

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

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Written By **Dr. Yaman Akdeniz**, Lecturer in CyberLaw, University of Leeds, United Kingdom. Director, Cyber-Rights & Cyber-Liberties (UK), and a 2003 Fellow of the International Policy and Information Policy Fellowship programmes of the Open Society Institute.

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Contact: Dr. Yaman Akdeniz, Department of Law, University of Leeds, Leeds LS2 9JT.
E-mail: lawva@cyber-rights.org Tel: 07798 865116 Fax: 0113 3435016

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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 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. This also needs to be done by a policy process which is open, transparent, and inclusive of the views of all interested parties. Consideration of 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 policy paper to address these issues and make recommendations for Good Internet Governance in Turkey. The report recommends to the Turkish Government that they should:

- Modernise the Turkish policy making process in the short term
- Provide an open and transparent policy making process
- Conduct risk analysis prior to regulation and consider the alternatives to state legislation
- 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 Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights.
- Enable access to government information including legislative, judicial and executive branch information through the Internet. Public authorities should comply with the requirements of the Right to Information Act 2003 which came into force on 24 April, 2004.
- 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.
- Ensure that the eEurope+ 2003 Turkey plan (as part of the European Commission’s eEurope+ 2003 Plan) is fully implemented in the short term.
- Ensure that the recently launched E-Transformation Turkey project’s Short Term Action Plan is compatible with the normative and process conditions explained in this report.
- 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)

Part I - Introduction

Aims and Objectives

This policy paper entitled *Internet Governance: Towards the modernisation of policy making process in Turkey* aims to identify the various possible modes and models appropriate for Internet governance in Turkey. The paper will argue that the modernisation of the Turkish policy making process in the short term is needed for good Internet governance. Only an open, transparent and co-operative policy making process which includes all stakeholders within the policy process can achieve the best results towards the creation of an Information Society in Turkey.

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 other stakeholders such as the industry, the NGOs working in this field, and the society as a whole will also be highlighted in this policy paper.

Impact of the Internet on Nation-State Policy Making

The policy paper 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.

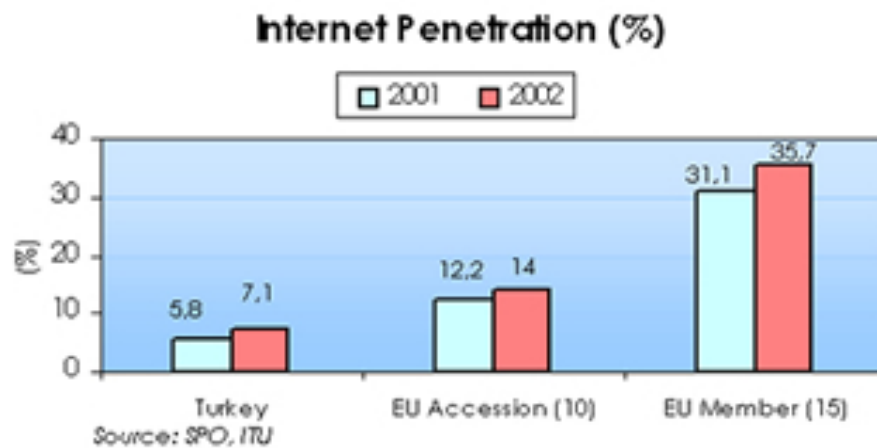


Figure 1¹

Different nation-states present a different level of economic development, respect for rights, trans-nationality, technological sophistication, and e-readiness.

¹ See the Information Society Department pages of the State Planning Organisation at <<http://www.btdb.gov.tr>>.

e-Readiness Index

Rank	Country	Point
1	Finland	5.92
2	USA	5.79
3	Singapore	5.74
4	Sweden	5.58
5	Island	5.51
6	Canada	5.44
7	UK	5.35
8	Denmark	5.33
9	Taiwan	5.31
10	Germany	5.29
...
...
50	TURKEY	3.57
...

Source: World Economic Forum

Figure 2²

While Turkey maybe considered at a developing stage with respect to the Internet, other states 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 governance 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 France³ and in Germany⁴] can set the pace.”⁵ Normative conditions such as the international human rights standards that nation-states adhere to can help to prevent the least tolerant states setting the standards.

² Turkey is ranked at number 56 within The Networked Readiness Index 2003-2004 prepared by the World Economic Forum, at <http://www.weforum.org/pdf/Gcr/GITR_2003_2004/Rankings.pdf>.

³ *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.

⁴ 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>>.

⁵ 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.

Multi-layered Approach?

The development of new communications technologies such as the Internet and its global and decentralised nature will undoubtedly affect any state including Turkey. At the same time, as mentioned above, 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.

A multi-layered approach to Internet governance (see *figure 3* below) is therefore, unavoidable and, will be adopted throughout this policy research paper 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.



Figure 3

A multi-layered model would mean that different players at different levels may be involved in the governance of different matters. While the Internet provides a great challenge for governance, the fragmented levels of governance may or may not include all the levels offered in *Figure 3*.

At the same time multi-layered governance must function with both public and private governing bodies in both national, supranational, and international level. The level of involvement and modes and models of governance will depend upon the “problem” or the subject matter of the policy issue to be governed. While self-regulatory models maybe more appropriate for the development of e-commerce both at the national and international levels of governance, the same may not be true for governing criminal matters on the Internet though there is a strong emphasis on self and co-regulation even in that field especially at the European Union level.

As a multi-layered governance system is inevitable and can be a useful tool for regulating complex networks, there is an important emphasis on “co-operation” between various nation-states and governing supranational and international bodies. Such co-operation for the establishment of a global information society should be subject to normative substantive and

process conditions. At a national level, it is now widely accepted that “government cannot simply regulate to achieve its aims in this new global electronic environment.”⁶ Although there has been much emphasis for a partnership between the government and the industry “to get the right balance” to build confidence and to protect consumers in the information age, that balance should reflect and respect the rights of the individual Internet users, an issue often undermined and not considered by the regulators and by the industry. To achieve such a balance which takes into account individual rights and not only the interests of the business community, there is need for openness, accountability, and transparency in relation to regulatory initiatives⁷ aimed at Internet governance at the national level. Civil society representation should be ensured within this sort of co-operation that leads into the development of an Internet policy at the national level.

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 also 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 law and policy at the national level.

The Role of the Civil Society

“If a popular voice requires detachment from government, then indeed in governance concerned with global human rights, there is a popular voice. It emanates from non-governmental organisations.”⁸

The role to be played by the civil society within the Internet policy making process is significant as the civil society representatives and NGOs working in this field can act as watchdogs for the activities of official bodies and can ensure that the policy initiatives respect

⁶ Per Tony Blair, foreword to the Cabinet Office Report, *e-commerce@its.best.uk*, September 1999.

⁷ See the Cabinet Office Regulatory Impact Unit’s Better Regulation Guide, and the Principles of Good Regulation at <<http://www.cabinet-office.gov.uk/regulation/taskforce/2000/PrinciplesLeaflet.pdf>>. Note also the CR&CL Response to Better Regulation Task Force Review of E-Commerce, 2000, at <<http://www.cyber-rights.org/reports/btrf.htm>>, and the Task Force’s report, *Regulating Cyberspace: Better Regulation for E-commerce*, 14 December, 2000.

⁸ Gordenker, L., “NGOs: The People’s Voice in International Governance?” A presentation made at a UNU Public Forum on Human Rights and NGOs, 18 September 1996, UNU, Tokyo, Japan, at <<http://www.soc.titech.ac.jp/ngo/lecture14.html>>. See further Weiss, T.G., and Gordenker, L., *NGOs, the UN and Global Governance*, (Boulder, CO, Lynne Rienner, 1996).

fundamental principles of human rights. The important role of the civil society and the NGOs within the international legal system can be defined as follows:

“They have some effect on international law-making in certain areas by adding additional expertise and making procedures more transparent, and a stronger effect with regard to supervision and fact-finding as to the implementation of international norms, most visibly in the area of human rights.”⁹

Generally, “NGOs have become an integral part of intergovernmental deliberations on human rights and have had an equally prominent role in some national legislatures and bureaucracies.”¹⁰ This seems to be the case also in relation to Internet policy making process and civil society movement has been crucial for raising awareness of human rights issues and bringing a more open, transparent, and democratic process to the policy making process. However, in most cases, the rights of the individuals are not represented while greater emphasis is given to the development of e-commerce and to the financial interests of the Internet industry, and to the interests and needs of the law enforcement agencies.

But government co-operation with the Internet industry and law enforcement agencies should also extend to NGOs and public interest groups while policies are fostered.

Normative Substantive and Process Conditions

Normative conditions such as the international human rights standards and the process conditions 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. Governance can only be legitimised by taking due account of these values.

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.

Although the Turkish Constitution offers protection for both freedom of expression and privacy of communications, these provisions have strict restrictions both in the Constitution and in law.¹¹ 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 of Human Rights and there are more than 20 judgments of the European Court of Human Rights involving Turkey and article 10 of the ECHR.¹² It is expected and hoped that the government will review current

⁹ See Malanczuk, P., *Akehurt's Modern Introduction to International Law*, London: Routledge, 1997, seventh edition, at 97. See also H. Thoolen & B. Verstappen, *Human Rights Missions: A Study of the Fact-Finding Practice of Non-Governmental Organisations*, 1986. T. V. Boven, “The Role of Non-Governmental Organisations in International Human Rights Standard-Setting: A Prerequisite of Democracy” (1989) *CWILJ* 20, 207-225.

¹⁰ Gordenker, L., “NGOs: The People’s Voice in International Governance?”

¹¹ See articles 20, 22, and 26 of the Turkish Constitution. 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 (Mukerrer) 15 October, 2001. Note also the Supreme Board of Radio and Television (RTUK) Bill (No 4676).

¹² Among others see: *Erdoğan and Ince* judgment of 8 July 1999, Reports 1999, *Sürek and Özdemir* judgment

legislation delineating freedom of expression in the light of the ECHR, especially with regard to the letter and spirit of articles 10, 17 and 18, as well as the related decisions of the European Court of Human Rights.¹³ Effective implementation of such measures is also important, as well as training in this field.

The same applies to privacy of communications and despite the existence of 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”¹⁴ and all forms of communications have been tapped and intercepted through-out the Turkish history ever since communication technologies have been created.¹⁵ Laws such as the 4442 Sayılı Çıkar Amaçlı Suç Örgütleriyle Mücadele Kanunu and the related regulations¹⁶ 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.¹⁷

At the same time there is currently no protection of personal data (through data protection laws or through any other regulatory means) in Turkey.¹⁸ This issue deserves the highest consideration from the Turkish regulators. The protection of personal data is essential for not only the development of e-commerce and for establishing confidence and trust with online consumers, and users, but also for ensuring that national laws are consistent with Pan-European laws. Although there has been several attempts at legislation in this field in Turkey no considerable progress have been made in this field until mid 2003. Currently a draft legislation entitled *Kişisel Verilerin Korunması Kanunu Taslağı* based upon both the 1981 CoE Convention and the 1995 EU Directive is being considered at the Ministry of Justice. It is expected that this draft law will be considered by the Parliament during 2004.

A more positive development is the enactment of the Right to Information Act 2003, *Bilgi Edinme Hakkı Kanunu (No: 4982)* in October 2003¹⁹ which came into force on 24 April, 2004. A freedom of information law in Turkey would help to achieve an open and transparent

of 8 July 1999, Reports 1999, *Okçuoğlu* judgment of 8 July 1999, Reports.

¹³ Republic of Turkey, National Programme for the Adoption of the Acquis, Official Gazette, 24 July 2003 No. 25178 bis, at <<http://www.abgs.gov.tr/NPAA/up.htm>>.

¹⁴ “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.

¹⁵ For a history of interception of communications see Bildirici, Faruk, *Gizli Kulaklar Ülkesi* (The Country of Hidden Ears), İstanbul: İletişim, 1999. See further Coskun, Enis, *Kuresel Gözetim: Elektronik Gizli Dinleme ve Görüntüleme*, Ankara: Umit Yayıncılık, 2000.

¹⁶ 4442 Sayılı Çıkar Amaçlı Suç Örgütleriyle Mücadele Kanununun uygulanmasına ilişkin yönetmelik (26 Ocak, 2001 tarihli ve 242999 sayılı Resmi Gazete).

¹⁷ 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).

¹⁸ 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.

¹⁹ See generally <<http://www.bilgilenmehakki.org>> which was set up by the author together with Mrs. Avniye Tansug and Miss Sevil Albayrak.

regulatory process and would promote openness and good practice within government departments. Following the enactment of the new law in Turkey, a Right to Information Assessment (Review) Council will be established to deal with appeals on rejected freedom of information requests. However, the government should avoid the three year delay witnessed in setting up the Turkish Competition Authority following the enactment of the Competition Law.

The information and documents pertaining the state secrets, the economical interests of the state, the state intelligence, the administrative investigation, and the judicial investigation and prosecution are out of the scope of this law. Limitations also apply for the privacy of the individuals, privacy of communications, trade secrets, intellectual property (works of art and science), institutions' internal regulations, and institutions' internal opinions, information notes and recommendations.²⁰ Although the enactment of the Right to Information Act is a very important first step towards openness, transparency, and democratisation in Turkey, it remains to be seen how transparent the government will be in Turkey. If the implementation is slow, the Act may never be fully functional.

EU Acquis and Recent Political Developments

In the last few years, Turkey has completed comprehensive constitutional and legislative reforms that reinforce and safeguard fundamental rights and freedoms, democracy, the rule of law, and the protection of and respect for minorities, as set out in the Turkish *National Programme for the Adoption of the European Union Acquis* of 24 March, 2001.²¹

Several international conventions relating to the political criteria have been signed or ratified, among which Additional Protocol No. 6 to the ECHR Concerning the Abolishing of the Death Penalty, the UN Convention on the Elimination of All Forms of Racial Discrimination, the UN Covenant on Civil and Political Rights, the UN Covenant on Economic, Social and Cultural Rights, the ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of Worst Forms of Child Labour (No. 182), and the UN Convention on Prevention of All Types of Discrimination Against Women and its Optional Protocol, can be cited.²² The signing of the International Covenant on Civil and Political Rights in August 2000 is directly related to the normative conditions that are set out in this policy paper. Moreover, the Human Rights Advisory Board, which constitutes an effective platform for dialogue between state and civil society in the area of human rights, has become operational.²³ This is in addition to the establishment of the EU Harmonisation Commission within the Turkish Grand National Assembly which aims to increase the efficiency of the process of legislative harmonisation with the EU. According to the official National Programme for the Adoption of the Acquis document:

“The Government has opted to harmonise various laws in order to fulfil the political criteria, the prerequisite to the opening of accession negotiations, through “harmonisation legislation packages” to accelerate the process. The Government is determined, in principle, that the

²⁰ Moreover, there will be further legislation to clarify the meaning of “state secrecy” and “trade secrets”. In fact, the Ministry of Justice published two draft bills on these issues (*Devlet Sırları Kanunu Tasarısı*, and *Ticari Sırlar Kanunu Tasarısı*) in February 2004. It is expected that these draft bills will be considered by the Parliament later in 2004. See generally <<http://www.bilgilenmehakki.org/>>.

²¹ See generally Republic of Turkey, National Programme for the Adoption of the Acquis, Official Gazette, 24 July 2003 No. 25178 bis, at <<http://www.abgs.gov.tr/NPAA/up.htm>>.

²² *Ibid.*

²³ Republic of Turkey, National Programme for the Adoption of the Acquis, Official Gazette, 24 July 2003 No. 25178 bis, at <<http://www.abgs.gov.tr/NPAA/up.htm>>.

impact of all concluded reforms will be observed simultaneously, in letter and spirit, by June 2004.”²⁴

Despite all these positive developments, a recent resolution by the European Parliament stated that

“Turkey does not yet meet the Copenhagen political criteria and whereas a clear framework for guaranteeing political, civil, economic, social and cultural rights has still not been established, and more far-reaching efforts than reparation and amendments are needed to enhance the coherence between legal provisions and practice, which will underline the radical and fundamental character of Turkey’s progress towards membership”²⁵

But at the same time above mentioned recent developments are welcomed by the European Parliament “with regard to making reforms that are revolutionary for Turkey, not only in order to meet the Copenhagen political criteria, in keeping with Turkish authorities’ oft-stated commitment to democracy and Europe, but also to advance the economic, social and political conditions of the Turkish people.” But it was pointed out by the European Parliament resolution that

“such reforms can only be judged on the basis of their actual implementation in terms of day-to-day practice at all levels of the judicial and security system and of both the civilian and military administration, and that they must have the support of society.”

Process Conditions

In many democratic states and as well within the policy making processes of supranational and international organisations such as at the European Union certain process standards are developed and adopted to achieve better regulation. One good example of this is the UK Cabinet Office Regulatory Impact Unit’s Better Regulation Guide, and the Principles of Good Regulation, published in October 2000.²⁶ 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.”²⁷ The intention of developing the principles of good regulation was to offer a template for “judging and improving the quality of regulation”.²⁸ These principles have also been incorporated into the UK Government’s Guide to Regulatory Impact Assessment.²⁹ 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.”³⁰

²⁴ Republic of Turkey, National Programme for the Adoption of the Acquis, Official Gazette, 24 July 2003 No. 25178 bis, at <<http://www.abgs.gov.tr/NPAA/up.htm>>.

²⁵ European Parliament resolution on the 2003 regular report of the Commission on Turkey's progress towards accession (COM(2003) 676 - SEC(2003)1212 - C5-0535/2003 - 2003/2204(INI)); Progress towards accession by Turkey, P5_TA-PROV(2004)0274, A5-0204/2004.

²⁶ 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>>.

²⁷ *Ibid.*, per Christopher Haskins, Chairman, Better Regulation Task Force.

²⁸ *Ibid.*

²⁹ 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>>.

³⁰ Principles of Good Regulation at <<http://www.cabinet-office.gov.uk/regulation/taskforce/2000/PrinciplesLeaflet.pdf>>.

The principles of good regulation have been set out to achieve this sort of balance, and these are *transparency, accountability, proportionality, consistency, and targeting*. In addition to these 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.³¹ 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/governance – global, European, national, regional and local.:

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 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”.³²

These process standards and principles (as well as the above mentioned normative standards) should not only be applied to state regulation but also to alternatives to state legislation such as self-regulation and co-regulation. Without due respect for such standards, the policy making process will never be democratic.

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” (see generally *figure 4*). Alternatives to state legislation “may be more flexible, cheaper and more effective.”³³ Government, industry, and civil society partnership for developing co-regulatory and self-regulatory³⁴ 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 also applies to the Short Term Action Plan of the E-Transformation Turkey Project (see below). For example, too much

³¹ European Commission, *European Governance, A White Paper*, Brussels, 25.7.2001, COM(2001) 428 final.

³² Principles of Good Regulation, page 7.

³³ Better Regulation Task Force report, *Alternatives to State Regulation*, July 2000.

³⁴ Note the Better Regulation Task Force interim report on *Self-Regulation*, October 1999.

reliance on state regulation may slow down the transformation into an information society. That is why the alternatives to state regulation, with an emphasis on co-operation with the industry and the civil society and NGOs is required.

Towards a Better Policy Making Process in Turkey

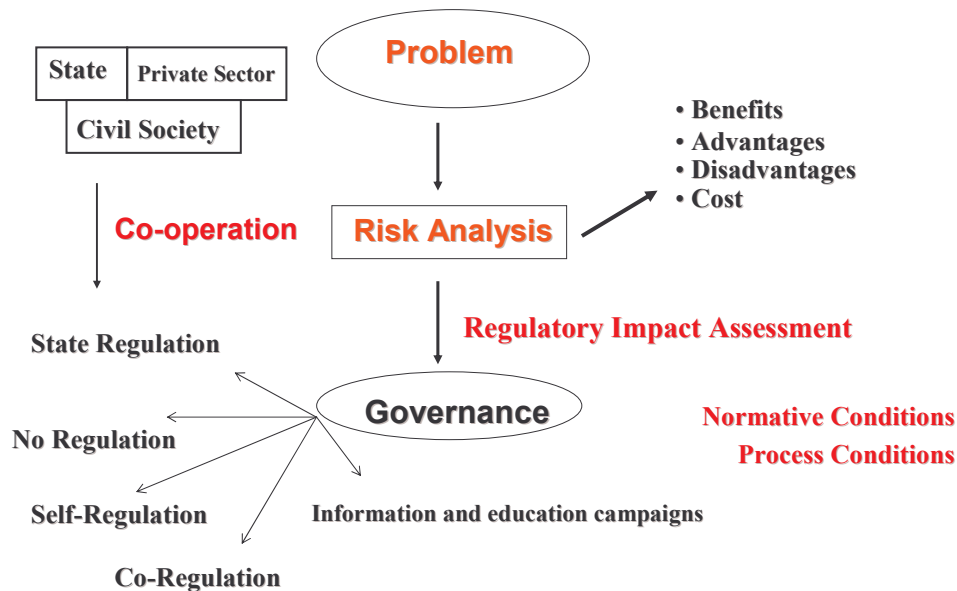


Figure 4

Regulatory impact assessment (“RIA”) exercises³⁵ should also be adopted in Turkey as part of the modernisation of the policy making process.³⁶ Such an exercise is crucially important where regulation concerns the development of an information society, e-government, and all aspects of Internet governance in Turkey. Such an exercise would help analysing the risks in terms of a specific problem and the best model of regulation if a regulatory approach is needed to address the problem. Normative and process conditions should be taken into account and the industry and the civil society should be consulted prior to finalising a governmental policy.

Regulatory Models and Alternatives to State Regulation

Although state legislation is still a strong option and maybe preferred in most instances, problems associated with the Internet may require the careful consideration of alternatives to state regulation. While the enactment of a law on digital signatures may bring legal clarity and certainty, the same may not necessarily be true for content regulation, and cyber-crimes. Due to the global and decentralised nature of the Internet, government regulation may not always be the best option³⁷ to tackle global problems, and jurisdictional issues should be taken into account while policies are developed at the national level.

³⁵ 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 of Government and small businesses, and how compliance with regulatory options would be secured and enforced. See Cabinet Office, Regulatory Impact Unit, Better Policy Making: A Guide to Regulatory Impact Assessment, January 2003, at <<http://www.cabinet-office.gov.uk/regulation/docs/ria/pdf/ria-guidance.pdf>>.

³⁶ See further the Research Paper.

³⁷ Better Regulation Task Force report, *Alternatives to State Regulation*, July 2000, at <<http://www.cabinet-office.gov.uk/regulation/TaskForce/2000/StateRegulation.pdf>>.

Depending upon their application the alternatives to state legislation could sometimes be complimentary and could be seen as an additional tool apart from being 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 and culture of “data protection” and “privacy” in Turkey. The same principles apply for example, in the case of “freedom of information” and the development 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 as detailed in the policy research paper *Internet Governance in Turkey*.

The Development of Internet Governance in Turkey

As far as Internet governance is concerned, this will undoubtedly be affected by the decentralised nature of the Internet. So, “effective” rule-making will not be confined to a single nation-state due to the global nature of the medium itself, as well as the influence and impact of supranational, and international developments and agreements in this field as a result of the nature of the medium itself. The result is that the emergence of Internet governance entails a more diverse and fragmented regulatory network with no presumption that these are anchored primarily in the nation-states. This is also in line with post-modern theories in which “the trajectory of social development is taking us away from the institutions of modernity towards a new and distinct type of social order”.³⁸

Compared to Western Europe, the development of Internet law and policy has been slow in Turkey, and only became the discourse of debate in the past few years. The government had certainly different priorities and Internet governance has not been a top priority within the government agenda, and Turkey’s transition to a “knowledge society” has been slow with major concerns about the development of the infrastructure for Information Society services, and access in Turkey.³⁹

On the other hand, membership to the European Union in the future will have a major impact upon the governance of the Internet in Turkey. The future membership could shape the Turkish policy. In fact the EU impact is already witnessed on the Turkish policy as Turkey is included as of June 2001 within the *eEurope+* Action Plan programme of the European Commission⁴⁰

³⁸ See Giddens, A., *The Consequences of Modernity*, Cambridge: Polity Press, 1990, 46.

³⁹ See generally Republic of Turkey Ministry of Transportation (TUENA), Turkish National Information Infrastructure Masterplan, Final Report, Ankara: TUENA, October 1999, at <<http://www.tuena.tubitak.gov.tr/pdf/tuenafinalreport.pdf>>. See further the Turkish Industrialists and Businessmen’s Association report, *Information Society and eTurkey Towards European Union*, T/2001-07/304, Istanbul: TUSIAD, 2001. This report is available through <<http://www.tusiad.org.tr/>> and the author has contributed to the preparation of this report. See further Approaches to eEurope+ initiative in Turkey at <<http://www.bilten.metu.edu.tr/eEurope+/>>.

⁴⁰ See eEurope+ 2000: A co-operative Effort to implement the Information Society in Europe, Action Plan, prepared by the Candidate Countries with the assistance of the European Commission, June 2001. See

as a candidate country which mirrors the priority objectives and targets of eEurope programme for the EU member states.⁴¹ The overall aim of the European Commission is to make the whole of Europe “the most competitive and dynamic knowledge-based economy in the world”.⁴² For this purpose,

“positive action on the basis of a strong, political commitment is needed to ensure that the EU Candidate Countries use the full potential offered by the Information Society and avoid a further digital divide with the EU.”⁴³

The targets, including acceleration of the putting in place of the basic building blocks for the Information Society, provision of a cheaper, faster, secure Internet, investing in people and skills, and the stimulation of the use of the Internet (including the acceleration of e-commerce), will have to be met by the candidate countries by the year 2003.⁴⁴ If these targets are met, Turkey then in theory could start implementing some of the more specific EU policies such as those provided within the Electronic Commerce Directive.⁴⁵

Furthermore, in general terms Turkey is already making progress towards EU membership and its national programme *for the Adoption of the Acquis*⁴⁶ include the preparation of a legal infrastructure for

“data security and the use of data by taking into consideration technological developments and the development of electronic commerce, and for allowing public access via the internet to information produced by the public and private sector, bearing in mind the need to protect personal data and national data security.”⁴⁷

Although there is no deadline set up for achieving these goals, the document outlining the national programme suggest that this will be achieved in the medium term.⁴⁸

Following the parliamentary elections of November 2002, the Turkish political landscape has undergone significant changes resulting with a single majority government. AKP - the Justice and Development Party established the E-Transformation Turkey Project in early 2003. The project aims to ensure the transition to an information society in Turkey.

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

generally <http://europa.eu.int/information_society/international/candidate_countries/index_en.htm>. Note also the press release, Commission welcomes eEurope+ initiative of EU Candidate Countries, Brussels, 16 June 2001, at <http://europa.eu.int/comm/gothenburg_council/eeurope_en.htm>.

⁴¹ eEurope 2002 - An Information society for all - Draft Action Plan prepared by the European Commission for the European Council in Feira - 19-20 June 2000, COM/2000/0330 final; Communication from the Commission to the Council and the European Parliament - eEurope 2002: Impact and Priorities A communication to the Spring European Council in Stockholm, 23-24 March 2001, COM/2001/0140 final.

⁴² eEurope+ 2000: A co-operative Effort to implement the Information Society in Europe, Action Plan, p 2.

⁴³ *Ibid*, p 1.

⁴⁴ *Ibid*, p 3.

⁴⁵ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Official Journal of the European Communities, vol 43, OJ L 178 17 July 2000 p.1.

⁴⁶ Republic of Turkey Prime Ministry, The Secretariat General for EU Affairs, Turkish National Programme for the Adoption of the Acquis (NPAA), Ankara, 19 March, 2001, p 387. See generally <<http://www.abgs.gov.tr>>.

⁴⁷ *Ibid*, para 4.20, Telecommunications, p 387.

⁴⁸ *Ibid*.

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. This also needs to be done by a policy process which is open, transparent, and inclusive of the views of all stakeholders and interested parties. As discussed above, alternatives to state legislation will also need to be part of the government agenda for developing Internet related policies.

Developing a working mechanism?

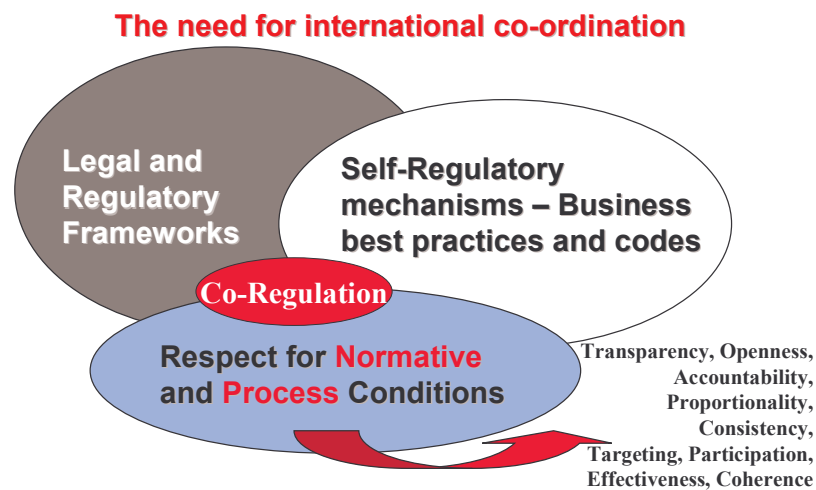


Figure 5

E-Transformation Turkey Project

E-Transformation Turkey Project was established with a Prime Minister’s Circular 2003/12, dated 27 February, 2003. With this circular, the responsible institution for the E-Transformation Turkey project is identified as the State Planning Organisation (“SPO”), which is affiliated to the Prime Ministry. Apart from the Prime Ministry, all public institutions, and NGOs are identified as affiliated organisations for this project. The E-Transformation Turkey project has the following aims and objectives:

- Policies, laws, and regulations regarding ICT will be re-examined and changed and adapted if necessary, with respect to the EU acquis; eEurope+ Action Plan, initiated for the candidate countries.
- Mechanisms that facilitate the participation of citizens to decision-making process in the public domain via using ICT will be developed.
- Transparency and accountability for public management will be enhanced.
- Good governance principles will be put in place in government services through increased usage of ICT.
- ICT diffusion will be promoted.

- Public IT projects will be co-ordinated, monitored, evaluated and consolidated if necessary in order to avoid duplicating or overlapping investments.
- Private sector will be guided according to the above-mentioned principles.

In order to realise the objectives of the E-Transformation Project and to ensure the success of the project, a new co-ordination unit, Information Society Department, within SPO is established.⁴⁹ With the establishment of the Information Society Department, for the first time in Turkey, a dedicated government department has been named as the co-ordinator of information society activities. The Minister of State, the Deputy Prime Minister was appointed as e-minister to foresee the activities of the Information Society Department. An Advisory Board with 41 members has been established to increase the participation and the level of success for the project. This consulting body consists of the representatives of public institutions, NGOs, and universities. The Board had its first meeting at the end of May 2003 to discuss and elaborate the Short Term Action Plan.

Apart from assuming the responsibility of the E-Transformation Turkey project, the Information Society Department is also responsible for the overall co-ordination of the European Commission's eEurope initiative which includes Turkey within the eEurope+ branch. There is a strong emphasis on eEurope 2005's goals and harmonisation of Turkish legislation to EU *acquis* to fulfil the objectives of the e-Transformation Turkey Project.⁵⁰ In a system of governance in which supranational and international agencies and regulatory bodies are already significant and are growing in scope, and have an impact upon the way policies are shaped, nation states remain as agencies of representation,⁵¹ though their continued role should not be underestimated. European Union initiatives are obviously having an impact upon candidate countries even before they become full members. In this case, it could be argued that the impact of the eEurope+ project on Turkey has been positive in dealing with social, economic, and technical aspects of information society.

Short Term Action Plan (STAP) - Vision and Goals

The initial focal point in the E-Transformation Turkey project is the Short Term Action Plan ("STAP"), which covers 2003-2004, for implementing specific tasks. There are currently 73 action items under eight headings within the STAP and the plan was developed during the course of 2003. STAP came into effect with a Prime Minister's Circular 2003/48 published in the Turkish Official Gazette, No: 25306, on 04 December, 2003.

Actions aiming to establish interoperable and secure online information services have the first priority in STAP. Moreover, actions in STAP are in line with actions of the government's overall Urgent Action Plan that covers restructuring of public management, increasing efficiency in public services, and the introduction of citizen-oriented services. As mentioned above, eEurope 2005's goals and harmonisation of Turkish legislation to EU *acquis* has been taken into account while STAP was developed. During the preparation of STAP, priorities of eEurope 2005, such as broadband, security, eInclusion, eBusiness and eGovernment are all taken into account, and each of them has been covered with several actions.

⁴⁹ See generally <<http://www.bilgitoplumu.gov.tr>>.

⁵⁰ See generally eEurope+ 2003: Interim Report - Turkey, June 2003; Contribution of Turkey to eEurope+ 2003: Progress Report, January 2004; eEurope+ 2003: Progress Report, February, 2004, at <<http://www.emcis2004.hu/>>.

⁵¹ Hirst, P., & Thompson, G., "Globalization and the Future of the Nation State," (1995) *Economy and Society*, 24(3), 408 - 442, 431.

An “Information Society Strategy” will be established during 2004 under the STAP. It is expected that the Strategy will encompass every part of society and will maximise national benefits. This strategy according to STAP will enlighten Turkey’s transformation from labour-intensive society to information society, and from traditional production-consumption economy to knowledge economy. The changes in production, consumption and use of global information technologies may also force the nation-states into democratic changes.⁵²

The impact of the E-Transformation Turkey Project and the Short Term Action Plan remains to be seen. The government favoured a co-regulatory approach while formulating the E-Transformation Turkey Project and that is to be welcomed as it includes representatives of all stakeholders including civil society within this initiative. However, it should also be ensured that the Short Term Action Plan is compatible with the normative and process conditions mentioned in this policy paper and explained in detail in the policy research paper entitled *Internet Governance in Turkey*.

Recommendations for Good Internet Regulation in Turkey

The Turkish Government should

- Modernise the Turkish policy making process in the short term.
- Provide an open and transparent policy making process.
- Conduct risk analysis prior to regulation and consider the alternatives to state legislation.
- 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 Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the European Convention on Human Rights.
- Enable access to government information including legislative, judicial and executive branch information through the Internet. Public authorities should comply with the requirements of the Right to Information Act 2003 which came into force on 24 April, 2004.
- Ensure that the legislative and administrative reforms concerning associations, and foundations are implemented effectively to support the development of the civil society and its participation in the Turkish democratic life.
- 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.
- Ensure that the eEurope+ 2003 Turkey plan (as part of the European Commission’s eEurope+ 2003 Plan) is fully implemented in the short term.
- Ensure that the recently launched E-Transformation Turkey project’s Short Term Action Plan is compatible with the normative and process conditions explained in this report.
- Ensure that Turkish policy is inline with EU policy
- Monitor systematically international legal and policy initiatives

⁵² “Telecommunications played as much of a role as pickaxes and shovels in bringing down the Berlin Wall and the barbed wire of the Iron Curtain.” See McGowan, W., ‘The part as Prologue: The Impact of International Telecommunications,’ in Hugh Chaloner ed., *Telecom 91 Global Review*, London: Kline Publishing, 1991, 56.

- 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)

While such a principled approach is incorporated to the government thinking, high priority should be given to respect normative and process conditions, and to raise 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 to be able to achieve the overall state goal of developing an information society in Turkey.