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## Turkish Constitutional Court Annuls Advertisement Board's Power to Block Access to Websites

Turkish Constitutional Court ("Court") annulled the paragraph 12 of Article 77 of the Consumer Protection Law, which granted the Advertisement Board the power to partially or entirely block access to websites containing unlawful advertising content. The relevant rule was considered to be unconstitutional pursuant to the Court's decision dated 13 September 2023 and numbered 2022/70 E. - 2023/152 K. which was published on the Official Gazette dated 27 October 2023 and numbered 32352.

The Court, in its decision, stated that "It is understood that the power granted to the Advertisement Board is not only limited to blocking access to the relevant commercial content that is found to be violating, but it can also be enforced by way of blocking access to the entire publication, part or section of where such violating commercial advertisement content was placed. In this framework, it is clear that the form of restriction envisaged in the subject rules will lead to the complete elimination of the exercise of freedom of expression and the liberty of labor and freedom to establish private enterprises vested with the users of the publication, section, or part to which access is entirely blocked. The rules do not provide any alternative restriction method that can be applied without blocking access to the entire website, such as informing the operator of the website where the content is available about the relevant content, notifying the owner of the content, or warning about the removal of the content before imposing such restriction. In this respect, the fact that the rules do not include alternative methods that cause less damage and that make it possible to achieve the desired goal, aimed to be achieved by limiting the freedom of expression and the liberty of labor and establish private enterprises, with a lighter restriction reveals that the restriction envisaged by the rules is not necessary within the context of proportionality." Accordingly the Court ruled that the scrutinized legal rules do not meet the necessity principle, which is the subprinciple of the proportionality principle that is one of the elements required to be satisfied under the Constitution for a limitation of right to be constitutionally compliant. Hence, the Court found that the subject rules are contrary to Articles 13, 26 and 48 of the Constitution.

Pursuant to the decision, the part of the subject provision stipulating that "In addition to these penalties, if the violation is committed on the Internet, the Advertisement Board may decide to block access to the publication, section, part (in the form of URL, etc.) of where the violation occurred. However, in cases where it is technically impossible to block access to the violating content or where the violation cannot be prevented by blocking access to the relevant content, the Advertisement Board may decide to block access to the violating content to the violation access to the relevant content, the Advertisement Board may decide to block access to the entire website where the violating content is placed." was annulled pursuant to their

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unconstitutionality. The remainder part of the cited provision stipulating that "This decision shall be conveyed to the Association of Access Providers in accordance with Article 6/A of the Law of Publications on the Internet and Combating Crimes Committed through These Publications dated 4/5/2007 and numbered 5651. This decision may be appealed before the criminal judge of peace. The decision of the criminal judge of peace may be appealed pursuant to the provisions of the Law of Criminal Procedure dated 4/12/2004 and numbered 5271." was annulled as these sentences are no longer enforceable due to the annulment of the preceding sentences. Since the legal gap, that might arise due to the annulment of the subject rules, is deemed to damage public interest, it has been decided that the Court's decision will enter into force nine months after publication of the annulment decision on Official Gazette. Accordingly, the Court's annulment decision will be effective as of 27 July 2024.

In reference to the legal framework prior to the subject annulment decision, the annulled provision was introduced to the Consumer Protection Law via Article 15 of the Law Amending the Consumer Protection Law and Property Ownership Law and was entered into force as of 1 October 2022. In the parliamentary working reports prepared with respect to the amending law proposal, the legislative motive for introducing the amended administrative sanction mechanism by inclusion of blocking access power was indicated as the need to provide consumers with stronger protection tools and the need to restructure administrative sanctions taking into account the seriousness of the violating act, fault degree and economic status of the wrongdoer and following the proportionality and deterrence principles.

In principle, the annulled provision prescribed a staggered administrative sanction mechanism. According to the annulled provision, the power of the Advertisement Board to block access to the entire website would not arise unless it was technically impossible to partially block access to the relevant content or partial access blocking would not suffice to prevent the violation. In other words, Advertisement Board's power to block access to the entire website was subject to the specific conditions set forth under the law. In practice, it was observed the Advertisement Board thoroughly dealt with enforcing the annulled provision and did not tend to entirely block access to websites containing violating content. Instead, in such cases, the Advertisement Board first reached out to advertisers of the complaint content with request for explanatory information and other proof, and primarily imposed the lighter sanction of blocking access to the relevant publication, part or section of where the violating content was placed rather than automatically blocking access to the entire website.

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Nevertheless, it is assumed that the fact that sub-conditions triggering the Advertisement Board's power to block access to the entire website, namely, "technical impossibility to partially block access to the relevant content" and "insufficiency of blocking access to the relevant content for prevention of the violation" were not precisely substantiated under the law, and the risk of unpredictability arising from the fact that limits of the Advertisement Board's power were not clearly and comprehensively established thereunder had an impact on the Court's rationale to annul the subject rules. It is worth mentioning that the Court did not rule that the mere fact that the Advertisement Board was equipped with the power to block access to websites was unconstitutional per se, however, the Court concluded that the structure of the subject administrative sanction was not in compliance with proportionality and necessity principles. If the legislative authority intends to enact a similar administrative sanction mechanism with the inclusion of blocking access power, within this nine months transition period, it could be sensible to establish a more substantiated balance between the principle of protecting consumers and other constitutional freedoms and to restructure the administrative sanction mechanism taking into account of proportionality and necessity principles as addressed in the Court's decision, by simultaneously maintaining the effective appealing mechanisms against Advertisement Board's decisions as previously conferred under the annulled rules.