

# ClientAlert

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## Turkey Overhauls Media Regulation

The new Turkish media law went into effect on March 3, 2011 (Law No. 6112 on the Establishment of Radio and Television Enterprises and Their Broadcasts, or the "Law"), which repeals the pre-existing Law No. 3984 and introduces substantive changes to television and radio broadcasting in Turkey. The new regulatory regime, whose stated purpose was to respond to current technological developments and to align Turkish legislation with commitments to the EU, stipulates:

- a complete switchover from analogue to digital broadcasting by 2014;
- an increase in the allowed foreign ownership percentage, as well as increased competition via limitations on domestic ownership, of media companies;
- regulation of various players in the digital industry, such as multiplex operators; and
- modifications to various content restrictions and related sanctions.

### Switchover to Digital Broadcasting

The Law stipulates the complete switchover from analogue to digital television broadcasting to be completed within two years. By March 3, 2013, the Radio and Television Supreme Council (or "RTÜK") shall organize a tender to grant digital broadcasting licenses. Certain media companies which are granted digital broadcasting frequency shall be permitted to maintain their analogue broadcasts for up to two years, based on their ranking in the tender and their existing analogue capacity. Radio license tenders will be held within six months of the termination of the analogue television broadcasts.

The digital frequency plan and implementation schedule shall be prepared by March 3, 2012. Radio and television broadcasters already holding cable or satellite broadcasting licenses on March 3, 2011, have six months to comply fully with the provisions of the Law.

Digital television is transmitted on radio frequencies through terrestrial space via multiplex transmitters which allow reception of multiple channels on a single frequency range. As such, the switchover from analogue to digital broadcasting requires detailed technical regulations. The Law does not address certain questions about the characteristics of the new digital terrestrial platform and about whether there will be government subsidies for consumers who are required to acquire set-top-boxes. These questions will presumably be addressed by the implementing regulations.

### Licensing Process

Licenses will be granted through a tender process. Media companies can participate in the tender if they have been in operation for at least one year, and have received a qualification certificate from RTÜK. Licenses are granted for 10 years, at the end of which period the terrestrial broadcasting capacity is re-tendered by RTÜK. License rights cannot be transferred and a media company which ceases operation must relinquish its license. However, a media company which obtained a license under the prior law will continue to have all rights granted to it until the expiration of its existing license.

A media company which is granted a digital broadcast license must start broadcasting on all channels and frequencies that are granted to it within two years of obtaining the license. Licensed media broadcasters are required to pay the following fees:

- a one-time licensing fee;
- an annual frequency usage fee (for terrestrial broadcast licenses only), in an amount to be set by RTÜK based on objective criteria such as the population and level of economic development in the area covered by the broadcast, type of broadcast, and transmission strength; and
- an ongoing fee equal to 3% of the monthly gross revenues (excluding sponsorship revenues) from "commercial communications" such as commercials and sponsorships. This fee has been criticized as creating a potential conflict of interest, as RTÜK is both the recipient of the fee and the regulator of the commercial activity that forms the basis for calculating the fee.

### **Shareholding Structure and Share Transfers**

Under the prior law, foreign investment in a media company was limited to 25% of the paid-in capital, and a foreign shareholder could hold shares in only one media company. The Law increases the foreign ownership limit to 50%, permits foreign shareholders to hold shares in up to two media companies directly, and clarifies that none of these restrictions apply to indirect ownership. However, whenever a foreign person has indirect ownership of a media company, (1) the positions of chairman of the board, vice-chairman and CEO must be held by Turkish citizens, and (2) the majority of both the board of directors and shareholders at general shareholder meetings must be Turkish persons or entities. The Law requires each media company to set forth these restrictions in its articles of incorporation in a clear manner.

In order to encourage competition in the sector, the Law also introduces ownership limits for domestic investors. A domestic investor may not be a direct or indirect shareholder in more than four media companies holding terrestrial broadcasting licenses. Furthermore, if a shareholder directly or indirectly owns equity in more than one media company, then the total annual revenues derived from "commercial communications" by such media companies cannot exceed 30% of the industry total, and if they exceed such total, then the shareholder has a 90-day grace period in which to transfer its shares to stay within the limit. Failure to transfer the required shares is subject to a fine. In calculating total shareholding, shares held by a person's spouse and relatives by blood or marriage up to (and including) the third degree are deemed to be owned by that person.

In addition, the Law prohibits domestic and foreign issuers from owning preferred shares in any manner (granting either preferred economic or management rights). Share transfers are subject to the prior consent of RTÜK and to a post-completion notification of the shareholding and voting structures to be made to RTÜK within 30 days.

### **Regulation of Operators**

The Law introduces and regulates various players in the value chain for digital broadcasting. These include "platform operators" and other infrastructure service providers (which provide signal dissemination services to all broadcasters), "multiplex operators" (which bundle multiple digital programs that are transmitted via one signal, and disseminate such bundles to transmission companies), and a single "transmission company" (which transmits signals to the end-user). The Law requires these activities to be carried out by entities that are separate and apart from the media companies themselves, but in certain instances permits media companies to hold limited stakes in the operators.

## **Advertisement and Content Regulation**

The Law modifies the limits on the permitted length of commercial breaks, telemarketing and self-promotion, as well as the restrictions on product placements and program sponsorships. In addition, the Law modifies the list of qualitative requirements and certain quantitative requirements regarding program content. In addition, the Law authorizes the Prime Minister (or a minister to be authorized by the prime minister) to impose a temporary ban on all broadcasts in the event that "national security clearly necessitates it" or "there is a strong probability that social order will be seriously impaired". While any use of this authority would be subject to judicial review by administrative courts, this provision has been criticized for giving the executive branch a first-instance ability to stop broadcasts.

## **Sanctions**

The Law generally imposes heavier sanctions than the pre-existing media law. The sanctions are organized on a sliding scale (from a warning to a revocation of the license) depending upon the nature and repetitiveness of the violation.

Generally, first violations of the Law are subject to a warning, and second violations are subject to an administrative fee equal to 1-3% of the media company's gross income for the preceding month. However, if the violation relates to a specified set of content restrictions, then an administrative fee of 2-5% is imposed automatically (without a warning) and the violating broadcast may be suspended. In addition, if the violation relates to a separate set of content restrictions, then a second violation within one year will lead to a 10-day suspension of the entire channel (not only the violating broadcast), and a third violation will lead to the revocation of the license.

Violations of licensing requirements are permitted a 30-day grace period (other than fraudulent violations), but thereafter are subject to a 3-month suspension of all broadcasts of the licensee. If the licensee fails to remedy the violation within 3 months, its license is revoked.

Violations of the Law constituting criminal offenses are subject to the administrative fines and injunctions described above regardless of whether the crime is actually prosecuted. The Law includes specific criminal sanctions for real persons, or the CEO and directors of legal entities, that broadcast without a license or despite a suspension order.

## **Scope and Application of the Law**

The Law applies to all radio, television and on-demand services within reach of Turkey's jurisdiction. Whether a company is within Turkey's jurisdiction is determined based on where the company is based and where it makes its editorial decisions. If the company makes its editorial decisions in a different country than where it is based, then the Law considers where a "significant part of the workforce" is located. Special rules apply if the hosting country cannot be determined. Separately, Turkish jurisdiction may still apply if they use (1) a satellite uplink in Turkey, or (2) satellite capacity appertaining to Turkey's satellites.

## **Implementing Regulations**

The Law requires RTÜK to promulgate implementing regulations by September 3, 2011. Until such time, existing regulations will continue to be implemented to the extent consistent with the Law.

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