

THE FRENCH LEGISLATION AGAINST DIGITAL INFORMATION

MANIPULATION IN ELECTORAL CAMPAIGNS:

A SCOPE LIMITED BY FREEDOM OF EXPRESSION *

ABSTRACT

As France is traditionally opposed to electronic voting, especially when used in general elections or national referendums, electoral interference could take the form of false information disseminated online. Indeed, misinformation may affect the honesty of electoral debates and influence voting behavior. This article first studies the electoral inferences that occurred in France, during the 2017 presidential campaign, and that targeted more particularly the future President of the Republic, Emmanuel Macron. It shows that the laws that existed at the time could only imperfectly counter disinformation spread in an online environment. This article then analyzes the new laws on the fight against the manipulation of information, adopted in reaction to the 2017 electoral interferences with the support of the President of Republic. It studies how those laws aim to react to manipulation of digital information before general elections and national referendums. A new judge sitting for urgent matters may order the suspension or suppression of limited digital false information. The French regulatory broadcasting agency may suspend, interrupt, or refuse broadcasting of false information by audio-visual media controlled or influenced by a foreign State. Its powers are however restrained by legal and political reasons. This article then studies how the new laws aim to prevent manipulation of digital information. They give to online platforms' users more means to critically assess digital information and be less influenced by it. Thus, online platforms must be more transparent about the information they host, especially during

* Translations of legal provisions from French into English were made by the author.

electoral campaigns. Furthermore, information and media literacy are strengthened. Finally, this article concludes that the scope of the new legislation against the manipulation of information, constrained by the freedom of expression, remains modest. It argues that facilitating the detection of false information by platforms' users is the way forward to diminish the impact of that information on electoral debates.

INTRODUCTION

Although electoral interference is not a new phenomenon, the use of cyberspace increases the scalability, reach, and effects of such interference and poses a serious threat to democracy. France is traditionally opposed to electronic voting, especially when used in general elections or national referendums. Since 2012, only French citizens abroad had been allowed to vote electronically in legislative elections, but not in presidential elections. In 2017 however, France's government dropped plans to let its citizens living abroad vote electronically for representatives of the National Assembly, the lower house of Parliament, due to take place in June of that year. This decision followed a recommendation made by the National Cybersecurity Agency for which there was an "extremely high risk" of cyber-attack (Leloup et Untersinger 2017). As a result of the lack of electronic voting, electoral interference in France could take the form of false information disseminated online shortly before elections. Indeed, disinformation may affect the honesty of the electoral debate and influence voting behavior.

False information and manipulation of information are not new. The digital revolution has however greatly accelerated the dissemination of information and given it a global audience. Online information is relayed quickly, in a few minutes, and massively, to thousands of people (Vuilletet 2018, 39). In addition, technologies can amplify the diffusion

of electronic information. Thus, automated, or semi-automated actors, “bots”, can manage fake accounts on Facebook or Twitter. They allow for the rapid diffusion of fake news through biased retweets and likes. Individuals, called “internet trolls”, or companies, “troll factories”, can saturate websites with comments and thereby also contribute to the spread of information (Vilmer, Escorcia, Guillaume and Herrera 2018, 83-84). Furthermore, it is easy and relatively cheap to spread false information on platforms, such as on Facebook or Twitter.¹

The 2017 French electoral campaign leading up to the election of the President of the Republic, that is the most important election in France was the subject of online dissemination of false and leaked information. The purpose of this information was to harm the reputation of candidates, in particular that of Emmanuel Macron. Once elected to the presidency, Emmanuel Macron vowed to introduce a law that counters false information spread online during national French election periods (Macron 2018). The law on the fight against the manipulation of information was passed at the end of 2018, following a difficult legislative journey. The Private Member’s bill was registered in the National Assembly, one of the two houses of the French Parliament, on 21 March 2018 without having been preceded by an impact study. Furthermore, the bill was only succinctly debated in Parliament as the Government applied the accelerated procedure of the French Constitution.² Indeed, the Government wanted to have the new law applicable to the European elections held in May 2019. The Senate, the upper house of Parliament, rejected the legislative proposal twice and the Joint Committee, composed of an equal number of members from each house, was not

¹ €40,000 is sufficient to launch political propaganda operations on social media; €5,000 to purchase 20 000 hateful comments; €2,600 to acquire 300 000 followers on Twitter.

² In accordance with Art. 45 Para. 2 of the French Constitution, when the two Houses of Parliament cannot agree on a bill after one reading by each House, the Prime Minister may convene a joint committee, composed of an equal number of members from each House, to propose a text on the provisions still under debate. French Constitution of 4 October 1958 at https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constitution_anglais.pdf

able to reach any compromise.³ The Private Member's bill was finally passed by the sole National Assembly on 22 November 2018, on the Government's initiative.⁴ The organic law on the fight against the manipulation of information was adopted on the same day, under the same conditions than the corresponding ordinary law.⁵ It integrates the provisions of the ordinary law on the fight against the manipulation of information into the law on the election of the President of the Republic (Organic law no. 2018-2101 on the fight against the manipulation of information). The ordinary law against information manipulation was submitted to the Constitutional Council, the supreme constitutional court in France.⁶ In December 2018, the Council declared the law compatible with the Constitution subject to certain reservations relating to its interpretation (Constitutional Council, Decision no. 2018-773 DC, 20 December 2018, Art. 1 and 2). Like every organic law, the organic law on the fight against information manipulation was submitted to the Constitutional Council and was also found to be in conformity with the Constitution subject to the same interpretation reservations to apply to the ordinary law (Constitutional Council, Decision no. 2018-774 DC, 20 December 2018, Art. 1 and 2). Both the ordinary and organic laws against information manipulation were then promulgated by the President of the Republic on 22 December 2018.

These laws seek to ensure the clarity of electoral debate and to stop the risk of citizens being tricked in exercising their vote by preventing the spread of digital disinformation. In doing so, this legislation gives new powers to public authorities, in cooperation with Internet

³ In accordance with Art. 45 Para. 2 of the French Constitution at https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constitution_anglais.pdf

⁴ In accordance with Art. 45 Para. 4 of the French Constitution, if the joint committee fails to agree on a common text, the Government may, after a further reading by the National Assembly and by the Senate, asks the National Assembly to reach a final decision. See also the legislative report on the law against the manipulation of information of 22 December 2018 at http://www.assemblee-nationale.fr/dyn/15/dossiers/alt/fausses_informations_lutte#15-SNNLEC

⁵ Legislative report on the organic law relating to the fight against the manipulation of information of 22 December 2018 at http://www.assemblee-nationale.fr/dyn/15/dossiers/alt/lutte_fausses_informations#15-ANLDEF Under French law, an organic law completes a provision of the French Constitution; it has therefore a higher value than an ordinary law in the French hierarchy of norms.

⁶ In accordance with Art. 61 Para. 2 of the French Constitution of 4 October 1958 at https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constitution_anglais.pdf

players, to act, not on the primary emission of false information, but on their secondary dissemination. Implementation of the laws relating to the fight against the manipulation of information is limited to general elections - of members of the National Assembly, of members of the Senate, of the President of the Republic, of the French representatives in the European Parliament - and national referendum operations. All those elections are done by direct suffrage, except the one of senators. The new legislation does not have any bearing on primary or local (regional, departmental, municipal) elections, which, due to their local significance, are less likely to be targeted by disinformation campaigns. The legislation does not apply to partial elections either.

The laws relating to the fight against the manipulation of information through digital means should not place excessive limits on freedom of expression and communication. Indeed, this freedom applies to communication carried out in cyberspace.⁷ Further, the freedom of expression and communication is enshrined in the Declaration of the Rights of Man and the Citizen of 1789 (Declaration of Rights of Man and the Citizen, 26 August 1789, Art. 11), and as such enjoys constitutional value under French law (Constitutional Council, Decision no. 71-44 DC of 16 July 1971, Para. 2). It is also guaranteed under the European Convention on Human Rights (European Convention on Human Rights, 4 November 1950, Art. 10) and the International Covenant on Civil and Political Rights (International Covenant on Civil and Political Rights, 16 December 1966, Art. 19) that have been ratified by France. Freedom of expression and communication may be limited as “prescribed by Law” (European Convention on Human Rights, 4 November 1950, Art. 10). The French legislature has the right “to institute provisions to bring an end to the abuse of the right to exercise freedom of expression and communication which infringes on public order and the rights of

⁷ States have regularly asserted their sovereign authority and jurisdiction over cyber activities conducted on their territory, and thus the implementation of national and international norms deriving from the principle of sovereignty. See UN Group of Governmental Experts (GGE) on Developments in the Field of Information and Telecommunications in the Context of International Security, Report 2015 UN Doc. A/70/174, Para. 27.

others” (Constitutional Council, Decision no. 2018-773 DC, 20 December 2018, Para. 14). Limits on freedom of expression and communication must however be as narrow as possible and be necessary and proportionate to the objective sought (Constitutional Council, Decision no. 2018-773 DC, 20 December 2018, Para. 15). Consequently, the laws against manipulation of information, as well as the Constitutional Council which interpreted them, seek a balance between freedom of expression and the aims of clarity of electoral debate and honesty of elections. The ordinary law of 22 December 2018 is the main legislative arsenal addressing false information. The organic law simply refers to it. This article will thus focus on the ordinary law relating to the fight against the manipulation of information, in the light of its interpretation by the Constitutional Council. When not otherwise specified, references to the law against the manipulation of information are references to the ordinary law.

This article will first study the electoral inferences that occurred in France, during the 2017 campaign of the election of the President of the Republic. It will show that the legislation that existed at the time could only imperfectly counter misinformation spread in an online environment. This article will then analyze the laws of 22 December 2018 on the fight against the manipulation of information, adopted in reaction to the 2017 electoral interferences. It will first examine, in chapter 3, how they aim to react to manipulation of digital information in electoral campaigns. It will analyze the powers of the new judge sitting for urgent matters against disinformation disseminated online. As will be seen, its powers, as interpreted by the Constitutional Council in light of freedom of expression, are very limited. This article will then study the new attributions of the Superior Audiovisual Council, the French regulatory broadcasting authority, in relation to the dissemination of false information on audio-visual media, controlled or influenced by a foreign State. It will be argued that the latitude of the Council in the implementation of its new attributions is restricted by the freedom of expression and by political considerations. Chapter 4 will then examine how the

laws of 22 December 2018 aim to prevent manipulation of digital information. They do so in giving to online platforms' users more means to critically assess digital information. Indeed, the new legislation requires from platforms to be more transparent about the information they host. It could not go further and asks platforms to remove false information because this would have been contrary to freedom of expression. Furthermore, the new laws strengthen information and media literacy. Finally, this article will conclude that the scope of the new legislation on the fight against the manipulation of information, constrained by freedom of expression, remains modest. The present author will then recommend a way forward to better counter the impact of digital false information during electoral campaigns.

DIGITAL INFORMATION MANIPULATION DURING THE PRESIDENTIAL CAMPAIGN AND EXISTING LEGISLATION

ELECTORAL INTERFERENCES THROUGH DIGITAL FALSE AND LEAKED INFORMATION

The 2017 French presidential campaign was the subject of massive online dissemination of false and leaked information in order to harm several candidates, notably Emmanuel Macron. The French president is elected every five years by direct popular vote in two rounds.⁸ At the beginning of 2017, Macron became a front-runner. At the same time, he was targeted by rumors and insinuations spread online. For instance, an article by Sputnik, a Russian State-funded news outlet, presented Macron as “an agent of the big American banking system” and supported by a “very wealthy gay lobby” (Sputnik 2017). More concerning, two hours before the final televised debate between Emmanuel Macron and

⁸ Except if a candidate wins an absolute majority in the first round, which has never happened.

Marine Le Pen, the two candidates in the second round, on Wednesday 3 May 2017, a user with a Latvian IP address posted two documents, on the anonymous messaging board 4Chan, reporting that Macron had an offshore account. This information was quickly retweeted by approximately 7,000 Twitter accounts, often with the “#MacronGate” and “#MacronCacheCash” hashtags. During the debate, Marine Le Pen referred to the existence of this account. Several investigative journals finally proved that the documents mentioning this account were fake (Vilmer, Escorcia, Guillaume, and Herrera 2018, 107). The public prosecutor’s office in Paris opened an investigation following the legal complaint filed by Emmanuel Macron for fake news and resort to false documents on the ground of Article L. 97 of the Electoral Code and Article 441-1 of the Criminal Code, analyzed further down in this article (Le Cain 2017).

Furthermore, on 5 May 2017, just a few hours before official campaign stopped, hacked emails from Macron’s close collaborators together with several fake documents, were posted on an online library site called Archiv.org and on the anonymous document sharing site Pastebin under the title “Emleaks”. The hackers had mixed falsified documents with genuine ones in order to sow doubt and disinformation. By 19:35 on 5 May, a link to the Pastebin files appeared on /pol/, the anarchic political discussion forum on board 4chan. A few minutes later, a journalist posted a link to the thread to Twitter using the hashtag #MacronLeaks. Automated accounts and real people shared the link on Twitter, as well as finally the WikiLeaks Twitter account what accelerated the dissemination of the leaks. The Macron leaks then began being spread by the National Front - a French far right party - accounts, this time in French. The hashtag #MacronLeaks was included in approximately 47,000 tweets in just three and a half hours (Mohan 2017).

The cyber-attacks directed against Emmanuel Macron, especially the Macron leaks, did not significantly influence French voters and Macron won the presidential election.⁹ This lack of impact on the behavior of French electors can be explained through several factors. First, the hackers overestimated their ability to shock and influence the electorate. Indeed, the Macron leaks revealed nothing illegal, compromising, let alone interesting. The 15 GB data, including 21,075 emails diffused were boring or ludicrous and were not taken seriously by the electors (Toucas 2017).¹⁰ Then, the release of the leaks just hours before official campaigning stopped on 5 May at 12:00am, became a double-edged sword.¹¹ The objective was of course to prevent Emmanuel Macron from having the time to address the leaks. On the other hand, however, this timing did not give enough time to spread the information, in particular in French, and made the leaks appear suspicious (Vilmer, Escorcia, Guillaume, and Herrera 2018, 111-112).

Furthermore, having in mind the interventions in the 2016 American presidential election, French authorities had anticipated similar interferences in the French presidential election. Two bodies in particular played an important role: the National Commission for the Control of the Electoral Campaign for the Presidential Election (CNCCEP) set up in the months preceding every French presidential election to serve as a campaign watchdog; the National Cybersecurity Agency (ANSSI) that ensures the integrity of electoral results and maintains public confidence in the electoral process. The CNCCEP and ANSSI alerted the media, political parties, and the public to the risk of harmful cyber operations during the presidential campaign. All major parties, except the Front National, participated in a

⁹ The Macron leaks did not have nearly as much influence on the election campaign as the traditional journalism of the well-known media outlet, *Le Canard Enchaîné*, which published revelations that marred the campaign of François Fillon, another candidate to the presidential election.

¹⁰ Some sources mention 9.2 GB of data. 9.2 GB is the size of the compressed archive that was initially uploaded, while 15 GB is the total size of its content once decompressed.

¹¹ Elections of the President of the Republic always take place on a Sunday. The official campaign for those elections must stop one day before the polls at 00:00, thus on Friday at 12:00 am. Between midnight on Friday and 8:00 p.m. on Sunday, when the last polls close, candidates are prohibited by law from making public statements or giving interviews.

workshop on cybersecurity, organized by the ANSSI at the beginning of the campaign. The ANSSI also heightened security measures during the electoral process in order to guarantee the integrity of the vote (Vilmer, Escorcía, Guillaume, and Herrera 2018, 112-113).

Moreover, expecting the hacks, Emmanuel Macron's political party "En Marche!" created fake email addresses, fake passwords, and fake documents to preemptively degrade the value of possible cyber-attacks (Brattberg and Maurer 2018). In addition, En Marche! reacted swiftly and very well to the Macron leaks. The Macron campaign staff issued a press release only a few hours after the documents were issued and four minutes before the purdah went into effect (En Marche! 2017). They also systematically responded to posts or comments on social media that mentioned the Macron leaks. Finally, Macron's team referred the case to the Superior Audiovisual Council and the CNCCEP (Vilmer, Escorcía, Guillaume, and Herrera 2018, 114-115). Under French Law, late dissemination of new electoral propaganda is prohibited (Electoral Code, Art. 49; Rambaud 2019, 571-572). Following this prohibition, as early as the evening of 5 May, the Superior Audiovisual Council emailed television and radio correspondents asking them to abstain from disseminating any information on the election coming from digital platforms (Conseil supérieur de l'audiovisuel 2018, 23). On the following day, the CNCCEP issued a press release, where it referred to the prohibition and recommended not to report on the content of the Macron leaks, especially on websites. It called "on all actors present on websites and social networks, first and foremost the media, but also all citizens, to show a spirit of responsibility and not relay the contents of these documents in order not to alter the integrity of the vote" (CNCCEP 2017). Audio-visual media strictly respected the Superior Audiovisual Council's and CNCCEP's recommendations. Media and news press websites referred to the Macron leaks but chose not to report on their content (CNCCEP 2017). Some even denounced an attempt of disruption of the electoral campaign (Leloup and Tual, 2017). More generally, France has a strong tradition

of serious journalism that provides built-in resilience to interference through disinformation. The French population still refers mostly to traditional media sources. Tabloid outlets and websites are less popular than there are for instance in the United States and United Kingdom (Vilmer, Escorcía, Guillaume, and Herrera 2018, 111; Brattberg and Maurer 2018).

Finally, in the evening of 5 May, shortly after the release of the Macron leaks, the public prosecutor's office in Paris opened an investigation, entrusted to the Brigade for the Investigation Technology Fraud for "fraudulent access to an automated data processing system" and "breach of the secrecy of correspondence" (Thierry 2017), that are offenses punished by the Criminal Code (Criminal Code, Art. 323-1 and 226-15 respectively). France never managed to attribute the hacking of Macron's campaign emails to a specific author. Some of the sites spreading the leaks have only been linked to Russian interests and there was a suspicion that Russia was behind the leaks. The Russian government has however always denied all allegations of electoral intervention in France (Leloup and Untersinger 2019; Vilmer 2019, 21-25).

INADAPTED EXISTING LEGISLATION AGAINST DIGITAL FALSE INFORMATION

During the last presidential election of 2017, French law already had many regulations countering false information. Thus, the Electoral Code stipulates a year's imprisonment and a fine of €15,000 for "those who, using false news, slanderous rumours or other fraudulent manoeuvres, have modified or diverted votes, led one or more voters to abstain from voting" (Electoral Code, Art. L. 97). The penalty for this offense is decided by the criminal judge (e.g. Constitutional Council, Decision no. 2012-4589 AN, 7 December

2012, Para. 4).¹² Little use has been made of this provision, no doubt because of the need to provide a causal link between false news, slanderous rumours or fraudulent tactics and the results of the ballot. The law on the freedom of the press of 29 July 1881 punishes with a fine of €45,000 “the publication, distribution, or reproduction ... of false news ... when this has disturbed public peace or was capable of disturbing it” (Law of 29 July 1881 on the freedom of the press, Art. 27). Requiring a disorder to public peace, this measure excludes the protection of individuals. Furthermore, it can only be invoked by the public prosecutor, and not by the person targeted by false news. This explains the low number of recourses to this measure (Dreyer 2019, 19-20). The law of 29 July 1881 also punishes, in its Article 29, defamation through the press or any other means of publication (Law of 29 July 1881 on the freedom of the press). This provision is easier to implement. It can be resorted to in order to fight false information that violates an individual’s honour or consideration. Further, the law of 21 June 2004 for confidence in the digital economy provides for civil and criminal liability for online platforms for disseminating illegal content - that could correspond to false information -, but only if they “actually” know of the illegal nature of that content (Law no. 2004-575 of 21 June 2004 for confidence in the digital economy, Art. 6 Para. I 2 and 3).¹³

More specifically, the Criminal Code penalizes “[s]upplying... the civil or military authorities of France with false information likely to mislead them and to damage the fundamental interests of the nation” (Criminal Code, Art. 411-10).¹⁴ The Code also sanctions “forgery and the use of forgeries ... by three years’ imprisonment and a fine of €45,000” (Criminal Code, Art. 441-1). Forgery consists of any fraudulent alteration of the truth liable to cause harm and made by any means. Other provisions of the Criminal Code, punishing

¹² The Constitutional Council was acting here as an electoral judge. The Constitutional Council is the electoral judge of elections of the President of the Republic and members of Parliament.

¹³ The Constitutional Council limited the scope of this liability indicating that the illegal content should be manifest. Decision no. 2004-496 DC, 10 June 2004, Para. 9.

¹⁴ See also Art. 322-14 Criminal Code.

breaches of privacy, can apply to false information disseminated on the Internet (e.g., Criminal Code, Art. 226-1 and Art. 226-8).

As this brief study shows, existing legal provisions tackling disinformation could apply to false information in an online environment under only limited circumstances. Consequently, following the cyber-attacks targeting his person, Emmanuel Macron called for a new legislation addressing the spread of false information online with the purpose of disturbing electoral processes. For the French executive, the legal tools available at the time were not sufficiently suited for combating the manipulation of information diffused through rapid and easily available new means of communication. It considered that a new law was needed to tackle digital false information of electoral interest rather than adapting and amending existing procedures (Macron 2018). The State Council, a body that advises the government, shared the same opinion than the executive. For the Council, “[t]he current state of the law, particularly in electoral matters, does not necessarily make it possible to respond to all of the risks induced by these new phenomena [information manipulation online]” (State Council, no. 394641-394642, Opinion relating to the bills on the fight against the manipulation of information, 19 April 2018).¹⁵ Similarly, according to the explanatory memorandum to the bill relating to the fight against the manipulation of information, “if the civil and criminal responsibilities of the authors of this false information can be sought on the basis of existing laws, those laws are however insufficient to allow the rapid removal of online content and to prevent its spread or reappearance” (Explanatory memorandum to the bill on the fight against the manipulation of information, registered at the presidency of the National Assembly the 21st of March 2018). The news laws of 22 December 2018 were meant to tackle the dissemination of digital false information more efficiently, although they do it in a limited way.

¹⁵ The State Council is also the highest administrative jurisdiction.

A LIMITED REACTION TO DIGITAL INFORMATION MANIPULATION

NEW LIMITED INTERLOCUTORY PROCEEDINGS AGAINST DIGITAL FALSE INFORMATION

Interlocutory Proceedings Limited to Certain Information

The law of 22 December 2018 establishes interlocutory proceedings that can order the rapid cessation of false information disseminated on online public communication services. Under French law, interlocutory proceedings constitute a specific procedure whereby a judge sitting for urgent matters can quickly adopt provisional measures pending a trial which will settle the dispute. French law already had emergency legal actions which could be used to react to digital false information. The law on the freedom of the press of 29 July 1881 provides for interlocutory proceedings applicable to provocation of hatred and violence, defamation or insult, to which false information may correspond (Law of 29 July 1881 on the freedom of the press, Art. 50-1). The numerous formalities required by this emergency legal action are, however, unsuitable for information disseminated on the Internet (Pillet and Soilihi 2016, 17-18). The Civil Code also provides for interlocutory proceedings for the adoption of any measure against false information which infringes privacy, if it can prevent or put an end to such infringement (Civil Code, Art. 9). Those interlocutory proceedings have a quite narrow application. The interlocutory proceedings of the law on confidence in the digital economy have a wider scope. They allow the judge to prescribe to access providers or hosts of online public communication services any measure able to avoid damage caused by online content (Law no. 2004-575 of 21 June 2004 for confidence in the digital economy,

Art. 6 I 8). With the new legislation of 22 December 2018, the legislature has chosen to create another emergency legal procedure instead of amending and adapting existing procedures to digital false information.

According to the law on the fight against the manipulation of information, the judge sitting for urgent matters may prescribe any measure to halt the dissemination of inaccurate or misleading allegations or imputations of facts likely to alter the honesty of elections (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 1). The judge could, for example, order Internet access providers or online content hosts the suspension or suppression of content, the closure of a user's account that diffuses false information, or in extreme circumstances the blocking of access to a website (Dreyer 2019, 33). The interlocutory proceedings do not target the author (often unknown) of false information, but the access provider or content host. Measures ordered by the judge sitting for urgent matters must be necessary and proportionate to their objective - bring an end to false information being spread - and thus affect the least freedom of expression (Constitutional Council, Decision no. 2018-773 DC, 20 December 2018, Para. 25).

In its decision of 20 December 2018 on the law on the fight against the manipulation of information, the Constitutional Council expressed a reservation of interpretation about the notion of "false information" and limited its scope. "These allegations or accusations do not relate to opinions, parodies, partial inaccuracies or simple exaggerations. They are those for which it is possible to objectively demonstrate falseness" (Constitutional Council, Decision no. 2018-773 DC, 20 December 2018, Para. 21). Furthermore, "the allegations or accusations in question can only justify such a measure [based on the interlocutory proceedings] if the incorrect or misleading nature is apparent" (Constitutional Council, Decision no. 2018-773 DC, 20 December 2018, Para. 23). The risk of alteration by those allegations or accusations

of the honesty of elections “must also be apparent” (Constitutional Council, Decision no. 2018-773 DC, 20 December 2018, Para. 23).

Moreover, inaccurate or misleading allegations or imputations are covered by the law of 22 December 2018 only if their dissemination meets three cumulative conditions: it must be deliberate - the false information is diffused on purpose -, artificial or automated - the false information is sponsored through the payment of third parties or diffused through bots -, and massively transmitted by an online communication service - the false information is seen by a high number of platforms’ users (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 1). These requirements to be fulfilled by the spread of false information aim to guarantee that the law against the manipulation of information applies only to manipulated information. The purpose of the new legislation was not to limit false information, but manipulation by false information (Moutchou 2018, 29). Indeed, in a democracy, citizens should not be prevented from sharing information, whether it is true or false. This is particularly the case during electoral periods. Accordingly, French courts have a broader interpretation of freedom of expression in electoral debates and electoral campaigns than in other circumstances (Court of cassation, Correctional chamber, Ruling no. 14-82587, 20 October 2015; Constitutional Council, Decision no. 2018-773 DC, 20 December 2018; State Council, Ruling no. 385859, 17 June 2015).¹⁶

Thus, the Constitutional Council has greatly limited the amount of false information that can trigger the implementation of the new interlocutory proceedings. Such false information must correspond to allegations or accusations for which falseness can be objectively demonstrated, whose misleading nature is apparent and that have a manifest risk of affecting the integrity of elections. Furthermore, those allegations or accusations must be spread deliberately, artificially, or automatically and massively. In narrowing down in such a

¹⁶ The Court of cassation is the highest jurisdiction in civil, commercial and criminal matters in France; the State Council is the highest jurisdiction in administrative matters; the Constitutional Council is acting here as electoral judge.

way the implementation of the new emergency legal action, the Constitutional Council reconciles the principle of honesty of elections - to which it explicitly gives, for the first time, a constitutional value - with freedom of expression (Constitutional Council, Decision no. 2018-773 DC, 20 December 2018, Para. 16).

If the judge for urgent matters can only intervene in apparent cases of false information that has a manifest impact on the integrity of ballots and that is disseminated deliberately, artificially and massively, one can question the usefulness of the new interlocutory proceedings. Some news is evidently false. Such was the news published on the Denver Guardian website on 5 November 2016, three days before the 2016 American presidential election, intending to undermine the candidacy of Hillary Clinton. This news, massively shared on social media, related to a FBI agent believed to be responsible for email leaks pertinent to the investigation into Hillary Clinton's private email server while she was Secretary of State. It reported that this agent killed himself after murdering his wife (Buhler & co 2016). Most false information disseminated in order to alter the vote of electors is however likely to be subtler than in that example. Authors of large-scale information manipulation will probably not spread outrageous statements that can easily be described as manifestly false (Morin-Desailly 2018, 37).

The limited material scope of the new legal injunction may explain why this injunction was resorted to only once during the electoral campaign preceding the European elections of May 2019, although the Paris "Tribunal of big instance" was prepared to deal with an influx of applications:¹⁷ three lines of magistrates were established and a permanent line was open. The Tribunal was seized on 16 May 2019, at the initiative of two politicians who aimed to demonstrate the uselessness of the new emergency legal action. Marie-Pierre

¹⁷ The "Tribunal of big instance" is a tribunal of general jurisdiction that hears cases at first instance when the claim is more than Euro 10,000 and cases which are not specifically allocated to specialist courts.

Vieu and Pierre Ouzoulias summonsed SAS Twitter France, for the purpose of ordering it to withdraw the tweet published by the Twitter account @ CCastaner on 1 May 2019. In this tweet, Christophe Castaner, Minister of Interior, stated that the Pitié-Salpêtrière hospital had been attacked on the margins of the May Day demonstration (Mounier 2019). The “Tribunal of big instance” held that “[i]t resorts that if the statement drafted by Mr. Christophe Castaner appears exaggerated in that it evokes the term attack and injuries, this exaggeration relates to facts that, themselves, are real, namely the intrusion of demonstrators in the enclosure”. Thus, since “the information is not unrelated to actual facts, the condition that the allegation must be manifestly inaccurate, or misleading is not met”. In addition, the dissemination of information was not artificial or automated (Judgment of the Paris “Tribunal of big instance”, 17 May 2019). The conditions for implementing the interlocutory proceedings were obviously not met and the request was declared inadmissible (Mounier 2019).

Interlocutory Proceedings Limited in Time

Referral to the judge sitting for urgent matters is broad: he can be seized by the public prosecutor and by any candidate, any party or political group or any person who considers himself victim of false information (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 1). The judge belongs to the 17th correctional chamber of the “Tribunal of big instance” of Paris (Decree no. 2019-53 of 30 January 2019 designating the “Tribunal of big instance” and the Court of appeal of Paris competent to hear actions based on Art. L. 163-2 of the Electoral Code).

In accordance with the law on the fight against the manipulation of information, a case for manipulated information can be brought before the judge only during the three months preceding the first day of the month of general elections or referendums and until the

date of the last round of those elections or referendums (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 1). Information manipulation is of course possible outside the three-month period leading up to elections. The legislature, however, limits the application in time of the new interlocutory proceedings under the principle of proportionality (Watin-Augouard 2019). The electoral judge can also intervene in the electoral process, but after an election. He could thus annul a ballot if he finds that its honesty has been impaired in breach of electoral law.

Once seized, the judge sitting for urgent matters has only forty-eight hours to rule. Appeals against the judge's rulings must be dealt with within the same time frame of forty-eight hours (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 1). The period of forty-eight hours established by the law against information manipulation can be too short to find out whether an information is false and affects the integrity of an election. Assessing that certain content is inaccurate or misleading requires a margin of interpretation which is difficult to reconcile with the necessity for the judge to decide rapidly. Such assessment is even more complex in an electoral campaign when many people may express opinions that could be seen as erroneous. Evaluating that certain content may distort the honesty of an election before that election has taken place is even more difficult. It is only after the vote that one can measure whether it has or has not been influenced by the diffusion of certain content (Guillaume 2019, 5). As rightly pointed out by a majority of senators opposed to the law against information manipulation, there was a risk that the judge for urgent matters would censure information that was not false and not meant to influence the behavior of voters (La rédaction 2019). Such censure would have been contrary to freedom of expression and communication whose limits must be necessary and proportionate.

As seen in the previous section however, the interim judge can act only against apparent false information that has a manifest risk of affecting the behavior of electors (Constitutional Council, Decision no. 2018-773 DC, 20 December 2018, Para. 16). The emergency judge should be able to detect the most serious cases of distortion of the electoral debate within forty-eight hours. The forty-eight-hour time limit of the legal injunction, applied to only that false information that has an evident impact on the integrity of elections, is proportionate and thus compatible with freedom of expression. The time frame of forty-eight hours appears to be a good compromise between the necessity to react quickly to the spread of digital information and the need to respect freedom of expression. In conclusion, constrained by the freedom of expression, the new legal proceedings established by the law against information manipulation can order the suspension or suppression of only limited digital content. The law of 22 December 2018 does not only give to a judge but also the Superior Audiovisual Council new powers to counter digital information manipulation. The Council may react to foreign interference on radio and television channels.

A BALANCING ACTION AGAINST FOREIGN INTERFERENCE IN MEDIA

The law against manipulation information establishes new tools to counter media controlled or influenced by a foreign State which does not respect the rules of honesty and pluralism of information. It intends to tackle especially media content made accessible online. The French legislature has thereby taken “into account the particular seriousness of an attempt at destabilization coming from media directly or indirectly controlled by a foreign power” (Constitutional Council, Decision no. 2018-773 DC, 20 December 2018, Para. 41). The new legal provisions implicitly target the Russian State-funded news outlets, RT, formerly called “Russia Toda”, and Sputnik (Vilmer, Escorcica, Guillaume, and Herrera 2018,

144). Once President of the Republic, at a joint press conference with the Russian President, Vladimir Poutine, Emmanuel Macron denounced Russian influence, stating that RT and Sputnik had engaged in spreading propaganda and fake news during the presidential campaign. For Emmanuel Macron, “Russia Today and Sputnik were organs of influence during this campaign that repeatedly produced untruths about me and my campaign” (Jambot 2017).

Broadcasting by radio or television services must be authorised through an agreement concluded with the Superior Audiovisual Council if they are distributed by networks which do not use the frequencies assigned by the Council and if their annual budget exceeds a certain amount.¹⁸ The Superior Audiovisual Council’s primary mission is to guarantee freedom of audio-visual expression. For doing so, it enjoys legal personality and decisive power that is exercised independently from the French executive (Law no. 2013-1028 of 15 November 2013 on the independence of the public audio-visual, Art. 33). The law against information manipulation confers to the Superior Audiovisual Council the power to suspend, interrupt or prevent authorisation to broadcast to radio or television services controlled by, or under the influence of, a foreign State.

First, the Superior Audiovisual Council may suspend authorisation to broadcast by a radio or television channel, controlled or placed under the influence of a foreign State, when this channel deliberately disseminates false information likely to affect the honesty of a general election or referendum. False information must correspond to incorrect or misleading allegations or accusation whose falseness can be objectively showed; it cannot be an opinion, a parody, a partial inaccuracy, or an exaggeration. Furthermore, the incorrect or misleading nature of the allegations or accusation or the risk of their effect on the honesty of an election or referendum must be apparent (Constitutional Council, Decision no. 2018-773 DC, 20

¹⁸ 150,000 EUR for a television service; 75,000 EUR for a radio service.

December 2018, Para. 51). The new suspension power of the Superior Audiovisual Council exists only within the three months preceding the first day of the month of the occurrence of the election or referendum. It finishes when the election or referendum is held (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 6).¹⁹ With this new provision, the French legislature wants to prevent citizens from being deceived when exercising their vote by the diffusion of false information on radio or television services directly or indirectly controlled by a foreign State. It aims to ensure honesty in electoral debates and ensuing elections. Limited by the freedom of expression, the power to suspend broadcasting of a radio or television service is however constrained to only certain false information.

More impactfully, the Superior Audiovisual Council can unilaterally terminate an agreement related to the broadcast of a radio or television service and concluded with a legal person controlled by a foreign State or placed under its influence. The Council can do so when the radio or television service harms the fundamental interests of the Nation, including the regular functioning of its institutions, in particular by disseminating false information before elections or referendums. Here too, false information must be understood as incorrect or misleading allegations or accusations for which it is possible to objectively demonstrate falseness (Constitutional Council, Decision no. 2018-773 DC, 20 December 2018, Para. 61). The reference to “fundamental interests of the Nation” alludes to a concept already defined under French law, especially by the Criminal Code and the Homeland Security Code (Criminal Code, Art. L. 401-1; Homeland Security Code, L. 811-3).²⁰ In order to assess whether a radio or television service infringes the fundamental interests of the Nation, the

¹⁹ See also State Council, no. 394641-394642, Opinion relating to the bills on the fight against the manipulation of information, 19 April 2018, Para. 30.

²⁰ Art. L. 401-1 Criminal Code states: “The fundamental interests of the nation are understood within the meaning of this title of its independence, the integrity of its territory, its security, the republican form of its institutions, the means of its defense and its diplomacy, the safeguarding of its population in France and abroad, the balance of its natural environment and its environment and essential elements of its scientific and economic potential and its cultural heritage.”

Superior Audiovisual Council can take into account the content that the company which entered into agreement with the Council or the legal person controlling it has broadcasted on other electronic communication services. This content should however not be the only criterium for the Council to terminate the agreement (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 8).

Finally, the Council can refuse to conclude an agreement to broadcast by radio or television channels, directly or indirectly controlled by a foreign State, if the broadcast involves a serious risk of infringing the fundamental interests of the Nation, in particular the regular functioning of its institutions (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 5). The Council must objectively establish the risk of fundamental interests being infringed in providing objective material elements. In doing so, the Council can refer, among others, to the content diffused on other electronic communication services by the company asking for authorisation to broadcast or by the legal person controlling it (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 5).²¹ Therefore, the Superior Audiovisual Council could refuse authorisation to broadcast to a company if that company affected the functioning of the institutions of another State in the past, in particular when disseminating false information aiming at influencing voting behavior.

When assessing whether a radio or television channel is controlled by a State, the Superior Audiovisual Council should refer to the notion of “control” within the meaning of the French Commercial Code (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 5, 6 and 8). For this Code, a legal person controls a company when it has the majority of the voting rights in the general meetings of this company and thus determines the decisions taken at those meetings (Commercial Code, Art.

²¹ See also State Council, no. 394641-394642, Opinion relating to the bills on the fight against the manipulation of information, 19 April 2018, Para. 28.

L. 233-3). The Council could also apply the concept of “control” as it is understood under international law. For the Draft Articles on Responsibility of States for Internationally Wrongful Acts, “[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or groups of persons is in fact acting ... under the direction or control of, that State in carrying out the conduct” (Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Art. 8, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, 47).²² The degree of control for the conduct of a (physical or legal) person to be attributable to a State must be high. A general situation of dependence and support would be insufficient to justify attribution (Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001, Art. 8, https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, 47-48). Thus, whether control is interpreted in accordance with French or international law, a radio or television service should be seen as being controlled by a State and acting on behalf of that State when it is financed by that State and its activities are decided by that State. The law of 22 December 2018 does not refer to any definition of what is an audio-visual service “placed under the influence” of a foreign State and it is up to the Superior Audiovisual Council to interpret this expression. Being influenced by a State implies less closeness to that State than

²² The content of Article 8 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts is customary.

being controlled by it. Thus, a radio or television service supported or encouraged by a State could be regarded as under the influence of that State.

In conclusion, the Superior Audiovisual Council has decisive powers to react to false information likely to affect the outcome of general elections or referendums, that is diffused by radio or television media controlled or influenced by a foreign State. It is even more so that it enjoys broad discretion in determining whether a radio or television channel is influenced by a State. The scope of the Council's powers is however limited by the freedom of expression. Indeed, the Superior Audiovisual Council can suspend or interrupt the broadcast of the sole information that is incorrect or misleading and for which falseness can be objectively demonstrated.

Political considerations may also limit the implementation of the news powers of the Superior Audiovisual Council. Indeed, in practice, the Audiovisual Superior Council may be reluctant to fully implement its new powers. Although the Council is independent from the French executive, action by the Council against audio-visual services controlled or influenced by a foreign State could give rise to diplomatic tensions between France and that foreign State and even acts of retorsion from that latter State. Thus, the formal notice to the RT France channel for lacking honesty and diversity of opinions for a news presented in the television journal of 13 April 2018 (Superior Audiovisual Council, Decision no. 2018-493 putting RT company on notice, 27 June 2018, *Journal Officiel de la République française* no. 0148, 29 June 2018), was immediately followed by a formal notice adopted by the Russian media regulatory authority, Roskomnadzor, against the French 24 channel (Morin-Desailly 2018, 38).²³

It is to be emphasised that misleading information aimed at discrediting candidates before an election and disseminated by a radio or television channel controlled or influenced

²³ RT France channel falsified the translation of a statement given by a witness from Ghouta, by making him say that the chemical attack in Ghouta was simulated, while he was in fact talking about famine in the region.

by a foreign State could trigger not only a reaction of the Superior Audiovisual Council but also a reaction of the French State, through acts of retorsion or countermeasures taken against that foreign State.²⁴ Such could be in particular the case if that misinformation were spread widely and received by a high number of viewers or listeners (Tsagourias 2019). The French State would be even more likely to react if that misinformation were diffused by a radio or television service under the effective control of the foreign State and thus attributable to that State. Indeed, disinformation aimed at influencing voting behavior, widely disseminated in France at the initiative of a foreign State, would affect an inherently governmental function of France - the conduct of elections -, would as such violate the sovereignty of the French State and would therefore justify a counter-reaction by the French State against the foreign State (Schmitt 2017, 21-22). The laws of 22 December 2018 do not only attempt to react to, but also to prevent digital information manipulation.

A DIFFICULT PREVENTION OF DIGITAL INFORMATION MANIPULATION

A LIMITED REGULATION OF ONLINE PLATFORMS ACTION

The law against manipulation information imposes new information transparency obligations on online platforms. Its aim is to make platforms' users aware of the origin and nature of digital information. Those users would then be more in control of their online experience and less influenced by biased information.

²⁴ An act of retorsion is an unfriendly measure, lawful in itself, adopted by a State in reaction to the unfriendly conduct of another State, whether that conduct is lawful or not. A countermeasure is a measure that would be unlawful if it were not taken by a State in response to an internationally wrongful act by another State

Only the most important online platforms fall under the pursue of the law of 22 December 2018: they must be covered by Article 111-7 of the Consumer Code²⁵ and have an activity exceeding five million connections per month on French territory (Decree no. 2019-297 of 10 April 2019 relating to information obligations of online platforms operators promoting information content related to a general interest debate, Art. 1). Thus, the law against information manipulation concerns only platforms that meet a large audience and risk, as such, influencing opinion.²⁶ Those exercise a large range of activities. They offer search engines (for instance Google or Yahoo Search), sites of referencing (like Google or Yahoo Portal), social media (for example Facebook or Instagram), content sharing (like YouTube or Dailymotion) or market places (such as Amazon or Airbnb).

Some online platforms, conscious that spreading false news affects their reputation, had already taken the initiative of proactive measures to tackle misinformation. Thus, shortly before the 2017 French presidential election, Facebook took down fake accounts in France and suppressed the sponsoring of “clickbaits”, links with attractive titles that refer to other websites (Frassa 2018, 13). Google partnered with over thirty media outlets, including main newspapers and television stations, to build the CrossCheck fact-checking platform (Brattberg and Maurer, 2018). CrossCheck aimed to report false, misleading and confusing claims that circulated online in the ten weeks leading up to the French presidential election and thereby to provide the public with the necessary knowledge to form their own conclusions about the information they received.

The law of 22 December 2018 introduces information transparency requirements that are specific to electoral campaigns and others that are applicable permanently.

²⁵ According to Art. 111-7 of the Consumption Code, an online platform operator is “any natural or legal person offering, on a professional basis, whether remunerated or not, an online communication service to the public based on: 1° Classification or referencing, by means of computer algorithms, of content, goods or services offered or put online by third parties; 2° Or bringing together several parties for the sale of a good, the provision of a service or the exchange or sharing of content, a good or a service.”

²⁶ Those platforms are sometimes qualified as “public digital places”.

During Electoral Campaigns

Strict transparency obligations apply during the three months preceding the first day of the month when general elections (election of the President of the Republic, election of the deputies, election of the senators, election of the representatives in the European Parliament) or referendums are held and up to the date of those elections or referendums. In accordance with those obligations, large online platforms must provide their users with fair, clear and transparent information about the identity of the natural person or about the company name, head office and corporate object of the legal person and that on whose behalf it has declared to act, when that natural or legal person pays the platform for promoting information “related to a debate of general interest” (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 1). The same platforms must also provide their users with fair, clear and transparent information about the use of their personal data when they promote information “related to a debate of general interest” (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 1). The French State Council referred to the European Court of Human Rights case-law to define what is a debate of general interest (State Council, no. 394641-394642, Opinion relating to the bills on the fight against the manipulation of information, 19 April 2018, Para. 16). For the European Court, “the public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree” (ECHR, 10 November 2015, *Couderc and Hachette Filipacchi Associés v/France*, App. no. 40454/07, Para. 103). Furthermore, the Constitutional Council limited the information of general interest that gives rise to the platforms’ transparency obligations to that presenting a link with an electoral campaign (Constitutional Council, Decision no. 2018-

773 DC, 20 December 2018, Para. 8). The amount of remuneration received by online platforms covered by the law of 22 December 2018 in return for the promotion of information linked to an electoral campaign must also be made public, when this amount exceeds €100 before tax for each information (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 1; Decree no. 2019-297 of 10 April 2019 relating to information obligations of online platforms operators promoting information content related to a general interest debate, Art. 1).

All information to be given by online platforms by virtue of the law of 22 December 2018 must be accessible by Internet users. For this purpose, it must be aggregated in a register made available to the public by electronic means and regularly updated during the three months preceding general elections or referendums (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 1). The breach of the new transparency obligations is sanctioned by a fine of €75,000, a one-year imprisonment or a ban on exercising the professional activity in the exercise of which the offense was committed (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 1).²⁷

Thus, the law against information manipulation does not prohibit sponsorship of information in electoral periods but frames it through a transparency system. The law of 22 December 2018 addresses the problem of questionable financing of websites that occurred for instance during the 2016 American presidential campaign (Vilmer, Escorcía, Guillaume, and Herrera 2018, 144). The new legislation provides consumers of large online platforms services with the means to assess the degree of reliability of information related to an electoral campaign when this information is disseminated against substantial payment. In doing so, it contributes to the honesty of the electoral debate.

²⁷ See also Criminal Code, Art. 121-2, Art 131-38, and Art. 131-39.

Permanently

The Consumer Code already imposed transparency obligations on large-scale digital platforms in periods that are not limited to electoral campaigns. Thus, users of large platforms have access to the platforms' terms of service as well as to the classification, referencing and dereferencing procedures of the content they disseminate. Further, users of large platforms should be made aware of what content is sponsored (Code of Consumption, Art. L. 111-7).

The law of 22 December 2018 reinforces transparency obligations for important online platforms. Those transparency requirements concern in particular information likely to affect electoral periods. Thus, the new law requires large online platforms to cooperate in the combat against false information that may compromise the integrity of upcoming votes or, alternatively, disrupt public order. False information must be understood as including incorrect or misleading allegations or accusations of facts for which falseness can be objectively demonstrated (Constitutional Council, Decision no. 2018-773 DC, 20 December 2018, Para. 86).

First, platform operators must set up an easily accessible and visible mechanism for users to report false information likely to disturb public order or to alter the honesty of one of the elections to which the law of 22 December 2018 applies (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 11 Para. I).

Second, platform operators must adopt a range of measures to combat false information that affects public order or the honesty of general elections or referendums. Here, the law of 22 December 2018 does not impose precise obligations on online platforms but a duty to cooperate in the fight against information manipulation. Thus, platforms enjoy a broad margin of appreciation as to the measures they can take (Law no. 2018-1202 of 22

December 2018 on the fight against the manipulation of information, Art. 11 Para. I). Those measures may relate to: the transparency of algorithms - algorithms sort, reference and select content; algorithms are also used by platforms to detect and process false information -; the promotion of content from companies, press agencies and audio-visual communication services - in other words, promotion of reliable content -; the fight against accounts that massively propagate false information - in practice the deletion of accounts' content or the temporary or permanent blocking of accounts -; the information of users about the identity of the natural person or the social entity, social head office or social object of the moral person who remunerates a platform in exchange for the promotion of content of general interest; the information of users about the nature, origin and modalities of dissemination of content of general interest; the support of media and information literacy (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Article 11 Para 1).

Monitoring

Online platforms covered by the law of 22 December 2018 must designate a legal representative who is the referent interlocutor on the French territory for the application of that law (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 13). However, the existence of this referent may not always be sufficient to engage the liability of a platform whose operator is located abroad. Indeed, unless he enjoys a delegation of powers by the operator, the referent cannot assume civil liability. In addition, he cannot be liable under criminal law for someone's else conduct (Dreyer 2019, 23).

Compliance by online platform operators with their new transparency obligations is entrusted to the Superior Audiovisual Council. Online platform operators covered by the law against information manipulation must report each year to the Council how they implemented

that law and the difficulties they may then have encountered (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 11 Para. I). Eleven operators did so in 2019 (Conseil supérieur de l'audiovisuel, 2020, 16). It is indeed essential to check whether and how online platforms are addressing misinformation. Thus, if tackling disinformation affecting electoral campaigns is a legitimate objective, it should however remain within the limits of freedom of expression. For instance, online platforms should be guided by necessity and proportionality principles when taking down false information or online accounts (Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Human Rights Council, UN Doc. A/HRC/38/35, 2018, Para. 47).

The Superior Audiovisual Council may address recommendations to platform operators aimed at improving the fight against the dissemination of false information (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 12). In its first recommendation, the Council raises the importance of easy access and visibility of the reporting mechanism by users of false information. For the Council, online platforms should use a clear title to refer to that mechanism and place it in the immediate vicinity of the content likely to be reported (Recommendation no. 2019-13 of 15 May 2019 of the Superior Audiovisual Council to online platform operators in the context of the duty to cooperate to fight the dissemination of false information). The Superior Audiovisual Council also publishes periodic reports relating to the implementation of the law against information manipulation by platform operators (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 12). In its first report, the Council emphasises the necessity for accuracy, clarity, fairness, and transparency in the fight against false information, including of electoral nature. Thus, it invites platforms operators that carry out reviews of content reported as false information to adopt standards and reference sources. It

also encourages the development of partnerships between platforms and fact-checkers (Conseil supérieur de l'audiovisuel, 2020).

A Limited Role

In conclusion, large online platforms have, during electoral campaigns, strict obligations of transparency in relation to sponsored information linked to those campaigns. Otherwise, online platforms are asked to participate through different means in the fight against misinformation affecting upcoming elections or referendums. The new legislation on information manipulation acknowledges that online platforms are more than simple transmitters of information. Platforms such as Google and Facebook, interact with the content they disseminate through, for example, the use of algorithms to shape the news feeds or search results users receive, and by directing specific advertising content to users.

The law of 22 December 2018 does not go further and does not impose on digital platforms an obligation to monitor information transmitted or stored by them and to report information to public authorities or to take down information. Indeed, in conformity with the law for confidence in digital economy that transposes the European Union directive of 8 June 2000 on electronic commerce into French law, online platforms are in principle not liable for the content they disseminate (Law no. 2004-575 of 21 June 2004 for confidence in the digital economy, Art. 6 Para. I 2 and 3). Imposing on platforms an obligation to search for, and to suppress, false information likely to affect the integrity of elections or referendums, information whose content cannot be clearly circumscribed, may result in the suppression of harmless information. Indeed, to avoid liability, platforms may over-remove online content, including legitimate or lawful one. This would undermine the freedom of expression of their users whose limits must be necessary and proportionate.

In conformity with the law of 22 December 2018, ten online platforms have established a reporting mechanism of false information. Those platforms adopted different measures against the false information that was reported, ranging from reducing its visibility to removing it. Some online platforms even acted against accounts spreading misinformation (Conseil supérieur de l'audiovisuel, 2020, 24-25). It remains to be seen, within a longer timeframe, how often platforms' users will report false information and how platforms will address the reported information. Platforms should act within the limits of freedom of expression and restrict the removal of content to the most obvious cases of false information. Ideally, removal of illegitimate or unlawful digital information should not be in the sole hands of private actors primarily driven by commercial interests. Such removal should be consistent with due process standards and be overseen by a judge (Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Human Rights Council, UN Doc. A/HRC/38/35, 2018, Para. 17). Therefore, if online platforms were to become too arbitrary in taking down information reported to them as false, the French legislature should involve an independent, impartial, and authoritative authority in the suppression of that information. Along with transparency about the origin of online content, better information and media literacy is also an efficient means to prevent the manipulation of citizens by digital information.

A NECESSARY STRENGTHENING OF INFORMATION AND MEDIA LITERACY

Education in new information and communication technologies appears essential for the development of digital citizenship, in particular for the prevention of harmful effects of false information in electoral debates and votes. Only citizens trained in the analysis of digital information can have enough distance and a critical mind to apprehend that information

(Studer 2018, 19). The lasting solution to the fight against misinformation is educating citizens for responsible use of mass media and social media. Learning the codes and languages of digital media is the best method to be able to differentiate quality information from false information. Such is also the conclusion of the group of experts set up by the European Commission to advise on policy initiatives to tackle fake news and disinformation spread online. It proposes strengthening media and information literacy to counter disinformation and help users navigate the digital media environment (European Commission high-level group of experts 2018, 25-27).

The law against information manipulation strengthens media and information education in schools, especially for content disseminated over the Internet and as part of the moral and civic education (Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 16). It aims to help students to become responsible and free digital citizens, able to develop critical thinking and to adopt thoughtful behavior in the use of the Internet. In France, media and information education should be provided at all levels of education. The cycle 2, from children aged six to eight years, is devoted to fundamental learning, while cycle 3, for children from nine to twelve years, is dedicated to their consolidation. Students in cycle 3 should be able to question information sources and the reliability of those sources. They should also be capable of distinguishing information from opinions, rumours, or propaganda, including in electoral debates. Students are thus expected to recognize inappropriate behavior and content, whether it is an attempt at manipulation or obnoxious content. In cycle 4, for children aged from thirteen to fifteen years, media and information education should be disseminated through all courses, be it French, history-geography, physics-chemistry, life and earth sciences, or foreign languages (Education Code, Art. L. 321-3; Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation

of information, Art. 17).²⁸ Prospective teachers and education personnel must also receive media and information education (Art. 18 of the Law no. 2018-1202 of 22 December 2018 on the fight against the manipulation of information, Art. 18).

In practice, however, media and information education are still not part of the curriculum in many French schools. Indeed, only a minority of current teachers are trained in new information technologies. External partners often have to intervene in classes to raise awareness about information manipulation (Studer 2018, 21). In March 2018, the culture minister pledged to double her ministry's budget for media and information education. Those funds were to support civil society actors (e.g. associations and journalists) in educating children on media literacy (Bancaud 2019). In addition, the Superior Audiovisual Council recommended to online platform operators to support projects and establish partnerships that contribute to media literacy, information literacy and education on digital tools. The Council asked that platform operators educate their users to better understand the issues the resort to platforms raises, including democratic ones (Recommendation no. 2019-13 of 15 May 2019 of the Superior Audiovisual Council to online platform operators in the context of the duty to cooperate to fight the dissemination of false information; Conseil supérieur de l'audiovisuel, 2020, 69).

CONCLUSION

The disinformation campaign that targeted Emmanuel Macron when he was running for presidency in 2017 prompted the adoption of the ordinary and organic laws on the fight against the manipulation of information. The new legislation aimed to address false information spread online and likely to influence prospective electors more efficiently than

²⁸ See also Studer 2018, 20-21.

existing laws that do not specifically tackle disinformation strategies in an online environment. Supported by the executive, the new laws were voted quickly despite the opposition of the Senate. Those laws introduce measures to prevent the diffusion of false information online, particularly before general elections and referendums. First, they establish interlocutory proceedings against digital false information. The Constitutional Council has limited the scope of those proceedings. Thus, for the Council, the new interlocutory proceedings can only relate to digital information, whose falseness can be objectively demonstrated, whose incorrect or misleading nature is manifest, and which have an evident risk of altering the honesty of upcoming elections. Further, the spread of that information must be artificial or computerized, deliberate, and massive. Implementing the interlocutory proceedings to only manifestly false and distorting information was necessary to respect freedom of expression and communication, especially when the judge for urgent matters has only forty-eight hours to deliver his decision. On the other hand, however, given its limited material scope, one may wonder whether the new emergency action is useful. Thus, the new interlocutory proceedings could not have been applied to the dissemination of stolen data from Macron's political movement as they were not all false. Nor could it have prevented the diffusion, during election periods, of correct information but biased, exaggerated or sensationalized. Most of the time the problem is not that the information is false, just that it is exaggerated or sensationalized. Electoral debates are often distorted by the dissemination of true information but presented in a particular way.

Second, the new legislation attempts to prevent the diffusion of misinformation by audio-visual media directly or indirectly controlled by a foreign State. Indeed, past experience has shown that foreign media, accessible online, may try to influence electoral public debate through biased news. The law against information manipulation gives to the Superior Audiovisual Council decisive means to suspend, terminate, or reject an authorisation

for broadcasting to a radio or television service controlled by, or placed under the influence of, a foreign State when that service disseminates false information. The scope of the new powers to suspend or interrupt broadcasting of information is however limited to the most obvious cases of misinformation. Furthermore, the Council may be reluctant to act against a radio or television channel directly or indirectly controlled by a foreign State. Such reaction could indeed trigger diplomatic tension between France and the foreign State and thus be politically sensitive. In practice, the Council has not acted yet against any radio or television service based on the law of 22 December 2018.

The new legislation also aims to prevent the manipulation of information online. It does so in imposing new transparency obligations on large digital platforms. In the three months preceding general elections and referendums, they must inform their users about the identity of natural or legal persons that finance them for disseminating information related to electoral campaigns. They must also communicate to their users the content of the remuneration they receive when it reaches a certain level. Citizens should then be able to assess the reliability of sponsored information and may be less influenced by it when exercising their vote. More generally, the law of 22 December 2018 asks online platforms to adopt a range of measures aimed at improving transparency of information likely to alter the honesty of general elections or referendums. The new law rightly sees online platforms not as simple passive hosts of digital content but as actors in combatting information manipulation. The law cannot go further however and impose on online platforms an obligation to look for false information and to block or take it down. If platforms were obliged to suspend or suppress false content likely to affect the integrity of elections or referendums, they may err on the side of cautious and over-remove content to avoid liability. Obliging platforms to remove false information of political interest, whose content cannot be precisely defined, may affect the freedom of expression of the platforms' users.

At the other end of the spectrum, the law against information manipulation rightly recognizes the role of citizens in preventing large-scale impact of false information in the online environment. It reinforces media and information education, in particular as part of moral and civic education. It asks online platforms to contribute to the improvement of media literacy. A civil society equipped with strong digital critical thinking provides a good protection against the resources and resourcefulness of malicious actors upon destabilizing electoral process with digital information manipulation strategies.

In conclusion, the French legislation on the fight against the manipulation of information disseminated online before important elections remains of modest scope. Attributing more powers to judicial authorities or the French broadcasting regulatory authority in the suspension or removal of online content or relying on online platforms to block or take-down online content, would affect freedom of expression and communication. Instead, for this author, the fight against manipulation information should focus on preventing the impact of digital false information on the public. French authorities should empower users of online platforms to better detect misinformation, especially of political nature. Thus, French authorities should ensure that online platforms are complying with their new transparency obligations. Transparency about the origin of information online allow platforms' users to make informed choices about what they see. Furthermore, French authorities should support, in particular before general elections or referendums, the establishment of a network of independent fact-checkers to expose digital disinformation aiming at influencing voting behavior. In addition, France should strengthen media and information literacy. Citizens would then be better equipped to critically discern and judge online misinformation which seeks to influence their political choice.

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