COUNTRY STUDIES

Turkey - The Role of Competition Policy in Regulatory Reform

2002

Introduction

The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers. This report on the role of competition policy in regulatory reform analyses the institutional set-up and use of policy instruments in Turkey. This report was principally prepared by Mr. Michael Wise for the OECD.

Overview

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LE ROLE DE LA POLITIQUE DE LA CONCURRENCE DANS LA RÉFORME DE LA RÉGLEMENTATION

FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on *The Role of Competition Policy in Regulatory Reform* analyses the institutional set-up and use of policy instruments in Turkey. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in Turkey* published in November 2002. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 16 member countries as part of its Regulatory Reform programme. The Programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses relative to the principles endorsed by member countries in the 1997 *OECD Report on Regulatory Reform*.

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness, specific sectors such as electricity and telecommunications, and on the domestic macroeconomic context.

This report was principally prepared by Michael Wise in the Directorate for Financial and Fiscal Affairs of the OECD. It benefited from extensive comments provided by colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in Turkey. The report was peer-reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

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Competition policy institutions are in place in Turkey, but competition policy is not yet fully integrated into the general policy framework for regulation. Many features of state-led development remain in place. Reforms have been announced, but implementation is slowed by crisis. The lack of public awareness about competition policy and the new institutions is indicative of the uncertain status of competition in Turkish public policy and debate.

Turkey's conception of competition policy supports a broad programme of pro-competitive reform. The competition laws and enforcement structures, the Competition Authority and its decision-making Competition Board, are strong enough to prevent or correct collusion and monopoly. The Competition Act is based on the EU model, with some interesting variations. The relatively new independent institutions are well-considered and supported by adequate resources. Already, enforcement efforts have addressed abuses in telecoms, and an important decision on privatisation outlined a pro-competitive policy for the electric power industry. But the institutions have not yet had to weather a serious political storm. The Competition Board's involvement in the policy process should be more systematic and consistent. The Competition Board's ambition, to be at the centre of a broad reform programme, does not quite match its present circumstances, but it is not necessarily unrealistic in the long run.

Turkey's greatest challenge is to complete the process of transition from a state-led economy to a market-driven one, by eliminating the remaining state monopolies and regulatory distortions that favour state firms. A system for monitoring and controlling anti-competitive state aids is needed to support that effort. That task might be assigned to the Competition Authority. The Authority should increase attention to advocacy, and it should have a more formal and consistent role in the consideration of potentially anti-competitive regulation.

Box 1. **Competition policy's roles in regulatory reform**

In addition to the threshold, general issue, which is whether regulatory policy is **consistent** with the conception and purpose of competition policy, there are four particular ways in which competition policy and regulatory problems interact:

- Regulation can **contradict** competition policy. Regulations may have encouraged, or even required, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may have permitted price co-ordination, prevented advertising or other avenues of competition, or required territorial market division. Other examples include laws banning sales below costs, which purport to promote competition but are often interpreted in anti-competitive ways, and the very broad category of regulations that restrict competition more than is necessary to achieve the regulatory goals. When such regulations are changed or removed, firms affected must change their habits and expectations.

- Regulation can **replace** competition policy. Especially where monopoly has appeared inevitable, regulation may try to control market power directly, by setting prices and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premise in support of regulation, that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.

- Regulation can **reproduce** competition policy. Regulators may have tried to prevent co-ordination or abuse in an industry, just as competition policy does. For example, regulations may set standards of fair competition or tendering rules to ensure competitive bidding. Different regulators may apply different standards, though, and changes in regulatory institutions may reveal that seemingly duplicate policies may have led to different outcomes.

- Regulation can **use** competition policy methods. Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Co-ordination may be necessary, to ensure that these instruments work as intended in the context of competition law requirements.

1. Competition policy foundations

Adoption of an explicit competition policy was an element in Turkey's project to restructure and reform its economy over the last 10 years. The concisely stated goals support an economics-based approach that encourages the overall reform effort.

State-led development depended on monopoly and control. Market-based economic policies were recommended following the creation of the modern Turkish republic after the revolution in the early 1920s. By the 1930s, the economic development programme shifted to a mixed economy, emphasising state direction In the post-war era, Turkey's policies resembled those of many other developing countries, as the private sector came to rely on the government. State monopolies supplied raw materials and the state-controlled banking system steered credit to favoured firms or sectors, while subsidies distorted market responses. This old programme created many of the problems that reforms since the mid-1980s have been trying to correct.

Despite substantial moves toward liberalisation, some state monopolies remain. Efforts to shift toward a more liberalised market economy have been underway for about 20 years. Some privatisation had begun in the 1970s. The state's share of manufacturing fell from 33% to 25% between 1986 and 1992 (Pope, 1997), and the state's role continues to decline pursuant to a series of commitments under IMF stabilisation programmes. Nonetheless, many areas of the economy remain under government control or ownership, and the state's share of manufacturing remains high: 25% measured by value added, 12% by employment (EC, 2001). Tobacco and alcoholic beverages (and at one time, sugar and tea) have been state-owned monopolies, with prices fixed all the way to the retail level. In mining and minerals, state-owned Eti Holding has a monopoly in boron production and is also involved in chromium, copper, and silver, while other state-connected firms have major interests in copper, steel, and petroleum (EIU, 2000, pp. 36-38). The principal telecoms provider is state-owned, as is the national airline, and in each of these sectors privatisation may be stalled by weakness in the markets for such firms (EIU, 2001).

Competition policy became a priority in the 1990s. The possibility that a formal competition policy would be needed was recognised at the beginning of the long-term reform process. Work on a competition law began in the 1970s, producing some drafts but no legislation. The project was revived in 1991, when an expert panel was appointed to design a programme of competition and consumer protection policies. This programme was intended to demonstrate that economic liberalisation also included a commitment to the public interest and vigilance against monopoly. Both internal and external forces supported the development of competition legislation. The competition law was being developed while Turkey was negotiating a customs union with the EU (which entered into force in 1996). The customs union agreement included the EU's standard substantive provisions about competition, and it also obligated Turkey to adopt such a competition law as domestic legislation and to adopt implementing regulations consistent with the EU's block exemption regulations. Thus the Act on the Protection of Competition[1] that was adopted at the end of 1994 takes Art. 81 and 82 of the EU treaty as its substantive basis.

But the institutional structure came slowly. At first competition policy was the responsibility of the General Directorate of Consumer and Competition Protection, which had been established in 1993 in the Ministry of Trade and Industry[2] (Turkey, 2001). After the Competition Act was on the books, it took two more years for the Competition Board to be appointed, on 27 February 1997, and most of another year before it began operation, in November 1997 (Turkey, 2001). At that time the Competition Board assumed the competition policy functions, including developing policy and legislation, leaving the General Directorate to handle consumer protection. The Competition Act has been in force for nearly 7 years, but the Board has been applying it for only about half of that period.

The policy goal is to protect the competitive process. Turkey's constitution lays an explicit foundation for competition policy by assuring that the state will take measures to provide for healthy markets and that the state "prevents monopolisation and cartel activities"[3] (Turkey, 2001). The first of these constitutional assurances could be too general to guide policy clearly. Many kinds of policies could conceivably be relevant to making markets "healthy", ranging from hands-off liberalism to paternalistic concern about unfairness, depending on what values are chosen to represent "healthy" markets. By contrast, the promise to prevent cartels and monopolisation is unusually concrete. Neither the constitution nor the Competition Act promises results such as efficiency, consumer welfare, or the protection of small business. Instead, the stated purpose of the Competition Act is simply the "protection of competition", which is defined in terms of independent rivalry, "the contest among the undertakings in the markets for goods and services, which enables them to take economic decisions independently" (Art. 1, Art. 3).

The Competition Board has a broad vision of its role. From the disciplined yet protean statements of general policy, the Board has staked an ambitious claim for the scope of competition policy:

> *Competition laws do not, in fact, detail all the competition policy of a state. Apart from competition laws, competition policy is a broad concept including subsidies, domestic and foreign trade, state monopoly and public buying policies. Turkey's competition policy as creating and maintaining a healthy and competitive domestic environment, is designed to build a powerful Turkish economy with high competitive power abroad. Such a policy can only be successful by directing all the instruments of the state towards the same target. The conductor of this mechanism will be the Competition Authority* (OECD CLP, 1998, p. 8).

The constitution's commitment to provide for healthy markets, as well as the original design to show that economic liberalisation not leave the public unprotected from abuse, justify the Board's claim that "competition policy" should be understood broadly.

Overall economic plans have emphasised reliance on markets and competition. The Seventh Five-Year Development Plan called for privatisation, to withdraw the state from production and thus increase the importance of its regulatory role. The plan highlighted competition policies and their contributions to efficiency and welfare, promising to avoid market sharing, to keep markets open, and to minimise market uncertainties. The Eighth Five-Year Development Plan makes similar long-term commitments and specifically calls attention both to the application of the Competition Act and to the effect of other administrative and legal regulations on the functioning of markets (Turkey, 2001).

Events have overtaken plans, but market reforms are still a high priority. Crises have demanded attention and resources, particularly concerning macroeconomic stability and banking. Many crisis-response measures reduce state control and improve market functioning, in part to prepare the way for privatisation. For example, Turkish Airlines may now set domestic fares without having to consult the government for approval. Markets were introduced for tobacco and sugar beets. The natural gas market is being liberalised, by ending the state monopoly on import, sale, and distribution, privatising local distribution companies, and setting up a regulator (EIU, 2001). Full privatisation of Turk Telecom' has been authorised; however, the state will retain a golden share. The demands of responding to crisis have not distracted from the generally pro-competitive intention of reform, but rather have intensified it.

2. Substantive issues: content of the competition law

Turkey's substantive competition law has generally followed the outline of EU law. Turkey decided that the EU model was appropriate, in part because Turkey's relationship with the European Union is an important vehicle for integration into the world economy (Turkey, 2001).

Box 2. **The competition policy toolkit**

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, **agreements**, is often subdivided for analytic purposes into two groups: "horizontal" agreements among firms that do the same things, and "vertical" agreements among firms at different stages of production or distribution. The second category is termed "**monopolisation**" in some laws, and "**abuse of dominant position**" in others; the legal systems that use different labels have developed somewhat different approaches to the problem of single-firm economic power. The third category, often called "**mergers**" or "**concentrations**," usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

Agreements may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome **horizontal** agreements are those that prevent rivalry about the fundamental dynamics of market competition, price and output. Most contemporary competition laws treat naked agreements to fix prices, limit output, rig bids, or divide markets very harshly. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

Vertical agreements try to control aspects of distribution. The reasons for concern are the same – that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier's product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

Abuse of dominance or **monopolisation** are categories that are concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output; it may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also try to address the actual exercise of market power. For example under some abuse of dominance systems, charging unreasonably high prices can be a violation of the law.

Merger control tries to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. In some cases, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence of effective barriers to new entry. Most systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition. And most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for expedited investigation, so problems can be identified and resolved before the restructuring is actually undertaken.

2.1. Horizontal agreements

Both explicit and tacit collusion are forbidden. The Competition Act's prohibition against anti-competitive agreements is slightly broader than the EU model. Agreements and concerted actions that prevent, distort, or restrict competition, or that have the potential to do so, are prohibited (Art. 4). The text of the prohibition does not distinguish between agreements in the horizontal and vertical dimensions, but the Authority concentrates its enforcement attention on price-fixing and market division cartels that restrict horizontal competition (Turkey, 2001). Turkey's law adds an interesting innovation to deal with tacit collusion. If conduct or conditions are similar to what would be expected in a market where competition is restricted, then an agreement can be inferred. This rule shifts the burden to the parties to show that they in fact acted independently, on "economic and rational grounds". The "concerted practice presumption" is designed for oligopolistic markets in which proving overt, subjective agreement is often difficult (Turkey, 2001). The rule has been applied in one case so far, to find an agreement among 4 producers of yeast. Recognising that the rule is novel, the Authority is using it cautiously to see how it works.

Pro-competitive agreements may be permitted, but not defensive ones. Block and individual exemptions may moderate the general prohibition. The criteria for these exemptions are the same as those used in the EU: the agreement leads to improvements in production, distribution, or technology, consumers benefit from it, it does not eliminate competition in a significant part of the market, and it is no more restrictive than necessary to achieve the proper purpose (Art. 5). The maximum duration of an exemption is 5 years. An exemption may be revoked if circumstances change (or if the parties fail to honour commitments or make misrepresentations in applying for the exemption) (Turkey, 2001). No block exemptions have been issued yet for agreements among horizontal competitors, but drafts are in preparation to cover agreements about technology transfer and research and development (Turkey, 2001). Of particular interest in Turkey's current economic conditions, there is no exemption or special treatment for "depression cartels". Smaller businesses in trouble may not agree to support prices or reduce output or capacity, but instead they may merge to create stronger units.

Cartels were found in the usual places. Commonly encountered cartel situations drew enforcement attention as soon as the law became effective. Left to their own choices, firms in many industries had chosen to avoid the "contest" or "independent action" that the Competition Act seeks to promote. Price-fixing, market-division, co-ordination, and retaliatory discipline were uncovered in the cement industry. An association of bakers had agreed on margins, withholding capacity from the market and disciplining would-be competitors with targeted below-cost sales. Bus companies were found to have agreed to fix prices and share markets through agreements about departure times. The poultry industry had agreed on industry-wide output and marketing co-ordination. Periodical distributors were engaged in market sharing and price discrimination, and the corrugated container association fixed prices by sponsoring minimum price lists and monitoring compliance (OECD CLP, 1996). The General Directorate handled these early cases before the Authority was in operation.

Persistent problems require repeated attention. The Authority and the Board have revisited some of the same sectors, to find and address similar restrictions. Bakeries agreed through their association to treat the regulated maximum price of bread as a minimum price. In media sectors, the Board has looked into price-fixing and market-division in the formation of a joint venture to distribute publications, as well as price-fixing about periodical prices and about broadcast advertising rates. Cement producers were supposed to have stopped using their trade association to agree on output when Turkey entered the customs union with the EU, but the Board found that the association's data collection was still used to co-ordinate, so the Board ordered that published data must be at least 2 months old. More pointedly, a 1999 decision fined five firms in the cement industry nearly TRL 900 000 million for a price-fixing and market-division agreement (OECD CLP, 2000).

Some problems will require legislative solutions. The constitution and other laws support the use of industry or trade associations to prevent competition in some sectors. These associations have a quasi-public status and statutory responsibilities for self-regulation that may include the power to fix prices. This legal support for their conduct prevents the Board from using the Competition Act to stop price-fixing by providers of many professional and other services. As services become a more important part of the economy, the laws that authorise these associations should be revised to remove the authority to fix prices or to limit entry on grounds other than competence, to ensure that these sectors operate competitively.

Box 3. **the EU competition law toolkit**

The law of Turkey follows closely the basic elements of competition law that have developed under the Treaty of Rome (now the Treaty of Amsterdam):

- **Agreements**: Article 81 (formerly Article 85) prohibits agreements that have the effect or intent of preventing, restricting, or distorting competition. The term "agreement" is understood broadly, so that the prohibition extends to concerted actions and other arrangements that fall short of formal contracts enforceable at civil law. Some prohibited agreements are identified explicitly: direct or indirect fixing of prices or trading conditions, limitation or control of production, markets, investment, or technical development; sharing of markets or suppliers, discrimination that places trading parties at a competitive disadvantage, and tying or imposing non-germane conditions under contracts. And decisions have further clarified the scope of Article 81's coverage. Joint purchasing has been permitted (in some market conditions) because of resulting efficiencies, but joint selling usually has been forbidden because it amounts to a cartel. All forms of agreements to divide markets and control prices, including profit pooling and mark-up agreements and private "fair trade practice" rules, are rejected. Exchange of price information is permitted only after time has passed, and only if the exchange does not permit identification of particular enterprises. Exclusionary devices like aggregate rebate cartels are disallowed, even if they make some allowance for dealings with third parties.

- **Exemptions**: An agreement that would otherwise be prohibited may nonetheless be permitted, if it improves production or distribution or promotes technical or economic progress and allows consumers a fair share of the benefit, imposes only such restrictions as are indispensable to attaining the beneficial objectives, and does not permit the elimination of competition for a substantial part of the products in question. Exemptions may be granted in response to particular case-by-case applications. In addition, there are generally applicable "block" exemptions, which specify conditions or criteria for permitted agreements, including clauses that either may or may not appear in agreements (the "white lists" and "black lists"). Any agreement that meets those conditions is exempt, without need for particular application. Some of the most important exemptions apply to types of vertical relationships, including exclusive distribution, exclusive purchasing, and franchising.

- **Abuse of dominance**: Article 82 (formerly Article 86) prohibits the abuse of a dominant position, and lists some acts that would be considered abuse of dominance: imposing unfair purchase or selling prices or trading conditions (either directly or indirectly), limiting production, markets, or technological development in ways that harm consumers, discrimination that places trading parties at a competitive disadvantage, and imposing non-germane contract conditions. In the presence of dominance, many types of conduct that disadvantage other parties in the market might be considered abuse. Dominance is often presumed at market shares over 50%, and may be found at lower levels depending on other factors. The prohibition can extend to abuse by several firms acting together, even if no single firm had such a high market share itself.

- **Reforms in administration**: Recent and proposed reforms of EU competition policy reduce the scope of the prohibition against vertical agreements and would eliminate the process of applying for exemptions for particular agreements. Instead, exemption criteria would apply directly in decisions applying the law, and these decisions would increasingly become the responsibility of national competition authorities.

2.2. Vertical agreements

Turkey uses the basic EU rulebook for vertical restraints. The Competition Act's prohibition and the provisions for exemption apply equally to vertical agreements. For commonly encountered agreements, the Authority has issued block exemption regulations defining what is acceptable and what is unacceptable. These cover exclusive distribution, exclusive purchasing, motor vehicle distribution and servicing, and franchising. All of them parallel the previous block exemption regulations of the EU (Turkey, 2001).

Most vertical agreements are not challenged. Paying more attention to horizontal problems is consistent with an economics-based approach and with one of the basic goals of the Competition Act. It permits businesses to use their independent judgement in entering agreements about distribution and to take responsibility for the consequences. Vertical agreements have thus drawn less law enforcement attention, except for resale price maintenance. One concern of the Board is to prevent firms from evading the RPM prohibition by the use of "passive sales". But the Board does not object to the use of recommended resale prices (Turkey, 2001).

Further reforms will parallel changes in the EU. Along with the EU system of substantive law, Turkey took on the practical problems of applying it through the method of prohibition and exemption. One result is an excess of applications for exemption or negative clearance, as businesses want to be sure their agreements are not challenged. The Authority had received over 300 such applications as of late 2000, mostly about vertical agreements, but the Board had concluded fewer than 100 of them. The Authority appointed a commission of experts to recommend changes to Turkey's system, to parallel the changes the EU is making to streamline its approach to vertical agreements. The draft of an exemption system like the European Commission's new block exemption regulation was under consideration by the Board in June 2001 (Turkey, 2001).

2.3. Abuse of dominance

Concepts about dominance and abuse follow the EU model. "Dominance" is defined as the power to act independently of competitors and customers in determining parameters such as price, output, and distribution (Art. 3). There is no particular market share test for presuming or identifying dominance, although EU case law is considered relevant about those subjects (Turkey, 2001). The particular kinds of abuse listed in the Competition Act are taken from the EU model (Art. 6).

Complex cases now examine exclusionary strategies. An early predatory pricing case implied that the Board might treat price cutting as illegal *per se* if it was intended to drive out competitors, regardless of the price cutters' market share or of the likelihood that they could then monopolise the market. A recent set of cases about the media industry shows a more sophisticated focus on the risk of anti-competitive exclusion. The Authority is looking into claims that a dominant media firm is forcing smaller publishers to use a higher-priced distributor and that it is extorting exclusive purchase and distribution agreements from sales points and publishers in order to prevent other major media firms from setting up competing distribution systems. Many of the Authority's matters include a claim about abuse of dominance, but these are often joined with claims about other violations, and sanctions aimed specifically against abuse of dominance have only been imposed infrequently.

Sectoral laws, rather than the general principles and processes of the Competition Act, dominate the reform of network infrastructure. The prohibition of abuse of dominance has been applied in telecoms to discrimination against internet service providers. In most respects, though, Turkey is dealing with dominance and abuse in traditional infrastructure monopolies through specific sectoral laws. Some of these laws set thresholds, some of them based on market share, evidently to prevent the creation of dominant positions after reform and restructuring. In electricity, no private generation company can have more than 20% of national capacity, no private wholesaler can account for more than 10% of national consumption, a distributor cannot install capacity for more than 20% of the power consumed in its distribution region, an autoproducer (or a group of autoproducers) cannot sell more than 20% of the power it generates, and a distributor cannot buy from its affiliates more than 20% of the power it distributes (within the region, based on the previous year's experience). Analogous restrictions will apply in natural gas, where the shares of most participants (at any stage) are limited to 20% of national consumption and a distribution company cannot buy more than 50% of its requirements from a single source (Turkey, 2001). These sectoral laws also contain rules about pricing and network access to control abuse by dominant incumbents. These rules will probably displace the Competition Act as a practical matter, although the sectoral reform laws do not create formal or explicit exclusions and thus the Board retains jurisdiction and power in these industries. The Board's potential role in restructuring traditional network monopolies is limited by the absence in Turkey's law of provisions equivalent to Art. 86 of the EU treaty setting out some competition-based principles to apply to state monopolies and firms with special and exclusive rights.

2.4. Mergers

Merger control has been applied sensitively, to support creation of efficient-scale firms while resisting creation of post-privatisation monopolies. A potentially ambiguous substantive standard is applied widely but carefully. The standard combines the two commonly used elements, dominant position and competitive effect. The test is whether the merger is "aimed at creating or strengthening a dominant position, as a result of which, competition is significantly impeded" in a market. The scope of the market at issue may be local or national. The way the two elements are combined suggests that the "dominance" test governs, because the effect on competition is said to be a consequence of the dominance. That implies the law would not be concerned about a merger's adverse effect on competition if it was not accompanied or caused by a dominant position. That construction makes it difficult to use merger control to prevent the creation of oligopoly structures that facilitate tacit collusion. Turkey may have less cause for concern over this difficulty than other jurisdictions which rely on a "dominance" test, because its law about agreements permits it to infer and thus sanction restrictive agreements when it finds non-competitive performance in concentrated industries.

Privatisation transactions are subject to an analogous review process. “Merger” control actually applies to a wide range of transactions and means of transferring management power, and that includes privatisations.[4] Privatisation transactions could in principle be covered by the Competition Act’s merger control article and the procedures set out in the Board’s 1997 *Communiqué*[5] about mergers. Experience showed, though, that this guidance was insufficient to ensure timely prior review. In 1998, the Board issued a separate communiqué specifically addressed to privatisation transactions undertaken by the Presidency of the Privatisation Administration. This was soon amended so that it would also cover privatisations carried out by other public institutions and organisations. The goal is to ensure that the Board is notified and there is an opportunity to consider potential competitive consequences at an early stage, even before actual tenders (Turkey, 2001). Board action is also possible at the end of the process. The Board has rejected at least one privatisation-related acquisition because it would have created a firm, IGSAS, with dominant position in the nitrogen fertiliser industry (Turkey, 2001).

The Board applies a standard multi-factor analysis to mergers, of market structure, the parties’ position in the market, their economic and financial situation, alternatives for customers, likelihood of entry, legal or other barriers to entry, technical developments, supply and demand trends, and the interests of intermediaries and ultimate consumers. Because a major goal of government economic policy is to maintain and develop effective competition, mergers have generally been permitted, in order to establish efficient-scale operations that can compete with imports.[6] The Board may approve the acquisition of a failing firm where there was no alternative purchaser, as it did in a brewing merger. Only 2 mergers have been rejected in the first 4 years that the Board has been responsible for merger control (Turkey, 2001).

The obligation to notify may be determined by market share. The scope of the obligation to notify the Authority in advance and obtain authorisation is determined by the 1997 *Communiqué*. One test is market share: transactions must be notified and authorised if the parties’ combined market share exceeds 25%. The other test is aggregate size: regardless of market share, parties must notify and obtain authorisation if their aggregated turnover exceeds TRL 25 trillion. Most notifications are based on the aggregate turnover threshold, so the Authority does not consider the market share test to have very much independent importance. Firms may be at risk of paying penalties for inaccurate filings if they get their market shares wrong, though. The risk can be reduced if the firms hedge their descriptions of the markets involved. The notification scheme for privatisations is also based in part on market shares.[7] Basing the formal notification obligation on what is often a contested judgement of market definition and market share imposes costs without providing much benefit. Unless there is a significant problem in Turkey with high-market-share mergers among relatively small firms, it would be better to drop the market share test and rely on the aggregate turnover standard, which governs nearly all the time anyway.

A short screening deadline provides some certainty. After notification, the Board may take 15 days to do a preliminary investigation. At the end of that time, it must permit the transaction to proceed unless it decides to undertake a formal investigation. If it does so, it must advise the parties of its preliminary objections. The investigation then follows the normal process for investigation and decision of all Competition Act matters. That process can take over 6 months, and well over a year if extensions are granted. Another subsection of the law implies that the waiting period is 30 days, by providing that if the Board does not reply or takes no action in response to a notification within the specified period (15 days, evidently), then the merger agreement “shall be legally effective after 30 days following the notification” (Art. 10). The agreement’s status in the intervening 15 days is unclear.

Box 4. Merger review and industry restructuring: electric power

When 17 local electric power distribution companies were spun off from the traditional integrated monopoly, TEDAS, to new owners, the Board exercised its merger review authority over these privatisation transactions. The Board approved the sales subject to conditions requiring reformation of the concession contracts between the new owners and the Ministry of Energy.

The Board objected to the concessions' grant of exclusive sales territories. This exclusivity would prevent direct end-user access to third-party power and turn the public monopoly into private ones. The electricity market law and regulations did not require locally exclusive monopolies, but simply called for restructuring into regional units.

The Board also objected to the terms in energy sales agreements that permitted TEDAS to set the distributors' retail prices. The electricity market law provided that tariffs would be set by the distributors and approved by the Energy Market Regulatory Board. Although some form of price regulation would obviously be needed, the law did not authorise naked vertical price fixing.

The Board was also concerned that the terms of the concession contracts gave the firms considerable discretion about access and quality but provided few avenues for competitors to challenge discrimination.

The conditions that the Board imposed on its approval set out a programme of pro-competitive regulation for the electric power sector:

- Distribution and trading functions were to be separated and supervised by the Energy Board, when that was established (and by the Ministry, until that time).
- The "exclusivity" term was to be removed from the concession agreements.
- For 5 years, customers with demand over 1 MW could buy from other sources outside the territory and the distributor must provide access to distribution lines (at a "certain line utilisation price").
- Distributors could set prices independently, within a band whose upper and lower bounds would be determined by the energy regulator (the Energy Board, when established, and until then the Ministry). Prices were not to be fixed by TEDAS.
- The concession contracts must be amended to prevent discrimination.
- Further transfers of operating rights must be subject to the review and approval of the Board.

(OECD CLP, 1998).

2.5. State aids

Currently, there is no body charged with responsibility for controlling anti-competitive state aids. Subsidies and preferences, like more direct state intervention, can distort competition and motivate otherwise unnecessary regulation. The Customs Union agreement with the EU sets out some obligations about the control of state aids. The relevant laws are still being inventoried, and a regional aid map is being prepared (EU, 2000). There is no single point of control over state aids in Turkey yet, but the Authority may take on this responsibility. The Authority is in an independent position, not subject to oversight by a ministry with programmatic responsibility, and thus may be well placed to perform this monitoring and supervision. The Authority believes that the inevitable political pressures can probably be managed. The EU's November 2000 Accession Report called for establishing a control point. That Report also suggested further examination of the Authority's role concerning public monopoly, and in particular whether it has appropriate powers about public undertakings, state monopolies, and companies with special and exclusive rights (EU, 2000).

2.6. *Unfair competition and consumer protection*

"Unfair" competition is a matter for private controversy. Unfair competition is generally described in Turkey's law[8] as "deceptive action, or any kind of abuse of various ways of economic competition, contrary to the rules of goodwill". It includes false advertising, deception, unfair practices, sales below cost, abuse of economic dependence, and trademark infringement. Controversies are decided by private lawsuits, with no involvement by the Authority, except that deception aimed at consumers may also subject to public enforcement oversight under the Consumer Protection Act (Turkey, 2001).

Consumer protection and competition were combined at the outset. Turkey's Consumer Protection Act[9] followed soon after its Competition Act, in 1995. It regulates marketing practices such as door-to-door sales, consumer loans, instalment sales, and guarantees, as well as advertising and consumer contracts. The parts that do not yet conform to EU rules are being revised to meet that goal. Consumer protection law extends more widely than competition law, imposing obligations on all kinds of entities, including government instrumentalities such as utilities that are not considered "undertakings" subject to the Competition Act. The public office that applies the consumer protection law is the Director General for Competition and Consumer Protection in the Ministry of Trade and Industry. Before the Authority and the Board were set up, the Director General was also responsible for enforcing the Competition Act.

Consumer views are not well represented in policy debate. Consumer groups have some opportunities for participation in applying the consumer protection law, as members of local arbitration councils that resolve consumer complaints and of the Advertising Board that applies the rules about deceptive advertising. But they are not organised for participation in consultation. Even the Director General is not usually consulted about the consumer impact of legislation or privatisation decisions. Although consumer bodies apparently play only a marginal role in policy-making, they do have an appreciation for the importance of competition for protecting consumers.

3. Institutional issues: enforcement structures and practices

The institutions with formal responsibility for competition policy, the Competition Authority and Competition Board, are new and ambitious. The procedures and methods they have introduced into Turkish administrative practice could be models for reform practice by other regulators.

3.1. *Competition policy institutions*

The Competition Board exercises the Competition Act's decision-making powers. In the organisational structure, the Board is part of the Competition Authority. The Chairman of the Board is also the President of the Authority and acts as its chief executive, managing the Authority and representing it publicly. The 11 members of the Board (including the Chairman) serve full-time. They meet as a body to hear and decide cases. They also act individually in supervising investigations, preparing matters for decision by the full Board. The members of the Board are appointed for fixed terms of 6 years, which can be renewed. To ensure continuity, one-third of the terms expire every 2 years.

The complex process of appointing Board members balances expertise with political responsiveness. Appointments are made by the government, from individuals nominated by several designated institutions. Each of these bodies nominates 2 individuals for a position on the Board, from which the government selects one. The Ministry of Trade and Industry can nominate for 2 positions, and 5 bodies can nominate for a single position: the State Ministry's Undersecretariat of State Planning Organisation, the Court of Appeals, the Council of State, the inter-university board, and the private business association, TOBB. The Board itself can nominate for 4 positions, and it must nominate experts from the Authority for half of those. The Chairman is appointed, by the government, from among the Board's nominees. Regardless of the source of the nomination, the members are required to have 10 years of experience and professional credentials, in the form of a degree in law, economics, engineering business, or finance. This system of designating members was used for Turkey's first such independent body, the Capital Markets Board, and it has since been used for others. With 11 members, the Board is unusually large. Of similar collegial decision-makers in other OECD Member countries, only a few are larger. Spain's Tribunal has had 12 members, and the Danish Competition Council had 19 – plus alternates. The members of the Board, like the members of Spain's Tribunal, take a direct, individual part in handling particular matters, and many decisions are made by groups smaller than the full membership. Problems raised by the "representative" character of some members may be diluted by the indirect appointment process and by the preponderance of members that have no links to interest groups. Only 1 of the members is nominated by the business groups that are actually subject to the law.

The Authority is a legally separate entity from the government. Administrative and financial autonomy are decreed by statute. Although the Authority is "related" to the Ministry of Trade and Industry, the Competition Act provides that it "shall be independent," which means that "no organ, authority, entity or person can give orders or directives to affect the final decision of the Authority" (Art. 20). Its budget is submitted to parliament through the Ministry, but the Ministry does not control it. The Authority is in effect self-funded. It can keep 25% of the fines it imposes, and it also receives a small percentage of the fees that firms pay to increase their registered capital. The civil service law applies to the members. Thus they may not be members of political party, and they are subject to conflict of interest rules about shareholdings. Although some of the members of the Board have political backgrounds, there have been no serious complaints of political influence on particular decisions.

Transparency is a priority, but disseminating information remains a challenge. Practitioners find that the Board's decisions, when they appear, are well-reasoned. They report some concern about delays between the announcement of a decision and the release of the opinion explaining it. That concern does not appear serious, though, as the time required to complete an opinion is usually only a few weeks. A programme of regular lectures and seminars about competition policy issues is open to the public and well attended. The Board has had difficulty calling attention to its work. Some of that difficulty may be because media interests have not reported the Board's views in its enforcement actions against media-industry transactions or conduct. Despite the Authority's efforts, the public at large, and even the business sector, are not yet well informed about competition policy developments. Among those who are paying attention, though, the Authority has a reputation for quality administration.

Institutional autonomy is a handicap in the policy process, though. The office of the Prime Minister has encouraged other parts of the government to consult with the Board. A memorandum to the ministries from the Prime Ministry emphasises the need to receive the Board's opinion about draft laws, regulations, and communiqués about issues under the Competition Board's subject matter responsibilities. But consultation pursuant to this admonition has been uneven. The Board has often not been asked for an opinion, or its opinion was sought only at a very late stage, as happened concerning the Sugar Industry Law and the Telecoms Law (Turkey, 2001).

3.2. Competition law enforcement

Law enforcement processes centre on adversary hearings. The Board's procedures for applying the law were a novelty in Turkey's administrative practice, which did not historically envisage the participation of the parties in the decision-making process (OECD CLP, 1997). Parties may request copies of the evidence against them at any time, and "the Board cannot base its decision on any issue about which the parties are not informed or not given the right to defence" (Art. 44).

The Board oversees the investigation and hearing process. The Board can respond to complaints or open a matter on its own initiative. The Chairman may appoint staff to perform a preliminary inquiry. On the basis of the preliminary report, the Board decides whether to open an investigation. A formal investigation is headed by members of the Board, assisted by staff. Parties are notified within 15 days after an investigation is opened and are requested to present their views within 30 days. At the conclusion of the investigation stage, the parties are notified of the results and again invited to submit their defence in writing. A public hearing is held, if the parties request it. Decisions are rendered at the end of the hearing after an *in camera* meeting of the Board. A final decision requires a majority of the full Board (that is, 6 votes).[10] Other decisions, such as for interim measures and recommendations, can be taken by simple majority of members present.[11]

Investigation powers are broad. The Authority can request information from other government bodies and from firms and associations (Art. 14). It can perform on-site examinations to review and copy documents, take oral or written statements, and examining facilities (Art. 15). Officials performing the examination must bring a certificate showing the subject matter and purpose of the investigation and advising of the administrative penalty for providing inaccurate responses (set by Art. 16). Draft regulations to govern investigative procedures are now under consideration by the Board (Turkey, 2001).

Deadlines govern every stage of the process. Most of the deadlines are in the Competition Act itself. A preliminary investigation must be done within 30 days. The full Board then has 10 days to authorise a formal investigation. The deadline for completing the formal investigation is 6 months, which may be extended, once, for another 6 months. The post-investigation exchange between the parties and the staff, including the staff response and the parties' rebuttal, can take up to 75 days; these deadlines may be extended once. A hearing must be held within 30 to 60 days after the end of the investigation. Hearings are limited to 5, consecutive, days. The Board's decision and reasoning must be issued within 15 days after the hearing. These deadlines apply to all kinds of investigations. If all extensions are taken, the timetable could take a year and a half from initiation to final decision. This may be too long for mergers.

Substantive sanctions appear adequate, but administrative sanctions are weak. Fines for substantive violations of the competition statute range from a minimum level (adjusted frequently for inflation) up to 10% of the violator's annual gross income. The minimum level for 2000 was TRL 2.433 billion. The managers of a firm that violates the law may also be assessed fines, of 10% of the fine against the undertaking. Factors considered in determining fines include intent, gravity of the violation, market power, and magnitude of harm (Art. 16). Sanctions to enforce compliance with process may now be too weak, as inflation has diluted their effect. One firm subject to a "dawn raid" elected to pay the daily fines and continued to resist access.(although it relented after holding out for a few days).

Appeals are delaying effective implementation. Appeals from the Board's decisions may be taken to the Council of State, that is, the Supreme Administrative Court (Art. 55). Although the court acts as "first instance" court, it cannot substitute a new decision for that of the Board, but can only affirm or reverse. The appeal process can take up to 3 years. No appeals had yet been decided as of mid-2001. Fines need not be paid until decisions are final, and that does not happen until all appeals are completed. Decisions imposing large fines have almost all been appealed and thus are still pending. As the law is clarified by decisions on these appeals from the Board's first actions, and as businesses and the courts become more familiar with the Competition Act's requirements and the Board's practice, delays due to appeals may decline.

3.3. Other enforcement methods

Private parties have several options for pursuing complaints. A party who is disappointed by the Board's rejection of its application, or failure to take action on it, may appeal to the administrative courts (Art. 42). Applications are deemed to be rejected if not acted on in 60 days (under general provisions of administrative law). In addition, the Competition Act permits injured parties to sue in the civil court for damages. There have been few cases. It is not clear whether a private suit can only be filed after the Board has found a violation. One decision held that the court hearing a private case is not competent to decide whether there has been a violation of the Competition Act. But this decision, by a chamber of the Court of Cassation, is not generally binding on other courts, which might come to a different conclusion.

3.4. International aspects of enforcement

International effects are analysed as matters of fact. The Competition Act incorporates a basic "extraterritorial effects" test. That is, anti-competitive conduct outside Turkey that affects Turkish markets falls within the Competition Act's prohibitions. There is no basis for treating foreign firms differently from domestic ones. Firms with foreign ownership are to be treated the same as purely domestic firms, under the Foreign Capital Act (Turkey, 2000), and the source of capital is not considered in applying the Competition Act (Art. 2).

The Authority acknowledges the practical problems raised by obtaining information about conduct involving foreign firms and products. But so far, there are no formal co-operation agreements between the Authority and other competition enforcers. Some other Turkish agencies, such as the telecoms regulator, have made informal co-operation arrangements with counterparts in other countries (Turkey, 2001).

The Authority has no direct role in other competition issues raised by international trade. In a few Member countries, competition policy institutions play a important role in removing regulatory obstacles to competition from foreign producers. In Turkey, all responsibility for implementing the law about dumping and unfair competition in imports[12] rests with the Prime Ministry's Undersecretariat of Foreign Trade. The Board and the Authority have not been involved in these issues.

3.5. Agency resources, actions, and implied priorities

Resource levels show serious commitment to competition policy. The number of staff is commensurate with the scope of the Authority's responsibilities and the scale of the Turkish economy. For comparison: the Authority's personnel complement is about 50% greater than that of the competition agencies in Italy, Poland, and Mexico, and it is about 75% of that of the competition agencies in Korea and Canada. Funding, in real terms, appears fairly stable.

Priorities in applying these resources appear balanced. Horizontal agreements and abuse of dominance are the principal targets. apparent The sanctions actually imposed appear to drop sharply after 1998, but that reported drop is probably not significant, because matters are reported under the year they were opened, not the year the sanctions, if any, were ordered. The decision process can take 18 months or more, and important matters initiated in the last year or two are still in process.

Table 1. **Trends in competition policy resources**

	Person-years	Budget (TRL billion)[1]
2001	318	10 921
2000	307	12 859
1999	297	13 840
1998	259	9 800
1997[2]		2 700

1. Budget figures are deflated to 1997 value of TRL.
2. Part year; the Competition Authority began operation 5 November 1997.

Source: Turkey, 2001.

Table 2. **Trends in competition policy actions[1]**

	Horizontal agreements[2]	Vertical agreements[2]	Abuse of dominance[2]	Mergers
2001: matters opened	14	8	23	40
Matters in progress	6	5	12	3
Matters concluded	8	3	11	37[3]
Total sanctions imposed (M TRL)				
2000: matters opened	22	11	22	56
Matters in progress	8	1	4	
Matters concluded	14	10	23	56[3]
Total sanctions imposed (M TRL)	42 000	447 515		761
1999: matters opened	17	10	32	29
Matters in progress	3	1	2	
Matters concluded	14	9	30	29[3]
Total sanctions imposed (M TRL)	1 264 911	6 973 100	1 704 466	
1998: matters opened	13	8	20	40
Matters in progress	1		1	
Matters concluded	12	8	19	40[3]
Total sanctions imposed (M TRL)	926 977	314 265	11 665 900	1 240

	Horizontal agreements[2]	Vertical agreements[2]	Abuse of dominance[2]	Mergers
1997: matters opened	8	1	4	3
Matters in progress				
Matters concluded	8	1	4	3[3]
Total sanctions imposed (M TRL)	1 535 910	819 803		

1. Data is for applications of the Competition Act by the Competition Authority, and does not include exemptions, opinions, and matters determined to be irrelevant under the Competition Act. Data are listed by the date the matter was opened.
2. Matters are listed under each relevant category. The total number of non-merger matters opened in 2000 was 41; in 1999, 39; in 1998, 31; in 1997, 13.
3. In 2001, 32 mergers authorised, 5 authorised subject to conditions, 0 rejected; in 2000, 52, 3, and 1; in 1999, 28, 1, and 0; in 1998, 33, 6, and 1; in 1997, 3, 0, and 0.

Source: Turkey, 2001.

4. Limits of competition policy: exemptions and special regulatory regimes

4.1. Economy-wide exemptions or special treatments

The ability of competition policy to provide a suitable framework for broad-based regulatory reform is partly determined by the extent and justification for general exemptions or special treatment. Conduct that is compelled or authorised by another regulator is likely to be exempt from competition policy scrutiny. How this is done affects the priority and effectiveness of competition policy. The Competition Act appears to apply broadly, but in fact authorisation by public bodies and agencies limits the reach of competition policy significantly.

Regulatory authorisation, if specific enough, may confer an exclusion. The Competition Act itself does not include any general rule of exemption that would remove the prohibitions from conduct pursuant to another regulatory scheme. General rules of statutory construction and administrative law could reach that same result, though, as specific laws or rules might override general principles such as those of the Competition Act. For example, the Turkish Drivers and Automobile Federation was authorised to stamp the "TR" logo on licence plates, and the application of these principles of construction concluded that his authorised monopoly was outside the scope of the competition law (Turkey, 2001).

Narrow interpretations of general terms have resulted in an exclusion for many public entities. Even public entities that are engaged in business may be excluded from the Competition Act prohibitions because of the interpretation of the term "undertaking". A key element of the definition, which determines the scope of the law, is that the entity is "capable of acting independently in markets". If a minister has the power to determine the price, or simply endorses the price as a formality, then the enterprise is not considered to be an undertaking. Thus the Board had to drop a complaint against the state sugar firm, TFA, for abusing its dominant position to push other firms out of business, because TFA's prices and policies were determined by the government (Turkey, 2001). Dependence on ministerial direction, not public ownership, determines the issue. Fines have been imposed where the enterprise, though publicly owned, was not subject to such control and thus did qualify as an "undertaking".[13] The Board fined BELKO, an undertaking with a legal monopoly over heating coal in Ankara, for abuse of dominance; the action led the Ankara Municipality to terminate the monopoly right.

No general rules set standards to control public monopoly. Turkey's competition law has no rule equivalent to Art. 86 of the EU treaty, to govern the permissible operations of monopolies providing public services. Indeed, there are general provisions about operations of public enterprises that tend to exacerbate competition problems. State economic enterprises remain free of hard budget constraints. Their prices may be fixed by the government, and if those prices do not cover costs, that shortage as well as the lost profit are to be met by the Treasury (Turkey, 2001).[14] Enterprises with such a guarantee against failure evade market discipline and may engage in subsidised unfair competition with private firms in their markets (Turkey, 2001).

Local government bodies may enjoy some degree of exemption. There is no independent regional level of government – regional governors are appointed by the national government – but municipalities have important powers and responsibilities in providing services, and some have been engaged in purely commercial operations too, such as running supermarkets (EIU, 2000, p. 35). Whether the law would apply to those operations would depend upon whether they qualified as "undertakings."

Small business has no general exemption The Board is considering adopting a *de minimis* exemption covering agreements among small enterprises (Turkey, 2001). This would be parallel to the EU regulation, and thus based on market share thresholds, of 5% for horizontal agreements and 10% for vertical ones.

4.2. Sector-specific exclusions, rules and exemptions

There are very few explicit exclusions from the law, but many regulatory programmes displace or undermine competitive markets. Some are remnants of the tradition of state control, and some respond to current crises.

4.2.1. Banking

Bank mergers are exempt from review, in the current emergency conditions. Mergers in the banking sector are excluded from the Board's jurisdiction under the Competition Act. This provision of the new banking act, adopted in May 2001, is the only explicit statutory exclusion from the Competition Act. The extraordinary general economic crisis that resulted from problems in the national banking sector is cited as the justification for this step (Turkey, 2001). The time and added complication of a competition policy review were evidently considered too great a burden, in view of the extent of the systemic problems requiring immediate action. The 1999 banking act[15] had already exempted mergers of smaller banks that are in the Savings Deposits Insurance Fund (SDIF), that is, those involving asset shares of a presumed national banking market below 20% (OECD CLP, 2000). For banks in difficulty that have been transferred to SDIF, further distribution of banking assets by SDIF need not be notified or approved under the Competition Act. The problems in this sector were not competition problems, but rather were traceable to the unlimited guarantee of deposits and the complexity of the regulatory system. For the time being, there is no competition policy input into decisions about restructuring the banking sector.

Interest rates could be controlled, but in fact they are not. The Banking Act authorises the Council of Ministers to set minimum and maximum interest rates for deposits. The government may delegate this power to the Central Bank. The government may also set maximum rates for loans. Since 1987, these powers have not been exercised, and rates are considered liberalised. But vigilance has still been necessary. The bankers' association asked for the Authority's views about rules setting minimum levels for fees and commissions. Unsurprisingly, the Authority rejected the idea (Turkey, 2001).

Regulatory intervention in banking affects competition in other sectors. Credit has been allocated by regulations or by decisions of the council of ministers. Public-capital banks must make low-interest loans to identified sectors, farmers, and artisans. Reforms are planned to prevent this practice, which distorts competition in the markets where credit preferences are targeted. The Authority was not asked for its views of the relevant amendments to the banking legislation, though (Turkey, 2001).

4.2.2. Alcoholic beverages

State monopoly is receding, but slowly and reluctantly. Production, import, and sales of spirits are state monopoly rights. The legal authority for this monopoly is the Alcoholic Drinks Monopoly Act,[16] and the regulator is the General Directorate of Monopoly, TEKEL. TEKEL had a complete monopoly until sales of a few products, imported whisky and bubbling wine, were liberalised in 1995,. Recent reforms, effective 20 January 2001, still fall short of eliminating the monopoly completely. Production and sales of beer and wine, and import and sale of whisky and "naturally bubbling wines" are now open to competition. For other products, the law sets a minimum scale requirement. Smaller firms, that is, those with production, sales or imports below 1 million litres per year, must deal through the state monopoly., at prices set by regulation. The monopoly is instructed not to discriminate between domestic and imported products. The minimum level may decline by 100 000 litres per year each year for 5 years, at which time it may be dropped to 0. Whether to eliminate it after 5 years is at the discretion of the Council of Ministers. Until it is eliminated, the system protects TEKEL's privileged position against the entry of competing importers or distributors (Turkey, 2001).

4.2.3. Tobacco

TEKEL also has monopolised the tobacco industry. The formal monopoly ended in the 1980s, but TEKEL still has about 70% of tobacco sales (including imports), even though 3 foreign firms have been producing in Turkey since the early 1990s. Regulatory controls, imposed by TEKEL, have prevented real competition despite this entry (Turkey, 2001). The regulation may be explained in part by the desire to keep track of revenue, as about 70% of the retail price is tax. Reforms enacted in January 2002[17] shift responsibility for regulating pricing, distribution, and sale to a new 7-member Tobacco Products and Alcoholic Beverages Board. In 2002, the state stopped making direct purchases. Instead, purchases will be at auction or under contract. These changes anticipate TEKEL's eventual privatisation. The reform programme for this sector encountered some political complications, over the consequences of ending direct support to growers. Production of tobacco products requires approval from the Board. Large undertakings (with the annual capacity to produce at least 2 billion cigarettes and 15 000 tons of other tobacco products per brand) may freely import, price, distribute, and sell that brand. For smaller importers, the price and marketing principles are to be determined by the Council of Ministers. Thus, the programme falls short of ending government controls on competition.

Mining

Mineral products have long been state monopolies; some may be privatised. Salt production was a TEKEL monopoly. Only since 1998 have other firms been permitted to produce salt, and then only from new locations or from sites that TEKEL has abandoned, and with the permission of the government.[18] Other mineral products that have been state monopolies include boron, trona, asphaltite, uranium, and thorium.[19] Trona and asphaltite were removed from the monopoly in 1994. In petroleum, TPAO, the Turkish Petroleum Corporation, has an advantage, though not a monopoly. The petroleum law calls for tenders for exploration and production from new areas, but TPAO has the right to a licence from the Ministry of Energy and Natural Resources without tender (Turkey, 2001).

4.2.4. *Agricultural products*

Official intervention and support displace supply and demand in agriculture. Historically, government price supports stabilised this sector, which is particularly important in Turkey. Though the support programme did not technically prevent application of the competition law, the non-competitive markets that resulted implied a *de facto* exemption (Turkey, 2001). Producer-owned co-operatives buy many products, such as hazelnuts, cotton, and olives, at government-fixed prices (EIU, 2000, p. 37).

The new agricultural policy is trying to shift toward market economy rules. A new law on the sugar market moves toward reform (Turkey, 2001). Beginning in the 2002-2003 season, the government will no longer set and announce the price. But the market will still be regulated. The 7-member Sugar Board (which will include 2 private sector representatives.) will halt production from state-owned firms when supply matches demand. This intervention is intended to prevent prices from falling. Despite the ending of formal support payments, the idea is that "producers will know in advance the price each season", implying that the price will still be controlled, by the Board's action. The programme is said to remove obstacles to privatisation.

4.2.5. *Pharmaceutical products*

Ministry of Health regulations control competition. These regulations appear to be generally consistent with common practices in EU countries. In addition to monitoring the industry, from production through retail sale, to ensure product quality, the rules prohibit advertising to the public, set "ethical" standards for promotions, and control prices and discounts. Maximum sales prices permit margins up to 20% for the producer, 9% for the wholesaler, and 25% for the pharmacist. Producer profit is not to exceed 15% of gross income (14% for imports). Revisions to the patent law in 1999 are expected to increase imports (Turkey, 2001).

4.2.6. *Professions and services*

Self-regulatory bodies of professionals and other providers of services are recognised in the Constitution as quasi-public entities.[20] This does not result in blanket exemption, though, as particular organisations must be authorised by particular laws. The laws authorising these associations typically also authorise them to set their members' prices, and that authorisation makes it difficult to challenge these pricing agreements under the Competition Law. Thus "tradesmen" (not including merchants dealing in goods or relying on cash capital[21]) may fix their fees and tariffs through their chambers.[22] Bar associations may set minimum legal fees, with the approval of the Ministry of Justice, and lawyers who charge less may be subject to discipline.[23] Accountants and financial consultants may set minimum fees.[24] The Turkish Doctors Union may set minimum treatment fees.[25] The managing board of the Turkish Union of Dentists may set minimum rates for treatment and examination[26] (Turkey, 2001).

Some association restraints may be subject to the Competition Act, though. The Authority has tried to call attention to the competition problems that these rules raise, and the Board has taken some law enforcement action where possible. Shortly after it began work, the Board investigated price fixing among electrical engineers, who stopped the practice when the investigation started. More recently, the Authority has looked at a price agreement among city planners, who are one part of the very large confederation of associations of architects, engineers, and related professions. The association contended that the minimum-price provisions of its bylaws, dating from 1981, protect the public interest, but the Authority concluded that the practice infringes competition. The law authorising the confederation, which dates from 1954, does not regulate the member associations' price-fixing practices (Turkey, 2001). For other professions, the most likely result of an investigation would be a report to the minister about the need for legislative change. The Authority is systematically reviewing the laws authorising the self-regulatory structures to identify such anti-competitive features that should be fixed.

4.2.7. Telecommunications[27]

The Telecoms Law overlaps the Competition Act in some respects. Monopoly rights of the incumbent, Türk Telecom, are to end when its public ownership falls below 50% or at the end of 2003, whichever comes first. The telecoms law requires licensing as a condition of entering telecoms markets, such as GSM. Licensing enforces the national plan for spectrum allocation. The telecoms law imposes minimum universal-service requirements and gives the Telecommunications Authority the power to set rate caps and determine the methods for calculating tariffs.

The telecoms and competition agencies are working to co-ordinate their actions. Duties of the Competition Authority and the Telecommunications Authority may overlap. Each may have some power to undertake an investigation of the same complaint, for example. The telecoms law provides that the Telecommunications Authority should consult with the Competition Authority in some cases, such as investigations of Turk Telecom, and that the Competition Authority should consult with the Telecommunications Authority before taking any decision in relation to the telecoms sector. The Telecommunications Authority is also to obtain the views of the Competition Authority when preparing secondary legislation. There should be a common framework for determining whether a firm has a dominant position, a determination that is made by the telecoms regulator in that sector. The agencies are engaged in discussions to develop a protocol for co-operation (Turkey, 2001). The two agencies have developed a practice of consultation, on particular cases and general regulations. The two agencies agreed on the analysis and outcome in a case involving abuse of dominance over internet service providers, and the telecoms regulator is consulting the Competition Authority about tariff setting principles.

4.2.8. Electricity and gas[28]

Plans for reforming these sectors preserve a role for the Board. The "public monopoly" in electric power ended officially in 1984, but the market remained effectively monopolised. The Board's merger-review decision in a major privatisation matter[29] tried to impose pro-competitive rules on the restructuring process. The reform plans enacted in February and April 2001 for electricity and gas have assigned regulatory responsibility to a new Energy Market Regulatory Board. In electric power, generation and supply are to be competitive and long-distance transmission is to be a publicly owned monopoly. Analogously, in natural gas the monopoly will be retained in long-distance transmission pipelines, while competition will be introduced for production and sales (Turkey, 2001).[30] The Board will retain authority to apply the Competition Act in each sector. The sectoral reform laws do not create exclusions from the Board's jurisdiction. The laws incorporate some competition principles, such as prohibition of discrimination by natural monopolies and elimination of geographic restrictions on retail sales of electricity. But unlike the telecoms law, these sectoral laws do not call for input from the Board in the development of regulations affecting competition in these sectors (Turkey, 2001).

4.2.8. *Bus and taxi service*[31]

Several levels of authority control aspects of entry, operation, and pricing. Municipalities may regulate taxi and bus service within a city. The national Directorate of Land Transport in the Ministry of Transport regulates long-distance inter-city service (over 100 km). And governors are responsible for regulating services between those smallest and largest ranges. The bodies that may be involved range from municipal governments and police through provincial directorates to associations under the Turkish Chauffeurs and Automobile Drivers Federation. There are no quantitative limits on entry for international and inter-city service, but localities control entry into municipal passenger services of all kinds. Fares for international service are set freely. Rates for inter-city passenger transport are subject to approval by regional directorates. Discounts up to 25% from approved rates are permitted, and price wars break out frequently, as there are more than 500 firms and excess capacity. Bus companies must give substantial notice – 4 months – before raising fares, and they may not increase fares during holiday periods. Although there are no official ceilings or floors, the Ministry may intervene to set limits if predatory conduct or excessive prices are against economic or public interests. For intra-city services, the taxi and minibus associations set their members' rates, pursuant to special legislation. This price-fixing may be exempted from the Competition Act, depending on the character of the legislative authorisation for it (Turkey, 2001). The Authority has investigated complaints about abuse of dominance by terminal operators and price fixing by bus firms (Turkey, 2001).

4.2.9. *Railroads*

The state monopoly is faltering. The Turkish State Railways (TCDD), operated by the Ministry of Transport, has a monopoly over freight and passenger service, and also over manufacturing railway equipment and over loading and unloading at several ports. It is suffering the commonly-encountered problems of inefficient subsidisation, high costs, poor management, and poor service (Turkey, 2001).

4.2.10. *Maritime transport and port services*

Domestic ocean-going trade is regulated to control competition. International maritime trade is open to competitive entry, and the national shipping firm, Sea Transport Inc., has been privatised. Foreign flag vessels account for 72% of the international trade. But anti-cabotage laws have protected domestic ocean trade from foreign-firm entry since 1926. There is less maritime transport than would be expected in a country with so much coastline. Intra-city ferry services, which are especially important in the Istanbul-Marmara region, are public services, for which rates and schedules are regulated by local authorities under the Municipalities Act.

Discriminatory regulations prevent much private port service competition. Several public firms (principally TCDD, TDİ and TÜPRAŞ) provide port services. Private firms may also operate in this market, but they are required to pay a 15% rental fee to the Ministry of Finance. The public firms do not pay this fee, and their resulting cost advantage is great enough to have essentially eliminated private competition. The Board had to reject a complaint about this competitive advantage, because it resulted from a decision by the Ministry of Finance, which is not an "undertaking" subject to the law. The Board did ask the Ministry of Finance to make the changes needed to permit competition. Competition between ports is limited by the poor state of inland rail service and the high costs of trucking. In some areas, especially around the Sea of Marmara, dense industrial and port development supports port service competition despite these disadvantages.

Regulations created non-competitive conditions for piloting and towing. Prices for these services are relatively high compared to other countries. Regulations of the Maritime Undersecretariat, following the recommendations of the professional association, the International Maritime Pilots Association, authorised local monopolies,. The high rates of the 2 public operators, the national railroad and Turkish Maritime Enterprises, establish a ceiling that the private operators also follow where they have local monopolies. The Competition Authority is considering a comment to the Maritime Undersecretariat about changing the regulations that authorise these anti-competitive conditions (Turkey, 2001). A communiqué from the Maritime Secretariat of 15 February 2002 ended the legal monopolies, but in practice the services remain monopolised.

4.2.11. Airlines

Regulation and operation have been combined as government functions. The General Directorate of Civil Aviation in the Ministry of Transport regulates airline service and also operates the national flag carrier, Turkish Airlines (THY). The Civil Aviation Act of 1983 permitted competitive entry, but most of the entrants foundered. Would-be entrants faced crippling conditions. According to a 1996 decision by the General Directorate, entry was only permitted on domestic routes that THY did not serve, or on days when THY did not serve the route, or when THY service was insufficient to meet demand. The Ministry no longer applies these conditions, and in April 2001, the rules about the minimum number of planes for a firm entering scheduled service were changed to make entry easier (Turkey, 2001). Licence holders can now set their own tariffs, although they must give 3 days' notice of changes. As THY is privatised, the government recognises that it will be necessary to set up an autonomous aviation authority and to formally rescind the 1996 order that effectively prevented new firms from competing with THY on domestic routes.

The Authority will be involved in further reforms. The Competition Authority has the power to investigate anti-competitive practices in the airline industry. As THY can now set its own fares, the Authority contends that it is an "undertaking" fully subject to the Competition Act. The privatisation process envisions that bidders will file applications with the Competition Authority (Turkey, 2001).

4.2.12. Postal services

The postal monopoly may enjoy unfair competitive advantages. Letter mail service is a government monopoly, which is performed by the General Directorate of Mail and Telegraph (PTT). "Letter" is defined in terms of communicative content, rather than weight or size. PTT enjoys cross-subsidies because it relies on the services of the national railway and airline without compensating them. PTT can also participate in non-monopoly services such as parcel delivery and remittances. In the absence of a provision similar to Art. 86 of the EU treaty, the anti-competitive effects of such cross-subsidies cannot be investigated under the Competition Act (Turkey, 2001).

4.2.13. Broadcasting and publishing: media cross-ownership

Special rules try to limit control of different media outlets. An owner of 10% or more of a private broadcast entity may not be a party to contracts with the state or public entities or enter transactions on a securities exchange. No one can own more than a 20% of the capital of a single broadcast entity. No one who publishes or owns a newspaper can hold more than 20% of newspapers and broadcasting combined. These rules attempt to prevent evasion by aggregating shares The limits apply to the shareholder's relatives, by blood and marriage, up to the third degree. The motivation for rules such as these is as much to preserve viewpoint diversity and to disperse influence over opinion, as it is to protect economic competition.

5. Competition advocacy for regulatory reform

Advocacy about the competitive effects of policies and proposals has been limited. Because competition policy is novel in Turkey, the Authority has concentrated on public education to call attention to the law and its principles. Its efforts have included several large-scale symposia, including one about privatisation in November 1999 and another about regulation in March 2001. Programs have been held around the country, in Bursa, Antalya, Izmir, Istanbul, and Gazientep. Some training programmes have invited participation by other agencies, such as the Telecommunications Authority (Turkey, 2001).

The Board and the Authority are nevertheless concerned about anti-competitive regulations. They are undertaking a comprehensive review of the laws on the books, in order to identify possible conflicts with the Competition Act. The results will be assembled into a report for submission to the government. The Board is evidently the only body with the power to make such a report without being invited to do so.

Consultation before potentially anti-competitive policies are adopted is inconsistent. A memorandum from the office of the Prime Minister has called on other agencies of the government to consult with the Board and the Authority about proposed regulations and decisions. On some occasions, the Board's views have been sought and heeded. The Board has supported aspects of the reforms in sugar industry and the agriculture sector, for example (Turkey, 2001). But the request for views about the sugar reforms only came at a very late stage in the process. The process of consultation about major structural reforms is sometimes cut short if the measures must be adopted quickly as emergency laws. There are curious inconsistencies, as the telecoms law calls in general terms for consultations between the competition agency and the regulator, but the energy-sector laws do not contain analogous provisions.

Box 5. **"Advocacy" in the privatisation process**

Consultation about competition impacts in privatisation appears to be working well. The Board may be involved at two stages, first in designing a privatisation plan for an industry or asset, and then in applying the general merger review authority to the proposed transaction. The Board's *Communiqué* about the privatisation process sets thresholds, so that consultation is required only for transactions that are more likely to present competition issues: those where the entity being privatised holds a market share over 20%, or has turnover above TRL 20 trillion, or has a legal monopoly or other competitive advantage. And the Board must be consulted if the acquiring party has a market share over 25% or turnover above TRL 25 trillion, whether or not any of the conditions about the privatised entity are met.

The general law providing for the Privatisation Authority calls for that Authority to consult with the Board. (Because the Competition Act was not in place when the general privatisation law was enacted, it was once thought that the competition-review power in privatisations should be exercised by the ministry general directorate; however, the Conseil d'état has ruled that the Board now exercises the review power.) The Board's views are to be obtained before the tender so the Board can advise about whether to eliminate firms that should not participate. The decision to privatise an asset and the approval of a bidder are made by the Privatisation High Council, a political body. But even after that decision, the Board may still have an opportunity in the merger review process to correct competition problems.

Some examples:

- The Authority helped develop the conditions for selling 20% of Turk Telecom, pointing out that the GSM holders should not bid, and if their affiliates won, divestiture might be needed.
- In the fertiliser case, the Board intervened at the end of the process to prevent the privatisation from leading to a monopoly.
- In petroleum distribution, the Authority said that the distributors' association should not be permitted to bid for the state firm.
- The two-stage review protocol is being incorporated in the privatisation legislation for the electricity and gas sectors.

Some oversight over regulations' competitive effects is provided at the Ministry level. For example, when the Ministry's small business directorate prepared a draft law to protect small retailers, the street-level *bakkals*, by regulating the locations of large retailers, the Director General pointed out, in the consultation process within the Ministry, how consumers benefit from hypermarkets, through greater selection and quality, and often through better consumer protection policies implemented by the larger firms' special consumer interest departments. (The Authority was also asked for its views on this bill; the Authority advised the Prime Ministry that the retail sector could operate under the usual competition rules and that the proposal would distort the structure of the market). The draft bill has not yet emerged from the Ministry.

6. Conclusions and policy options

The process of reducing the state's direct involvement in the economy has been accompanied by the development of an explicit policy about competition. Turkish policy makers understand that in a private enterprise economy, protecting the public interest requires viable institutions dedicated to supporting market competition. That concern motivated development of the law on competition in the early 1990s. Another motivation was the expansion of ties with the EU, evidenced by the customs union agreement of 1995, which includes competition policy conditions. Turkey now has a comprehensive competition law and a credible institution to apply it. But even though the law has been in place for 7 years, public awareness of what competition policy really means is limited.

Reform plans call for more competition in traditionally monopolised infrastructure sectors.[32] Implementation of those plans will depend on action by sectoral regulators and the outcome of the privatisation process. As in most OECD Member countries, the role of the competition agency in infrastructure reform is largely to advise about the design and implementation of reform, and to enforce the law against abuse of dominance aimed at new entrants.

But the state's involvement in the economy remains strong. In sectors that the state has long dominated, reforms and restructuring are moving toward greater reliance on markets and competition. Events and conditions of the recent economic crisis have compelled many of these changes, some of which are being encouraged by international institutions like the World Bank and IMF. But market conditions and inertia have slowed or stalled important privatisation projects. In some sectors, proposed reforms only go half-way, by providing for new regulatory bodies rather than simply dismantling the monopolies and thus eliminating the need for economic regulation. Political sensitivity and linkages to other policy concerns no doubt counsel caution. Thus, the effort to reduce controls in the tobacco industry was delayed because of concern about the fact that the reforms would also have reduced subsidies to producers. The evident need for outside support to make these changes happen indicates the difficulty of establishing market competition principles in the face of Turkey's regulatory and political traditions. The general direction of policy is toward greater reliance on markets and competition, but legislation is coming faster than action.

In competition law enforcement the process is more advanced, as concrete actions are being taken to apply well-established basic legislation. The Authority and the Board have been doing this for more than 3 years. Several important action had been taken even before these institutions were in operation. Enforcement priorities are well considered and actions show increasing confidence and imagination. A notable example is Board's use of conditions in a privatisation decision to outline requirements for competition in the electric power sector. The Board's investigative and decision-making practices are transparent and responsive. The Board's position with respect to the government and the composition of its membership show a sensible balance of independence and responsiveness. The Board and the Authority are off to a good start. It remains to be seen how well they will weather a substantial politically-charged controversy, though. And the Board's first decisions still have not been finally decided on appeal; in the meantime, big fines remain unpaid.

Competition advocacy has been sporadic. The Authority may have been concentrating at first on applying the Competition Act, including educating business and the public about its provisions and requirements. A solid record of competition law enforcement can make advocacy about competition in other policy areas more credible. And there have been important steps. The Board's role in the important task of privatisation appears well-conceived. The Authority is engaged in a valuable project to canvass the existing body of legislation to identify and report on anti-competitive provisions that should be reformed or removed. But in general, its involvement in policymaking and sectoral reform is inconsistent, despite the instruction from the Prime Minister's office that other agencies consult with it about proposals that could affect competition. In some cases, crisis and time pressure make more thorough consultation difficult. But other parties may also try to bypass the Competition Board in order to avoid its likely policy advice. It is curious that the telecoms legislation calls for consultation between the Board and the sectoral regulator, but the energy legislation does not. Does this represent an oversight in the preparation of the energy law? The Competition Board has an expansive conception of its responsibilities, and it clearly wants to be a leader in pro-competitive reform. It is not yet clear how many will follow.

6.1. Policy options for consideration

The following steps are recommended for consideration to strengthen the scope, effectiveness, and enforcement of competition policy, by eliminating gaps in coverage, enforcing competition law vigorously, and providing competition policy institutions with the authority and capacity to advocate reform and to participate effectively in the transition to competition in deregulating, restructuring industries. They are listed beginning with the most important – and the most difficult.

– ***Finish eliminating state monopolies and anti-competitive protections.***

Despite the efforts to reform over the last several years, several state monopolies remain in place, in sectors that could be competitive. For some, the plans for reform call for establishing new bodies to regulate their prices and control abusive behaviour. It would be better simply to eliminate the monopolies and to prevent abuse by applying the general competition law. Special sectoral regulation is not costless. Care must be taken to ensure that sectoral regulatory boards represent the interests of consumers and the public, rather than the industries themselves. Even then, regulation is unlikely to achieve the level of efficiency and innovation expected from market competition. And for some other sectors, state firms enjoy actual or implied advantages over non-state competitors, in access to licenses or drilling rights, for example. Those advantages should be removed, to eliminate inefficient competitive distortions and discriminations. Market conditions may have made it more difficult to privatise these firms and thus eliminate the motivation to protect them. But pending successful privatisation, and in preparation for it, any special advantages in access to resources or to regulators should be eliminated.

– ***Assign formal responsibility for controlling anti-competitive state aids.***

The benefits of reducing direct state involvement in the economy could be compromised by a proliferation of indirect distortions and preferences that also distort competition. The need for centralised control of anti-competitive state aids is widely recognised. Turkey has already undertaken an obligation to control these subsidies in the context of its customs union agreement with the EU.[33] A general principle that applies to effects in Turkey, as well as to effects on trade with EU countries, would be a valuable addition to Turkey's substantive competition law. No single office in Turkey is responsible for this task. Increasingly, EU countries are incorporating this principle into domestic law and giving this responsibility to competition authorities, paralleling the assignment of responsibilities at the EC. The EC has proposed that the Authority and the Board perform this task in Turkey.

– *Develop a competition policy control on monopolies providing public services.*

Another item from the EU "toolkit" that Turkey has not yet adopted is a general principle to govern the treatment of public monopolies. The EU approach, based on Art. 86 of the EU treaty, provides some basis for limiting the anti-competitive effect of grants of special and exclusive rights or duties to perform services in the public interest. Turkey might consider adding that tool to its domestic law. In addition, Turkey might consider revisiting the interpretation of the technical jurisdictional definition of "undertaking." Narrow interpretation has limited the application of the Competition Act to state-related entities in important cases. In EU practice, the interpretation and application of this undefined term has led to broader application than Turkey recognises (Goyder, 1998, pp. 86-90).

– *Limit self-regulation to pro-competitive tasks.*

Some trade and professional associations with quasi-public status and statutory responsibilities for self-regulation can use those powers to fix prices and limit competition. This is one of the most significant formal exclusions from the competition law. Self-regulation to protect consumers against misrepresentation and injury is possible without eliminating competition. Any self-regulation needs to be monitored so that what purports assure quality is not just a device to prevent competitive entry. Provisions of the authorising legislation, and perhaps of the constitution itself, should be revised to eliminate those aspects that authorise professional and other service associations to fix prices and to limit entry on grounds other than competence, so the Competition Board can take law enforcement action against abuses.

– *Strengthen advocacy and the role of competition policy in regulatory analysis.*

Other parts of the government are to consult with the Competition Board about proposals that could affect competition. That direction, in a communiqué from the Prime Ministry's office, is not followed consistently. It appears to be treated more as guidance than as a formal requirement. The requirement for consultation should be more authoritative, and it should be integrated into the process of policy review.[34] On its own, the Board has undertaken a comprehensive review of the laws on the books and plans to submit a report to the government about provisions of law that are inconsistent with the Competition Act. The Board believes it is the only body with the power to make such a report without being invited to do so. It is equally important to be alert to the risks that new legislation or regulation will also impair competition unnecessarily. As Turkey adopts a stronger institutional structure for regulatory management, competition policy must be made part of it. In the meantime, the Authority and the Board should devote more resources to studies and public reports about competition issues in Turkish markets, building on increasing enforcement experience and pointing out the need for legislative change. Advocacy can be an important vehicle for educating the public about the need for pro-competitive reform and about the importance and value of competition policy.

– *Ensure consultation with sectoral regulators.*

As infrastructure (and other) monopolies are restructured, competition agencies and sectoral regulators need to be in continual communication to ensure policy consistency. Turkey's sectoral regulators are just being established. Co-ordination with the telecoms regulator is provided in the sectoral law, and the two agencies are both trying to make it work. So far, the energy law does not call explicitly for the same level of consultation with the regulator for electricity and gas. Although the agencies could co-ordinate the consideration of common issues even without legislative direction, statutory authority would eliminate any uncertainty about either agency's power, so that the Competition Board and the Competition Authority could participate as appropriate in the process of restructuring and developing the regulatory system for those sectors.

– *Simplify the merger notification standards and streamline the decision process.*

The always-ambiguous "market share" test for notification should be removed. Basing the obligation on a judgement about market definition and market share imposes unnecessary costs and risks. Problems of high-market-share mergers among relatively small firms, if any, could be handled after-the-fact. That would save firms the costs of pre-notification, although it would admittedly make enforcement more complex in those cases. But the savings in costs to firms are likely to be higher than the increase costs of enforcement in what would surely be a tiny number of cases. The aggregate turnover standard determines notification in nearly all cases already. Another potential problem in the merger process is the time that could be required for decision in a contested case. Mergers are usually time-sensitive, and if a consummation of a merger must await a decision that is 12-18 months away, parties may abandon it. For that reason, many jurisdictions set deadlines or special procedures to ensure prompt final decisions in merger cases. To be sure, virtually all transactions that are notified in Turkey are now processed and approved within the 30 day deadline, and the full process of investigating and deciding a claim of infringement has not been applied to a merger transaction yet. But if a merger is challenged as an infringement, even if firms are allowed to merge pending the Board's final decision they might not implement some potentially valuable strategies if there is a significant risk that their transaction will have to be undone or significantly modified. Thus provision of a faster track for final decisions about merger infringements could provide valuable certainty. There is some risk that tight deadlines for mergers could crowd other matters off the docket, but the Board's merger workload has not been disproportionate, so that risk is probably low.

– *Restore competition policy oversight of banking sector mergers.*

Once the emergency situation in the financial sector is under control, the exclusion for bank mergers should be repealed. Competition problems in the banking sector may spill over into other sectors, as problems of access to funds may discourage entry or encourage discrimination. To be sure, it will be necessary to devise institutional means of considering prudential and systemic regulatory issues along with competition issues, where those are relevant.

– *Strengthen administrative sanctions to aid investigations.*

Sanctions to ensure compliance with the administrative process should be strong and credible, so the Authority can get the information it needs to make sound judgements at reasonable cost. The financial sanctions for this purpose appear to have lost the battle with the inflation rate. Sanctions for substantive violations are adjusted annually for inflation. A similar system, and perhaps a higher basic level, should be applied to administrative sanctions as well.

– *Leverage and expand the Authority's reach through international co-operation.*

The Authority should consider forming stronger, more formal relationships for co-operation with other competition agencies. Increases in foreign investment and the expansion of the scope of foreign trade will increase the need for co-ordination and for obtaining information and evidence from abroad. This may be a particularly important practical problem for Turkey, which is not part of a supra-national structure with competition policy competence, such as the EU.

NOTES

1. Act 4054, on the Protection of Competition; passed 7 December 1994, effective 13 December 1994 upon official publication ("Competition Act").

2. Statutory Decree 494, amending Organisational Act 3143.

3. Constitution of Turkey, Art. 167.

4. It does not apply, though, to the acquisition of shares through inheritance, whether by an individual or by an undertaking (Art. 7 para. 1).

5. Communiqué Concerning Mergers and Acquisitions Calling for the Authorisation of the Competition Board

6. Merger Communiqué, Art. 6/1.

7. Early notification to the Board is required if the entity being be privatised has a market share over 20%or if it enjoys legal monopoly or other competitive privileges, or if its turnover exceeds TRL 20 trillion. Board approval is required even if pre-notification is not, if the acquiring firm has a market share over 25% or turnover over TRL 25 trillion.

8. Commercial Code, Art. 56.

9. Law 4077.

10. If there are not enough votes at the first meeting, the matter may be put on the agenda for the next meeting, and a decision may then be taken by a simple majority of the required quorum, of 8. In case of a tie, the Chairman's vote controls. Art. 51.

11. For such decisions, the required quorum is at least one-third of the members, or 4. Thus, as a practical matter, these measures require at least 3 votes.

12. Act on Prevention of Unfair Competition in Imports, No. 3577 and Regulations on Prevention of Unfair Competition in Imports.

13. The Board has found that associations may be "undertakings". In addition to the usual trade associations, the Board has also found that the football association is an "undertaking".

14. Statutory Decree 233, Art. 2.

15. Law 4491.

16. Law 4250.

17. Law 4733.

18. In theory, the scope of this monopoly has thus been narrowed somewhat. (Law 3978 on Salt, modified by Law 4373).

19. Law 2840.

20. The Constitution describes their functions and aspirations: “to meet common needs, to make their professional activities easier, provide development of profession in accordance with general advantages, to dominate [sic] honesty and trust in relations between public and members of the profession, to protect professional discipline and morality”. (Art. 135, para. 1)

21. Commercial Code, Art. 17.

22. Law 507 on Tradesman and Artisans, Art. 125.

23. Law 1136 Regarding Lawyers, Art. 168, 163(3).

24. Law 3568 on Free Accountancy, Financial Consultancy and Certified Financial Consultancy, Article 46.

25. Law 6023(28)(2) on Turkish Union of Doctors.

26. Law No. 3224/11(f) on Turkish Union of Dentists.

27. This sector is addressed in detail in a separate chapter of this study.

28. These sectors are addressed in detail in a separate chapter of this study.

29. Described above, in the box in the section discussing mergers.

30. The Energy Market Regulatory Board will deal with the petroleum sector, too, issuing licences for exploration and production of natural resources that are publicly owned.

31. Truck transport is addressed in a separate chapter of this study.

32. These are discussed in more detail in other chapters of this study.

33. Art. 34 of the Customs Union Agreement provides (in language that precisely parallels the EU Treaty): “Any aid granted by Member States of the Community or by Turkey through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between the Community and Turkey, be incompatible with the proper functioning of the Customs Union.”

34. The communiqué was issued by the General Directorate of Personnel and Principles of the Prime Ministry. Other parts of the Prime Ministry have direct responsibility for policy consultation about proposed legislation (the General Directorate of Laws and Decrees) and for ensuring the legal quality of proposed lower-level regulations (the General Directorate of Legislation Development and Publication).

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