

ACCESS DENIED



Gönenç Gürkaynak, İlay Yılmaz and Derya Durlu of ELIG review access ban decisions in light of the European Court of Human Rights' decision in *Ahmet Yıldırım v Turkey*

In its decision of *Ahmet Yıldırım v. Turkey* (Case No. 3111/10), given on 18 December 2012, the European Court of Human Rights (ECHR, or the Court) concluded that Article 10 of the European Convention on Human Rights (Convention), which regulates freedom of expression, was violated because the access ban decision of the Denizli Criminal Court of Peace restricted the rights of the Internet users and had a collateral effect upon freedom of expression.

The Court's decision may bring about various commercial issues with respect to web-based companies such as Google, as well as third-parties such as content

providers benefiting from the online ads they embed into their websites. This article discusses the Court's decision, and draws out the legal implications for companies operating in the Internet sector.

The facts of the case

The petitioner, Ahmet Yıldırım, is the owner and user of the website <http://sites.google.com/a/ahmetyildirim.com.tr/academic/> where he publishes his academic works and points of view on different fields. This site was created using the Google Sites (<http://sites.google.com/>) service, a Google module for the creation and hosting of websites.

On 23 June 2009, the Denizli Criminal Court of Peace gave a decision ordering, by virtue of Article 8(1b) of Law No

- ▶ 5651 on Regulation of Broadcasts via Internet and Prevention of Crimes Committee through such Broadcasts (Law No. 5651), blocking of access to the site <http://sites.google.com/site/kemalizminkarinagrasi/benimhikayem/atauerk-koessi/at> (hereinafter referred to as the litigious site). It was a preventive measure adopted within the framework of a legal procedure filed against its owner, which was accused of an insult to the memory of Atatürk. A copy of the access ban decision was notified to the Telecommunications Communications Presidency for execution.

On 24 June 2009, on the response of the Telecommunications Communications Presidency, which states that the access ban decision shall be given for the entire website over its domain name or IP addresses, the Denizli Criminal Court of Peace amended its decision dated 23 June 2009 and decided to completely ban access to Google Sites by virtue of Article 8 of Law No 5651.

The petitioner, Ahmet Yıldırım, objected to the court's access ban decision, as a complete access ban on Google Sites prevented access to the contents broadcasted on his own website, arguing specifically that a method should have been used such that only the litigious site would be made inaccessible due to the allegedly unlawful content it broadcasted (such as through a URL restriction).

The ECHR's conclusion - an analysis

When the matter was brought before the ECHR, it first looked at whether Article 8(1) of Law No 5651 met the accessibility and predictability requirements of Article 10 of the Convention, which the petitioner argued as being negative, since the provision in Law No. 5651 is too uncertain. According to the well-established jurisprudence of the Court, in order to meet these requirements the national law must provide a certain protection against arbitrary violation by the public power of the rights guaranteed by the Convention.

For issues related to fundamental rights, the law could be contrary to the supremacy of the right, which constitutes one of the fundamental principles of a democratic society confirmed by the Convention, if the power of appreciation granted to the executive had no limit. Consequently, it must define the extent and the modalities of exercising such power with sufficient clarity.

The ECHR observed that, with the access ban decision, Google Sites is held responsible for the content of a site being broadcasted by a third party content provider. However, it is not indicated in Articles 4, 5 and 6 of the Law No 5651, which clearly specify the responsibilities of the content, hosting and access providers, that a hosting provider may be held responsible in this way.

The ECHR also observed that nothing showed that the judges

to whom the objection was submitted at the local court tried to evaluate the various interests by considering especially the necessity of a total ban of access to Google Sites. The ECHR finally concluded that the national law (i.e. Law No. 5651) does not provide any guarantee to avoid an access ban decision for a specific website to be used as a means of a general access ban, thereby violating Article 10 of the Convention.

Pursuant to Articles 43 and 44 of the Convention, the ECHR decision is not final as of the date when this legal insight was published. Parties may request that the case be referred to the Grand Chamber of the Court within three months as of the date when the Court decided the case, i.e. until 18 March 2013. As soon as a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution.

Commercial implications

The ECHR's case essentially highlights how an access ban decision was continued to be implemented over Google Sites, even though the local chief public prosecutor's office gave a non-prosecution order for the owner of litigious site, and how this practice is in violation of Article 10 of the Convention.

Article 10 comprises the right to impart and receive

information and ideas, including on the Internet. Restrictions on freedom of expression may be imposed by the state, but must be 'prescribed by law,' 'in pursuit of one of the legitimate aims laid down in Article 10(2)' and 'necessary and proportionate' to the achievement of the aim. The latter concepts have been developed through the case law of the Court and require the state to justify the restriction as pursuing a 'pressing social need,' as not imposing an excessive burden on any individual and as being supported by relevant and sufficient reasoning.

The contracting states have a certain margin of appreciation in assessing whether such a pressing social need exists, but this is subject to supervision by the ECHR, in respect of both the legislation and the decisions applying it. The ECHR looks at the interference complained of in the light of the case as a whole and determines whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient' and whether the measures are 'proportionate to the legitimate aim pursued.' In doing so, the Court must satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and that they relied on an acceptable assessment of the relevant facts. ▶



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► 'Prescribed by law'

As regards 'prescribed by law,' the law must be sufficiently clear and precise for it to be 'foreseeable'; individuals must be able to regulate their conduct to comply with the law. Article 8(9) of Law No 5651 provides that where the broadcasts that constitute the crimes are "removed" the access ban decision shall be 'eliminated.' This was previously interpreted by the Turkish courts as meaning that where a hosting provider had restricted access to the offending content from Turkey it had 'removed' the relevant content, such that the access ban had to be lifted.

Insofar as legitimate aim is concerned, although the right to freedom of expression is a qualified right, the permitted restrictions which a state may seek to impose all relate to expression within its territory. Thus the closing words of Article 10(1) relating to licensing have been held to refer to licensing within the territory of the state. Similarly, certain of the aims identified in Article 10(2) such as national security and territorial integrity are necessarily restricted to matters within the state.

It follows, in our view, that the aim of preventing crime identified in Article 10(2) must be interpreted as preventing crime within the state – it cannot be a legitimate aim to prevent the accessing anywhere in the world of content which would amount to a crime in Turkey. The aim could only be legitimate if it was to prevent crimes in Turkey. This limited objective is important when assessing proportionality. The most that Turkey could argue is that its 'legitimate aim' was to prevent access to content in Turkey to meet societal needs; the question then becomes whether it was necessary and proportionate to that aim in a democratic society for it to require global removal of the offending content. In this case that would include not only Google Sites' interests, but the interests of the public generally in having access to Google Sites.

'Necessary and proportionate'

Regarding the 'necessity and proportionality' criteria used in assessing the violation, we consider that Google had a strong argument

that the access ban, insofar as it can be said to have a legal basis, was unnecessary and disproportionate to such an aim in circumstances where Google Sites had taken measures to prevent access to the content from Turkey.

The requirement of global removal of content would affect Google Sites users across the world. The absolute access ban on Google Sites for all those based in Turkey is a very severe restriction indeed and can hardly be justified on the basis of the need to prevent a limited number of Turkish users gaining access to the offending content through foreign DNS servers; alternative measures with lesser effects could have been used.

The Court's decision will prompt Turkey to lift the access ban decisions given by the respective local courts, thereby reinstating and enabling free flow of information over Google Sites, in particular, and the Internet, in general, and to amend the Law No 5651. The adverse effects of a continued implementation of the access ban decisions would be an abrupt cessation of the traffic data that web-based companies receive, and a decrease in the number of advertisements posted by third parties benefiting from the broadcast of contents over Google Sites, as well as the content providers commercially benefiting from the online advertisements they embed into their websites. On the other hand, execution of the Court's decision by Turkey, i.e. amending the Law No 5651 in a way to eliminate disproportionate access ban decisions, may even be considered as a step by globally-known web-based companies to invest in Turkey and localise.

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About the authors



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