

OTT Market and Regulations in Turkey

24 Mar 2021

Foreword

Since the first affordable home radios occupied a central place in living rooms around the world, consumers have sought ever more convenient and customizable ways to access media. Today, streaming services offer a once unimaginable level of consumer convenience and consumption customization; and, currently, over-the-top-media, or OTT, is the paradigm.

OTT providers offer on-demand media content and communication platforms accessible twenty-four-seven on internet-connected devices. The OTT market has experienced exponential growth in virtual lockstep with massive, worldwide mobile device penetration.

Similar to radio and television broadcasting, OTT services are regulated. Recently, the European Union expanded its Electronic Communication Code to cover OTT services. Similar laws and regulations have been enacted in Turkey, with additional legislation work in process.

In light of the ubiquity of OTT and its evolving regulatory landscape, Moroğlu Arseven presents the following analysis of recent, important legal developments impacting OTT market participants.

1. Definition of OTT

Telecommunications services is among the fastest growing industries in the modern economy. Market participants, if they are to meet the ever-increasing demand for novel digital services, and satisfy rapidly changing digital consumer preferences, must continually innovate and regularly expand their services portfolio. Businesses continue to migrate from traditional telecommunications networks to over-the-top digital platforms like voice over the internet protocol ("**VoIP**"), and digital messaging ("**DM**," and collectively, with VoIP, etc., and each, individually, an "**OTT**").

While there is no universally accepted standard for what constitutes an OTT, the 2016 report (the "**BEREC Report**") of the Body of European Regulators for Electronic Communications ("**BEREC**") described it as "*content, a service or an application that is provided to the end-user over the open Internet.*" Instead of incorporating the *without operating a network* concept, the BEREC Report divides OTT services into three categories based on economic and technological combinations, and effect on electronic communications services (collectively, "**ECS**").

1. OTT-0: ECS include, among others, voice services that make calls to telecom subscribers, or services consisting primarily or solely of transmitting telecom signals.
2. OTT-1: services not specified as ECS which provide a substantially equivalent platform (e.g, IM).

3. OTT-2: other services such as those relating to ecommerce and media streaming^[1].

In short, an OTT is a virtual platform that delivers content to consumers via the internet, provided, however, that every such platform (i) makes communication easier and promotes information sharing, (ii) is not the provider of the underlying transmission technology (i.e., the Internet).

^[1] Berec Report on OTT Services, January 2016.

1.1. Market Developments of OTT

Total combined revenue from OTT video services is projected to reach USD 283.5 million in 2024, representing a compound annual growth rate of 9.7%. As the chart below illustrates, SVOD which will be described under Section 1.2.2 below, and TVOD which will be described under Section 1.2.3 below, revenues are expected to reach USD 264 million and USD 20 million, respectively ^[1]

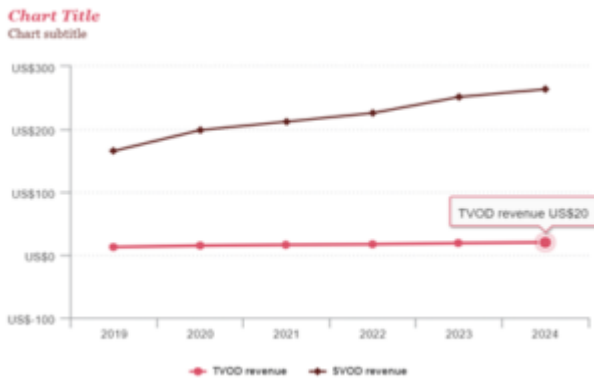


Chart no:1 TVOD and SVOD revenue comparison^[1]

^[1] <https://www.pwc.com.tr/global-entertainment-media-outlook-2020-2024>

^[1] Pwc, Global Entertainment and Media Outlook 2020-2024, available at <https://www.pwc.com.tr/kuresel-eglenecive-medya-sektorune-bakis-2020-2024>

Overall, the OTT market is projected to grow at an annual rate of 17.1%. By 2025, combined OTT revenue is projected to reach USD 3.49 billion,^[1] with video streaming services increasing by more than 85%.^[2] Turkey's imminent global OTT lead was recognized in a recent report by a Big Four accounting firm.^[3] The report projects 6.72 million Turkish OTT service subscribers by 2023.

^[1] Bilbil Ebru, Article on Methodology for Studying Over the Top (OTT) Services in Turkey: The Need of a Multidimensional Perspective, November 2017.

^[2] 'OTT Video Worldwide: Key Market Trends & Forecasts Through 2018-2023' (Globalnewswire, 21 June 2019)

^[3] [OTT TV & Video Forecasts Market in MENA 2018-2023: Turkey Will Remain the Leader, with 6.72 Million Subscribers \(A Third of the Region's Total\) \(prnewswire.com\)](https://www.prnewswire.com)

1.2. The importance of OTT

In order to address the rapid growth of online consumption, businesses are steadily migrating to OTT. Accordingly, new service provider and advertising opportunities within the marketplace continue to emerge. Notably, the net result of OTT service provider reliance on telecom infrastructure may be an increase in operating income of telecoms. ^[1]

[1] <https://news.itu.int/itu-launches-new-study-paper-on-economic-impact-of-otts/>

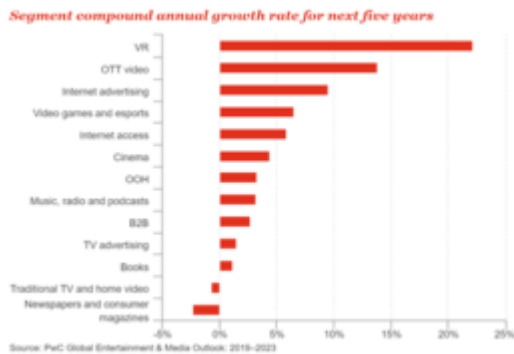


Chart no:2 segment compound annual growth rate between 2019-2023 [1]

[1] <https://www.pwc.com/gx/en/industries/tmt/media/outlook.html>

OTT streaming video accounts for more than 75% of total internet streaming traffic, with the remaining 25% attributable to other services.[1]

[1] CISCO (2017), Cisco Visual Networking Index: Forecast and Methodology, 2016-2021. Available at : <https://www.cisco.com/c/en/us/solutions/service-provider/visual-networking-index-vni/white-paper-listing.html>

To address the growing existential threat to established telecoms posed by OTT services like SMS, MMS, Voice-Over-Internet Protocol (VoIP), and email,[1] the BEREC stated that those services can be treated as electronic communication services. Skype is the most widely used OTT replacing traditional telecom services. In this regard, OTT platforms are capable of providing telecommunications services for instance SMS, MMS, Voice-Over-Internet Protocol (VOIP), email, photos, calls, etc. are threatening the telecommunications operators.[2] . Notably, since they do not participate in the electronic communications market, neither Uber nor Airbnb are considered OTT service providers.[3]

[1] REMY, J-G. & LETAMENDIA, C., (2014). LTE services, John Wiley & Sons. Accessed from Berec Report on OTT Services, January 2016.

[3] Berec Report on OTT Services, January 2016.

1.3. Relevant Concepts

1.3.1 VOD

Video on demand ("**VOD**") refers to streaming video content delivered by an OTT to a consumer on request. VOD platforms are generally subscription based - though ad-supported, non-subscription platforms do exist.

While VOD is conceptually simple, distinct VOD platforms including, subscription video on demand ("**SVOD**"), transactional video on demand ("**TVOD**"), and advertising video on demand ("**AVOD**") cause some practical complexity.

1.3.2 SVOD

SVOD is a subscription-based OTT that includes the likes of Netflix, Hulu, Amazon Prime, Disney+ ("**SVOD Provider**"), which, for a recurring fee, provide subscribers with unlimited access to, among other programming, television

shows and feature films. Stiff competition for SVOD customers encourages programming innovation and acts as a price control.

1.3.3 TVOD

For consumers preferring not to be bound by a periodic fee based SVOD subscription, there is TVOD, often referred to as pay-per-view since consumers pay only for what they watch. There are two kinds of TVOD, namely, electronic sell through ("**EST**"), where consumers pay once for permanent access to a particular video and download to rent ("**DTR**") where consumers pay a reduced fee to watch a particular video for a specified length of time only.

The trend among streaming services seems to be towards high turnover TVOD for recent releases. Maximizing revenue in this way is necessary to offset high licensing fees associated with acquiring streaming rights to new releases. Popular TVOD providers include, Apple iTunes, Distrify, Sky Box Office, and The Video Store from Amazon ("**TVOD Provider**").

1.3.4 AVOD

AVOD is advertiser supported without pecuniary cost to consumers. However, as with all ad supported platforms, the consumer, as it were, becomes the product vis-a-vis paying advertisers. In that regard, advertisers pay to place product ads strategically, to target consumer groups. Youtube and DailyMotion are examples of AVOD providers. Notably, premium content licensors - e.g, VOD and TVOD providers - rarely, if ever, engage in AVOD since their subscribers pay for and expect ad-free content.

1.4. VoIP

VoIP is a platform for transmitting voice calls over the internet. Hardwired telephones are replaced by internet protocol addresses, and transmission wires by the internet.

VoIP is a cost-effective, high speed, high capacity means of voice communication. Voice data is instantly transmitted back and forth via internet in small data packets, thus providing what is commonly referred to as internet telephony.

VoIP has several capabilities other than voice calling, including video calls, video conferencing, and voice transcription via applications like WhatsApp, Viber, Facetime, and Skype.

1.5 OECD's OTT classification

OTT service classifications are based upon the type of service offered. The latest BEREC report includes the following classifications: real-time communication, entertainment video services, telework and telepresence, cloud computing and storage, financial services, Internet of Things, and Smart Homes.

Real-time communication

In a relatively short time, VoIP has rendered traditional voice messaging - once a core service of traditional telecoms - a relic of bygone times. VoIP platforms like Skype, Facetime, and WhatsApp, provide consumers with an all-in-one experience integrating voice, video, text messaging, screen sharing, and file transferring. More robust platforms provide additional functionality like high quality video, videoconferencing, and computer integration.

Entertainment video services

The proliferation of broadband networks has been a boon for streaming video providers requiring, perhaps more importantly, in addition to speed, extensive bandwidth to prevent streaming quality degradation, particularly for live and high-definition content.

Telework and telepresence

Telework platforms provide remote workspaces. There are several advantages to telework, including reduced expenses for employer and employee, and happier, more empowered employees. Telepresence platforms provide very high-quality audio-video links which give remote users the feeling of being together in the same room.

Cloud computing and storage

Desktop software companies have modified their business model to take full advantage of cloud computing. Once sold as a product, most major software companies now sell their software as a service (SaaS) accessible via the cloud. Cloud based software enables users to access their data from any appropriate, internet connected device. Pioneering SaaS platforms include G-Suite, Salesforce.com, and Dropbox, among many others.

Financial services

In coming years, an exponential increase in financial services transacted via smartphone is expected. Smartphones equipped with connectivity technology like Bluetooth, and security technology incorporating biometric authentication, and payment platforms like ApplePay and Android Pay, have radically transformed the way in which financial transactions are accomplished. Since these technologies generally consume minimal data bandwidth, there is no need for increased network capacity to handle them.

Internet of Things

The Internet of Things (IoT) includes nearly all internet connected mobile gadgets, home appliances, cameras, vehicles, computers, and machinery. Machine-to-machine features enable certain connected devices function without a human operator.

Smart homes

By connecting energy consuming devices inside homes with the means of power transmission outside, high-capacity fiber networks reduce costs significantly. Smart grids can calculate consumption and generate mechanisms to transfer demand in real time.

2. OTT Regulation in the European Union ("EU")

The EU's electronic communication policy framework is part of its Digital Single Market strategy, which seeks to boost innovation and competition while enforcing data privacy laws.

The latest promulgated regulatory scheme applicable to OTT services is the Electronic Communication Code^[1] ("ECC"), enacted in 2018, became fully effective on 21 December 2020. The ECC is an attempt to harmonize regulations applicable to telecom services within the EU, and it will replace the current regulatory scheme.

The prior regulatory scheme governing electronic communication services consisted of five directives: the Access Directive^[2], the Authorization Directive^[3], the Framework Directive^[4], the Universal Service Directive^[5], and the Privacy Directive^[6]. As mentioned above, these directives -except for Privacy Directive number 2002/58, which will remain in effect coextensive with the ECC - were superseded by the ECC as of 21 December 2020.

An OTT provider, regardless of where it is formally established, is subject to ECC if the communication services provided are (i) paid, which, in this context includes, but is not necessarily limited to, remuneration in the form of currency, personal data, advertising revenue, and (ii) accomplished via electronic communication networks. Notably, the provision of content does not alone render a provider subject to ECC, and neither website operators, nor marketers of broadcast content are subject to ECC.

Electronic communication services are defined in the Framework Directive as a service consisting wholly or mainly in conveyance of signals on electronic communications networks. Currently, neither the Framework Directive, nor any other directive, explicitly mentions OTT services, however, some courts have interpreted certain directives as applicable to OTT services.

Notably, the ECC broadened the rules applicable to electronic communication services to include OTT services. Prior to that, inclusion was controversial because the framework was established to regulate traditional telecoms and electronic communication services.

Importantly, the ECC emphasizes personal privacy and consumer protection, and is an important step toward the creation of Gigabit Society^[7] because it supports higher quality services and next generation 5G networks.

The BEREC was established to harmonize EU telecom rules, and to contribute to the development of the Digital Single Market by assisting the European Commission and national regulatory authorities. To that end, the BEREC Regulation charges the BEREC with certain tasks, including *"issuing guidelines on several topics, reporting on technical matters, keeping registers, lists or databases and delivering opinions on internal market procedures for draft national measures on market regulation."* While the ECC brings a new set of rules for telecoms, it entrusts the BEREC with implementation of a consistent regulatory framework.

The BEREC's assessment of the rapidly growing OTT industry and its impact on electronic communication services is contained in its 2016 published report. According to the said report, the main problem arising from industrywide disruption caused by services like OTT services is that as technology rapidly develops, current regulations become obsolete; and Member States, and their regulatory agencies, lack a harmonious approach to OTT service providers, resulting in market uncertainty.

[1] <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1547633333762&uri=CELEX:32018L1972>

[2] Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities

[3] Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services

[4] Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services

[5] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services

[6] Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

[7] https://ec.europa.eu/commission/presscorner/detail/en/MEMO_18_4084

2.1 Recent Developments for VoIP and ECC

The ECC broadly defines electronic communication services to include *"a service normally provided for remuneration via electronic communications networks, which consists of (a) internet access services, (b) interpersonal communications services, or (c) services consisting wholly or mainly in the conveyance of signals."* Accordingly, OTT services such as instant message applications and VoIP service platforms are covered. Under the BEREC's definition, it is reasonable to conclude that OTT-0 and OTT-1 services are within the scope of the ECC; and that VoIP

services will be treated the same as electronic communication services classified as OTT-0 services. However, the applicability of ECC to integrated OTT services - which, like Facebook, Snapchat, and Twitter, are an amalgam of varied features and services - remains unclear.

Furthermore, the recognition of VoIP services as an electronic communication service effectively levels the playing field in as much as it aims to eliminate unfair competition between OTT service providers and traditional telecoms. VoIP services, even if they have functionally equivalent counterparts within traditional telecoms, are not subject to the same strict regulatory framework. Therefore IP-based systems may benefit unfairly from this lack of regulation. The ECC aims to address this risk by evaluating market dynamics and other factors.

Figure 14. Voice, video and messaging communication services offered by Orange (in orange), Skype (in blue), Apple (black) and WhatsApp (green).⁴¹

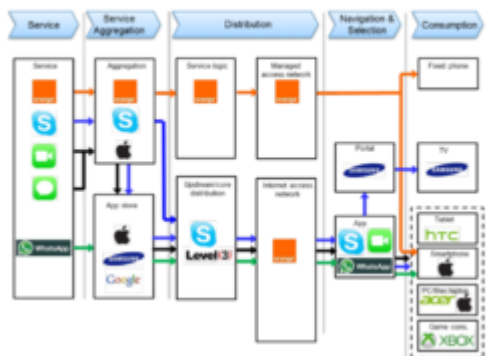


Chart no.3 Offered Video, voice and messaging communication services^[1]

^[1] [https://www.europarl.europa.eu/RegData/etudes/STUD/2015/569979/IPOL_STU\(2015\)569979_EN.pdf#page=36&zoom=100](https://www.europarl.europa.eu/RegData/etudes/STUD/2015/569979/IPOL_STU(2015)569979_EN.pdf#page=36&zoom=100)

2.1.1 ECJ Decisions of Skype^[1](Belgium) and Gmail^[2] (Germany)

National supervisory and regulatory authorities take different approaches to interpreting OTT regulations, and request for declaratory rulings have been brought before the European Court of Justice ("ECJ"). Two recent decisions are worth mentioning for their interpretations of EU directives.

In the Skype decision, dated 5 June 2019, the ECJ considered the SkypeOut feature of the Skype application - which allows users to make voice calls and send text messages both to traditional telecom users via traditional transmission means, and to Skype users via the Internet - and ruled that pursuant to Framework Directive, a VoIP service shall be considered an electronic communication service if it enables users to make calls that conclude on the public switched telephone network. On that basis the court found the SkypeOut feature meets Article 2(c) of the Framework Directive in that it consists *at least mainly in the conveyance of signals*.

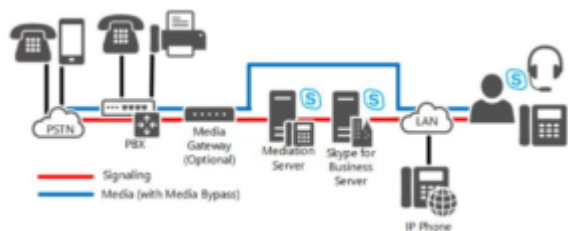


Chart no:4 Skype Business Plan^[1]

^[1] <https://docs.microsoft.com/en-us/skypeforbusiness/plan-your-deployment/enterprise-voice-solution/direct-sip>

[1]

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=214741&pageIndex=0&doclang=EN&mode=lst&dir=&occ=fi>

[2]

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=214944&pageIndex=0&doclang=EN&mode=lst&dir=&occ=fi>

Moreover, the ECJ found the SkypeOut feature to be functionally identical to traditional telecom services and, therefore, equivalent consumer privacy protections must be implemented by the service provider. Accordingly, SkypeOut users can enforce their personal data privacy against Skype pursuant to Privacy Directive number 2002/58.

At this point, we would like to emphasize that OTT-0 and OTT-1 services will be deemed electronic communication services under the new ECC regime due to the Skype ruling.

The ECJ adjudicated a similar case involving Gmail regarding determining responsibility for the decisive transmission of signals to determine whether the service *at least mainly consists in the conveyance of signals*. The court concluded that email services cannot be considered electronic communication services because they do not consist, wholly or mainly, of transmitting signals via electronic communications networks. With this decision, the ECJ confirmed that OTT-2 services are not subject to the regulatory framework applicable to traditional telecoms.

Even if the ECJ had concluded that an IP-based email service such as Gmail was within the scope of traditional telecom regulations, under the broader ECC email services may nevertheless be considered an electronic communication service.

2.2.2 Additional Obligations:

a. Privacy Security

Since VoIP services fall within the scope of the ECC, service providers should register with the necessary regulatory authorities, and comply with applicable regulations governing data privacy and security in both transmission and storage, consumer protection, and law enforcement access.

Currently, new e-Privacy legislation is being drafted by the EU. In the meantime, Privacy Directive number 2002/58, and the Citizens' Rights Directive, address privacy matters within the electronic communication services arena.

b. Customer Protection

Under the ECC all actors, from traditional telecom operators to online players, must, in providing interpersonal communication services (*including OTT services*), implement equivalent consumer protections.

The ECC sets a higher standard of consumer protection. For example, in the event of service failure, a customer may terminate a contract without incurring additional fees, and, that a subscriber contract may be prolonged automatically by the provider only if the consumer is informed in advance. Additionally, the ECC enhances consumer rights regarding switching internet service providers, and phone number porting.

To harmonize its consumer protection laws, all EU Member States must apply and enforce only the ECC.

Nevertheless, ECC compliance remains a matter of some contention. Traditional telecoms favor the ECC's *level playing field* approach. However, the high pecuniary cost of ECC compliance may be an economic barrier preventing startups with limited resources from entering the marketplace. That is a potential negative for consumers who benefit from increased competition and innovation.

3. OTT Regulation in Turkey

3.1 Related Authorities and Regulations

Laws specifically regulating the OTT marketplace have yet to be enacted in Turkey. In fact, only once did a government communicate even recognize OTT. However, due to skyrocketing rates of streaming media consumption, promulgating an OTT regulatory scheme has, since 2018, been as a legislative priority.

Providing a general OTT regulatory framework since its enactment in 2018, the Law on Establishment and Broadcasting Services of Radio and Television no. 6112, as amended, including Article 29/A (collectively, the "**Amended Broadcasting Law**"), directly regulates internet broadcasting. The Amended Broadcasting Law is based primarily upon EU directives and Member State laws on licensing and content regulation. Although prior provisions of the Law on Regulation of Publications on the Internet and Suppression of Crimes Committed by Means of Such Publications no. 5651 (the "**Internet Law**") are still applicable to OTT services, they are not specific to OTT services. Article 29/A of the Amended Broadcasting Law, titled Regulation on Submission of Radio, Television, and Voluntary Broadcasts through the Internet is effectuated by the ICTA and RTSC. Of note, while extant EU directives regulate video-on-demand services based on content, under Turkish law the content supervisory power of RTSC with respect to video-on-demand services was not promulgated until enactment of the Amended Broadcasting Law.

Pursuant to the article 29/A of the Amended Broadcasting Law, the ICTA and RTSC are the regulatory authorities with comprehensive powers over OTT services and providers, and are charged with, among other duties, supervising the content provided via OTT services. The ICTA's content supervisory authority is limited to matters arising under the Internet Law and its secondary legislation, and consumer complaints. The authority of the RTSC is much broader.

Unlike the ECC which applies only OTT services providers paid electronically by its subscribers, the Amended Broadcasting Law does not incorporate an e-payment condition and applies generally to media service providers defined therein as *"a legal person who has editorial responsibility in the selection of the content of the radio, television and on-demand broadcast service and decides on the way this service is organized and broadcast."* Furthermore, whereas each individual EU Member State can determine its own internet broadcasting license requirements - Germany for example requires licensing - in Turkey, every domestic OTT broadcaster is regulated by the Amended Broadcasting Law.

In its Turkey 2020 Report,^[1] the EU criticized the RTSC for lacking independence of authority, and both the Internet Law and Amended Broadcasting Law for not conforming to EU legislation; specifically with respect to the Amended Broadcasting Law, for a lack of clarity as to scope, definitions, licensing criteria and costs, and for containing controversial provisions on jurisdictional matters, and broadcast access restrictions, and for granting the RTSC discretion to define obscenity, general morality, and national integrity for internet broadcasting purposes - just as it does for television broadcasting - and to enforce such definitions, which, collectively, the EU argued, threaten media pluralism.

3.1.1 ICTA's Authorities towards OTT

The Internet Law is the primary legislation granting watchdog authority to the ICTA.

a. Content restriction

Content disseminated via the internet, the content of which is reasonably suspected to constitute criminal activity under the Internet Law, can be banned or removed. Such criminal activity includes:

- Encouraging suicide

- Sexual abuse of children
- Facilitating the use of drugs or stimulants
- Supplying materials hazardous to health
- Obscenity
- Prostitution
- Providing a place and opportunity for gambling
- All crimes stipulated in the Law on Crimes Committed Against Atatürk, no. 5816
- Crimes stipulated in the Law on the Regulation of Betting and Games of Chance in Football and Other Sports Competitions, no. 7258

While the general rule is that only a judge can issue an order banning or removing content, in an emergency, the public prosecutor may issue the order which will later be submitted for judicial approval. Under Article 8/A, for the purpose of protection of the right to life and the security of life and property of persons, the protection of national security and public order, the prevention of crime or the protection of general health upon the request of Presidency of the Republic of Turkey, the chairperson of the ICTA or a judge of criminal court of peace content may be removed. Also, for the purposes of protection of national security and public order, prevention of crime or general health the chairperson of the ICTA may decide on removal or banning of content at the request of the Ministry of Justice. These decisions are presented to a judge within 24 hours for approval.

Under Article 9 of the Internet Law, natural or legal persons may request the removal or banning of content. Furthermore, natural, or legal persons whose personal rights or privacy rights are violated by content broadcasted via the Internet may request its removal. If the request is denied or goes without response, applicant may direct a second request for relief to the Court of Peace. On the other hand, as per the Article 9/A of the Internet Law, person whose private life right is violated may also directly ask the ICTA to remove or ban the content.

b. Liability of Hosting Providers and Internet Service Providers ("ISP")

The Internet Law defines a hosting provider as real or legal person providing or operating systems that host services and provide content. It defines an ISP as a natural or legal person providing internet access.

In principle, hosting providers are not obligated to examine hosted content nor to investigate illegal content. However, hosting providers must remove content if it is notified that the content is unlawful.

Hosting providers are required to keep logs for a period to be determined by regulation (*min 1 year- max 2 years*), provide the ICTA with any information requested. Failure to comply with any of the foregoing will result in administrative fines.

ISPs are required to remove access to content when notified that it is unlawful, keep logs for a period to be determined by regulation (*min 6 months- max 2 years*), notify the ICTA, content providers, and customers at least three months before ceasing operations, submit traffic records to the Authority in accordance with applicable regulations, provide the ICTA with any information requested, and take measures to prevent alternative access routes to banned content. Failure to comply with any of the abovementioned obligation will result in administrative fines.

c. Social Network Provider Liability

The Internet Law defines a social network provider as *"real persons or legal entities that enable users to create, share or view content, information or data such as text, images, sound, location via Internet, for the purpose of social interaction."* Relative to hosting providers, social network providers have additional obligations - such as appointing a local agent - based on their total customer traffic.

Social network providers are not responsible for the legality of content. However, the Internet Law requires social network providers, whose daily access originating in Turkey is over 1 million daily to respond to user inquiries

concerning infringement of their personal or privacy rights within 48 hours. Failure to comply with the foregoing will result in an administrative fine of 5 million TRY. In addition, social network providers are obligated to remove content within 24 hours of notice to avoid consequential liability.

d. Content Provider Liability

Content providers are liable for unlawful content originating with the provider and originating outside the provider if its presentation clearly indicates provider's adoption of the content. Content providers must provide information requested by the ICTA in the execution its duties.

e. Fines

Providers are subject to ICTA fines for failing to:

- Include identifying information on its website,
- Comply with applicable notification requirements,
- Keep required logs,
- Timely execute an access denial decision,
- Remove content from broadcast pursuant to an access denial decision.

3.1.2 RTSC's Authorities towards OTT

a. Licensing Requirement

According to Article 29/A of the Broadcasting Law, media service providers wishing to provide media services solely on the internet must obtain a license from the RTSC. However, if a media service provider already holds a broadcasting license, no separate license is required to provide media services on the Internet.

Media services providers wishing to engage in online broadcasting must obtain a separate broadcast license from the RTSC as follows:

- For online radio services: INTERNET-RD broadcast license
- For television services: INTERNET-TV broadcast license
- For on-demand broadcast services: INTERNET-?BYH broadcast license

A single media services provider is limited to one radio, one television, and one on-demand service. Online broadcast licenses are granted to companies for 10 years. Platform operators broadcasting on their own websites or mobile applications must be authorized by the RTSC.

Foreign media service providers wishing to broadcast in Turkey and in a language(s) other than Turkish must also be licensed. A foreign entity should begin the licensing process by legally establishing its business in Turkey.

b. Liabilities

The RTSC will notify media service providers, and publish such notices on its website if the, if such provider:

- Broadcasts without license.
- Continue broadcasting after its license has been revoked RTSC.

If a media service provider fails to comply with such notice, the RTSC may obtain an access denial decision from the criminal court of peace and may then file a criminal complaint against an unlicensed broadcaster.

The RTSC may serve a second notice for failure to comply with the first notice and may obtain an access denial decision from the criminal court of peace and may then file a criminal complaint based upon the unauthorized

broadcasts.

c. Fines

Under the Article 29 of the Broadcasting Law, the ICTA may fine access, content, or hosting providers failing to **(i)** take necessary steps to execute an access denial decision and **(ii)** remove content from broadcast as instructed in an access denial decision as stated under the Internet Law Article 8/A.

d. Transition Period

Regulation on Broadcasting Services of Radio and Television ("**Regulation**") outlines more detailed transitional provisions. Notably, a one-month transition period is provided within which applications for broadcasting licenses and transmission authorizations may be filed. If a service provider fails to file an application during the one-month transition period, or the application process is not completed within that period, the criminal court of peace may order content removed and access denial.

e. RTSC's Recent Regulatory Actions

Under the Regulation, broadcasters previously warned by the RTSC must submit their license applications to the RTSC within 72 hours, together with three months of licensing fees, otherwise:

- Pursuant to the second paragraph of Article 29 / A of the Broadcasting Law, a criminal judge of peace may be requested to remove content and/or block access, and
- Pursuant to Article 33 of the Broadcasting Law, a criminal complaint may be filed against natural persons, members of boards of directors, and general managers of legal entities engaging in unauthorized broadcasting, and
- The duration of license will be reduced by a period equal to the duration of the application process.

The RTSC has recently warned broadcasters, including Spotify and FOXplay. Subsequently, the RTSC announced that Spotify had cured its non-compliance. Tidal also received a recent warning but did not apply for a license. As a result, the RTSC sought to block Tidal services in Turkey. The criminal judge of peace ruled in favor of the RTSC, and Tidal services remain blocked^[2].

The RTSC's first content enforcement action against Netflix concerned the movie "Cuties," which has since been removed from Netflix's domestic offerings, because, according to the RTSC, it is "*a production in which children take part in adult life at an early age involving abuse can reveal potential child abuse behavior patterns.*"^[3]

3.1.3 VoIP services in Turkey

a. Electronic Communication Law ("ECL")

Pursuant to the ECL, and in consideration of the Ministry's policies and goals, electronic communications services may be provided, and/or electronic communications network or infrastructure constructed and operated, upon authorization from the ICTA.

Certain electronic communications services and network infrastructure construction and operations are exempt from this authorization requirement if same is:

- within any natural person's or legal entity's property under his/its own use, which do not exceed any property's borders, which is used exclusively for individual or organizational needs, which is not used for providing any electronic communications services to third parties, which is provided without any commercial intention, and which is not publicly available, or
- services only public corporations and institutions in accordance with applicable law.

VoIP providers, if considered within the scope of the ECL, and absent an exemption, must obtain a license from the ICTA.

b. Evaluation of the VoIP under the ECL

The ECL defines electronic communication quite broadly as the transmission, exchange, and receiving of all kinds of signals, symbols, sounds, images, and data which could be converted into electrical signals by means of cable, radio, optic, electric, magnetic, electromagnetic, electrochemical, electromechanical, and other means of transmission. With a codification of such definitional breadth, it may be interpreted that VoIP services are covered by the ECL, and, therefore, that VoIP providers must be duly licensed unless covered by one of the exemptions set forth above.

3.2 Expectations under the 11th Development Plan

The Government of Turkey's 11th Development Plan provides certain goals slated for accomplishment by 2023. Several provisions have the potential to impact OTT insofar as they incorporate the goal of reducing the media's negative influence on families, the achievement of which may require stricter supervision of OTT services and providers.

The 11th Development Plan states without clarification that proper use of Turkish will be encouraged. In light of EU legislation requiring at least 30% of OTT catalogs to consist of European productions, it is reasonable to expect a similar requirement on Turkish OTT catalogs for Turkish productions.

The 11th Development Plan considers VoIP developments within the OTT sector to require more comprehensive regulation in the near future.

[1] https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/turkey_report_2020.pdf

[2] <https://www.rtuk.gov.tr/haberler/3787/8458/basin-aciklamasi.html?Keyword=tidal> (Available in Turkish)

[3] <https://www.rtuk.gov.tr/haberler/3787/8383/rtukten-netflix-istismar-cezasi.html?Keyword=netflix> (Available in Turkish)

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