

Observations des autorités françaises relatives à la mise à jour du chapitre sur la France de l'étude comparative sur le blocage, le filtrage et le retrait de contenus illégaux sur Internet dans les 47 Etats membres du Conseil de l'Europe

Observations of the French authorities on the update of the chapter on France of the Comparative study on blocking, filtering and removal of illegal content on the internet in the 47 member States of the Council of Europe

With regard to « 1. Sources »

A new chapter was added to the LCEN in the summer of 2021, establishing new obligations for large online platforms and search engines to combat illegal hate speech on their services. This new mechanism relies on general due diligence obligations, including risk assessment and mitigation obligations, under the supervision of the French independent authority for audiovisual and digital communication (Autorité de Régulation de la communication audiovisuelle et numérique).¹

With regard to « 2.1.1. The protection of national security and morality »

- ❖ According to the procedure for administrative blocking introduced into the LCEN, the administrative authority may also request search engines to delist the website in question.
- ❖ The new criminal offence created by Law 2016-731 of 3 June 2016² consists in the extraction, reproduction or transmission of data promoting or inciting acts of terrorism in order to willingly impede or hinder the efficiency of the procedures of blocking and removal of terrorist content online as provided for by the LCEN or by article 706-23 of the Criminal Procedural Code.
- ❖ In its decision of 18 June 2020, the Constitutional Council did not consider “the lack of judicial or other review” as a separate criterion, but as part of its argumentation about the assignment of assessment of the notified content solely to internet intermediaries, regardless the complexity of such assessment that might require special expertise.
- ❖ Law 2020-766 regarding fight against hateful content on the internet, among other types of illegal content, addresses also illegal hate speech. This Law also introduced a specialized prosecutor's office and court, charged with examining cases of online harassment.
- ❖ As a new development, on August 24, 2021 was published a new law reinforcing the respect of the principles of the Republic, which introduced in its article 42 a new paragraph in the LCEN³. The newly adopted article 6-4 of the LCEN creates new obligations for large online platforms which rely on classification, indexation or sharing of content uploaded by their users, in order to better fight against illegal hate speech online.

These platforms must adopt procedures and dedicate human and technological resources to i) respond in a timely fashion to court and administrative orders to remove illegal hate speech, and preserve the content notified in these orders for the purposes of ulterior criminal investigations, ii) designate a point of contact responsible for receiving and answering to such orders, iii) make available

¹ Article 42 of the law n° 2021-1109 of 24 August 2021 reinforcing the respect of the principles of the Republic, available at <https://www.legifrance.gouv.fr/> (in French only)

² Law 2016-731 of 3 June 2016 reinforcing the fight against organised crime, terrorism and its financing and ameliorating the efficiency and guarantees of the criminal procedure, J.O., 4 June 2016, available at: www.legifrance.gouv.fr (in French only)

³ Article 42 of the law n° 2021-1109 of 24 August 2021 reinforcing the respect of the principles of the Republic, available at <https://www.legifrance.gouv.fr/> (in French only)

their terms and conditions on the fight against illegal hate speech, including the detail of the procedures and resources deployed to that end, iv) periodically report on the measures they put in place to achieve that goal, according to key performance indicators determined by the supervisory authority, v) put in place a mechanism allowing users to notify illegal hate speech, vi) ensure notices delivered by trusted flaggers are examined in priority, vii) acknowledge and promptly examine notifications of illegal hate speech, inform the authors of such notifications of the outcome of the notification as well as, where applicable, the user who provided the content, with an explanation of the motive of the removal, and viii) allow users to seek redress for unfair removal or unjustified absence of removal. Where platforms decide to suspend or terminate user accounts for the repeated publication of illegal hate speech, the relevant procedure must be detailed in their terms and conditions, and must rely on a case-by-case analysis, taking into account various criterion relating to the gravity and occurrence of the behaviour.

This article also created additional risk assessment and mitigation obligations for very large online platforms.

❖ Lastly, creating, transporting, disseminating or commercialising a violent, terrorist or pornographic message, or any message that would gravely harm human dignity or drive minors to cause themselves physical harm is forbidden if there is a chance that minors can see it⁴. Offenders are exposed to 3 years of imprisonment and 75 000 € fines. The audiovisual regulator (*Autorité de régulation de la communication audiovisuelle et numérique* – ARCOM) is charged with requesting any website allowing minors to access such content to take all available measures to prevent such access. If this request is not respected, the ARCOM may request judicial blocking of the website in question and its delisting from search engines.

With regard to « 2.2.1. The protection of national security and morality »

❖ According to the “notice and take-down” system provided for by LCEN, which derives from the European e-commerce directive, hosting services can be held liable for illegal content present on their services if they did not expeditiously remove it after having obtained actual knowledge of their unlawful nature.⁵ The hosting service is presumed to have obtained this actual knowledge if it has received a user notification of illicit content containing all relevant information as listed in the LCEN.

Article 6, I, 2 LCEN links the exemption from liability for the hosting services to their knowledge of the manifestly illegal nature of online content at issue. However, no provision of the Law explicitly leaves the margin of appreciation whether to remove such content or not to the hosting services.

❖ While in 2020 the largely debated amendments to the LCEN that intended to introduce a procedure for removal of hateful online content have not been adopted, provisions to this effect were introduced into the Law in August 2021 (see comments on section 2.1.1).

With regard to « 2.2.2. Protection of intellectual rights »

The “notice and take-down” procedure mentioned above can also be applied to notify websites when they host content breaching intellectual rights. A user may inform the web host of the existence of unlawful content; once notified, the host must remove the unlawful content, or risk being held liable for it. No provision of the Law explicitly leaves discretion whether to remove content that is not *manifestly* unlawful to the hosting services.

⁴ Article 227-24 of the Code pénal

⁵ Article 6, I, 2 LCEN.

With regard to « 2.2.3. The protection of privacy-related rights »

The “notice and take-down” procedure mentioned above also applies to websites violating the privacy of third parties. A user may inform the web host of the existence of unlawful content; once notified, the host must remove the unlawful content, or risk being held liable for it. No provision of the Law explicitly leaves discretion whether to remove content that is not *manifestly* unlawful to the hosting services.

With regard to « 3.3. Court-ordered blocking and removal »

The 2021 law reinforcing the respect of the principles of the Republic also introduced, in its article 39, a new article 6-3 in the LCEN which allows the administrative authority (in this case, the *Autorité de Régulation de la communication audiovisuelle et numérique*) to request the blocking of any online communication service which makes available, in its entirety or in a substantial manner, the content of the service blocked by a court ruling, in accordance with article 6, I, 8 LCEN.

With regard to « 4. General Internet monitoring »

❖ As a result of legislative reforms in 2016 and 2018, the legal requirement that internet intermediaries must establish a procedure whereby anyone is able to bring to their attention any relevant information for combating certain categories of crimes also applies to the glorification, negation or trivialisation of crimes against humanity.

❖ Law 2020-766 of 24 June 2020 on fighting against hateful content on the internet has created a new internet monitoring body – an online hate observatory charged with monitoring and analysing the evolution of hateful content on the internet. The observatory brings together operators, associations, administrations and researchers concerned with the fight against and prevention of relevant offenses, taking into account the diversity of audiences, in particular the minors. The *Autorité de régulation de la communication audiovisuelle et numérique* (ARCOM) provides secretariat services to this body.

With regard to « 4. Evaluation in the light of the case law of the European Court of Human Rights »

❖ The functions of the former *Conseil supérieur de l’audiovisuel* (CSA) mentioned in this section are currently performed by the [Autorité de régulation de la communication audiovisuelle et numérique \(ARCOM\)](#).

❖ On 16 October 2020, Mr Samuel Paty, a schoolteacher in Conflans-Sainte-Honorine in France, was murdered and beheaded after having shown Charlie Hebdo's 2012 caricatures of Mahomet to his students in the framework of a class on the topic of freedom of speech. This attack, which occurred following a campaign on social media against Mr Paty for his class, was one of the reasons motivating the adoption of article 42 of the Law of 24 August 2021 reinforcing the respect of the principles of the Republic (see section 2.1.1). Since this law did not contain removal obligations for individual pieces of illegal content, with fixed deadlines and fines, the Constitutional Council deemed it compatible with the Constitution.