

IT & Internet - Turkey

New access ban regime proposed for Law 5651

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Introduction

On January 19 2015 yet another amendment to Law 5651 on the Regulation of Broadcasts via Internet and Prevention of Crimes Committed through Such Broadcasts was proposed. The proposed amendment grants wide authority to an administrative body to remove content and/or place an access ban on online content without a prior judicial audit. Similar amendments to Law 5651 were previously proposed, enacted and annulled.

Internet censorship in Turkey

Various countries have focused on regulating content broadcast on the Internet. Law 5651 was enacted in 2007 to specify the liabilities of internet businesses in this regard (eg, content providers, access providers, mass-use providers and hosting providers). Since then, the implementation of this law has been a hot topic internationally, especially after the access bans imposed on the world's leading social media platforms following the Gezi protests and the corruption investigations of December 17 and 25 2013.

The access ban regime, regulated by Law 5651, grants the head of the Presidency of Telecommunication and Communication (PTC) the authority to ban access *ex officio* to content listed under the law (eg, incitement to commit suicide, child abuse, the promotion of drug use, obscenity, prostitution, gambling, the provision of drugs which endanger health and crimes against the memory of the founder of the Turkish Republic). Law 5651 also empowers courts the ability to impose an access ban on content without notice. If the courts decide that an access ban on specific content would not prevent a violation, they may also decide to ban access to an entire website. Failure to implement access ban decisions may lead to fines.

The law has considerable implications for media businesses, including content providers and access providers, as well as those advertising on websites that may be affected by any relevant access ban. Access to websites such as YouTube, Vimeo, Dailymotion, Blogger, Wordpress, Twitter and many others has been banned in Turkey at various points and more than once.

According to recent statistics, access to over 67,818 websites had been banned as of March 6 2015, almost eight years after Law 5651 came into effect.⁽¹⁾

Amendments to Law 5651

Law 5651 underwent three major amendments on February 6 2014, February 26 2014 and September 10 2014, all of which aimed to increase control of online content.

The February 6 2014 amendments, which enabled administrative authorities to implement access ban decisions without a court order, had certain shortcomings which the February 26 amendments aimed to resolve. After the presidential elections of August 10 2014, similar amendments were introduced on September 10 2014 that allowed administrative authorities to impose access bans on websites. The September 10 2014 amendments were annulled by the Constitutional Court on October 2 2014.

On January 19 2015 an omnibus amendment bill proposal was presented to the Grand National Assembly. The bill included a significant amendment to Law 5651.

The proposed amendment adds a new Article 8/A (Removal of Content and/or Access Ban on Urgent Cases).

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Article 8/A provides as follows:

- Courts can decide to remove and/or impose an access ban on online content concerning issues such as the right to life, the security of life and private property, the protection of national security and public order, the prevention of crimes or protection of public health.
- The PTC can decide to remove and/or impose an access ban on online content at its own discretion in urgent cases. The PTC's decision must follow a request from the Prime Minister's Office or a related minister about issues such as the protection of national security and public order, the prevention of crimes or the protection of public health.
- The PTC will immediately notify access, content and hosting providers of any access ban and/or removal of content decision based on Article 8/A.
- Access, content or hosting providers must comply with the PTC access ban and/or removal of content decision within four hours of notification at the latest.
- The PTC must present the access ban and/or removal of content decision for the approval of a criminal judgeship of the peace within 24 hours. The judge will announce his or her decision within 48 hours. If not, the decision will be void.
- Access ban decisions must be specific about the part, section and broadcast through which a personal right violation occurs (eg, a URL). However, an access ban can be imposed on an entire website if it is not technically possible to ban access to the content relating to such a violation or if the violation cannot be prevented by imposing an access ban on the relevant content.
- Criminal complaints will be filed against parties that create or disseminate content subject to the crimes indicated under Article 8/A.
- Access, hosting and content providers must provide judicial authorities with the information required to identify perpetrators of these crimes upon a judge's decision.
- Access, hosting and content providers that do not provide the requested information will be subject to punitive fines.
- Access, hosting and content providers that do not comply with the access ban, imposed per Article 8/A, will be subject to administrative fines ranging from TRY50,000 to TRY500,000.

Analysis of Article 8/A

Article 8/A aims to provide administrative authorities with wide authority over the Internet, freedom of expression and access to information. The article violates several Constitutional Court decisions, as well as European Court of Human Rights (ECHR) decisions. In this regard, Article 8/A paves the way for arbitrary intervention in the freedom of expression, communication and access to information through the Internet. The Constitutional Court defines the Internet as "an essential tool for using fundamental rights and freedoms, especially the freedom of expression in modern democracies and indispensable for the expression of thought".⁽²⁾

Relevant Constitutional Court decisions

Article 8/A is very similar to the September 10 2014 amendment, which granted unlimited authority to impose access bans on content to administrative authorities based on vague grounds. The proposed amendment was annulled by the Constitutional Court.

In its decision (Case 2014/149, Decision 2014/151, October 2 2014),⁽³⁾ the Constitutional Court stated as follows:

"Authority to render an access ban decision which causes the curtailment of fundamental rights and freedoms is granted to the President based on national security, preservation of public security and prevention of crime, stated in the provision subject to the case. Therefore, the authority to evaluate and render a decision regarding the circumstances for the extremely important matters stated in the provision is granted to the Presidency. However, it is clear that the Presidency, which is an intermediary authority for access ban decisions rendered generally by public prosecutors, judges and courts, does not occupy such a position to solely ratify the existence or absence of these terms. In terms of national security, preservation of public security and prevention of crime, granting access ban decisions solely, without considering the authority to render a decision or evaluation of the authorised institutions, would be against the Constitution."

Further, Article 8/A requires that PTC access ban and/or removal of online content decisions to be implemented immediately or within four hours of notification of the decision at the latest. As a result, these decisions lack prior judicial review and are not subject to judicial evaluation. Rather, they are presented to a judge for approval after the fact. This scheme violates the rule of law, legal certainty and the right to a fair trial under the Constitution.

The principle of legal certainty aims to:

"provide individuals with legal security and requires foreseeable legal principles, the confidence of individuals in the state in all their acts and actions and the state to refrain from all methods which damage the security in its regulations. The principle of certainty means that the regulations must be clear, certain, apparent and applicable without any hesitation or doubt for both individuals and administrators and also include measures preventing the arbitral implementations of public authorities. In this respect, the wording of the law should enable people to foresee clearly and undoubtedly which legal sanction or consequence will be

implemented according to which specific act and fact. Therefore, before implementing the law, its possible effects and consequences should be foreseeable".(4)

Article 8/A does not possess any of these elements and grants the authority to limit fundamental rights and freedoms at the administration's own discretion.

The Constitutional Court held that the legislation cannot contradict these principles in a decision on an individual request made regarding an access ban imposed on a video sharing website (Application 2014/4705, May 29 2015).(5) The Constitutional Court stated that "as the legal basis of the authority given to the Presidency does not meet the minimum requirement of being clear, certain and apparent, it is seen that its scope and limits are vague". Further, the court determined that the authority given to the PTC and prime minister concerning access bans contravenes the principle of legality.

The ECHR also emphasised this issue in *Copland v the United Kingdom*. According to the ECHR:

"in order to fulfil the requirement of foreseeability, the law must be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which and the conditions on which the authorities are empowered to resort to any such measures".(6)

The ECHR further clarified the term in accordance with the law in *Halford v the United Kingdom*, stating that:

"any interference by a public authority with an individual's right to respect for private life and correspondence must be in accordance with the law. This does not only necessitate compliance with domestic law, but also relates to the quality of that law, requiring it to be compatible with the rule of law. In the context of secret measures of surveillance or interception of communications by public authorities, because of the lack of public scrutiny and the risk of misuse of power, the domestic law must provide some protection to the individual against arbitrary interference with Article 8 rights (art. 8)".(7)

The ECHR stressed the importance of the protection of the individual against arbitrary interference through the protection of privacy regulated under Article 8 of the European Convention on Human Rights.

Article 8/A requires access, hosting and content providers to comply with PTC access ban and/or removal of content decisions within four hours of notification at the latest. Four hours is an extremely short period of time to exercise the right to defence. Article 8/A makes it impossible for the relevant parties to object to such a decision. Therefore Article 8/A violates the right to defence of access, hosting and content providers as these parties have substantial legal interests in objecting to such decisions.

The right to defence is a universally accepted principle of criminal law. Article 36 of the Constitution states that: "Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures."

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms - to which Turkey is a party – also regulates the right to defence:

"in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

Notification of access ban

Article 8/A does not indicate whether notification of an access ban and/or removal of content decision is formal. Therefore, the requirement to comply within four hours without indicating whether formal notification is required restricts the right to defence of anyone with substantial legal interests, in contradiction of the Constitution.

Further, under Law 5651 there are no exceptions to the four-hour requirement. This constitutes a violation of the principle of proportionality. In this regard, the implementation of Article 8/A might contradict the natural rhythm of life. Such a contradiction might occur when an access, hosting or content provider was notified of an access ban and/or removal of content decision outside regular working hours. This could cause various financial or non-financial damages to relevant businesses or individuals. Aside from the brevity of the four-hour period, the lack of a limit may also cause disproportionate interference in minimum life standards.

Article 8/A also requires the PTC to present its access ban and/or removal of content decision for approval by a criminal judgeship of the peace within 24 hours. The judge will disclose his or her decision within 48 hours or the decision becomes void.

This provision is against the law and violates of the right to defence. Article 8/A will result in access ban and/or removal of content decisions being made preliminarily by an administrative authority at its own discretion. It therefore does not foresee a right to object. The article does not identify how and

where the judge will disclose the decision, or whether and how the relevant parties will be informed and which legal remedies can be applied against such a decision. Therefore, this process is not transparent. As a result, access ban and/or removal of content decisions may be obtained and executed without informing the relevant parties (ie, access providers and relevant hosting or content providers).

Removal of content

Article 8/A foresees the removal of content and/or the imposition of access bans. The removal of content implies the global removal of content, where by that content, subject to a decision, will disappear from the Internet completely. If the PTC's decision is found to be contrary to the law by the judge or the judge does not disclose the decision within 48 hours, access to the relevant content cannot be reinstated, as the content will no longer exist. The removal of content decision resolves the merits of the case, rendering the approval process pointless. It therefore goes beyond being a precautionary measure.

Compliance with a removal of content decision from the PTC may cause lawful content to disappear. It will thus turn an administrative precautionary measure into a penalty, which will cause an irrevocable violation of freedom of expression. Further, submitting a removal of content decision to judicial review after its implementation would still not resolve the issue of illegality.

Access ban of entire websites

Article 8/A states that access bans must be specific to the part, section and broadcast in which a personal right violation occurs. However, an access ban can be imposed on an entire website if it is not technically possible to impose an access ban on the content relating to such a violation or if the violation cannot be prevented by imposing an access ban on the relevant content.

An access ban imposed on an entire website for any reason constitutes a serious curtailment of freedom of speech and information, as it will result in access bans being imposed on content shared by millions of individuals. An access ban imposed on an entire website for any reason is clearly contrary to Constitutional Court decisions. The significance of the ability to impose an access ban on an entire website is clear, especially when imposed on social media websites or other similar platforms where ideas and expressions are shared.

The Constitutional Court elaborated on this fact in its April 2014 decision:

"The social media ground the Internet provides is indispensable for people to express, mutually share and disseminate their information and thoughts. Therefore, it is clear that the state and administrative authorities must be extremely sensitive in the regulation and practice for internet and social media instruments, which have become one of the most effective and widespread methods to express thoughts."

Further, it indicated that:

"it is clear that the complete access ban by an administrative authority of an entire social media network with millions of users, by overlapping Court orders, which are shown as the basis for the administration's order, has no legal grounds, and the access ban of this social network with no legal grounds, and with an order of prohibition with vague limits is a serious intervention to freedom of expression, and it must be decided on a violation of the applicants' freedom of expression secured in Article 26 of the Constitution."⁽⁸⁾

The Constitutional Court also clarified its position on the imposition of access bans on entire websites in its May 2014 decision in which it emphasised that this can also block access to content which has no relation to the content subject to the order:

"without even searching for a less restrictive method, implementation of a general access ban to a great amount of URLs which are numerically incomparable and irrelevant to the content subject to the measure, leads to broadening the measure by access banning users who are not content providers or hosting providers of the content which is subject to the order".⁽⁹⁾

Article 8/A also empowers the PTC to impose an access ban on an entire website in cases where the imposition of an access ban on content relating to the violation is not technically possible. Per Law 5651, access ban decisions are implemented by the PTC or the Access Provider's Union, depending on the legal basis of the decision. However, hypertext transfer protocol secure (https) URLs cannot be technically access banned.

Article 8/A provides a tool to be used against websites that host content subject to an access ban decision that use the https protocol where seen fit. In fact, per Constitutional Court decisions, even if it is technically impossible to impose an access ban on a URL, blocking an entire website would violate the core principle of freedom of speech and information as a basic human right.

Article 13 of the Constitution states that:

"Fundamental rights and freedoms may only be restricted by law and in conformity with the reasons mentioned in the relevant articles of the Constitution without damaging their essence. These restrictions may not be contrary to the wording and the spirit of the Constitution and the requirements of the democratic order of the society and the secular republic and the principle of proportionality."

The principle of proportionality is a basic principle of criminal law. As stated in a Constitutional Court

decision:

"this principle is formed of three sub-principles such as 'sufficiency', 'necessity' and 'proportionality'. 'Sufficiency' means that the applied protection must be sufficient for the desired purpose, 'necessity' means that the applied protection is necessary in terms of the desired purpose, 'proportionality' means the measurement which should be between the desired purpose and applied protection ... [and] ... the state, with the principle of proportionality, is obliged to provide fair balance between the freedoms and rights of individuals and the public benefit arising from the punishment."⁽¹⁰⁾

Comment

The proposed addition to Law 5651 contradicts Turkish and international precedents, as well as Constitutional Court decisions and the universal bills of human rights. Similar amendments to Law 5651 with the same purpose have already been annulled by the Constitutional Court. Thus, the chances of Article 8/A remaining in force – even if it is enacted by the Grand National Assembly and approved by the president – appear to be slim.

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Endnotes

(1) Please see <http://engelliweb.com/istatistikler>.

(2) Constitutional Court Decision of April 2 2014 with Application 2014/3986 p39. The full Turkish text of this decision is available at www.resmigazete.gov.tr/eskiler/2014/04/20140403-18.pdf.

(3) The full Turkish text of this decision is available at www.resmigazete.gov.tr/eskiler/2015/01/20150101-16.pdf.

(4) Constitutional Court (Case 2013/39, Decision 2013/65, May 22 2013). The full Turkish text of this decision is available at www.resmigazete.gov.tr/eskiler/2013/07/20130712-16.htm.

(5) The full Turkish text of this decision is available at www.resmigazete.gov.tr/eskiler/2014/06/20140606-10.pdf.

(6) The full text of this decision is available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-79996#{%22itemid%22:%5B%22001-79996%22%5D}>.

(7) The full text of this decision is available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58039#{%22itemid%22:%5B%22001-58039%22%5D}>.

(8) Constitutional Court Decision of April 2 2014 with Application 2014/3986 p39. The full Turkish text of this decision is available at <http://www.resmigazete.gov.tr/eskiler/2014/04/20140403-18.pdf>.

(9) Constitutional Court Decision of May 29 2014 with Application 2014/4705. The full Turkish text of this decision is available at www.resmigazete.gov.tr/eskiler/2014/06/20140606-10.pdf.

(10) Constitutional Court Decision of January 17 2013 with Case 2012/80 and Decision 2013/16 K. The full Turkish text of this decision is available at www.resmigazete.gov.tr/eskiler/2013/01/20130123-22.htm.

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