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Contact: Zoë Bryanston-Cross
Tel: 03.90.21.59.62

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Communication from NGOs (İfade Özgürlüğü Derneği, Human Rights Association, Article 19) (27/01/2021) in the Ahmet Yildirim group of cases v. Turkey (Application No. 3111/10).

Information made available under Rule 9.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements.

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Réunion : 1398e réunion (mars 2021) (DH)

Communication d'ONG (İfade Özgürlüğü Derneği, Human Rights Association, Article 19) (27/01/2021) concernant le groupe d'affaires Ahmet Yildirim c. Turquie (Requête no 3111/10) ***[anglais uniquement]***

Informations mises à disposition en vertu de la Règle 9.2 des Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables.

RULE 9.2 COMMUNICATION

in the Ahmet Yıldırım Group of Cases v. Turkey (Application No. 3111/10)

by

İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)

&

HUMAN RIGHTS ASSOCIATION (İHD)

&

ARTICLE 19 (A19)

26 January 2021

İFADE ÖZGÜRLÜĞÜ DERNEĞİ

DGI Directorate General of Human Rights and Rule of Law
Department for the Execution of Judgments of the ECtHR
F-67075 Strasbourg Cedex
FRANCE

26.01.2021

Rule 9.2 Communication from Freedom of Expression Association (İFÖD), Human Rights Association (İHD) and ARTICLE 19 (A19) in the Ahmet Yıldırım group of cases v. Turkey (Application No. 3111/10)

1. This submission is prepared by **İfade Özgürlüğü Derneği** (İFÖD – Freedom of Expression Association), a non-profit and non-governmental organization which aims to protect and foster the right to freedom of opinion and expression in Turkey and **supported by İnsan Hakları Derneği** (İHD - Human Rights Association) and **ARTICLE 19** (A19), hereinafter the "**Interveners**". The aim of this submission is to update the Committee of Ministers concerning the persistent failure of Turkish authorities in full and effective implementation of general measures in the **Ahmet Yıldırım group of cases**.[1] The submission focusses on the amendments to Law No. 5651, which were introduced in order to fully align the domestic legal framework concerning blocking orders with the European Court's case law. In particular, the aim was to satisfy the foreseeability requirement of Article 10 of the Convention by providing safeguards against abuse of power by the courts as well as relevant administrative bodies in the implementation of blocking orders, including blanket blocking orders on entire websites and platforms.

Background of the Ahmet Yıldırım Group of Cases

2. The Ahmet Yıldırım group of cases comprises two cases concerning violations of the applicants' right to freedom of expression (Article 10) on account of domestic court orders blocking access to the Google Sites and the YouTube platforms. In the case of *Ahmet Yıldırım*[2] the blocking order, based on Article 8 of Law No. 5651 (Law on Regulating Internet Publications and Combating Internet Offences), was issued by a criminal peace court in Denizli in the context of criminal proceedings brought against a third person, of unknown identity, who owned a website hosted by the Google Sites platform. As a result of this blocking order, access to the applicant's website which was also hosted by Google Sites was also blocked. The Court's conclusions, finding a violation of Article 10 were mainly based on the following grounds:

a. the interference with the applicant's right to freedom of expression resulting from Article 8 of Law No. 5661 did **not satisfy the foreseeability requirement** of the Convention and did not afford the applicant the degree of protection to which he was entitled by the rule of law in a democratic society;
b. the measure in question **produced arbitrary effects** and could not be said to have been aimed solely at blocking the offending website, since it blocked access to all the sites hosted by the host website, Google Sites resulting in a **significant collateral effect**;

[1] *Ahmet Yıldırım v. Turkey*, no. 3111/10, 18.12.2012, *Cengiz and Others*, nos. 48226/10 and 14027/11, 01.12.2015.
[2] *Ahmet Yıldırım v. Turkey*, no. 3111/10, 18.12.2012.

c. the notion of "**publication**" under Law No. 5651 **was broad** and could cover all kinds of data published on the Internet and there were **no provisions** under this law which **allowed the wholesale blocking of access to entire websites**;
d. Article 8 of Law No. 5651 **conferred extensive powers on an administrative body** (the Telecommunications and Information Technology Directorate -"the TIB")[3] in the implementation of a blocking order;
e. the **judicial-review procedures** concerning the blocking of websites **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 more broadly to entire platforms or whole websites.

3. In the case of *Cengiz and Others,*[4] the domestic court found that the content of ten pages (URL addresses) on the YouTube platform infringed the prohibition on insulting the memory of Atatürk and therefore a criminal peace court in Ankara imposed a blocking order on the entire website of the platform under Article 8 of Law No. 5651. Access to YouTube was blocked from Turkey between 05.05.2008 and 30.10.2010. The Court, following on from *Ahmet Yıldırım* and finding a violation of Article 10, held that the authorities should have taken account of the fact that the imposition of a blanket blocking order on an entire website would inevitably affect the rights of Internet users and have a substantial collateral effect. Although the Court, in *Cengiz and Others* followed substantially its findings in the *Ahmet Yıldırım* decision, the Court had also some significant additional conclusions:

a. In terms of victim status, the Court stated that the question of whether an applicant can **claim to be the victim** of a **measure blocking access to a website** will depend on an assessment of the circumstances of each case, in particular the way in which the person concerned uses the website and the potential impact of the measure on him;
b. the Internet has now become one of the principal means by which individuals exercise their right to freedom to **receive** and **impart** information and ideas, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest;
c. YouTube, as a platform, not only hosts artistic and musical works, but is also a very popular platform for political speeches and political and social activities fostering the emergence of citizen journalism.

4. With regards to the general measures required for the full implementation of these judgments, the Committee of Ministers called upon the authorities to amend the relevant legislation to ensure that:

- it **meets the requirements of foreseeability** and **clarity** and provides **effective safeguards** to prevent abuse by the administration;

- measures blocking access to websites **do not produce arbitrary effects** and do not result in wholesale blocking of access to a host website.

5. The Turkish Government submitted four separate action reports regarding this group in **2014** [DH-DD(2014)161] and [DH-DD(2014)916], in **2017** [DH-DD(2017)1157] and in **2021** [DH-DD(2021)51]. One of the applicants, Ahmet Yıldırım, also submitted a

[3] TIB has been shut down in August 2016. Subsequently, Law No. 5651 was amended and the President of the Information and Communications Authority – BTK, currently oversees the same responsibilities.
[4] *Cengiz and Others*, nos. 48226/10 and 14027/11, 01.12.2015.

communication in June 2014 [DH-DD(2014)820] as access blocking to the Google Sites platform continued until end of July 2014 **for almost 20 months** after the Court ruled in December 2012. In the last action report, the Turkish authorities mentioned the legislative amendments made by Law Nos. 7188 and 7253.[5] The authorities argued that the Court's finding of violation of the Convention merely related to article 8 of the Law No. 5651 and recent amendments redressed the deficiencies in that article.

Background to Law No. 5651 and Its Relevant Amendments

6. First of all, it is important to summarize the legislative history of the Law No. 5651 and the measures included within this law which has been subject to several amendments since the *Ahmet Yıldırım* group of cases have been decided by the European Court.

7. In summary, the current **Turkish Internet Content Control Model** includes the following:

a. **Access blocking** to websites
b. **Access blocking** measure (URL based)
c. **Removal of content** measure (URL based)
d. **Right to be forgotten** measure with regards to search engines
e. **Liability** of social media platform providers

8. In its current version, Law No. 5651 includes **four separate** blocking as well as removal measures through **article 8** (protection of children from allegedly harmful content), **article 8/A** (protection of national security, public order, protection of life and property as well as protection of public health and prevention of crime),[6] **article 9** (violation of individual rights) and **article 9/A** (violation of privacy of individuals). Therefore, these **provisions involve separate content criteria and different legal procedures for blocking and/or removal measures.**

9. The below table is included to show the different legal criteria for blocking and removal, as well as the relevant blocking authority for the four separate provisions (**articles 8, 8/A, 9 and 9/A**) under Law No. 5651.[7] The below table also clearly shows the date when each article and amendment came into force.

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[5] Another amendment was made in the first paragraph of article 8 by Law No. 7226 on 25.03.2020 and a new category of crimes included in the catalogue of crimes subject to access blocking and content removal measures. According to sub-paragraph (c) in case of reasonable suspicion of commission of crimes regulated under the Law on Regulation of Betting and Games of Chance in Football and Other Sports Competitions (Law No. 7258) access blocking and content removal measures can be applied.

[6] According to this provision, access to an Internet site may be blocked by a judge (peace judgeship), or where a delay would present a risk, by the President of the ICTA, subsequent to a request by the Office of President of the Republic or a ministry concerned with the protection of national security and public order, the prevention of commission of crimes or the protection of public health. When a blocking order is issued upon request, the President shall submit this administrative order to a criminal judgeship of peace for approval within 24 hours, and the judge shall review this submission and issue his/her decision within 48 hours.

[7] It should be noted that a new "**right to be forgotten measure**" with regards to search engines was included to article 9 of Law No. 5651 with the addition of a newly introduced paragraph 10 with the July 2020 amendments through Law No. 7253.

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Blocking Provision	Removal Provision	Blocking & Removal Criteria	Blocking & Removal Method	Blocking & Removal Authority
Article 8 – blocking provision introduced in **May 2007**	**Article 8** amended to include removal in **July 2020**	There are specific "catalogue crimes" that are included and the aim of this provision is the protection of children from allegedly harmful content. The so called catalogue crimes are: encouragement and incitement of suicide,[8] sexual exploitation and abuse of children,[9] facilitation of the use of drugs,[10] provision of dangerous substances for health,[11] obscenity,[12] prostitution,[13] gambling,[14] crimes committed against Atatürk[15] and crimes regulated under the Law No. 7258.	**Article 8(17)**: **Originally** whole websites (domain based) and **since 2019** URL based or whole websites (domain based) when necessary and technically not feasible	Criminal Judgeships of Peace and Head of BTK if the content or hosting provider of the websites that carry content in breach of article 8 is located abroad, or even if the content or hosting provider is domestically located, when such content contains sexual abuse of children, obscenity,[16] prostitution or crimes regulated under the Law No 7258
Article 8/A – blocking provision introduced in **April 2015**	**Article 8/A** – removal provision introduced in **April 2015**	Access to content can be blocked or such content removed for the protection of life and property, national security and public order, prevention of crime or for the protection of public health.	**Article 8/A(3)**: URL based or whole websites (domain based) when necessary and technically not feasible	Criminal Judgeships of Peace and **in cases of emergency** the President of Turkey and/or relevant ministries can request head of BTK to block or remove content. BTK decision is subject to approval by a criminal judgeship of peace
Article 9 – blocking provision introduced in **February 2014**	**Article 9 –** removal provision introduced in **July 2020**	Violations of individual rights are the subject matter of Article 9 decisions	**Article 9(4)**: URL based or whole websites (domain based) when necessary and technically not feasible	Criminal Judgeships of Peace and the Association of Internet Service Providers ("ESB")
Article 9/A – blocking provision introduced in **February 2014**	No removal provision included	Individual privacy violations may be the subject of blocking decisions.	**Article 9/A(4)**: Only URL based, whole website blocking is not included	Head of BTK and Criminal Judgeships of Peace

[8] Article 84, Turkish Penal Code.
[9] Article 103(1), Turkish Penal Code.
[10] Article 190, Turkish Penal Code.
[11] Article 194, Turkish Penal Code.
[12] Article 226, Turkish Penal Code.
[13] Article 227, Turkish Penal Code.
[14] Article 228, Turkish Penal Code.
[15] Provided by the Law No. 5816.
[16] The Constitutional Court decided by a majority vote that the power to block access to "obscene" websites hosted outside Turkey (article 8(1)(5)) vested with the President of BTK subject to article 8(4) of Law No. 5651 was **incompatible with the Constitution**. Therefore, the Court **annulled the relevant measure**: Constitutional Court Judgment no. E. 2015/76., K. 2017/153, 15 November, 2017, published in the Official Gazette, no. 30325, 7.02.2018.

10. In their January 2021 Action Report, the Authorities mentioned amendments to articles 8/A and 9/A and argued that the actions taken within the scope of these articles are in line with the vision drawn by the Council of Europe's Internet Governance Strategy of 2016-2019 and carried out in accordance with the principle of legality, legitimacy and proportionality set out in the CM's Recommendation of April 2016.[17]

11. The authorities also mentioned legislative amendments made by the Law No. 7253 which introduced the possibility of ordering **content removal** as an additional new measure to access blocking. The government argued that in cases where it is possible to remove content such as a news article allegedly constituting an offence, the content in question would be removed instead of a wholesale blocking required. They argued that in this way, freedom of expression and the right to receive information is better protected since only criminal content is removed and legal content remains accessible on the website. The authorities contended that the amendment aimed to ensure that the measures applied within the scope of the mentioned article meet the criteria of proportionality with the assumption that removal of URL content prevents wholesale access blocking to websites. We explain below how removal of content is not necessarily an improvement or a better alternative to blocking. In fact, it can be a more extreme measure than access blocking and increased the possibility of abuse of power by public authorities.

12. The authorities argued the current practice is primarily based on the procedure of **notice-and-take-down** ("uyar-kaldır").[18] It is contended that local authorities first notify the representative of the relevant website if they consider a publication constitutes an offence and if the content provider fails to remove the impugned content then blocking access is applied as a "**last resort**". Nevertheless, no such procedure of notice-and-take-down is stipulated in articles 8, 8/A, 9 or 9/A of the Law No. 5651. The government **should explain the legal basis** as well as **name the local authorities** which apply the referred notice-and-take-down procedure.

13. The authorities also claimed that if a website uses the secure "**https protocol**", then specific **URL based access blocking measures are technically impossible** and blocking access to the entire website is the only available option.[19] They also argued that 99.73% of access blocking measures applied within the scope of article 8 of the Law No. 5651 concern allegedly harmful content constituting offences of sexual abuse of children, prostitution, obscenity, illegal betting and gambling. The government claims that if the use by websites of the secure "https protocol" prevents access blocking and/or removal of a specific page (URL based content) in breach of article 8, blocking access completely to those websites would be compatible with the spirit of the Convention and freedom of expression considering that access blocking to a certain piece of content is not possible due to technical impediments.[20] These arguments of the government will also be evaluated below.

14. It should be immediately mentioned that the **Venice Commission** examined in full the Law No. 5651 in **June 2016** and found especially articles 8/A, 9, and 9/A to be incompatible with the European standards and recommended either to repeal these articles or amend in

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17 See CM's Recommendation no. CM/Rec(2016)5 dated 13.04.2016.
18 See Communication from Turkey concerning the group of cases Ahmet Yıldırım v. Turkey (Application No. 3111/10), Action Report (06/01/2021, DH-DD(2021)51, para 20.
19 *Ibid*, para 21-25.
20 *Ibid*, para 26.

order to bring these measures in line with the case-law of the Court on Article 10 of the Convention.[21]

15. The **Committee of Ministers** also examined aforementioned articles and decided that **they do not comply with the requirements of foreseeability and proportionality**. The Committee decided in its 1302nd meeting in December 2017 that the legislative amendments made to Law No. 5651 **still did not correspond** to the concerns raised by the Court. The Committee emphasized that the law still does not impose an obligation to make an assessment of proportionality. Furthermore, the Committee reminded that, despite the Court's finding that the Law No. 5651 confers extensive powers on an administrative body, the mentioned legislative amendments allow a non-judicial authority, the President of the Information Technologies and Communications Authority ("ICTA"), to take a decision to block access to an internet site, effective immediately, in circumstances where delay would entail risk, which seems open to abuse by the administration.

16. It will be shown below that the amendments mentioned in the Government's January 2021 Action Report rather than improving the law, had the opposite effect of worsening the situation even further. Similarly, the authorities also mentioned the decision of the Constitutional Court in the case of Wikimedia and others application[22] and mentioned some sample decisions of a number of criminal judgeships of peace.[23] Detailed **statistics will be provided** in this submission to show how Law No. 5651 turned into a **tool of censorship** in practice. Finally, the authorities argued that all the individual and general measures required in this group of cases have been taken and they invited Committee of Ministers to close its supervision on the case thereof.[24]

17. This submission will show below that Law No. 5651 **does not satisfy the foreseeability requirement of Article 10 of the Convention** and **does not provide any safeguards** against abuse of power by public authorities including criminal judgeships of peace. Statistics show that criminal judgeships of peace **systematically disregard the case-law** of the Constitutional Court and the European Court. Legislative amendments in the Law No. 5651 **have not provided necessary safeguards** against arbitrary interference with freedom of expression on the Internet. Therefore, we invite the Committee of Ministers **not to close its supervision of this group of cases** and to continue its enhanced supervision.

THE INTERVENERS' OBSERVATIONS

18. With regard to the Committee's call upon the Turkish authorities to amend the legislation to ensure that measures do not result in wholesale blocking of access to websites and platforms, we observe that further legislative amendments were made in Law No. 5651 following the last examination of the Committee as mentioned above. Nevertheless, those amendments far from satisfied the requirement of foreseeability and preventing abuse of power by public authorities, rather **they provided further extensive powers** to extend access blocking measures as well as **introducing the additional measure** of removal of

[21] See the Venice Commission, Opinion on Law No.5651 on Regulation of Publications on the Internet and Combating Crimes Committed by Means of Such Publications, No. 805/2015, CDL-AD(2016)011, June 2016, at https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)011-e

[22] *Ibid*, para 32.

[23] *Ibid*, para 37-40.

[24] The authorities also mentioned a number of training and awareness-raising measures through education of candidates of judges and prosecutors at the Justice Academy on the freedom of expression. See para 27-31.

content. Therefore, this submission will firstly evaluate the new amendments and then provide statistical data showing that Law No. 5651 **turned into a censorship tool in practice** to silence any dissenting voices including investigative journalism. The submission will argue that abuse of power is not limited to administrative bodies, rather it also extends to criminal judgeships of peace, which are authorised to order access blocking and content removal measures under Law No. 5651. Therefore, the submission will invite the Committee **to adopt a comprehensive approach to prevent** all kinds of abuse in access blocking and removal of content measures which lead to censoring critical Internet content protected by Article 10 of the Convention.

Assessment of Recent Amendments in the Law No. 5651

19. As noted above, although the *Yıldırım Group of Cases* concerns article 8 of the Law No. 5651, most of the information and case-law samples provided by the government are concerning other articles of the Law No. 5651. We consider that as the different restrictions imposed on Internet publications under the Law No. 5651 seek to address common problems, the same methodology should be used in this submission. Therefore, this submission, as in the action plan of the government, will not only address problems arising out of article 8 but will include the other provisions.

20. As mentioned in the action plan submitted by the authorities, several amendments have been made in the Law No. 5651 since the last examination of the Committee. Some of those amendments are relevant to the implementation of the *Ahmet Yıldırım* group of cases since they are related to access blocking and content removal measures involving Internet websites and content. Firstly, a new **paragraph 17 to article 8** of Law No. 5651 was included by Law No. 7188 dated 17.10.2019. This was introduced **almost seven years** after the violation decision of the European Court in *Ahmet Yıldırım,* so as to provide foreseeability and legality. The new subsection 17 of article 8, which requires principally URL based access blocking, stipulates that:

> "Blocking orders made under paragraphs 2, 4 and 14 of this Article shall be issued in the form of blocking access to the **relevant publication**, **section**, or **part** in which the offence was committed (in the form of the **URL** etc). However, in circumstances where access to the content leading to a violation cannot be blocked for technical reasons, or where a violation cannot be prevented by means of blocking access to the relevant content, an order **blocking access to an entire website may be issued**."

21. The authorities claim that this new measure will prevent new violations. However, this is **exactly the same wording used** in **article 9(4)** with regards to **violations of individual rights** introduced in **February 2014** with Law No. 6518 as well as in **article 8/A(3)** with regards to protection of life and property, national security and public order, prevention of crime or for the protection of public health introduced in **April 2015** with Law No. 6639. In both amendments, the Government chose not to amend article 8 and waited until October 2019.

22. At first sight, the amendment of 17.10.2019 as well as the inclusion of the same provisions in articles 8/A(3) and 9(4) can be seen as a positive step in the right direction. Nevertheless, this paragraph **still allows the blocking of access to an entire website** if there is technical impossibility to apply specific URL based blocking. The authorities argued that if the relevant website uses the secure "**https protocol**", then blocking access to the whole website is a technical imperative. However, this rule does not require the judicial authorities

to implement a proportionality test as required under the European Court's jurisprudence. As a result, the judge will not assess whether blocking access to the entire website would be proportional to the aim pursued. Accordingly, if the relevant URL address cannot be blocked due to a technical reason, the judge can still block the whole YouTube or Twitter platform or news websites under this provision without making a proportionally assessment. This is entirely inconsistent with the European Court's finding in the Ahmet Yıldırım judgment. Indeed, in that case the Court held that:

> "However, there is no indication that the judges considering the application sought to weigh up the various interests at stake, in particular by assessing the need to block all access to Google Sites. In the Court's view, this shortcoming was simply a consequence of the wording of section 8 of Law no. 5651 itself, which did not lay down any obligation for the domestic courts to examine whether the wholesale blocking of Google Sites was necessary, having regard to the criteria established and applied by the Court under Article 10 of the Convention. Such an obligation, however, flows directly from the Convention and from the case-law of the Convention institutions. In reaching their decision, the courts simply found it established that the only means of blocking access to the offending website in accordance with the order made to that effect was to block all access to Google Sites.[25] However, in the Court's view, they should have taken into consideration, among other elements, the fact that such a measure, by rendering large quantities of information inaccessible, substantially restricted the rights of Internet users and had a significant collateral effect".[26]

23. The government does not explain how criminal peace judges will make the assessment required in the *Ahmet Yıldırım* judgment after the abovementioned amendments have been made. In fact, the availability of such provisions did not prevent the courts from blocking access to the **Wikipedia** platform for almost 2.5 years[27] as well as well-known news websites such as **Sendika.org** (63 times in total between 2015-2020) and **Siyasihaber.org, OdaTV**, **Independent Turkish** and **Jinnews** among others since article 8/A came into force. In some of these cases, the Constitutional Court found violation of freedom of expression and freedom of the press. Nevertheless, until the decisions of the Constitutional Court were executed by the local courts, domain names belonging to the news portals remained inaccessible for four to five years on average.

24. More worryingly, according to İFÖD's EngelliWeb Research since article 8/A came into force, between April 2015 and until the end of 2020 the judges issued **500 separate decisions** blocking access to **2174 separate websites and 3193 Twitter accounts**. It is therefore, at the very least, **arguable that** the inclusion of these provisions **will not prevent similar violations** in the future, as the provisions **did not prevent similar violations** in the past.[28] It is therefore **at the very least arguable that** "article 8/A of Law No. 5651 is not compatible with Article 10 § 2 of the European Convention on Human Rights" contrary to

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[25] *Ahmet Yıldırım v. Turkey*, no. 3111/10, 18.12.2012, paragraphs 8, 10 and 13.
[26] *Ahmet Yıldırım v. Turkey*, no. 3111/10, 18.12.2012, para 66.
[27] Wikimedia Foundation and Others Application, No: 2017/22355, 26.12.2019.
[28] Note cases pending before the European Court of Human Rights involving **article 8/A** of Law No. 5651: *Wikimedia Foundation v. Turkey*, no. 25479/19, 29.04.2019, communicated on 02.07.2019 involving access blocking to the Wikipedia platform from Turkey; *Ali Ergin Demirhan v. Turkey*, no. 10509/20, 10.02.2020, communicated on 06.07.2020, involving access blocking to the Sendika.org website and *Yaman Akdeniz & Kerem Altıparmak*, no. 5568/20, 14.01.2020, communicated on 26.08.2020 involving access blocking to over 600 Internet addresses.

what the Turkish Government has suggested.[29] Any rule that reflects the *Ahmet Yıldırım Group of Cases* should clearly show how the proportionality test in line with Strasbourg jurisprudence will be implemented by judicial authorities. However, neither the amendment made in article 8 nor in other provisions of the Law clarify this point.

25. Within this context, the European Court asserted recently that blocking access to entire websites is an extreme measure which is comparable to banning a newspaper or TV station.[30] Through this, **the Court raised the required standards to block access to websites much higher** than its earlier judgments. This entails that domestic authorities can only block the specific illegal content in a given website. If the **scope of the blocking order extends to legal content** on the website, **it would constitute a violation of the Convention**. Given that some Member States do not have the necessary technology to block specific pages in websites, the Court certainly **does not leave much room for domestic authorities to manoeuvre**.[31] So, authorities cannot put forward technical insufficiency as an excuse to block access to entire websites.

26. With those amendments, both the scope and content of the power of the President of the ICTA has been expanded. Even prior to these amendments, the Venice Commission argued that endowing an administrative body with such a power was unnecessary without prior judicial review and recommended repealing this power granted to the President of ICTA.[32] Nevertheless, the government expanded the competence, rather than repealing it.

27. Law No. 7253 expanded the competence of judgeships of peace to order **content removal** in addition to the measure of access-blocking in articles 8/A, 9 and 9/A. Nevertheless, as indicated by the Venice Commission the procedures under articles 8/A, 9 and 9/A do not concern an interlocutory or precautionary measure taken in the framework of a pending criminal or civil procedure before the domestic courts, but constitute fully-fledged, autonomous procedures through which substantive decisions on "access-blocking and/or content removal" are taken for a number of aims indicated in those articles.[33] The procedures under articles 8/A, 9 and 9/A do not require the institution of any civil or criminal procedures. Therefore, there is no possibility of review of those decisions by a trial court. Under these circumstances, the short time allowed to the peace judgeship to take a decision on access-blocking/content removal (24 hours under articles 8/A and 9; 48 hours under article 9/A), without holding a hearing and without any possibility of appeal before a higher court against the decision on access-blocking/content removal, **cannot be considered** as providing the **necessary procedural guarantees** in order to protect the right to freedom of expression on the Internet.[34]

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[29] Communication from Turkey concerning the group of cases Ahmet Yıldırım v. Turkey (Application No. 3111/10), Action Report (06/01/2021, DH-DD(2021)51, para 19.

[30] *OOO Flavus and Others v. Russia*, no. 12468/15 23489/15 19074/16, para. 37, 23.06.2020.

[31] Güngördü, A., The Strasbourg Court Establishes Standards on Blocking Access to Websites, Strasbourg Observer, at https://strasbourgobservers.com/2020/08/26/the-strasbourg-court-establishes-standards-on-blocking-access-to-websites/

[32] Venice Commission, Opinion on Law No.5651 on Regulation of Publications on the Internet and Combating Crimes Committed by Means of Such Publications (No. 805/2015) CDL-AD(2016)011, para.53.

[33] *Ibid*, para 54.

[34] *Ibid*, para 60.

28. The Venice Commission recommended that the procedures under articles 8/A, 9 and 9/A should be made **dependent on the institution of a criminal or civil procedure**[35] and the decision on access blocking under those procedures should only constitute a "precautionary measure" which can be taken in anticipation of the substantive criminal or civil proceedings when there is a reasonable suspicion of a violation of the law and the danger of an irreparable damage.[36] This should also be the case for article 8 procedures as the procedural guarantees referred to by the Commission, including the possibility of a review of the precautionary measure by a trial judge, never takes place in practice. This is because the majority of the decisions subject to article 8 are issued by the President of ICTA and no criminal trial takes place. Therefore, currently, **de facto**, all the orders under the different legal provisions of Law No. 5651 are issued **without a time limit** extending the duration of the so-called precautionary measures **indefinitely**.

29. Alternatively, should the autonomous character of the procedures on access-blocking/content removal under article 8/A, 9 and 9/A be maintained, the Venice Commission recommended that the procedures should be amended significantly in order to provide the content providers and (or owners of websites and portals) sufficient time and facilities to defend themselves and the judgeships sufficient time and possibilities to take a well-reasoned decision, and in particular the competence to hold a hearing in order to make an appropriate proportionality assessment on the necessity of the interference with freedom of expression. A hearing would give the judge the opportunity to examine properly all the concrete circumstances of the case and to examine the points of view of the parties to set a fair balance between freedom of expression and the rights of others.[37]

30. Nevertheless, recommendations of the Venice Commission have not been followed by the Turkish authorities. The government neither made the procedures under articles 8, 8/A, 9 and 9/A dependent on the institution of a criminal or civil procedure nor amended them to provide content providers any procedural safeguards. On the contrary, the extent of the provisions was widened by enabling the criminal judgeships of peace and President of the ICTA to decide on removal of content (articles 8 and 9) as well as introducing the "right to be forgotten" measure with regards to search engines (article 9) alongside the access blocking measures with the amendments made by Law No. 7253 which entered into force on 31.07.2020.[38]

31. It should be noted that the procedures under articles 8/A, 9 and 9/A of the Law No. 5651 do not provide any procedural safeguards for content providers. The request of access blocking and/or removal of content are not notified to the content providers to allow them to submit their defence. The Court recently elaborated its case-law about procedural safeguards to be observed by contracting states when interfering with freedom of expression through online access blocking measures.[39] The Court has enumerated a set of procedural safeguards which include (*i*) advance notification of the blocking measures to the affected parties to ensure the involvement of the website owners in the blocking proceedings, (*ii*) authorities'

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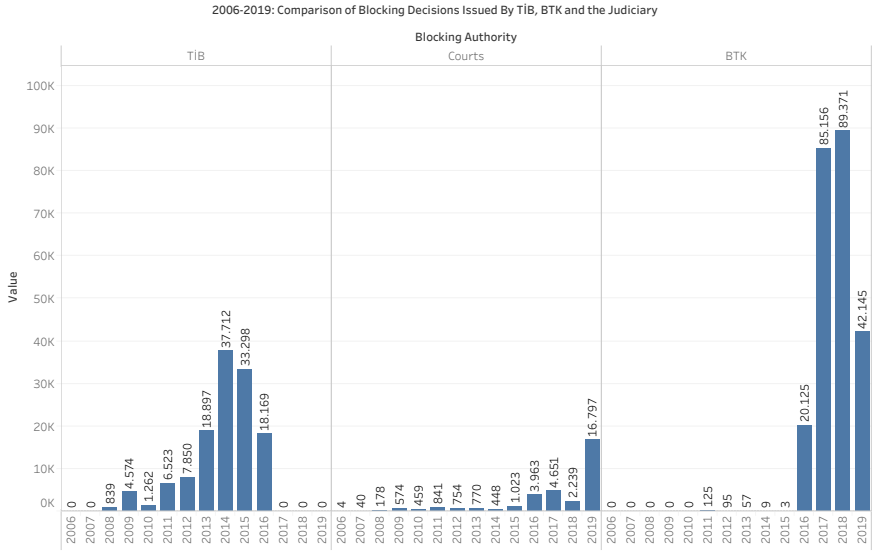
35 *Ibid*, para 61.
36 *Ibid*, para 60.
37 *Ibid*, para 62.
38 Please note that "removal of content" measure existed within article 8/A since it was introduced in April 2015.
39 *OOO Flavus and Others v. Russia*, no. 12468/15 23489/15 19074/16, 23.06.2020; *Bulgakov v. Russia*, no. 20159/15, 23.06.2020; *Engels v. Russia*, no. 61919/16, 23.06.2020; *Vladimir Kharitonov v. Russia*, no. 10795/14, 23.06.2020.

obligation to carry out an impact assessment of the blocking measures prior to their implementation or justify the urgency if an immediate implementation is necessary, (*iii*) giving the opportunity to websites owners to remove the illegal content, and (*iv*) providing a forum, such as a court or other independent adjudicatory body, for affected parties to be heard and to challenge the measure.[40] The procedures stipulated under articles 8/A, 9 and 9/A of the Law No. 5651 do not comply with these requirements.

32. Therefore, the Law No. 5651 does not **guarantee the foreseeability of measures of access blocking or content removal**. Neither does **it prevent arbitrary interference** with freedom of expression.

Application of Law No. 5651 in Practice

33. It should be noted that, no statistical data on websites or URL addresses blocked from Turkey were published by the public authorities such as ICTA or the Association of Access Providers ("ESB"). However, İFÖD publishes its annual EngelliWeb reports since 2018 and these reports are the only resource for statistical data.[41] According to EngelliWeb 2019 report, a total of 408.494 domain names and websites were blocked from Turkey by the end of 2019 and 366.210 of these websites were blocked by administrative blocking orders subject to article 8 of Law No. 5651.[42] As can be seen from the table below most of the measures have been ordered administratively by the TİB until August 2016 and since then by the President of ICTA without any judicial oversight and without involvement of content providers.



[40] Güngördü, A., The Strasbourg Court Establishes Standards on Blocking Access to Websites, Strasbourg Observer, at https://strasbourgobservers.com/2020/08/26/the-strasbourg-court-establishes-standards-on-blocking-access-to-websites/

[41] İFÖD, **EngelliWeb 2018**: An Assessment Report on Blocked Websites, News Articles and Social Media Content from Turkey, July 2019, at https://ifade.org.tr/reports/EngelliWeb_2018_Eng.pdf; **EngelliWeb 2019**: An Iceberg of Unseen Internet Censorship in Turkey, August 2020, at https://ifade.org.tr/reports/EngelliWeb_2019_Eng.pdf.

[42] Akdeniz, Y. & Güven, O., EngelliWeb 2019: An Iceberg of Unseen Internet Censorship in Turkey, İFÖD, August 2020, p. 8.

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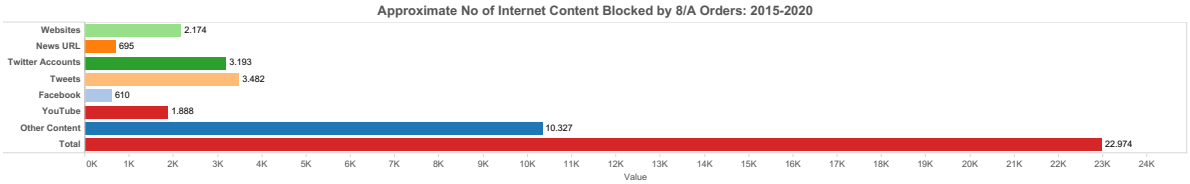
34. According to EngelliWeb 2019 report a total of 500 8/A orders were issued by the end of 2020 and access to more than 22.974 Internet addresses including approximately 2174 websites and domain names, more than 695 news articles, more than 3193 Twitter accounts, approximately 3482 tweets, nearly 600 Facebook content items, and more than 1888 YouTube videos, was blocked pursuant to these orders.[43]



35. Article 8/A-based orders usually target Kurdish and left-wing news websites. In addition to Sendika.org and SiyasiHaber.org, news websites such as Yüksekova Güncel, Dicle Haber Ajansı (DIHA), Azadiya Welat, Özgür Gündem, Yeni Özgür Politika, Rudaw, RojNews, ANF, JinNews, Kaypakkaya Haber, Güneydoğu'nun Sesi İdil Haber, Kentin Özgün Sesi Bitlis Güncel, Besta Nuce, JINHA and JinNews are regularly blocked from Turkey by 8/A orders. During 2020, access to OdaTV and Independent Turkey news websites were also blocked several times. Furthermore, subject to article 8/A, access to the Wikipedia platform had been blocked for 2.5 years between 2017 and 2019 until the decision of the Constitutional Court finding violation of constitutional rights.[44]

36. In none of the 500 blocking orders did a criminal judgeship of peace reject the approval of the order of the President of the ICTA. This means that judicial oversight of the orders of the President of the ICTA by peace judgeships is hopelessly inadequate and cannot prevent arbitrary interference with freedom of expression and press freedom. This opinion has been confirmed several times by the Constitutional Court decisions. In 2019, the Constitutional Court gave seven separate judgments involving article 8/A of Law No. 5651 and it found violation of constitution in each judgment.[45] In 2020 the Constitutional Court delivered further violation judgments regarding article 8/A.[46]

37. In their January 2021 Action Report, the Authorities referred to two separate 8/A decisions issued by the same judgeship as evidence that judges of the peace provide adequate oversight. In the first case, the Ankara 5th Criminal Judgeship of Peace rejected a 8/A request by the Ankara Chief Public Prosecutor's Office.[47] In the second case, the same judgeship rejected a separate 8/A request made by the Ministry of Culture and Tourism.[48]

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43 Akdeniz, Y. & Güven, O., EngelliWeb 2019: An Iceberg of Unseen Internet Censorship in Turkey, İFÖD, August 2020, p.16. As part of the EngelliWeb project, the elimination and classification of **10.327 of the 22.974** websites that were found to be blocked by the end of 2019 under Article 8/A continue. Unlike orders issued subject to Article 9 of the Law No. 5651, 8/A orders are not implemented in a transparent manner; thus, it is not possible to access the details of criminal judgeships of peace access blocking decisions and the impugned content and blocked URL addresses.

44 *Ibid*., p.16.

45 Birgün İletişim ve Yayıncılık Ticaret A.Ş. Application, Application No: 2015/18936, 22.05.2019; Baransav ve Keskin Kalem Yayıncılık ve Ticaret A.Ş., Application No: 2015/18581, 26.09.2019; Cahit Yiğit Application, No: 2016/2736, 27.11.2019; Tahsin Kandamar Application, No: 2016/213, 28.11.2019; Wikimedia Foundation and Others Application, No: 2017/22355, 26.12.2019.

46 Ali Ergin Demirhan Application, Application No:2015/16368, 11/3/2020; Ali Ergin Demirhan Application (2), Application No: 2017/35947, 9/9/2020.

47 Ankara 5th Criminal Judgeship of Peace, no 2019/9292, 05.12.2019.

48 Ankara 5th Criminal Judgeship of Peace, no 2020/7369, 22.10.2020.

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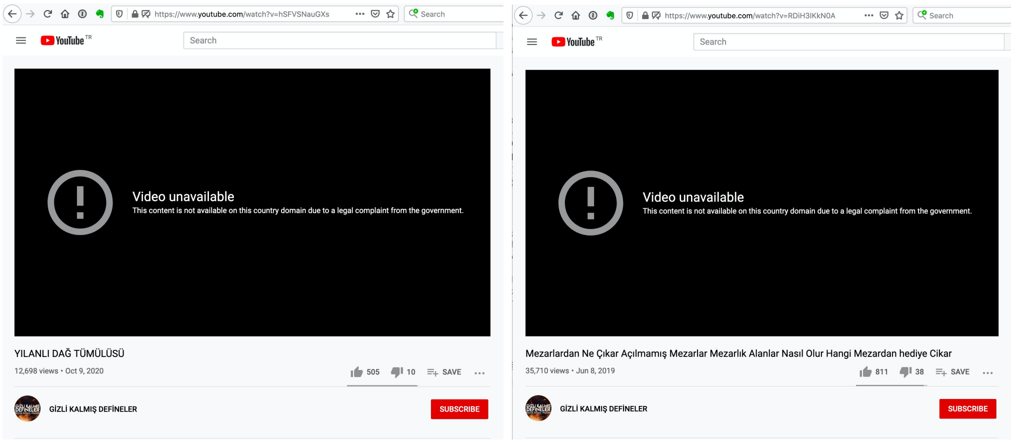
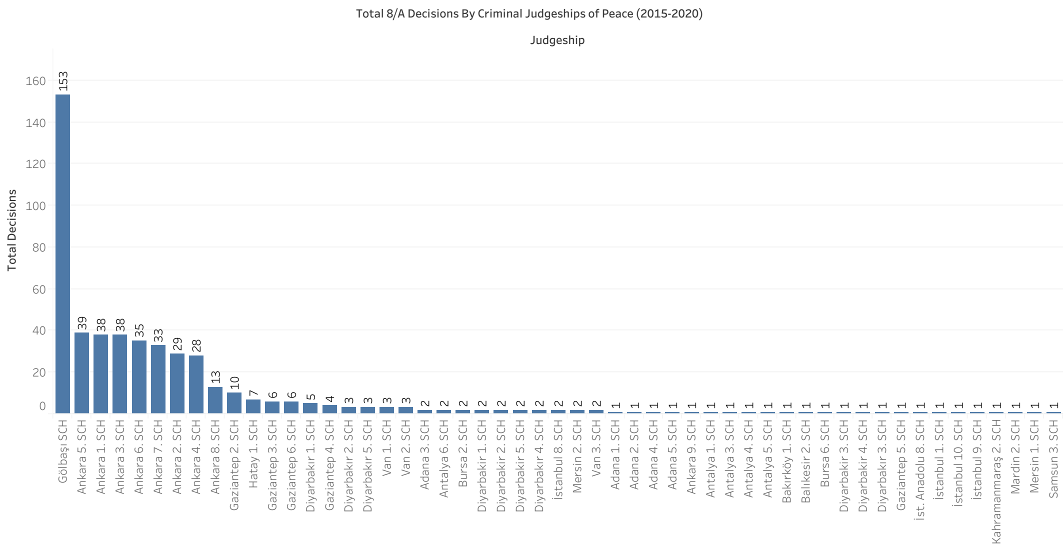
In our view, these examples are clearly insufficient to provide evidence of appropriate oversight and somewhat misleading. **Firstly**, the first decision submitted by the authorities was rejected on procedural grounds and the Judgeship may have re-considered his decision subsequently. In the other decision, the same Judgeship considered that the YouTube videos at issue were related to "**Hidden Treasures**" and concerned hidden cultural assets and heritage around the world, i.e. content which had nothing to do with article 8/A. Accordingly, it rejected the request from the Ministry. Nonetheless, at a later date, the videos in question were somehow blocked and clearly tagged as "legal complaint from the government" by YouTube.



38. Secondly, as can be seen below, the Ankara 5th Criminal Judgeship of Peace issued 39 separate 8/A decisions between 2015-2020, the second highest in terms of issuing 8/A access blocking decisions. Therefore, the sample provided by the authorities do not reflect the reality of blocking decisions and how they are issued in Turkey. The odd decision to the contrary does not contradict nor balance this conclusion. In fact, they reinforce the views put by the intervenors in this submission.



39. In terms of the application of article 9 of Law No. 5651 on violation of personal rights, this provision has been extensively used to block access to Internet content as in the cases of articles 8 and 8/A. As of end of 2017, 48.665 such decisions were issued by the judges with

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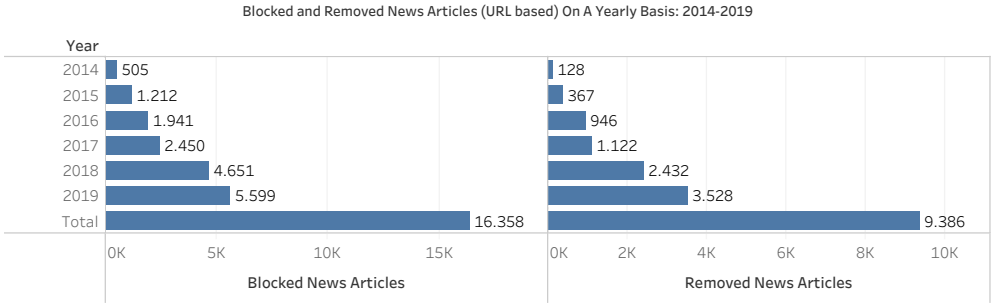
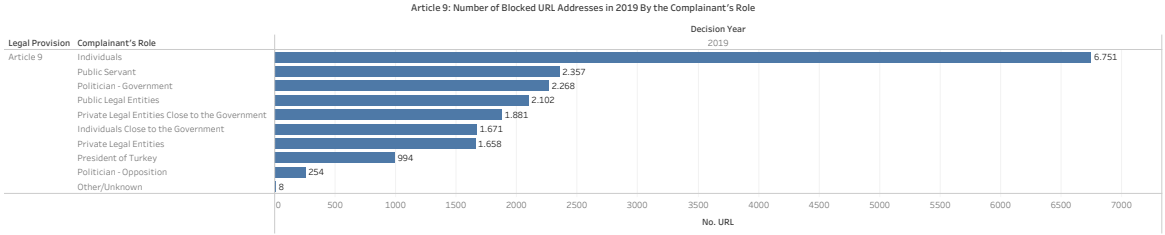
the result of blocking access to a total of 99.952 Internet addresses as well removal of 50.186 separate Internet addresses. İFÖD, as part of its EngelliWeb project, assessed the blocking practice with regards to the media and news articles and determined that, until the end of 2019, 16.358 specific **news articles** (URL addresses) were blocked (9386 of these were removed) in accordance with article 9 by 4158 separate orders issued by 408 separate criminal judgeships of peace.[49]



40. Moreover, as part of its EngelliWeb research, İFÖD identified in total **1138 article 9 decisions** issued in 2019 and **a total of 19.044 URL addresses** that have been blocked with these decisions including not only news articles but also social media content. When these are categorised and assessed by reference to the complainant's position, it can be seen below that majority of the content blocked was based on requests by public servants, politicians associated with the government, public legal entities and authorities, individuals and private legal entities close to the government as well as by the President of Turkey.



41. The Authorities in their January 2021 Action Report referred to six separate article 9 decisions which were rejected by various judgeships.[50] **Firstly**, none of these are politically motivated requests involving politicians, public servants or public legal entities as mentioned above. On the contrary, these involve requests by private individuals and entities. **Secondly**, the subject of the requests is not of a political nature. **Thirdly**, some requests involve blocking access to Twitter accounts and one request involves access blocking to Yeni Asır, a well-known newspaper's website. It is not therefore uncommon that some requests are rejected. **Finally**, in two cases, it is not clear from the decisions what was requested for blocking or removal. As in the case of article 8/A, the sample provided by the authorities is primarily very small and does not reflect the reality or contradict İFÖD's findings through its EngelliWeb research.

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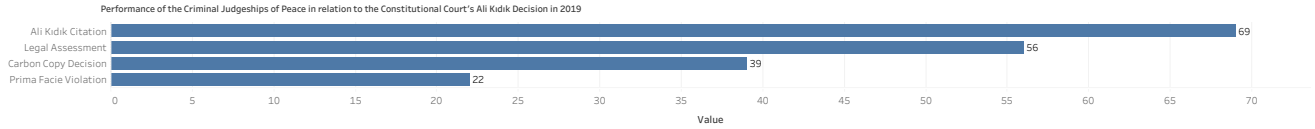
49 Akdeniz, Y. & Güven, O., EngelliWeb 2019: An Iceberg of Unseen Internet Censorship in Turkey, İFÖD, August 2020, p.24.

50 The authorities submitted six separate decisions in their submission by the Istanbul 5th Criminal Judgeship of Peace, Istanbul 1st Criminal Judgeship of Peace, Izmir 6th Criminal Judgeship of Peace, Izmir 1st Criminal Judgeship of Peace, Ankara 1st Criminal Judgeship of Peace and Istanbul 12th Criminal Judgeship of Peace.

42. The Constitutional Court delivered a leading judgment in the Ali Kıdık application about access blocking decisions issued pursuant to article 9 and developed a "prima facie violation" test for the criminal judgeships of peace to apply in order to block access to Internet content.[51] The Constitutional Court has so far referred to the Ali Kıdık judgment and the principle of prima facie violation in 15 different applications.[52] The Ali Kıdık judgment of the Constitutional Court is binding on the lower courts including the criminal judgeships of peace. It is therefore required for the criminal judgeships of peace to make a prima facie violation assessment when evaluating the requests made under article 9 of the Law No. 5651 and prior to issuing access blocking related decisions. Nevertheless, İFÖD found out, as part of the EngelliWeb project, that approximately 6200 access-blocking orders were issued in 2019 subject to article 9 of Law No. 5651 by nearly 690 criminal judgeships of peace across Turkey. Of those 6200 decisions, only 69 decisions made reference to the Ali Kıdık judgment of the Constitutional Court and only in 22 of those decisions a "prima facie violation" assessment was made by 17 separate judgeships, the remaining 47 decisions only referred to the application number of the Ali Kıdık judgment.[53]



Conclusions and Recommendations

1. Systematic problems continue with regard to access blocking and content removal orders issued by criminal judgeships of peace and by administrative bodies. The legal framework is far from being foreseeable and does not provide procedural safeguards for website owners or content providers to defend their rights during the proceedings. Amendments made in article 8 and other provisions of the Law have not ended this structural and systemic problem.

2. Law No. 5651 continues to enable criminal judgeships of peace and administrative bodies, such as the president of the ICTA, to order the blocking of access to entire websites. The Wikipedia platform remained inaccessible from Turkey for approximately 2.5 years.

3. None of the legal amendments made and mentioned by the authorities would prevent a similar blocking decision in the near future. And despite the Constitutional Court decisions, access to the OdaTV, Independent Turkish and JinNews websites, among other news websites, remain inaccessible currently as the lower courts continue to disregard the principled approach adopted by the Constitutional Court as well as by the Strasbourg Court.

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51 Ali Kıdık Application, No: 2014/5552, 26.10.2017.

52 Kemal Gözler Application, (No: 2014/5232, 19.04.2018); Miyase İlknur and Others Application (No: 2015/15242, 18.07.2018); A.A. Application, (No: 2014/7244, 12.09.2018); Yeni Gün Haber Ajansı Basın ve Yayıncılık A.Ş. Application, (No: 2015/6313, 13.09.2018); IPS Communication Foundation Application (No: 2015/14758, 30.10.2018); Özgen Acar Application, (No: 2015/15241, 31.10.2018); IPS Communication Foundation Application (2) (No: 2015/15873, 07.03.2019); Barış Yarkadaş Application (No: 2015/4821, 17.04.2019); Medya Gündem Dijital Yayıncılık Ticaret A.Ş (3) Application (No: 2015/16499, 3.07.2019); Education and Science Workers' Union (Eğitim-SEN) Application (No: 2015/11131, 4.07.2019); Kemalettin Bulamacı Application (No: 2016/14830, 4.07.2019); Kerem Altıparmak and Yaman Akdeniz Application (3) (No: 2015/17387, 20.11.2019); Kerem Altıparmak Application (No: 2015/8193, 27.11.2019); Kemal Gözler Application (2) (No: 2015/5612, 10.12.2019); Aykut Küçükkaya Application (No: 2014/15916, 09.01.2020).

53 EngelliWeb 2019, p.39.

4. Based on the detailed analysis provided in this submission, we kindly invite the Committee of Ministers **not to close** the *Ahmet Yıldırım* Group of cases and **continue to examine this group under the enhanced procedure**, as the problem remains persistent and requires even a closer scrutiny.

5. Finally, the Committee of Ministers should ask the government to provide detailed statistical data about access blocking and/or content removal measures.

İFADE ÖZGÜRLÜĞÜ DERNEĞİ
Osmanağa Mah. Hasırcıbaşı Cad.
No:24/4 Kadıköy/İSTANBUL
Kadıköy V.D. 4700644051
Kütük No: 34-235/076

İfade Özgürlüğü Derneği – İFÖD (Turkey) Web: https://ifade.org.tr Twitter: @ifadeorgtr

İnsan Hakları Derneği – İHD (Turkey) Web: https://www.ihd.org.tr/ Twitter: @ihd_genelmerkez

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Human Rights Association ("IHD") is a non-governmental and voluntary organization which was set with the sole objective of promoting activity concerned with human rights and freedoms.

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