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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

JUDGEMENT OF THE CONSTITUTIONAL COURT OF TURKEY (Nb. 2014/87E, 2015/112K)

of 8 December 2015

EXTRACTS OF RELEVANCE[1]

FOR THE LAW ON REGULATION OF PUBLICATIONS ON THE INTERNET AND COMBATING CRIMES COMMITTED BY MEANS OF SUCH PUBLICATIONS

OF TURKEY

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[1] *Translation made by the Council of Europe*

[…]

F-Examination of Subsection (n) Added to Section (1) of Article 2 of the Law on Regulation Publications on the Internet and Combating Crimes Committed by means of Such Publication, Statute 5651, by Article 85 of the Law [that is, the Law on Amendments to the Legislative Decree Concerning the Organisation and Duties of the Ministry for the Family and Social Policy and Some Laws and Legislative Decrees, Statute 6518] and Sections (1), (2), (3) (4), (5), (6), (8), (9), (10) of Article 6/A Added to Statute 5651 by Article 90 [of the Law] and Sections (5) and (8) of Article 9 of Statute 5651 Amended by Article 93 [of the Law] and Sections (1), (3), (4) and the Second Sentence of Section (2) of Provisional Article 3 Added to Statute 5651 by Article 100 [of the Law]

1-The Meaning and Scope of the Provisions

78. The Union of Access Providers (*Erişim Sağlayıcıları Birliği* ESB/UAP) was established as a special legal entity by article 6/A of the Law in order to ensure the implementation of decisions to block access outside the scope of article 8 of the Law.

79. It is stated in subsection (n) of article 2 of the Law, the challenged provision, that "the Union" refers to the Union of Access Providers.

80. Article 6/A of the Law, the challenged provision, sets out the arrangements relating to the UAP. Section (1) of the article provides that the Union of Access Providers was established for the purposes of implementation of decisions for denial of access outside the scope of article 8 of Statute 5651, section (2) provides that the Union is a legal entity under civil law, and that its headquarters is in Ankara, section (3) provides that the Union shall determine the principles and practices of its operation in the form of a Charter which shall be approved by the Authority (the Information and Communication Technologies Authority, BTK/ICTA), and that amendments of the Charter shall be subject to approval by the Authority, section (4) provides that the Union shall commence operations once the Charter has been examined and approved by the Authority, section (5) provides that the Union is a coordinating organisation comprising the membership of all internet service providers and all other operators providing internet access services authorised under the scope of the Electronic Communications Law, Statute 5809, dated 5/11/2008, section (6) provides that decisions to block access outside the scope of article 8 of this Statute shall be implemented by internet access providers, and that all manner of hardware and software necessary for the implementation of decisions shall be provided by the access providers themselves, section (8) provides that the Union may object to decisions sent to it if it considers that are not in conformity with legislation, section (9) provides that the revenue of the Union shall be provided by fees paid by the members, that the fees chargeable shall be set at a level which meets the costs of the Union, that the fee paid by a member shall be determined by the proportion of net sales of that member within the total net sales of all members, that the payment periods for members, the time from which new members shall commence payment, and other provisions concerning payment shall be specified in the Union

Charter, and that fees not paid in a timely fashion shall be collected by the Union, together with legal interest, section (10) provides that internet service providers which are not members of the Union may not operate.

81. Section (1) of provisional article 3 of the Law, the challenged provision, provides that the establishment of the Union shall be completed within a period of three months after the date of publication of the Law, the second sentence of section (2) provides that those internet service providers and internet access providers who have not become members within a maximum of one month following the establishment of the Union must complete their membership procedures, section (3) provides that if the establishment of the Union cannot be completed within the specified period, an administrative penalty of one percent of net sales during the previous calendar year shall be imposed by the Authority on internet service providers and internet access providers, section (4) provides that an administrative penalty of one percent of net sales during the previous calendar year shall be imposed by the Authority on internet service providers and other internet access providers who have not become members of the Union within one month of its establishment.

82. Section (5) of article 9 of the Law, the challenged provision, provides that decisions given by a judge to deny access within the scope of this article shall be sent directly to the Union, section (8) provides that a decision to block access sent by the Union to the access provider shall be implemented by the internet access provider promptly, within a maximum of four hours.

83. The ESB began operations on 19 May 2014. The basic duty of the Union is to ensure implementation of denial of access decisions not covered by the protective and administrative measures relating to catalogue offences under the scope of article 8 of the Law. The Union is a coordinating organisation which is formed by the membership of all internet service providers and all other operators which provide internet access services authorised under the scope of the Electronic Communications Law, Statute 5809. Internet service providers which are not members of the Union may not operate. In view of these characteristics, the UAP does not have the status of an association or a foundation.

84. Article 135 of the Constitution states: "*Professional organizations having the characteristics of public institutions and their higher bodies are public corporate bodies established by law, with the objectives of meeting the common needs of the members of a given profession, to facilitate their professional activities, to ensure the development of the profession in keeping with common interests, to safeguard professional discipline and ethics in order to ensure integrity and trust in relations among its members and with the public; their organs shall be elected by secret ballot by their members in accordance with the procedure set forth in the law, and under judicial supervision."* In view of the fact that the UAP is not a public corporate body, and the fact that the purpose of its founding was to implement decisions to block access outside the scope of article 8 of Statute 5651, it is clear that the Union cannot be considered within the scope of professional organisations with the character of public institutions either.

85. The elimination of illegality on the internet can only be achieved by blocking of access, and blocking of access may only be achieved through access providers. The UAP was established in the public interest in order to ensure that current obstacles to the implementation of decisions for removal from publication and blocking of access to content such as unenforceability, lack of clarity concerning the identity of respondent parties might be eliminated. The UAP provides a connection with access providers and is responsible for transmission to access providers of decisions concerning blocking of access.

86. It is stated in the Law that the UAP is a legal entity under civil law, that it is comprised of legal entities under civil law, that it was founded by statute, that in order for it to commence activities, its Charter had to be approved by the ICTA, that amendments of its Charter were made subject to approval by the ICTA, that its establishment and membership of it were made mandatory and envisaged as an administrative requirement, and that its duties are mainly public

in character, it may be said that it is a *sui generis* institution, established by statute but not located within the administrative structure.

2-The Grounds for the Demand for Cancellation

87. The statement of claim, in summary states:

a) That in the justification for the Law, it was stated that the main reason for the establishment of a structure under the name of *"Union of Access Providers,"* a *sui generis* structure of a legal entity under civil law with public powers, was to eliminate the problems experienced in the enforcement of decisions to block access to content and to remove content from publication, that this was the intention of the phrase in the second sentence of the seventh section of article 6/A of the Law: *"For the purposes referred to here, a communication made to the Union shall be deemed to have been made to access providers"* that it was stated that the Union was based on international procedures in this sphere, but that it is impossible to find a similar example in other countries,

b. It is asserted that the fifth section of the article makes compulsory the participation of all internet service providers and other operators providing internet access services, and the tenth section provides that internet service providers which are not members of the Union may not operate, but that no legal entity established with such provisions can be accepted as a lawful and reasonable legal entity, that the said Union is reduced to the status of an institution whose function is no more than to carry out the orders and instructions of the Telecommunication Communication President, that this arrangement, which makes it compulsory for all internet service providers and operators providing access service to become members of the Union, amounts to the introduction of a new "condition" for engaging in activity in the sector, that making the establishment of the Union and membership of the Union quite openly compulsory for service providers will amount to a violation of the right to freedom of association, safeguarded by national and international law, which provides that no person may be obliged to become a member of an organisation against their will, that it also restricts freedom of enterprise, that it introduces a new "condition for entry into the market" for real persons and legal entities wishing to engage in business in the area in question, that it is clearly stated in the second section of article 6/A of the Law that the Union is a legal entity under civil law, that the exclusion, by the hand of the State, of internet service providers who are not members of the Union from the sector, violates competition law and also usurps the access provider's acquired right, that consequently the fifth and sixth sections of article 6/A violate the right to freedom to establish associations, that the said arrangements also restrict freedom of enterprise, and that they are not measures which are essential and necessary in a democratic society,

c. It is asserted that the fact that according to section 6 of article 6/A of the Law, businesses are made liable for all of the burden and costs of blocking measures and of the Union into which they are enrolled against their will, that the Union is to perform an obligation which is public in character is contrary to law and equity and cannot be reconciled with the principle of the rule of law, that in addition to the transfer of a public obligation to the access providers, since the costs of the infrastructure for access blocking measures are very high, such measures can only be applied by internet service providers and operators providing access services who are in a dominant position in the market with effective market power, that the result of this will be that operators who are newly arriving in the market and are operating on a smaller scale will be unable to offer electronic communications services, that these measures will open the way for monopolisation and cartel formation by those internet service providers and operators providing access services who are in a dominant position in the market and have effective market power.

d. It is asserted that the unconstitutionality of the first, fifth, sixth and tenth sections of article 6/A taint the other challenged sections of the same article, and will inevitably undermine those sections also, resulting in a violation of the Constitution, and that all of the grounds for the unconstitutionality of these sections, are similarly valid for the other sections of the same article,

e. It is asserted that all of the grounds of unconstitutionality asserted in connection with the cancellation of article 6/A of the Law are also valid for subsection (n) added to section (1) of article 2 of the Law and also for these challenged sections of article 9, because there is an organic link between the said articles, and that the articles are interlinked in terms of their continued existence, and

f. It is asserted that the provision that *"Those internet service providers and internet access providers who have not become members within a maximum of one month following the establishment of the Union must complete their membership procedures"* makes membership of the Union compulsory for those internet service providers and internet access providers who have not become members, that the sanctions for non-compliance with this compulsion are shown in sections (3) and (4) of provisional article 3, that compelling internet service providers and internet access providers who have not become members to complete their memberships within a maximum of one month following the establishment of the Union is a clear violation of the right to freedom of association, the "freedom of work and contract" and the "right to organize unions," that all of the grounds for the unconstitutionality of article 6/A of the Law are also similarly valid for provisional article 3, and that the requirements are in violation of articles 2, 5, 33, 36, 40, 48, 51 and 167 of the Constitution.

3-The Issue of Unconstitutionality

88. One of the fundamental principles of the rule of law specified in article 2 of the Constitution is the principle of "clarity." According to this principle, legal arrangements must be clear, unambiguous, comprehensible and applicable so as to give neither individuals nor the administration any cause for doubt or hesitation, and they must also include safeguards against arbitrary behaviour by public authorities. The principle of clarity is important in terms of ensuring individuals' legal certainty.

89. It is understood that the legislature founded the UAP in order that obstacles to the implementation of decisions for removal from publication and blocking of access to content such as problems of unenforceability and lack of clarity concerning the identity of respondent parties might be eliminated, bearing in mind that there was no other institution that could carry out this duty, due to its technical character, and that its intention was to ensure that decisions to block access were implemented immediately. The introduction of legal measures in this form is a matter for the legislature's discretionary authority, within constitutional limits.

90. The UAP does not directly implement the said decisions to block access, but only performs an intermediary role between access providers and those who are subject to the said decision. The compulsory nature of membership of the Union is necessitated by the duty allocated to the Union, and if it were not made mandatory, it would be impossible to implement decisions to deny access. The principles and practices of the operation of the Union are defined in the form of a Charter which must be approved by the Authority, and amendments of the Charter are subject to approval by the Authority. Also, the UAP commences operations only after the Charter has been approved by the Authority. Consequently, the Union is subject to the supervision and audit of the State. Consequently, the rules for the structure, operation and establishment of the Union, which was established for the purposes of implementation of decisions for denial of access outside the scope of article 8 of Statute 5651, have clarity and are foreseeable.

91. Article 48 of the Constitution states: "*Everyone has the freedom to work and conclude contracts in the field of his/her choice. Establishment of private enterprises is free. The State shall take measures to ensure that private enterprises operate in accordance with national economic requirements and social objectives and in certainty and stability."*

92. Access providers are private enterprises, as provided for in the first section of article 48 of the Constitution. According to the second section of the same article, the State shall take measures to ensure that private enterprises operate in accordance with national economic requirements and social objectives, in certainty and stability. When the purpose of making membership of the UAP compulsory for access providers, it is clear that this objective could only be achieved if all access providers are members of the said Union. Consequently, the provision introduced by the legislature are applied within this scope, to eliminate lack of clarity concerning the identity of respondent parties in the implementation of decisions to block access, and to ensure that the decisions are implemented promptly. Otherwise, it would be impossible to operate the said system. Indeed, when one considers the following provision of Article 138 of the Constitution: *"Legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution[,]"* making UAP membership for access providers to ensure that court decisions are implemented promptly is a consequence of the positive obligations of the State, and in no way offers any harm to individuals' right to free enterprise.

93. The internet market is established over a system which consists of software and hardware. In order for access providers to be able to carry out their activities, they must have the necessary software and hardware. In section (6) of article 6/A of the Law, the challenged provision, it is stated that all manner of hardware and software necessary for the implementation of decisions shall be provided by the access providers themselves.

94. As stated in a number of Constitutional Court judgments, the social state is an interventionist state, in economic terms. Our Constitution recognises the right of ownership and freedom of private enterprise, but at the same time, as with all contemporary constitutions, anticipates that the State shall take measures to restrict these in the public interest, and to ensure that private enterprises operate in accordance with national economic requirements and social objectives. The Constitutional duty imposed by article 5, requiring the State to *"to ensure the welfare, peace, and happiness of the individual and society"* and the provisions of article 48 which require the State to *"take measures to ensure that private enterprises operate in accordance with national economic requirements and social objectives and in certainty and stability"* show that the State may intervene in working life where this is necessary. The State has a duty to ensure the protection of persons whose personal rights and private life are being violated by publications in the internet environment. It was for this purpose that it established the UAP with this challenged provision, in order to ensure the blocking of access to publications directed at such persons whose rights are being violated. Thus, the provision that requires access providers themselves to provide all hardware and software required to block such access is one of the safeguards enacted by the State, and the making of arrangements on such matters is within the legislature's discretionary authority. For the stated reasons, the provision is not in violation of articles 2, 5 or 48 of the Constitution.

95. Section (8) of article 6/A of the Law, the challenged provision, grants to the Union the right to object to decisions it receives for implementation if it considers that they are not in conformity with legislation is a measure directed toward the public interest. By granting the Union the right to object, the intention was to ensure review of such decisions to block access. Section (9) of article 6/A of the Law, the challenged provision, provides that the revenue of the Union shall be provided by fees paid by the members, that the fees chargeable shall be set at a level which

meets the costs of the Union, that the fee paid by a member shall be determined by the proportion of net sales of that member within the total net sales of all members, that the payment periods for members, the time from which new members shall commence payment, and other provisions concerning payment shall be specified in the Union Charter, that fees not paid in a timely fashion shall be collected by the Union, together with legal interest. are directed toward maintaining the UAP in existence and ensuring that it is capable of performing its allocated function of blocking access. These arrangements, which were put in place in the public interest, are also within the legislature's field of discretion, subject to constitutional limits.

96. For the reasons stated, the provision is not in violation of articles 2, 5 or 48 of the Constitution. The request for cancellation must be rejected.

97. The provisions were not considered to have any connection with articles 33, 36, 40, 48, 51 or 167 of the Constitution.

G-Examination of Section (7) of Article 6/A Added to Statute 5651 by Article 90 of the Law

1-The Grounds for the Demand for Cancellation

98. The statement of claim, in summary states that the provision is contrary to legislation concerning notice, and is prejudicial to the certainty of notice, and to legal interests protected by international agreements, that if the provision is implemented, it will not be clear whether notice served upon the Union has gone to the access provider who is the notified party or not, whether the notice reached the notified party, and if it did reach the said party, when the party became aware of it, that the question of whether the notice was received by persons with authority to receive the notice will be open to question, that making all the periods and processes stipulated for valid notice applicable to all access providers by means of notice served upon the Union alone undermines legal certainty, that with this arrangement it is possible that a number of legal processes might be initiated without the party concerned even being aware of the content of the notice, that this situation may seriously threaten freedom to seek legal remedies, that if service of decisions for injunctions/sanctions with the capacity directly to affect the rights of real persons and legal entities are considered valid [even] when notified to another different legal entity under civil law will obstruct the effective exercise of the right of defence, that if notice served via the Union to internet service providers under Statute 5651 fails to reach the intended notified party, it will amount to a deprivation of the intended notified parties of their right to fair trial and their right to use reasonable means and channels in exercising their rights of claim and defence before the judicial authorities as claimant, respondent, intervenor or objecting party, and that consequently that it deprives them of the freedom to seek legal remedies, and it was also alleged that the provision contains no recognition of the right of real persons or legal entities who claim a violation of their Constitutional rights and freedoms to apply promptly to competent authorities, and that since the legal channels and authorities to whom the real persons or legal entities may apply in such circumstances, and the periods within which such applications must be made, are not shown, the provision violates articles 2, 36 and 40 of the Constitution.

2-The Issue of Unconstitutionality

99. The first sentence of the challenged section (7) of article 6/A of the Law provides that decisions for denial of access outside the scope of article 8 of this Statute shall be sent to the Union for implementation, and the second sentence provides that a communication made to the Union shall be deemed to have been made to access providers.

100. One of the fundamental principles of the rule of law specified in article 2 of the Constitution is the principle of *"legal certainty."* Legal certainty requires that norms are foreseeable, that individuals can feel confidence in the State in all their actions and transactions, that the State will also, in its legal arrangements, avoid measures which are damaging to that sense of trust.

101. The first section of article 36 of the Constitution which provides for the freedom to seek legal remedies states *"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"* thereby safeguarding the right to apply to the judicial authorities as claimant or respondent, and as a natural consequence thereof, the right to submit claims, defence pleadings, and to a fair trial. The freedom to seek legal remedies protected by the article is not only a fundamental right in itself, but is also, according to article 40 of the Constitution, one of the most effective guarantees safeguarding the other fundamental rights and freedoms, ensuring that they are duly protected and can be exercised. The effective path for a person to defend themselves against an injustice or harm, or to assert and prove the injustice of an action or procedure inflicted against them, and to remedy such a harm, is their ability to litigate before the judicial authorities.

102. Notice is the notification of persons in accordance with law of various legal procedures by authorised bodies so that such persons shall incur the legal consequences of those procedures, and it is also the documentation of the fact that such notice has been duly given. In order to ensure that procedures give rise to the legal consequences attributed to them, due notice of the procedures must be given to the intended notified party. Notification thus performed is one of the important guarantees accorded to individuals of their freedom to seek legal remedy and of their full exercise of the right to claim and defend which are enshrined in the Constitution.

103. According to the first sentence of the challenged section (7) of article 6/A of the Law, decisions to block access shall be sent to the Union for action. The UAP is an organisation which provides coordination between access providers and courts and the administration. The purpose of the provision is to ensure that decisions are implemented as soon as possible, and to remove any uncertainty concerning the intended notified party. When one considers the fact that the number of access providers increases every day, and the difficulty of keeping track of all of them and reaching their addresses to give notice, it is essential, if the system to work as well as possible, that decisions for blocking access are sent to the UAP for action. However the UAP only provides coordination with the access providers. Such an arrangement is within the legislature's discretionary authority, subject to constitutional limits.

104. The second sentence of article 6/A of the Law, the challenged provision, provides that notice of decisions for denial of access outside the scope of article 8 of Statute 5651 sent to the Union for implementation shall be deemed to have been given to access providers. The date of notice to the Union shall be deemed to be the date of notice given to the access providers. According to sections (8) of article 9 and section (3) of article 9/A of Statute 5651, access providers must implement these decisions within a maximum of four hours.

105. Any delay in the implementation of a decision to block access in order to prevent damage to personal rights and freedoms may result in irremediable consequences. Consequently, decisions to deny access must be implemented as promptly as possible. It has been accepted that in order to achieve this a communication made to the Union shall, according to the challenged provision, be deemed to have been made to access providers. Under this system, decisions made by courts or by the administration are forwarded in an electronic environment directly to the UAP, and the UAP forwards these decisions simultaneously to the electronic addresses of the access providers over the system which it has established with the access providers. It may be seen over the system that the said notice reached access providers. In view of the fact that by the very nature of the function it must be performed as quickly as possible, the fact that the rate of change in the field of technology is rapid, and the fact that it can be identified that the UAP and the access providers are aware of the said notice, the enactment of these arrangements which are being challenged, is within the legislature's discretionary authority, and the provisions cannot be said to violate the principle of legal certainty or of the right to freedom to seek legal remedies.

106. For the stated reasons, the provision is not in violation of articles 2, 36 or 40 of the Constitution. The request for cancellation must be rejected.

107. Erdal TERCAN dissented from this view with respect to the second sentence of sections (7) of article 6/A of the Law.

H-Examination of Section (9) of Article 9 of Statute 5651 amended by Article 93 of the Law

1-The Grounds for the Demand for Cancellation

108. The statement of claim, in summary states that the provisions specified within the scope of article 6/A of the Law are in violation of articles 2, 33, 36, 40 of the Constitution.

2-The Issue of Unconstitutionality

109. Pursuant to Article 43 of Statute 6216, the challenged provision was examined in terms of articles 13 and 26 of the Constitution.

110. In section (9) of article 9 of the Law, the challenged provision, it is provided that if the publication subject to a decision by a judge for blocking of access due to violation of personal rights within the scope of this article, or a publication of the same character, is also published in other internet sites, the existing decision shall also be applied to those other addresses, if an application is made by the person concerned to the Union.

111. In the first section of article 26 of the Constitution entitled *"Freedom of expression and dissemination of thought,"* The scope of the freedom of expression and dissemination of thought is specified as follows: "*Everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively. This freedom includes the liberty of receiving or imparting information or ideas without interference by official authorities. This provision shall not preclude subjecting transmission by radio, television, cinema, or similar means to a system of licensing."*

112. The limits to the "Freedom of expression and dissemination of thought," are set out in the second section of article 26 of the Constitution. According to this provision, the exercise of these

freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, withholding information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or to ensure the proper functioning of the judicial process, or protecting professional confidentiality as prescribed by law.

113. According to these arrangements freedom of expression is not only the freedom "to have thoughts and opinions," but also *"to express and disseminate thoughts and opinions"* and related to this, it also covers the freedom to "receive and to express news or opinion." Within this framework, freedom of expression means that individuals can freely access news and information, and others' ideas, that they should not be censured for such thought and opinions, and they must be able freely to express them, alone or with others through various channels, explain them, defend them, pass them on to others and disseminate them.

114. The means which may be used for expressing and disseminating thought are stated in article 26 of the constitution as "by speech, in writing or in pictures or through other media" and the phrase "through other media" shows that all means of expression are subject to constitutional protection.

115. However, the freedom to express and disseminate ideas is not absolute or without limitation. Indeed the freedom to express and disseminate ideas protected by articles 26 and 28 of the constitution may be restricted, subject to the conditions set out in article 13 of the Constitution, for the reasons specified in these articles. According to article 13 of the Constitution, fundamental rights and freedoms may only be restricted by law, and the restrictions shall not be contrary to the requirements of the democratic order of society and the principle of proportionality, and may not infringe upon the essence of those rights and freedoms.

116. The internet has considerable value in terms of the exercise of fundamental rights and freedoms in modern democracies, and most importantly, freedom of expression. Social media constitute a media channel in the form of a platform established for transparent and mutual communication which permit individual participation in order to generate, publish and interpret media content. The internet offers an indispensible basis for individuals to express, share and disseminated information and ideas.

117. In circumstances where a decision has been given for denial of access to an internet site, the principles of legal certainty and legal clarity, which are preconditions for the rule of law, must be taken into consideration.

118. According to the challenged provision if the same publication which is subject to a decision by a judge for blocking of access due to violation of personal rights or a similar publication is published at other addresses, the Union will make an assessment and, without a new decision being made by the legal body, the existing decision shall also be applied to those other addresses, provided that an application has been made by the person concerned to the Union.

119. If the publication already subject to a decision by a judge for blocking of access due to violation of personal rights is published in another internet site, the Union shall have no difficulty in applying the decision to these addresses also. In such circumstances, the application of the existing decision to these addresses also is merely the implementation of the said judge's decision because the publication referred to has already been identified by the court as violating a personal right. What the Union will do in this case is to determine whether the said publication is the same or not, and whether the publication in violation has been published in full or in part on the internet address. Also, if the same act is carried out with very minor changes made with a

view to vitiating the judge's decision, the publication in violation must be considered to be the same. Here the assessment made by the Union is not a legal assessment, but an assessment of a material event. Under these circumstances, the publication which is to be the subject of the decision to block access has previously been determined by the decision of a judge and therefore there is no lack of clarity, nor any arbitrary or disproportionate restriction of freedom of expression.

120. However, if "publications of a similar character" to that subject to a decision for blocking of access due to violation of personal rights within the scope of article 9 are published in other internet sites, and the individual concerned applies to the Union, this is also left to Union to decide. Determining whether a publication is of the similar character is different to determining whether it is the same and requires an assessment of the content of the publication. *"Publications of the same character"* are publications which are not the same as the publication subject to a judge's decision for blocking of access, but are publications of a character which may violate a personal right of the individual concerned in terms of the outcome arrived at. The question of the scope of the personal right, and what acts violate the personal right require that a number of legal issues be assessed, including the social, economic, political and legal statuses of the parties involved, the populace which the said publication reached, and whether or not the publication is within the scope of freedom of expression, and decisions have to be made on these matters. The competence to block access to publications of a similar character which is granted to the UAP by the challenged provision does not meet the basic condition of the principle of legality that it should comprehensible, clear and unambiguous, and moreover, its scope and boundaries are undefined. In its term *"publications of the same character"* the provision is not clear or foreseeable.

121. Also, if publications of a similar character to a publication subject to a judge's decision for blocking of access due to violation of personal rights are published in other internet sites, the application of the decision to block access also to these sites restricts freedom of expression in a disproportionate manner because access to these sites has been obstructed.

122. For the reasons given, the phrase *"or publications of the same character"* in the challenged provision is in violation of Articles 2, 13 and 26 of the Constitution. It must be cancelled.

123. The remainder of the provision is not in violation of articles 2, 13 or 26 of the Constitution. The request for cancellation must be rejected.

124. Serdar ÖZGÜLDÜR concurred with the cancellation of the phrase *"or publications of the same character"* in the provision, on different grounds, but did not concur with the foregoing view for the parts of the provision other than the phrase *"or publications of the same character."*

125. Hicabi DURSUN, Kadir ÖZKAYA and Rıdvan GÜLEÇ did not concur with the foregoing opinion concerning cancellation of the phrase *"or publications of the same character*" in the provision.

126. The provision was not considered to have any connection with articles 33, 36 or 40 of the Constitution.

I-Examination of the First Sentence of Section (2) of Provisional Article 3 Added to Statute 5651 by Article 100 of the Law

127. The first sentence of the second section of provisional article 3 added to Statute 5651 by Article 100 of Statute 6518 was amended by article 30 of the Law Amending Some Laws and Decrees, Statute 6639, dated 27.3.2015.

128. Consequently, it is not necessary to give a decision concerning the request for cancellation of this sentence, which is no longer applicable.

İ-Examination of the phrase *"… and [using] similar methods"* which occurs in subsection (o) added to Section (1) of Article 2 of Statute 5651 by article 85 of the Law

1-The Grounds for the Demand for Cancellation

129. The statement of claim, in summary states that the reference, in the definition of blocking of access, to some of the methods used during blocking of access as "similar methods" conflicts with the purpose and scope of Law 5651, and that it will give rise to legal uncertainty, that norms regulating the responsibilities and liabilities of content providers, hosting providers, access providers and public use providers, and the principles and practices applicable to efforts to combat, through the agency of the content, hosting and access providers, offences committed in the internet environment, must include provisions which are clear, comprehensible and clearly defined, and that the provision is therefore in violation of article 2 of the Constitution.

2-The Issue of Unconstitutionality

130. The challenged phrase defines the blocking of access as denial of access achieved by means of denial of access via the domain name, denial of access via the IP address, denial of access to the content (URL) and using similar methods. The challenged provision is the phrase *"… and [using] similar methods."*

131. One of the fundamental principles of the rule of law specified in article 2 of the Constitution is the principle of "*clarity*." According to this principle, legal arrangements must be clear, precise, comprehensible and applicable in a manner which gives individuals and the administration no cause for doubt or hesitation, and they must also include safeguards against arbitrary behaviour by public authorities. The principle of clarity is related to legal certainty and the individual must know from the law, within a certain degree of accuracy, which concrete act or event entails which legal sanction or outcome, and which of the foregoing empower the administration to intervene. Only under such circumstances can s/he anticipate the obligations falling upon him/her, and adjust his/her behaviour accordingly. Legal certainty makes it necessary that norms are foreseeable, that individuals can rely upon the State in all of his/her actions and procedures, and that the State shall also, in its legal arrangements, avoid measures which are damaging to that sense of trust.

132. Blocking of access is the prevention, by various means, of entry to a site carrying out publishing in an internet environment. In other words, it is the obstruction of users' access to an internet site by means of various techniques. Blocking of access to internet sites is not achieved by one single method alone. The scope of the blocking varies depending upon the technique used, the duration of the blocking, the process prior to and after the blocking, [and] technological developments.

133. The legislature has the powers to make arrangements in response to developments in activity over the internet in accordance with social needs. But the legislature must remain within the discretionary authority granted to it with regard to legal arrangements taking account of the criteria of justice, equity and public benefit and within constitutional limits.

134. In fields in which it is necessary to act rapidly to apply or remove measures in order to meet developing situations and conditions, leaving matters requiring administrative and technical expertise to the executive, once the legislature has identified the basic provisions, cannot be interpreted as handing over legislative powers, and performance by the executive of act which are of a general legal character, in compliance with criteria which are sufficiently flexible to be able to accommodate changing conditions within the framework set out by the legislative organ, cannot be considered as a violation of the rule of law principle of clarity.

135. It is clear that the provision which contains the challenged phrase was introduced in the public interest, bearing in mind that developments in the internet environment are dynamic and changing, in order that blocking of access could be carried out under changing conditions, making use of such scientific and technological developments as may arise.

136. In the provision which contains the challenged phrase, methods of blocking access were defined in the form of a list, including blocking of access via the domain name denial of access via the IP address and denial of access to the content (URL), and it went on to make reference to *"… and [using] similar methods… ."* Methods of blocking access are techniques which are rapidly changing and developing to meet rapid technological and scientific developments requiring expertise and technical knowledge. Consequently, it would be impossible for the legislature to determine in advance which each of these measures will be implemented. The fact that the legislature, after clearly listing the mechanisms of blocking access, included blocking access in a way similar to these methods as part of this list is not a violation of the rule of law. Consequently, it may not be said that the phrase *"… and [using] similar methods…"* is unclear or is likely to give rise to arbitrary practices.

137. For the stated reasons, the provision is not in violation of article 2 of the Constitution. The request for cancellation must be rejected.

J-Examination of Subsection (r) Added to Section (1) of Article 2 Added to Statute 5651 by Article 85 of the Law

1-The Grounds for the Demand for Cancellation

138. The statement of claim states, in summary, that the provision, which allows valid notice to be served upon those engaging in activities within Turkey or abroad, addressing them via email addresses on their internet pages, is in breach of national legislation concerning notice and undermines the certainty of notice, as well as legal interests protected by international agreements, that it cannot be reconciled with the principle of the rule of law, that if notice is given to persons carrying out activities within the scope of Statute 5651 within Turkey or abroad, addressing them by means of email addresses derived from information obtained from communications tools on the internet pages, the domain name, the IP address and similar sources, [it may be difficult or impossible to determine] whether or not the email was sent, whether or not it reached the notified party, if it did arrive, when it was opened and viewed, and if it was opened, whether the notice was received by the persons with authority to receive the notice, also that it is a provision which may be in breach of the form of public law under which a service provider in a foreign country is operating, that the unconstitutionality of the third section added to article 3 of Statute 5651 by article 86 of Statute 6518 will inevitably disable subsection

(r) added to the first section of article 2 of the Law, which expresses this provision, that such an arrangement means that a legal process may be initiated without the knowledge of the party in question and may seriously threaten his/her freedom to seek legal remedies, that persons who are the subject of administrative actions and procedures may, in many cases, miss out on their periods within which they are permitted to make claims or objections, and will therefore be deprived of their freedom to seek legal remedies, that in addition to the violation of the right to freedom to seek legal remedies, it will result in a violation of article 40 of the Constitution, that, in the event that a violation of the right to freedom to seek legal remedies does take place, the challenged provisions do not grant persons subject to administrative measures the right to demand the right to apply to a competent body without delay, and that since said provisions do not indicate the legal channels and authorities to whom persons may apply in such circumstances, or the periods within which such applications must be made, the provision violates articles 2, 36 and 40 of the Constitution.

2-The Issue of Unconstitutionality

139. Subsection (r) of section (1) of article 2 of the Law defines the method of giving warning notice, and states that the method of notice by which persons whose rights are alleged to have been violated as a consequence of content published in the internet environment may request removal of content is by giving notice first of all to the content provider by means of their contact addresses, and if no result can be obtained in a reasonable period of time, to the hosting service provider,

140. The method of providing warning notice is dealt with in section (1) of article 9 of the Law, and in this section, real persons, legal entities and institutions and organisations who assert that their rights have been violated as a consequence of content published in the internet environment may demand that the content be removed from publication by the method of providing warning notice by application to the content provider, and if it fails to reach the content provider, to the hosting provider, but it also provides that they may apply directly to a criminal court judge to request denial of access to the content. The challenged provision deals with how the method of giving warning notice will be performed.

141. The method of providing warning notice specified in subsection (r) of article 2 of the Law is that persons who assert that their rights have been violated shall apply firstly to the content provider, and then, if a result is not obtained within a reasonable period, to the hosting provider via their contact addresses. Under the provision contained in section (2) of article 9 of the Law which states *"A response shall be provided within a maximum of 24 hours by the content and/or hosting provider to requests made by real persons, legal entities and institutions or organisations who assert that their rights have been violated as a consequence of content published in the internet environment*[,]*"* the content provider and/or the hosting provider must respond within 24 hours to the request for removal of the content from publication. The right to apply to the content and hosting provider is not a mandatory right, and a person who claims that a personal right has been violated, may also apply directly to a criminal court judge to request denial of access to the content.

142. The challenged provision refers to a method of notice for the removal of content given not by authorised bodies but by persons whose rights are alleged to have been violated by content published in the internet environment, and it is provided that such notice will be given to the contact addresses of content or hosting providers. It is not mandatory that persons who claim that their personal rights have been violated must resort to the method of giving warning notice and such persons also have the right to apply directly to a criminal court judge for the removal of the content from publication, without applying to the content or hosting providers. Consequently,

the freedom to seek legal remedies will not be negatively affected by the arrangements for notice in the provision concerned.

143. Meanwhile, the definition of the *"method of warning"* in subsection (r) of article 2 of the Law provides that persons who assert that their rights have been violated shall apply to the content provider and to the hosting provider via their contact addresses. The contact address are the addresses by which the content and hosting provider can be contacted, and the imposing of such an arrangement is within the legislature's discretionary authority, subject to constitutional limits.

144. For the stated reasons, the provision is not in violation of articles 2 or 36 of the Constitution. The request for cancellation must be rejected.

145. The provision was not considered to have any connection with article 40 of the Constitution.

K-Examination of Section (3) Added to Article 3 of Statute 5651 by Article 86 of the Law

1-The Grounds for the Demand for Cancellation

146. The statement of claim states, in summary, that the provision is in violation of articles 2, 36 and 40 of the Constitution on the same grounds specified within the scope of subsection (r) of section (1) of article 2 of the Law.

2-The Issue of Unconstitutionality

147. Section (3) of article 3 of the Law, the challenged provision provides that notice may be made to persons carrying out activities within the scope of this Statute within Turkey or abroad, addressing them by means of email or other methods of communication on the basis of information obtained from communications tools on internet pages, the domain name, the IP address or similar sources.

148. Electronic systems are today very widespread and are now used in every field of life. As technology develops, the use of electronic media in the issuing of notice has also gained currency, and the application of electronic notice has even become a necessity in some fields.

149. Article 1 of Statute 5651 states that the purpose and scope of this Law is to regulate the responsibilities and liabilities of content providers, hosting providers, access providers and public use providers, as well as the principles and practices applicable to efforts to combat, through the agency of content, hosting and access providers, certain offences committed in the internet environment. The challenged provision states that notice may be given to persons carrying out activities within the scope of Statute 5651 within Turkey or abroad, addressing them by means of email or other methods of communication, and section (1) of article 3 of the Law states that content, hosting and access providers are required, within the framework of principles and procedures set out in a regulation, to place their contact details in a manner which enables users in an internet medium to access them, that they are also required to keep such details updated, and section (2) of the same article states that an administrative fine shall be imposed by the Presidency of Telecommunication and Communication (PTC/*Telekomünikasyon İletişim Başkanlığı/TİB*) on any content, hosting or access provider who fails to comply with this requirement. Content, hosting, access and public use providers covered by the terms of this article are required to place their current contact details in a manner which enables users in an internet medium to access them.

150. In view of the fact that the business conducted by content, hosting, access and public use providers is conducted over an information technology system, and when it is taken into consideration that notice given to them concerning their services must be served upon them as promptly as possible, and bearing in mind also the rapid rate of change in the field of technology and information technology systems, it may be understood that the challenged provision was passed in the public interest in order to ensure that notification of such persons is carried out as promptly as possible.

151. In view of the fact that it can be established that notice given by email or other means of communication to the persons specified in the provision has reached them, the challenged provision cannot be said to be in violation of the principle of legal certainty or of right to freedom to seek remedies.

152. Moreover, notice which may be given to content, hosting, access or public use providers may be made on the basis of information obtained from communications tools on the internet pages, the domain name, the IP address and similar sources. The challenged provision states that notice may be given by email on the basis of information obtained from similar sources and this was apparently arranged in order to ensure that if there are new technological developments, notice can be issued in a manner which is in line with changing conditions. "Information gathered from similar sources" clearly refers to details which can be ascertained from the internet such as communications tools on the internet pages, the domain name, or the IP address. Consequently, the provision cannot be described as uncertain in this respect.

153. For the stated reasons, the provision is not in violation of articles 2 or 36 of the Constitution. The request for cancellation must be rejected.

154. The provision was not considered to have any connection with article 40 of the Constitution.

L-Examination of Section (3) Added to Article 4 of Statute 5651 by Article 87 of the Law, and Section (5) Added to Article 5 of Statute 5651 by Article 88 of the Law, and

Subsection (d) Added to Section (1) of Article 6 of Statute 5651 by Article 89 of the Law

1-Grounds for the Demand for Cancellation

155. The statement of claim states, in summary, that the challenged provisions were introduced in order to enable the Presidency of Telecommunication and Communication to collect internet communications data of all internet users without any legal limit or restraint, that throughout the whole of this process the persons who are the target of the restriction will have no knowledge of the flow of information, that it will be impossible someone negatively affected by such a decision, made in an entirely arbitrary manner by the administration, to make any objection, that there will be no benefit to the hosting and access providers in objecting to this decision, that such a practice, which will result in interference in private life, will not only eliminate freedom to seek legal remedies, but will also render unusable the effective remedy provided for in article 13 of the European Human Rights Convention, that the challenged provisions are clearly in breach of the Constitutional requirement that *"Personal data can be processed only in cases envisaged by law or by the person's explicit consent*[,]*"* that it is not specified in any article of Statute 6518 what constitutes the "*cases envisaged by law,"* that neither the nature of the information which is to be demanded from the content, hosting or access provider by the Presidency of Telecommunication and Communication nor the method by which it will be demanded are made

clear, that the information includes a variety of types of information including sensitive information, personal information, confidential information and commercial in confidence, that it is essential for the protection of personal rights, privacy and privacy of private life that [it be made clear] by which methods such information is to be demanded, that the challenged provisions provide that the Presidency shall be responsible for taking the notified measures, but do not state what these measures will be, and that this matter is therefore unclear, that according to Article 13 of the Constitution, fundamental rights and freedoms may only be restricted by law, but that the challenged provisions contain no arrangement restricting the Presidency's access to the personal information submitted to the Presidency, at the Presidency's request, by the content, hosting and access providers, that any procedure which amounts to interference with a fundamental right must objectively be an appropriate means of achieving the intended public benefit, and must be necessary in order to achieve this purpose, that according to the challenged provisions, since the content, hosting and access providers must surrender to the Presidency all information demanded by the PTC, including all information relating to private life, it undermines the freedom to seek legal remedies, that it is not indicated which legal paths must be used by those whose constitutional rights are violated, nor which authority they must apply to, nor the periods of time within which such procedures must be accomplished, and that the provisions are therefore in violation of articles 2, 13, 20, 36 and 40 of the Constitution.

2-The Issue of Unconstitutionality

156. Section (3) of article 4 of the Law states that the content provider shall furnish the Presidency of Telecommunication and Communication with such information as it may demand within the scope of the Presidency's performance of duties delegated to it by this Law and other legislation, and shall take such measures as may be directed by the Presidency.

157. Subsection (d) of section (1) of article 6 and section (5) of article 5 of the Law state that the hosting and access providers shall be liable to surrender to the Presidency such information as it may demand, in such form as it may demand it, and to take such measures as may be directed by the Presidency. The said provisions do not contain the phrase, which is specified in section (3) of article 4 of the Law, *"within the scope of the performance by the President of duties delegated by this Law and other legislation."*

158. According to the challenged provision, content, hosting and access providers are held liable to surrender to the PTC such information as the PTC may demand, in such form as it may demand it, and to take such measures as may be directed by the PTC.

159. In the first section of article 20 of the Constitution it is stated that everyone has the right to demand respect for his/her private and family life, and that the privacy of private or family life shall not be violated. In the final section it is stated that everyone has the right to request the protection of his/her personal data, that this right includes being informed in matters concerning his/her personal data, to have access to and to requesting the correction and deletion of his/her personal data, and to be informed whether those data are being used in a manner which is consistent with the envisaged objectives. The article also contains a provision requiring that personal data can be processed only in cases envisaged by law, or with the person's explicit consent, and that the principles and procedures regarding the protection of personal data shall be laid down in law. The justification of the article states that the protection of private life requires above all protection of the privacy of private life, and that this means non-interference in private life by official bodies.

160. The confidentiality and protection of private life may under certain circumstances, in a democratic society, be restricted by law, on those grounds specified in the relevant articles of the Constitution. However, such restrictions, which must be necessary measures, shall not be in breach of the safeguards set out in article 13 of the Constitution.

161. Restrictions to fundamental right and freedoms shall not infringe upon the essence of those rights. They shall not be contrary to the requirements of the democratic order of society and the principle of proportionality. The essence which, according to the Constitution, must not be infringed varies for each fundamental right or freedom, but it may be accepted that the restriction imposed by law does not infringe the essence if it does not seriously hamper the exercise of fundamental rights, and does not prevent them from achieving their objective or render them ineffective.

162. The test for the principle of proportionality in article 13 of the Constitution is that there must be a fair balance between the aim and the means. The principle of proportionality also includes the requirement that the legal measure is appropriate in order to achieve the purpose of the restriction, that there is a reasonable relationship between the end and the means, and that the restrictive measure is necessary for the ordering of a democratic society.

163. In circumstances in which a restrictive measure is imposed by a public authority upon constitutional rights, the law in question must specify, with adequate clarity, the scope and methods by which such authority is to be exercised.

164. The term “information” used in the challenged provisions is an elliptical expression referring to “processed data.” The term personal data, meanwhile, refers to any information relating to an identified or identifiable person. Consequently, the word “information” used in the challenged provision covers personal data. The right to protection of personal data is a special form of a person’s right to protection of their human dignity and the right freely to develop their individuality, and is intended to protect the rights and freedoms of the individual when personal data is being processed. However, this right is not unlimited. The right to protection of personal data does not grant the owner of the data absolute and unlimited data sovereignty. Thus article 9 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Treaty Number 108, of 1981, which Turkey signed but to which it did not become a party because the implementing law never became valid, provides that limitations may be placed on the protection of personal data for the purpose of protecting State security,

public safety, the monetary interests of the State or the suppression of criminal offence, or for protecting the data subject or the rights and freedoms of others, or where data is used for statistics or for scientific research purposes.

165. Thanks to information and communication technologies, the compilation, classification, storage of personal data, and their convenient retrieval upon request has become easier, and as a result of this, a risk has emerged that such information concerning private life may be used in an improper manner. Such technologies permit the disclosure to others of personal data without the consent of the individual concerned, and the transfer of such information from place to place.

166. The internet is a means of communication which is being used intensely in every field of contemporary life from trade to politics, and from journalism to government business. If individuals were to fear that they may be subject to state interference when exercising their rights and freedoms, it would inhibit their free exercise of those rights and freedoms, and will severely impede individuals in their efforts to construct the foundations of a democratic society.

Individuals employ the internet in the exercise of many rights and freedoms defined in the Constitution. For example, individuals may use the internet to exercise their freedom of information, their freedom of thought and expression, their freedom of education and learning, their freedom to receive information, and their freedom of enterprise. The grounds for restricting these freedoms are set out in the provision which provides for each of those freedoms.

167. The fundamental purpose of setting up the PTC, which is responsible for controlling the content of the communication carried out via telecommunications in Turkey, was to centralise powers relating to detection and monitoring of communications. According to Statute 5651, the PTC is responsible for tracking and monitoring internet content and for implementing access blocking decisions issued by judges, courts and public prosecutors. The PTC also has powers within Turkey to block access to certain specified internet contents, and to block access to content outside Turkey in the case of the offences listed in article 8. The PTC is also authorised to determine the timing, methodology and the structure of systems for monitoring content on the internet, and the minimum criteria for the production of software or hardware to be used in the filtering, blocking and tracking of content.

168. Since the challenged provisions only refer to "information demanded" and there is no explanatory provision concerning this matter, it is certain beyond question that any information relating to an identified or identifiable person, referred to as *"personal data"* or *"requestable information"* may be demanded by the PTC. It is also clear from section (3) of article 5 of the Law and subsection (b) of paragraph 1 of article 6 that the traffic information held by hosting and access providers in the course of their duties to store traffic information is included within the scope of information which may be demanded by the PTC. In addition to this, under section (6) of article 5 of the Law, and access providers, under section (3) of the article 6 of the Law hosting providers will be punished by administrative fines if they fail to carry out their obligations as specified in the challenged provisions. Meanwhile, the article of the Law contains no provisions ensuring that the persons concerned are informed that the information requested is being supplied to the PTC by content, hosting and access providers. Consequently, such persons will not be aware that information about them has been given to the PTC.

169. It is inevitable that the Presidency of Telecommunication and Communication will need various information and documents, including personal data, in order to regulate publication in the internet environment, and for the purpose of combatting offences committed through such publication and in order that the Presidency can carry out the duties allocated to it. But the challenged provisions do not define the scope of the information which the PTC may demand from content, hosting and access providers in the course of its duties under the Law, or the framework for the obligations which may be imposed thereby, and the scope of its authority to obtain information from content, hosting and access providers was not limited in the course of the provision of the necessary guarantees concerning protection of personal data, and obligations of undefined scope were imposed in the context of the notified measures. Section (3) of article 4 of the Law, the challenged provision, makes a general definition in the following terms: *"within the scope of the performance by the President of duties delegated by this Law and other legislation."* But this general definition does not appear in section (5) of article 5 of the Law, or in subsection (d) of section (1) of article 6. Thus the challenged provisions have no specificity in respect of under what conditions or upon what grounds information demanded by the PTC may be delivered by the content, hosting or access providers to the Ministry, nor how long the information provided will be stored at the PTC, nor the nature of the information demanded, nor the measures which will be notified to the content, hosting and access providers. To this extent, the provisions are not clear and foreseeable.

170. Private life is too broad a concept to be definable in all of its elements, but it is beyond doubt that the collection of information by authorised representatives of the State about the persons concerned will always involve that person's private life. The challenged provisions permit the accessing of personal information without the consent of the person concerned, the processing of this personal information and the delivery thereof in the form of information to the PTC. The third section of article 20 of the Constitution states that: *"Personal data can be processed only in cases envisaged by law or by the person's explicit consent. The principles and procedures regarding the protection of personal data shall be laid down in law."* Statute 5651 does not clearly state what the *"cases envisaged by law"* concerning the processing of personal data contained in this provision of the Constitution might consist of. The challenged provisions, contrary to the assurance given in the Constitution, permit all manner of personal data, information and documents belonging to individuals to be passed to the PTC unconditionally, without adequate limits in terms of subject, purpose and scope, and thereby render such individuals undefended against the administration. Consequently the challenged provisions, because they are not clear and foreseeable, unreasonably limit individuals' rights to protection of personal data and constitutes a violation of article 20 of the Constitution.

171. For the stated reasons, the provisions are in violation of articles 2, 13 and 20 of the Constitution. They must be cancelled.

172. Serruh KALELİ, Hicabi DURSUN, Muammer TOPAL, Kadir ÖZKAYA and Rıdvan GÜLEÇ dissented from this view.

173. The provisions were not considered to have any connection with articles 36 or 40 of the Constitution.

M-Examination of Section (3) Added to Article 5 of Statute 5651 by Article 88 of the Law

1-The Grounds for the Demand for Cancellation

174. The statement of claim states, in summary, that the retention period provided for in section (3) of article 5 of the Law is not only prolonged and broad in scope compared to provisions in international and European law, but also contains no indication of any measures concerning the security of the data stored, that it presents a severe danger in terms of freedom of expression and the privacy of private life, in terms

of freedom of expression, that the storage of this data in a manner which permits it to be accessed at any moment is likely to lead to self censorship and this will probably suppress the expression of dissident views, even in the private sphere, leading to a society of fear, that the fact that sufficient protection concerning the storage of data was not put in place by the amendments to the law gave the impression that privacy of private life was only a consideration for public figures and only to the extent that the right of access to information could be prevented, that the said provision will impose a financial burden upon internet access providers and will increase the cost of internet use, that with the challenged provisions, the responsibility imposed upon the hosting service provider to retain traffic information concerning its services for a period of at least one year and not more than two years, as specified by regulations, and for ensuring the accuracy, integrity and confidentiality of that information, was an attempt to grant the administration powers without basing them on specific and foreseeable provisions, that allocating the authority to determine the [retention] periods to the administration in an unlimited fashion, and without specifying the principles and framework, amounted to a transfer of legislative power, that in view of the principle enshrined in Article 13 of the Constitution that

restrictions on fundamental rights and freedoms must be enacted in law, and that restrictions thereupon must be in conformity with law, the fact that determination of the duration of the hosting provider's responsibility for retaining traffic information concerning its hosting services, and for ensuring the accuracy, integrity and confidentiality of that information was left to be defined in a regulation is unconstitutional, and that the provisions are in violation of articles 2, 7, 13, 20 and 26 of the Constitution.

2-The Issue of Unconstitutionality

175. The challenged provision, section (3) of article 5 of the Law, states that the hosting service provider is responsible for retaining traffic information concerning the services it provides for a period of at least one year and not more than two years, to be specified by regulations, and that it is responsible for ensuring the accuracy, integrity and confidentiality of that information.

176. Article 7 of the Constitution states that legislative authority lies with the Grand National Assembly of Turkey, and that this authority may not be transferred. The executive organ must not be granted general and undefined regulatory authority in matters upon which the Constitution states shall be regulated by law.

177. Internet traffic information, including personal data, is required in order to detect and monitor offences in the internet environment. Traffic information is defined in subsection (j) of section (1) of article 2 of Statute 5651. This definition states that traffic information is information such as parties' IP address, the start and finish time of the service provided, the type of service used, the quantity of data transferred, and the subscriber identification details, if available. The concept of "personal data" refers to any information relating to an identified or identifiable person. Consequently, personal data also comes within the scope of traffic information. The right to protection of personal data is a special form of a person's right to protection of their human dignity and the right freely to develop their individuality, and is intended to protect the rights and freedoms of the individual when personal data is being processed. However, this right is not without limit. The right to protection of personal data does not grant the owner of the data absolute and unlimited data sovereignty. The legislature enacted the challenged provision in order to prevent loss of information that is important and necessary in order to combat offences committed over the internet, and in order to identify perpetrators. It is clear that the legislative measure is within the legislature's field of discretion, subject to constitutional limits.

178. Traffic information is a form of data which includes critical information of a kind which may reveal considerable detail about the internet user's private life, including their personal preferences, their political leanings, their health information, and commercial in confidence information. Consequently, traffic information can easily be used to identify almost every detail about a person's life. However, as a natural consequence of their business, hosting providers already have traffic information connected with their hosting services. The provision concerned makes hosting providers responsible for retaining this information for the specified period, and for ensuring the accuracy, integrity and confidentiality of that information. If traffic information is used by hosting providers in a manner which is contrary to its intended purpose, they will quite naturally be subject to the provisions of the Turkish Civil Code and the Turkish Criminal Code.

179. The provision concerned will make hosting providers responsible for retaining this information for the specified period, and for ensuring the accuracy, integrity and confidentiality of that information. Making hosting providers responsible for ensuring the accuracy, integrity and confidentiality of that information is a responsibility which arises out of the hosting provider's duties, and is directed toward the protection of individuals' fundamental rights and freedoms. Also, the methods of ensuring the confidentiality of the said information will require very different measures as technology practices develop and will continually be changing. These matters are

details of a technical nature related to operational matters, and the provision is to this extent clear and foreseeable. Consequently, the challenged provision is not in violation of the principle of legal certainty.

180. Also since the provision does not contain a restriction which makes the right to request protection of personal data impossible or excessively difficult, it does not breach the safeguards concerning protection of personal data set out in article 20 of the Constitution.

181. The challenged provision also indicated how long hosting providers would retain their traffic information by specifying the upper and low limits. According to this, traffic information will be retained for a period which will be determined by regulation, and which will be not less than one year and not more than two years. Consequently, the boundary of the area left for regulation by the administration is defined. Therefore, since the limits of the period which are to be determined by regulation have been indicated in terms of an lower and upper limit, the authority delegated to the executive does not have the character of legislative authority.

182. For the stated reasons, the provision is not in violation of articles 2, 7, 13 or 20 of the Constitution. The request for cancellation must be rejected.

183. The provision was not considered to have any connection with article 26 of the Constitution.

N-Examination of Section (4) Added to Article 5 of Statute 5651 by Article 88 of the Law

1-The Grounds for the Demand for Cancellation

184. The statement of claim states, in summary, that according to the challenged provision, the principles and procedures for classifying and differentiating hosting providers were left to be determined by regulation, that this was an attempt to grant the administration powers without basing them on specific and foreseeable provisions, that this arrangement amounted to a transfer of legislative power to the executive, also that the fact that the question of who was to perform the categorisation of the hosting providers was left to be determined by a regulation which was to be issued by an unspecified party was in breach of the hierarchy of norms, especially in view of the proportional importance of hosting providers among all internet actors, since they make the most important contribution to the internet ecosystem, that an area of arbitrary action was being granted to the administration, that consequently it was impossible to ensure legal certainty with such a measure, that in view of the principle enshrined in article 13 of the Constitution that restrictions on fundamental rights and freedoms must be enacted in law, and that the restrictions thereupon must be in conformity with law, the fact that the determination of the principles and procedures for classifying and differentiating hosting providers was left to be decided in a regulation was unconstitutional, and it was asserted that the provisions are in violation of articles 2, 7, and 13 of the Constitution.

2-The Issue of Unconstitutionality

185. The challenged provision, section (4) of article 5 of the Law, provides that hosting service providers may be classified on the basis of principles and procedures which are to be defined by regulation, according to the nature of their business, and that they may be differentiated in terms of their rights and obligations.

186. It is understood that the servers of many hosting providers are housed abroad, that this constitutes a problem in combatting illegal and harmful content, that consequently the legislature, in order to strengthen the combat against illegal and harmful content by registering hosting providers, in order to ensure that a contribution is made to the economy, and in order to ensure the implementation of policies to encourage hosting providers, passed the provision in the public interest. This provision makes it possible to reduce the taxation burden of hosting providers for domestic hosting services, to increase connection speed by developing the infrastructure, and to support registered hosting providers by, for example, supplying electrical energy on a special tariff.

187. The definition of “hosting provider” is given in subsection (m) of article 2 of the Law, while the responsibilities of hosting providers are specified in detail in article 5. The challenged provision states that the classification of the hosting providers will be assessed on the basis of the nature of their business, and that their rights and responsibilities will be taken into consideration when differentiating them. Consequently, the framework for the principles and procedures to be determined by regulation are specified in the Law. Also, the principles and procedures which will be specified by regulation, according to the challenged provision, are matters concerning technical details which require expertise but do not require regulation in the form of law. Leaving the arrangement of such matters to a regulation cannot be described as transfer of legislative authority, or as permitting the administration to exercise unconstitutional authority.

188. Meanwhile, the statement of claim asserted that it was not clear by whom the said regulation would be issued, but section (2) of article 11 of the Law provided that the principles and procedures concerning the obligations of hosting providers would be arranged in the form of a regulation issued by the Authority, and it was also stated that the Authority referred to the Information Technologies and Communication Authority, in subsection (ı) of article 2 of Statute 5651, subsection (ee) of article 3 of Statute 5809 and section (3) of paragraph of article 65 of Statute 5809.

189. For the stated reasons, the provision is not in violation of articles 2 or 7 of the Constitution. The request for cancellation must be rejected.

190. The provision was not considered to have any connection with article 13 of the Constitution.

O-Examination of Section (6) Added to Article 5 of Statute 5651 by Article 88 of the Law

1-The Grounds for the Demand for Cancellation

191. The statement of claim states, in summary, that according to the challenged provision an administrative fine may be imposed on hosting providers by the PTC, that any sanction which provides for a fine, even if it is an administrative fine, must be imposed not by the administration but by courts, that there was an exorbitant ten-fold range between the lower and upper limits for the fine provided in the article, that the proposed administrative fine was in breach of the principle that crimes and penalties must be foreseeable and proportionate, that even when courts are imposing penalties, they must comply with criteria stated in law and must indicate their reasoning in their judgments, that granting the PTC the authority to impose a penalty which is exorbitant, which may be arbitrary and which, moreover, may vary by a ten-fold factor, is contrary to the fundamental principles of criminal law, and it was asserted that the provisions are in violation of article 38 of the Constitution.

2-The Issue of Unconstitutionality

192. Pursuant to Article 43 of Statute 6216, the challenged provision was examined in terms of article 2 of the Constitution.

193. The challenged provision provides that a civil penalty of between ten thousand Turkish Lira and one hundred thousand Turkish Lira shall be imposed on any hosting service provider who fails to carry out hosting service provider status notification and fails to carry out the obligations imposed by this Law.

194. The first section of article 38 of the Constitution states that *"No one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed"* and the *"statutory nature of the offence"* is described in the third section as follows: *"Penalties, and security measures in lieu of penalties, shall be prescribed only by law*[,]*"* thus making explicit the principle of the *"statutory nature of the offence"* Nowadays, when an understanding based on human rights and freedoms has come to the fore, the principle of the statutory character of crime and penalty provided for in the Constitution constitutes one of the fundamental principles of criminal law. According to the principle of the statutory character of crime and penalty, those acts which are considered offences, and penalties applied to such acts, shall be represented in law in a manner which shall leave no room for doubt, and such provisions must have clear, comprehensible and defined limits.

195. In certain changing social, political and economic circumstances, it has become necessary to endow administrations with certain rights in order to meet developing, growing, diversifying and multiplying social needs in an appropriate, timely and effective manner, and in contemporary forms of governance, powers to impose sanctions are granted to the administration in various fields. The administrative fine performs a deterrent function in inhibiting the commission of acts considered to be misdemeanours and has served the purpose of preserving the public from harms.

196. In a state under the rule of law, just as with provisions of criminal law, in cases involving acts which may be deemed misdemeanours, the legislature has the discretionary authority to determine, under the law as it concerns misdemeanours, the type and severity of sanctions applied to such acts, the determination of factors which aggravate or mitigate the sanction, and also to grant to the administration powers to apply sanctions, provided that constitutional limits are respected.

197. It is impossible, bearing in mind all the various events and cases which may arise, for the legislature to determine by rules of law, in advance, what kind of decisions authorities must make when carrying out the duties assigned to them by laws and indeed, this would not be a suitable approach in view of the variability of public services and social needs. Consequently, in order that administrations can create the most appropriate solutions for the various circumstances they encounter, they must be furnished with discretionary authority. The purpose of such discretionary authority is to grant the administration the freedom to choose what is appropriate and fitting from among the various solutions available.

198. Granting the administration discretionary authority does not mean that the administration can act in an "arbitrary" fashion. The discretionary authority granted to the administration to take into consideration the circumstances of the situation in hand, the gravity of an act, the severity of the harm done, ensuring that [powers are] exercised in accordance with the requirements of equality, the public interest and public service, and taking into consideration a just balance between the act which has been committed and the penalty which is to be imposed, is one of

the general principles of law. The administration must, when moving beyond the lower limit of the penalty, set out the reasons and grounds for this decision. If the administration is unable to explain the grounds for imposing a penalty above the lower limit, or if the grounds disclosed are not reasonable or justified, if the required balance between the act and the penalty was not considered, or if that balance is misjudged, the penalty may quite naturally be cancelled by judicial authorities.

199. The administrative fine provided for under the challenged provision, and imposed upon hosting organisations if they do not fulfill their obligations to users in the internet environment, is an administrative sanction which will be applied by the Presidency of Telecommunication and Communication. Such an arrangement is clearly within the legislature's field of discretion, subject to constitutional limits.

200. The acts for which administrative sanctions may be applied to hosting providers were shown in Statute 5651, and an lower and upper limit for the fine were specified in the Law. Hosting providers are in a position to know and foresee how they may be fined if they commit the misdemeanours mentioned in law. Consequently, the challenged provision does not involve any uncertainty in terms of the form or amount of the penalty, and there is no violation of the principle of the statutory nature of offences and penalties.

201. The challenged provision, in specifying the administrative fine, for which lower and upper limits were defined, did not indicate what criteria would be considered. However, article 3 of Statute 5326 provides that the general provisions of the said Law would be applied concerning all acts which entail the sanction of an administrative fine, and section (2) of article 17 of the same Law provides that when determining the amount of the administrative fine, in circumstances in which it is to be determined between a lower and upper limit, the unlawful content of the act, the degree of fault on the part of the perpetrator and their economic circumstances shall be taken into consideration. Consequently, the PTC must, in determining the administrative fine which may be imposed on hosting providers, comply with the criteria specified in article 17 of the Law on Misdemeanours and also the general principles of law. Consequently, it cannot be said that no criterion was specified for the administrative fine, nor that it creates circumstances in which the administration can apply penalties in an arbitrary fashion. Consequently, the provision is not in violation of the principle of the rule of law.

202. For the reasons given, the provision is not in violation of articles 2 or 38 of the Constitution. The request for cancellation must be rejected.

Ö-Examination of Subsection (ç) Added to Section (1) of Article 6 of Statute 5651 by Article 89 of the Law

1-The Grounds for the Demand for Cancellation

203. The statement of claim states, in summary, that the intended meaning of this provision, which is known by the public and in the press as *"the Gezi provision,"* is incomprehensible, that the matter of what kinds of alternative access pathways will be blocked by the access provider, and the means they are to use, is left to the discretion of the party implementing the provision, that the provision is not clear or precise on this matter, that the meaning of the term *"alternative methods of access with regard to publication concerning which there has been a decision to prevent access"* should have been expressed in an explicit manner in the text of the Law, and it was asserted that the provisions are in violation of article 2 of the Constitution.

2-The Issue of Unconstitutionality

204. The challenged provision, section (1) of article 6 of the Law, contains provisions concerning the obligations of access providers. The challenged provision also states that access providers are responsible for taking measures to prevent alternative methods of access to publications concerning which there has been a decision to block access.

205. Blocking access is the prevention, by various means, of entry to a site carrying out publishing in an internet environment. Even if a decision to block access is implemented, internet users may use various techniques to access the blocked publication, and they may thereby render the decision to block access ineffective. This challenged provision burdens access providers with the obligation to take measures to prevent alternative methods of access to publications concerning which there has been a decision to block access. In this way users who are using alternative methods to access the publication concerning which a decision to block access has been given will be blocked by the access providers using alternative measures and in this way the decision to block access will not be rendered ineffective.

206. The challenged provision was issued in order that problems arising when access providers respond to [requests for] data required by PTC in connection with publications concerning which a decision to block access has been made, can be eliminated in order to ensure effective implementation of the aforementioned decisions. Within this context, it is within the legislature's discretionary authority to make access providers responsible for taking measures to prevent alternative methods of accessing publications concerning which there has been a decision to block access.

207. Alternative measures to block means of access are techniques which are changing and developing fast to meet rapid technological and scientific developments which require expertise and technical knowledge. Consequently, it is impossible for the legislature to determine in advance what each of such measures will be. Also access providers will be applying the said alternative measures to publications concerning which an access blocking decision has been taken. The challenged provision does not directly grant access providers authority to block access. The duty imposed upon access providers is effectively to implement a decision to block access that has already been taken. Therefore, the challenged provision cannot be said to be in violation of the principle of legal certainty or clarity.

208. For the stated reasons, the provision is not in violation of articles 2 of the Constitution. The request for cancellation must be rejected.

P-Examination of Section (4) Added to Article 7 of Statute 565 by Article 91 of the Law and Amended Sections (2) and (3) of the Same Article amended by Article 91 of the Law

1-The Meaning and Scope of the Provisions

209. The obligations of public use providers are set out in article 7 of the Law. A public use provider, according to subsection (i) of article 2 of the Law, is one who provides individuals with the means to use the internet in a certain location for a certain period of time.

210. Section (1) of article 7 of the Law states that public use providers operating for commercial purposes must obtain a permit document from the senior local civil administrative officer, that the details of the permit shall be notified to the Authority within thirty days by the senior local civil administrative officer, that verification of those details shall be performed by the senior local

civil administrative officer, that a regulation shall be issued setting forth the principles and procedures concerning verification and issuing of the permit, that the challenged section (2) states that all public use providers, irrespective of whether or not they are operating commercially, must implement the measures specified in regulations concerning blocking access to unlawful content and maintaining access records, that the challenged section (3) states that public use providers operating for commercial purposes are responsible for implementing the precautionary measures, principles and procedures specified in the regulation with regard to protection of the family and children, the prevention of crime, and the identification of perpetrators, that the challenged section (4) states that the senior local administrative officer is authorised to decide the sanction which is to be imposed, subject to principles and procedures which shall be specified by regulation, upon public use providers who are in breach of the obligations specified in this article, namely a warning, a civil penalty of between one thousand Turkish Lira and fifteen thousand Turkish Lira, or a suspension of their commercial activities for up to three days, depending on the gravity of the violation.

211. The administrative sanctions specified in section (4) of article 7 of the Law can only be applied to public use providers operating for commercial purposes if the obligations specified in the same article have been violated. The obligations which must be fulfilled by public use providers operating for commercial purposes in article 7 of the Law are as follows:

a-Obtaining a permit from the local civil administrative officer,

b-Implementing the measures specified in regulations concerning blocking access to unlawful content and maintaining access records,

c-Implementing the precautions, the principles and procedures specified in the regulation with regard to protection of the family and children, the prevention of crime, and the identification of perpetrators.

2-The Grounds for the Demand for Cancellation

212. The statement of claim states, in summary, that the provisions were an attempt to grant the administration powers without basing them on specific and foreseeable provisions, that such an arrangement cannot ensure legal certainty, that imposing the obligations contained within the article on public use providers and allocating the authority to determine the sanctions specified in the said article to the administration in a generalised manner which leaves the limits, principles and framework undefined, amounted to a *"transfer of legislative power,"* that in view of the principle enshrined in article 13 of the Constitution that restrictions on fundamental rights and freedoms must be enacted in law, and that the restrictions therefore must be in conformity with law, the challenged provisions are in violation of article 13 of the Constitution, that any sanction which provides for a fine, even if it is an administrative fine, must be imposed not by the administrative units but by courts, that there was an exorbitant *"fifteen-fold range"* between the lower and upper limits for the fine provided in the article, that the assessment of the level of a fine required a very sensitive and detailed adjudication, that this authority should therefore be given to courts rather than to the administration, that the imposition by the local civil administrative officer upon public use providers of an administrative fine of from one thousand to fifteen thousand Turkish Lira fine was in breach of the principle that crimes and penalties must be foreseeable and proportionate, that in Turkey, even criminal courts were required to indicate in their verdicts the details specified in article 68 of the Turkish Criminal Code in the course of determining and personalising the penalty, that granting an officer of the administration the authority to impose a penalty which is exorbitant, which may be arbitrary, and which, moreover, may vary by a factor of 15 is contrary to the fundamental principles of criminal law, that the third

section of article 38 of the Constitution states that: *"Penalties, and security measures in lieu of penalties, shall be prescribed only by law*[,]*"* that a penalty imposed by law must be given by courts, and that the requirements are in violation of articles 2, 7, 13, and 38 of the Constitution.

3-The Issue of Unconstitutionality

213. The challenged provisions, sections (2) and (3) of article 7 of the Law, are intended to strengthen the legal grounds for the retention, by public use providers, of records which play an important part in the identification of perpetrators, and for the retention of camera records for a certain period, for the purpose of protection of children, in particular, from harmful and illegal content on the internet, and the prevention of the commission of crimes. Thus the placing of the responsibility for the enactment of the measures specified within the framework set out in the challenged provisions upon public use providers and public use providers operating for commercial purposes, is within the legislature's discretionary authority, subject to constitutional limits.

214. The challenged provision, section (2) of article 7 of the Law, places the responsibility to take the measures specified in the regulation upon all public use providers. However, the framework of the measures which must be applied is provided by the statement that they are intended for the purpose of implementing the measures specified concerning blocking access to unlawful content and maintaining access records, and according to section (3) of the same article the responsibility to take the measures specified in the regulation was placed upon all public use providers operating for commercial purposes. It is stated that the scope of these responsibilities is the protection of the family and children, the prevention of crime, and the identification of perpetrators. The framework for the measures to be determined by regulation is provided in the challenged provision, and the administration, in its exercise of this authority in determining the said measures, shall be limited to the purposes specified in the challenged provisions. Consequently, the challenged provisions are clear and foreseeable.

215. Also, when it is considered that the measures which are to be determined by regulation will frequently change in line with developments in technology, the granting to the administration of the authority to determine matters of expertise and administrative operations cannot be characterised as a transfer of legislative authority.

216. The challenged provision, section (4) of article 7 of the Law, authorises the senior local administrative officer to decide the sanction which is to be imposed, subject to principles and procedures which shall be specified by regulation, upon public use providers who are in breach of the obligations specified in this article, namely a warning, a civil penalty of between one thousand Turkish Lira and fifteen thousand Turkish Lira, or a suspension of their commercial activities for up to three days, depending on the gravity of the violation.

217. The legislature will be able to identify which actions, taking into consideration factors such as the nature of the offences, the manner in which they were committed, their content and severity, the degree to which public order was violated and the deterrence provided by the penalties, within the framework of the fundamental principles of the Constitution and criminal law, may be deemed offences and the type and degree of penalty to be applied, depending on the severity of the danger in terms of their social consequences, and it may, for certain actions, provide for the application of administrative sanctions rather than penalties which restrict [physical] liberty.

218. The challenged provisions treat violations by public use providers operating for commercial purposes of their obligations under article 7 of the Law as misdemeanours, and a choice of sanctions are provided. The scope of the said obligations are set out in sections (1), (2) and (3)

of Article 1 of Statute 7 and the penalties which will be applied if these obligations are not fulfilled are clearly specified in the provision. The provision is to this extent clear and foreseeable.

219. The fact that after listing those acts which are deemed offences and their penalties, authority to enact measures with respect to matters of expertise and management operations is delegated by the legislature to the executive does not mean that the offence is constituted by means of administrative provisions. The challenged provision also states that penalties applied to public use providers operating for commercial purposes for violations of their obligations under article 7 will be determined according to the gravity of the offence, and that the said penalty will be applied by the local civil administrative officer.

220. Meanwhile, misdemeanours under the challenged provision are subject to the Law on Misdemeanours and article 17 of the said Law, among its general provisions, indicates which criteria must be taken into account when applying an administrative fine. According to section (2) of that article, when imposing an administrative fine in circumstances in which it is to be determined between a lower and upper limit, the unlawful content of the act, the degree of fault on the part of the perpetrator and their economic circumstances shall be taken into consideration when determining the amount of that administrative fine. Consequently, it cannot be said that no criterion was specified for the administrative fine in the provision, nor that it creates an opportunity for the administration to apply penalties in an arbitrary fashion. The penalties which must be applied to public use providers operating for commercial purposes who fail to carry out their obligations are expressed in terms of options, and since any one of these penalties may be selected in light of the severity of the offence and of the factors mentioned in the Law on Misdemeanours, the provision cannot be described as disproportionate. Consequently, since both the misdemeanour and the sanctions are provided for in law, the provision cannot be described as uncertain or unforeseeable, and there is no violation of the principle of the statutory nature of offences and penalties.

221. For the reasons given, the provisions are not in violation of articles 2, 7 or 38 of the Constitution. The request for cancellation must be rejected.

222. The provisions were not considered to have any connection with article 13 of the Constitution.

R-Examination of Sections (1), (2), (3), (4), (5), (6), (7) and (8) of Article 9/A added to Statute 5651 by Article 94 of the Law

1-The Grounds for the Demand for Cancellation

223. The statement of claim states, in summary, that the reduction in judicial supervision over the operations of the PTC conflicts with national and international law, that the fact that, contrary to the other provisions in the said article, no reference was made to the Turkish Criminal Code, Statute 5237, combined with the fact that violation of the right to private life, which is a personal right, is provided for in a separate article, raises the question of what definition of the privacy of private life, a subjective concept, will be used, that according to the new provision, an allegation of an infringement of *"the privacy of private life"* will trigger procedures *sua sponte* without any assessment by any authority, that the lack of clarity in the provision is unacceptable, that the challenged provision grants no person, not even the owner of the content, any right of objection to a criminal court decision which approves the access blocking measure issued by the Presidency, and does not indicate any means of objection, that consequently this provision is in breach of the right to freedom to seek legal remedies, that the sixth section of article 9/A did indicate a path by which objection could be made against a criminal court judge's decision to lift

a blocking measure by the Presidency, but that this right of objection was only granted to the Presidency, so that if judgment is given by a criminal court judge for the lifting of a decision for application of measures passed by the Presidency in response to the request of a person who demands the removal of content by application to the Presidency, claiming that his/her right to private life has been violated, the article grants no right of objection to this person, despite the fact that such a decision is a decision against the person who has alleged that their right to private life has been violated, that this would amount to a violation of the right to seek legal remedies, and of the first and second sections of article 40 of the Constitution, that the clause in the eighth section of the challenged provision is an outright *"censorship"* clause, that authority is granted directly to the PTC to issue a decision to block access, and that according to this arrangement, in circumstances in which a delay might be prejudicial to the protection of the privacy of private life or the protection of the rights and freedoms of others, the PTC President can decide *sua sponte* to issue a decision for the application of measures to block access without having received any warning, allegation, compliant or application, nor a request from any individual, that this is contrary to the principle of the rule of law, that the granting of such authority amounts to a very grave violation of Articles 26, 22 and 28 of the Constitution. It is also stated that authority was given to the PTC President in the eighth section of article 9/A to give instructions to block the exercise of *"freedom of expression,"* considered one of the fundamental rights and freedoms, that this amounts to a direct interference in freedom of expression since this situation amounts to a limitation of freedom of expression by extra-legal means, that the arrangement cannot be reconciled with the principle of proportionality in terms of the interests which were to be protected by the arrangement, that all of the grounds for the unconstitutionality of these sections are also similarly valid for the first, third and fourth sections of the article, that the said unconstitutionality taint the challenged second, fifth, and seventh sections of the same article, and will inevitably prejudice those sections also, that this will result in a violation of the Constitution, that the stated grounds are also valid for these provisions, that pursuant to Article 43/4 of Statute 6216 if a decision is given to cancel the first, third, fourth, sixth and eighth sections of article 9/A, a decision must be given that the second, fifth and seventh sections of the same article, which will no longer be capable of application, must also be cancelled, and it was asserted that the requirements are in violation of articles 2, 13, 22, 26, 28, 36 and 40 of the Constitution.

2-The Issue of Unconstitutionality

224. The challenged provision, section (1) of article 9/A of the Law, states that persons who assert that the confidentiality of their private life has been violated by a publication in the internet environment may request the denial of access to content by applying directly to the Presidency. Section (2) provides that such a request shall specify the full address (URL) of the publication which is the cause of the violation of a right, and shall explain the nature of the violation, with details verifying the identity of the application, and that any request which does not contain these details shall not be processed. Section (3) provides that the Presidency shall immediately inform the Union in order to ensure that this request is implemented, and the access providers shall carry out the request promptly and within a maximum of four hours. Section (4) provides that blocking of access shall be applied by means of blocking of access to the particular publication, part or section of the content (in the form of URL etc) which is alleged to have occasioned the violation. Section (5) provides that persons who demand blocking of access shall submit their demand for prevention of access, made on the grounds that the publication content presented in the internet environment is a violation of the confidentiality of their private life, to a magistrate within twenty four hours of the demand for blocking of access, that the judge shall assess whether or not the confidentiality of their private life has been violated by publication of the content presented in the internet environment, shall announce his/her decision within a maximum of forty-eight hours, and shall send the decision directly to the Presidency, that otherwise, the measures for denial of access shall automatically be lifted. Section (6) provides that an objection to such a decision may be made by the Presidency on the basis of

the Criminal Procedure Code, Statute 5271. Section (7) provides that if the content which is subject of the denial of access is removed from publication, the judge's decision shall automatically become invalidated. Section (8) provides that in circumstances in connection with a violation of the privacy of private life where it is considered that delay may present a risk, the denial of access shall be carried out by the Presidency upon the direct instructions of the President.

225. The privacy of private life is safeguarded by Article 20 of the Constitution which states *"Everyone has the right to demand respect for his/her private and family life. Privacy of private or family life shall not be violated*[,]*"* and freedom of communication is safeguarded by Article 22 of the Constitution which states *"Everyone has the freedom of communication. Privacy of communication is fundamental."*

226. Protection of private life requires above all protection of the privacy of private life and this means that it must not be spread before the eyes of others. A person's right to demand that what they experience in their private life should only be known to those persons they choose is one of an individual's fundamental rights which has therefore found its place in declarations and conventions concerning human rights, and is safeguarded against the State, society and individuals, other than in clearly stated exceptional circumstances, in the legislation of all democratic countries.

227. Freedom of communication is the right to establish communication with others without interruption and without censorship. This freedom is one part of "private life" which covers a much more extensive area.

228. As with other personal rights in modern societies, the privacy of private life and freedom of communication are not unlimited rights. In some circumstances there may be interference in these rights, and individuals must bear with such interferences.

229. The second section of article 22 of the Constitution states that an interference may be made if there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or if there exists a written order of an agency authorised by law, in cases where delay is prejudicial, again on the above-mentioned grounds, that the decision of the competent authority shall be submitted for approval by the competent judge within twenty-four hours, that otherwise, the decision shall automatically be lifted.

230. Article 26 of the Constitution, entitled "Freedom of expression and dissemination of thought" states that everyone has the right to express and disseminate his/her thoughts and opinions by speech, in writing or in pictures or through other media, individually or collectively, but that the exercise of these freedoms may be restricted for the purposes of national security, public order, public safety, safeguarding the basic characteristics of the Republic and the indivisible integrity of the State with its territory and nation, preventing crime, punishing offenders, preventing disclosure of information duly classified as a state secret, protecting the reputation or rights and private and family life of others, or protecting professional secrets as prescribed by law, or ensuring the proper functioning of the judiciary.

231. The State has both positive and negative obligations in the matter of freedom of expression. In terms of their negative obligation, public bodies must not, unless compulsory under articles 13 and 26 of the Constitution, forbid the expression and publication of thoughts, and must not make such expression or publication subject to sanctions. In terms of their positive obligation, public bodies must take such measures as are necessary to protect freedom of expression in a real and effective manner. However, the freedom to express and disseminate

ideas is not absolute or without limitation. Indeed the freedom to express and disseminate ideas protected by articles 26 and 28 of the constitution may be restricted, subject to the conditions set out in article 13 of the Constitution, for the reasons specified in these articles. According to Article 13 of the Constitution, fundamental rights and freedoms may only be restricted by law, and such restrictions shall not be contrary to the requirements of the democratic order of society and the principle of proportionality, and may not infringe upon the essence of those rights and freedoms.

232. It is not sufficient merely that an interference in constitutional rights is based in law, and such law must have certain characteristics such as certainty and foreseeability. In other words, the law must be clear, unambiguous, and sufficiently precise to permit the person in question easily to access its meaning, where necessary with professional assistance, in order that s/he may determine his/her behaviour.

233. In circumstances in which a restrictive measure is applied by a public authority to rights safeguarded by the Constitution, the Law concerned must specify with adequate clarity the scope and methods by which such authority is to be exercised.

234. The first article of the law states that one purpose of the Law is to regulate the principles and practices applicable in efforts to combat, through the agency of the content, hosting and access providers, certain offences committed in the internet environment.

235. Article 9/A of the Law includes provisions for blocking access to content on grounds of the privacy of private life. According to this article, the ability to make a decision to block access is limited by the status of the content as a violation of the privacy of private life.

236. It may be understood that the intention of immediately blocking access to the content of the publication in the internet environment if a person whose privacy has been violated makes an application and the application is made in accordance with procedure, is to protect the privacy of private life and is an indication of the seriousness with which the legislature views violations of the privacy of private life. In this context, the legislature has discretionary authority, within constitutional limits, in the matters of what details are to be shown in an application by persons who assert that the confidentiality of their private life has been violated by a publication in the internet environment and request denial of access to that content by applying directly to the Presidency, how the decision will be implemented and the channels by which the application may be made.

237. Article 22 of the Constitution states that freedom of communication may be restricted by the written order of an authorised body if a delay might be prejudicial to the protection of the privacy of private life or the protection of the rights and freedoms of others, article 26 of the Constitution states that freedom of expression may be restricted in order to protect the reputation and rights of others and to protect private and family life, article 28 of the Constitution states the freedom of the press may be restricted by applying the provisions of articles 26 and 27 of the Constitution. The restrictions of freedom enacted by the challenged provisions are limited to the grounds for such restrictions specified in articles 22, 26 and 28 of the Constitution, and there is no doubt that the restriction, since it is for the protection of the rights and freedoms of others, is based upon reasonable grounds. In addition to this, under article 22 of the Constitution, it is clear that circumstances in which the privacy of private life is violated may be described as circumstances in which delay may present a risk, and that therefore they are circumstances in which such restriction may be imposed by an authorised body. Consequently, the provisions, which are not arbitrary and which do not infringe upon the essence of the right, are consistent with the requirements of the democratic order of society, and are limited and proportionate to the intended purpose.

238. Meanwhile, the scope of the authority granted to the administration in connection with the blocking of access and the procedures by which such authority is to be exercised were indicated in detail in the challenged provisions, as well as how the blocking of access is to be implemented. Since the provisions are, to this extent, clear and foreseeable, there is no violation of the principle of the rule of law.

239. According to section (5) of article 9/A of the Law, judicial supervision of PTC's blocking of access is performed by a criminal court judge. A person who claims that the privacy of their private life has been violated must apply to the criminal court within 24 hours. The judge, making an assessment of whether the privacy of the individual's private life was violated by the content of the publication, will announce the decision within a maximum of 48 hours, and will send it directly to the Presidency. Otherwise, the measures for denial of access shall automatically be lifted. The arrangement introduced by the challenged provision, section (5) of article 9/A of the Law, is required by the second section of article 22 of the Constitution, and therefore is not in violation of the Constitution.

240. The statement of claim states that the right of objection was only granted to the Presidency, that because no right of objection was granted to the individual whose right to private life was violated, section (6) of article 9/A of the Law was in breach of the Constitution. Section (6), the challenged provision, does contain a provision stating that the PTC may object, pursuant to the provision of the Criminal Procedure Code (CPC), to the decision given by the judge, but contains no provision concerning the applicant's right of objection. However, according to article 267 of Statute 5271, objections may be made to the decisions of a judge. According to article 268 of the CPC, the right of objection is granted to concerned parties. The victim is clearly a concerned party. Consequently, according to the CPC, the victim also has the right of objection and therefore the challenged provision is not in violation of the freedom to seek legal remedies or of article 40 of the Constitution.

241. According to section (7) of article 9/A of the Law, if the content which is the subject of the denial of access is removed from publication, the judge's decision automatically becomes invalidated, and since there is no longer a situation in which protection of private life is required, and if the judge's ruling has automatically become invalid, there is of course, no breach of the Constitution.

242. The challenged provision section (8) provides that in circumstances where it is considered that delay may present a risk of violation of the privacy of private life, the denial of access shall be implemented by the Presidency upon the direct instructions of the President.

243. The legislature cannot possibly determine in advance the content and scope of the phrases *"violation of the privacy of private life"* or *"circumstances where it is considered that delay may present a risk"* for each individual case. However, it is clear that the circumstances in which the privacy of private life is violated may be described as circumstances in which delay may present a risk.

244. Under the challenged provision, the legislature granted authority to the PTC to issue a decision to block access taking into consideration circumstances in which delay may present a risk of violation of the privacy of private life, bearing in mind that they are circumstances which require urgent action, [including] in circumstances in which even the individual themselves is unaware, or where the privacy of private life of public figures has been violated, in order to protect public order and the public interest. Such an arrangement is within the legislature's field of discretion, subject to constitutional limits.

245. Clearly, the PTC President will exercise the said authority in circumstances in which a delay might be prejudicial to the protection of the privacy of private life or protection of the rights and freedoms of others. It is not explicitly stated in the provision by what channel the PTC President will block access, but the provision in section (4) of article 9/A of the Law stating that denial of access shall be accomplished by blocking access to the video, picture, part, section, or publication (in the form of the URL etc) which is violating the privacy of private life is clearly also applicable to the PTC President. The fundamental principles and framework for the circumstances and conditions for blocking of access are set out in article 9/A of the Law, and therefore the provision is, to this extent, clear and foreseeable.

246. Also, the decision to block access issued by the PTC President pursuant to section (8) of article 9/A of the Law is, according to section (9) of the same article, subject to judicial supervision. A decision to block access issued by the President must be submitted by the Presidency for the approval of a criminal court judge within 24 hours, and announced by the judge within 48 hours.

247. For the reasons given, the provisions are not in violation of articles 13, 22, 26, 28, 36 or 40 of the Constitution. The requests for cancellation must be rejected.

S-The phrase *"in the case of judges and prosecutors, subject to their own…"* in the First Sentence of Section (5) Added to Supplementary Article 1 Added to Statute 5651 by Article 97 of the Law Examination of the Phrase

1-The Grounds for the Demand for Cancellation

248. The statement of claim states, in summary, that the appointment of judges and prosecutors, who are without doubt the most effective figures within the judiciary, at the disposal of an administration is manifestly unconstitutional, that their appointment for judicial service at the disposal of the PRC or other administration, of judges and prosecutors, who, according to legislation are appointed for service within the Ministry of Justice, is impossible, that the phrase itself "*emrinde/*at the disposal of," which occurs in the challenged provision, is irreconcilable with the principle of the independence of the judiciary and the separation of powers, that it puts in question the principle of *"the independence of courts,"* and that the challenged phrase is unacceptable under the requirement of *"law consistent with the Constitutional order"* referred to in the fifth section of article 140 of the Constitution, that any arrangement which violates the principles of the "*independence of the courts*" and "*security of tenure*" is also in violation of the principle of "*separation of powers*" expressed in paragraph 4 of the preamble to the Constitution, and that the provisions are in violation of articles 2, 138 and 140 of the Constitution.

2-The Issue of Unconstitutionality

249. The challenged provision provides that employees in public institutions and organisations, as listed in article 2 of Legislative Decree Number 217 Concerning the Foundation and Functions of the State Personnel Presidency, dated 8/6/1984, may, subject to the consent of such institutions and, in the case of judges and prosecutors, subject to their own consent also, be appointed temporarily at the disposal of the Presidency of Telecommunication and Communication, provided that their monthly salary, allowance, and all manner of payment increases and compensation and other financial and social employment benefits and assistance are paid by their institutions. The phrase in the provision *"in the case of judges and prosecutors, subject to their own…"* is the provision which is the subject of the challenge.

250. The independence of the courts is based upon the independence of the judiciary which is considered the most important element in the rule of law described in article 2 of the

Constitution. Judges carry out their duties on the basis of the principles of the independence of the courts and judges' security of tenure. The independence of the courts and the independence of judges in their duties are synonymous, and may be considered natural and interdependent. The security of tenure of judges is essential to this legal component.

251. The *"independence of the courts"* provided in article 138 of the Constitution and the *"security of tenure of judges and public prosecutors"* provided in article 139, and also in the second section of article 140, states that judges carry out their duties on the basis of the principles of the independence of the courts and judges' security of tenure.

252. The independence of the judiciary, which is one of the fundamental components of the rule of law, is the main and most effective guarantee of human rights and freedoms. The principle of the independence of courts means that judges are independent in their duties. The independence afforded to judges in carrying out their duties is not a privilege granted to them, but rather, it is intended to ensure that justice is distributed in a manner which is free from all influence, pressure, manipulation or suspicion. Independence, which is essential to the adjudication process, means that a judge can freely and impartially render judgment without fear or hesitation, free of any external factor other than the requirements provided for in the Constitution.

253. Judges' security of tenure is directed towards the same purpose. It is an obstacle to the dismissal of judges and prosecutors, to their involuntary retirement before the age specified in the Constitution, to any deprivation for any reason of their rights to salary, payment or other employment rights.

254. The principles of the independence of the courts and of the security of tenure of judges are principles applied to judicial activities and are intended to provide a fair system of justice.

255. The fifth section of article 140 of the Constitution states *"Judges and public prosecutors shall not assume any official or private occupation other than those prescribed by law."* Thus, it was accepted by those who wrote the Constitution that judges and prosecutors may assume official or private occupations provided that they are prescribed by law. In view of this, for a judge or prosecutor to be appointed to another institution or organisation, there must first of all be a legal provision in the law founding an institution or organisation which states that a judge or prosecutor will be appointed. Consequently, if there is no legal provision in the law founding an institution or organisation which states that a judge or prosecutor will be appointed, no judge or prosecutor can possibly be appointed with temporary powers or permanent duties to that institution or organisation. The employment status of judges or prosecutors continues while they are appointed to another institution or organisation with temporary powers or permanent duties, and they retain their status as judge or prosecutor. Indeed the employment rights of these judges and prosecutors are conducted pursuant to Statute 2802 and they benefit from the guarantees of security contained in the Constitution. Consequently, in view of the fifth section of article 140 of the Constitution, it cannot be said that the appointment of a judge or prosecutor who is appointed, on the basis of a clear provision of law, to another institution or organisation with temporary powers or permanent duties, is not covered by the definition of a judge or prosecutor set out in Statute 2802.

256. It is clear that the legislature took into consideration the constitutional provisions which include the principles of the independence and impartiality of the judiciary, and the security of tenure and independence of judges and prosecutors in its specification of official and private occupations defined by Law.

257. According to the challenged provision, judges and prosecutors may be appointed temporarily at the disposal of the Telecommunications and Communications Presidency, provided that they themselves agree to such appointment. Such appointment is temporary, and the judges and prosecutors will be paid their monthly salary, allowance, and all manner of payment increases and compensation and other financial and social employment benefits and assistance from their own institutions. Also, judges and prosecutors shall be deemed to be on leave from their institutions, and their employees rights associated with their profession shall continue throughout such periods of leave. In addition to this, such periods in which they undertake duties at the Presidency of Telecommunication and Communication shall be included for the purposes of calculations with regard to their promotion and their retirement pensions. Their promotions shall be implemented on time [automatically] without requirement for any other procedures.

258. The consent of the Second Chamber of the SBJP must be obtained for judges and prosecutors to be appointed by the PTC, according to the provisions of the Law on the Supreme Board of Judges and Prosecutors (SBJP/*Hakim ve Savcılar Yüksek Kurulu*/HSYK). The duties of the Second Chamber of the SBJP are set out in section (2) of article 9 of Statute 6087, and in the fifth line of subsection (a) of the same provision, the duty of *"management of procedures for leaver relating to requests for temporary appointment and transfer to other institutions"* is provided for among the duties of the Second Chamber. According to this provision, the Second Chamber of the SBJP will carry out the procedures for granting of leave for the appointment of judges and prosecutors who agreed to be appointed to the PTC.

259. The provision concerning the appointment of judges and prosecutors to the PTC is provided for in law. In addition, by reason of the security of tenure of judges, the agreement of the judges and prosecutors themselves has been made a condition of such appointment. Also, when one considers the relationship between the area of duty of the Telecommunications and Communications Presidency and the [relevant] law, there is nothing unconstitutional in the appointment of judges and prosecutors at the disposal of the Presidency in order that it may benefit from their professional knowledge and experience.

260. For the stated reasons, the challenged provision is not in violation of articles 2, 138 or 140 of the Constitution. The request for cancellation must be rejected.

261. Serdar ÖZGÜLDÜR dissented from this opinion.

262. The provision was not considered to have any connection with the preamble to the Constitution.

IV-REQUEST FOR INVALIDATION

263. The statement of claim states, in summary, that the challenged provisions are clearly unconstitutional and that if they are not invalidated, the situation will cause irreparable harm in terms of the rule of law, that serious obstacles were placed in the path toward the development of an information society by the changes in Statute 5651 wrought by Statute 6518. that it is the cause of practices which are in violation of European Union Law in terms of the protection of freedom of expression, human rights and fundamental rights and freedoms, that the privacy of private life, freedom of communication, freedom of expression, freedom of the press, the freedom to establish associations and to become a member or to refuse membership in such an association, the freedom and to establish unions, and to become a member or to refuse membership in such a union, freedom of work and contract, the freedom to seek legal remedies, the protection of fundamental rights and freedoms and fundamental rights and freedoms

themselves may only be restricted by law, and that it imposes more restrictions and limitations on fundamental rights and freedoms, that this negative situation cannot be reconciled with the objective of ensuring the aggregation of knowledge within society, the creation of a knowledge economy, or with ensuring that Turkey can compete globally in the Information Society, that the said changes permitting decisions to apply access blocking measures fall far short of principles concerning proportionality, that these arrangements which permit blocking of access on grounds of the privacy of private life, a situation which is very much open to abuse, create circumstances in which blocking of access may be applied in a disproportionate manner upon the instructions of the PTC President, that decisions to block access issued at the hand of the UAP under these arrangements present a grave risk, that unlimited powers are granted to the PTC, that at the same time freedom of expression, the freedom to establish associations and to become a member or to refuse membership in such associations, freedom of communication, and the freedom of the press are violated, that no legal pathway is provided individuals whose right to privacy of private life has been violated, that the limitations imposed by Statute 6518 are excessively broad, that all other regulatory details, including data retention periods, are to be determined by the administration, and that the challenged provisions are a significant interference in private life, and a demand was made for a decision to invalidate the provisions.

UNANIMOUS judgment was rendered was rendered on 8.12.2015 concerning demands for invalidation of provisions of the Law Concerning Amendments to Some Laws and Statutory Decrees and to the Statutory Decree on the Organisation and Functions of the Ministry of Family and Social Policies, Statute 6518 dated 6.2.2014, as follows:

A-That the demand for invalidation of Section (9) of article 9 of the Law on the Regulation of Publishing in the Internet Environment and the Combatting of Offences Committed through Such Publication, Statute 5651 of 4.5.2007 amended by article 93 the phrase *"or publications of the same character"* shall, since the required conditions were not fulfilled, be REJECTED,

B-That the demands for cancellation of:

1-Section (3) added to article 4 of Statute 5651 by Article 87 of the Law,

2-Section (5) added to article 5 of Statute 5651 by Article 88 of the Law, and

3-Subsection (d) added to section (1) of article 6 of Statute 5651 by Article 89 of the Law

be REJECTED on the grounds that the entry into validity of the challenged provisions was postponed,

C-That the demand for cancellation of the following sections, subsections, segments and phrases:

1-Subsection (6) of the first section of repeat article 257 of the Tax Procedure Law, Statute 213, dated 4.1.1961, amended by article 8 of the Law, stating*"…that taxpayers be required to produce documents indicating whether or not they have outstanding debts to tax offices associated with the Ministry of Finance, that it will not be necessary to identify the public receivables covered by this requirement by type and amount, nor their status…* [,]*"*

2-The following phrases in article 38 of the Public Competitive Tender Procedures Law, Statute 4734 dated 4.1.2002 amended by article 47:

a-The phrase "*…matters such as…*" in the second section,

b-The phrase*"…can be concluded without a declaration…"* and *"…concerning its rejection without a declaration being required*[,]*"* in the first sentence of the third section,

3-The phrase *"approximate cost"* in the section added to article 43 of Statute 4734 by Article 48 of the Law and "*… less than … and more than 15%*[,]*.*"

4-The section added to article 30 of the Social Security Institution Law, Statute 5502 dated 16.5.2006 by Article 80 of the Law,

5-The phrase *"… and [using] similar methods…"* which occurs in subsections (n), (r) and (o) added to section (1) of article 2 of Statute 5651 by article 85 of the Law,

6-Section (3) added to article 3 of Statute 5651 by Article 86 of the Law,

7-Sections (3), (4) and (6) added to article 5 of Statute 5651 by Article 88 of the Law,

8-Subsection (ç) added to section (1) of article 6 of Statute 5651 by Article 89 of the Law,

9-Article 6/A added to Statute 5651 by Article 90 of the Law, **[**and]

10-The following sections of article 7 added to Statute 5651 by Article 91 of the Law:

a-Amended sections (2) and (3),

b-Added section (4),

11-The segments of section (9) and sections (5) and (8) of article 9 amended by Statute 5651 amended by article 93 of the Law apart from the phrase *"…or a publication of the same character,"*

12-Sections number (1), (2), (3), (4), (5), (6), (7) and (8) of article 9/A added to Statute 5651 by Article 94 of the Law,

13-The phrase *"in the case of judges and prosecutors, subject to their own…"* in the first sentence of section (5) added to supplementary article 1 added to Statute 5651 by article 97 of the Law,

14-The second sentence of section (2) and to sections (1), (3) and (4) of provisional article 3 added to Statute 5651 by article 100 of the Law,

shall be REJECTED, since they had [already] been rejected by judgment number E.2014/87 K.2015/112 dated 8.12.2015,

D-That IT IS NOT NECESSARY TO RENDER JUDGMENT concerning the demand for invalidation of the first sentence of section (2) of provisional article 3 added to Statute 5651 by article 100 of the Law, since it was [already] decided by judgment number E. 2014/87, K.2015/112 of 8.12.2015 that there it was not necessary to give a ruling.

V-THE EFFECT ON OTHER PROVISIONS

264. Section (4) of article 43 of Statute 6216 provides that if the cancellation of certain provisions of the law require that some other provisions must not be implemented, or that none of the provisions must be implemented, judgment may be rendered by the Constitutional Court to cancel those provisions also.

265. The occurrence of the phrase *"…and (d)…"* in section (3) of article 6 of Statute 5651 which can no longer be applied by reason of cancellation of subsection (d) added to section (1) of article 6 of Statute 5651 by Article 89 of the Law must be cancelled, pursuant to section (4) of article 43 of Statute 6216.

VI-THE PROBLEM OF THE DATE UPON WHICH THE CANCELLATION SHALL ENTER INTO FORCE

266. The third section of article 153 of the Constitution states: *"Laws, decrees having the force of law, or the Rules of Procedure of the Grand National Assembly of Turkey or provisions thereof, shall cease to have effect from the date of publication in the Official Gazette of the annulment decision. Where necessary, the Constitutional Court may also decide on the date on which the annulment decision shall come into effect. That duration shall not be more than one year from the date of publication of the decision in the Official Gazette."* This is repeated in section (3) of article 66 of Statute 6216.

267. Since the legislative hiatus arising as a result of the cancellation of the phrase "*…and (d)…*" occurring in #section (3) added to article 4 of Statute 5651 by Article 87 of in Statute 6518 dated 6.2.2014 and #section (5) added to article 5 of Statute 5651 by Article 88 of the Law, and subsection (d) added to Section (1) and in section (3) of article 6 of Statute 5651 by Article 91 of the Law will be prejudicial to the public interest, it is deemed appropriate that the decision to cancel these sections, subsections and phrases pursuant to section (3) of article 66 of Statute 6216 and the third section of article 153 of the Constitution shall enter into force one year after the publication of the decision in the Official Gazette.

VII-JUDGMENT

Judgment was rendered [on 8 December 2015] concerning the following provisions of the Law Concerning Amendments to Some Laws and Statutory Decrees and to the Statutory Decree on the Organisation and Functions of the Ministry of Family and Social Policies, Statute 6518 dated 6.2.2014:

A- Concerning the following segments of subsection (6) of the first section of repeat article 257 of the Tax Procedure Law, Statute 213, dated 4.1.1961, amended by article 8 of the Law:

1-That the segment *"…that taxpayers be required to produce documents indicating whether or not they have outstanding debts to tax offices associated with the Ministry of Finance…"* is not in breach of the Constitution, and that the demand for its cancellation shall be REJECTED, by MAJORITY DECISION, Engin YILDIRIM, Serdar ÖZGÜLDÜR, Serruh KALELİ, Osman Alifeyyaz PAKSÜT, Alparslan ALTAN and Erdal TERCAN dissenting,

2-That the segment *"…that it will not be necessary to identify the public receivables covered by this requirement by type and amount, nor their status…"* is not in breach of the Constitution, and that the demand for its cancellation shall be REJECTED, by MAJORITY DECISION, Serdar

ÖZGÜLDÜR, Serruh KALELİ, Osman Alifeyyaz PAKSÜT, Alparslan ALTAN and Erdal TERCAN dissenting,

B-Concerning the following phrases in article 38 of the Public Competitive Tender Procedures Law, Statute 4734 dated 4.1.2002 amended by article 47 of the Law:

1-That the phrase *"matters such as"* in the second section, and

2-That the phrases *"…can be concluded without a declaration…"*and *"…concerning its rejection without a declaration being required*[,]*"* are not in breach of the Constitution, and that the demand for their cancellation be REJECTED, UNANIMOUSLY,

C-That the phrase *"approximate cost"* in the section added to article 43 of Statute 4734 by Article 48 of the Law and the phrase *"… less than … and more than 15%*[,]*"* are not in breach of the Constitution, and that the demand for their cancellation be REJECTED, UNANIMOUSLY,

D-That the section added to article 30 of the Social Security Institution Law, Statute 5502 dated 16.5.2006 by Article 80 of the Law is not in breach of the Constitution, and that the demand for its cancellation be REJECTED, by MAJORITY DECISION, Serdar ÖZGÜLDÜR dissenting,

E-That the phrase *"… and using similar methods…"* in subsection (o) and in subsections (n) and (r) added to section (1) of article 2 of the Law on the Regulation of Publishing in the Internet Environment and the Combatting of Offences Committed through Such Publication, Statute 5651 of 4.5.2007 amended by article 85 of the Law is not in breach of the Constitution, and that the demand for its cancellation be REJECTED, UNANIMOUSLY,

F-That section (3) added to Article 3 of Statute 5651 by Article 86 of the Law is not in breach of the Constitution, and that the demand for its cancellation be REJECTED, UNANIMOUSLY,

G-That section (3) added to article 4 of Statute 5651 by Article 87 of the Law is in violation of the Constitution, and shall be CANCELLED, by MAJORITY DECISION, Serruh KALELİ, Hicabi DURSUN, Muammer TOPAL, Kadir ÖZKAYA and Rıdvan GÜLEÇ dissenting, that pursuant to section (3) of article 66 of Statute 6216 and the third section of article 153 of the Constitution, the cancellation DECISION SHALL BECOME VALID ONE YEAR AFTER ITS PUBLICATION IN THE OFFICIAL GAZETTE, UNANIMOUSLY,

H-Concerning the following sections and substions added to article 5 of Statute 5651 by Article 88 of the Law:

1-That sections (3), (4) and (6) are not in breach of the Constitution, and that the demand for their cancellation be REJECTED, UNANIMOUSLY,

2-That section (5) is in violation of the Constitution, and shall be CANCELLED, by MAJORITY DECISION, Serruh KALELİ, Hicabi DURSUN, Muammer TOPAL, Kadir ÖZKAYA and Rıdvan GÜLEÇ dissenting, that, pursuant to section (3) of article 66 of Statute 6216 and the third section of article 153 of the Constitution, the cancellation DECISION SHALL BECOME VALID ONE YEAR AFTER ITS PUBLICATION IN THE OFFICIAL GAZETTE, UNANIMOUSLY,

I-Concerning the following subsections and phrase added to section (1) of article 6 of Statute 5651 by Article 89 of the Law:

1-That subsection (ç) is not in breach of the Constitution, and that the demand for its cancellation be REJECTED, UNANIMOUSLY,

2-That subsection (d) is in violation of the Constitution, and shall be CANCELLED, by MAJORITY DECISION, Serruh KALELİ, Hicabi DURSUN, Muammer TOPAL, Kadir ÖZKAYA and Rıdvan GÜLEÇ dissenting, that pursuant to section (3) of article 66 of Statute 6216 and the third section of article 153 of the Constitution, the cancellation DECISION SHALL BECOME VALID ONE YEAR AFTER ITS PUBLICATION IN THE OFFICIAL GAZETTE, UNANIMOUSLY,

3-That the phrase *"…and (d)…"* in section (3) of the same article, which can no longer be applied, due to the cancellation of subsection (d), shall, pursuant to section (4) of article 43 of Statute 6216, be CANCELLED, that, pursuant to section (3) of article 66 of Statute 6216 and the third section of article 153 of the Constitution, the cancellation DECISION SHALL BECOME VALID ONE YEAR AFTER ITS PUBLICATION IN THE OFFICIAL GAZETTE, UNANIMOUSLY,

J-Concerning the following sections and sentences of article 6/A added to Statute 5651 by Article 90 of the Law:

1-That sections number (1), (2), (3), (4), (5), (6), (8), (9) and (10) are not in breach of the Constitution, and that the demand for their cancellation be REJECTED, UNANIMOUSLY, and

2-Concerning section (7):

a-That the first sentence is not in breach of the Constitution, and that the demand for its cancellation be REJECTED, UNANIMOUSLY,

b-That the second sentence is not in breach of the Constitution, and that the demand for its cancellation be REJECTED, by MAJORITY DECISION, Erdal TERCAN dissenting,

K-Concerning the following sections of article 7 of Statute 5651 by Article 91 of the Law:

1-That Amended sections (2) and (3), and

2-That added section (4)

are not in breach of the Constitution, and that the demand for their cancellation be REJECTED, UNANIMOUSLY,

L-Concerning the following sections of article 9 added to Statute 5651 by Article 93 of the Law:

1-That sections (5) and (8) are not in breach of the Constitution, and that the demand for their cancellation be REJECTED, UNANIMOUSLY, and

2-Concerning section (9):

a-That the phrase *"…or publications of the same character…"* is in violation of the Constitution, and shall be CANCELLED, by MAJORITY DECISION, Hicabi DURSUN, Kadir ÖZKAYA and Rıdvan GÜLEÇ dissenting,

b-That the remaining segment is not in breach of the Constitution, and that the demand for its cancellation be REJECTED, by MAJORITY DECISION, Serdar ÖZGÜLDÜR dissenting,

M-That sections (1), (2) (3), (4), (5), (6), (7), (8) of article (9/A) added to Statute 5651 by article 94 of the Law are not in breach of the Constitution, and that the demand for their cancellation be REJECTED, UNANIMOUSLY,

N-That the phrase *"…in the case of judges and prosecutors, subject to their own…"* in the first sentence of section (5) added to Supplementary Article 1 of Statute 5651 by Article 97 of the Law is not in breach of the Constitution, and that the demand for its cancellation be REJECTED, by MAJORITY DECISION, Serdar ÖZGÜLDÜR dissenting,

O-Concerning the following sections of provisional article 3 added to Statute 5651 by Article 100 of the Law:

1-That sections (1), (3) and (4) are not in breach of the Constitution, and that the demand for their cancellation be REJECTED, UNANIMOUSLY, and

2-Concerning section (2):

a-That the first sentence was amended by article 30 of the Law Amending Some Laws and Decrees, Statute 6639, dated 27.3.2015, and that therefore IT IS NOT NECESSARY TO RENDER JUDGMENT concerning the demand for invalidation of this sentence,

b-That the second sentence is not in breach of the Constitution, and that the demand for its cancellation be REJECTED, UNANIMOUSLY. 8.12.2015.

President Zühtü ARSLAN	Deputy President Burhan ÜSTÜN	Deputy President Engin YILDIRIM
Member of the Court Serdar ÖZGÜLDÜR	Member of the Court Serruh KALELİ	Member of the Court Osman Alifeyyaz PAKSÜT
Member of the Court Recep KÖMÜRCÜ	Member of the Court Alparslan ALTAN	Member of the Court Hicabi DURSUN
Member of the Court Celal Mümtaz AKINCI	Member of the Court Erdal TERCAN	Member of the Court Muammer TOPAL
Member of the Court M. Emin KUZ	Member of the Court Hasan Tahsin GÖKCAN	
Member of the Court Kadir ÖZKAYA	Member of the Court Rıdvan GÜLEÇ	