

IT & Internet - Turkey

National security as legal basis for broad access bans

Contributed by **ELIG, Attorneys-at-Law**

September 22 2015

Legal scope and procedure

National security versus access to information

Comment

On April 15 2015 an omnibus amendment bill was published in the *Official Gazette* that included significant changes to Law 5651. The amendment added Article 8(A), which allows for access bans to be imposed on online content based on national security concerns as well as other violations. Considering the government's recent agenda, Article 8(A) has wide implications regarding national security-related internet bans.

Legal scope and procedure

Article 8(A) provides as follows:

- The removal of content and/or the imposition of an access ban may be decided by a judge due to issues relating to:
 - the right to life;
 - the security of life and property;
 - the protection of national security and public order;
 - crime prevention; or
 - the protection of public health.
- The prime minister or relevant ministers may request that the Presidency of Telecommunication and Communication implements access bans and/or orders the removal of content broadcast on the Internet if failure to do so could result in delays, cause irreparable damage or threaten:
 - national security and public order;
 - crime prevention; or
 - public health protection.
- The presidency will immediately notify the relevant access, content and hosting providers of the decision. An access ban or removal-of-content decision should be complied with within four hours of notification.
- The presidency must submit the access ban and/or removal-of-content decision request from the prime minister or related ministries to a criminal judge of the peace for approval within 24 hours. The judge must announce his or her decision within 48 hours. If not, the decision will be void.
- Access bans will be imposed only on the part, section or broadcast in which a personal rights violation occurs (eg, a URL). However, an access ban can be imposed on an entire website if it is technically impossible 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.
- The presidency may file a criminal complaint with the public prosecutor against parties that create or disseminate content subject to the offences listed under Article 8(A). Following a judge's decision, content, hosting and access providers must provide judicial authorities with the information required to identify the perpetrators of these crimes. Authorised personnel from these providers that fail to provide this information will be fined. Judicial fines range from 3,000 to 10,000 day judicial fines, provided that the action does not result in another crime that requires a more severe penalty.
- Content, hosting and access providers that fail to comply with a removal-of-content decision or access ban imposed under Article 8(A) will be subject to administrative fines ranging from TRY50,000 to TRY500,000.

Article 8(A) is similar to Article 8(16), which was abrogated by the Constitutional Court on October 2 2014. This provision gave the presidency unlimited authority to impose access bans on content for the protection of national and public security.

The Constitutional Court repealed the provision with Decisions 2014/149 and 2014/151, stating that

Authors

Gönenç Gürkaynak



İlay Yılmaz



the:

"authority to render an access ban decision which causes the restraint of fundamental rights and freedoms is given to the President based on national security, the preservation of public security and the prevention of crime, which are stated in the provision subject to the lawsuit. 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 hold such a position to ratify the existence or absence of the terms solely. In terms of national security, the preservation of public security and the prevention of crime, granting access ban decisions without considering the authority to render a decision or the evaluation of the authorised institutions would be against the Constitution."

Although Article 8(16) was abrogated by the Constitutional Court, a similar but broader version of the provision (ie, Article 8(A)) now applies.

National security versus access to information

National security and public order-related legal actions may harm access to information and curtail freedom of speech. Each legal system has its own understanding of these concepts. In Turkey, national security and public order-based internet bans may occasionally limit access to information. Further, Turkish court orders and legal doctrine are inclined to interpret national security and public order concerns widely and Article 8(A) allows access bans to be imposed on an entire website if it is technically impossible to impose an access ban on the specific content relating to the violation or the violation cannot be prevented by imposing an access ban on the relevant content. However, high court decisions occasionally contrast with the broad interpretation of national security-related access bans.

Comment

Article 8(A) aims to provide a broad scope of authority over the Internet, freedom of expression and access to information. The article violates several Constitutional Court and European Court of Human Rights decisions, including the decision to cancel a previous version of the provision.

Imposing an access ban on an entire website for any reason constitutes a serious intervention in the spheres of freedom of speech and information, as it affects millions of users. The disproportionality of placing an access ban on an entire website has been established by the Constitutional Court and Article 8(A) contradicts the principles that the court has set out regarding access bans of online content.

In this regard, Article 8(A) paves the way for arbitrary intervention in the spheres of freedom of expression, communication and access to information through the Internet. The Constitutional Court defines the Internet as "an essential tool for exercising fundamental rights and freedoms, especially the freedom of expression in modern democracies and indispensable for the expression of thought".

For further information on this topic please contact [Gönenç Gürkaynak](#) or [Ilay Yilmaz](#) at ELIG, Attorneys at Law by telephone (+90 212 327 17 24) or email (gonenc.gurkaynak@elig.com or ilay.yilmaz@elig.com). The ELIG, Attorneys at Law website can be accessed at www.elig.com.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.

Online Media Partners



© Copyright 1997-2015
Globe Business Publishing Ltd