

OTT regulation in Turkey

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Currently, one of the most controversial topics in the global regulatory debate on electronic communications is whether over-the-top (OTT) streaming media services should be regulated. This article explains why countries are so eager to regulate OTT services and scrutinizes the recent regulatory developments in Turkey.

Introduction

Rapid technological development has led to a growing range of services being able to consume online. This has affected the competitive dynamics and technological scenarios in communication markets, and many Internet-based services that are usually called “over-the-top” (OTT) have been flourishing in the broadcasting markets (BEREC, 2016).

More than 75 percent of Internet traffic now consists of transmitting video content, while online videos watched from TV represent 25 percent of total internet traffic (Cisco, 2017). In addition, it is estimated that almost half of the adults in developed countries are subscribers to at least two services that provide visual and audio content on the Internet, and the number of these subscriptions is expected to double by 2020 (Deloitte, 2018).

Most countries already have some kind of regulation of conventional media services, as for a long time these have been the main players in the broadcasting sector. However, as viewing habits of end-users have changed significantly, there is a need to revise the regulatory framework, which will primarily aim to set appropriate definitions, scopes, related obligations, etc. (TCA, 2017).

In recent years, a number of countries, particularly in Europe, have placed more emphasis on OTT regulations. Pursuant to this tendency, Article 29/A is issued in the “*Law no. 5651 on Regulation of Publications on The Internet and Suppression of Crimes Committed by Means of Such Publications*” (Code) in order to set out the general outline of the proposed regulation regarding OTT services in Turkey.

This paper will initially address the question of what OTT is in media markets, before scrutinizing recent developments in Turkey in detail. In this context, the draft regulation will be evaluated by including a comparison with other countries’ regulations. Finally, potential amendment recommendations will be set out.

What is OTT?

From a general perspective, the term of “over the top” refers to the delivery of the film and TV content over internet without requiring a subscription to a traditional cable or satellite pay TV- service. Accordingly, BEREC, which is an important organization in the electronic communications sector, defines OTT as “*a content, service or practice transmitted to end users on the Internet*”. In line with BEREC’s approach, it can be argued that all services and applications provided on the Internet can be included within the scope of the OTT concept. Moreover, it means that Internet service providers (ISPs) only have a role in the distribution of the OTT service, as the production is solely provided by the OTT service provider (BEREC, 2016).

The main reason why OTT services provided by a third-party content provider is that it provides the distribution of the video or other media on the Internet without a multiple system operator. In this context, the ISP is not responsible for the content and has no ability to control it unless the video is purchased from an ISP such as IPTV, which is a television programming being communicated using the internet protocol. (Remy & Letamendia 2014).

In this respect, OECD refers in the 2015 report of the OECD Working Group on Infrastructures and Service Policy to OTT services as “*an alternative way of providing services on a broadband internet environment*” (OECD, 2015). According to the OECD, OTT services use similar network facilities as the other content and application providers.

OTT services usually do not constitute a standalone service, as the production of these services does not represent a value in itself. Therefore, they can only demonstrate their function in conjunction with the other elements of the network such as the transmission of the content.

BEREC also points out that OTT services should be regarded as electronic communication services if they potentially compete with them (such as providing e-mail, mes-

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saging, etc.) In this respect, OTT services that are able to offer telecommunications services – such as SMS, MMS, voice-over-Internet protocol (VOIP), text, images, calls, etc. – will be deemed services that challenge the telecom operators (Remy & Letamendia, 2014). Skype is the best-known OTT service that can be substituted for conventional communication services. On the other hand, it is worth emphasising that OTT services that do not relate to the electronic communication sector, such as Uber and Airbnb, should not be regarded as electronic communication services (BEREC, 2016).

Recent developments in Turkey concerning online video on-demand platforms

The Radio and Television Supreme Board (RTUK) is the main authority for the regulation and supervision of radio, television and on-demand media services that are under the jurisdiction of the Republic of Turkey. In order to achieve its primary objectives and determine the required administrative, financial and technical standards for the media service operators, the RTUK releases its secondary legislation pursuant to the Broadcasting Code, which is the primary source of law in broadcasting services.

Conventional media services such as cable, satellite and terrestrial networks have already been regulated by the secondary legislation of the RTUK. These regulations mainly aim to determine the principles and procedures for granting cable and satellite licenses and transmission authorizations to media service providers.

Several video-on-demand (VOD) platforms have grown their presence in Turkey by targeting online users. Therefore, lawmakers took VOD service providers into the scope of RTUK surveillance, through Article 29/A of the Code, which was passed by the Turkish Parliament and published in the Official Gazette on March 21, 2018.

Article 29/A of the Code stipulates the obligation to obtain a licence from the RTUK to provide radio, television and on-demand broadcasting services exclusively on the Internet. Along with some other provisions that set a general framework for the supervision of the RTUK over the VOD service providers, the new article stipulates that secondary legislation shall be issued jointly by the RTUK and the Information and Communication Technologies Authority (BTK).

Although the RTUK released its draft regulation in the last quarter of 2018, the regulation has not been passed into law yet (as of the date of this article). As the draft regulation reflects the latest position of the RTUK for the

supervision of internet broadcasting services, this paper will present its evaluations in line with the draft regulation.

Critical Analysis of the Draft Regulation

The draft regulation consists of 24 articles that set out the main principles and procedures for broadcasting via the Internet. In this respect, the draft regulation mainly aims to clarify licensing conditions and the supervision of the RTUK over OTT service providers.

Although this article only evaluates limited issues regarding the draft regulation, there are number of other aspects that can be taken into consideration.

In this respect, this paper only scrutinizes the draft regulation in line with the most controversial provisions related to the scope, authorization and content of the regulation.

The Scope

In line with the scope of the regulation, Article 2 includes any platforms providing radio, television and on-demand services over the Internet. However, in the second paragraph, it exempts the following service providers from the scope of the regulation:

- Individual communication service
- Platforms whose main activity is not associated with the transmission of radio, television and on-demand broadcast services via the Internet
- Real and legal persons who provide only hosting for radio, television and on-demand broadcast services.

First of all, it can be inferred that any broadcasting activity that targets the territory of Turkey, such as having subscribers from Turkey, will fall under the scope of the regulation. To assess this, the RTUK uses an impact analysis to determine the range of its surveillance.

The most problematic issue will be defining the individual communication services and hosting service providers, as this directly relates to the determination of the involvement of video-sharing platforms such as YouTube and Dailymotion. The draft regulation should not apply to an individual user who uploads a couple of videos to the video-sharing platforms. On the other hand, the design of the current video-sharing platforms can easily allow the OTT service providers to broadcast their content over a channel opened in the platform. More specifically, a medium-sized OTT service provider in Turkey can easily take shelter in the YouTube channel in order to evade the legal obligations provided in the regulation.

According to Article 2, it is not quite clear whether those channels will be included within the scope of the regulation; in fact, since it excludes the hosting service providers, one could argue that YouTube channels are not subject to the regulation.

In this respect, it is possible to argue that the law should embrace a two-pronged approach towards video-sharing platforms. Individual communications such as personal vlogs should be put to one side and exempted from the scope of the regulation. On the other hand, corporate communications should be distinguished from other content in the video-sharing platforms and made subject to the legal obligations set forth in the regulation and, consequently, in the Code.

As the main rationale of the OTT regulation is to determine the principles and procedures for OTT services that are now capable of generating a significant amount of business, hosting service providers should not go unnoticed. In this context, it will be plausible to claim that OTT services provided through video-sharing platforms should be covered within the scope of the regulations as long as they are substitutable with other broadcasting content provided through the Internet.

However, the regulation could create an unfair advantage for hosting providers – specifically YouTube – over the OTT providers. In South Korea, for example, local firms are worried because YouTube is free from proper regulation and poses a significant challenge to the country's OTT industry (Digital TV Life, 2018). Hence, it is likely that many countries will likely embrace an inclusionary approach to regulating hosting service providers in the near future.

Broadcasting Authorization

According to Article 5 of the regulation, media service providers that offer radio, television and on-demand broadcast services only from the Internet will need to request a broadcasting license from the Supreme Council of the RTUK. In addition, the providers will have to apply for a transmission authorisation from the Supreme Council of the RTUK. Pursuant to Article 8, before acquiring transmission authorisation, a provider must be established as a limited or joint stock company in accordance with the provisions of the Turkish Commercial Code.

Although strict OTT regulations have not been common until recently, many European countries now adopt various authorisation procedures for OTT providers. In this respect, many of them prefer to stipulate a notification obligation for OTT providers. Poland, Hungary, the Czech Republic and the United Kingdom are examples of coun-

tries that put service providers under a notification obligation (Blaguez, 2016). In order to determine the scope of the notification obligation, the countries generally release a guideline that provides criteria for being subject to the obligation (OFCOM, 2018).

On the other hand, Romania and Singapore regulate a similar authorisation regime with a draft regulation, as both countries lay down the licensing requirement as a condition, rather than a notification obligation. One could argue that countries that are relatively unattractive to foreign investors have a greater tendency to require licensing from the service providers. The main reason for this situation is that the countries strive to preclude tax avoidance by compelling service providers to establish a local company that will be under a tax obligation within that country.

Similarly, it is clear that the regulation stipulates an authorization process that leaves the service providers no choice but to establish a company in accordance with Turkish law. In this respect, the law aims to levy taxes on the income generated from Turkey's territory over the Turkish establishment of the service providers.

Since the alternative ways of abstaining from tax avoidance are quite limited within the scope of the international tax law, it can be accepted as a feasible policy that the legislator intends to reduce tax loss by planning a licensing process that stipulates the permanent establishment of the service provider.

The Content

The regulation aims to impose surveillance over the content of the broadcasting provided through the Internet. Although the regulation does not provide details on how this surveillance over the content will be implemented, it can be inferred that one of the significant purposes of the surveillance will be the protection of children.

This policy seems quite probable as the European Union also mainly targets the protection of the children with its Audiovisual Media Services Directive. According to the directive, Member States should take necessary precautions to protect minors from harmful content. Those precautions include scheduling restrictions, technical measures or visual indicators (EBU). In this respect, it can be clearly inferred that the directive does not prohibit harmful content; it only stipulates the obligation to take measures to prevent children from viewing the inappropriate content.

From this point of view, this paper suggests that the regulation should provide more certainty for the service providers over whether they are obliged to cut out all inappropriate content for the sake of protecting children. As it will not be cost-effective for the service providers to do this,

the regulation should determine the necessary precautions that the service providers should take in order to broadcast their content. For example, the encrypted channels can be exempted from content limitations as long as they keep the content out of the reach of children.

Conclusion

In conclusion, regulating OTT services should be regarded as an appropriate approach for Turkey since the income generated from those services is increasing every day. Therefore, putting the OTT services under surveillance will bring the treatment of the conventional broadcasting sector and the new technologies into balance.

On the other hand, the regulatory body must be careful not to ignore the business needs of the OTT service providers when stipulating new rules on the sector. Regulations that go too far could discourage the service providers from making significant investments in Turkey.

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