

ELECTRONIC COMMUNICATIONS LAW: ANALYSIS

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I. INTRODUCTION

The necessity for a comprehensive law covering the problematic issues of the electronic communications sector as well as recent developments in information technologies have been frequently expressed in the last few years in Turkey. Prior to the enactment of the Electronic Communications Law No. 5809 (the “Electronic Communications Law” or the “Law”), the main legal framework governing the electronic communications sector was the Telephone and Telegraph Law No. 406, enacted in 1924 along with several amendments made thereto from time to time. Furthermore, as part of Turkey’s accession negotiations with the European Union, the legislative harmonization process regarding the “Information Society and Media” chapter necessitated a new law to regulate the sector.¹

As a result, the Turkish Parliament has enacted the Law, which entered into force on 10 November 2008. The Law stipulates that the provisions in Part Two - Chapter One regarding the authorization process shall become effective six months following the publication of the Law (i.e., on 10 May).

II. MAIN FEATURES OF THE LAW

A. Competent Authorities

The Electronic Communications Law renames the relevant regulatory authority (i.e., the Telecommunications Authority) as “Information and Communication Technologies Authority” (“ICTA”), and provides that the Ministry of Transportation (the “Ministry”) and ICTA are the competent authorities in the electronic communications sector.

The Ministry’s main duty is to develop general strategies and policies with respect to electronic communications services and to establish an alternative communications infrastructure to avoid the risk of a breakdown in communications in the event of a natural disaster or state of emergency. The Ministry is also authorized to determine the body which shall allocate the internet domain names as well as the relevant procedures.

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¹ Full text is available at http://www.abgs.gov.tr/files/AB_Iliskileri/Tur_En_Realitons/Progress/turkey_progress_report_2008.pdf.

ICTA, on the other hand, is mainly responsible for (i) establishing and maintaining competition in the sector, (ii) granting necessary permissions and authorizations, (iii) supervising and monitoring the sector, (iv) approving the reference access proposals of the enterprises; and (v) planning and allocation of the frequencies, satellite positions and numbering for the establishment and operation of the communications network and infrastructure. The Law also grants ICTA the right to prepare the national numbering plan and allocate the numbers accordingly.

Furthermore, ICTA can, *ex officio* or upon complaint, supervise the individuals or legal entities in the electronic communications sector. This authority includes reviewing all documents, data, hardware, software and systems and requesting copies and samples. The enterprises subject to such supervision process are required to cooperate with ICTA and provide them with the necessary information and documents.

As will be further discussed below, ICTA also has a wide range of authorities including protection of competition and consumers in the sector. In addition, ICTA is authorized to decide on the procedures and principles for the use of personal data and the protection of privacy by the electronic communications enterprises.

B. Authorization to Perform Electronic Communications Services

The Electronic Communications Law provides that the enterprises willing to provide electronic communications services and to establish/operate an electronic communications network or infrastructure are required to obtain authorization from ICTA unless such activities are carried out either (i) exclusively for internal individual/institutional needs without any commercial purposes, or (ii) by public bodies and institutions in relation to the services exclusively provided by them pursuant to the applicable legislation.

Pursuant to the Law, authorization can be given either by way of notification or granting a usage right, depending on the necessity to use infrastructural sources. If an enterprise does not need an allocation of sources (e.g., number, frequency or satellite position for its service/operation), it will be deemed authorized upon notification to ICTA. On the other hand, in case that the allocation of sources is required for the prospective activities of the enterprise, it will be authorized by way of obtaining a usage right from ICTA. ICTA can decide to limit the number of usage rights only if the sources are required to be operated by a limited number of users due to efficiency grounds.

If the number of usage rights is not limited, such rights will be granted within 30 days following an application to ICTA in due form and content. The term of a usage right cannot exceed 25 years.

The authorization fee for grant of a usage right is composed of the administrative fee and the usage fee. The Law envisages that the annual administrative fee cannot exceed 0,5 % of the net sales of the enterprise for the previous year. The minimum limits of usage fees are to be set by the Council of Ministers upon proposals of ICTA and the Ministry.

C. Tariffs

The tariffs to be applied to the electronic communications services can be freely determined by the enterprises provided that such tariffs comply with the relevant legislation and regulations of ICTA; i.e, without being subject to any minimum or maximum monetary limits to be set by ICTA. Such tariffs may comprise of one or more fees such as subscription fee, fixed fee, call fee, line lease amount, etc. If it is determined that an enterprise has significant power in the relevant market, ICTA may determine the limits of the tariffs and also take measures for prevention of non-competitive tariffs that may lead to price squeezing or predatory pricing.

D. Consumer Protection

The Law provides several provisions aiming at protection of consumers. Article 50 of the Law describes the minimum contents of the subscription agreements and states that provisions which cause imbalance between the rights and obligations of the parties to the detriment of the consumer contrary to the principle of good faith are invalid. The Law also sets forth provisions regarding equal access of the consumers to the services, the quality and transparency of the services, and rights of the consumers under the subscription agreements.

E. Cross Authority Issue

Following lengthy discussions on the limits of the powers of ICTA and the Competition Authority - and the relevant decisions of the Competition Board - the Law intends to establish a cooperative relationship between these authorities. Article 7 of the Law provides that ICTA is, *ex officio* or upon complaint, authorized to investigate non-competitive practices and behaviors in the electronic communications sector and to take necessary measures to establish competition in the sector, provided that the provisions of the Competition Law No. 4054 are reserved. On the other hand, the Competition Board, while conducting all investigations and rendering decisions in relation to the electronic communications sector, shall primarily ask for the opinion of ICTA and take into account the regulatory acts of ICTA. Nevertheless, we believe that cross authority issue may still arise in practice.

ICTA may obligate an enterprise to accept the accession and interconnection requests of other enterprises in order to establish a competitive environment. Similarly, ICTA may impose obligations to share its facilities with other enterprises for a reasonable price if the facilities of the enterprise are located on/under the property of the State or a third party; or to provide accommodation for other enterprises for a cost-based price if the facilities are located on its own property. The procedures and principles regarding such obligations shall be determined later by ICTA.

F. Administrative Sanctions and Penalties

Article 61 grants ICTA the right to impose monetary fines on the enterprises as a result of its supervision duty on the sector. If an enterprise is in breach of the legislation and/or the term of its authorization or usage right; ICTA may impose monetary fines in an amount of up to 3% of the net sales of the enterprise for the previous year, take the necessary actions, acquire the facilities in return for a compensation, or cancel the enterprise's authorization depending on the gravity of the breach.

The Law also envisages monetary fines to be imposed by courts on individuals who provide electronic communications services or establish/operate an electronic communications network or infrastructure without providing notification or obtaining a usage right. Article 63 further envisages an imprisonment penalty if a usage right is not obtained.