Paris, May 10th 2021

| ARTICLE 19a OF THE FRENCH LAW CONFIRMING CONSOLIDATING RESPECT FOR THE PRINCIPLES OF THE REPUBLIC | |
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The purpose of this note is to present comments on the *Law reinforcing compliance with the principles of the Republic* as notified by France on 12/03/2021 under TRIS Notification Number 2021/152/F (France).

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## I. BACKGROUND

The French legislator is currently examining the draft *bill to strengthen the respect of the principles of the Republic*[1] (hereinafter referred to as the "**Bill**"). The Bill was tabled at the French National Assembly on December 9th, 2020. The Bill was adopted by the French National Assembly on February 16th, 2021 and by the French Senate on April 12th, 2021. The Bill has been transmitted to the *Commission mixte paritaire*[2] on April 13th, 2021.

According to the minutes of the 9 December 9th, 2020 Council of Ministers[3], one of the objectives pursued by the French government through the adoption of the Bill is described as follow : *"Firstly, it aims to guarantee respect for the laws and principles of the Republic in all areas exposed to the risk of*

[1] See https://www.assemblee-nationale.fr/dyn/15/dossiers/alt/respects_principes_republique

[2] Composed of members of the Senate and the National Assembly in equal proportions, this commission has the task of achieving the conciliation of the two assemblies on a common text.

[3] Accessible here in French: https://www.assemblee-nationale.fr/dyn/15/dossiers/alt/respects_principes_republique

*separatist influence, [including] the fight against speeches and practices that encourage hatred, by reinforcing the effectiveness of judicial measures taken against sites that relay illicit content, by creating an offence of endangering the life of others by disclosing information relating to a person's private, family or professional life and by making accelerated procedures applicable to offences of provocation in order to provide a rapid response to these acts.[…]".*

As a result, during the examination of the Bill, the French government tabled an amendment entitled *"**Strengthening the regulation of platform operators**"*[4] providing for an additional article to the Bill: Article 19a. This is the provision notified to the Commission. The announced objective of this amendment is to strengthen the French legal framework for combating hateful content online by giving platforms, on the one hand, obligations of means and transparency with regard to the moderation of content published on electronic communication services, and on the other hand, by giving the *Conseil supérieur de l'audiovisuel* ("**CSA**") the power to monitor and enforce the implementation of the new obligations, including with respect to platform established in other Member States.

Mr Cédric O, Secretary of State, explained during the debates[5] that Article 19a reflects the government's commitment to tackle the online hate phenomena and in such a perspective, its willingness to transpose in advance the proposed regulation on the Digital Services Act[6] (the "**DSA**"). According to him, the anticipated transposition of the DSA is *"intended to anticipate European legislation, given the urgency of the matter. The sunset clause of 31 December 2023 is there to signify that the European provisions are intended to take over from this text."* In this respect, it can already be noted that despite this positioning, the Bill pre-empts the European Union's ongoing work on the DSA - which, it should be recalled, is only at the draft stage. Further fragmentation between EU and national laws, even if for an interim period only, until the DSA will enter into force, would weaken the European efforts for a strong harmonized framework.

In accordance with Directive (UE) 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services, the European Commission has been notified of several technical provisions detailed by the Bill. Amongst them, draft Article 19a of the Bill was submitted to the European Commission on March 12th, 2021 (Notification number: 2021/152/F). From this date started a three-month standstill period, during which the European Commission and the other Member States can examine the notified Bill.

As the Bill concerns a matter where harmonisation work is currently underway as a result of the proposed DSA regulation, it is stressed that the Commission may find appropriate to exercise its prerogatives under Article 6(4) Directive (UE) 2015/1535 and decide that the adoption of the Bill shall be postponed for twelve months[7].

[4] Amendment 1770: https://www.assemblee-nationale.fr/dyn/15/amendements/3649/CSPRINCREP/1770

[5] See: https://www.assemblee-nationale.fr/dyn/15/rapports/csprincrep/l15b3797-tii_rapport-fond

[6] Here: https://ec.europa.eu/digital-single-market/en/digital-services-act-package

[7] See Article 6(4) Directive (UE) 2015/1535 : *"Member States shall postpone the adoption of a draft technical regulation for 12 months from the date of receipt by the Commission of the communication referred to in Article 5(1) of this Directive, if, within the three months following that date, the Commission announces its finding that the draft technical regulation concerns a matter which is covered by a proposal for a directive, regulation or decision presented to the European Parliament and the Council in accordance with Article 288 TFEU."*

## II. DETAIL OF THE MEASURES PROVIDED BY ARTICLE 19A

**Article 19a I. 2.** creates a new Article 6-5 of the law for confidence in the digital economy ("**LCEN**"[8]) which transposed Directive 2000/31 into French law.

The purpose of Article 6-5 is to introduce a general obligation for online platforms to contribute to the fight against illegal content and a set of more specific due diligence obligations concerning the moderation of illegal content. For the purpose of the new legal framework, illegal content refers to the list of criminal offences listed in Article 6(I)(7) LCEN as well as in Article 24a and in the third and fourth paragraphs of Article 33 of the Law of 29 July 1881 on the freedom of the press[9]. In essence, this list includes the glorification of crimes against humanity, incitement to commit acts of terrorism and their glorification, incitement to racial hatred, hatred against persons on the grounds of their sex, sexual orientation, gender identity or disability, as well as child pornography, incitement to violence, in particular incitement to sexual and gender-based violence, and offences against human dignity.

These new obligations shall apply to "*operators of online platforms*" defined in Article L. 111-7 of the Consumer Code[10] as operators that offer an online public communication service based on the classification, referencing or sharing of content posted online (e.g., social networks, video sharing platforms and search engines). The new obligations are applicable to any operator as soon as its activity in the French territory exceeds a threshold relative to the number of connections to be determined by decree. It is worth to highlight that the notion of "*online platforms*" is absent of the *e-commerce Directive*[11] (ECD). It was introduced into French law by the Digital republic bill to create a specific sub-category of service provider in the meaning of article 2 of the Directive 2000/31/CE.

Article 6-5 explicitly provides that operators of online platform shall comply with the new legal framework "*whether or not they are established in French territory*". In the same way, the explanatory memorandum to the French government's amendment states that: *"It is essential, in order to ensure the useful effect of the measure, that it be applicable to platforms established abroad, in particular in other European Union Member States. This implies a derogation from the country-of-origin principle provided for in the e-commerce Directive. Such a derogation may be justified by the objective of protecting human dignity, provided that the measure targets content that infringes it."*[12]

Article 6-5 (1°) to (8°) specifies the obligations applicable to platforms whose activity exceeds a first threshold relative to the number of connections to be determined by decree:

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[8] Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique, here: https://www.assemblee-nationale.fr/dyn/15/amendements/3649/CSPRINCREP/1770
https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000801164/

[9] *Loi sur la liberté de la presse*: https://www.legifrance.gouv.fr/loda/id/LEGITEXT000006070722/

[10] Article L. 111-7 French consumer code: *"Any natural or legal person offering, on a professional basis, whether remunerated or not, an online public communication service based on:1° The classification or referencing, by means of computer algorithms, of content, goods or services offered or put online by third parties; 2° Or the bringing together of several parties with a view to the sale of a good, the provision of a service or the exchange or sharing of a content, good or service"*

[11] Directive 2000/31/CE

[12] See: https://www.assemblee-nationale.fr/dyn/15/amendements/3649/CSPRINCREP/1770 - in French : « *Il est indispensable, pour assurer l'effet utile du dispositif, que celui-ci soit applicable aux plateformes établies à l'étranger, notamment dans d'autres États-membres de l'Union européenne. Ceci suppose de déroger au principe du pays d'origine prévu par la directive sur le commerce électronique. Une telle dérogation peut être justifiée par l'objectif de protection de la dignité humaine, à condition que le dispositif cible des contenus qui y portent atteinte. Ainsi, le présent texte est ciblé sur une liste exhaustive de catégories de contenus illicites, qui reprend celle figurant au 7 du I de l'article 6 de la loi du 21 juin 2004 sur la confiance dans l'économie numérique auxquelles sont ajoutées les injures racistes ou homophobes et les propos négationnistes.* »

- Online platforms must implement proportionate human and technological procedures and means to comply with their obligation of cooperation with the public authorities, both in the implementation of judicial or administrative orders (1° (a)), as well as in the communication of data regarding the identification of the authors of hateful content ((b) of 1°). The content reported must be temporarily preserved for the purposes of the judicial investigation ((c) of 1°).
- Platforms will also have to designate a single contact person, who will be the point of contact for the French public authorities including the regulatory authority (CSA), to ensure the effectiveness of this cooperation (2°)
- Their general conditions of use must include specific stipulations with respect to their policy and the human and technological means of moderation, as well as the measures taken in the event of the dissemination of hateful content, and the internal and legal remedies available to users (3°).
- Platforms must also regularly publish information and indicators, specifically defined by the CSA, relating to the processing of notifications and internal appeals. The Bill implies that platforms will have to designate trusted third parties whose notifications will be treated as a priority, and whose selection criteria and cooperation terms will be subject to control by the CSA. (4°).
- Points (5°) to (7°) provide that platforms must put in place easily accessible and user-friendly mechanisms for notifying content considered by users to be unlawful. Platforms will have to acknowledge receipt of these notifications, examine them promptly and inform the author of each notification of the action taken and of the internal remedies available. At the same time, platforms will also have to prevent abusive alerts.

In addition, Article 6-5 (9°) provides for specific obligations reserved to the largest platforms in terms of connexion from the French territory (i.e., platforms whose activity exceeds a second threshold relative to the number of connections to be determined by decree[13]), they must:

- Carry out an annual assessment of the systemic risks associated with the operation and use of their services with regard to the dissemination of illegal content and in relation to infringements of fundamental rights, including freedom of expression.
- Implement what is referred to as reasonable, proportionate and effective measures, aimed at mitigating the risks of dissemination while ensuring that the risks of unjustified removal are prevented.
- Report to the public in a manner to be determined by the CSA, the assessment of these systemic risks and the implemented mitigating measures.

**Article 19a II** creates a new article 62 and a new chapter III within the law of 30 September 1986 on freedom of communication. The purpose of Article 62 is to set out the CSA as the regulatory authority competent to monitor and enforce compliance with the provisions of 6.5 and to specify the powers it is given to carry out this task. It follows from the provisions of article 6-5 detailed above that the CSA will be able to exercise these powers regardless of the country of establishment of the operator within the European Union.

The CSA is thus endowed with the powers to establish the guidelines relating to transparency and due diligence obligations[14] and to access information to monitor compliance[15], as well as the powers to issue formal notices to platforms and sanctioning them: (i) up to 1% of the annual worldwide turnover when incorrect information is provided and (ii) up to 6% in the event of non-compliance.

[13] Article 19a provides for additional obligations for platforms affected by a second higher threshold.

[14] The CSA lays down the procedures and intervals for informing the public of the means used and the measures adopted to combat dissemination of illegal content; defines information and quantified indicators relating in particular to the processing of injunctions or requests for information from judicial or administrative authorities; defines the criteria for selecting trusted third parties; establishes the procedure and interval for reporting to the public on systemic risks and implemented mitigation measures.

[15] The CSA may both receive and collect data from platforms as well as set up automatic collection of public data.

## III. ISSUES RELATED TO THE COMPATIBILITY WITH EU LAW AND THE PRINCIPLES OF THE FREE MOVEMENT OF SERVICES

### 1. ART.19A IS INCONSISTENT WITH THE COUNTRY-OF-ORIGIN PRINCIPLE (ART.3 ECD)

Being given that Article 19a sets out measures restricting the freedom to provide information society services[16], such measures can be taken only if the French government demonstrate that they comply with the substantive[17] and procedural conditions[18] provided by Article 3(4) and 3(5) of the ECD[19]. Yet, no evidence that such conditions would be met is available.

If the Bill were to come into force as is, an operator which operates an *"online platform"* would have to comply with the requirements set out by Article 19a under the supervision and control of the French regulatory authority – the CSA – whether or not it is established on French territory. This would be inconsistent with the country-of-origin principle (hereinafter the "**COP**") pursuant to Article 3(1) of the E-commerce Directive ("**ECD**") according to which *information society services* must be supervised "*at the source of the activity*"[20] and that also applies to *video sharing platforms* pursuant to the Audiovisual Media Services Directive[21] ("**AVMSD**"). As a corollary rule, pursuant to Article 3(2) ECD, Member States of destination are prohibited from taking any measure restricting the freedom to provide information society services from another Member State for reasons that fall within the coordinated field[22]. While the French government presents Article 19a as a pre-transposition of the DSA, it should also be noted that the COP is in fact reaffirmed in the DSA proposal[23], with the Commission reiterating that it is the *"optimum model for ensuring that rules can effectively be enforced against services"*[24]. The COP thus remains a core principle underpinning the DSA's proposed approach, which would be unaffected by the DSA's proposed changes to the ECD.

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[16] This has been expressly admitted by the French Government as exemplified by the explanatory note of the government amendment, here: https://www.assemblee-nationale.fr/dyn/15/amendements/3649/CSPRINCREP/1770. In that respect it must be emphasized that the draft text provides for particularly heavy obligations accompanied by very heavy penalties as well. Especially, the operators would have : (i) to designate a single point of contact for the French public authorities, while a point of contact may already be designated and available in the Member State of origin; (ii) to publish information and indicators, specifically defined by the CSA that may differ from the information and indicators set by the Member state of origin ; (iii) to designate trusted third parties, the selection criteria for these trusted third parties being also determined by the CSA, again, these criteria may differ from those established by the Member State of origin; and, (iv) for a subcategory of platforms exceeding a special threshold, the requirement to report to the public in a manner to be determined by the CSA, which, yet again, may differ from one Member State to another and particularly in the Member State of origin.

[17] Article 3(4) ECD

[18] Article 3(4) and Article 3(5) ECD

[19] Please note these conditions are cumulative - see judgment of 19 December 2019, *Airbnb Ireland* (C-390/18, EU:C:2019:1112, paragraph 99).

[20] See Recital (22)

[21] Article 28a (1) of the AVMSD which refers to Article 3 (1) of the ECD.

[22] Article 2(h) of the ECD defines the coordinated field as requirements laid down in Member States' legal systems applicable to information society service providers or information society services, regardless of whether they are of a general nature or specifically designed for them. Articles 2(h)(i) and (ii) further details the scope of the coordinated field, which includes requirements concerning the behaviour of the service provider, requirements regarding the quality or content of the service including those applicable to advertising and contracts, or requirements concerning the liability of the service provider. Article 19a lays down obligations for online platforms regarding illegal content, which directly concerns the pursuit of the activity of an information society service as provided for in Article 2 (i) of the ECD and especially requirements regarding the content of the service and requirements concerning the liability of the service provider. As such, the measures set out in Article 19a concern "*content that contravenes the provisions mentioned in the third paragraph of Article 6(I)(7) of this law, as well as Article 24a and the third and fourth paragraphs of Article 33 of the law of 29 July 1881 on the freedom of the press*" in broad, illegal content is thus covered without any specific reference to a subject specifically listed in the Annex to the ECD and excluded from the coordinated field. The measures in Article 19a therefore fall within the coordinated field of the ECD.

[23] See in particular, Article 40 of the proposed DSA.

[24] See Impact assessment of the Digital Services Act, part ½, pt. 171, page 49: https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-services-act

Further, the Bill contains provisions falling into the coordinated field of Article 2(h) of the ECD and restricting the freedom to provide information society services from another Member State, thereby (if applied to providers established in another Member State) deviating from the COP stipulated in Article 3(2) of the ECD.

Yet, at this stage, no impact assessment of the measure is available nor evidence showing the above-mentioned conditions would be met. To the contrary, the European Commission already expressed serious doubts regarding the compatibility with the ECD of the previous French draft "Law aimed at combating hate content on the internet," also known as Avia law,[25] or other national drafts falling within the coordinated field of the ECD, such as the German draft Network Enforcement Act[26] and, most recently, regarding the Austrian draft of a Communication Platforms Act.[27]

First, it must be noted that Article 19a is inconsistent with the requirement of Article 3(4) a) (ii)[28] and of the European court case law that the derogating measures must be specific enough[29]. In order to not violate the ECD, the measures envisioned must, in fact, be targeted and only apply to a particular service or operator. As the European Commission recalled very early after the adoption of the ECD,[30] the exception to the COP does not allow *general* measures to be adopted with regard to a category of services, but only *case by case* measures with regard to a specific service supplied by a *given operator*. In its Communication regarding financial services, the Commission held that a Member State of destination may not, under Article 3(4) ECD, take general measures in respect of a whole category of services. The Commission pointed out that the measure must be taken on a case-by-case basis against a specific service provided by a given operator.[31] While this leaves room for individual administrative orders or court decisions, it does not allow for laws addressing a potentially infinite number of providers in an infinite number of cases. This view is supported not only by the language of Article 3(4) ECD referring to *"a given information society service which prejudices the objectives*" listed in the provision *"or which presents a serious and grave risk of prejudice to those objectives".* The materiality of a risk can only be evaluated on a case-by-case basis. The procedural requirements under Article 3(4)(b) ECD, as well, argue in favour of this proposition. This is because lit. b) presupposes that there is a competent *"Member State referred to in paragraph 1"* to take such measures. In the case of an abstract-general law, however, the Member State of destination would, ultimately, have to ask 26 other Member States as the proposed provisions would apply to any social network in the EU. Article 19a applies generally to all "*online platforms*"[32] whose activity in the French territory exceeds a threshold relative to the number of connections, regardless of its country of establishment. As a result, the contemplated measure shall not apply to a *given information society service* but to the contrary, to a very important number of targeted operators. It must be specified that the notion of "*online*

[25] See C(2019) 8585 final.

[26] See the Commission's comments on notification 2020/174/D, C(2020) 4575 final, 1 July 2020, and the comments on notification 2020/65/D, C(2020) 3380 final, 18 May 2020.

[27] See the comments on notification 2020/544/A, C(2020) 8737 final, 3 December 2020.

[28] *[…] 4. 4. Member States may take measures to derogate from paragraph 2 in respect of a **given** information society service if the following conditions are fulfilled: (a) the measures shall be: […] (ii) taken against a **given** information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives […]*"

[29] See § 84, ECJ, October 1st, 2020, n° C-649/18 ; and *Airbnb* case, n° C-390/18, § 132 et seq., were Szpunar outlined that a derogation from the freedom to provide electronic services can only derive from public interest provisions of the destination State *"taken on a case-by-case basis"* ; and Delivery of comments pursuant to Article 5(2) of Directive (EU) 2015/1535 of 9 September 2015 C(2019) 8585 final, were the Commission expressed doubts in its observations on the Avia law as to the targeted nature of the law since the notified project was generally applicable to all online platforms.

[30] *"There is also a case-by-case derogation to the Internal Market clause which Member States may use to take measures, such as sanctions or injunctions, to restrict the provision of a particular online service from another Member State where there is a need to protect certain identified interests, e.g., consumers;" First Report on the application of Directive 2000/31/EC (COM/2003/702, Section 4.1). See also in this sense, the communication to the Council, European Parliament and the European Central Bank "Application to financial services of article 3(4) to (6) of the electronic commerce directive" (COM/2003/259, point 2.1.2).*

[31] COM(2003) 259 final, page 5.

[32] Except for the measure set out in Article 19a I.2. (9)

*platforms*" is absent of the ECD[33] and inconsistent with the definition proposed by the DSA[34]. Also, an additional inconsistency with the DSA can be noted regarding the threshold that would determine whether or not a given platform would be subject to the new obligations: while the Bill specifies that only platforms exceeding the *number of connections* on French territory set by decree will be covered, the DSA would for its part take into account the number of *"active recipients*" on the territory of the Union to set a threshold[35].

Looking at the definition provided by the French Consumer Code[36], it turns out that this notion may correspond to two categories of actors defined in Union law: "*information society services*" pursuant to Article 2(a) ECD and "*video sharing platforms*" pursuant to Article 1(1)(b)(aa) AVMSD[37]. In addition, the French government provides no evidence as to the fact that all platforms targeted by the measures would actually prejudice the objective of protecting human dignity, or that all platforms present a serious and grave risk of prejudice to this objective[38]. We note that the Commission expressed serious doubts in this regard in its comments on notification 2019/412/F concerning the previous French draft "Law aimed at combating hate content on the internet". In particular, the Commission pointed out the following: *"As regards the targeted nature of the measures, the Commission is not convinced that this requirement is met in the case at hand. It notes that the notified draft applies generally to virtually any online platform".*[39] The previous French draft law was comparable to the obligations of the Bill in that its provisions also would have been applicable to providers having their registered seat outside of French territory.

Secondly, as to the necessity of the measure, it appears that the concerns expressed with respect to the previous attempt by the French government to regulate online hate in 2019 – i.e., Law aimed at combating hate content on the internet[40] - remains valid with respect to Article 19a. At the time, as it does today[41], the French government supported the view that the derogation to the COP would be justified by the objective of protecting human dignity, assuming that all the categories of content covered by the scope of the law would aim at protecting the human dignity of individual persons.

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[33] Article 19a is applicable to online platforms, being understood as a subcategory of information services providers as defined in the ECD, even though such sub-categories are currently not being defined at European level. This comment was in fact formulated the Commission in its detailed opinion on the Digital Republic Bill, see TRIS/(2016) 00504 Directive (EU) 2015/1535 Notification: 2015/0630/F, 2015/0626/F Detailed opinion from the Commission regarding a rule on services (article 6, paragraph 2, third indent, of Directive (EU) 2015/1535).

[34] According to the proposed DSA, an online platform is *"a provider of a hosting service which, at the request of a recipient of the service, stores and disseminates to the public information, unless that activity is a minor and purely ancillary feature of another service and, for objective and technical reasons cannot be used without that other service, and the integration of the feature into the other service is not a means to circumvent the applicability of this Regulation.",* See Article 2 (h) of the DSA

[35] The DSA only sets a threshold for "very large online platforms", see Article 25 of the proposed DSA.

[36] See Article 111-7 of the Consumer Code : "I. *Is qualified as an* ***online platform operator*** *any natural or legal person offering, on a professional basis, whether paid or not, an online public communication service based on : 1° The classification or referencing, by means of computer algorithms, of content, goods or services offered or put online by third parties; 2° Or the bringing together of several parties with a view to the sale of a good, the provision of a service or the exchange or sharing of a content, good or service"*. While France claims to be "pre-transposing" the DSA, it must be stressed that the Bill is not aligned with the European proposal on the key definition of online platform. In addition, Article 19a specifies that only platforms exceeding a threshold of connections on French territory set by decree will be covered, whereas, again, this provision is not a pre-transposition of the DSA which takes into account the number of "*active recipients*" on the territory of the Union to set a threshold. The size of platforms, and the associated obligations, are therefore not assessed according to the DSA criteria.

[37] Directive (EU) 2018/1808 of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, here: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32018L1808&from=EN

[38] The European court case law is well settled on the fact that the measures *"must be taken against an information society service which actually undermines those objectives or constitutes a serious and grave risk to those objectives and, finally, it must be proportionate to those objectives"* see ECJ Case C-390/18 or n° C-649/18. Also, the Commission had expressed doubts on the Avia Law, stating *"It is not clear that all online platforms covered prejudice the objective invoked by the French authorities or present a serious and grave risk to that objective"*. - see C(2019) 8585 final

[39] See (C(2019) 8585 final, 22 November 2019), p. 4 f.

[40] https://www.assemblee-nationale.fr/dyn/15/dossiers/lutte_contre_haine_internet

[41] See summary of the government amendment 1170: "*In order to ensure the effectiveness of the measure, it is essential that it be applicable to platforms established abroad, particularly in other EU Member States. This means derogating from the country-of-origin principle provided for in the e-commerce directive.",*
here: https://www.assemblee-nationale.fr/dyn/15/amendements/3649/CSPRINCREP/1770

However, the Commission pointed out that sufficient information was lacking to corroborate the French government position[42]. No more information is available regarding the list of offences[43] referred to in Article 19a[44]. In addition, the possibility of a Member State to itself regulate the activity of a given service provider established in another Member State is strictly limited and only admitted in the event of a failing or inadequacy in such State, after having requested in advance and in vain that it take measures. In this instance, in terms of procedure, it is established that France has not requested any other Member State to take measures with regard to operators established on its territory.

In the third place, regarding the proportional nature of the measures, the relevance and indispensability of the measures provided for in Article 19a are highly questionable, in particular for online platforms established in other Member States. We note that the Commission also expressed serious doubts in this regard in its comments on notification 2019/412/F concerning the previous French draft *"Law aimed at combating hate content on the internet"*. In particular, the Commission pointed out the following: "*As regards the proportionality, the Commission has doubts as well. In particular, it should be assessed whether less restrictive means to obtain a similar result could be envisaged. However, thus far, the French authorities have not provided an assessment of the proportionality of the obligations imposed on online platforms, in particular for those established in other Member States, including smaller ones, and of the potential less restrictive measures available that could achieve the stated objective*."[45] In that respect, it must be emphasized that the Bill provides for substantial obligations requiring the allocation of specific resources[46] and accompanied by very heavy penalties as well[47]. Especially, the operators would have : (i) to designate a single point of contact for the French public authorities, while a point of contact may already be designated and available in the Member State of origin ; (ii) to publish information and indicators specifically defined by the CSA that may differ from the information and indicators set by the Member state of origin; (iii) to designate trusted third parties, the selection criteria for these trusted third parties being also determined by the CSA, again, these criteria may differ from those established by the Member State of origin; and, (iv) for a subcategory of platforms exceeding a special threshold, the requirement to report to the public in a manner to be determined by the CSA, which, yet again, may differ from one Member State to another and particularly in the Member State of origin. However, thus far, the French government has not provided an assessment of the proportionality of the obligations imposed on online platforms and on the possibility to attain the stated objective with less restrictive measures[48]. Actually, the proportionality of the contemplated measures is all the more questionable as the CSA would be empowered with far-reaching investigation and sanction powers (i.e., up to 20 million euros or 6% of the total annual worldwide turnover for the previous financial year). The CSA would not only set the

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[42] See C(2019) 8585 final, footnote 10: "*The Commission has not received sufficient information at this stage that would justify that all the categories of content covered by the scope of the law would aim at protecting the human dignity of individual persons. More information and further assessment would be needed to reach a conclusion on this point."*

[43] Article 6. I, 7° referred to in Article 19a covers *"the repression of apology for crimes against humanity, provocation to commit acts of terrorism and their apology, incitement to racial hatred, hatred against persons on the grounds of their sex, sexual orientation, gender identity or disability, as well as child pornography, incitement to violence, in particular incitement to sexual and sexist violence, as well as offences against human dignity*".

[44] Article 19a was introduced during the examination of the Bill at the French Parliament and as a consequence was not subject to the impact assessment conducted on the Bill nor was it assessed by the *Conseil d'Etat* (French highest administrative court). The Bill was submitted to the *Conseil d'Etat* for an opinion and an impact assessment has been conducted before being tabled on December 9th, 2020. The Bill was then referred to the Special Commission responsible for examining the bill. Article 19a (amendments 1770 and 1780) was adopted by the Special Commission and was therefore not subject to the opinion of the Council of State or to the impact assessment.

[45] C(2019) 8585 final, 22 November 2019.

[46] See for instance: ECJ, 27 March 2014, Case C-314/12, (UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH) Pt. 49 "The freedom to conduct a business includes, inter alia, the right for any business to be able to freely use, within the limits of its liability for its own acts, the economic, technical and financial resources available to it." Here: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62012CJ0314&from=FR or see ECJ, C-534/16 (BB construct s. r. o.,)

[47] See *infra*

[48] See for instance C(2020) 8737 final (Comments of the Commission for notification 2020/544/A on the Austrian Draft Federal Act on User Protection Measures for Communication Platforms):*"the proportionality of this restriction to the objective pursued has not been demonstrated, in particular the fact that less stringent measures would have similar effects."*

terms of implementation of transparency and due diligence obligations but also directly supervise and sanction any platform established in a Member State.

For all the above considerations, Article 19a, as it stands, would constitute a significant restriction to the freedom to provide services and a severe derogation from the country-of-origin principle, whilst France fails to justify the measure appropriately in the light of the relevant criteria.

## 2. ART.19A INCREASES LEGAL UNCERTAINTY AS TO HOSTING PROVIDERS' LIABILITY (ART.14 & 15 ECD)

Article 19a exacerbates the existing legal uncertainties originating from the provisions of the liability regime under Articles 14 and 15 of the ECD[49] and as a result set out a strong risk of depriving online platforms operator from its benefits.

As explained in the impact assessment on the DSA[50], "[…]. *The ECD as interpreted by the Court left a paradox of incentives for service providers: proactive measures taken to detect illegal activities (even by automatic means) could be used as an argument that the service provider is an 'active' service controlling the content uploaded by their users, and therefore cannot be considered as in scope of the conditional liability exemption*. […]". Thus, through voluntary proactive measures, intermediaries could be seen as no longer neutral, passive and technical and consequently lose the benefit of the limited liability regime for hosting providers[51].

As a result, platforms which take a responsible attitude and adopt in good faith proactive measures, which may go beyond their legal obligations, lack legal certainty as to what extent they are adopting an active role of such a kind as to give it knowledge of, or control over the content.

This disincentive for voluntary measures by intermediaries has been clearly recognized in the *Communication on tackling illegal content online*[52] and then, the subsequent *Recommendation on effective measures to tackle illegal content online*[53]. Although these instruments are not binding, they both state that taking voluntary proactive measures to detect and remove illegal content online does not automatically lead to the online platform losing the benefit of the safe harbor under Article 14 ECD. Besides these non-binding instruments, the proposal for a regulation preventing the dissemination of terrorist content online specifies that *"The application of this Regulation should not affect the application of Article 14 of Directive 2000/31/EC 8. In particular, any measures taken by the hosting service provider in compliance with this Regulation, including any proactive measures, should not in themselves lead to that service provider losing the benefit of the liability exemption provided for in that provision."*[54].

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[49] Article 14 of the ECD provides that a hosting provider cannot be held liable for the information stored at the request of a recipient of the service, on condition that (i) it does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (ii) it acts expeditiously to remove or to disable access to the information upon obtaining such knowledge or awareness. Article 15 of the ECD, for its part, prohibits member states from imposing a general obligation on providers monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

[50] See impact assessment on the DSA, part 2/2 page 158

[51] In favour of a clearer and stricter interpretation of when the "active role of such a kind as to lead to knowledge or control over the data hosted, see Advocate General Saugmandsgaard Øe, Opinion of 16 July 2020 for Case C-682/18 and C-683/18

[52] "The Commission considers that taking such voluntary, proactive measures does not automatically lead to the online platform losing the benefit of the liability exemption provided for in Article 14 of the E-Commerce Directive", here: https://digital-strategy.ec.europa.eu/en/library/communication-tackling-illegal-content-online-towards-enhanced-responsibility-online-platforms

[53] "the Commission has set out its view that taking such voluntary proactive measures does not automatically lead to the hosting service provider concerned losing the benefit of the liability exemption provided for in Article 14 of Directive 2000/31/EC", here: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32018H0334

[54] See Recital (5) of the proposal, here: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52018PC0640

Drawing the consequences from this situation, the Commission's DSA proposal reaffirms the principles of articles 14 and 15 of the ECD and introduces a "***Good Samaritan clause***" in order to achieve a better balance and guarantee legal certainty as well as to encourage the implementation of voluntary moderation measures. The purpose of this clause is thus to specify that the implementation of such monitoring does not call into question the possibility for the operators concerned to avail themselves of the limited liability regime of the ECD.

Yet, in the opposite direction, if not amended, Article 19a would create greater legal uncertainty as platforms would be placed in a situation where:

I. complying with the newly enacted obligations and guidelines decided by the French regulatory authority (i.e., the CSA) will protect them from heavy administrative penalties (i.e., up to 20 million euros or 6% of the total annual worldwide turnover for the previous financial year);

   but at the same time,

II. exposes them to a substantial risk of losing the benefit of the limited liability regime for hosting providers and of being subject to significant damage claims or event criminal liability.

Consequently, in the hypothesis where Article 19a would be enacted in its current version (i.e., without "*Good Samaritan clause*"), one may fear that the provisions of Articles 14 and 15 ECD will in practice be of little or no effective effect with respect to operators of online platforms subject to French law which include operators established in other Member states.

## III. ISSUES RELATED TO THE CONSISTENCY WITH DATA RETENTION EU LAW (ART. 23(1) GDPR)

Article 19a I. 2. 1° (c) provides for a new obligation requiring platforms to retain the content withdrawn or made inaccessible as a result of a notification, the compliance of which with EU law as set out by the Court of Justice of the European Union remains to be confirmed.

If Article 19a were to come into force as is, online platforms[55] whether or not established in France, would bear the obligation to temporarily retain the contents they have withdrawn or made inaccessible[56], in order to make them available to the judicial authority for the purposes of searching, finding and prosecuting criminal offences[57]. Given the purpose of the required retention, this obligation appears to be the corollary of an obligation already provided for by the LCEN[58], which requires hosting companies to retain data likely to allow the identification of anyone who has contributed to the creation of the content[59]. Indeed, the conservation of the contents only, if it were not coupled with the conservation of the data allowing the identification of the persons at their origin, would not make it possible to achieve the pursued objective.

[55] As defined in the French Consumer Code, see *supra*
[56] i.e., content that has been reported to them as contrary to the provisions covered by Article 19a
[57] See Article 19a I. 2. 1° (c) *"To temporarily retain the contents which have been reported to them as contrary to the provisions referred to in the first paragraph and which they have withdrawn or made inaccessible, for the purpose of making them available to the judicial authority for the purposes of searching, finding and prosecuting criminal offences. The duration and the methods for the preservation of these contents are defined by decree of the Council of State, after the opinion of the National Commission on Information Technology and Freedoms;"*
[58] The *Law for confidence in the digital economy* is the transposition of the ECD into French law.
[59] See Article 6. II LCEN

These provisions of the LCEN, along with their implementing Decree[60], were precisely subject of a prejudicial question[61] that let the CJEU to rule that where the GDPR is applicable[62], "*Article 23(1) of Regulation 2016/679, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, must be interpreted as precluding national legislation which requires that providers of access to online public communication services and hosting service providers retain, generally and indiscriminately, inter alia, personal data relating to those services.*"[63]

As a result, to say the least, a legitimate concern arises as to the compatibility of the data retention obligation resulting from Article 19a and the most recent case law of the CJEU. Although the notified draft specifies that the duration and the methods for the retention of the contents in question will be defined by decree of the *Conseil d'Etat* after the opinion of the French data protection authority, the recent positions expressed by the French authorities regarding compliance with the case law of the CJEU reinforce this concern[64].

For all the above considerations, Article 19a, as it stands, gives rise to uncertainty as to its consistency with European law as interpreted by the CJEU.

[60] Décret n° 2011-219 du 25 février 2011 relatif à la conservation et à la communication des données permettant d'identifier toute personne ayant contribué à la création d'un contenu mis en ligne, here: https://www.legifrance.gouv.fr/loda/id/JORFTEXT000023646013/#:~:text=Copier%20le%20texte-,D%C3%A9cret%20n%C2%B0%202011%2D219%20du%2025%20f%C3%A9vrier%202011%20relatif,un%20contenu%20mis%20en%20ligne

[61] Joined Cases C-511/18, C-512/18 and C-520/18, here: https://curia.europa.eu/juris/document/document.jsf?text=&docid=232084&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=6240757 See pt. 73: *"'(1)Is the general and indiscriminate retention obligation imposed on providers on the basis of the implementing provisions of Article 15(1) of [Directive 2002/58] to be regarded, inter alia in the light of the safeguards and checks to which the collection and use of such connection data are then subject, as interference justified by the right to security guaranteed in Article 6 of the [Charter] and the requirements of national security, responsibility for which falls to the Member States alone pursuant to Article 4 [TEU]? (2) Are the provisions of [Directive 2000/31], read in the light of Articles 6, 7, 8 and 11 and Article 52(1) of the [Charter], to be interpreted as allowing a State to introduce national legislation requiring the persons, whose activity consists in offering access to online public communications services and the natural or legal persons who, even free of charge, and for provision to the public via online public communications services, store signals, writing, images, sounds or messages of any kind provided by recipients of those services, to retain the data capable of enabling the identification of anyone who has contributed to the creation of the content or some of the content of the services which they provide, so that a judicial authority may, where appropriate, require the communication of that data with a view to ensuring compliance with the rules on civil and criminal liability?'"*

[62] See pt. 201 and 202: *"Accordingly, depending on whether the provision of services covered by that national legislation falls within the scope of Directive 2002/58 or not, it is to be governed either by that directive, specifically by Article 15(1) thereof, read in the light of Articles 7, 8 and 11 and Article 52(1) of the Charter, or by Regulation 2016/679, specifically by Article 23(1) of that regulation, read in the light of the same articles of the Charter."*

[63] See *La Quadrature du Net and Others* judgment - Joined Cases C-511/18, C-512/18 and C-520/18 - §193 et seq.

[64] See for instance: https://www.politico.eu/article/france-data-retention-bypass-eu-top-court/ or for an article in French: https://www.nextinpact.com/article/45724/conservation-donnees-gouvernement-demande-au-conseil-detat-dignorer-justice-europeenne

**[About Syntec Numérique]**

Syntec Numérique, French professional association for the digital industry, welcomes digital technology professionals from IT services and consulting firms, software manufacturers, and technology consulting firms. The 2,000 members account for 80% of the industry's total revenue (57 billion) and employ 530 000 people.

Its mission is to shape the digital industry of the future, serving as an advocate for digital technology professionals, and contributing to the development of the digital economy, its uses, and new markets. www.syntec-numerique.fr

**[About TECH IN France]**

Created in 2005, TECH IN France is a trade association according to the Law of 1901 with a purpose to gather and represent the software publishers, internet services and platforms in France. Representing the digital industry, TECH IN France has 400 member companies: from startups to multinationals, including small and medium-sized companies and large French groups, which represents 8 billion euros and 90,000 jobs.

TECH IN France has set itself the mission of leading a permanent reflection of the evolution of the digital industry and promoting the attractiveness of the sector. www.techinfrance.fr