

New Era for Turkish Internet Law: Will Turkey Become Another China or Iran?

Gönenç Gürkaynak, İlay Yılmaz, Nazlı Pınar Taşkiran
(ELIG Attorneys-at-Law, 34349 Istanbul, Turkey)

Abstract: This article discusses the highly criticized recent amendments to the Law No. 5651 on the Regulation of Broadcasts via Internet and Prevention of Crimes Committed through Such Broadcasts (“Law No. 5651”), including background information on the relevant legislation in Turkey. Amendments, their legal results and economic affects will be explained in detail along with an overview of the debate. This article argues that the amendments constitute a significant step backwards for Turkey in terms of freedom of speech. As the amendment includes major revisions to the Internet legislation in Turkey, the debates about the legislation are likely to continue even as the amendments come into force.

Keywords: law No. 5651; internet law; Turkey; access ban; removal of content; censorship; freedom of speech; internet economy

JEL codes: K, K39, K42, O38

1. Introduction

Since 2007, when Law No. 5651 went into effect, debates and reformation efforts regarding Internet regulation in Turkey have been a hot topic. Academics, information and communication technologies experts, public and private stakeholders, and concerned internet actors have been discussing the necessary steps to be taken for improving the Internet legislation and Internet regulation practice in Turkey. These discussions have also included the Information and Communication Technologies Authority of Turkey (“ICTA”), which is the main regulatory and supervisory authority for the IT sector in Turkey.

However, as a result of a process that is completely contrary to these efforts, dramatic amendments were proposed with respect to the Law No. 5651, contained within an omnibus bill including many amendments to numerous laws in Turkey. The Turkish Grand National Assembly (“TGNA”) accepted the amending legislation on February 5, 2014 by rejecting all the contrary resolutions submitted by the opposing political parties. The amending legislation is ratified by the President of the Turkish Republic and came into force on the same day it is published in the Official Gazette of February 19, 2014.

Gönenç Gürkaynak, Managing Partner, ELIG Attorneys-at-Law; research areas/interests: law and economics, competition law, internet law, human rights. E-mail: gonenc.gurkaynak@elig.com.

İlay Yılmaz, Senior Associate, ELIG Attorneys-at-Law; research areas/interests: internet law, human rights, data protection law, telecommunications law, media law. E-mail: ilay.yilmaz@elig.com.

Nazlı Pınar Taşkiran, Mid-level Associate, ELIG Attorneys-at-Law; research areas/interests: internet law, human rights, data protection law, telecommunications law, media law. E-mail: nazli.taskiran@elig.com.

The amendments are oriented towards control and content bans and would lead to Turkish Internet legislation and law, which is already behind the times, embracing the procedures of countries such as China and Iran, in terms of the lack of freedom of speech.

Amendments include additional obligations for internet service providers in Turkey and the sector experts expect that these changes directly affect internet usage in Turkey and internet economy.

2. Background

Transparency reports which are publicly available from online sources clearly state that, between January and June 2013,¹ Turkey has aggressively requested the removal of content from the Internet, four times as often as the next closest country, India. In fact, Turkey's volume of content removal requests is almost the half the worldwide total. Not satisfied with being the world's Internet police and champion of combating against Internet content, legislation is being prepared by force and with undue haste to ensure an even harsher, less restrained practice. The amending legislation is made for the sake of ruling the Internet with a much more effective fist of steel.

Article 8 of the Law No. 5651 was already regulating access bans on the Internet before the amending legislation. Article 8 allows the government to ban access to a broadcast on the Internet if there is sufficient suspicion that the content constitutes: (1) provocation for committing suicide, (2) sexual harassment of children, (3) the easing of drug usage, (4) the supplying of drugs which are dangerous for health, (5) obscenity, (6) prostitution, (7) the provision of a place and opportunity for gambling, or (8) for violating the Law on Crimes against Atatürk. Article 9 of the same law stipulates the principles and procedures for requesting the removal of content. Law No. 5651 also outlines the liability of content, hosting, and access providers and mass use providers. Even in its previous form before the amending legislation, Law No. 5651 already relied on vague wording and inadequate procedures, which has led to several disproportional access ban exercises in Turkey.

The *Ahmet Yıldırım v. Turkey* case of 2012² before the European Court of Human Rights ("ECHR") was known to be the first ruling of the ECHR addressing the intersection of freedom of expression and Internet access in the context of Internet access bans. The ECHR determined that Turkey had violated Article 10³ of the European Convention on Human Rights ("Convention") when one of its courts banned all access to Google Sites in Turkey based on the content of the website of one of its users. More importantly, ECHR clearly stated that Law No. 5651 suffers from significant procedural flaws and indicated that the law is against basic human rights, such as freedom of speech.

Since then, though, the Turkish government has not upgraded its understanding of how to craft Internet regulations according to the current needs of technology and to address the freedom of speech concerns in Turkey. Non-proportional exercises of Law No. 5651 have caused many access ban exercises against both national and international websites. One of the most significant non-proportional exercises of an access ban in Turkey was the

¹ Please see <https://www.google.com/transparencyreport/removals/government/TR/>.

² *Ahmet Yıldırım v. Turkey*, No. 3111/10, December 18, 2012.

³ Article 10, European Convention on Human Rights: "Freedom of expression": "(1) everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. (2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

access ban enforced against YouTube for two and a half years. While an amending stage with the participation of all concerned actors with respect to Internet legislation was expected, Turkey instead is faced with a sudden and unexpected amending legislation served to TGNA from the current ruling political party in Turkey.

In general, the goal of the amending legislation on the Law No. 5651 is to allow the government to interfere with Internet more easily and rapidly and to push judicial mechanisms into the background. The amendments have been highly criticized by public opinion and basic non-governmental organizations, as explained in detail below.

3. What Are the New Amendments to the Law No. 5651?

The amending legislation published on the Official Gazette of February 19, 2014, came into force on the same day it is published. The amendments bring significant revisions to the Internet law in Turkey and were highly criticized in public opinion and by the media, mostly on freedom of speech grounds. The amendments ensure that the use of Internet bans will increase even more.

The amendments introduced new terminologies to the definitions section of the Law No. 5651. Amending legislation diversifies the range of methods that can be used to implement access bans to include: access bans through a domain name, access bans through an IP address, access bans to content (URL), and similar access ban methods. Technical measures to be used for these methods and “similar access ban methods” are not set out under the amending legislation but providers are now expected to provide the necessary hardware and software to implement the bans.

These additional technical and legal obligations stipulated for the access providers, are expected to harm the competitive atmosphere for internet economy. Access providers need to make technical investment in order to comply with the provisions of new access ban types, only certain access providers are expected to survive and small and medium sized access providers are expected to be eliminated from the market, as declared by one of the leading sector associations.⁴

Additionally, as declared by Economic Policy Research Foundation of Turkey, legal foresee ability for national and international investors is weakened with the amended legislation and it is stated that such change would directly affect the internet economy in Turkey.⁵

Another significant change involves the notice method to the provider by the person who is claiming that their rights are violated due to content being broadcasted on the Internet medium. The amending legislation on the Law No. 5651 define this as the “notification method”, in which the content provider is contacted first and then if there is no result achieved within a reasonable time, the hosting provider is contacted through their contact information for the removal of content. This represents a step backwards from the previous version of the Law No. 5651, which did not define the notification methods. Instead, general principles of Turkish law was applied, which requires that such notifications must be made through formal notification procedures such as certified mails or cease and desist letters. These laws are intended to maintain the reliability of a legal notification, such as under Notification Law No. 7201, which regulates forms and procedures of formal notifications.

With the amending legislation, the person who is claiming that their rights are violated by specific Internet content now has the ability to notify the hosting provider informally through the contact information of the

⁴ http://bilgicagi.com/Yazilar/17026-telkoder_internet_servis_saglayicisi_sirketleri_istanbulda_bir_araya_getirdi.aspx.

⁵ Please see:

http://www.tepav.org.tr/upload/files/1395667720-1.5651_Sayili_Kanunda_Yapilan_Degisiklikler_Olumle_Korkutup_Sitmaya_Razi_Etmek_Mi.pdf.

hosting provider. This method would allow individuals to serve their notifications through, for example, the e-mail addresses of the hosting providers. Article 86 of the amending legislation stipulates that the notifications to the ones carrying out activities in Turkey or abroad that fall within the context of Law No.5651 may be served through e-mail message or other communication tools which are found based on information gathered from the sources such as the communication tools on their Internet pages, domain name, IP address and similar sources. With the relevant provision, now it became possible to make a notification with a simple e-mail message, which may be perceived as a spam message and which is not a secure and binding official notification process under Turkish notification law. Moreover, by using the phrase “the ones carrying out activities in Turkey or abroad”, the amending legislation covers entities which should not be subject to Turkish laws. Such a provision is clearly against the principle of territoriality of the laws.

According to Article 88 of the amending legislation, the hosting provider must remove the illegal content from broadcast, provided that it has been informed about the illegal content pursuant to Articles 8 and 9 of the Law No. 5651. The amending legislation removed the phrase “if technically possible” from the relevant provision of the Law No. 5651 and the hosting providers are now in any case obliged to remove the illegal content, even if it is technically not possible.

The amending legislation also establishes a new civil organization consisting of the access providers providing services in Turkey, namely the “Access Providers Union” (“Union”). The Union will be a legal person subject to private law and the center of the Union will be in Ankara. Access ban decisions which fall outside the scope of Article 8 of the Law No. 5651, which designates access ban for catalogue crimes, must be executed by access providers. All hardware and software necessary to implement these decisions must be provided by the access providers themselves. Access ban decisions which fall outside the scope of Article 8 of the Law No. 5651 will be sent to the Union for execution. The notifications served on the Union in this context will be deemed served on the access providers. Internet service providers in Turkey which are not a member of the Union will not be able to operate. As of April 2014, the Union has not been established yet. The initial aim to establish the Union was to establish a civil initiative and to grant the right to object to the unlawful decisions they receive. Access providers, so far, merely executed the access ban decisions they had been served on and their DNA does not have the code to fight for protecting the contents in terms of freedom of expression.

The content removal procedure designated under Article 9 of the Law No. 5651 is entirely changed under the amending legislation. Article 93 of the amending legislation states that any real person or legal entity or authority or institution who claims that his or her personal rights are violated due to content broadcasted on the Internet may (i) apply to the content provider, or to the hosting provider, if the content provider may not be reached, and request removal of content by the notice method or (ii) may directly apply to a criminal court of peace judge, and request an access ban of the content.

The content or hosting provider must reply to these requests within twenty four hours. Criminal courts of peace may decide to ban access in accordance with the requests as well. The court may also grant access ban decisions in the scope of this article by banning access to the content method, only for the part, section, broadcast where the personal right violation occurs (URL, etc.). The court, however, may ban access to entire broadcasts that allegedly contain violating content on air, provided that the court indicates the decision’s grounds. If a decision is given to ban access to content, it is sent to the access provider by the Union, and must be implemented by the access provider immediately, at the latest within four hours. In case the broadcasts subject to the court’s access ban decision or the same kind of broadcasts are also broadcasted on other Internet sites, then the relevant

decision will also apply to these addresses upon the relevant person's application to the Union.

A brand new provision titled "access ban due to privacy of private life" is inserted into the Law No. 5651 as Article 9A, according to the Article 94 of the amending legislation. Any person, who claims that his or her privacy is violated due to content broadcasted on an Internet medium may directly apply to the Presidency of Telecommunications ("Presidency") and request an access ban on the content. The Presidency will send this request to the Union for enforcement and the access providers must enforce this request immediately, at the latest within four hours. Upon the order of the President of Telecommunications, the Presidency will directly execute access ban for the reasons related to violation of privacy, if it is not convenient to delay the case. It is possible to object to this decision before the criminal court of peace. The amending legislation goes beyond the protection of privacy and includes vague criminal definitions. Moreover, it grants a single "administrative" person the power to order access bans against an online content. This provision inappropriately extends the authority of an administrative body by granting it judicial powers, whereas it ought to be the duty of judicial bodies to evaluate whether content violates laws.

In addition, Internet service providers are required to keep track of personal data and conduct sweeping surveillance on behalf of the government due to the access ban by URL technique. New access ban procedures regulated under amending legislation now make it nearly impossible to access banned content by changing DNS settings.

Finally, the amending legislation imposes additional obligations for Internet service providers in Turkey. According to the recent statistics of Organization for Economic Co-operation and Development ("OECD"), Turkish internet users have one of the most expensive internet usage fees all over the world.⁶

Internet freedom has a broad definition in today's society. Therefore, it does not only consist of "freedom of speech" and "censorship" issues, but it also includes "easy and inexpensive access" of the users to the Internet or "accessibility", "online privacy" and "data protection" of the Internet users and "net neutrality". Since the recently enacted changes that the amending legislation introduces are against the spirit of the Internet, it would cause both legal and technical problems with respect to Internet usage in Turkey. Indeed, the amending legislation for the Law No. 5651 attacks Internet freedoms in each and every aspect.

4. Criticisms of the Organizations on the Amendments to the Law No. 5651

Following the service of the amending legislation to TGNA, the virtue and the content of the amending legislation was widely criticized and debated. Numerous non-governmental organizations, authorities and academics have published criticisms of the amending regulation. The most important and agreed point of all is that the amending legislation for the Law No. 5651 is a huge step backwards.

The Turkish Industry and Business Association ("TUSIAD")⁷ has published a press statement on January 13, 2014 and a detailed report regarding the amending legislation and its possible consequences. TUSIAD stated that the suggestions of civil society organizations, legal experts on information technology and other interested parties were not taken into consideration during the legislation procedure. TUSIAD also stated that the prohibiting reflexes of regulating Internet are unacceptable and that they strongly believe that this legislation needs to be drafted in a way that encapsulates fundamental human rights criteria, including freedom of expression, as defined

⁶ <http://www.oecd.org/sti/broadband/oecdbroadbandportal.htm#prices>.

⁷ Please see http://www.tusiad.org.tr/_rsc/shared/file/5651noluGorus-TeknolojiKomisyon.pdf.

by the ECHR and other international agreements that Turkey is party to.

Human Rights Watch (“HRW”)⁸ has also published a press statement on February 6, 2014, calling the President of Turkish Republic to veto the amending legislation on the Law No. 5651. HRW stated that especially at this sensitive political time, Turkey does not need more censorship and called the President of the Turkish Republic to veto these new measures to ensure Turkey does not violate its obligations to respect the right to access information, freedom of expression, and privacy rights. HRW stated that the timing of the amending legislation raises concerns that a defensive government is seeking to increase its power to silence critics and to limit arbitrarily any politically damaging material.

The Council of Europe also declared on February 10, 2014, that the restrictions on Internet use in Turkey are under examination by Council of Europe experts. Communication Director of the Council of Europe, Daniel Holtgen confirmed that the changes “may raise issues” under Article 10 of the European Convention on Human Rights. The Commissioner for Human Rights of the Council of Europe has also stated that the amendments toughen the restrictions already in place on the Internet and further limit channels for free expression in Turkey.⁹

The Organization for Security and Co-operation in Europe (“AGIT”) representative on freedom of the media, DunjaMijatović, has outlined¹⁰ her assessment of these amendments. The representative stated that if the new measures are adopted they would place a disproportionate burden on Internet service and hosting providers, referring to an assessment of the amendments commissioned by her office and sent to the Turkish authorities. The assessment of AGIT points to a number of concerns including the right of the Presidency to request and collect data on any Internet user without judicial oversight.

The President of the Union of Turkish Bar Association, Att. MetinFeyzioğlu, has also sent a formal letter¹¹ to the President of Turkish Republic underlining his concerns on the amending legislation on the Law No. 5651 and requested for the President of Turkish Republic to use the right of veto the amending legislation.

5. Conclusion

Instead of the government trying to follow a path for freedom, and instead of searching for the reasons it has earned medals of intolerance and impatience, the government’s will to restrict is on the rise and it is seeking new toys of control. This governmental desire to restrict, already intense, is seeking new potential by radically and directly interrupting access to Internet content and to information. The amending legislation puts a power switch in the hands of administrative authorities before judicial procedures.

The Administrative authorities holding the switch have demonstrated their desire to restrict content amounting to half of the world’s total removal requests and four times those made by India, which has a population of 1.3 billion and is not, in any case, considered a good reference for democracy and prosperity.

It is unknown whether there are any virtues in the amending legislation to establish censorship procedures that lack transparency and restrict opposition rights, or any public benefit that might outweigh the destruction that the amending legislation will cause to social fields that lead to prosperity, as there was no opportunity to discuss the legislation.

Moreover, the amending legislation does not meet the expectation to adopt legislation in accordance with the

⁸ Please see: <http://www.hrw.org/news/2014/02/06/turkey-gul-should-veto-new-internet-rules>.

⁹ Please see: <http://policyreview.info/articles/news/president-signs-turkish-draconian-internet-law/235>.

¹⁰ Please see: <http://www.osce.org/node/111400>.

¹¹ Please see: <http://www.barobirlik.org.tr/Detay22864.tbb>.

needs of a democratic society, following the 2012 decision of the ECHR that implied that Law No. 5651 is against Article 10 of the European Convention on Human Rights. Quite the contrary, the amending legislation has negative effects.

Content providers and hosting providers will be bypassed from now on by this legislation and the results will be automatically executed by the supervisory authorities of the administration. It will not be possible to keep the statistics that were kept so far. As such, thanks to the statistics swallowed by the depths of government, it will be expected that we celebrate our new “honoring” statistical records that do not reflect the real numbers, as we “will not be disgraced anymore before World”.

The amending legislation was swiftly proposed and came into force without any regulatory impact assessment and without attendance of the natural addressees of this legislation, despite the fact that the amendments directly affects both the general freedom field of internet usage and the sense of freedom of the internet users in Turkey.

The youth of Turkey are headed to an enlightened and widening world based on basic freedoms which should be treated with great respect, including exposure to shocking ideas, visuals and states. It underestimates the youth, who will rule the future of the people of Turkey, and prevents the development of their emotions and opinions, to expect them to entrust their progress and adventures to the previous banning-oriented generations.

All legislative proposals need a commitment with extensive public participation and a mature and clear notion.