Mr Christophe-André Frassa
Sénat
Casier de la Poste
15 rue de Vaugirard
75291 Paris Cedex 06
France
c.frassa@senat.fr

05 December 2019

Monsieur le Sénateur,

Re: Concerns about the Bill on Countering Online Hatred (Projet de loi Avia)

We, the undersigned, are civil society organisations defending freedom of expression and digital rights. We have extensive experience analysing legislation that engages freedom of expression online, including hate speech[1] and terrorism laws.[2]

We are writing to you to raise concerns about the draft Bill on Countering Online Hatred (Proposition de loi Avia, the Bill), passed in the National Assembly on 9 July 2019 and currently pending before the Senate.

We condemn racism and discrimination in all its forms, online and offline. Accordingly, we agree with the Bill's stated purpose of protecting minority groups and other vulnerable persons against such discrimination. However, we believe that in its current form, the Bill fails to strike an appropriate balance between the right to equality and the rights to freedom of expression and privacy. We believe that if France is to provide a blueprint for how other European democracies should regulate hateful content online, it is essential for France to adopt laws that comply with international standards on freedom of expression.

Our concerns relate to the **scope**, **enforcement regime** and applicable **sanctions** under the Bill. We further note that the Bill might be in breach of European Union law.

First, the **scope** of the Bill is incredibly broad, both in terms of the types of intermediaries and range of illegal content.

[1] For example, ARTICLE 19, Germany: The Act to Improve Enforcement of the Law in Social Networks, Legal analysis, August 2017; ARTICLE 19 comments on Italian Regulation on hate speech, 25 July 2019

[2] See e.g. EDRI, Open letter: Regulation of terrorist content online endangers freedom of expression, 18 March 2019

- The Bill covers communication service providers online when they enable the exchange of public content between various parties or the classifying or referencing, through computer algorithms, of content proposed or uploaded by third parties. However, the Bill applies only to companies that meet certain thresholds of 'activity' on French territory set by decrees (Article 1). 'Activity' is not defined in the Bill, though parliamentary debates make reference to a number of users rather than turnover. Although the original version of the Bill was conceived to be applicable to the dominant digital companies, the latest text gives great latitude to the French government to decide the scope of application of the rules, including to small local providers. Meanwhile, the Bill makes no provision for a tiered or proportionate approach depending on, e.g. the size or resources of the provider at issue. In practice, this means that social media companies, search engines as well as not-for-profit platforms fall within the scope of the Bill. Providers such as Wikipedia would be required to have costly content moderation measures in place because they meet the thresholds set by decrees.

- The obligation to remove 'manifestly illegal' content within 24 hours has been extended to a wide range of illegal content under French law (Article 1), including apology of acts constituting an offence against human dignity, war crimes, crimes against humanity, slavery, crimes of collaboration with an enemy, voluntary interference with life or physical integrity, sexual aggression, aggravated theft, extortion or destruction, voluntary degradation or deterioration which is dangerous to a person, sexual harassment, human trafficking, pimping, incitement to or apology of acts of terrorism and child abuse content. Although most of these offences cover speech or conduct that can be legitimately restricted under international standards on freedom of expression, a significant number of those are drafted in overly broad language that could lead to unwarranted prosecutions. For instance, the offence of apology of voluntary interference with life has been used to prosecute jokes in bad taste about the terrorist attacks on 11 September 2001. In our view, several of these offences fail the legality test under international law.

Secondly, the Bill includes **sanctions** that might be disproportionate under international standards on freedom of expression.

- Under Article 4 of the Bill, the *Conseil supérieur de l'audiovisuel* (CSA) can impose fines of up to 4% of a company's global annual turnover depending on the seriousness and recurrent failures by companies to comply with their obligations under the law. While we understand that global companies such as Facebook or YouTube may well be in a position to pay significant fines, we believe that the threshold is set so high that it is likely to lead to over-removal of content. Our concerns are not allayed by the fact that the CSA can take into account the extent to which the behaviour of platforms is 'insufficient' or 'excessive' in relation to the removal of content. For this kind of oversight to be done effectively would require extensive resources given the volume of online content that is likely to fall within the scope of the Bill. In our experience, however, the government has consistently failed to provide the resources necessary to ex post facto oversight work carried out by the 'personne qualifiée' in relation to the removal and blocking of terrorist

or child abuse content. The personal qualifiée was scathing in its 2018 report, noting that none of his recommendations had been heeded since the law had come into force.[3]

- We further note that fines for failing to cooperate with law enforcement or other agencies, including by preserving data that may enable the identification of those who posted the allegedly illegal content, have trebled from 75,000 to 250,000 EUR (Article 3 bis). We are concerned that the level of these fines is so high as to undermine the protection of the right to privacy, as faced with these fines, companies would be unlikely to refuse to pass on the details of their users who are accused of having posted illegal content online.

- The criminalisation of the 'refusal to remove a manifestly illegal message' (Articles 1er and 6 bis C) also makes it more likely that companies will be overly vigorous in removing content.

Thirdly, the proposed **regime of enforcement** of the Bill is problematic for the following reasons.

- The Bill establishes a framework that effectively deputises private companies as censors. We are concerned that the obligation to remove or block manifestly illegal content applies without prior determination of the legality of the content at issue by a court. This in effect privatises the judicial function of the State.

- Under the Bill, the CSA can, if necessary, address recommendations, best practices and guidelines to communication service providers with a view to ensuring proper compliance with their new obligations under the law (Article 4). At the same time, companies are explicitly expected to comply with the Council's recommendations (Article 2). Failure to comply is taken into account for the purposes of determining whether a company has overall failed to observe its obligations to cooperate in the fight against online hatred. If so, the CSA can impose sanctions (Article 4). It is worrisome that the body overseeing compliance with these new obligations, and therefore the limits of expression online, is an administrative authority, which is not insulated from political influence, rather than a court of law.

- Moreover, the Bill envisages the creation of an Observatory of Online Hatred (*Observatoire de la haine en ligne*) to monitor and analyse the evolution of the content covered by the Bill, together with communication service providers, associations and researchers (Article 7). This is yet another non-judicial body with a mandate to examine hateful content online.

- Another concern is that 24 hours is an excessively short period of time in which to make decisions about 'hate speech', which is an inherently contextual, fact-specific, area of law. That the content must meet the threshold of 'manifest illegality' is unlikely to be helpful in practice. Instead, this

[3] See CNIL, Rapport d'activité 2018 de la personne qualifiée prévue par l'article 6-1 de la loi no. 2004-575 du 21 juin 2004 créé par la loi no. 2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme.

time limit encourages companies to be excessively prudent and remove even content that is not manifestly hateful. Therefore, it threatens freedom of expression and freedom of information. Realistically, in many cases compliance with this very short time limit would be impossible for some companies. This means that the time limit is counterproductive, since it will often not be enforced in practice.

- Further, since a 24-hour time limit means that companies must treat all notifications within the same timeframe, they will not necessarily examine as a matter of priority the content that is most serious or that has been shared the most. Also, this short timeframe means that companies will not be able to examine all notifications with the same level of care. Therefore, they will probably treat expeditiously and favourably notifications by users they might consider trustworthy, such as the police services. This would allow the executive power (in this case, the police) to usurp the role of the judicial authorities by defining the very offences against which it fights. The risk is that the separation of powers would be eroded, favouring political censorship.

- According to Article 6 of the Bill, an administrative authority – in practice the Central Office for Combating Crimes Related to Information and Communication Technologies (OCLCTIC)) can request the blocking of websites, servers or any other electronic means enabling access to content that has been deemed illegal by a court decision. Under the same conditions, it can request search engines or web directories to de-reference the websites giving access to this content. If providers do not comply, the OCLCTIC can make an application to the courts, which can then order the removal or other restriction on access to the content at issue. This raises a number of concerns, including that such orders can be made on an ex parte basis (*sur requête*), i.e. without sufficient due process safeguards and that website blocking orders are inherently disproportionate. Moreover, blocking content that has 'already' been deemed illegal inevitably involves the use of filters to detect that content in circumstances where that 'same' content may not be illegal because it is used in a different context.

Finally, we are also concerned that the **obligation to 'prevent the redistribution' of illegal content might infringe EU law**. Article 2 requires companies 'to prevent the redistribution of 'manifestly illegal' content. In practice, it is unclear whether it is actually possible for companies to do so, as users can instantaneously share a multitude of copies of hateful content online. Some of these copies are very hard to detect as such – see, for example, the edited videos of the Christchurch massacre that are still on Facebook. So virtually every company might be in breach of its duty to prevent the redistribution of illegal content.

Last but not least, it is difficult to see how a company can prevent the redistribution of illegal content without monitoring all content posted by its users and comparing it with the content that has been removed. However, Article 15 of the EU E-Commerce Directive strictly prohibits imposing a general obligation on providers to monitor the information which they transmit or store. It also prohibits imposing a general obligation actively to seek facts or circumstances indicating illegal activity.

Overall, we are concerned that the new regulatory framework laid down in the Bill entrenches private censorship powers and that its highly punitive fines will be very damaging for freedom of expression.

For all these reasons, we urge the Senate to reject the Bill. Given the expected review of the E-Commerce Directive and the adoption of a Digital Services Act at EU level, as well as recent calls for EU legislation on hate speech, we believe that the French government should pause rather than press on with the Bill. Hate speech online is undeniably a matter of great concern, however, any proposals in this area must contain strong safeguards for the protection of freedom of expression. We remain at your disposal for any further questions.

Thank you for your consideration.

Yours sincerely,

Access Now, International
ARTICLE 19, International
Center for Democracy & Technology, US
Državljan D, Slovenia
EDRi, Europe
Electronic Frontier Finland
Epicenter.works, Austria
Homo Digitalis, Greece
Index on Censorship, International
IT-Pol, Denmark