

**Analysis of the Draft Provision on the “Presentation of media services via Internet” to the Turkish Law No. 6112 on the Establishment of Radio and Television Enterprises and Their Media Services**

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**I. INTRODUCTION**

Historically, radio and television broadcasting has been subject to licensing laws and regulations in the light of the scarcity of available broadcasting frequencies. Where there are substantially more companies or media organisations who want to broadcast than there are frequencies to allocate, then the enactment of broadcasting licensing laws and regulations has been deemed to be justified. In fact, such laws exist in many OSCE participating States, including Turkey, due to the scarcity of available broadcasting frequencies. However, the problem of scarcity of available frequencies is not present on the Internet as “the Internet can hardly be considered a “scarce” expressive commodity”.<sup>1</sup> As will be assessed in detail below, the Turkish Parliament is currently considering a draft legal provision which would attempt to apply a traditional broadcasting licensing regime to media service providers on the Internet by giving extensive licence control powers to the Radio and Television Supreme Council (“RTÜK”), which is the Turkish state agency for monitoring, regulating, and sanctioning radio and television broadcasts.

The wording of the draft legal provision would cover any media service on the Internet transmitted to Turkey or targeting Turkey, whether in Turkish or any other language if it is a commercial transmission. Therefore, the new provision raises serious concerns in terms of existing OSCE media freedom commitments, Article 19 of the Universal Declaration of Human Rights, Article 19 of the International Covenant on Civil and Political Rights, Article 10 of the European Convention on Human Rights, as well as the case law of the European Court of Human Rights. As Turkey is one of the member states of the Council of Europe and has ratified the European Convention on Human Rights, this review will assess the compatibility of the draft provisions on licensing of media services via the Internet with Article 10 of the European Convention on Human Rights which guarantees the right to freedom of expression.

Article 10 of the European Convention on Human Rights on the right to freedom of expression states that “this Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.” However, any such licensing law needs to be “prescribed by law, pursue one or more legitimate aims under the third sentence of paragraph 1 of Article 10 or under paragraph 2 thereof, and also should be “necessary in a democratic society”.<sup>2</sup> Similarly, it is also necessary to assess whether such provisions are consistent with Article 19(3) of the International

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<sup>1</sup> US Supreme Court in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), p 869.

<sup>2</sup> *Meltex Ltd and Mesrop Movsesyan v. Armenia*, no. 32283/04, 08.06.2008, para 75.

Covenant on Civil and Political Rights (“ICCPR”) which Turkey has signed and ratified.<sup>3</sup>

## II. HISTORICAL BACKGROUND AND OVERVIEW OF LAW NO 5651

Turkey has extensive blocking, filtering and take down procedures for both allegedly illegal and harmful Internet content. Law No. 5651, entitled “*Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publication*”, is the primary piece of legislation for regulation of this area. Law No. 5651 was enacted in May 2007 and came into force in November 2007. This law was subsequently amended three times during 2014 and once during 2015, extending the scope of the original blocking measures. In its current version, Law No. 5651 includes four separate blocking measures through **article 8 (protection of children from harmful content)**, **article 8A (protection of national security, public order, protection of life and property as well as protection of public health and prevention of crime)**, **article 9 (violation of individual rights)** and **article 9A (violation of privacy of individuals)**. Furthermore, hosting providers are required by article 5(2) of Law No. 5651 to remove and take down content if legally notified to do so.

Subject to **article 8**, access to a website can be blocked with a court or administrative order if there is sufficient suspicion that certain crimes are being committed on that website. There are eight specific “catalogue crimes” that are included within article 8 with the aim of protecting **children from allegedly harmful content**. The so-called catalogue crimes are encouragement and incitement of suicide (article 84 of the Turkish Penal Code);<sup>4</sup> sexual exploitation and abuse of children (article 103(1) of the TPC);<sup>5</sup> facilitation of the use of drugs (article 190 of the TPC);<sup>6</sup> provision of dangerous substances for health (article 194 of the TPC);<sup>7</sup> obscenity (article 226 of the TPC);<sup>8</sup> prostitution (article 227 of the TPC);<sup>9</sup> gambling (article 228 of the TPC);<sup>10</sup> and crimes committed against Atatürk (Law No. 5816, dated 25/7/1951).<sup>11</sup>

Article 8 blocking provisions were extended in January 2008 and are also applicable to websites facilitating unlicensed or illegal betting on football and other sports. Additionally, websites that enable users to play games of chance via the Internet, which are based outside the Turkish jurisdiction and lack valid permission from the Turkish authorities, are also susceptible to blocking.<sup>12</sup> Other blocking provisions also exist with regards to alcohol and tobacco advertisement as well as the promotion of and advertisement of unapproved health products.

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<sup>3</sup> See General Comment No.34 on Article 19 which was adopted during the 102<sup>nd</sup> session of the UN Human Rights Committee, Geneva, 11-29 July 2011, at <<http://www2.ohchr.org/english/bodies/hrc/docs/CCPR-C-GC-34.doc>>.

<sup>4</sup> Article 8(1)(a)(1).

<sup>5</sup> Article 8(1)(a)(2).

<sup>6</sup> Article 8(1)(a)(3).

<sup>7</sup> Article 8(1)(a)(4).

<sup>8</sup> Article 8(1)(a)(5).

<sup>9</sup> Article 8(1)(a)(6).

<sup>10</sup> Article 8(1)(a)(7).

<sup>11</sup> Article 8(1)(b).

<sup>12</sup> Law Amending Some Acts to Harmonise Criminal Law No 5728, Article 256. Official Gazette, 23.1.2008, No. 26781.

Websites that carry content in breach of article 8 can be taken down if hosted in Turkey, or blocked through Internet service providers if hosted abroad subject to a court decision or subject to an administrative decision issued by the president of the Information and Communication Technologies Authority (“BTK”). Once notified, the Internet service providers and hosting providers are required to block/remove content within 4 hours of receipt of the order through BTK.<sup>13</sup>

Under **article 8A**, which was added to Law No. 5651 in April 2015, **access to content can be restricted for the protection of life and property, national security and public order, prevention of crime or for the protection of public health**. Compared to the other blocking provisions provided in Law 5651, under article 8A, removal or blocking of such content may be **requested by the Prime Minister Minister and/or relevant ministries (“executive decision”)** in cases of emergency, in addition to judges issuing such decisions. If the removal or blocking decision is requested by the Prime Ministry or the relevant ministries (“executive decision”), the President of BTK would notify the content, hosting and access providers about its administrative removal or blocking decision. The providers are required to remove or block content within 4 hours of notification.<sup>14</sup> The President of BTK is then required to obtain judicial approval from a Judge within 24 hours.<sup>15</sup> Judges are required to issue their decisions within 48 hours.<sup>16</sup> Content, hosting and access providers may be fined in the case of non-compliance with onerous administrative fines between 50,000TRY (approx. 10,000 EUR) and 500,000TRY (approx. 100,000 EUR) for the hosting providers as in the case of content providers.<sup>17</sup>

**Article 9** of Law No. 5651 which was introduced in February 2014 includes in addition to existing notice and take-down provisions for violations of individual rights, URL based blocking orders to be issued by Criminal Judgeships of Peace (single judge) for alleged violations of individual rights. In exceptional cases and when necessary, the Judge may also decide to issue a blocking order for the whole website if the URL based restriction is not sufficient to remedy the alleged individual violation. The blocking decision would be notified to the Association of Access Providers<sup>18</sup> which will then notify all access and Internet service providers. Access providers are then compelled by law to comply with the blocking order of the Judge within 4 hours of notification.

**Article 9A**, of Law No. 5651 which was also introduced in February 2014 includes a new blocking measure in relation to individual privacy violations. According to this new provision, individuals and legal entities who claim that their privacy has been violated through the Internet may apply directly to BTK to request that access to such content is blocked. Individuals and legal entities who claim that their privacy has been violated are then required to apply to a Judge at a Criminal Judgeship of Peace within 24 hours.<sup>19</sup> The judge is required to issue a decision within 48 hours.<sup>20</sup> In case of no

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<sup>13</sup> Article 8(5).

<sup>14</sup> Article 8A(1).

<sup>15</sup> Article 8A(2).

<sup>16</sup> Article 8A(2).

<sup>17</sup> Article 8A(5).

<sup>18</sup> Established by Article 6A, Law No. 5651 in February 2014.

<sup>19</sup> Article 9A(5).

decision being taken by a judge or if the application is rejected, the administrative blocking decision issued by the President of BTK would be nullified.

### III. ASSESSMENT OF APPLICATION OF LAW NO 5651 & INTERNATIONAL CRITICISM

Currently, access to approximately 167,000 domain names and websites are blocked from Turkey subject to article 8 and 8/A provisions of Law No. 5651. Almost 93% of these websites are blocked with administrative blocking decisions issued by BTK.<sup>21</sup> So far as the article 8/A decisions are concerned, almost 212 such decisions were issued since July 2015 and almost all of them were requested by the Prime Ministry. They were all executed by TIB/BTK and approved by Criminal Judgeships of Peace in Ankara.

137 of these blocking were issued by a single Criminal Judgeship in Gölbaşı, Ankara blocking access to 575 websites, 482 news articles, 1759 Twitter accounts, 736 tweets, 505 YouTube videos, 116 Facebook pages and 195 other content totalling 4368 separate Internet addresses.<sup>22</sup> Kurdish and dissident media is often the target of these blocking decisions. Subject to article 8/A requests from the Prime Ministry, Sendika.org, for example, was subjected to 61 separate blocking decisions and currently is available through sendika62.org.<sup>23</sup> Similarly, demokrasi.com has been subjected to 55 separate blocking decisions so far.<sup>24</sup> More notoriously, Wikipedia is currently blocked from Turkey subject to an article 8/A request from the Prime Ministry since 29 April, 2017 with an order of the Ankara 1<sup>st</sup> Criminal Judgeship of Peace. All the appeals against the blocking decision were rejected and several applications are currently pending with the Constitutional Court.

Furthermore, subject to article 9, Criminal Judgeships of Peace issued almost 10,000 decisions blocking access to almost 36,000 individual URLs in 2015. During 2016, the Criminal Judgeships of Peace issued almost 14,000 article 9 decisions blocking access to almost 50,000 individual URLs.<sup>25</sup> In total, almost 86,000 individual URLs are blocked from Turkey as of end of 2016. In terms of appeal involving article 9 decisions, 840 appeals were successful during 2015 and only 489 during 2016. Within this context, it should be recalled that the duties, competences and functioning of the Criminal Peace Judgeships has been subject to review by the Venice Commission which criticised the appeals mechanism with regards to the decisions of the Criminal Judgeships of Peace. In the Turkish system, a decision of a Criminal Judgeship of Peace is reviewed by another and same level Criminal Judgeship of Peace. According to the Venice Commission, this “horizontal appeals” system is concerning because of a “lack of appellate procedures to a superior court where the relevant measures go

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<sup>20</sup> Article 9A(5).

<sup>21</sup> See further US Bureau of Democracy, Human Rights, and Labor, Turkey Human Rights Report for 2016 available through <https://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper>.

<sup>22</sup> See further Akdeniz, Y., “Country Report on Turkey,” in Swiss Institute of Comparative Law eds *Filtering, blocking and take-down of illegal content on the Internet*, 2016, Council of Europe, pp 711-727 at <https://rm.coe.int/16806554bf>.

<sup>23</sup> Data compiled by the author.

<sup>24</sup> Data compiled by the author.

<sup>25</sup> Information is provided from confidential sources of the author. For further related statistics, see Venice Commission (2017), Opinion on the Duties, Competences and Functioning of the Criminal Peace Judgeships, CDL-AD(2017)004, para 20.

beyond pre-trial or interim measures and amount to final decisions with no review by a trial court”.<sup>26</sup> According to the Venice Commission, this has been a particularly problematic approach with regards to Internet blocking decisions issued by the Criminal Judgeship of Peace in Turkey.<sup>27</sup>

Article 8 of Law No. 5651 has been subject to review twice by the European Court of Human Rights. In *Ahmet Yıldırım v. Turkey*, the European Court, finding a violation of Article 10 of the European Convention on Human Rights, held that restricting complete access to an Internet platform is only compatible with the European Convention if a strict legal framework is in place regulating the scope of the ban and providing a guarantee of judicial review to prevent possible abuses.<sup>28</sup> Within this context the European Court of Human Rights concluded that **article 8** of Law No. 5651, which was the basis of the interference (the blocking measure), did not satisfy the requirements under the Convention and the case law of the European Court of Human Rights in terms of the “quality of law” principle prescribing such interference. The European Court also held that the judicial-review procedures concerning the access blocking of Internet sites were insufficient to meet the criteria for avoiding abuse, as **domestic law did not provide for any safeguards to ensure that a blocking order in respect of a specific website was not used as a means of blocking access in general.**<sup>29</sup>

Subsequently, in *Cengiz and Others v. Turkey*, the European Court also found a violation of Article 10 concerning the blocking of access to the YouTube platform from Turkey from 5 May 2008 until 30 October 2010.<sup>30</sup> The Turkish Constitutional Court has also addressed Law No. 5651 and with regards to complete access blocking to the Twitter platform, the Second Section of the Constitutional Court stated that blocking access to the Twitter platform was clearly unlawful and constituted a grave intervention on the freedom of expression of all users of social media platforms.<sup>31</sup> Similarly, in relation to the access blocking to the YouTube platform, the Grand Chamber of the Constitutional Court, with a 14-2 majority decision, concurred with the findings of the European Court in *Ahmet Yıldırım v. Turkey* that the provisions of Law No. 5651 did not meet the requirement of foreseeability and were not clear in terms of scope and substance in setting out the procedure for blocking access to websites.<sup>32</sup>

It should be recalled that long before these significant decisions were announced at both the Constitutional Court and the European Court of Human Rights level, the Representative of the Organization for Security and Co-operation in Europe on Freedom of the Media published a report on Law No. 5651 in January 2010 which

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<sup>26</sup> Venice Commission (2017), Opinion on the Duties, Competences and Functioning of the Criminal Peace Judgeships, CDL-AD(2017)004, para 82.

<sup>27</sup> Venice Commission, CDL-AD(2016)011, Turkey – Opinion on Law No. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication (“the Internet Law”) adopted at the 107<sup>th</sup> Plenary Session (Venice, 10-11 June 2016).

<sup>28</sup> *Ahmet Yıldırım v. Turkey*, no. 3111/10, judgment of 18.12.2012, 18.03.2013 (final).

<sup>29</sup> See para 64 of the *Ahmet Yıldırım v. Turkey* judgment.

<sup>30</sup> *Cengiz and Others v. Turkey*, nos. 48226/10 and 14027/11, 01.12.2015, 01.03.2016 (final).

<sup>31</sup> *Yaman Akdeniz and others*, App. No: 2014/3986, 2/4/2014, Judgment of the Second Section of the Constitutional Court.

<sup>32</sup> *Youtube Llc Corporation Company and others* (Plenary), App. No: 2014/4705, 29/5/2014, Judgment of the Constitutional Court.

argued that the banning of social networks such as YouTube and Google Sites has very strong implications on political expression and that the State's response to Internet content and publications is evidently problematic and the blocking orders resulted in blocking access not only to allegedly illegal content but also legal content and information.<sup>33</sup> The report recommended, on the basis of legal and procedural deficiencies identified, that the government should urgently bring Law no. 5651 in line with international standards on freedom of expression, or otherwise should consider abolishing the Law.

More recently, the Venice Commission recommended that "the necessity of a fair balance between competing rights and interests when restricting the Internet freedoms should be the guiding principle for the administrative authorities and the courts"<sup>34</sup> and substantial amendments including appropriate procedural guarantees are required for all the four procedures on access blocking under Law No.5651.<sup>35</sup>

#### **IV. DRAFT NEW PROVISION AND NEW POWERS GRANTED TO THE RADIO AND TELEVISION SUPREME COUNCIL ("RTUK")**

The Law No. 6112 on the Establishment of Radio and Television Enterprises and Their Media Services, regulates the establishment, organization, duties, competences and responsibilities of the Radio and Television Supreme Council. The Law No: 6112, was adopted by the Turkish Parliament on 15 February 2011 and entered into force on 3 March, 2011.

As part of a 66 pages-long miscellaneous Amendments in Tax Law, Other Laws and State Decrees Bill announced on 2 February, 2018, an amendment was also included to the Radio and Television Supreme Council Law No. 6112. Through article 73 of the miscellaneous Bill it is proposed to include a new Article 29/A to the Law No. 6112 entitled "**Presentation of media services via Internet**".<sup>36</sup>

The general explanatory statement for the miscellaneous Bill does not refer to this new amendment. An explanation however is provided for each article of the miscellaneous Bill and for Article 73 it is explained that

"due to the technological advances in the information sector and the widespread use of broadband internet services, radio and television broadcasts have started to shift towards Internet"

and

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<sup>33</sup> Report of the OSCE Representative on Freedom of the Media *on Turkey and Internet Censorship*, January 2010, at <https://www.osce.org/fom/41091?download=true>. See further the related press release, "Turkey's Internet law needs to be reformed or abolished, says OSCE media freedom representative," 18 January, 2010 at <https://www.osce.org/fom/51828>.

<sup>34</sup> Venice Commission, CDL-AD(2016)011, Turkey – Opinion on Law No. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication ("the Internet Law") adopted at the 107<sup>th</sup> Plenary Session (Venice, 10-11 June 2016), para 103.

<sup>35</sup> Venice Commission, CDL-AD(2016)011, Turkey – Opinion on Law No. 5651 on regulation of publications on the Internet and combating crimes committed by means of such publication ("the Internet Law") adopted at the 107<sup>th</sup> Plenary Session (Venice, 10-11 June 2016).

<sup>36</sup> Vergi Kanunları ile Bazı Kanun ve Kanun Hükmünde Kararnamelerde Değişiklik Yapılması Hakkında Kanun Tasarısı (1/914).

“the media service provider enterprises that broadcast under a licence via terrestrial, satellite and cable environment, have now started also to present their broadcasting services via Internet. In addition, **many enterprises which do not have a licence from the Radio and Television Supreme Council have started to broadcast radio and television content via Internet in an unregistered manner.**”

It is further explained that such platforms

“**are not authorized** by the Information Technologies and Communication Authority with respect to transmission, nor are they granted with a transmission authorization by the Supreme Council. Platforms transmitting those broadcasting services via Internet Enterprises presenting radio and television broadcasts via Internet **are not licensed** in any way by the Supreme Council.”

According to the general explanatory text, as a result of no authorization and no licensing,

“besides circumventing supervision of the broadcast content, such enterprises avoid tax and similar financial obligations of their income earned both within Turkey and mostly from abroad as a result of those broadcasts.”

Therefore, this new draft provision through article 73 of the miscellaneous Bill **will provide an “opportunity to obtain a licence”** for those who do not already have a licence. They will be subject to the content supervision of the Supreme Council in the same manner as the other broadcasts presented via terrestrial, satellite and cable environment. It is stated in the explanation that already registered broadcasting enterprises can transmit also through the Internet if they choose to without any other additional burden.

The proposed article 29/A states:

Article 29/A- (1) Media service provider organisations who have obtained temporary broadcast right and/or broadcasting licence from the Supreme Council may present their media services via Internet in accordance with the provisions of the Law No. 5651 of 4 May 2007 on *Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publication*. Media service providers requesting to present radio and television broadcasting services and on-demand media services exclusively via Internet must obtain broadcasting licence from the Supreme Council while the platform operators requesting to transmit those broadcasting services via Internet must obtain authorization for the transmission of media services from the Supreme Council.

(2) In case it is found by the Supreme Council that the broadcasting services of the natural and legal persons who does not have any temporary broadcast right and/or broadcasting licence obtained from the Supreme Council, or whose right and/or licence was revoked are being transmitted via Internet, upon the request of the Supreme Council, the judge of the Criminal Judgeship of Peace may decide to remove content and/or deny access in respect of the relevant broadcasting service on the Internet. Pursuant to the Law No. 5651, this decision shall be sent to the Association of Internet Service Providers for further action. The judge of the Criminal Judgeship of Peace shall adjudicate the request of the Supreme Council and give its summary judgment within the twenty-four hours at the latest. This judgment

may be appealed in accordance with the Code of Criminal Procedure No. 5271 of 4 December 2004.

(3) Notwithstanding that content or hosting provider is located abroad, the provisions of the second paragraph shall also apply to the transmission of the broadcasting services of the media service providers and platform operators under the jurisdiction of another country via Internet, which is determined by the Supreme Council to be broadcasting in violation of the international treaties signed and ratified by the Republic of Turkey in relation to the scope of duty of the Supreme Council as well as the provisions of this Law, and to the Turkish broadcasting services of the broadcasting enterprises addressing the audience in Turkey via Internet or featuring commercial communication broadcasting addressed to the audience in Turkey even though the broadcast language is not Turkish. In order for these enterprises to continue their broadcasting services via Internet, they must obtain temporary broadcast right and/or broadcasting licence from the Supreme Council in the same manner as other enterprises under the jurisdiction of the Republic of Turkey; the platform operators within this scope must also obtain an authorization for the transmission of media services.

(4) The procedures and principles in relation to the presentation of radio and television broadcasting services and on-demand media services via Internet, to the issuance of temporary broadcast right and/or broadcasting licence to media service providers who provide the transmission of these services via Internet and of authorization for the transmission of media services to platform operators, to the supervision of those broadcasts and to the implementation of this provision shall be regulated by the by-law to be commonly adopted by the Supreme Council and the Information and Communication Technologies Authority within six months from the effective date of this provision.”

## 1. A. Key Definitions

The definitions of the key terms within the proposed law are provided within Law No. 6112. According to article 3(1)(l) of Law No. 6112 “**media service provider**” means **the legal person who has editorial responsibility for the choice of the content of the radio, television and on-demand media services** and determines the manner in which it is organized and broadcast.<sup>37</sup> Article 3(1)(f) of Law No. 6112 also defines ‘**editorial responsibility**’ as having the authority to organise and control both over the content and the selection of the programs and over their organization either in a chronological schedule in the case of radio and television broadcasting services; or in a catalogue in the case of on-demand media services.<sup>38</sup> According to article 3(1)(hh), “**broadcasting licence**” means the certificate of permission issued separately for each broadcasting type, technique and network by the Supreme Council to media service providers on the condition that they meet the provisions stated in Law No. 6112 and by-laws and other regulations prepared in accordance with Law No. 6112 in order to allow them to broadcast using any kind of technology via cable, satellite, terrestrial and similar networks. According to article 3(1)(h), “**on-demand media service**” means the media service provided for the viewing or listening of programmes at the

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<sup>37</sup> See further 4(1)(r) of the By-Law On The Procedures And Principles Of Media Services. Published in the Official Gazette No. 28103, 2 November 2011.

<sup>38</sup> See further Article 4(1)(g) of the By-Law On The Procedures And Principles Of Media Services. Published in the Official Gazette No. 28103, 2 November 2011.



moment chosen by the user and at his/her individual request on the basis of a catalogue of programmes selected by the media service provider.

According to article 3(1)(p) of Law No. 6112, “**platform operator**” means an enterprise which transforms multiple media services into one or multiple signals and provides the transmission of them, through satellite, cable and similar networks either in an encoded and/or un-encoded mode in a way accessible directly by the viewers. Subject to Article 29(1), the platform operators providing electronic communication services and the infrastructure operators providing broadcasting service transmission authorized by the Information Technologies and Communication Authority (“BTK”) are subject to the provisions of Law No. 6112 in terms of broadcasting services. Subject to Article 29(2), platform operators and infrastructure operators providing broadcasting service transmission shall inform the Supreme Council of the broadcasting services that they will transmit. More importantly, subject to Article 29(3), platform and infrastructure operators shall stop, following the notification of the Supreme Council’s decision, the transmission of broadcasting services of the media service providers which have not been granted a broadcasting licence by the Supreme Council or whose broadcasting licences have been revoked and those which are under the jurisdiction of another country but whose broadcasts have been identified by the Supreme Council as violating the international treaties to which Turkey is party and the provisions of Law No. 6112. The broadcast transmission authorization of the operator who does not stop the transmission of broadcasting services despite the notification shall be revoked and this case shall be notified to the Information Technologies and Communication Authority.

## 2. B. Existing Powers of the Supreme Council

Broadly speaking, the Supreme Council has the authority to supervise content of any licensed broadcast and if article 29/A is adopted, the Supreme Council will have authority over media services via Internet and their content. All the media service providers will have to comply with article 8 of Law No. 6112 which includes a long list of “**principles for media services**”. Among others, media services shall not operate in a way that is contrary to the existence and independence of the State of the Republic of Turkey, the indivisible integrity of the State with its territory and nation, the principles and reforms of Atatürk; shall not glorify and encourage terror; shall not display terrorist organizations as powerful or justified; shall not portray terrifying and deterrent features of terrorist organizations; and shall not present the act, the perpetrators and the victims of terror in a way serving for the interests of the terror.<sup>39</sup> The Supreme Council has authority to issue administrative sanctions from fines to revoking of licences through article 32 of Law No. 6112. Furthermore, subject to article 19(2) of Law No. 6112,<sup>40</sup> the Supreme Council, in consultation with the relevant institutions, may reject the licence requests on the grounds resulting from the requirements of **national security, protection of public order and public interest**. In addition to this new power, subject to article 19(3), the licence applications of the media service provider enterprises whose partners and board chairman and members are reported by the National Intelligence Agency or General Directorate of Security as being associated or connected with terrorist organizations will also be rejected.<sup>41</sup>

<sup>39</sup> Added paragraph by article 18 of the Emergency Decree Law No. 680, 02.12.2017.

<sup>40</sup> Added by article 18 of the Emergency Decree Law No. 680 on 02 January, 2017.

<sup>41</sup> Added by article 19 of the Emergency Decree Law No. 680 on 02 January, 2017.

### 3. C. Analysis of the Proposed Article 29/A

Subject to the new draft provisions, any media service provider who has already obtained a **temporary broadcast right and/or broadcasting licence** from the Supreme Council **may present their media services via Internet** in accordance with the provisions of the Law No. 5651. This will mean that the media service providers will have to comply with the above detailed requirements of articles 8 (**protection of children from harmful content**), 8/A (**protection of national security, public order, protection of life and property as well as protection of public health and prevention of crime**), 9 (**violation of individual rights**) and 9/A (**violation of privacy of individuals**) of Law No. 5651 among others. On the other hand, media service providers requesting to present radio and television broadcasting services and on-demand media services **exclusively via Internet must obtain broadcasting licence from the Supreme Council**, while the platform operators requesting to transmit those broadcasting services via Internet must also obtain authorization for the transmission of media services from the Supreme Council.

If the media service providers do **not have any temporary broadcast right and/or broadcasting licence** or **whose right and/or licence was revoked by the Supreme Council**, then the Supreme Council may request a Criminal Judgeship of Peace **to remove content and/or block access in respect of the relevant broadcasting service on the Internet**. The Criminal Judgeships of Peace are required to issue their decisions within 24 hours. Similar to the procedures provided in article 9 of Law No. 5651, the decisions of the Criminal Judgeship of Peace will be sent to the Internet Service Providers Association for the execution of the decision. Appeals may be lodged in accordance with the Code of Criminal Procedure No. 5271.

Furthermore, the new draft provision also covers “broadcasting services of the media service providers and platform operators **under the jurisdiction of another country via Internet**” through Article 29/A(3). Therefore, foreign media service providers or media service providers under the jurisdiction of another country will also be subject to the jurisdiction of the Supreme Council if:

1. They are in violation of the international treaties signed and ratified by the Republic of Turkey in relation to the scope of duty of the Supreme Council as well as the provisions of this Law;
2. They broadcast in Turkish addressing the audience in Turkey;
3. They feature commercial communication broadcasting addressed to the audience in Turkey even though the broadcast language is not Turkish.<sup>42</sup>

In order for these foreign media service providers or media service providers under the jurisdiction of another country to continue their broadcasting services via Internet,

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<sup>42</sup> A similar provision was also added to Article 2(4) of Law No. 6112 on April 17, 2017 by Article 58 of the Decree Law No. 690: Notwithstanding the other paragraphs of this Article, the broadcasting enterprises which are using satellite capacity appertaining to Turkey and addressing the audience in Turkey in Turkish language or featuring commercial communication broadcasting addressed to the audience in Turkey even though the broadcast language is not Turkish shall be deemed to be under the jurisdiction of the Republic of Turkey. These enterprises must obtain broadcasting licence from the Supreme Council in the same manner as the enterprises falling under the jurisdiction of the Republic of Turkey.

**they must obtain temporary broadcast right and/or broadcasting licence from the Supreme Council** in the same manner as other enterprises under the jurisdiction of the Republic of Turkey. The platform operators within this scope must also obtain an authorization for the transmission of media services. However, this seems to contradict with Article 4 of the European Convention on Transfrontier Television which Turkey signed<sup>43</sup> and ratified.<sup>44</sup> The Convention provisions came into force in Turkey on 01.05.1994. Subject to Article 4 of the Convention entitled “Freedom of reception and retransmission”, the Parties to the Convention shall ensure freedom of expression and information in accordance with Article 10 of the ECHR and they shall guarantee freedom of reception and shall not restrict the retransmission on their territories of programme services which comply with the terms of this Convention.

This would mean that **a Party will not be entitled to rely on the specific provisions of its domestic broadcasting legislation or regulations in areas covered by the Convention** such as advertising, sponsorship, responsibility of the broadcaster in maintaining programme standards, **to restrict reception or to prevent the retransmission, on its territory, of a programme service transmitted from another Party which complies with the provisions of the Convention.**<sup>45</sup> So, the proposed Turkish provisions would contradict Article 4 of the Convention in relation to the “broadcasting services of the media service providers and platform operators **under the jurisdiction of another country via Internet**” provision of article 29/A(3).

Further by-laws will be developed and adopted by the Supreme Council and the Information and Communication Technologies Authority within six months of this provision entering in force. The miscellaneous Bill is currently being discussed in the Planning and Budget Committee of the Parliament. So far, seven meetings have been held on 8, 13-16 and 20-21 February, 2018 respectively. It is expected that the miscellaneous Bill will reach the Parliament subsequent to the Committee stage.

## V. ASSESSMENT OF THE DRAFT TURKISH LAW WITH INTERNATIONAL STANDARDS ON FREEDOM OF EXPRESSION

Freedom of expression is a fundamental human right enshrined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights and guaranteed by OSCE commitments. Article 19 of the International Covenant on Civil and Political Rights provides that “everyone shall have the right to hold opinions without interference” subject to the provisions in Article 19, paragraph 3, and article 20.<sup>46</sup> The exercise of the rights provided for in Article 19 paragraph 2 carries with it special duties and responsibilities. Freedom of expression may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary for respect of

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<sup>43</sup> 07.09.1992.

<sup>44</sup> 21.01.1994.

<sup>45</sup> See generally Explanatory Report to the European Convention on Transfrontier Television, Strasbourg, 5.V.1989. Text of the Report amended by the provisions of the Protocol (ETS No. 171) which entered into force on 1 March 2002. See further in particular paras 119-123.

<sup>46</sup> Article 20: 1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law. See communications Nos. 359/1989 and 385/1989, *Ballantyne, Davidson and McIntyre v. Canada*, Views adopted on 18 October 1990.

the rights or reputations of others; for the protection of national security or of public order (*ordre public*), or of public health or morals.

Although there may be certain restrictions based on conditions provided in Article 19(3) of the ICCPR or Article 10(2) of the ECHR, freedom of expression is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive but also to those that offend, shock or disturb.<sup>47</sup>

#### **4. Article 19 of ICCPR and Article 10 ECHR Protects the Content of Information and Means of Transmission Regardless of Frontiers**

In line with international human rights instruments including the European Convention on Human Rights, the right to freedom of expression, amongst others, contains **not only to impart but also to seek and receive information**. Article 19 of the International Covenant on Civil and Political Rights includes “freedom to seek, receive and **impart information** and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice” **including audio-visual as well as electronic and Internet-based modes of expression**.<sup>48</sup> Similarly, Article 10 of the European Convention on Human Rights **applies not only to the content of information but also to the means of transmission or reception** since any restriction imposed on the means necessarily interferes with the right to receive and impart information.<sup>49</sup>

Furthermore, **freedom to receive and impart information is not limited to the forum state**. On the contrary, as stated in Article 10 of the Convention and recognised by the European Court **freedom to receive and impart information applies “regardless of frontiers”**.<sup>50</sup> As established in the introduction of this text, the Internet does not suffer from the problems associated with the scarcity of available broadcasting frequencies for traditional radio and television transmissions.

Therefore, introduction of a broadcasting style licensing regulation for the Internet for the transmission of any audio-visual content is characteristically problematic as the means of such transmission does not suffer from scarcity of frequencies. Within this context, **the State must not stand between the speaker and his audience** and thus defeat the purpose for which the protection of expression is realised.<sup>51</sup>

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<sup>47</sup> *Handyside v. the United Kingdom*, 7 December 1976, Series A no. 24, p. 23, § 49; *Lingens v. Austria*, 8 July 1986, Series A no. 103, p. 26, § 41; and *Jersild v. Denmark*, 23 September 1994, Series A no. 298, p. 26, § 37.

<sup>48</sup> Note the new General Comment No.34 on Article 19 which was adopted during the 102<sup>nd</sup> session of the UN Human Rights Committee, Geneva, 11-29 July 2011, at <<http://www2.ohchr.org/english/bodies/hrc/docs/CCPR-C-GC-34.doc>>.

<sup>49</sup> *Autronic AG v. Switzerland*, 22.05.1990, §§ 47-48, Series A no. 178; *Öztürk v. Turkey* [GC], no. 22479/93, § 49, ECHR 1999-VI.

<sup>50</sup> *Groppera Radio Ag and Others v. Switzerland*, no. 10890/84, judgment of 28.03.1990, para. 50.

<sup>51</sup> *Ibid.*

## 5. Compatibility of the Draft Turkish Law with Article 10 of the European Convention of Human Rights

As mentioned in the introduction Article 10 of the European Convention on Human Rights on the right to freedom of expression states that “**this Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.**”<sup>52</sup> However, any such licensing law needs to be “prescribed by law”, pursued one or more legitimate aims under the third sentence of paragraph 1 of Article 10 or under paragraph 2 thereof, and also should be “necessary in a democratic society”. Similar requirements exist within article 19(3) of the International Covenant on Civil and Political Rights (“ICCPR”) which Turkey signed and ratified.<sup>53</sup>

In the case law of the European Court of Human Rights, the refusal to grant a broadcasting licence constitutes interference with the exercise of the rights guaranteed by Article 10(1) of the Convention.<sup>54</sup> The Court explains that “the purpose of the third sentence of Article 10(1) of the Convention **is to make it clear that States are permitted to control by a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects.**”<sup>55</sup> According to the case law, a licensing system not respecting the requirements of pluralism, tolerance and broadmindedness would not be acceptable in a democratic society.<sup>56</sup> Therefore, for the purposes of this review the requirement of a licence regime for media service providers transmitting their services through the Internet and the possibility of refusal of such licenses or revoking of such licences will be regarded as interference with the exercise of the rights guaranteed by Article 10(1) of the Convention.

### a. Prescribed by Law

The third sentence of Article 10(1) entitles States to regulate by means of a licensing system the way in which broadcasting is organised in their territories, particularly in its technical aspects. The third sentence of Article 10(1) was inserted at an advanced stage of the preparatory work on the Convention and “was clearly **due to technical or practical considerations such as the limited number of available frequencies** and the major capital investment required for building transmitters”.<sup>57</sup> The granting of a

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<sup>52</sup> Article 19 of the 1966 International Covenant on Civil and Political Rights does not include a provision corresponding to the third sentence of Article 10(1). See the discussion of this issue in *Groppera Radio Ag and Others v. Switzerland*, no. 10890/84, judgment of 28.03.1990, para 61.

<sup>53</sup> See General Comment No.34 on Article 19 which was adopted during the 102<sup>nd</sup> session of the UN Human Rights Committee, Geneva, 11-29 July 2011, at <<http://www2.ohchr.org/english/bodies/hrc/docs/CCPR-C-GC-34.doc>>.

<sup>54</sup> See, among other authorities, *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, no. 38433/09, 7 June 2012, § 136; *Radio ABC v. Austria*, 20 October 1997, § 27, Reports 1997-VI; *Leveque v. France* (dec.), no. 35591/97, 23 November 1999; *United Christian Broadcasters Ltd v. the United Kingdom* (dec.), no. 44802/98, 7 November 2000; *Demuth v. Switzerland*, no. 38743/97, § 30, ECHR 2002-IX.

<sup>55</sup> *Groppera Radio Ag and Others v. Switzerland*, no. 10890/84, judgment of 28.03.1990, para 61. See further *Informationsverein Lentia and Others v. Austria*, nos. no. 13914/88; 15041/89; 15717/89; 15779/89; 17207/90, 24.11.1993, para 32.

<sup>56</sup> *Verein Alternatives Lokalradio Bern and Verein Radio Dreyeckland Basel v. Switzerland*, no. 10746/84, Commission decision of 16 October 1986, Decisions and Reports (DR) 49, p. 140.

<sup>57</sup> *Groppera Radio Ag and Others v. Switzerland*, no. 10890/84, 28.03.1990, § 60.

licence may also be made conditional on other considerations, such as the nature and objectives of a proposed channel, its potential audience at national, regional or local level, the rights and needs of a specific audience and the obligations deriving from international legal instruments.<sup>58</sup> Such regulation must have a basis in “law”.

The expression “prescribed by law” in the second paragraph of Article 10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects.<sup>59</sup> According to the Court’s settled case-law, a rule is “foreseeable” if it is formulated with sufficient precision to enable any individual – if need be with appropriate advice – to regulate his conduct.<sup>60</sup>

The level of precision required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed.<sup>61</sup> In particular, a rule is “foreseeable” when it affords a measure of protection against arbitrary interferences by the public authorities,<sup>62</sup> and against the extensive application of a restriction to any party’s detriment.<sup>63</sup>

Furthermore, according to the European Court “there can be no democracy without pluralism. Democracy thrives on freedom of expression”.<sup>64</sup> Even in the case of broadcast licensing, the European Court considers that “in order to ensure true pluralism in the audiovisual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audio-visual market. It is necessary in addition to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed”.<sup>65</sup>

The European Court seems to support pluralism and diversity even when broadcasting may be subject to frequency limitations. In terms of the Internet, according to the Court “in light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information generally.”<sup>66</sup> In fact, according to the Court, the Internet “had now become one of the principal means of

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<sup>58</sup> *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, no. 38433/09, 7.06.2012, § 139.

<sup>59</sup> See among others *Rotaru v. Romania* [GC], no. 28341/95, § 52, ECHR 2000-V; *Ahmet Yildirim v. Turkey*, Application No. 3111/10, judgment of 18 December 2012, 18.03.2013 (final); *Cengiz and Others v. Turkey*, Application Nos. 48226/10 and 14027/11, judgment of 01 December 2015, 01 March 2016 (final), § 59.

<sup>60</sup> See among others *RTBF v. Belgium*, no. 50084/06, 29.03.2011, § 103; *Akçam v. Turkey*, no. 32964/96, § 87, 30 October 2001.

<sup>61</sup> See among others *RTBF v. Belgium*, no. 50084/06, 29.03.2011, § 104; *Vogt v. Germany*, 26 September 1995, § 48, Series A no. 323.

<sup>62</sup> *Tourancheau and July v. France*, no. 53886/00, 24.11.2005, § 54.

<sup>63</sup> See, *mutatis mutandis*, *Başkaya and Okçuoğlu v. Turkey* [GC], nos. 23536/94 and 24408/94, § 36, ECHR 1999-IV.

<sup>64</sup> *Centro Europa 7 Srl and Di Stefano v. Italy* [GC], No. 38433/09, § 129.

<sup>65</sup> *Centro Europa 7 Srl and Di Stefano v. Italy* [GC], No. 38433/09, § 130, ECHR 2012; *Aydoğan and Dara Radyo Televizyon Yayıncılık Anonim Şirketi v. Turkey*, no. 12261/06, 13.02.2018, § 41.

<sup>66</sup> See *Times Newspapers Ltd (Nos. 1 and 2) v. The United Kingdom*, nos. 3002/03 and 23676/03, 10.03.2009 and *Ashby Donald and Others v. France*, no. 36769/08, § 34, 10.01.2013.

exercising the right to freedom of expression and information.”<sup>67</sup> Therefore, considering that the Internet does not suffer from the problem of scarcity of frequencies, the draft law provisions would be incompatible with Article 10 requirements.

Furthermore, the provision will empower the Supreme Council to request access blocking to media service providers’ websites whether based in Turkey or abroad in the case of “no licensing” or revoke of existing licenses. The draft law does not specify whether blocking in practice will be domain name based or URL based but it is understood as total blocking via domain names as it is based on whether a media service provider has a licence or not. Such a measure, by rendering large quantities of information inaccessible, will be bound to substantially restrict the rights of Internet users to access and seek information “regardless of frontiers”<sup>68</sup> and could result in the censorship of countless number of media service providers from Turkey.

Considering these principles, although the new licensing requirement and new control powers granted to the Supreme Council (RTÜK) are provided by law through article 73 of the miscellaneous Bill, the content of the provision remains too uncertain and too broad to make it foreseeable. Therefore, it does not satisfy the requirement of lawfulness under the Convention.

#### **b. Whether the provisions are “necessary in a democratic society”**

Even though the new licensing requirement and new control powers granted to the Supreme Council (RTÜK) are considered to be provided by law and have a legitimate aim under Article 10(2), it will be argued in this section that such provisions are not necessary in a democratic society.

According to this important requirement, any restriction needs to be necessary in a democratic society<sup>69</sup> and the state interference should correspond to a “pressing social need”.<sup>70</sup> Therefore, the state response and the limitations provided by law should be “proportionate to the legitimate aim pursued”.<sup>71</sup> In other words, **the restriction must be proportionate, must not render the right itself illusory and must be necessary in a democratic society.** The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The European Court of Human Rights requires the reasons given by the national authorities to be relevant and sufficient.<sup>72</sup>

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<sup>67</sup> *Ahmet Yıldırım v. Turkey*, no. 3111/10, 18.12.2012, 18.03.2013 (final).

<sup>68</sup> *Ahmet Yıldırım v. Turkey*, no. 3111/10, 18.12.2012; *Cengiz and Others v. Turkey*, nos. 48226/10 and 14027/11, 01.12.2015, 01.03.2016 (final).

<sup>69</sup> See *Sunday Times v. UK* (No. 2), Series A No. 217, 26.11.1991, para. 50; *Okçuoğlu v. Turkey*, No. 24246/94, 8.7.1999, para. 43.

<sup>70</sup> See *Sürek v. Turkey* (No. 1), no. 26682/95, 8.07.1999, Reports 1999; *Sürek v. Turkey* (No. 3), no. 24735/94, 8.07.1999.

<sup>71</sup> See *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, ECHR 1999-III.

<sup>72</sup> The Court notes that the nature and severity of the penalty imposed, as well as the “relevance” and “sufficiency” of the national courts’ reasoning, are matters of particular significance when it comes to assessing the proportionality of an interference under Article 10(2): See *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 111, ECHR 2004, and *Zana v. Turkey*, 25 November 1997, § 51, *Reports of Judgments and Decisions* 1997-VII. The Court also reiterates that Governments should

As was previously stated in this analysis, the Internet does not suffer from the problem of scarcity of broadcasting frequencies. Therefore, in technical terms, a licensing regime is not necessary for the transmission of media services through the Internet. Furthermore, the draft provisions in addition to its new licensing regime grants new power to the Supreme Council to request access blocking to websites and Internet platforms through a single judge appointed Criminal Judgeships of Peace. Similar provisions already exist under Law No. 5651 through articles 8, 8/A and 9. These provisions were used to block access to the Twitter (in 2014 and in 2015), YouTube (between 2008-2010 and in 2014) and Wikipedia (since April 2017) platforms from Turkey. As mentioned previously over 166,000 websites and over 100,000 URLs are blocked indefinitely from Turkey including hundreds of Kurdish and dissident new websites. Appeals against such blocking decisions are almost exclusively unsuccessful and the only course of legal action is to lodge individual applications to the Constitutional Court. Considering that the Constitutional Court only issued 53 decisions out of 3356 involving freedom of expression related applications received between 2012-2017, judicial and constitutional scrutiny is a very long process. This also has a considerable slowing impact upon reaching the European Court of Human Rights.

Therefore, such an extensive blocking practice can amount to total censorship of popular platforms and news providers from Turkey. In the case of news providers, such an action can result in prior restraints. The European Court of Human Rights, in the case of *Ürper and Others vs. Turkey* stated that Article 10 of the Convention does not prohibit the imposition of prior restraints on publication.<sup>73</sup> However, “the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court. This is especially so as far as the press is concerned, for news is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest”.<sup>74</sup> In the *Ürper* case, the practice of banning the future publication of entire periodicals went beyond any notion of “necessary” restraint in a democratic society and, instead, amounted to censorship. The *Ürper* case cannot be thought to be limited only to newspapers and magazines. The decision also applies to Internet publications. **Denial of access to Internet websites and platforms is incompatible with Article 10 of the ECHR and such practice can only be defined as censorship in the light of the *Ürper* decision together with the *Ahmet Yıldırım* and *Cengiz and Others* decisions on Internet blocking.** It is also inconsistent with Article 19(3) of the International Covenant on Civil and Political Rights “to prohibit a site or an information dissemination system from publishing material solely on the basis that it may be critical of the government or the political social system espoused by the government”.<sup>75</sup> The access blocking decisions undoubtedly has a very strong impact on freedom of expression and such a restrictive approach is too far-reaching than reasonably necessary in a democratic society.<sup>76</sup> As

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always display restraint in resorting to criminal sanctions, particularly where there are other means of redress available. See further *Başkaya and Okçuoğlu* judgment of 8 July 1999, Reports 1999.

<sup>73</sup> *Ürper and Others v. Turkey*, nos. 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, 20.09.2009.

<sup>74</sup> *Observer and Guardian v. the United Kingdom*, no. 13585/88, 26.11.1991, Series A no. 216, § 60.

<sup>75</sup> See General Comment No.34 on Article 19 which was adopted during the 102<sup>nd</sup> session of the UN Human Rights Committee, Geneva, 11-29 July 2011, at <<http://www2.ohchr.org/english/bodies/hrc/docs/CCPR-C-GC-34.doc>>, para 43.

<sup>76</sup> *Khurshid Mustafa and Tarzibachi v. Sweden*, no. 23883/06, 16.12.2008.



there is no compelling social need to impose such a broad restriction, such a restriction would constitute a serious infringement on freedom of speech.

## VI. CONCLUSION AND RECOMMENDATIONS

Blocking access to Internet content is inherently problematic especially when access to whole websites, as well as platforms, is blocked from a country. Therefore, State-level blocking policies undoubtedly have a very strong impact on freedom of expression, which is one of the founding principles of democracy. Turkey has been introducing different blocking provisions into its legal system since 2007 and with these provisions extensive blocking practice is visible with thousands of decisions issued every year.

While Wikipedia remains blocked from Turkey, social media platforms like Twitter and YouTube have been blocked in the past. They continue to receive regular URL based blocking decisions on a regular basis. The miscellaneous Bill draft provision, if enacted, would extend further the current blocking regime through a previously non existing licensing regime based on radio and television broadcasting granting authority to the Radio and Television Supreme Council.

The new “**licensing model**” endangers any platform or website with audio-visual content as well as on demand media services transmission capability whether based in Turkey or elsewhere, targeting audiences in Turkey in Turkish and otherwise, even though not in Turkish and in the form of commercial communication. This means every alternative news provider, which includes Internet media services, would be subject to licensing including **Medyascope TV and Evrensel WebTV** among others.

Furthermore, every Turkish media service provider with Internet media services operating from outside Turkey will be subject to licensing. Every foreign media service provider with a Turkish service such as **BBC, Voice of America and DW** would be subject to this new provision. Every foreign media service provider with “commercial communication broadcasting” addressed to the audience in Turkey, even though the broadcast language is not Turkish including the likes of **Netflix and CNN International**, could be subject to licensing.

The licensing model is also likely to cover video sharing platforms such as **YouTube and Vimeo** as article 29/A (1) and (4) covers presentation of on demand media services **exclusively via Internet**. Although it could be argued that YouTube and Vimeo are not “video on demand platform providers”, the definition of “**on-demand media service**” in Law No. 6112 includes catalogue of programmes and selection by users. Any YouTube channel could well be regarded within this context. At best, further clarification is needed, and if this is not an intended outcome, then article 29/A should explicitly state this.

Furthermore, the proposed licensing model is based on a system of *a priori* control requiring the media service providers as well as the platform operators to obtain a licence from the Supreme Council prior to transmission of their content over the Internet. It is explicitly stated within the Explanatory Report of the European Convention on Transfrontier Television that **a system of a priori control** is “**contrary to the philosophy of the member States of the Council of Europe**” in

such a matter.<sup>77</sup> This is especially relevant for the reception of media services transmitted from outside the Turkish jurisdiction.

Based on this principle, a “**notification model**” is favoured if scarcity of frequencies or spectrum is not an issue and the proposed permissive model should be rejected.

Overall, it is recommended that the Turkish Parliament rejects article 73 of the Miscellaneous Bill which is intended to amend Law No. 6112 on the Establishment of Radio and Television Enterprises and Their Media Services. The proposed provision does not comply with the requirements of Article 10 of the European Convention on Human Rights, Article 19 of the International Covenant on Civil and Political Rights as well as Article 4 of the European Convention on Transfrontier Television. The inclusion of access blocking measures within the proposed article 29/A is also incompatible with the decisions of the European Court of Human Rights in the cases of *Ahmet Yildirim v. Turkey* and *Cengiz and Others v. Turkey*.<sup>78</sup>

Furthermore, in compliance with Article 19 of the International Covenant on Civil and Political Rights and Article 10 of the European Convention on Human Rights, participating States of the OSCE including Turkey should take all necessary steps to foster the independence of new media and ensure access of individuals to information and resources available through the Internet regardless of frontiers without subjecting media service providers to burdensome and unnecessary licensing and control regimes for transmissions of media services over the Internet. The States, as the ultimate guarantor of pluralism must continue to ensure that the public has access to wide range of information<sup>79</sup> as “there can be no democracy without pluralism.”<sup>80</sup>

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<sup>77</sup> Explanatory Report to the European Convention on Transfrontier Television, Strasbourg, 5.V.1989. Text of the Report amended by the provisions of the Protocol (ETS No. 171) which entered into force on 1 March 2002. See further in particular para 129.

<sup>78</sup> *Ahmet Yildirim v. Turkey*, no. 3111/10, 18.12.2012; *Cengiz and Others v. Turkey*, nos. 48226/10 and 14027/11, 01.12.2015, 01.03.2016 (final).

<sup>79</sup> See generally European Court of Human Rights (Research Division), Positive obligations on member States under Article 10 to protect journalists and prevent impunity, Research Report, December 2011.

<sup>80</sup> *Manole and Others v. Moldova*, no. 13936/02, 17.09.2009, para 95.

**Article 29/A- (1) Media service provider organisations who have obtained temporary broadcast right and/or broadcasting licence** from the Supreme Council **may present their media services via Internet** in accordance with the provisions of the Law No. 5651 of 4 May 2007 on *Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publication*. Media service providers requesting to present radio and television broadcasting services and on-demand media services **exclusively via Internet must obtain broadcasting licence from the Supreme Council** while the platform operators requesting to transmit those broadcasting services via Internet must obtain authorization for the transmission of media services from the Supreme Council.

(2) In case **it is found by the Supreme Council** that the broadcasting services of the natural and legal persons **who does not have any temporary broadcast right and/or broadcasting licence obtained from the Supreme Council, or whose right and/or licence was revoked** are being transmitted via Internet, upon the request of the Supreme Council, the judge of the Criminal Judgeship of Peace **may decide to remove content and/or deny access in respect of the relevant broadcasting service on the Internet**. Pursuant to the Law No. 5651, this decision shall be sent to the Association of Internet Service Providers for further action. The judge of the Criminal Judgeship of Peace shall adjudicate the request of the Supreme Council and give its summary judgment within the twenty-four hours at the latest. This judgment may be appealed in accordance with the Code of Criminal Procedure No. 5271 of 4 December 2004.

(3) **Notwithstanding that content or hosting provider is located abroad, the provisions of the second paragraph shall also apply to the transmission of the broadcasting services of the media service providers and platform operators under the jurisdiction of another country via Internet**, which is determined by the Supreme Council to be broadcasting in violation of the international treaties signed and ratified by the Republic of Turkey in relation to the scope of duty of the Supreme Council as well as the provisions of this Law, and **to the Turkish broadcasting services of the broadcasting enterprises addressing the audience in Turkey via Internet or featuring commercial communication broadcasting addressed to the audience in Turkey even though the broadcast language is not Turkish**. In order for these enterprises to continue their broadcasting services via Internet, **they must obtain temporary broadcast right and/or broadcasting licence from the Supreme Council** in the same manner as other enterprises under the jurisdiction of the Republic of Turkey; the platform operators within this scope must also obtain an authorization for the transmission of media services.

(4) The procedures and principles in relation to the presentation of radio and television broadcasting services and on-demand media services via Internet, to the issuance of temporary broadcast right and/or broadcasting licence to media service providers who provide the transmission of these services via Internet and of authorization for the transmission of media services to platform operators, to the supervision of those broadcasts and to the implementation of this provision shall be regulated by the by-law to be commonly adopted by the Supreme Council and the Information and Communication Technologies Authority within six months from the effective date of this provision.”