional or electronic formats, thus involving an increased number of authors, the supervision of compliance with journalistic deontology is of greater importance (Stoll v. Switzerland (MC), paragraph 104]. Indeed, as regards the 'duties and responsibilities' of a journalist, the potential impact of the corresponding media along with an objective and balanced reporting might imply a wide range of channels, inter alia, the media under consideration (Delfi AS v. Estonia (MC), paragraph 134).

According to the Court, unless a newspaper has been informed of the bringing of a defamation action against a public article in the written press, the mandatory introduction of a corresponding caveat/warning about the article at issue within Internet archives in which appears cannot be regarded as a disproportionate interference with freedom of expression (Times Newspapers Ltd v. United Kingdom (Nos 1 and No 2), point 4).<sup>22</sup>

There is worth being taken into account the heightened interest in relation to the institutions of the European Union on combating online disinformation.

*Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions ' Tackling disinformation online: a European approach*. COM(2018)<sup>23</sup>, defines disinformation as "a set of information whose false or misleading character can be verified, that is created, presented and disseminated for economic gain or to deliberately mislead the public, hereby might cause public harm. "

The Commission identifies the main causes of disinformation (interconnected economic, technological, political and ideological) and - capturing the complexity of the subject and the rapid pace of developments in the digital environment, outlines the general principles and objectives<sup>24</sup> that should guide actions to tackle disinformation.

On a targeted basis, the actions of the Commission concern: 1) A more transparent, trustworthy and accountable online ecosystem; 2) Secure and resilient electoral processes; 3) Boosting education, including the media; 4) To support quality journalism as an essential element of a democratic society; 5) Counter internal and external threats of disinformation through strategic communication.

The Commission addresses the interested parties to significantly intensify efforts to manage the issue under consideration in an appropriate manner, thus considering that the actions

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<sup>22</sup> Items of information taken from The Guide on Article 10 of the European Convention on Human Rights – The Freedom of Expression (p.623, 625), material available on the website [https://www.echr.coe.int/Documents/Guide\\_Art\\_10\\_RON.pdf](https://www.echr.coe.int/Documents/Guide_Art_10_RON.pdf)

<sup>23</sup> Davailable on the site <https://eur-lex.europa.eu/legal-content/ro/ALL/?uri=CELEX%3A52018DC0236>

<sup>24</sup> General principles and objectives :1)Improve transparency as to the origin of information and how it is produced, sponsored, disseminated and targeted, in order to allow citizens to assess the content they access online and to discover potential attempts to manipulate their opinion;2) promoting information diversity to enable citizens to make informed decisions based on critical thinking by supporting high-quality journalism, media literacy and rebalancing the relationship between information creators and distributors;3) promoting the credibility of information, providing an indication of its reliability, in particular with the help of trusted notifiers, and by improving the traceability of information and authentication of influential information providers;4) developing inclusive solutions. Effective long-term solutions require public awareness, better media literacy, the involvement of as many stakeholders as possible and cooperation between public authorities, online platforms, advertisers, trusted notifiers, journalists and media groups.

into discussion, if implemented effectively, shall contribute substantially to counter online disinformation.

The communication was based on the First Report of the expert group in the European Commission, which capitalizes on the ideas drawn from the public statement and the *Eurobarometer/2018 survey*, according to which 83% of the European citizens respondents consider that fake-news poses a threat to democracy. In line with respondents, journalists (45%), national authorities (39%), press and broadcasting management (36%) are primarily responsible to stop the spread of fake news<sup>25</sup>. According to European experts, "Disinformation is similar to tobacco. It might prove addictive, harmful, still not easy to renounce."

In line with the European Commission's Communication<sup>26</sup>, *the EU Code of Good Practice on Disinformation* has been adopted, the stated aim being to identify actions that signatories could assume to address the challenges of 'disinformation'.

An attempt to define disinformation cannot be equivalent or perceived as/to a legal definition, since it appears in a communication of the Commission and not within a directive that gives rise to transposition liability for Member States. Nevertheless, an assessment is to be considered and studied as a pattern, as the French have proceeded.<sup>27</sup>

The considerations of the European Commission and the factual reality denote that disinformation erodes trust with regard to institutions, as well as digital and traditional media, being detrimental in point of democracy.

#### *4. Final considerations*

Democratic systems might be subject to be destabilized by disinformation, but an act of legislation on combating disinformation has not been adopted at either European or national level.

There could not be found the explanation according to which a legislative intervention might degenerate into an abuse in terms of the freedom of expression that is ensured and guaranteed within international, union documents and constitutional norms.

Equally, threats that are to destabilize democratic systems and social reality cannot be encouraged, the right to free expression and the dribble to information must be manifested in compliance with the coordinates of the correct information as regards public opinion.

As a corollary of the thoughts that have been asserted within current material a law cannot completely protect an individual from disinformation, but the development of public policies – with the involvement of actors responsible for merging the fake-news phenomenon, is embraced and imperative.

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<sup>25</sup> Eurobarometer On Fake News available on the site <https://www.caleaeuropeana.ro/eurobarometru-privind-fake-news-pestele-80-dintre-romani-sustin-ca-pot-recunoaste-o-stire-falsa-grupul-de-experti-al-ue-cere-un-cod-de-principii-impotriva-dezinformarii/>

<sup>26</sup> Available on site <https://digital-strategy.ec.europa.eu/en/library/2018-code-practice-disinformation>

<sup>27</sup> M.Cercelescu, "Misinformation in the post-truth era. Can the fight against disinformation be regulated?", article available on <https://www.juridice.ro/628769/dezinformarea-in-epoca-post-adevar-poate-fi-reglementata-lupta-impotriva-dezinformarii.html>

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