

Competition Law and Policy in Turkey

How is competition law enforced in Turkey?

What are the principal strengths and weaknesses of the TCA?

How can Turkey make the Competition Authority more effective?

What can the Competition Authority do to increase its effectiveness?

For further information

For further reading

Where to contact us?

Introduction

The evolution of Turkey's economy from a government-controlled regime to market-based competition led to the enactment in 1994 of the Act on the Protection of Competition ("Competition Act") and the creation of the Turkish Competition Authority ("TCA"). Final impetus for the legislation was Turkey's negotiation of a customs union agreement with the European Union, which obliged Turkey to enact the EU's standard competition provisions as its own law and to establish an agency to enforce them.

In 2002, as part of a larger study, the OECD assessed the status of Turkey's competition regime, concluding that the TCA had made a good beginning during the five years since it began operations in late 1997. In 2005, the OECD updated the earlier study with a new assessment (see www.oecd.org/competition, country review section). The new report concludes that the Authority has continued to make excellent progress, developing a reputation as one of Turkey's most effective autonomous agencies, winning respect and support from leaders in the business community, and playing a critical role in moving the Turkish economy forward to greater reliance on competition-based and consumer welfare-oriented market mechanisms. The TCA, however, faces a number of obstacles. Public understanding of and appreciation for competition policy is deficient, agency law enforcement efforts are slowed by inexperienced judicial review organs, and support from other parts of the government is less than complete. The 2005 Report recommends changes that the TCA itself can make to enhance performance, and also suggests a variety of statutory modifications that would improve the legal environment for competition policy. The Report's analysis and recommendations are particularly timely because effective implementation of national competition policy is an important element of Turkey's current programme to achieve formal membership of the European Union. ■

How is competition law enforced in Turkey?

The Competition Act establishes the TCA as an autonomous enforcement agency and vests its decision-making authority in a seven-member Competition Board (reduced from 11 by recent legislation). Board members serve for staggered terms of six years and may be removed from office only for cause. Law enforcement procedures can be triggered by a complaint or at the Board's own initiative. The TCA has broad investigative powers, including authority to obtain a court order permitting the search of corporate premises.

The Competition Act's declared purpose is to "protect competition," which the Board construes as protecting the entire competitive process, not simply rivalry among firms. The TCA sees its ultimate objective as promoting efficient markets and consumer welfare, consistent with provisions in Turkey's Constitution requiring the state to prevent monopolies and protect consumers.

The Act's substantive antitrust prohibitions appear in three articles. The first, Article 4, deals with agreements among two or more firms (and parallels Article 81(1) of the EU law). The second, Article 6, deals with abuse of dominance by one or more firms (parallel to EU Article 82). The third, Article 7, focuses on mergers and acquisitions (following the EU merger regulation).

Article 4 prohibits "agreements, concerted practices, and decisions" that prevent, distort or restrict competition, or that have the potential to do so. The law includes a non-exclusive list of anticompetitive practices that constitute potential violations. The Act empowers the Board to issue individual and "block" exemptions from Article 4, as well as case-specific "negative clearances" declaring that the given case does not violate the law.

At present, Turkey's law on agreements diverges from the EU model because the EU eliminated case-specific exemptions and negative clearances effective 1 May 2004 (although retaining the block exemption system). Until recently, the Competition Act also differed from the EU's approach by requiring the

Box 1. INTERNATIONAL ENFORCEMENT COOPERATION AND STATE AID PROGRAMS

Co-operation across national boundaries, particularly with respect to international cartels, has become an increasingly important feature of competition law enforcement in recent years. Although the TCA wishes to expand multilateral or bilateral co-operation, it has not yet established any effective arrangements with enforcement agencies in other countries. One reason for this failure arises from certain provisions in Turkey's Customs Union Agreement with the EU. The Agreement, tracking language in Article 87 of the EU Treaty, bars Turkey from providing state resources to aid domestic economic sectors where doing so "distorts or threatens to distort competition [...] between the Community and Turkey." Rules implementing the Agreement's antitrust and state aid provisions are still pending, essentially because Turkey has been unable to reach consensus on a mechanism for aligning its aid system with the EU's requirements. This has hindered the TCA's ability to establish a better cooperative arrangement with the EU's Directorate General for Competition. The pending implementation rules deal with requests for co-ordinating antitrust enforcement activities and provide that such requests should be treated "in a favourable way." Until Turkey establishes a system for controlling state aid programs, the TCA cannot fully realize the benefits of co-operation.

parties to any agreement or concerted practice falling within the scope of Article 4 to notify the TCA, unless the conduct qualified for protection under a block exemption. A July 2005 amendment deleted this requirement.

The statutory list of horizontal anticompetitive practices in Article 4 includes price fixing, market division, concerted control of outputs or inputs, boycotts, and entry deterrence. A unique feature of Article 4 is the “concerted practice presumption,” under which the existence of unlawful collusion among competitors may be inferred if market conduct or conditions are similar to those that arise where competition is artificially distorted. The non-exclusive list of anticompetitive vertical practices in Article 4 includes resale price fixing, discrimination between similarly situated parties, tying, and actions designed to impede competitors or prospective entrants.

Article 6 of the Act bars abuse of a dominant position, whether by a single firm or by several firms acting jointly. There is no particular market share test for presuming or identifying dominance, although EU case law is considered relevant. The non-exclusive roster of abusive practices in Article 6 is based on the EU list, although Turkey does not include the EU’s reference to “unfair purchase or selling prices or other unfair trading conditions,” and adds references to excluding competitors, exploiting market power to distort competition in a different market, and resale price maintenance.

Article 7 of the Competition Act, and a Merger Communiqué issued by the Board in 1997, deal with mergers and acquisitions through the transfer of stock, assets, or managerial authority. Joint ventures are also covered if the emerging entity is an autonomous economic actor. Article 7 bars transactions that “create or strengthen the dominant position of one or more enterprises, as a result of which competition is significantly impeded” in a relevant market. This is another element of Turkey’s law that has fallen out of congruence with the EU, as the EU’s amended regulation, effective 1 May 2004, bars mergers or acquisitions that “would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.” Mergers require authorisation from the Board if either: 1) the parties’ combined market share exceeds 25% of the relevant market in Turkey; or 2) their aggregated turnover in Turkey exceeds TRL 25 trillion (USD 16.75 million). The Board has also ruled that the merger control provisions in the Act apply to government privatisation proceedings, and has issued communiqués about competition policy aspects of privatisation.

Board decisions may be appealed to the “Council of State,” a judicial body. Most of the Board’s decisions imposing significant fines have been appealed, and many of the appeals are still pending. To address the problems posed by Turkish judges’ unfamiliarity with competition law, legislation in 2004 created a special chamber in the Council of State to deal with appeals against TCA rulings.

The Competition Act appears to cover all forms of economic activity. The only express exemption applies to bank mergers. In fact, however, the competition statute is not deemed applicable to state agencies and organs acting in a

governmental capacity. Sectoral legislation that involves creating a regulatory agency may also effectively oust the TCA, by giving the regulator authority to control or approve various aspects of sector business operations. There are also state-owned or controlled commercial undertakings that assert the right to undertake anticompetitive conduct based on various statutory powers and privileges.

The Competition Act empowers the Board to give an opinion on the competition policy aspects of government legislation and regulations. A communiqué from the Prime Minister's office encourages other government agencies to consult with the TCA about proposed regulations and decisions with implications for competition policy. The communiqué is not treated as obligatory, however, and there are no sanctions if agencies fail to notify the TCA of an important regulation. ■

What are the principal strengths and weaknesses of the TCA?

The Turkish Competition Authority can take justifiable pride in its reputation as one of Turkey's most effective and best-administered agencies. It has pursued its mission with energy, imagination, and integrity and has won respect and support from leaders in the business community. The TCA's particular strengths include its devotion to articulating and efficiently implementing sound competition policy; its focus on due process and transparency; and its attention to developing and training expert staff. Its fiscal and administrative autonomy, and the absence of substantive government interference in its work, also contribute significantly to its efficacy. Its weaknesses include disorganisation in its approach to harmonisation with EU competition law, and certain other problems that often confront competition agencies in economies with a long tradition of strong government control. These include little public understanding of competition policy, inexperienced (and slow) judicial review organs, and inadequate commitment to competition by other parts of the government. The TCA is, however, aided by the fact that improving the competition policy framework will advance Turkey's goal of EU membership. ■

How can Turkey make the Competition Authority more effective?

- Promptly establish a mechanism for controlling anticompetitive state aid. Turkey should, without further delay, adopt a mechanism for controlling state aid, consistent with its obligations under the Customs Union Agreement. While the TCA's independent status and competition policy expertise make it an appropriate agency to regulate state aid, the government's pending proposal vests primary authority in the State Planning Office. If that proposal is enacted, the TCA should participate vigorously in the deliberations of the State Aid Monitoring and Supervising Board, which will be created to render judgments on the competitive effects of particular state aid programs.
- Eliminate or control state-created enterprises and associations vested with monopoly concessions or with powers and privileges enabling them to undertake anticompetitive conduct.

Ideally, Turkey should simply terminate state monopolies, privatize state commercial enterprises, and eliminate the anticompetitive legislative

provisions already identified by the TCA. Failing that, however, the TCA has proposed amending the Competition Act to include a means for addressing state measures that establish monopolies or accord special privileges or powers to enterprises or associations. The proposal would empower the Board, after determining that a state measure distorted competition in Turkey, to petition the Council of State for annulment of the offending legislation or regulation. The proposal leaves open, however, the standard to be employed by the Council in resolving the TCA's application where policy objectives other than competition are raised to justify the measure in question. Article 86(2) of the EU's competition law, which deals with undertakings that operate "services of general economic interest" or have "the character of a revenue-producing monopoly," could serve as guidance in identifying the kinds of public policy concerns that are sufficient to trump competition principles.

- Restore competition policy oversight of banking sector mergers.

The prudential concerns of banking regulators are entitled to full recognition, but do not justify complete elimination of competition analysis in assessing bank mergers. The exemption of such mergers from the TCA's jurisdiction should therefore be repealed.

- Mandate an explicit role for the TCA in regulatory analysis.

The TCA staff has proposed amending the Competition Act to require public institutions and organisations to obtain the Board's opinion concerning proposed regulations. Agencies would not be obliged to accept the TCA's opinion, but failure to obtain it would render the resulting measure unenforceable. The proposed provision should be enacted, but should be modified so that agencies declining to follow the TCA's recommendation are required to state on the public record the reasons for their position.

- Improve the TCA's law enforcement capacity by amending the Competition Act to:
 - Simplify merger notification standards through elimination of notification requirements keyed to market share.
 - Adopt the revised EU standard for assessing mergers.
 - Revise the deadlines for merger evaluation to extend the preliminary examination period to 30 days, and reduce the maximum period for litigated merger proceedings to 90 days.
 - Increase maximum fines for violations other than substantive infringements and make early consummation of mergers a substantive violation.
 - Create an exemption (modelled on the EU's *de minimis* exemption) for agreements involving small enterprises, which would apply where the aggregate market share of the participating parties does not exceed 5% for horizontal agreements and 10% for vertical agreements, but would exclude "hardcore" agreements to fix prices or allocate markets.

- Eliminate the negative clearance procedure. (The July 2005 amendments eliminated mandatory notification of agreements, practices, and decisions, as well as the 5-year limit on individual exemptions. These changes were recommended by the OECD Report.)
- Establish a procedure for settling cases by consent, thus permitting termination of proceedings at any stage if the defendant pledges to accept the conduct modifications recommended by the Board.
- Eliminate minimum fines and authorize the TCA to offer lenient treatment to co-operative firms.
- Establish personal fines for company managers and consider criminal penalties for managers responsible for substantive violations.
- Expand due process protections in TCA proceedings by applying the statute's existing procedural provisions to the withdrawal of block or individual exemptions or negative clearances. (The recent amendments also terminated personal participation by Board members in agency investigations, which was another change recommended by the OECD Report.) ■

What can the Competition Authority do to increase its effectiveness?

- Adopt an organized approach to harmonisation with EU competition law.

The TCA has issued block exemptions that differ in significant ways from the EU counterpart exemptions, without consulting the EU to determine whether the TCA's exemptions comply with Customs Union obligations. A more efficient approach would involve soliciting the EU's views in advance on proposed block exemptions. The TCA should also establish and publish an agenda, with timetables, for the prompt consideration of EU block exemptions that presently have no Turkish counterpart and of block exemption amendments issued by the EU. In March 2005, the TCA and EU met to develop a plan for aligning legislation.

- Expand consultation with sectoral regulators.

The TCA should continue to seek opportunities for co-operation with the Telecommunications Authority. That agency's overlapping jurisdiction with the TCA imposes uncertainty on private sector firms and impairs competitive market operations. This problem should be promptly addressed, but not necessarily by a statutory amendment specifying precise jurisdictional boundaries. The affected agencies should consider the possibility of devising a more flexible solution, such as negotiating an expanded protocol that explicitly allocates enforcement authority. The agencies should also develop a common framework for determining whether a firm has a dominant market position. With respect to the Energy Market Regulatory Authority (EMRA), the TCA should seek to establish a statutory basis for TCA participation in EMRA regulatory proceedings, and should pursue adoption of a formal protocol with EMRA to establish improved communication and co-ordination procedures. The TCA should also consider proposing legislation that would enable the Board to comment formally on proposed government determinations in proceedings to enforce Turkey's unfair import and dumping laws.

- Exercise due care in employing the “concerted practice presumption.”

The TCA has correctly concluded that the concerted practice presumption should not be invoked to find an infringement of the Competition Act merely on the basis of parallel pricing. To address practitioners’ concerns, the Board should make special efforts to articulate in its decisions what role, if any, the presumption played in its analysis of the case and to explain what additional evidence was deemed to prove collusion for each of the firms found liable. In addition, the Board should consider developing, and publishing for public comment, a formal policy statement on its standards for opening investigations, particularly in oligopolistic markets.

The Competition Authority should also:

- Enhance transparency by 1) establishing standard procedures for notice and public comment on proposed statutory amendments and communiqués, 2) developing guidelines for calculating the size of fines and 3) continuing to publish summary versions of Board opinions issued at the initial stage of privatisation proceedings.
- Leverage and expand the Authority’s reach through international co-operation, and consider developing co-operation agreements with antitrust agencies in other countries that would permit sharing of investigative information.
- Consider requesting statutory authority to employ investigative powers in conducting non-law enforcement market studies to understand the competitive dynamics of individual markets or sectors.
- Promote a competition culture in Turkey by: 1) encouraging the bar association to establish a competition law committee or similar organisation to organize interaction between the TCA and the legal community; 2) cooperating with the Directorate for Competition and Consumer Protection in the Trade and Industry Ministry to include information about competition cases affecting consumers in the education programs sponsored by that agency; 3) increasing media coverage of its actions by offering more television and radio interviews to media outlets; 4) issuing press releases, written in consumer-friendly language, to describe Board decisions in competition enforcement cases; 5) expanding interaction with TUSIAD (the Turkish Industrialists’ and Businessmen’s Association); 6) reinvigorating its program of one-day competition conferences in conjunction with city business chambers; and 7) increasing the frequency with which TCA representatives make presentations to national and local business groups.
- Increase the number and expertise of TCA lawyers and enhance the TCA’s industrial organisation competence to provide support and supervision for economic analysis in difficult cases. ■

**For further
information**

For further information about the OECD’s work on competition policy, please visit our website at www.oecd.org/competition or contact us at dafcomp.contact@oecd.org.



For further reading

- OECD (2004), *OECD Economic Surveys: Turkey – Volume 2004 Issue 15*, ISBN 9264006826, € 42, 234 pages.
- OECD, *OECD Journal of Competition Law and Policy*, ISSN 1560-7771, Subscription (3 issues per year), € 152.
- OECD (2003), *Trade and Competition: From Doha to Cancun*, ISBN 9264102787, € 25, 72 pages.
- OECD (2002), *OECD Reviews of Regulatory Reform, Turkey: Crucial Support for Economic Recovery*, ISBN 9264198083, € 40, 168 pages.
- The following publications are available at www.oecd.org/competition (“Country Reviews” section):
 - *Competition Law & Policy in Turkey: An OECD Peer Review*
 - *Turkey: Regulatory Reform in Electricity, Gas, and Road Freight Transport*
 - *Turkey: The Role of Competition Policy in Regulatory Reform*

OECD publications can be purchased from our online bookshop:
www.oecdbookshop.org

OECD publications and statistical databases are also available via our online library:
www.SourceOECD.org

Where to contact us?

OECD HEADQUARTERS

2, rue André-Pascal
75775 PARIS Cedex 16
Tel.: (33) 01 45 24 81 67
Fax: (33) 01 45 24 19 50
E-mail: sales@oecd.org
Internet: www.oecd.org

GERMANY

OECD Berlin Centre
Schumannstrasse 10
D-10117 BERLIN
Tel.: (49-30) 288 8353
Fax: (49-30) 288 83545
E-mail:
berlin.contact@oecd.org
Internet:
www.oecd.org/deutschland

JAPAN

OECD Tokyo Centre
Nippon Press Center Bldg
2-2-1 Uchisaiwaicho,
Chiyoda-ku
TOKYO 100-0011
Tel.: (81-3) 5532 0021
Fax: (81-3) 5532 0035
E-mail: center@oecdtokyo.org
Internet: www.oecdtokyo.org

MEXICO

OECD Mexico Centre
Av. Presidente Mazaryk 526
Colonia: Polanco
C.P. 11560 MEXICO, D.F.
Tel.: (00.52.55) 9138 6233
Fax: (00.52.55) 5280 0480
E-mail:
mexico.contact@oecd.org
Internet:
www.rtn.net.mx/ocde

UNITED STATES

OECD Washington Center
2001 L Street N.W., Suite 650
WASHINGTON DC. 20036-4922
Tel.: (1-202) 785 6323
Fax: (1-202) 785 0350
E-mail:
washington.contact@oecd.org
Internet: www.oecdwash.org
Toll free: (1-800) 456 6323

The OECD Policy Briefs are prepared by the Public Affairs Division, Public Affairs and Communications Directorate. They are published under the responsibility of the Secretary-General.