To the Public Opinion of

The Republic of Turkey

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Our opinion regarding the draft Social Media Law which has been submitted to the Grand National Assembly of Turkey

The "Legislative Proposal regarding the Amendment of the Law on the Regulation of Publications in the Internet Environment and the Fight against Crimes Which Are Committed by means of These Publications" which has been submitted to the Grand National Assembly of Turkey[1] (GNAT) stipulates the definition of social network providers, the **opening of representative agencies in Turkey by foreign-based social network providers with daily access numbers in Turkey of over one million** and the imposition of sanctions on social network providers which do not fulfill the requirement of opening representative agencies, namely **a fine of 10 million Turkish lira (TL) at the first stage and afterwards, a fine of TL 30 million, advertising prohibition and the reduction of internet bandwidth of up to 90%.**

The amendment proposal, which will create fundamental impacts on social media, has been under discussion for a significant period. In the first place, a proposal for similar amendments to Omnibus Law No. 7244 was submitted; this proposal, dubbed the "WhatsApp Law" in the public opinion, provoked considerable reaction and was subsequently removed from the draft law. Afterwards, twelve rules were explained under the name of the "Social Media Codes of Conduct." On 21 July 2020, the new

[1] The proposal which is before the Commission can be accessed via the following link: GNAT, (online), https://www2.tbmm.gov.tr/d27/2/2-3050.pdf (access date: 22.07.2020).

draft law was submitted to the Speaker's Office of the GNAT, and this draft law was added to the agenda of the Assembly upon being accepted by the Justice Commission of the GNAT on 24 July 2020.

OUR ASSESSMENT

The fundamental reasoning of the proposed amendments to the "Law on the Regulation of Publications in the Internet Environment and the Fight against Crimes Which Are Committed by means of These Publications"[2] (Internet Law), numbered 5651, is as follows: *"*despite the income in the amount of billions of dollars which is generated by social network providers by virtue of their extensive numbers of users and user data, these social network providers do not develop the required preventive and protective mechanisms with respect to the protection of the rights of persons or they do not apply these mechanisms in an effective manner or they resist the justified requests of states […] and problems are experienced concerning the fulfillment of the positive obligation incumbent on states with regard to the protection of fundamental rights and freedoms." As the conclusion drawn from the reasoning behind the proposal, it is understood that by means of the regulations stipulated concerning social network providers, the intention is to ensure the fulfillment by the state of its positive obligations of prevention and protection with respect to individuals whose personal rights are harmed. **However, the actual implementation of the proposal would comprise a combination of excessive sanctions which results in the prevention of the freedom of expression and the right to receive information of individuals by "blockading," through legal regulations, the internet and social media channels which have become the most important sources for obtaining information and news nowadays.**

The amendments intended to be made by means of the proposal are explained in detail below.

[2] Official Gazette, 23 May 2007, O.G. Number: 26,530.

What is the substance of the amendments stipulated by the proposal?

I. The definition, meaning and scope of the social network provider concept

The first proposed amendment to the Internet Law includes the concept of the "**social network provider**" in the law. Pursuant thereto, social network providers are defined as "real or legal persons who/which provide to users the opportunity of creating, displaying and sharing data such as texts, images, audio and locations in the internet environment for social interaction purposes." At first sight, this definition gives the impression that the term encompasses only the social media platforms such as Facebook, Twitter, Instagram, TikTok, etc. **However, it is observed that this definition is made in a considerably extensive manner.** First of all, the issue of whether or not communication-based applications such as WhatsApp, Telegram and Skype can be regarded as social network providers under this definition should be discussed.

First, the following question should be addressed: Are WhatsApp and similar instant messaging applications in the nature of social media platforms? The answer must be that WhatsApp is not a social media platform, because WhatsApp is generally used for communication and conversations and thus it serves telecommunication purposes. From this perspective, WhatsApp does not constitute an application in which the messages are open for social interaction and that serves sharing purposes as do Facebook, Twitter or Instagram. These features establish that WhatsApp is not in the nature of a social media platform.

However, the fundamental question is whether WhatsApp **will be regarded in this manner** pursuant to the amended Law or not. When we examine the definition, the expression "social interaction purposes" draws attention. Pursuant thereto, any channels through which data such as texts, images and audio can be created, shared or displayed in the internet environment for the intended purpose of social interaction can be regarded as social network providers.

At the outset, while this definition is exceedingly extensive, the expression "social interaction" is notably ambiguous. **Specifically, we would like to state that this definition seems to have been established only for the purposes of not being restricted to social media and therefore allowing the blockading of almost all spheres of the internet world.** Nowadays, everything can be regarded within the context of a social interaction: your conversation with a friend while walking on the street; sending a letter to an individual; or your WhatsApp correspondence, which in practice constitutes something similar to a letter in digital form – all of these can be regarded as constituting a social interaction. For this reason, the determination of what will be regarded as social interaction under the amended law is very important. It is difficult to understand why a separate definition is required for those social media platforms comprised by the category of "social network provider" as defined in the Internet Law, and therefore we approach this definition with suspicion. **The definition is so extensive that the web sites of media organizations which open a subsection of their news articles or opinion columns for comments could also be included in its scope and regarded as social network providers.**

As above, WhatsApp and communication instruments of similar type should not be regarded as social network providers. Engaging in correspondence with a person or a group should not be regarded as social interactions, because in such cases individuals conduct their communications only with persons determined by them. The expression "social interaction" should be construed in a narrow context: only the intentional opening up by individuals of data such as letters, audio or images, to be shared with other persons of unspecified numbers, should be considered within this context. In other words, only the true social media platforms should be regarded within this context. Otherwise, every corner of the internet could be regarded as "social network providers" with an objective of data sharing and social interaction.

Thus, our reply can be stated as follows: WhatsApp and similar channels which are outside the scope of the definition of social media platforms do not constitute social network providers, and they should not be included within the scope of this law. We are required to state persistently, for the sake of emphasizing the importance of this issue, that **this definition should be amended**. If the intention of the proposed amendments to the Internet Law is to create a separate definition for social media, this

definition exceeds its intention.

Taking the definition in the German law on social media of "social media network applications"[3] as an example (this law having been used as a basis for the reasoning behind the Turkish proposal), social network providers are therein defined as "those internet platforms which are designed for the purpose of sharing by their users of any content with other users and that make this content open for access by the general public in order to seek profits." As can be seen, it is required in German law that social network providers **seek profits** and that **the manner in which any content is shared includes its being open to the general public**. In contrast to the proposal which has been submitted in Turkey, these two criteria ensure that a social media platform and an ordinary web page can be differentiated from each other. **Therefore, this is an important distinction between the regulation which is stated to be taken as an example and the proposal which has been submitted.**

II. The responsibility regime imposed on social network providers

Subsequent to clarification of the definition of "social network providers" and our opinion that this should be restricted to social media platforms, the responsibilities imposed on social network providers should also be assessed. The most important responsibility seems to be the obligation on **foreign-based social media platforms with daily access numbers in Turkey of over one million** to make available a representative in Turkey.

Accordingly, US- or China-based platforms such as Facebook, Twitter, Instagram or TikTok would be required to be present in Turkey and to open offices or representative agencies in Turkey. What are the issues that are to be dealt by these representative agencies?

Primarily, the representatives would be obliged to satisfy requests with regard to removal of content and prevention of access which are made on the basis of Article

[3] In German: *Netzwerkdurchsetzungsgesetz*.

9 of the Internet Law. Requests with respect to the violation of personal rights and the confidentiality of private life would have to be responded to by the representative agencies within 48 hours. Furthermore, the representative agencies would be obliged to keep records of applications by individuals (regarding removal of content, prevention of access, etc.), decisions on which are to be concluded directly or pursuant to the decisions of the Criminal Judicature of Peace, and to provide the Information Technologies and Communications Authority with quarterly statistics of these records in a report format.

It can be seen that the legal status of the representative agencies is not stipulated in the legislative proposal. In Turkish law, foreign-based companies which have respondent relationships in Turkey may have the status of liaison office pursuant to the Implementing Regulation of the Foreign Direct Investment Law No. 4875, and they may have the status of branch, dealer and commercial representative pursuant to the Turkish Commercial Code No. 6102. However, questions and issues such as the capacity of the representative agencies stipulated in the legislative proposal; the financial responsibilities of these representative agencies; the capital which will be allocated to them and the management of this capital; the legal responsibilities of these representative agencies; and the execution capabilities with regard to fines are not directly addressed in the legislative proposal, and this fact creates substantial uncertainty and a problem of predictability.

In addition to these concerns, **another very important regulation is the imposition on these social networks of the requirement to keep user data in Turkey**. Pursuant thereto, social networks will be required to make servers available in Turkey and to keep on these servers the data of users based in Turkey. The most substantial result of this regulation can be stated as follows: **Article 332 of the Code of Criminal Procedure** stipulates that prosecution offices and courts may require information from institutions, organizations and persons which/who are considered appropriate by them in the course of the investigation or prosecution of crimes. Pursuant thereto:

"It is obligatory to respond within ten days to provide information which is required by the public prosecutors, judges or courts in the course of the investigation or prosecution of crimes."

The situation should be embodied by means of an example. For instance, it is asserted that the crime of provoking the public to hatred, hostility or degrading treatment (Article 216 of the Turkish Criminal Code), **which is quite popular nowadays and within the scope of which almost all opponent discourse is included**, is committed by means of an anonymous account on a platform, such as Twitter, on which being anonymous is common. In an investigation which is commenced within this scope, prosecution office authorities who wish to find out the identity of this anonymous account – in other words, who wish to determine the suspect in this alleged crime – would make an application to the Turkish representative agency of Twitter. Then, Twitter would be obliged to share the "user data" which is kept by it in Turkey. If it failed or refused to do so, it would be regarded to have acted in contravention of the information requirement regulation. Meanwhile, failure to respond to such information requirements could constitute the committing of a crime of misconduct in office by Twitter's Turkish representative agency.

Even prior to this proposed regulation, prosecution offices and courts are able to require from these institutions information regarding the prosecution of the crimes which are committed via social media platforms. However, it is not possible to find the relevant respondents or receive replies, for the reason that these institutions are US-based. The aim of the amendment proposal is therefore to require the presence in Turkey of respondents representing these institutions.

This situation unfolds the impacts which will be created by the legislative amendment proposal. **By virtue of the amendments, it would be possible to compel platforms such as Twitter, Facebook, etc. to cooperate with Turkish state institutions, to terminate the ability to be anonymous on social media, and to avoid the intensification of opponent voices via social media by keeping a record of individuals, causing self-censorship**. This matter can be interpreted as the underlying objective of the proposal, or at least as an area which is left open to being misused. When the news and opinions published on the matter are examined, it can be seen that the general public accepts the first of these interpretations.

III. Sanctions to be applied to social network providers if they fail to fulfill their obligations

Social network providers which satisfy the relevant conditions would be required to appoint representatives by means of notification to be made by the Information and Communication Technologies Authority. The sanctions which are stipulated with respect to the non-fulfillment of this obligation are as follows:

i. If the relevant social network provider does not fulfill this obligation within 30 days from the date of notification of the Information Technologies and Communications Authority, **an administrative fine at the amount of 10 million Turkish lira (TL) would be imposed regarding this social network provider in the first stage**;

ii. If this obligation is not fulfilled within 30 days from the notification of the administrative fine, **an additional administrative fine at the amount of TL 30 million Lira would be imposed**;

iii. If this obligation is not fulfilled within 30 days from the notification of the second administrative fine, the **placement of advertisements by the relevant social network provider by the real or legal person taxpayers domiciled in Turkey would be prohibited** by the President of the Information and Communication Technologies Authority;

iv. If this obligation is not fulfilled within 3 months from the date on which the decision regarding the advertising prohibition is made, **the internet traffic bandwidth of the relevant social network provider would be reduced by up to 50%** pursuant to a decision to be made by the Criminal Judicature of Peace subsequent to the application to be made by the President of the Information and Communication Technologies Authority;

v.If this obligation is not fulfilled within 30 days from the implementation of the first decision regarding the reduction of the bandwidth, **the internet traffic bandwidth of**

the relevant social network provider could be reduced by up to 90% pursuant to a decision to be made by the Criminal Judicature of Peace.

First of all, the administrative fines which are stipulated in terms of the social network provider with regard to its failure to fulfill these obligations are considerably high. In the case where the administrative fine at the amount of TL 30 million is imposed in addition to the administrative fine at the amount of TL 10 million, a fine at a total amount of TL 40 million would be applicable. Subsequently, the intention of the stipulated advertising prohibition is the entire prevention of the generation of income by social network providers which do not fulfill their obligation with regard to the appointment of representatives.

Meanwhile, the reduction of internet traffic bandwidth would mean that would not be possible to access these web sites from within Turkey under any circumstances. In other words, access would be blocked to any web sites which are subject to barring of access from within Turkey via services such as VPNs. By virtue of the reduction of bandwidth, these web sites would be restricted in such a way as to make access to them from within Turkey entirely impossible. **Therefore, social media platforms which do not appoint their representatives would be "unplugged".**

In a case where these platforms appoint representatives as required following the imposition of sanctions, this reduction would automatically be inoperative. Similarly, only a quarter (1/4) of the administrative fines would be collected and the advertising prohibition would be lifted. In this case, it can be seen that it would not possible to access to certain platforms which had not complied with the regulations, but that subsequently it would be possible to have access to these platforms instantly if the relevant representatives were appointed.

The issue should be discussed under the heading: **Is such a sanction (bandwidth reduction and preclusion of access from within Turkey) proportionate, legitimate and lawful?** Herein, the issue of conflicting and competing rights (interests) arises. For instance, Twitter constitutes a platform through which users obtain news, information and opinions, and at the same time it constitutes a

channel through which the same users can engaging in sharing news, information and opinions. **Therefore, the presence of such platforms is based on the right to freedom of expression, the right with regard to the provision of news and the right of the public to be able to obtain news and information.** Currently, the arbitrary closure of web sites such as Twitter or Wikipedia without stating any reasons would definitely be in contravention of the law and the Constitution. Thus, as is known, previous decisions with regard to access bars on these internet channels were rescinded by the Constitutional Court and it was determined that these bars constituted violations.

However, the bandwidth reduction decision would not be made without any reasoning: the reasoning for the decision would be non-compliance with the obligation concerning the "designation and notification of the representative." The duty of the relevant representative would be to respond to applications with regard to personal rights. In this case, **personal rights and freedom of expression and the right to obtain news are in conflict**. **The prevailing factor in settling this conflict should be freedom of expression and the right of individuals to receive information**, because **no attack on personal rights currently exists** in terms of preclusion of access to the relevant web site in a case where the relevant representative is not appointed. Furthermore, it would be sufficient to remove only the relevant content in order to avoid an offensive aimed at personal rights, and therefore the complete preclusion of access to the web site would not be proportionate. **Therefore, it would be unlawful and impossible to apply a sanction which would not be applied even in a case where an offensive was existent, for the reason that the mechanism (representative agency) which may eliminate a probable offensive has not been established.**

Besides this, it is necessary to remember that these social media platforms are currently existent in the law as "social network providers" and that they can currently remove from access any text, audio or images which comprise an offensive aimed at personal rights in this capacity, even if the amendment proposal is not accepted. **In other words, in the current order, personal rights can be protected even when the relevant representative is not available, and it would be unlawful to preclude access to the web site and eliminate the freedom to obtain news in**

response to a failure to appoint representatives just for the intensification of this protection.

Therefore, this article should be amended and regulated: otherwise, it could be subjected to annulment before the Constitutional Court. **Compelling social media platforms to open representative agencies on the basis of the sanction that they will be unable to continue their activities in Turkey if they do not would constitute a violation of the law and the Constitution.**

OUR RECOMMENDATIONS:

1. The definition of social network providers should be narrowed so that this definition comprises only social media platforms. Otherwise, any web sites on which sharing takes place for the purpose of "social interaction," the web sites of media organizations which open a subsection of their news articles or opinion columns for comments, and also forum sites which serve the purpose of product purchasing and selling by users and even sections under the name of "chat" of web sites which enable online live gaming, can all be considered within the scope of the definition of social network provider. The social network provider concept should be restricted to social media platforms by clearly determining criteria such as "sharing openly for the general public" and "seeking profits," as is applicable within the context of the **German social media law** which is stated to have been taken as an example. If the intention of the Internet Law amendments is to create a separate definition for social media, this definition exceeds its intention.

2. The obligation to keep user data should not be imposed on social network providers, or such an obligation should be regulated in such a manner as to avoid suspicion of individuals in terms of their privacy. This is because the imposition of this obligation could serve the purpose of keeping records of individuals and could therefore represent the termination of being anonymous on social media. It is obvious that the keeping of user data in Turkey is open to being misused. Nowadays, unfortunately, all kinds of opposition or contrary opinions can be considered within the scope of the crime of provoking the public to hatred, hostility or degrading treatment

(Article 216 of the Turkish Criminal Code) and criminal prosecutions can be commenced with regard to the opinion owners. In such a probability, it would be possible for the prosecution office and court authorities to have access to all kinds of user data through the representative agencies and servers situated in Turkey by means of "Information Requirement" demands (Article 332 of the Turkish Criminal Code). This mechanism would usually prevent the violation by individuals of the personal rights of other persons through "hiding" behind anonymous accounts or will preclude the committing of crime by individuals in this manner. In a case where these actions cannot be prevented and the violations are materialized, this mechanism would provide the possibility of determining and punishing the perpetrators. **However**, at the same, this mechanism would provide the opportunity to identify individuals who do not clearly display information enabling direct communication with them in their profiles or who use anonymous accounts, based on political pressures. **This situation may give rise to self-censorship and it may create an adverse effect on freedom of expression.**

3. The sanction with regard to the reduction of internet bandwidth in relation to a failure to meet the obligation to appoint a representative is excessive. For this reason, the obligation should not be implemented under any conditions. In terms of the new regulation which is proposed to be implemented, the German social media law may be taken as an example once again. When the aforementioned law is examined, it is seen that regulation with "regard to the appointment of the representative" is also available in this law (*Netzwerkdurchsetzungsgesetz* §5) and that only an administrative fine can be applied in the case of this obligation not being fulfilled. Meanwhile, the stipulated administrative fine is regulated to be lower than the amounts which are applicable in other cases of administrative sanction impositions and is limited to 500,000 euros. On the other hand, an administrative fine of up to 5 million euros may be imposed in a case where the social network provider does not fulfill its other obligations. **The matter to be explained herein is that in the German regulation, non-fulfillment of the obligation to appoint a representative is clearly stipulated as an insubstantial violation compared with other obligations.** However, in the proposal which is desired to be enacted in our country, non-fulfillment of the obligation to appoint a representative attracts highly severe sanctions such as the imposition of the administrative fine of TL 40 million, the advertising prohibition and the preclusion of access to the web site by reducing internet bandwidth by up to 90%.

Apart from the fact that the stipulated administrative fine and the advertising prohibition are disproportionate, **the preclusion of access to the web site by means of reducing bandwidth constitutes an intervention in freedom of expression and the right of individuals to receive information**. Such an intervention is **excessive**, because non-fulfillment of the obligation to appoint a representative would not in itself constitute an attack on personal rights, but only raises the possibility that the consequences would not be dealt with in the event of such an attack. Therefore, non-appointment of the representative does not constitute an offensive or crime aimed at personal rights: it merely brings forward the probability of the non-elimination of the relevant results in case of such an action. Moreover, it would be sufficient to remove only the relevant content in order to avoid an offensive aimed at personal rights, and therefore the complete preclusion of access to the web site would not be proportionate. **In conclusion, it would be unlawful and excessive to apply a sanction which would not be applied even in a case where such an offensive was existent, on the basis of the fact that the mechanism (representative agency) which may eliminate a potential offensive has not been established.**

CONCLUSION

Unfortunately, our country does not have a good record in terms of freedom of expression and internet prohibitions. According to new research, as of the end of 2019, access to 408,494 web sites, 130,000 URL addresses, 7,000 Twitter accounts, 40,000 tweets, 10,000 YouTube videos and 6,200 items of Facebook content was barred.[4] Regrettably, we have witnessed since 2007 – the year in which Law No. 5651 was enacted – that a restrictive structure rather than a regulative structure has been established in terms of the internet environment. The introduction of a similar approach in terms of social media would mean that no environments in which individuals can freely express themselves under the current approach would be left. This situation may of course give rise to the origination of new platforms and new interaction instruments: it is possible to encounter examples of such instruments in countries such as China and Iran. However, talk of being a new Iran or China also indicates the sorrowful condition that is about to be experienced by our country in terms of the law, democracy and freedoms.

[4] **Yaman Akdeniz/Ozan Güven**, HandicappedWeb 2019, An Iceberg of Unseen Internet Censorship in Turkey (online), https://engelliweb.ifade.org.tr/ (access date: 22.07.2020).

In fact, to summarize, the proposal comprises many excessive, unlawful regulations and also regulations that constitute interventions in human rights. Therefore, as we do, the general public reacts adversely to and criticizes this proposal. On the other hand, there is indeed a reasonable necessity with respect to drafting a regulation: at present, the implementation of decisions to bar access in the case of offensives made against personal rights and crimes committed via foreign-based social media platforms is not possible in practice, and persons who execute these actions cannot be determined in cases where they are anonymous. **However,** the current amendment proposal, which should meet the purpose of responding to this necessity, also includes many excessive obligations and sanctions. Furthermore, when the "fight" of our country with the internet is considered, and in the light of the fact that the current regulations are open to misuse, we are required to state that the proposal is far from having appropriately restrictive and foreseeable content.

The regulation applicable in Germany was made in order to "avoid the creation of adverse effects on the general public by the Neo-Nazi movement and all kinds of far right movements and the prevention of the hate speech," in the context of the refugee crisis which intensified as of 2016. Even this German regulation which is taken as an example was heavily criticized by the general public, despite the fact that it comprised insubstantial conditions compared with the proposal which has been submitted in Turkey. Furthermore, the aforementioned regulation was adopted as of the end of 2017 and it cannot be stated that its results have been completely comprehended in Germany to date. Meanwhile, within the context of the regulation proposed in our country, despite the fact that no such urgent necessity or recent crisis exists in terms of hate speech, many severe obligations and sanctions are stipulated in terms of social network providers within the scope of the proposal. In light of the fact that almost all social media platforms – or, if we construe the relevant definition in a broad manner, any web sites which facilitate other "social interactions" – do not have representative agencies in Turkey, these social media platforms and web sites would be **"unplugged"**.

In conclusion, the amendment proposal comprises many excessive regulations which may create adverse effects on freedom of expression and the right to receive information, and also regulations which are in contravention of fundamental

rights. Should the proposal become law in its current form, social media platforms which do not open representative agencies in Turkey would be entirely inaccessible, while any that did open representative agencies in Turkey would thus give rise to self-censorship by creating an environment in which individuals would become suspicious with respect to their own privacy and security, and there would therefore be no channel available through which relatively different opinions could be freely communicated to the relevant persons. However, a discussion environment which allows freedom of expression and free statements constitutes the fundamental operating mechanism of modern democracies. In the "Information Age" experienced in the 21st century, our opinions and democracy have been digitized as have our whole lives. It is necessary to understand the full breadth of opinions and to include them in the decision-making mechanism instead of restricting them. This amendment proposal, which is known as the "Censorship Law" in the public opinion, **should not become law in its current form.** Even in a case where there is a genuine necessity to require the cooperation of social network providers in identifying individual users, regulations should be drafted which are aimed only at this necessity and whose scope is no wider than that outlined in our recommendations. The stakeholders in this subject matter should meet and conduct discussions with regard to this proposal and an environment of joint consideration concerning the problems and solutions should be created. **All kinds of laws which would "censor" the internet and any legislation in which the relevant discussion environment is not ensured would harm our democracy.** Despite the fact that, unfortunately, both of these harms are encountered more frequently in our country, we hope that this proposal will be withdrawn, as the proposal which had been submitted within the scope of the Draft Omnibus Law was in March of this year, and we expect that a new proposal will be presented which is limited to the necessities and that is drafted in a proportionate and more appropriate manner .

We would like to state that we consider the pursuit of the agenda contained within the current amendment proposal useless and a waste of energy on the part of our country in these critical days, when we should focus on the medical problems related to Covid-19; the fight against the problems which are caused in our economy and social life by the strict measures and restrictions applied in our country and the world; and the protection of businesses, restraining the extraordinary increases in the unemployment figures; the support of those who are currently unemployed and lacking income; and the turning of the wheels of the economy.