Terrorist content and Avia Law - implications of constitutionality of the Terrorist Content Regulation in France

October 2020

In June 2020, France's Constitutional Court issued a decision that contradicts most key aspects of the EU proposal for a regulation on preventing the dissemination of terrorist content online – but also gave EU legislators specific tools to prevent drafting legislations pertaining to content regulation that would directly contradict fundamental rights and national constitutional requirements.

Introduction

Over the course of the past two years, France had a lively debate on a draft bill to combat hate speech online (the so-called Avia law). The debate mainly revolved around imposing stricter content removal obligations for both platforms and other intermediaries such as hosting providers. The final law, passed in May 2020, included the obligation for hosting providers to remove terrorist content and child sex abuse material within the hour of receiving a blocking order by an administrative authority. The law also foresaw a 24-hour deadline for platforms to remove hate speech content, based on flagging by either a user, or trusted flaggers – based on the platforms' own judgement and with the help of technical measures. This content removal activity was supposed to be subject to guidelines that were to be established by the French Media Regulator (CSA).

This paper highlights which aspects of the decision by the French Constitutional Council of 18 June 2020 (Decision No 2020-801 DC) could apply to the European Commission's proposed regulation on preventing the dissemination of terrorist content online. It also proposes amendments in accordance with the French constitution. While we are fully aware that a decision by the Constitutional Court of a Member State does not apply to all EU Member States or the EU *directly*, it should at least influence the ongoing negotiation as it raises serious questions as to the compatibility between the proposal and freedom of expression. The latter is protected at European level by both the Charter of Fundamental Rights (Art. 11) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 10).

The paper will first address the impact of this decision on removal orders as foreseen by Article 4 of the Commission's proposal and then examine how the decision should be applied to the rest of the proposed regulation.

Reception of the Avia Law

This piece of legislation was largely criticized by the civil-rights movement, and by Wikimedia because of its far-reaching impact on the freedom to obtain and impart information. Some stakeholders noted that the broader issue of intermediary liability had to be raised at the European level since the Digital Services Act was to be considered around the same time. The Commission itself criticized the law because of its impact on the single market and questioned the proportionality of the envisioned scheme. The one-hour deadline for removal of terrorist content in particular has been heavily criticized by Wikimedia, digital rights organisations, and the industry alike. It is the cornerstone of France's position during negotiations at the Council, which explains why it was included in a provision of the Avia law.

France decided, however, to keep on pushing for the draft bill to become law. As Cédric O, the French minister for the Digital Economy put it, the objective of the push was threefold: to advance quickly on the matter of hate speech online, to set European standards for the upcoming Digital Services Act, and to influence the negotiations on the proposal for a regulation on preventing the dissemination of terrorist content online.

After the law was passed in May 2020, several members of the Parliament challenged the law in front of the French Constitutional Council. Many organisations, including Wikimedia, submitted their own *amicus curiae* briefs to the Court. On 18 June 2020, the Constitutional Court published its decision effectively declaring most of the law unconstitutional.

Decision of the French Constitutional Council

It is noteworthy that the Council struck down the law as a whole, which explains the length and extent of the judge's reasoning and why this decision is so instructive. Moreover, the Court published a lengthy commentary that can be used as a legislative toolbox to determine what works, and what doesn't, in terms of constitutional requirements regarding freedom of expression in France.

According to the French Constitution, a one-hour deadline to remove terrorist content is a disproportionate infringement to freedom of expression

The first part of the decision tackles the obligation for hosting providers, irrespective of their size, and publishers to remove child sexual abuse material or terrorist content within the hour after receiving a removal order by a competent administrative authority.

According to Article 11 of the French Declaration on Human Rights (*Déclaration des Droits de l'Homme et du Citoyen*), "*the free communication of thoughts and of opinions is one of the most precious rights of man: any citizen thus may speak, write, print freely, except what is tantamount to the abuse of this liberty in the cases determined by Law "*. On that point, the Court stated that the legislator can thus directly impose limitations on this fundamental freedom if the restriction is necessary, appropriate, and proportionate, and that content that is recognised as terrorist constitutes an abuse of this fundamental right.

However, the Council noted that, according to the Avia law, the legal qualification of the content was entirely up to the administrative authority and that the authority was at liberty to issue removal orders on content that is not manifestly illicit.

Furthermore, according to the Council, the one-hour deadline did not give enough time to the publisher or to the hosting provider to challenge the order in front of a court, nor did the law allow for the deadline to be suspended in case of a legal challenge.

In its commentary of the decision, the Council notes that some content is not manifestly illicit and can be subject to debates. The Council explains that a removal order should therefore be challengeable to take the context into account. In these cases, only a court should assess the lawfulness of content. In this context, the Council referenced a decision from 2004 according to which hosting providers cannot be held liable for refusing to remove a content if it is not obviously illicit or if the removal order was not ordered by a judge.

Based on this reasoning and its precedent, the French Constitutional Council decided that the framework laid out in the Avia law did not meet the proportionality requirements of the French Constitution and thus infringed upon the fundamental right of free expression. Subsequently, the Council declared the disposition relating to child sexual abuse material and terrorist content to be unconstitutional.

Implications for Removal Orders in the French Legal System

In the Commission's proposal for a regulation on preventing the dissemination of terrorist content online (TCO), article 4 of the proposal bears a lot of resemblance to the French Avia law. According to article 4 of TCO, competent authorities can issue a removal order which creates an obligation for hosting providers to remove the content within 1 hour, unless the provider spots manifest errors in the order pertaining to formal requirements only, such as a missing URL for instance. The provider thus is held accountable to an even greater degree than in the French Avia law.

According to our legal assessment, the key aspects of article 4 of the Commission's proposal are incompatible with the French constitution. First, unless the competent authority according to the regulation is the judiciary, an administrative body should not have the power to issue a removal order if the piece of content in question is not obviously illicit. Second, hosting providers should not bear the responsibility to assess whether the authority has committed a "manifest error in its assessment". In any case, the one-hour deadline should be off the table as it puts too much pressure on hosting providers, with the risk of leading to over-removal of content, without taking the time to assess its proper legal qualification.

Given the striking resemblance between the scheme laid out in article 4 of the proposed regulation and the Avia law, there is no doubt that the article in its current form would infringe on the French Constitution. At the very least, it should be amended to allow removal orders only to be issued by a judicial authority, especially in cases where the content is not manifestly illicit. The one-hour removal deadline should be lifted.

This decision also lays out the boundaries that cannot be crossed by lawmakers when regulating content.

The French Constitutional Council also addressed the cornerstone of the Avia law: a notice and takedown procedure applicable to platforms within 24 hours of the notification if the content is manifestly illicit. This procedure targeted several categories of content, including hate speech, pornography, sexual harassment, as well as the glorification of terrorism, and incitement to committing terrorist acts. Pursuant to the legislation, the notifications could be made by private persons or, in some cases, accredited associations like the ones working in the field of anti-discrimination for instance. The law also included a fine of up to 250 000€ each time the platform would not have performed a "proportionate and necessary" examination of a flagged piece of de facto illegal content.

The Council noted that the broad legal basis for removal and the complexity to even determine if content is manifestly illicit in such a short time, given the importance of context, could lead to over-removal of content, regardless if it is in fact manifestly illicit. According to the Court, over-removal would also be triggered by the fact that the foreseen sanctions are quite high and thus create an incentive for removing content, as platforms would want to minimise the risk of fines.

This led the Council to declare the whole procedure to be unconstitutional as it constituted a disproportionate infringement on freedom of speech. While content removal as such was not necessarily disproportionate, the Council reasoned that removal procedures could be constitutional if they respected several safeguards.

Implications for Referrals in the French Legal System

The assessment carried out by the Constitutional Council raises several questions with regards to the mechanism of referrals as foreseen in Article 5 of the proposed regulation on preventing the dissemination of terrorist content online.

At first, one must note that according to the Constitutional Council, the timeframe granted for the assessment by platforms of the manifestly illicit character is too short. As the Terms of Services of a Platform do not constitute a legal basis cannot be considered as sources of the law, we believe that these points combined raise serious doubts about the compatibility of the framework laid out in article 5 of the aforementioned regulation with the French Constitution.

Second, the necessity for an expeditious assessment including by ways of technical measures, and the fact that Member States have to impose sanctions on platforms providers (and knowing that a 250 000€ sanction was too high in the opinion of the French Constitutional Council), create even more surrounding conditions that could encourage the over-removal of content which contravenes the constitutional proportionality requirement.

The proactive measures foreseen in article 6 pose the same issues as the broad competencies given to the competent authorities, the importance of context clues in order to qualify content, and the foreseen sanction could again result in the over-removal of content, thus failing to meet the necessary requirements of proportionality in order to be compliant with the French Constitution.

What comes next?

The European Court of Justice has exclusive competency to assess the compatibility of the proposed regulation with Article 11 of the Charter of Fundamental Rights. However, given the similarities between the French Constitution, the Charter on Fundamental Rights and the Convention on Human Rights, it is not unlikely that both the European Court of Justice and the European Court of Human Rights would conduct a similar assessment to the one of the French Constitutional Council. For the regulation to be future-proof and in order to avoid the risk of taking the case to the supranational courts, the discussions surrounding the proposed regulation should take into account the decision on the Avia law, which should be used as a guide for any future policy aiming at regulating content online.

Based on the decision of the Constitutional Council, we hope that France will change its position moving away from promoting policies that violate fundamental freedoms to hopefully a more reasonable approach. This adjustment can already be observed within the French Media Regulator CSA. M. Roch-Olivier Maistre, Chair of the CSA, expressed on September 22nd, 2020 that the decision on the Avia law should present the basis of the conversations surrounding the Digital Services Act. The same should apply to any other draft law, especially to the proposed regulation on terrorist content precisely because its provisions mirror the French law.

Article 4 of the proposed regulation should be thoroughly amended and the one-hour deadline needs to be removed. In order to ensure maximum legal certainty, the judiciary should retain exclusive competency to issue removal orders. Regarding other provisions, particularly on referrals and on proactive measures, we call for a proper assessment of the compatibility of the text and the Charter of Fundamental Rights, as these frameworks are subject to serious doubts with regards to their constitutionality according to French constitutional law.

Finally, we call on all the policymakers involved in the trilogues to fully take this decision into account: if some provisions are contrary French Constitution, they will likely also be contrary to the provisions of the Charter of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.