



COUNTRY STUDIES

Turkey - Peer Review of Competition Law and Policy 2005

Introduction

This report updates the 2002 report on the role of Competition Policy in Regulatory Reform in Turkey. It assesses the developments of Competition Law and Policy occurred in the country since then. This report was prepared by Mr. Jay Shaffer to the OECD.

Overview

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2005



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**COMPETITION LAW AND POLICY
IN TURKEY**

-- 2005 --

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Foreword

Under the OECD's Regulatory Reform Program, a previous assessment of Turkey's competition law and policy was completed in 2002. It concluded that the Turkish Competition Authority ("TCA") had made a good start since it began operations in late 1997. The current report^{*}, which was the basis for a three-hour peer review in the OECD Global Forum on Competition on 18th February 2005, concludes that the Authority continues to make excellent progress. The TCA has developed a reputation as one of Turkey's most effective autonomous agencies, winning respect and support from leaders in the business community and playing a critical role in moving the Turkish economy forward to greater reliance on competition-based and consumer-welfare oriented market mechanisms. The TCA, however, faces a number of obstacles. Public understanding of and appreciation for competition policy is deficient, agency law enforcement efforts are slowed by inexperienced judicial review organs, and support from other parts of the government is less than complete. The OECD Secretariat report recommends changes that the TCA can itself make to enhance performance, and also suggests a variety of statutory modifications that would improve the legal environment for competition policy. The report's analysis and recommendations are particularly timely because effective implementation of national competition policy is an important element of Turkey's program to achieve formal membership in the European Union.

* This report was prepared by Jay C. Shaffer, consultant to the OECD, previously of the Antitrust Division at the US Department of Justice and Deputy General Counsel of the US Federal Trade Commission.

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EXECUTIVE SUMMARY

This Report assesses the development and application during the last three years of competition law and policy in Turkey. It follows an OECD report prepared in 2002 as part of a larger regulatory reform study. The previous Report found that the Turkish Competition Authority ("TCA") had made a good start since it began operations in late 1997. The agency has continued to make excellent progress since 2002, and has developed a reputation as one of Turkey's most effective and best administered agencies. It has pursued its mission with energy, imagination, and integrity and has won respect and support from leaders in the business community. Most importantly, it has played a critically important role in moving the Turkish economy forward to greater reliance on competition-based and consumer-welfare oriented market mechanisms.

The TCA does, however, face problems of the kind that often confront competition agencies in economies with a long tradition of strong government control. Public understanding of and appreciation for competition policy is far from well developed. The agency's law enforcement efforts are slowed by inexperienced judicial review organs. And support from other parts of the government is less than complete, although this is partially offset by the government's recognition that improving the competition policy framework will advance Turkey's goal of membership in the European Union.

The Competition Authority's particular strengths include its devotion to the articulation and efficient implementation of sound competition policy; its focus on due process and transparency; and its attention to the development and training of expert staff personnel. Its status as agency with fiscal and administrative autonomy, and the absence of substantive interference in its work by the government, also contribute significantly to its efficacy. It deserves commendation for its efforts to implement the recommendations addressed to it by the previous Report. Specifically, it has since 2002 advanced its competition advocacy activities within the government (in the privatisation process and elsewhere), assured timely resolution of merger review proceedings, sought to improve coordination with sector regulatory agencies in Turkey, and attempted to expand cooperative relationships with competition agencies in other countries. The agency's weaknesses include some disorganisation in its approach to harmonisation with EU competition law and the continuing problem of developing a robust competition culture. The most serious problems with competition law and policy in Turkey, however, entail not TCA operations but statutory deficiencies that will require Parliamentary action to correct. Necessary legislation includes institution of a mechanism to control state aids, elimination or control of state-created commercial enterprises that are vested with monopoly concessions or anticompetitive privileges, establishment of a mandatory role for the TCA in reviewing proposed laws and regulations, and modification of the Competition Act to improve the TCA's law enforcement capacity.

This Report makes proposals designed to address the full array of competition law and policy issues in Turkey today, and examines a variety of topics, including the competition policy provisions in the Customs Union Agreement between Turkey and the European Union, the interaction between the competition law and other statutory and regulatory

EXECUTIVE SUMMARY (cont.)

regimes, the terms of the Competition Act itself, and various policies of the Competition Authority. Some of the following proposals recommend action by branches of the government other than the TCA, while some involve changes that the TCA itself can make. In the first category, the Report recommends that Turkey:

- Promptly establish a mechanism for controlling anticompetitive state aid;
- Eliminate or control state-created enterprises that are vested with monopoly concessions or with powers and privileges enabling them to undertake anticompetitive conduct;
- Restore competition policy oversight of banking sector mergers;
- Mandate an explicit role for the TCA in regulatory analysis; and
- Improve the TCA's law enforcement capacity by amending the Competition Act to:
 - Simplify merger notification standards;
 - Adopt a revised standard for assessing mergers;
 - Modify the deadlines for the merger evaluation process;
 - Increase maximum fines for violations other than substantive infringements and make early consummation of mergers a substantive violation;
 - Create a *de minimis* exemption for agreements involving small enterprises;
 - Eliminate both mandatory notification of agreements and the negative clearance procedure, and consider modifying the 5-year duration limit for individual exemptions;
 - Establish a procedure for the settlement of cases by consent;
 - Eliminate minimum fines and authorize the TCA to offer lenient treatment to cooperative firms;
 - Establish personal fines and consider criminal penalties for managers who are responsible for substantive violations; and
 - Expand due process protections in TCA proceedings.

EXECUTIVE SUMMARY (cont.)

In the second category of proposals, the Report recommends that the Competition Authority:

- Adopt a more organised approach to harmonisation with EU competition law;
- Expand consultation with sectoral regulators;
- Exercise due care in employing the concerted practice presumption;
- Enhance transparency, particularly with respect to developing proposed statutory amendments and communiqués, and determining the size the fine assessments;
- Leverage and expand the Authority's reach through international co-operation;
- Consider requesting statutory authority to employ investigative powers in conducting non-law enforcement market studies;
- Promote public understanding of and support for competition policy; and
- Increase the numbers and expertise of TCA lawyers and augment the TCA's industrial organisation competence.

1. Competition policy in Turkey: Foundations and context

This report assesses the development and application of competition law and policy in Turkey since 2002. It updates the OECD's "Background Report on the Role of Competition Policy in Regulatory Reform," prepared in 2002 as part of a larger OECD study of regulatory reform in Turkey (hereafter "2002 Report").¹ As did the previous Report, this analysis begins with a description of the background of competition policy in Turkey and the context in which it operates.

Turkey's economic policies after World War II resembled those of many other developing countries. State monopolies supplied raw materials at non-market prices, a state-controlled banking system steered credit to favoured firms or sectors, and various subsidies distorted market responses. The private sector was weakened by reliance on the government. A series of economic crises in the 1970s exposed the deficiencies of the existing system and led to reforms that opened Turkey's borders to international trade and liberalised domestic market operations.

The need for a formal competition policy was recognised at the outset of the reform process and 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 set of competition and consumer protection policies. Both internal and external forces supported the development of competition legislation, and closure on a legislative model was finally reached in 1994 during Turkey's negotiation of a customs union with the European Union. The customs agreement included the EU's standard substantive provisions about competition, and obligated Turkey to enact those provisions as part of its own law (and establish a competition authority to enforce them) prior to the agreement's effective date of December 31, 1995.² The Act on the Protection of Competition, adopted by Turkey at the end of 1994, created the Turkish Competition Authority (TCA) as an autonomous antitrust enforcement agency, with a Competition Board to resolve cases and set policy.³

Beyond the economic and political incentives that played a role in developing Turkey's competition law, Article 167 of the Turkish Constitution provides an explicit foundation for competition policy by requiring that the state "take measures to ensure and promote the sound, orderly functioning of the money, credit, capital, goods and services markets; and ... prevent the formation, in practice or by agreement, of monopolies and cartels." In line with Article 167, the purpose of the Competition Act is stated simply as the "protection of competition" (Art.1), and the Act defines competition 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. 3). The Competition Authority adds, however, that the Act's ultimate objective is to protect the competitive process (not

merely rivalry among firms) in order to achieve efficient markets and promote consumer welfare. The Authority considers this approach consistent not only with Article 167 of the Constitution, but also with Article 172, which requires that the state “take measures to protect and inform consumers.”

Initially, competition policy was the responsibility of the General Directorate of Consumer and Competition Protection, which was established in 1993 in the Ministry of Trade and Industry.⁴ The Competition Board was appointed on 27 February 1997, two years after the Competition Act was adopted, and most of another year passed before the Board began operations in November 1997. The Board at that time assumed the competition law and policy functions, while the General Directorate turned its focus to handling consumer protection issues. The Competition Act has now been in force for ten years, and the Board has been applying it for seven years of that period.

At present, implementation of competition policy in Turkey is one element of a much larger national initiative to advance beyond the Customs Union Agreement and achieve formal membership in the European Union. In October 2004, the European Commission recommended that the EU open formal accession negotiations with Turkey, a recommendation that the EU member states accepted in December 2004. In Turkey, the Secretariat General for EU Affairs supervises a government-wide program to adopt the body of EU laws and regulations necessary for accession.⁵ Turkey has also continued to implement economic reforms required for accession, despite an economic crisis in 2000-2002 characterized by severe inflation and disruption in the banking system. New monetary and fiscal policies have subdued inflation, while restructuring and improved regulation and supervision in the banking sector has increased credit funding for investment. The government has also adopted a variety of changes respecting government intervention in the product, labour, and financial markets; infrastructure industries; and agricultural sector support programs.⁶

An important aspect of Turkey’s accession program that has implications for competition law is an ongoing effort to eliminate state monopolies and reduce the state’s share of the economy. Privatisation activities, stalled due to adverse economic conditions in 2001 and 2002, rebounded in 2003-2004. Divestiture of state assets is now complete (or virtually so) in textiles, paper, alcoholic beverages, petroleum distribution, and port management; and partially complete in fertilisers, mining, and natural gas distribution. Privatisation proceedings are presently underway with respect to state assets in telephony (involving 55% of Turk Telekom), tobacco, airlines (although only a 20% share at the outset), petroleum refining, sugar, fertilisers, and motor vehicle inspection stations. Planning for future privatisation has commenced for banking, electricity generation and distribution,

petrochemical manufacturing, and the national lottery.⁷ Nonetheless, the share of the state sector in the national economy is still significant. In value-added terms, state owned enterprises and state banks amounted to 7% of GDP in 2003, while government services accounted for another 13%. In the manufacturing sector, fully state-owned enterprises account for about one fifth of the sector's value added and for about 12% of sector employment. Economy-wide, employment in state-owned enterprises, including the banking sector, amounted to 2% of total employment (430,000 persons) in 2003.⁸ Further, despite some liberalisation, competition and private investment are notably weak in such sectors as electricity, natural gas, and some aspects of telecommunications, and service costs (especially those charged to businesses) remain high.

2. Substantive issues: Content of the competition law

Because the 1995 Customs Union Agreement with the EU obliges Turkey to adopt a substantive competition law that follows the EU model, the following box provides a summary of the EU's legal provisions for context.

BOX 1. EU COMPETITION LAW

The competition law of the European Union, as established in Articles 85 and 86 of the 1957 Treaty of Rome, was subsequently restated (and renumbered) in Articles 81 and 82 of the 1999 Treaty of Amsterdam. Article 81 deals with agreements and other forms of concerted action involving two or more firms, while Article 82 deals with unilateral conduct by a dominant firm or group of firms.

Agreements: Article 81(1) prohibits (and Article 81(2) renders legally void) all agreements and concerted practices "which have as their object or effect the prevention, restriction, or distortion of competition." The statutory text makes no distinction between horizontal and vertical restraints. The statute provides a non-exclusive list of unlawful conduct, including direct or indirect price fixing (both horizontal and vertical); limitation or control of "production, markets, technical development or investment;" sharing of markets or sources of supply; discrimination that places disfavoured firms at a competitive disadvantage; and the imposition of tying or other non-germane contract conditions.

Exemptions: Article 81(3) provides that an agreement that would otherwise be prohibited under Article 81(1) may nonetheless be permitted, provided that it (a) improves production or distribution, or promotes technical or economic progress; (b) allows consumers a fair share of the benefit; (c) imposes only such restrictions as are indispensable to attaining the beneficial results, and (d) does not eliminate competition for a substantial part of the affected product market.

EU COMPETITION LAW (cont.)

Article 81(3) may be invoked directly by the parties to a qualifying agreement as a defence to prosecution. In addition, the EU issues generally-applicable “block” exemptions that specify conditions under which various kinds of agreements (such as vertical distribution contracts and joint research and development arrangements) will enjoy the protection of Article 81(3).

Abuse of dominance: Article 82 prohibits the abuse of a dominant position. Again, the statute provides a non-exclusive list of conduct that is deemed to be abusive, including the imposition of unfair purchase or selling prices or other trading conditions; the limitation of production, markets, or technological development in ways that harm consumers; discrimination that places disfavoured firms at a competitive disadvantage; and the imposition of non-germane contract conditions. Dominance is often presumed at market shares over 50 percent, and may be found at lower market shares depending on other factors. The prohibition extends to abuse attributable to several firms acting together, even if no single firm has a sufficiently high market share to constitute dominance.

Mergers: Merger control does not arise directly from the Treaty articles, but from a separate EU regulation. Pre-notification is required for qualifying transactions, which are assessed to determine if they will “significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.”

The substantive prohibitions in Turkey’s law appear in Articles 4, 6, and 7 of the Competition Act. Article 4 deals with agreements and concerted practices and therefore parallels Article 81(1) of the EU law. Article 6, directed to abuse of dominance, is designed to follow EU Article 82, while Article 7 on mergers and acquisitions follows the EU merger regulation. Under Article 4 of the Act, “agreements and concerted practices” that have as their object or effect the prevention, distortion, or restriction of competition, or that have the potential for such effects, are prohibited.⁹ As in EU Article 81, the statutory text in Turkey makes no distinction between agreements in the horizontal and vertical dimensions. Also as in Article 81, Article 4 includes a non-exclusive list of anticompetitive practices that constitute potential violations.¹⁰

2.1 *Horizontal agreements*

With respect to horizontal agreements, the non-exclusive list of anticompetitive practices in Article 4 includes price fixing, market division, concerted control of outputs or inputs, boycotts, and entry deterrence. A unique feature of Article 4 is

language providing that the existence of unlawful collusion among competitors may be inferred if market conduct or conditions are similar to those that would arise in a market where competition is artificially distorted. The Board's approach to this presumption has been a topic of considerable controversy and is discussed in a later section of the report.

There are no statutory exemptions for "depression cartels" or for agreements among small businesses. The Board has been considering for several years seeking a statutory amendment that would create a *de minimis* exemption for agreements involving small enterprises. Such an exemption would be designed to cover agreements that, even if producing some anticompetitive effect, were of trivial significance in the relevant market. The exemption would parallel the existing EU *de minimis* regulation, which applies where the aggregate market share of the participating parties does not exceed 5% for horizontal agreements and 10% for vertical agreements.¹¹

Article 5 of the Competition Act empowers the Board to issue both individual and block exemptions, which operate to make the prohibitions in Article 4 inapplicable to specified conduct. Article 8 provides separately for the issuance of case-specific "negative clearances," which declare that a given agreement or practice is not contrary to Article 4. The criteria under Article 5 for granting both individual and block exemptions are the same as those established in Article 81(3) of the EU law, and require that the agreement at issue lead to improvements in production, distribution, or technology, and confer benefits on consumers; yet not eliminate competition in a significant part of the market or be more restrictive than necessary to achieve its beneficial objective. The maximum duration for an individual exemption is 5 years, subject to renewal. Both individual exemptions and negative clearances may be revoked if circumstances change, or if the parties fail to honour commitments or make misrepresentations in applying for the exemption (Art. 13). Block exemptions may be made applicable indefinitely or for any duration that the Board specifies, and may be revoked as to a particular agreement if the Board determines that the agreement has effects "incompatible" with the Article 5 standards.¹²

Although the principal features of the Turkish exemption and negative clearance scheme are modelled on the EU system, a significant distinction between the two has arisen because of recent changes in the EU's enforcement structure. Formerly, if the parties to an agreement wished to obtain protection under EU Article 81(3), but could invoke no applicable block exemption, they could file a notice of the agreement with EU competition authorities and request an exemption directed specifically to their agreement. The EU eliminated the system of case-specific exemptions under Article 81(3) effective May 1, 2004, while retaining the

block exemption system. The EU “negative clearance” system, which enabled parties to obtain a declaration that there were no grounds for prosecution of an action under Article 81(1) or Article 82, was likewise eliminated effective May 1, 2004.¹³ Turkey, in contrast, retains both individual exemptions and negative clearances, in addition to block exemptions.

In August 2003, the TCA issued a Communiqué on “Research and Development Agreements” No:2003/2, establishing a block exemption for R&D agreements. The TCA exemption differs in several ways from the comparable EU exemption (EU Regulation No 2659/2000). First, for projects in which the results of the R&D are jointly exploited, the EU exemption continues to apply for seven years after the products are first launched in the common market (art. 4.1), and thereafter for so long as the combined market share of the participants does not exceed 25 % of the relevant market for the contract products (Art. 4.3). In contrast, the TCA exemption for projects involving joint exploitation continues to apply for only five years after product launch in Turkey (Art. 4). The TCA describes its approach as reflecting both the five year duration specified for individual exemptions in Article 5(2) of the Competition Act, and the provision in the previous version of the EU’s R&D block exemption (No. 418/85, Art. 3.1) which established a five year duration for R&D projects involving joint exploitation.

Second, the EU exemption requires that, where at least two of the project participants are competitors, the total market share of all project participants must not exceed 25 % of the relevant market at the time that the R&D agreement is initiated (Art. 4.2). The TCA employs a bifurcated scheme under which the total market share of the participants must not exceed 40% if project products are jointly marketed by competitors (Art. 5(a)), and must not exceed 20% if the project products are marketed solely by one of the participants or by a firm designated or controlled by the participants (Art. 5(b)). The TCA’s explanation for this difference again refers to the earlier EU block exemption, which also employed a bifurcation under which the market share ceiling was 20% for agreements entailing joint manufacture by the participants (Art. 3.3) and 10% for agreements that involved distribution of products by a single party or joint undertaking (Article 3.3a). According to the TCA, the high 40% market share ceiling in its regulation reflects the fact that R&D programs in Turkey are initiated primarily by large companies. Establishing a lower ceiling would risk suppressing the volume of R&D expenditures, which is already a smaller share of Turkey’s GDP than is considered desirable. On the other hand, the low 20 % ceiling applicable to projects that involve restricted product distribution arises from the TCA’s concern about the potentially serious anticompetitive impact of such restrictions in downstream markets.

Third, the EU block exemption specifically permits project participants to fix prices where the project products are jointly produced (Art. 5.2(b)). Further, whether or not products are jointly produced, project participants may, for the first seven years after product launch, implement customer marketing restraints (Art. 5.1(e)) and impose territorial marketing restrictions on “active sales” (Art. 5.1(g)).¹⁴ The TCA exemption, in contrast, prohibits all such contract provisions unconditionally (Arts. 6(e) and 6(f)). The TCA explains that because restrictions involving downstream prices, customers, and territories are considered to have the potential for severe anticompetitive consequences, the agency prefers to address such contract provisions through applications for individual exemptions under Article 5.

No other block exemptions involving horizontal arrangements have been issued thus far by the TCA. The agency has undertaken preliminary planning to adopt block exemptions similar to the EU’s existing exemptions for the maritime, airlines, and insurance industries. The agency’s efforts to develop a technology transfer block exemption parallel to the comparable EU exemption are presently in abeyance because of provisions in Turkish patent law that permit exclusive patent licenses without restriction. The EU exemption, in contrast, permits exclusive licenses only if the combined market shares of the parties involved fall below specified ceilings (Art. 3). The TCA expects to formulate a solution to this conflict in laws during 2005 and will then resume its project to issue a technology transfer exemption.

The enforcement experience under Article 4 of the Act with respect to horizontal agreements reflects chronic problems of cartel behaviour in some sectors of the economy. In the period before the Authority was constituted in 1997, the General Directorate of Consumer and Competition Protection prosecuted cartel cases against the cement industry, bakeries, bus companies, the poultry industry, distributors of periodical publications, and the association of corrugated container manufacturers. Subsequently, between 1997 and 2002, the Board rendered decisions against further anticompetitive agreements among bakeries, periodical distributors, and cement producers, including a 1999 case in which five cement companies were fined nearly 900 billion Turkish Lira (“TRL”) (USD 603,000) for a price-fixing and market-division agreement in the Aegean region. Since the previous OECD Report in 2002, additional cases have been filed with respect to bakeries (Ankara, Gaziantep, Kütahya) and buses (Konya), while yet another cement prosecution involving the Ankara and South Marmara markets resulted in fines against 18 firms totalling TRL 4.88 trillion (USD 3.3 million).

Other recent proceedings have involved different sectors, including cases that attacked price fixing, bid rigging, and market division in the agricultural fertiliser industry (6 firms fined TRL 7.3 trillion, USD 4.9 million); a joint marketing agency formed by competitors to sell advertising time on Turkish TV channels; bid rigging

sales of individual-serving milk cartons to schools, and price fixing and market sharing in the ceramics industry (30 firms fined TRL 13 trillion, USD 8.7 million). A 2003 proceeding found an agreement between 11 insurance companies and a reinsurance facility to set prices for fire insurance, as well as a separate scheme orchestrated by the Turkish Union of Insurance Companies to set tariffs and conditions for various forms of insurance coverage.

The 2002 Report observed (p. 10) that, in the horizontal area, the TCA “concentrates its enforcement attention on price-fixing and market division cartels that restrict horizontal competition.” In the past several years, the Board has also been examining fee agreements organised by public professional associations. In Turkey, the members of many professions are required to maintain membership in professional associations established by statute. Some association statutes have provisions that contemplate the promulgation of binding fee schedules, while others do not. In early 2002, the Board fined the Turkish Architects’ and Engineers’ Chambers Association (TAECA) and ordered it to abolish its by-law provisions setting minimum fees. The Association’s authorising statute entailed no price setting power.¹⁵ By contrast, in late 2003, the Board decided that no prosecution could lie against the minimum fee schedules promulgated by the Turkish Medical Association, the Turkish Dental Association, and the Turkish Bar Association, because the foundation laws for those associations clearly articulated their authority to establish fee minimums.

Even if an association has price setting authority, however, an anticompetitive agreement among members of the profession is susceptible to attack by the Board if the agreement is not established by the association itself. Thus, the Board imposed fines on a group of mechanical engineers in Konya found to have created a “revenue pool” through which they equally shared revenue from their various jobs. Such agreements were not contemplated by the Konya Chamber of Mechanical Engineers, thus making irrelevant whether the Chamber had statutory authority to authorise such arrangements.

The most recent (and interesting) action in this field is a January 2004 decision by the Board in a case against TURSAB, the Turkish Association of Tourism and Travel Agencies. By statute, membership in the Association is mandatory for travel agents in Turkey. The focus of the case was not fees charged by agents to customers, but rather fees charged by the Association to its members. The Association is empowered to make expenditures promoting tourism in Turkey and may raise funds for this and other purposes by establishing both annual membership fees and a registration fee for new travel agents. The Board concluded that the power to set a registration fee did not include power to create an entry barrier violating Article 4 of the Competition Act. Finding that the Association had set the registration fee so high

as to deter new entry in the market, the Board ordered establishment of a reasonable fee and imposed a fine. This case is the first Board decision to invoke the “entry deterrence” clause in Article 4 as the basis for a violation.

2.2 *Vertical agreements*

Turkey uses the EU rulebook for vertical restraints. The non-exclusive list of anticompetitive vertical practices in Article 4 of the Act cites resale price fixing, discrimination between similarly situated parties, tying, and actions designed to impede competitors or prospective entrants. As is true for horizontal practices, the Board may issue both individual and block exemptions that make Article 4 inapplicable to specified forms of vertical conduct, while case-specific “negative clearance” declarations may be issued under Article 8.

In July 2002, the Board issued a new block exemption for vertical agreements (Communiqué No: 2002/2). The exemption, which superseded and revoked three previous block exemption regulations dealing with vertical agreements,¹⁶ is based largely on the revised block exemption issued by the EU in December 1999 (Regulation 2790/1999). The TCA’s new exemption is broader in scope than the three exemptions it superseded in that it covers vertical agreements involving more than two undertakings, purchase (supply) agreements as well as distribution agreements, and agreements relating to services as well as products. It also covers agreements involving the purchase, sale, transfer or use of intellectual rights by or to the buyer, provided that (1) the intellectual rights relate directly to the goods or services forming the primary subject of the agreement, (2) the transfer or use of intellectual rights is an ancillary feature of the agreement and not its principal objective, and (3) the agreement does not contain provisions that are excluded from the scope of the exemption.

Like its EU counterpart, the new exemption eliminates the list of “permissible” contract provisions that appeared in the predecessor exemptions, and simply specifies the provisions that render the exemption inapplicable (including, most prominently, resale price maintenance). At the time it was issued, the TCA exemption differed in two significant ways from the comparable EU block exemption. First, while the EU exemption excludes from protection any “non-compete” clause¹⁷ the duration of which is indefinite or exceeds five years, the TCA exemption included a special provision permitting a longer duration where a supplier undertook 35% or more of the investment required for the buyer to commence operations. In such circumstances, a non-compete restriction could extend for up to ten years if the buyer continued operations on the premises for which the investment was made. The Authority’s explanation for adopting the ten year limit is that, in some sectors (including specifically fuel oil distribution), a five year period is

insufficient time for a supplier who has invested in a distributor's facilities to recover the investment. After the block exemption was issued, however, the TCA became aware that the 35% investment clause was susceptible to exploitation in situations that did not truly warrant a ten year investment recovery period. Therefore, in September 2003, Communiqué 2003/3 was issued to delete the provision dealing with 35% investments, thus bringing the block exemption on that point into congruence with the EU model.

The second, more significant (and still existent) difference between the TCA exemption and the EU version is that the EU exemption protects agreements only if the supplier's share of the relevant market does not exceed 30%, while the TCA exemption has no market share ceiling. The Authority's explanation for this difference is that its version provides firms possessing market power with desirable flexibility to adopt efficient contract provisions. The Authority recognises that such provisions can have anticompetitive effects, but considers that there are other enforcement alternatives preferable to a market share ceiling. First, the exemption may be withdrawn, either with respect to a specific offending firm by means of the Board's revocation authority under Article 13, or with respect to all of the firms in a particular market by issuing an amended Communiqué. Second, because block exemptions apply only to Article 4 of the Act and provide no protection from an abuse of dominance action, an enforcement action may be commenced against an offending firm under Article 6 of the Act,

In fact, the Board has withdrawn the vertical block exemption in three instances. In an August 2003 case, a leading bank that required retail outlets to honour only the bank's brand of credit card was stripped of protection. The bank was also assessed a fine because the non-compete clause in question extended for an indefinite duration and thus was not covered by the block exemption in any event. The Board withdrew the exemption as a precaution, to prevent the bank from re-instituting the non-compete clause with a 5 year duration that would have passed muster under the exemption's terms.¹⁸ In the second case, the dominant firm in the salty snacks market was barred in May 2004 from including non-compete clauses in its distribution agreements with retail outlets. The third case involved withdrawal of the exemption in September 2004 from a firm that had established exclusive contracts with numerous food retailers to provide on-line order services to customers. In all three cases, the Board concluded that the restrictive clauses yielded no significant efficiencies and served principally as a barrier to entry by competing suppliers. At present, the Board has further cases underway to examine the non-compete clauses employed in agreements with retail outlets by certain firms in the beer and soft-drinks markets. More broadly, the TCA's staff is reassessing the entire Communiqué, with a particular focus on whether to introduce a market share limit similar to that in the EU exemption.¹⁹

In June 2003, the TCA issued Vertical Guidelines,²⁰ designed to provide guidance about vertical restrictions similar to that provided by the EU's 2000 Guidelines on Vertical Restraints (2000/C 291/01). The TCA Guidelines are considerably less elaborate and detailed than the EU version, and one difference between the two has proven consequential for franchisors doing business in Turkey. The difference relates, again, to the permissible duration of non-compete provisions. The vertical block exemptions of both the EU and the TCA generally limit non-compete clauses to a five year duration, subject to renewal by mutual agreement of the contracting parties. Section 200(2) of the EU's Vertical Restraints Guidelines, however, includes the following language directed specifically to franchise agreements:

A non-compete obligation on the goods or services purchased by the franchisee falls outside Article 81(1) when the obligation is necessary to maintain the common identity and reputation of the franchised network. In such cases, the duration of the non-compete obligation is also irrelevant under Article 81(1), as long as it does not exceed the duration of the franchise agreement itself.

The TCA's Guidelines have no comparable language, and the TCA takes the position that the five year limit applies to franchise non-compete clauses as it does to all others. Franchisors in Turkey complain that such clauses should be permitted for the life of the franchise agreement, as they are in Europe. The TCA responds that franchisors may petition for a negative clearance, which can be issued for an unlimited duration. Presumably, the petitioner would argue that a negative clearance was warranted because, in line with EU policy, a franchise non-compete clause does not violate Article 4 if it is limited to the life of the franchise contract.

The Authority has issued one other vertical block exemption. Communiqué No. 1998/3, dealing with distribution and servicing agreements for motor vehicles, is virtually identical to the EU's former Regulation No: 1475/95. The EU replaced its exemption with a new version in 2002 (No. 1400/2002). The problems that lead to the EU revision (especially those relating to the distribution of services and spare parts) have been experienced in Turkey as well, and the TCA has a project to develop revised language for its exemption modelled on the current EU text.

The 2002 Report (p. 12) observed that vertical agreements have drawn relatively little of the TCA's law enforcement attention, and this remains true. The TCA focuses some attention on resale price maintenance, bringing one or two cases per year. An enduring concern has been to prevent suppliers who operate restrictive distribution systems from suppressing intra-brand price competition by discouraging dealers from making "passive sales" in the territories of other dealers.²¹ The TCA

does not, however, attack maximum or suggested resale prices, which Article 4(a) of the vertical block exemption permits suppliers to specify if such prices “do not amount to a fixed or minimum sale prices as result of the pressures or incentives by any of the parties.” Recent vertical cases include a 2002 proceeding in which the TCA attacked contracts employed by a port operator. Under the contracts, vessels using the port were required to employ a specified port services company. The Board treated the contracts as impermissibly tying port agent services to use of the port, thus restraining competition for the delivery of port agent services. Also in 2002, the Board assessed fines for maintaining resale prices against a manufacturer of liquid carbon dioxide. A similar case was prosecuted against a manufacturer of fruit juices and fruit drinks in 2003. And in 2004, the Board resolved a case involving alleged exclusivity requirements imposed on cigarette retailers by requiring cigarette manufactures to notify their distributors and retail sales outlets that prohibitions on the use of display racks provided by competing manufacturers were illegal.

2.3 Abuse of dominance

Article 6 bars abuse of a dominant position, whether perpetrated by a single firm or by several firms acting jointly. 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 amounts distributed (Art. 3). There is no particular market share test for presuming or identifying dominance, although EU case law is considered relevant about those subjects. The non-exclusive list of abusive practices in Article 6 is based on the list in EU Article 82, and the two lists overlap in their references to discrimination between similarly situated parties, tying, and the restriction of production or technical development to the detriment of consumers. Turkey, however, does not include the EU’s reference to the imposition of “unfair purchase or selling prices or other unfair trading conditions,” and adds references to the exclusion of competitors, the exploitation of market power to distort competition in a different market, and resale price maintenance.

The TCA fully recognises the importance of preserving incentives for firms to improve their market position by introducing efficiencies and innovation, and is therefore cautious in pursuing abuse of dominance investigations. Recent cases have focused on efforts by market leaders to raise entry barriers or otherwise exclude competitors. A 2003 decision involved ÇEAŞ, a company holding a monopoly concession for the distribution and transmission of electric power in one of Turkey’s 33 designated distribution areas. The Board found that refusals by ÇEAŞ to provide system interconnections for independent electric generation facilities were unjustified and fined it TRL 9.5 trillion (USD 6.4 million). In a 2002 case against

Karbogaz, the Board barred exclusive contracts for the sale of liquid carbon dioxide to end users and imposed a fine of TRL 311 billion (USD 208,000). In January 2004, the Board rejected a predatory pricing complaint against Coca-Cola, finding that Coke's prices, although below average total cost, were above average variable cost and that Coke had no predatory objectives in setting its pricing policies

The telecommunications sector has been a fertile field for proceedings under Article 6. In a March 2002 decision against Turkcell and Telsim, the Board concluded that the two firms exercised joint dominance over the "essential facility" infrastructure necessary to provide national roaming capability for GSM mobile telephone services. The Board found that the defendants had denied a prospective service provider use of their infrastructure without a legitimate basis in violation of Article 6, and assessed a total fine of TRL 30.4 trillion (21.8 trillion to Turkcell and 8.6 trillion to Telsim). The amount, equivalent to about USD 20.4 million, is the largest fine imposed by Board since its creation in 1997. The Council of State has suspended execution of the Board's decision pending appeal.

Other Article 6 cases have involved Turk Telekom (TTAŞ), the state-owned monopoly provider of land line telephone infrastructure. In late 2002, a fine of TRL 1.1 trillion (USD 737,000) was imposed on TTAŞ for excluding competition in the dial-up internet services provider ("ISP") market. The Board found that independent ISPs could not effectively compete for retail customers because of the spread between the low prices charged by TTAŞ to its own retail customers and the high prices charged to the competing ISPs. A separate proceeding in 2003 involved a refusal by TTAŞ, the only provider of ADSL internet service (broadband high-speed service over telephone lines), to allocate ADSL ports to other internet service providers. The Board advised TTAŞ to cease selling ADSL ports to new retail customers until promulgation of the access regulations that were then pending before the national Telecommunications Authority. The Board observed that severe entry barriers could arise if Turk Telekom sold all of its ADSL ports to retail customers without reserving any for re-sellers. The Board added that a refusal to cease sales would lead to the initiation of a formal investigation. TTAŞ duly ceased selling ports until the access regulations were issued. A pending investigation of TTAŞ focuses on its refusal to grant competing providers of broadband internet services access to its cable TV infrastructure.

Another abuse of dominance case that warrants mention here is the 2001 decision in the BELKO case. This case had been completed by the time of the 2002 OECD Report and is noted there as an important precedent showing the TCA's ability to assert jurisdiction over state-created monopolies (p. 21). It is also important, however, for the light it sheds on the Board's approach to Article 6. The city of Ankara granted BELKO a monopoly concession to import and sell coal for

heating purposes. BELKO was found liable for abusing its dominant position by charging excessively high prices, even though it did not earn excessive profits. The Board ascribed the firm's excessive prices to its "failure to exercise maximum care and diligence in protecting the Company's interests in making purchases; overstaffing; [and incurring] costs higher than what they should have been, due to ineffective style of management."²²

Prosecuting a dominant firm merely for charging monopolistic prices is ordinarily problematic, because it is unwise to punish a firm for the rational exercise of market power lawfully obtained. Inefficient monopolists that set high charges, moreover, are especially likely to attract new entrants.²³ In BELKO, the Board recognised these considerations and emphasized that the conjunction of two critical features justified a finding of illegality. The first was that BELKO's monopoly concession precluded any entry by competing suppliers, and the second was that heating coal was a commodity with a highly inelastic demand function. After the decision was rendered, the Ankara city government accepted a recommendation from the Board to withdraw BELKO's monopoly concession.

2.4 Mergers

Article 7 of the Competition Act, and the associated Merger Communiqué issued by the Board in 1997,²⁴ deal with mergers and acquisitions accomplished by the transfer of stock, assets, or managerial authority. Joint ventures are covered if the emerging entity is an autonomous economic actor.²⁵ Article 7 bars any merger or acquisition that "creates or strengthens the dominant position of one or more enterprises, as a result of which competition is significantly impeded" in a relevant market. At the time of Article 7's adoption, this language mirrored that in the EU's merger regulation (No 4064/89). In January 2004, however, the EU issued a new merger regulation (No 139/2004), effective May 1, 2004, that recast the prohibition so as to bar mergers or acquisitions that "would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position" (Art. 2(3)).

This change was introduced by the EU to deal with the mergers that presented the risk of anticompetitive "unilateral" effects even though not leading to dominance. The definition of dominance in the EU (like that in Turkey's law) covers market control consolidated in the hands of either a single firm *or a group* of cooperating firms. Mergers that produced oligopolistic market structures leading to anticompetitive coordination among the surviving firms could effectively be addressed under the dominance clause of the existing merger regulation. But the regulation could not be deployed against combinations that merely presented a risk of anticompetitive effects arising from "the non-coordinated behaviour" of the

remaining firms.²⁶ The solution reached by the EU was to make dominance an example of a significant anticompetitive effect arising from a merger, rather than demanding the creation of dominance as a prerequisite for illegality. As is typical for changes in antitrust law adopted by the EU, the TCA has this amendment under consideration for inclusion in Article 7 of the Competition Act.

The Board's Merger Communiqué establishes the details of the merger review process and specifies the factors employed in merger assessment. Under Article 6(b) of the Communiqué, the Board applies a standard multi-element analysis to mergers, evaluating market structure, the parties' economic and financial situation, alternatives available to purchasers, likelihood of entry, legal or other barriers to entry, technological developments, supply and demand trends, and the interests of intermediaries and ultimate consumers. The Communiqué expressly contemplates approval of transactions that establish efficient-scale operations able to compete with imports.²⁷ The Board has in the past also approved acquisitions of failing firms where there were no alternative purchasers, although no such cases have been presented since the previous Report. Only 2 mergers have been rejected *in toto* during the years that the Board has been responsible for merger control. The following table summarizes merger review activity from 1999 to the present.

Table 1. Board Determinations in Merger, Acquisition and Joint Venture Matters under Article 7¹

YEAR	Transactions Permitted without Conditions	Transactions Subjected to Conditions		Transactions Disapproved
		Substantive	Ancillary	
2004	98	4	5	0
2003	72	3	6	0
2002	53	1	5	2
2001	42	2	2	0
2000	48	2	1	0
1999	24	1	0	0
Total	337	13	19	2

1. Table includes mergers examined in privatisation proceedings

Source: Turkey, 2005

The Board has imposed conditions on about 9 % of transactions. Less than half of the conditional cases entail substantive requirements affecting the disposition of assets. The remainder involve ancillary provisions in acquisition agreements. DSM's 2003 acquisition of Roche's vitamins and chemicals division provides an example of a substantive condition case, as the Board in that matter approved the transaction subject to DSM's divestiture of its interest in an existing joint venture with BASF to produce animal food enzymes. Similarly, Syngenta, a manufacturer of seeds and crop protection products such as fungicides and herbicides, was permitted to acquire Advanta in 2004 subject to divestiture of Advanta's operations in the sunflower seed market.

An example of an ancillary condition case is Cargill's acquisition in 2002 of Cerestar, Montedison's starch and sweeteners subsidiary. The Board concluded that, due to the presence of large buyers and alternative sources of supply, coupled with an absence of entry barriers, no competitive concerns were presented by the acquisition itself. The Board approved the acquisition, but required that a non-compete provision against Cerestar be reduced from three to two years because the transaction involved no transfer of specialised know-how. Another provision that prohibited Cerestar from taking more than a 5 % share in any rival firm was altered to prohibit only the taking of a controlling share.

Most transactions (91%) have been approved without conditions. A 2002 joint venture involving four domestic producers of enamelled copper wire was permitted so that sufficient scale would be attained to permit competition for sales in the international market. Domestic wire purchasers were not at risk because prices were constrained by readily available imports and the production capacity of other suppliers could easily be increased. The impact of the transaction in the copper supply market was also assessed, because one of the joint venture partners was integrated into copper production. The Board concluded that, even in the unlikely event that the joint venture confined all of its copper purchases to an affiliated firm, any market effects would be minor. Also approved was a 2003 transaction in which the Dow Chemical Company acquired certain acrylic acid and acrylate product lines from Celanese AG. None of the affected production facilities were in Turkey, but Dow's post-merger share of sales in the relevant Turkish product markets would range from 57 to 90%. The Board decided to clear the acquisition despite the high market shares, because numerous firms exported the products to Turkey, there was excess production capacity, and domestic purchasers could easily switch suppliers if Dow increased its prices. The Board also noted that the high market shares held by Dow reflected, in part, the transient impact of currency fluctuations, since Dow's sales were denominated in US dollars while those of Dow's competitors were mainly denominated in higher-value euros.

In late 2003, the TCA reviewed the merger of two smaller GSM mobile telephone operators, Aria (İŞ-TİM) and Aycell. Aycell was a subsidiary of Turk Telekom, the state-owned company operating Turkey's fixed line telephone system. The Board permitted the merger because TTI, the resulting entity, would not obtain a dominant position in the GSM services market, nor would the dominant position of Turk Telekom in the telecommunications services and infrastructure markets be enhanced. The Board considered but rejected claims from other GSM operators that the merger should be barred because Turk Telekom might favour TTI through cross-subsidisation and discriminatory interconnection services.

Mergers in the banking sector of the economy have been effectively removed from the TCA's jurisdiction. Emergency banking legislation, adopted in 1999 and subsequently expanded and made permanent in 2001, contains the only example in Turkish law of an express exclusion from the Competition Act. Under the legislation, bank mergers in which the market share of the merged entity falls below 20% of a presumed national banking market are expressly made exempt from Article 7 and are subjected to control only by the national Banking Regulation and Supervision Agency. This ceiling is sufficiently high to constitute a *de facto* exclusion of all bank mergers. The 2002 Report recommended (p. 32) that the exemption be repealed once the bank emergency had been resolved, but the government has not proposed such legislation, despite the urging of the TCA.

Article 7 of the Competition Act, besides setting out the substantive standard for reviewing mergers, also provides that the Board shall specify by regulation the categories of transactions that require prior notification to and authorisation by the Board. Under Article 4 of the Merger Communiqué, notification is required if either (1) the parties' combined market share exceeds 25% of the relevant market in Turkey, or (2) their aggregated turnover in Turkey exceeds TRL 25 trillion (USD 16.75 million). The 2002 Report recommended (p. 32) that the merger notification system be modified to eliminate the market share test, on the grounds that the test rarely had independent significance and that the obligation of small firms to determine whether they met the test imposed costs without commensurate benefits. No action has been taken to implement this recommendation, but the TCA staff currently has underway a project to revise the merger review system and one item on the agenda for consideration is elimination of the market share test.

The Act also establishes the time limit by which the Board must complete its preliminary examination of a notified transaction. Under Article 10(2), the Board may take 15 calendar days after notification to determine whether it will either permit the transaction to proceed or commence a formal investigation. If the notification filing is incomplete or incorrect, however, the 15 day period does not begin to run until the deficiencies are resolved. The TCA reports that it must

frequently request missing information, particularly with respect to transactions that appear to raise competition issues. Some merging parties, meanwhile, have taken advantage of the short 15 day period by filing their notification forms late on the Friday before a holiday week.

If the Board determines to open a formal investigation, the parties to the merger are advised of the agency's preliminary objections and the investigation then follows the normal process established by the Competition Act for all contested matters. If the Board neither replies to a notification nor takes any other responsive action within the initial 15 day period, Article 10(3) provides that the merger agreement "shall be legally effective after 30 days following the notification." This language leaves unclear the agreement's precise legal status during the period between 15 and 30 days after notification. The TCA staff, as part of its project to revise the merger review system, plans to recommend that the preliminary examination period be extended from 15 days to 30, a change that would both address the problem of late Friday filings and resolve the ambiguity in Article 10(3) respecting the effective date of transactions.

The 2002 Report expressed concern about the fact that formal investigations of notified mergers are subject only to the standard statutory deadlines applicable to any investigation under the Act. The Report noted that formal processes can take 6 months (and well over a year if all available extensions are granted), and observed that parties might abandon a merger if obliged to wait 12 to 18 months for a decision (p. 14). The Report urged Turkey to follow the example of other jurisdictions and set deadlines or special procedures to ensure prompt final decisions in merger cases (p. 32). The TCA replies that only 10 merger cases since 1999 have involved opening a formal investigation, and that none of those investigations lasted more than three months. Nonetheless, the TCA staff expects to recommend creation of a process tailored for mergers that would subject case proceedings to a maximum duration of three months.

The Competition Board concluded shortly after its establishment that the broad merger control provisions in Article 7 were applicable to privatisation transactions conducted by the state.²⁸ To ensure timely review of such transactions, the Board issued a communiqué in September 1998 (No. 1998/4) specifically addressed to privatisation proceedings administered by the Privatisation Administration.²⁹ This was soon amended to cover privatisations carried out by any public institution or organisation.³⁰ The Communiqué provides (Art. 5) that a privatisation transaction will not be legally effective absent Board approval in any case (1) where advance notification of the transaction is required by the Communiqué or, (2) even if advance notification is not required, where the acquiring firm has a pre-transaction market share above 25% or turnover exceeding TRL 25 trillion. The separate advance

notification requirement (Art. 3) applies wherever the entity being privatised (1) has a market share over 20%, (2) has turnover exceeding TRL 20 trillion, (3) possesses a legal monopoly, or (4) enjoys statutory or *de facto* privileges not accorded to private firms in the relevant market. Article 4 of the Communiqué requires that advance notification be provided to the Board before the tender is announced to the public, so that the Board can provide its views on the proper method of structuring sale of the privatisation assets. Thus, the Board has two opportunities to influence the outcome, one at the time the tender is devised, and again when a particular firm is identified as the acquirer. At the first stage, the Board acts as a competition advocate, providing its views for consideration by the agency responsible for conducting the privatisation. At the second stage, the Board acts as a law enforcement agency, issuing binding determinations under the merger control provision in Article 7 of the Competition Act.

The TCA has reviewed 33 privatisation transactions under Article 7 since 2000 – none in 2001 or 2002, but 13 in 2003, and 20 in 2004. In general, the Board has permitted the establishment of efficient-scale firms while resisting the creation of post-privatisation monopolies.³¹ An important case in 2003 involved the alcoholic beverages division of TEKEL, which had previously been the state's monopoly provider of alcohol and tobacco products. TEKEL's monopoly was eliminated prior to the tender, and the Board approved a block sale of TEKEL's alcoholic beverage production facilities to a joint venture group. The Board found that, in the three relevant markets (beer, raki and other high alcohol drinks, and wine), TEKEL's share was either less than dominant or exposed to vigorous new entry that made maintenance of dominant power unlikely. Another 2003 case involved privatisation of IGSAS, a state firm that manufactured nitrogenous and composite fertilisers. The Board had rejected an earlier privatisation attempt in 2000 because the prospective purchaser already had a significant presence in the relevant market. The second proceeding resulted in the sale of IGSAS without objection to a firm that had no operations in the industry.

A 2004 privatisation proceeding involved TÜPRAŞ, a state corporation that held 86% of Turkey's petroleum refining capacity. The Board approved sale of the firm to a German subsidiary of a Tatarstan-based company,³² but noted that any new refining capacity investment by the firm would be assessed for entry deterrence effects on potential entrants into the refining market.³³ Also privatised in 2004 were ESGAZ and BURSAGAZ, two natural gas distribution companies that had been affiliates of Turkey's vertically integrated natural gas company. The Board authorised acquisition of the companies by private sector firms without conditions because the highest bidders had not previously operated in the market and the sector was in any event heavily regulated under the Natural Gas Market Law.

2.5 *State aids*

Article 34 of the Customs Union Agreement, in language tracking Article 87 of the EU Treaty, bars Turkey and the EU Member States from providing state resources to aid undertakings or economic sectors where doing so “distorts or threatens to distort competition ... between the Community and Turkey.” Although this Article is part of the “Competition” section of the Agreement, state aids are treated differently from the substantive antitrust provisions found in EU Treaty Articles 81 and 82. The Customs Agreement required Turkey to adopt the competition provisions in Articles 81 and 82 as part of its own positive law, but imposes no such obligation for the state aid provision. Instead, under Article 39(2) of the Agreement, Turkey must “adapt” all of its existing aid schemes to EU standards, and comply generally with the notification and guidelines procedures established by the EU to control aid by Member States. In another important respect, however, the antitrust and state aids provisions are treated alike. Article 37 of the Agreement requires that Turkey adopt, within two years after the effective date of the Agreement, the “necessary rules” for the implementation of the provisions relating to both antitrust and state aid.

Despite that deadline, the required rules have not yet been adopted, essentially because Turkey has been unable to reach consensus on a mechanism for aligning its aid system with the EU’s requirements. A draft version of the Article 37 implementing rules has been developed that specifies the organic entities in Turkey and the EU responsible for enforcing the competition laws and controlling state aid. The draft text establishes procedures for notification, information exchange, and coordination of enforcement activities between the two jurisdictions; and provides mechanisms for avoidance of conflicts and resolution of disputes. The draft lists the TCA explicitly as the agency responsible for competition enforcement, but the provision relating to state aid lists only a non-existent “Turkish State Aid Monitoring Authority.” The EU’s annual accession reports on Turkey routinely decry the failure to resolve this question and call for the establishment of an “operationally independent” state aid monitoring agency.³⁴ The 2002 OECD Report (p. 30) likewise recommended creation of an aid monitoring system.

The Turkish government proposed legislation in 2003 that would vest primary authority to control anticompetitive state aid in the State Planning Organisation (“SPO”), an executive branch entity that is part of Turkey’s existing state aids bureaucracy. The bill establishes a Directorate General for state aid within the SPO, along with a State Aid Monitoring and Supervising Board that would have power to render judgments on the propriety of particular state aid programs.³⁵ The TCA filed comments objecting to the bill on the grounds that primary authority to control anticompetitive aids should not be assigned to any agency that has responsibility for

planning aid programs. The TCA argued that it is best suited for the task, since it is an independent agency with experience in assessing anticompetitive effects. The bill is pending.

2.6 *Unfair competition and consumer protection*

“Unfair” competition is not addressed in the Competition Act, but in Turkey’s Commercial Code for regulating business dealings between private parties. The Code defines unfair competition as “deceptive action, or any kind of abuse of various ways of economic competition, contrary to the rules of goodwill.”³⁶ Disputes involving commercial disparagement, unfair practices, sales below cost, abuse of economic dependence, and trademark infringement are resolved by private lawsuits, with no involvement by the Competition Authority. Deceptive practices that injure consumers may also be subject to public enforcement under the Consumer Protection Act.

Turkey’s Consumer Protection Act,³⁷ adopted in 1995, regulates such marketing practices as door-to-door sales, consumer loans, instalment sales, and guarantees, as well as deceptive advertising and consumer contracts. A project to conform the regulations to the EU’s consumer protection rules was completed in June 2003. The consumer protection law extends more widely than does competition law, imposing obligations on all kinds of entities, including government instrumentalities such as utilities. The statute establishes an Advertising Board with power to enforce the rules about deceptive advertising, while vesting the Directorate for Competition and Consumer Protection in the Ministry of Trade and Industry³⁸ with authority for enforcing the other provisions of the law. The Directorate, in addition to its enforcement responsibilities, also has a consumer education function implemented through brochures and radio and television programs. The Directorate and the TCA exchange consumer complaints that relate to the other agency’s jurisdiction, but do not otherwise interact.

3. Institutional issues: Enforcement structures and practices

3.1 *Competition policy institutions*

The Competition Act establishes the Board as part of the Competition Authority and vests it with the agency’s decision-making powers. 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. Board appointments are for fixed terms of 6 years, which can be renewed, and members may be removed from office only for cause (Art. 24).³⁹ To ensure continuity, one-third of the terms expire every 2 years.

The government has recently introduced legislation styled as an omnibus reform act for autonomous agencies. It would apply to the TCA and the other independent agencies (including sector regulatory bodies) that have been established in Turkey's governmental scheme. The proposal would reduce the number of seats on all multi-member boards to a maximum of seven, and limit members to one six year term without possibility of re-appointment.

The Competition Act creates a complex mechanism for appointing Board members (Art. 22), designed to balance expertise with political responsiveness. Appointments are made by the government from among 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. Nominees may, but need not, be drawn from among the personnel of the nominating institutions. The Ministry of Trade and Industry can nominate for 2 positions, and 5 bodies can each nominate for a single position: the Ministry of State with which the State Planning Organisation is affiliated, the Court of Appeals, the Council of State, the Inter-University Board, and the statutorily-created business association, TOBB (the Turkish Union of Chambers and Exchanges). The Competition Board itself submits nominations for the remaining four positions, and half of those nominees must be experts from the Authority. The Chairman is appointed by the government from among three sitting members nominated by the Board.

Regardless of the source of the nomination, Board members are required to have 10 years of professional experience, as well as credentials in the form of a degree in law, economics, engineering, business, or finance (Art. 23). Of the ten current Board members (one seat is vacant), five (including the Chairman) have backgrounds in business administration or finance, and five have backgrounds in law or public administration. Only one member has formal academic credentials in economics. The business community would prefer to see more Board members drawn from a business background, while members of the academic and practitioner communities recommend the appointment of more Board members with personal experience in competition law and policy.⁴⁰ The government's bill for autonomous bodies would vest all nominating and appointing power in the government, but require that at least one appointee have a legal background, one have an economics background, and one have personal experience in the agency's substantive work. The government would be required to issue a statement for each appointment, explaining how the appointee meets the statutory criteria.

The Competition Act provides that the TCA "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). Board members are subject to conflict of interest rules about shareholdings (Art. 25) and, under applicable civil

service law, may not be members of a political party. Although some of the members have political backgrounds, the Board is uniformly regarded as truly autonomous, and there have been no serious complaints of political influence on particular decisions.⁴¹ The 2004 EU accession report on Turkey remarks that the government's efforts to enact the proposed omnibus law on autonomous agencies "raise concerns about potential political intervention in the operations of the Competition Authority,"⁴² but there is no overt evidence that such an objective motivates the government.

Although Article 20 of the Competition Act states that the TCA is "related" to the Ministry of Trade and Industry, the same provision also states that the agency is a legally separate entity from the government and possesses "administrative and financial autonomy." The Competition Act originally provided (Art. 39) that the "income" of the agency would arise from three sources: an appropriation in the budget of the Ministry, a 25% share of the fines it collected for violations of the Act, and revenues from sale of publications. No Ministry appropriation has ever been made, nor has the TCA ever charged for its publications. The provision for a 25% share of the fines collected was repealed in 2003 in response to criticism that such a mechanism created an improper prosecutorial bias. In any event, the fines provision was never a significant source of funds, as the amount received by the TCA totals only TRL 196 billion (USD \$131,000).

The TCA's income actually comes from another law entirely. Under Law No. 4077, enacted in 1995, newly-constituted corporations are required to register their capital and pay a fee to the state, and existing corporations are required to pay a fee whenever they increase their registered capital. A portion of the registration fee, originally equal to .19% of the capital amount registered (that is, TRL 19 for every TRL 10,000 registered), was deposited to the TCA's account. In 2003, the law was amended (No. 4791, later incorporated into No. 5234) so that the TCA's share fell to .04% of the amount registered (that is, TRL 4 for every TRL 10,000 registered). The financial impact on the TCA of this reduction is discussed later in this report. The TCA does not, however, consider that the change in the fee percentage has any implications with respect to the agency's institutional autonomy.

Because the TCA's income is established as a fixed percentage of fees paid by private corporations, the TCA's autonomy is not threatened on the budgetary appropriations front by any authority held by the Ministry. A related issue with implications for autonomy, however, is the extent to which the Ministry controls the TCA's expenditures. The TCA notes that, although the government never directly interferes with expenditures relating to the agency's law enforcement functions, certain expenditure controls are imposed on a government-wide basis. For example, all public agencies in Turkey are required to obtain approval from the State Staff

Presidency (a general directorate under the Prime Ministry) before hiring new employees. Thus far, all of the hiring requests submitted by the TCA have been accepted. Further, all trips abroad by public employees, including trips for post-graduate educational training, are subject to government approval. A 2003 TCA proposal to send 13 assistant experts to group training at the College of Europe was dropped when the government would approve only four slots, but the TCA's subsequent proposals for study abroad in 2003 and 2004 were approved. The Ministry of Trade and Industry also controls expenditure for international conferences hosted by the TCA in Turkey or attended by TCA personnel abroad. All TCA requests to date have been accepted.

3.2 *Competition law enforcement*

A significant feature of the enforcement scheme established by the Competition Act, and one that reflects a distinctive difference from the EU's approach, arises from Article 10 of the Act. Under that Article, any agreement, decision, or concerted practice "within the scope of Article 4" must be notified to the Board within one month of the conduct's execution, unless the conduct qualifies for protection under a block exemption. Failure to file where otherwise required is a separate violation subject to a fine, in addition to any penalty that may be assessed if the conduct is subsequently found to be unlawful. The EU's scheme formerly required notification only if the applicant firm wished to obtain a case-specific exemption under EU Article 81(3) and, as discussed previously, the EU eliminated case-specific exemptions during 2004.

In Turkey, filing an Article 10 notification both protects the firm from a penalty for failure to file and constitutes an application for an individual exemption under Article 5. After the Competition Act came into force, firms anxious about their legal exposure began filing applications with the Board, mainly about vertical agreements. Most of those notifications also sought "negative clearance" under Article 8 of the Act. This was because no time limit is mandated for the duration of a negative clearance, whereas the statute itself limits the duration of an individual exemption to a maximum of five years.⁴³ From 1999 through 2004, the TCA received a total of 193 applications for exemption or negative clearance and resolved 159 of them. Of the applications resolved, about 31% (49) were subjected to conditions and the rest were granted unconditionally. The TCA's staff has underway a project to develop recommended amendments to the Competition Act, and two features of the package are elimination of the mandatory notification requirement in Article 10 and the negative clearance procedure in Article 8. The system for granting case-specific exemptions, however, would be retained.

Law enforcement procedures under the Act are commenced upon receipt of a complaint or upon the Board's own initiative (Art. 40). The Board may either open a preliminary inquiry to establish whether a formal investigation is warranted, or launch a formal investigation immediately. Preliminary inquiries are conducted by members of the TCA staff, and the resulting report is assessed by the Board to determine if the allegations are "serious and sufficient." If so, a formal investigation is initiated.

As required under Article 43 of the Act, a formal investigation is headed by one or more members of the Board, assisted by staff. There has been some concern about the Act's requirement for personal participation by Board members in investigations, as mixing investigative and judicial functions can obviously raise doubts about a tribunal's impartiality. The original rationale for requiring Board participation was to assure that investigative information favourable to the defendant was brought to the Board's attention, but the Act's adjudicative processes provide defendants with fully adequate opportunities to defend themselves. A proposal to eliminate the Board member participation requirement is a feature of both the TCA staff's statutory revision package and the government's proposed omnibus law on autonomous agencies.

Once an investigation is underway, the parties must be notified within 15 days and requested to present their views, which must be filed within the following 30 days. Parties may at any time obtain copies of the evidence against them, 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). At the conclusion of the investigation stage, the parties are advised 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 after the hearing at an *in camera* meeting of the Board. A final decision requires a majority of the full Board (that is, 6 votes).⁴⁴ Other decisions, such as those involving interim measures and recommendations, can be taken by simple majority of members present.⁴⁵

The TCA has broad investigative powers available during both the preliminary inquiry and the formal investigation. The Authority can request information from any firm or association and from any government body (Art. 14). It can also conduct on-site examinations at business premises to review and copy documents, take oral or written statements, and assess assets (Art. 15). Officials performing such on-site examinations must bring a certificate showing the subject matter and purpose of the investigation and specifying the administrative penalty (set by Article 16) for providing an inaccurate response. One problem that emerged with respect to "on-site" investigations was that penalties for resisting access were weak and target firms could simply elect to pay the daily penalty until they had sufficient opportunity to purge their files. Under an amendment to Article 15 adopted in 2003, the Authority may now obtain an *ex parte* court order in advance that compels immediate access and that may be enforced, if necessary, with the aid of the police.

Article 9(4) of the Act provides that the Board may impose interim relief orders during the course of an investigation “where there may arise serious and irreparable damages until the final decision.” The Board employed this authority on seven occasions in the years before 2002, but only once since that time. In 2003, the Board was investigating an abuse of dominance claim against a supplier of clinker (a component of cement). The Board issued an interim order requiring the firm, for the duration of the investigation, to resume deliveries of clinker to one of its customers at a specified daily volume and price. The customer, a cement and concrete producer, asserted that it was about to cease operations because of the supplier’s action in terminating deliveries. The Board’s interim order was subsequently annulled by the Council of State, which rested its decision on the intervening expiration of the supply contract and what it found to be inadequate proof that alternate sources of supply were unavailable.

There is no provision in the Competition Act that allows settlement of a pending case by consent. Under current practice, the Board permits a limited form of consent settlement by relying on Article 9(3) of the Competition Act, which provides that the Board, before formally determining that a defendant has violated the Act, must inform the defendant “in writing of the [the Board’s] opinion and on how [the defendant] shall terminate the infringement.” The Board considers that this language provides a basis for settling a matter without a formal determination of illegality, but only if the commitment is made during the preliminary inquiry stage. The usual mechanism is to advise the defendant that it can accept the proposed commitment or the Board will open a formal investigation. This approach has been used in eleven matters since 1999, eight of which occurred in the last two years.⁴⁶ One item in the TCA staff’s package of proposed amendments to the Competition Act is a provision expressly permitting the Board to terminate a proceeding at any stage if the defendant commits itself to accepting the conduct modifications recommended by the Board.⁴⁷

When the Competition Act was passed, the adversary hearings and procedures it provided were a novelty in Turkey’s administrative practice, which did not historically envisage the direct participation of the parties in the decision-making process. Practitioners today generally regard the Board’s proceedings as models of due process, although some express concern that the Competition Act accords procedural protections only in Board proceedings that lead to finding a violation, and not for such actions as withdrawing a block exemption from an individual firm.⁴⁸ The TCA responds that the exemption withdrawal provision in the vertical agreements block exemption expressly obliges the Board to request the written or oral views of the affected party before rendering a decision.⁴⁹

BOX 2. THE CONCERTED PRACTICE PRESUMPTION

A controversial issue associated with the TCA's enforcement policies relates to the "concerted practice presumption" in Article 4 of the Competition Act. As described earlier in this report, the "concerted practice presumption" permits the Board to infer the existence of unlawful collusion among competitors if conduct or conditions in a market are similar to those that would arise where competition was artificially distorted. The presumption, designed for oligopolistic markets in which proving overt agreement is difficult, shifts the burden to the parties to show "on economic and rational grounds" that they in fact are acting independently. A threshold issue presented by the statutory language is what kinds of market conduct and conditions should be deemed sufficient to trigger the presumption. Practitioners object strenuously, on due process and economic grounds, to any invocation of the presumption based on conditions that could merely reflect non-collusive "conscious parallelism."⁵⁰ Particular attention has focused on the issue of whether uniform pricing in oligopolistic markets with homogeneous products is sufficient to trigger the presumption.

The TCA has faced some internal disagreement about how to treat the presumption, and its policies have gradually emerged in a series of litigated cases over the past several years. The first case to arise was a proceeding in 2000 against yeast manufacturers who had posted uniform price increases unrelated to any changes in costs.⁵¹ The Board considered applying the presumption, but ultimately declined to find unlawful collusion because there was no evidence on the record of any meetings or communications among the parties with respect to price changes. The Board did find, based on documentary evidence, that the producers had colluded to implement resale price requirements for downstream distributors, but this determination did not entail use of the presumption. On appeal before the Council of State, one of the appellants raised a constitutional due process claim against the concerted practice presumption. The Council's initial decision in 2003 upheld the Board's decision and rejected the constitutional claim as insubstantial without focusing on whether the presumption had actually been employed.⁵² The appeal is still before the Council pending plenary review.

The second case, also in 2000, attacked a horizontal price agreement between two newspaper publishers.⁵³ The Board found collusive action, again based on documentary evidence, and stated explicitly in its decision that oligopolistic interdependence alone is not sufficient to trigger the concerted practice presumption. In a February 2004 decision against a cartel among ceramics manufacturers, the Board's finding of collusion relied on evidence that the participants had exchanged sensitive price information.⁵⁴ The Board's decision observed that, although the presumption is not triggered merely by consciously parallel pricing behaviour, it can be invoked where such behaviour is combined with additional factors that tend to show collusion, such as the exchange of commercial data. In such circumstances, the Board concluded, defendants may properly be burdened with the obligation to prove that the information exchanged was not susceptible to exploitation for

THE CONCERTED PRACTICE PRESUMPTION (cont.)

price collusion.⁵⁵ Subsequently, in two December 2004 decisions involving the cement and ready-mix concrete markets, the Board cited circumstantial evidence and employed economic analysis to support its determinations of collusion. Thus, the Board asserts that it has not relied on the presumption in any of its decisions thus far.

The practitioner community is not fully convinced that the Board's treatment of the presumption is sufficiently cautious. There is still concern that the existence of the presumption influences the Board to rely on weak and non-probative "additional factors" to find collusion. Further, beyond the issue of finding an infringement of Article 4, practitioners also object to reliance on the presumption as the basis for initiating formal investigations. The Board's position on this point is that it may properly open an investigation of any market, oligopolistic or not, even if the only available evidence (such as, for example, a pattern of parallel pricing) could be consistent with lawful conduct. Practitioners retort that investigations impose costs on the target firms and expose them to negative publicity, and should not be lightly commenced in markets where parallel pricing or other interdependent behaviour could be the normal outcome of competitive forces.

Most members of the legal and academic communities in Turkey compliment the quality of the Board's decisions, particularly in comparison to those issued by other agencies. Some lawyers complain that the Board provides inadequate analysis of such legal issues as the proper admission of evidence. Also, the Board's decisions do not always describe and consider the EU case precedents relevant to the issues in dispute. The sophistication of the Board's economic analysis varies considerably from decision to decision,⁵⁶ reflecting in part the fact that the TCA is still a relatively new agency and partly the fact that the TCA does not have a staff of industrial organisation economists. Even the harshest critics of the TCA, however, do not usually assert that the decisions reached are incorrect on economic grounds, but rather that the analysis in the decisions should be more thorough and incisive.

Deadlines established in the Competition Act govern every stage of the process. A preliminary investigation must be completed within 30 days, and the Board then has 10 days to determine whether to commence a formal investigation (Arts. 40, 41). The deadline for completing a formal investigation is 6 months, which may be extended once for an additional 6 months (Art. 43). The post-investigation exchange between the parties and the staff, including the staff response and the parties' rebuttal, can take up to 75 days; and one 30 day extension is available to the parties (Art. 45). A hearing, if requested, must be held within 30 to 60 days after the end of the investigation, and the hearing itself is limited to a maximum of 5 (consecutive) days (Arts. 46, 47). The Board's decision and reasoning must be issued within

15 days after the hearing (Art. 48). With the exception of the 15 day deadline for issuing a final reasoned decision after the hearing, the TCA has a track record of adhering to the statutory deadlines.

With respect to final decisions, the Board's traditional practice was to issue a short one or two page statement of its holding within 15 days after the hearing and then issue the full reasoned decision at its leisure, which often entailed a delay of a year or more. By 2002, a backlog of unreleased decisions had accumulated and the Board was subject to increasing criticism about the delay. The Board then initiated the practice of having staff competition experts assist in preparation of the final decisions. The backlog was eliminated, and presently most final decisions are released within about 30 days. For other decisions, such as those relating to preliminary investigations, mergers, and exemption applications, the lapse between the Board's determination and the final decision is ordinarily no more than 20 days. The proposed law for autonomous bodies entails a 30 day deadline after an agency determination for issuance of a final decision (backed by the threat of removal from office for recalcitrant board members), while the statutory amendments drafted by the TCA's staff specify a 60 day period.⁵⁷

The Competition Act establishes two types of fines. Article 16 specifies one-time fines for committing various wrongful acts, while Article 17 provides daily accumulating fines for ongoing violations. Fine maximums under both articles are adjusted regularly for inflation. Under Article 16, fines for infringing the substantive antitrust prohibitions in Articles 4 and 6 range from a mandatory minimum level (set for 2004 at TRL 11.9 billion, USD 8,000) up to 10% of the violator's annual gross income. Factors specified in the statute for determining the size of fine assessments include intent, degree of fault, market power, and magnitude of harm (Art. 16). Other Article 16 fines range from TRL 3 billion (USD 2,000) for failure to notify a merger or Article 4 agreement, to TRL 5.9 billion (USD 4,000) for providing misleading information. The managers of a firm that is assessed a fine under these supplementary provisions in Article 16 (but not under the Article 16 provisions relating to substantive antitrust violations) must also each be assessed a fine, up to 10% of the fine levied against the firm. The daily accumulating fines set by Article 17, which apply for failing to comply with various kinds of Board orders and conditions, range (for 2004) from TRL 1.5 to 3 billion per day (USD 2,000), while impeding an on-site investigation warrants a daily fine under Article 17 of TRL 1.2 billion. The Competition Act does not provide any criminal penalties for violations, and none exist elsewhere in Turkish law with the exception that bid rigging during state tenders is a criminal offence.

The mandatory minimum fine required by Article 16 for substantive violations means that Board decisions finding such infringements always entail the imposition

of some fine amount. In the years 1999 through 2004, the Board assessed a total of TRL 111.4 trillion (USD 74.6 million) in fines for substantive violations of the Competition Act. Violations of Article 4 accounted for 59 % of the total (of these, 34 percentage points entailed horizontal violations, 19 points entailed vertical violations, and 6 points entailed mixed horizontal and vertical violations), while Article 6 abuse of dominance violations accounted for the remainder. Fines for substantive merger violations under Article 7 accounted for only a fraction of a percentage point.

The minimum fine required by Article 16 also means that the Board cannot relieve a cooperating firm in a cartel investigation from monetary penalties. The TCA staff's draft statutory amendments would eliminate the mandatory minimum clause, and add language providing for the abatement of criminal sanctions against firms that cooperate actively with the TCA by disclosing unlawful conduct. The factors specified in Article 16 for determining the size of fine assessments would also be expanded to include consideration of whether the violator had assisted the investigation.

The 2002 Report suggested (p. 32) that higher maximum fines be set for failing to comply with or impeding investigative processes. The TCA staff's draft statutory amendments would satisfy that recommendation, and more. Under the proposals, Article 16 would be amended to eliminate the individual fine limits provided for specific types of violations and to replace them with a provision establishing a maximum limit for all such fines at 1% of the violator's gross income. The limit for substantive antitrust violations at 10% of gross income would be retained. Article 17 would also be revised to eliminate the individual daily fine amounts provided for specific types of continuing violations and to replace them with a provision establishing a maximum daily limit for all such fines at 5% of the violator's gross income. The Article 16 clause presently dealing with the provision of "incorrect or misleading information" in response to an information request would be expanded to cover both the submission of incomplete information as well as the failure to provide information at all, conduct that is not now prohibited by Article 16. Likewise, a clause would be added to Article 17, applying a daily fine for providing "incomplete, false or misleading information, or no information at all," in response to an information request. Early consummation of a merger requiring Board approval would be made a substantive violation subject to a fine up to the 10% limit, thus filling a loophole in the existing law, which does not sanction early consummation. The language in Article 16(3) requiring imposition of fines on company managers for violations of that Article's supplementary provisions would be eliminated entirely, on the grounds that the violations involved do not warrant expenditure of the effort required to administer fines against individuals. The Board has found that identifying the managers responsible for ancillary violations of

Article 16 consumes significant time that could be better spent on substantive issues.⁵⁸

One criticism voiced by practitioners is that the Board's analysis in applying the Article 16 factors to determine fine assessments is not sufficiently transparent. The Board is aware of this criticism and has undertaken to provide more detailed reasons in its decisions explaining how fine amounts were calculated. The TCA also plans to develop and release guidelines for determining fines. As noted above, the TCA staff's draft statutory amendments would expand the factors specified in Article 16 for determining the size of fine assessments by adding consideration of whether the violator had assisted the investigation. Other factors that would be added include recidivism, duration of the violation, and whether the violator had transgressed commitments previously given to the TCA.

Appeals from the Board's decisions⁵⁹ may be taken to the Council of State.⁶⁰ Board decisions subject to review include those that determine legal violations; assess fines; impose interim measures; issue or withdraw individual exemptions, block exemptions and negative clearances; and reject complaints.⁶¹ Although the Council acts as a "first instance" court, it cannot substitute a new decision for that of the Board, but may only affirm or reverse. Appeals are heard initially by a designated chamber within the Council of State, consisting of 5 judges. The first chamber's decision may then be appealed further to a second "plenary chamber" consisting of 29 judges, none of whom is from the chamber that issued the initial ruling. A party may also request that the plenary chamber reconsider its decision, although such requests rarely result in any modification. The judicial review process typically takes about three years to complete, but sometimes extends to four. Most of the Board's decisions imposing significant fines have been appealed, and most appeals raise both procedural and substantive issues. To address the problems posed by the unfamiliarity of Turkish judges with competition law, the Parliament recently enacted legislation⁶² under which a new special chamber in the Council of State will be created specifically to deal with cases appealed from the TCA. The chamber's judges, to take office in 2005, are to be selected for their expertise in economics, and competition law training will also be provided.

Of the 744 decisions subject to judicial review that the Board rendered from 1999 through 2004, 136 (or about 18%) have been appealed to the Council of State. The TCA's experience with first and second instance judicial review since 1999 is summarized in the following table.⁶³ Virtually all of the adverse Council decisions thus far involve procedural points. The most significant adverse decision dealing with a competition policy issue is a November 2003 ruling that overturned the Board's 1999 decision in the Cine 5 case. The Board had brought an abuse of dominance case founded on Cine 5's exclusive contract with Turkey's professional

soccer league to televise soccer contests. The alleged abuse entailed discriminatory prices that Cine 5 charged to other TV broadcasters for film clips to be shown on news broadcasts. Although the Board argued that there was no proper basis for price discrimination among broadcasters, the Council concluded that the public interest warranted different prices for audiences with different demographics and demand functions.

Table 2. Judicial Review of Competition Board Decisions

Year	First Instance Appeals						Second Instance Appeals				
	Initiated	Resolved					Initiated	Resolved			
		Total	Favourable ¹	Unfavourable ²	Mixed ³	Dismissed		Total	Favourable ¹	Unfavourable ²	Dismissed
2004	197	16	12	3	1	0	29	2	0	2	0
2003	41	38	31	6	0	1	16	4	3	0	1
2002	28	19	12	6	0	1	3	14	5	8	1
2001	43	14	3	9	0	2	11	2	0	0	2
2000	12	0	0	0	0	0	0	0	0	0	0
1999	8	1	1	0	0	0	1	1	1	0	0
Total	329	88	59	24	1	4	60	23	9	10	4

1. Decisions characterised by the TCA as favourable.

2. Decisions characterised by the TCA as unfavourable.

3. Decisions characterised by the TCA as partially favourable and partially unfavourable.

Source: Turkey 2005

The 2002 Report noted (p. 18) that judicial review of Board decisions had led to significant difficulties in the process of collecting fines assessed in Competition Act cases. Under Article 55 as originally enacted, fines were not required to be paid until judicial review proceedings were complete, and the passage of several years during the pendency of appeals meant that inflation eroded the weight of the fine assessed. A 2003 amendment to Article 55 addressed the problem by specifying that fines must be paid within thirty days of the Board's order, whether or not an appeal is taken. In late 2004, the requirement was modified to extend the payment period from thirty to ninety days.⁶⁴ The Council of State retains the authority to stay execution of the fine pending appeal, upon application of the party. If the Council grants a stay, it also has discretion to require that the appellant post a bond.⁶⁵ The Finance Ministry, not the TCA, is responsible for collecting fines if the violator files no appeal or loses the appeal it does file.

The TCA is sensitive to the importance of transparency, but makes some compromises in the interests of economy. For example, Article 53 of the Competition Act, as enacted, provided that the TCA would itself publish final

decisions issued by the Board. Article 53 was modified in 2003 to provide that Board decisions could be published instead in the government's official Gazette, but the introduction in 2004 of a fee for Gazette publication led to a further amendment permitting the Authority to forego the Gazette and publish Board decisions by posting them on the TCA's website. Some in the academic community are doubtful about the sufficiency of that approach. There is also uncertainty about the TCA's policies with respect to publication of Board decisions other than those dealing with substantive legal determinations arising under the Competition Act. Recently, for example, the Board took the novel action of posting summary versions of two opinions that it had provided to the Privatisation Administration at the initial stage of privatisation proceedings.⁶⁶ There are also complaints about the TCA's practices in exposing proposed statutory amendments and communiqués for public comment. The TCA has no regulation or formal policy on this point, but ordinarily follows the practice of posting draft communiqués and amendments on its website for comment. Although an announcement is issued at the time of posting, no statement is made indicating how long the comment period will last, nor are the comments received by the TCA posted or summarized on the website. Posted proposals are sometimes withdrawn without notice or explanation, and when proposals are finally adopted, the TCA does not routinely issue a statement explaining the reasons for the conclusions reached.

A separate transparency problem faced by competition law practitioners in Turkey arises from the fact that, although the Council of State publishes some of its decisions in the Council's Journal, most are merely provided to the parties in the case. The TCA publishes in its own Competition Bulletin a list of finalised Council decisions in which the TCA is a party, together with the text of selected, but not all, Council decisions.

One final enforcement issue that deserves mention arises from the obligation in the Customs Union Agreement to harmonize Turkey's competition law regime with that of the EU. Article 39(2) of the Agreement requires that Turkey not only enact Articles 81 and 82 of the EU Treaty as positive law and establish a competition enforcement agency, but also "ensure that, within one year after the entry into force of the Customs Union, the principles contained in block exemption Regulations in force in the Community ... shall be applied in Turkey." The EU has issued various block exemptions that have no counterpart in TCA laws or communiqués. Examples mentioned previously in this report are the EU block exemptions for transfer of technology, and for the maritime, airlines, and insurance industries.

The TCA notes that all components of the EU's secondary competition legislation are on its agenda for eventual consideration. In the meantime, the TCA's position is that the absence of a block exemption in Turkish law does not mean that

Turkey is out of compliance with the Customs Union requirement, because any agreement that is legal within the EU will in fact be treated as legal by the TCA. Firms covered by an EU exemption that wish complete assurance of protection from prosecution under Turkish law may file for an individual exemption under Article 5, and expect to receive it. Even if no individual exemption is sought, the TCA will not prosecute a firm protected by an EU block exemption. As a case in point, the TCA cites a June 2003 decision by the Board not to prosecute a liner conference for price fixing activities protected by the EU's block exemption for the maritime industry (Regulation No.4056/86, Art. 3).⁶⁷ In the obverse situation, where conduct outside an EU exemption is protected by the TCA version, the TCA reserves the option to withdraw the exemption from an individual firm if its conduct proves anticompetitive.

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 by the Board's failure to take action with respect to it, may appeal to the Council of State (Art. 42). Under general principles of administrative law, applications are deemed to be rejected if not acted upon by the Board within 60 days. Article 57 of the Competition Act authorises parties injured by conduct violating the Act to sue the perpetrator in civil court for damages. Although about 30 cases have been commenced under Article 57 since 1999, it is not yet clear whether the Board must find a violation to exist before private damages can be awarded. An appellate court ruled in one private case that an Article 57 damages action must be held in abeyance while the alleged antitrust violation is referred to the Competition Board for resolution.⁶⁸ The TCA staff's draft amendment package includes a provision designed to establish that holding as statutory law.

3.4 *International aspects of enforcement*

Article 2 of the Competition Act incorporates a basic "extraterritorial effects" test, so that anticompetitive conduct occurring outside Turkey that affects Turkish markets falls within the Act's prohibitions. In proceedings under the Act, foreign firms are treated no differently than domestic firms. The Authority recognises the practical problems associated with obtaining information about conduct involving foreign firms and products. The 2002 Report (p. 19) noted that Turkey had no formal cooperation agreements with competition enforcement agencies in other countries, and urged the TCA to consider establishing such relationships in order to obtain necessary information and evidence from abroad in enforcement proceedings. The Report observed that such cooperative arrangements might be particularly

important for Turkey, since it “is not part of a supra-national structure with competition policy competence, such as the EU” (p. 32).

The TCA states that it attaches great importance to cooperating with the competition components of major international organisations and to participating in their activities. It has recently reorganised its international relations unit and begun submitting more information about the Turkish competition policy experience to the OECD, UNCTAD, and WTO. Since the TCA’s establishment in 1997, it has been a participant in the activities of the OECD’s Competition Committee and in WTO meetings on competition policy. As a member of the WTO’s Working Group on interaction between trade and competition policy, the TCA supported the attempt to include competition policy issues in the Doha Development Agenda. The TCA has also participated since 1997 in meetings convened by UNCTAD’s Competition and Consumer Policies Branch, and recently proposed that Turkey host the UN’s 5th Review Conference, to be held during 2005. At that Conference, member countries will review their progress in implementing a set of competition policy recommendations adopted by the UN in 1980. The TCA considers that this event would provide a particularly good forum for Turkey to share its competition policy experience with other developing countries.

Although the TCA wishes to expand cooperation with other countries through multilateral or bilateral platforms, it has not, as recommended in the 2002 Report, established any formal cooperation arrangements with enforcement agencies in other countries. On two occasions in the past year, the agency sought the assistance of the EU in enforcement matters.⁶⁹ In May 2004, the Authority initiated an informal request to the EU’s Directorate General for Competition (DG COMP), inquiring whether the EU’s ongoing investigation of a cartel in the electrical equipment industry had revealed any information about the cartel’s activities in Turkey. DG Comp replied that it could not provide any information to the TCA because the material collected was confidential and subject to the disclosure prohibition applied to such material by Article 28 of the EU’s general competition regulation (No. 2003R001). DG COMP also noted that, under Article 36 of the Customs Union Agreement, any information exchanges between Turkey and the EU were subject to “the limitations imposed by the requirements of professional and business secrecy.”

In June 2004, the TCA initiated a more formal request to DG COMP under Article 43 of the Customs Union Agreement. Article 43 provides that either the EU or Turkey may request the other party to initiate enforcement action if conduct carried out in the territory of the second party adversely affects the interests of the requesting party. Under Article 43(3), however, the second party retains full discretion to decide whether or not to initiate an investigation. The TCA’s request arose from an investigation into a possible cartel in the coal industry that involved

enterprises based in EU member countries but whose activities affected Turkish markets. The TCA sought an investigation by DG COMP and also requested that, if no EC enforcement action resulted, any relevant investigative information be provided to the TCA. In its response, DG COMP referred to the discretion it retained under Article 43(3) and noted that the Commission saw no appreciable effect in the EU arising from the conduct in question. Further, the response observed that because any information obtained would have been seized during an investigation, EU confidentiality regulations would have prevented its disclosure to the TCA.

The TCA has thus been unsuccessful in its efforts to cooperate in particular enforcement cases. Issuance of the competition implementing rules under the Customs Agreement would be a useful step in expanding interaction between the TCA and the EU, because those rules oblige the competition authorities to regard requests for co-ordination of enforcement activities “in a favourable way” (Art. 7). As discussed previously, however, the implementing rules cannot be adopted until Turkey establishes a system for controlling state aid programs.⁷⁰ Even then, legal obstacles to the exchange of confidential information between the TCA and DG COMP would persist. Although the TCA believes that it can properly disclose confidential information in its possession to other enforcement agencies if an agreement between the agencies expressly provides for such exchange, Article 5.3 of the draft implementation regulation merely provides (much like Article 36 of the existing Agreement) that “any exchange of information under this Article is limited by the requirements of professional and business secrecy and confidentiality.” These provisions make clear, and DG COMP has confirmed, that adoption of the implementing rules would not permit disclosure to the TCA of protected information that it has been collected in EU investigations.

The TCA has no direct role in government proceedings that entail other competition issues raised by international trade. The Prime Ministry’s Undersecretariat of Foreign Trade holds all responsibility for implementing Turkey’s law dealing with dumping and unfair import competition,⁷¹ and the Authority has had no involvement in those matters.

3.5 Agency resources, actions, and implied priorities

As noted previously, a portion of the fee paid by corporations for registering their capital is deposited to the TCA’s account and serves as the principal source of the agency’s income. The TCA’s share of the fee was reduced substantially in 2003, but this decrease has not adversely affected the agency because, as shown in the following table, annual expenditures have consistently been less than the allotted amounts. The TCA considers that its budget allocation is sufficient for present and planned needs. There is a concern at the agency, however, about the level of salaries

that may be paid to agency personnel. This issue arises not from any lack of available budget funds, but from a decree issued by the Council of Ministers that controls increases in salaries and benefits for all government personnel, including the TCA's Board members and staff. The Council's administration of the decree in recent years has caused salaries and benefits to fall behind inflation. The number of agency staff has recently declined because of resignations, but the agency is presently engaged in recruiting efforts to replenish and increase the ranks of competition experts and lawyers.

Table 3. Trends in Competition Policy Resources

Year	Number of Personnel ¹	Budget Allowance ² (TRL trillion)	Budget Allowance ² (USD million) ³	Expenditures (TRL trillion)	Expenditures (USD million) ³
2004	304	17.8	12.5	14.5	10.2
2003	310	18.7	12.5	13.7	9.2
2002	317	17.3	11.4	12.1	7.9
2001	318	10.9	8.8	7.9	6.4
2000	300	44.1	70.8	15.6	25.0

1. "Number of personnel" refers to the person-years actually on staff at the end of the year.
2. "Budget Allowance" is the amount established at the beginning of a year as available for expenditure.
3. Currency conversion rates: 1 USD = TRL 1.42 million (2004), 1.49 million (2003), 1.52 million (2002), 1.23 million (2001), 0.62 million (2000).

Source: Turkey, 2005

The following table shows the TCA's enforcement activities over the past six years. Enforcement priorities appear balanced and well directed, with a focus on horizontal agreements and abuse of dominance. About 11 % of the cases opened under Articles 4 and 6 were initiated by the Board *ex officio*. Of the Article 4 *ex officio* cases, two-thirds involved horizontal conduct and the remainder involved vertical infringements.

Table 4. Trends in Competition Policy Actions¹

	Horizontal Agreements ^{2, 5}	Vertical Agreements ²	Abuse of Dominance ^{2, 4}	Mergers ³
2004: matters opened	24	14	32	92
Matters in progress	15	5	10	3
Matters concluded	39	19	41	107
Total sanctions imposed (TRL million)	15,601,915	7,649,830	2,488,607	14,853
2003: matters opened	40	8	28	91
Matters in progress	30	10	19	18
Matters concluded	28	7	27	81
Total sanctions imposed (TRL million)	4,567,638	5,198,582	39,960,321	35,372
2002: matters opened	38	7	24	65
Matters in progress	18	9	18	8
Matters concluded	39	4	28	61
Total sanctions imposed (TRL million)	22,956,113	317,169	1,136,376	2,908
2001: matters opened	20	7	26	39
Matters in progress	19	6	22	4
Matters concluded	16	9	16	46
Total sanctions imposed (TRL million)	172,234	7,877,954	1,799,225	949
2000: matters opened	17	11	18	57
Matters in progress	15	8	12	11
Matters concluded	16	12	25	51
Total sanctions imposed (TRL million)	1,193,663	515,894	-	608

Table 4. Trends in Competition Policy Actions¹ (cont)

	Horizontal Agreements ^{2, 5}	Vertical Agreements ²	Abuse of Dominance ^{2, 4}	Mergers ³
1999: matters opened	18	12	24	30
Matters in progress	14	9	19	5
Matters concluded	4	3	5	25
Total sanctions imposed (TRL million)	4,320	-	-	-

1. Data are for applications of the Competition Act by the Competition Authority, and do not include negative clearances, exemptions, opinions, and matters determined to be irrelevant under the Act.
2. The total number of non-merger matters opened in 2004 was 70; in 2003, 76; in 2002, 69; in 2001, 53; in 2000, 46; in 1999, 54.
3. Includes mergers reviewed in privatisation proceedings but excludes mergers that were below notification thresholds or otherwise deemed out of scope.
4. Includes cases in which both Articles 4 and 6 were applied.
5. Includes cases in which both horizontal and vertical agreements were involved.

Source: Turkey, 2005

The main functions of the Authority are organised into eight departments under the supervision of two vice-presidents reporting to the President. The various sectors of the economy are divided among the four operating departments that are responsible for law implementation and enforcement activities. The other four departments include Research (for studies of domestic and international market activities), Data Processing and Statistics, Human Resources, and Administrative and Financial Affairs. Ancillary offices include the Legal Office, which serves as the base for the agency's lawyers, the Executive Secretary's Office, and the Press Office, all of which are attached to the Presidency. At the time of the Authority's establishment in 1997, one vice president was placed in charge of the Authority's four operating departments, plus Research and Data Processing, while the second was charged with Human Resources and Administration. The assignment of one vice president exclusively to administrative issues was considered important during the agency's formative period. Now that the agency has reached relative maturity, a reorganisation has been undertaken that allocates one of the operating departments to the "administrative" vice-president and includes the Legal Office in that vice president's portfolio. The agency presently has 300 employees, including 10 Board members, 25 executives, 81 competition experts, 4 lawyers, and 180 supporting staff.⁷²

The professional staff work of the TCA is performed primarily by employees holding the positions of “competition expert” and “assistant competition expert.” These positions are created and defined by Articles 35 and 36 of the Competition Act. Applicants must hold a university degree and pass a specially designed examination. The Authority has an ambitious and comprehensive system for training its competition experts. Every two to three years, the Authority conducts entrance examinations and hires a class of 10 to 15 new “assistant experts.” The new employees are subjected to a training program that extends for three and a half years and begins with five months of intensive schooling at the agency in law, economics, and competition policy, followed by at least one year of practical experience in case handling under the supervision of senior competition experts. The trainees are then sent as a group to a four-week seminar at the College of Europe in Bruges, Belgium, where they undertake advanced seminars and begin identifying subjects for their thesis projects. In the final phase, they complete a thesis paper on a topic of competition law and policy, and defend the paper before a committee of three Authority officers and two outside academicians. Successful completion of these steps leads to promotion from “assistant” to the position of “competition expert.” Competition experts are encouraged to undertake further study for masters degrees in law or economics at the Authority’s expense at various universities in Europe and the United States. Experts also attend other training programs, including international trade seminars and courses in intellectual property and specialised topics of EU law. The TCA’s staff of experts is held in uniformly high regard by the Turkish academic community and by competition law practitioners. The agency believes that, over the next ten years, the present number of about 80 experts should be increased to 200.

Lawyers in the TCA’s Legal Office represent the agency in judicial review proceedings and provide legal counsel to the Board and Authority staff. The normal complement of lawyers in the Office is eight, but the present level is half that because several lawyers have recently departed from the agency. The TCA also employs lawyers who work as competition experts in the operating departments. These, however, are very few in number, with the result that personnel with legal training rarely participate directly in the investigation of cases. Further, technical drafting in the preparation of Board decisions is undertaken by competition experts with little input from lawyers and, as noted previously, legal practitioners complain that Board decisions provide insufficient analysis of legal issues. The Authority recognises these problems, and plans to increase over the next two years both the number of Legal Office lawyers and the number of lawyers working as competition experts. The TCA will also consider utilising its authority to hire attorneys from private practice on a temporary basis to deal with specific cases or projects.

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

By its terms, the Competition Act appears to cover all forms of economic activity. The only express exemption from its ambit appears in banking legislation that applies to exempt bank mergers. In fact, however, a significant portion of Turkish commerce is beyond the TCA's jurisdictional reach, because standard rules of statutory construction and administrative law apply to override the Act. For example, if a state ministry displaces competition by exercising statutory authority to regulate the price of a commodity (such as the Health Ministry does in Turkey with respect to the price of pharmaceuticals), the TCA has no power to act, except in a competition advocacy role, because the competition statute is not deemed applicable to state agencies and organs acting in a governmental capacity. Sector reform legislation that involves creation of a regulatory agency may also effectively oust the TCA, by vesting authority in the regulator to control or approve various aspects of the sector's operation. In such circumstances, the TCA retains its ability to enforce the Competition Act only with respect to whatever conduct (if any) the regulator remits to free market forces. There are also numerous statutes that create commercial undertakings and expressly vest them with powers and privileges that enable them to undertake anticompetitive conduct. This last category, which includes state-owned companies, has been the focus of particular controversy in Turkey with respect to the applicability of the TCA's jurisdiction.

Some state-owned firms in Turkey are granted a statutory monopoly that gives them exclusive control of a market, while others have no such protection and compete in the market with private firms. The 2002 Report (p. 21) describes a case in the latter category brought by the Authority against TFA, the state sugar firm, for abusing its dominant position to force private competitors out of business. The Board ultimately dismissed the case because TFA's prices and policies were determined by a government ministry and hence considered beyond the ambit of the Competition Act. The significance of the case lies in the Board's conclusion that the Act applies to anticompetitive conduct by an economic entity only if the conduct is undertaken at the entity's own volition. Where state-owned commercial entities act autonomously, the Authority has not hesitated to attack anticompetitive behaviour, as its several cases against Turk Telekom attest.⁷³

The TCA has also addressed another variation on the theme of state involvement in commercial activity by prosecuting BELKO, a commercial enterprise owned by the city of Ankara that had been granted a monopoly over heating coal. That case, discussed previously, involved a charge that BELKO had violated Article 6 of the Competition Act by abusing its monopoly power. The

TCA's jurisdiction applied because nothing in the grant of monopoly power purported to mandate the excessive prices that BELKO charged.

The Board's decision that it had no jurisdiction in the TFA sugar case, and similar holdings by the Board in other cases, generated criticism because the Board was perceived as resting its jurisdictional analysis on the term "undertaking" in the Competition Act. The Act, by its terms, covers only "undertakings," a term defined in Article 3 as "any natural or legal person who produces, markets or sells goods and services and who forms an economic whole, capable of acting independently in the market." The words "acting independently" were included in the definition to assure that a subsidiary of a larger firm would not be treated as an economic actor separate from its parent. Some ambiguous language employed by the Board in its decisions, however, made it seem that the Board was resting the requirement for autonomous conduct on that clause. The TCA has since confirmed that the language in Article 3 plays no role in determinations of jurisdiction, and that commercial entities, whether or not owned by the state, are "undertakings" subject to the Act. The relevant question for establishing jurisdiction is whether the conduct at issue reflects autonomous behaviour by the commercial entity or is conduct dictated by the state acting in a governmental capacity. The 2002 Report (¶p. 31) recommended that the TCA adopt a broader approach to the definition of "undertaking," to bring Turkey into conformity with the EU with respect to jurisdiction over public entities. The Board's requirement for autonomous behaviour, as currently formulated, comports both with that recommendation and with EU practice.⁷⁴

The 2002 Report made two related recommendations on the subject of state monopolies. The first (p. 30) was that any monopoly concessions (and related special privileges, such as tax exemptions) held by state firms should be withdrawn, so that entry by private competitors would not be prohibited or otherwise handicapped. The second (p. 31) was that Turkey should consider adopting legislation equivalent to Article 86 of the EU Treaty with respect to monopolies that provide public services.⁷⁵ Article 86(1) prohibits EU member states from granting special or exclusive rights to public or private undertakings in such a manner as to create a Treaty violation. Conduct that violates EU Articles 81 or 82 by distorting competition among the Member States is cited specifically as an example. Article 86(2) moderates that prohibition with respect to "undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly." Such enterprises are made subject to the competition rules only where application does not "obstruct the performance" of the particular tasks assigned to them. A closing sentence provides that, in waiving application of the competition rules for such undertakings, the "development of trade must not be affected to such an extent as would be contrary to the interests of the Community."

These provisions in Article 86 are the basis for a large and complicated body of law developed by the EU in the course of enforcing the provisions against member states. The Customs Union Agreement between the EU and Turkey does not contain any provision requiring that Turkey adopt Article 86 as part of its positive law or designate an authority to enforce the Article's provisions. Rather, Article 41 of the Agreement simply provides that "with regard to public undertakings and undertakings to which special or exclusive rights have been granted," Turkey must assure that the principles in the EU treaty, including particularly those in Article 86, are "upheld." This requirement, which applies only to provisions in Turkish law that distort competition between Turkey and the EU Member States, was supposed to have been satisfied within one year after the Agreement's effective date of December 31, 1995. As in the case of controlling state aid programs, however, Turkey has not fully complied with its obligations and the annual EU accession reports routinely demand further action by Turkey on this subject.⁷⁶

Turkey's General Secretariat for EU Affairs, which administers the program to adopt laws and regulations necessary for accession, at one point established a working group (including TCA representatives) to prepare an inventory of "special or exclusive rights legislation" subject to Article 41 of the Customs Agreement. That group, however, has not convened anytime recently, and the General Secretariat advises that Turkey's ongoing privatisation program for state-owned firms is the principal means by which Turkey is addressing its Article 41 obligations.⁷⁷

As the 2002 Report urged, Turkey has eliminated some monopolies and special privileges, usually in the context of preparing for privatisation. An example is TEKEL, the state alcohol and tobacco firm that once had regulatory powers over both cigarette and alcohol sales and a statutory monopoly over certain alcoholic beverages. The regulatory powers were transferred to a newly-created Tobacco and Alcoholic Beverages Board and the alcohol monopoly was terminated before TEKEL's privatisation. No action has been taken, however, on the 2002 Report's recommendation to consider adopting EU Article 86 into Turkish law. The TCA staff proposals for amending the Competition Act include a provision under which the Board, after determining that a state measure (including "public disposals, regulations [or] transactions") had an anticompetitive effect under Articles 4 or 6 of the Act, could petition the Council of State to annul the offending regulations or transaction.

The 2002 Report, in its treatment of exemptions from the Competition Act, noted that one of the most significant exclusions arises from the fact that various trade and professional associations with quasi-public status and statutory responsibilities for self-regulation can employ those powers to fix prices and limit competition (p. 31). Self-regulatory bodies of professionals and other service

providers are recognised in the Turkish Constitution as quasi-public entities.⁷⁸ Although the constitutional language does not provide protection from the Competition Act, the statutes establishing such associations frequently authorise them to set their members' prices. As described previously in this report, the TCA has attacked fee agreements administered by associations in circumstances where the authorising statute entailed no price-setting power. The Board has not, however, attempted to proceed where the foundation law for an association clearly articulated its authority to establish minimum fees. The 2002 Report recommended that the authorising statutes for associations be amended to eliminate authority for fixing prices and restraining entry on grounds other than competence (p. 31). No such statutory amendments have been enacted, although the TCA is engaged in competition advocacy on this topic, as described in the next section.

5. Competition advocacy

Competition advocacy by the TCA has two dimensions. The first reflects the agency's role as a consultant to the government and to sector regulatory agencies concerning legislation and regulations that implicate competition policy. The second is as a proponent at large for increased public recognition and acceptance of competition principles. As to the first dimension, Article 27(g) of the Competition Act empowers the Board to opine, on its own initiative or on a Ministry's request, with respect to competition policy aspects of government legislation and regulations. The 2002 Report observed that TCA advocacy with respect to the competitive effects of government policies and proposals had been limited in the past, and recommended an increased emphasis on the competition advocacy mission and closer integration of regulatory and competition policy generally (p. 31). The TCA agrees that it devoted relatively little attention to competition advocacy in its formative years, when the prevailing view was that law enforcement constituted the best employment for agency resources. The TCA states that, more recently, it has recognised that government interference in competitive processes can produce results worse than those of anticompetitive practices by private undertakings. The agency has therefore paid increased attention to its competition advocacy mission.⁷⁹

The 2002 Report noted (p. 31) that a communiqué had been issued in 1998 by the office of the Prime Minister encouraging other agencies of the government to consult with the TCA in advance about proposed regulations and decisions that had implications for competition policy.⁸⁰ The Report observed that the Board had sometimes been afforded an opportunity to comment on proposals as contemplated by the communiqué, but sometimes not, and sometimes only very late in the regulatory formulation process. The Report recommended that consultation with the Board be made a formal, authoritative requirement (p. 31). Although such a requirement has not been established, the TCA reports that the government and

regulatory agencies have alerted the TCA more frequently in recent years about pending bills and proposals. Lapses, however, still occur. The Prime Ministry's communiqué is not treated as obligatory and there are no sanctions if an agency fails to notify the TCA of an important regulation. The TCA staff's draft amendments to the Competition Act include a provision expressly requiring public institutions and organisations to obtain the Board's opinion concerning any "acts, bylaws and regulations ... which shall affect competitive conditions in markets for goods or services in the whole or a significant part of the territory." State agencies would not be obliged to accept the TCA's opinion, but failure to obtain it would render the resulting measure unenforceable as a matter of law.

The number of opinions on competition policy issues issued by the TCA to public institutions and sector regulatory authorities has fluctuated over the years, in tandem with the number of requests received. In 2000, 16 opinions were issued, followed by 26 in 2001, 37 in 2002, 42 in 2003, and 25 in 2004. The TCA provides opinions in a variety of contexts. One important category comprises views delivered with respect to proposed legislation. Two examples mentioned previously are the TCA's opinions on the establishment of an agency to control state aid programs and on the applicability of the Competition Act to bank mergers. Other examples include the Board's opinion on a 2003 draft bill to revise the foundational legislation for the Turkish Union of Chambers and Exchanges (TOBB). The Board concluded that the provision in the bill maintaining the authority of business chambers to establish price tariffs was inconsistent with Article 4 of the Competition Act, regardless whether merchant associations purported to set maximum, minimum, or any other price terms. The Board also analysed a provision vesting business chambers with authority to collect and disseminate business data. The Board remarked that although the provision was not itself contrary to the Competition Act, a law enforcement action might be brought against a chamber that employed the authority to anticompetitive effect, such as by circulating current prices, sales figures, and production capacity in an oligopolistic market with homogeneous products. In contrast, a Board opinion issued in 2004 on amendments to the Tradesmen and Craftsmen Act reached a different conclusion on the provision authorising trade chambers to set price tariffs. The Board did not insist, as in TOBB, on eliminating that provision entirely. Rather, the Board concluded that language must be added specifying that the tariffs were "maximum prices" and that additional regulations must be issued to "ensure that tradesmen and craftsmen adequately perceive that prices in price tariffs indicate merely the maximum limit."⁸¹ Both bills are presently pending.

Another advocacy matter involved a bill designed to restrict the competitive impact of large retail stores on smaller competitors. In October 2003, the Board criticised the first version of the bill for, among other things, unnecessarily

prohibiting certain forms of conduct (such as charging exorbitant prices, discounting prices excessively, and forcing competitors from the market) that could be addressed directly under the Competition Act. Those prohibitions were deleted from the next draft of the bill, but other features of the legislation attracted further Board comments in April 2004. The Board objected to provisions that restricted the private label sales of large stores to a maximum 20% of store turnover, and limited price reduction sales campaigns to certain periods of the year (and even then required that the sale be approved in advance by the relevant business chamber). The Board noted that such restrictions harmed consumers by denying them the benefit of lower prices and that the limitation on private label sales also injured small and medium manufacturers who were the most likely producers of private label brands. The bill is presently pending. In other action, the TCA's comments on a draft bill regulating the distribution of magazines and other periodicals successfully urged adoption of an amendment that prohibits distributors from establishing exclusive dealing contracts with retail sales outlets and requires retailers to treat competing distributors on a non-discriminatory basis.⁸²

A second variety of competition advocacy is commentary on regulations proposed by sector regulatory agencies. The TCA opined on a draft interconnection offer submitted to the Telecommunications Authority by Turk Telekom (TTAŞ), the state-owned monopoly provider of land line telephone infrastructure. The Board objected unsuccessfully to various features of the offer, including provisions under which (1) TTAŞ would charge interconnecting providers for incomplete calls despite the fact that TTAŞ did not charge its own customers for such calls, (2) competing operators would be required to establish exchange facilities in at least 12 provinces to be selected by TTAŞ, and (3) the number of transmission circuits to be allocated to a competing provider would be determined unilaterally by TTAŞ. Although rejecting those points, the Telecommunications Authority partially accepted the Board's recommendation to reduce interconnection fees to levels more commensurate with costs. In another Telecommunications Authority matter, the TCA reviewed proposed regulations relating to separation of accounts and cost accounting. The Board observed that the regulations were intended to facilitate detection of cross-subsidisation and enable the Authority to establish appropriate fees for interconnection access. The Board concluded that the accounting requirements need not be imposed on all operators of fixed and mobile telecommunications networks, but only on operators that had market power or were otherwise obliged by the Telecommunications Authority to offer interconnection access to competitors. The Authority accepted this opinion and modified the regulations accordingly.

In comments to the Tobacco and Alcoholic Beverages Board, the TCA advised against pending regulations designed to limit the adverse health effects of alcohol

consumption by restricting advertisements for alcoholic beverages. The Board cited as unduly restrictive of competition the provisions that prohibited “buy one-get one free” promotions, sales campaigns involving price reductions, contests requiring the purchase of a drink to participate, and price labels that featured high prices struck out and replaced by lower prices.

The Energy Market Regulatory Authority (EMRA) has consulted with the TCA on numerous draft regulations, including proposals concerning licenses, tariffs, import and export restrictions, network accounting and financial reports, and consumer services. In 2004, the TCA provided comments to EMRA respecting a proposed regulation on natural gas distribution. EMRA made certain modifications based on the TCA’s comments and issued the final regulation. Just before publication, however, EMRA added a new provision relating to “letters of guarantee” issued by banks for capital investment projects undertaken by distribution companies. The provision specified that such guarantee letters would be considered acceptable to the Authority only if issued by financial institutions that were among the 10 largest banks in Turkey. The TCA advised EMRA that such a restriction discriminated unnecessarily among banks, and EMRA thereafter annulled the provision.

A third type of competition advocacy involves statutes that accord monopoly rights or special privileges to state enterprises. This subject area has been a concern of the TCA for several years, motivated in part by Turkey’s obligation under the Customs Union Agreement to adjust such statutes in compliance with EU Article 86. In 2002, the TCA published in its Competition Journal, and delivered to the government, an analysis of thirty Turkish statutes that posed competition policy issues of this kind.⁸³ Although no statutory amendments resulted from that effort, the TCA has extended the original project and expects to publish a report by June 30, 2005, that will update developments since the 2002 report and add an analysis of additional statutes. The agency plans to use the study as the basis for an advocacy initiative to eliminate unjustified legal privileges. The agency recognises, however, that statutes establishing monopolies and special privileges often respond to public policy objectives other than competition. As the TCA succinctly puts it, “some of these legal privileges are crucially important, and the rationale behind them outweighs any benefit accrued from a competitive market structure.”

Also in this field, the TCA has recently completed a review of laws authorising self-regulatory professional and trade associations. The study’s objective was to identify provisions vesting associations with authority to fix minimum prices and adopt other anticompetitive regulations.⁸⁴ The final report, with recommendations for appropriate statutory amendments, will be sent to the government in June 2005 in conjunction with the TCA’s report on special privilege laws.

A fourth variety of competition advocacy arises in the context of privatisation. As described previously, Board participation occurs at two stages in a privatisation proceeding. At the first stage, the Board acts as a competition advocate in the process of designing a privatisation plan for an industry or asset. At the second stage, the Board acts as a law enforcement agency in applying the merger provisions in Article 7 of the Competition Act to particular transactions. The law establishing the Privatisation Administration requires it to consult with the Board, and the Board's Privatisation Communiqué provides specifically for consultation at the first phase of the process, before tender offers are released to the public.

A currently controversial example of the Board's activities in structuring privatisation tender offers involves the sale of a majority share in Turk Telekom (TTAŞ), the state-owned monopoly provider of land line telephone infrastructure. TTAŞ also owns and operates infrastructure for GSM mobile phone services, cable television, and Internet access. The Board concluded that the sale of Turk Telekom should be conditioned upon a requirement that the purchaser divest the cable television operation to a different entity within one year after purchase, and that the Internet access operation be established as a separate (but wholly owned) entity within the divested company within six months after purchase. The Board further recommended that the dominant private sector GSM service provider not be permitted to acquire TTAŞ nor hold a controlling interest in any consortium that submitted a bid. Finally, the Board urged that certain communication taxes that are charged to private sector operators but not to TTAŞ be eliminated before the sale. The Board's recommendation for structural separation of the cable television assets was criticised by some government officials who preferred to sell TTAŞ intact, but the Privatisation Administration's November 2004 tender announcement provided that the cable assets would not be part of the sale.

In August 2004, the Board was unsuccessful in urging disaggregation in another privatisation proceeding. At stake were the factories, warehouses, and brands of TEKEL's tobacco products division. Although TEKEL's previous cigarette monopoly ended in the 1980's, and several multinational firms have since established strong brands in the market, TEKEL's overall retail share is still about 60%. It holds even higher shares in some segments if the market is subdivided into price-point ranges. Introduction of new brands is difficult because cigarette advertising has been banned by law since 1996 on health grounds. The Board recommended that TEKEL's brands be divided and sold separately, reasoning that the possibility of purchasing a single brand would increase the likelihood of entry by more firms not already participating in the cigarette market. It would also enable smaller, less wealthy enterprises to participate in the tender auction proceedings. The Board added that selling the brands as a single block would make more likely enforcement action by the Board under Article 7 once the purchaser was identified.

The pending tender announcement, however, contemplates selling the tobacco products division as a block.⁸⁵

Another aspect of the TCA's competition advocacy role entails its relationship with the regulatory agencies responsible for the telecommunications and energy sectors. This topic has been a particular focus of interest, both for the TCA itself and for affected private firms. The telecommunications law both obliges the Telecommunications Authority to consult with the TCA about certain matters (such as investigations of Turk Telecom and preparation of proposed regulations) and provides that the TCA should consult with the Telecommunications Authority before taking any decisions respecting the telecommunications sector. In September 2002, a cooperation protocol was signed between the TCA and the Telecommunications Authority to promote cooperation and coordination between the two agencies with respect to law enforcement investigations, merger review, and exemptions and negative clearances under the Competition Act.⁸⁶ The protocol established a coordination committee of senior agency officers that was scheduled to convene four times per year, and a working group of more junior staff members that was expected to meet monthly. The TCA reports, however, that the working group has not been meeting and that the protocol has not been effectively implemented.

Meanwhile, private sector telecommunications firms complain that, due to overlapping jurisdictions, they are subject to penalties by both the TCA and the TA for the same conduct. It is also apparently possible that a firm could be subject to directly conflicting rules. For example, telephone service providers face both the Competition Act's prohibition of resale price maintenance and the Telecommunication Authority's regulations barring price discrimination in sales of phone services to end users (including retail purchasers of telephone cards). The TCA confirms that the existing laws vest the two agencies with overlapping jurisdiction respecting competition enforcement. A new draft law on telecommunications has recently been released for public comment. The government has requested the opinion of Competition Authority with respect to the proposal, and the TCA is developing comments with a particular focus on the problem of overlapping jurisdiction.

The 2002 Report (p. 81) noted the "curious" inconsistency between the telecommunications law, which (as described above) requires consultations between the TCA and Telecommunications Authority, and the sector laws on electricity and natural gas, which do not contain analogous provisions requiring consultations between the TCA and the Energy Market Regulatory Authority (EMRA). The 2002 Report concluded that, although the two agencies "could co-ordinate the consideration of common issues even without legislative direction," statutory authority should be provided to "eliminate any uncertainty about either agency's

power, so that the [TCA] could participate as appropriate in the process of restructuring and developing the regulatory system” for the energy sector” (p. 94). No action has been taken on that recommendation. The TCA observes that a recent Competition Act case against an electricity distribution firm implicated the jurisdiction of both agencies and exposed a need to delineate their respective roles and establish formal procedures for communication and coordination.⁸⁷ Although the TCA believes that a protocol for cooperation with EMRA should be developed, it states that no progress has yet been made on this front due to the press of other business.

A final form of activity relating to the first dimension of competition advocacy is the study of competitive dynamics in individual markets and other aspects of competition in Turkey. Although the TCA has been largely inactive in this area, the agency’s Economic Research Directorate was recently reorganised and 2004 saw the issuance of reports on media diversity, concentration in the software industry, tying agreements in the banking industry, and concentration ratios in production markets. More reports are expected in 2005.

The TCA staff’s proposed amendments to the Competition Act included at one point a provision that would have made the investigative tools in Articles 14 and 15 available for use in non-law enforcement market studies. That provision was later discarded, on the grounds that investigative tools may not be appropriate for use in research projects, and the agency now expects to obtain data for market studies by relying on outside contractors and using information collected by other government agencies (such as the Central Bank and the State Statistical Institute). The databanks held by other agencies are, however, protected by strong confidentiality protections that would have to be modified if the TCA is to gain access.

The second dimension of competition advocacy entails the agency’s efforts as a proponent for the acknowledgment and acceptance of competition principles in society at large. The TCA appreciates the importance of such advocacy and has developed a variety of programs to advance public recognition. In cooperation with local chambers of commerce, the TCA has periodically held one-day conferences on competition law and policy in Turkey’s main cities. From 1998 to 2001, eleven conferences were convened in such cities as Bursa, Antalya, Izmir, Istanbul, and Gazientep. Although no such conferences were held from 2002 to 2004, the TCA plans to convene conferences in thirteen cities during 2005. The agency also regularly presents conferences and symposia for the competition law and policy community. Recent symposia have focused on such topics as legal monopolies, developments in EU competition law, mergers and acquisitions, the interface between regulation and competition, public tenders, and abuse of dominance.

“Thursday Conferences,” open to the public, feature less formal discussions of current competition issues.

Other means by which the agency communicates with the public include the TCA’s website, which contains decisions, opinions, announcements, and updated news, with links to legislation and other related materials.⁸⁸ The TCA also publishes a 28-page booklet entitled “Competition, Why?” that describes the objectives and principal provisions of the Competition Act, and provides procedural charts, frequently asked questions, and one-paragraph summaries of selected cases involving cartels, abuse of dominance, and other violations. Now in its second edition, the booklet is designed to make basic information about the agency available to the public in a readily understandable form. It will soon be joined by an interactive CD-ROM, covering much of the same information as the booklet but also including video extracts and links to legislative documents, regulations, Board decisions and opinions, and TCA annual reports. The TCA also publishes the proceedings of many of its conferences and symposia, and issues the “Competition Journal,” a periodical that contains articles of interest to the competition policy community as well as the text of selected Council of State decisions rendered in TCA cases.

Training offered to external parties is another tool that the TCA employs to disseminate information about competition policy. In conjunction with the Bar Associations of Istanbul and Ankara, the agency holds one-week training programs in competition law for lawyers in private practice, taught by academicians and senior agency personnel. The fact that few law schools in Turkey offer courses in competition law has led the TCA to sponsor two-week training sessions in competition law for law students. Eighty students attended such sessions in 2004, which not only disseminate competition law principles in the legal community but also help the TCA identify candidates for employment as attorneys. Beginning in 2005, TCA experts will serve as guest lecturers for a competition law course offered by the law faculty at Ankara University. Within the government, the TCA staff provides lectures on competition policy at training programs offered to the personnel of other agencies. Agencies that have invited TCA lecturers include the Ministry of Energy, the State Planning Organisation, the under secretariats of the Foreign Trade and Treasury Ministries, and the Central Bank. The Authority also supports training in competition law and policy for judges in the Turkish judicial system. For conflict of interest reasons, however, it does not undertake to provide such training itself, but facilitates efforts to obtain judicial training assistance from outside institutions.

With respect to media relations, the following table shows the number of news stories published about the TCA each year since 1999, accompanied by the number and percentage of stories that the TCA’s media office characterizes as negative.

Table 5. News Media Coverage of the TCA

Year	Total stories	Negative stories	Negative %
2004	772	21	2.7
2003	769	38	4.9
2002	455	28	6.2
2001	577	10	1.7
2000	780	4	0.5
1999	772	8	1.0

Source: Turkey 2005

The amount of media coverage devoted to the TCA and competition issues is generally considered modest. The 2002 Report suggested (p. 17) that at least part of the difficulty faced by the TCA in getting media attention was attributable to the fact that the agency had prosecuted several actions against media companies. The TCA does not, however, believe that factor to be significant in accounting for variations in media coverage. The TCA attributes part of the decline in stories in 2001 and 2002 to the fact that the Turkish economy in those years was enduring a crisis that brought privatisation and liberalisation efforts to a virtual halt, thus reducing the number of TCA determinations that drew media attention. Part of the decline may also be due to the fact that the President of the agency in the 2001-2002 period offered less encouragement for media coverage than does the current administration. The TCA's media office notes that most news media in Turkey have only one reporter covering economic issues for the entire country, making it more difficult for the TCA to get substantial and continuing coverage for its activities.

The media office does not typically prepare a press release announcing the Board's decisions in law enforcement proceedings. A press conference is called when such decisions are issued and the major news bureaus (such as Reuters) usually attend. The news bureaus then prepare wire stories that are disseminated to other media outlets. Press releases in media-friendly language are, however, prepared for Board opinions on structuring privatisation proceedings, because the issues involved in those matters are usually more technical and complicated. Media representatives agreed that the TCA's press relations are generally well handled. The TCA hopes to encourage increased media coverage by offering to provide more television and radio interviews

Knowledge about the TCA, the Competition Act, and competition policy is reasonably prevalent among large businesses in Turkey. It is considerably less so among small and medium business enterprises and, in the TCA's words, "poor" as

to the public generally. The degree of support for competition policy follows the same pattern. TUSIAD (Turkish Industrialists' and Businessmen's Association), a private sector association of 550 business leaders of major companies in Turkey, reports a significantly increased awareness of competition policy among its members over the past few years, but notes that the depth of understanding and the degree of support for competitive principles is uncertain. TUSIAD's leadership, at least, supports competition policy and gives high marks to the TCA as an agency. TOBB, the Turkish Union of Chambers and Exchanges, reports similar sentiments at the national organisation level. The extent to which the views of TOBB's leadership have penetrated to the level of the association's many members is far more doubtful.⁸⁹ Development of general public support is hampered generally by the absence in Turkey of any strong civic institution with competition policy as part of its agenda.

The origin of the Competition Act as a requirement in the Customs Union Agreement with the EU does not, in the TCA's view, adversely affect prospects for public support. The TCA notes that Article 167 of the Constitution requires the state to assure orderly functioning of markets and prevent monopolies, and that government efforts to develop and adopt a competition law date back to the early 1970s. Consequently, the Competition Act has domestic origins that can be cited quite apart from the Customs Union.

6. Conclusions and policy options

6.1 *Current strengths and weaknesses*

The 2002 Report remarked (p. 29) that the Turkish Competition Authority was "off to a good start." The agency has continued to make excellent progress in the years since. It has played a critically important role in moving the Turkish economy forward to greater reliance on competition-based and consumer-welfare oriented market mechanisms. As an agency, it can take justifiable pride in its reputation as one of Turkey's most effective and best administered agencies. It has pursued its mission with energy, imagination, and integrity and has won respect and support from leaders in the business community. The TCA faces problems that often confront competition agencies in economies with a long tradition of strong government control, including deficiencies in public understanding of and appreciation for competition policy, inexperienced (and slow) judicial review organs, and less than complete support from other parts of the government. It is, however, aided by the fact that improving the competition policy framework will advance Turkey's goal of membership in the European Union.

Particular strengths of the TCA include its devotion to the articulation and efficient implementation of sound competition policy; its focus on due process and transparency; and its attention to the development and training of expert staff personnel. Its status as agency with fiscal and administrative autonomy, and the absence of substantive interference in its work by the government, also contribute significantly to its efficacy. Weaknesses include some disorganisation in its approach to harmonisation with EU competition law and the continuing problem of developing a robust competition culture. Other problems with competition law and policy in Turkey, reflected in the recommendations below, arise from statutory deficiencies that will require Parliamentary action to correct. Indeed, most of the recommendations made by the 2002 Report that remain unmet, and that are renewed here, entail action by the parts of the government other than the TCA. The TCA has responded, at least partially, to all of the proposals in the previous report directed specifically to it. It has advanced its competition advocacy activities within the government, assured timely resolution of merger review proceedings, and made efforts (albeit not notably successful thus far) to improve coordination with sector regulatory agencies in Turkey and to expand cooperative relationships with competition agencies in other countries. The following recommendations are designed to address the full array of competition law and policy issues in Turkey today and treat a variety of topics, including the implementation of the Customs Union Agreement, the interaction between the competition law and other statutory and regulatory regimes, the terms of the Competition Act itself, and various policies of the Competition Authority.

6.2 Recommendations

6.2.1 *Promptly establish a mechanism for controlling anticompetitive state aid.*

Turkey should, without further delay, adopt a mechanism for controlling state aid, consistent with its obligations under the Customs Union Agreement. The pending question is how that mechanism should be organised. The TCA's independent status and competition policy expertise plainly make it an appropriate agency to discharge the responsibility. Resistance to that approach may be based on concerns that the TCA will be too enthusiastic in restraining aid programs. Its discretion would not be unlimited, of course, because state aid decisions by the TCA can be made subject to judicial review. Moreover, the draft implementation rules for the Customs Union Agreement require that final decisions about particular aid programs be communicated to the EU, and contemplate ongoing consultations between Turkey and the EU with respect to enforcement policies. Thus, there will be procedures in place to avoid either over- or under-enforcement and to promote convergence between Turkey and the EU on state aid policies.

If the government's pending proposal to vest primary authority for controlling anticompetitive state aid in the State Planning Office is nonetheless enacted, the TCA would still retain an important role in the review process through its seat on the State Aid Monitoring and Supervising Board. The TCA should, of course, participate vigorously in the deliberations of that Board, which will have power to render judgments on the competitive effects of particular state aid programs.

6.2.2 Adopt an organised approach to harmonisation with EU competition law.

The Customs Union Agreement (Art. 39(2)) requires Turkey to assure that "the principles contained in the block exemption Regulations in force in the Community, as well as in the case-law developed by EC authorities" are effectively applied. The TCA has issued block exemptions for vertical arrangements and for research and development agreements that differ in significant ways from the EU counterpart exemptions. There have been no consultations between the TCA and the EU to determine whether the TCA text is compliant with the obligations under the Customs Union Agreement. A more efficient approach would involve solicitation of the EU's views on proposed block exemptions while the exemptions are being formulated. Whether such consultations could have been undertaken previously is unclear, due to the absence of implementing regulations under the Customs Union Agreement. Once Turkey establishes a state aid control program and the implementing regulations are adopted, however, the TCA should routinely consult with the EU with respect to the adoption and modification of block exemptions.

The TCA should also establish and publish an agenda, with timetables, for the prompt consideration of EU block exemptions that presently have no Turkish counterpart and of block exemption amendments issued by the EU. In the past, the TCA has typically taken about three years to adopt regulations corresponding to new EU exemption regulations or amendments, although the Customs Union Agreement provides that Turkey should adapt its provisions to EU amendments within one year.⁹⁰

Finally, to assure compliance with the obligation under the Customs Union Agreement to apply EU case law principles, the Board's formal case decisions should routinely describe and consider the EU precedents relevant to the issues in dispute.

6.2.3 *Eliminate or control state-created enterprises and associations that are vested with monopoly concessions or with powers and privileges enabling them to undertake anticompetitive conduct.*

This recommendation arises from three related recommendations made by the 2002 Report, which urged (1) the elimination of state monopolies and anticompetitive protections accorded to favoured commercial enterprises, (2) the development of competition policy controls akin to EU Article 86(2) with respect to monopolies providing public services, and (3) the restriction of self-regulatory powers vested in public professional associations, to prevent anticompetitive regulation of prices and entry on grounds other than competence. Ideally, Turkey should simply terminate state monopolies, privatise all state commercial enterprises, and eliminate the anticompetitive legislative provisions identified by the TCA in its various studies. Failing that, however, the TCA staff proposals for amending the Competition Act include a means for addressing state measures that establish monopolies or accord special privileges or powers to enterprises or associations. The proposal would empower the Board, after it determined that a state measure distorted competition in Turkey under Articles 4 or 6 of the Act, to petition the Council of State for annulment of the offending legislation or regulation. The fact that a state measure would be inconsistent with the Competition Act is a sound reason for triggering formal scrutiny. The proposal, however, leaves open the standard to be employed by the Council in resolving the TCA's application where policy objectives other than competition are raised to justify the measure in question. EU Article 86(2) could serve as guidance in identifying the kinds of public policy concerns that are sufficient to trump competition principles, and Turkey should consider adopting some version of that legislation.⁹¹

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

This recommendation, which relates to the TCA's authority under Article 7 of the Competition Act, renews the same recommendation made in the 2002 Report. As observed then, assuring competition in the banking sector is important because constraints on access to funds can discourage entry into other market sectors. The prudential concerns of banking regulators are, of course, entitled to full recognition, but such concerns do not justify complete elimination of competition analysis. In the EU, on whose system Turkey is supposed to be modelled, the antitrust authorities generally retain authority to conduct competition reviews of bank mergers, while the member states may still undertake prudential supervision and analysis.⁹²

6.2.5 *Mandate a role for the TCA in regulatory analysis.*

The 2002 Report recommended that a formal, authoritative requirement be imposed on government agencies requiring advance consultation with the TCA on proposed laws and regulations. No legislation to that effect having been enacted, the TCA staff's draft amendments to the Competition Act appropriately require public institutions and organisations to obtain the Board's opinion concerning any "acts, bylaws and regulations ... which shall affect competitive conditions in markets for goods or services in the whole or a significant part of the territory." This provision would not oblige agencies to accept the TCA's opinion, but failure to obtain it would render the resulting measure unenforceable as a matter of law. The proposed provision should be enacted, but should be modified so that agencies declining to follow the TCA's recommendation are required to state on the public record the reasons for their position.

6.2.6 *Expand consultation with sectoral regulators.*

Although part of this recommendation reiterates an item from the 2002 Report, the problems of coordination between the TCA and sector regulatory agencies have become broader and more pressing since that time. The TCA should continue to seek opportunities for cooperation with the Telecommunications Authority. The issues of overlapping jurisdiction that impose uncertainty on private sector firms and impair competitive market operations should be promptly addressed, but not necessarily by a statutory amendment specifying precise jurisdictional boundaries. Statutory demarcations of authority cannot readily be altered to reflect changes in the market, and provide additional issues for parties to contest in court. The affected agencies should consider the possibility of devising a more flexible solution, such as by negotiating and issuing an expanded protocol that contains an explicit allocation of enforcement authority. Such a protocol could be designed to preserve each agency's core jurisdiction while eliminating the exposure of private parties to conflicting or duplicative legal requirements. The agencies should also address the suggestion in the 2002 OECD Report that they develop a common framework for determining whether a firm has a dominant market position.

With respect to the Energy Market Regulatory Authority (EMRA), action should be taken on the 2002 recommendation to establish a statutory basis for TCA participation in EMRA regulatory proceedings. Also, the TCA should pursue adoption of a formal protocol with EMRA, to establish the procedures for communication and coordination that the TCA recognises are now lacking.

Finally, on a related point, consideration should be given to affording the Board a formal opportunity to comment on proposed determinations by the Prime

Ministry's under secretariat of Foreign Trade in proceedings to enforce Turkey's unfair import and dumping laws.

6.2.7 *Exercise due care in employing the concerted practice presumption.*

The TCA has correctly concluded that the concerted practice presumption should not be invoked to find an infringement of Article 4 merely on the basis of parallel pricing. Due process issues aside, it is a commonplace proposition of economic analysis that parallel pricing in oligopolistic markets is as consistent with competition as it is with collusion. The Board's present policy on this point appears to be correct, and the Board's decisions properly recognise that economic analysis of market conditions and careful assessment of additional evidentiary factors is important to avoid erroneous determinations of illegality. To address practitioners' concerns in this respect, the Board should make special efforts to articulate in its decisions what role, if any, the presumption played in its analysis of the case and to explain what additional evidence was deemed probative of collusion for each of the firms found liable.

More subtle issues are presented by the Board's reliance on parallel pricing or other interdependent behaviour as the basis for opening investigations in oligopolistic markets. Target firms have legitimate concerns about the costs and burdens associated with TCA investigations, and the question of standards for commencing investigations warrants focused debate. The Board should consider developing, and publishing for public comment, a formal policy statement on its standards for opening investigations, particularly in oligopolistic markets. The statement would explain the role of the concerted practice presumption, describe the minimum factual evidence deemed necessary to justify an investigation, and discuss the circumstances in which a research study by the TCA could be a preferable initial approach to a problematic market.⁹³

6.2.8 *Amend the Competition Act to improve law enforcement capacity.*

The Competition Act should be revised in a number of ways to make the law enforcement process more efficient and fair. Many of the following recommendations already appear in the TCA staff's draft amendment package and two of them (respecting the market share test for merger notifications and fines for non-compliance with investigative processes) are reiterations of proposals in the 2002 Report.

- Simplify merger notification standards.

Merger notification requirements keyed to market share are problematic. Experience elsewhere has shown that reporting obligations should not depend on issues critical to the substantive evaluation of the underlying transaction. Requiring judgments about market definition and market share imposes costs and risks on the filing parties and detracts from efficient administration of the notification program. Nearly all of countries that previously employed market share as a notification trigger have eliminated it. The TCA, as part of its ongoing project to revise the merger review system, should ascertain how many transactions are filed only because they meet the market share threshold, and determine whether the benefits associated with such filings justify the costs. The same point applies to privatisation notifications, which are also subject to a market share trigger. If most notifications are based on the aggregate turnover threshold, the market share test should be eliminated unless it can be established that high-market-share mergers among relatively small firms pose a particularly significant competition problem in Turkey.

- Adopt the revised EU standard for assessing mergers.

Article 7 of the Competition Act, which bars any merger or acquisition that “creates or strengthens the dominant position of one or more enterprises, as a result of which competition is significantly impeded” in a relevant market, should be conformed to the EU’s new merger regulation, which prohibits transactions that “would significantly impede effective competition [in a relevant market], in particular as a result of the creation or strengthening of a dominant position.” This change is desirable both to achieve harmonisation with the EU and because the revised EU formulation provides a more flexible and refined standard for identifying anticompetitive transactions.

- Revise the deadlines for the merger evaluation process.

The 15 day preliminary examination period now provided by the Competition Act for notified transactions is too short. It should be extended to 30 days, a change that would provide adequate time for review and also resolve both the problem of “late Friday” filings and the ambiguity in Article 10(3) respecting the effective date of notified transactions. On the other hand, the maximum period for litigated merger case proceedings is now too long. The Act provides that such proceedings are subject to the same deadlines as other competition cases, which means that more than a year could elapse before final case resolution by the Board. The maximum duration for merger case proceedings should be limited to 90 days, as the TCA staff’s proposal recommends.

- Increase maximum fines for violations other than substantive infringements and make early consummation of mergers a substantive violation.

The inadequate fines now provided in the Competition Act for ancillary violations should be increased. Article 16 should be amended, as the TCA staff proposes, to eliminate the existing individual fine limits and to replace them with a maximum limit set at 1% of the violator's gross income. Article 17 should likewise be revised to eliminate the individual daily fine amounts provided for specific types of violations and to replace them with a maximum daily limit set at 5% of the violator's gross income. Submission of incomplete information and the failure to provide any information at all in response to an information request should be added to the list of violations for both Articles 16 and 17. Finally, early consummation of a merger requiring Board approval should be made a substantive violation, thus subject to a fine up to the 10% gross income limit applicable to other substantive violations.

- Create a *de minimis* exemption for agreements involving small enterprises.

The TCA should be vested with statutory authority to establish, by communiqué, a *de minimis* exemption protecting small firms from prosecution. The model for the communiqué would be the EU's *de minimis* exemption, which applies where the aggregate market share of the participating parties does not exceed 5% for horizontal agreements and 10% for vertical agreements. The TCA has expressed concern about the wisdom of prosecuting horizontal agreements in local markets, on the grounds that the agency risks expending its enforcement resources on numerous small cases. Although adoption of a *de minimis* exemption will assist in resolving questions of enforcement priority, it is important to note that the EU exemption does not protect "hardcore" agreements to fix prices or allocate markets. Such agreements should likewise be excluded from protection under the TCA's communiqué. Local price fixing cases, especially in consumer markets like bread and bus transportation, often produce benefits well beyond termination of the offending agreement. Such cases usually receive significant attention in the local news media and serve to educate both consumers and the local business community about the Competition Authority as an agency and the role of competition law in a market economy.

It is fair to observe, however, that the exclusion of "hard core" cases from the EU's *de minimis* exemption does not mean that EU competition authorities must prosecute all such cases. Under EU Article 81, agreements cannot be prosecuted in any event unless they "appreciably restrict competition" among the Member States.

While hard core agreements among small firms in Turkey should not be sheltered from attack by a *de minimis* exemption, neither should the TCA be compelled to prosecute all such agreements. It would therefore be appropriate to include language in the Competition Act specifying that the TCA has discretion whether to prosecute hard core agreements that fall beneath the *de minimis* exemption's market share ceilings.

- Eliminate mandatory notification and the negative clearance procedure, and consider modifying the duration limit for individual exemptions.

As another step to achieve conformity with the EU and efficient practice for the TCA, the Competition Act should be amended, as the TCA staff proposes, to eliminate both the mandatory notification requirement in Article 10 and the negative clearance procedure in Article 8. Besides relieving the Authority from dealing with a plethora of notification filings, elimination of mandatory notification will avoid the enforcement problem presented when firms (such as the liner conference described previously in this report) enter agreements that are protected by an EU block exemption but not by a TCA exemption. Such firms typically do submit an Article 10 notification and thus make themselves technically liable to a fine for failure to file. The TCA correctly declines to seek a fine in such circumstances, but its position on that point is inconsistent with the letter of the Competition Act.

It may be observed that the TCA staff proposal to eliminate mandatory notification does not take the further step toward conformity with the EU by eliminating individual exemptions altogether. This is largely because the TCA relies on the individual exemption authority in Article 5 to resolve issues that arise from the incomplete congruence between the TCA's block exemptions and those of the EU. For example, as noted previously, the EU's research and development block exemption permits project participants to fix prices for project products that are jointly produced, and also permits the imposition of certain customer and territorial marketing restraints on downstream product sales. The TCA block exemption prohibits all such contract provisions unconditionally, with the consequence that the Authority addresses the acceptability of downstream market restraints through applications for individual exemptions under Article 5. If the Authority is committed to retaining the individual exemption system, it might nonetheless consider amending Article 5 to lengthen or eliminate the statute's 5 year limit on the duration of any individual exemption granted. The existence of that limit thwarts franchisors in Turkey who wish to impose non-compete clauses for the duration of franchise contracts lasting longer than five years. The only mechanism available presently to

them is to seek a negative clearance for such non-compete clauses, but that option will disappear if the TCA implements its proposal to eliminate negative clearances.

- Establish a procedure for settlement of cases by consent.

To permit efficient resolution of TCA investigations and achieve another point of conformity with the EU, the Competition Act should be amended as the TCA staff proposes to permit termination of a proceeding at any stage if the defendant commits itself to accepting the conduct modifications recommended by the Board.

- Eliminate minimum fines and authorise the TCA to offer lenient treatment to cooperative firms.

Enforcement experience in other countries has amply demonstrated that competition authorities should be able to offer lenient treatment or immunity from penalties to companies that reveal their participation in unlawful concerted agreements and activities. Therefore, as also proposed by the TCA staff, the Competition Act should be amended to (1) eliminate the mandatory minimum fine for substantive violations; (2) authorise the Board, in determining fine assessments, to consider whether the violator has assisted the investigation; and (3) provide for the abatement of criminal sanctions with respect to cooperative firms.

- Establish personal fines for company managers and consider criminal penalties for managers who are responsible for substantive violations.

Article 16 of the Competition Act presently requires the imposition of personal fines for managers (up to 10% of the fine assessed against the fine against the manager's firm), but only for ancillary violations like obstructing investigations, providing misleading information, or failing to file required notifications. The Act does not provide any criminal penalties for substantive competition law violations, and none exist elsewhere in Turkish law except for bid rigging of state tender offers. If the TCA wishes to administer an effective leniency program, the prospect of substantial personal fines and criminal prosecution is a powerful inducement for managers to cooperate with agency investigations. The existence of the bid rigging penalty shows that the concept of criminal punishment for price fixing is not completely novel in Turkey. Personal fines should be established for substantive violations, and consideration should be given to providing criminal penalties for at least hard core Article 4 violations. The TCA staff's proposal to eliminate entirely the provision requiring imposition of fines on company managers for violating the ancillary provisions in Article 16 may be too sweeping. Eliminating the mandatory element of the provision and providing the Board with authority to assess such fines at its discretion would retain the Board's ability to address managerial misconduct in

egregious cases and strike a reasonable balance between effective law enforcement and administrative efficiency.

- Expand due process protections in TCA proceedings.

Although some of the TCA's block exemptions already require the Board to request the views of the affected party before withdrawing the exemption for an individual firm, the Competition Act should be amended to assure that the due process protections provided by Part IV of the Act are extended to all actions withdrawing block or individual exemptions or negative clearances. Also, for due process reasons of impartiality, the TCA staff proposal amending Article 43 of the Act to eliminate personal participation by Board members in agency investigations should be adopted.⁹⁴

6.2.9 *Enhance transparency.*

Although the TCA is already among the most transparent of Turkish agencies, it could improve its transparency practices further by issuing a policy statement or regulation that would specify the procedures it employs for developing proposed statutory amendments and communiqués. The regulation would establish standard procedures for notice and public comment on such proposals, and provide for posting on the public record the public comments received, the TCA's responses to the issues that the commentators present, and the TCA's rationale for its final conclusions. The Board should also develop and publish guidelines for determining the size the fine assessments. Finally, the Authority should follow routinely the practice it has recently commenced of publishing summary versions of the opinions it delivers at the initial stage of privatisation proceedings, and should also post on its website the text of all Council of State decisions delivered in TCA cases.

6.2.10 *Leverage and expand the Authority's reach through international cooperation.*

This is another recommendation of the 2002 report that deserves reiteration. The TCA's efforts to establish a more cooperative arrangement with DG COMP can presumably advance once a state aid monitoring system is established and implementing rules are adopted under the Customs Union Agreement. As noted previously, however, the implementation rules will not permit the EU to disclose confidential law enforcement information. The TCA should therefore consider the possibility of developing cooperation agreements with antitrust agencies in other countries that would permit sharing of investigative information.

6.2.11 Consider requesting statutory authority to employ investigative powers in conducting non-law enforcement market studies.

Competition agencies can perform an extremely valuable service by conducting in-depth analyses of the competitive dynamics in individual markets or sectors. Such studies can reveal previously unsuspected forms of private conduct or government regulation that impair competition. And study results can play an important role in promoting public understanding of how competition works and what benefits it produces. The details and data of industry operations are not, however, often readily available on the public record or willingly provided by the companies under examination. Other government agencies that have collected sensitive commercial data for statistical or regulatory reasons are typically unwilling to share such data with competition agencies, because of concerns that such disclosure might prejudice the accuracy of data submitted by firms in the future. For these reasons, the TCA should consider requesting express authority to employ its own statutory investigative powers in non-law enforcement market studies. Private firms will likely raise concerns that market studies conducted by a competition law enforcement agency are not impartial efforts to collect and analyse facts but rather investigations seeking violations of the law. Such concerns are legitimate, and should be addressed by imposing confidentiality restrictions on the agency's study staff with respect to firm-specific information, and prohibiting study staff members for some period of years from involvement in law enforcement proceedings related to the industry examined. It should also be recognised that market studies can impose significant resource costs both on the agency conducting the study and the firms under focus, as well as generate public expectations that law enforcement or other governmental intervention in the market will be forthcoming. Studies should therefore be conducted only where the need is well justified, and any public announcement should emphasize that the investigation is not based on a suspicion of unlawful behaviour.

6.2.12 Promote support for competition policy.

The Authority engages in several notable activities to promote the development of a competition culture in Turkey. Its programs to provide training in competition law and policy to practicing attorneys, law students, and the personnel of other government agencies are worthy of emulation by competition authorities in any developing economy. There are, however, additional possibilities that the TCA could explore. It should (1) encourage establishment by the bar association of a competition law committee or similar organisation to organise interaction between the TCA and the legal community, (2) seek cooperation with the Directorate for Competition and Consumer Protection in the Ministry of Trade and Industry to include information about competition cases significant for consumers in the

education programs sponsored by that agency, (3) increase media coverage of its actions by implementing its plan to offer more television and radio interviews to media outlets, (4) consider issuing press releases, written in consumer-friendly language, to describe Board decisions in competition enforcement cases, (5) explore expanded interaction with TUSIAD (the Turkish Industrialists' and Businessmen's Association), which advises that it would welcome participation by the TCA in such TUSIAD projects as the development of policy recommendations for Turkey's energy sector, (6) implement the planned reinvigoration of its one-day competition programs offered in conjunction with city business chambers and (7) generally increase the frequency with which TCA representatives make presentations to national and local business groups.

6.2.13 Increase the numbers and expertise of TCA lawyers and enhance the TCA's industrial organisation competence.

The TCA already recognises that it needs more competition experts with legal training to participate in investigations and prepare the analysis of legal issues in Board decisions, as well as more Legal Office attorneys to defend Board decisions on appeal before the Council of State. The agency should pursue its plans to increase significantly the number of agency lawyers in the near term. The TCA should also continue and expand its program offering agency lawyers the opportunity to obtain post-graduate degrees in competition law.

With respect to economic expertise, although the TCA's competition experts are trained in and conversant with economic analysis, none of them holds a doctorate in industrial organisation economics or any other branch of economics. The agency needs, and should promptly obtain, advanced industrial organisation expertise to provide support and supervision for economic analysis in difficult cases. Programs that offer present TCA experts the opportunity to obtain post-graduate degrees in industrial organisation economics should be expanded.

NOTES

1. Background Report on the Role of Competition Policy in Regulatory Reform, in OECD, *Regulatory Reform in Turkey* (2002), also available at www.oecd.org/dataoecd/3/0/27068413.pdf.
2. Art. 39(2)(a) & (b), Decision 1/95 of the EU-Turkey Association Council Implementing the Final Phase of the Customs Union (Dec. 22, 1995). Article 39(2)(a) also requires Turkey to “ensure that, within one year after the entry into force of the Customs Union, the principles contained in the block exemption Regulations in force in the Community, as well as in the case-law developed by EC authorities, shall be applied in Turkey.”
3. Law No. 4054, on the Protection of Competition; passed 7 December 1994, effective 13 December 1994 (“Competition Act”).
4. Statutory Decree No. 494, amending Organisational Act No. 3143.
5. National Program for the Adoption of the Acquis, Official Gazette, 24 July 2003 No. 25178 bis.
6. For further information, see 2004 OECD Economic Survey of Turkey.
7. Pre-Accession Economic Programme (State Planning Organisation, Ankara, Nov. 2004) pp. 73-74, 134-35.
8. European Commission, 2004 Regular Report on Turkey’s Progress Towards Accession (Oct. 6, 2004) p. 64.
9. No practical difference between Turkey and the EU appears to arise from the fact that Article 4 covers conduct that has an anti-competitive “object or effect or ... possible impact” while the comparable language in Article 81(1) refers only to “object or effect.” In the EU, Article 81(1) has been interpreted to reach potential as well as actual effects and covers, for example, agreements that were never put into operation. Bellamy, Christopher, and Graham Child (2001), *European Community Law of Competition*, London. ¶¶ 2-101, 2-106.
10. Turkey’s Article 56, which provides that agreements violating Article 4 are void and unenforceable as a matter of law, is the counterpart to the similar provision in EU article 81(2).
11. EU Notice 2001/C 368/07, implements EU case precedent under which agreements are deemed to violate Article 81(1) only if they “appreciably restrict

- competition.” The Notice provides, however, that no protection is accorded for “hardcore” horizontal agreements that fix prices or allocate markets, or for certain vertical agreements (such as those designed to control resale prices).
12. Authority to revoke a block exemption as to a particular agreement involving a given firm is typically reserved by a provision in the exemption itself. Further, a provision in the vertical agreements block exemption (Communiqué No. 2002/2, Art. 6(2)) reserves the Board’s option to issue a separate communiqué withdrawing the exemption as to all the firms in a relevant market if a “significant part” of that market is covered by a “parallel network” of similar vertical restraints.
 13. As a substitute, Article 10 of the EU’s new general competition regulation (No. 2003R001) provides for the issuance of declarations that “the prohibition in Article 81 or Article 82 of the Treaty does not apply” to a particular agreement or practice. Such declarations are, however, available only in “exceptional cases where the public interest of the Community so requires,” and are intended particularly to deal with “new types of agreements or practices that have not been settled in the existing case-law and administrative practice.” Council Regulation No. 1/2003 (Dec. 16, 2002) (OJ L 1, 4.1.2003), ¶ 14.
 14. The EU defines “active sales” as those made by direct marketing methods, such as (1) sales calls, visits, or direct mail to individual customers; (2) specifically targeted advertising; or (3) the establishment of a distribution outlet in another distributor’s exclusive territory. *Guidelines on Vertical Restraints*, Commission Notice 2000/C 291/01, (Oct. 13, 2000) ¶50.
 15. The case is on judicial review, and the Board’s decision has been suspended pending the appeal.
 16. Communiqué No. 1997/3 Concerning Exclusive Distribution Agreements, Communiqué No. 1997/4 Concerning Exclusive Purchasing Agreements, and Communiqué No. 1998/7 Concerning Franchise Agreements.
 17. A “non-compete clause,” as defined identically in Article 3(d) of the TCA’s Communiqué and Article 1(b) of the EU’s exemption, is a contract provision that either (1) prohibits the buyer from manufacturing, purchasing, or selling goods or services that compete with the goods or services involved in the vertical agreement at issue, or (2) requires the buyer to purchase from the supplier (or from a source designated by the supplier) more than 80% of the buyer’s requirements for the subject goods or services. Clauses of the second type are often referred to as “exclusive dealing.”
 18. An earlier September 2001 proceeding with respect to the same non-compete clause involved the only occasion on which the Board has revoked a negative clearance. The Board had originally granted a negative clearance for a non-compete clause of indefinite duration, but concluded that, by 2001, the bank’s

- share of the relevant market had become so large as to impair unduly the prospects of new entrants.
19. The Board has never withdrawn any of the other block exemptions from an individual firm. Nor has it ever withdrawn an individual exemption previously granted to a firm.
 20. Explanation of the Block Exemption Communiqué on Vertical Agreements (Decision No. 03-46/540-M, June 30, 2003).
 21. The TCA's Vertical Guidelines (¶23) define "passive sales" as those which do not result from any active attempt to solicit sales in another distributor's assigned territory. Sales arising from general media advertisements are considered to be passive. Article 4(b) of the TCA's vertical block exemption prohibits suppliers from restricting passive sales.
 22. Decision No. 01-17/150-39 (April 6, 2001), p. 56.
 23. For these reasons, the EU's competition authorities (as most others) do not normally prosecute firms with monopoly power for charging "high" prices, even though Article 82(a) (unlike Article 6 of the Turkish statute) expressly mentions charging "unfair" selling prices as an example of abuse. The EU has instead reserved the pricing clause in Article 82 for cases attacking predatory pricing. See Faull, Jonathan, and Ali Nikpay (1999), *The EC Law of Competition*, Oxford, §§ 3.295-3.304.
 24. Communiqué No.1997/1, Mergers and Acquisitions Calling for the Authorisation of the Competition Board (Jan. 1, 1997).
 25. Merger Communiqué Art. 2(c).
 26. For the EU's analysis of this point, see Regulation 139/2004 (Jan. 20, 2004), paragraphs 24-26.
 27. Article 6(1)(a) of the Merger Communiqué provides that the Board, in assessing mergers, will consider "the need to maintain and develop effective competition within the country in view of ... actual or potential competition from the undertakings located either within or outside the country."
 28. The language of Article 7, which covers any form of acquisition by which one enterprise gains control of another, excludes only acquisitions by inheritance.
 29. The Privatisation Administration determines how to structure the sale of assets designated for privatisation. The Privatisation High Council, a political body, decides whether and when to include particular assets in the privatisation program and approves the winning bidder.
 30. See Communiqué No. 1998/5 (Nov. 18, 1998).
 31. The Board's activities as a commentator at the initial stage of privatisation proceedings are treated later in the discussion of competition advocacy.

32. The Board did not object to privatisation of the firm as a block sale because legislation enacted in late 2003 terminated Turkish petroleum import restrictions effective January 1, 2005. Large capacity refineries in the Mediterranean and Black Sea areas could readily defeat any price increase by TÜPRAŞ.
33. The transaction was, however, subsequently annulled on procedural grounds by the Council of State. The Privatisation Administration is preparing to renew the proceeding.
34. See, *e.g.*, European Commission, 2004 Regular Report on Turkey's Progress Towards Accession (Oct. 6, 2004) pp. 93-94.
35. The Board, chaired by the Deputy Undersecretary of the SPO, would consist of the General Director for State Aid and representatives from the Ministry of Finance, the Undersecretariats of the Treasury and of Foreign Trade, the Ministry of Industry and Trade, and the Competition Authority. Board decisions would be subject to review by the Council of State.
36. Commercial Code, Art. 56.
37. Law No. 4077.
38. The Directorate's title reflects the fact that it was responsible for enforcing the Competition Act before the Competition Board was constituted. It no longer has a competition enforcement function.
39. The terms of Board members are staggered against the terms of Presidential administrations and Parliamentary cohorts. Turkey elects its national president every 7 years and its unicameral Parliament every 5 years.
40. It may be noted that an institutional check on the capacity of the Board to diverge too greatly from the recommendations of its expert staff arises for the conjunction of Articles 43 and 52 of the Competition Act. The former requires that formal investigations have one or more assigned staff rapporteurs, and the latter requires that Board's final decision include the opinion that the rapporteurs prepare at the end of the formal investigation.
41. One academician observed that, although the Board appears free from external political influence, Board members may nonetheless have an incentive to cultivate the government's favour in hopes of winning re-appointment. The solution suggested was to extend the term of Board members from six years to ten and to forbid re-appointment. The members of the Board responded that they did not consider the prospect of re-appointment so attractive as to skew their case decisions. Some observed, however, that a single ten year appointment was superior to the proposed omnibus law for autonomous agencies, under which members would be limited to a single six year term.
42. European Commission, 2004 Regular Report on Turkey's Progress Towards Accession (Oct. 6, 2004) 93.

43. On the other hand, the standard for granting a negative clearance is more demanding, as it entails a determination that the conduct notified does not violate Article 4 at all. In contrast, an individual exemption reflects a determination that, although the conduct violates Article 4's prohibitions, the particular circumstances involve sufficient countervailing benefits to make the conduct acceptable.
44. 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.)
45. 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 affirmative votes (Art. 51).
46. Two examples described previously in this report are the cigarette display rack exclusivity case and the TTAŞ/ADSL matter.
47. The effect of the provision would be roughly similar to that of the consent settlement provision in Article 9 of the EU's competition regulation (No. 2003R0001).
48. On a different point, some practitioners expressed doubt about the willingness of the TCA to honour claims of attorney-client privilege in the investigative process. In the EU, the Court of Justice has recognised that attorney-client privilege protects communications between a client and an independent lawyer. *AM&S v. Commission*, [1982] ECR 1575, [1982] 2 CMLR 16. The TCA states that it follows EU policy and neither requests privileged documents nor employs as evidence any that are found.
49. See Article 6 of the exemption, Communiqué No. 2002/2. Similar language requiring the views of the affected parties appears in the withdrawal provision (Article 7) of the Research & Development exemption, Communiqué No. 2003/2, but not in the withdrawal provision (Article 8) of the Motor Vehicle Distribution and Servicing exemption, Communiqué No. 1998/3.
50. See Gürkaynak, Gönenç, *Shifting the Burden of Proof in Turkish Competition Law*, *Global Competition Review* 29 (Feb./Mar. 2002), London, Law Business Research Ltd., for a treatment of this and related issues.
51. Decision No. 00-24/255-138 (June 27, 2000).
52. When a constitutional claim is presented to the Council of State in a pending appeal, the Council must make a preliminary determination of the claim's merit. If the Council concludes that the claim is substantial, it must refer the issue to the Turkish Constitutional Court for resolution. If the Council decides that the constitutional claim is insubstantial, that determination may itself be appealed to the plenary chamber of the Council.

53. Decision No. 00-26/291-161 (July 17, 2000).
54. Decision No. 04-16/123-26 (Feb. 24, 2004).
55. The Board's ceramics decision, which includes an analysis of precedents in the EU and the United States that involve proof of concerted action, relies particularly on the EU's *Polypropylene* litigation, citing EU Commission Decision No. 86/398/EEC (OJ 1986 L 230/1), and the subsequent European Court of Justice decision on appeal in *Hercules Chemicals NV v. Commission*, [1999] ECR 4235, [1999] CMLR 976.
56. The Board's holding in the Coca-Cola predatory pricing case (Decision No. 04-07/75-18 (Jan. 23, 2004)), described earlier in this report, is an example of a decision replete with economic and econometric analysis.
57. One deadline that the Authority's staff finds problematic is the provision in Article 40 requiring that preliminary inquiries be completed within 30 days (as opposed to 6 months for formal investigations). The difficulty arises because commencement of a formal investigation must be notified to the target firm, and the staff therefore cannot conduct an unannounced and unexpected on-site investigation of the target firm unless it does so during the short preliminary inquiry period. The TCA staff's draft amendments would solve this problem by eliminating the separate deadline for preliminary inquiries and establishing instead a single deadline requiring issuance of the Board's final decision within 18 months after initiation of a matter.
58. For the years 1999 through 2004, the Board assessed about TRL 38 billion (USD 25,500) in fines against managers under Article 16 (3).
59. The Competition Act provides no mechanism by which a defendant may seek Board reconsideration of an adverse final decision. The TCA is not inclined to propose creation of such an option, because it anticipates that petitions for reconsideration would be filed routinely in every case, thus deflecting the Board's attention from more significant matters.
60. The title of this judicial body ("Danıştay" in Turkish) is also sometimes translated as "Supreme Administrative Court" or "Supreme Council." It is responsible for handling cases involving actions of the government. A separate court (the Supreme Court of Appeals) handles cases involving litigation between private parties.
61. Authority to seek judicial review of various Board decisions arises from Articles 42 and 55 of the Competition Act and from Article 24 of the Council of State Act. Judicial review is available only upon final resolution of the TCA proceeding. Parties cannot obtain interlocutory judicial review during the proceeding to hear (for example) arguments that the defendant is not an "undertaking" under Article 3 and hence not subject to TCA jurisdiction, or claims that a request for information under Article 14 is too broad or burdensome.
62. Law No. 5183 (June 2, 2004), Art. 34(C) (creating 13th Division).

63. Although 136 Board decisions were appealed, the Table reports that 329 appeal proceedings were initiated. The difference is attributable to the fact that some Board decisions involved multiple parties, each of whom filed a separate appeal.
64. Law No. 5234 (Sept. 21, 2004). The Article 55 amendment does not apply retroactively to pending appeals, but only to cases in which the Board's reasoned decision was delivered to the parties after the effective date of the amendment.
65. Under current law, if collection of the fine is stayed and the appellant ultimately loses the appeal, the appellant does not have to pay interest for the period of the appeal's pendency. The draft law on autonomous bodies includes a provision that requires payment of accumulated interest in that situation.
66. The opinions related to the privatisations of Turk Telekom and the tobacco assets of TEKEL.
67. A separate problem associated with situations like that in the liner conference case arises from the mandatory notification requirement in Article 10 of the Competition Act. Notification is mandatory, under penalty of a fine, for any conduct violating Article 4 that is not covered by a block exemption. In the liner conference case, the Board ultimately decided not to pursue this point against the conference, although no notification had been filed.
68. Because the case involved litigation between two private parties, the ruling was by a chamber of the Supreme Court of Appeals, not by the Council of State.
69. The EU is, of course, the prime focus of TCA interest with respect to enforcement cooperation. In December 2004, however, the TCA sent a delegation of competition experts to the United States for meetings with the US Department of Justice Antitrust Division and the US Federal Trade Commission. The TCA is now considering development of a cooperation agreement with those agencies.
70. Once Turkey establishes a state aid control program and the Customs Union implementing rules are adopted, the TCA expects to open consultations with DG Comp on a variety of topics beyond cooperation in law enforcement investigations. In particular, the TCA hopes to resolve questions about the degree of necessary harmonisation between Turkey's competition law regime and that of the EU.
71. Act on Prevention of Unfair Competition in Imports (Law No. 3577) and Regulations on Prevention of Unfair Competition in Imports.
72. One feature of the government's proposed omnibus law on autonomous bodies is a provision limiting the number of an agency's support staff to 30% of its professional staff.
73. Similarly, in 2003, the Board asserted jurisdiction to investigate an abuse of dominance complaint against TCDD, the Transport Ministry's state-owned railroad. The complaint, which alleged discrimination by TCDD against the use of

imported railcars on its lines by private freight companies, was ultimately rejected on the merits. But the Board claimed jurisdiction because TCDD's decisions on such matters such as the operation of imported railcars were made independently by TCDD and not controlled by the Transport Ministry.

74. See *Altair Chimica SpA v ENEL Distribuzione SpA.*, [2003] ECR 8875. A detailed analysis of the Board's holdings on this issue appears in İ. Selçuk, *State Monopolies and Exclusive Rights in Turkish Competition Law* (Oct. 2004) (paper presented at Colloquium on Current Issues of Competition Law in the Light of EU-Turkey Relations (Istanbul, Oct. 13-17, 2004).
75. This recommendation was based on the observation that no provision in Turkish law is available to constrain public enterprises from undertaking anti-competitive practices mandated in some fashion by the state (and hence outside the TCA's jurisdiction). Indeed, as the 2002 Report noted (p. 22), Turkish law contains provisions that exacerbate market distortions arising from the commercial operations of public enterprises, such as provisions providing state funds if costs exceed revenue (Statutory Decree No. 233, Art. 2).
76. See, e.g., the 2004 Accession Report at 94: "Major efforts concerning alignment in the adjustment of state monopolies and companies having exclusive and special rights are needed."
77. It is interesting to note that, on appeal of the Board's BELKO decision, the Council of State exercised its own initiative to consider the applicability of EU Article 86. The Council concluded that although BELKO, as a monopoly provider of heating coal, was "entrusted with the operation of services of general economic interest" within the meaning of Article 86(2), application of the Competition Act in the case at issue would not impermissibly obstruct BELKO's performance of its assigned task. Council of State (10). Dairesi E. 2001/4817, K. 2003/4770 (Dec. 5, 2003).
78. The Constitution describes the objectives of public professional organisations as "meeting the common needs of the members of a given profession, to facilitate their professional activities, to ensure the development of the profession in keeping with common interests, [and] to safeguard professional discipline and ethics in order to ensure integrity and trust in relations among its members and with the public." (Art. 135, para.1.)
79. The 2002 Report observed (p. 29) that the TCA's oversight role with respect to the competitive effects of proposed government regulations was supplemented to some degree at the Ministry level, citing the example of a draft law prepared by the small business directorate of the Industry and Trade Ministry. The bill was designed to protect small stores by regulating the locations of large retailers. Both the TCA and the Ministry's Director General pointed out that the proposal would deny the benefits of superstores to consumers. No recent examples of such involvement by the Industry and Trade Ministry are available, because no recent

- legislative proposals emerging from that Ministry have involved anti-competitive provisions.
80. The 1998 communiqué was issued by the General Directorate of Personnel and Principles of the Prime Ministry and re-issued in 2001.
 81. The Board's opinion in TOBB mentioned the fact that tradesmen chambers set maximum prices. The Board recommended adding a provision to the TOBB legislation that would prohibit merchants from joining tradesmen chambers. The Board remarked that implementation by merchants of maximum price schedules established for tradesmen not only distorted competition among the participating merchants but also "complicates, on the other hand, the maintenance of existence and the sustenance of activity by tradesmen." The Board added that, compared to merchants, tradesmen are disadvantaged "in many aspects, the production scale and the structure of costs being in the lead."
 82. A variation on the theme of providing commentary with respect to proposed legislation arose from an application filed by the Turkish Union of Banks that complained about certain existing laws. The Board advised the government to remove provisions in various budget acts that required public institutions to maintain their accounts at public banking institutions rather than at private banking companies. Banking legislation in 1999 had formally eliminated the distinctions between the two types of financial institutions and there was no reason to deny public organisations the benefits of competition as customers for financial services. The Board's recommendation is pending.
 83. This study was mentioned in the 2002 Report. (p. 28)
 84. This study was also mentioned in the 2002 Report. (p. 25).
 85. In 2003, the TCA considered another matter involving TEKEL, this one for the privatisation of TEKEL's salt division. The assets to be sold were four salt pans, three located near Turkey's Salt Lake, and the fourth (a sea-salt pan) located in İzmir. Together, the four pans produce all of Turkey's salt needs. The Board recommended that the three pans located near the Salt Lake be sold separately to three different purchasers, while concluding that the Izmir pan could be sold either separately or to one of the three purchasers of the Salt Lake pans.
 86. The protocol did not, however, address the suggestion in the 2002 OECD Report (p. 25) that the two agencies develop "a common framework for determining whether a firm has a dominant position, a determination that is made by the telecoms regulator in that sector."
 87. The case, described earlier in this report, was against ÇEAŞ, a company holding a monopoly concession for the distribution and transmission of electric power in one of Turkey's designated distribution areas. The Board found that ÇEAŞ had abused its dominant position by refusing to provide system interconnections for independent electric generation facilities.

88. The address is www.rekabet.gov.tr. The site also has an English version that includes, among other items, translations of selected Board decisions and opinions.
89. TOBB is created by statute to serve as the national trade association for businesses in Turkey. All business concerns must belong and about 1.2 million companies are presently on the membership rolls.
90. Article 39(2)(a).
91. Turkey is already obligated by Article 41 of the Customs Union Agreement to “uphold” the principles of Article 86, including that Article’s secondary legislation and case law, with respect to state measures that distort competition between Turkey and the EU Member States.
92. Article 21(4) of the EU Merger Regulation (No. 139/2004) explicitly contemplates that member states may undertake separate reviews of mergers on prudential grounds.
93. Identifying the best techniques for examining oligopolistic markets is also a topic about which the TCA could usefully solicit technical advice from other competition law enforcement agencies.
94. The government’s proposed omnibus law on autonomous agencies has a provision that would reduce the number of Board members from eleven to seven. If that provision is adopted, there would be a further practical reason for eliminating personal Board member participation in TCA investigations, as the number of available members would be insufficient to staff all pending investigations.