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# Privacy & the media. Traditional and emerging protections in an online world.

IP / IT MEDIA & TELECOM- Workshop

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National Report of Turkey

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## 1. Privacy rights

Under Privacy right, we understand the right not to have information about a person to be disclosed to other persons without consent of the person which the information refers to.

### 1.1. Are privacy rights statutory rights or are these case-law based?

Privacy rights are statutory rights, mainly protected under section IV of the Turkish Constitution entitled “Secrecy and Protection of Private Life”. It establishes the main principle of the Turkish legal system regarding privacy rights by stating, “*Everyone has the right to demand respect for his or her private and family life. Privacy of an individual or family life cannot be violated.*” This principle is reflected in other legislations as well. General provisions which aim to protect privacy rights include:

- Turkish Criminal Code numbered 5237 ("**Criminal Code**") which includes a section pertaining to the privacy rights of individuals, and penalizes acts which violate such privacy rights (Section IX entitled “Offenses Against Privacy and Secrecy of Life”).
- In some cases, infringement of personal rights may also constitute violation of privacy rights within the context of the Turkish Civil Code numbered 4721 ("**Civil Code**") (Article 24 of Civil Code).
- Infringement of personal rights may constitute a violation of privacy rights under tort, as per Turkish Code of Obligations numbered 6098 ("**Code of Obligations**") (Article 49 of Code of Obligations)

### 1.2. What type of information (including pictures, sounds, etc.) would be covered by the concept of “privacy rights” in the legal system of your country ?

The provisions regulating privacy rights do not specify what type of information would be protected under privacy rights. Therefore, a limitation is not established. Accordingly, any kind of information is protected under privacy rights, so long as disclosure of that information would infringe on the privacy of the individual to whom such information refers. However, the Section IX of the Criminal Code entitled "Offenses Against Privacy and Secrecy of Life" specifically regulates offenses committed by means of recording sounds, capturing videos, and images of individuals.

In terms of new developments on this subject, the Draft Code on the Protection of Personal Data (the “**Draft Code**”) is again at the top of the Turkish Grand National Assembly’s agenda. On 26 December 2014, the Turkish Prime Minister submitted the Draft Code to the Turkish Grand National Assembly.

Within the scope of the Draft Code, the notion of “*Personal data*” is defined under Article 3 of the Draft Code to be “*any information relating to a specific or identifiable real persons or legal entities*”. Such personal data could include the name of a person, his/her

contact information, identity information, or information related to his/her past. Therefore, pictures and sounds are also within the definition's scope.

After adoption of the Draft Code, personal data will be protected in a more extensive manner.

**1.2.1. Would the information included in that concept, or the extent of the privacy rights, depend upon the celebrity of the person, or upon other elements? Please describe briefly.**

The Turkish Constitution states that privacy rights can only be restricted if such a restriction decision is given by a court or judge order and if it is required for:

- national security,
- public peace,
- public health,
- public morality,
- prevention of a crime, or
- protection of the rights and freedom of others.

Nevertheless, the extent of privacy rights is not defined by legislation in Turkey, and should be considered on a case-by-case basis.

Privacy rights granted by law apply to every individual, regardless of their title or status. On the other hand, in Turkish legal doctrine as well as Court of Cassation decisions, it is considered that public figures and celebrities have less expectancy of privacy than ordinary individuals. While this approach does not prevent public figures and celebrities from demanding respect for their private life, the legitimacy of interventions made into their private area is assessed differently. This approach is mostly justified on the basis of arguments as per public interest and information value. These arguments may also apply to ordinary individuals in some cases, depending on the content of the information involved.

The Court of Cassation ruled against a complainant with an infectious disease who claimed his privacy had been violated by a newspaper article which discussed whether the complainant could practice his work (as a doctor) in his condition<sup>1</sup>. The court decided there is public interest in making people aware of a threat of infectious disease, and therefore publishing this information would not violate the complainant's privacy rights.

In a relevant case in European Court of Human Rights regarding the violation of Article 10 of the European Convention of Human Rights (Freedom of Expression), the Court decided that Turkey has violated the right to freedom of expression by seizing a book regarding a pop star.

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<sup>1</sup> Court of Cassation, E. 2004/155 K. 2004/157.

In its decision, the European Court of Human Rights stated that the book, through scientific methods, used the pop star as an example to scientifically address the social phenomenon of stardom. The book's role was to satisfy curiosity about the details of celebrities' private lives.

The European Court of Human Rights noted that all the pictures used in the book were ones that the relevant pop star had posed for and that had been published before.<sup>2</sup>

### **1.2.2. Would privacy rights also apply in relation to legal persons (vs. physical persons) ?**

Turkish provisions regulating privacy rights do not make a literal distinction between real or legal persons. However, legal persons are not deemed to have privacy rights because the legal value protected by privacy rights is closely associated with individuals' private lives. A legal person, by its very nature, cannot be attributed to have these rights. Rather, legal persons have personal rights relating to their public appearance, such as name, reputation, and other elements pertaining to their activities such as trade secrets and business relations. Legal persons are entitled to claim damages within this scope, including non-pecuniary damages.

### **1.2.3. Would privacy rights encompass private information made available only to some chosen persons (authorized recipients). So, for instance, can disclosure to third parties, by one of the authorized recipients of the private information, be part of the privacy rights (e.g. disclosure of private correspondence, private phone calls, information shared on social media, etc.)**

Privacy rights also apply to private information shared with authorized recipients. Articles 132 and 133 of the Criminal Code prohibit:

- A participant disclosing the contents of private correspondence without the consent of other participants, and
- Recording a non-public conversation by a participant, without the consent of the other speakers

In addition, disclosure of an individual's secret by a recipient may also be actionable as a violation of privacy under the Civil Code.

Disclosing private information would not constitute a violation if the individual to whom the private information pertains gives his or her consent. The scope of authorization should be assessed to determine whether the individual made such information available to recipients with the expectation of maintaining its secrecy or not.

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<sup>2</sup> Sapan v. Turkey. Application No. 44102/04

In addition, defamation of the Turkish President, humiliating signs of sovereignty of the state, insulting the Turkish nation, the republic, or the bodies and institutions of the state are all offenses penalized under the Criminal Code.

The Court of Cassations refers to the decisions of the European Court of Human Rights in many cases pertaining to freedom of expression. It states the two exceptions on the right to exercise freedom of expression as; i) inciting violence, and ii) hate speech against minorities. The established view of the Court, in accordance with the European Convention of Human Rights, is that freedom of expression applies to all ideas, whether they are disturbing, displeasing, anomalous, or shocking for the government, or a fraction of the community, unless they are violent or inciting violence<sup>3</sup>.

**1.3. Is there a specific status for “fictional use” of information related to an individual ? And are disclaimers sufficient to allow such use ?**

In Turkish legislation, there is no specific regulation or information related to “fictional use”. However, based on the teleological interpretation of the articles provided under Section 1.1, fictional use may be also evaluated as a violation of personal rights to the extent that such use is ascribable to the implied person.

Disclaimers to the effect that all persons are fictitious are not sufficient in order to legalize the violation. However, this is settled on a case-by-case basis.

## **2. Freedom of speech**

**2.1 Is there a on the one hand a statutory/treaty based freedom or constitutional recognition of “Freedom of speech” or on the other hand is that freedom based on case-law ?**

Freedom of speech is a constitutional freedom recognized under article 26 of the Turkish Constitution, entitled “Freedom of Expression and Dissemination of Thought.” However, international treaties which have been ratified and duly put into effect carry the force of law in the Turkish jurisdiction. Accordingly, international agreements which Turkey is party to, such as the European Convention of Human Rights (Article 10), the International Covenant on Civil and Political Rights (Article 19), and the United Nations Declaration of Human Rights (Article 19) also exists as statutory sources of freedom of speech in Turkey.

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<sup>3</sup> Court of Cassation, E. 2009/18022 K. 2012/21275

## **2.2 If it is a statutory/treaty/ constitution based freedom is it based on domestic or supranational law?**

Domestic recognition for freedom of speech exists in Turkey's constitution and other regulations. However, the aforementioned treaties (section 2.1) provide the supranational basis for the freedom of speech in Turkey.

In accordance with the principle hierarchy of norms applied in Turkish legislation, international treaties regarding fundamental rights and freedoms prevail over the Turkish Constitution. However, in these circumstances, supranational law and domestic regulations are consistent.

## **2.3 Describe the main characteristics of the “freedom of speech” as recognized in your jurisdiction.**

- 1.3.1. beneficiaries;*
- 1.3.2. extent of the freedom of speech;*
- 1.3.3. exceptions; limit*
- 1.3.4. specific status for press (including online press)?*

Freedom of speech is recognized by the Turkish Constitution under the section entitled "Freedom of Expression and Dissemination of Thought". Accordingly, everyone is granted the right to express and disseminate their thoughts and opinions by any means, either individually or collectively. On the other hand, it is not prohibited to subject the transmission of information by radio, television, cinema and similar means to a licensing system. It should also be noted that members of the Grand National Assembly of Turkey are granted immunity for their votes and statements made during parliamentary proceedings, as well as for the views they express before the Assembly, or (unless the Assembly decides otherwise) for repeating or revealing these statements outside the Assembly.

Exercising freedom of speech guaranteed by the Constitution may be restricted only by law and for the following purposes:

- protection 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 or punishing offenders;
- withholding information duly classified as a state secret;
- protecting the reputation or rights and private and family life of others;
- protecting professional secrets as prescribed by law; or
- ensuring the proper functioning of the judiciary.

Provisions under section V of the Criminal Code entitled "Offenses Against Public Peace" are significant to establish the framework of the freedom of speech. Crimes penalized under the Criminal Code include:

- provoking people in a way to risk public safety;
- humiliating another person based on social class, religion, race, sect or origin;
- showing disrespect to the beliefs of a religious group to the extent posing a risk for public peace;
- provoking people to commit crimes.

If any of the acts listed above are committed through press and broadcast by exceeding the limits of informative purposes, the punishment will be increased at the rate of one half of the punishment given by the court to the extent that it is provided under the Criminal Code .

The freedom of press is also subject to restrictions as required for protection of others' rights and reputation, public health, national security, public order, territorial integrity, the impartiality of judicial bodies, and in order to prevent disclosure of official secrets. Any restriction concerning freedom of the press may be enforceable only if such a restriction is provided by law. It should also be noted that in accordance with the Code Regarding the Establishment and the Broadcasting of TV Channels and Radio Stations ("**TV Code**"), broadcasting services cannot use humiliating or libelous expressions beyond the limits of criticism. The primary principles to be considered when determining the legitimacy of information published or broadcast by the press is that the information must:

- be based on facts,
- have informative value,
- be delivered in an appropriate way, and
- be based on sufficient research to prove its authenticity.

Precedents of the Court of Cassation suggests that the press should not be liable for publishing or broadcasting events as they appeared on the date of publishing or broadcasting, even if it turns out afterwards that the content was misleading.<sup>4</sup>

Another aspect to restrictions of the freedom of speech and dissemination of thought is the legal measures preventing internet access. Content which constitutes the following offenses are grounds for blocking access to the websites as per the Code on Regulating Broadcasting in the Internet and Fighting Against Crime Committed Through Internet Broadcasting numbered 5651 ("**Internet Code**"):

- solicitation to commit suicide,
- sexual abuse of minors,

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<sup>4</sup> Court of Cassation, E. 2004/7980 K. 2005/5148

- facilitating the use of drugs or stimulants,
- providing hazardous substances,
- obscenity,
- prostitution,
- providing facilities for gambling,
- offenses set forth under the Law on Crimes Committed against Atatürk numbered 5816.

### **3. Hierarchy between Freedom of Speech on one side and privacy rights on the other side.**

#### **3.1 Under the law applicable in your jurisdiction, is there a clear hierarchy between freedom of speech on the one hand and privacy rights on the other?**

In Turkey, both the freedom of speech and privacy rights are equally protected on constitutional grounds. The Constitution states that freedom of speech can be limited if required for the protection of other individuals' reputation, rights, private and family lives. The Constitution further states that privacy rights can be limited if required for the protection of other individuals' rights and freedom. Therefore, in case of a conflict, it should be settled on a case-by-case basis.

#### **3.2 What would be the most significant criteria allowing freedom of speech or privacy rights to prevail over the other (e.g. public interest argument) ?**

Public interest is the most prominent criteria that would render a violation of privacy rights legitimate while exercising the right of freedom of speech. However, there are certain principles which must be met in order for a disclosure to fall within the scope of public interest. This argument has been made clearly in a resolution of the Court of Cassation which focused on press freedom. The Court states that in order for the freedom of press to prevail over personal rights, the information must comply with the facts, be newsworthy, objective and delivered in an appropriate way. The Court further stated that if there is a possibility for publication to damage third parties, stricter rules should be followed while confirming the facts. Accordingly, in the event of an evident disproportion between the damage made to an individual's personal rights and the purposes of the press, such publication will be deemed unlawful. Publishing false information is unlawful in any event<sup>5</sup>.

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<sup>5</sup> Court of Cassation, E. 2002/4-115, K. 2002/151



#### **4. Remedies available in your jurisdiction to protect individuals against disclosure of information belonging to their privacy**

##### **4.1 Are there pre-emptive remedies to avoid disclosure of such information before disclosure occurs ? Describe briefly the main remedies available.**

If there is a threat of invasion of privacy or personal rights, an individual can demand this threat to be ceased, as per article 25 of Civil Code. In such case, the court should take the measures necessary to prevent such disclosure before it occurs.

##### **4.2 Are “gagging orders”<sup>6</sup> or “super injunctions”<sup>7</sup> as known in the UK known under the legal system of your country? Describe briefly their main characteristics.**

The TV Code allows the Prime Minister (or a minister to be appointed by the Prime Minister) to impose a temporary ban on broadcasts if such a ban is evidently required for national security, or in situations where it is highly likely that public order will be seriously disrupted (Article 7 of the TV Code). Determining whether the risks pertaining to national security and public order are sufficient to justify restriction of freedom of expression is controversial.

According to the Internet Code, individuals who claim their privacy has been violated due to an online publication may apply to the content provider or hosting provider to request the content be blocked. Individuals may also directly apply to the President of Telecommunication and Communication ("TIB"). However, unless the complainant applies to court regarding the alleged privacy violation, the injunction would be removed within 24 hours. If the TIB deems protection of privacy as urgent, it is entitled to block such content without receiving an individual's complaint (Article 9/A of the Internet Code) This particular power of the TIB, as a governmental authority, has been criticized as allowing inappropriately broad discretionary powers to the president of the TIB, which may easily be used for censorship purposes, rather than protecting privacy. The Internet Code further requires:

- Access providers to block alternative access methods and provide information to the TIB if requested;
- Mass use providers to take measures to prevent users accessing criminal content.

Furthermore, freedom of press may be restricted for the purposes of protecting the rights and reputation of others, community health care and morals, national security, prevention of disclosure of official secrets, or committal of crime, or assurance of

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<sup>6</sup>See for details : [http://en.wikipedia.org/wiki/Gag\\_order#United\\_Kingdom](http://en.wikipedia.org/wiki/Gag_order#United_Kingdom)

<sup>7</sup> See for details: [http://en.wikipedia.org/wiki/Injunction#UK\\_superinjunctions](http://en.wikipedia.org/wiki/Injunction#UK_superinjunctions)

judicial power, authority and impartiality in accordance with requirements of democratic society (Article 3 of the Press Law numbered. 5187(“**Press Code**”).

#### **4.3 Are there other post-disclosure remedies, such as for example damage claims, rectification claims, right of answer. Describe shortly**

After the infringement of their privacy, individuals may:

- bring a criminal charge, of which sanction is imprisonment for a term ranging from 1 years to 5 years depending on the offense;
- commence a civil action and claim compensation for monetary damages;
- commence a civil action and claim compensation for moral damages, in which case the court can decide another kind of remedy available, either instead or in addition to the compensation, and can decide whether the decision is to be published;
- demand the reimbursement of a defendant's unlawful profits derived from such disclosure;
- demand the continuing offence be stopped, or bring a declaratory action to establish the unlawful consequences of the offence even if the act has been discontinued;
- if the privacy violation has occurred on the internet, apply to the content provider to have the content removed, or apply to the hosting provider, the courts, or the Presidency of Telecommunication and Communication to have the content blocked;
- demand correction of the information, if applicable, or the court decision to be published or notified to third persons. As per article 32 of the Constitution pertaining to the press and publication, the right of rectification and reply will be allowed only in cases where personal reputation and honor has been injured, or where unfounded allegations are published.

It should also be noted that, according to article 49 of Code of Obligations, the following factors must exist to claim damages:

- i. illegal act of the defendant;
- ii. existence of a damage to the aggrieved party;
- iii. fault or negligence by the defendant; and
- iv. a casual connection between the illegal act and damages.

#### **4.4 In the case of damages, how are they calculated ?**

While calculating damages, the amount of loss establishes the upper limit of the compensation. In Turkish legislation, punitive damages are not accepted. Accordingly, pecuniary damages should be equal to the loss suffered. However, non-pecuniary damages may be difficult to calculate because their purpose is to remedy the individual's pain and suffering. In this case, the judge must determine an amount sufficient to ease the individual's pain and suffering on a case-by-case basis.

#### 4.5 In case of disclosure of private information, who can be held liable for damages, especially online?

- Within the responsibility provisions stated under the Press Code, regardless of whether it is a periodical or non-periodical publication, criminal liability of such publications belongs to the owner of the work. (Article 11 of the Press Code).

In terms of the damages arising out of the acts fulfilled through published works, the following parties will be jointly liable:

1. *for periodicals*, the author of work, the publisher and its representative, if exists.
2. *for non-periodicals*, the author and the editor, and if the editor is not determinable, the publisher.

This provision also applies for the publisher, brand owner or licensee, renter, operator, or anyone who publishes under any other name, or acts as a publisher, irrespective of whether it is a natural person or a legal entity. If the legal entity is a company, joint and several liability applies between the company itself and either the head of board of directors (in joint stock companies), or to the highest ranking executive (in other companies).

In the event that the published work is transferred, merged with another publication, the owner changes after the performance of the act which caused damages, the person who acquires or merges the published work, or who acts as an owner of the published work, chairman of board of directors (in joint stock companies) and the highest ranking executive in other companies, will be held jointly and severally liable for compensation of this action along with the other parties who are mentioned above paragraphs (Article 13 of the Press Code).

- Within the scope of the responsibility provisions stated under Internet Code) content provider i.e. *any real or legal person who produces, amends, and provides any information or data submitted to users via internet* is responsible for all kinds of content that is being put into service on the internet. (Article 4 of the Internet Code).

- Within the scope of the responsibility provisions stated under the TV Code, media service providers are responsible for content and presentation of all broadcasting services, including those produced by third parties via commercial channel (Article 6/4 of TV Code)

**4.6 Are there special defences to a cause of action for information disclosed by the press/ media?**

*4.6.1 As part of your answer please explain what is range of news information organizations is covered by the definitions press/ media?*

*4.6.2 Is there a specific protection offered to informants/ sources?*

In terms of the information as to disclosure of the informant or the source of the news, according to the Press Code, owner of the periodicals, managing director and author of work cannot be compelled to disclose its sources including information and documents or witnessed therefor (Article 12 of the Press Code).

**4.7 Are the principles described in your answers above also applicable to the online world ? Is there any specific case-law in your country relating to social media, and if so please summarise this?**

General provisions provided under Criminal Code, Civil Code and Code of Obligations will be also applied to online publications and sharings.

Alongside of the general provisions, our answers regulated under the Press Code (those which applies for the non-periodical publications) and Internet Code are applicable to the online publications and sharings.

Recently, when the TIB banned access to Twitter in Turkey, the Turkish Constitutional Court decided that the TIB had violated Article 26 of the Constitution, regarding the freedom of expression. The Turkish Constitutional Court also decided that the legal basis for the scope and boundaries of the authority vested on the TIB to impose an access ban does not satisfy the requirement that the Internet Law must be comprehensible, clear, and accurate. These are the minimum conditions for legislation to be legal in Turkey. <sup>8</sup>

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<sup>8</sup> Turkish Constitutional Court Decision with Application no. 2014/3896.

**4.8 Are there specific remedies against disclosure of information that (could) damage an individual reputation (such as slander or libel) ? Describe these remedies briefly.**

In the Criminal Code, defamation is cited as a crime against personal dignity (Article 125). If this crime is committed through the media, this fact will be considered to be an aggravating circumstance when sentencing. There are different subdivisions of defamation under the Criminal Code, such as defamatory statements against the following:

- The president of the Republic,
- Sovereignty symbols of the nation,
- The Republic of Turkey,
- Government agencies,
- National flags of foreign countries, and
- The representatives of foreign states.

If the crime is committed through the media, the aggrieved party may claim the suspension of the publication and/or broadcasting of the defamatory statements as per the Press Code (Article 25). The aggrieved party may also exercise his or her right of reply or disclaimer (Article 14). In addition, an aggrieved party may bring a penal claim that may result in the penalty of imprisonment starting from 3 months up to 24 months, and/or fines (Article 125 of the Criminal Code). The TV Code also regulates administrative fines and warning sanctions applicable to publication and/or broadcasting of the defamatory statements (Article 32). In addition, if the slandering act has been committed through the media, the penalty given to the offender must be announced through the same, or equivalent, media organ. However, it should be noted that as long as the disclosing party complies with the principles mentioned in Section 3.2, such disclosure is deemed legal and the aggrieved party may not claim damages due to the lack of illegal act of the defendant.

**4.9 Forum and applicable law**

*4.10.1 Describe shortly what rules are exist in your jurisdiction for the determination of the forum and the applicable law.*

*4.10.2 Are there specific rules for breaches caused online (when the information is accessible from different jurisdictions) ?*

The appropriate forum is decided as per legal procedure laws, as well as law numbered 5235 relating to the Establishment, Functions and Authorizations of First Degree Trial Courts and Regional Courts of Justice ("**Code Numbered 5235**").

For civil claims, Turkish Civil Procedure Code numbered 6100 ("**Civil Procedure Code**") applies. In respect thereof, disputes regarding immaterial rights are in the jurisdiction of the Civil Courts of First Instance, unless otherwise specified. The general principle in determining venue is the defendant's residential area. However, in accordance with Article 16 of the Civil Procedure Code, in case of wrongful acts, the plaintiff may choose to apply to the courts at the defendant's residential area, as well as where either the act was committed, the damage was incurred, or is anticipated to incur. This provision has significance for online breaches. However, even though the disclosed information is accessible anywhere through the internet, the plaintiff will only be able to apply to the courts where damage has been incurred, which will be considered based on the plaintiff's social environment and reputation. In addition, if a foreign element exists, whether in respect of parties, venue or subject matter, the International Private and Procedural Code numbered 5718 ("**International Procedural Code**") shall apply with respect to rules about conflicts of law.

However, the authorized court for criminal claims is decided depending on the offense. High criminal courts have jurisdiction for certain offenses and for the offenses to be penalized for more than ten years of imprisonment. Other crimes are subject to the jurisdiction of the criminal courts of first instance.

#### **4.10 From your experience, what reforms should be made to the legal system of your country to better protect individual privacy, if any**

Turkish jurisdiction needs to make substantial reforms in order to create a convenient legal infrastructure for the protection and development of individual privacy. Following steps have great importance in this regard:

- The current Draft Code on data protection has been prepared in accordance with the EU Data Protection Directive 95/46/EC. However, legislative efforts of the EU regarding the data protection are progressive, and the Draft Code had failed to comply with these improvements. The amendments made to the Directive have not been adapted by the Draft Code. On the other hand, a legal framework for data protection is a great necessity at the time being. In the absence of a legal framework, both civil and criminal claims regarding data protection lack sufficient legal grounds and cannot be implemented effectively. Therefore, whether adjusted as per the new regulations of EU or not, the Draft Code must be immediately ratified and put into force.
- Most recently, the omnibus bill, which also referred to as "Domestic Security Package", is on the agenda of the Turkish Grand National Assembly. The amendments empower the police with compelling authorities, allowing them

to take restrictive measures, including conducting search on persons or inside their cars without the prior permit of a prosecutor or a court warrant; taking persons in custody up to 48 hours during social uprisings, without requiring the permit of a prosecutor before this limit is reached, and so forth. These regulations that threaten privacy and security of individuals should be brought before the Turkish Constitutional Court, and nullified before they are practically implemented.

- The content removals and internet access preventions should be more strictly regulated. As explained above, it is controversial to provide broad grounds for an administrative authority, TIB, with regard to blocking internet access. Moreover, the current regulation does not provide sufficient measures to prevent governmental bodies to adopt their own regulations which may advance to the extent of censorship. These matters should be acknowledged under the Internet Code, and the governmental bodies should only be allowed to refer to the provisions of the Internet Code pertaining to restricting measures, and such measures should be exclusively subject to court decisions.

## **5. Interplay between data protection rules and privacy rights**

### **5.1 Summarise how does data protection law in your jurisdiction protects privacy or other personal data being used in online media?**

Turkey has been a signatory to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data since 28 January 1981. Turkey has also declared that the Convention will apply to personal data files which are not processed automatically. However, the Convention was not brought before the Turkish National Grand Assembly until 1 August 2014 and is currently still pending ratification. Data protection rights were introduced to the Turkish Constitution by amendments made in 2010. However, the Constitution sets out the main principles and does not provide efficient legal measures to protect personal data. In furtherance of this requirement, a Draft Code is expected to be enacted by the Turkish National Grand Assembly in the near future, in order to regulate processing, storage and use of personal data in line with the Convention.

At present, the main legal source (besides the Turkish Constitution) is the Internet Code. Accordingly, individuals claiming their privacy has been violated due to an online publication may apply to the content provider or hosting provider to request the content be blocked. Individuals may also directly apply to the Presidency of Telecommunication and Communication ("**TIB**"). However, unless the complainant applies to court regarding the alleged privacy violation, the injunction would be removed within 24 hours. If the TIB deems protection of privacy as urgent, it is

entitled to block such content without receiving an individual's complaint. Judges at the Criminal Court of Peace are empowered to issue URL-based and likewise orders to block access. However, if the judge concludes that URL-based blocking is not sufficient to remedy the violation, the judge can block access to the whole website, on condition of providing justification for adopting this wider blocking method. If the content subject to the blocking order is removed the judge's blocking order will be null and void.

## 5.2 Is there an effective a right of opposition to collection of data?

Data protection rights were recently included in the Constitution (2010). These are stated as *“Everyone has the right to request the protection of their personal data. This right includes being informed of, having access to and requesting the correction and removal of the personal data, and to be informed whether such data is used in consistency with envisaged purposes. 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 regulated by law.”* The provision grants individuals the right to have control over their personal data. However, implementation of the principles and procedures for collection of data is not sufficient to completely protect the rights of individuals in Turkey for the time being. Therefore, in regard of certain sectors which are exposed to data breach risks, it is inclined to impose sector-specific regulations some of which are as the following:

- Information Technologies and Communication Authority regulations which restricts telecom operators to share information of their subscribers;
- Banking Law numbered 5411 which restricts the disclosure of information such as customer, banking and trade secrets;
- The Law on Regulation of Electronic Commerce numbered 6563, which will take effect on May 1, 2015 and imposes restrictions to main and intermediary service providers to protect customer information obtained during the electronic commerce activities.

Although it has not been enacted yet, the Draft Code mentioned under Section 5.1 aims to ensure that data processing is conducted in compliance with the envisaged purposes. Data processing is defined under the recent version of the Draft Code as: *“automatically or manually obtaining, storing, changing, deleting or destroying the personal data, transmitting the same to third parties, to label such data in order to restrict its use, to prevent its use, and other processes made on the personal data.”*

The Draft Code also envisages establishment of a Committee to monitor whether the collected data is processed in accordance with the law, and to resolve individuals' complaints pertaining to the protection of their personal data.



However, there are contradictory legislative approaches as well. These include the latest amendments made to the Internet Code which pose risks to privacy rights and freedom of expression for individuals. Under the amended Internet Code, content providers are required to provide information to TIB if requested; however, the scope of the information to be provided is not specified. Further, hosting providers are required to retain traffic data about their hosting activities for minimum one year and maximum two years, and provide the TIB with this data. Since no similar time limit is imposed on the TIB, it is entitled to retain such information for an indefinite period.

## **6. Right to be forgotten**

### **6.1 Is there a statutory or case-law based “right to be forgotten” in your jurisdiction (whether under domestic or supranational law) ? Describe it briefly.**

The “right to be forgotten” is not recognized under Turkish law. Individuals may refer to the legal protections granted for personal rights, privacy rights, or freedom of communication in order to request their content be removed under some conditions. Please refer to Section 5.1 for further details.

### **6.2 Is there relevant case law in your jurisdiction regarding the right to be forgotten and/or are there other guidelines (whether under domestic or supranational legal procedure) for a successful claim under the “right to be forgotten”.**

Individuals can request misleading content be removed or banned drawing the basis for such a request from their personal and privacy rights. However, such claims do not comprehend the “right to be forgotten” in an equivalent manner. Irrelevancy of information is sufficient in order to file a successful claim under the “right to be forgotten”. However, damage (or potential damage) to personal or privacy rights must exist in order to file similar claims in Turkey.

### **6.3 Did the view on the right to be forgotten change in your jurisdiction due to the European Court of Justice Case in Google Spain v. AEPD and González (C-131/12)? Is there any case law arising from this decision in your jurisdiction?**

The framework regulation establishing protection of personal data in Turkey is yet to be enacted. Therefore, there is already a gap in the Turkish jurisdiction with regard to such privacy rights.

Pursuant to the decision of the European Court of Justice, several questions have arisen regarding the status of the right to be forgotten against the freedom of communication and information. However, there are no domestic claims arising from this decision. On the other hand, according to the Google's Transparency Report dated 2013, Turkey has had the most individuals applying to Google pursuant to the recognition of the right to be forgotten. However, Google refused the applications on the basis that the decision of the European Court of Justice has no enforceability for Turkey.

**7. Are there other aspects to take into consideration in your jurisdiction in relation to freedom of speech, the privacy right and the right to be forgotten?**

All answers provided above intended to comprehend different aspects of the individual rights acknowledged in Turkish jurisdiction. Turkey experiences significant economic developments; however, same progress cannot be reflected to the matters regarding privacy rights and freedom of speech. Recent legislative efforts, especially the Internal Security Package and amendments made to the Internet Code threaten the individual privacy and security rather than protecting the same. These regulations that allow monitoring of individuals will definitely distort the improvement of privacy rights in Turkey. Moreover, as long as a consistent regulation on data protection does not go into effect, effective implementation of criminal sanctions will continue to fail. Unfortunately, challenging subjects such as right to be forgotten can only be on the agenda of Turkey after more basic individual rights are granted.