The French Twitter Case:
a difficult equilibrium between freedom of expression and its limits

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The French Twitter case shows the difficulties experienced by courts, national authorities and companies, in relation to an international activity, and to find an equilibrium between freedom of expression and its limits, notably in the respect of public order. Moreover, it also shows that in a significant number of cases on the Internet, the application of the French law depends on the goodwill of the companies or the authorities of a foreign state.

In the autumn of 2012, there was a wave of tweets on Twitter in French with racist content using the hashtags[2] *#unbonjuif* [a good Jew] or *#unjuifmort* [a dead Jew]. The tweets were contrary to the French public order.

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[1] This commentary is based on a previous blog post of the SURVEILLE FP7 project (http://www.surveille.eu). I thank Stephen Mason for his useful comments; of course, all errors are that of the author.

[2] In French, the decision was made to translate 'hashtag' by 'mot-dièse'; see: 'Vocabulaire des télécommunications et de l'informatique (NOR: CTNX1242797K)', *Journal Officiel de la République française*, 19, 23 January 2013, 1515

On the 23 October 2012, a number of French associations acting against racism requested Twitter to remove the tweets. The associations based their action on the provisions of article 6.I.7 of the act of 21 June 2004 on confidence in the digital economy (LCEN).[3] Indeed, according to article 6.I.2 of LCEN, providers are not civilly liable for the content they host if they are not aware of the wrongfulness of this content; moreover, article 6.I.7, used by the associations, specifies that there is not a general obligation on the provider to monitor the content it hosts, but it has a duty as follows:

> '[…] Compte tenu de l'intérêt général attaché à la répression de l'apologie des crimes contre l'humanité, de l'incitation à la haine raciale ainsi que de la pornographie enfantine […] elles doivent mettre en place un dispositif facilement accessible et visible permettant à toute personne de porter à leur connaissance ce type de données. Elles ont également l'obligation, d'une part, d'informer promptement les autorités publiques compétentes de toutes activités illicites mentionnées à l'alinéa précédent qui leur seraient signalées et qu'exerceraient les destinataires de leurs services, et, d'autre part, de rendre publics les moyens qu'elles consacrent à la lutte contre ces activités illicites.'
>
> '[…] Given the general interest attached to the repression of the apology of crimes against humanity, incitement to racial hatred and child pornography […] they must establish an easily accessible and visible device for anyone to draw their attention to this type of data. They also have an obligation, on the one hand, to promptly inform the competent public authorities of all illegal activities mentioned in the preceding paragraph which are reported to them and performed by the users of their services, and, on the other hand to render public how they spend the fight against these illegal activities.'

By their letter, the associations rendered Twitter aware of the wrongfulness of the tweets, and so Twitter had to take action against them; if not, Twitter would be liable for the content of the tweets. The associations decided to seize the court of the matter due to the lack of an answer and any action from Twitter, although Twitter eventually made the tweets inaccessible.

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http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=31D2C7AB2F1C537B51631A55E96447C3.tpdjo09v_3?cidTexte=JORFTEXT000026972451&dateTexte=&oldAction=rechJO&categorieLien=id.

[3] Loi n° 2004-575 du 21 juin 2004 loi pour la confiance dans l'économie numérique.

The first instance procedure

On 29 November 2012, two French associations, the Union des Etudiants Juifs de France (UEJF) [French Jewish Students Union] and the Association J'accuse – action internationale pour la justice, decided to take legal action against Twitter in France.[4] In addition, their action was accompanied by voluntary interventions from three others associations, Le Mouvement Contre Le Racisme et pour L'Amitié Entre Les Peuples (MRAP), La ligue contre le racisme et l'antisémitisme (LICRA) and Association SOS Racisme-Touche pas a mon pote. On 20 December 2012, the same associations took another legal action, for the same reasons, against the newly created French subsidiary of Twitter, Twitter France.[5] The judge decided to join both cases, and so they will be considered together.

Before going further, it is important to note that in France, article 48-1 of the law of 29 of July 1881 on the freedom of the press,[6] as noted in the case, states that French associations may exercise rights for different kind of offence:

> 'combattre le racisme ou d'assister les victimes de discrimination fondée sur leur origine nationale, ethnique, raciale ou religieuse, peut exercer les droits reconnus à la partie civile'
>
> 'combating racism and assisting victims of discrimination based on racial or religious, national, ethnic origin, may exercise the rights granted to the civil party'

This explains why, in this case, some associations took legal action against Twitter. Moreover, it should be added that Twitter did not contest the competence of the plaintiff associations.

The associations asked primarily for two things: firstly, 'to order the company Twitter Inc. to provide them with the data listed in the decree 2011-219 of 25 February 2011 likely to enable the identification of any person who has contributed to the creation of clearly illegal tweets […]' and secondly, 'to order the company Twitter Inc. to implement in the context of the French platform service Twitter Inc. a device easily accessible and visible to any person to

[4] Tribunal de Grande Instance de Paris, Ordonnance de référé, 24 janv. 2013, n° 13/50262, n° 13/50276, *UEJF et a. c/ Twitter Inc. et Sté Twitter France*.

[5] The company Twitter France was created on the 19 November 2012 and is incorporated in France (789305596 R.C.S. PARIS); see https://www.infogreffe.fr/societes/entreprise-societe/789305596-twitter-france-sas-750112B228780000.html.

[6] Loi du 29 juillet 1881 sur la liberté de la presse.

bring to the knowledge of illegal content falling within the scope of defending crimes against humanity and incitement to racial hatred'.

The judge agreed with the demands of the plaintiffs and ordered 'the company Twitter Inc. to communicate with the five associations because the data in its possession is likely to enable the identification of any person who has contributed to the creation of clearly illegal tweets with URLs that include the device assignment of 29 November in 2012, made inaccessible on notification of 23 October 2012'; moreover, the judge added 'that communication must take place within fifteen days of service of this decision, and under penalty of €1,000 per day of delay after such period'. Secondly, the judge ordered 'the company Twitter Inc. to implement in the context of the French service platform Twitter Inc. a device that is easily accessible and visible to any person to bring knowledge of illegal content, including falling within the scope of the apology of crimes against humanity and incitement to racial hatred'.

To come to this decision, the first question for the judge was to determine if she was competent; and following it, the main questions were to qualify Twitter Inc. and Twitter France, their connexion with France and its territory, and the applicable law.

On the competence of the French judge, the litigious tweets had been received in France, because Twitter can be viewed everywhere in the world. Consequently, damage occurred on the French territory and so the French judge was competent.[7] In addition, it should be noted that it is specified in the case that Twitter did not dispute the jurisdiction of the French judge or the illegality of the tweets. The French judge was competent to deal with this case.

The judge examined the two demands separately. Firstly, the judge investigated the demand from the associations that Twitter should enable the identification of the authors of the tweets by transmitting the identification data it possessed.

According to the associations, Twitter and its French branch, Twitter France, should be seen as a provider with a sufficient connexion with France, notably due to the existence of Twitter France, making the French law applicable. The defendant argued that Twitter France was created only for a commercial purpose, notably marketing, and all the data are collected and stored only by Twitter in the United States, and so it cannot be seen as a provider under the French law, which meant that the French law was inapplicable.

[7] Emmanuel Derieux, 'Diffusion de messages racistes sur Twitter: Obligations de l'hébergeur', *Revue Lamy droit de l'immatériel*, 90 (February 2013), 27-32, 28.

To answer this demand, the judge started by deciding if the act of 21 June 2004 on confidence in the digital economy (LCEN) and its qualification of provider were applicable to Twitter and to the case. LCEN does not specify its spatial applicability, but the provision of article 4 of its Implementing Decree No. 2011-219 of 25 February 2011[8] provides that

> 'La conservation des données mentionnées à l'article 1er est soumise aux prescriptions de la loi du 6 janvier 1978 susvisée, notamment les prescriptions prévues à l'article 34, relatives à la sécurité des informations.'
>
> 'The retention of data referred to in article 1 shall be subject to the requirements of the law of 6 January 1978 referred to above, including the requirements set out in article 34, for information security.'

Article 2 of Law No. 78-12 of 6 January 1978[9] relating to computers, files and freedoms accurate treatment are subject to this law 'whose controller is established on the French territory' or 'uses processing means located on French territory.' The judge followed the arguments of the defendant about the commercial purpose of Twitter France and that Twitter is incorporated in the United States and does not use the French territory for its activity; consequently, the judge declared LCEN inapplicable to the case.

Some authors find the way that the judge solved the conflict of laws not fully convincing.[10] Moreover, the plaintiffs argued that some articles of LCEN can be qualified as statutes relating to public policy and safety that would apply to a foreign company such as Twitter, and so it would have avoided the necessity to resolve the conflict of laws. It should be noted here that the notion of statutes relating to public policy and safety is controversial. However, as it was a procedure for interim relief, the judge did not go further on this question.

Finally, the judge found the solution in the alternative demand of the plaintiffs on the basis of article 145 of the Code of Civil Procedure,[11] which reads:

> 'S'il existe un motif légitime de conserver ou d'établir avant tout procès la preuve de faits dont pourrait dépendre la solution d'un litige, les mesures d'instruction

[8] Décret n° 2011-219 du 25 février 2011 relatif à la conservation et à la communication des données permettant d'identifier toute personne ayant contribué à la création d'un contenu mis en ligne.

[9] Loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés.

[10] Anne Cousin, 'Twitter peut-elle échapper à la loi française ?', *Recueil Dalloz* (2013), 696.

[11] Code de procédure civile.

légalement admissibles peuvent être ordonnées à la demande de tout intéressé, sur requête ou en référé.'

'If there is a legitimate reason to preserve or to establish, before any legal process, the evidence of the facts upon which the resolution of the dispute depends, legally permissible preparatory inquiries may be ordered at the request of any interested party, by way of a petition or by way of a summary procedure.'

The present action was a procedure for interim relief. The judge justified the application of this article with three arguments: firstly, the litigious tweets are offences under French law and only Twitter could identify the persons concerned in order to initiate legal proceedings against the authors; secondly, Twitter did not contest the wrongful character of the litigious tweets; and thirdly, Twitter possessed the data due to its obligation to conserve them under Californian law. However, here the application depended on the cooperation of Twitter. If Twitter is not cooperative, the French judge would have to request the execution from a Californian judge, and the success of such demand is not certain.

The second demand investigated by the judge was for the creation of a method to identify and inform Twitter about manifestly illegal content. The main argument by the associations was the fact that 'the form in question was not available in the French language in any case on the eve of the hearing', however Twitter produced a form on the day of the hearing. The judge followed the plaintiffs, and recognised that the form produced by Twitter was not sufficiently visible and accessible. However, as Twitter agreed on the necessity of such form, the judge did not go further and just asked Twitter to make the form more visible. Here again, the implementation of the decision depended on the cooperation of Twitter.

The appeal by Twitter

On 21 March 2013, Twitter decided to appeal the first instance decision.[12] From the first instance decision, Twitter had to comply with two obligations, firstly, to communicate data that would enable the identification of the authors of the illegal tweets; and secondly, to establish a method to identify and inform Twitter about manifestly illegal content.

Regarding the obligation to communicate data that would enable the identification of the authors of illegal tweets, Twitter recognized that it possessed the data, but refused to

[12] Cour d'Appel de Paris, 12 June 2013, *Twitter Inc. et Twitter France c/ UEJF et a.*

communicate it for two reasons: firstly, Twitter justified its decision not to transmit the data by the fact that it would be an irreversible act without a possible appeal for the users concerned. Secondly, Twitter restated, as it did in the first instance hearing, that it is committed to provide the data for the identification of the authors of tweets exclusively in connection with an international rogatory commission respecting the provisions of international conventions ratified by France and the United States. For the judge of appeal, this was not sufficient to justify the refusal of Twitter to communicate the data, because Twitter failed to comply with the decision that it had appealed against (article 526 of the Code of Civil Procedure), which meant it could not appeal on a point that it failed to comply with.

Regarding the second obligation, the day after the first instance judgment, Twitter had implemented a method to identify and inform Twitter about manifestly illegal content in French. However, l'UEJF, as well as the judge of appeal, considered that this new procedure was not visible enough for users. The process of identifying illegal content is described in the judgment; the main criticism from both the UEJF and the judge was the fact that signalling illegal content was not possible from the main page, and the user had to pass through the help centre of Twitter and obtain access to more pages before signalling the illegal content.

As a consequence, the judge of appeal concluded that Twitter had not complied with the two obligations arising from the first instance decision, and the judge of appeal decided to strike out the appeal formed by Twitter. To do so, the French judge used the provisions of article 526 of the French Code of Civil Procedure, which allows the judge to strike out the appeal when the appellant does not justify the reason of his failure to execute the appealed decision.

Developments related to and following the trial

Since the beginning of this case, in addition to its legal side, there was a significant political side. Fleur Pellerin, the French Minister for the Digital Economy, declared that Twitter must conform to the European legal system and human rights.[13] Najat Vallaud-Belkacem, the French Minister of Women's Rights and Government spokesperson, published an opinion column in the French newspaper *Le Monde* where she asked Twitter to find a way to control users' publications with racist or homophobic content, and warned Twitter against future

[13] Eric Pfanner and David Jolly, 'Pushing France Onto the Digital Stage', *The New York Times*, 16 January 2013, available at http://www.nytimes.com/2013/01/17/technology/17iht-pellerin17.html?pagewanted=all&_r=1&.

possible legal action in France or in Europe.[14] The French government organised a meeting with Twitter and the associations that respond to racism and homophobia.[15] Following this meeting, on 17 May 2013, Najat Vallaud-Belkacem announced on her Twitter account that the association SOS Homophobie had been granted a specific Twitter account, allowing it to signal illegal tweets.[16] Some noted that Twitter seems to have been much more receptive and cooperative than other internet companies in previous cases, even if some other internet companies found a solution with the French associations without going to court.[17] Finally, the on 12 July 2013, Twitter announced that it would cooperate with the French court and provide the required identification data.[18]

However, the anonymity and impunity of the users of Twitter for the content of their tweets was not only criticised in France but also in several other countries. Notably in the United Kingdom, where some women in the public eye received bomb threats and rape threats on their Twitter accounts.[19] In the following days, a debate occurred in the UK, and more than 127,000 people signed a petition calling Twitter to add a 'report abuse' button.[20] Finally, on 3 August 2013, Twitter announced on its UK blog (http://blog.uk.twitter.com) of a number changes, notably the introduction of an 'in-Tweet report button'; this 'in-Tweet report button'

[14] Najat Vallaud-Belkacem, 'Twitter doit respecter les valeurs de la République', *Le Monde*, 28 December 2012, available at http://www.lemonde.fr/idees/article/2012/12/28/twitter-doit-respecter-les-valeurs-de-la-republique_1811161_3232.html.

[15] LeMonde.fr, 'La justice française ordonne à Twitter d'aider à identifier les auteurs de tweets litigieux', *LeMonde.fr*, 24 January 2013, available at http://www.lemonde.fr/technologies/article/2013/01/24/la-justice-francaise-ordonne-a-twitter-d-aider-a-identifier-les-auteurs-de-tweets-litigieux_1822165_651865.html.

[16] The announcement of Najat Vallaud-Belkacem (@najatvb) was done in two tweets posted on the 17 May 2013: https://twitter.com/najatvb/status/335402195711320064 and https://twitter.com/najatvb/status/335402423399100416; see also Cedric Manara, 'Twitter: validité du dispositif de signalement de contenus illicites', *Dalloz actualité* (2013), 1614.

[17] Anne Cousin, 'Twitter peut-elle échapper à la loi française ?'; France24, 'Twitter accepte de livrer des données à la justice française', France 24, 12 July 2013, available at http://www.france24.com/fr/20130712-tweets-racistes-twitter-accepte-livrer-noms-donnees-a-justice-francaise/.

[18] France 24, 'Twitter accepte de livrer des données à la justice française', *France 24*, 12 July 2013, available at http://www.france24.com/fr/20130712-tweets-racistes-twitter-accepte-livrer-noms-donnees-a-justice-francaise; Znet.fr, 'Tweets antisémites: Twitter accepte de transmettre ses données à la justice', *Znet.fr*, 12 July 2013, available at http://www.zdnet.fr/actualites/tweets-antisemites-twitter-accepte-de-transmettre-ses-donnees-a-la-justice-39792385.htm.

[19] 'Twitter's Tony Wang issues apology to abuse victims', *BBC News UK*, 3 August 2013, available at http://www.bbc.co.uk/news/uk-23559605.

[20] The petition is accessible by following this link: http://www.change.org/en-GB/petitions/twitter-add-a-report-abuse-button-to-tweets.

is already available for IOS and '[s]tarting next month, this button will also be available in our Android app and on Twitter.com.'[21]

Conclusion

The creation of the 'in-Tweet report button' was one of the demands of the French associations in the Twitter case. It can be assumed that, in addition to what happened in the UK, the French litigation had probably also contributed to raising awareness with Twitter on the necessity of including such a button.

As a result, Twitter has now complied with the two obligations arising from the French Twitter case.

As will be observed, all the outcome of the case depended on the willingness of Twitter to comply; indeed, the compliance of Twitter was not the result of a judicial decision, but of pressure of public opinion. Consequently, the application of the French law appears to depend on the goodwill of the foreign provider, or in case of a legal procedure, on the goodwill of the authorities of the host country of the company. Moreover, it should be noted that the French decision concern only two hashtags: *#Unbonjuif* and *#unjuifmort*, two others were not determined by the judge in the case,[22] and so the abusive comments relating to other hashtags and their contents was left to the goodwill of Twitter. In case of disagreement with Twitter, a new trial would be necessary.

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[21] The blog post is accessible by following this link: http://blog.uk.twitter.com/2013/08/our-commitment.html.

[22] The two hashtags were *#simonfilsestgay* [if my son is gay] and *#simafilleramèneunnoir* [if my daughter brings a black man].