[FR] Constitutional Council blocks online hate law

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The so-called ‘Avia law’ (named after the MP who tabled the bill), which aims to combat hate speech on the Internet, has been blocked. Having finally been adopted as France came out of lockdown on 13 May 2020 after a difficult legislative process lasting almost 18 months, the law, which had been criticised by numerous bodies and institutions, was rejected by the Constitutional Council on 18 June. The text, which would have seen criminal sanctions imposed by the CSA (the French audiovisual regulator) against platforms that failed to remove terrorist material or child pornography within one hour and manifestly illegal hate speech within 24 hours, was deemed harmful to freedom of expression. Almost all the other provisions of the law were therefore also rejected.

First of all, the Constitutional Council pointed out that, in view of the widespread growth of online public communication services and their importance for participation in democratic life and the expression of ideas and opinions, the right to freedom of expression included the freedom to access these services and to use them to express opinions. Although the legislature was free to take measures designed to prevent abuses of freedom of expression and communication that were harmful to public order and the rights of third parties, any attempt to restrict such freedom should be necessary, adapted and proportionate to the stated aim.

Opposition MPs had asked the Council firstly to examine section I of Article 1 of the law, which amended Article 6-1 of Law No. 2004-575 of 21 June 2004 on trust in the digital economy (LCEN) by requiring online communication service providers and website hosts to remove terrorist content or child pornography within one hour of being notified by the administrative authority, or risk a one-year prison sentence and a EUR 250 000 fine.

The Constitutional Court ruled, for the first time, that the dissemination of pornographic images depicting minors and the provocation and glorification of terrorist acts constituted abuses of freedom of expression and communication that seriously harmed public order and the rights of third parties. However, it noted, firstly, that the illegal nature of such content did not depend on whether it was manifest, and that this was something that only the administration should determine. Secondly, an appeal against such a removal order did not have staying effect and the one-hour deadline set for the provider or platform operator to remove or block the disputed content was not long enough to obtain a judge’s

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decision before having to remove it. Finally, a platform operator or service provider who failed to meet the request before the deadline could be sent to prison for one year and fined EUR 250 000. The court therefore ruled that the legislature had undermined freedom of expression and communication in a way that was not adapted, necessary and proportionate to the stated aim.

The Constitutional Court had also been asked to consider section II of Article 1, which had added an Article 6-2 to the LCEN, obliging online platform operators to remove or block illegal hate speech and unlawful sexual content within 24 hours of it being reported by a user, or risk a EUR 250 000 fine.

The court began by highlighting the difficulties faced by operators when assessing, within a very short timeframe, whether or not reported content was manifestly illegal, especially as their assessment needed to cover more than just the reason for which it was reported. Furthermore, criminal sanctions were imposed for a first offence and for every failure to remove reported content, with no consideration given to their repeated nature.

In view of the above, the Council concluded that the disputed provisions could only encourage operators to remove reported content whether it was manifestly illegal or not. They therefore undermined freedom of expression and communication in a way that was not necessary, adapted and proportionate.

As a consequence of these two decisions, the other provisions of the law that were linked to the obligation to remove unlawful content were also rejected. The only parts that were upheld concerned the creation of an online hate observatory under the auspices of the CSA (Article 16) and a specialist public prosecution authority (Article 10), and a simplification of the procedure for reporting illegal content described in Article 6-1-5 of the LCEN (Article 2).

Noting the decision, the Minister of Justice said: “In a context in which the fight against hate, especially online, is a high social and societal priority, the government will consider the possibility of reworking this piece of legislation in consultation with the stakeholders concerned and taking the Constitutional Council’s decision into account.”

Conseil constitutionnel, Décision n° 2020-801 DC du 18 juin 2020

https://www.conseil-constitutionnel.fr/decision/2020/2020801DC.htm

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