Turkey: The New Turkish Regulation For Foreign Satellite Broadcasters

Last Updated: 11 December 2012

Article by **Serra Başoğlu Gurkaynak**, **Başak Gürbüz**, **Begüm Yavuzdoğan** and **Dicle Doğan**

Gun & Partners

The new Law on Principles of Radio and Television Broadcasts (the "RTUK Law") entered into force in March 03, 2011 in Turkey and has been issued in accordance with the European Convention on Transfrontier Television. Some important changes in terms of broadcasting principles as well as broadcasting licenses are brought with the new RTUK Law.

Namely, RTUK (the Supreme Council of Radio and Television) is now on the process of a new development affecting the foreign based broadcasters that make or will make broadcasts in Turkey. RTUK imposes an obligation on foreign based satellite broadcasters that broadcast via Turkish satellite platforms or cable systems to obtain a local satellite license for a television, radio or on demand broadcast service channels. This obligation was already in place for terrestrial broadcasters, who, by nature, were Turkish companies incorporated and operating under Turkish Commercial Code (the "TCC"). The criterion for RTUK's requirement for a local broadcasting license is "Turkish content which is added within and changes the original broadcast" which will be explained in detail here below.

The ultimate goal of this new regulation is to unify all the media service providers broadcasting via satellite platforms and cable systems in Turkey under one governing law. However, this unification is aimed to be realized without taking into consideration whether the media service providers are established in Turkey or not.

Impositions of RTUK on foreign based satellite broadcasters

Under RTUK Law, a broadcast license may be granted to joint stock companies ("JSC") only, established in accordance with the provisions of the TCC, for the purpose of exclusively providing radio, television and on demand broadcast services. The same company can only provide one radio, one television and one on demand broadcast service.

In line with this rule and also to clarify the new obligation on foreign broadcasters, RTUK issued the Directive on Foreign Based Radio and Television Broadcasts on March 26, 2012 (the "RTUK Directive"). The Article 4/3 of the RTUK Directive –which was intensively debated- imposes license liabilities on foreign based broadcasters. Namely, with the implementation of the RTUK Law and the RTUK Directive, the offshore broadcasts channeled to Turkey via Turkish satellite platforms and cable systems that are Turkish dubbed or include insertion of Turkish ads or any other Turkish content, are no longer exempt from the local satellite broadcast license requirements. In the event of a broadcast without a license, RTUK will instruct the infrastructure or platform operator to cease all broadcasts of the relevant media service providers. If the platform does not comply with RTUK's request, its broadcast transmission authorization will be cancelled as set out in Article 29/3 of the RTUK Law.

Moreover, RTUK Law imposed an obligation to the foreign media service providers in Turkey, to pay a share over their commercial advertising revenue to RTUK. According Article 41/ç of RTUK Law, a 3% share of monthly gross commercial advertising revenues of media service providers excluding program sponsorship revenues shall be paid to RTUK.

Additional Turkish content

The RTUK Law doesn't impose to obtain a local satellite license on a foreign based broadcaster that doesn't broadcast any additional content attached to its original content. In other words, if the foreign based broadcaster retransmits its original broadcast with no other contents, then there is no liability to obtain a local broadcasting license.

Retransmission is defined as "*complete or partial reception of the technique and means used of broadcast service provided by a media service provider and transmitting it simultaneously in an unchanged form*" according to both Article 3/ii of the RTUK Law and Article 2/b of the European Convention on Transfrontier Television. The essential point here is to change somehow the source transmission by insertion of local ads, any kinds of programs, various Turkish content or Turkish subtitled programs for the local audience. If the broadcaster changes the content by means of any abovementioned ways, it is obliged by the RTUK Law to obtain a local satellite license in order to conduct broadcasting activities in Turkey. However broadcasters transmitting directly their original foreign content are not under this obligation and accordingly to establish a JSC for obtaining a local satellite license in Turkey.

The RTUK Law refers to "simultaneously broadcasting" as a condition for retransmission whereas the abrogated RTUK Law was referring to "simultaneously or with a delay". The new legislative disposition is convenient with the European Convention which obliges simultaneously broadcasting for a retransmission.

The new shareholding structure requirements for foreign media service providers

The RTUK Law as well as the RTUK Directive implicitly imposes the referred foreign based media service providers to incorporate a local joint stock company in Turkey in order to apply for a license before RTUK. As mentioned above, under Article 19/a of the RTUK Law, the broadcasting license can only be granted to local JSC incorporated under TCC. That being the case, the local broadcasting company will also have to comply with the shareholding structure requirements set out for all local broadcasting companies.

The current restrictions imposed on the shareholding structure of private broadcast service providers under the new RTUK Law Article 19/f is that direct foreign shareholding cannot exceed 50% of the total share capital. This provision was also debated in terms of constituting contradiction with the Turkish Foreign Direct Investment Law which indeed does not restrict the establishment of a company with 100% foreign shareholders. Under the referred law, it has been stated international investors are free to make direct investments in Turkey and are subject to equal treatment as Turkish investors, unless a special legal provision or an international agreement provides the contrary. In that respect, RTUK's requirements are regarded as an exception to the general rule freedom of capital in Turkey nowadays.

It should also be noted that the 50% shareholding threshold does not apply to indirect foreign ownership. Notwithstanding this, in the event the Turkish licensee company of the foreign satellite broadcaster has indirect foreign ownership, then the chairman, the vice chairman and the majority of the board of directors and the general manager must be Turkish citizens and the majority of the voting rights in the general assembly must belong to real persons or legal entities having Turkish citizenship.

Final Assessment

In light of the foregoing, we can say that the new obligations imposed on the foreign broadcasters by RTUK would initiate big debates in time whereas it has already begun. For instance, as a usual practice, the platform operators may add commercials or insert other contents to the offshore broadcasts which will be broadcast on the channels within their channel catalogue. In such cases, the platform operator sells the program areas for commercials during the broadcast and therefore the foreign media service providers nowadays argue that the platform operator is the party who makes the ad/program sale agreements and therefore should be the party to obtain the license as it changes the content. However, on the contrary, RTUK's criterion here is that since such additional content (whether ad or any other program) will be broadcast on the TV/radio channel, the liability is imposed on the media service provider companies.

As another arising debate, the capital restrictions for foreign shareholding structure could also be mentioned in terms of being regarded as a restriction for promoting foreign investments in Turkey and also exception of the freedom of capital rule. However, on the other side, the incorporation of local Turkish entities to could be seen as an opportunity for offshore broadcast channels to consider investing in Turkey and settle active local companies or even to choose the terrestrial broadcasting type instead of using satellite considering that it may be more practical and advantageous to make terrestrial broadcasting if they will pay a local licensee fee and make the investment either way.

We will see in time what further effects will arise upon implementation of the new RTUK Law as well as the RTUK Directive concurrently.