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Communication from an NGO (IFÖD) (16/01/2023) in the case of AHMET YILDIRIM 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 : 1459e réunion (mars 2023) (DH)

Communication d'une ONG (IFÖD) (16/01/2023) dans l'affaire AHMET YILDIRIM c. Turquie (requête n° 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. Türkiye (Application No. 3111/10)

by

İFADE ÖZGÜRLÜĞÜ DERNEĞİ (İFÖD)

17 January 2023

An independent non-governmental organization specialized in defending and promoting freedom of expression

İFADE ÖZGÜRLÜĞÜ DERNEĞİ

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17.01.2023

Rule 9.2 Communication from İfade Özgürlüğü Derneği ("İFÖD") in the *Ahmet Yıldırım* group of cases v. Türkiye (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 Türkiye. İFÖD has been informing the Committee of Ministers ("the Committee") on the recent developments concerning the persistent failure of Turkish authorities in full and effective implementation of general measures in *Ahmet Yıldırım* group of cases v. Türkiye since 2021.[1]

2. In relation to *Ahmet Yıldırım* group of cases, İFÖD submitted its joint Rule 9.2 communication with İHD and Article 19 on 26.01.2021.[2] In the submission, the NGOs explained the background and amendments made to Law No. 5651 in detail. The NGOs further provided examples and statistics demonstrating that Law No. 5651 **did not satisfy the foreseeability requirement of Article 10 of the Convention** and **provide any safeguards** against abuse of power by public authorities.

3. The aim of this submission is to inform the Committee concerning the recent application of Law No. 5651. In this respect, İFÖD will elucidate the problems arising from and in relation to Law No. 5651. In the present submission, **firstly**, the background on the judgments and the execution phase of the *Ahmet Yıldırım* group of cases will be summarized. **Secondly**, İFÖD will provide a short overview of the recent case-law of the European Court on access blocking measures and practices relevant also to Turkish law. **Thirdly**, the decision of the Committee of Ministers adopted at its 1398th meeting in March 2021 will be reminded. **Fourthly**, the additional information provided by the Turkish authorities with their Rule 8.2a submission of 15.06.2022 (DH-DD(2022)652) will be scrutinized with respect to the Committee's decision of March 2021. **Fifthly**, İFÖD will assess the sample decisions presented by the Government. **Finally**, the October 2022 amendments to Law No. 5651 will be explained. Based on its annual reports, İFÖD will also provide the Committee recent statistics on access blocking and removal of content practices deployed in Türkiye.[3]

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1 *Ahmet Yıldırım v. Türkiye*, no. 3111/10, 18.12.2012; *Cengiz and Others v. Türkiye*, nos. 48226/10 and 14027/11, 01.12.2015.

2 See İFÖD's joint submission with İHD and Article 19, DH-DD (2021)144 at https://ifade.org.tr/reports/rule9/IFOD_Rule9_AhmetYildirim_Group_Submission.pdf

3 Yaman Akdeniz and Ozan Güven, *EngelliWeb 2021: The Year of the Offended Reputation, Honour and Dignity of the High-Level Public Personalities*, October 2022, İfade Özgürlüğü Derneği, available at: https://ifade.org.tr/reports/EngelliWeb_2021_Eng.pdf.

Background of the *Ahmet Yıldırım* Group of Cases

4. *Ahmet Yıldırım* group of cases concerns the interference with the applicants' right to freedom to **receive** and **impart** information and ideas by blocking access to entire websites relying on article 8 of Law No. 5651 which does **not satisfy the foreseeability requirement** of the Convention and which did not afford the applicants the degree of protection to which they were entitled by the rule of law in a democratic society.

5. The *Ahmet Yıldırım* group of cases comprises two cases concerning violations of the applicants' right to freedom of expression on account of domestic court decisions blocking access to the Google Sites and YouTube platforms. The Court's conclusions, finding a violation of Article 10 were mainly based on the following grounds:

a. the interference with the applicants' right to freedom of expression resulting from Article 8 of Law No. 5651 **did not satisfy the foreseeability requirement** 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 **generated arbitrary outcomes** and could not be said to have been aimed solely at blocking the offending content, since it blocked access to all the sites hosted by the hosting platform, resulting in a **significant collateral effect**;

c. the notion of "**publication**" under Law No. 5651 was too **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")[4] in the implementation of blocking decisions;

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 any safeguards to ensure that a blocking decision in respect of a specific website was not used as a means of blocking access more broadly to entire platforms or whole websites.

6. In the case of *Cengiz and others*, the Court had some additional conclusions involving the victim status of the applicants:

a. 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, how the person concerned uses the website and the potential impact of the measure on them;
b. YouTube, as a platform, not only hosts artistic and musical works but is also a very popular platform for political speech and political and social activities, fostering citizen journalism's emergence.

[4] TIB has been shut down in August 2016. Subsequently, Law No. 5651 was amended and the President of the Information and Communications Technologies Authority, currently bears the same responsibilities.

7. 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 the Law No. 5651:

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

ii. access blocking measures **do not generate arbitrary outcomes** and do not result in wholesale blocking of access to a host website.

8. 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 2021 [DH-DD (2021)51]. In the last action report, the Turkish authorities referred to the legislative amendments made by Law Nos. 7188 and 7253. İFÖD and other NGOs submitted their Rule 9.2 communication on this group of cases on 26.01.2021 and provided the Committee an assessment on the then-newly-adopted legal amendments as well as detailed statistics on the application of the relevant law.

9. The Committee of Ministers, in its 1398th meeting held on 9-11 March 2021, adopted a decision regarding the supervision of the execution of the *Ahmet Yıldırım* group of cases and decided to continue to monitor the implementation of the group of cases.[5] The Government made a Rule 8.2a submission which included additional information on this group of cases on 15.06.2022.[6]

Recent Case-Law of the Court on Access Blocking Measures and Practices

10. Subsequent to the judgments of this group of cases, the Court has adjudicated on the Convention standards applicable to wholesale access-blocking measures in several cases concerning Russia[7], expanding on its own principles set in the earlier cases concerning Türkiye. It is therefore relevant to reiterate the extended standards set by the Court, as the Committee, in its most recent decision, called for the alignment of the Turkish legal framework with the Court's case law.

11. According to the Court, the Internet has now become one of the principal means by which individuals exercise their freedom to **receive and impart information and ideas** and Article 10 guarantees **not only the right to impart information but also the right of the public to receive it.**

12. In short, the Court **raised the required standards to block access to websites or social media accounts much higher** than in its earlier judgments of *Ahmet Yıldırım* and *Cengiz and Others* by stating that "a measure blocking access to an entire website **has to be justified on its own**, **separately and distinctly** from the justification underlying **the initial order targeting illegal content**, and by reference to the **criteria established** and applied

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5 See CM/Del/Dec(2021)1398/H46-31.

6 See DH-DD(2022)652.

7 *Kablis v. Russia*, nos. 48310/16 and 59663/17, 30.04.2019; *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; *OOO Informatsionnoye Agentstvo Tambov-Inform v. Russia*, no. 43351/12, 18.05.2021; *Taganrog LRO and Others v. Russia*, nos. 32401/10 44285/10 3488/11 3492/11 14821/11 17552/11 2269/12 5547/12 76162/12 74387/13 79240/13 28108/14 2861/15 15962/15 16578/15 24622/16 10188/17 39417/17 3215/18 44386/19, 07.06.2022.

by the Court under Article 10 of the Convention."[8] As clearly stated by the European Court, "when **exceptional** circumstances justify the blocking of illegal content, **a State agency** making the **blocking order must ensure** that the **measure strictly targets the illegal content** and **has no arbitrary or excessive effects**, **irrespective of the manner of its implementation**. Any indiscriminate blocking measure **which interferes with lawful content or websites as a collateral effect** of a measure aimed at illegal content or websites amounts to arbitrary interference with the rights of owners of such websites."[9]

13. According to the Court, "blocking access to legitimate content **can never be an automatic consequence of another**, more restricted blocking measure"[10] of wholesale access blocking to a website. The Court, in its Russia related cases clearly established that if any justification for the wholesale blocking orders targeting the applicants' websites or social media accounts is lacking, **the Court will certainly find that they do not pursue any legitimate aim**. The Court certainly **does not leave much room for domestic authorities to manoeuvre**[11] especially if the blocking measure extends to **legal content** on the website or have a significant collateral effect on the material that has not been found to be illegal.

14. The European Court in its Russia related case-law **also clarified the required procedural safeguards** to be observed by contracting states when interfering with freedom of expression through online access blocking measures.[12] The Court has enumerated a set of procedural safeguards which include:

i. **Involvement** on the part of the website owners in the blocking proceedings,

ii. Advance **notification** to the parties whose rights and interests were likely to be affected,

iii. **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, provide the opportunity to websites owners to remove the illegal content,

iv. **Provision** for the affected parties to be heard and to challenge the measure.[13]

15. Due to the evolutionary interpretation of the Convention by the European Court, the execution of this group of cases must encompass the evolving jurisprudence of the Court.

1398th Meeting of the Committee of Ministers and its Relevant Decisions

16. In its 1398th meeting, the Committee adopted further decisions regarding the execution of the *Ahmet Yıldırım* group of cases. It reiterated that the relevant law still "did **not correspond** to the concerns raised by the European Court, as it **allows the blocking of**

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8 *Vladimir Kharitonov v. Russia*, no. 10795/14, 23.06.2020 § 38.

9 *Ibid*, § 46.

10 See for a recent application of this principle within the context of both Articles 9 and 10 of the Convention, *Taganrog LRO and Others v. Russia*, nos. 32401/10 44285/10 3488/11 3492/11 14821/11 17552/11 2269/12 5547/12 76162/12 74387/13 79240/13 28108/14 2861/15 15962/15 16578/15 24622/16 10188/17 39417/17 3215/18 44386/19, 07.06.2022, § 231.

11 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/.

12 *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.

13 *Ibid*.

access to an entire website in circumstances where blocking access to the relevant content is not *possible*, **without submitting this measure to a proportionality assessment** based on *necessity*".[14] The Committee, *inter alia*, expressed its concern about the powers of the Information and Communications Technologies Authority ("ICTA"), in the absence of a legal framework which ensures both tight control over the scope of the ban and effective judicial review to prevent any abuse.

17. The Committee, citing the Venice Commission's Opinion on Law No. 5651, urged the Government to make legislative amendments to ensure that Law No. 5651 fully responds to the concerns raised by the European Court in the present group of cases. The Venice Commission had recommended that the Government repeals the power of issuing access blocking orders of the president of ICTA.[15] Despite this finding, as will be explained below, the power granted to the President of ICTA was further expanded by the most recent amendments to the Law during October 2022 and the subsequent judicial review procedure is still not in compliance with the Convention standards.

18. Moreover, the Committee requested from the Government detailed statistical data "on the overall number of removed content, blocked URLs and websites by the President of ICTA and by the courts in the past three years, with an indication of the articles of the Law No. 5651 on which they are based, together with the number of blocking requests rejected by the courts and examples of the reasoning of such decisions." The Committee invited the authorities to provide information on the directed questions by 31.03.2022.[16] The Government failed to submit such information in due time though submitted an Additional Information note on 15.06.2022.

An Assessment of the Additional Information Submitted by the Government in June 2022

19. It must be highlighted from the outset that the Government cannot be considered to have complied with the Committee's decision, as the Rule 8.2a submission, in addition to having been presented after the deadline prescribed by the Committee, **does not provide any of the information requested by the Committee.** It mainly consists of a repetition of the information that the Committee is already familiar with.

20. The Additional Information Note sets off with a summary of the legal amendments made to Law No. 5651 in 2019 and 2020, notwithstanding the fact that the relevant information was presented to the Committee previously. Due to the timing of the communication, the most recent change in the legal framework (amendments made by Law No. 7418 on 13.10.2022) is not present in the Government's submission, though it is assessed below by İFÖD.

21. The Rule 8.2a submission proceeds with a run-down of the constitutional and statutory provisions concerning the general obligations of the courts to provide reasoned judgments as enshrined in their relevant procedural codes (paras. 16 and 18). It is self-explanatory that the mentioned regulations are neither relevant to the questions directed by the Committee

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14 CM/Del/Dec(2021)1398/H46-31, para. 6 (Emphasis in original).

15 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.

16 DH-DD(2022)652, para. 5.

nor capable of compelling the courts to provide adequately reasoned judgments in the absence of legal safeguards envisioned in the substantive legal rules, such as article 8 of Law No. 5651, as is demonstrated by this group of cases.

22. The Government, referring to article 8(17) of Law No. 5651, argues once again that there now exists legal ground for wholesale blocking of a website. However, the *obiter dictum* of the *Ahmet Yıldırım* judgment and the focus of this present group's supervision does not merely relate to the lack of a legal basis for the impugned interference with the freedom of expression of the applicants but encompasses the quality of such legal provisions, as well. As the law stands today, the prerogative of the president of the ICTA to block an entire website without the approval of a judge remains and as will be explained below, is further expanded by the most recent amendments. Needless to state, regardless of this provision, article 8 of Law No. 5651 falls also short of the **required procedural safeguards** to be observed by contracting states when interfering with freedom of expression through online access blocking measures.[17]

23. The Government argued that the lifting of the blocking decisions (article 8(7/8)), which were issued by the president of the ICTA, due to non-prosecution decisions or acquittals constitutes a judicial review of the said administrative orders. This claim is misleading on several grounds: **firstly**, there are not many criminal investigations and/or prosecutions involving crimes listed in article 8 with regards to websites or Internet content in Türkiye. Therefore, **access blocking decisions do not necessarily lead into criminal investigations and/or prosecutions**. The same is also true for articles 8/A and 9 related blocking decisions. **Secondly**, the criminal proceedings brought against individuals who are prosecuted do not, at any rate, relate to or assess the lawfulness of the blocking decisions issued by the president of the ICTA. Such criminal proceedings pertain exclusively to the criminal liability of the alleged offenders as access blocking constitutes in theory but not in practice, a precautionary measure. Therefore, the criminal process does not assess the proportionality or the necessity of the blocking decisions, as was stat ed by the Court and the Committee. **Thirdly**, the blocked websites continue to be inaccessible during the period between the issuing of the blocking decisions and the rare occasions in which non-prosecution or acquittal decisions are issued. In fact, even an acquittal decision may not be sufficient for the lifting of an access blocking decision issued by the President of ICTA. The K. Duman application[18] involved the applicant's claim that his freedom of expression has been violated due to the fact that the access blocking measure applied to his website was not lifted, despite the fact that a verdict of acquittal was issued in relation to his prosecution. Oddly enough, the Constitutional Court found this application inadmissible on the grounds that the applicant failed to communicate his acquittal decision to ICTA even though the Law No. 5651 explicitly states that the decision needs to be sent to ICTA via the deciding court. **Finally**, in the absence of any criminal prosecutions and guilty verdicts, the blocking decisions issued by the president of ICTA, which are supposedly precautionary measures, remain indefinitely even though no court of law ruled on whether the content on such a website includes illegal content or not. In sum, there exists no

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17 *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.

18 K. Duman, Application No: 2013/7896, 20.04.2016

safeguards to prevent indefinite access blocking decisions issued subject to article 8 of Law No. 5651.

24. Furthermore, the Government submission includes references to irrelevant information such as the obligations of the social network providers to assign a permanent representative in Türkiye. However, the supervision process at hand deals with the obligations of Türkiye under the Convention system with regards to the *Ahmet Yıldırım* group of cases. The Government submission however describes the responsibilities of the companies envisaged by the new regulations and argues that the companies' fulfilment of their obligations is a step towards the full compliance of Türkiye with the judgments. It is without question that such obligations conformed to by the companies cannot be considered as the realization of human rights obligations in lieu of the contracting States.

25. In this respect, İFÖD would like to stress that the Government's arguments purporting that the authorities exercise the "notice and take-down" mechanism when applying articles 8 and 9 are also misleading and flawed. As İFÖD already pointed out in its previous submission, there is no "notice and take-down" mechanism **incorporated as a legal procedure** in the Law. Likewise, in practice, the administrative authorities or criminal judgeships of peace do not give any notice before issuing a removal of content/access blocking decision, notwithstanding the recent emphasis of the Court on the necessity of such measures.[19]

26. As there is no legal basis formalizing the Government's "notice and takedown" approach[20] and in the absence of due process, procedural guarantees or any appeal mechanism, such an approach falls short of any Article 10 Convention standards.[21] The European Court, in its *Engels v. Russia* decision noted that, the applicant in that case was "**confronted with a choice** between **removing the allegedly illegal content** and **having access to his entire website blocked**" and this "caused the **applicant to take it down in order to avoid the blocking measure**". According to the Court, this amounted "to "**interference by a public authority**" with the **right to receive and impart information**, since Article 10 guarantees not only the right to impart information **but also the right of the public to receive it**."[22] According to the Court, "such a **vague and overly broad** legal provision **fails to satisfy the foreseeability requirement**. It does not afford website owners, the **opportunity to regulate their conduct**, as they cannot know in advance what content is susceptible to be banned and can lead to a blocking measure against their entire website."[23] Therefore, the Committee should invite the Government to explain the legal basis of the "notice and take-down" mechanism, list the names of domestic authorities applying this procedure and provide some examples in this regard.

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19 *OOO Flavus and Others v. Russia*, § 40.

20 No such procedure of notice-and-take-down is stipulated in articles 8, 8/A, 9 or 9/A of the Law No. 5651.

21 See *OOO Flavus and Others v. Russia*, no. 12468/15, 23.06.2020, §§ 38-44; *Ahmet Yıldırım v. Turkey*, no. 3111/10, ECHR 2012, § 66; *Kablis v. Russia*, nos. 48310/16 and 59663/17, 30.04.2019, § 94. See also *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.

22 *Engels v. Russia*, no. 61919/16, 23.06.2020, § 25.

23 *Ibid*., § 27.

27. Furthermore, the Government submission refers to the Constitutional Court judgments of *Ali Engin Demirhan*[24] and *Wikimedia Foundation Inc.*[25] as indicative of the alignment of the Constitutional Court case-law with the European Court's jurisprudence. It must be noted, **firstly**, that these judgments concern article 8/A of Law No. 5651, and not article 8. They are two unrelated measures within Law No. 5651 and the Ahmet Yıldırım group of cases at the moment only concern article 8 of Law No. 5651. **Secondly**, these judgments in themselves do not *ipso facto* reflect such compatibility, as the former case still awaits before the Strasbourg Court, along with two other 8/A applications,[26] while the latter concerns the admissibility of the application and the effectiveness of the Constitutional Court as a domestic remedy. However, as found by İFÖD's EngelliWeb report of 2021, despite the judgments of the Constitutional Court, none of the 8/A decisions issued by the domestic courts between 2019 and 2021 included any reference to the case-law of the Constitutional Court with regard to article 8/A or any assessment of the principles developed by the Court with regards to the application of article 8/A.[27] Moreover, news platforms such as OdaTV, Independent Turkish, and JinNews were blocked by consecutive blocking orders subject to article 8/A of Law No. 5651, notwithstanding the article 8/A related Constitutional Court judgments finding violations of freedom of expression.[28] The Constitutional Court has not decided on any 8/A applications since September 2020, while the respective Constitutional Court applications for JinNews, OdaTV and Independent Turkish stand before the Court for a very long time. Notwithstanding the principled approach taken by the Constitutional Court in its judgments relating to article 8/A, among 375 decisions issued by 76 different criminal judgeships of peace during 2021, not a single one of them referred to the Constitutional Court's judgements on 8/A.[29] The performance of the judgeships was no better in the previous years.

28. In light of the analysis and observations above, it is evident that the Turkish legal framework and judicial practice are not in compliance with the Court's standards and the Committee's recommendations.

Observations on the Sample Decisions Presented by the Government

29. The Government, in its June 2022 submission, referred to five separate domestic court decisions in which access blocking requests were rejected by various criminal judgeships

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24 No. 2017/22355, 26.12.2019.

25 *Ali Ergin Demirhan (1)*, No. 2015/16368, 11.03.2020 and *Ali Ergin Demirhan (2),* No. 2017/35947, 09.09.2020.

26 *Ali Ergin Demirhan (Sendika.org) v. Turkey*, no. 10509/20, lodged on 10.02.2020, communicated on 27.07.2020; *Akdeniz and Altıparmak v.* Turkey, no. 5568/20, lodged on 14.01.2020, communicated on 26.08.2020; *Akdeniz and Altıparmak v. Turkey*, no. 35278/20, lodged on 28.07.2020, communicated on 09.02.2021. See further Y. Akdeniz, *The Calm Before the Storm? The Inadmissibility Decision in Wikimedia Foundation v. Turkey*, 18.04.2022, available at: https://strasbourgobservers.com/2022/04/18/the-calm-before-the-storm-the-inadmissibility-decision-in-wikimedia-foundation-v-turkey/.

27 EngelliWeb 2021, p. 31.

28 See BirGün İletişim and Yayıncılık Ticaret A.Ş., Application No: 2015/18936, 22.05.2019; Baransav and Keskin Kalem Yay. Tic. A.Ş., Application No: 2015/18581, 26.09.2019; Cahit Yiğit (Yüksekovaguncel.com), Application No: 2016/2736, 27.11.2019; Tahsin Kandamar (Siyasihaber.org & Siyasihaber1.org), Application No: 2016/213, 28.11.2019; Wikimedia Foundation and Others, Application No: 2017/22355, 26.12.2019; Ali Ergin Demirhan (Sendika.Org), Application No: 2015/16368, 11.03.2020; Ali Ergin Demirhan (2) (Sendika.Org) Application No: 2017/35947, 09.09.2020.

29 EngelliWeb 2021, p. 31.

of peace.[30] It must be highlighted at the outset that none of the presented examples concerns the judicial review of the blocking decisions issued by the president of the ICTA under article 8/4 of the Law. **Two of the submitted decisions** involved requests by the **Gendarmerie General Command in Bursa** subject to **article 8/A** of Law No. 5651 (see the Government Submission Annex pages 1-2: Bursa 3rd Criminal Judgeship of Peace decision no. 2020/6472 and 9: Bursa 2nd Criminal Judgeship of Peace decision no. 2021/3849)[31] and the remaining three (see the Government Submission Annex pages 3-6: Istanbul 2nd Criminal Judgeship of Peace decision no. 2022/153, 7-8: Istanbul 3rd Criminal Judgeship of Peace decision no. 2021/2407, 10: Denizli 2nd Criminal Judgeship of Peace decision no. 2021/4066) involved individuals claiming "**personal rights violations**" subject to **article 9** of Law No. 5651. Without going in detail what these decisions are about, none of them are about article 8 of Law No. 5651 which is the subject matter of the *Ahmet Yıldırım* group of cases. Therefore, the Government provides **hardly any evidence** to the contrary to show that article 8 of Law No. 5651 meets the legality standards required by the Convention jurisprudence or that this provision meets the **required procedural safeguards** to be observed by contracting states when interfering with freedom of expression through online access blocking measures.[32]

Amendments adopted in October 2022 with Law No. 7418 and İFÖD's Observations

30. As mentioned above, the most recent amendments to Law No. 5651 were introduced on 13.10.2022 with Law No. 7418. The new law generated criticism from many NGOs and international supervisory mechanisms, such as the Venice Commission of the Council of Europe.[33] In addition to its highly-debated provision on disinformation, Law No. 7418 also concerns the expansion of the prerogatives of the president of the ICTA subject to article 8 of Law No. 5651. **Firstly**, an amendment was made to the so called "catalogue crimes" and the **offences specified** in the first[34] and second[35] paragraphs of article 27 of the Law No. 2937 (amended: 17/4/2014-6532/7) on State Intelligence Services and the National Intelligence Organization were included in article 8(1)(ç).

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30 The Government submitted five sample decisions annexed to their submission of 15.06.2022: Bursa 3rd Criminal Judgeship of Peace, Istanbul 2nd Criminal Judgeship of Peace, Istanbul 3rd Criminal Judgeship of Peace, Bursa 2nd Criminal Judgeship of Peace and Denizli 2nd Criminal Judgeship of Peace.

31 It should be noted that a requests by the **Gendarmerie General Command in Bursa** subject to **article 8/A** of Law No. 5651 to block access to the https://partizanarsiv5.net/ domain name was although rejected by the Bursa 2nd Criminal Judgeship of Peace, the domain mane was subsequently blocked by a decision of the Hatay 1st Criminal Judgeship of Peace, decision no. 2022/883, 22.02.2022.

32 *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.

33 European Commission for Democracy through Law, Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe on the Draft Amendments to the Penal Code Regarding the Provision on "False or Misleading Information," (07.10.2022), available at https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2022)032-e.

34 Any person who obtains, procures, steals, falsely produces, forges or destroys information and documents without an authorisation relating to the duties and activities of the National Intelligence Organisation shall be sentenced to imprisonment from four to ten years.

35 Those who disclose the identities, positions, duties and activities of the members of the National Intelligence Organisation and their families by any means, or who forge or alter the identities of the members of the National Intelligence Organisation, or who use such forged documents, shall be sentenced to imprisonment from three to seven years.

31. **Secondly**, a substantial change was made to article 8(4) of Law No. 5651 which provides power to issue ex officio access blocking and removal of content decisions to the president of ICTA. In its original version, article 8(4) provided authority for the president of ICTA, to issue ex-officio decisions to block access to websites/content involving all the so-called catalogue crimes if these were hosted outside the country and authority for websites/content located domestically in Türkiye involving sexual abuse of children, obscenity, prostitution, or providing a place and opportunity for gambling. This two-pronged approach was removed from article 8(4) with the October 2022 amendments. Although this may look like an innocent and cosmetic change, it is not as simple as it looks as the provision broadens the ex officio blocking and removal power of the President of ICTA. **However**, the blocking power of the President of ICTA with regard to foreign-hosted websites containing **obscene content** was annulled by the Constitutional Court with a judgment published in the Official Gazette on **07.02.2018**. Subject to a constitutionality review application made through the 13th Chamber of the Council of State, the Constitutional Court found by a majority vote that **the power to block access to "obscene" websites hosted outside Türkiye** (article 8(1)(5)) vested with the President of BTK subject to article 8(4) of the Law No. 5651 **was incompatible with the Constitution.** The Constitutional Court stated that the annulled power enabled the "*administration to block access to websites ex officio and* ***without need of judicial approval*** *in case a publication constituting an offence is published in mass communication websites with consent with the intention of not committing an offence or facilitating the commission of an offence*".[36] The Court's judgment entered into force on 07.02.2019. Since no amendments were introduced to the Law No. 5651 by 07.02.2019, the authority granted to the President of BTK by the Law **to block access to obscene websites hosted outside Turkey ex officio and by way of administrative orders has expired on that date**. However, in practice, İFÖD's annual EngelliWeb reports observed that the **President of BTK continued to block access to obscene websites ex officio** by way of unlawful administrative orders since 2019 disregarding the annulment judgment of the Constitutional Court.[37] The October 2022 amendment basically gets around the Constitutional Court decision "**problem**" by nullifying that decision.

32. **Finally,** failure to comply with article 8 decisions will result with serious new administrative fines and other sanctions so far as the social media platforms are concerned as the October 2022 amendments also empowered the president of ICTA with far-reaching powers. In fact, **additional sanctions including advertisement ban for up to 6 months as well as reducing ("throttling") the Internet traffic bandwidth** of the social network provider by fifty to ninety percent are envisaged in the event that social network providers fail to fulfil the removal of content and/or access blocking decisions issued by the President within the scope of **articles 8 and 8/A of Law No. 5651**.[38] Although subject to the approval of a criminal judgeship of peace, **throttling of the bandwidth by 90 per cent constitutes a *de facto* wholesale ban on access by users to the sanctioned social media platforms.** It is evident from this submission that the criminal judgeships of peace are **not obliged to**

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36 Constitutional Court Judgment, E. 2015/76., K. 2017/153, 15.11.2017.

37 See further İFÖD, EngelliWeb 2020: Fahrenheit 5651: The Scorching Effect of Censorship, August 2020, at https://ifade.org.tr/reports/EngelliWeb_2020_Eng.pdf.

38 Note Additional article 4, paragraphs 10-11 of Law No. 5651.

conduct a proportionality or **necessity test** and all the decision process takes place **without a Convention-compliant review** by the president of ICTA as well as the relevant criminal judgeships of peace.[39]

33. Last but not least, incompliance of the social network providers with several obligations enumerated in subparagraphs 6, 7, 13, 16, 18 and 19 of additional article 4 will trigger administrative fines of up to 3 per cent of the company's annual global revenue, subject to paragraph 20 of additional article 4.[40] The **lack of a proportionality assessment of inflicting such a burdensome financial sanction as well punitive measures by an administrative authority without a court approval is not in line with the safeguards prescribed by the Court and the Committee.** No court approval means that the judicial review of the sanctions can only be challenged through the administrative courts resulting with lengthy proceedings.

34. As was summarised above, the expansion of the list of catalogue crimes in article 8 and the amendments adopted with regard to the administrative sanctions under Law No. 5651 **exhibits a trend** in which the **administration is entrusted with greater prerogatives and signifies the unwillingness of the Turkish authorities to comply with the recommendations of the Committee.** Instead of substituting the impugned practices of the judiciary and the administration according to the principles specified in the Court's case law and the Committee's recommendations, **the Turkish legal framework is evolving in the opposite direction.**

İFÖD's Observations on the Application of Article 8 of Law No. 5651

35. As was mentioned above, the application of article 8 of Law No. 5651 remains highly problematic and at odds with the Convention standards. In this regard, İFÖD would like to present to the Committee the relevant statistics based on data presented to the public in its 2021 EngelliWeb Report.[41]

36. As İFÖD has determined in its EngelliWeb 2021 Report, in 2021, out of the **107.706** blocked domain names and websites under article 8, access to **98.044** was blocked with **98.039** separate administrative blocking decisions issued by the president of ICTA where only 5.834 were blocked by orders issued by the judiciary.[42] Amongst all of the blocking decisions issued by the president, IFÖD is not aware of a single example where that decision had been overruled.

37. In addition to inviting the Committee to reinstate its request made in its 1398th Meeting regarding the submission by the Government of detailed information, İFÖD proposes that the Committee **requests the Government to submit detailed qualitative and**

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39 *Vladimir Kharitonov v. Russia*, no. 10795/14, 23.06.2020, § 45.

40 The obligations are respectively; storing user information under paragraph 6, providing special child appropriate content under paragraph 7, complying with the ICTA's user rights regulations under paragraph 13, sharing with the police the content and the user information when the shared content constitutes a threat to others under paragraph 16. They should also provide within three months any information requested by ICTA on their corporate structure, IT systems, algorithms, data processing mechanisms, and commercial behaviours under paragraph 18; moreover, social network providers need to prepare crisis plans for extraordinary cases where public safety and public health are at stake and communicate this to the ICTA under paragraph 19.

41 EngelliWeb 2021, p. 8.

42 *Ibid*, p.13.

quantitative data on the judicial review of the blocking/content removal decisions issued by the president of the ICTA. IFÖD requests the Committee to invite the Government to provide samples where administrative courts annulled the blocking decisions issued by the president of ICTA, along with the legal reasoning behind such decisions.

38. IFÖD is of the opinion that contrary to the Government's arguments, Law No. 5651 still **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. Legislative amendments **have not therefore provided necessary safeguards** against arbitrary interference with freedom of expression on the Internet. In addition, the domestic legal practice is far from providing any effective legal safeguards in the application of Law No. 5651.

39. The above-presented information and statistics demonstrate that criminal judgeships of peace **systematically disregard the case-law** of the Constitutional Court and the European Court. In this respect, it is not possible to claim that Türkiye's judicial practice is well-established or provides effective safeguards. Thus, a few randomly selected irrelevant decisions cannot be construed as representative of an improvement in judicial practice. Therefore, İFÖD invites the Committee of Ministers **not to close its supervision of this group of cases** and to continue its supervision.

Conclusions and Recommendations

1. Systematic problems continue with regard to access blocking and content removal decisions issued by the criminal judgeships of peace and by the administrative bodies.

2. 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.

3. Law No. 5651 continues to enable criminal judgeships of peace and the president of the ICTA to order blocking of access to entire websites.

4. Amendments made to article 8 and other provisions of the Law did not resolve the structural and systemic problems identified by the European Court and the Committee, as well as NGOs such as İFÖD. None of the legal amendments adopted and mentioned by the authorities would prevent similar blocking decisions to be issued in the future.

5. Based on the detailed analysis provided in this submission, İFÖD kindly invites 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 closer scrutiny.

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

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