6 February 2014

New Internet Law – A Back Step on Fundamental Rights and Freedoms

The envisaged modification on the Law No. 5651 on the Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publications (the "**Internet Law**") is one of the most publicly debated topics in Turkey. The fact that, in accordance with the current regulations, it is possible to adopt the protection measure of "blocking access" with a mere administrative decision, thus without the necessity of a court decision has been criticized in Turkey as well as in the EU within the frame of the accession process.

On this vein, the European Commission has determined in the Turkey 2013 Progress Report that Turkey is gradually following a more prohibitive attitude with regards to the internet regulations. According to this report:

"Problems remained, including (…) frequent website bans and the fact that freedom of expression and media freedom are in practice hampered by the approach taken by the audio-visual regulator and the judiciary."

"Website bans of disproportionate scope and duration continued. The Telecommunications Communication Presidency ("**TİB**") *has not published statistics on banned sites since May 2009. An independent website that monitors banned sites stated in September (2013) that more than 32,000 sites were not accessible in Turkey."*

The Progress Report also addressed the desired and expected reforms and determined the European Union norms as the standard to attain.

"The Law on the Internet[1]*, which limits freedom of expression and restricts citizens' right of access to information, needs to be revised in line with European standards."*

At this stage it is necessary to point out the decision of the European Court of Human Rights (the "**Court**") on the *Ahmet Yıldırım v. Turkey* case where the Court has highlighted that blocking access to "Google Sites" through an administrative authority (that is, TİB) decision led to a violation of Article 10 (freedom of expression) of the European Convention on Human Rights (the "**Convention**").

In the related case the Court reiterated that a restriction on access to a source of information was only compatible with the Convention if a strict legal framework was in place regulating the scope of a ban and affording the guarantee of judicial review to prevent possible abuses.

[1] Refers to the Internet Law.

However despite the determinations above and the Turkish public opinion's intensive expectations, the long-awaited amendments are on the eve of a converse modification; in other words the amendments are going to be made to the detriment of the freedom of expression. The draft amendment (the "**Draft Law**")[2] which has been brought to the Parliament's agenda without being debated in public opinion and without obtaining the experts', lawyers', non-governmental organizations' views and which has been approved in the meeting of the General Assembly on 5 February 2014 is not reflecting the democratic practice and is problematical as far as the enacting techniques are concerned. Furthermore, although the Draft Law was an independent proposal in its first aspect, it has been added to the "omnibus bill" draft during the negotiations which took place in the Parliament Commissions.

The Draft Law that we are analyzing below in accordance with the version published on publicly available sources is in essence stipulating two provisions which will be vigorously debated: (i) the enlargement of the direct power accorded to the regulatory authorities to block access without the requirement of a court decision; (ii) the delivery by the internet actors (content/site/access providers) following the request of the regulatory authorities, therefore TİB, of the data which belong, for instance, to internet users (traffic data etc.).

A. Amendments

1. Obligation to Inform (Article 3)

The Draft Law adds a new provision to the Internet Law. Accordingly, it will become possible to make notifications through e-mail or other communication means to persons performing activities under the Internet Law, whether in Turkey or abroad, using the data obtained from the communication means, domain name, IP address and similar resources shown on their website. In other words, the points to create contact with the internet actors have been re-determined. The notification which will be made to the relevant persons is important as it will allow the beginning of legal proceedings.

2. Obligations of the Site Provider[3] (Article 5)

The Draft Law is widening the obligations of the site provider as explained below. In summary; the current Internet Law does not bring any obligation requiring the site providers to supply information to TİB upon being asked as is the case with the obligation to preserve the traffic data and to take the necessary measures prescribed by TİB.

- Traffic data: Site providers, along with the content providers, will now be under the obligation to preserve the traffic data[4] with regards to the service they provide for a period of one to two years; more precisely, in accordance with the duration which will be further determined by the regulation within the given framework. Furthermore, they will be responsible for the accuracy,

[2] After being approved by the General Assembly, the Draft Law will now be submitted to the approval of the President. If the President approves such, the Draft Law will enter into force after being published in the Official Gazette. Therefore the text to be reviewed by the President is technically no longer a draft and the "Draft Law" term is used for ease of understanding.

[3] For the avoidance of doubt, this definition (site provider) also covers hosting providers.

[4] Data which includes the parties, time, duration, type of service, transferred data, and point of connection with regards to all types of access realized on the internet platform.

integrity and confidentiality of this data. Site providers will deliver to TİB the data required by TİB and will take the measures prescribed by TİB. In other words, TİB will be able to request the traffic data without a prior court decision and will be able to impose an administrative fine of TL 10,000.00 up to TL 100,000.00 upon the site providers who fail to comply with its request.

The envisaged amendments constitute a violation of the European Union norms. Indeed, according to the Article 6 of the Directive 2006/24/EC (the "**Data Retention Directive**"), the lower limit to preserve data, which also includes the traffic data, is 6 months in contrast with the 1 year limit stipulated in the Draft Law. Moreover, the power given to TİB with the Draft Law, to request traffic data without a prior court decision does not correspond with the essence of the Data Retention Directive as the relevant European Union norms require clear and well-defined restrictions for the access to these data by national authorities. According to Article 4 of the Data Retention Directive, even though the subject is left to the national laws of the member states, as specified in the same Article; the Convention and Court decisions will constitute a guiding principle for the legal system which will be adopted at the national level and the national authorities will request such data only in specific cases and under limited circumstances. That is to say, the provision according to which the data requested by TİB will be communicated to TİB without making any specific assessment case by case is incompatible with Data Retention Directive.

- To remove illegal content that was published: Without determining if it is technically possible or not, the site providers will remove the illegal content publication.

- Classification: Finally, in a framework which will be later determined by the secondary legislation, the site providers will be classified based on the nature of the activity that they perform. This will result in a different treatment between websites providing hosting services and online forum or internet sites which allow people to express their opinion (*Ekşisözlük* for example).

3. The Obligations of the Access Provider (Article 6)

The Draft Law aims to increase the obligations of the access provider.

- The blocking of alternative access means: The access providers shall take necessary measures to block alternative access means and possibilities concerning publications to which access has been blocked. There is no clarification on what the alternative access means in the context of the Draft Law. In this regard, the decision by a court to block the access to the website "Ktunnel.com", a proxy server, represents a clue on the measures which will be used with the adoption of the Draft Law. The access providers who do not take necessary measures in order to block alternative access possibilities will face the risk of an administrative fine of TL 10,000.00 to TL 50,000.00.

- The supply of information: The access providers will give the required information to TİB (traffic data etc.) in the required form and will take the measures prescribed by TİB. As stated above,

this broad authority given to TİB with the Draft Law is incompatible with the spirit of the Data Retention Directive as the relevant European Union norms require clear and well-defined restrictions for the access to these data by national authorities.

4. The Establishment of the Access Providers' Union (Article 6/A)

The establishment of an Access Providers' Union (the "**Union**") is envisaged for the implementation of the decisions to block the access; more precisely the blocking decisions which do not fall under the scope of Article 8 of the Internet Law (decisions to block access with regards to catalogue crimes). The Union will be incorporated as a private law legal entity located in Ankara. The procedures and principles of the Union will be determined by a bylaw to be drafted by the Information and Communication Technologies Authority (the "**ICTA**"), and the amendments to this bylaw will be subject to the approval of the ICTA. The internet service providers will not be able to operate unless they enroll as the members of the Union. The Union will be configured as a free establishment constituted of internet service providers and other people giving internet access service in appearance which will perform its functions under the state authority.

- Decisions to block access: The decisions to block access which are outside the scope of Article 8 will be implemented by the access providers. All equipment and software necessary for the implementation of decisions will be provided by the access providers.

- Notification: The decisions in question will be directly sent to the Union for implementation. In this respect, a notification made to the Union will be considered as made to the access provider and the legal proceeding will be deemed launched.

- Objection: Where the decisions sent to the Union are regarded as contrary to the law and regulations, the Union will have the capacity to object to the relevant decision. However, as the form and procedure of the objection is not determined in the Draft Law, it remains as another matter in question to determine how reliable an objection mechanism is in a structure tied to the ICTA's authority. Moreover, as indicated below in our explanations concerning Article 9 and Article 9/A of the Draft Law, the access providers have to implement the decision sent to the Union on blocking the access within maximum four hours. Therefore, before any objection literally takes place, the decision on blocking the access will be implemented. Finally, from the Draft Law it seems only the Union has the right to object to the decisions which are considered unlawful and the access provider does not have such right. This situation is detrimental to the access providers and means that the right to object is taken away from their hands and given to the Union.

5. The Obligations of the Mass Use Providers (Article 7)

The Draft Law imposes new burdens on the mass use providers (internet cafes etc.) heavier. The mass use providers will have to take the measures to be determined by the secondary legislation, concerning the access to contents which constitute a crime and they will have to keep the access records with regards to the individual use. In addition, mass use providers with commercial purposes

are under the obligation of taking the measures which will be determined by the secondary legislation with regards the protection of the family and kids, the prevention of crime and the determination of criminals. Administrative fines or serious sanctions such as closing the business up to three days will be imposed on the mass use providers in violation of these obligations.

6. The Decision to Block the Access and its Implementation (Article 8)

The Draft Law which envisages to modify Article 8 and 9 of the Internet Law and to add Article 9/A therein, must be taken into consideration with the insertion which is made in Article 2 of the Internet Law. In this vein, the decision to block the access will be implemented by (i) DNS blocking; (ii) IP blocking; (iii) URL blocking and other similar methods. DNS blocking and IP blocking are the current measures taken in the event of a violation and the Draft Law is being criticized for involving URL blocking (solely for the publication where the content constituting a violation exists) in these measures. First and foremost, URL blocking will enable the authorities to reach all the connection contents of the users who want to display that publication and will make it possible to analyze all the data. As a consequence, personal data of the users will be under threat. Another criticism is that blocking a sole publication gives rise to practices which will then end up in censorship. Whereas blocking access to the entire website can be easily remarked by the users and can create a censorship perception; blocking only one publication will not have the same effect and may reduce sensitiveness and awareness over the issue of censorship.

- Ahmet Yıldırım v. Turkey Decision: Article 8 of the current Internet Law has been severely criticized by the Court in relation to the standards for blocking access. Although the Court rendered in its decision in relation to the case filed by the applicant Ahmet Yıldırım against Turkey that, blocking access to "Google Sites" through an administrative authority (TİB) decision resulted in a violation of Article 10 (freedom of expression) of the Convention; no modification has been deemed necessary in the Draft Law with regards to the standards for blocking access. As stated above, the Court reiterated in its decision that a restriction on access to a source of information was only compatible with the Convention if a strict legal framework was in place regulating the scope of a ban and affording the guarantee of judicial review to prevent possible abuses. In the last instance, it is evident that the Draft Law stands far away from diminishing the restrictions and providing a legal control guarantee against abusive situations.

- Modifications on blocking access: Although there is no amendment in the Draft Law modifying the standards for blocking access, there are two issues which will alter the current situation with regards to blocking access. Accordingly, site and access providers who do not comply with the precautionary measures to block access will no longer be sentenced to an imprisonment and instead a judicial fine will be imposed on them. The prison sentence stipulated in the Internet Law with an upper limit of 2 years was, in practice, being applied as a judicial fine which would go up to 770 days; whereas the Draft Law regulates that the responsible parties will be sanctioned with a judicial fine from 500 days up to 3,000.

The second issue which is envisaged to be modified is to give discretion to the competent authorities on whether the access will be blocked for a limited time. Based on the previous experiences with the competent authorities, it is thought that a sanction for a limited amount of time will not be frequently used.

- Prostitution: Article 8/4 of the Internet Law is also modified, and TİB will be ex officio authorized to block access to publications generating the crime of prostitution in addition to the crimes which constitute sexual abuse of children and obscenity.

7. Blocking the Access in the Case of Violation of Personal Rights (Article 9)

The related Article of the Draft Law envisages modifying entirely the current provision of the Internet Law.

- Applying to Court: The current Article entitled "The Removal of the Content from the Publication and Right of Reply" regulates that people who think that their rights have been violated due to a content published in a website can request, at first, the removal of the publication by reaching the content/site provider and the publication of a text drafted by themselves. In case that request remains unanswered it becomes possible to file a lawsuit. Under the Draft Law, people who think that their personal rights have been violated will directly, on the basis of Article 9, be able to file a lawsuit. As it is stipulated that the judge will decide within 24 hours, it is considered that the workload of the courts will increase after the amendment.

- Blocking URL: The decision to block access within the scope of Article 9 will, in principle, be realized on the URL (solely for the publication where the content constituting a violation exists). Aside from our explanations above regarding the problems that may arise in practice as a consequence of blocking URL; another deficiency of the Draft Law is to still allow the judges to block the access to the entire publication in a website with the ambiguous wording of "in compulsory situations, by providing a justification". Taking into consideration the decisions rendered by Turkish judges such as "blocking YouTube access worldwide" which legal standards put aside are not technically possible; it is easy to predict that there may be blocking measures being applied to personal social media accounts.

- The transmission of the documents to the Union: The judge will directly send to the Union his/her decision to block the access within the scope of Article 9. The access provider will implement the decision communicated by the Union within maximum 4 hours. It also possible to understand from here that the objection right granted to the Union explained in Section 4 is a mere formality as in practice the access will be blocked before the objection is even made.

- Blocking access to other websites: If (i) the publication which is the cause of the violation on the basis of the judge's decision to block the access within the scope of Article 9, or (ii) any other publication of the same nature have been published in other websites; it will be possible to apply to the Union with the same decision. This application will result in the extension of the blocking access measures to the other websites.

8. Blocking the Access due to the Right of Privacy (Article 9/A)

With this new Article, powers of TİB with regards to blocking access have been significantly extended with reference to the "right of privacy". The lack of definition of this notion in the Draft Law has been criticized on the basis that it may lead to a wide interpretation to the detriment of the freedom of expression.

- Application to TİB: The person who is of the view that his/her right of privacy has been infringed due to a publication on the internet will be able to file an application directly to TİB and to request access blocking. The decision to block access which will be given on the ground of Article 9/A will be applied as a URL blocking (solely for the publication which contains the content consisting in a violation). Needless to say we addressed on Section 6 the concerns in relation to blocking URL. Last but not least, the applicant will be required to deliver certain information (the URL of the publication, explanation concerning the infringement of the right, identity information) as part of the application before TİB.

- Transmission of the request to TİB: TİB will send the submitted request within the scope of this Article immediately to the Union for its implementation. The access provider will implement the decision communicated by the Union within maximum 4 hours. Therefore all applications which fulfil the formal criterions will be considered automatically as blocking access decisions. It is possible to understand from here that the Union's right to object mentioned in Section 4 is a mere formality as in practice the access will already be blocked before the objection is made.

- The Judge's Decision: People who apply to TİB according to Article 9/A will present their request, within 24 hours following the application, to the judge of the competent criminal court of peace. The judge will decide within 48 hours and deliver this decision directly to TİB, otherwise the decision to block the access will be automatically cancelled. It is important to note that only TİB will be able to appeal against the judge's decision; thus according to the text, the content provider who's subject to the measure or other beneficiaries will not have the right to object. In other words, if TİB's decision is approved by the judge; there will be no way of objection against the decision on blocking access. It is argued that this structure constitutes a violation of the Convention as well as the Constitution of the Republic of Turkey with regards to the freedom of expression and the right to a fair trial.

- In case of risk in delay: The provision in the Draft Law according to which the access will be blocked following the order of the TİB President in case of risk in delay has been criticized on the ground that it constitutes a violation of Article 10 of the Convention on the freedom of expression as well as an infringement of the Constitution of the Republic of Turkey with regards to the "Freedom Expression and Dissemination of Thought (Article 26)" and of the "Protection of the Means of Press (Article 30)". Above all, the "right of privacy" is an ambiguous term which is not defined under the Draft Law. No piece of legislation exists in the European Union where the head of an administrative body is granted a direct authority to block access by reference to such an ambiguous term. Even though it will be possible to object to a decision given by TİB

President before the competent criminal court of peace; the measure of blocking access will already be imposed before this objection is made.

B. Conclusion

The Draft Law is being criticized due to the fact that it enables the limitation of the fundamental rights and freedoms by the use of undetermined and open-ended terms, it places an unfair burden on access providers, site providers and mass use providers and creates a clear divergence from the European Union values and regulations and in particular from the Convention. Instead of the Draft Law of which many provisions have been debated on the ground that they are unconstitutional and of the Internet Law which has been already labelled as in contradiction with the Convention; there is a growing need for a law which would adopt freedom as a principle and the limitations as an exception. A legal text which would be in conformity with the dynamic, fast paced and constantly evolving nature of the internet would constitute a substantial improvement as far as the fundamental rights and freedoms are concerned.

Güner Law Office...
Levent Caddesi Alt Zeren Sokak No.7
Levent Istanbul 34330 Turkey
Tel: +90 212 282 4385
Fax: +90 212 282 4305
info@guner.av.tr
eg@guner.av.tr