Turkey: Electronic Communication Law In A Nutshell

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Introduction

The Telegram and Telephone Law dated February 21, 1924 and numbered 406 (the "Law No. 406") has been the governing regulation with regards to telecommunication activities for more than eighty years and despite the fact that it was subject to substantial amendments after the abolishment of monopoly on telecommunication activities, it failed to fully satisfy the demands of the telecommunication market. On November 10, 2008, the Electronic Communication Law numbered 5809 (the "Law") came into force and abolished the Law No. 406, except for its provisions related to authorization which will come into force as of May 10, 2009. In preparation of the Law, the aim of the legislator was to model a regulatory framework for electronic communications networks and services in harmony with its counterpart in the European Union (the "EU"). In this study, we analyze the most noteworthy topics covered by the Law, such as the definition of electronic communication services and networks, the authorization procedure set forth under the Law and the coordination requirement between Information Technologies and Communication Authority (the "Authority") and the Turkish Competition Authority (the "Competition Board").

The Definition of Electronic Communication Services and Networks

Article 3 of the Law provides definitions of certain terms related to electronic communication. In the reasoning of the draft form of the Law, it is stated that definitions were drafted taking into account the descriptions set forth under the EU legislation and the International Telecommunications Union (the "ITU").

The scope of electronic communication services ("ECS") is defined more broadly than the definition adopted by the Directive 2002/21/EC of the European Parliament and the Council dated 7 March 2002 on a Common Regulatory Framework for Electronic Communications Networks and Services (the "Framework Directive"). Article 2 (c) of the Framework Directive, provides that the term ECS does not cover services providing, or exercising editorial control over content transmitted using electronic communication networks ("ECN") or ECS and; it does not include information society services[1], which do not consist wholly or mainly in the conveyance of signals on electronic communications. Article 3 of the Law, however, does not explicitly provide as to which type of services are not included in the definition of ECS.

Furthermore; under Article 3 of the Law, ECN refers to all kinds of transmission system networks including but not limited to switching equipments and lines, which constitute the connections between one or more points to facilitate electronic communication among such points. The scope is similar to the definition provided in the Framework Directive, which states

that ECN refers to transmission systems which permit the conveyance of signals irrespective of the type of information conveyed.

The Authorization Procedure

The most noteworthy amendment introduced by the Law concerns the authorization of the ECS and the ECN. The Law provides the legal framework for the new authorization system to come into force as of May 10th, 2009, and it has introduced major changes with regards to the authorization system. Currently, service providers are obliged to obtain different types of authorizations for each type of services they will render. However, with the authorization system to be introduced by the Law, companies will commence their services either by a prior notification to the Authority or upon obtaining a right of use from the Authority.

Article 9 of the Law provides that companies willing to provide an ECS and/or construct and operate an ECN or electronic communication infrastructure shall notify the Authority of their intention prior to the commencement of their activities. The companies which do not need allocation of resources (such as number, frequency and satellite position) for an ECS and/or an ECN or an infrastructure they are planning to conduct and/or operate shall be authorized to provide such services upon a written notification to the Authority in accordance with the terms and conditions determined by the Authority.

However, if they need allocation of resources, they shall be authorized upon obtaining a right of use from the Authority. The Authority issues a right of use within 30 days upon due application for an ECS, ECN or an infrastructure which is not reserved for only a limited number of service providers.

The Authority is entitled to determine which type of ECS/ECN shall be subject to a right of use and which type of ECS/ECN shall be conducted by a limited number of service providers.

The provisions of the Law which are related to authorization procedure are generally in line with the principles set forth under the EU legislation. However, the Directive 2002/20/EC of the European Parliament and the Council dated 7 March 2002 on the authorization of electronic communications and services stipulates that in case an ECS or an ECN is not provided to public, it is appropriate to impose fewer and lighter terms and conditions than those which are justified for ECS/ECN provided to public. Under Article 8 of the Law, not providing an ECS or an ECN to public is recognized as one of the conditions required in order to be exempt from the authorization requirement. However, provision of an ECS/ECN for personal/organizational needs does not, in and of itself, entitle a natural person or a legal entity to be exempt from the authorization requirement. Therefore, it is possible to say that the Law fails to impose lighter conditions on the ECS/ECN which are provided for personal/organizational needs.

The Coordination between the Authority and the Competition Board

While it is the authority and obligation of the Competition Board to govern the enforcement of the Law on the Protection of Competition dated December 7, 1994 and numbered 4054 (the "Competition Law") regardless of any sector discrimination, the Authority has the obligation to sustain and protect the competition in the telecommunication sector and therefore, the powers of the two authorities overlap concerning the competition in the telecommunication sector. The Law aims to regulate the coordination between the two authorities and in this respect, to clarify any conflicts or ambiguities in the telecommunication sector arising from such a dual-system.

The need for a clarification of the powers of the Competition Board and the Authority in the telecommunication sector has been on the agenda of the two authorities in the past. A coordination protocol was signed on September 23rd, 2002 in order to arrange for a coordination in this respect (the "Coordination Protocol"). The main purpose of the Coordination Protocol was to provide a procedure to handle matters which fall under the power of each authority and to coordinate the exchange of views and documents in order for the authorities not to issue conflicting decisions or opinions.

In line with the Coordination Protocol, the Law provides further provisions regarding coordination rules. Pursuant to Article 6 of the Law, the Authority is entitled to provide regulations in order to prevent infringements of competition and for this purpose; the Authority is entitled to impose obligations on entities and can take the necessary precautions. Furthermore, the Authority is obliged to monitor any breaches of competition in the telecommunications sector and is entitled to impose sanctions when need be.

Pursuant to Article 7(1) of the Law, save for the provisions of the Competition Law, the Authority is entitled to investigate any transactions and practices which are contrary to competition. On the other hand, pursuant to Article 7(2), the Competition Board is required to obtain the Authority's view and take into account the regulatory procedures determined by the Authority before making any decisions regarding the telecommunication sector, including mergers and acquisitions related to the telecommunication sector. As a result of market analyses conducted, the Authority is entitled to identify the operators with significant market power in the relevant markets and also to impose obligations on operators with significant market power with the aim of ensuring and promoting an effective competition environment.

In light of the above, although it was expected that the Law would develop the strategy adopted by the Coordination Protocol, we are of the opinion that it fails to set clear rules regarding the powers of the two authorities, and therefore it cannot be claimed that the Law will prevent any possible conflicts among the two authorities in future.

Conclusion

The Law was primarily promulgated to bring the Turkish telecommunication legislation in harmony with the relevant EC Directives and yet, it is hard to conclude that the promulgation of

the Law has achieved this purpose. Nevertheless, despite its flaws, the Law can still be considered as a major step taken towards the European Electronic Communication legislation.

Footnote

1 Article 1(2) of Directive 98/34/EC ("Directive 98") as amended by Directive 98/48/EC defines Information Society Services ("ISS") as "any services provided for remuneration, at a distance (parties are not simultaneously present), by electronic means (through the use of electronic equipment, including digital compression, conveyed and received by wire, by radio, by optical means or by other electromagnetic means) and at the recipient's request for service (data is transmitted upon the individual's request)". This definition does not apply to radio broadcasting and television broadcasting services.