

Constitutional Court: Advertisement Board's Authority to Block Access to the Websites is Unconstitutional

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Pursuant to the Consumer Protection Law, advertisements must be carried out in compliance with the matters specified in the law and principal decisions. Otherwise, the Advertisement Board ("Board") has the right and authority to impose various sanctions. The scope of this authorization was broadened with the regulations ("Regulation") published in the Official Gazette dated 01.04.2022 and numbered 31796 to include the following sanctions:

"(...) In addition to these penalties, if the violation is committed over the internet, the Advertisement Board may decide to block access to the publication, section, episode (in the form of URL, etc.) where the violation occurred. However, in cases where it is technically impossible to block access to the infringing content or the infringement cannot be halted by blocking access to the relevant content, the decision to block access to the entire website may be made. This decision shall be sent to the Association of Access Providers in accordance with Article 6/A of the Law No. 5651 dated 4/5/2007 on the Regulation of Publications on the Internet and Combating Crimes Committed Through These Publications. This decision can be appealed before the Criminal Judgeships of Peace. The decision of the Criminal Judgeships of Peace can also be appealed in accordance with the provisions of the Code of Criminal Procedure dated 4/12/2004 and numbered 5271."

According to the Regulation, the Board may decide to block access to the publication, a section or a part of the publication, or alternatively the entire website if such partial blocking is not technically possible. These decisions can be appealed before the Criminal Judgeships of Peace, whose decisions can also face an appeal. However, since these decisions are administrative, just like the other decisions of the Board, they may encounter the remedy of cancellation. This is because different remedies have been foreseen for the same type of decision.

Thereupon, an application for annulment was filed before the Constitutional Court against the regulation in question, to argue that i) There is no clear, explicit, comprehensible criterion limiting the authority of the Board to block access, ii) In the event of a total blocking of access, other content owners on the relevant website may be victimized, iii) In this case, there would be a restriction of fundamental rights and freedoms, but there is no limitation that guarantees this, iv) The fact that the objection procedure against access blocking decisions is different from the objection procedure for other sanctions arising from the same act will cause problems in practice.

Based on the evaluation of the Constitutional Court, it is understood that this regulation authorizes the Board "not only to block access to the content in the context of direct commercial advertisement, but also to entirely block access to the publication, a section of the publication or the section containing such content." This situation is thought to restrict fundamental rights such as freedom of expression and freedom to work and establish enterprises. However, the Constitutional Court held that the rules in this respect must be specific, accessible and foreseeable so as not to allow any arbitrariness. In this respect, it has been determined that the sanction in question is not an unfavorable means of achieving the ultimate objective.

The Constitutional Court emphasized that "public authorities have the obligation to choose not only the most convenient but also the most appropriate means to achieve the legitimate aim of the restriction when it interferes with fundamental rights and freedoms". According to the regulation in the current version of the Law, it may be possible to completely block access to the relevant section without taking any other measures. It is considered that this may lead to the complete abolition of the exercise of freedom of expression and the freedom to work and to

establish private enterprises. Instead, in accordance with the principle of proportionality, alternative methods that may make it possible to achieve the objective with a lighter restriction or may cause less damage should be taken into consideration.

In the case at issue, the Constitutional Court decided to cancel the sentences in question. In addition, the cancellation decision will enter into force nine months after the publication of the decision in the Official Gazette in order to prevent the legal gaps that may arise during this period.

The Constitutional Court did not find the main purpose and the practice of the Board in this respect completely wrong but underscored the fact that they should be evaluated within the scope of the principle of proportionality. The fact that the legislator has been given such a long period of time to make a new regulation is an indication of this. At this stage, it is expected that the legislator will develop a relatively more limited and predictable method to achieve the same basic objective and protect consumers.

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