**The Role of Corporate Social Responsibility in the Regulation of OTT Platforms: The Case of Film Industry and Perspectives from Turkish Corporate Law**

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**Abstract**

*Among the types of on-demand broadcasting, Over-The-Top video streaming services refer to the provision of content and applications, including communication services, by media service providers over the Internet (“OTT platforms”). The freedom of OTT platforms to choose which films to broadcast can have negative implications on the social and cultural aspects of the film industry: Firstly, OTT platforms often refuse to broadcast films that may cause political discontent in the countries where they operate. Secondly, as films can be popular tools of propaganda, OTT platforms ultimately contribute to certain views over others through their film selection. Thirdly, the fact that certain content is denied broadcasting indicates that certain content creators lack sufficient access to the market through OTT platforms. As a result, reconsideration of OTT platforms’ freedom to curate their film catalogs is essential to support the development of the film industry and preserve the integrity of associated cultures. This article proposes that corporate social responsibility (CSR) can be used as a method of self-regulation to create an inherent limitation on the editorial freedom of the OTT platforms toward a fairer film selection process. The non-interventionist approach suggested in this article is demonstrated by analyzing the regulation of OTT platforms under Turkish law, with reference to European Union law where necessary.*

**Keywords:** *Corporate Social Responsibility, Editorial Decision, Media Service Providers, Corporations, Fair Film Selection.*

# **Introduction**

Broadcasting services are recognized as cultural and economic services whose importance for societies, democracy, education, and culture justifies the implementation of specific rules to govern them[[1]](#footnote-1). The content delivered by broadcasting services impacts the way people form their opinions[[2]](#footnote-2), as well as their lifestyles. Broadcasting services are generally categorized as television broadcasting, radio broadcasting, and on-demand broadcasting[[3]](#footnote-3). Today, on-demand broadcasting is steadily growing. Among the various types of on-demand broadcasting[[4]](#footnote-4), over-the-top video streaming services refers to the provision of content and applications, including communication services, by media service providers over the Internet (“OTT platforms”)[[5]](#footnote-5). These platforms are particularly influential, possessing significant cultural power over societies[[6]](#footnote-6) and economic power within the film industry.

Non-public OTT platforms are commercial enterprises that make independent business decisions and compete with other relevant broadcasting service providers in the market. Organizational decisions are made regarding which films to include in their catalogs, primarily considering revenue and market competition constraints. Thus, OTT platforms exercise their business judgment when selecting films, reaping the benefits of successful choices and bearing the costs of poor ones. As a result, they no longer act as neutral platforms but rather selectively promote and remove specific kinds of content from their catalogs[[7]](#footnote-7). However, the increasing reliance of the film industry, including its constituents such as producers, actors, scriptwriters, songwriters, and directors, on OTT platforms[[8]](#footnote-8) implies that the platforms can potentially engage in harmful business practices that can adversely affect market constituents.

The freedom of OTT platforms to choose which films to broadcast is increasingly having negative implications on the social, cultural, and economic aspects of the film industry. This can be observed in three ways: Firstly, OTT platforms tend to avoid broadcasting films that could lead to political discontent in the countries where they operate[[9]](#footnote-9). Secondly, as films can be powerful instruments for propaganda, OTT platforms may ultimately amplify certain views over others through their film selection[[10]](#footnote-10). Lastly, the refusal to broadcast certain content indicates that certain content creators lack adequate access to the market through OTT platforms[[11]](#footnote-11). Therefore, the freedom of OTT platforms to curate their film catalogs should be reevaluated to support the development of the film industry and maintain the integrity of associated cultures[[12]](#footnote-12).

This study suggests that CSR, from the perspective of corporate law, can be employed as a method of self-regulation[[13]](#footnote-13) to establish an inherent limitation on the editorial freedom of OTT platforms for the benefit of the film industry. By encouraging OTT platforms to consider the long-term effects of their business decisions and adhere to the broader objectives of applicable broadcasting legislations, CSR would inherently restrict the freedom of OTT platforms to create their film catalogs. To illustrate how this non-interventionist approach would work, the relationship between editorial freedom and business judgment is demonstrated. The study then analyzes the regulation of OTT platforms under Turkish law, with reference to European Union (“EU”) law where necessary, as Turkish law on broadcasting is built upon its principles[[14]](#footnote-14). Lastly, the study lays the foundations for its CSR approach through the lens of Turkish corporate law, indicating that it could positively limit the editorial freedom of OTT platforms for the benefit of the film industry constituents and society as a whole.

# **The relationship between editorial freedom and business judgment**

Each year, the film industry produces hundreds of thousands of new films worldwide. Some of these films come from independent production institutions or individuals, while others are produced directly or indirectly on behalf of the party who will be broadcasting or distribution parties. OTT platforms thus have the option to either purchase[[15]](#footnote-15) already produced films from the marketplace or produce their content, either directly or indirectly through producers working on their behalf[[16]](#footnote-16). The decision to take one of these paths is related to the concepts of editorial freedom, business judgment, and social responsibility.

From the perspective of the viewers, OTT platforms offer subscribers the option to select films from the platform’s pre-prepared catalog. This means that subscribers can only watch films that OTT platforms have pre-selected from the available films in the marketplace[[17]](#footnote-17). The selection process of an OTT platform is considered an exercise of its “editorial freedom” and an “editorial decision”. This editorial freedom refers to the platform’s independent will in creating the catalog, similar to how an editor of a magazine selects news for publication[[18]](#footnote-18). The value of an OTT lies in how it organizes its film catalog, analyzes potential market effects, and aligns film content with its objectives before deciding to include or reject a film[[19]](#footnote-19).

The “editorial decision” refers to regular decisions made to exercise editorial responsibility and is linked to the day-to-day operation of the broadcasting service[[20]](#footnote-20). “Editorial freedom,” on the other hand, aims to protect editorial decisions from state interference or influence by national or supra-national authorities or organizations[[21]](#footnote-21). When the party making the editorial decision is a stock corporation, such a decision becomes an action of the corporation itself. Thus, an editorial decision is also a commercial decision, exercised as a business judgment by the corporation’s management organ, the board of directors[[22]](#footnote-22). However, commercial decisions unrelated to the formation of the catalogs are considered business decisions rather than editorial decisions.

An editorial decision based on editorial freedom eventually carries editorial responsibility. “Editorial responsibility” involves effective control both over the selection of programs, such as films,[[23]](#footnote-23) and, in the case of OTT platforms, their organization in a catalog[[24]](#footnote-24). It is a bedrock principle of corporate law that the manager of a stock corporation is responsible for his decisions and may be held personally liable against related parties if applicable conditions are satisfied. This responsibility may not necessarily lead to civil, criminal, or administrative liability but is a concept used to structure legislation[[25]](#footnote-25). Regardless of liability implications, the board of directors of a corporation is responsible for following applicable corporate law principles related to their decisions, including those involving editorial decisions.

Thus, “editorial freedom” serves as a method to achieve the primary purpose of audiovisual media services, which is to serve individuals’ interests and shape public opinion through comprehensive and diverse information[[26]](#footnote-26). Similarly, commercial decisions made by corporation managers are protected from unwarranted court intervention through the “business judgment rule” and its equivalent standards in other jurisdictions[[27]](#footnote-27). However, both editorial freedom and business judgment have statutory limits. For instance, under EU law, OTT platforms are required to make their services more accessible to persons with disabilities through proportionate measures[[28]](#footnote-28) and they must secure at least a thirty percent share of European works[[29]](#footnote-29) in their catalogs[[30]](#footnote-30). Therefore, the editorial freedom and managerial decision-making power of a stock corporation, when acting as an OTT platform, are not unconstrained by legislation.

# **OTT Platforms under Turkish Law**

## **Legal Status of OTT Platforms**

In Turkey, individuals have the freedom to establish private enterprises (Constitution of the Republic of Turkey (“Constitution”), Article 48). As a result, private parties can establish and operate radio and television stations in line with relevant statutory conditions (Constitution, Article 133(1)). However, the State is responsible for implementing measures to ensure that private enterprises operate in line with national economic necessities and social purposes (Constitution, Article 48(2)). In this context, OTT platforms are regulated by the Establishment and Broadcasting Services of Radio and Television Institutions Law No. 6112, which aims to align with relevant EU laws[[31]](#footnote-31).

Under Law No. 6112, a “media service provider” is defined as a *“legal person who has editorial responsibility for the choice of content in radio, television broadcasting, and on-demand media services, and determines the manner in which it is organized and broadcasted”* (Article 3(1)(l)). On the other hand, an “on-demand media service” refers to a *“media service provided for the viewing or listening of programs at the moment chosen by the user and at her individual request based on a catalog of programs selected by the media service provider”* (Law No. 6112 Article 3(1)(h)). Thus, according to Turkish broadcasting law, OTT platforms are considered “media service providers” offering “on-demand media services”.

A private enterprise can apply for a broadcasting license as a media service provider, provided that it takes the form of a stock corporation formed under Turkish Commercial Code (“TCC”) no. 6102 and has the exclusive purpose of providing radio broadcasting services, television broadcasting services, and on-demand media services (Law No. 6112 Article 19(1)(a)). Consequently, OTT platforms are required to obtain an Internet broadcasting license[[32]](#footnote-32) from the Radio and Television Supreme Council (“RTUK”) to provide their service through the Internet (Regulation on the Provision of Radio, Television, and On-Demand Media Service on Internet (“Regulation”), Article 5(2)). Additionally, in line with Law No. 6112, OTT platforms are required to be in the form of stock corporations, regardless of whether they are closely held or publicly traded. However, if a license holder intends to issue its shares publicly, the RTUK’s prior approval is necessary (Article 19(1)(ç)). The persons who can establish or become shareholders of a license holder corporation are also specified by Law No. 6112[[33]](#footnote-33). An OTT platform can then be defined as a stock corporation subject to Law No. 6112, and media service providers as a sui generis type of legal persons[[34]](#footnote-34). As per TCC Article 330, TCC applies to stock corporations subject to specific laws, except for those specific provisions, meaning that TCC continues to regulate OTT platforms.

## **Broadcasting Services Principles for OTT Platforms**

In Turkey, broadcasting services may either be general or thematical (Law No. 6112 Article 14(1)). Like all media service providers, OTT platforms are responsible for the content and presentations of their broadcasts, including commercial communication and third-party content (Law No. 6112 Article 6(4))[[35]](#footnote-35). While Law No. 6112 upholds that *“the content and transmission of the media services shall not be subject to a prior intervention and the content of the media services shall not be supervised in advance”* (Article 6(1)), it also clarifies that “*the provisions of this law, along with other laws and international legislation to which Turkey is a party, and regulatory actions issued by RTUK related to the implementation of these provisions, shall not be considered an intervention”* (Article 6(2)). Consequently, both Law No. 6112 and the Regulation list general broadcasting principles that media service providers and OTT platforms must adhere to. Additionally, the principle that *“media service providers shall be obliged to ensure that media services shall not be exercised in a manner that serves the unfair interests of themselves, shareholders, and their relatives by blood or by marriage up to and including those of third degree or any other real or legal persons”* (Law No. 6112, Article 6(3)) is also applicable to OTT platforms.

Law No. 6112 treats broadcasting license holders differently depending on the type of license they hold. As such, general broadcasting service principles include (1) rules applicable to all media service providers, (2) rules specifically for radio and television broadcasters, and (3) rules specific to on-demand media services[[36]](#footnote-36). These general broadcasting service principles apply to the activities of OTT platforms as well[[37]](#footnote-37). In line with Law No. 6112 Article 6(2), the Regulation Article 16(1)(b) stipulates that OTT platforms should operate in compliance with Law No. 5651, Law No. 6112, the Regulation, other applicable laws, and international agreements which Turkey is a party to.

While Law No. 6112 Article 8(1) specifically indicates that broadcasting shall be done with an *“understanding of responsibility toward the public”*, the meaning of this conception is clarified by the preceding list of rules in Article 8(1). According to the Official Comment to Law No. 6112 Article 8, this article aims to protect children and young viewers, as well as the generally accepted viewpoints of society. Law No. 6112 Article 8 focuses on what content OTT platforms should not broadcast[[38]](#footnote-38) rather than what content they should broadcast. Therefore, the general broadcasting principles do not explicitly constrain the arbitrary decisions of OTT platforms during the formation of their film catalog. However, Law No. 6112 Article 8 does limit the editorial freedom of OTT platforms in terms of content selection. OTT platforms are statutorily obliged to refuse to add a film to their catalog if it violates general broadcasting principles.

Certain provisions of Law No. 6112, although not listed under Article 8(1), introduce two additional general broadcasting service principles that can be seen as limitations on the editorial freedom of OTT platforms. Firstly, Article 6(3) requires that media service providers do not use their privileges for their benefit and interests[[39]](#footnote-39). This rule applies to post-catalog selection stages of OTT platform services rather than pre-catalog selection stages, as indicated by the term “media services”, which refers to *“television broadcasting services, on-demand media services, as well as commercial communication and radio broadcasting services, with the exception of individual communication services under the editorial responsibility of a media service provider and the principal purpose of which are the provision of programs to inform, entertain or educate the general public by electronic communications networks”* (Law No. 6112 Article 3(1)(ff)), and as supported by RTUK decisions[[40]](#footnote-40). Thus, it seems unlikely that Law No. 6112 Article 6(3) limits the editorial freedom of OTT platforms in choosing films for their catalogs. Otherwise, the OTT platforms’ in-house film productions and their inclusion in the film catalog would have to be considered as a prohibited conflict of interest incident. Secondly, Article 15(1) mandates television broadcasters holding national terrestrial broadcasting licenses to reserve a specified portion of their transmission time and budget for European works. Although this limitation does not directly apply to OTT platforms, RTUK has the authority to determine the principles for encouraging the production and access to European works by OTT platforms (Article 15(2))[[41]](#footnote-41).

The decision to include a film in its catalog is regarded as an editorial decision exercised by the broadcaster itself by general broadcasting service principles. However, the rule stated in Regulation Article 16(1)(b) that the media service providers shall comply with Law No. 6112, Law No. 5651[[42]](#footnote-42), the Regulation, other applicable laws, and international agreements to which Turkey is a party to may constrain the providers’ editorial freedom. Consequently, CSR may play a crucial role when read in conjunction with the general broadcasting service principle of “*understanding of responsibility toward the public.”*

# **Corporate Social Responsibility under Turkish Law**

## **The Concept of Corporate Social Responsibility**

An essential factor that has begun to limit the business decisions of corporations is the concept of corporate social responsibility (“CSR”). CSR involves corporations’ obligations to “prevent, identify, manage and mitigate any possible negative impact that they may cause on society as a whole”[[43]](#footnote-43).Although the scholarly literature on CSR dates back to at least the 1950s[[44]](#footnote-44), there is still no clear consensus or agreed-upon definition[[45]](#footnote-45). The breadth of the concept becomes apparent when considering a popular CSR definition: “The social responsibility of business encompasses the economic, legal, ethical, and discretionary expectations that society has of organizations at a given point in time”[[46]](#footnote-46). This lack of a definitive definition creates challenges for those in charge of corporations when it comes to practicing CSR.

Moreover, CSR is often misunderstood and confused with the purpose of corporations[[47]](#footnote-47). It raises the age-old question of “What is business for and what contribution does it make to society?”[[48]](#footnote-48) This ambiguity brings the legitimacy of the CSR concept into question[[49]](#footnote-49). However, by defining CSR as “the responsibility of enterprises for their impacts on society,”[[50]](#footnote-50) following the European Commission’s understanding, it becomes clear that corporate purpose and CSR are different concepts. As corporate law generally does not prescribe specific goals for corporations or dictate how businesses should behave, any legislation concerning CSR may inherently limit or add to the business decisions of corporations, and in some cases, influence its purpose[[51]](#footnote-51).

Today, CSR is increasingly acknowledged as an obligation tied to the core functions of businesses, especially in terms of safeguarding the rights of others and avoiding undue benefits while pursuing these primary functions[[52]](#footnote-52). The European Commission provides an essential guideline to demonstrate how corporations can meet their CSR. According to this guideline, corporations need to have in place a process that integrates social, environmental, ethical, human rights, and consumer concerns into their business operations. They should also develop a strategy with stakeholders to maximize the creation of shared value for shareholders, other stakeholders, and society. Additionally, corporations must identify, prevent, and mitigate any potential adverse impacts arising from their activities[[53]](#footnote-53).

CSR is addressed through various instruments on the international, regional, and national levels. At the international level, organizations such as the United Nations, the Organization for Economic Cooperation and Development, and the International Labor Organization, emphasize responsible behavior and human rights[[54]](#footnote-54). On the regional level, the EU, for instance, enacted Directive 2014/95/EU, which mandates certain large undertakings and groups to disclose non-financial and diversity information, recognizing the significance of divulging sustainability-related data, including social and environmental factors[[55]](#footnote-55). On the national level, jurisdictions have diverse perspectives on CSR, ranging from mandatory to voluntary approaches[[56]](#footnote-56). For example, France and the Netherlands have enacted due diligence requirements concerning the identification and prevention of certain violations of the law within organizations[[57]](#footnote-57). Thus, CSR requirements on the national level can take the form of general legislation, sectoral legislation, or soft law instruments[[58]](#footnote-58). However, the scope of regulation by CSR instruments varies across countries[[59]](#footnote-59).

In Turkey, the general legislation governing CSR requirements of closely held corporations can be analyzed through the TCC, even though it is not explicitly regulated therein. However, publicly traded corporations operate under a different CSR regime[[60]](#footnote-60), as they are subject to Market Law No. 6362 in addition to the TCC. Regarding the film industry, there is no direct sectoral legislation focused on CSR requirements, particularly concerning the film selection process. However, the Law on Human Rights and Equality Institution of Türkiye (“TIHEKK”) covers OTT platforms, and it can be used as a CSR reference to establish the necessity of fair treatment of content available on the marketplace for such platforms. TIHEKK prohibits discrimination against individuals seeking to benefit from the services of covered entities, including those in the telecommunication and culture sectors (Article 5(1)). Consequently, TIHEKK may be seen as an indirect and limited sectoral legislation applicable to the film industry.

## **CSR Regime in Turkey**

Under the TCC system, there is no specific duty for the corporation or its board of directors to explicitly consider the corporation’s CSR[[61]](#footnote-61). In practice, the tendency to apply the shareholder primacy approach often undermines CSR efforts[[62]](#footnote-62). However, two legal provisions can serve as the basis for a corporation’s CSR: (1) The duty of the board of directors to consider the interests of the corporation (TCC Article 369(1))[[63]](#footnote-63) and (2) The duty of the board of directors to ensure the corporation’s compliance with applicable laws (TCC Article 375(1)(e))[[64]](#footnote-64). The duty of loyalty of the board of directors shapes what is in the best interests of the corporation[[65]](#footnote-65), while the duty of care sets the boundaries for compliance precautions.

It should be noted that the TCC does not explicitly define the concept of “corporation’s interest”[[66]](#footnote-66). However, it is generally understood to encompass the bundle of legal and economic interests outlined in the articles of incorporation and other corporate documents[[67]](#footnote-67). This notion is believed to represent the supreme interest, which should be used to protect and balance the competing interests of all stakeholders involved with the corporation[[68]](#footnote-68). TCC Article 369(1) specifically directs the board of directors to prioritize the corporation’s interests[[69]](#footnote-69). Nevertheless, it is important to clarify that this interest must be determined by the corporation itself while adhering to the limits and procedures prescribed by the law and the articles of incorporation[[70]](#footnote-70). Consequently, the requirement to act in the best interest of the corporation serves as a boundary for the commercial discretion exercised by the directors[[71]](#footnote-71). Although the concept of the “best interest of the corporation” remains undefined, the one-tier board system based on a contractual relationship is appropriate for treating the shareholder interests as the best interest of the corporation[[72]](#footnote-72). However, it is still possible that the duty of loyalty may provide the board the discretion to take into account the interests of stakeholders beyond shareholders[[73]](#footnote-73).

Under the TCC system, incorporators are not permitted to establish a corporation solely for the purpose of using profits for public benefits[[74]](#footnote-74); non-profit objectives should be pursued by forming other legal entities such as associations and foundations (Law No. 4721, Article 56 and Article 101). The specific purpose of a corporation is documented in its articles of incorporation (TCC Article 339(2)(b)), where the concept of an economic purpose serves as an overarching term that can encompass both shareholder primacy and stakeholder approach norms for corporations[[75]](#footnote-75). However, the existence of statutory safeguards concerning shareholders’ right to dividends underscores that the interests of shareholders cannot be disregarded[[76]](#footnote-76). Consequently, all corporate organs should work toward the objective of generating profits and declaring dividends[[77]](#footnote-77). Nonetheless, the fact that a corporation’s interest is distinct from the shareholders’ interests raises the question of which interest should take precedence. Some argue that the ultimate interest of a corporation is to continue its legal existence (sustainability)[[78]](#footnote-78).

On the other hand, according to CML Article 17, the Capital Markets Board of Turkey (the “Board”) is granted the authority to determine corporate governance principles. In addition, Corporate Governance Communique No. II-17.1 (“Communique”), promulgated by the Board, articulates the system for corporate governance for publicly held corporations. While some principles are mandatory, others are subject to the “comply or explain” approach and certain principles do not apply to specifically designated corporations (Communique Article 1(2)). Furthermore, the sustainability principles announced by the CMB are viewed as a part of corporate governance requirements (Communique Article 1(5)). Consequently, the board of directors’ annual report must indicate whether the corporate governance principles and sustainability principles are applied or provide a reason for not applying them (Communique Article 8(1)). In this context, Annex 1 to the Communique details the corporate governance principles, and No. 3.5, titled “Ethical Rules and Social Responsibility” includes the requirement that *“the corporation shall be sensitive toward its social responsibilities and comply with the regulations and ethical rules concerning environment, consumers, public health”[[79]](#footnote-79)*. Moreover, the Sustainability Principles Compliance Framework[[80]](#footnote-80) (“SPCF”) lists specific environmental, social, and corporate governance activities[[81]](#footnote-81). Sustainability activities are expected to consider the needs and priorities of the corporation’s constituents (No. C2), and social responsibility activities should be publicly disclosed (No. C1).

Secondly, the board of directors must ensure that the corporation complies with the applicable law, which, in the case of OTT platforms, inherently includes Law No. 6112 and TIHEKK. Herein, the duty of care determines the level of precautions and decisions required to be taken by the board of directors. Consequently, the duty of care of a director has two functions: (1) it is used as a criterion to assess the director’s fault, and (2) it is an additional duty for the director to fulfill[[82]](#footnote-82). An important aspect of the duty of care is to define the scope of the directors’ responsibilities that are not specified in the law[[83]](#footnote-83). In this regard, the “cautious manager” standard is applied as an objective criterion, mandating an examination based on the specific requirements of the director’s business activities. Since Law No. 6112 Article 8(1) does not indicate how “*understanding of responsibility toward the public”* should be satisfied, and TIHEKK does not specify how to avoid discrimination, it is left to the board of directors to determine the instruments to satisfy these corporate obligations, considering the cautious manager standard[[84]](#footnote-84). As a result, it can be argued that OTT platforms’ boards of directors must implement codes of conduct or standards regarding their film selection process, given their sector-specific CSR, as deduced from the combined reading of the TCC, Law No. 6112, and TIHEKK.

# **OTT Platforms and CSR**

The actions of corporations do not only impact the daily lives of the consumers, but also shape the future of society, as they have implications for working conditions, human rights, health, environment, innovation, education, and more[[85]](#footnote-85). In the absence of mandatory non-shareholder constituency statutes[[86]](#footnote-86), such as CSR legislation, the benefits of corporate activity on society may be considered incidental outcomes. Consequently, without specific and mandatory legislation guiding OTT platforms to incorporate CSR principles in their film selection process to embrace all viewers and individuals from different segments of the film industry, the implementation of CSR becomes subject to the discretion of the board of directors.

The institutional integrity of a corporation relies on the responsible discharge of duties by its directors[[87]](#footnote-87). However, the tendency of directors to view the duty of care as a duty to act in the best interest of the shareholders may create sustainability risks for the corporation and its stakeholders in the long run[[88]](#footnote-88). Adopting a strategic approach to CSR is crucial to the competitiveness of corporations, as it allows them to anticipate and adapt to changing societal expectations and operating conditions[[89]](#footnote-89). Building higher levels of trust among stakeholders can foster an environment conducive to innovation and growth[[90]](#footnote-90). Thus, the duty of directors to act in the interest of the corporation, in line with their duty of loyalty to consider the corporation’s interests, necessitates a focus on both short-term and long-term goals. For corporations operating OTT platforms, this may involve considering the endurance of the film industry as a part of their CSR, regardless of their corporate status.

As previously emphasized, OTT platforms’ film catalogs are subject to the oversight of Law No. 6112[[91]](#footnote-91). Although the law’s editorial responsibility system does not impose a specific duty to objectively determine content, the principle that OTT platforms should operate as a stock corporation implicitly limits their editorial freedom when read in conjunction with the aforementioned law and TIHEKK. Consequently, the board of directors, under its obligations and duties, is required to comply with applicable laws and Law No. 6112 Article 8(1) the principle that OTT platforms should operate with an “*understanding of responsibility toward the public”* implicitly limits their editorial freedom*.* Consequently, the board of directors, under its obligations and duties, is required to comply with applicable laws and ensure fair film selection to fulfill its responsibility toward the public. Without proper precautions, the OTT may be seen as disregarding certain films or engaging in discriminatory practices, leading to the need for the board of directors to implement and disclose film selection codes of conduct or fair treatment standards they follow.

Lastly, it is argued that on-demand media services have an interest in broadcasting a certain amount of local cultural content, as corporations should act in favor of the consumers[[92]](#footnote-92). Similarly, OTT platforms, just like TV channels, need to retain their subscribers by providing satisfactory original content[[93]](#footnote-93). To act in the long-term interest of the corporation, the board of directors is obligated to adhere to the principle of “*understanding of responsibility toward the public.*” Such an approach is likely to generate income for the corporation in the long run, as sustainability remains the ultimate goal.

# **Conclusion**

The importance of OTT platforms is steadily increasing. Consequently, the way they select their film catalog has a profound impact on shaping culture in society and distributing income among the constituents of the film industry. As OTT platforms enjoy editorial freedom in choosing and broadcasting films, there is a potential risk of unwarranted misguidance and unfair treatment with economic implications for the film industry and society. However, instead of regulatory intervention, it may be more effective to rely on the CSR of OTT platforms to drive a fair film selection process. As stock corporations, the film choices of OTT platforms reflect the business judgment of their board of directors, who can freely deploy strategies to promote the best interests of the corporation.

Under Turkish law, the principles of broadcasting with an understanding of the public and avoiding discrimination, along with the necessity to consider the long-term interests of the corporation, limit the discretion of the board of directors. Consequently, OTT platforms are implicitly obligated to implement measures demonstrating a fair film selection process. This implies that the board of directors of OTT platforms should disclose the film selection standards and procedures they follow. In essence, the duty of OTT platforms’ board of directors to implement codes of conduct or standards for film selection arises from their sector-specific CSR, as evident from the combined reading of the TCC, TIHEKK, and Law No. 6112. In this context, CSR can function as a method of self-regulation and naturally impose limitations on the editorial freedom of the OTT platforms. By encouraging OTT platforms to consider the long-term effects of their business decisions, CSR inherently constrains their freedom to create their film catalogs.

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 See Audiovisual Media Services Directive, Recital 5. [↑](#footnote-ref-1)
2. Directive (n 1) Recital 45. [↑](#footnote-ref-2)
3. In this article, the term “broadcasting services” is preferred over “audiovisual media services”, since EU law excludes radio broadcasting from the scope of the latter term, see Directive (n 1) Recitals 21 and 23. [↑](#footnote-ref-3)
4. For different categorizations of on-demand and OTT business models, see Sedat Özel, ‘Talebe Bağlı Video Servisleri Çağında Netflix Etkisi’ (2020) 7 İnsan ve İnsan 115, 121. [↑](#footnote-ref-4)
5. *IRIS Plus 2016-3: VOD, Platforms and OTT: Which Promotion Obligations for European Works?* (European Audiovisual Observatory, Strasbourg 2016) 24. [↑](#footnote-ref-5)
6. See Directive (n 1) Recital 69. [↑](#footnote-ref-6)
7. MZ Van Drunen, ‘The Post-Editorial Control Era: How EU Media Law Matches Platforms’ Organizational Control with Cooperative Responsibility’ (2020) 12 Journal of Media Law 166, 167. [↑](#footnote-ref-7)
8. PWC, *Perspectives from the Global Entertainment and Media Outlook 2020-2024* (2020) 9 <<https://www.pwc.com/gx/en/entertainment-media/outlook-2020/perspectives.pdf>> Accessed 02 March 2021. [↑](#footnote-ref-8)
9. Nicole Sperling, ‘An Oscar Winner Made a Khasoggi Documentary. Streaming Services Didn’t Want it’, *NYT* (24.12.2020), <<https://www.nytimes.com/2020/12/24/business/media/dissident-jamal-khashoggi-netflix-amazon.html>> Accessed 02 March 2022. [↑](#footnote-ref-9)
10. -- ,‘Islamophobic UAE Financed Hollywood Film Slammed as “Shameful”’, *TRTWORLD* (Istanbul 25.06.2021), <https://www.trtworld.com/magazine/islamophobic-uae-financed-hollywood-film-slammed-as-shameful-47833>. [↑](#footnote-ref-10)
11. Some OTT platforms are choosing not to add content that may be regarded as offensive to society, even though historically embraced by the same society, due to generational changes and shifts in societal understanding, see Alexander Hall, ‘Paramount CEO Bob Bakish warns it’s a “mistake” to censor entertainment to “reflect different sensibilities”’, *Fox* (23.06.2022) <<https://www.foxnews.com/media/paramount-ceo-bob-bakish-mistake-censor-entertainment-different-sensibilities>> Accessed 28 March 2023. [↑](#footnote-ref-11)
12. Adopting measures to encourage the activity and development of European audiovisual production and distribution is among the considerations of EU law, see Directive Recital 66. [↑](#footnote-ref-12)
13. Fostering self-regulation is a method embraced by the EU in Directive (EU) 2018/1808 of the European Parliament and of the Council Amending Directive 2010/13/EU (Amending Directive) Article 1(6). [↑](#footnote-ref-13)
14. Abdulvahap Darendeli, ‘Judicial Regime on Audiovisual Administrative Sanctions Developed After Decree Laws of State of Emergency’ (2017) 25 Selcuk University Faculty of Law Review 115, 121. [↑](#footnote-ref-14)
15. The term “purchase” is used to refer to any type of arrangement between the right holders of the film and the OTT platform relating to the intellectual property rights concerning the film itself and the rights held by others. [↑](#footnote-ref-15)
16. See ‘Netflix, Inc. ‘FORM S-1 Registration Statement, As Filed With the Securities and Exchange Commission on March 6, 2002’ (“Netflix Registration Statement”) 7, 37 <<https://www.prospectus.com/wp-content/uploads/2018/10/netflix.pdf>> Accessed: 03 March 2021. [↑](#footnote-ref-16)
17. Subscribers certainly affect this selection by rating, unsubscribing, or providing feedback, but its influence is remote in the process of film selection. [↑](#footnote-ref-17)
18. OTT Platforms differ from video-sharing platform services, as a significant share of content provided on video-sharing platform services is not under the editorial responsibility of the video-sharing platform provider; these providers only determine the organization of the content (Amending Directive (n 13) Recital 47). [↑](#footnote-ref-18)
19. See Netflix Registration Statement (n 16) 4. [↑](#footnote-ref-19)
20. Amending Directive (n 13) Article 1(d)(bb). [↑](#footnote-ref-20)
21. Amending Directive (n 13) Recital 54. [↑](#footnote-ref-21)
22. Business judgment refers to a commercial decision given by the managers of the corporation, see Franklin A. Gevurtz, ‘The Business Judgment Rule: Meaningless Verbiage or Misguided Notion?’ (1994) 67 Southern California Law Review 287, 291. [↑](#footnote-ref-22)
23. See Directive (n 1) Article 1(1)(b). [↑](#footnote-ref-23)
24. See Directive (n 1) Article 1(1)(c). [↑](#footnote-ref-24)
25. IRIS, *Editorial Responsibility* (European Audiovisual Observatory 2008) 10. [↑](#footnote-ref-25)
26. Amending Directive (n 13) Recital 54. [↑](#footnote-ref-26)
27. Ünal Tekinalp, *Sermaye Ortaklıklarının Yeni Hukuku*, (Vedat Kitapçılık, 2020) 443. [↑](#footnote-ref-27)
28. Amending Directive Article 1(11). [↑](#footnote-ref-28)
29. For its definition, see Directive (n 1) Article 1(1)(n). [↑](#footnote-ref-29)
30. Amending Directive (n 13) Article 1(18). [↑](#footnote-ref-30)
31. While both the terminology and definitions used in Law no. 6112 align with the EU law, there are differences, including the use of the term “broadcasting services” rather than the umbrella term “audiovisual media services,” which is preferred under EU law (Official Comment to Law no. 6112, General Comments). [↑](#footnote-ref-31)
32. The terminology of “broadcasting license” is criticized based on the fact that Internet broadcasting does not fit the conventional definition of “broadcasting” (Olgun Değirmenci, ‘Netflix’in Sonu mu? Düzenleme- Sansür Sarkacında Radyo, Televizyon ve İsteğe Bağlı Yayınların İnternet Ortamından Sunumu Hakkında Yönetmelik Taslağı’ (2019) 14 Terazi Law Journal 108, 113). [↑](#footnote-ref-32)
33. See generally, Article 19(1) and 19(2). [↑](#footnote-ref-33)
34. Danıştay İBK E. 2001/1 K. 2001/4 K. 10/04/2001. [↑](#footnote-ref-34)
35. For example, a speech communicated by a member of the audience who randomly participates in the program by telephone to answer a question asked by the anchor may give rise to liability for media service providers, based on Law no. 6112 Article 6(4), even though the person representing the media service provider is not the one who spoke (RTUK Decision Number: 33 Meeting Number: 2015/48 Date: 11/11/2015). [↑](#footnote-ref-35)
36. Official Comment to Law no. 6112, General Comments. [↑](#footnote-ref-36)
37. It must be noted that some principles in Law no. 6112 and the Regulation limit the editorial decisions of platform operators. Platform operators shall offer services to media service providers under neutral, fair, reasonable, and non-discriminatory conditions (Article 29). However, OTT platforms are not regarded as “platform operators”, since this term refers to *“an enterprise that transforms multiple media services into one or more signals and provides their transmission through satellite, cable, and similar networks either in an encoded or unencoded mode in a way that is directly accessible to the viewers”* (Law no. 6112 Article 3(1)(p)). A similar limitation on editorial decisions applies to platform operators for Internet broadcasting, see, Regulation Article 17(1)(ç). On the other hand, the obligation of radio and television institutions to broadcast certain content and news as articulated in Law no. 6112 does not relate to films (for instance, see Article 7, 14, 15). [↑](#footnote-ref-37)
38. Regarding the enforcement actions that RTUK can initiate, see Sezgin Baş, ‘6112 Sayılı Radyo ve Televizyon Kuruluş ve Yayın Hizmetleri Hakkında Kanun’da Düzenlenen İdari Yaptırımlar’ in Zeynel T. Kangal (ed), *Kabahatler Hukuku Yazıları II* (12 Levha Yayıncılık, 2018) 237, 241. [↑](#footnote-ref-38)
39. Official Comment to Law no. 6112, Article 6(3). [↑](#footnote-ref-39)
40. A cursory examination of these decisions shows that requesting money from the viewers to generate income for the media service provider (RTUK Decision Number: 7 Meeting Number: 2013/43 Date: 17/07/2013, RTUK Decision Number: 23 Meeting Number: 2013/40 Date: 03/07/2013) is a violation of Law no. 6112 Article 6(3). Moreover, Article 6(3) is applied in conjunction with Article 8(1)(j) since money is requested from the viewers through content broadcasted by the media service provider (RTUK Decision Number: 6 Meeting Number: 2013/43 Date: 17/07/2013, RTUK Decision Number: 30 Meeting Number: 2013/52 Date: 10/09/2013, RTUK Decision Number: 24 Meeting Number 2013/48 Date: 20/08/2013). [↑](#footnote-ref-40)
41. On the other hand, under EU law, media service providers of on-demand audiovisual media services should secure at least a thirty percent share of European Works in their catalogs (Amending Directive (n 13) Article 1(18)). [↑](#footnote-ref-41)
42. Law no. 5651 provides four different access-blocking procedures: blocking access to content on grounds of confidentiality of private life (Article 9A), removal of content from publication, and blocking of access in case of violation of personality rights (Article 9), removal of content or blocking of access in circumstances (prevention of crime; protection of public health, national security, public order; protection of the right to life and life, and security of property) where delay would entail risk (Article 8A), and the decision to deny access and removal of content based on the articulated crimes (Article 8). [↑](#footnote-ref-42)
43. European Parliament Policy Department for Citizens’ Rights and Constitutional Affairs, ‘Corporate Social Responsibility (CSR) and Its Implementation into EU Company Law’ (2020), <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/658541/IPOL\_STU(2020)658541\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/658541/IPOL_STU%282020%29658541_EN.pdf)> Accessed 28 March 2023, 8. [↑](#footnote-ref-43)
44. Andrew Crane and others, ‘The Corporate Social Responsibility Agenda’ in Andrew Crane and others (eds), *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press, 2008) 3. [↑](#footnote-ref-44)
45. Rebecca Stratling, ‘The Legitimacy of Corporate Social Responsibility’ (2007) 4 Corporate Ownership and Control 80, 80. [↑](#footnote-ref-45)
46. Archie B. Carroll, ‘A Three-Dimensional Conceptual Model of Corporate Performance’ (1979) 4 The Academy of Management Review 497, 500. [↑](#footnote-ref-46)
47. Dan Pontefract, ‘Stop Confusing CSR With Purpose’, *Forbes* (18.11.2017), <<https://www.forbes.com/sites/danpontefract/2017/11/18/stop-confusing-csr-with-purpose/?sh=2166f8603190>>, Accessed 04 March 2023. [↑](#footnote-ref-47)
48. Crane (n 44) 4. [↑](#footnote-ref-48)
49. Fred Robins, ‘The Future of Corporate Social Responsibility’ (2005) 4 Asian Business and Management 95, 98. [↑](#footnote-ref-49)
50. Commission, ‘A Renewed EU Strategy 2011-14 for Corporate Social Responsibility’ (Communication) COM (2011) 681 final, 6. [↑](#footnote-ref-50)
51. See, generally, Jingchen Zhao, ‘Promoting More Socially Responsible Through A Corporate Law Regulatory Framework’ (2017) 37 Legal Studies 103. [↑](#footnote-ref-51)
52. Mallika Tamvada, ‘Corporate Social Responsibility and Accountability: A New Theoretical Foundation for Regulating CSR’ (2020) 5 International Journal of Corporate Social Responsibility 1, 5. [↑](#footnote-ref-52)
53. Commission (n 50) 6. [↑](#footnote-ref-53)
54. Policy (n 43) 8. [↑](#footnote-ref-54)
55. Recital 3. [↑](#footnote-ref-55)
56. Policy (n 43) 8. [↑](#footnote-ref-56)
57. Policy (n 43) 27. [↑](#footnote-ref-57)
58. Policy (n 43) 15. [↑](#footnote-ref-58)
59. Li-Wen Lin, ‘Mandatory Corporate Social Responsibility Legislation Around the World: Emergent Varieties and National Experiences’ (2020) 23 University of Pennsylvania Journal of Business Law 430, 459. [↑](#footnote-ref-59)
60. Under the Turkish system, only a stock corporation may become a publicly held corporation (CML Article 3(1)(e)). A stock corporation may be considered publicly held if (1) its shares are traded on a stock exchange, (2) its number of shareholders exceeds five hundred, except for corporations that raised funds through equity crowdfunding, or (3) its shares are offered to the public (CML Article 3(1)(e) and Article 16(1)). Accordingly, publicly held status is tied only to shares, rather than other types of securities (Tekin Memiş, Gökçe Turan, *Sermaye Piyasası Hukuku* (Seçkin Yayıncılık, Ankara 2019) 54). A corporation deemed publicly held should apply to the stock exchange to have its shares traded within two years (CML Article 16(2)) unless an exception applies (CML Article 33). [↑](#footnote-ref-60)
61. Hasan Pulaşlı, ‘Kurumsal Sosyal Sorumluluk Bağlamında Uluslararası İnsan Hakları ve Çevre Standartlarının Çok Uluslu Şirketlerin Merkez Yönetim Organının Hukuki Sorumluluğuna Etkisi’ (2020) 36 BATIDER 5, 21. [↑](#footnote-ref-61)
62. Muzaffer Eroğlu, ‘How to Achieve Sustainable Companies: Soft Law (Corporate Social Responsbility and Sustainable Investment) or Hard Law (Company Law)’ (2014) 2 Kadir Has Üniversitesi hukuk Fakültesi Dergisi 87, 99. [↑](#footnote-ref-62)
63. Pulaşlı (n 61) 22. [↑](#footnote-ref-63)
64. Pulaşlı (n 61) 23. [↑](#footnote-ref-64)
65. Sibel Hacımahmutoğlu, ‘The Business Judgment Rule: İş Adamı Kararı mı Yoksa Ticari Muhakeme Kuralı mı?’ (2014) 30 BATIDER 99, 134. [↑](#footnote-ref-65)
66. Rıfat Cankat, Mehmet Helvacı, ‘Karşılaştırmalı Hukukta Şirketin Menfaati Kavramı’ in Ziya Akıncı and Candan Yasan Tepetas (eds) *Şirketler Hukuku Uyuşmazlıkları ve Tahkim* (12 Levha Yayıncılık 2019) 521, 521. [↑](#footnote-ref-66)
67. See Mehmet Helvacı and others, ‘Özellikle Anonim Şirket Açısından Şirket Menfaati Kavramı’, in *Prof. Dr. Hamdi Yasaman’a Armağan* (12 Levha Yayıncılık, 2017) 309, 312. [↑](#footnote-ref-67)
68. Mehmet Helvacı, ‘21. Yüzyılda Anonim Ortaklığa İlişkin Düşünceler ‘Tüzel Kişiye ve Bir Örnek Olarak Kar Payı Kavramına Belki Olması Gereken Farklı Bir Bakış’ in Havva Karagöz and others (eds) *Tüzel Kişilik Penceresinden Anonim Ortaklık Sempozyumu* (12 Levha Yayıncılık, 2021) 3, 5. [↑](#footnote-ref-68)
69. Helvacı (n 68) 6. [↑](#footnote-ref-69)
70. Helvacı (n 68) 7. [↑](#footnote-ref-70)
71. Burak Adıgüzel, ‘Anonim Şirketlerde Bağış ve Yöneticilerin Sorumluluğu’ (2019) 14 Terazi Hukuk Dergisi 58, 65. [↑](#footnote-ref-71)
72. Hacımahmutoğlu (n 65) 134. [↑](#footnote-ref-72)
73. Hacımahmutoğlu (n 65) 135. [↑](#footnote-ref-73)
74. Oğuz İmregün, *Kara Ticareti Hukuku Dersleri* (Evrim Dağıtım 1987) 263. [↑](#footnote-ref-74)
75. Anonim şirketin esas sözleşmesinde faaliyetlerini yürütürken “çevrenin korunması” gibi bir konu tanımlanması halinde çevrenin korunması amaç değil, yönetimin işletme konusunu yerine getirirken dikkate alması gereken ve işletme konusunun bir parçasını oluşturan genel bir talimatı ifade eder. Uzunallı, s. 9. [↑](#footnote-ref-75)
76. See TCC Article 519, 523. [↑](#footnote-ref-76)
77. Reha Poroy and others, *Ortaklıklar Hukuku I* (Vedat Kitapçılık 2019) 307. [↑](#footnote-ref-77)
78. Cankat and Helvacı (n 66) 549. [↑](#footnote-ref-78)
79. An English translation of the Communique is available at CMB, <<https://www.cmb.gov.tr/SiteApps/Teblig/File/479>>, Accessed 06 March 2021. [↑](#footnote-ref-79)
80. Available at CMB, <<https://www.spk.gov.tr/Sayfa/Dosya/1332>> Accessed: 06 March 2021. [↑](#footnote-ref-80)
81. See Fatma Beril Özcanlı, ‘Sosyal Eşitsizliğin Giderilmesi ve İnsan Hakları Cephesinden Sürdürülebilir Bir Şirketler Hukuku’ in Havva Karagöz and others (eds), *Tüzel Kişilik Penceresinden Anonim Ortaklık Sempozyumu* (12 Levha Yayıncılık, 2021) 177, 192-193. [↑](#footnote-ref-81)
82. Ersin Çamoğlu, *Anonim Ortaklık Yönetim Kurulu Üyelerinin Hukuki Sorumluluğu* (Vedat Kitapçılık 2010) 68. [↑](#footnote-ref-82)
83. Adıgüzel (n 71) 65. [↑](#footnote-ref-83)
84. The way to exercise such an understanding can be exemplified through the Law on Evaluation and Classification of Films and Support, which requires that films to be screened in movie theatres for the first time may not be broadcasted by OTT platforms for commercial purposes with a fee within five months of the date of the first screening in movie theatres (Regulation on the Procedures and Principles Concerning Evaluation and Classification of Films, Article 10(2)). The objective of this prohibition is to protect the consumers. [↑](#footnote-ref-84)
85. Commission Staff Working Document on Corporate Social Responsibility, Responsible Business Conduct, and Business & Health Rights: Overview of Progress, European Commission, Brussels 20.03.2019, 2. [↑](#footnote-ref-85)
86. “Constituency statutes expand the protection of the business judgment rule by permitting, not mandating, directors to consider non-shareholder constituents. In other words, directors would not face liability for actions justified, in part, by serving non-shareholder interests” (Christopher Geczy and others, *Institutional Investing When Shareholders Are Not Supreme* (2015) 5 Harvard Business Law Review 73, 95). [↑](#footnote-ref-86)
87. *Francis v. United Jersey Bank* (1981) 87 NJ 15. [↑](#footnote-ref-87)
88. Study on Directors’ Duties and Sustainable Corporate Governance, Final Report, European Commission B- 1049 (Brussels, July 2020) 61. [↑](#footnote-ref-88)
89. Commission (n 50) 3. [↑](#footnote-ref-89)
90. Commission (n 50) 3. [↑](#footnote-ref-90)
91. See RTUK Decision Number: 7 Meeting Number: 2020/36 Date: 03/09/2020. [↑](#footnote-ref-91)
92. See Antonios Vlassis, ‘The Review of the Audiovisual Media Services Directive. Many Political Voices for One Digital Europe?’ (2017) 56 Dans Politique Europeenne 102. [↑](#footnote-ref-92)
93. Özel (n 4) 130. [↑](#footnote-ref-93)