Permanent Representation
of Turkey
to the Council of Europe

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Strasbourg, 6 April 2016

Dear Secretary General,

I have the honour to refer to your letter of 10 February 2016 and transmit at annex the comments by our relevant authorities concerning the Comparative Study on blocking, filtering and take-down of illegal internet content in the member States of the Council of Europe.

Please accept, Secretary General, the assurances of my highest consideration.

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Encl.

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Comments by Turkish Ministry of Justice on the Comparative Study on blocking, filtering and take-down of illegal internet content

Our observations on the Swiss Institute of Comparative Law (SICRL) Report's findings which fall within our field of duty are as follows:

1) Even though some criticisms against the Law no. 5651 were made in page 689 et seq. of the Report with respect to freedom of expression, the criticisms in question were dealt with by virtue of the amendments made to the Law no. 5651 by the Laws no. 6518 and 6527. Namely:

With the amendments introduced, the Law no. 5651 was brought into compliancy with the wording and spirit of Article 10 of the European Convention on Human Rights ("the Convention") since the Law, as it is, enshrines the principles of "restriction of fundamental rights and freedoms by law", "reasonableness" and "proportionality".

Within this scope, the fundamental features of the amendments can be listed as follows:

- The legal foundation which would enable effective operation of the notice and take down system was strengthened.

- Prison sentences were abolished and custodial sentences were commuted to fines.

- Active and prompt implementation of measures by the civil initiative by means of establishing a union of access providers was adopted as a rule.

- Rendering blocking of access decisions in a limited manner for a certain period of time rather than for an indefinite period was enabled.

- It was enabled to effectively eliminate violations of personal rights and the right to privacy in the Internet with proportional measures within a very short time.

- It was set out that the blocking of access decisions could principally and essentially be rendered for specific URL addresses and only in respect of the publication, section or part which is in breach of a right by means of employing the method of blocking of access to the content, but that where it is strictly necessary, access to the entire website could be blocked as a last resort.

- It was made easier for hosting service providers to carry out activities within the country, and the requirement to obtain a certificate of activity was abolished and replaced by the notification procedure.

The second significant amendment to Law no. 5651 was introduced by Law no. 6639, dated 15 April 2015. Article 8 § A was added to Law no. 5651 by Law no. 6639.

In making these amendments, the criteria of the Convention and the European Court of Human Rights ("the ECtHR" or "the Court") were taken as a basis in terms of substantive and procedural aspects. Thus, it was aimed to ensure that protective measures can be taken with respect to violations that can occur in the Internet within a short time on one or several of the grounds of protection of national security and public order and prevention of crime which are

set out as exceptions in both Article 22 of the Turkish Constitution concerning the freedom of communication and Article 10 of the Convention.

With respect to the procedural aspect, in the amendments in question, the principle of "limitation of fundamental rights and freedoms by law" and the principles of "reasonableness" and "proportionality", which are taken as a basis by the Court in respect of the limitation of freedoms, were complied with.

2) With respect to the criticisms made in page 690 of the Report that the concerned persons are not notified of the decisions on blocking of access rendered by Magistrate Judges in criminal matters and that filing an objection against the decisions does not constitute an effective and expeditious "appeal" remedy:

Pursuant to Article 34 of the Code of Criminal Procedure ("Law no. 5271" or "the CCP"), all kind of decisions rendered by the judge and courts, including dissenting opinions, must be delivered in a written form and contain the motives. While writing the motives, Art. 230 shall be considered. The duplicates of the decisions shall also include the dissenting opinions. The decisions shall contain explanations on the legal remedies that are open to the parties, the time limits for the motion, where to apply and formalities of the application.

Explanation of decisions and their notifications is regulated in Article 35 of the CCP.

According to this Article, the decision rendered in the presence of the related party shall be explained to him orally, and if he requests so, he shall be furnished with a duplicate of the decision as well. Decisions rendered by the judge or the court, which may be challenged, shall be notified to the related party, if he is not able to be present; decisions related to the measures of protection are exempted from this rule.

Procedure of notifications and correspondence is regulated in Article 36 of the CCP. The presiding judge of the court or the judge shall make all manner of notifications or correspondence with real or private persons or public legal entities and state departments and establishments. Decisions to be executed shall be forwarded to the office of the chief public prosecution.

Decisions, which are subject to a motion of objection, are regulated in Article 267 of the CCP. According to this Article, decisions rendered by the judge, and if the code opens this remedy, decisions rendered by the court may be subject to objection.

The procedure of objection and the inspection authorities are set out in detail in Article 268 of the CCP.

According to this Article, if the Code did not regulate with a special regulation, objection against the decision of a judge or a court shall be filed through rendering a written application or orally while the oral submission shall be taken into records with the authority that rendered the decision within seven days after the interested parties had learned about the decision, as ruled in Article 35. The president of the court or the judge shall approve the submission or the signature, which had been taken into the records. The judge or the court, whose decision had been subject to objection, shall correct the decision, if he determines that the objection is justified; otherwise shall send the application in at most three days, to the authority that has jurisdiction to make the inspection on the objection.(...)

The competent authorities to inspect an objection are explained in detailed in paragraph 3 of the Article in question.

The effect of the objection on the execution of the decision is governed in Article 269 of the CCP. According to this Article, filing a motion of objection does not suspend the execution of the decision. However, the authority whose decision was subject to objection, or the authority that is going to inspect the decision, may make a ruling on suspension It was decreed in Article 270 of the CCP with the title line "Notification of the objection to the public prosecutor and the opposite party and inspection and exploration" that the authority who is going to inspect the objection may notify the objection to the public prosecutor and to the opposing party in order to give an opportunity of a written argument and that the authority may conduct inspection and exploration and may also give orders for those to be conducted, if it deems necessary.

Where the opinion of the public prosecutor is obtained upon an objection filed under Articles 101 and 105 of the CCP, the opinion in question shall be notified to the suspect, accused or his defence counsel. The suspect, accused or his defence counsel may submit their opinion within three days.

It is observed that the criticism that decisions lack reasoning is an expression which is of a general and abstract nature, that the court decisions which were taken as a basis in the Report with respect to the existence of reasoning are not annexed to the Report and that for this reason, this criticism is a heavy and abstract one encompassing all the decisions rendered by judges.

3) It was indicated in the paragraph, which concerns an individual application lodged with the Constitutional Court for the annulment of Article 8 § A of the Law no. 5651, in page 691 of the Report that "photographs of weapons carried by vehicles belonging to the National Intelligence Agency to the extremists fighting against the Bashar Assad regime in Syria were published in the Cumhuriyet newspaper", that "a decision on blocking the domain extension pertaining to the publication in question was rendered by the Office of the 8th Istanbul Magistrate Judge in criminal matters" and that "the objection filed against this decision was rejected by the Office of the 9th Istanbul Magistrate Judge in criminal matters without reasoning".

Instance courts are not required to respond to all the allegations raised by the parties, and it is sufficient for them to establish the reasons which provide the basis for the judgment. On the other hand, since the reasons given by the courts of lower instance in their decisions would have been accepted where decisions on upholding, dismissal of an objection or an application are rendered by the judicial authorities, giving reasons separately in these decisions is not required (*Ibrahim Atas*, the Turkish Constitutional Court, 2013/1235, 13 June 2013, § 25).

Indeed, the same view is enshrined in the case-law of the Court (*Van de Hurk v. the Netherlands*, 16034/90, 19 April 1994, § 61; and *Hiro Balani v. Spain*, 18064/91, 9 December 1994).

For this reason, the allegation that no justification was provided by the authority examining the objection in the said proceedings does not reflect the truth and it does not comply with the decisions of the Court, either. Since, as it is also mentioned above, the failure of the authority examining the objection to provide reasons is not a practice which violates the right to a fair trial according to the practices of both the Constitutional Court and the European Court of Human Rights.

4) The expressions that "the systematic problems indicated in the "*Ahmet Yıldırım v. Turkey*" judgment of the Court persist, the legislative amendments made following the judgment in question do not provide a detailed legislative framework and in this connection, the current legislation is not compatible with the findings in the decisions of the Court" were included in page 701 of the Report.

In this respect, the following points should be taken into account:
The amendments made to the Law no. 5651 by the Laws no. 6518 and 6527 with respect to the removal from publication of Internet content are explained in detailed above.

The amendments in question were introduced in the wake of the *Ahmet Yıldırım v. Turkey* judgment, and there is no judgment finding a violation rendered by the Court in respect of Turkey due to the fact that the latest version of the Law is being applied. For this reason, the expressions that the current legislation is not compatible with the findings in the decisions of the Court do not have any concrete basis.

Comments by Turkish Information and Communication Technologies Authority (TIB) on "Comparative Study on blocking, filtering and Take-down of illegal internet content"

In Turkey, with a view to combating illegal content on the Internet, the Law no 5651 on the "Regulation of Content on the Internet and Combating Crimes Committed Through These Contents" and subsidiary regulations provide for blocking based on a limited number of catalog offences pursuant to Articles 41 (titled "Protection of Family and Children's Rights") and 58 (titled "Protection of the Youth") of the Constitution, primarily focusing on the protection of children from sexual abuse and the prevention of illegal drug use.

The notice and take down procedure has been primarily adopted in these subsidiary regulations, which eliminates the risk of blocking an entire internet address. Internet actors such as content provider, access provider (service provider), hosting provider and mass use provider have been defined within the scope of the Law and their duties and responsibilities have also been specified.

Firstly, the sections "methodology" and "questions" of the work have been examined. The following issues have been contained in the "2.1. Blocking and/or filtering of illegal content" of the questions section:

Matters relating to the sections "the protection of national security, territorial integrity or public safety" and "the protection of health or morals" have been provided for under Article 8/A of the Law no. 5651, titled "Removal of content and/or blocking access where delays are prejudicial". In this context, removal of content and as a last resort, blocking access have been laid down on one or more of the following grounds: the right to life, protection of the safety of life and property of persons, the protection of national security and public order, prevention of crime or protection of general health.

Matters relating to the section "The prevention of disorder or crime" have been regulated by a limited number of catalog offences under Article 8 of the Law, based on Articles 41 (titled "Protection of Family and Children's Rights") and 58 (titled "Protection of the Youth") of the Constitution.

Matters relating to the section "the protection of the reputation or rights of others" have been laid down in Articles 9 and 9/A of the Law, as the right of those whose personal rights or privacy have been violated as a result of internet broadcasts to request the removal of such content from the internet.

Removal of content and blocking of access are measures which have been stipulated for a limited number of offences relating particularly to the protection of children in the online environment, national security and public order, personal rights and the violation of privacy under Articles 8, 8/A, 9 and 9/A of the Law no. 5651. Whereas, in many countries' practice, access to illegal content is blocked following the principle "any crime in real life is a crime on the Internet", in Turkey the legal context of sanctions in respect of an internet site has been circumscribed under the Law no. 5651.

In Turkey, all the measures taken pursuant to the Law relate to content which are the subject of a limited number of offences and as Turkey is a democratic state governed by the rule of law, the principles of proportionality, legality and transparency are followed. Within this framework,

the Law no. 5651 and the relevant practices are compatible with the provisions of Article 10 of the European Convention on Human Rights.

Whereas in almost all European countries the legal limits are not clear in respect of sanctions against illegal internet content and the principle of "any crime in real life is a crime on the Internet" is followed, in Turkey the margins are clear owing to a legal framework. Moreover, appeals to independent judicial bodies is available against all sanctions imposed on an internet site. The majority of measures for blocking access to a website require a court decision. Only some of the decisions of blocking access or removal of content under Article 8 of the Law for the protection of children in the online environment, based on Articles 41 (titled "Protection of Family and Children's Rights") and 58 (titled "Protection of the Youth") of the Constitution, can be taken by the Telecommunications and Information Technology Directorate. In case the content or hosting provider of these contents which constitute these crimes is located abroad or if such contents are solely for the purpose of the sexual abuse of minors, contain severe pornography or prostitution, the decision to block access can be taken *ex officio* by the Directorate, even when the content or hosting providers are located in Turkey.

In the implementation of the Law no. 5651, firstly the "notice and take down" procedure is applied, which eliminates the risk of blocking an entire internet address. However, if no response can be taken from the relevant content or hosting provider, measures are imposed on the relevant URL address relevant to the violating content. In cases where the notice and take down or, due to technical shortcomings, the URL measure cannot be imposed, the measure of blocking access is applied as a last resort. Therefore, utmost care is being taken for the principles of lawfulness and proportionality. However, the removal of content by the notice and take down method and avoiding any further sanctions can only be achieved if the relevant content or hosting provider fulfills its responsibilities.

In Turkey, 99% of the blocked sites relate to sexual abuse of minors, or those which contain severe pornography or prostitution, which could be easily accessed by children. Whereas in many countries a "404 Error" or similar messages are displayed when a website is blocked, in Turkey detailed information is displayed about the administrative or judicial decisions. Moreover, a search can be performed at the TİB portal http://eekg.tib.gov.tr to find out if there are any sanctions on a website, which is a clear indication of transparency.

Moreover, the Turkey section of the report has been examined in detail and many biased, false and unconfirmed information were found:

- On page 687, in paragraph 3 of the section "1. Legal Sources", it has been alleged that internet cafes and other mass use providers, whether commercial or not, are obliged to use the filters and blocking systems approved by the state. The relevant Regulations of the Law only obligate commercial mass internet providers, including internet cafes.

- On page 688, in paragraph 4 of the same section, it has been stated that the Safe Internet Service which came into force in 2011 is compulsory for all family members. In fact, the Safe Internet Service is, since its start, optional (upon request) for all users and has the flexibility to allow users to activate or deactivate at any moment they wish. Approximately two million subscribers are actively using this service completely on request.

- It is considered that in many parts of the report, the phrase "extensive blocking" has been used deliberately. However, the principles of clarity, lawfulness, proportionality and transparency

have been explained above in detail. 99% of the blocked sites relate to sexual abuse of minors, or those which contain severe pornography or prostitution, which could be easily accessed by children. Moreover, we cannot accept the description of imagery showing sexual abuse of children, particularly child pornography which is recognized as an offence in the entire world, as allegedly/so-called harmful contents.

- On page 691, paragraph 2, it has been stated that the blocking of access to Twitter and YouTube were not based on specific court rulings and that the decisions by the TİB were incompatible with Article 8 of the Law. In the process of enforcing these sanctions, the relevant content providers have been asked many times to remove such content by the TİB, based on court decisions and requests by public prosecutors. However, despite all efforts made in good will, almost none of the requests were met during that period concerning contents violating personal rights, privacy, confidentiality of investigations and which contained obscenity. Moreover, all of these sanctions were based on independent court decisions.

- On page 691, paragraph 3, it is stated that the TİB has been given broad powers under Article 8/A of the Law. In fact, the primary decision-maker under Article 8/A is also independent courts. No sanctions are imposed against ethnic or political sites or accounts under Article 8/A. All access-blocking or content removal requests are made within the context of national security, regarding sites or accounts affiliated with the PKK or ISIL, which are enlisted by the EU and the USA as terrorist organizations.

- On page 692, paragraph 2, the number of URLs blocked under Article 9 of the Law.