

July 31, 2015

TO ISTANBUL JUDGESHIP OF PEACE ON DUTY

To be sent to

GOLBASI CRIMINAL JUDGESHIP OF PEACE

To be sent to

ANKARA CRIMINAL JUDGESHIP OF PEACE ON DUTY

Misc. No: 2015/646 Misc.

OBJECTING PARTY : Automattic Inc.
ATTORNEYS FOR : Gönenç Gürkaynak - İlay Yılmaz
THE OBJECTING Attorneys-at-Law
PARTY Çitlenbik Sokak No. 12 Yıldız Mah. Beşiktaş 34349 İstanbul
SUBJECT : Submission of our objections to Golbasi Criminal Judgeship
of Peace's illegal decision with decision number 2015/646
Misc..

EXPLANATIONS

The client company has been informed of Golbasi Criminal Judgeship of Peace's decision of July 25, 2015 with decision number 2015/646 Misc. ("Decision"), approving Information and Technologies Authority Telecommunication Communication Presidency's ("TIB") decision for access ban of a list of URL addresses, along with the IP addresses indicated next to them, based on Article 8/A of the Law on Regulation of Broadcasts via Internet and Prevention of Crimes Committed through Such Broadcasts with number 5651 ("Law No.5651"). The URL addresses subject to the decision includes the following URL addresses which are hosted on WordPress.com, a platform that is owned by the client company Automattic Inc.

www.rojbas1.wordpress.com 192.0.78.12

www.rojbas2.wordpress.com 192.0.78.12 192.0.78.13

www.pkkonline.wordpress.com 192.0.78.12 192.0.78.13

www.peaceinkurdistancampaign.com 192.0.78.24 192.0.78.25

www.pirtukxane.org/pirtukenserok 192.0.78.24 192.0.78.25

www.pirtukxane.org 192.0.78.24 192.0.78.25

We hereby submit to your Esteemed Judgeship that the foregoing URL addresses hosted on WordPress.com are not accessible (**Annex – 1**).

Still, the Decision is illegal and the necessity to object to the Decision has emerged based on the grounds below.

OUR OBJECTIONS

I. BANNING ACCESS TO IP ADDRESSES, WHICH LEAD TO ACCESS BAN OF AN ENTIRE WORDPRESS.COM PLATFORM, IS AGAINST THE PURPOSE OF THE LAW NO. 5651 AS WELL AS THE CONSTITUTIONAL COURT AND ECHR PRECEDENTS.

The IP addresses indicated next to the URL addresses hosted on WordPress.com in the Decision are not only related to those websites, which are claimed to be in violation of Turkish laws. Access ban of contents through IP addresses is already a disproportionate and excessive measure, which is against the precedents of Turkish Constitutional Court and European Court of Human Rights (“ECHR”).

Even if the Law No. 5651 allows access ban through IP address, this should be done in a way to block only the illegal content in a very limited scope. Otherwise, other websites, which do not include any illegal content and which provide services through the same IP address might be access banned as well. Yet, that is the case at hand with respect to Golbasi Criminal Judgeship of Peace’s decision, as the IP addresses subject to the decision are the same IP addresses that entire WordPress.com and accordingly millions of other websites are provided through.

The aim of access ban should be banning access to specific contents, which are in violation of law, not to an entire platform or other websites that have no connection with the contents subject to access ban decision. The essential element of the Law No. 5651 is banning access

to the specific contents, but not an IP address, on which many different websites and services may serve.

WordPress.com is a web publishing tool that allows anyone to create and publish their own website in minutes. WordPress.com sites range from small, individual blogs, to the websites of some of the largest media companies in the world. WordPress.com is, then, a collection of millions of individual websites, and each individual site hosted on the WordPress.com platform has its own distinct URL.

As of its release in 2005, WordPress.com became one of the most popular and recognized platforms on which to create your own website or blog. According to the data of Alexa company which rates the popularity and traffic of websites, WordPress.com is ranked 39th in the world based on the visitor and viewing numbers (**Annex-2**). Currently WordPress.com hosts more than 70 million websites and 1 billion posts, approximately resulting in more than 200 million page views from Turkey and 5 billion total views in a month. More than 10 million of those posts are written in Turkish and several million unique visitors from Turkey access WordPress.com on any given day. Considering WordPress.com's reach worldwide and in Turkey, implementing access ban on IP addresses which results in access banning the entire WordPress.com platform and consequently all other websites hosted by WordPress.com, which do not have any connection with the contents subject to the decision, would violate millions of WordPress.com users' freedom of speech and information.

Besides, banning access to IP addresses and in the case at hand, to entire platform, for any reason, harms the freedom of expression which is one of the fundamental rights and freedoms and protected under the Constitution. As a matter of fact, Article 25 of the Constitution states that everyone has the freedom of thought and opinion and may not be forced to state their thoughts and opinions for any reason and purpose and shall not be censured or accused for that reason. Also according to Article 26 of the Constitution which is related to the previous article of the freedom of thought and opinion, *“Everyone has the right to express and spread their thoughts and opinions verbally, in writing, with picture or in other ways solely or collectively. This freedom contains the freedom of receiving or giving news or opinions without the intervention of the public authorities.”*

In accordance with Article 13 of the Constitution: ***“Fundamental rights and freedom may be limited without interfering with their nature and only for the reasons stated in relevant articles of the Constitution and only by the laws. These limitations may not be contrary to the wording and spirit of the Constitution, to the requirements of the democratic public order and the secular Republic and to the principle of proportionality”***. The “principle of proportionality” referred to in this article means the existence of a logical bond between the precautions taken for the limitation of the fundamental rights and freedom and the intended purpose and the tools to achieve the limitation must give the minimum harm to the fundamental rights and freedoms.

In other words, there must be a proportion between the precaution to be taken for the limitation of the fundamental rights or freedoms and the purpose. In the Turkish Republic which is a democratic government of law, an important security of the fundamental rights and freedoms including the freedom of speech is that they can only be limited with the compulsory precautions and depending on the causes of limitation stated explicitly in the Constitution. Accordingly, it is compulsory for the limitation to apply on the fundamental rights and freedom to be based on the laws and only for the purpose of performing the limitation reasons that are explicitly stated in the relevant articles and the intervention to freedom to perform these purposes of limitation must be mandatory. This approach adopted by the ECHR, as well in its decision, which states that the exceptions for freedom of expression ***“must be narrowly interpreted and the necessity for any restrictions must be convincingly established”*** (The Observer and The Guardian v. the United Kingdom, of 26 November 1991, Application no.13585/88) (**Annex – 3**).

The Decision, in this respect, is disproportionate and in violation of fundamental and constitutional rights and freedoms, as also approved by the ECHR. Rendering a decision to protect third parties by banning access to IP addresses which leads to access ban of an entire platform (WordPress.com), which includes millions of websites and massive amounts of contents that benefit from freedom of expression on a daily basis, is illegal and aggrieves rest of millions of WordPress.com users, who express their thoughts and opinions through posting contents at the very moment when it is worth protecting them; it restricts the freedom of information and expression of potential WordPress.com users.

Banning access to IP addresses which leads to access ban of an entire platform, for whatever reason, **is against fundamental and constitutional rights and freedoms, as also attested by the Turkish Constitutional Court's decision of May 29, 2014 with the number 2014/4705** on a previous access ban implementation on the entirety of a video sharing platform. The Constitutional Court, in its decision, firstly emphasizes that access ban of an entire website having countless URL addresses also causes access ban of users or content, which have no relation to the contents subject to the decision by stating that: “...without even searching for a less restrictive method, implementation of a general access ban to a great amount of URL address which is numerically incomparable and irrelevant to the contents subject to the measure, leads broadening the measure by access banning users who are not content providers or hosting providers of the contents which are subject to the order” **(Annex-4)**.

Besides, the Constitutional Court stated in its decision dated April 2, 2014 with the application no. 2014/3986 regarding a similar case **(Annex-5)**; taking the rules of Law no. 5651 into consideration, that it is clear that the complete access ban of a micro blogging website, which is a social media network and which has millions of users, instead of specific URL addresses violates the articles 26, 27, 40 and 67 of the Constitution and **the freedom of expression protected under article 26 of the Constitution and international treaties is violated by the access ban based on the Law No. 5651 and the violation and the consequences thereof must be immediately removed (Annex-6)**.

Turkish Constitutional Court clearly stated that freedom of expression is a basis for a democratic society and is one of the irreplaceable conditions for a society to develop and for an individual to realize himself. Turkish Constitutional Court followed that; “*Social pluralism may become accessible only under an independent platform where all kind of opinions are freely expressed. In this respect, social and political pluralism is depended on free and peaceful expression of all kinds of thoughts. Likewise, an individual can realize his original personality in an environment where he/she can express and discuss his/her thoughts freely.*”

Turkish Constitutional Court additionally stated that; “*Considering the restricting effect of access ban to such a social networking site which has millions of users in our country leading those users freedom of expression which is one of the fundamentals of democratic society, those kind of restrictions' compliance with law shall be immediately supervised and in such a*

determination of non-compliance with law, the access ban shall be immediately removed as a requirement arising from the principle of democratic constitutional state.”

Turkish Constitutional Court quoted Article 13 (i.e. “Restriction of Fundamental Rights and Freedoms”) and Article 26 of the Constitution (i.e. “Freedom of expression and dissemination of thought”) and stated that as per the quoted provisions of the Constitution, freedom of expression does not only include “right to have thoughts and opinions”, but also includes the “right to express and disseminate thoughts and opinions” and accordingly, “freedom of receiving and imparting information”.

Additionally Turkish Constitutional Court highlighted that the internet has an essential instrumental value for the exhaustion of fundamental rights and freedoms, especially the freedom of expression in modern democracies, the social media ground of the internet is essential for people to express, mutually share and disseminate information and thoughts and therefore, it is clear that the authorities must be extremely sensitive when regulating and practicing with respect to social media instruments.

Besides, in a similar dispute, as a result of an evaluation of an application which was made by Ahmet Yildirim regarding access ban to entire “Google Sites” website which is access banned due to another access ban decision regarding another website in the scope of a criminal investigation due to the accusation for defaming Ataturk’s memory provides a hosting service for the applicant’s website, the ECHR decided in its decision of December 18, 2012 (Ahmet Yildirim v. Turkey – 3111/10) that *“The Courts should have foreseen causing big amount of information unreachable, with this such a protection, therefore, directly effects the internet users’ rights and that they may cause side effects. For this reason, the protection that arises from the execution of the Article 8 of the Law No. 5651 fails to comply the cause of predictability in the Convention and the protection in the democratic society which is possessed by the state of law cannot granted to the applicant. The Court also indicates that the first paragraph of the Article 10 of the Convention which foresees the right of freedom of expression should be applied ‘without considering its lines’*. Furthermore ECHR stated that the implemented measure’s effects are arbitrary and judicial supervision on the access ban decisions for preventing abusive uses (exploitation) are not sufficient. Therefore the court decided to convict Turkey to indemnity as Article 10 of the European Convention on Human

Rights (“Convention”) was violated by access banning the entire “Google Sites” website (**Annex-7**).

Therefore even the Law No. 5651 allows access ban to an IP address, it is not possible to take into account this provision in the disputes according to the Constitution, as such provision conflicts with Article 10 of the Convention, if the IP address belongs to the entire website or platform. Article 90 of the Constitution provides that *“In the case of a conflict between international agreements, duly put into effect, concerning fundamental rights and freedoms and the laws due to differences in provisions on the same matter, the provisions of international agreements shall prevail”*.

Therefore, the Decision on access banning the IP addresses which leads to access ban of entire WordPress.com is against the Law No. 5651 and Constitutional Court and ECHR decisions and a serious intervention to freedom of speech and information, which is a fundamental human right.

II. THE DECISION IS AGAINST RIGHT TO DEFENSE WHICH IS A FUNDAMENTAL RIGHT REGULATED UNDER THE TURKISH CONSTITUTION AND EUROPEAN CONVENTION ON HUMAN RIGHTS.

Second phrase of Article 8/A regulates that “removal of content and/or access ban may be decided by the judge due to one or more matters among right to life, security of life and property of people, protection of national security and public order, prevention of crimes or protection of public health. Access ban and/or removal of content broadcasted on the Internet may be decided by Prime Ministry if failure to do so might result in delay and cause irreparable damages, by TIB upon the request of relevant ministers due to preservation of national security and public order, prevention of crimes or protection of public health”. Therefore access ban decision upon TIB’s decision may only be granted in the presence of threads of right to life, security of life and property of people, protection of national security and public order, prevention of crimes or protection of public health. However, the Decision does not present the legal reasoning behind the access ban decision granted as per Article 8/A.

Additionally, as first paragraph of Article 8/A states that access ban and/or removal of content decision of TIB should be complied immediately and within four hours from notice at the

latest and second paragraph of Article 8/A states that the judge shall announce its decision within forty eight hours.

That means, as it is also the case at hand, **the criminal judgeships of peace grant an approval for access ban decision without evaluating the contents subject to the decision, since the addressees are obliged to comply with the order of TIB and access ban the contents within 4 hours.**

Right to defense and right to a fair trial is one of the universally accepted criminal law principles as the Article 36 of the Constitution also states that; “everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through legitimate means and procedures”.

This fundamental human right is also stipulated under Article 6 of Convention, to which Turkey is a party to. As per the Convention; “*in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice*”.

Article 8/A of the Law No. 5651 enables TIB to *ex-officio* decide to access ban if the hosting provider is abroad or the content subject to the access ban decision is deemed within the scope of the crimes set forth within the same article. Therefore, a real or legal person (such as client company) who gets affected by TIB’s access ban decision granted as per Article 8 of the Law No. 5651 cannot object to TIB’s access ban decision before it is executed by TIB, as the access ban decision rendering the right to fair trial of these persons void. Accordingly, Article 8/A of the Law No. 5651 clearly violates the right to defense protected under Article 36 of the Constitution.

Fair, sufficient and adequate execution of the right to defense is an essential part of the democratic society and rule of law. The ECHR established with its precedents that any real

and/or legal person should have effective judicial remedies, enabling them to assert their rights (Case of Běleš and others against the Czech Republic 47273/99 47273/99).

Moreover, the right to defense must be used in a practical and effective manner, and must be interpreted in ways enabling any real and/or legal person to exercise their right to defense efficiently and practically (Case of Lüdi v. Switzerland 12433/86 12433/86). Contrarily, executing Article 8/A of the Law No. 5651 clearly disables any real and/or legal person to assert their rights where such rights are intervened by the administrative act of access banning the entire website *ex-officio*, as TIB is granted with the authority to decide for access banning an entire platform, without granting the option for the relevant real and/or legal persons' to submit a defense before the access ban decision is executed.

The Decision, without providing the legal reasoning behind the alleged violation, or even without mentioning the reasoning of TIB for the decision of July 25, 2015, but approving TIB's decision without evaluating the contents, violates our client's right to defense and right to a fair trial, which is a fundamental right regulated under Article 36 of the Constitution and Article 6 of the ECHR.

III. WWW.PKKONLINE.WORDPRESS.COM SUBJECT TO THE DECISION SHOULD BE EVALUATED WITHIN THE SCOPE OF FREEDOM OF SPEECH AND INFORMATION.

The content broadcasted at <http://pkkonline.wordpress.com> includes heavy criticism and anti-terror propaganda regarding PKK, which is an internationally recognized terrorist organization, and may not be deemed to fall into scope of any of the grounds for access ban under Article 8/A of the Law No. 5651, which is the basis of the Decision. The website does not support terror activities but makes anti-terror propaganda. We hereby submit a screenshot of the relevant content to your Esteemed Judgeship's attention (**Annex – 8**).

Although the contents therein might be deemed as traumatic, shocking or disturbing for a certain part of public, as European Court of Human Rights states in the decision *Handyside v. The United Kingdom* with application number 5493/72, the freedom of expression is not protected "*for information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also for those that offend shock or disturb the state or any*

sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there can be no democratic society. This means ... that every 'formality, ' 'condition, ' 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.” (Annex – 9).

Also, the Turkish Constitutional Court states within its decision regarding the individual application with No. 2014/3986 of April 2, 2014 that: “...for the freedom of expression to satisfy its social and individual function, the news and thoughts that disturb the state or one part of the society or that are deemed negative or wrong by them must be freely expressed and not just the “news” and “thoughts” the society and the state deems positive, right or harmless, and the individuals must be certain that they will not be sanctioned by these expressions. Freedom of expression is the basis of pluralism, tolerance and open-mindedness, there cannot be any “democratic society” without this freedom.” (Constitutional Court Application No: 2014/3986 2.4.2014, p.35).

In line with the decisions of European Court of Human Rights and Turkish Constitutional Court, Turkish Supreme Court also bases its decisions this way. Freedom of speech is defined in the decision of the General Criminal Assembly of the Supreme Court submitted to the information of the Court attached to this objection petition dated July 11th, 2006, with file number 2006/9-169 and with decision number 2006/184: Freedom of Speech ***“is valid not only for the good or not disturbing or unconcerned information and opinion, but also for offensive, traumatic or disturbing information and opinion.”*** The Court goes on to say that this freedom is a part of **the pluralism, broadmindedness and tolerance which are irrevocable features of a democratic public (Annex – 10).**

The internet and social media is created for people to express their opinions and ideas freely. In social media, there are millions of users with varying expressions, and the ideas and expressions a user shares can reach from tens to millions of people. Therefore, the judicial authorities must be even more careful while applying the limitation to fundamental rights and freedoms when the internet and social media is concerned.

As the Turkish Constitutional Court clearly confirms with its decision regarding the individual application No. 2014/3986: *“the Internet has an essential instrumental value for exhaustion of fundamental rights and freedoms, especially the freedom of expression in*

modern democracies. The social media ground the internet provides is indispensable for people to express, mutually share and disseminate their information and thoughts. Therefore, it is clear that the states and administrative authorities must be extremely sensitive in the regulation and practice for internet and social media instruments, which became one of the most effective and widespread methods to express thoughts.” (Constitutional Court Application no: 2014/3986 2.4.2014, S.39).

The freedom of expression is a universally protected right and the Order is clearly against the decision of ECHR which is the sole adjudicator of the Convention to which Turkey is also a party. The European Court of Human Rights clearly highlights that freedom of expression **“constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment.”** (ECHR Vogt v Germany with application number 17851/91) (Annex – 11).

The Convention defines the freedom of expression in Article 10 as *“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.*

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

In line with the European Convention on Human Rights, Article 25 of the Constitution states that everyone has the freedom of thought and opinion and may not be forced to state their thoughts and opinion for any reason and purpose and shall not be censured or accused for that reason. Within this context, there is no restriction on the expression of thoughts and criticisms regarding what they must include. It is clear that granting an access ban decision on all sorts

of broadcasts which do not have positive criticism does not comply with the necessities of law and justice.

The limitation of the fundamental rights and freedom secured by the Constitution is subject to some specific conditions and must be realized for the purposes of providing balance of interest. This rule is also regulated under the Constitution and accepted in the doctrine. The “principle of proportionality” referred in Article 13 of the Constitution means the existence of a logical bond between the precautions taken for the limitation of the fundamental rights and freedom, and the purpose desired. The tools to achieve the desired objective must minimally harm the fundamental rights and freedoms.

In other words, a court must balance how a fundamental right such as speech is limited with the purpose of the restriction. In the Republic of Turkey, which is a democratic government of law, an important safeguard to the fundamental rights and freedom including the freedom of speech is that these restriction are subject to compulsory precautions and can only be limited based if stated explicitly in the Constitution. Accordingly, a restriction on fundamental rights and freedom must be based on the laws and must be absolutely necessary and must be explicitly stated in the relevant Constitutional articles. This approach is also adopted by the European Court of Human Rights, which states that the exceptions for freedom of expression must be narrowly interpreted and the necessity for any restrictions must be convincingly established (*The Observer and The Guardian v. the United Kingdom*, of 26 November 1991, Application no.13585/88).

Since it is a fundamental right and freedom protected under Article 26 of the Constitution for a person to express his or her thoughts, including through a website, this limitation of this person’s freedom of speech can only be imposed if the speech on the violates another person’s personal rights, must be regulated by the law and must necessary. Moreover, the provision of Article 15 of the Constitution regulates the restriction on the fundamental rights and freedom: “Provided that the obligations arising from the international law shall not be violated, during war, mobilization, martial law, or in extraordinary situations, ***the usage of the fundamental rights and freedom might be ceased partially or completely in the proportion that the situation requires or precautions that are predicted in the Constitution may be taken.***” The Constitution also states that the tool to be used to limit the fundamental rights and freedom must be convenient and necessary to perform its purpose, and that the tool and the purpose

must be proportional. Both the provisions of Article 13 and 15 provide safeguards for the limitation of fundamental rights and freedom and aim to prevent damaging the fundamental rights and freedom by applying the limitations without any proportion with the purpose, as applied in this case.

In light of these decisions, the Decision is unlawful for access banning content, which should be evaluated within the scope of freedom of speech and information and disproportionate for access banning the entirety of WordPress.com through access banning IP addresses.

CONCLUSION AND REQUEST: In light of the foregoing, we hereby request from your Esteemed Judgeship to accept our objections against Golbasi Criminal Judgeship of Peace's illegal decision of July 25, 2015 with the decision number 2015/646 Misc. and to cancel it.

Best regards,

On behalf of Automattic Inc.,

Gönenç Gürkaynak
Attorney-at-Law

İlay Yılmaz
Attorney-at-Law