Türkiye's Draft Digital Communications Regulations Would Harm U.S. Services

The telecommunications regulator in Türkiye, Information and Communication Technologies Authority ("ICTA"), released a consultation with draft regulations for over-the-top ("OTT") communications providers on March 21.[1] The consultation seeks to amend the Electronic Communications Law No. 5809, and includes a series of concerning proposed requirements with significant potential impacts for U.S. business operations in this key market.

The specific requirements would:

- require OTT providers to **locally incorporate** through a joint-stock Turkish company;
- subject OTT providers to requirements associated with **universal service payments**;
- expose them to **potential surveillance and content restriction** demands; and would
- threaten OTT providers with **blocking, throttling, or fines** for violations of these obligations.

These are all discussed in detail below.

The draft regulations would bring OTT suppliers under the same regulatory regime of traditional telecommunications companies, legacy providers who have been regulated for over a century based on their control of essential and ubiquitous physical infrastructure (copper, fiber, etc.). OTT providers are defined as "interpersonal electronic communication services" offering "voice, written and visual communication" that are "provided to subscribers and users with internet access through publicly available software, independent of operators or the internet service." A threshold of one million monthly unique users is also proposed.

The consultation follows a global trend of similar efforts in other jurisdictions, most notably in India, that similarly fail to account for the fact that OTT communications services and those provided by traditional telecommunications providers are fundamentally different. These services differ both in what they offer consumers and how they function technically, making them an ill-fitting target of traditional regulation. Telecommunications providers operate at the physical layer of the network that connects different networks and therefore serves as the foundation of the internet's functioning, whereas OTT providers are applications that operate above the network layer and use the internet to move data between users. The International Telecommunications Union has concluded such approaches are unwise:

> *Regulators must also be cautious about the impact of their actions on innovation and competition. While important public policy considerations need to be addressed, regulation of OTTs driven solely by the motivation of "levelling the playing field" between traditional and digital modes of service delivery would be detrimental to consumer interests.*[2]

[1] https://www.btk.gov.tr/kurul-kararlari?decision_no=2025%2F%C4%B0K-YED%2F70.
[2] https://www.itu.int/dms_pub/itu-d/oth/07/23/D07230000030001PDFE.pdf.

Currently, the regulations will enter into force in January 2026, if approved as is. The consultation ended in April, so ICTA could finalize the rules as early as July, though there is no official deadline. Therefore, as the United States engages with Türkiye over a range of digital trade issues,[3] this concerning development should be addressed as well.

Obligation to Register and Partner with a Local Company

Article 3(a) of the rules require over-the-top providers to:

> *carry out their activities through their fully authorized representatives in the status of a joint-stock company or limited company established in Turkey, within the framework of authorization to be made by the Institution. In this context, all shares of the company established by a company established abroad in order to be authorized to provide services in Turkey must belong to the company in question.*

Licensing and authorization for telecommunications is typically associated with obligations and oversight of physical facilities associated with provision of telecommunications services—such as wireline, spectrum, and poles. OTTs generally do not own these facilities, nor do they receive the rights to operate over commercially-owned spectrum. Therefore, an authorization obligation is unnecessary and unreasonable to impose on OTT services. Further, requiring partnership with a local company will hinder competition, as smaller companies will be less able to comply, and contravenes trade cooperation norms that provide certainty to international businesses.

To rectify this, ICTA should specify that the authorization regime distinguishes between OTT and telecommunications services and assigns each appropriate legal requirements—meaning OTT services should not be required to locally incorporate with a majority-Turkish owned company nor seek licensing.

Such a requirement undermines the whole premise of cross-border services, that the internet has so effectively promoted: the ability of firms from one location to serve customers globally, without the burdensome, time-consuming and expensive requirement to establish in every jurisdiction. While larger companies may be able to shoulder such burdens, they can be prohibitive for smaller companies—an object lesson for which was PayPal's decision to exit the Turkish market in 2016 after a similar requirement was imposed on payment processors.[4] Since Turkey made a legally-binding commitment to allow for the cross-border provision of voice services in the World Trade Organization (WTO), this requirement could also rule afoul of WTO rules.

Threat of Blocking, Throttling, and Fines for Violations

Article 3(b) stipulates that companies that fail to adhere to ICTA's rules—and the subsequent obligations—risk "administrative sanctions", "prevention of service provision", and

[3] https://ccianet.org/library/turkiye-barriers-to-u-s-digital-service-suppliers-and-suggested-commitments/.
[4] https://techcrunch.com/2016/05/31/paypal-to-halt-operations-in-turkey-after-losing-license-impacts-hundreds-of-thousands/.

"suspension of operation." The fines could range from 1 million Turkish Lira to 30 million Turkish Lira.

Blocking and throttling of services are extreme measures that would restrict access to important communications services between individuals in and out of Türkiye. Doing so would also impede Turkish individuals' right to communicate, which is guaranteed by Article 22 of the Constitution.[5]

ICTA also reserves the right to "decide to directly block access to the relevant application or website of over-the-air service providers, regardless of whether they are subject to authorization, within the framework of national security, public order, public health and similar public interest requirements." This offers the Turkish government gaping discretion to block access to OTT services for any reason they deem within the range of protecting the "public interest," which will introduce a lack of stability for U.S. companies operating in-market and offer the Turkish government significant leverage in any dispute or pursuit of demands, including on content takedowns or restrictions. This is of particular concern given the Turkish government's efforts over the past decade to quell dissent and freedom of expression through online platforms.[6]

However, even just imposing the threat of blocking and throttling for obligations that include Turkish ownership and incorporation offers preferential treatment to Turkish companies over U.S. and non-Turkish firms. A Turkish OTT supplier—including services offered by Turkish telecommunications companies or standalone OTT providers—would experience significantly easier access to licensing and authorization by virtue of being a Turkish company compared to a U.S. firm, which could be throttled or blocked as a result of these onerous localization obligations.

Further, conditioning operation in the market on securing a partnership with a local company and registration is a significant impediment to market access. Although Türkiye is permitted to require licensing and authorization for telecommunications and mobile providers—and to require 51% minimum Turkish ownership for companies choosing to establish locally—in the country's 1997 WTO commitments,[7] the wording of this commitment highlights this regime and the exception itself are not appropriate for OTT providers, and it did not preclude the provision, without limitations, of cross-border services:

> *The Ministry of Transport and Communications may grant licence and authorization to private companies **for the operation of network,** with licensing criteria publicly available. Interconnection between private companies is prohibited. The licences and permissions are available only for the companies which deal with the subject of licence and registered in Turkey. Total Turkish citizens equity should not be less than 51%.*[8]

[5] https://anayasa.gov.tr/media/7258/anayasa_eng.pdf.
[6] https://www.internetsociety.org/resources/internet-fragmentation/turkeys-censorship-law/.
[7] https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/SCHD/GATS-SC/SC88S2.pdf&Open=True.
[8] https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/SCHD/GATS-SC/SC88S2.pdf&Open=True at 3 (emphasis added).

Note that while the Ministry reserves the right to grant licenses and authorization for the operation of a network, OTT providers do not themselves operate the network, because that is not where they sit in the internet stack. As discussed above, OTT providers do not, generally, own and operate facilities or the networks themselves, they sit on top of that layer (over-the-top) to offer communications services between individuals. Therefore, a requirement for OTT providers to obtain authorization or licensing for operation of a network—something that they do not and cannot do—renders this exception meaningless in the context of what would otherwise be a textbook restriction to market access.

Threat of Government Surveillance and Content Restrictions

Article 3(b) suggests that OTT providers will be subjected to a range of obligations, including those "related to public order and national security." The wording of this requirement is extremely vague and broad, with no certainty provided for what the obligations following the imposition of these proposed regulations would actually be, instead stating OTT providers would be responsible for "other relevant rights and obligations of operators."

By leaving out any specific obligations, the proposal leaves the possibility that OTT providers would be subjected to surveillance requirements for traditional telecommunications providers that would be ill-suited for them to carry out. These obligations include interception, decryption, and data collection obligations, all of which would be deeply problematic for OTT providers to implement. For companies to adhere to these rules (and avoid fines, throttling, and/or blocking), they would have to break their own digital security protocols, undermine consumer privacy and confidence, and fundamentally change their product design, likely globally. As such, these requirements are ill-fitted for OTT services, and would represent harm not only to online free expression, but also to U.S. business.

Insofar as ICTA seeks to impose any public safety requirements onto OTT providers that involve the extension of surveillance laws, it should involve a separate and robust public consultation process that acknowledges and addresses the security and privacy concerns of stakeholders. Input from companies, civil society, and foreign governments on this specific topic is necessary to ensure that any regulations are proportionate, relevant, and amenable.

Threat of Mandatory Payments Benefitting Telecommunications Providers

Article 3(b) stipulates that OTT providers will be subjected to an authorization fee and a "universal service contribution fee" as part of this new regime. Universal service, under Law No. 5369, pertains to "fixed telephone services, public payphone services, telephone directory services (printed or electronic media), emergency calls services, basic internet services, passenger transportation services for settlements to which maritime lines is the single option of access as well as communications services regarding distress and safety at sea."[9] As such, OTT providers would be required to pay fees for a fund dedicated towards services that do not directly impact their own operations, and from which they could not draw.

Under the WTO's Agreement on the Basic Services of Telecommunication, to which Türkiye is party, the following commitments govern universal service funds:

[9] https://dergipark.org.tr/en/download/article-file/787419 at 4.

> *Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive per se, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.*[10]

By requiring U.S. OTT providers to pay into this fund, which is dedicated to services outside of their own operations and therefore precluding them from participating in receiving the funds, the regime proposed by the ICTA consultation is both discriminatory and competitively non-neutral. Further, as described above, OTT providers do not own or operate physical infrastructure associated with the deployment of networks, beyond some involved in subsea cables and is beyond the purview of the questions envisaged in this consultation. As such, imposing universal service obligations to pay for network deployment or upgrades on OTT suppliers would be mandating a revenue transfer from U.S. companies to local Turkish incumbents, an unfair condition for market access.

Additionally, by bringing OTT providers into the same regulatory regime as traditional telecommunications providers, it opens the door to telecommunications companies demanding payment from OTT providers for their traffic over the network. Telecommunications companies could demand these "network usage fees" by forcing OTT providers into negotiations in the name of seeking interconnection, in line with the underlying Electronic Communications Law, Law No. 5809 Article 16(2):

> *In accordance with this Law, all operators are obliged to negotiate on interconnection with each other upon request. In case that the parties cannot reach an agreement, the Authority may impose on operators the obligation to provide interconnection.*[11]

The open threat of network usage fees leaves the possibility of a framework permitting forced revenue transfers between U.S. companies and Turkish telecommunications conglomerates—many of which also compete with OTT providers in video distribution, in some cases. Further, this potential regime undermines the open internet ecosystem that has allowed communication and business to flourish over the past three decades by requiring payment for the delivery of all traffic—which is determined by consumer use and already paid for when consumers purchase internet access—in the same manner as the telephone calls of yesteryear. In the one country where such a regime has been adopted, South Korea, it has resulted in higher transit costs, increased latency, increased packet loss, and lower mean throughput trends, likely due to OTT providers choosing to host content outside of Korea to avoid this unreasonable treatment.[12]

This concern is not merely theoretical—this is precisely the reinterpretation of telecommunications law that the communications regulator in Italy, Autorità per le Garanzie nelle Comunicazioni (or AGCOM), has recently pursued to force content delivery networks

[10] https://www.wto.org/english/res_e/publications_e/ai17_e/gats_art18_oth.pdf.
[11] https://tahseen.ae/media/3385/turkey_electronic-communications-law.pdf at 15.
[12] https://ccianet.org/research/reports/myths-surrounding-network-usage-fees-south-korea/.

(CDNs) to pay ISPs for traffic.[13] In that case, AGCOM has proposed, following one instance of congestion due to a football match, to redefine all CDNs as telecommunications services under its communications law to effectively implement network usage fees. A similar outcome in Türkiye could be a natural consequence of inappropriately bringing OTT providers into the same regulatory realm as telecommunications providers.

ICTA should act to uphold the safeguards included in the law, such as the assertion at Law 5089 Article 4(1)(ı) of the following principle: "...[E]nsuring free determination of the prices by the operators for the electronic communications services which covers access charges including interconnection and line and circuit rental fees."[14] ICTA should do so by clarifying that, if OTT providers are to be brought under new requirements, it will not be subjected to mandatory arbitration for peering or interconnection with internet service providers.

[13] https://ccianet.org/library/ccia-europe-response-to-agcoms-consultation-on-content-delivery-networks/.
[14] https://tahseen.ae/media/3385/turkey_electronic-communications-law.pdf at 5-6.