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The role of corporate social responsibility in the regulation of OTT platforms: the case of film industry and Turkish corporate law

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ABSTRACT


Among the types of on-demand broadcasting, Over-The-Top video streaming services ('OTT platforms') refer to media service providers that provide content and applications, including communication services, over the Internet. The freedom of OTT platforms to choose which films to broadcast can have negative implications for the social and cultural aspects of the film industry and the society: First, OTT platforms often refuse to broadcast films that may cause political discontent in the countries where they operate. Second, as films can be popular tools of propaganda, OTT platforms ultimately contribute to certain views more than others through their film selection. Third, the fact that some content is denied to be broadcasted 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 catalogues is essential to support the development of the film industry and preserve the integrity of associated societies. 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 leading to a fairer film selection process.

KEYWORDS

Corporate social responsibility; editorial freedom; media service providers; corporations; fair film selection

I. 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 The content delivered by broadcasting services, generally categorized as television broadcasting, radio broadcasting and on-demand broadcasting,² affects the way people form their opinions³ as well as their lifestyles. Today, on-demand broadcasting is steadily growing. Among the various types of on-demand broadcasting,⁴ over-the-top video streaming services refers to the provision of content and

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¹See Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 (Audiovisual Media Services Directive), Recital 5.

²In 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.

³Directive (n 1) Recital 45.

⁴For different categorizations of on-demand and OTT business models, see Sedat Özel, 'Talebe Bağlı Video Servisleri Çağında Netflix Etkisi' (Netflix Affect in the Era of On Demand Video Services) (2020) 7 İnsan ve İnsan 115, 121.

applications, including communication services, by media service providers over the Internet ('OTT platforms').⁵ These platforms are particularly influential, possessing significant cultural power over societies⁶ and economic power within the film industry.

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 films⁷ to include in their catalogues, 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 catalogues.⁸ However, the increasing reliance of the film industry,⁹ including its constituents such as producers, actors, scriptwriters, songwriters and directors, on OTT platforms implies that the platforms can potentially engage in harmful business practices that may adversely affect market constituents.

The freedom of OTT platforms to choose which films to broadcast is increasingly having negative implications for the social, cultural and economic aspects of the film industry. This can be observed in three ways: First, OTT platforms tend to avoid broadcasting films that could lead to political discontent in the countries where they operate.¹⁰ Second, as films can be powerful instruments for propaganda, OTT platforms may ultimately amplify certain views over others through their film selection.¹¹ Last, the refusal to broadcast certain content indicates that certain content creators lack adequate access to the market through OTT platforms.¹² Therefore, the freedom of OTT platforms to curate their film catalogues should be reevaluated to support the development of the film industry and maintain the integrity of associated societies.¹³

This article suggests that corporate social responsibility (CSR), from the perspective of corporate law, can be employed as a method of self-regulation¹⁴ to establish an

⁵IRIS Plus 2016-3: VOD, *Platforms and OTT: Which Promotion Obligations for European Works?* (European Audiovisual Observatory, Strasbourg, 2016) 24. Coverage of the term 'OTT platform' is debated, see BEREC, *Report on OTT Services* (2016) 3 <https://www.berec.europa.eu/sites/default/files/files/document_register_store/2016/2/BoR_%2816%29_35_Report_on_OTT_services.pdf> Accessed 05 August 2023. In this article, the term 'OTT platform' is used to refer to platforms such as Netflix, Disney+, and Amazon Prime Video.

⁶See Directive (n 1) Recital 38, 69.

⁷In this article, the term "films" is used to refer to all types of motion picture products, irrespective of their subject-wise categorization or length, including series.

⁸MZ 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.

⁹PWC, *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.

¹⁰Nicole 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.

¹¹'Islamophobic UAE Financed Hollywood Film Slammed as "Shameful"', *TRTWORLD* (25.06.2021), <<https://www.trtworld.com/magazine/islamophobic-uae-financed-hollywood-film-slammed-as-shameful-47833>> Accessed 02 March 2022.

¹²Some 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.

¹³Adopting measures to encourage the activity and development of European audiovisual production and distribution is among the considerations of EU law, see Directive (n 1) Recital 66.

¹⁴Fostering 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).

inherent limitation on the editorial freedom of OTT platforms for the benefit of the film industry and societies. By encouraging OTT platforms to consider the long-term effects of their business decisions and to adhere to the broader objectives of applicable broadcasting legislations, CSR would inherently restrict the freedom of OTT platforms to create their film catalogues. To illustrate how this non-interventionist approach would work, the relationship between editorial freedom and business judgment is demonstrated. The article 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 EU principles¹⁵ and is a recent ground of debate for OTT platforms' editorial freedom. Finally, the article 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 and societies.

II. 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 by the party that will be broadcasting or indirectly on behalf of the party that will be broadcasting. OTT platforms thus have the option to either purchase¹⁶ already produced films from the marketplace or produce their content, either directly or indirectly through producers working on their behalf.¹⁷ The decision to take one of these paths draws upon editorial freedom, business judgment and social responsibility.¹⁸

From the perspective of the viewers, OTT platforms offer subscribers the option to select films from the platform's pre-prepared catalogue. This means that subscribers can watch only films that OTT platforms have pre-selected from the available films and film projects in the marketplace.¹⁹ 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 catalogue, similar to how an editor of a magazine selects news for publication.²⁰ The value of an OTT platform lies in how it organizes its film catalogue, analyzes potential market effects and aligns film content with its objectives before deciding to include or reject a film project.²¹

¹⁵A. Vahap 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.

¹⁶The 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.

¹⁷See '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.

¹⁸Behavior of corporate actors is not only shaped by law, but also by social norms (Jennifer G. Hill, 'Transnational Migration of Laws and Norms in Corporate Governance: Fiduciary Duties and Corporate Codes' 14 <https://www.ecgi.global/sites/default/files/working_papers/documents/hilfinal.pdf> Accessed 05 August 2023).

¹⁹Subscribers certainly effect this selection by rating, unsubscribing, or providing feedback, but its influence is remote in the process of film selection.

²⁰OTT 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 14) Recital 47).

²¹See Netflix Registration Statement (n 17) 4.

The ‘editorial decision’ refers to regular decisions subject to editorial responsibility and is linked to the day-to-day operation of the broadcasting service.²² ‘Editorial freedom’, on the other hand, aims to protect editorial decisions from state interference or influence by national or supra-national authorities or organizations.²³ When the party making the editorial decision is a corporation, such a decision becomes an action of the corporation itself as it is made through its organs. Thus, an editorial decision is also a commercial decision, exercised as a business judgment by the corporation’s management organ, the board of directors.²⁴ However, commercial decisions unrelated to the formation of the catalogues are considered business decisions rather than editorial decisions.

An editorial decision based on editorial freedom eventually carries editorial responsibility.²⁵ ‘Editorial responsibility’ involves effective control both over the selection of programs, such as films,²⁶ and, in the case of OTT platforms, over their organization in a catalogue.²⁷ It is a bedrock principle of corporate law that a manager of a corporation is responsible for his decisions made as a manager and may be held personally liable against related parties if applicable conditions are satisfied. 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.

‘Editorial freedom’ serves as a method for achieving the primary purpose of audiovisual media services, which is to serve individuals’ interests and shape public opinion by providing them with comprehensive and diverse information.²⁸ Similarly, commercial decisions made by corporate managers are protected from unwarranted court intervention through the ‘business judgment rule’ and its equivalent standards in other jurisdictions.²⁹ 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 measures³⁰ and they must secure at least a thirty percent share of European works³¹ in their catalogues.³² Therefore, the editorial freedom and managerial decision-making power of a corporation, when acting as an OTT platform, are not unconstrained by legislation. This shows that provision of audiovisual media services is subject to public policy concerns more than other conventional commercial activities.

III. Relevance of perspectives from Turkish law

It is well-known that Turkish authorities are actively monitoring film catalogues of OTT platforms.³³ Recently, an OTT platform that is broadcasting worldwide including

²²Amending Directive (n 14) Article 1(d)(bb).

²³Amending Directive (n 14) Recital 54.

²⁴Business 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.

²⁵IRIS, *Editorial Responsibility* (European Audiovisual Observatory, 2008) 10.

²⁶See Directive (n 1) Article 1(1)(b).

²⁷See Directive (n 1) Article 1(1)(c).

²⁸Amending Directive (n 14) Recital 54.

²⁹Ünal Tekinalp, *Sermaye Ortaklıklarının Yeni Hukuku (New Law of Stock Companies)* (Vedat Kitapçılık, 2020) 443.

³⁰Amending Directive (n 14) Article 1(11).

³¹For its definition, see Directive (n 1) Article 1(1)(n).

³²Amending Directive (n 14) Article 1(18).

³³For example, a well-known OTT platform, Netflix, states that Netflix complied with only three government requests related to content removal in 2022, and one of the complied requests was from Turkey, see, Netflix, ‘Environmental

Turkey, announced its decision to cancel a series project about the founder of the Republic of Turkey, Mustafa Kemal Atatürk, despite advertising the project to public previously, allegedly under pressure from foreign advocacy groups.³⁴ The OTT platform has said that the decision is a part of its revised content distribution strategy and that the content will be instead released as films in TV and theaters. Nevertheless, Turkey's state radio and television agency Radio and Television Supreme Council ('RTÜK') has launched an investigation about the matter, announcing that it is investigating the OTT platform's broadcasting policy in relation to social values RTÜK is sensitive to.³⁵

It is equally well-known that foreign OTT platforms broadcasting to Turkey in Turkish language or making commercial communications with Turkey in its broadcasting despite broadcasting in a foreign language, are subject to Turkish broadcasting law (Regulation on the Provision of Radio, Television and On-Demand Media Service on Internet ('Regulation') Art. 5(8)). Thus, those foreign OTT platforms need to establish corporations pursuant to Turkish corporate law to apply for the necessary license or licenses to broadcast on Internet to Turkey (Regulation Art. 7(1)).³⁶ Accordingly, for example, an OTT platform based in the United States but broadcasting to Turkey, through and due to its license holder subsidiary Turkish corporation, will be under effect of Turkish law when organizing its general broadcasting policy.

While the RTÜK investigation mentioned above is still continuing, irrespective of its result, Turkish law's perspective on OTT platforms' freedom to select films appears to be relevant to the rest of the world as a contemporary example, given that Turkish law on broadcasting is commingling with its own corporate law related business judgment 'freedom'.³⁷ Turkish law is also relevant for OTT platforms broadcasting worldwide including Turkey, as Turkish law is among the factors effecting those OTT platforms' general (worldwide) level of editorial freedom. Therefore, findings and solutions of this article are presumably relevant worldwide.

IV. OTT platforms under Turkish law

A. 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

Social Governance Report 2022' (29.06.2023) <https://s22.q4cdn.com/959853165/files/doc_downloads/2023/06/29/Netflix_2022-ESG-Report-FINAL.pdf> Accessed 07 July 2023, 51.

³⁴Joe Snell, 'Turkey Investigates Reported Cancellation of Disney Plus series on Atatürk', *Washington Post* (02.08.2023) <<https://www.washingtonpost.com/world/2023/08/02/turkey-disney-ataturk-series-cancelled/>> Accessed 04 August 2023.

³⁵'Türkiye 'Ata' için ayakta ... RTÜK'ten inceleme, sosyal medyadan 'abonelikler iptal' boykotu', *Hürriyet* (03.08.2023) <<https://www.hurriyet.com.tr/gundem/turkiye-ata-icin-ayakta-rtuktan-inceleme-sosyal-medyadan-abonelikler-iptal-boykotu-42308890>>, Accessed 04 August 2023.

³⁶Constitutionality of a license requirement for OTT platforms broadcasting over the Internet was debated by legislators, based on the argument that Internet is not a venue requiring licensing by RTÜK and that the law will eventually cause content restrictions, see 'TBMM Dissenting Opinions' *TBMM* (27.03.2018) <https://www5.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d26/c067/tbmm26067066ss0533.pdf>> Accessed 05 August 2023, 116- 118.

³⁷In case the OTT platform's decision to cancel the project is regarded as an unfair competition or violation of consumer protection legislation, then this decision cannot be accepted as an exercise of business judgment 'freedom' and should be sanctioned accordingly.

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 accordance 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 law.³⁸

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 catalogue 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'. Still, certain platforms, for instance, platforms providing only personal communication services are explicitly excluded from the scope of OTT platform regulation (Law No. 6112 Article 29/A(4)).

A private enterprise can apply for a broadcasting license as a media service provider, provided that it takes the form of a corporation (*anonim şirket*)³⁹ formed under Turkish Commercial Code No. 6102 ('TCC') 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)). OTT platforms are required to obtain an Internet broadcasting license from the RTUK to provide their service through the Internet (Regulation Article 5(3)).⁴⁰ Additionally, in line with the law, OTT platforms are required to be in the form of corporations (Regulation Article 7(1)), 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 parties that can establish or become shareholders of a license holder corporation are also specified by Law No. 6112.⁴¹ Then, an OTT platform can be simply defined as a corporation subject to Law No. 6112. It is important to note that according to TCC Article 330, TCC applies to corporations subject to specific laws, except for those specific provisions, meaning that TCC continues to regulate OTT platforms.⁴²

³⁸While 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).

³⁹The for-profit entity called 'corporation' in American law is equivalent to '*anonim şirket*' entity in Turkish law (Oguz Imregun, *Amerikan Ortaklıklar Hukukunun Ana Hatları (Main Principles of American Company Law)* (İstanbul Üniversitesi, 1969) 35), which is defined in TCC Article 329.

⁴⁰For example, see RTUK Decision Number: 8 Meeting Number: 2021/51 Date: 29/12/2021. 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' ('End of Netflix?' Regulation Template on Radio, TV and On Demand Broadcasting Through İnternet in Regulation- Censorship Pendulum) (2019) 14 Terazi Law Journal 108, 113).

⁴¹See generally, Article 19(1) and 19(2).

⁴²Media service providers can be regarded as a sui generis type of legal persons, see Danıştay İBK E. 2001/1 K. 2001/4 K. 10/04/2001.

B. 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)).⁴³ 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 (Law No. 6112 Article 8).⁴⁴ 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.⁴⁵

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 (without defining) that broadcasting shall be done with an *'understanding of responsibility toward the public'*,⁴⁶ the meaning of this conception is only 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. However, Law No. 6112 Article 8 focuses on what content OTT platforms should not broadcast⁴⁷ rather than what content they should broadcast. Therefore, the general broadcasting principles do not explicitly constrain the arbitrary decisions (i.e. decisions not made pursuant to a fair film selection process) of OTT platforms during the formation

⁴³For 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).

⁴⁴Official Comment to Law no. 6112, General Comments. 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.

⁴⁵It 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).

⁴⁶Relying on this provision, courts emphasize that both the content and format of broadcasted programs should comply with the law, see Danıştay 13. D. E. 2018/3081 K. 2020/685 T. 02/03/2020.

⁴⁷Regarding 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' (Administration Sanctions in 6112 numbered Law) in Zeynel T. Kangal (ed), *Kabahatler Hukuku Yazıları II* (12 Levha Yayıncılık, 2018) 237, 241.

of their film catalogue. Still, 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 catalogue if it violates general broadcasting principles.

Certain provisions of Law No. 6112, although not listed under Article 8, introduce two additional general broadcasting service principles that can be seen as limitations on the editorial freedom of OTT platforms. First, as indicated above, Article 6(3) requires that media service providers not use their privileges for their unfair benefit and interests.⁴⁸ This rule can be interpreted as applying to only post-catalogue selection stages of OTT platform services rather than pre-catalogue selection stages, as indicated by the term ‘media services’⁴⁹ used thereunder: After all, the word of this law suggest that ‘media services’ refers to a post-, not pre-catalogue selection stage of the OTT platform services, as supported by RTUK decisions.⁵⁰ Thus, it seems unlikely that Law No. 6112 Article 6(3) explicitly and directly limits the editorial freedom of OTT platforms in choosing films for their catalogues. Otherwise, for example, the OTT platforms’ in-house film productions and their inclusion in the film catalogue would have to be considered as a prohibited conflict of interest incident. Second, Article 15(1) of the law 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)).⁵¹

The decision to include a film in its catalogue is regarded as an editorial decision exercised by the broadcaster itself pursuant to 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. 5651,⁵² the Regulation, other applicable laws and international agreements to which Turkey is a party, may constrain the providers’ editorial freedom. After all, CSR may play a crucial role in limiting the editorial freedom of OTT platforms when read in conjunction with the general broadcasting service principle of ‘*understanding of responsibility toward the public*’.

⁴⁸Official Comment to Law no. 6112, Article 6(3). This rule, read in conjunction with Article 8(1)(j), is interpreted as a rule limiting instances of unfair competition, see A. Vahap Darendeli, ‘Medya Yoğunlaşması, Tekelleşmenin Denetimi ve Çoğulculuğun Kurulması’ (Media Concentration, Control of Monopolization and Establishment of Pluralism) (2007) 68 TBB Dergisi 94, 128.

⁴⁹This term 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)).

⁵⁰A cursory examination of these decisions shows that, for example, 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).

⁵¹On 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 catalogues (Amending Directive (n 14) Article 1(18)).

⁵²Law 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).

V. Corporate social responsibility under Turkish law

A. The concept of corporate social responsibility

An important factor that has begun to limit the business decisions of corporations is the concept of corporate social responsibility ('CSR').⁵³ CSR involves corporations' obligations to 'prevent, identify, manage and mitigate any possible negative impact that they may cause on society as a whole'.⁵⁴ Although the scholarly literature on CSR dates back to at least the 1950s,⁵⁵ there is still no clear consensus or agreed-upon definition.⁵⁶ 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'.⁵⁷ This lack of a definitive definition creates challenges for those responsible for the corporate exercise of CSR.

Moreover, CSR is often misunderstood and confused with corporate purpose,⁵⁸ raising the age-old question of: 'What is business for and what contribution does it make to society?'.⁵⁹ This ambiguity inevitably brings the legitimacy of the CSR concept into question.⁶⁰ However, by defining CSR as 'the responsibility of enterprises for their impacts on society',⁶¹ 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.⁶²

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.⁶³ According to the European Commission, corporations need to have in place a process that integrates social, environmental, ethical, human rights and consumer concerns into their business operations.⁶⁴

⁵³See Danyelle Guyatt, 'Corporate Social Responsibility: The Case of Long-Term and Responsible Investment' in Alan Lewis (ed), *The Cambridge Handbook of Psychology and Economic Behavior* (Cambridge University Press, 2008).

⁵⁴European 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(2020)658541_EN.pdf)> Accessed 28 March 2023, 8. 'Corporate responsibility involves the search for an effective 'fit' between businesses and the societies in which they operate. The notion of 'fit' recognizes the mutual dependence of business and society- a business sector cannot prosper if the society in which it operates is failing', see OECD, 'Corporate Responsibility', (2001) <<https://www.oecd.org/daf/inv/corporateresponsibility/35315900.pdf> > Accessed 05 August 2023.

⁵⁵Andrew 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.

⁵⁶Rebecca Stratling, 'The Legitimacy of Corporate Social Responsibility' (2007) 4 *Corporate Ownership and Control* 80, 80.

⁵⁷Archie B. Carroll, 'A Three-Dimensional Conceptual Model of Corporate Performance' (1979) 4 *The Academy of Management Review* 497, 500. See Li-Wen Lin, 'Mandatory Corporate Social Responsibility? Legislative Innovation and Judicial Application in China', (2020) 68 *The American Journal of Comparative Law* 576, 577.

⁵⁸Dan 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.

⁵⁹Crane (n 55) 4.

⁶⁰Fred Robins, 'The Future of Corporate Social Responsibility' (2005) 4 *Asian Business and Management* 95, 98.

⁶¹Commission, 'A Renewed EU Strategy 2011–14 for Corporate Social Responsibility' (Communication) COM (2011) 681 final, 6.

⁶²See, generally, Jingchen Zhao, 'Promoting More Socially Responsible Through A Corporate Law Regulatory Framework' (2017) 37 *Legal Studies* 103.

⁶³Mallika Tamvada, 'Corporate Social Responsibility and Accountability: A New Theoretical Foundation for Regulating CSR' (2020) 5 *International Journal of Corporate Social Responsibility* 1, 5.

⁶⁴Commission (n 61) 6.

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.

CSR is addressed through various instruments on the international, regional and national levels. At the international level, organizations, including the United Nations, the Organization for Economic Cooperation and Development and the International Labor Organization, emphasize responsible behavior and human rights.⁶⁵ 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.⁶⁶ On the national level, jurisdictions have diverse perspectives on CSR, ranging from mandatory to voluntary approaches.⁶⁷ For example, France and the Netherlands have enacted due diligence requirements concerning the identification and prevention of certain violations of the law within organizations.⁶⁸ Thus, CSR requirements on the national level can take the form of general legislation, sectoral legislation or soft law instruments.⁶⁹ The scope of regulation by CSR instruments varies across countries.⁷⁰

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,⁷¹ as they are subject to Capital Market Law No. 6362 ('CML') 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 No. 6701 ('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.

B. CSR regime in Turkey

Under the TCC system, business and affairs of the corporation are managed by the board of directors (Article 374), but there is no specific duty for the corporation or its board of

⁶⁵Policy (n 54) 8.

⁶⁶Recital 3.

⁶⁷Policy (n 54) 8.

⁶⁸Policy (n 54) 27.

⁶⁹Policy (n 54) 15.

⁷⁰Li-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.

⁷¹Under the Turkish system, only a corporation may become publicly traded (CML Article 3(1)(e)). A corporation may be considered publicly traded 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 traded status is tied only to shares, rather than to other types of securities (Tekin Memiş, Gökçe Turan, *Sermaye Piyasası Hukuku (Capital Market Law)* (Seçkin 2019) 54). A corporation deemed publicly traded 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).

directors to explicitly consider the corporation's CSR.⁷² In practice, the tendency to apply the shareholder primacy approach often undermines CSR efforts.⁷³ 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))⁷⁴ and (2) the duty of the board of directors to ensure the corporation's compliance with applicable laws (TCC Article 375(1)(e)).⁷⁵ In this context, the duty of loyalty of the board of directors shapes what is in the best interests of the corporation,⁷⁶ while the duty of care sets the boundaries for compliance precautions.⁷⁷

It should be noted that the TCC does not explicitly define the concept of 'corporation's interest'.⁷⁸ However, it is generally understood to encompass the bundle of legal and economic interests outlined in the articles of incorporation and other corporate documents.⁷⁹ 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.⁸⁰ TCC Article 369(1) specifically directs the board of directors to prioritize the corporation's interests.⁸¹ 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.⁸² Consequently, the

⁷²Ismail Kirca and others, *Anonim Şirketler Hukuku (Law of Corporations) Vol. 1* (BTHAE 2013) 275 ; Hasan Pulaşlı, 'Kurumsal Sosyal Sorumluluk Bağlamında Uluslararası İnsan Hakları ve Çevre Standartlarının Çok Uluslu Şirketlerin Merkez Yönetim Organının Hukuki Sorumluluğuna Etkisi' (Effect of International Human Rights and Environmental Standards to Central Management Organ's Civil Liability in Relation to Corporate Social Responsibility) (2020) 36 BATIDER 5, 21. While some commentators opine that principle of equal treatment of shareholders (TCC Article 357) covers all stakeholders (see Pelin Özçelik, 'The Shareholder Primacy Model in the Light of American and English Company Law and an Assessment of the Effects of This model on the Companies' (2021) 16 ERÜHFD 59, 112- 113), word of this law is only indicating shareholders and its scope should not be expanded by way of interpretation.

⁷³Muzaffer Eroğlu, 'How to Achieve Sustainable Companies: Soft Law (Corporate Social Responsibility and Sustainable Investment) or Hard Law (Company Law)' (2014) 2 Kadir Has Üniversitesi Hukuk Fakültesi Dergisi 87, 99. Closely held corporations are not obligated to apply corporate governance principles (TCC Article 1529), see Poroy and others, *Ortaklıklar Hukuku I (Law of Companies I)* (Vedat Kitapçılık 2021) 363.

⁷⁴Pulaşlı (n 72) 22. Deniz Okuyucu, *Anonim Şirketin Sosyal Sorumluluğu (Social Responsibility of Corporations)* (On İki Levha 2023) 309- 317.

⁷⁵Pulaşlı (n 72) 23. Compliance obligation covers not only national law but also laws of countries of presence and international law for multinational corporations, see Hasan Pulaşlı, 'Significant Developments in Recent Years in the Law on Public Joint Stock Companies' (2021) 27 MÜHFAD 414, 435.

⁷⁶Sibel Hacimahmutoglu, 'The Business Judgment Rule: İş Adanı Kararı mı Yoksa Ticari Muhakeme Kuralı mı?' (2014) 30 BATIDER 99, 134. TCC Article 391 on void board of directors' resolutions also shape business judgment freedom of the board of directors in relation to corporation's interest, see Okuyucu (n 74) 317.

⁷⁷Sean J. Griffith, 'Corporate Governance in an Era of Compliance' (2016) 57 Wm. & L. Rev. 2075, 2114. Under some circumstances, compliance can become relevant to the duty of loyalty, see Michael Nietsch, 'Corporate Illegal Conduct and Directors' Liability: An Approach to Personal Accountability for Violations of Corporate Legal Compliance' (2018) 18 Journal of Corporate Law Studies 151, 176.

⁷⁸Rifat Cankat, Mehmet Helvacı, 'Karşılaştırmalı Hukukta Şirketin Menfaati Kavramı' (Company's Interest Conception in Comparative Law) in Ziya Akıncı and Candan Yasan Tepetas (eds) *Şirketler Hukuku Uyuşmazlıkları ve Tahkim* (12 Levha Yayıncılık 2019) 521, 521.

⁷⁹See Mehmet Helvacı and others, 'Özellikle Anonim Şirket Açısından Şirket Menfaati Kavramı' (Company's Interest Conception in Relation to Especially Corporations), in Prof. Dr. Hamdi Yasaman'a Armağan (12 Levha Yayıncılık, 2017) 309, 312.

⁸⁰Mehmet Helvacı, '21. Yüzyılda Anonim Ortaklığa İlişkin Düşünceler 'Tüzel Kişiy ve Bir Örnek Olarak Kar Payı Kavramına Belki Olması Gereken Farklı Bir Bakış' (Thoughts About Corporations in 21. Century: A Different Maybe Necessary View for Dividend Concept and Legal Personality) in Havva Karagöz and others (eds) *Tüzel Kişilik Penceresinden Anonim Ortaklık Sempozyumu* (12 Levha Yayıncılık, 2021) 3, 5. The notion that TCC endorses 'entity theory' for corporations more than 'contractual theory' (Kirca and others (n 72) 250), supports this view. For theories of the corporation, see David Millon, 'Theories of the Corporation' (1990) 39 Duke Law Journal 201.

⁸¹Helvacı (n 80) 6. Considering the interest of the corporation does not oblige to ultimately consider shareholder interests, see Pulaşlı (75) 417.

⁸²Helvacı (n 80) 7.

requirement to act in the interest of the corporation serves as a boundary for the commercial discretion exercised by the directors.⁸³ Although the concept of the ‘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.⁸⁴ 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.⁸⁵

Under the TCC system, incorporators are not permitted to establish a corporation solely for the purpose of using profits for public benefits;⁸⁶ 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 (TCC Article 331) can encompass both shareholder primacy and stakeholder approach norms for corporations.⁸⁷ However, the existence of statutory safeguards concerning shareholders’ right to dividends underscores that the interests of shareholders cannot be disregarded.⁸⁸ Consequently, all corporate organs should work toward the objective of generating profits and declaring dividends.⁸⁹ Nonetheless, the fact that a corporation’s interest is distinct from the shareholders’ interests raises and solidifies the dilemma of which interest should take precedence.⁹⁰

On the other hand, according to CML Article 17(1), applicable only to publicly traded corporations, 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 traded corporations.⁹¹ 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, entitled ‘Ethical Rules and Social Responsibility’ includes the requirement that *‘the corporation shall be*

⁸³Burak Adıgüzel, ‘Anonim Şirketlerde Bağış ve Yöneticilerin Sorumluluğu’ (Donations in Corporations and Liability of Directors) (2019) 14 Terazi Hukuk Dergisi 58, 65.

⁸⁴Hacımahmutoğlu (n 76) 134.

⁸⁵Hacımahmutoğlu (n 76) 135. TCC Article 331 on corporate purpose does not preclude the corporation from being managed for the benefit of all stakeholders, see Okuyucu (n 74) 305- 309.

⁸⁶Oğuz İmregün, *Kara Ticareti Hukuku Dersleri (Commercial Law Courses)* (Evrım Dağıtım 1987) 263.

⁸⁷In case a corporation’s articles of incorporation includes a phrase such as ‘protection of environment’, this should not be interpreted as its corporate purpose but be interpreted as a general order to the board of directors, see Sevilay Uzunallı, *Anonim Şirkette İşletme Konusu (Operation Subject in Corporations)* (Adalet 2013) 9.

⁸⁸See TCC Article 519, 523.

⁸⁹Poroy and others (n 73) 307. A dividend policy aiming not to distribute dividend to shareholders would violate the basic structure of corporations and TCC Article 531 on involuntary dissolution prohibits such policy, see Tekinalp (n 29) 359. About the function of involuntary dissolution statutes, see Murat Can Pehlivanoglu, *Non- Pecuniary Private Benefits in Publicly Traded Corporations: How Involuntary Dissolution Statute May Be the Solution* (Brill 2024).

⁹⁰Some argue that the ultimate interest of a corporation is to continue its legal existence (sustainability), see Cankat and Helvacı (n 78) 549.

⁹¹About the concept of ‘corporate governance’, see Hasan Pulaşlı, *Corporate Governance* (BTHAE 2003).

sensitive toward its social responsibilities and comply with the regulations and ethical rules concerning environment, consumers, public health.⁹² Moreover, the Board's Sustainability Principles Compliance Framework⁹³ ('SPCF') categorized under 'comply or explain' approach (Communique Article 8(3)), lists specific environmental, social and corporate governance activities.⁹⁴ 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). Still, given that the majority of OTT platforms in Turkey are not publicly traded corporations, CML's importance and relevance are limited in the context of OTT CSR.

Second, in both publicly traded and closely held corporations 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.⁹⁵ An important aspect of the duty of care is to define the scope of the directors' responsibilities that are not specified in the law.⁹⁶ In this regard, the 'cautious manager' standard is applied as an objective criterion, mandating an examination based on the specific requirements of the 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.⁹⁷ As a result, it can be argued that OTT platforms' boards of directors must implement codes of conduct or standards (i.e. guidelines) regarding their film selection process, given their sector-specific CSR, as deduced from the combined reading of the TCC, Law No. 6112 and TIHEKK.

VI. OTT Platforms and CSR

The actions of corporations not only impact the daily lives of the consumers, but they also shape the future of societies, as they have implications for working conditions, human rights, health, environment, innovation, education and more.⁹⁸ In the absence of

⁹²An English translation of the Communique is available at CMB, <<https://www.cmb.gov.tr/SiteApps/Teblig/File/479>>, Accessed 06 March 2021.

⁹³Available at CMB, <<https://spk.gov.tr/data/63a17b1a8f95db0fa40e3309/surdurulebilirlik%20ilkeleri%20uyum%20cercevesi.pdf>> Accessed: 06 August 2023.

⁹⁴See Fatma Beril Özcanlı, 'Sosyal Eşitsizliğin Giderilmesi ve İnsan Hakları Cephesinden Sürdürülebilir Bir Şirketler Hukuku' (Remedying Social Inequality and Sustainable Company Law in Relation to Human Rights) in Havva Karagöz and others (eds), *Tüzel Kişilik Penceresinden Anonim Ortaklık Sempozyumu* (12 Levha Yayıncılık, 2021) 177, 192-193.

⁹⁵Ersin Çamoğlu, *Anonim Ortaklık Yönetim Kurulu Üyelerinin Hukuki Sorumluluğu (Civil Liability of Corporate Board of Directors)* (Vedat Kitapçılık 2010) 68.

⁹⁶Adıgüzel (n 83) 65.

⁹⁷The 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.

⁹⁸Commission Staff Working Document on Corporate Social Responsibility, Responsible Business Conduct, and Business & Health Rights: Overview of Progress, European Commission, Brussels 20.03.2019, 2.

mandatory non-shareholder constituency statutes,⁹⁹ 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 producers, 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.¹⁰⁰ 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.¹⁰¹ 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.¹⁰² Building higher levels of trust among stakeholders can foster an environment conducive to innovation and growth.¹⁰³ 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 a previously emphasized example, OTT platforms' film catalogues are subject to the oversight of Law No. 6112 in Turkey.¹⁰⁴ Although the law's editorial responsibility system does not impose a specific duty to objectively determine (i.e. fairly select) content, the principle that OTT platforms should operate as a corporation implicitly limits their editorial freedom when read in conjunction with the aforementioned law and TIHEKK. The board of directors, under its obligations and duties, is required to comply with applicable laws. Primarily, the Law No. 6112 Article 8(1) principle that OTT platforms should operate with an '*understanding of responsibility toward the public*' implicitly limits their editorial freedom. Consequently, the board of directors is required to ensure fair film selection to fulfill OTT platform's responsibility toward the public.¹⁰⁵ Without proper precautions, the OTT platform may be seen as disregarding certain films or engaging in discriminatory practices, leading to the need for the board of directors to implement and publicly disclose film selection codes of conduct or fair treatment standards (i.e. guidelines) they follow.¹⁰⁶

⁹⁹Constituency 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).

¹⁰⁰*Francis v. United Jersey Bank* (1981) 87 NJ 15.

¹⁰¹Study on Directors' Duties and Sustainable Corporate Governance, Final Report, European Commission B- 1049 (Brussels, July 2020) 61.

¹⁰²Commission (n 61) 3.

¹⁰³Commission (n 61) 3.

¹⁰⁴See RTUK Decision Number: 7 Meeting Number: 2020/36 Date: 03/09/2020.

¹⁰⁵In EU law, fair treatment of persons providing their services to public through online platforms is also considered important in the context of e-commerce platform's right to delist its business users, see Murat Can Pehlivanoğlu, 'Internal Complaint- Handling Systems of Online Platforms, Commercial Law and the Board of Directors' Duty of Care' (2021) 14 John Marshall Law Journal 168.

¹⁰⁶For example, a well-known OTT platform, Netflix, has a directive for its employees emphasizing the importance of not censoring specific artists or voices even if the employees consider the content harmful, see Todd Spangler, 'Netflix Updates Corporate Culture Memo, Adding Anti-Censorship Section and a Vow to Spend Our Members Money

Then, 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.¹⁰⁷ When the principle of broadcasting with an *'understanding of responsibility toward the public'* is considered in conjunction with corporation's compliance obligation and Law No. 6112 Article 6(3) requirement that media service providers should not use their privileges for their unfair interests, it becomes clear that OTT platforms should not disregard stakeholder interests for the sake of shareholder interests and that OTT platforms' interests as a corporation may be interpreted closer to stakeholder interests.¹⁰⁸ After all, relying on the opposite meaning of the term 'unfair', it can be argued that broadcasting can be done to only support 'fair' interests of media service providers,¹⁰⁹ and the fairness of interests is inherently requiring consideration of stakeholder (i.e. society) interests under OTT platforms' CSR.

VII. Conclusion

The importance of OTT platforms is steadily increasing. Consequently, the way they select their film catalogue has a profound impact on shaping culture in society and distributing income among film industry constituents. As OTT platforms enjoy editorial freedom in choosing and broadcasting films, there is a potential risk of unwarranted misguidance and unfair treatment, accompanied by 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. After all, as corporations, OTT platforms' film choices reflect the business judgment of their managers, who can freely deploy strategies to promote the best interests of the corporation.

Under Turkish law, the principles of broadcasting with *'understanding of responsibility toward the public'* and avoiding discrimination, along with the necessity of considering the long-term interests of the corporation, limit the discretion of the board of directors (managers). Consequently, OTT platforms are implicitly obligated to implement measures demonstrating a fair film selection process. This implies that the board of directors (as the managers of OTT platforms) should disclose the film selection standards and procedures (i.e. guidelines) they follow. In essence, the duty of OTT platforms' boards 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.

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

Wisely' *Variety* (12 May 2023) <<https://variety.com/2022/digital/news/netflix-culture-memo-update-censorship-spending-1235264904/>> Accessed 05/04/2023.

¹⁰⁷In this regard, it is argued that on-demand media services have an interest in broadcasting a certain amount of local cultural content, as corporations should ideally act to the benefit of the consumers, see Antonios Vlassis, 'The Review of the Audiovisual Media Services Directive. Many Political Voices for One Digital Europe?' (2017) 56 *Dans Politique Européenne* 102. Similarly, OTT platforms, just like TV channels, need to retain their subscribers by providing satisfactory original content, see Özel (n 4) 130.

¹⁰⁸The board of directors' duty to act in the interest of the corporation ultimately determines which interest (shareholder or stakeholder) to follow, see Kirca and others (n 72) 277.

¹⁰⁹Darendeli (n 48) 128.

create their film catalogues. Turkish law is an example showing how corporate law and broadcasting law can effectively connect. Accordingly, corporate law can constrain OTT platforms' editorial freedom for the benefit of the public through the notion of CSR, especially by embracing applicable general broadcasting law principles.

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