LEGAL NOTICE OF 20.01.2015

(*Original sent in Turkish via Notary Public*)

Notice served by Yaman AKDENIZ & Kerem ALTIPARMAK

To the attention of : Legal Representatives of Twitter, Inc. (USA / Turkey)

Subject : Our formal notice for the termination of Twitter's corporate practices that are in violation of human rights in Turkey.

To whom it may concern,

1. Since 2006, your company has been providing social media services to an estimated 284 million users worldwide and 12 million users in Turkey via the *twitter.com* website. Kerem ALTIPARMAK (@KeremALTIPARMAK) and Yaman AKDENIZ (@cyberrights) currently reside in Turkey and have both been active Twitter users since 2010 and 2009, respectively.

As it is well known, on 20th March 2014, access to the *Twitter.com* website was subject to a general blocking in Turkey. This decision is recognisably significant in that it was made immediately before the local elections to be held in Turkey on 30th March 2014. The audio recordings leaked through the Internet during the debate over graft allegations on 17th December 2013 reveal that both broadcast and print media outlets had been expressly subject to pressure by the government on the eve of the local elections. Furthermore, the time period in question was one in which the sense of self-censorship and censorship in the media were palpable as a reflection of the capital shareholder structure of media organisations and the threat of financial and penal sanctions that could potentially be imposed. Throughout this time, Twitter played an indispensable role as a *public forum* by providing an opportunity to debate over matters which could affect the outcome of the local elections but which could not be discussed in the mainstream media.

The blocking order against the *Twitter.com* website was an arbitrary administrative order issued by the Presidency of Telecommunication and Communication (TIB) in the absence of a court decision ordering the total blocking of access to the website. Although the statement made by the Prime Ministry's Press Office on 20th March 2014, prior to the blocking order, asserted that Twitter 'had failed to implement court decisions', it is understood from the public announcement made by your company on 26th March 2014 that the said court orders, which were the purported legal basis for the ban, had not been provided to you prior to the ban. It was also understood that Twitter did not remain unresponsive or indifferent to such orders which had been communicated to them.

2. Following the blocking order, on 24th March 2014, Akdeniz & Altıparmak filed an individual application with the Constitutional Court of the Republic of Turkey, alleging that the ban on the Twitter.com website was in violation of the right to freedom of expression, science and art as well as the right to vote and be elected. Consequently, on 2nd April 2014, the Constitutional Court issued its

Decision No. 2014/3986 based on Article 26 of the Constitution of the Republic of Turkey and the case-law of the European Court of Human Rights (ECtHR). In summary, the decision made the determination that the Internet has an instrumental value in the enjoyment of fundamental rights and freedoms, and primarily the right to freedom of expression, in modern democracies. The Constitutional Court has found that the social media platform is of an indispensable nature for people to mutually express, share and disseminate their knowledge and thoughts; that according to Article 13 of the Constitution, fundamental rights and freedoms may only be restricted by law without infringing upon their essence and that such restrictions may not be contrary to the democratic order of society and the principle of proportionality. The Court thus found that 'the blocking of access to the *Twitter.com* website' from Turkey was a violation of the right to freedom of expression. In view of this decision and a subsequent decision issued by the Constitutional Court along the same lines on 29th May 2014 (Decision No: 2014/4705) regarding the blocking of access to *YouTube.com*, it has been established that it is no longer possible to give general blocking orders of this nature in Turkey.

3. However, according to reports in the press, a series of meetings were held between representatives of your company and government authorities. Subsequently, your company started to apply its *country withheld content policy* in Turkey. As a result of this practice, numerous Twitter accounts as well as individual tweets were "withheld" and blocked for access from Turkey.

It must be noted that the implementation of this policy, which can only be defined as political censorship, does not arise from a legal requirement. This policy has been adopted not as a requirement of the laws of the Republic of Turkey and/or a requirement of court decisions, administrative orders or blocking practices deployed by the Internet Service Providers, but rather by your company. As will be illustrated by a number of examples below, this policy quite often results in violations that have significant consequences with respect to freedom of political expression and freedom of communication.

For instance; On 17th December 2013, a wide-ranging criminal investigation on corruption was launched against senior bureaucrats including certain ministers and mayors and the allegations were widely discussed on the platform provided by Twitter. For example, reports were made on these developments via the @fuatavni Twitter account whose posts were considered to be important by a wide audience and the account was followed by hundreds of thousands of Twitter users. However, on 5th August 2014, access to the account was blocked with the notice "@fuatavni withheld. This account has been withheld in Turkey." The decision issued by the Istanbul 5th Criminal Judgeship of Peace (Decision No. 2014/109D. İş), a copy of which can be accessed on the chillingeffects.org website, reads as follows: 'the court hereby rules for the blocking of the URL address of the user 'fuatavni' on the twitter.com website as per Articles 3 and 4 of Law No 6518 S9, dated 06/02/2014'. However, the decision does not mention what content triggered the court to issue a blocking decision or why such content is deemed criminal.

Similarly, in the rationale of another decision issued by the Ankara 5th Criminal Court of Peace regarding the @TheRedHack account (Decision No. 2014/531D.iş dated 27/05/2014), the court ruled for 'the blocking of access to the URL address of the account @TheRedHack as per Article 9 of Law No. 5651'. It is

understood from the decision that the blocking is ordered on grounds that one or several posts were in violation of personal rights. However, there is no further mention of the content of the postings or an indication of which posts were the subject matter of the blocking decision.

Another example is the blocking order issued by the Eskişehir 6th Criminal Court of Peace (Decision No. 2014/255D.iş, dated 28.02.2014) regarding the account @bulutalti. In this decision, there is reference to the provisions of the relevant law which are the legal grounds for the blocking but there is no mention of which content has led to a blocking order or why such content is regarded as an act that falls within the scope the said provisions.

In another decision issued by the Istanbul Anadolu 5th Criminal Judgeship of Peace (Decision No. 2014/1527D.iş, dated 04/09/2014), with regard to the account @csagir, which is known to belong to a journalist, it is stated that there is a need to strike a balance between personal rights and the right of the public to information. However, in the reasoning, the court merely 'rules for the blocking of posts made by the user @csagir on the http://www.twitter.com website as per Article 9 of Law No 5651.' There is no discussion of the balance that is being sought, or mention of which particular act constitutes which particular crime. Furthermore, the Istanbul Anadolu 5th Criminal Judgeship of Peace has ruled for the blocking of subsequent Twitter accounts by the same user under the names @csagir2010 and @CelilSgr (by Decision No. 2014/2410 D.İş). This decision follows the lead of earlier ones in that it makes no legal deliberation regarding the content in question and is devoid of any reasoning. In this last example, the earlier blocking order issued by the court with respect to the account @csagir is shown as grounds for the new blocking order. It is understood that the tweets made by @csagir after the initial court decision are interpreted as 'disobedience to a court order' and the user is virtually banned from using his Twitter account for an indefinite time and his thoughts are thus censored for an indefinite period.

All the above mentioned decisions have been executed by Twitter within the scope of its Country Withheld Content Policy. As illustrated in the foregoing examples, the same judicial bodies have systemically issued dozens of boilerplate decisions devoid of any reasoning and with total disregard for freedom of expression. It is clear that this method constitutes a systemic and structural problem for social media in general and Twitter in particular.

Likewise, as far as it is understood from the documents published on the same website, demands for the execution of the Country Withheld Content Policy made by the Presidency of Telecommunication and Communication under the Information and Communications Technologies Authority are not furnished with any reasoning.

Finally, blocking orders issued more recently against various Twitter accounts, which have been put into effect without question by your company, have turned into clear violations of the freedom of the press. Tweets posted by Birgün newspaper linking to news reports regarding the MIT (National Intelligence Agency) trucks allegedly carrying weapons to various groups in Syria last year have been blocked with the notice "This Tweet from @BirGun_Gazetesi has been withheld in: Turkey".

It is observed that decisions issued by judges regarding these tweets are against the Constitution in that they fail to respect the freedom of expression of those who post, follow and retweet tweets, are clearly in violation of the strict scrutiny test required by the US Constitutional Court for content based restrictions and are discriminatory in how they deal with different opinions. It is the case that those accounts and tweets which are critical of the government or which give information about its operations are blocked whereas demands for the blocking of pro-government accounts and tweets are denied. For example, demands for the blocking of the accounts such as @kuscuesref and @yerliajansimit have been rejected by the Istanbul Anadolu 6th Criminal Judgeship of Peace (Decision No. 2014/1705 D.İş, dated 11.11.2014) despite the fact that they host similar content to those accounts which have been subject to a blocking order as mentioned above. In other words, what is common to blocking orders communicated to your company by the Turkish government and executed without question, is that these accounts are all critical of the government and seen as "politically damaging". However, accounts that have similar content but are pro-government have not even been remotely affected by this practice. By adopting such a position and in alliance with the Turkish government, Twitter is playing a role in transforming a public forum into a pro-government one.

4. As far as it is understood, decisions of this nature are communicated to your company by the Presidency of Telecommunication and Communication and your company withholds such content in Turkey with no further questioning or consideration of the rights of the account holders. Accounts which have been subject to such blocking orders issued by various courts in Turkey remains inaccessible from Turkey due to the Country Withheld Content Policy.

Processes that Lead to Court Orders, Which are shown as Grounds for Country Withheld Content, are Against the Right to a Fair Trial

5. All of the court decisions mentioned so far have been issued by the newly-founded Criminal Judgeships of Peace. By Law No 6545 Amending the Turkish Criminal Code and Other Laws, criminal courts of peace have been dissolved and criminal judgeships of peace were established to issue decisions regarding investigations, to perform relevant duties and to examine appeals against decisions. According to Article 268 of the Criminal Procedures Law No. 5271, which has also been amended by the aforementioned law, the authority to examine appeals against decisions issued by a Criminal Judgeships of Peace rests with the judgeship which has been assigned the consecutive number in jurisdictions that have more than one judgeship. In short, appeals are assessed by the same level of courts and one Criminal Judgeship of Peace decision is reviewed by another one under the current rules.

6. The political influence of the government has been observed more clearly ever since the criminal judgeships of peace started examining the demands for a blocking order. In particular, data regarding the demands for formal denials and right of reply reveal the procedure by which these judgeships function. For example, up until June 2014, Cumhuriyet newspaper had received only three demands for a refutation whereas 30 separate decisions have been issued by the new judgeships after

this date with 17 of these decisions being blocking orders. All appeals made against these decisions have been rejected.[1]

Blocking orders regarding Twitter accounts and posts are also issued by these judgeships. While none of the decisions noted above give information about the legal grounds for the blocking orders, no other criminal judgeship of peace has included reasons in its decision for the denial of appeals made against earlier decisions. This is a similar practice observed across all blocking orders.

In other words, blocking orders are issued without any reasoning whatsoever and in an arbitrary manner.

7. There are discussions in the press and in academia that these judgeships have been established to counteract the investigations on graft allegations. Indeed, the opportunity 'to appeal to a higher court', which has been present since the founding of the Republic, has been eliminated and replaced with a requirement to appeal to 'judgeships with equal status', which are few in number and therefore deprived of the safeguards necessary for independence and impartiality. Indeed, this practice, which is blatantly contrary to principles of a fair trial and the principles governing judgeship is pending before the Constitutional Court with a request for the annulment of these provisions.

8. The impact of all these unconstitutional practices are also observed in the Transparency Report released by your company. In view of the sections of the report covering statistics of demands for removal/withholding made by Turkey, it is observed that in 2013 a total of five court orders and 4 TIB requests have been made to Twitter by Turkey regarding 32 accounts, whereas in the first half of 2014, 65 court orders and 121 TIB requests have been made regarding 304 accounts (https://transparency.twitter.com/country/tr). As illustrated above, it is Twitter that executes these orders and demands. In other words, the chief executor of this drastic practice, which can be defined as political censorship, is Twitter itself.

Twitter has no Obligation to abide by the Decisions issued by the Judicial Bodies in Turkey

9. As far as it is known, your company is not established as a legal entity in Turkey. Your company procures hosting services in the United States and is not subject to the national legislation of Turkey. Therefore, the company is not subject to obligations set forth under the laws of Turkey; nor is it legally possible for Turkish courts to make determinations or pass judgements against your company with respect to alleged offenses, violations of personal rights or privacy rights.

10. Articles 8, 9, and 9(A) of Law No 5651 on the Regulation of Publications on the Internet and Suppression of Crimes Committed by means of Such Publications set forth the procedure for issuing decisions on 'the removal of content' and 'access blocking. Accordingly, the authority to issue blocking orders under Articles 8 and 9 rests with the judiciary. As per Article 8(4), the Presidency of Telecommunication and Communication may also issue blocking orders under

[1] See. Can Dündar "Cumhuriyet'e Açık Teşekkür", 7th December 2014 http://www.cumhuriyet.com.tr/koseyazisi/157629/Cumhuriyet_e_Acik_Tesekkur.html

specific circumstances. For situations that fall under Article 9(A), individuals who make a request to TIB for blocking access to certain content allegedly violating their privacy must submit their request to the criminal judgeship of peace within 24 hours of their initial request to TIB. According to these provisions, court decisions regarding publications suspected of constituting an offense are communicated to the Presidency of Telecommunication and Communication for further action as per Article 8(3); court decisions regarding publications alleged to be in violation of personal rights are communicated to the Access Providers Association for further action as per Article 9(5); court decisions regarding publications alleged to be in violation of privacy are communicated to the Presidency to be forwarded to the Association for further action as per Article 9(A).

As it is clearly understood from the text of the law, the authorities that are empowered by law to issue and execute blocking orders are explicitly stated, and neither your company nor hosting companies in general are listed explicitly among those bodies. Therefore, your company has no legal obligation to directly execute decisions issued on grounds of the foregoing legal provisions.

The Majority of Decisions issued by the Courts regarding Twitter Accounts are Against the Constitution and the European Convention on Human Rights

11. Supposing that there were legal grounds in Turkey supporting your company's practices against freedom of expression, these would still be against the Constitution and the ECHR.

A close examination of various court orders issued so far reveals that blocking orders mainly target posts and accounts that engage in criticism over issues such as corruption, state violence and political figures. Such matters that fall within the realm of freedom of political expression are expected to be subject to close public oversight and the protection of these rights must be subject to a wide interpretation (Castells v. Spain, 11798/85, 23.04.1992; Lingens v. Austria, 9815/82, 08.07.1986). Certain conditions that have, in the past, been shown as justification for blocking orders such as the publication of confidential information (Vereniging Weekblad Bluf! V. The Netherlands, 16616/90, 09/02/1995) corporate security (Sürek v. Turkey no. 4, 24762/94, 08/07/1999; Gözel and Özer v. Turkey, 43453/04 and 31098/05, 06/07/2010) are not regarded by the ECtHR as sufficient justification for restricting freedom of expression.

12. Article 13 of the Constitution of the Republic of Turkey sets forth the conditions under which fundamental rights and freedoms may be restricted. Accordingly, such rights may be restricted only by law and in conformity with the relevant articles of the Constitution without infringing upon their essence; and shall not be contrary to the letter and spirit of the Constitution and the democratic order of society and the secular republic and the principle of proportionality. Indeed, with regard to international human rights law, in addition to the requirement of being prescribed by law, any restriction must also be legitimate and necessary in a democratic society (Sunday Times v. UK, Application No:6538/74, 26/04/1979)

13. The problem of blocking of user accounts under the *country withheld content policy* first and foremost affects the right to freedom of expression and the

right to impart and receive information. Freedom of expression and the right to impart and receive information are safeguarded under Article 26 of the Constitution and Article 10 of the ECHR. Orders issued under Law No. 5651 are essentially temporary protection measures. The ECtHR has found that in the implementation of the measure foreseen under Article 8 of Law No 5651, the Turkish courts failed to provide a reasoning to strike a balance between the values to be protected and the rights that would be violated; and that they failed to consider whether less far-reaching measures had been available. Furthermore, with regard to freedom of expression safeguarded under Article 10 of the Convention, the ECtHR emphasized that despite the need to introduce clear limits to such restrictions, the measures listed under Article 8 of Law 5651 were inadequate with respect to the criteria of being foreseeable and necessary in a democratic society (Ahmet Yıldırım v. Turkey Application No: 3111/10, 12/12/2012). Nevertheless, the ECtHR has noted in its decision in the pilot case of Ürper and others v. Turkey that while protection measures, in and of themselves, were not contrary to Article 10 of the Convention it is an entirely different situation when the publication of newspapers, whose future content is yet unknown, is suspended by a judicial body in such a manner (Application No: 14526/07, 14747/07, 15022/07, 15737/07, 36137/07, 47245/07, 50371/07, 50372/07 and 54637/07, 20/10/2009) According to the ECtHR, the suspension of future editions of newspapers amounts to an act of censorship. It must be noted that the Urper case cannot be seen as confined to only newspapers and magazines; the decision also applies to Internet publications. Blocking of access to websites is a restriction under Article 10 of the ECHR and Article 26 of the Constitution and such practices can only be regarded as 'censorship' in the light of the Urper case.

14. On the other hand, blocking of access to a user's account violates not only that specific user's freedom of expression and right to impart information but also the rights of other followers to receive news and information, as safeguarded by Article 10 of the Convention (Sunday Times v. United Kingdom, Lingens v. Austria).

15. The issue of blocking access also affects the right to a fair trial. The right to a fair trial in enshrined in Article 36 and subsequent articles of the Constitution and Article 6 of the ECHR. The right comprises the right to defence, the principle of equality of arms and the right of the person to be informed of the charges against him. As known, under Law 5651, judicial bodies issue court orders without giving notice to content providers or allowing them to access the case files and do so in the absence of their defence. Furthermore, the decisions are not even notified to the account owners or content providers. In the same way, when blocking access to accounts under its *country withheld content policy*, your company is interfering with users' freedom of expression and also violating the aforementioned rules pertaining to such restrictions and the principle of the right to a fair trial.

16. Although, on paper, it seems as if there is a right to challenge such interferences, it is impossible to follow the thousands of decisions issued by the courts of law. As explained above, the criminal judgeships of peace uphold each other's decisions without question. Filing an individual application with the Constitutional Court is a long, costly path with limited effect. It is impossible for a user to dedicate his entire time to following each and every decision for legal challenge.

17. You company does challenge certain decisions, including those listed above, through its legal counsel in Turkey. These appeals primarily stress that your

company is not founded according to Turkish laws and does not provide hosting services in Turkey. Furthermore, these appeals make reference to Decision No 2014/3986 of the Constitutional Court and underline the importance of freedom of expression on social media. Therefore, it is understood that your company is also aware of the fact that the blocking orders in question and the execution of these orders through your *country withheld content policy* or other means is against the law and contrary to human rights.

18. With respect to freedom of expression, the form by which speech is expressed is just as worthy of protection as its content. In this framework, the distinct characteristics of Twitter in today's world must be noted. As expressed before, Twitter is among the most widely-used and most popular social media platforms in the world and in Turkey where all different views can be discussed. With this aspect, although it is a subscriber-based system, it is clear that Twitter has become a public forum protected under the First Amendment to the United States Constitution. Its popularity and the absence of an equivalent alternative virtually make Twitter a monopoly. It is not easy to say that there is an alternative platform to Twitter with respect to freedom of communication and freedom of expression. For these reasons, the rights of Twitter users, as users of a public forum, must be subject to a protection beyond that which is afforded by a simple commercial decision-making process. This is especially important in cases that fall under the realm of freedom of political expression.

Protection of Universal Human Rights is not only the Obligation of States but also of Companies that Engage in Transnational Activities

19. In conclusion, it is evident that states have an obligation to respect rules pertaining to human rights recognized by the ECHR and the Constitution. However, today, some corporations have the potential to violate human rights as severely as any government, if not more so. For example, if the exemption of an oil company from environmental regulations in a country is not regarded as a human rights issue because of its financial power, the right to a safe environment will be rendered meaningless. Twitter's activities in the fields of freedom of expression, science, art, and even the right to hold demonstrations and marches are of a similar nature. In many countries of the world, people convey their speech to others through social media platforms developed by companies. In cases where social media companies cooperate with political powers that exert political pressure on their citizens, those companies will be jointly responsible for the human rights violations. In the same manner, turning a blind eye on people who use the platform for violence will be deemed a violation of the right to life.

20. In this sense, social media companies have a negative obligation to refrain from violating others' rights and a positive obligation to prevent the violation of fundamental rights. This obligation has been enshrined in a number of international instruments. The Global Compact of the United Nations, The Protect- Respect-Remedy Framework and the UN Guiding Principles on Business and Human Rights for the implementation of these principles, the OECD Guidelines for Multinational Enterprises, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy are among documents that aim at securing these obligations. In view of the foregoing, because of the fact that Twitter is a *public forum*

without an alternative, it has an obligation to respect freedom of expression and the right to communication and other rights as much as the right to private life.

In view of the foregoing,

1. We wish to remind your company that;

a. As a non-state actor, you have the obligation to respect human rights and must therefore respect all human rights in general and freedom of expression in particular,

b. The procedure followed in the issuance of blocking orders and the content of the decisions are explicitly against international human rights law, the ECHR, the case-law of the ECtHR and the Constitution of the Republic of Turkey,

c. Judicial and administrative decisions for the blocking of access to individual Twitter accounts are not binding, in any way, on a company which is not founded in Turkey and which delivers content provider services from the US,

d. Blocking orders should be considered carefully bearing in mind that the authorities which issue and execute such orders as well as those authorities before which orders can be challenged are far from being independent and are structured in a way that violates the right to a fair trial, the decisions are not reasoned and judicial review is completely ineffective,

e. Twitter carries the characteristics of a public forum protected by the First Amendment to the United States Constitution and there is no alternative platform to it in Turkey,

f. The judicial decisions and blocking orders issued to date and executed by Twitter all relate to political expression, the exercise of which should be given more leeway and afforded better protection.

g. The blocking of future content through the practice of withholding accounts infringes upon the essence of the right and is defined as 'censorship' by the ECtHR.

2. We hereby ask you to abandon all blocking practices including the implementation of the *country withheld content policy*, to take all necessary steps to meet your obligation to respect human rights, as explained in detail above, and to notify the public of such steps. **We hereby give notice that in the event of failure to take these actions we will take all possible forms of legal action in both Turkey and the United States**.

Prof. Dr. Yaman AKDENIZ & Assistant Professor Kerem ALTIPARMAK