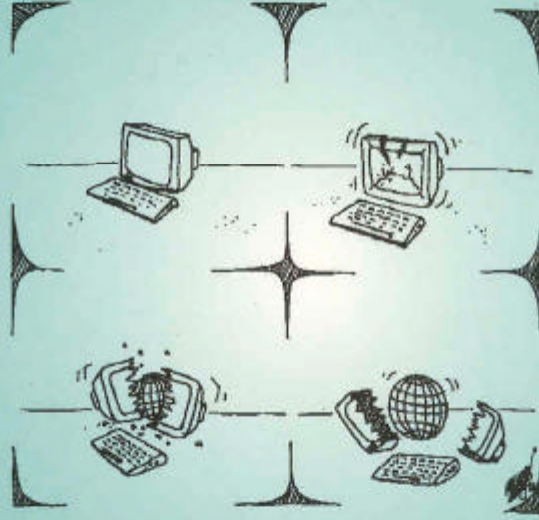




Towards the modernization of policy making process
in Turkey



INTERNET GOVERNANCE

Dr.Yaman AKDENİZ



Turkiye Bilisim Vakfi (“TBV”) White Paper

Internet Governance: Towards the modernisation of policy making process in Turkey

October 2003

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Internet Governance: Towards the modernisation of policy making process in Turkey

October 2003

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0. Executive Summary

The global, decentralised and borderless nature of the Internet means that it is not possible for the individual governments to regulate effectively and satisfactorily to address Internet related problems and issues. This means that the nature of government regulation, thinking, and policy making need also to adopt to the changes that are the result of improvement in technology and especially in global communications.

At the same time the role of the governments are still crucially important and pivotal but there needs to be more emphasis on such concepts as “risk analysis”, “co-operation”, “co-ordination”, “consultation”, “co-regulation”, and “self-regulation”. Rather than rushing into legislating, governments need to assess carefully the “risks” associated with Internet usage or the availability of certain types of content over the Internet such as child pornography. This also needs to be done by a policy process which is open, transparent, and inclusive of the views of all interested parties. Alternatives to state legislation will also need to be part of the government agenda for developing Internet related policies.

It is the purpose of this white paper to address these issues and make recommendations for Good Internet Regulation in Turkey. The white paper recommends to the Turkish Government that they should:

- Modernise the Turkish policy making process in the short term
- Ensure that policymaking in this field is undertaken by policymakers who are well informed about the unique nature of the Internet and have direct experience with its use
- Ensure that such policies are developed with substantial input and comment from all interested parties including the Internet industry, the academia, non governmental organisations, and Internet users.
- Respect fundamental human rights enshrined in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights.
- Enable access to government information including legislative, judicial and executive branch information through the Internet. Such access should be backed up by a legal right to public information through the enactment of a Turkish Freedom of Information law.
- Ensure access by Turkish citizens to the Internet and enable full participation in the global information society. In particular, access to the Internet by schools, libraries and other public institutions should be viewed as a policy goal, subsidised as necessary.
- Provide an open and transparent policy making process
- Conduct risk analysis prior to regulation and consider the alternatives to state legislation
- Ensure that Turkish policy is inline with EU policy
- Monitor systematically international legal and policy initiatives
- Ensure systematic representation and participation of Turkey within the international forums that develop Internet related policies (including but not exclusively at the Council of Europe, United Nations, the OECD, and the European Union level)

1. Introduction - Aims and Objectives

This *White Paper on the Governance of the Internet in Turkey* will examine and analyse different approaches to Internet governance in a number of national and international forums. The aim of the project and the final White Paper is to identify the various possible modes and models of regulation appropriate for Internet governance in Turkey. Apart from the identification of such possible modes and models of Internet governance, the project will also analyse the normative (for example human rights standards such as the European Convention on Human Rights, Turkish Constitution) and process conditions (principles of good regulation

as adopted by a number of governments and international organisations) for such regulatory models. How do democratic states develop their Internet laws and policies? What are the best regulatory standards for achieving the best approaches to Internet governance? How do governments (and international organisations such as the European Union and the OECD) regulate and how do they achieve their goals? Who do they co-operate with in terms of developing their Internet related policies? Is there a role to be played by the Internet industry, by the NGOs working in the field, and by the society as a whole? These are some of the questions to be tackled in this research and project.

1.1. Impact of the Internet on Nation-State Policy Making

The project takes as its theme Internet governance and how new communications technologies such as the Internet affects nation-state policy making including in Turkey and how nation-states foster policies related to the Internet. Obviously, there may be different approaches to the growth of the Internet in different societies and the impact of the Internet on different nation-states may have different results. Different nation-states present a different level of economic development, respect for rights, trans-nationality, and technological sophistication. While Turkey maybe considered at a developing stage with respect to the Internet, others may be far more sophisticated with regards to Internet access, use, and penetration. Inevitably, this will be reflected upon the policy making process and the development of policies and in most cases the level of policy making process and nation-state approaches to Internet governance will be in different stages with different priorities.

The discourse of governance is especially relevant to analysis of the Internet within Western Europe, not only because of the inherent nature of the technology but also because of the political and social nature of Western Europe. Of course there will be challenges and difficulties in recognising the legitimate socio-cultural differences and approaches to Internet and its regulation by nation-states. At Member State level within the European Union, there is no doubt that there is a strong commitment, based on global economic competition but equally political populism, to embrace in principle “the age of the Information Society”. Yet, because of cultural, historical and socio-political diversity, there will inevitably be divergent approaches to the growth and governance of the Internet in different European societies. For example, while the German government has political fears and sensitivities about the use of the Internet by Neo-Nazis, the United Kingdom takes a more relaxed attitude to the dangers of racism but conversely has a long cultural tradition of repression towards the availability of sexually explicit material. It is then for the European Union to try to reflect these differences. However, in an ideal world, “states within Western Europe should especially avoid pandering to the lowest common denominator where the least tolerant [such as in respect of racist expression in France¹ and in Germany²] can set the pace.”³ Normative conditions such as the international human rights standards that nation-states adhere to (which will be explored in section 2.1. below) can help to prevent the least tolerant states setting the standards.

¹ *League Against Racism and Antisemitism (LICRA), French Union of Jewish Students, v Yahoo! Inc. (USA), Yahoo France*, Tribunal de Grande Instance de Paris (The County Court of Paris), Interim Court Order, 20 November, 2000; Akdeniz, Y., Case Review of the Yahoo! Case, [2001] *Electronic Business Law Reports*, 1(3) 110-120.

² Criminal case of Somm, Felix Bruno, File No: 8340 Ds 465 JS 173158/95, Local Court (Amtsgericht) Munich. An English version of the case is available at <<http://www.cyber-rights.org/isps/somm-dec.htm>>.

³ Walker, C., & Akdeniz, Y., “The governance of the Internet in Europe with special reference to illegal and harmful content,” [1998] *Criminal Law Review*, December Special Edition: Crime, Criminal Justice and the Internet, 5-19, at 14.

1.2. Multi-layered Approach?

The development of new communications technologies such as the Internet and its global and decentralised nature will undoubtedly affect Turkey. Moreover, it will be argued in this thesis that different societies have different concerns about the Internet and their Internet policy, and the Internet governance is a reflection of the nature of the state of development, and cultural, historic and political background of that society.

Therefore, a multi-layered approach to Internet governance is unavoidable and will be adopted throughout the project in the light of not only national developments but also in the light of supranational (e.g. European Union), and international (Council of Europe, United Nations, OECD, G8) developments which will have an impact upon the development of policies at the national level (Turkey). So, “effective” rule-making will not be confined to a single nation-state due to the influence and impact of supranational, and international developments and agreements and also due to the global and decentralised nature of the Internet itself.

Therefore, apart from the option of government regulating and legislating (including advantages and disadvantages of government regulation), alternatives to state legislation such as self-regulation and co-regulation and the role of the industry, the NGOs working in this field, and the society as a whole will also be considered in this study.

1.3. Aligning of strategies and Co-operation at the International level

The effect of supranational and international developments on nation-state governance cannot be underestimated and aligning of strategies and policies may be necessary at an international stage to find common solutions for Internet related problems or for boosting consumer confidence and trust in the information age.

It has been the intention of the Turkish government to align its strategies and regulatory system with the EU following its recognition as a candidate country to EU membership in December 1999. So the current regulatory differences that are the result of the membership/non membership to the European Union may be less significant the closer Turkey gets to the European Union. An eventual membership to the EU will force Turkey or any other EU candidate state to align its policies including those related to the Internet to EU policy. Furthermore, there will inevitably be future aligning of policies with the international organisations of which Turkey is a member such as the Council of Europe. An important policy development at the Council of Europe level has been provided with the drafting of the Cyber Crime Convention in 2001. The development of such policy on the international stage will undoubtedly have an impact upon the future of laws and policy at the national level.

2. Normative Substantive and Process Conditions

The mechanisms provided for Internet governance at the national level will be subject to normative substantive conditions and process conditions. The governance of the Internet will be examined in a critical sense, in the light of a normative framework which takes individual rights such as freedom of expression and privacy as incontrovertible values. Governance can only be legitimised by taking due account of these values. This white paper will consider how the Internet can further these values, and whether regulation of the Internet in Turkey furthers or damages these values. The consideration of such values are also relevant to assess whether the framework involves “good governance” as opposed to “bad governance”. Normative conditions such as the international human rights standards can help to set certain criteria for good governance of the Internet if these conditions and values are incorporated into proposals and policy initiatives at the national, supranational, and international levels of Internet governance.

The project will as a further part of its critical structure, examine whether the current levels of Internet governance in Turkey involve good or bad governance in a procedural as well as in a substantive sense. The process conditions of accountability, effectiveness and openness of the players involved in Internet governance will be discussed in the light of respect for individuals and basic rights (normative substantive conditions).

2.1. Normative Substantive Conditions

The European Convention on Human Rights (articles 8 and 10) and other international human rights instruments such as the Universal Declaration of Human Rights, (articles 12, and 19); the International Covenant on Civil and Political Rights, (articles 17, and 19); and the more recent European Union Charter of Fundamental Rights, (articles 7, 8, and 11) enshrine the rights to freedom of expression, access to information, and right to privacy of communications. These core documents explicitly protect freedom of expression and privacy without regard to borders, a phrase especially pertinent to the global Internet.

The European Convention on Human Rights

Article 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Universal Declaration of Human Rights

Article 12

No one should be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks on his honour or reputation. Everyone has the right to the protection of the law against such interferences or attacks.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

International Covenant on Civil and Political Rights

Article 17

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others;
 - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

European Union Charter of Fundamental Rights

Article 7

Everyone has the right to respect for his or her private life, home, and communications.

Article 8

1. Everyone has the right to the protection of personal data concerning him or her.
2. Such data must be processed fairly for specified purposes and on the basis of consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her. And the right to have it rectified.

3. Compliance with these rules shall be subject to control by and independent authority.

Article 11

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected.

Although Turkey is not a member of the European Union yet, it is one of the long-standing members of the Council of Europe. Turkey signed and ratified the ECHR in 1954. It should also be noted that Turkey accepted the provisions of Article 25 of the ECHR which governs the right of individual complaint to the European Court of Human Rights in January 1987. More recently, in August 2000, Turkey also signed the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights.

The normative conditions within this report will therefore refer to the rights enshrined mainly in the European Convention on Human Rights. Of particular importance will be articles 8 (privacy) and 10 (freedom of expression). It should be noted at this stage that these rights are not absolute rights under the Convention and interference with them is possible both under article 8(2) and article 10(2) subject to restrictions being in accordance with law, and being necessary in a democratic society and being proportionate to the aims pursued.

2.2. Respect for Rights and ECHR standards

The Turkish Constitution provides protection for fundamental rights and duties within part II of the Turkish Constitution in which article 12 states that “everyone possesses inherent fundamental rights and freedoms which are inviolable and inalienable.” However, these rights are not absolute, and article 13 states that:

“Fundamental rights and freedoms may be restricted by law, in conformity with the letter and spirit of the Constitution, with the aim of safeguarding the indivisible integrity of the State with its territory and nation, national sovereignty, the Republic, national security, public order, general peace, the public interest, public morals and public health, and also for specific reasons set forth in the relevant articles of the Constitution.”

Although not absolute in one way or another the Turkish Constitution provide a solid basis for shared values and rights in theory. The following important normative standards should be taken into account while fostering Internet related policies.

2.3. Freedom of Expression

Freedom of expression is the “lifeblood of democracy”.⁴ Article 10 of the European Convention on Human Rights (“ECHR”) is devoted to freedom of expression:⁵

“(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers...”

⁴ *R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, [1999] 3 All ER 400, at p 126.

⁵ See generally Clayton, R., and Tomlinson, H., *Privacy and Freedom of Expression*, Oxford University Press, 2001, Van Dijk, P. et al, *Theory and Practice of the European Convention on Human Rights*, The Hague: Kluwer Law International, 1998 (3rd ed.).

The European Court of Human Rights has described freedom of expression as “one of the basic conditions for the progress of democratic societies and for the development of each individual”⁶. Article 10 could be applied to any medium including the Internet though freedom of expression and information is not an absolute right under the ECHR. The member states of the Council of Europe may validly interfere with such freedom but only under the conditions laid down in Article 10, paragraph 2:

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

If the conditions laid down in the second paragraph are not fulfilled, a limitation on freedom of expression and information will amount to a violation of article 10.

“Subject to Article 10(2), it is applicable not only to ‘information’ of ‘ideas’ that are favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no ‘democratic society’.”⁷

The restrictions on the exercise of freedom of expression and information that are admissible according to Article 10, paragraph 2, fall into three categories:

- those designed to protect the public interest (national security, territorial integrity, public safety, prevention of disorder or crime, protection of health or morals);
- those designed to protect other individual rights (protection of the reputation or rights of others, prevention of the disclosure of information received in confidence);
- those that are necessary for maintaining the authority and impartiality of the judiciary.

This list may appear to be an extensive one, but it should be noted that, in order to be admissible, any restriction must be prescribed by law and be necessary “in a democratic society”. The Court has repeatedly stressed the importance of testing whether interference is necessary in the context of European supervision. Generally “necessary in a democratic society” under article 10(2) would be decided by the European Court of Human Rights in Strasbourg by determining whether the State interference corresponds to a “pressing social need”,⁸ and whether it was proportionate⁹ to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient.¹⁰ The Strasbourg Court has consistently held that:

“the Contracting States enjoy a certain margin of appreciation in assessing the need for an interference, but this margin goes hand in hand with European supervision, whose extent will vary according to the case. Where there has been an interference with the exercise of the rights and freedoms guaranteed in paragraph 1 of Article 10, the supervision must be strict, because of the

⁶ *Handyside* judgment of 7 December 1976, Series A No. 24, §49, (1976) 1 EHRR 737.

⁷ *Nilsen and Johnsen v Norman* (1999) 30 EHRR 878 at para 43. See further *Castells v. Spain*, App. no.11798/85, Ser.A vol.236, (1992) 14 EHRR 445, § 42.

⁸ See *Sürek* (No. 1) judgment of 8 July 1999, Reports 1999; *Sürek* (No. 3) judgment of 8 July 1999, Reports 1999; *Zana* judgment of 25 November 1997, Reports 1997 - VII Compare these with the following judgments in which there was no violation of article 10: *Öztürk* judgment of 28 September 1999, Reports 1999; *Incal* judgment of 9 June 1998, Reports 1998-IV, § 46.

⁹ See generally the following Turkish cases: *Erdogdu and Ince* judgment of 8 July 1999, Reports 1999; *Sürek and Özdemir* judgment of 8 July 1999, Reports 1999; *Sürek* (No. 4) judgment of 8 July 1999, Reports 1999.

¹⁰ *Baskaya and Okçuoglu* judgment of 8 July 1999, Reports 1999.

importance of the rights in question..... The necessity for restricting them must be convincingly established".¹¹

Furthermore, the Committee of Ministers of the Council of Europe, in their Recommendation (99) 1, stressed that "states should promote political and cultural pluralism by developing their media policy in line with Article 10 of the European Convention on Human Rights."¹²

As far as Turkey is concerned, the Turkish Constitution through article 26 refers to freedom of expression and dissemination of thought and states that "everyone has the right to express and disseminate his thought and opinion by speech, in writing or in pictures or through other media, individually or collectively."¹³ Article 26 further states that these rights may for example be restricted for the prevention of crime¹⁴ but this provision "shall not preclude subjecting transmission by radio, television, cinema, and similar means to a system of licensing." In addition to that, the Turkish government unsuccessfully tried to apply a similar licensing system to the Internet in May 2001 with a proposal to include the Internet within the context of the current press, and radio and television regulations.¹⁵ The initial 2001 proposal which would have subjected websites to tight media controls was vetoed by Ahmet Necdet Sezer, President of Turkey who stated that:¹⁶

"The most important aspect of Internet broadcasting, which is like a revolution in communication technology, is that it is the most effective area for freely expressing and spreading ideas and for forming original opinions..... Leaving the regulation of the Internet to public authorities completely and linking it to the Press Law does not fit with the characteristics of Internet broadcasting."¹⁷

However, the sponsors of the Bill were successful the following year. In May 2002, the Parliament approved the Supreme Board of Radio and Television (RTUK) Bill (No 4676). The bill regulates the establishment and broadcasting principles of private radio and television stations and amends the current Turkish Press Code. It includes provisions which would subject the Internet to restrictive press legislation in Turkey. Although it tries to apply only some aspects of the Press Code (such as to do with publishing "lies"), the unclear provisions are open to various interpretations. The rationale behind these provisions is the silencing of the criticism of the Members of the Turkish Parliament and to silence political speech and dissent.

¹¹ Autronic AG judgment of 22 May 1990, Series A No. 178, § 61.

¹² Committee on Culture, Science and Education, *Freedom of expression and information in the media in Europe report*, (Rapporteur: Mr Gyula Hegyi, Hungary, Socialist Group) CoE Parliamentary Assembly, Doc. 9000, 19 March, 2001.

¹³ Note the recent changes within the Turkish Constitution in relation to article 26. Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinin Değiştirilmesi Hakkında Kanun, No: 4709, Kabul Tarihi: 3.10.2001, T.C. Resmi Gazete, No: 24556 (Mükerrer) 15 October, 2001.

¹⁴ Note that Restrictions on the exercise of this right, such as "national security, public order, public security, the fundamental characteristics of the Republic and the protection of the indivisible integrity of the State with its territory and nation", are added to the second paragraph of Article 26. See further Republic of Turkey Prime Ministry Secretariat General for European Union Affairs, *An Analytical Note on the Constitutional Amendments*, Ankara, 4 October 2001. This document is available through <<http://www.abgs.gov.tr/>>.

¹⁵ Section 27 of the proposed legislation would bring the Internet within the ambit of the 5680 numbered Press Law. Radyo ve Televizyonların Kuruluş ve Yayınları Hakkında Kanun, Basın Kanunu, Gelir Vergisi Kanunu ile Kurumlar Vergisi Kanununda Değişiklik Yapılmasına Dair Kanun Tasarısı, T.B.M.M. (S. Sayısı : 682), Dönem : 21 Yasama Yılı : 3.

¹⁶ Presidential Statement in relation to proposal to amend the Press Law, 18 June, 2001, at <<http://www.cankaya.gov.tr/ACIKLAMALAR/18.06.2001-1159.html>>. See further Anderson, J.W., "Turkey in a Tangle Over Control of Web," *Washington Post*, 21 June, 2001.

¹⁷ *Ibid.*

However, it should be noted that no action has been taken in relation to any website publications under the provisions of this legislation.

Turkish law and court judgments are also subject to the European Convention on Human Rights and are bound by the judgments of the European Court on Human Rights and there are more than 20 judgments of the European Court of Human Rights involving Turkey and article 10 of the ECHR.¹⁸

2.4. Privacy of Communications

Article 8 of the ECHR is devoted to privacy and refers to privacy of “correspondence” which can include all forms of communications including Internet communications within its context:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

In general terms, the monitoring of communications can constitute an interference with the right to respect for private life and correspondence in breach of Art. 8(2) which states that:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

This is of course unless the monitoring of communications is carried out in accordance with a legal provision capable of protecting against arbitrary interference by the state with the rights guaranteed.¹⁹ As explained in the judgment of *X v Netherlands*,²⁰ article 8 does not provide an absolute protection for privacy of communications:

“The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative obligation, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.”²¹

Although the Convention does not “compel the State to abstain from such interference,” the exceptions provided for in Article 8(2) are to be interpreted narrowly,²² and the need for them in a given case must be convincingly established as far as interception of communications are concerned as in the case of article 10 of the ECHR. Furthermore, the relevant provisions of domestic law must be both accessible, be in accordance with the law,²³ and their consequences foreseeable, “so that competing interests need to be weighed up and, under the terms of the case law of the European Court of Human Rights.”²⁴ Furthermore, the conditions and

¹⁸ Among others see: *Erdogdu and Ince* judgment of 8 July 1999, Reports 1999, *Sürek and Özdemir* judgment of 8 July 1999, Reports 1999, *Okçuoglu* judgment of 8 July 1999, Reports.

¹⁹ *Malone v United Kingdom* (A/82) (1985) 7 E.H.R.R. 14.

²⁰ *X v Netherlands* (1985) (Decision of 3 May 1983 in Application 9322/81), 8 EHRR 235.

²¹ *Ibid.*, at 239-240 (para 23)).

²² See *Klass and Others v. Germany* (A/28): (1978) 2 E.H.R.R. 214, para. 42.

²³ See for example *Malone v United Kingdom* (A/82) (1985) 7 E.H.R.R. 14.

²⁴ European Parliament resolution on the existence of a global system for the interception of private and commercial communications (ECHELON interception system) (2001/2098(INI)), 05 September, 2001 A5-0264/2001, paragraph H.

circumstances in which the state is empowered to take secret measures such as telephone monitoring should be clearly indicated²⁵ as “where a power of the executive is exercised in secret the risks of arbitrariness are evident.”²⁶ In particular, the avoidance of abuse demands certain minimum safeguards, including the conditions regarding the definition of categories of persons liable to have their telephones tapped, and the nature of offences that could give rise to such an order, “it is not enough that the interference should merely be useful or desirable.”²⁷ It is essential to have clear, “detailed rules on the subject, especially as the technology available for use is constantly becoming more sophisticated.”²⁸

As far as constitutional protection in Turkey is concerned, section 5 of the 1982 Turkish Constitution is entitled, “Privacy and Protection of Private Life.” Article 20 of the Turkish constitution covers the section on “Privacy of the Individual’s Life,” and it states that:

“Everyone has the right to demand respect for his private and family life. Privacy of individual and family life cannot be violated. *Exceptions necessitated by judiciary investigation and prosecution are reserved.*²⁹ Unless there exists a decision duly passed by a judge in cases explicitly defined by law, and unless there exists an order of an agency authorised by law in cases where delay is deemed prejudicial, neither the person nor the private papers, nor belongings of an individual shall be searched nor shall they be seized.”³⁰

Furthermore, article 22 of the Turkish Constitution states that:

“Secrecy of communication is fundamental. Communication shall not be impeded nor its secrecy be violated, unless there exists a decision duly passed by a judge in cases explicitly defined by law, and unless there exists an order of an agency authorised by law in cases where delay is deemed prejudicial. Public establishments or institutions where exceptions to the above may be applied will be defined by law.”³¹

Despite the existing constitutional protection to privacy of communications, the right to privacy and to private communications remains rather problematic in Turkey. In practice, Turkey has been a country of “tele-ears”³² and all forms of communications have been tapped and intercepted through-out the Turkish history ever since communication technologies have

²⁵ *Kruslin v France* (A/176-B) (1990) 12 E.H.R.R. 547; *Huvig v France*, A/176-B, (1990) 12 EHHR 528.

²⁶ *ibid.*

²⁷ European Parliament resolution on the existence of a global system for the interception of private and commercial communications (2001/2098(INI)), 05 September, 2001 A5-0264/2001, paragraph H.

²⁸ *Kruslin v France*, A/176-A, (1990) 12 EHR 547.

²⁹ This sentence is deleted with amendments made to the Turkish Constitution in October 2001. Specific reasons for the restrictions on the right of privacy such as “national security, public order, the prevention of crime, public health, public morals, or for the protection of the rights and freedoms of others”, are added to the second paragraph of this article, in light of Article 8 of the ECHR. See Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinin Degistirilmesi Hakkında Kanun, No: 4709, Kabul Tarihi: 3.10.2001, T.C. Resmi Gazete, No: 24556 (Mukerrer) 15 October, 2001.

³⁰ The requirement for a “written” order from an authorized body before restrictions can be imposed on the exercise of this right is an additional safeguard for the right to privacy of the individual provided with the October 2001 amendments.

³¹ Specific grounds for the restrictions on the freedom of communication such as “national security, public order, the prevention of crime, public health, public morals, or for the protection of the rights and freedoms of others”, are added to this article, in light of Article 8 of the ECHR as well as the requirement for a “written” order from an authorized body before restrictions can be imposed on the exercise of this right as an additional safeguard on the freedom of communication with the October 2001 amendments to the Turkish Constitution.

³² “Susurluk wiretapping,” *Turkish Daily News*, May 18, 1999; “Bugging scandal creates rift at police department, Ecevit unconvinced by explanations,” *Turkish Daily News*, 09 June, 1999.

been created.³³ Laws such as the *4442 Sayılı Çıkar Amaçlı Suç Örgütleriyle Mücadele Kanunu* and the related *bu kanunun uygulanmasına ilişkin yönetmelik* (ve 26 Ocak 2001 tarihli ve 242999 sayılı Resmi Gazete) intend to regulate and control such unaccountable interception of communications taking place and it remains to be seen whether the practice in Turkey will comply with the requirements of article 8, ECHR and the jurisprudence of the Strasbourg court.³⁴

2.5. Data Protection

Data protection laws have been in place in many European countries since the publication of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Strasbourg 1981, European Treaty Series No. 108) by the Council of Europe. All member states of the European Union currently have data protection laws and the recently established European Union Charter of Fundamental Rights recognises data protection as a fundamental right under article 8:

“Everyone has the right to the protection of personal data concerning him or her.”

At the same time data protection laws are constantly being updated since the 1981 Convention by the Council of Europe was published. Significant improvements were made to the 1981 Convention by the European Union’s Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The Directive entered into effect on 25 October 1998 and establishes a clear and stable regulatory framework to ensure both a high level of protection for the privacy of individuals in all Member States and the free movement of personal data within the European Union. Article 1.1. of the 1995 Directive states that:

“Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy, with respect to the processing of personal data.”

Obviously the Directive aims at harmonising the national provisions in this field. Moreover, two further EU Directives were developed in addition to the 1995 Directive and these concern the processing of personal data and the protection of privacy in the telecommunications sector (EU Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997); and the more recent Directive concerning the processing of personal data and the protection of privacy in the electronic communications sector (EU Directive 2002/58/EC on privacy and electronic communications of 12 July, 2002).

By fostering consumer confidence and minimising differences between Member States’ data protection rules, these directives facilitate the development of electronic commerce, and protection of personal data in the information age at the European Union level. The 1995 Directive also establishes rules to ensure that personal data is only transferred to non-EU countries that provide an “adequate” level of privacy protection.

³³ For a history of interception of communications see Bildirici, Faruk, *Gizli Kulaklar Ulkesi* (The Country of Hidden Ears), Istanbul: İletişim, 1999. See further Coskun, Enis, *Kuresel Gözetim: Elektronik Gizli Dinleme ve Görüntüleme*, Ankara: Umit Yayıncılık, 2000.

³⁴ See further TBMM İnsan Haklarını İnceleme Komisyonu’nun 7 Haziran 2001 15inci toplantısında telefon dinleme ve bu yolla elde edilen kayıt ve bilgilerin medyada yer alması üzerine gündeme getirilen usulsüz telefon dinleme konusunu araştırmak amacıyla 14 Haziran 2001 tarihinde kurulan alt komisyon raporu (Haziran 2002).

Although there is constitutional protection for a private life within the Turkish legal system (under section 5 of the 1982 Constitution, article 20 and article 22), there is currently no protection of personal data (through data protection laws or through any other regulatory means).³⁵ This issue deserves the highest consideration from the Turkish regulators and from the Turkish industry. The protection of personal data is essential for both the development of e-commerce and for establishing confidence and trust with online consumers, and users. Although there has been several attempts at legislation in this field in Turkey and although a draft legislation based upon the 1981 Convention is being considered at the Ministry of Justice, no considerable progress have been made in this field.

2.6. Freedom of Information

The right to information is guaranteed in international law, including as part of the guarantee of freedom of expression in article 19 of the International Covenant on Civil and Political Rights. Many countries around the world are now giving legal effect to the freedom of information as a fundamental right, both by enshrining access to information in their constitutions and by adopting laws which give practical effect to the right, providing concrete processes for its exercise.

Even though governments may recognise the importance of openness, the political and bureaucratic pressures to control information can be irresistible in many countries including in the western world. That is why legislation to guarantee openness – a freedom of information law is crucially essential.³⁶

FOI laws usually have a common format. They provide the individual with a right of access to documents held by government and other public authorities. Usually the applicant is not required to give reasons for, or justify his request, and the authority cannot withhold information from those it considers do not have a valid interest. Information can be withheld only where the law permits it. Exemptions to the right of access generally apply where disclosure would harm specific interests such as defence, security, international relations, law enforcement, privacy, commercial interests, or the decision-making process. Refusals can be challenged by appealing to (depending on the country) an existing ombudsman, a special information commissioner or commission, the courts, or a combination of these.

An insightful account of the role of freedom of information in a modern and democratic society is provided in section 3 of the 1999 Finnish Act on the Openness of Government Activities:

“to promote openness and good practice on information management in government, and to provide private individuals and corporations with an opportunity to monitor the exercise of

³⁵ The Turkish Ministry of Justice has been working on draft legislation on the Protection of Personal Data during 1998. The new proposals will follow the Council of Europe’s 1981 Convention and the European Union Directive. The new proposals cover the collection and processing of data by both public and private bodies. However, the April 1999 elections and a change of Government in Ankara delayed the enactment of this legislation. The new proposals discussed within the May 1998 E-Commerce Laws Working Party Report emphasise both the importance of facilitating the collection and processing of personal data and the protection of personal data of individuals in the information age. Turkish Republic Foreign Trade Office, E-Commerce Laws Working Party Report, 8 May, 1998.

³⁶ See generally Maurice Frankel, Freedom of Information: International Characteristics, paper given at a seminar entitled *Transparency in Europe* for government officials from EU member states, organised by the Dutch Ministry of the Interior, The Hague, 15-16 February 2001, at <<http://www.cfoi.org.uk/pdf/amsterdam.pdf>>.

public authority and the use of public resources, to freely form an opinion, to influence the exercise of public authority, and to protect their rights and interests.”³⁷

A freedom of information law in Turkey would help to achieve an open and transparent regulatory process and would promote openness and good practice within government departments. A draft piece of legislation entitled *Bilgi Edinme Hakki Kanun Tasarisi* is currently up for consultation through the Ministry of Justice. Although such legislation (if implemented) would not immediately change the culture of secrecy but would be the first important step towards openness within the government.

2.7. Human Rights and Europe

The building of “an ever closer”³⁸ Europe is a “democratic project which has arisen out of the political desire of democratic States to associate with one another in an ‘organisation of States’ featuring common institutions and acting on the basis of respect for human rights.”³⁹ The Treaty on European Union (Maastricht Treaty) including human rights provisions was signed in February 1992. Article F of the Maastricht Treaty stated that:

1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
3. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

This was amended by the Amsterdam Treaty,⁴⁰ and with the Treaty on European Union the EU member states have confirmed their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law. Article 6 (ex Article F) of the Treaty states that:

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

This is also regarded as a condition for membership to the European Union, and evidently the incorporation of such important human rights principles to the policy making process in Turkey is very important. It is possible for the Council of the European Union to decide to suspend certain of the rights deriving from the application of this Treaty to a Member State following the “existence of a serious and persistent breach by a Member State of principles

³⁷ See generally David Banisar, Freedom of Information and Access to Government Records Around the World, Privacy International, July 2, 2002, at <<http://www.freedominfo.org/survey.htm>>. See further Article 19, A Model Freedom Of Information Law, July 2001, at <http://www.article19.org/docimages/1112.htm>

³⁸ Article A, Common Provisions, Treaty on European Union (Maastricht Treaty).

³⁹ European Commission, Human Rights, Democracy, and Fundamental Freedoms (Building Europe Together), at <<http://europa.eu.int/en/comm/dg10/build/en/democ.htm>>.

⁴⁰ The Amsterdam Treaty: a Comprehensive Guide: Fundamental rights and non-discrimination, at <<http://europa.eu.int/scadplus/leg/en/lvb/a10000.htm>>.

mentioned in Article 6(1) (after inviting the government of the Member State in question to submit its observations)”.

Furthermore, in December 2000 the European Union Charter of Fundamental Rights, was signed at the European Council meeting in Nice.⁴¹ The text of the charter is based upon the fundamental rights and freedoms recognised by the European Convention on Human Rights and other conventions to which the European Union or its Member States are parties. Of particular relevance to this thesis are article 7 (Respect for private and family life), article 8 (Protection of personal data), and article 11 (Freedom of expression and information) as mentioned above. So these are important normative standards which needs to be adhered to at the European Union level and such fundamental rights need to be guaranteed at the national level.

The next section will deal with process standards for governance which are also linked to the normative conditions that are mentioned above.

2.8. Process Conditions

According to the World Bank, governance is “the exercise of political power to manage a nation’s affairs” and “good governance” involves:

“an efficient public service, an independent judicial system and legal framework to enforce contracts; the accountable administration of public funds; an independent public auditor, responsible to a representative legislature; respect for the law and human rights at all levels of government; a pluralistic institutional structure, and a free press.”⁴²

Self-organising networks largely control themselves. But autonomy not only implies freedom, it also implies self-responsibility.⁴³ A 1984 Report by the Chartered Institute of Public Finance and Accountancy (“CIPFA”) identified three fundamental principles which apply equally to organisations in the public and private sectors. They recommended openness or the disclosure of information; integrity or straightforward dealing and completeness; and accountability or holding individuals responsible for their actions by a clear allocation of responsibilities and clearly defined roles.⁴⁴

In many democratic countries and as well as at the European Union level such process standards are developed further into the principles of good regulation.⁴⁵ One good example of this is the UK Cabinet Office Regulatory Impact Unit’s Better Regulation Guide, and the

⁴¹ See <http://www.europarl.eu.int/charter/default_en.htm>. The full text of the Charter is published in Official Journal of the European Communities C 364/11, 18.12.2000, and is available at <http://www.europarl.eu.int/charter/pdf/text_en.pdf>. See further Fredman, S., “An E.U. Charter of fundamental rights,” (2000) *Public Law*, 178-186; Eicke, T., “European Charter of Fundamental Rights - unique opportunity or unwelcome distraction,” (2000) *E.H.R.L.R.* 3, 280-296; Betten, L., “European Community law: human rights,” (2001) *I.C.Q.L.* 50(3), 690-701.

⁴² See World Bank, *Governance and Development*, Washington DC: The World Bank, 1992 and Leftwich, A., “Governance, democracy, and development in the Third World,” (1993) *Third World Quarterly*, 14, 605-624 at 610.

⁴³ See W. Kickert, “Autopoiesis and the science of (public) administration: Essence, sense, and nonsense,” (1993) *Organization Studies* 14, 261-278.

⁴⁴ See CIPFA, The Chartered Institute of Public Finance and Accountancy, *Corporate Governance in the Public Services*, London: CIPFA, May 1994, at 6.

⁴⁵ For a good example of this see the UK Cabinet Office Regulatory Impact Unit’s Better Regulation Guide, and the Principles of Good Regulation, October 2000, at <<http://www.cabinet-office.gov.uk/regulation/taskforce/2000/PrinciplesLeaflet.pdf>>.

Principles of Good Regulation, published in October 2000.⁴⁶ The intention of the UK government was to get the balance right between “providing citizens with proper protection and ensuring that the impact on those being regulated is not such as to be counterproductive.”⁴⁷

The intention of developing the principles of good regulation was to offer a template for “judging and improving the quality of regulation”.⁴⁸ These principles have also been incorporated into the UK Government’s Guide to Regulatory Impact Assessment.⁴⁹ According to the Better Regulation Task Force

“Whilst recognising that there are differences about the levels of intervention, all governments should seek to ensure that regulations are necessary, fair, effective, affordable and enjoy a broad degree of public confidence.”⁵⁰

The principles of good regulation have been set out to achieve this sort of balance, and these are:

Transparency

- The case for a regulation should be clearly made and the purpose clearly communicated.
- Proper consultation should take place before creating and implementing a regulation.
- Penalties for non-compliance should be clearly spelt out.
- Regulations should be simple and clear, and come with guidance in plain language.
- Those being regulated should be made aware of their obligations and given support and time to comply by the enforcing authorities with examples of methods of compliance.

Accountability

- Regulators and enforcers should be clearly accountable to government and citizens and to parliaments.
- Those being regulated must understand their responsibility for their actions.
- There should be a well-publicised, accessible, fair and efficient appeals procedure.
- Enforcers should be given the powers to be effective but fair.

Proportionality

- Any enforcement action (i.e. inspection, sanctions etc.) should be in proportion to the risk, with penalties proportionate to the harm done.
- Compliance should be affordable to those regulated – regulators should ‘think small first’.
- Alternatives to state regulation should be fully considered, as they might be more effective and cheaper to apply.

Consistency

- New regulations should be consistent with existing regulations.
- Departmental regulators should be consistent with each other.
- Enforcement agencies should apply regulations consistently across the country.
- Regulations should be compatible with international trade rules, EU law and competition policy.
- EU Directives, once agreed, should be consistently applied across the Union and transposed without ‘gold-plating’.

Targeting

- Regulations should be aimed at the problem and avoid a scattergun approach.
- Where possible, a goals based approach should be used, with enforcers and those being regulated given flexibility in deciding how best to achieve clear, unambiguous targets.
- Regulations should be reviewed from time to time to test whether they are still necessary and effective. If not, they should be modified or eliminated.

⁴⁶ See <<http://www.cabinet-office.gov.uk/regulation/taskforce/2000/PrinciplesLeaflet.pdf>>.

⁴⁷ *Ibid.*, per Christopher Haskins, Chairman, Better Regulation Task Force.

⁴⁸ *Ibid.*

⁴⁹ The Cabinet Office Regulatory Impact Unit, Good Policy Making: A Guide to Regulatory Impact Assessment, at <<http://www.cabinet-office.gov.uk/regulation/2000/riaguide/default.htm>>. Note that the Regulatory Impact Unit web page is at <<http://www.cabinet-office.gov.uk/regulation/index.htm>>.

⁵⁰ Principles of Good Regulation at <<http://www.cabinet-office.gov.uk/regulation/taskforce/2000/PrinciplesLeaflet.pdf>>.

- Where regulation disproportionately affects small businesses, the state should consider support options for those who are disadvantaged, including direct compensation.

In addition to these above mentioned principles of good regulation, government regulators should also be aware of the five principles (*openness, participation, accountability, effectiveness and coherence*) that underpin good governance within the European Governance, A White Paper document published by the European Commission.⁵¹

Each principle is important for establishing more democratic governance. They underpin democracy and the rule of law in the Member States of the European Union, but in theory they apply to all levels of government – global, European, national, regional and local.:

- **Openness.**

- The government institutions and departments should work in a more open manner.
- They should actively communicate about what the government does and the decisions it takes.
- They should use language that is accessible and understandable for the general public. This is of particular importance in order to improve the public confidence.

- **Participation**

- The quality, relevance and effectiveness of government policies depend on ensuring wide participation throughout the policy chain – from conception to implementation.
- Improved participation is likely create more confidence in the end result and in the government which deliver policies.
- Participation crucially depends on government following an inclusive approach when developing and implementing its national policies.

- **Accountability.**

- Roles in the legislative and executive processes need to be clearer.

- **Effectiveness.**

- Policies must be effective and timely, delivering what is needed on the basis of clear objectives, an evaluation of future impact and, where available, of past experience.
- Effectiveness also depends on implementing EU policies in a proportionate manner and on taking decisions at the most appropriate level.

- **Coherence.**

- Policies and action must be coherent and easily understood.

Each principle is important by itself. But they cannot be achieved through separate actions. Policies can not be effective unless they are prepared, implemented and enforced in a more inclusive way.

These important principles should be applied to all forms of regulatory initiatives at the national level of Internet governance. An open and transparent policy making would generally lead into easy to understand regulation and legislation with clear aims and objectives. Furthermore, under the principles of good regulation, any regulatory action should be proportionate, and the effects of proposed regulatory action on citizens should be identified and a right balance between risks and cost should be analysed. Knee-jerk reactions to public and media pressures should be resisted and informed decisions should only be taken following extensive consultation with all interested parties.

Proportionality is also tied to the standards set out in the European Convention on Human Rights. Consistency is another principle which means that proposed regulation or legislation

⁵¹ European Commission, European Governance, A White Paper, Brussels, 25.7.2001, COM(2001) 428 final.

should be consistent with existent regulation and should be predictable apart from being targeted. Consistency should also take into account supranational developments within the European Union. This would mean that regulation should focus on the problems and reduce side effects to a minimum and “seek to reconcile contradictory policy objectives”.⁵²

These principles should not only be applied to state regulation but also to alternatives to state legislation such as self-regulation and co-regulation.

One would expect to see the normative conditions, and principles and process standards for governance being applied described in this White Paper as universal standards during the course of such co-operation. These should be referred to and applied not only in relation to national policy making in Turkey, but elsewhere as well as at supranational, and international level of Internet governance where similar co-operation is witnessed.

3. Towards a Better Policy Making Process in Turkey

It is important to identify policy objectives which can be achieved through state regulation in Turkey such as to protect and enhance the rights and liberty of citizens and to promote a safe and peaceful society. At the same time it is also important to consider ways of achieving policy objectives “without recourse to state legislation” as many of the same policy objectives that may be considered by governments, regulators, or by quasi-regulatory bodies could also be achieved with “little or no state legislation”.⁵³ Alternatives to state legislation “may be more flexible, cheaper and more effective.”⁵⁴ Government and industry partnership or government, law enforcement, and industry partnership for developing co-regulatory and self-regulatory⁵⁵ solutions could also be useful especially in relation to dealing with technical matters or in relation to problems that are multi-national in nature such as those created by the Internet.

This part of the report will address issues related to improving policy making process in Turkey. Risk and cost analysis is becoming an essential part of government thinking before any regulatory activity takes place in modern and democratic societies. For example, in 1988 the British government announced that no proposal for regulation which has an impact on business, charities or voluntary bodies, should be considered by government departments without a regulatory impact assessment being carried out. Therefore UK regulators are required to develop a Regulatory Impact Assessment (“RIA”) and this would help them to

- think through the full impact of their proposals,
- identify alternative options (such as self-regulation) to achieving the desired policy change
- assess options in relation to regulatory and non-regulatory methods of implementation
- ensure that the consultation exercise is meaningful and reaches the widest possible range of stakeholders
- Inform negotiations in the EU
- determine whether the benefits justify the costs
- determine whether particular sectors are disproportionately affected

The purpose of the RIA is usually to explain the objectives of the proposal, the risks to be addressed and the options for delivering such objectives. It should make transparent the expected costs and benefits of the options for the different bodies involved, such as other parts

⁵² Principles of Good Regulation, page 7.

⁵³ *Ibid.*, page 4.

⁵⁴ Better Regulation Task Force report, *Alternatives to State Regulation*, July 2000.

⁵⁵ Note the Better Regulation Task Force interim report on *Self-Regulation*, October 1999.

of Government and small businesses, and how compliance with regulatory options would be secured and enforced.

Ideally a RIA should be drafted at an early stage in policy making to advise Ministers and be developed in the light of further evidence and consultation. Policy makers should send the RIA to interested parties for comment, and summarise their responses. The RIA is then usually submitted to the relevant Government Ministers who, following consideration, are asked to sign it off with a statement that in their opinion the benefits justify the costs. The final version accompanies the submission of legislation to Parliament.

Such a regulatory impact assessment exercise should also be adopted in Turkey. Such an exercise is crucially important where regulation concerns the development of an information society, e-government, and all aspects of electronic commerce in Turkey.

3.1. When should an RIA be prepared?

It is always good practice to produce an RIA as a structured way to inform policy-making, but government departments must prepare an RIA for all proposals (legislative and non-legislative) which are likely to have a direct or indirect impact (whether benefit or cost) on businesses, on the voluntary sector, and society as a whole. This should include proposals which reduce costs on business and others, as well as those that increase them.

A similar approach should also be taken when European Union, and other international (such as Council of Europe, and United Nations) instruments are incorporated into Turkish legislation.

What makes a good RIA?

A good RIA will:

- Include the best information available at the time.
- Be clear, concise and proportionate to the problem/risk it is addressing.
- Be a stand-alone document, explaining the problem clearly, setting out the alternatives to regulation (such as self or co-regulation) and the options, without the need to refer to other documents.
- Use plain Turkish
- Avoid technical terms that are unintelligible to the lay person.
- Provide a clear statement of the objectives
- Describe, and where possible, quantify, the scale of the issue
- Identify who is affected
- Identify any issues of equity and fairness
- Flag up any potential unintended consequences
- Identify regulatory and non-regulatory alternative options
- Examine what is already known about the costs and benefits
- Try to identify markets that may be affected and flag up any potential competition issues
- Consider how to secure compliance
- Consider the pros and cons of each option and the fit with existing requirements on the relevant sector

3.2. Better Policy Making

“It is government policy that regulation, where it is needed, should have a light

touch with the right balance struck between under-regulating (so failing to protect the public) and over-regulating (so creating excessive bureaucracy).⁵⁶

In their report, “*Better Regulation: Making Good Use of Regulatory Impact Assessments*” (2001), the UK National Audit Office said that RIAs add value to the policy making process and can help deliver better and lighter touch regulation. The UK National Audit Office produced a checklist setting out key points which they found deserve particular attention if good use is to be made of RIAs. (see appendix I)

The use of RIAs will undoubtedly lead into open, transparent, and better policy making process, and early consultation would help government departments to obtain an informed view of risks, options and a broad indication of the likely costs and benefits involved. Though such an early assessment should NOT be seen as a substitute for wider consultation later in the policy making process, but it should help government departments plan to make that consultation more effective. Depending upon the nature of the policy proposal, involving external experts and large umbrella organisations at an early stage should also be considered. This could help to identify and avoid any unintended consequences of governmental policy proposals and identify alternatives to regulation at an early stage. This sort of early informal consultation can also lead to better formal consultation.

3.3. Identifying options

Government departments and ministers should identify a wide range of options, including **alternatives to regulation** as well as **doing nothing**.

Remember, legislation may not always be necessary!

Alternatives to state regulation include and some of these possible options will be discussed later on in the report:

- Do nothing
- Information and education campaigns (eg product labelling or media campaigns)
- Market-based instruments (eg taxes, subsidies)
- Pre-market assessment schemes (eg certification and licensing)
- Post-market exclusion measures (eg bans, recalls, licence revocation provisions and “negative” licensing).
- Service charters
- Codes of practice
- Self or co-regulatory standards and initiatives (eg voluntary and regulatory, performance-based or prescriptive)
- Other mechanisms eg public information registers, mandatory audits and quality assurance schemes.

⁵⁶ UK National Audit Office, *Better Regulation: Making Good Use of Regulatory Impact Assessments*, November 2001.

3.4. Analysing the costs, risks and benefits of a government proposal

The risks, costs and benefits for each possible option should be carefully assessed apart from identifying those parts of the society or business sectors affected and the impact of the possible regulatory action on such groups.

Benefits

The benefits of regulatory action should be identified by thinking about the aim of the proposal – if it is to improve consumer health then the benefit should be a reduction in illness/death. On the other hand if it is to facilitate exchange of contracts in an online environment, it should be the recognition of digital signatures in law. It is also crucial that the benefits of government regulation should outweigh its detrimental impact upon society.

Costs

The costs should also be identified by thinking about the aim of the proposal. Will the proposal result in changing practices within the business sector? Will it require citizens to pay extra tax? What costs will the public sector bear in complying with such a proposal, and in enforcing and monitoring it? Will consumers bear any direct costs? These sort of questions should be answered at an early stage of a government proposal which could lead into regulation.

Costs should be separated into **policy and implementation costs**.

The separation of policy and implementation costs is important for several reasons. Firstly, policy costs represent the essential costs of meeting the policy objectives while implementation costs usually arise from the regulatory aspects of the policy (familiarisation with the requirements, monitoring and enforcement, proving compliance etc). Identifying the implementation costs separately sheds light on the extent to which it would be desirable to find an **alternative to regulation**. Secondly, the relative magnitudes of the two categories reflect how efficiently the policy would be implemented and therefore how well it is designed and thought through.

How to identify and quantify the risk?

Risk should be an important issue for all parts of Government.

Risk is a broad term which can usefully be broken down into different types of risk, including technological, contractual, physical, financial, personnel and environmental risks. Good policy making demands the management of risk by not only governments but also by the private sector. Risks, particularly those to public health and safety and the environment, are an important consideration in a large number of policy and regulatory decisions.

The key questions for government are **which risks require intervention** and **what form** such intervention should take. The on-going challenge is to protect the public, including vulnerable groups and the environment properly, whilst keeping restrictions on personal freedom and choice (by complying with the above mentioned human rights standards), and costs to business, acceptably low. In so doing the government must also **secure the trust** of the public that the arrangements in place are adequate to ensure that they, and things they value, are secure.

Therefore government management of risks needs to be seen as part of good policy making. Moreover, the decision making process must be flexible enough to take into account that people are more averse to certain risks than others, depending on factors such as how well understood the risk is, whether the risk is assumed voluntarily, and the benefits that they and society derive from the risk.

Another important ingredient of risk management is risk communication. Good communication allows people to participate in and be represented by decisions made about risk. And it plays a vital part in putting decisions into practice – whether helping people to understand regulations, informing them and advising them about risks they can control themselves, or dissuading them from antisocial and risky behaviour.

Developments in science and information technology, and an increasingly sophisticated and educated population, also mean that attitudes to risk are changing. As a result, there are growing demands from the public for explanations on how governments and government departments reach decisions on risk, and calls for more openness and transparency in that process.

3.5. Impact of government regulation on E-commerce and Information Society

As a general rule, when the costs, options for compliance and impact on business, consumers and other end users are considered, government departments should take into account the impact of their proposal on e-commerce and the development of an information society in Turkey. The Office of the e-Envoy in the UK has developed a set of e-policy principles to help government departments ensure that their legislative and policy proposals do not hinder the development of e-commerce, and can work effectively in the e-world.

It is intended that these e-policy principles will help government departments to consider the impact that local, national, European and other international policy decisions and legislative proposals may have on e-commerce.

Summary of the E-Policy Principles

1. **Always establish the policy consequences for e-commerce:** When evaluating your proposals, consider what the impact on e-commerce will be. Consider how the electronic world may add value to what you are trying to achieve.
2. **Avoid undue burdens on e-commerce:** A Regulatory Impact Assessment will assess the costs and benefits of a proposal including the implementation costs to business. In considering the costs, options for compliance and impact on business, consumers and other end users, it is important to take into account the special features of e-commerce.
3. **Consider self and co-regulatory options:** To encourage trust and fast, effective resolution of problems, the Government is pursuing a policy of promoting co-regulation between providers, users and regulators.
4. **Consult fully on e-commerce implications:** As with any policy decision or legislative proposal, early consultation with the relevant stakeholders is essential.
5. **Regulation should be technology neutral in its effects:** The effects of the offline and online regulatory environments, including the criminal and civil law, should be as similar as possible. There may be occasions when different treatment is necessary to realise an equivalent result.
6. **Check that your proposals are enforceable in an electronic age:** Regulation and legislation must be enforceable to be effective.
7. **Take account of the global market place – the EU and international angle:** Regulatory regimes need to be reviewed and reformed at the international as well as domestic level to ensure they provide for e-commerce.
8. **Consider the implications for e-Government:** Where any policy change involves the delivery of public services or other activity, you should consider at the outset how this might be done electronically.

Incorporation of such important policy principles in the work of governments and government departments could help to ensure that policies developed by various organisations do NOT have a detrimental impact upon the development of an information society in Turkey.

4. Regulatory Models and Alternatives to State Regulation

This section of the report will describe the alternatives to state legislation and will explain the strengths and weaknesses of each possible alternative to state legislation. Although state legislation is still a strong possibility and maybe required in most instances, problems associated with the Internet may require the careful consideration of alternatives to state regulation. While a law on digital signatures would bring legal clarity and certainty, the same may not be true for content regulation, and cyber-crimes. Due to the global and decentralised nature of the Internet, government regulation may not be the best alternative to tackle global problems, and jurisdictional issues should be taken into account while policies are developed at the national level.

Depending upon their application the models of regulation discussed below could be complimentary and could be seen as an additional tool rather than an alternative to state regulation. For example although the best way of tackling the problem of privacy of communications and processing of personal data is by means of introducing a law on data protection, this may not be effective alone to tackle the problem. Self-regulatory and co-regulatory schemes may be required to backup such a massive piece of legislation, and the government, the industry, and the civil society may be required to work together to effectively introduce the concept of “data protection” and “privacy” in Turkey. The same principles apply

for example, in the case of “freedom of information” and the implementation of a culture of openness and transparency within the regulatory process in Turkey. Laws and rules alone will not be enough to achieve such important state goals.

Regulation is often designed to reduce risk but alternative methods can be less costly, more flexible and more effective than prescriptive government legislation. These include the option “to do nothing”, self-regulation, co-regulation, and information and education campaigns. It is important to start with the analysis of state regulation and outline its strengths and weaknesses.

4.1. State Regulation

In general terms state regulation could be defined as any government intervention or measure which controls, directs or restricts the behaviour of individuals, or sectors of society, so as to:⁵⁷

- Protect and enhance the rights and liberty of citizens;
- Promote a safe and peaceful society;
- Collect taxes and ensure that they are spent in accordance with policy objectives;
- Safeguard health and safety or protect citizens from "harming" themselves;
- Protect consumers, employees and vulnerable groups from abuse;
- Promote the efficient working of markets;
- Protect the environment and promote sustainable development.

Traditionally governments choose to regulate when faced with a problem, and it would be good to outline the strengths and the weaknesses of government regulation.

Legislation: the strengths

- Legally imposed rules draw *authority and legitimacy* from the democratic process. They are the principal means for achieving political objectives (in this context, setting out the nature and extent of market intervention).
- Whether criminal, civil or administrative, their effect is *coercive*: businesses cannot choose whether to follow the rules or not.
- They have *universal application*, applying to every business or activity within the scope of the particular rule: ignorance of the law is no defence.
- They are *adaptable*, in the sense that their content can be as broad, or as detailed, as necessary. There are no restraints on what can be included, other than those imposed by the democratic process involved in making them.
- They have *credibility* by virtue of their status, and by their nature (at least in principle) achieve objectives which will not result from voluntary action.

Legislation: the weaknesses

- There are difficulties in securing political attention and *legislative time*, both for introducing and amending legislation.
- Legally enforceable standards are usually written *in negative terms*, giving business an incentive to avoid breaking standards but doing nothing to promote a positive approach to satisfying the customer.
- Legislation written in general terms leaves too much *discretion* to businesses and regulators. But clarity and certainty tend to produce *complexity and loss of flexibility*.
- The comparatively minor nature of many trading offences and, often, the need for strict legal liability, make the criminal law an *unwieldy and inappropriate vehicle* for regulation.

⁵⁷ Better Regulation Task Force, December 1997 (revised October 2000), Principles of Good Regulation.

Legislation that is concerned with subjective matters, often seeking to regulate a wide variety of different commercial and organisational practices, can be particularly unsatisfactory.

- Legislation is *costly* in interpretation, application, and enforcement.
- *Law enforcement by a statutory body is no panacea*: statutory regulators can sometimes tend towards over-zealous aggression, complacency, or under-resourced impotency. Evidential, procedural and due process requirements (including those imposed by human rights legislation) can also handicap flexibility and effectiveness. And credibility can be undermined by bureaucratic delay and the threat of legal challenge from regulated businesses.
- Legislation can have *unintended costs or side-effects* which do not serve consumers' interests.
- Traditional legislative routes *cannot tackle modern forms of business practice* – for instance, telephone transactions (there is often no record of what was said or done) or the anticipated explosion in electronic commerce.

However, it should be noted that as far as the Internet or other new communications technologies are concerned, the decentralised nature of the Internet means there is no unique solution for effective government regulation at the national level. But, it would be wrong to dismiss the role that may be played by the governments especially for maintaining the policing of the state and for co-ordinating and aligning national policy with initiatives and policies at both supranational and international levels of Internet governance. Moreover, in most instances government regulation could be seen as a positive step towards achieving state goals and certainly the development of comprehensive data protection legislation in Europe has been seen as positive towards creating trust and confidence for e-commerce. On the other hand new laws may be necessary to tackle new crimes, or behaviour that has not been criminalised previously in Turkey. This is certainly the case so far as the problem of Internet child pornography is concerned. So the ratification of the UN optional protocol through the *Çocuk Pornografisi konusunda 4755 Nolu Çocuk Haklarına Dair Sözleşmeye Ek Çocuk Satışı, Çocuk Fahiseligi ve Çocuk Pornografisi ile İlgili İhtiyari Protokolün Onaylanmasının Uygun Bulunduğu Hakkında Kanun (Resmi Gazete Tarihi 14/05/2002)* is welcome. However, the provisions of the UN optional protocol need to be incorporated to the Turkish Criminal Code. Hence the continuing importance of the government in the information age. But undoubtedly the global and decentralised nature of the Internet will lead into a fragmented regulatory environment rather than “no government” involvement at all and therefore it is worth considering the alternatives to state regulation as these maybe necessary to achieve other government goals.

The first alternative to state legislation to consider is the option to do nothing.

4.2. Do nothing?

In some cases it is possible that government action will not improve the problem. Government action may only shift the problem elsewhere, or the costs of Government action may be greater than the costs imposed by the problem it is designed to correct. The cause of the problem should also be considered in this scenario. It is possible that the problem may have been caused by previous Government action and there may be areas of existing regulation that need to be removed, simplified or amended in order to resolve the problem.

4.3. Self-Regulation

Self-regulation remains the strongest alternative to state regulation. An industry or sector can self-regulate, by producing its own rules and codes of conduct, which it then enforces. Self-regulation means in essence that rules which govern behaviour in the market are developed, administered and enforced by the people (or their direct representatives) whose behaviour is to be governed. Self-regulation is usually, but not necessarily, a collective activity, involving participants from a market sector who agree to abide by joint rules, much like a club membership. It is also (at least nominally) voluntary, with benefits perceived for those who participate. Moreover, there is often considerable outside pressure to self-regulate. And there are many ways in which independent interests can, and should, have an influence on self-regulatory arrangements.

Self-regulation: the strengths

- Voluntary initiatives can be a flexible, cost-effective way of tackling problem areas. Self-regulation implies a clear wish by participating traders to distinguish themselves from those with lower standards. The business benefits when customers actually seek out traders who observe self-regulatory requirements.
- Self-regulation can not only ban detrimental practice, it can also *benchmark best practice* over and above the basic minimum requirements.
- An arrangement that is drawn up by, or with, members of an industry will be ‘owned’ by them. It will be tailor-made for the needs and problems of that particular sector, and will (at both design and enforcement stages) reflect inside knowledge about the realities of that sector.
- It should be *quicker and less costly* to put in place (and adapt to changing needs) than legislation.
- It can more easily deal with matters of subjective judgement, such as questions of decency.
- It can address *complex areas* – especially where common values and assumptions are shared – without attracting the disadvantages of complex legal requirements.
- It can put *the burden of proof of compliance* on the trader.
- *Redress can be achieved more quickly and cheaply* than legal remedies through civil proceedings.
- The *cost of self-regulation* can be laid on the trade or industry involved (although this is increasingly true of statutory regulation as well).

Self-regulation: the weaknesses

- The outstanding drawback with a self-regulatory arrangement is that *it does not apply to those traders who are not members of such a scheme*. And where there is only partial coverage, it is often those who stay outside the scheme who tend to be the main cause of consumer problems.
- On the other hand, of course, where there is full coverage across a business or professional sector there can be *a strong tendency towards anti-competitive behaviour*, especially where self-imposed restrictions impose barriers to entry or make it difficult for consumers to exercise informed choice. Effective self-regulation organised on any sort of collective basis involves some form of cartel-type restrictions. The more these lack any features that might bring them under the scrutiny of the competition authorities, the less likely they are to produce tangible and meaningful benefits for consumers. For instance, it is easy for self-regulation to lead to unnecessarily high prices. So there is a very narrow line between ‘self-regulation in the public interest’ and ‘restrictive practices’.
- There can be *distortion of the market*. Non-members of a self-regulatory scheme do not have to follow the rules, so they can under-cut the market with lower standards.

- Even participating traders *may not take self-regulatory requirements seriously*.
- A plethora of codes and, often, their inaccessibility make it difficult to *educate* traders, consumers and their respective advisers about their *obligations and rights*.
- *A limited range of sanctions* is available for breach of self-regulatory rules. The usual sanctions would be expulsion (a step a trade association, for example, may be reluctant to take) or a fine (which seems rare in practice). Sometimes there is *no sanction* within such self-regulatory codes.
- *Public confidence may be lacking*: there can be scepticism about the commitment of business interests to content of regulations and their enforcement.
- There are real and perceived doubts about the ability of professional or trade bodies to both represent the interests of their members and aspire to a public interest role. *Doubts about impartiality* are especially acute where the self-regulator is responsible for enforcement, or is involved in adjudicating disputes between consumers and traders.
- Inadequate self-regulation may act as *a barrier to adequate legislation*.
- As with legislation, if there is no commitment and resources for monitoring and enforcement, *effectiveness will be limited*.

Self-regulation works best within a legal framework

Self-regulation and legal regulation are not black-and-white opposites. It is widely accepted that the right balance has to be found between the two. Self-regulation, at its best, can be seen as a co-operation between the regulator, regulated and those in whose interests regulation is made.

It is important to ensure that self-regulating arrangements do not protect or confer commercial advantage on one group over another, or exclude entrants to an industry, fix prices or limit competition. They may also affect consumers, for example by reducing the ability of consumers to choose lower costs and/or lower quality products and services.

Therefore for self-regulation to work effectively, there may be a need for a concept of co-regulation which is underpinned by legal regulation otherwise the above mentioned weaknesses can cause distortion of the market or could lead into ineffective monitoring and enforcement leading into public confidence lacking.

The credible self-regulatory scheme: a checklist

1. The scheme must be able to command **public confidence**.
2. There must be strong **external consultation and involvement** with all relevant stakeholders in the design and operation of the scheme.
3. As far as practicable, the operation and control of the scheme should be **separate** from the institutions of the industry.
4. Consumer, public interest and other **independent representatives must be fully represented** (if possible, up to 75 per cent or more) on the governing bodies of self-regulatory schemes.
5. The scheme must be based on **clear and intelligible statements of principle** and **measurable standards** – usually in a Code – which address **real consumer concerns**. The objectives must be rooted in the reasons for intervention.
6. The rules should **identify the intended outcomes**.
7. There must be clear, accessible and **well-publicised complaints procedures** where breach of the code is alleged.
8. There must be adequate, meaningful and commercially significant **sanctions** for non-observance.
9. **Compliance must be monitored** (for example through complaints, research and compliance letters from chief executives).
10. **Performance indicators** must be developed, implemented and published to measure the scheme's effectiveness.
11. There must be a degree of **public accountability**, such as an Annual Report.
12. The scheme must be **well publicised**, with maximum education and information directed at consumers and traders.
13. The scheme must have **adequate resources** and be funded in such a way that the objectives are not compromised.
14. **Independence** is vital in any redress scheme which includes the resolution of disputes between traders and consumers.
15. The scheme must be regularly reviewed and **updated** in the light of changing circumstances and expectations.

Self-regulation for example maybe considered in relation to the Internet Service Providers. Often ISPs are thought to be legally responsible for third party content going through their servers or for the behaviour of their users. However, although no ISP controls third party content or all of the backbones of the Internet, or the Internet itself, the crucial role they play in providing access to the Internet made them visible targets for the control of “content on the Internet”. In recent years, there have been attempts to hold ISPs liable for carrying or providing illegal content through their servers even though the content has been originated by third parties. It follows that the responsibilities for content must be allocated at various points rather than concentrated within one all-purpose “policing” organisation and the chain of responsibility needs to be clearly defined at a national level. The international developments in this field need also be taken into account. The EU Electronic Commerce Directive encourages the drawing-up of codes of conduct in this field in addition to legal solutions that may be adopted at the Member States level and great emphasis is given on industry self-regulation as the best way forward in this complex area.

4.4. Co-Regulation

In some instances, there may be strong linkage between government aims and the self-regulatory solutions offered by the industry to achieve government's aims. Co-regulation aims at combining the advantages of the predictability and binding nature of legislation and the more flexible self-regulatory approach. Co-regulation could therefore be described as

indicating “situations in which the regulator would be actively involved in securing that an acceptable and effective solution is achieved.”⁵⁸ In such situations, the regulator may for example “set objectives which are to be achieved, or provide support for sanctions available, while still leaving space for self-regulatory initiatives by industry, taking due account of the interests and views of other stakeholders, to meet the objectives in the most efficient way.”⁵⁹

In such a scenario, strong co-operation between the industry players, the government, and law enforcement bodies would be inevitable and in most cases the government would have a leading role for setting the agenda as in the case of interception of communications and policy issues related to the protection of children and the Internet.⁶⁰ Such co-operation could lead into co-regulatory initiatives as an alternative to state regulation⁶¹ especially in areas in which achieving the state political aims by means of legislation (or nation-state regulation) is not possible or satisfactorily effective. Even though the objectives of the state may change from time to time, co-regulatory and self-regulatory solutions would provide the flexibility required to adopt to the needs or new objectives of a certain state. At the same time with co-regulation, “the regulator will ... have scope to impose more formal regulation if the response of industry is ineffective or not forthcoming in a sufficiently timely manner.”⁶²

The advantages of a co-regulatory system are therefore the legitimacy and transparency of the public process combined with the expertise and flexibility of the self-regulation process and the assuming of responsibility by stakeholder bodies. Such a system would also lead into improved credibility, lower administration costs for the government, enhanced flexibility, and rules which are tailored to specific needs

4.5. Information and education campaigns

Finally, information and education campaigns can improve market functioning by enabling people to make better informed decisions. This allows people to choose what is best for them, taking account of the information that is available, rather than imposing one solution for all.

Information can be provided through government action in two ways:

- By requiring companies to disclose information about certain features or attributes of the product to consumers e.g. labelling requirements; and
- Through the government collecting and disclosing information to the public eg anti-smoking campaigns.

So far as the Internet, e-commerce, and the creation of an information society in Turkey is concerned, the government needs to take a pro-active role in educating consumers about their rights and how to enforce them; and campaign with consumer watchdog organisations to raise awareness of consumer rights.

⁵⁸ White Paper, *A New Future for Communications*, December 2000, Cm 5010, at <<http://www.communicationswhitepaper.gov.uk/>>, page 83. See further Culture, Media and Sport, *Second Report on the Communications White Paper*, Volume I HC 161-I, 15 March 2001.

⁵⁹ *Ibid.*

⁶⁰ Home Office Task Force on Child Protection on the Internet, Improving child protection on the Internet: A partnership for action, Home Office News Release, 29/03/2001, at <http://www.cyber-rights.org/documents/safe_uk.htm>.

⁶¹ See generally Better Regulation Task Force report, *Alternatives to State Regulation*, July 2000.

⁶² White Paper, *A New Future for Communications*, December 2000, Cm 5010, p 83 and para 6.3.

Therefore an informed judgment can only be made following the extensive analysis of the alternatives to state legislation. In most cases some of the alternatives maybe considered along state legislation and self-regulation or extensive awareness campaigns may co exist with state legislation. But on the other hand sometimes it may be appropriate not to legislate immediately and tackle the problem in question with one of these alternatives. This study tried to highlight the effectiveness of various regulatory actions that maybe taken by the Turkish government and the need for an informed decision during the regulatory process.

5. Developing a working mechanism in Turkey

The global, decentralised and borderless nature of the Internet means that it is not possible for the individual governments to regulate effectively and satisfactorily to address Internet related problems and issues. This means that the nature of government regulation, thinking, and policy making need also to adopt to the changes that are the result of improvement in technology and especially in global communications. The role of the governments are still crucially important and pivotal but there needs to be more emphasis on such concepts as “risk analysis”, “co-operation”, “co-ordination”, “consultation”, “co-regulation”, and “self-regulation”. Rather than rushing into legislating, governments need to assess carefully the “risks” associated with Internet usage or the availability of certain types of content over the Internet such as child pornography. This also needs to be done by a policy process which is open, transparent, and inclusive of the views of all interested parties. As discussed above alternatives to state legislation will also need to be part of the government agenda for developing Internet related policies.

5.1. Recommendations for Good Internet Regulation in Turkey

The Turkish Government should

- Modernise the Turkish policy making process in the short term
- Ensure that policymaking in this field is undertaken by policymakers who are well informed about the unique nature of the Internet and have direct experience with its use
- Ensure that such policies are developed with substantial input and comment from all interested parties including the Internet industry, the academia, non governmental organisations, and Internet users.
- Respect fundamental human rights enshrined in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights.
- Enable access to government information including legislative, judicial and executive branch information through the Internet. Such access should be backed up by a legal right to public information through the enactment of a Turkish Freedom of Information law.
- Ensure access by Turkish citizens to the Internet and enable full participation in the global information society. In particular, access to the Internet by schools, libraries and other public institutions should be viewed as a policy goal, subsidised as necessary.
- Provide an open and transparent policy making process
- Conduct risk analysis prior to regulation and consider the alternatives to state legislation
- Ensure that Turkish policy is inline with EU policy
- Monitor systematically international legal and policy initiatives
- Ensure systematic representation and participation of Turkey within the international forums that develop Internet related policies (including but not exclusively at the Council of Europe, United Nations, the OECD, and the European Union level)

The above principles should be seen as additional principles to those which were set out at the Ankara Iletisim Surasi in February 2003. While such a principled approach is incorporated to the government thinking, high priority should be given to raise consumer trust and confidence

as a pre-requisite to entry to the information age. But the modernisation of the Turkish policy making process in the short term remains as a high priority.

Appendix I - Key questions for policy makers when preparing a Regulatory Impact Assessment

Getting started - the Initial RIA⁶³

Start early - the RIA should facilitate informed consideration of the options available for achieving the objectives of the envisaged regulation, and an Initial RIA should, wherever possible, be produced before decisions are made or there is a commitment to legislate. For EU legislation this should be in time to inform negotiations on the proposed Directive etc.

Identify the objectives - the problem and risks to be addressed, and the desired outcomes. This is necessary before the options can be considered.

Plan the process - project management principles and techniques provide a useful discipline which can help ensure that all aspects are planned for. In drawing up a timetable work back from any deadline for legislative implementation to allow enough time for each key stage, especially for consultation.

Consult early - with the Small Business Service and other policy makers having responsibility in relation to the industry or sector concerned, enforcement bodies and representative bodies, to obtain an informed view of risks, options and a broad indication of the likely costs and benefits concerned. This is not a substitute for effective consultation with the broader spectrum of those concerned later in the process, but should help with planning how effective consultation can be undertaken.

Assess the risks being addressed - identify how prevalent the problem to be addressed is, the gravity and nature of the consequences, and highlight areas where more information is needed.

Identify a wide range of options - including self-regulation and non-regulatory options. Where the broad policy direction is already determined the focus should be on options for implementing the desired solution most effectively.

Consider compliance - the level of compliance with existing regulation and good practice can indicate the types of solutions most likely to achieve the desired outcome. Regulatory solutions are effective only as far as they are complied with, and the way they are implemented can affect the extent as well as the costs of compliance. Adapting existing business or regulatory processes may make compliance easier and hence more likely.

Obtaining a clear picture - the Partial RIA

Think through the consultation process - it may need to cover other public sector bodies, charities and voluntary organisations as well as businesses. A good quality response is important and people may be more responsive if consultation on the RIA precedes formal consultation on draft legislation. Make it easier for respondents to respond to the assumptions in the RIA, for instance by asking a few clear questions up-front. Include questions on the estimates of costs and benefits in the RIA.

Obtain representative views from small businesses, charities etc - take advice from the Small Business Service on the "litmus test" and consider asking for their assistance. The test

⁶³ These are taken from the UK National Audit Office Checklist.

should involve small sufficient businesses, charities etc to be representative. Such bodies respond best to direct face to face or telephone interview when the impact of the regulatory proposal and options can be talked through and a clear view of the likely impact obtained. Focus groups may also be valuable. Sufficient businesses should be selected to be representative of different types of business or sectors. The findings from the test should be included in the RIA sent out for general consultation.

Analyse separately how costs and benefits apply to different sectors and types of business - including small businesses and consumers. A proposal that is proportionate overall may be disproportionate for some sectors, especially small businesses. Can the impact in these cases be mitigated?

Place the RIA on the web - as soon as it is prepared, so that it is readily accessible to those concerned and where appropriate link it to the relevant consultation document.

Quantify costs and benefits appropriately - so as to demonstrate that the preferred option is the most effective and is proportionate. Benefits should be quantified unless they are evidently overwhelming but this is often not easy and may necessitate surveys or sophisticated analytical techniques. Precise monetary values are not necessary –informed figures as to what is likely to happen to which people are, wherever they can be obtained.

Keep an open mind on options - quantify the costs and benefits of all practicable options, and be alert for ways of making compliance easier and more likely. Particular attention should be given to self-regulatory options as voluntary compliance can be more effective and less costly.

Consider compliance in detail –obtain a clear view of how those affected, including enforcement bodies, will comply with the proposal, perhaps by drafting and consulting on a skeleton of the step by step guide to compliance that will eventually be needed. This should feed into the estimation of costs and benefits. Consider and consult on what action will be needed to inform those affected about the proposal once it is implemented, including enforcement bodies.

Pulling it together - the Final RIA

Firm up on compliance and enforcement - explain the steps being taken to ensure that those affected know what is expected of them and what guidance, seminars, publicity etc will be issued for this purpose. Set out the actions the enforcement body expects to take to secure the intended compliance rate.

Summarise the results of consultation - including response rates, responses from different sectors or types of business/body where these vary and how proposals have been modified to reflect significant concerns.

Explain arrangements for any review - including when any review will be carried out, how data will be collected, how compliance will be monitored and what expertise will need to be drawn upon, bearing in mind the importance of the review informing future legislation in the area.