**Summary & Outcome**

On October 3, 2022, the Supreme Court of Spain ordered the partial unblocking of the website of Women on Web International Foundation (“WOW”), which published information on sexual and reproductive rights and offered mifepristone and misoprostol, drugs commonly used to end a pregnancy, in exchange for a monetary donation. The case arose after the Spanish Agency of Medicines and Medical Devices (“AEMPS”) blocked access to the website as a precautionary measure. After conducting an administrative procedure, the AEMPS ordered the interruption and withdrawal of information related to the sale of medicines through the foundation's website and maintained the blocking of the entire website. Consequently, WOW appealed the decision to the Central Contentious-Administrative Court, and the National High Court dismissed the appeal on the grounds that the requirement of judicial intervention did not apply to this case. This was because the administrative decision to block the website did not affect the rights and freedoms protected by the reservation of jurisdiction established under Article 20 of the Constitution.

In its decision, the Supreme Court, by adopting a purposive interpretation of Article 20.5 of the Constitution, determined that websites must be considered within the scope of the definition of a “means of communication”. Therefore, the Court held that when a website's content constitutes expression or information, the decision on whether a blocking of the site is valid must be judicially determined. Additionally, the Court held that while the publications through which the Foundation offered the drugs in exchange for monetary compensation fell outside the scope of Article 20.5 of the Constitution, the administrative authority had failed to respect the principle of proportionality, by blocking the access to the entire website, rather than solely to the section, which had an independent URL from the main site, where the unlawful activity was contained.  For the Court, it would have been sufficient to interrupt access exclusively to this section rather than the whole website.

**Facts**

The appellants, WOW, is an organization based in Canada that seeks to advise women on sexual health and reproductive rights. While it has no physical establishment in Spain, it operates digitally through a Spanish-language website.

The AEMPS is an autonomous Government agency responsible for regulating and authorizing clinical trials and commercializing sanitary products for human use.

The AEMPS became aware that through its website, WOW offered the possibility of obtaining mifepristone and misoprostol, which can be used to end a pregnancy. The marketing of both drugs is prohibited in Spain and, in any case, cannot be administered without a doctor's prescription. While the website did not advertise the sale or establish a price, it contained an application form to obtain the drugs, which stipulated that the request had to be accompanied by a donation of €50 to €70.

On 29 May 2019, the AEMPS sent an email to WOW, warning the Foundation that the marketing of the drugs by online means was illegal in Spain.

On June 25, 2020, as a result of WOW not complying with the request, the AEMPS initiated an administrative procedure pursuing the interruption or withdrawal of the information and marketing of the drugs. As a precautionary measure, it also ordered internet access providers in Spain to interrupt access to WOW's website. On September 23, 2020, the Director of the AEMPS issued a resolution ordering the withdrawal of the service consisting of the sale of drugs through the website in order to safeguard public health. The effects of the precautionary measure blocking access to the entire website were maintained. Consequently, WOW presented an appeal for reconsideration, which was rejected.

As a result, the foundation filed a contentious-administrative recourse. Nevertheless, on March 9, 2021, the appeal was dismissed by a judgment of the Central Contentious-Administrative Court no. 10. The First instance Court determined that contrary to what the Foundation claimed, there had been no need for judicial intervention in the decision to block the website since such a measure did not affect the right to freedom of information or expression. Further, the Court determined that the factual circumstances of the case were related to the protection of public health, allowing the administrative authority to interrupt or restrict website access legally. Moreover, the Court stressed that the marketing of the drugs in question was prohibited in Spain and indicated that the qualification as a "donation" of the amount requested to obtain the drugs was not convincing. The Foundation appealed the decision; however, the ruling was upheld. On January 13, 2022, the First Section of the Court of Appels admitted WOW’s submission.

**Decision Overview**

The main issues for the Court to examine in this case were whether blocking access to a website required judicial authorization and whether the blocking of WOW's entire website was disproportionate.

In its submission to the Court, WOW alleged that the contested judgment infringed Article 20 of the Constitution, Article 10 of the European Convention on Human Rights (ECHR), and Articles 8 and 11 of Law 34/2002, stressing that a judicial body should have determined whether the blocking of the website was appropriate. The Foundation claimed that although the administrative measure order was directed to suspend the online marketing of drugs, it unjustifiably blocked access to the entire website. Moreover, WOW argued that the administrative measure and the judgment infringed the principle of proportionality since the purpose of the precautionary measure could have been achieved by limiting the blocking to the section entitled "I need an abortion," where the Foundation offered the drugs. In the same vein, WOW added that such a section had a separate URL from the main website, which made it possible to block access only to that section without affecting the rest of the website. Further, the Foundation argued that in light of the Royal Decree 81/2014 and Articles 56 and 59 of the Treaty on the Functioning of the European Union, the contested judgment infringed on its right to freedom to provide services.

In turn, the State Attorney contended that contrary to what the Foundation claimed, judicial intervention was not necessary to substantiate the blocking of the website. Also, they claimed that the administrative measure under appeal was legal and proportionate.

Similarly, the Public Prosecutor noted that according to Articles 8 and 11 of Law 34/2002, in connection to Article 20.5 of the Constitution, judicial authorization for blocking access to websites was only required when the rights to freedom of information and expression were affected. In the Prosecutor's view, in the instant case, judicial authorization was not needed since the purpose of the website's content was to carry out illegal activity. However, the Public Prosecutor believed that the contested administrative act and the judgment under appeal infringed the principle of proportionality because it would have been sufficient to block the section through which the Foundation offered the medications in question. Finally, the Public Prosecutor stated that the argument concerning the right to provide services should be rejected since WOW was a Canadian entity.

The Court started the analysis of this case by noting that marketing "mifepristone" and "mifepristone" through the WOW website constituted an illegal activity. The Court also noted that the sale of the drugs in question, the online commerce of pharmaceuticals, and the marketing of medications that do not bear the European Union stamp were prohibited in Spain. The Court agreed with the lower instance courts' view that labeling payment as a "donation" constituted a simulation. In the same vein, the Court stressed that even if it were not a simulation, the conclusion would not change because the free distribution of unauthorized medicines, even if not technically commerce, was still unlawful.

The Court then explained that Article 8 of Law 34/2002 allows blocking websites to safeguard public health and mandates judicial intervention to validate such blockings only when constitutionally required.

To unravel whether and to what extent the blocking of websites was subject to court warrants, the Court recalled that Article 20.5 of the Constitution prescribes that the seizure of publications, recordings, and other means of information could only be ordered by a judicial decision. However, the Court stressed that a literal interpretation of the Article was insufficient since the notion of what websites are and what their use entails could not have been conceived by the Spanish Constituent Assembly of 1978. Similarly, the Court pointed out that its own case law did not serve as a guide since it had never ruled on this specific question. Therefore, the Court determined that a purposive interpretation would potentially shed light on the issue. The Court first observed that the goal of Article 20.5 of the Constitution was to prohibit the administrative or governmental seizure of publications and noted that its origins could be traced as a reaction to arbitrary and abusive practices in the past. Thus, the Court explained that the seizure or dissemination of illegal publications was not constitutionally prohibited per se, and it was for administrative authorities to decide on the matter independently. The purpose of the latter, the Court remarked, was to curb administrative arbitrariness and, most importantly, to entrust the review of the facts and the weighing of interests to an impartial, independent authority that only responded to legal reasoning.

In the Court's opinion, websites fell into the category of "other media" within the meaning of Article 20.5 of the Constitution. Moreover, it considered that news, data, and factual judgments (information), as well as opinions, positions, and value judgments (expressions), circulate publicly through the Internet, and as such, websites played a role very similar to that of traditional media. Therefore, the Court determined that Article 20.5 of the Constitution applied to the blocking of websites. However, the Court cautioned that websites that did not contain information or content that constituted expression could not be characterized as "information media".

By applying the aforementioned considerations to the instant case, the Court noted that WOW’s publications about the properties of mifepristone and misoprostol were information, and advertising their use constituted expression. Nevertheless, the Court stated that offering the drugs online in exchange for monetary compensation was neither one nor the other. Instead, the Court held that using the website to make a contractual offer fell outside the scope of Article 20.5 of the Constitution. In the Court's opinion, Article 20.5 of the Constitution applied only when the purpose of publications, recordings, or other information was that of circulation of ideas, regardless of whether they dealt with facts or values. Therefore, the Court remarked that Article 20.5 allowed administrative determinations to block websites solely when no information or expressions are at play.

The Court then analyzed whether blocking access to a website to end an illegal activity carried out by means of it should only include removing the specific section of the website strictly necessary to achieve that purpose. The Court emphasized that the principle of proportionality required the least intrusive or burdensome measure. Yet, the Court specified that the principle applied in as much as it was technically possible to interrupt access exclusively to the section concerned. In cases where the only option was to restrict access to the whole website, the issue would require to be examined under the so-called "proportionality in the strict sense". Nevertheless, the Court stressed that regardless of which authority ordered blocking access to a website, the principle of proportionality must be respected. Thus, the Court explained that administrative authorities could unilaterally determine the suspension of a website only when the content in question did not constitute an expression or information. Likewise, the Court emphasized that the illegality of the information or expression of the content did not exclude the need for judicial interference.

Additionally, by stressing the transcendence of delimiting the scope of the constitutional protection of websites, the Court cautioned the legislative branch that there were no established procedures that enabled judicial authorities to authorize the interruption of websites. Thus, the gap in procedural law could eventually impede the material application of the safeguards enshrined in Article 20.5 of the Constitution.

Focusing on the immediate case, the Court recalled that both the precautionary measure adopted in the administrative proceeding and the resolution ordering the suspension of WOW's website was carried out without any judicial authorization. The Court stressed that along with the marketing of the drugs online, the Foundation's website contained information, recommendations, and opinions on sexual health and reproductive rights, which undoubtedly fell under the category of information and expression. Therefore, their interruption could not be done legally without prior judicial authorization. Moreover, the Court emphasised that organizations that promote the so-called "reproductive rights" carry out an activity that has a political dimension in contemporary society and demand special attention. Finally, the Court noted that if the AEMPS had only suspended access to the section of the website where the drugs were offered in exchange for cash donations, there would have been no need for judicial intervention.

In light of the above, the Court decided to partially uphold the contentious-administrative appeal so that the decision of the Director of the AEMPS of September 23, 2020, could be annulled in all that exceeded the mere interruption of access to the contested section of the website. Likewise, the Court ordered the annulment of the interim measure adopted during the administrative proceedings.