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Abstract

This paper evaluates the current competition policy framework in Turkey. A brief history of competition policy is presented. An account of the Law on the Protection of Competition, the main law on competition in Turkey, is given. The structure of the Competition Authority, the body responsible for applying the Law, and the way the enforcement system works are explained. Detailed statistics are given about all the cases submitted to the Competition Authority by 2002. Accounts of some selected cases are reported and a general assessment of the implementation of competition policy is offered. The main finding of the paper is that, although there is a movement in the right direction, competition policy implementation in Turkey still needs to be developed and strengthened.

Key words: Competition policy; Competition law.

JEL Classifications: K21, L4, L5.

1 Introduction

Since its foundation in 1923, one of the main aims of the Republic of Turkey has been integration with the West¹. For that purpose, Turkey joined newly-emerging Western organizations like the Organization for European Economic Cooperation (OEEC)² in 1948, the Council of Europe (CE) in 1949, and the North Atlantic Treaty Organization (NATO) in 1952. However, Turkey was ambivalent toward European Economic Community (EEC), formed under the Treaty of Rome in 1958. This was partly because the focus at that time was on

*The author is grateful to the Turkish Competition Authority staff for their help. Opinions expressed herein are those of the author and do not necessarily reflect the views of the Turkish Competition Board or the Turkish Competition Authority staff. Any remaining errors are the author's.

¹This paper is the first essay of the author's doctoral dissertation, written under the supervision of Prof. Stephen Martin at Purdue University, to whom it owes beyond a mere acknowledgement.

²The OEEC was superseded by the Organization for Economic Cooperation and Development (OECD) in 1961.

domestic political and economic instabilities and partly because of the EEC's uncertain future. Nevertheless, caution was set aside when Greece, a historical rival of Turkey, applied to EEC for associate membership in 1959. At the time, Turkey and Greece exported similar products to Europe, Turkey's largest trading partner, and the Turkish government believed that Greece's association with the EEC was likely to pose serious political and economic problems for Turkey in the future. Only sixteen days after the formal Greek application, Turkey applied to the EEC for associate membership³. Thus, the Greek factor and economic concerns lay behind Turkey's application to the EEC.

The EEC accepted Turkey's application and official negotiations on an association agreement started. However, in 1960, the military intervention in Turkey put a hold on the negotiations. Only after three years was the association agreement (a.k.a. the Ankara Agreement) between Turkey and the EEC finally signed on September 12, 1963. It came into force on December 1, 1964. The agreement basically consisted of three stages: the preparatory stage, the transitional stage, and the final stage. The establishment of a customs union was achieved at the end of the three stages. But Turkey's eventual aim was full membership in the EEC.

The preparatory stage that started on December 1, 1964 was concluded on January 1, 1970. At that date, the official negotiations between Turkey and the European Community (EC)⁴ on the transitional stage began. The negotiations led to the Additional Protocol, which was a supplement to the Association Agreement. The Additional Protocol was signed on November 23, 1970 and came into effect on January 1, 1973⁵. The Additional Protocol basically laid down the conditions, arrangements, and timetables for implementing the transitional stage referred to in Article 4 of the Association Agreement. Thus, the transitional stage started with the Additional Protocol. The Additional Protocol ultimately aimed to establish a customs union between Turkey and the EC by December 31, 1995. For that purpose, Article 43 of the Additional Protocol anticipated a closer alignment of economic policies between Turkey and the EC:

Article 43. The Council of Association shall, within six years of the entry into force of this Protocol, adopt the conditions and rules for the application of the principles laid down in Articles 85, 86, 90 and 92⁶ of the Treaty establishing the Community.

Article 85, 86, and 90 concern rules applying to undertakings. Article 85 precludes restrictive agreements between independent undertakings. Article 86 deals with abuse of monopoly or market power. Article 90 deals with public undertakings and undertakings granted special or exclusive rights. Article 92 concerns aids granted by states. With the Additional Protocol in general and Article 43 in particular, the foundations of Turkish competition policy were laid.

³Muftuler Bac (1997), p. 54.

⁴EEC was replaced by EC on July 1, 1967.

⁵Muftuler Bac (1997), p.59.

⁶These articles have been renumbered as 81, 82, 86, and 88 by the Treaty of Amsterdam.

However, it took many years for Turkey to adopt the conditions and rules mentioned in the article. It was only on December 13, 1994 that Turkey had a competition law close to the spirit set in Article 43 of the Additional Protocol⁷. Three months later, on 6 March 1995, the EC-Turkey Association Council decided to move on to the final stage of the customs union. On 13 December 1995 the Parliament gave its assent to the customs union. The decision on the final phase of customs union came into force on 31 December 1995. Despite the customs union, the implementation of competition policy in Turkey actually began in 1997, when the Competition Authority was established. Thus, it is legitimate to say that competition policy is a new experience for Turkey.

The object of this chapter is to evaluate Turkey's experience with competition policy since 1997, mainly drawing upon the Annual Reports of the Competition Authority, the Justified Decisions of the Competition Board, and extensive interviews and correspondence with the Authority's competition experts. The paper's contribution to the literature is twofold. First, despite the recent trend of empirical evaluations of competition policies in various countries⁸, it seems that there is a gap in the literature for Turkey's competition policy experience. This paper aims to fill this gap. Second, most studies that evaluate competition policy rely heavily on formal documents like annual reports of competition authorities. We believe that a better evaluation of competition policy implementation has to go beyond that. That's why this paper digs deeper and presents a more detailed analysis of the implementation of competition policy by going over each publicly available decision made by the Competition Authority between 1997 and 2002. In that way, we are able to derive specific information about the way the relevant market is defined, the degree of consensus between the reporters and the board on cases, and average duration of cases.

The organization of the paper is as follows. Section 2 gives a brief history of competition policy in Turkey. Section 3 introduces the Law on the Protection of Competition, Law No. 4054. Section 4 discusses the structure of the Turkish Competition Authority and the procedures followed by it in implementing the Law. Section 5 presents some detailed descriptive statistics about all the cases processed by the Authority by the end of 2002. Section 6 presents some illustrative cases. Section 7 concludes. Some important articles of the Law are included in an appendix.

⁷The competition law in Turkey still does not have articles corresponding to Articles 90 and 92 of the Treaty of Rome.

⁸See Hoekman and Djankov (2000) for Bulgaria, Anderson and Stanbury (1998) for Canada, Boner (1998), Dutz and Vagliasindi (2000), and Pittman (1998) for transition economies, Borrell (1998) for Spain, the whole 21st issue of the Review of Industrial Organization for Asian economies, Gallo and Parker (2000) and Lin and Slottje (2000) for the US, Joskov and Tsukanova (1994) and Slay and Capelik (1998) for Russia, Massey (2002) for Ireland, Neven and von Ungern-Sternberg (1998) for Switzerland, Utton (2000) for the UK, and Martin (1998) for several European countries.

2 A Brief History of Competition Policy in Turkey

As stated above, Turkey's legislative activities concerning competition laws date back to early 1970s when it signed the Additional Protocol with the EC. In 1971, the Turkish Ministry of Commerce organized a symposium mainly on consumer protection⁹. Following the symposium, the Ministry prepared The Draft Law on Regulating Activities Concerning Commercial Goods and Services for the Protection of Consumers in the same year. Although the draft law was primarily intended to protect consumers and regulate domestic markets and was far from being a competition law, it contained the earliest fragments of such a law.

A second draft law, The Draft Law on Regulating Commerce and Protecting Consumers, followed the first one in 1975. In the technical sense, it included the first provisions on competition law in Turkey. For instance, Article 51 declared that¹⁰

With this law ... forming price, manufacture, production, service, and distribution monopolies causing free competition in commerce to be abolished, artificially increasing prices or service tariffs through explicit or implicit agreements, keeping them at an increased level, or preventing them from decreasing, and for these purposes decreasing, stopping, or keeping at a constant level production and manufacture or product supply, or exterminating products are forbidden.

If they carry the purposes mentioned in the first paragraph, establishing companies, cooperatives, and other undertakings, merging them, and making changes in their main contracts are not allowed, approved, and registered. Contrary transactions are void.

As can be seen, the article forbade monopolization and agreements and concerted practices. The draft law also anticipated heavy fines in case of infringement of the article. However, compared to a modern competition law, the draft law in general and the article in particular were insufficient and ambiguous. For instance, the draft law did not mention any body to implement it or any exemptions. Also it is obvious that the article was prepared with the short-run interests of consumers in mind since it mentioned only increased prices but not decreased prices, which might arise in a predatory pricing case.

The Ministry later prepared The Draft Law on Protecting Integrity in Commerce in 1980. This third draft law was aimed at protecting a free market system and eliminating elements adversely affecting competition. It contained a somewhat different version of Article 51 from the earlier draft. It also dealt with deliberately restricting or stopping production as a form of quota cartels and refusal of sale as an abuse of dominant position in different articles.

In 1981, a fourth draft law was prepared by the Ministry under the title of The Draft Law on Regulating Commercial Activities and Protecting Consumers.

⁹This section draws from Esin (1992) and the Turkish Competition Authority Annual Reports.

¹⁰The author's translation.

But this draft law did not introduce much that was new and was mainly parallel to the last one.

The years following the military intervention in September 12, 1980 saw a new constitution in Turkey¹¹. The new constitution was passed by a government appointed by the military in the Turkish Parliament in 1982. The fourth part of the Constitution, entitled *Financial and Economic Provisions*, was composed of two chapters. In the second chapter, entitled *Economic Provisions*, Section II, *Supervision of Markets and Regulation of Foreign Trade*, is Article 167 of the Constitution and it declares that

The State shall take measures to ensure and promote the sound, orderly functioning of the money, credit, capital, goods and services markets; and shall prevent the formation, in practice or by agreement, of monopolies and cartels in the markets.

In order to regulate foreign trade for the benefit of the economy of the country, the Council of Ministers may be empowered by law to introduce or lift additional financial impositions on imports, exports, and other foreign transactions, in addition to tax and similar impositions.

As can be seen, only the first part of Article 167 is about competition. The second part is about foreign trade. But, unlike the second part, which empowers the Council of Ministers to implement the law, the first part does not cite any particular body to carry out the necessary measures. In that respect, Article 167 is ambiguous. It is also far from being a proper competition law.

The Draft Law on Protecting Consumers of October 1983 and its somewhat different version with the same title in March 1984 prepared by the Ministry of Commerce dealt with regulations concerning cartels and monopolies in a separate section for the first time. Article 16 of the former draft and Article 17 of the latter, under the title of Cartel Prohibition, prohibited making implicit or explicit agreements or connections to become dominant in markets, share them, increase prices, or reduce the supply of goods and services with the intention of decreasing or eliminating free competition. For the first time, Article 18 mentioned some exemptions. They were agreements that regard delivery of and payments for goods, that are likely to bring forth new technologies and to increase productivity, that are to public's benefit during periods of general stagnation in the economy, and that will help weather an economic depression that affects most of the undertakings in a sector. On the other hand, the draft law neither contained any articles about mergers and acquisitions nor cited any body to implement it.

After the general elections in November 1983, Turkey went through major changes in its economic structure. The economy became more open to foreign trade, the state started withdrawing from the economy through privatization, a floating exchange rate system was adopted, and the efforts of integration

¹¹The Third Constitution.

with the EU gained a new momentum. Partly because of this new economic ambience and also partly because of the criticisms directed at the earlier drafts, the Turkish Ministry of Industry and Commerce prepared The Draft Law on Agreements and Practices Restricting Competition in December 1984. This draft, for the first time, separated issues related to restricting competition from those related to protecting consumers and regulating commerce. It was also the first independent draft law on competition issues and, unlike all the earlier draft laws, it went to the Parliament to be legalized in December 1985. But it was never taken up in the Parliament and fell into oblivion after the 1987 elections.

After the general elections in 1991, the Ministry of Industry and Commerce prepared two draft laws: The Draft Law on Protecting Consumers and The Draft Law on Protecting Competition. The latter draft law was prepared by taking into consideration the U.S., British, German, and European Union competition laws, and was very different from the earlier ones. After it was completed in July 1992, it was circulated among institutions for their opinions. After it was finalized, it went to the Parliament and was passed in December 7, 1994 and became effective following the publication in the Official Gazette No. 22140 dated December 13, 1994.

The law anticipated a competition board and a competition authority. The Competition Board was appointed on February 1997 and the Competition Authority was established on November 5, 1997. Thus, with the establishment of the Competition Authority the competition law system was completed and competition policy effectively started in Turkey.

3 The Law on the Protection of Competition

This section broadly describes the legal framework of competition policy in Turkey¹². The legislation is composed of two parts: primary legislation and secondary legislation. The primary legislation is the Law with its general and article-by-article justifications. The secondary legislation is communiqués and by-laws.

The aim of the Law on the Protection of Competition, Law No. 4054, is to protect competition by ensuring necessary regulation and supervision in the form of preventing abuse of a dominant position by undertakings holding a dominant position in markets and prohibiting agreements, decisions, and concerted practices which prevent, restrict or distort competition in goods and services markets within the territory of the Turkish Republic. For that purpose, the Law empowers the Competition Board, the decision making organ of the Competition Authority, to perform the necessary regulation and supervision. The law is regularly updated by Communiqués¹³.

We can divide the prohibitive provisions of the law into three broad categories:

¹²This section draws mainly from the Law on the Protection of Competition and its general and article-by-article unpublished justifications.

¹³Amendments.

- provisions related to agreements, decisions, and concerted practices which prevent, restrict, or distort competition among undertakings in goods and services markets within the territory of the Turkish Republic and their exemptions;
- provisions related to abuse of a dominant position by undertakings;
- provisions related to mergers and acquisitions creating a dominant position or strengthening an already existing dominant position and negative clearance.

These provisions form the basis of the Law and are covered in Articles 4 through 8. Now, we will take up these articles in turn.

3.1 Agreements, Concerted Practices, and Decisions Restricting Competition

Article 4¹⁴ of the Law prohibits agreements, concerted practices, and decisions among undertakings preventing, restricting, or distorting competition. Thus, Article 4 covers actions taken by more than one undertaking. In other words, if an action that distorts competition is taken cooperatively, it is covered by Article 4. The term “agreements” means every kind of reconciliation or conformity that parties feel obliged to follow. It is not important whether an agreement is written or oral or even non-binding. Even if the existence of an agreement among undertakings cannot be determined, direct or indirect relations providing the undertakings with a coordination or practical cooperation replacing their own independent decisions, if they produce the same result, are forbidden. From time to time, undertakings form associations to deal with their common problems. These associations sometimes may prevent competition among their members by making decisions enabling them to make more earnings. These types of decisions are contrary to the competition system and are also forbidden.

Agreements restricting competition can be categorized as horizontal and vertical. Horizontal agreements are agreements in the same stage in a chain of transactions. Vertical agreements are agreements in the different stages in a chain of transactions. It might be the case that an agreement has both horizontal and vertical aspects. The second paragraph of the Article lists the most common agreements restricting competition as examples and emphasizes that those types of agreements are by themselves forbidden¹⁵. However, the list is just exemplary and not exhaustive.

The third paragraph of Article 4 is worth noting. Agreements that Article 4 prohibits are usually made in secret and proving their existence is very difficult or even impossible. That’s why, given the existence of the conditions stated in the third paragraph, undertakings are presumed to be involved in

¹⁴Article 4 corresponds to Article 81(1) (Article 85(1)) of the Treaty of Amsterdam (the Treaty of Rome).

¹⁵See Article 4 in the appendix.

concerted practices. In practical terms, if an agreement cannot be proven but price movements or supply-demand balance in a market exhibit similarities to those markets in which competition is prevented, restricted, or distorted, then the Law presumes that undertakings are engaged in concerted practices. Thus, the burden of proof of the nonexistence of concerted practices is placed on the parties involved. The aim is to prevent the Law from being unable to function because of the difficulty of proving an agreement. We should note that there is no article corresponding to the third paragraph of Article 4 in the competition law of the EU.

3.2 Exemptions

Article 5¹⁶, which regulates exemptions from Article 4, states that, upon application from undertakings, the board may exempt agreements, concerted practices, and decisions from Article 4 if they (a) contribute to technological or economic progress in production or distribution of goods and services, (b) allow consumers to get a share from the resulting benefit, (c) do not eliminate competition in a substantial part of the relevant market, and (d) do not induce a restraint on competition that is more than essential for the attainment of the objectives set out in (a) and (b). It is important to note that all of the conditions have to be satisfied for the board to issue an exemption.

Exemptions are given for at most 5 years. The Board may issue a conditional exemption, which is basically an exemption decision provided that undertakings make necessary adjustments in their agreements, concerted practices, and decisions in order to satisfy certain conditions. At the end of the exemption period, the decision may be renewed upon the application of the parties concerned if the requirements for exemption continue to be satisfied. The Board also grant group exemptions through communiqués to those groups whose agreements meet the requirements.

The position of the Authority in Article 5 is explained in the unpublished article justifications where it is stated that a rigid application of Article 4 may cause some undesired results. For instance, some practices restricting competition may create more positive effects than negative effects. The justifications state that these practices should be exempted from Article 4. But the justifications also note that the four conditions listed in Article 5 have to exist simultaneously for an exemption to be granted. First of all, it is necessary that agreements, concerted practices, and decisions restricting competition create positive effects on the economy. Exemption cannot be applied if these effects show themselves only as profits. It is also necessary that consumers get a fair share from the positive effects created. If the same positive effects can be achieved with less restriction of competition, then agreements cannot be exempted. Only necessary and essential competition restrictions to get positive effects can be exempted. Besides, competition should not be rooted out completely in a substantial part of the relevant product market with these restrictions.

¹⁶Article 5 corresponds to Article 81(3) (Article 86(3)) of the Treaty of Amsterdam (the Treaty of Rome).

The justifications also mention the advantages of exemptions being granted for a limited amount of time and group exemptions. That exemption decisions are granted for a limited amount of time will give the Board a chance to monitor changes that may result in restricting competition further in the relevant market after the exemption decision was given. Group exemptions, on the one hand, will bring legal certainty for these types of agreements and, on the other hand, positive effects of these agreements will be contributed to the economy.

3.3 Abuse of a Dominant Position

Article 6 prohibits abuse of a dominant position¹⁷ by one or more undertakings and corresponds to Article 82 (Article 86) of the Treaty of Amsterdam (the Treaty of Rome).

The point of view of the Competition Authority in abuse of a dominant position is explained in the article justifications. It is stated that if an undertaking grows through its internal dynamics and takes a dominant position in various sectors, this is not against the competition laws. On the contrary, in Turkey, it is desirable for firms to accumulate capital and increase investments. Because, in today's world, foreign trade rises at an increasing pace and customs barriers are either decreased or completely eliminated through various agreements. Besides, Turkey has applied to the European Union for a full membership and has been in a customs union with it since 1996. Under these circumstances, undertakings should have competitive power gained through growth in order to be able to compete in the EU and in the world. On the other hand, it is forbidden for dominant firms in a market to abuse their position to prevent, restrict, or distort competition.

The most common abuses of a dominant position in practice are listed in the second paragraph. This list is exemplary, not exhaustive. Abuses include creating entry barriers, impeding the activities of other undertakings already in the market, discrimination among peer buyers, tying, limiting resale conditions, taking actions to obstruct competition in a market using a dominant position in another market, and restricting marketing or technical progress in a way that hurts consumers. In some cases, an undertaking may take a dominant position through protection provided by laws. For instance, industrial and commercial property rights provide such a protection. These rights should not be used to prevent competition in any way.

In order to apply Article 6, it is important to determine whether an undertaking has a dominant position. Market share, product differentiation, entry barriers, vertical integration, and substitutability of the relevant product determines whether or not there is a dominant position in a specific market.

¹⁷Article 3 of the Law gives a definition of a dominant position. See the appendix.

3.4 Mergers and Acquisitions

Mergers and acquisitions are regulated by Article 7 and Communiqués 1997/1¹⁸ and 1998/4¹⁹. Article 7 declares that mergers and acquisitions are against the Law and forbidden if they create a dominant position or strengthen an already existing dominant position in a way that substantially decreases competition in a goods or services market in the whole or part of the country. Article 7 also authorizes the Board to issue communiqués about what types of mergers and acquisitions need approval in order to be legal.

The position of the Competition Authority in this article is explained in the Article Justifications for the Law on the Protection of Competition. The Justifications state that Article 7 aims to take under control undertakings' growth outside their internal dynamics and, for that purpose, it prohibits achieving a dominant position through merger or acquisition in a way that substantially decreases competition, even though a dominant position in itself is not forbidden in Article 6. The Justifications declare that, as a rule, the second paragraph of the article does not state that the Board's approval is obligatory for mergers and acquisitions to be legal. In other words, mergers and acquisitions can be valid without the Board's approval. However, the Justifications also notes that there are some exceptions. Since invalidating mergers and acquisitions falling under the first paragraph after they are put into effect will create problems in practice, the second paragraph of Article 7 authorizes the Board to issue communiqués about what types of mergers and acquisitions need approval in order to be legal. The Board did this in Communiqué 1997/1, Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Board.

Article 2 of the communiqué defines cases considered to be mergers or acquisitions. According to the article, mergers of two or more previously independent undertakings, acquisitions granting an acquirer the power to have a right in the management, and joint ventures are covered under Article 7 of the Law. The first paragraph of Article 4 of the communiqué determines what type of mergers and acquisitions require permission. According to the article, if the total market share of the undertakings that are parties to a merger or an acquisition exceeds 25% or if their total turnover exceeds 25 trillion TL²⁰ in the relevant product market within the whole territory of the country or a part of it, it is compulsory for the undertakings to get permission from the Competition Board.

The last two paragraphs of Article 4 of communiqué 1997/1 explain the Authority's procedure for defining the relevant product and geographic markets. The relevant geographic market is defined as a substantial part of the country²¹ within the meaning of the first paragraph of the article in which undertakings are involved in the supply and demand of their goods and services, in which the conditions of competition are sufficiently homogenous, and which can easily

¹⁸Communiqués 1998/2, 1998/6, and 2002/2 made minor changes in communiqué 1997/1.

¹⁹Communiqué 1998/5 made minor changes in communiqué 1998/4.

²⁰The turnover threshold of 10 trillion TL in communiqué 1997/1 was replaced by 25 trillion TL, which is approximately 15M Euros, in communiqué 1998/2.

²¹As will be made clear in section 5, the relevant geographic market is in practice almost never larger than the country.

be distinguished from neighboring areas as the conditions of competition are appreciably different. In defining the relevant geographic market, the Authority takes into account factors such as the nature and characteristics of the goods or services concerned, the existence of entry barriers, of consumer preferences, of appreciable differences in the undertakings' market shares between neighboring areas and the area concerned, or substantial price differences.

In defining the relevant product market within the meaning of the first paragraph, the Authority takes into account the market comprising the goods and services which are regarded as being the same in the eyes of consumers in terms of their characteristics, prices and intended use, together with the goods or services which are the subject of the merger or acquisition. The Authority also assesses other factors that may affect the market.

A special type of acquisition is privatization. In Turkey, privatization is administered by the Prime Ministry Privatization Administration (PMPA). Communiqué 1998/4 of the Law determines the methods and principles to be pursued by the PMPA during the course of pre-notifications and applications to the Authority in order for acquisitions by way of privatization to be legally valid. The scope of the communiqué is stated in Article 2, which declares that any acquisition by way of privatization which changes control or affects decision-making bodies, or regards production units in an undertaking comes under the scope of the communiqué. Article 2 also lists some exclusions, which include sales to the public, sales in international markets, and turnovers to employees among others.

Acquisitions by way of privatization within the scope of the communiqué fall into two categories: those that are subject to pre-notification and those that are subject to application. For the first category, which includes acquisitions of undertakings with a market share exceeding 20% or a turnover exceeding 20 trillion TL or, even if these thresholds are not exceeded, having legal or de facto privileges in the relevant product market, it is obligatory for the PMPA to have recourse to the Authority's opinion. On the other hand, for the second category, which includes acquisitions of undertakings with a market share exceeding 25% or a turnover exceeding 25 trillion TL, it is obligatory for the PMPA to have the Authority's approval.

3.5 Negative Clearances

Article 8 deals with negative clearances. It states that upon application by undertakings or associations of undertakings, the Board, within the context of information presented to it, may issue a negative clearance document stating that an agreement, decision, concerted practice, or merger or acquisition is not contrary to Articles 4, 6, and 7 of the Law.

The Board may reverse its decision under certain conditions stated in Article 13 anytime after the negative clearance document was issued. However, the undertakings are not subject to penalties for the time interval between the date the negative clearance document was issued and the date the Board reversed its decision. Again the position of the Authority in Article 5 is stated in the

justifications²²:

Undertakings and associations of undertakings, in order to bring legal certainty and security to their agreements, decisions, concerted practices, or concentrations, should be able to request, by applying to the Competition Board, a formal document declaring that their transactions are not contrary to competition rules. This is a necessity for commercial life to be free from uncertainty.

It should be emphasized that the competition law of Turkey on negative clearance is somewhat different from that of the EU. The EU competition law covers negative clearance under Article 2 of Regulation 17, which provides²³

Upon application by the undertakings or associations of undertakings concerned, the Commission may certify that, on the basis of the facts in its possession, there are no grounds under Article [81(1)] or Article [82] of the Treaty for action on its part in respect of an agreement, decision or practice.

On the other hand, the Turkish competition law covers mergers and acquisitions in addition to agreements, decisions, and practices.

4 The Competition Authority

When the Law on the Protection of Competition was passed in the Parliament in 1994, it anticipated a Competition Board and a Competition Authority. The Competition Board, the decision making organ of the Competition Authority, is responsible for the enforcement of the Law and was appointed only on February 27, 1997 (a delay of 27 months). However, the Competition Authority completed its organization within the short period of 8 months. This was announced by a Communiqué issued as the Temporary Article 2 of the Law on November 5, 1997 and the Authority started to operate hereafter. This section surveys the structure and procedure of the Competition Authority.

4.1 The Structure

The decision making organ of the Authority is the Competition Board. The Competition Board is composed of one chairman, one deputy chairman, and ten board members. The Board's duties include, among others, making final decisions regarding prohibited activities, assessing exemption and negative clearance requests, allowing mergers and acquisitions, issuing communiqués, and making necessary arrangements as to the legislation and the implementation of the Law.

Initial examinations, preliminary research, and investigations are carried out by the technical departments. There are four technical departments. Each department covers certain sectors.

²² Author's translation.

²³ See Jones and Sufrin (2001), pp. 201-202.

4.2 The Implementation Procedure

We now discuss the general procedures in implementing the Law by the Authority. Basically, they are composed of a series of inquiries. Successive inquiries require more information about a case. Each inquiry is decided upon by the Board.

Under the Law, the Authority can start a case either by an application or on its own initiative. An application is either an informing or a complaint. In the first, an informer, not a party to a case, informs the Authority of a possible infringement. In the second, a complaint, the complainant, one or more of the parties to a case, notifies the Authority that it is hurt by an infringement²⁴. Applications can be made by a petition or an email. They may be made anonymously. The Authority is obliged to examine every application. If an application is found to be serious, this is notified to the applicant. An application is said to be rejected if either it is notified as rejected to the applicant or not notified within a legal amount of time. Initiators of rejected applications, if they can prove their direct or indirect vested interests in the case, may appeal against the rejection.

The Authority can also start a case on its own initiative based on any information or documentation, from either media news or other sources, such as those gathered during an initial examination, preliminary research, or investigation of other cases. In principle, the Authority can directly start an investigation upon an application. But in practice, cases, independently of their sources, go to either initial examination or preliminary research.

Technical departments process an initial examination. The aim of an initial examination is to see if the allegations in an application are viable. The first step is to determine if the case falls within the scope of the act and if so, under which article. The next step is to collect information about sectors, markets, competitors, etc. to see if the allegations are correct. Investigated undertakings are, in principle, unaware of the investigation at this stage. There may be on-the-spot research if that is deemed necessary. There is no predefined deadline but in practice this stage lasts at most 60 days. Whether an infringement is or is not detected is indicated in the initial examination report.

It should be noted that an information note has mostly replaced the initial examination in the last few years in order to speed up the process. It is a requirement to present an information note to the Board at most one month after the application. But the decision process can take at most two months. If it takes more than a month to make a decision, the undertakings are informed of this at the end of the first month. Whenever a decision is made within two months, the undertakings are informed of the decision.

²⁴There is a third form of application which is a request from the Ministry of Industry and Commerce. But this type of application is very rare. Unless stated otherwise, an application means an informing or a complaint from now on.

4.2.1 Preliminary Research

Preliminary research is the stage in a case where the Board decides whether an investigation is necessary or not. After an initial examination, if the Board decides to continue with a preliminary research, the Board Chairman assigns one or more competition experts as reporters. The undertakings are not informed about the preliminary research until it starts. The reporters examine all the undertakings at the same time. Under the Law, the maximum duration for preliminary research is 30 days²⁵. There is much on-the-spot research involved. At the end of the preliminary research, the reporters present a preliminary research report containing information gathered, every type of evidence, and their views on the case to the Board. The Board has to gather and decide within a maximum of 10 days whether an investigation is necessary. The Board may be content with declaring only an opinion²⁶. In either case, the undertakings are informed of the result.

4.2.2 Investigation

An investigation is much more detailed than a preliminary research. If an investigation is started, the Board assigns one or more board members together with one or more competition experts as the investigation committee. The board member(s) run the investigation. A notification²⁷ is sent to the undertakings within 15 days from the date the Board decided to conduct an investigation. Undertakings are required to submit a written defense within 30 days from the date they receive the notification.

The committee may visit firms or plants. They have the authority to search for documents in business headquarters. The aim is to collect as much information as necessary to determine whether an infringement occurred or not. In the end, they submit a report to the Competition Board. The report naturally proposes either that an infringement occurred or not, but the decision need not be taken collectively. Reporters have the right to oppose a decision taken by the majority. If so, they need to offer their reasons.

The investigation report, taking into consideration the first written defense, has to be finalized by the investigation committee within 6 months from the date the Board decided to investigate. There might be one additional period of 6 months. When it is finalized, the report is sent to the Board and the parties, with commercial secrets deleted, within 15 days after it is completed. The parties are given a second chance to submit a written defense within 30 days. The Committee attaches an appendix to the written defense explaining its view within 15 days. There may be an oral defense, which may last at most a few days, if the parties wish. The Board makes its final decision within 15 days following the oral defense, evaluating the report and the defense of the defendants. The

²⁵Most competition experts believe this is too short a time interval.

²⁶This is usually reserved for state-owned companies.

²⁷This is a formal document containing information about the nature of the claim, which articles of the law are relevant in the case, and the relevant evidence.

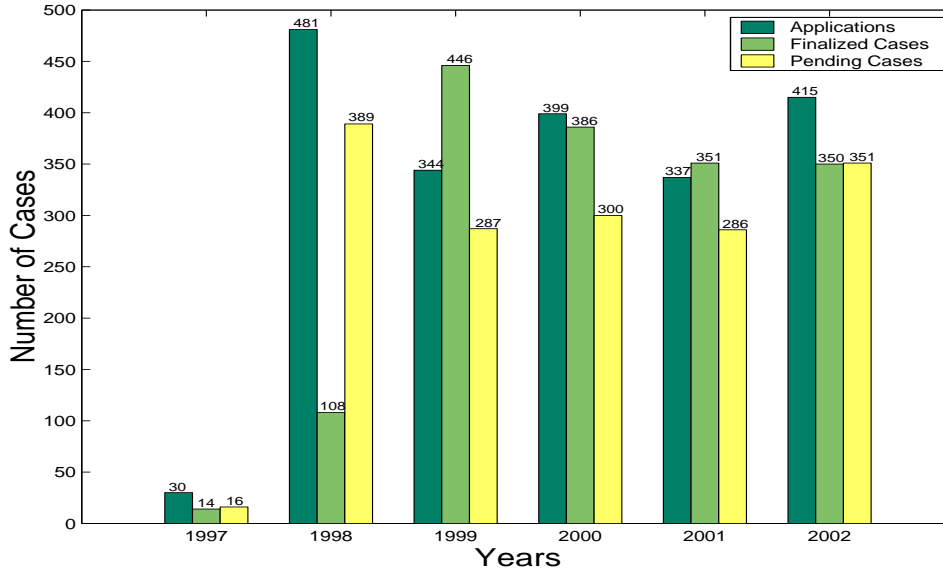


Figure 1: Cases Handled by the Authority Overtime

final decision is read by the Board in a meeting where the reporters and the defendants are present. The Board writes an opinion justifying its decision. Within 60 days after it is published in the Official Gazette, the parties may appeal the decision to the Court of Appeals. If the Court of Appeals decides for the Authority too, then the Authority collects the fine that was assessed. But, on average, it takes 3 to 4 years for the Court to decide because of its heavy workload.

5 Competition Law Enforcement: Descriptive Statistics

In this section, we present some detailed descriptive statistics on all the applications, finalized cases, and pending cases from November 1997, the date on which the Competition Authority started processing applications, until the end of 2002. Figure 1 shows the total number of applications, finalized cases, and pending cases by years. Excluding 1997, in which year the Authority operated for only 2 months, the annual average number of applications is approximately 395, which means a little more than one application a day.

The fact that the number of applications peaked in 1998 might suggest that the function of the new competition law was not properly understood in the beginning.²⁸ In fact, in the beginning years, there were too many off-the-mark

²⁸As in the case where a complainant called the sale of bread at a low price “unfair compe-

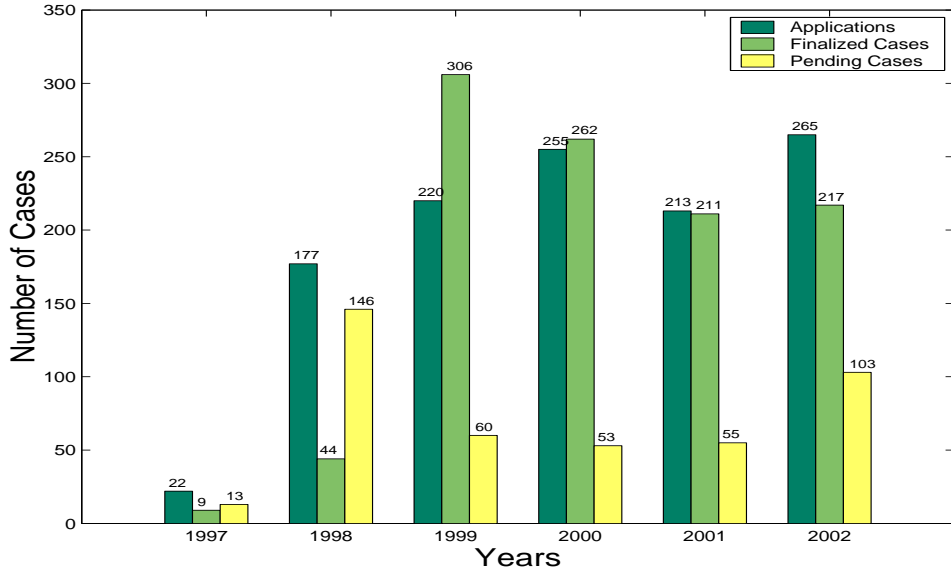


Figure 2: Competition Infringement Cases

applications. However, they stayed relatively low later. Figure 1 also shows that the Authority found it hard to keep up with the applications since the number of finalized cases has been decreasing but on the other hand the number of pending cases has been increasing for the most recent years.

The next subsections will look at the cases in more detail, breaking them into three parts: competition infringement cases, exemption and negative clearance cases, and merger and acquisition cases.

5.1 Competition Infringements

With the exception of 1999, most of the applications to the Competition Authority were competition infringement applications. Figure 2 shows competition infringement cases by years. As can be seen, the number of applications increased over time, peaking in 2002. However, the number of finalized cases was on a decline. This might be due to a shortage of staff and also the relatively long process of handling cases.

Figure 3 further breaks down the finalized competition infringement cases. There are three categories: finalized decisions after initial examination or preliminary research / investigation (shortly, accepted), cases rejected or deemed not worth studying (shortly, rejected), and cases that are outside the scope of the Act (shortly, outside the scope). One thing to notice is that the number of cases that are outside of the scope of the Act was high, with a maximum of 236

tition”.

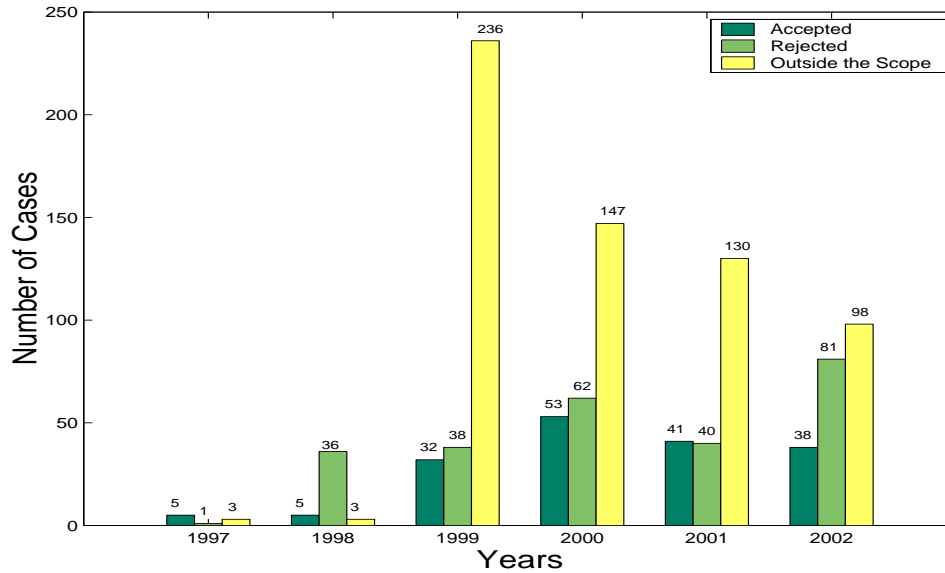


Figure 3: Finalized Competition Infringement Cases

cases in 1999. This might show that the role of the Law was still not properly understood in Turkey. Another possible explanation is that firms might have tended to file complaints in order to cause problems for their rivals. In any case, since the marginal cost of filing a complaint is almost zero²⁹, undertakings did not refrain from applying even for minor cases. Whatever the reason, the number of applications that are outside the scope of the Act declined over time.

Table 1 breaks down the accepted cases by articles of the Law. As can be expected, most of the decisions concerned either Article 4 (concerted practices) or Article 6 (abuse of a dominant position). The rest concerned both articles, as in cases where undertakings abuse a dominant position achieved through concerted practices.

As Table 1 shows, the Competition Board finalized 174 cases between November 1997 and December 2002. Of these 174 cases, 130 are publicly available. Table 2 presents some summary statistics for these cases. As discussed in section 4, a case can be initiated either by an application (in the form of an informing or a complaint) or by the Authority itself. Each case is composed of various stages. The stages shown in the next table are initial examination (Stage I), preliminary research (Stage II), and investigation (Stage III). A case may be finalized in each of these stages. In the table, the duration of the initial examination stage is defined as the time interval between the date a complaint was filed and the date a decision was made either to finalize it or to continue to preliminary

²⁹Even an email will do.

Table 1: Finalized Decisions by Articles of the Law

Year	Article 4	Article 6	Article 4 and Article 6
1997	2	3	-
1998	3	2	-
1999	9	10	13
2000	21	16	16
2001	12	19	10
2002	18	15	5
Total	65	65	44

Source: The Competition Authority Annual Reports

research. Sometimes more than one complaint was filed with different dates for the same case. If this is the case, we take the first complaint date as the application date. The duration of preliminary research stage is defined as the time interval between the date an initial examination was over and a decision was made to continue to preliminary research and the date a decision was made either to finalize or to continue to investigation. The duration of investigation stage is defined as the time interval between the date a preliminary research was over and a decision was made to continue to investigation and the date a final decision was made on the case. We went over each of the 130 cases and Table 2 presents some descriptive statistics.

In the table, the first row shows the number of cases that falls within the category in each column. The second row shows the mean number of days of the cases. The third row shows the standard errors and the fourth row shows the 10% trimmed means, a measure robust to extreme values. The fifth and sixth rows show the minimum and maximum number of days, respectively.

As the table shows, 112 cases that fall within the first stage were decided. The mean number of days is 104.41 and the standard error is about 94, which is very high. Since even a 10% trimmed mean does not make much difference, we can conclude that, the first stage, on average, takes about three months. The reason that stage I takes so much time is that when an application is filed, it may wait months in line to be processed. Because of the heavy workload, the Authority discriminates between applications, processing earlier the ones that seem more important.

Table 2 shows that there are 72 cases falling in stage II. It takes approximately 4 months on average to finalize this stage. The standard error is also very high. This can also be seen by looking at the minimum and maximum number of days. The maximum number of days is approximately sixty times the minimum. In this stage of a case, reporters usually visit undertakings' headquarters or plants and try to collect information about the case.

Table 2 also shows that as the stages of a case advance, it takes longer to finish it. Stage III is by far the longest one, approximately 15.5 months on average lapsed before it was finalized. On the other hand, the standard error is relatively low, suggesting that the duration of stage III is approximately the

Table 2: Summary Statistics on the Duration of Each Stage

Stages:	Number of Days			
	I	II	III	All Stages
Cases	112	72	23	20
Mean	104	148	466	703
Std. Error	94	154	108	218
Trimmed Mean	94	126	469	691
Minimum	5	14	259	379
Maximum	462	831	608	1231

Source: Author's Calculations

same for each case.

When we look at the last column, we can see that, on average, it takes about 2 years to complete an competition infringement investigation. This may not good news for the Authority. In predatory pricing or abuse of dominant position cases, time is very important. By the time a case is finalized, the victim might have endured high costs which cannot be recovered later.

There are a couple of other interesting points about the Competition Board Decisions. One of them concerns the definition of geographical markets. In almost half of the cases (58 out of 128) the geographical market was defined as the whole country. We should emphasize that reporters did not use quantitative techniques in defining either product or geographical markets. That's why it seems that they opted for practical approaches. If the possible economic effects of an action were likely to transcend provincial borders, they tended to define the geographic market as the whole country. The geographic market was almost never defined outside the country borders. Their main argument for this was that the Law could not be applied outside Turkey. Article 2 of the Law defines the scope and it does not explicitly imply that the Law can be applied only inside the borders of Turkey:

... Agreements, decisions, and practices which prevent, distort or restrict competition between the enterprises which operate in or affect the goods and services markets in the territory of Republic of Turkey
 ...

However, in practice, the competition experts restrict themselves within the borders of Turkey.

In 38 out of 128 cases, the geographic market was not even defined. For the most of the rest, it is defined as either as a province or a group of provinces. It seems that when reporters defined a province or a group of neighboring provinces as the geographic market they took into consideration mostly supply-side effects. For instance, when they define a product market, they usually define the geographic market as the area where the producer is able to supply with its existing sales network.

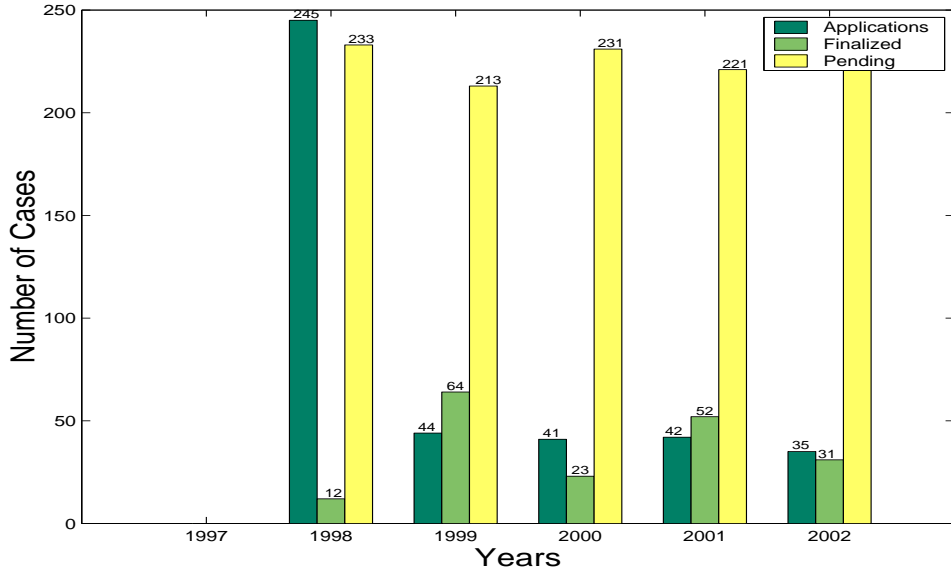


Figure 4: Exemption / Negative Clearance Cases by Years

Another point worth making is that reporter’s view on a case and the Board decision usually coincide. In 110 out of 128 cases, the Board followed reporters’ view. In other words, 86% of the time, a case was finalized in the accord with the reporter’s views. This is not necessarily a good or a bad thing by itself. But when considered together with the fact that the Board usually was content with the facts presented to them by the reporters and did not demand additional information³⁰, it is clear that their views were mostly shaped by those of the reporters.

5.2 Exemptions and Negative Clearances

Figure 4 shows the breakdown of exemption/negative clearance cases by years. The first thing to notice is that the number of pending cases is large. This might suggest that exemption/negative clearance decisions take a long time to make. But the pending cases lingered mostly due to the large volume of applications in 1998, 245 to be exact. For the following years, the Authority finalized approximately as many cases as the applications, but it could not clear away the accumulated applications of 1998.

Table 3 further breaks down the finalized negative clearance/exemption cases. The interesting point is that for most of the applications, exemption or negative clearance was granted. Another interesting point is that the Authority never rejected an application. The conditional decisions column shows

³⁰Based on the interviews with the competition experts.

Table 3: Exemption and Negative Clearance Decisions

Year	Exemption Granted	Negative Clearance Granted	Conditional Decisions	Outside the Scope of the Act
1997	-	-	-	-
1998	1	11	-	-
1999	11	17	21	15
2000	5	8	6	4
2001	16	13	19	4
2002	12	11	7	1

Source: The Competition Authority 4th Annual Report

the applications that were acceptable provided they satisfy some requirements.

Table 4 shows summary statistics on negative clearance/exemption cases. It seems that the Authority handled these cases relatively quickly since their mean duration was one and a half months.

We should note that the minimum duration column might give the incorrect impression that some cases were finalized in a few days. As we stated earlier, some applications are renewed over and over again. The Board Decisions usually recorded the first application date. But for some applications the application date recorded was the last application date before a decision was made on the cases. So it is possible that there was a renewed application one day before a decision was made for this particular case, which went into the record as the application date. That's why it seems that it took only one day to finalize. Bearing that in mind, the mean duration column must be interpreted as a lower bound. As to the maximum duration of 760 days, it is possible that this application waited a long time before it was finally taken up. In brief, the maximum and minimum duration statistics should be interpreted cautiously. Still, we believe that the summary statistics figures in Table 4 are reasonably correct since there are only a few late-record cases.

Table 5 shows the sectoral breakdown of negative clearance/exemption cases. Unfortunately, there was no systematic sectoral distribution of the cases either in the annual reports or in the board decisions. In this paper, we prepared the sectoral breakdown tables based on the information provided in the board decisions, which were usually detailed enough, and our knowledge of the Turkish economy. We used International Standard Industrial Classification Revision 3.1 (ISIC Rev. 3.1) one-digit sectors. As can be seen in Table 5, most of the 149 cases, approximately 76%, were either from manufacturing sector or wholesale and retail trade sector.

As in the competition infringement cases, Turkey was defined as the geographical market in most of the negative clearance/exemption case, 91 to be exact. In 49 cases, the geographic market was not even mentioned. For the rest, it was either provinces or regions.

Table 4: Summary Statistics for Negative Clearance/Exemption Cases

Number of Cases	Duration Mean	Duration Standard Error	Min. Duration	Max. Duration
149	46	68	1	760

Source: Author's calculations

5.3 Mergers and Acquisitions

Figure 5 shows merger and acquisition applications, finalized cases, and pending cases by years. As can be seen in the figure, applications steadily increased over time, with the exception of 2001, in which year the Turkish economy experienced one of the worst recessions in its history. A possible explanation behind the increasing trend in the applications might be the fixed 25 trillion TL turnover threshold set in 1998 which brought an increasing number of transactions under the scope of the Law because of the inflationary Turkish economy. However, the Authority succeeded in keeping up with the increased number of applications. Although the number of applications was almost always higher than the number of finalized cases, the pending cases did not accumulate over time.

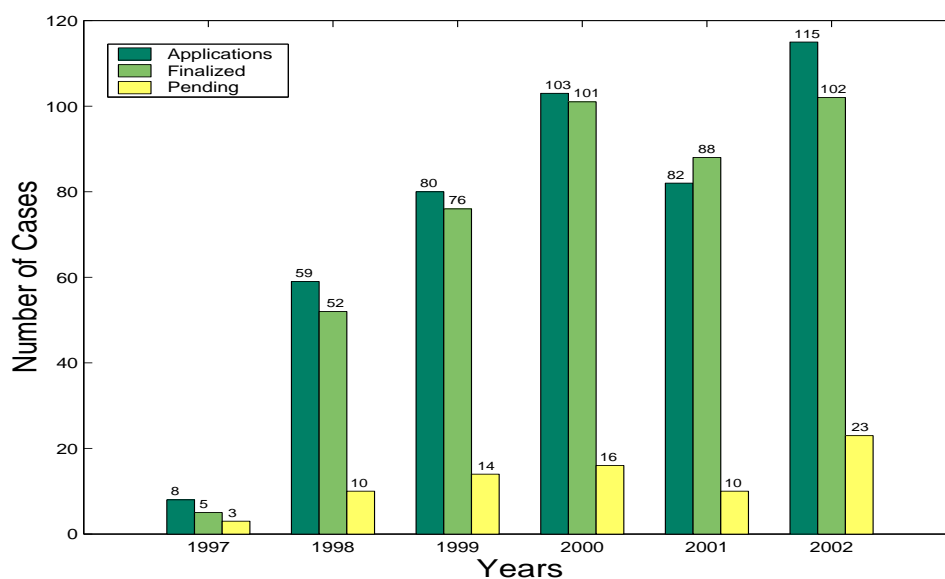


Figure 5: Merger / Acquisition Cases by Years

Table 6 breaks down the finalized cases. A finalized case may end up either approved, rejected, or it may be classified as falling outside the scope of the Act. There are two types of approvals: (unconditional) approval and conditional ap-

Table 5: Sectoral Breakdown of Negative Clearance/Exemption Cases

Sector	Number of Cases
Agriculture, Hunting, & Forestry	1
Mining & Quarrying	1
Manufacturing	41
Construction	1
Wholesale & Retail Trade	72
Hotels & Restaurants	4
Transport, Storage & Communications	10
Financial Intermediation	10
Real Estate, Renting & Business Activities	8
Health & Social Work	1
Total	149

Source: Author's calculations

Table 6: Finalized Merger and Acquisition Cases

Year	Conditionally		Outside the Scope	
	Approved	Approved	Rejected	of the Act
1997	1	-	-	4
1998	25	6	-	21
1999	31	1	1	43
2000	46	3	1	51
2001	39	4	-	45
2002	54	6	-	42

Source: The Competition Authority 4th Annual Report

proval. Conditional approval is an approval provided that one or more articles³¹ in a transaction contract are amended to comply with the Law. In most of cases, it was required that a time limit not to compete between undertakings was reduced. For instance, in an acquisition case, the transaction contract may set a time limit of 20 years for the parties not to compete with each other. The Authority may approve the acquisition provided that the time limit is decreased to, for instance, 3 years. The cases that fell outside the scope of the Act were cases that either are not covered under Article 2 of communiqué 1997/1 or were not subject to permission from the Authority as stated in Article 4 of the same communiqué.

The most striking feature of the table is that, like exemption and negative clearance applications, most of the merger and acquisition applications that were not outside the scope of the Law were approved. It is interesting to note that only two cases out of 424 applications were rejected between 1997 and 2002. One of them concerned the privatization of a fertilizer company³² and

³¹They are called ancillary restraints.

³²We will analyze this case in section 6.

Table 7: Nature of Transactions

Year	Merger/ Acquisition		Joint Venture
	Acquisition	Privatization	
1997	1	-	-
1998	20	8	3
1999	26	1	6
2000	41	6	3
2001	37	-	5
2002	55	-	5

Source: The Competition Authority 4th Annual Report

the case was rejected by the Authority on the grounds that the acquisition would create a dominant position in the relevant market. The other case concerned a joint venture among 38 LPG (liquid petroleum gas) companies. The Authority rejected it on the grounds that the transaction was actually a concerted practice under the scope of Article 4 of the Law.

Another striking feature of Table 6 is the large number of cases that were outside the scope of the Act. Most of them were cases that did not violate Article 4, although covered under Article 2, of communiqué 1997/1. The main reason was probably that undertakings could not be sure whether the transaction exceeded the market share or turnover thresholds since it depends on how one defines the relevant market.

Table 7 shows the nature of transactions in the cases that fell within the scope of the Act. As can be seen, most of the transactions were either merger or acquisition cases. Actually, majority of them, approximately three fourth, were acquisition cases. Privatization cases constituted the smallest part. One explanation for the small number of privatization cases is that not every type of privatization falls under the scope of the competition law³³.

At the time of writing, 218 board decisions regarding merger and acquisition cases were publicly available. Table 8 presents summary statistics on the duration of these cases. The most quickly processed cases are merger and acquisition cases. On average, it took one to one and half months to finalize them. Compared to competition infringement decisions, these decisions took considerably less time. The main reason is that the decision making processes are different. In competition infringement cases, there may be up to three stages where each one of them may take months. On the other hand, in merger/acquisition cases, there is one stage where the Board make a decision after reporters finish their report.

Privatization decisions, although constituting the smallest part, had the longest average duration, approximately 5 months. The reason might be that privatization is a sensitive issue in Turkey and the Authority took care not to make a controversial decision. The last column shows that the longest decision was a privatization decision which lasted more than two years. That was one of

³³See the discussion at the end of section 3.4.

Table 8: Summary Statistics for Merger/Acquisition Cases

Type	Number	Duration	Duration	Min.	Max.
		Mean	Standard Error	Duration	Duration
Merger	19	33	28	3	123
Acquisition	167	41	47	1	349
Privatization	8	151	263	13	760
Joint Venture	24	52	39	15	206
Overall	218	46	68	1	760

Source: Author's calculations

Table 9: Sectoral Breakdown of Merger/Acquisition Cases

Sector	ME	AC	PR	JV	Total
Agriculture, Hunting, & Forestry	1	2	-	-	3
Mining & Quarrying	1	1	-	-	2
Manufacturing	10	101	3	15	129
Electricity, Gas, & Water Supply	1	4	-	-	5
Construction	-	1	-	1	2
Wholesale & Retail Trade	-	24	1	2	27
Hotels & Restaurants	-	1	-	-	1
Transport, Storage & Communications	2	12	3	-	17
Financial Intermediation	1	15	1	4	21
Real Estate, Renting & Business Activities	3	2	-	-	5
Health & Social Work	-	2	-	1	3
Other Activities	-	1	-	-	1
Total	19	166	8	23	216

Source: Author's calculations

ME: Merger, AC: Acquisition, PR: Privatization, JV: Joint Venture

the two cases rejected by the Authority under Article 7. It also was the most detailed decision in terms of industry analysis.

Table 9 breaks down the cases into sectors. Note that the total number of cases in the last column is 216 instead of 218. The reason is that we were not able to determine the sectors in 2 cases due to insufficient information in their board decisions.

Not surprisingly, manufacturing took the first place in the total number of the board decisions. It constituted approximately 60% of all the cases. The share of acquisitions in manufacturing cases were approximately 80%. In manufacturing, 41 cases concerned consumer products where examples are food, home appliances, and automobiles, 77 cases concerned producer products where examples are auto parts, cement, chemicals, and construction equipments, and 11 cases concerned both consumer and producer products where examples are hairdressing products, (LPG) liquid petroleum gas, and glass products for which there is demand from both consumers and producers.

Wholesale and retail trade took second place and constituted 12.5% of all the cases. Acquisition cases constituted the largest part, 89% to be precise, in this sector too. Of the 27 wholesale and retail decisions, 13 concerned consumer products like supermarkets and food retail stores, 9 concerned producer products like wholesale of construction equipment, auto parts, and grease, and 5 concerned both consumer and producer products like distribution of LPG and gasoline.

Financial intermediation took the third place and its share was approximately 10%. Acquisitions constituted the largest part in this sector too with a share of 71%. Of the 21 decisions in this sector, 12 concerned consumer products where most of them were consumer credit cards and alike, 8 concerned producer products where examples are investment banking and intellectual property rights, and 1 case concerned both producer and consumer products where a bank was acquired with all of its assets and liabilities. Overall, 80 board decisions concerned consumer products, 113 concerned producer products, and 23 concerned both consumer and producer products.

There are a few other interesting points about the board decisions on mergers and acquisitions. One of them is the degree of compliance between reporters and the board. In 206 out of the 218 cases, the board followed reporter's views. The degree of compliance is approximately 95%. This exceeds even the degree of compliance in the competition infringement cases, which was 86%. The implication of this finding is that the best chance of undertakings to tip the scale to their benefit is to try to convince reporters in written or oral argument that a concentration is either not covered in the Law or, even if it is, it does not exceed the turnover or market share thresholds. Also cooperation with reporters is an advantage for undertakings. There is one case where reporters were denied information and then they demanded an investigation from the board in their report rather than simply applying Article 7.

Another interesting point is about the relevant geographic market definition. In 146 out of the 218 cases, the relevant geographic market was defined as the whole country. This makes 67%, which is higher than the ratio of 45% in the competition infringement cases. Actually the ratio might be even higher since the relevant geographic market was not even discussed in 53 cases. Thus, in 91% of the merger and acquisition cases, the relevant geographic market was either defined as Turkey or was not discussed at all. For most of the rest, it was either one or more provinces or regions. In only one case, it was defined as the European Union. Except that case, the largest relevant geographic market was Turkey.

6 Some Significant Cases Examined

In this section, we examine some significant cases to illustrate the competition policy implementation in Turkey.

Table 10: Newspapers, Owners, and Categories

Newspaper	Owner	News Category
Hürriyet	Doğan	Political
Milliyet	Doğan	Political
Sabah	Bilgin	Political
Fanatik	Doğan	Sports
Taraftar/Fotomaç	Bilgin	Sports

Source: The Competition Board Decisions

6.1 Cases Investigated under Article 4

Concerted Practices in the Newspaper Market: The allegation in the newspaper market investigation was that Hürriyet Gazetecilik ve Matbaacılık A.Ş.³⁴ (Hürriyet), Milliyet Gazetecilik A.Ş.³⁵ (Milliyet), Sabah Yayıncılık A.Ş.³⁶ (Sabah), and Simge Yayıncılık ve Dağıtım A.Ş.³⁷ (Simge) determined the prices of Hürriyet, Milliyet, Sabah, Taraftar-Fotomaç, and Fanatik newspapers through concerted practices in the daily political and sports newspaper markets. It started with a complaint from Uluslararası Moda Yayıncılık A.Ş.³⁸ (UMYAŞ)³⁹. The case actually concerned two big media groups: Bilgin and Doğan. Table 10 shows the newspapers, the media group they belong in, and their news category.

Before going into the details of the case, we shortly present the chronological order of the events. On May 4, 1998, UMYAŞ filed a petition stating that Hürriyet, Milliyet, and Sabah had been increasing their prices at the same rate at the same day or at subsequent days for a while and they had succeeded this through an association established among them. Upon this petition, the Competition Board decided to start a preliminary research⁴⁰. After examining the preliminary research report, the Board decided to start an investigation about Hürriyet, Milliyet, Simge⁴¹, and Sabah based on Article 4(a). The undertakings were informed of the investigation and demanded to send their first written defenses within 30 days. Approximately a year later, the investigation report was finalized and was notified to the Board members and the undertakings. In the report, the investigation committee took the view that Doğan and Bilgin Groups determined the prices of newspapers and some sale conditions in the political newspapers and sports newspapers markets through concerted practices replacing their independent behaviors, that their action was against Article 4(a), and should have been fined in accordance with Article 16, paragraph 2.

³⁴Hürriyet Journalism and Printing Inc.

³⁵Milliyet Journalism Inc.

³⁶Sabah Publications Inc.

³⁷Simge Publication and Distribution Inc.

³⁸International Fashion Publications Inc.

³⁹In the justified decision of the Competition Board, it was not clear why it would be in the interest of UMYAŞ to file the complaint.

⁴⁰It is obvious that the Board took the petition seriously since it skipped the initial examination stage.

⁴¹Simge belongs to Doğan Group.

At this point the undertakings were given 30 days to send their second written defenses. After requesting and receiving 20 additional days, the undertakings sent their second defenses to the Authority. The investigation committee notified an additional written view to the defenses. And the undertakings sent their rejoinders to the view. Finally, on July 5, 2000 the undertakings orally defended their cases and on July 17, 2000⁴² the Board issued its final decision.

We are going to present the case first from the committee's point of view and later from the undertakings' point of view. Lastly, we are going to present our standpoint in the case.

During the investigation, the investigation committee determined that the relevant product markets were daily national political newspapers and daily national sports newspapers. *Hürriyet*, *Milliyet*, and *Sabah* were treated as a separate category under the first market taking into consideration publication policy, consumer loyalty, price, advertising capacity, consumer reaction to price changes, and the stable trends of the newspapers in the market. The committee also determined that the relevant geographic market is the whole country based on the fact that the newspapers were published and sold countrywide.

The reporters inspected the headquarters of each newspaper. The committee's main evidence of a concerted practice was some notes of meetings they found in various places. When they inspected *Hürriyet*, they detected a Board of Execution decision in the bureau of a member of the Board of Directors including, among other things, a meeting with *Sabah* on fixing advertising prices⁴³. However, the staff refused to give a copy of the decision to the reporters.

When the committee inspected *Milliyet*, they found some decisions of the Board of Execution meetings. These documents formed the core of the committee's case. One of them included the following lines: "Besides, *Sabah* Group's proposal to increase [the price] to 125,000 TL⁴⁴ from the beginning of September on was discussed." Another one was "Agreed with *Sabah* Group, it was decided to increase the prices of *Fotomaç* and *Fanatik* newspapers from 40,000 TL to 50,000 TL from the first of September." Although it was not explicitly mentioned in the Competition Board Decisions, it is apparent that the committee was not able to find any evidence in the headquarters of *Sabah*.

Beside the findings in the inspections, another main argument of the committee was that the (simple) correlations among the prices of the newspapers were very high. The second column of Table 11 shows the price correlations as calculated by the Authority and confirmed by us⁴⁵. It is obvious that the prices of *Hürriyet* and *Milliyet* are highly correlated. However, the price of *Sabah* is not too highly correlated with those of *Milliyet* and *Hürriyet*. Figure 6 shows the daily nominal prices of the newspapers over time.

⁴²Note that the case lasted about two years since the application date and this is consistent with our findings in the earlier section.

⁴³This is the reporters' claim.

⁴⁴Turkish Liras.

⁴⁵The use of simple correlation coefficient in antitrust cases has some serious problems as documented in various studies. For example, see of Fair Trading (1999), 53-55.

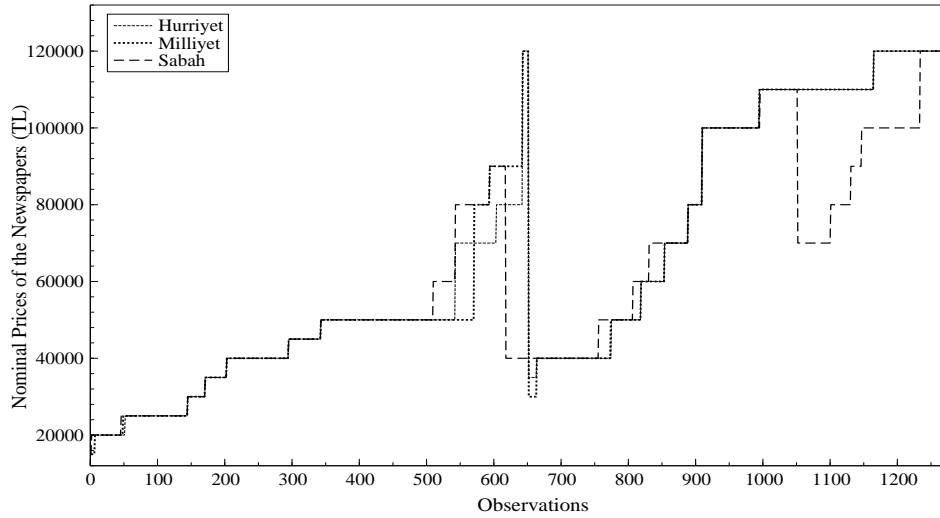


Figure 6: Price Movements of Newspapers over Time

Table 11: Newspapers and Price Correlations

Newspapers	Simple Correlations	Partial Correlations
Hürriyet - Milliyet	0.99	0.96
Hürriyet - Sabah	0.91	0.61
Milliyet - Sabah	0.90	0.57

Source: Author's Calculations

The Authority determined that the companies have different cost figures⁴⁶. That's why it rejected the argument of the parties that their prices were similar and their price changes were simultaneous because they obeyed similar cost structures. The Authority dismissed this argument on the grounds that, although the circulation revenues are similar for each company, their advertising revenues are different and this difference affects cost structures and thus price. Figure 7 shows the revenues of the newspapers for 1997.

Among all the newspapers, only Sabah sent a first defense. Sabah's defense was mainly that costs and prices were similar in the newspaper industry because they were in a similar position in acquiring raw materials and that the committee

⁴⁶The Authority probably based this argument on accounting costs, not on economic costs. If the firms use different accounting practices, the different cost structures argument may not be valid. Besides, selling newspapers is not the sole activity of these companies and we are not sure the Authority took the necessary measures to single out the costs of publishing and selling newspapers from the costs of other activities, which is a difficult task.

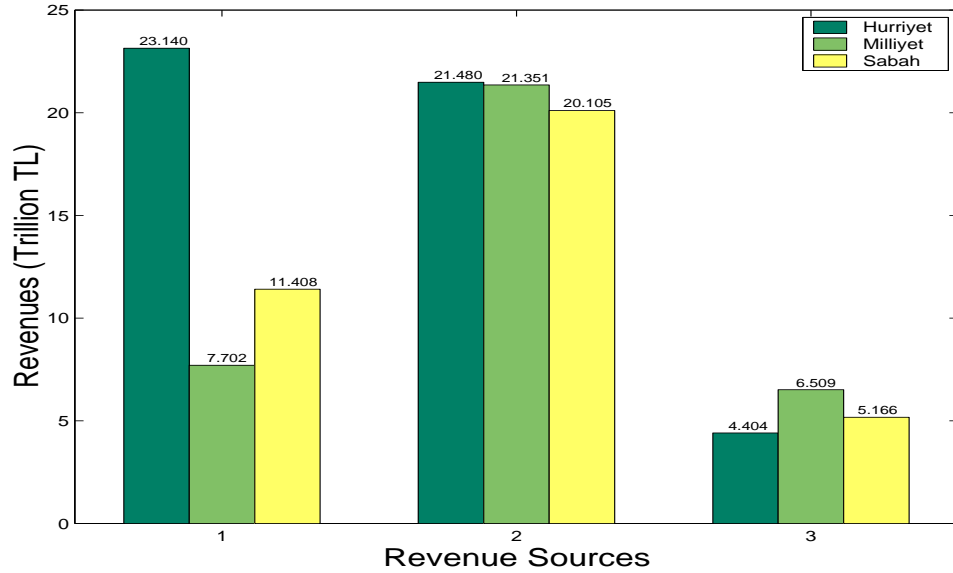


Figure 7: Newspapers and Their Revenues in 1997

did not find any evidence against Sabah. The newspapers presented a detailed common defense after the investigation report and during the oral defense. Their main arguments after the investigation can be summarized as follows:

- Since Hürriyet and Milliyet are in the same economic unit⁴⁷, it is natural that they regularly meet and make common decisions,
- The Authority should look at the results, not the findings of the investigation⁴⁸,
- If it does not harm other undertakings, the concerted practice does not restrict competition,
- The present case exhibits similarities to *Ahlström Oy v. Commission* cases⁴⁹, and the European Court of Justice overruled the Commission's decision,
- That the price increases, from time to time, happened to be at the same dates and that they were aware of each other's actions did not harm consumers and did not create entry barriers.

The undertakings' main arguments in the oral defense were that

⁴⁷Doğan Group.

⁴⁸They gave some European Commission decisions as examples.

⁴⁹Wood pulp decisions.

Table 12: Fines in the Newspaper Investigation

Newspaper	Fine (Billion TL)	Fine (\$)
Hürriyet	246.143	393,409
Milliyet	177.811	284,194
Sabah	183.397	293,122
Simge	35.779	57,185

Source: The Competition Board Decisions.

- Price is not the determining factor in newspaper competition,
- Newspapers compete for service, not for price,
- Neither the prices increased as to harm consumers nor decreased as to create entry barriers,
- There was neither an aim to restrict competition nor an outcome to the same effect.

The Authority concluded that the undertakings infringed Article 4(a) and fined the companies applying Article 16. It fined the companies with an amount of 0.5% of their 1997 turnovers. Table 12 shows the fines both in TL and dollars.

The high price correlation argument of the Authority has some serious problems. First of all, the prices are nominal, not real. This means that they include a strong increasing trend, as shown in Figure 6, because of the high inflation in Turkey, which makes the prices seem more correlated than they actually are. In that case, from a statistical point of view, a partial correlation coefficient, taking the increasing time trend into account, rather than a simple correlation coefficient would be a better measurement among the prices. The last column of Table 11 shows our partial correlations after taking out the “latent” effects of time. As can be seen, the correlations are considerably lower, especially between the price of Sabah and those of the other newspapers⁵⁰. Besides, even if one accepts the Authority’s simple correlation argument, a stronger argument that could have been made by the committee would be comparing the price correlations of the newspapers to those of other newspapers that do not belong to Bilgin or Doğan groups and trying to show that these correlations were lower. Still another problem with the price correlation argument, stated by the newspapers in their defense but rejected by the Authority, is the fact that some common cost items exist in producing and distributing newspapers. For instance, newspapers use similar types of paper in production. Paper production is run and paper prices are determined mostly by the state in Turkey. It is unlikely that any newspaper has a buying power in the paper market. Another common cost item is gasoline prices since newspapers are mainly distributed by trucks to vendors. Thus, we believe that the argument made by the newspapers

⁵⁰A better method would be deflating the prices and then estimating a simple correlation coefficient but we do not have the data necessary to carry out such a task.

that the prices are correlated because of similar cost items holds up although it was rejected by the Authority.

The defense argument of the newspapers that neither consumers nor other newspapers were hurt is worth consideration. Indeed, consumers actually gained by occasional price declines as shown in Figure 6. These declines were not predatory since neither of them drove other newspapers out of the market. Also, from the authority's point of view, these newspapers were in a separate product market from others, which rules out any predatory behavior since there is no other newspaper in the market to drive out. As to price increases, one can take them as a result of the concerted practices. However, in the past, many newspapers in Turkey, including Hürriyet, Milliyet, and Sabah, offered promotions where consumers collected coupons, cut out of the newspapers they buy, and exchanged them for some items like utensils or various domestic products. During these promotions, newspapers increased their prices. That's why the occasional price increases in Figure 6 also reflected cost increases due to promotions. Since these promotions were highly successful, we can say that the price increases did not actually hurt consumers.

It is hard to say more without knowing the details of the case. In the end, we believe the Authority made the right decision. In our opinion, the strongest piece of evidence in the Authority's hands was the meeting notes. The notes showed that there was some information exchange about price determination among the companies, which is against the Law.

6.2 Cases Investigated under Article 6

Abuse of Dominant Position in Coal Market: An interesting case concerned the sale of coal for household use in Ankara. In 1980s, some cities in Turkey struggled with air pollution. The main culprit was believed to be low-quality domestic coal for household use. Since Ankara, the capital city of Turkey, is surrounded by high mountains and thus vulnerable to inversion, it was one of the cities most affected by the air pollution. Domestic coal was far from meeting the necessary quality. When the pollution started to threaten human health, it was decided in 1986 to use imported coal in Ankara, along with other cities experiencing air pollution. The Ministry of Environment determined the general characteristics to be satisfied of imported coal. Based on these qualifications, the General Hygiene Board of the Province of Ankara (GHBPA), a board working under the Governorship of Ankara, set the necessary qualifications, taking into consideration the city's special pollution situation. The right to import and sell coal was granted to the Ankara Municipality. The Municipality established Belko in 1986. Almost all of its capital was owned by the Ankara Municipality. Belko had the exclusive right, granted by the GHBPA, to import coal⁵¹ in order to sell it within the borders of Ankara. The monopoly right was given in order to bar the entry of low-quality coal into Ankara and, thus, to create pollution-free air. Belko also had operations in various product markets like running quarries,

⁵¹Russia and South Africa are the two sources of imported coal in Turkey.

producing and selling asphalt, and running an insurance agency, among others.

Let's first present a chronological order of the events. The complaint was lodged by a person on June 25, 1999. It had two parts. The first concerned the monopolization of the coal market in Ankara by giving the exclusive rights to import and sell coal to Belko and denying those rights other importers. The second one concerned high prices charged by Belko abusing its monopoly position.

The Authority launched an initial examination. The initial examination report was finished on July 15, 1999. The report, although stated that the monopoly right of Belko was out of the scope of the Law since it was granted by the Governorship of Ankara, proposed a preliminary research in order to understand whether Belko charged high prices. Thus the report changed the case from monopolization into abuse of a dominant position. The next day the Board decided to start a preliminary research in order to determine whether it is necessary to start an investigation.

In the preliminary research report, the geographic market was determined as the borders of the province of Ankara and the relevant product market was determined as bulk and bagged piece coal meeting standards determined by the GHBPA for household use. The report claimed that Belko sold its coal at a price that was 60-70% higher than those at which similar coal was sold in other cities. The report cited that the price of coal in Ankara, which is located in the mid-Turkey, was \$180 per ton on November 1999. On the other hand, the prices of coal with similar qualities were \$120 in Polatli, a city very close to Ankara, \$112 in İstanbul, located in the north-west of Turkey, \$117 in Sivas, located in the mid-east of Turkey, and \$132 in Kayseri, located in the mid-south of Turkey. The report attributed these price differences to Belko's monopoly position. In the report, it was claimed that Belko pays more for coal than other companies in various cities. The report also found out that despite the fact that Belko sells coal at high prices in Ankara, it incurs losses.

On December 8, 1999, the Authority decided to start an investigation after studying the preliminary research report and demanded Belko to send its first written defense. The investigation report was finished on September 6, 2000. The investigation report stated that Belko was at liberty to set coal prices between the summer of 1996 and June 18, 2000 on which date the GHBPA's decision to determine coal prices by a commission under the chairmanship of the assistant governor of Ankara went into effect. The report claimed that Belko abused its dominant position by charging high prices. The reason was that Belko, consciously or unconsciously, did not show maximum care to the company's interests in purchasing coal and in the formation of other cost items and thus had higher operating costs than necessary. The report also stated that Belko should have been fined in accordance with Article 16.

Belko was notified of the investigation report and was asked to send a second written defense. After Belko sent its second written defense, the investigation committee added its supplemental view, and Belko sent a final defense. Belko also orally defended on March 26, 2001. The Board issued its final decision on April 6, 2001. As a result of the investigation, the Authority concluded that

Belko abused its dominant position. The main argument of the Authority was that Belko, through inefficient operations during importing and selling coal, caused costs to be higher than they ought to be. It was also noted that Belko reflected its costs from other operations to coal operations. The Authority took two measures. First, it fined Belko about 41 Billion Turkish Liras⁵². Second, it informed the GHBPA, via a declaration of opinion, of the possible ways to open up the coal market in Ankara into competition. The GHBPA, as a result of the Authority's declaration of opinion, decided to rescind the monopoly right granted to Belko on November 2, 2001.

The Authority's main argument in the case was directed towards Belko's high costs⁵³. The costs were divided into two parts: costs of coal procurement and Belko's own operational costs. For the first one, the Authority claimed that Belko procured coal at relatively higher prices than the importers in other cities. The latter costs were divided into personnel costs, storage costs, and cost due to exchange rate differences. The Authority claimed that Belko's personnel was too large. Another claim by the Authority was that Belko kept higher stocks than necessary. Finally, the Authority claimed that Belko incurred high costs due to exchange rate differences because it bought coal with a maturity of 360 days but sold coal in installments.

The main lines of Belko's defence against the Authority's accusations were as follows. Belko claimed that the Authority's price comparisons with other cities did not reflect the facts because these cities did not experience as much air pollution as Ankara did and the importers did not face serious quality controls. As to the high personnel costs, Belko claimed that it took radical measures like privatization to solve the problem. Belko also asserted that it had to keep high stocks because it had been entrusted with an important task and simply could not risk being unable to supply coal. Finally, Belko claimed that it had to make long-term purchases because of its insufficient financial capitals.

First of all, we should stress that Belko's situation is special. Belko is a company owned by a municipality and has the exclusive rights. The Turkish Competition Law lacks any articles dealing specifically with undertakings with special or exclusive rights⁵⁴. Secondly, unlike Article 82(a) of the Treaty of Amsterdam, Article 6 of the Law does not cite excessive pricing as an abuse of dominant position. However, in the article-by-article justifications of the Law, it is stated that the list is not exhaustive but exemplary.

In this case, one needs to answer the following two questions. First, was Belko in a dominant position? The answer is definitely yes. Second, did Belko abuse its dominant position? In order to answer this question, we need to determine what constitutes an abusive conduct. Examples of abusive conduct are excessively high pricing, discriminatory pricing, predatory pricing, refusal to supply, or inability to supply through inefficiency. None of these happened in this case. Article 6 is directed towards conduct which might be an abuse. In this case, there is nothing that shows that the real conduct of Belko was to abuse

⁵²Approximately 34 thousand dollars at the time.

⁵³It seems that the Authority examined Belko's accounting records in much detail.

⁵⁴Article 90 in the Treaty of Rome.

its dominant position. Excessive pricing was not a conduct deliberately chosen by Belko. It may be true that Belko operated inefficiently and that caused the coal prices to be high in Ankara. But it is not up to a competition authority to fix this problem. It is up to the Governorship of Ankara, which granted the monopoly right to Belko. One question arises. Is the type of auditing the Authority did with Belko really a competition authority's job? Our answer is no. Analyzing a company's books and pointing out the problems *ex ante* has nothing to do with competition.

There are a couple of points we should make. It seems that the Authority disregarded the fact that Belko had to incur extra costs in order to keep Ankara free of smuggled coal. Being the second most populous city in Turkey⁵⁵, Ankara was a more profitable target for coal smugglers than the surrounding cities. Besides, opening up the coal market to other firms may not be the right decision for Ankara and may take the city back to the days of pollution. The main reason is that each new firm will have less interest in guarding the market from illegal or low quality coal. It is possible that coal consumers may end up paying less for coal but more for health. Another important point is that some of the costs Belko incurred were hardly avoidable. The degree of uncertainty in business life is high in Turkey. Exchange rates kept increasing, with occasional jumps, in the 1990s in an unpredictable manner. Since Belko had to pay for coal in dollars, it brought additional burden on its budget when dollar appreciated. Also demand for coal was not perfectly predictable. In Ankara, the demand for coal for household use has decreased over time because of the recent switching to natural gas and that may have caused some unexpected increases in stocks. However, Belko always had to keep extra stocks as a precaution. The Authority disregarded uncertainty in its assessment of costs.

It is our belief that the penalty decision was not correct because the Authority failed to present enough evidence on the issue and nothing in the Authority's case against Belko showed that Belko's conduct was an abuse of its dominant position. The final situation in the case is a bit ambiguous. The competition experts we interviewed claimed that Belko was no longer a monopoly. However, Belko still claims⁵⁶ that it is the only company that has the right to import and sell coal in Ankara. In fact, Belko, jointly with Vakıflar Bankası A.Ş.⁵⁷, established a company, Vakbel, in 1995. Vakbel bought two coal mines in South Africa in order to decrease costs in coal procurement.

6.3 Cases Investigated under Article 7

Competition Policy and Privatization: The case concerned the takeover of İstanbul Gübre Sanayii A. Ş.⁵⁸ (İgsaş) by Toros Gübre ve Kimya Endüstrisi A.Ş.⁵⁹ (Toros). The case was initiated on October 5, 1998, by the High Board

⁵⁵Istanbul being the first.

⁵⁶Through its web site <http://www.belko.com.tr/>.

⁵⁷Vakıflar Bank Inc.

⁵⁸İstanbul Fertilizer Industry Inc.

⁵⁹Toros Fertilizer and Chemical Industry Inc.

of Privatization (HBP), which demanded the Competition Board's view on the privatization of 99.98% shares of İgşaş, which is a government-owned company operating in the fertilizer industry. We first briefly discuss fertilizers and the Turkish fertilizer industry and then present the Authority's decision and our assessment of the case.

Plants need two types of nutrients: macro-nutrients and micro-nutrients. Plants need macro-nutrients in large amounts. Macro-nutrients are nitrogen (N), phosphorus (P), and potassium⁶⁰ (K). Plants need micro-nutrients in small amounts. A typical bag or bulk of artificial fertilizer⁶¹ will contain macro-nutrients, micro-nutrients, and filler material. Filler material allows for even application of the nutrients across the fertilized area.

Although artificial fertilizers come in two physical forms, liquid (or fluid) and solid (or dry), it seems that only solid fertilizers are used in Turkey. Solid fertilizers are sold in two forms: bulk and bag. The bulk materials are generally less expensive and easier to handle, especially when large quantities are used. Fertilizers are either single-nutrient or multi-nutrient. Single-nutrient fertilizers are nitrogen, phosphorus, and potassium. Multi-nutrient fertilizers include at least two of the above three nutrients. There are subgroups in each single- and multi-nutrient fertilizer. For instance, among nitrogen fertilizers are ammonium sulfate (AS), ammonium nitrate (AN), urea, and calcium ammonium nitrate (CAN).

Fertilizer supply in Turkey has two sources: domestic production and imports. Domestic producers are of two types: those for whom fertilizer is the main line of business and those for whom fertilizer is the secondary line of business. Importers are also of two types: those which are also domestic producers and those which are only importers. The number of producers has been fixed in nine since 1981, the year in which the last entry into the market occurred. For the six⁶² of the nine producers, fertilizer is the main line of business. Imports are approximately a third of total sales. But around two third of the imports is done by the domestic producers. It is interesting to note that fertilizer producers are also the largest importers. This may be a result of government policies since government subsidizes both domestic sales and imports.

Buyers of fertilizers are farmers. Farms in Turkey are mostly small family businesses. Since farmers, although small in scale, are large in numbers, they have political power as a group. That's why government intervention is high in the fertilizer industry. Government acts as input supplier, producer, distributor, and regulator in the industry. For instance, four of the nine domestic producers belong to the government. Also the main raw material in fertilizer production, natural gas, is provided by Botaş, a government-owned company. The Turkish fertilizer industry is a heavily subsidized industry. For instance, intermediate product imports are tax-exempted.

Fertilizer consumption is around 5 million tons a year⁶³, a third of which

⁶⁰Also known as potash.

⁶¹Fertilizers are either organic or inorganic (artificial).

⁶²Two of which belong to the government and İgşaş is one of them.

⁶³See DPT (2000), p. viii.

is imports as stated above. Exports are around 40,000-70,000 tons a year⁶⁴. Demand is highly seasonal, peaking in spring and fall. Demand for fertilizer is price inelastic in developed countries because there are no close substitutes. However, it is elastic in developing countries because there are substitutes as manure or other organic materials⁶⁵.

The reporters in the case determined that each one of nitrogen, phosphorus, potassium, and composed fertilizers is a relevant product market by itself because they cannot be substituted for each other. The reporters concluded that if İgşaş were taken over by Toros, Toros would not be in a dominant position in the composed fertilizers market. However, they added that Toros would be in a dominant position in the nitrogen fertilizers market. Based on the report, the Competition Board made its decision on November 3, 2000⁶⁶. The Board's decision basically repeated the reporters' claims in the case and as a result the Authority prohibited the merger.

As in any merger case, the key point in that case is the definition of the relevant product and geographic markets. The reporters' claim that each single-nutrient fertilizer and multi-nutrient fertilizers are separate relevant product markets, based on their degree of substitutability among each other, is actually an empirical issue. Also if there are regional markets in the fertilizer industry and Toros and İgşaş are in different geographical markets, then Toros might not be in a dominant position after the merger. More specifically, Toros has two plants, which are located in mid-south of Turkey. İgşaş' plant is in the north-west of Turkey. The Authority determined the geographical market as the whole country. However, if this is not true, then the merger will not affect the market structure in each regional market. The only change will be in the form of ownership.

It seems that the Authority based its decision only on market share argument, which may not be correct. The point is whether the merged company would have such market power to be able to decrease production and increase prices large and long enough so it will make substantial profits at the expense of consumers. This does not seem possible for a couple of reasons. First, there is the possibility of substitution among different fertilizer types. For instance, Boyle (1982) confirms the earlier findings that phosphorus and potassium are substitutable for nitrogen although not for each other. Second, import-penetration is high in the fertilizer market. The Authority's conclusion that importers have a minor share in total sales misses the point. It is not important that importers' share is not large. What is important is that their pressure is there. Low imports may be the result of low domestic prices. Once fertilizer prices go up, imports may increase. Third, buyers, supported by the government, have a considerable degree of power and apply a downward pressure on prices. It does not seem likely for any company to charge monopoly prices. Fourth, there is the possibility that producers of other fertilizer types will start

⁶⁴See DPT (2000), p. viii.

⁶⁵See Korol and Larivire (1998).

⁶⁶Notice that the decision was made two years after the application by the HBP. This is an extraordinarily long time for a merger case.

to produce nitrogen fertilizer if the merged company increases its prices. In sum, there are three types of economic actors in the Turkish fertilizer industry that will prevent any producer from charging monopoly prices. They are importers, the government, and other producers. And finally, one can put forward a failing firm argument for İgsaş. Production activities in İgsaş stopped as a result of the 1999 earthquake. The merger would bring back its productive resources to the economy. For the reasons cited above, we believe that prohibiting the merger was not the right decision for the Authority.

7 Conclusion

Until 1980s, the Turkish economy was a relatively closed economy. Most of the production activities were carried out by inefficient and bulky state-run companies. Investments were initiated by governments but mostly for political reasons. All of these changed in the 1980s. Since then, the state has been withdrawing from economic activities through privatization and opening up the economy to free trade. It should, however, be noted that, despite this trend toward a free-market economy, Turkey would not have adapted a competition policy this soon if it was not for the effort to become integrated to the European Union. Whatever the reason is, the outcomes of this effort, especially the competition laws and their implementation, have been paying off.

A number of conclusions can be offered based on the analysis in the paper. We divide these conclusions into two parts: those concerning legislation and those concerning implementation. We first start with the legislation part, and then move on to the implementation part.

Competition laws need a well-established and swift legislation process. This is hardly the case in developing countries like Turkey where even the simplest lawsuits may take years to finalize. The current legislative structure allows the Authority to collect monetary penalties only after an appeal results in its favor. One of the biggest challenges the Turkish Competition Authority faces is the slow appeal process, which basically depreciates any monetary penalties. Since firms are aware of this, they appeal every decision and get advantage of the slowness of the Turkish justice system. As a result, the Authority has not been able to collect any administrative fines to date. This fact renders the effectiveness of the Authority a questionable one⁶⁷.

Competition policy in Turkey still needs articles concerning state aids and undertakings with special or exclusive rights (including public undertakings). As stated before, the Additional Protocol, signed between Turkey and the EC on December 13, 1970, anticipated that Turkey would adopt the conditions and rules for the application of the principles laid down in Articles 85, 86, 90 and 92 of the Treaty of Rome⁶⁸. Articles 85 and 86 have corresponding articles in

⁶⁷At the time of writing, a new draft law appeared. The new law aims to address some problems of the current law. The most important of them is the new penalty system, in which the Authority is authorized to collect the penalty as soon as a decision is made.

⁶⁸Articles 81, 82, 86, and 88 in the Treaty of Amsterdam.

the Law on the Protection of Competition, namely Articles 4 and 6. However, despite the fact that Turkey and the EC have been in customs union since 1996, competition laws in Turkey still lack articles corresponding to Article 90 (public undertakings and undertakings with special or exclusive rights) and Article 92 (state aids). The issue of state aids will be more important if Turkey becomes a full member of the EU. But it is probably a good idea to discipline domestic industries and the government authorities regarding state aids as soon as possible. This may bring Turkey closer to the full membership and also make the transformation easier.

Since the Law on the Protection of Competition was prepared observing the EU competition laws, its general structure is well formed. However, we want to point out a problem with Article 4, of which paragraph 3 states that

In cases where the existence of an agreement cannot be proved, if the price changes or the balance of supply and demand or the areas of activity in the markets of the enterprises concerned are similar to those of the markets where competition is prevented, distorted or restricted, this constitutes a presumption that the enterprises concerned are engaged in a concerted practice.

Each such party thereto may avoid liability if the contrary is proven on economic and rational grounds.

We should emphasize that this paragraph has no counterpart in the Treaty of Amsterdam. This is a particularly problematic paragraph from an economic point of view. The paragraph basically states that if the Authority suspects that an infringement occurred but cannot prove it, it is up to the parties involved to prove that there is no such an infringement. We think that this paragraph should be completely removed from the Law. There are many practical difficulties in implementing it. For instance, how will the Authority conclude that the price changes or the balance of supply and demand are similar to those of the markets where competition is prevented, distorted, or restricted? Moreover, is there a specific pattern in the price changes or the balance of supply and demand in the markets where competition is prevented, distorted, or restricted so that the Authority will be able to compare the case at hand to it? If there is such a pattern, then the task of competition authorities is very easy. All they have to do is to compare the actual price changes or the balance of supply and demand to those of the markets where competition is prevented, distorted, or restricted. If the existence of an agreement cannot be proved, then the Authority should conclude that there is no such an agreement and, thus, there is no competition infringement. Taking the investigation one step further and attempting to compare the price changes or the balance of supply and demand of a market in which the Authority believes an infringement occurred to those of the markets where competition is prevented, distorted, or restricted will bring a lot of speculation with it. The paragraph also implies that if there is an competition infringement in an area of activity in any market, then all of the similar areas of activity are under suspicion. One competition expert we interviewed claimed that this

paragraph makes their job easier. However, he could not remember any specific case, in which the Authority had recourse to it.

As to the implementation of competition policy, our main conclusion is about the way the relevant geographic markets are defined. It seems that in most of the cases the way the relevant geographic markets are defined is somewhat heuristic. First of all, we should stress that the Small but Significant Non-transitory Increase in Price (SSNIP) test has never been used in any case. The SSNIP test, which has been adopted by the European Commission, emphasizes demand substitution as the main element in defining the relevant geographic market⁶⁹. On the other hand, the relevant geographic market definitions of the Turkish Competition Authority were mainly supply-sided and ignored demand-side effects. For instance, the relevant geographic market was most of the time defined as the extent of an area to which a specific supplier or a group of suppliers have the means to supply. Econometric or statistical tools are almost never used in defining markets, even in cases where the geographic market definition plays a vital role. The arguments about market definition were restricted to a few short paragraphs in most of the cases. Another problem is that the largest geographical market is almost always Turkey. It seems that there is a general consensus among the experts that the largest geographical market should be defined the whole country because the Law cannot be applied outside Turkey. Their main argument for this is Article 2 of the Law⁷⁰. However, Article 2 does not prevent one from defining a geographical market larger than Turkey since it states that

Agreements, decisions, and practices which prevent, distort or restrict competition between the enterprises which operate in or *affect the goods and services markets in the territory of Republic of Turkey...*⁷¹

Thus, Article 2 clearly states that geographic markets can be defined larger than Turkey. This is going to be more important if Turkey becomes a full member of the EU. We believe that the competition experts in the Authority should begin this exercise.

Another problem regarding the implementation of competition policy is that there is no monitoring department that follows up on investigated undertakings to see if they stopped the actions that led to the investigation. For instance, in the Belko case we covered above, the competition experts we interviewed stated that Belko is no longer the sole importer and seller of domestic coal in Ankara. However, Belko still claims to have the exclusive rights. This problem does not seem likely to be solved because of the shortage of staff.

One minor point is that each investigation committee is composed of one board member and two or more competition experts. The Board, based on the report of the investigation committee, decides a case on a voting basis. Each

⁶⁹See Jones and Sufrin (2001), pp. 43-44.

⁷⁰See the appendix.

⁷¹Emphasis mine.

board member votes in favor of or against penalty and cases are decided on either a majority vote or a unanimous vote. The board member who is also in the investigation committee has a vote for the case. In order to create an environment as impartial as possible for undertakings, we believe the board member, who is also in the investigation committee, should not take part in voting.

The integration process of Turkey with Europe is not over since Turkey is still not a full member of the EU. But Turkey has made great progress towards the full integration. One of the most notable achievements was to pass the Law on the Protection of Competition, which was required for the customs unions between Turkey and the EU. However, a careful assessment of the possible market performance effects of competition policy in Turkey is much needed. This is our agenda for future research.

Appendix

This appendix includes some of the articles of the Law on Protection of Competition that is referred to in the text.

PART I Purpose, Scope, Definitions

Scope

Article 2. Agreements, decisions, and practices which prevent, distort or restrict competition between the enterprises which operate in or affect the goods and services markets in the territory of Republic of Turkey and the abuse of dominant position by those enterprises which are dominant in the market and all kinds of operations and practices which are considered to be a merger or an acquisition by which competition in the market is significantly impeded and all operations concerning the measures, decisions, regulation and supervision for the protection of competition are within the scope of this Law.

LAW ON THE PROTECTION OF COMPETITION (LAW NO. 4054)

[Published in Official Gazette No. 22140 dated 13 December 1994]

PART I Purpose, Scope, Definitions Definitions

Article 3. For the purposes of this Law:

Dominant Position: shall mean any position enjoyed in a certain market by one or more enterprises by virtue of which, those enterprises have the power to act independently of their competitors and purchasers in determining economic parameters such as the amount of production or distribution, price and supply;

PART II
CHAPTER ONE
Prohibited Practices

**Agreements, Concerted Practices and Decisions Restricting
Competition**

Article 4. Agreements and concerted practices of the enterprises and decisions and practices of the associations of enterprises the object or effect or the possible impact of which is, directly or indirectly, to prevent, distort or restrict competition in a certain market for goods and services, are unlawful and prohibited.

Such practices are, in particular, as follows:

a) To fix purchase or sales prices or the factors such as cost or profit which form the price or all other trading conditions concerning purchase and sales of goods and services;

b) To share the markets for goods and services or to share or control the market sources and components;

c) To control or to determine the quantities of supply or demand in the markets for goods and services outside the market conditions;

d) To impede or restrict the activities of the competitors or to eliminate other enterprises operating in the market by boycotts or by other practices or to prevent the newcomers in the market;

e) Except exclusive dealing agreements, to apply dissimilar conditions to persons which have equivalent transactions with equal rights and obligations;

f) Contrary to the nature of the agreement or to the commercial customary rules, to make the conclusion of contracts subject to the purchase of other goods and services or acceptance by the intermediary purchasers to display of other goods and services or acceptance of resale conditions for the goods or services concerned.

In cases where the existence of an agreement cannot be proved, if the price changes or the balance of supply and demand or the areas of activity in the markets of the enterprises concerned are similar to those of the markets where competition is prevented, distorted or restricted, this constitutes a presumption that the enterprises concerned are engaged in a concerted practice.

Each such party thereto may avoid liability if the contrary is proven on economic and rational grounds.

Exemption

Article 5. The Board, in the existence of all the conditions stated below and upon the application of the parties concerned, may declare the provisions of Article 4 inapplicable to any agreement or concerted practice between enterprises or decision by associations of enterprises which:

a) Contributes to new developments and progress or technical or economic improvement in production or distribution of goods and in providing services;

b) Allows consumers to get a share from the resulting benefit;

and which does not:

- c) Eliminate competition in a substantial part of the relevant market;
- d) Induce a restraint on competition that is more than essential for the attainment of the objectives set out in paragraphs (a) and (b);

A decision for exemption shall be issued for a specified period of not more than five years. Certain conditions and/or obligations may be attached to an exemption decision. Upon the termination of the specified period of exemption, the decision for exemption may, upon the application of the parties concerned, be renewed if the requirements for exemption continue to be satisfied.

In cases where the requirements stated in the first paragraph are satisfied, the Board may issue communiqués by which certain categories of agreements shall be exempted as a group and the conditions attached thereto are shown.

Abuse of Dominant Position

Article 6. Any abuse, by one or more enterprises acting alone or by means of agreements or practices, of a dominant position in a market for goods and services within the whole or part of the territory of the State, is unlawful and prohibited.

Abusive practices are, in particular, as follows:

a) To prevent, directly or indirectly, other enterprises in its area of commercial activities or practices which aim to impede the activities of the competitors in the market;

b) To make discrimination, directly or indirectly, by way of imposing dissimilar conditions for equivalent and same rights and obligations to the purchasers who have equivalent position;

c) To make the conclusion of contracts subject to the acceptance of restrictions concerning resale conditions such as the purchase of other goods and services or acceptance by the intermediary purchasers to display other goods and services or maintenance of a minimum resale price;

d) Practices which aim to distort competition in a market for goods and services by means of taking financial, technological and commercial advantages created by the dominant position in another market;

e) To restrict production, marketing or technical development thereby causing a disadvantage for the consumers.

Mergers and Acquisitions

Article 7 Merger of two or more enterprises and acquisition, except acquisition by way of inheritance, by an enterprise or by a person, of another enterprise, either by acquisition of all or part of its assets or securities or other means by which that person or enterprise acquires a controlling power in that enterprise concerned, which creates or strengthens the dominant position of one or more enterprises as a result of which, competition is significantly impeded in the market for goods and services in the whole or part of the territory of the State, is unlawful and prohibited.

The Board, shall issue communiqués to announce the categories of mergers and acquisitions which, to be considered as legally valid, require a permission by prior notification to the Board.

CHAPTER TWO Powers of the Board

Negative Clearance

Article 8. Upon application by an enterprise or associations of enterprises concerned, the Board, on the basis of the facts in its possession, may certify by a negative clearance certificate that the agreement, decision, practice or the merger or acquisition, is not contrary to the Articles 4, 6 and 7 of this Law.

The Board, after issuing a negative clearance certificate, may revoke its decision at any time, within the framework of the conditions set out in Article 13. However, in such a case, no punitive sanctions shall be applied to the parties concerned, for the period until the revocation decision of the Board.

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