

INTERNET ACCESS:

TRENDS IN TURKEY



Göneç Gürkaynak and **İlay Yılmaz** of **ELIG Attorneys-at-Law** assess whether access to the internet amounts to an individual human right, and the disputes that may arise if that right is regulated



On 16 May 2011, United Nations special rapporteur Frank La Rue issued a report on the promotion and protection of the rights

to freedom of opinion and expression. In his report, he emphasised a question which has long been debated among academics: “is access to the internet a human right?” The answer could potentially have a major effect on businesses, considering how the internet has enabled the global economy to flourish on an unprecedented scale. Global flows of goods, services and finance on the internet are estimated to be worth as much as USD 26 trillion, or 36% of global GDP.

Cross-border internet traffic increased 18-fold between 2005 and 2012. In the first quarter of 2014, global online advertising revenue reached an all-time high of USD 11.8 billion; a 19% increase in growth compared to the first quarter of 2013. Add in mobile internet connectivity and the significance of mobile advertising revenues, and one can see how important access to the internet is economically.

According to research carried out by accountancy firm PwC, growth in global annual mobile advertising revenues is a good indicator of opportunities within the overall global advertising market. Global annual mobile advertising revenue amounted to USD 600 million in 2010, rising to USD 7.1 billion in 2013.

Considering the impact the internet has economically, it is clear that access to the internet is of great importance for any business, whether online or offline.

A human right?

Recognition of access to the internet as a basic human right would mean significant ramifications for individuals and businesses around the world.

While La Rue did not go as far as calling access to the internet a human right, he did state that disconnecting people from the internet is a violation of human rights under Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which provides that the right to

freedom of expression includes the right to seek, receive and impart information and ideas of all kinds. This freedom is now intertwined with internet access, since the internet has become the go-to place for individuals to seek, receive and impart information. Evidently, La Rue shares the same view, as he states in paragraph 85 of his report that the internet has become an indispensable tool for realising a range of human rights, and any measure which in any way hinders connectivity to the internet will be disproportionate and in violation of the ICCPR, regardless of any legal grounds cited for so doing, including the application of copyright law.

Numerous international surveys carried out by respected international agencies, such as the BBC and The Internet Society, show that the vast majority of respondents agree that freedom of access to the internet should be defined as a fundamental human right.

Leading the debate are the supporters of two widely acknowledged opposing views: one which sees the internet as a form of technology alone which enables individuals to exercise their freedom of access to information, and is not a human right of itself; while the other claims that the exercise of human rights can only be maintained by uninterrupted, seamless connectivity and access to the internet. Having a consistent legal basis for internet access for individuals, and a mechanism under which that right to access may be upheld or challenged, would also impact Turkish businesses – which similarly possess rights under the Turkish Constitution.

Article 48, paragraph 2 of the Constitution stipulates that the state is obliged to take necessary measures in order to enable businesses to continue functioning in a safe and stable environment. The revenues of “e-businesses” are, of course, highly dependent on internet connectivity and cannot operate without it.

Turkish regulators recently issued a monetary fine to one of Turkey’s largest internet service providers (ISP).

The ISP concerned had banned access to several websites, owing to their impact on national bandwidth as a result of high

- ▶ internet usage. The regulator stated that the ISP had not taken necessary measures to ensure constant connectivity to the internet, and imposed the fine, thus fulfilling its statutory duty pursuant to Article 48 and showing that Turkey recognises the importance of internet access to e-businesses.

European approaches

Some countries in the Organisation for Economic Co-operation and Development (OECD) have taken legislative measures to consolidate the values discussed above. For instance, the Estonian Parliament passed a Telecommunications Act in 2000 declaring internet access a fundamental human right. According to OECD reports, the Estonian government's efforts yielded prominent economic results; by 2011, 4.4% of Estonia's working population was employed in occupations relating to information and communication technology (ICT) and Estonia's ICT exports reached a volume of USD 2 billion.

Estonia is now rated as the second freest country in the world, according to Freedom House's *Freedom on the Net Report 2013*. It is also one of the top 25 countries in The Networked Readiness Index according to the World Economic Forum's *Global Information Technology Report of 2014*, which names close neighbour Finland as the most network-ready country in the world.

Finland has gone one step further by issuing a decree making it mandatory for all Finnish ISP's to provide a connection of at least 1 MB/s to every household they service. Although Finnish legislation does not classify access to the internet as a basic human right, the effect of a decree that imposes liability on ISPs to mandatorily provide that service has had a similar outcome. Other countries, such as Costa Rica, France, Greece and Spain have adopted similar approaches regarding safeguarding access to the internet. So how does Turkey fare?

Turkey and the World Wide Web

The government pursued a hands-off approach to internet regulation until 2001, when a legislative proposal intended to extend existing laws governing the traditional press to the internet, came before the Turkish Parliament.

The proposal was submitted for the approval of the then-president Ahmet Necdet Sezer, who returned the proposal stating that one of the most overwhelming

characteristics of the internet was its use as a medium for the freedom of expression and that regulation of the internet should be left to judicial control. Sezer further indicated that leaving the regulation of broadcasts to the discretion of public authorities, and linking it to media law, did not fit the inherent character of the internet.

However, the parliament approved the initial legislation with minor changes in May 2002, subjecting the internet to more restrictive press legislation, until both the press and broadcasting laws at the time were annulled in June 2004.

Until 2007, Turkey regulated internet broadcasts by reference to best practice internationally. Although internet accessibility and usage in Turkey have been increasing year-on-year (by approximately 5% each year and 20% in 2014), the government has failed to ensure the protection of internet connectivity as an individual right.

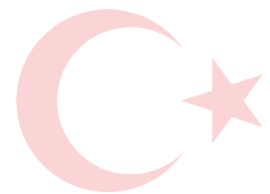
A controlling hand

Successive Turkish governments have focused on regulating the content broadcast on the internet. In this regard, Turkey enacted a law regulating broadcasts through the internet and specifying the liabilities of internet businesses, such as access and hosting providers, for the first time in 2007 (Law No. 5651 of 2007). Since then, enforcement practice arising from this law has been an internationally hot topic, especially after internet access bans were implemented following the Gezi protests and corruption investigations of December 2013, both of which were reported as politically controversial in Turkish and foreign media.

The access ban regime grants the president of the Office of Telecommunication and Communication the power to ban access to certain content stated in the law, and grants the courts the ability to ban access to content without any notice and to require providers to institute a take-down or removal procedure. If the courts decide that an access ban on specific content would not prevent the violation, then they can decide to ban access to entire broadcasts on the relevant website. Failure to implement access ban decisions may lead to subsequent monetary fines.

The law, therefore, has considerable implications for media businesses, including content providers and access providers, as well as those advertising on websites affected by any ban. While the law is clearly aimed at restricting individual access, bans

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would also affect businesses. As evidence of this, access to streaming and social media sites has been banned in Turkey at various points, e.g. access to **YouTube** was banned in Turkey for nearly two and a half years, while access to **Google Sites** was banned for almost five years.

According to recent statistics, as at September 2014, access to over 52,000 websites has been banned since the law came into effect.

Impact on foreign businesses

While Turkish law does not apply to businesses based outside of Turkey and whose servers are also located abroad, there are clear implications for the Turkish subsidiaries of such businesses. In practice, Turkish courts are likely to interpret this law as applicable to foreign businesses. Banning access to entire websites, as well as individual URL addresses, within the borders of a country means that both individual users and businesses are unable to access the banned content and websites without using tools such as virtual private networks (VPNs, which enable the access ban to be bypassed).

In order to mitigate the risk of receiving access bans, some businesses may employ tools to identify and remove problematic online content. Such access ban decisions pose a serious threat to businesses which host user-generated content online.

While Turkey does not implement blanket internet censorship, the consequences of such censorship in other jurisdictions has had significant implications; Google, for example, withdrew its operations in China due to the country's disproportionate access ban implementations. Nor is that the only consequence of such bans. A territorial website or individual URL address access ban, and related procedures, can impact businesses negatively most notably by causing a downturn in user numbers and advertising revenue.

According to **Twitter's** transparency report covering the first half of 2014, Turkey has issued 186 removal requests; more than any other country. Google's 2014 transparency report, meanwhile, shows that the Turkish government has filed removal requests in relation to more than 13,000 items (including over 1,500 removal requests from courts and government agencies in Turkey); almost three times as many as any other country.

When the sheer volume of access

bans and removal requests in Turkey are considered, they might force businesses to reconsider their operations or existing and future investments in Turkey. This would almost certainly lead businesses to consider challenging the law on restricting internet access.

Clearly, establishing state control over internet content has been the ultimate goal of some politicians who see the internet as something that should be regulated. Unlike countries such as Estonia and Finland, enabling, providing and maintaining access to the internet in Turkey has only been an item on the agenda; an aspiration, at best.

Enabling the internet economy to flourish through widened accessibility, while protecting fundamental human rights, is not seen as a goal worth achieving; nor is the lack of a protected right to the internet seen as a problem for political parties to address.

Although control of the internet has been a major topic in successive Turkish governments' agendas, economic growth has been a key issue. Turkey, in its vision for 2023, aims to be one of the top 10 economies in the world, and IT is cited as a key focus. Such an objective seems to clash with the restrictive nature of the current laws prohibiting internet access.

The Information Society Chamber of the Ministry of Development has finished drafting the government's *Information Society Action Plan*, which will focus on growth and employment opportunities. The plan provides for USD 10.7 billion worth of IT investment, aimed at a resulting increase in Turkey's GDP ranging from approximately USD 23 billion to USD 38.3 billion. If successful, jobs in the Turkish IT sector are expected to increase by 27%, thus benefitting 233,000 employees.

The action plan envisages the growth of a strong and competitive IT sector, with an increasing influence on other sectors, where IT businesses are able to flourish, therefore contributing to economic growth. Yet to achieve this, the action plan will also have to combat problems that arise from businesses targeted for breaches of Turkey's internet laws, as well as any popular discontent arising from the internet being used in this way.

Although Turkey aims to grow its internet-related business, it has a long road ahead before internet access is considered a basic human right – with all the sensitivities that surround it – and until laws are developed to

encourage businesses to use the internet to communicate with customers. It is apparent that these targets contradict what is currently happening in practice. Turkey needs to take baby steps first, leaving the ideal of control behind in order to focus on the enrichment of freedom of expression and to enable its citizens to access the internet. This may then pave the way for more leading internet-based companies to invest in this sector. ■

– A full list of hyperlinks, sources, and references on which this article is based will appear in the online version of this article.

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