

The wisdom and pragmatism of the French Constitutional Court

The **French hate speech law**, the Avia law, in particular its two notice and take down mechanisms, declared incompatible with the freedom of expression by **the French Constitutional Court** which **unequivocally censored 10 out of its nineteen articles**.

What did the Avia Law provide for ?

The Avia law, voted by the French Parliament on May 14, 2020, amended the 2004 law for the trust in digital economy (implementing the Directive on electronic commerce n° 2000/31/CE).

The Avia law extended the obligations to be complied with by Internet service providers (ISPs), hosting providers and the editors of online communication services with, in particular, two notice and take down mechanisms.

- 1 - Firstly, it required the hosting providers and the editors of online communication services, **within 1 hour** (previously 24 hours) **from a notification** received from the empowered governmental authority, to remove content which encourages terrorist acts or which glorify these acts and content which is a pornographic representation of a minor (under 18), or to ensure that it is no longer available.

The hosting providers and the editors of online communication services had to immediately acknowledge safe receipt of this notification and inform this authority, within this 1 hour time frame, of the measures taken to comply with the notification.

The violation of this obligation was sanctioned, for individuals (the legal representative of the company operating the website) by a fine of up to 75,000 Euros. Legal entities were also to be sanctioned, in particular by a fine of up to 375,000 Euros.

- 2 - Secondly, the Avia Law created new obligations imposed on certain operators of online platforms that exceed a certain volume of activity (to be subsequently specified by decree), in particular an **additional take down mechanism with a 24 hour time limit**.

It defined an operator of online platforms as any individual or legal entity offering, on a professional basis, for free or not, an online communication service (i) either based on the rating, the referencing, through algorithms, of

content, goods or products offered by third parties, or **(ii)** the linking, through online means, of third parties for the sale of goods or the provisions of services.

Under the provisions of the Avia Law, the online platforms **(i)** offering public online communication services aiming at connecting people with the view to share public content and **(ii)** whose activity, over the French territory, was to exceed a threshold to be set by decree, would have been required to **remove (or prevent the access to), within 24 hours** from a notification made by one or several individual(s), any **content which obviously** qualifies as :

- glorification of intentional criminal offence on life, or on the integrity of a person, sexual assaults, war crimes, crimes against humanity, crimes of enslavement or exploitation of a person enslaved, or crimes and offenses of collaboration with the enemy;
- incitation to discrimination, hatred or violence against a person or a group of people because of their origin or their membership or non-membership of an ethnic group, a nation, a race or a determined religion;
- incitation to hatred or violence towards a person or a group of people because of their sex, their sexual orientation or gender identity or their handicap or the incitation, with regard to these people, to discriminations;
- challenge of the existence of crimes against humanity, genocides, or a crime pertaining to slavery or exploitation of slavery...etc;
- insult towards a person or a group of people because of their origin or their membership or their non-membership of an ethnic group, a nation, a race or a religion;
- insult towards a person or a group of people because of their sex, their sexual orientation or gender identity or their handicap;
- sexual harassment;
- pornographic representation of a minor (under 18);
- encouragement of terrorist acts or glorification of these acts.

The Avia Law contains additional provisions imposing further requirements on the online platforms, such as the obligation to set up a uniform system of notification, to acknowledge receipt of notifications without delay, to provide users with clear information pertaining to the moderation methods for illegal content, to appoint an individual as a point of contact, etc.

On May 18, 2020, the Avia Law, which was to enter into force on July 1, 2020, was submitted to the review of the French Constitutional Court, which handed down its decision on June 18, 2020.

The French Constitutional Court censored the Avia Law

The two notice and take down mechanisms of the Avia Law have been censored by the Constitutional Court whose decision turns on the fact that these mechanisms are endangering the freedom of expression and communication in

ways that infringe on this freedom and are not appropriate, necessary and proportionate.

While the Constitutional Court reaffirms in its decision that the French Constitution allows the legislator to punish abuses of freedom of expression and communication and to introduce provisions designed to put an end to such abuses that undermine public order and the rights of third parties, it does severely censor the two notice and take down mechanisms imposed by the Avia Law on the online platforms.

- 1 - The Constitutional Court censors article 1, paragraph I, of the Avia Law, which allows the empowered governmental authority to require the hosts or publishers of an online communication service to remove certain terrorist or child pornography content **within one hour** and provides, in the event of their failure to comply with this obligation, for the application of a penalty of one year's imprisonment and a fine of 250,000 euros.

The Court observes that the determination of the unlawful nature of the content in question is not based on its obvious nature. It is subject solely to the assessment of the empowered governmental authority. Further, the lodging of an appeal against the request for withdrawal is not suspensive and the one hour period granted to the publisher or host to withdraw or make inaccessible the content in question does not allow him to obtain a decision from a judge before being forced to withdraw it. Finally, the host or publisher who does not comply with this request within this period may be sentenced to up to one year imprisonment and a fine of 250,000 euros.

For these reasons, the Constitutional Court considers that the legislator has infringed the freedom of expression and communication in a way that is not appropriate, necessary and proportionate to the aim pursued.

- 2 - The Constitutional Court also censured article 1, paragraph II, of the Avia Law, requiring certain online platform operators, under penalty of criminal sanctions, to remove or make inaccessible, **within 24 hours, manifestly illegal content** because of its hateful or sexual nature.

The Constitutional Court notes that the obligation to withdraw is imposed on the operator once a person has reported illegal content to him, specifying his identity, the location of that content and the legal grounds for which it is manifestly illegal. It is not subject to the prior intervention of a judge or any other condition. It is therefore up to the operator to examine all the contents reported to him, however numerous they may be, in order to avoid the risk of criminal sanctions.

The Court further notes that, while it is up to online platform operators to remove only manifestly illegal content, the legislator has retained numerous criminal qualifications justifying the removal of such content. Moreover, the examination by the platform operators should not be limited to the reason given in the alert. It is therefore up to the operator to examine the content reported in the light of all these offences, even though the constituent elements of some of them may be of a complex legal nature or, in the case of press offences in particular, may require an assessment in the light of the context in which the content in question was written or disseminated.

The Court also held that the legislator has obliged online platform operators to fulfil their obligation to withdraw within 24 hours. However, in view of the abovementioned difficulties in assessing the manifest unlawfulness of the content reported and the risk of numerous, possibly unfounded, reports, such a time limit is particularly short.

Finally, although it is clear from the parliamentary work that the legislator intended to provide in the last paragraph of paragraph I of the new Article 6-2 a ground for exonerating online platform operators from liability, this ground, according to which "*the intentional nature of the offence ... may result from the absence of proportionate and necessary examination of the content notified*", is not drafted in terms that make it possible to determine its scope. No other specific grounds for exemption from liability are provided for, such as a multiplicity of alerts at the same time.

From all these grounds, the Constitutional Court concludes that, given the difficulties in assessing the manifestly unlawful nature of the content reported within the prescribed period, the penalty incurred from the first failure to do so and the absence of a specific cause for exemption from liability, the contested provisions can only encourage online platform operators to withdraw the content reported to them, whether or not it is manifestly unlawful. These contested provisions therefore infringe the exercise of freedom of expression and communication in a way which is unnecessary, inappropriate, and disproportionate.

The Avia Law, in its final form, has been very carefully reviewed by the online platforms, which noted its flaws and the lack of realism shown by its authors.

The decision of the Constitutional Court of June 18, 2020 was expected with a certain anxiety by the online platforms and has been justly welcomed for its pragmatic wisdom.

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