[FR] Proposed legislation to combat fake news: Conseil d'Etat gives its opinion

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On 19 April 2018 the Conseil d'Etat made public its opinion on the proposed legislation to combat fake news that is to be examined by Parliament in the next few weeks. Since the 2008 revision of the Constitution, the leader of either of the Assemblies may submit proposed legislation to the Conseil d'État for its opinion, and 2015 saw the end of the tradition of secrecy regarding such opinions.

The Conseil d'Etat observed firstly that "French law already contains a number of provisions aimed, in substance, at combating the circulation of fake news, following various separate paths of logic". Thus, combating fake news was a long-standing and recurrent concern on the part of the legislature. Recent news has, however, revealed that fake news is now being circulated according to new lines of logic and using different vectors. The Conseil d'Etat therefore admits that the present state of the law, particularly with regard to elections, does not necessarily make it possible to counter all the risks thrown up by these new phenomena. The Conseil d'Etat went on to note that the proposed legislation mentioned not only "fake news" but also "false information", which has a wider scope since it does not include the condition that the information at issue has already been divulged. With a view to making the text consistent and understandable, it is therefore suggested that the terms be harmonised and that the more effective notion of "fake news" be applied. In addition, to avoid any disproportionate infringement of freedom of expression, the Conseil d'Etat recommends that combating fake news be systematically limited to those cases in which it is established that the "news" is being circulated with the deliberate intention of causing cause harm.

Concerning Section 1 and the obligation of transparency during an election period, which requires platforms of any significant size to observe an obligation of additional transparency on pain of criminal sanctions, the proposed legislation requires them to disclose to their users the identity and capacity of parties paying them remuneration in return for the promotion of news content, together with the sums of money involved. After particular examination of the compatibility of this provision with EU law, the Conseil d'Etat felt that the limitation on freedom of trade was not disproportionate in relation to the objective of general interest of providing the population with enlightened information during election periods. It nevertheless suggested a number of amendments clarifying certain terms, including "news content", that were deemed insufficiently precise. The Conseil

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d'Etat also suggested that news content "connected with a debate of general interest" should be included. Concerning the new mechanism for urgent proceedings, the Conseil d'Etat went on to point out the difficulty of identifying "events constituting fake news" in legal terms (particularly when the courts were required to deliberate within a short space of time) and the uncertainty of the effectiveness of the procedure (action taken too late or even at the wrong time). The Conseil d'Etat nevertheless felt that this new legal remedy did not in itself constitute a disproportionate infringement of freedom of expression, and also made a number of comments aimed at achieving a better calibration of the new procedure.

The Conseil d'Etat also validated, albeit with a number of caveats, Section II of the proposed legislation, which amends the Audiovisual Communication Act of 30 September 1986. The French national audiovisual regulatory authority (Conseil Supérieur de l'Audiovisuel - CSA) will be able to refuse to conclude, or to unilaterally terminate, a convention with a legal entity under the control or influence of a foreign state if its service is likely to infringe France's fundamental interests. The Conseil d'Etat also validated the special new policing power attributed to the CSA, which would henceforth be authorised to suspend, until the end of voting operations, the broadcasting by any means of electronic communication of a service from a legal entity controlled or under the influence of a foreign state considered to be deliberately aiming to affect the accuracy of the upcoming ballot. The same applied to extending the CSA's referral to the Conseil d'Etat under the urgent procedure with the aim of stopping the broadcasting by a services distributor (rather than merely a satellite operator) of a television service falling within France's field of competence if its programmes infringed any of the principles mentioned in Articles 1, 3-1 and 15 of the 1986 Act. Concerning Section III of the proposed legislation and the duty incumbent on platforms to cooperate in combating the circulation of fake news, on pain of criminal sanctions, the Conseil d'Etat advocated retaining no more than the obligation incumbent on IAPs and hosts to publish information on the resources that they devoted to combating the circulation of fake news. On the other hand, the Conseil d'Etat was not in favour of the obligation (under the proposed legislation) to set up a mechanism enabling anyone to report such content or the obligation to report to the public authorities any activities involving the circulation of fake news.

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http://www.conseil-etat.fr/content/download/134123/1359552/version/1/file/avis%20394641-394642.pdf

Opinion of the Conseil d'Etat, 19 April 2018

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