

Constitutional Court: The Information Technologies and Communications Council's Authority to Block Access to the Websites Is Unconstitutional

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One of the most striking decisions of the Constitutional Court ("the Court") in 2023 was annulling the regulation containing the Advertising Board's authority to block access to websites. In a similar move, "the Court" annulled the regulation that gave the Information Technologies and Communication ("BTK") the authority to remove online content. The latter decision dated 1/10/2023 and numbered 2020/76 E., 2023/172 K., was published in the Turkish Official Gazette dated January 10, 2024, and numbered 32425.

Both decisions of the Constitutional Court will take effect nine months after their publication in the Official Gazette, giving the legislator sufficient time to make a regulation in line with the evaluations of the high court. The details of the annulment decision are as follows:

Article 8 of the Law on the Regulation of Publications on the Internet and Suppression of Crimes Committed by Means of Such Publications No. 5651 ("Law No. 5651") stipulates that it is possible to remove the content and/or block access to the publication if there is sufficient suspicion that the content constitutes the following:

a) Crimes included in the Turkish Penal Code No. 5237 dated 26/9/2004; 1) Induces suicide (article 84), 2) Sexual abuse of children (article 103, first paragraph), 3) Facilitates the use of narcotic or stimulant substances (article 190), 4) Supplies substances dangerous to health (article 194), 5) Obscenity (Article 226), 6) Prostitution (Article 227), 7) Provides a place and opportunity for gambling (Article 228).

b) Crimes included in the Law on Crimes Committed Against Atatürk No. 5816 dated 25/7/1951.

c) Crimes included in the Law No. 7258 dated 29/4/1959 on the Regulation of Betting and Games of Chance in Football and Other Sports Competitions.

ç) Crimes included in the first and second paragraphs of Article 27 of the State Intelligence Services and National Intelligence Organization Law No. 2937 dated 1/11/1983.

Pursuant to Paragraph 4 of Law No.5651, the decision to remove content can be granted by the President of the BTK. Elsewhere in Paragraph 11, the President is given the authority to impose an administrative fine on the content/ location/ access provider if the removal decision is not implemented.

The Constitutional Court examined the BTK President's content removal authority in light of the presumption of innocence and discussed whether such practice contradicted this legal principle. "The Court", thus, examined whether the content removal decision was based on the detection of a crime or whether it was a punishment.

"The Court" concluded that BTK President's authority to remove online content violated the presumption of innocence and made the following changes:

- The phrase "remove content and/or" in Paragraph 4 of Article 8 was taken out:

"8(4): The decision to remove content and/or block access regarding publications whose content constitutes the crimes specified in the first paragraph is made ex officio by the President. This decision is notified to the relevant content and hosting providers and the access provider, and they are requested to comply with the requirements."

- The phrase "to the relevant content, location and access provider" in Paragraph 11 of Article 8 was taken out:

"8(11) If the decision to remove content and/or block access given as an administrative measure is not implemented, the President will impose an administrative fine of ten thousand to one hundred thousand New Turkish Liras on the relevant content, hosting and access provider. If the decision is not fulfilled by the access provider within twenty-four hours from the moment the administrative fine is imposed (...) the Authority may decide to cancel the authorization."

In addition, "the Court" examined Article 9 of Law No. 5651. The article contained provisions on the removal of online content through applications by real and legal persons whose personal rights had been violated. The applicants could notify the content/hosting provider to take down the content or lodge a similar application with the criminal judge. "The Court" argued that such applications would violate freedom of expression in a disproportionate manner.

"The Court" held that there was no balance between the conflicting rights- the plaintiff's rights against the right to freedom of speech/press- in the matter at hand since the criminal judges of peace were expected to reach a conclusion without conducting a detailed examination. "The Court" added such a restriction prevented access to a certain content on the internet, thus preventing access to that content within the borders of a certain country indefinitely from the date of the decision, concluding that this situation seriously interfered with the freedoms of expression and press. It was also stated that there was no possibility of gradual intervention to limit internet content against attacks on personal rights. For this reason, the Constitutional Court annulled the relevant article in its entirety.

As can be seen, the Constitutional Court prioritized the presumption of innocence and the principle of proportionality and concluded that practices to the contrary had to be terminated. Practitioners are eagerly watching to see how the annulment decision will proceed until it comes into force nine months later.

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