

ARTICLE

THE CORONAVIRUS AND FAKE NEWS

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The Law of 22 December 2018 to prevent the manipulation of information is not really applicable to the prevention of the catastrophist information that is circulating here and there, particularly on social media, concerning the spread of the coronavirus, how to protect oneself against it, effective medical capabilities, the consequences of closing borders, and so on.

In fact, this Law is only intended to apply during election periods, to maintain the integrity of the polls, and it can only be used against internet platforms. In Article 12, however, it does give the CSA (the French broadcasting authority) the task of ensuring that, even outside election periods, those platforms contribute to "preventing the distribution of misinformation liable to disturb the peace".

This is precisely the definition of the fake news offence given in Article 27 of the Law of 29 July 1881. According to that provision, false health information that would have the effect of disrupting international relations, causing waves of rationing or even an exodus, are "liable to disturb the peace". However, only the Public Prosecutor can decide that a prosecution is appropriate and should be brought for this criminal offence; prosecutions cannot be brought by ordinary private individuals.

The prosecutor (1) and the CSA (2) are therefore responsible for preventing the distribution of any misinformation in these circumstances.

1- Prosecution of the fake news offence by the prosecutor.

Article 27 of the Law of 29 July 1881 makes it an offence: "to publish, distribute or reproduce, by any means whatever, misinformation, fabricated or falsified documents or documents falsely attributed to third parties, when, having been produced in bad faith, they have the effect of disturbing the peace or are liable to disturb the peace". In order for the offence to be proved, a number of elements must be present.

1-1 "Fake news"

First of all, the misinformation must be "new", which means information that had not previously been distributed, and it must be false. This falseness is assessed objectively, and it must be proved by the prosecuting authority. This is the major difficulty which results in the offence rarely being used. The misleading nature of the information must be proved. Sometimes falseness is so obvious that this poses no difficulty. However, the falseness of information of a scientific or medical nature, which is sometimes inherently controversial, tends to be less easy to prove. Also, just because an official version has been proclaimed does not mean that contradicting it necessarily involves a misrepresentation. A typical example in which falseness is obvious is when there is evidence of the news being "fabricated", that is to say when one can prove its artificial nature. In that case, both falseness and bad faith are proved.

1-2 "Bad faith"

The bad faith concerned is that of the person behind the news, who knows it to be false and yet distributes it. The fact that, entirely in good faith, one is mistaken, fails to check the information or is even very gullible, is not enough to prove such bad faith. However, according to the case-law, information likely to cause reactions of "widespread panic among consumers, or to ruin whole sectors of the economy of a country" must necessarily cause journalists to check their facts. (Paris *Tribunal de Grande Instance*, 10 June 1997 LP 98-I p. 87, relating to suspect meat). Having said that, for the time being, this case-law only applies to professional journalists, and not (yet?) to internet users.

1-3 "The risk of disturbing the peace"

Not every item of misinformation is within the scope of the criminal offence provided by law for the press. It is not the prosecutor's job to satisfy himself of the truth of all information circulating in public. Only the most serious information is concerned. In effect, the public prosecutor is the guardian of the peace. He must ensure that misinformation information that might have the effect of disturbing the peace is suppressed and that the persons responsible are prosecuted. Any news liable to provoke large gatherings, demonstrations, panic among consumers rushing to supermarkets to get provisions, or the sudden mass departure of people, is covered by this criminal provision. For example, it has been held that a fake report that raised "questions and fears of tensions in a municipality, whose mayor had to respond urgently to restore calm" did constitute such a disturbance. (Nanterre *Tribunal de Grande Instance*, 12 Dec. 2000, LP 2001 no. 180-I-40).

2- The duty of cooperation of internet platforms, and the broadcasting authority's supervisory power.





The CSA is involved in the regulation of information distributed on the internet, particularly on social media. This was the major innovation contained in the Law of 22 December 2018 to prevent the manipulation of information. As recalled above, having been enacted principally to protect the integrity of national elections, the law extended the CSAs ability to act outside the scope of elections. These new powers will also be supplemented by the future law to prevent hate crime (known as the Avia Law after its rapporteur in the National Assembly); through the adoption of a variety of measures, this will impose additional responsibilities on internet platforms. The CSA is now the administrative regulatory authority, which can issue recommendations, carry out checks and potentially sanction those who fail to comply with their new legal "cooperation" obligations.

In this capacity, the CSA, on 15 May 2019, sent a recommendation to the operators of online platforms (No. 2019-03 of 15 May 2019) to get them to cooperate in preventing the distribution of misinformation. It required them to set up an accessible and visible reporting mechanism allowing anyone to report misinformation. It also required them to ensure the transparency of algorithms to allow users to exercise their critical judgment of content. In order to make it easier to identify information from journalistic sources, it asked them to promote content from press companies and agencies and audiovisual communication services. Finally, it asked them to set up a system to detect accounts disseminating massive amounts of information, and in the same spirit, it reminded them that they must allow users to discover the identities of persons paying for the promotion of information content.

The CSA has just sent all the platforms a questionnaire, to which they must respond no later than 31 March 2020, to find out how, in practice, each of them has implemented these recommendations. It will be interesting to see the replies and whether some of them relate to the information that has started to appear in the last few days about the coronavirus. However, it is not certain that they will deign to reply.

Similarly, it is not certain that the Prosecutor will bring any prosecutions for the distribution of fake news, despite the fact that there are many examples. Only then will we be in a position to say whether the French legal mechanism now in place to prevent the manipulation of information is or is not effective and adequate.
