

Development of Competition Policy in The Turkish Banking Sector: 1994-2005*

Dr. Necip Kağan Kocaoğlu, Esq.**

SUMMARY

Increased concentration due to bank failures and government takeovers in the banking market causes profitability in Turkish banking sector. Moreover, privatization of state banks has been a failure for three decades. Lack of competitive forces in the Turkish banking industry attracted significant foreign entry into the market.

Key Words : *banking regulation, competition policy, trade liberalization, European union, political economy of Turkey*

* Bu makale hakem incelemesinden geçmiştir. (This Article has been peer reviewed.)

** Member of New York & Ankara Bar Associations; J.S.D. (Georgetown), LL.M. (Virginia), LL.M (Ankara). kagan@kocaoğlu.av.tr

Absent absolute necessity, no intervention to the markets shall be undertaken. However, markets shall not be left unattended.¹

Kemal Atatürk

§ 1. Introduction

Competition policy plays a significant role in banking industry although banking business is built on efficiency and scale economies. This article seeks to analyze the role of competition policy in the Turkish banking sector between 1994 and 2005. This research studies on the interaction between the Competition Act and Banking Act. This goal requires further discussion on effect of the enforcement cases decided in the Turkish Competition Authority on competition policy in banking. Finally, the research evaluates the impact of privatization and restructuring program on banking competition.

Turkish banking and competition policy are relatively new. Turkish banking has a history of nearly nine decades and competition policy has a history of 15 years. Their intersection, competition policy in Turkish banking sector, has developed in two phases. The first phase unfolded between 1994 and 2005. In 1994, Turkey established its competition authority in the midst of an economic crisis. Turkey seized 11 banks until the establishment of Banking Regulation and Supervision Agency (“BRSA”) in 1999. A second wave of failing banks triggered the economic crisis in 2001. Banking regulators focus has been primarily market restructuring, capital adequacy and asset management during the course of the economic crisis. Turkish government took control of the banking market by adding private banks to its portfolio, which already consisted of several state banks.

Bank failures and government takeovers increased concentration in the banking industry. Turkish public opinion view bank profits as an indicator of the health of financial system.² Individual banks became profitable due to increased

1 Kemal Atatürk’s, the founder of the Republic of Turkey, statement in his commencement speech to the Turkish parliament in 1937 (<<http://www.epdk.org.tr>> (in Turkish)).

2 Recep Tayyip Erdoğan, Prime Minister of Turkey, told Banks announced their results. All of them earned great profits.” (<www.aksam.com.tr/.../evet_cikarsa_tusiad_hangi_yuzle_katilacak.html> (in Turkish) (Last visited on 9/14/2010)). At a meeting with banking industry on 5/19/2010, Ali Babacan, Deputy Prime Minister, told that Turkish banks are profitable and this an indicator of the system’s health. (<<http://www.milliyet.com.tr/-oligopol-calismasi-bddk-da-sektoru-zora-sokmayacagiz-ekonomi/haberdetay/20.05.2010/1240139/default.htm>> (in Turkish) (Last visited on 9/14/2010)).

concentration in banking market. Global financial conditions were friendly and increase in the profit margins resulting from lessened competition attracted significant foreign entry to banking industry. Turkish government started paying attention to the competition policy after the economy got back on track and the second phase in Turkish competition policy is still unfolding.³

The first section of this work discusses the development of the Turkish competition policy and the factors underlying this progress and studies the relevant dynamics such as Turkish accession to the European Union, liberalization movement and failed attempts to adopt a competition policy. The next section examines the regulatory network over the competition policy in the Turkish banking sector. This section scrutinizes the concurrent jurisdiction of the government agencies and application of the Competition Act to state banking units. The third section evaluates banking practices that have been subject to Turkish Competition Authority's review. The subsequent section delves deeper into Turkish Competition Authority's decisions to figure out government delineation of the geographic markets and figuring out the relevant undertaking in the relevant market. Examination of concerted practices and abuse of dominance in banking follows that inquiry. Analysis would be incomplete without shedding light on merger control and the International Monetary Fund ("IMF") backed restructuring program on both private and government banks and its effects on competition policy on banking. The last section contains an overall analysis and suggestions for future.

The author presented this paper at the Antitrust for Transition Economies seminar held under the supervision of Prof. John D. Graubert at Georgetown University Law Center located in Washington, D.C. on 5.1.2005. Author subsequently revised and updated the paper. Errors belong to author.

§ 2. The Development of the Competition Policy in Banking

I. Implementation of Competition Policy

1. The Role of the EFTA and the EU

Turkish commitment to the competition policy is an example of hard convergence. Turkey is under international obligation to implement competition policy. The Free Trade Agreement between the EFTA and Turkey prohibits concerted practices⁴ and abuse of dominant position.⁵ This agreement made in 1991 did not

3 Ali Babacan, Deputy Prime Minister, told that the BRSA is working on an internal study on regulation of banking oligopolies. He added that the results of the study will not cause trouble. <<http://www.milliyet.com.tr/-oligopol-calismasi-bddk-da-sektoru-zora-sokmayacagiz-ekonomi/haberdetay/20.05.2010/1240139/default.htm>> (*in Turkish*) (Last visited on 9/14/2010).

4 Art. 17(1)(a) of the Agreement between the EFTA States and Turkey (Geneva, Dec. 10, 1991).

5 Art. 17(1)(b) *Id.*

envisage adoption of competition legislation or creation of an agency. EFTA's role in Turkish competition policy is limited because of lack of enforcement in this treaty.

Turkey and the European Economic Community ("EEC") established an economic association with the Treaty of Ankara of 1963.⁶ This treaty aimed economic integration through a customs union. The Second Financial Protocol⁷ established the first phase of the customs union in 1973.⁸ Association Council's decision called "Customs Union Resolution" implemented the final phase of the customs union in 1995.⁹ Customs Union Resolution prohibits certain anticompetitive practices incompatible with the operation of the customs union (art. 32 and 33).¹⁰ Customs Union Resolution sets forth that the prohibitions in art. 32 and 33 will be assessed by the criteria arose from the application of the art. 85 and 86 of the Rome Treaty establishing the European Economic Community.¹¹

Turkey follows European model in competition law. With the Customs Union Resolution, Turkey undertook to make its competition legislation compatible with the E.U. *acquis*,¹² to enforce the E.U. *acquis* effectively¹³ and to establish a competition authority¹⁴. The Customs Union Resolution requires on the part of Turkey to conform with principles laid down in the E.U. jurisprudence and the E.U.'s block exemption regulations.¹⁵ The Turkish Council of State, the highest

6 Convention Establishing an Association Between the European Economic Community and Turkey, Sept. 12, 1963, 3 I.L.M. 65 (1963).

7 Memorandum of Understandings are called as Protocols in Europe.

8 Additional Protocol and Financial Protocol Signed on 23 November 1970, Annexed to the Agreement Establishing the Association Between the European Economic Community and Turkey and on Measures to Be Taken for Their Entry into Force, 1972 O.J. (L 293) 4.

9 EC-Turkey Association Council Resolution 1/95, 1996 O.J. (L 35) 1 [hereinafter "Customs Union Resolution"]. See David A. Kanarek, *Turkey and the European Union: The Path to Accession*, 9 Colum. J. Eur. L. 457, 462 (Summer, 2003) (describing the Turkey-E.U. relation). See for an extreme view, Kemal Baslar, *The Legal Status of the Customs Union "Agreement"*, 4 Ankara European Studies Rev. (2003) (alleging that Customs Union Resolution is unconstitutional, null and void).

10 Customs Union Resolution prohibits (art. 32): (1) price fixing, (2) supply reduction, (3) market division, (4) price discrimination, (5) tying arrangements. Any agreements or decisions thereof will be null and void (art. 32(1)). However, these practices will not be illegal if they contribute to improve the production or distribution of goods or to promote technical or economic progress, which allow consumers a fair share of the resulting benefit, and which does not: (a) impose restriction more than necessary in achieving the relevant goals, and (b) eliminates competition in substantial part of the market. Customs Union Resolution prohibits abuse of dominant position (art. 33) and provides a few examples of abuse of dominant position.

11 Amsterdam Treaty alters the article numbers 85 and 86 with 81 and 82 (art. 12).

12 Turkey promised to adopt competition law with the conditions set forth in art. 85 and 86 of the Treaty of Rome before the customs union's effective date (art. 39(2)(a) of the Customs Union Resolution).

13 Art. 39(1) of the Customs Union Resolution.

14 *Id.* at art. 39(2)(b).

15 *Id.* at art. 39(2)(a).

administrative court, ruled that Turkish Competition Authority's decisions should be in line with the E.U. Commission's practices and precedents of the European Court of Justice.¹⁶

2. Promulgation of Turkish Competition Law

Legislation of a competition law sat on Turkish government's agenda for more than three decades. Turkish Constitution protects freedom to establish private enterprises.¹⁷ In order to protect this right, the Constitution also sets forth that the government is under affirmative duty to prevent the formation, in practice or by agreement, of monopolies and cartels in the markets.¹⁸ Various draft competition legislations emerge in 1971, 1975, 1980, 1980, 1983 and 1984.¹⁹ However, these attempts were not successful because of the weak coalitions in governments. A bill was introduced to the Turkish Parliament (Grand National Congress of Turkey) in 1985, the bill lapsed due to upcoming elections.²⁰

Turkish Grand National Assembly promulgated the Act on the Protection of Competition in 1994 during the Customs Union negotiations conducted with the E.U.²¹ The Competition Act modeled primarily after the European competition regime. Some aspects of the American antitrust law have mingled in the legislation as well.²² The Customs Union Resolution and the EFTA free trade agreement are silent on merger control. Although Turkey is under no international obligation to engage in merger control, Turkey undertook merger control to implement the Constitutional mandate effectively.

3. Overview of the Competition Law

The prohibitions in the Competition Act focus on “undertaking” (enterprise) concept similar to its European counterparts.²³ Undertakings are units that constitute an economic unity and that act independently in markets. Competition Act applies to actual distortion and potential threats to competition processes

16 Council of State, 10th Cir., Decision No. 4468 (2003), Matter No. 1441 (2001), Decision Date: 11/18/2003.

17 Art. 48(1) of the 1982 Constitution (The Constitution of the Republic of Turkey, Act No. 2709, Adoption Date: 11/7/1982.).

18 *Id.* at art. 167(1). The government shall take measures to protect the consumers, small traders and craftsmen (*Id.* at art. 172 & 173).

19 The Turkish Competition Authority Year 2002 Report, at 3 (2002).

20 The bill has been not debated or voted on Turkish Parliament's floor (*Id.*, at 3).

21 Act No. 4054, Adoption Date: 12/7/1994; Official Gazette/Journal [Hereinafter “O.J.”], Date: 12/13/1994, No. 22140 [hereinafter Competition Law].

22 See *infra* FN. 141 *et seq.* and accompanying text.

23 See Competition Authority 2002 Report, *supra* note 19, at 4. The prohibitions in the Rome Treaty apply to undertaking(s), association(s) of undertakings (See art. 85 and 86 of the Treaty Establishing the European Community (Rome, Mar., 25, 1957)).

by undertakings.²⁴ Competition Act prohibits cartel agreements and concerted practices,²⁵ abuse of dominant position²⁶ and controls mergers.²⁷

Criminal liability does not attach for infringement of competition. Nevertheless, the administrative sanctions prescribed in Competition Authority are deterrent. Injured parties can pursue their private rights of action.²⁸ Courts can award compensation up to treble damages incurred or profits gained (or could have been earned) if the injury is a result of an agreement, decision of the parties or gross negligence of the parties.²⁹ The treble damages provision fortifies the private rights of action. Treble damages provision is modeled after American antitrust law unlike the rest of the Competition Act following the European regime.

II. Liberalization of Banking in Turkey

Ottoman Empire had a liberal trade policy and granted many concessions to foreign traders. Foreign bankers dominated the banking industry of the Ottoman Empire.³⁰ Even, the central bank was foreign owned.³¹ Turkish banks flourished in republican era. After eight decades of import substitution, Turkish government liberalized financial system beginning in 1980.³²

24 OECD Report, at 1, available at <<http://www.oecd.org/dataoecd/3/53/1823532.pdf>> (1997) (citing art. 1 of the Competition Law).

25 The Competition Act prohibits cartel agreements, decisions and concerted practices which impair competition (Art. 4). Competition Act gives some examples of cartelistic behavior (*Ibid*). These examples are not exhaustive. Competition Authority issued “Communiqué of the Competition Board on the Procedures and Principles for Notification of Agreements, Concerted Practices and Decisions of Associations of Undertakings Pursuant to the Article 10 of the Act” on this matter.

26 Abuse of dominant position is prohibited in the art. 6 of the Competition Law. This provision brings a concerted practice presumption where the defendants carry the burden of prove the contrary.

27 Competition Act provides the Administration with broad authority over mergers (Art. 7). Competition Authority’s merger regulations are: (1) *Communiqué on the Mergers and Acquisitions Calling for the Authorization of the Competition Commission and Communiqué No: 1997/2* (2) *Communiqué Regarding the Methods and Principles to be Pursued During the Course of Pre-Notifications and Applications for Authorization Made to the Competition Authority in order to Acquisitions via Privatization to be Legally Valid* .

28 Art. 57 of the Competition Law.

29 Art. 58 of the Competition Law.

30 Islam prohibits interest. However, Courts of Ottoman Turkey honored credit transactions with interest and enforced them. In the 17th century, Greeks and Armenians flourished as the leading financiers (Sevket Pamuk, *The Evolution of Financial Institutions in the Ottoman Empire, 1600–1914*, 11.1 *Financial History Review* 7, 21 (2004)). *Commercial Bank of Smyrna*, established in 1847 as the first bank. This bank was chartered in London and has been closed down due to the 1847-48 financial crisis (*Id.*, at 27).

31 *Banque Impériale Ottomane* (Ottoman Bank) was founded in 1863 by British and French capital. Although Ottoman Bank was a foreign bank, the government granted it central bank privileges (See Pamuk, supra note 36, at 24). Ottoman Bank’s central bank privileges continued until 1935.

32 Erol Balkan & Erinc Yeldan, *Peripheral Development under Financial Liberalization: The Turkish Experience*, at 2 (2001) available at <http://www.hamilton.edu/academics/Econ/workpap/01_01.pdf>

Liberalization of interest rates in June 1980 is the first step to open Turkish banking to competition.³³ Banking legislation gives the Cabinet *de jure* authority to set maximum interest rates applicable to loans and deposits.³⁴ Turkish Cabinet has not exercised this *de facto* authority since 1987³⁵ and relevant regulations set all rates free.³⁶ Nevertheless, Turkish government owns significant stake in the banking market and has *de facto* power to influence banking market.

§ 2. Regulatory Network

Concurrent regulation of the credit institutions by the banking authorities and antitrust authorities leads to jurisdictional problems. There are two approaches on how to regulate the competition in banking. The French Competition Authority (*Conseil de la Concurrence*) decided that French competition law is applicable to banks although banking is subject to its own specific regulation.³⁷ On the other hand, Court of Appeals of South Africa decided that the banks are only subject to the South African Banks Act.³⁸ Competition Authority applies the Competition Act to the banks and it protected its jurisdiction against explicit language in the statute.³⁹ Turkish approach is the one in the middle. Competition Act is applicable to banks. However, Competition Authority's jurisdiction is merger review is restricted.

I. Turkish Competition Authority

Competition Authority is the statutory authority to implement the Competition Act⁴⁰ and established a specialized sub-department in order to carry out the relevant regulations in the financial sector.⁴¹

The law establishes an independent agency entitled Competition Authority⁴² and

33 İbrahim Ekmen, Competition in Banking Sector and Market Structure, Banking Regulation and Supervision Agency Expert Dissertation (Ankara 2004) at 2.

34 Banking Act. art. 144 (2005); Banks Act art. 20(1) (1999) (*repealed*).

35 OECD Reviews of Regulatory Reform, Regulatory Reform in Turkey: The Role of Competition Policy in the Regulatory Reform, at 22 (Nov. 2002).

36 See, Council of Ministers Ordinance (No. 87/11921 and 2002/3707); CBRT Communiqué (No. 91/1 and 2002/1). Banks may freely pass expenses to their customers according to a Council of Ministers' Decision (Decision Concerning Benefits other than Interest Obtained by the Banks and Collection of the Expenses in Credit Transactions, Council of Ministers Decision No. 92/3469; O.G.; Date: Oct. 3, 1993, No. 21364.).

37 OECD Report France 2000.

38 OECD Global Forum on Competition, Peer Review of South Africa, at 32 (Feb. 11, 2003).

39 See *infra* FN. 212-213 and accompanying text.

40 Art. 27(a) of the Competition Law.

41 "Technical Department No: 4" is the service department in Competition Authority which is assigned to fulfill the tasks concerning competition in the financial services sector including banking, insurance and other financial organizations among other duties (See Competition Authority , <<http://www.rekabet.gov.tr/e4nolu.html>>).

42 Competition Authority is independent and no organ, person may give commands and orders in order to impact the final decision of Competition Authority (art. 20(3) of the Competition Law).

its independent decision-making authority entitled Competition Commission. The Act makes removal of the commissioners from their posts more difficult than impeachment of judges to fortify this independence.⁴³ Judiciary, the Ministry governing [Turkish] State Planning Office, Ministry of Industry and Commerce and federation of trade chambers, and Competition Authority's career personnel have representatives at the commission level.⁴⁴ The Parliament amended the law in 2005 to remove the seat of representative sent by universities and shrank the size of the commission.⁴⁵

Competition Authority is more than self-sufficient and is not dependant on the national government for funding. The financial independency of Competition Authority comes from its collection of franchise taxes. Incorporated entities bear mandatory minimum capital requirements. All the corporations and limited liability companies must pay certain portion of their capital to Competition Authority in their incorporation/establishment stage and subsequent capital promotions.⁴⁶ This transfer is the primary funding source of Competition Authority in addition with the administrative fines levied.⁴⁷ Competition Authority's relative success among other developing nations derives from its financial capacity. Competition Authority was able to build the necessary enforcement capacity with the generous funding opportunity granted by the Parliament. National government attached

43 Only a court or the commission itself may remove the commissioners from their posts based on limited grounds: (1) Loss of the qualifications necessary for appointment, (2) Insider trading, (3) Business activity, and (4) Shareholding (*Id.*, at art. 24(2)). Compared to the judges, the revocation of the commissioners' title is harder.

44 **The law reserves each seat at the Competition Board for a particular organization.** Competition Board is a seven-member-panel. The law reserves: (1) one seat for Ministry of Industry and Commerce, (2) one seat for the State Ministry (which is responsible for State Planning Authority), (3) two seats for the Competition Authority, (4) one seat for Court of Cassation (appeals court for civil affairs), (5) one seat for Council of State (appeals court for administrative affairs), (6) one seat for Turkish Union of Chambers and Commodity Exchanges. Each organization chooses two nominees for their seats and the Cabinet appoints one commissioner.

45 Act No. 5388, art. 3 (Date of Passage at the Parliament: 7.2.2005). Previously, Competition Board was an eleven-member-panel (*Id.*, at art. 22(1) (*modified*)). Formerly, Interuniversity Council also had one seat, Competition Authority had four seats and the Ministry of Industry and Commerce had two seats. The Commission consists of a staggered board and commissioners serve for six years (Competition Act, art. 24(2)).

46 Since 2004, incorporating and capital promoting limited companies and corporations are obliged to pay 4/10000 of their statutory capital (par value capital) to Competition Authority (art. 39(1)(c) of the Competition Act inserted by art. 29(1)(a) of the Act No. 5234). See also "Principles Regarding Payments by Corporations and Limited Companies Pursuant to Act No. 4054" (Competition Authority) O.J., No. 25600, Date 10/1/2004. Before 2004, the major source of Competition Authority's funds was the Consumer Protection Fund. The Law on Consumer Protection established Consumer Protection Fund obliging all corporations incorporating or increasing their subscribed capital are obliged to pay 2/1000 of their par value capital to the Fund. Competition Authority can utilize 95% of this fund along with the administrative fines (Art. 29 of the Law on Protection of Consumers (Act No. 4077), Date of Passage: 2/23/1995; O.J., No. 22221, Date. 3/8/1995).

47 Competition Authority can impose 10% of the annual gross revenue to undertakings, associations and real persons who constitute their management (each of them) as administrative fines for the violations of the Competition Act (art. 16(2), (3) of the Competition Law).

Competition Authority's surplus funds and cash after the earthquake catastrophe in 1999⁴⁸ and in 2005.⁴⁹

In some countries, administrative authorities can remand the decisions of competition agencies. For instance, the German Federal Minister of Economics may permit a concentration prohibited by the Federal Cartel Office⁵⁰ or the South African Minister may remove a banking consolidation from the jurisdiction of Competition Act.⁵¹ Unlike these examples, no administrative authority can remand the decisions of Competition Authority. However, the decisions of Competition Authority are subject to judicial review. Parties can appeal to the Council of State, the highest administrative court, against the decisions of Competition Authority.⁵²

The unfair competition cases are not in the jurisdiction of Competition Authority. Unfair competition is a civil matter in Turkey. Business courts review unfair competition cases and apply the unfair competition provisions of the Turkish Commercial Code.⁵³

In the early years of competition enforcement, business community confused unfair competition with competition. Therefore, the Competition Authority received many unfair competition complaints in the beginning. Competition Authority rejected a provincial chamber of commerce's complaint alleging that they encounter "unfair competition" from insurance companies.⁵⁴ Competition Authority ruled that alleged violations of Competition Act through banking advertisements do not fall within the scope of the Competition Law.⁵⁵

48 The Parliament authorized the national government to take the surplus money in their funds which accumulated in the Consumer Protection Fund on behalf of Competition Authority after two major earthquakes (art. 15 of the Statute Amending Tax Laws and Creating New Obligations with the Purpose of Recovery of the Economic Losses Resulted from the Earthquakes on 8/7/1999 and 11/12/1999 in Marmara and its Neighboring Regions). Except privatized institutions (Privatization Act art. 27(c)) all other companies should submit these fees to Competition Authority.

49 Provisional Art. 2 of the Act No. 5398 entitled "An Act Amending Several Laws and Ordinances" (O.G. # 25,882 (7.21.2005)).

50 See the Act against the Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) § 42 (2005).

51 OECD Global Forum on Competition, Peer Review of South Africa, (Feb. 11, 2003) p. 32 (citing South African Competition Act §18 (2005)).

52 Council of State is a hybrid court similar to the U.S. Article I courts. Council of State is the plenary appellate court over the decisions of Tax Courts and Administrative court. Council of State can also give advisory opinions.

53 Turkish Commercial Code (TCC) defines unfair competition. According to the art. 57 of the TCC, unfair competition are actions incompatible with good faith involving (1) Discrediting competitors, (2) Giving misinformation about others, (3) Using false titles, (3) Attempting to confuse products and services of others, (4) Seducing the employees of others in order to obtain trade secrets, (5) Failing to comply with the laws and regulations which her rivals are also subject to. These examples are not exhaustive (Turkish Competition Code, Act No. 6762, O.J., No 9353, Date: 7/9/1956).

54 Gaziantep Chamber of Commerce alleged that bank branches and car dealerships became agents of insurance companies (The Turkish Competition Authority Year 2001 Report, at 25 (2001) (quoting *Gaziantep Chamber of Commerce*, Decision Date: 12/11/2001, No. 01-59/531-167)).

55 *Dışbank A.Ş.*, Decision Date: 11/27/2001, No. 01-57/595-153 (See Competition Authority 2001 Report, supra note 54, at 24).

II. Banking Regulation & Supervision Authority (BRSA)

In order to meet the structural performance criterion imposed by the IMF, the Banks Act of 1999 created the BRSA⁵⁶ and it became operational in August 2000. Before the IMF program, there was a split of jurisdiction between the Turkish Treasury and the Turkish Central Bank on banking supervision.⁵⁷ IMF program also abolished Turkish Cabinet's authority to engage in banking supervision to render BRSA independent.⁵⁸ Turkish Parliament amended Banks Act frequently⁵⁹ and the legislation became a complex pile of laws. The Parliament replaced this pile finally with a manageable legislation called "Banking Act" of 2005.⁶⁰

The BRSA Commission is the decision authority of the BRSA. The priority of BRSA commissioners is banking issues rather than competition related matters.⁶¹ Banking Act of 2005 authorized BRSA to develop strategies to maintain competition among financial sector actors.⁶²

Channels of communication exist between the BRSA and Competition Authority. Banking Act of 2005 established an advisory panel entitled Financial Sector Commission within the BRSA. Financial Sector Commission meets at least once in every six months and advises the Turkish Cabinet. Competition Authority can share its competition concerns in this commission through its representative in the commission.⁶³ Competition Authority constantly shares its opinion with the BRSA on draft banking regulations.⁶⁴

56 Banks Act, Act No. 4389 (*repealed*), Date of Passage: 06/18/1999, O.J.; Date: 6/23/1999, No. 23734. See for the IMF criterion art. 48 of the Letter of Intent to the IMF (Dec. 18, 2000).

57 Art. 52 of the Letter of Intent to the IMF (Dec. 9, 1999).

58 Art. 53 of the Letter of Intent to the IMF (Dec. 9, 1999).

59 Turkish Parliament amended the Banks Act eight times: (1) Act No. 4491 (12.19.1999), (2) Act No. 4672 (05.25. 2001), (3) Act No. 4684 (06.20.2001), (4) Act No. 4743 (01.31. 2002), (5) Act No. 4842 (04.09. 2003), (6) Act No. 5020 (12.12.2003), (7) Act No. 5189 (6.16. 2004), (8) Act No. 5228 (7.16. 2004).

60 Banking Act, Act No. 5411, No. 25983, O.J.; Date: 10/19/2005,.

61 Initially, various industry associations and government regulators nominated candidates to the commission and the Cabinet appointed commissioners from these nominees. The Council of Ministers appointed commissioners from the candidates nominated by Central Bank, Undersecretariat of Treasury, Ministry of Finance, State Planning Organization, Banks Association of Turkey and Capital Markets Board (Banks Act art. 3(3) (*repealed*)). At that time, Competition Authority did not have the authority to nominate candidates as other regulatory agencies had. The Parliament repealed commissioners origin requirement in 1999 (art. 1 of the Act No. 4491 (1999)).

62 Banking Act art. 94(1) (2005).

63 Competition Authority has a representative in this commission along with representatives from other regulators and industry associations (Banking Act art. 99(1) (2005)).

64 Banking Act art. 95(1)(b) (2005).

III. The Savings Deposit Insurance Fund (SDIF)

In 1983, the Council of Ministers established the Savings Deposit Insurance Fund (SDIF) in order to insure the savings deposits in Turkey.⁶⁵ Initially, the Central Bank then the BRSA governed the SDIF.⁶⁶ Legislative changes in 2003 rendered the SDIF independent.⁶⁷ SDIF members consist of deposit accepting banks.⁶⁸ Investment and development (I&D) banks may not accept deposits so they are not under SDIF jurisdiction.⁶⁹ To protect the stability of the Turkish banking system, the SDIF has authority to take over and reorganize deposit-accepting banks.⁷⁰ According to the Turkish government, seizing the insolvent banks is a significant discipline on the banking market and this threat protects the assets on behalf of the depositors and other creditors.⁷¹ The primary mandate of SDIF is to insure deposits. After seizing significant number of banks, its function shifted to asset management.⁷²

IV. Privatization Administration (TPA)

According to the Turkish Constitution, privatization process shall be prescribed in a statute.⁷³ Turkish Parliament enacted the Privatization Act of 1994.⁷⁴ Privatization Act aims that privatization shall prevent the negative effects of monopolies. To

65 Too big to fail concerns led to many countries to insure the deposits in order to bear the burden of the bank failures (John H. Boyd, Chun Chang & Bruce D. Smith, *Moral Hazard Under Commercial and Universal Banking*, Federal Reserve Bank of Minneapolis Research Department Working Paper at 13, 14 available at <<http://minneapolisfed.org/research/WP/WP585.pdf>> (1998)). Turkish government established the SDIF with the Decree No. 70 on Banks Law (*abolished*) (See the BRSA 2002 Report, *infra* note 260, at 3).

66 Neslihan Özdemiş, *Deposit Insurance and Differential Premium System in Turkey*, at 5, Presented at IADI Annual Conference (October 22, 2003) available at <http://www.bddk.org.tr/turkce/yayinlar/veraporlar/sunumlar/22102003_nozdemir.ppt>

67 Banking Act art. 111(1) (2005); Act No. 5020 amending the Banks Act of 1999.

68 See Ozdemir, *supra* note 66, at 7.

69 <<http://www.turkishembassy.org/business/economy/bankinginfo.htm>>

70 Banking Act, Art. 65-72, and Provisional Art. 11 (2005).

71 Art. 55 of the Letter of Intent to the IMF (Dec. 9, 1999). Ali Babacan, State Minister on Economy, explained that SDIF is like a disciplining mechanism for the people who do not perform their work truthfully. He added that SDIF became an execution institution for the bankers who commit wrong. ([taraf.com.tr](http://www.taraf.com.tr) (Last visited 9.18.2010) (*in Turkish*))

72 The BRSA initially considered to develop an asset management company in order to deal with these assets (Art. 18 of the Letter of Intent to the IMF (Jul. 30, 2002)). Asset management and collection departments will become operative in Aug. 2000 (Art. 28 of the Letter of Intent to the IMF (Jun. 22, 2000)). This unit became operative in Aug. 2000 as promised in the previous Letter of Intent to the IMF (Art. 48 of the Letter of Intent to the IMF (Dec. 18, 2000)). The nonperforming loans will be transferred to this department (Art. 55 of the Letter of Intent to the IMF (Dec. 18, 2000).; Art. 14 of Memorandum of Economic Policies to the IMF (May 3, 2001)).

73 Art. 47(3) of the Turkish Constitution.

74 The Statute on Implementation of Privatization and Amending Certain Laws and Decrees Having the Force of Statute (Act No. 4046), Date of Adoption: 11/24/1994, O.J., No. 22124, Date. 11/27/1994 [hereinafter "Privatization Law"]. A courtesy translation is available at <http://www.oib.gov.tr/baskanlik/yasa_eng.htm>.

prevent the anticompetitive effects after privatization, the law prohibits restraints on competition.⁷⁵

Competition Authority is the final authority for consummation of virtually for all privatizations. Competition Authority receives a pre-notification to prepare the relevant government economic unit to privatization process. Privatization Administration must notify the Competition Authority and obtain its opinion to prepare the auction of economic unit before the privatization negotiations initiated if the undertaking privatized has legal or de facto privileges stemming from its governmental status⁷⁶ or its market share exceeds 20% threshold,⁷⁷ or its annual turnover exceeds 20 Mil. TRY. (Approximately 14.4 M. US\$)⁷⁸ Privatizations are consummated with Competition Authority's final authorization: (1) if the transaction is subject to pre-notification, or, (2) if transaction exceeds 25% market share, or, (3) if annual turnover exceeds 25 Mil. TRY (Approximately \$18 Mil.).⁷⁹ Thus, privatization of government banks through Privatization Administration is subject Competition Authority review, as these privatizations will pass the third test.

The most important feature in a liberalization program is privatization of state banks. However, the privatization of Turkish government banks has been a total failure. Corruption and government reluctance to privatize state banks factor in this failure.⁸⁰ Privatization Administration merged two government banks into other government banks in 1992.⁸¹ Then, Privatization Administration privatized

75 Art. 16(1) of the Privatization Law prohibits certain restrictions of competition after the finalization of privatization process: (1) Market division, (2) Creation of entry barriers, (3) Price discrimination, (4) Tying arrangements. The Statute also gives authority to the Ministry of Industry and Trade to take the necessary measures against concerted practices and M&A activities substantially lessen competition (Art. 16(2) of the Privatization Law). The Law grants the Turkish Ministry of Industry and Commerce authority to issue a regulation in order to implement these provisions (art. 16(3) of the Privatization Law).

76 Legal or de facto privileges mean all privileges as a result of the undertaking's public organization status; being based on a statute or other legal regulation or formed as de facto including the monopoly rights not had or expected to be able to be not had by other undertakings operating in the same relevant product market for the purposes of the 1998/4 Communiqué (art. 3(2) of the 1998/4 Communiqué).

77 If the undertaking's market share exceeds 20% or turnover exceeds 20 M. TRY.s then this privatization should be notified to the Competition Authority (art. 3(1) of the 1998/4 Communiqué).

78 Art. 3(1) of the *Communiqué Regarding the Methods and Principles to be Pursued During the Course of Pre-Notifications and Applications for Authorization Made to the Competition Authority in order to Acquisitions via Privatization to be Legally Valid* [Competition Authority], Communiqué No. 1998/4, O.J., No. 23461, Date. 9/12/1998 [hereinafter "Privatization Communiqué"].

79 Art. 5(1) of the Privatization Communiqué.

80 The tripartite collation government (57th government) collapsed due to the revelation of the secret dealings with a potential purchaser during the Turkbank privatization (Metin R. Ercan & Ziya Onis, *Politics within the State: Institutions and Dilemmas of Turkish Privatization in Comparative Perspective*, at 32 (Sept. 2000) available at <<http://home.ku.edu.tr/~zonis/privatization.PDF>>).

81 Privatization Administration transferred the Teachers Banks of Turkey to the People's Bank of Turkey and Maritime Bank to the Real Estate Bank of Turkey in 1992 (All banks men-

four government owned banks in 1998.⁸² Two years later, the SDIF seized two of the privatized banks back due to undercapitalization. SDIF reorganized and consolidated them and sold these banks to private banks again in 2001. This tragedy may be consistent with Keynesian theories, but apparently is not efficient.

V. Application of Competition Act to Turkish Government Instrumentalities

The Competition Act is applicable to economic units and does not cover government units acting in an administrative (sovereign) capacity.⁸³ EFTA-Turkey Free Trade Agreement foresees that the competition policy is applicable to the government enterprises.⁸⁴ The Turkish Competition Act does not distinguish government economic units from private enterprises.⁸⁵ The Council of State also confirmed this approach in its judgments.⁸⁶

State immunity can be a problem to maintain competition. Different regulatory agencies may distort competition. For instance, Turkish *Energy Market Regulation Agency's* (EMRA) *Natural Gas Sector Distribution and Customer Services Regulation*⁸⁷ required guarantee letters brought by covered companies should be from the largest 10 banks (based on asset sizes). Several banks and the BAT filed complaints with Competition Authority against this regulation. Competition Authority responded that this discriminating regulation unduly distorted competition in banking, but it has no jurisdiction over EMRA. After Competition Authority's notification, EMRA repealed the relevant part of its regulation.⁸⁸ In this case, the corporate body of EMRA hedged its transactional

tioned are government). Turkish Government consolidated the Real Estate Bank's assets with the People's Bank in 2001. See TPA website available at <http://www.oib.gov.tr/portfoy/1985-2003_portfolio.htm>

82 The Privatization Administration privatized government ownership in five banks (Anadolubank, Denizbank, Sumerbank and Etibank). The Administration sold minority shares of the government in four banks (Caybank (49%), Sekerbank (10%), Industrial Development Bank of Turkey (8.24%) and Turkey Is Bank (12.3%)) (See, Privatization Administration, *Completed Privatizations*, available at <http://www.oib.gov.tr/program/uygulamalar/completely_privatized.htm>).

83 OECD Peer Review of Turkey's Competition Act and Policy at 33 (Mar. 24, 2005), available at <<http://www.rekabet.gov.tr/pdf/OECD%20Peer%20Review%20Report.pdf>>

84 Art. 17(2) of the EFTA-Turkey Free Trade Agreement.

85 Some authors suggest that the Competition Law's silence on its application to the government enterprises creates some degree of ambiguity (Ayşe Mumcu & Ünal Zenginobuz, *Competition Policy in Turkey*, at 10 available at <http://www.erf.org.eg/html/Trade_8th/Competition-in-Turkey-Zenginobuz&Ayse.pdf> (2001) (describing Turkish competition policy in general)). Silence means that there is no exception to the competition policy for government enterprises.

86 The activities of the government enterprises are subject to competition rules. However, according to the Council of State, competition rules does not apply, if the implementation of the primary function of government enterprises create superior interest than preservation of competition (Council of State, 10th Cir., Decision No. 4770 (2003), Matter No. 4817 (2001), Decision Date: 12/05/2003). Thus, Council of State erroneously created a public interest defense which the Court does not possess a legal authority to do so.

87 O.J., No. 24925, Date: 11.3.2002.

88 Competition Authority notified the EMRA the consequences of relevant regulation thereaf-

risk affecting supply and demand forces of the market. Consequently, Competition Authority could have decided that EMRA is not acting with sovereign capacity, but it decided to take a low profile action to solve competition problem.

Competition Authority continued to reject cases against administrative units⁸⁹ and administrative regulations.⁹⁰ For instance, Competition Authority considers a State Highway Administration tender allocating World Bank loans for a particular project does not fall under the Competition Act.⁹¹ Government procurement activities consist of purchases that affect the supply and demand.⁹² Except the exercise of the police duties stemming from sovereignty, government activities should be subject to competition rules. Turkish Public Procurement Law that states administrative units are responsible to maintain competition in public tenders also supports above interpretation.⁹³

VII. Central Bank

Turkish Central Bank is a government owned bank with monopoly on monetary issues. The primary objective of Turkish Central Bank is to achieve and maintain price stability.⁹⁴ The Competition Act applies to the Central Bank. German competition law explicitly excludes application of competition law to German central bank.⁹⁵

VIII. Trade Liberalization as a Regulatory Instrument in Banking

Trade liberalization is a perfect substitute for competition policy.⁹⁶ From an historic perspective, maintaining constant supply in markets was paramount in Ottoman

ter (*Natural Gas Sector Distribution and Customer Services Regulation*, Decision No. 04-47/624-155, Date. 7.15.2004). See OECD (Peer Review 2005), supra note 83, at 37.

89 See, *The Industrial Development Bank of Turkey*, Competition Authority, Decision Date: 5/29/2001, No. 01-25/241 (See Competition Authority 2001 Report, supra note 54, at 19).

90 See, *Natural Gas Sector Distribution and Customer Services Regulation*, Decision No. 04-47/624-155, Date. 7.15.2004

91 Turkish Competition Authority, Decision Date: 2/12/02, No. 02-08/82-37 (See, Competition Authority 2002 Report, supra note 19, at 22).

92 Undertaking definition seems to encompass the enterprises in the activities of “production, market and sale”. However, sale and purchase activities are inseparable. As a result, government procurement consisting of purchasing goods and services from the market shall also abide the competition rules.

93 Art. 5 of the Public Procurement Statute, Act No. 4734, Adoption Date: 1/4/2002, O.J., No. 24648, Date. 1/22/2002.

94 Republic Central Bank Act, Art. 4 (Act No. 1211 (1.14.1970)) as amended by Act No. 4651 (4.25.,2001).

95 See the Act against the Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) § 130.

96 According to Cooter, “[b]est antitrust policy is free trade”. Cooter sees foreign competition more pro-competitive than an antitrust bureaucracy (See Robert D. Cooter, *Market Modernization of Law: Economic Development through Decentralized Law*, in ECONOMIC DIMENSIONS OF INTERNATIONAL LAW at 306 (Jagdeep S. Bhandari & Alan O Sykes eds., 1997)).

Turkey. For instance, Ottoman Empire's Food Regulation of 1502 aimed to take on black market by preventing supply shortages and ordered bakeries to retain flour and supplies necessary to last for a month of operation.⁹⁷ As a result, Ottoman Turkey was ultra liberal in its trade policy. Central bank of Turkey was foreign incorporated and owned and it was not a monopoly. Ottoman Sultan granted the Bank of Turkey exclusive right to issue paper bank notes within the Empire and then granted the same privilege to the Ottoman Bank. Bank of Turkey filed an injunction against the Ottoman Bank in Britain to enforce its privileges in Turkey. British judiciary rejected the claims of the Bank of Turkey on sovereign immunity and added that the result would be the same even if the incident happened in Britain.⁹⁸ Historically, there has been no discrimination against foreign banks in Turkey if they abide prudential regulations.⁹⁹ Republic era Turkish governments are also well aware of the benefit of trade liberalization as a market disciplining mechanism. Turkish government has not allowing red meat imports due to health and safety concerns. People became restless because domestic red meat prices sky rocketed. Turkish government rushed into foreign markets to suppress red meat prices.¹⁰⁰

There were only 18 foreign banks operating in Turkey with a very miniscule market share as of the end 1998. Thus, foreign banks could not initiate a contest in banking. Commentators report that foreign banks market share increased to 28.3% as of 2004. Foreign stake comes to 50% considering securities purchased at the stock exchange.¹⁰¹ A global wave of foreign banking acquisitions occurred prior to the global recession and academic and regulatory discussions on trade liberalization in banking sector still ensuing. Studies reveal that foreign entry increased competition in Latin American¹⁰² and Indian¹⁰³ banking sectors. However, not all foreign entry is beneficial. Commentators argue that foreign ownership minority stakes at banks

97 See, Mehmet Yüksel, *On Ahi Fraternities and Artisans' Week*, GRAND NATIONAL ASSEMBLY, 23RD CONG., 5TH LEG. YR., 6TH SESSION, 1ST MTNG. (October 13, 2010).

98 *Gladstone et al v. The Ottoman Bank*, 8 L. Rep. 162 (V.C. Wood's Court, 2.27.1863).

99 **Foreign banks operating in Turkey shall abide Turkish prudential regulations.** The banking license of a foreign bank's branch consisting of one office in Turkey was revoked in September 2000 and the branch is being liquidated (Art. 49 of the Letter of Intent to the IMF (Dec. 18, 2000)).

100 Red meat imports to resume amid health concerns in market, <<http://www.todayszaman.com/tz-web/news-208569-red-meat-imports-to-resume-amid-health-concerns-in-market.html>> (9.19.2010).

101 See Ahmet Faruk Aysan & Şanlı Pinar Ceyhan, *Globalization of Turkey's Banking Sector: Determinants of Foreign Bank Penetration in Turkey*, 15 Int'l Res. J. Fin. & Econ. 90, 94 (2008). Bankers expect that the foreign banks' market share increase to 15-20%, if the impending merger negotiations finish successfully (Erol Sabancı, *The Foreign entry is healthy, not a risk for domestics* <<http://www.milliyet.com.tr/2005/04/19/ekonomi/axeko02.html>> (in Turkish)).

102 See Ekmen, supra note 33, at 26 (citing Yelati Levy & Alejandro Micco, *Bank Competition in Latin America*, OECD Latin American Competition Forum (April 7-8, 2003)).

103 See Ekmen, supra note 33, at 26 (citing S.P. Talwar, *Competition, Consolidation and Systemic Stability in the Indian Banking Industry*, BIS Papers, No. 4 (2001)).

are not beneficial as majority ownership.¹⁰⁴ Some commentators ask what should be maximum rate of foreign banks in domestic banking markets.¹⁰⁵ A total foreign ownership will not create a problem for Turkey if government employs a sound competition policy. A lax competition policy creates supra profits which pulls foreign banks into Turkey. After foreign banks are locked in, government can apply competition policy to eliminate excessive profits.

BRSA management encourages Turkish banks lay out their operations in bordering countries.¹⁰⁶ Branching outside Turkey is beneficial for Turkish banks. Certainly, there are also drawbacks. Turkish banks face significant political risk in neighboring countries. For instance, Business Bank of Turkey opened its first international branch in Alexandria, Egypt in 1932. Socialist government nationalized the branch in 1959. Turkey Business Bank reopened a representative office in 2010.¹⁰⁷

§ 3. Banking Practices & Competition Enforcement

Banking cases represent a small percentage in Competition Authority's practice until 2005.¹⁰⁸

I. Relevant Geographic Market

Turkish banks are national and there is no chartering of local banks as in America.¹⁰⁹ The Competition Act's application is limited to undertakings "operating in" or "affecting markets" within the geographical boundaries of the Republic of Turkey.¹¹⁰ Competition Authority does not slice the market into homogenous geographical markets for banking cases despite the fact that Competition Authority's own Merger Communiqué prescribes principles for

104 Bettina Hagmayr & Peter Haiss, *Foreign banks in Turkey and Other EU Accession Countries – Does Minority vs. Majority Ownership Make the Difference?*, in Proceedings of the International Finance Symposium 2006 on "Financial Integration Review and Steps Ahead", (Niyazi Berk ed.) (Istanbul, May 25-26, 2006) at 649 (studying countries negotiating with the E.U. for accession).

105 See Aysan & Ceyhan, supra note 101, at 92.

106 Tevfik Bilgin, BRSA President, drew attention to the fact that Turkey's neighbors do not have a developed banking system and a bank can become operational in these markets with \$30 Mil. capital. (milliyet.com.tr (9.16.2010) (*in Turkish*)).

107 Turkey Business Bank is in Egypt, <http://www.sabah.com.tr/Ekonomi/2010/06/22/is_bankasi_misirda> (*Last visited* 6.22.2010) (*in Turkish*).

108 Out of the 38 competition violations, only one was concerned about the financial sector in 2002 (See Competition Authority 2002 Report, supra note 19, at 17). Banks filed one out of 21 negative clearance applications filed to Competition Authority in 2000 (See Competition Authority 2002 Report, supra note 19, at 5). Two out of 66 negative clearance applications were filed to Competition Authority by banks in 1999 (The Turkish Competition Authority Year 1999 Report, at 10 (1999)).

109 Ihsan Isik & M. Kabir Hassan, *Technical, Scale and Allocative Efficiencies of Turkish Banking Industry*, 26 J. Bank. & Fin. 719, 721 (2002) (evaluating the efficiency of the Turkish banking sector for the years of 1988, 1992 and 1996).

110 Art. 2 of the Competition Law.

delineation of the geographic markets. such as One of the criteria is appreciable differences of the market shares between neighboring areas.¹¹¹ Competition Authority usually considers the entire Turkey as geographical market in the banking cases considering competition conditions are similar in whole country.¹¹²

Competition Authority's analysis will differ if it delineates sub-geographical markets. Turkish bank branches are more scattered than in Europe. As of 2005, the number of branches per bank in Turkey (113) is far higher than European (36) and candidate countries negotiating with the E.U. (33).¹¹³ Small banks stay in urban areas and do not compete with the bigger banks in the rural areas.¹¹⁴ Marmara Sea region and Central Anatolia region represent 67.2% of total deposits between 1995 and 2002.¹¹⁵ Top three cities of Turkey (Ankara, Istanbul, and Izmir) represent 68% of total deposits in the same period¹¹⁶ and 45% of bank branches are located in these cities.¹¹⁷ These facts are also applicable to loan markets.¹¹⁸ Thus, the structure of banking market in urban areas is much different from that of rural regions. Consequently, a local geographical test shall be employed to analyze competition case and controversies.

Competition Authority applied national market perception even to miniscule transactions. Despite the fact that the each merger partner only had only one branch in Turkey, Competition Authority did not disaggregate the geographic market and determined that the relevant geographic market is the whole country.¹¹⁹ In another merger case, one of the merging Banks did not have any activities/branches in Turkey.¹²⁰ However, geographical market definition stayed the same. Other Competition Authority decisions advise that if a foreign bank acquires a Turkish bank their market share will not change.¹²¹ Competition Authority review for acquisition of Turkish banks becomes just rubber-stamping due to the national market concept. The decisions of Competition Authority will be more insightful if Competition Authority evaluates the scope of the geographical markets and reveal its analysis thereof.

111 Art. 4(4) of the Merger Communiqué.

112 J.P. Morgan Chase & Co. and Bank One Corporation Merger, Decision No. 04-26/307-70, Date. 4.15.2004. See also *KVK*, Decision No. 03-64/768-355, Date. 10.2.2003 at 4.

113 Ceyla Pazarbasioglu, *Costs of EU Accession: The Potential Impact on the Turkish Banking Sector*, at 20 available at <http://www.bddk.org.tr/turkce/yayinlar/veraporlar/sunumlar/EU_ACCESSION-IMPACT_ON_THE_BANKING_SECTOR.ppt#256,1>

114 See Isik & Hassan, supra note 109, at 762.

115 See Ekmen, supra note 33, at 73-74 (data source: Banks Association of Turkey Annals).

116 See Ekmen, supra note 33, at 74 (data source: Banks Association of Turkey Annals).

117 See *Ibid.*, (data source: State Statistics Office).

118 See *Ibid.*, (analyzing credit market structure),

119 *The Chase Manhattan Corporation and J.P. Morgan & Co. Incorporated Merger*, Decision; No. 00-48/509-277, Date: 12.5.2000 AT 2-3. See also *Deutsche Bank A.G. /Bankers Trust Corp. Merger*, Decision No. 99-33/312-192, Date: 7.6.1999.

120 *J.P. Morgan Chase & Co./Bank One Corporation Merger*, Decision No. 04-26/307-70, Date. 4.15.2004.

121 *Fortis Bank's acquisition of Dış Bank's Financial Leasing Subsidiary*, Competition Authority, Matter No. 2005-4-92, Decision No. 05-32/437-102, Decision Date: 5.15.2005.

The lack of geographical market definition may have been resulted from the lack of data. Developing countries antitrust regimes suffer lack of established databases that usable for antitrust enforcement. Competition Authority may not reach now databases operated by other governmental agencies due to confidentiality concerns.¹²² As of 2005, an agency responsible for protecting access to the essential facilities does not have access to other governmental essential facilities. Competition Authority should have access to BRSA data to enhance antitrust enforcement.

II. Relevant Product Market

Relevant market definition is decisive in antitrust cases and controversies. Therefore, defendant firms try to enlarge the relevant market definition as much as they can. This rational behavior is typical in almost every country.¹²³

1. Limits of Banking Business

The outer boundaries of the banking services should be determined in order to determine the relevant market in banking cases. Financial power of banks is capable of restricting competition in non-financial industries. Therefore, banks commercial activities in non-banking sectors are restricted. Restrictions on leveraging into other sectors have been scattered to various statutes and there has been no statutory provision on bank holding companies similar to the U.S. Bank Holding Companies Act (BHCA) in Turkey. Banking Act of 2005 codified a section on financial holding companies. BRSA now has great authority to regulate financial holding companies.¹²⁴ BRSA can even force bankers to establish financial holding companies.¹²⁵

Combined financial and media power can entrench and become everlasting through manipulating public opinion. Therefore banking business and media should remain separated. *The Law on the Establishment of Radio and Television Enterprises and Their Broadcasts* (LERTEB) separates the financial sector from the radio-television broadcasting sector. According to the LERTEB, financial institutions may not obtain radio and television broadcast permits. Banks also shall not affiliate the enterprises having radio and television broadcast permit.¹²⁶ Competition Authority reported in 2001 about the media groups:

“Despite article 29 of the Act No. 3984 in force, as is also known by the public, each of four groups has happened to own at least one national television channel and national radio channel, two newspapers and one bank. Besides, two groups have digital broadcasting platforms, music and

122 See OECD (Peer Review 2005), supra note 83, at 38.

123 See FN. 157 and accompanying text.

124 BRSA issued the Financial Holding Companies Regulation in 2006 (Regulation on Financial Holding Companies, O.J. # 26,333 (11.1.2006)).

125 Banking Act art. 78(1) (2005).

126 art. 29(a) of the LERTEB (Act No. 3984, Adoption Date: 4/13/1994, O.J., No. 21911, Date: 4/20/1994).

*movie production companies and GSM networks, and three groups have a total of four newspaper and magazine distribution companies.*¹²⁷

The picture depicted in Competition Authority's above note has changed rapidly until 2005. The last media owned bank (Dışbank) announced on April 12, 2005 that a Belgium bank (Fortis) is going to acquire it.¹²⁸

Banking Act prescribes banking services that banks can engage in (art. 4(1)).¹²⁹ Deposit banks may not collect equity funds and engage in financial leasing.¹³⁰ Deposit banks may not engage in commercial activities.¹³¹ Islamic banks may not accept deposits.¹³² Investment and development banks may not collect deposits and collect equity funds.¹³³ Banking regulations also separate non-financial activities with banking business. Banking Act prescribes certain limits on affiliation with non-financial companies.¹³⁴ The law also restricts direct bank ownership in real estate.¹³⁵ Islamic banks are exempt from some these requirements and they can deal more freely in real estate and engage in financial leasing.¹³⁶

127 See Competition Authority 2001 Report, supra note 54, at 109.

128 Fortis, *Fortis to acquire Disbank, Turkey's seventh largest privately owned bank.*, available at <<http://www.disbank.com.tr/en/index.jsp>> (Last visited April 13, 2005).

129 Banks may (1) collect deposits, (2) collect equity funds,(3) extend all sort of loans (cash or non-cash), (4) engage in all kinds of payment and collection transactions, including cash and deposit payments and fund transfer transactions, check accounts, and correspondent bank transactions, (5) check and other commercial bill trading, (6) provide safe-keeping services, (7) issue payment instruments such as credit cards, bank cards and travel checks, and executing relevant activities, (8) carry out foreign exchange transactions, trade money market instruments and precious metals and stones and safe keep such, (9) trade and intermediate forward, future and option contracts, simple or complex financial instruments which involve multiple derivative instruments, based on economic and financial indicators, capital market instruments, goods, precious metals and foreign exchange, (10) trade capital market instruments and engage in repurchase or re-sale commitments, (10) underwrite public offering of securities, (11) engage in secondary market transaction of securities for intermediation purposes, (12) provide guarantee on behalf of third parties, (13) provide for investment counseling services, (14) engage in portfolio operation and management, (15) engage in market making within the primary market established by Treasury, Central Bank and industry associations, (16) engage in factoring and forfeiting, (17) engage in transactions in inter-bank market,(18) engage in financial leasing services, (19) act as insurance agent and provide private pension fund services, (19) engage in other services permitted by BRSA.

130 Banking Act at. 4(2) (2005).

131 **Banks cannot participate in real estate and commodities exchange business. BRSA may permit banks to engage in gold and rare metals exchange business** (Banking Act art. 56(2); Banks Act art. 12(2) (*repealed*)).

132 Banking Act at. 4(2) (2005).

133 Banking Act at. 4(2) (2005).

134 **Banks cannot affiliate with a single non-financial company exceeding its 15% equity capital. The total amount of non-financial affiliates (and subsidiaries) can not exceed 60% of the bank's equity capital** (Banking Act art. 56(1); Banks Act art. 12(1)(a) (*repealed*)).

135 Banks may not affiliate with companies exclusively dealing with real estate trading or extend credit to these companies or similar real persons. These prohibitions do not apply to real estate investment companies. Real estate investment companies are particular entities whose activities are governed by the Capital Markets Board of Turkey's (CMB) regulations (Communiqué on Principles Concerning Real Estate Partnerships (CMB) 6th Serial, No. 11). Moreover, banks may not own real estate more than %50 of its equity capital (Banking Act art. 57(1); Banks Act art. 12(2) (*repealed*)).

136 Banking Act art. 57(3) (2005).

Activities of banks in securities business are subject to the Capital Markets Law and Capital Market Board's (CMB) relevant regulations. Similar to their American counterparts, Turkish banks may not engage in underwriting according to CMB's regulations.¹³⁷ Unlike their American counterparts, Turkish banks can carry out secondary market securities transactions subject to some exceptions.¹³⁸

Turkish banks can engage in non-bank financial activities. Thus, there is no competition from the non-banks as non-bank financial institutions affiliated with the banks.¹³⁹

2. American Approach to Figure out Relevant Market

Americans define product market and the geographic market by demand substitution factors including the SNIP test.¹⁴⁰ There are two alternatives in defining the relevant product market for banking purposes in America. The Federal Reserve (FDR) employs *cluster market method*. The cluster market method analyzes commercial banking market to include all the banking products and services that a hypothetical monopolist can exercise its monopoly power.¹⁴¹ Many authors indicated that the cluster market approach is inapplicable to contemporary market conditions.¹⁴² Department of Justice (DOJ), which has concurrent authority over bank mergers, started to employ *disaggregation method* to segment relevant

137 Banks can not engage in stock trade intermediation on the stock exchange and underwriting according to the CMB's regulations. They can undertake intermediation of repurchase agreements, reverse repurchase agreements, derivative instruments. Non-deposit banks can do underwriting, portfolio management and investment consultancy in addition to the other permitted activities (art. 5 of the Communiqué of the Capital Markets Board Concerning the Principles on Intermediary Activities and Intermediary Institutions (Capital Markets Board) (O.J., No. 24163, Date. 9.7.2000)). However, banks may affiliate with other intermediary institutions doing underwriting work.

138 The U.S. Glass-Steagall Act prohibits national banks (1) Engaging underwriting or dealing in any investment securities except government securities, (2) Trading securities on behalf of their own except certain government securities, (3) Affiliating with companies principally engaged in underwriting and dealing in securities (Craig M. Scheer, *Note: The Second Banking Directive and Deposit Insurance in the European Union: Implications for U.S. Banks*, 28 GW J. Int'l L. & Econ. 171, 181 (1994) (citing 12 U.S.C. 24(7), 78, 377 & 378)).

139 See Isik & Hassan, *supra* note 109, at 721.

140 Tim McCarthy, *Note: Refining Product Market Definition in the Antitrust Analysis of Bank Mergers*, 46 Duke L.J. 865, 870 (February, 1997) (comparing the DOJ's and FDR's review process in bank mergers).

141 The Supreme Court of the U.S. articulated the cluster market theory in 1963 in *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 326 n. 5 (1963) (*Id.* at 868, 872). The best reasoning for the cluster market theory is the transactional complementarity (*Id.* at 874 (citing Ian Ayres, *Rationalizing Antitrust Cluster Markets*, 95 Yale L.J. 109, 111 (1985))). The Court detected the direct competition between commercial banks and the thrifts 10 years thereafter in *United States v. Connecticut Nat'l Bank*, 418 U.S. 656, 662-663 (*Id.* at 877). Recognizing this competition, the court still upheld the cluster market theory (*Id.* at 878). The Supreme Court's later approach can be explained by the insulation of the banking industry from the non-bank financial institutions (for instance thrifts, finance companies, credit card companies, and insurance companies) (*Id.* at 877).

142 *Id.* at 879. Harvey Rosenblum, John Di Clemente, & Kit O'Brien, *The Product Market in Commercial Banking: Cluster's Last Stand?*, Fed. Chi. Econ. Pers. 21 (Feb. 1985).

product market. DOJ classified the market according to the lender qualifications as commercial lending to small and medium-sized businesses.¹⁴³ DOJ's evaluation has two prongs. DOJ's Herfindahl-Hirschman Index (HHI) calculation utilizes deposits as an indicator of market share. The DOJ initially calculates the relevant product market under the cluster method. If the prospective merger fails this test, then DOJ makes a new review on submarkets.¹⁴⁴

3. Competition Authority's Initial Market Designation

Competition Authority recognized existence of the submarkets. Nevertheless, it utilized the cluster market method initially. In one case, Competition Authority analyzed that merger partners are involved in the institutional banking, but then designated banking services as the relevant product market.¹⁴⁵ Competition Authority repeated its approach in another case, where Turkish Cabinet extended operational loans to shipyards suffering working capital. The Cabinet used Investment Promotion Fund resources for this transaction.¹⁴⁶ Industrial Development Bank of Turkey ("IDBT") was going to extend those loans to finance hardships. Several shipyards filed complaint about the allocation of the credits by IDBT and they argued that: (1) IDBT acquired dominant position in shipyard financing with Cabinet Resolution, (2) IDBT discriminated shipyards by applying different criteria to extend loans, (3) IDBT's discrimination distorted competition in shipyard industry. IDBT was to recommend a list eligible for loans for to the Turkish Maritime Administration¹⁴⁷ according to a memorandum of understanding signed between Maritime Administration and IDBT. Competition Authority decided that IDBT does not possess decisive authority to act independently to extend loans due to the memorandum of understanding.¹⁴⁸ However, the Administration extended credits to the shipyards identical to the list recommended by the Bank without making any amendments. Competition Authority rejected this case on sovereign immunity. Competition Authority did not enter to the substance of the case and did not analyze relevant product.¹⁴⁹ Although Commission's decision lacks remarks on product market, the Reporter of case (Competition Authority personnel) rejected complainant's product market recommendation (shipyard financing) and

143 *Id.* at 868.

144 *Id.* at 898.

145 See the Chase Manhattan Corporation & J.P. Morgan Merger, *supra* note 119, at 2-3.

146 Council of Ministers Decision; Date: 4.7.2005, No. 2000/308.

147 See Undersecretariat of Maritime website <denizcilik.gov.tr>.

148 According to the protocol the Administration has the final authority to decide on loans (*Industrial Development Bank of Turkey*, Decision; No. 01-25/241-63, Date: 5.29.2000). However, the Administration extended credits to the shipyards identical to the list recommended by the Bank without making any amendments.

149 Competition Authority rejected the application cause the relevant transaction is not between "undertakings" because of the Administration's *de jure* authority.

allegation of existence of dominance.¹⁵⁰ Competition Act is applicable to situations where government affects supply and demand with private law contracts. Here, Competition Authority should have applied the Act.

3. Competition Authority's Relevant Submarkets Determination

Segmenting banking into product categories is appropriate for antitrust reviews on banking.¹⁵¹ Table 1 indicates that if loans market is segregated, market shares vary based on bank type. For example, market share of foreign banks in credit cards is very high depending on their relatively small total asset size. Therefore, a cluster market approach is not suitable for the Republic of Turkey. Competition Authority later changed its opinion from cluster market approach to disaggregated markets approach.¹⁵²

Table 1: Market Shares in Loans (Dec., 2004)

	SDIF Banks	Private Banks	Foreign Banks	I & D Banks	Government Banks
1 Discount Loans	0.0%	0.6%	1.4%	0.4%	0.3%
2 Export Loans	83.3%	20.6%	28.0%	37.8%	8.0%
3 Import Loans	0.0%	0.1%	0.1%	0.0%	0.0%
4 Export Guaranteed Investment Loans	0.0%	0.8%	0.5%	33.1%	5.6%
5 Other Investment Loans	0.0%	5.2%	6.2%	4.4%	1.7%
6 Working Capital Loans	0.0%	32.7%	11.5%	2.5%	11.4%
7 Specialty Loans	0.0%	0.1%	0.0%	3.5%	16.9%
8 Loans from Funds	0.0%	0.1%	0.0%	17.7%	25.1%
9 Consumer Loans	16.7%	15.2%	24.9%	0.3%	24.5%
10 Credit Cards	0.0%	24.1%	27.2%	0.0%	6.5%
11 Loans to Costumers to Purchase Security	0.0%	0.1%	0.0%	0.3%	0.0%
12 Valuable Metal Loans	0.0%	0.3%	0.3%	0.0%	0.0%
13 Due from Factoring Operations	0.0%	0.4%	0.3%	0.0%	0.0%
14 Other Loans	33.3%	41.0%	10.2%	23.2%	20.5%
15 Total Loans (Million US\$)	\$25	\$153,089	\$10,428	\$7,069	\$46,776

Source: BSRA¹⁵³

150 See the Industrial Development Bank of Turkey, *supra* note 115.

151 Note: *The Line of Commerce for Commercial Bank Mergers: A Product-Oriented Redefinition*, 96 Harv. L. Rev. 907, 919 (Feb., 1983).

152 Competition Authority did not address these theories in its decisions.

153 BSRA, *Turkish Banking Financial Data for Dec. 2004*, available at <<http://www.bddk.org.tr/english/publicationsandreports/tables/december2004loan.htm>>

a. Cards Sub-Market

Defendant behavior to enlarge the relevant market is the same in both Turkey and America. The definition of the relevant card market differs slightly between Turkey and America. Competition Authority distinguished credit cards from store cards called “installment shopping cards”¹⁵⁴ in *Benkar-FIBA merger*. According to Competition Authority, installments card market has submarkets as department stores cards.¹⁵⁵ The defendant (Benkar) appealed to the Council of State against Competition Authority decision. The defendant alleged Competition Authority determined the relevant product market in error and insisted that Visa and Mastercard are included in relevant market. Turkish Council of State rejected this theory and ruled out that both Visa and Mastercard are not substitutable with installments cards.¹⁵⁶

Under American judicial analysis, cards are in a market of their own if network effects are present. Southern District of New York (“S.D.N.Y.”) decided in *Visa-Mastercard* case that both firms serve in their own market due to network effects and low substitutability.¹⁵⁷ To show Visa does not have market power, Visa claimed that it serves in the payment systems market including cash along with other instruments. S.D.N.Y. rejected wide market definition that includes cash.¹⁵⁸ Competition Authority and Turkish courts will probably reject this defense either. Although Competition Authority discussed about the network effects of installment card system, Competition Authority did not decide that whether cards serve in a market of their own. Due to the exclusive arrangements in installment cards system, a decision consistent with the U.S. approach would be more helpful.

b. Islamic Banks Sub-Market

Turkish government permitted Islamic financing institutions in 1985.¹⁵⁹ Turkish Parliament issued legislation concerning Islamic banks in 2001.¹⁶⁰ The Parliament

154 Purchase through installments system is a tripartite contract involving stores, consumers and the credit supplier. The Competition Authority determined the market as market of shopping with installment cards (OECD Directorate for Financial & Enterprise Affairs, *Note by the Secretariat: Peer Review of Turkey's Competition Act and Policy*, available at <<http://www.oecd.org/dataoecd/26/7/34645128.pdf>>).

155 *Benkar-Fiba Bank Joint Venture (Advantage Card)*, Decision; No. 00-48/509-277, Date: 12.5.2000 at 3.

156 Council of State, 10th Cir., Decision No. 5295 (2003), Matter No. 693 (2002), Decision Date: 12/23/2003.

157 Eunice A. Moon, *Note: Redefining Relevant Markets under the Sherman Antitrust Act: The New York District Court Finds Mastercard and Visa in a Class of Their Own*, 34 Rutgers L. J. 797, 814-815, 830 (Spring, 2003) (citing Visa-MasterCard, 163 F. Supp. 2d 322, 335 (S.D.N.Y. 2001)).

158 *Id.* at 815 (citing 163 F. Supp. 2d 336).

159 Ji-Hyang Jang, *The Politics of Islamic Banks in Turkey: Taming Political Islamists by Islamic Capital*, Prepared for Delivery at the 2003 Annual Meeting of the Midwest Political Science Association, Chicago, IL, at 1 available at <<http://mpsa.indiana.edu/conf2003papers/1032222980.pdf>>.

160 Act No. 4491.

formulated the legislation to meet with demands of IMF and industry. Deposit insurance covers Islamic banks, so they are able to compete with conventional bank. However, competition policy should contemplate a submarket for Islamic financing in relevant market calculations. First, the market share of the Islamic banks in Turkey is miniscule.¹⁶¹ Market shares of Islamic banks erode when mixed with conventional banks. Second, Islamic banks distribute dividends to deposits accounts instead of applying interest. Relevant market calculation regarding the commercial banking sector needs careful consideration because of faith of customers. Significant non-transitory price increases may increase transition of the customers between the commercial banks and Islamic banks. Nonetheless, most of the Islamic banking customers would not use conventional banking. Classical banking services are not substitutable with Islamic financing from their viewpoint.

III. Relevant Undertaking

The fundamental concept in the Turkish Competition Act is the undertaking concept modeled after Europe. Competition is defined in the Competition Act as a contest between undertakings. Turkish Competition Act defines undertakings as follows:¹⁶²

“Natural and juridical persons who produce, and sell goods or services in the market, and their units that can act independently and constitute an economic whole.”

Undertaking definition enlarges competition policy’s application. Historically, this concept has developed to deal with German universal banking. Without undertaking concept, market power of the individual banks would seem less than holding group in merger calculations. Under statutory definition, a parent company constitutes single undertaking with its subsidiaries because: (1) Subsidiaries of a parent company may not act independently disregarding the parent’s policies, and (2) The statutory language of “units ...that constitute a whole” indicates this result. Thus, this definition is similar to the piercing the corporate veil doctrine in the sense that it disregards the juridical (legal) personality of the subsidiaries evaluates the economic consequences for determining control. Therefore, pursuant to the definition of undertakings and competition in the Competition Law, the competition law applies to banking groups instead of individual banks. This aspect limits the application of Competition Act to intra-holding competition. In several decisions, Competition Authority rejected to initiate investigations against

161 The share of the Islamic financing in the share of deposits varied from 1%-3% in 1991-2001. The share in the loans market fluctuated between 2% and 6%. The five special financing houses provide Islamic banking services. Their total asset size is approximately \$3 Bil. which constitutes the 2% of total banking sector (See Ozdemir, supra note 66, at 7).

162 See art. 3 of the Competition Law.

collaboration among subsidiary banks within the same holding company.¹⁶³ Competition Authority's approach is consistent with European regulations¹⁶⁴ and Turkish Council of State endorses that several appeal cases¹⁶⁵

Scope of undertaking is decisive in the outcome of Competition Authority's decision. If we look at Table 2, Turkish government owns four-partite miniscule shares in the credit card market.¹⁶⁶ Considering state banks and SDIF banks under one undertaking, government share in the credit cards market increases to 16.2%, a 185.34 increase in the HHI Index.

Chart 1: Market Share - Credit Cards (2005)

Individual Banks'			Government Banks Consolidated			
Bank	Status	Market Share	Bank	Market Share		
1	YKB	Private	16.10%	1	Government (6 Banks)	16.20%
2	Garanti	Private	15.60%	2	YKB	16.10%
3	Is Bank	Private	11.60%	3	Garanti	15.60%
4	Akbank	Private	10.80%	4	Is Bank	11.60%
5	Finansbank	Private	7.00%	5	Akbank	10.80%
6	Disbank	Private	7.00%	6	Disbank	7.00%
7	HSBC	Foreign	6.90%	7	Finansbank	7.00%
8	Vakifbank	Government	6.80%	8	HSBC	6.90%
9	Agriculture Bank	Government	4.10%	9	Denizbank	3.20%
10	Denizbank	Private	3.20%	10	Kocbank	2.00%
11	People's Bank	Government	2.70%	11	Other	1.90%
12	Pamukbank	SDIF	2.60%	12	Oyak Bank	1.40%
13	Kocbank	Private	2.00%	13	TEB	0.30%
14	Oyak Bank	Private	1.40%			
15	TEB	Private	0.30%			
16	Eximbank	I&D (Gov't)	0.00%			
17	Other		1.90%			

Source: Fortis¹⁶⁷

163 *Oyakbank*, Decision No. 04-66/952-230, Date: 10.19.2004.

164 See art. 3 of the "E.U. Commission Notice on the Concept of Undertakings Concerned under Council Regulation (EEC) No 4064/89 on the Control of Concentrations between Undertakings" (OJ C 66, 2.3.1998). See also E.U. D.G., *Competition Glossary*, available at <http://europa.eu.int/comm/competition/general_info/u_en.html#t62>

165 Council of State also endorses this interpretation. Legal independence is not a criterion in competition law. Units taking economic decisions independently constitute undertaking. Therefore, parent and subsidiary companies establish an economic unity and their relationship will not fall under competition law (Council of State, 10th Cir., Decision No. 4374 (2003), Matter No. 4495 (2002), Decision Date: 11/12/2003).

166 According to BRSA, the government's share in the credit card market is 11% (BRSA, *Dec., 2004 Balance Sheets*, available at <<http://www.bddk.org.tr/english/publicationsandreports/tables/december2004balance.htm>>).

167 See Fortis, *Fortis to Acquire Full Ownership of Disbank, Turkey's 7th Largest Privately*

IV. Anticompetitive Practices

The restraints on competition can be unilateral in form or through collaboration of rivals in the banking market.

1. Concerted Practices

Cartels are scarce in Turkey as Turkish culture does not appreciate cooperative practices. Competition Authority found most of the complaints filed against banking cartels moot. For instance, a customer complained that “all banks” in Turkey abused their dominant position, overcharged way above their costs and discriminated among customers. Competition Authority transferred this complaint to the BRSA after deciding *forum non conveniens*.¹⁶⁸

2. Decisions of Bank Associations

(a) Banks Association of Turkey

The Banks Act of 1957 founded Banks Association of Turkey (“BAT”).¹⁶⁹ It is mandatory for banks to become a member of BAT within one month of their banking license pursuant to law.¹⁷⁰ BAT’s main goal is to ensure that banks function in order to meet the necessities of the national economy.¹⁷¹ The BAT also has authority to adopt and implement all measures necessary in order to prevent unfair competition among banks¹⁷² and the authority to prescribe the type, style, quality and quantity of notices and advertisements of the banks.¹⁷³ Banks that do not comply with BAT decisions face administrative fines.¹⁷⁴ The statutory status of BAT may seem to have *prima facie* characteristics of a cartel as BAT controls advertisements of its members and may fine them. However, BAT set the banks free to determine expenditure on their advertisements in 1997.¹⁷⁵ Moreover, the statutory limit for maximum amount of fine is 20,000 TRY (approximately

Owned Bank, at 7 (Apr., 2005) available at <http://www.fortis.nl/Aandeelhouders/documenten/UK_Fortis_Disbank_Presentation_120405.pdf>

168 Turkish Competition Authority, Decision Date: 3/26/02, No. 02-16/194-81 (See Competition Authority 2002 Report, *supra* note 19, at 26).

169 Art. 57 of the Banks Act (1957).

170 Banking Act art. 79 (2005); Art. 19(1) of the Banks Act (*repealed*).

171 Banking Act art. 80(1)(b) (2005); Banks Act art. 19(1)(b) (*repealed*).

172 Banking Act art. 80(1)(e) (2005); Banks Act art. 19(1)(c) (*repealed*).

173 Banking Act art. 80(1)(f) (2005); Banks Act art.19(1)(d) (*repealed*).

174 Banking Act art. 81(2) (2005); Banks Act art. 19(5) (*repealed*).

175 Art. 2 of the Mandatory Principles and Conditions for Banking Notices and Advertisements (BAT), Communiqué no. 1002, date: 4/14/1997. Banks may not engage in advertisements: (1) resulting in unfair competition, (2) impairing the confidence in the banking sector, (3) impairing the confidence of the financial strength of the banks, (4) illegal, immoral or deceptive advertisements, (5) containing statements that some banks are more secure, (6) containing rankings by any criteria other than rankings by international institutions or media.

\$13,350), which is very low. BAT has relations with other industry associations. For instance, the BAT and the Turkey Exporters' Assembly formed a working group to study problems in export sector.¹⁷⁶

Virtually all of the Turkish banks are members of the Society for Worldwide Inter-bank Financial Telecommunication (SWIFT) and the Turkish Inter-bank Clearing System (TIC).¹⁷⁷ These associations may not reject membership applications as they qualify as an essential facility under the European antitrust jurisprudence (*i.e.*, *SWIFT*¹⁷⁸).

There are two credit record bureaus in Turkey. In 1995, Turkish banks established a private corporation called "Credit Record Office, Inc. of Turkey" in order to keep track of the defaulting debtors.¹⁷⁹ Competition Authority issued an advisory opinion concerning legislation on databases maintained by trade chambers and noted that this practice is not anticompetitive by itself. Competition Authority highlighted the fact that database usage can be part of anticompetitive practices, such as to circulate prices or to fix prices, in violation of Competition Act.¹⁸⁰ Thus, mere establishment of databases do not suffice for antitrust violation in Turkey. Banking Act of 2005 established a public entity called Interbank Risk Center to keep track of customers using financial services.¹⁸¹ Credit Record Office and Interbank Risk Center use different criteria and banks use data from both of them while evaluating loan applications. Competition Authority decided on the status of both in 2008. Competition Authority drew attention to the fact that Credit Record Office keeps track of a larger data and therefore, the system is beneficial to reduce risk factors in economy. Competition Authority stated "there are no findings showing information coordination on loan customers" and rejected allegations that Credit Record Office is a cartel.¹⁸² However, the Spanish Protection of Competition Tribunal (*Tribunal de Defensa de la Competencia*) rejected to grant individual exemption to similar arrangement.¹⁸³ There are no *de jure* entry barriers to Turkish credit history market but Turkish banks closed competition to credit history market. It is unlikely that a competitor to Credit Record Office and Interbank Risk Center would emerge. It is true that current structure of credit history corporations

176 This group is formed by 3 banks and 4 exporters union. The decisions in the meetings are published online (See <<http://www.tbb.org.tr/turkce/cg/cg%5Ftbb%5Ftim.asp>> (*in Turkish*)).

177 The BAT and the Central Bank of the Republic of Turkey (CBRT) established the TIC in April 1992 (See <<http://www.turkishembassy.org/business/economy/bankinginfo.htm>>).

178 The French Postal Service (FPS) applied to the E.U. Commission against SWIFT after SWIFT refused to admit the FPS as a member. The E.U. Commission decided that the telecommunications network is an essential facility (2-18 Competition Act of the European Community § 18.02).

179 See <<http://www.kkb.com.tr>> (*in Turkish*)

180 See OECD (Peer Review 2005), *supra* note 83, at 36.

181 Republic Central Bank Act, art. 44 (2005).

182 *KKB Decision*, Turkish Competition Authority, Matter No. 2008-4-215, Decision No. 08-58/937-380, Decision Date: 10.16.2008.

183 <<http://competition.practicallaw.com/8-200-4078>>

produce some efficiencies. Nonetheless, shutting down competition in credit history market restricts innovations in credit history.

Competition Authority analyzed the status of Banks Association of Turkey several cases. Competition Authority rejected to investigate against allegations of BAT's Regulation on Trusts creates unfair competition.¹⁸⁴ Most significant case on the BAT concerned price fixing. BAT asked for negative clearance for fixing the minimum fees except electronic banking fees from Competition Authority. Competition Act prohibits fixing service prices by industry associations.¹⁸⁵ Competition Authority decided that a special legislation establishes BAT, but BAT is within Competition Act's statutory definition of "association of undertakings".¹⁸⁶ Fixing the minimum fee levels by an industry association is absolutely a decision taken by "association of undertakings".¹⁸⁷ The reasoning of Competition Authority is consistent with its previous *TOBB* decision¹⁸⁸ where Competition Authority decided that trade chambers federation created by legislation is an association of undertakings. Competition Authority decided that this practice constitutes a horizontal restraint distorting competition in banking market and it is a clear violation of the Competition Law. Competition Authority also indicated that the practice violates the E.U. law. Then, Competition Authority declared that BAT resolution is not binding on banks and banks are free to set their fees.¹⁸⁹ On the other hand, Finnish Competition Authority (FCA), an European regulator, granted Finnish saving banks a ten-year-long exemption for joint pricing in 2002.¹⁹⁰

(b) Equity Banks Association of Turkey

Amendments of 2001 collected Islamic banks under one umbrella organization entitled "Special Finance Houses Union".¹⁹¹ The law required Islamic banks to become a member in the association within 30 days of its operational date.¹⁹²

184 Turkish Competition Authority, Decision Date: 3/12/02, No. 02-13/143-64 (*See* Competition Authority 2002 Report, *supra* note 19, at 24).

185 Art. 4(1)(a) of the Competition Law.

186 *See* for the definition of association of undertakings, art. 3 of the Competition Act.

187 Competition Authority Decision, Decision Date: 4/5/2001, (*See* Competition Authority 2001 Report, *supra* note 54, at 91).

188 In the Union of Chambers and Exchanges of Turkey (TOBB) case, Competition Authority defined an umbrella organization which possess public juridical personality established by legislation is an association of undertakings (*See* Mumcu & Zenginobuz, *supra* note 85, at 10). Turkish Parliament established the Union of Chambers and Exchanges of Turkey (TOBB) with an statute (Act No. 5590).

189 Turkish Competition Authority, Decision Date: 4/5/2001, (*See* Competition Authority 2001 Report, *supra* note 54, at 91).

190 OECD 2002 Report on Competition Policy Development in Finland At.2 available at <<http://www.oecd.org/dataoecd/22/4/2509527.pdf>> (Last visited April 5, 2005).

191 Art. 20(6) of the Banks Act (1999) amended by Art. 11 of the Act No. 4672 of 2001 amending the Banks Act.

192 Provisional art. 2(b) of the Act No. 4672 of 2001 amending the Banks Act.

Banking Act of 2005 changed the name of the association to “Equity Banks Association of Turkey” and kept the mandatory membership provision.¹⁹³ The Cabinet granted organization’s charter with an ordinance in 2006.¹⁹⁴

2. Abuse of the Dominant Position

The Competition Act prohibits abuse of dominant position and provides non-exhaustive examples of abusive practices.¹⁹⁵ However, Competition Authority’s precedents on abuse of dominant position are scarce as private banks are not generally dominant in any banking product market.

Group banks may act assist in abuse of dominance cases. Three companies that are the subsidiaries of same holding group started a promotional offer where the largest GSM operator (Turkcell) and its affiliated cell phone distributor (KVK) subsidize cell phones through group bank (YKB).¹⁹⁶ Other cell phone retailers filed complaint alleging that they did not received this promotional offer.¹⁹⁷ Competition Authority decided that relevant undertaking does not possess dominant position so this practice is not anticompetitive.¹⁹⁸

a. Exclusive Dealing

Benkar, a non-bank financial institution, started to offer a combined installments & loyalty card service (Advantage Card) to customers of the major department stores. This card service allowed the customers to purchase through installments. Benkar established a system of mutual exclusivity with the member institutions. In return for preventing rival stores to be members of the system, covered stores will seek to become members of rival card services. Competition Commission cleared this arrangement¹⁹⁹ and Competition Authority rejected a complaint filed by a store which is denied membership to Advantage Card system.²⁰⁰

193 Art. 79 and Provisional Art. 3 of Banking Act (2005).

194 Charter of Equity Banks Association of Turkey, Council of Minister’s Decision, O.J., No. 26094, Date: 2.28.2006,

195 See art. 6 of the Competition Law.

196 According to the arrangement, if purchases are made from cell phone retailers of the group, no interest for will be charged for five installments.

197 See *KVK*, supra note 112, at 1.

198 *Id.* at 4.

199 *The Advantage Card Negative Clearance*, Decision; No. 99-21/177-96, Date: 4.28.1999 (O.J.; Date: 8.31.2000, No. 24156). Competition Authority later informed that it granted clearance for the exclusive agreement among 20 stores of which half of them are owned by the Benkar group. Competition Authority granted this clearance when the Advantage Card system compassed only a small fragment of the market (See, the *Benkar-Fiba Bank Joint Venture*, supra note 155). Under Turkish competition law, exclusive dealing arrangements within the same enterprise do not fall under Competition Authority’s jurisdiction. However, it is very hard to find that Advantage card to constitute a small fragment of the market because the Advantage card is the first to start this market and it has the first mover advantage.

200 Competition Authority rejected this application for following reasons: (1) This is a conglom-

FIBA Bank entered into the same market and then signed a merger deal involving acquisition the Advantage Card system through a newly established joint venture.²⁰¹ Establishment of joint venture invokes merger control. When this matter came before Competition Authority again, Competition Authority revoked its previous negative clearance decision due to change in circumstances.²⁰² This time, Competition Authority decided that the exclusivity system creates entry barriers. Competition Authority also discussed the network effects of this arrangement.²⁰³ Then, the Commission authorized the merger with the condition to repeal the exclusivity and also advised rival card services.²⁰⁴

b. Anti-tying

Banks may impose additional conditions in loans to hedge their credit risks or to maximize their profits. Turkey lacks a special anti-tying statutory provision for banking unlike American antitrust law.²⁰⁵ Nevertheless, Competition Act prohibits tying arrangements imposed by the dominant undertakings (Art. 6(2)(c)).²⁰⁶

Commonly, banks impose mandatory insurance when extending credit facilities. Competition Authority rejected cases involving mandatory insurance in connected with credit facilities in early line of cases. In 1999, several associations of insurance agents filed complaints with Competition Authority alleging that banks impose loan collaterals be insured by certain insurers and this practice violates Competition Act. Competition Authority found no concerted practice or

erate restraint. It is accepted in the antitrust literature that conglomerate agreements do not restrict competition as much as vertical or horizontal restraints. (2) There no entry barriers. Banks can still enter this market very easily. (3) Selective distribution is not a violation of the Competition Law. (4) Benkar is not in a dominant position (*Damat Tween v. Benkar*, Decision No: 99-21/167-86, Date: 04.28.1999). In another installment card decision, Competition Authority granted negative clearance because it is a conglomerate restraint (*Cankart*, Decision No. 99-21/188-104, Date: 4.29.1999). Competition Authority took this line of decisions in earlier days of its operation. Thus in the subsequent applications, Competition Authority changed its position and applied law against Benkar this time (See the *Benkar-Fiba Bank Joint Venture*, *supra* note 155).

201 Boyner Holding and Fiba Holdings, Inc. stipulated a joint venture agreement in which; 99.99% shares of the Benkar, a consumer financing company, Advantage trademark and Advantage card database will be exchanged for %50 shares of the FIBA Bank.

202 See art. 13(a) of the Competition Law.

203 The Commission determined that the network effects fortified Benkar's position in the market (See *Benkar-Fiba Bank Joint Venture*, *supra* note 155, at 6).

204 *Id.* at 11-12.

205 See 12 U.S.C. 1972.

206 Art. 6(2)(c) of the Competition Act is as follows: "Abusive cases are, in particular, as follows: (c) Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price,".

combined dominances. Therefore, Competition Authority decided that there is no need to open investigation, as the banks do not restrict risks stemming from competition.²⁰⁷ Competition Authority rejected another case where insurance required by commercial banks to extend consumer loans for car sales. Competition Authority decided that the case is not within its jurisdiction.²⁰⁸ Competition Authority did not analyze tying arrangements and did not invoke the anti-tying provision of the Competition Law.

In *Koçbank* case, a private bank applied to Competition Authority to obtain negative clearance regarding its internal circular directing its branches to accept only insurance policies underwritten by certain insurance companies to extend consumer credits. Majority of the Commission decided that absence dominance in the relevant market, Competition Law does not provide any remedy. Thus, there is no violation of the art. 6 of the Competition Law. However, the Commission noted that this practice is void under insurance law.²⁰⁹ Two Commissioners and one Competition Authority Reporter dissented majority's decision and asserted that the practice is an explicit violation of the Competition Law.²¹⁰ Competition Authority's decision does not change the result under majority's reasoning based on insurance law or minority dissent based on Competition Act. Mandatory insurance is void anyway. Banks may no longer impose mandatory insurance because of insurance law provisions. On the other hand, Competition Authority could have used the explicit anti-tying provision in the Competition Law. It would be more pro-competitive if Competition Authority assess tying arrangements based on Competition Act in the future. This will also be consistent with Competition Authority's statutory mandate.

c. Excessive Pricing

Turkish competition law prohibits from excessive pricing only in abuse of dominance cases. Excessive and divergent fee practices troubles Turkish government which is sensitive to consumer issues. Ali Babacan, State Minister on Economy, warned banks not to assume their customers are captive and to abandon practice of overcharging customers based on this perception.²¹¹ Tevfik Bilgin, BRSA President, demanded that BRSA should have jurisdiction over

207 *Credit Insurance*, Decision no. 99-24/211-124, Date. 5.20.1999.

208 Turkish Competition Authority, Decision Date: 2/28/02, No. 02-10/116-48 (See Competition Authority 2002 Report, *supra* note 19, at 23).

209 Art. 28(5) of the Insurance Supervision Act ("*Sigorta Murakabe Kanunu*", Act No. 7397, O.J., No. 10394, Date: 12/21/1959) prescribes contract provisions mandating certain insurers are void

210 *Koçbank*, Competition Authority Decision no. 02-15/165-69, Date. 3.19.2002.

211 yenisafak.com.tr (Last visited 9.18.2010) (*in Turkish*).

significant discrepancies among the bank charged to their customers.²¹²

Previously, Competition Authority rejected the complaint alleging that interest rates applicable to credit card payments are higher than they should have been due to an agreement between the banks.²¹³ President of a regional industry chamber filed complaint to Competition Authority alleging that the banks discriminate against small businesses and do not provide favorable terms. Competition Authority decided they do not have jurisdiction over those claims and no such procedure exists within the Competition Law.²¹⁴ These decisions are in line with Competition Authority's mandate to attack monopolistic and cartelistic pricing behaviors. Competition Authority does not have a mandate to control and suppress the prices. Market forces control the prices.

V. Exemptions

Turkey undertook to adopt the principles laid down in E.U.'s block exemption regulations.²¹⁵ The Competition Act gives Competition Authority the authority to grant block exemptions.²¹⁶ Competition Authority has issued block exemptions on vertical arrangements and on research and development affairs.

European exemptions concerning the banking industry concern price fixing. German Federal Cartel Office (*Bundeskartellamt*) has *de jure* authority to exempt banking cartels and credit syndicates from bans on price and business conditions fixing.²¹⁷ Finnish Competition Authority granted to Finnish saving banks exemption for joint pricing until 2012.²¹⁸ Price fixing is *per se* illegal in Turkey similar to America. Although Competition Authority has the authority to grant block exemptions, it is unlikely to exercise this authority in favor of banking services.²¹⁹

Exemptions are for a limited period only and may not exceed five years in Turkey. Advantage Card's membership network of reached 5,000 stores. HSBC

212 yenisafak.com.tr (Last visited 9.18.2010) (*in Turkish*).

213 Competition Authority 2002 Report, *supra* note 19, at 30 (quoting Competition Authority Decision, Decision Date: 5/14/02, No. 02-28/334-137).

214 See Competition Authority 2002 Report, *supra* note 19, at 25 (quoting *The Chamber of Industry of Aegean Region*, Competition Authority Decision Date: 3/26/02, No. 02-16/191-78).

215 Art. 39(2)(a) of the Customs Union Resolution .

216 See art. art. 5(2) of the Competition Law.

217 See Act Against the Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*) § 29.

218 OECD 2002 Report on Competition Policy Development in Finland At.2 available at <<http://www.oecd.org/dataoecd/22/4/2509527.pdf>> (Last visited April 5, 2005).

219 Turkish Competition Authority's block exemption regulations are: (1) Block Exemption Communiqué Regarding Vertical Agreements Communiqué No: 2002/2, (2) Block Exemption Communiqué on Research and Development Agreements No:2003/2, (3) Communiqué on Group Exemption Regarding Distribution and Servicing Agreements in Relation to Motor Vehicles.

bank's acquisition of Advantage Card prompted Competition Authority to revisit installment cards industry. Competition Authority decided that the vertical arrangement exemption is not applicable for an indefinite period and fined HSBC for Competition Act violation.²²⁰ The number of exemptions will probably diminish after economic development and entrenchment of competition awareness.

§ 4. Merger Control

Banking mergers are subject to concurrent authority of the BRSA for prudential review and Competition Authority for competition review if certain thresholds are invoked. Banks should obtain BRSA clearance to consummate merger, sale of assets and transfer of liabilities.²²¹

Competition Authority issued a communiqué in order regulate mergers in all sectors. Competition Act confers authority to Competition Commission to determine via administrative communiqués types of acquisitions subject to clearance.²²² Competition Commission used its authority to regulate the mergers activity in 1997.²²³ Mergers Communiqué defines merger and sets forth presumption for merger.²²⁴ The substantive test for merger control is dominance. The law prohibits mergers creating dominant position that result significant decrease in competition.²²⁵ This is similar to the new European substantive test concerning mergers.

220 See *Advantage Card III*, at 33 (Decision No. 03-57/671-304, Date. 8.15.2003). During this proceeding, Benkar raised some efficiency defenses that it also provided members marketing information. Competition Authority evaluated this defense and found this defense baseless (see *Id. at 12-17*).

221 Art. 5(1) of the Regulation on Merger, Acquisition, Division and Changes in Shares of Banks [BRSA], O.J., No. 26333, Date: 11/1/2006; Art. 19(1) of the Banking Act (*repealed*) [Former Art. 18(1) of the Banks Act (*repealed*)].

222 art. 7(2) of the Competition Law.

223 Communiqué on the Mergers and Acquisitions Subject to the Permission of the Competition Board [hereinafter "Mergers communiqué"] (Communiqué No: 1997/1; Date 1.1.1997; O.J., Date: 08.12.1997, No. 23078). The Mergers Communiqué was amended three times in 1998 and in 2000. A convenience translation is available at <<http://www.rekabet.gov.tr/word/tebli-geng1.doc>>

224 According to the art. 2(1) of the Mergers Communiqué, these situations are deemed as mergers subject to clearance: (1) Merger of the two or more independent undertakings, (2) Acquisition of the control of the undertaking via securities transactions, (3) Joint Ventures not aimed to restrict competition. Undertaking concept is also defines in the Statute. Thus, merger of the subsidiaries of the same holding company will not fall under the merger provision. See for the definition of the control, *Id. at art. 2(2)*.

225 Under art. 7 of the Competition Act, merger of two or more undertakings, aimed at creating a dominant position or strengthening their dominant position, as a result of which, competition is significantly decreased in any market for goods or services within the whole or a part of the country, or acquisition, except acquisition by way of inheritance, by any undertaking or person, of another undertaking, either by acquisition of its assets or all or a part of its partnership shares, or of other means which confer it/him the power to hold a managerial right, is illegal and prohibited.

1. Change in Control

Only change of control between the undertakings trigger merger control. Thus, freeze-outs or squeeze-outs are out jurisdiction of merger control. For example, Competition Authority decided that the consolidation did not trigger the provisions of the Merger Communiqué when acquiring the minority shares of its subsidiary bank.²²⁶ Competition Authority continued this approach in subsequent decisions²²⁷ while evaluating change of control case-by-case basis.

The merger partners should seek Competition Commission clearance assessing competitive impact prior to consummation. Merger Communiqué prescribes that Competition Authority authorization is necessary, if the consolidated entity exceeds 25% of the relevant market after the merger.²²⁸ As of 2005, it was unclear how Competition Authority calculated relevant market shares. Consolidated entities have not exceeded market share threshold in majority of the cases.

The merger partners should also seek authorization from the Commission if their total turnovers exceed 25 Mil. TRY (approximately \$18 Mil.).²²⁹ Merger Communiqué takes into account sum of consolidated turnovers in the relevant product market.²³⁰ The turnover threshold is not in harmony with banking regulations. Banking Act prescribes that every bank has to have a minimum starting capital of 30 Mil. TRY (approximately \$20 Mil.)²³¹. Therefore, every merger transaction in banking exceeds the turnover threshold making the transaction subject to Competition Authority review. Competition Authority laid down the calculation of the turnover for banks and other financial institutions for merger purposes by an administrative communiqué issued in 1998.²³² Competition Authority sums interest revenues and non-interest revenues stated in income

226 This case concerned acquisition of the 40% foreign shares of a subsidiary bank by a bank holding company which already controlled more than 50% of the bank. (See The Turkish Competition Authority Year 1998 Report, at 15-16 (1998) (quoting *Körfezbank/Doğuş B.V.* Decision)).

227 HSBC acquired Demirbank's subsidiary in the securities business after Demirbank was sold to HSBC by SDIF. Competition Authority decided that HSBC's consolidation of Demir Investment Securities, Inc. with HSBC Investment Securities, Inc. did not require its authorization as they are within the same undertaking (*Demir Investment Securities, Inc./HSBC Investment Securities, Inc. Merger*, Decision No. 01-58/605-160, Date. 12.4.2001).

228 See art. 4(1) of the Merger Communiqué.

229 *Id.*, at art. 4(1). The amount in the turnover prong of the test was increased from 10 M. TRY to 25 M. TRY. in 1998. This amendment was made by the *Communiqué Concerning Amendment of the 4th Article of the Communiqué on the Mergers and Acquisitions Subject to the Authorization of the Competition Commission* (Communiqué No: 1998/2).

230 Art. 4(2) of the Merger Communiqué.

231 Banking Act art. 7(1)(f) (2005). The former Banks Act prescribed that every bank has to have a minimum starting capital of 20 Mil. TRY. (approximately \$14.4 Mil.) (Art. 7(2)(d) of the Banks Act (*repealed*)). BRSA Chairman told at a conference held for 10th Anniversary of the BRSA that they hope to have a minimum statutory starting capital of \$300 Mil. per bank (www.milliyet.com.tr (*Last visited* 9.16.2010)).

232 Competition Authority Communiqué No: 1998/6, O.J., No. 23527, Date: 11/18/1998.

statements to find out turnover for merger review.²³³ The turnover calculation for banks is identical with European standards.²³⁴ The statutory undertaking concept has traces in turnover calculation. Holding company turnovers shall be set off and not taken into account in the calculation of the turnover for merger purposes.²³⁵ Statutory undertaking concept expedites intra-holding mergers.

Compared to other jurisdictions, the turnover threshold is extremely low.²³⁶ European turnover thresholds are significantly higher than their Turkish counterpart. European criteria deal with mergers having an E.U. dimension.²³⁷ There is also a noteworthy discrepancy between market share threshold and the turnover threshold. The turnover of a bank that controls 20% of the banking sector is approximately \$75 Bil. The relative low amount of the turnover threshold is acceptable as it aims to capture merger transactions as much as it can. Competition Authority could invoke its jurisdiction in many cases based on turnover threshold.²³⁸

2. Exceptions to Merger Control

a. Exception in the Merger Communiqué

Competition Authority's Merger Communiqué brings exceptions to the merger control. Government acquisitions based on a statute to liquidate or privatize do

233 The relevant income statement for the calculation of the revenue threshold is the income statement prepared according to the Undersecretariat of Treasury's regulations with the authority prescribed in the art. 51(5) of the No. 3182 Banks Act. According to the art. 4(4) of the Merger Communiqué, the turnovers of the banks will be calculated factoring in following variables: (1) Interest revenue; (a) Interest from the credit transactions, (b) Interest from Additional Deposit Provisions, (c) Interest from banks, (d) Interest from the interbank money market transactions, (e) Interest from the mobile values accounts, (f) Other interest income, (2) Non-interest revenues, (a) Fees and commission fees, (b) Profit from capital market transactions, (c) Profit of exchange, (d) Dividends from affiliates and subsidiaries, (e) extraordinary revenues, (f) Other extrainterest income.

234 See E.U. Council Directive 86/635/EEC, of Dec. 8, 1986 on the Annual Accounts and Consolidated Accounts of Banks and other Financial Institutions. See also E.U. Council Directive 2001/65/EC and E.U. Council Directive 2003/51/EC.

235 Art. 4(3) of the Merger Communiqué.

236 Bank mergers consisting of a party with total asset value exceeds 10 Bil. JPY and another party whose exceeds 1 B. JPY will need to be reported to the Japanese Fair Trade Commission (Eric C. Sibbitt, *A Brave New World for M&A of Financial Institutions in Japan: Big Bang Financial Deregulation and the New Environment for Corporate Combinations of Financial Institutions*, 19 U. Pa. J. Int'l Econ. L. 965, 1001 (Winter, 1998) (citing art. 15 and 16 of the Antimonopoly Law)).

237 Art. 1 of the E.U. Council Regulation on the Control of Concentrations between Undertakings (Council Regulation (EC) No. 139/2004 of Jan. 20, 2004). See also E.U. Council Directive 86/635/EEC, of Dec. 8, 1986 on the Annual Accounts and Consolidated Accounts of Banks and other Financial Institutions. See also E.U. Council Directive 2001/65/EC and E.U. Council Directive 2003/51/EC.

238 Competition Authority calculated the market share of Chase Manhattan and J.P. Morgan 4%. J.P. Morgan's market share did not suffice for antitrust jurisdiction. Competition Authority's jurisdiction is only invoked after the consolidated entities exceeded the relatively low turnover threshold (*Chase Manhattan Corporation/J.P. Morgan Merger*, supra note 94, at 3).

not trigger merger control under Competition Authority's Merger Communiqué.²³⁹ Therefore, SDIF takeover of banks is not subject to the merger control.

b. Banking Act Exception

Banking industry objects Competition Authority clearance. Banks Association of Turkey recommended to abolish Competition Authority clearance in merger proceedings and suggested to obtain authorization only from BRSA even if transaction exceeds competition law thresholds.²⁴⁰ Taking into account these objections, Turkish Parliament amended the Banks Act in 2001 to exclude application of art.s 7, 10 and 11 of the Competition Act to bank mergers or acquisitions if total consolidated assets do not exceed 20% of the total banking sector.²⁴¹ Banking Act of 2005 continued to keep this exception.²⁴² This exception does not consider the submarkets within the banking industry. Primary justification of the exception is presence of emergency conditions in the banking sector. OECD indicated that the problems in the banking sector were not due to the problems within competition among banks.²⁴³ These problems emanated from the complex regulatory structure, moral hazard rooting from unlimited deposit guarantee²⁴⁴ and bad governance. For mergers exceeding the threshold, Competition Authority and BSRA jurisdiction do not overlap, as the BRSA has no authority in the competition issues.²⁴⁵

Statutory exception reduces the number of transactions subject to Competition Authority's merger control according to certain scenarios under Table 3, which indicates the market share of individual banks. For instance, Competition Authority will not review the deal, if Akbank with market share 11.2% and Garanti Bank with market share 9% have merged in 2005. OECD recommends abolishing the "exceptions" for banks after the crisis ends.²⁴⁶

239 Acquisition, by a public institution or an organization, according to the law, with the aim of liquidation, winding up, insolvency, cessation of payments, composition, privatization or by any analogous proceedings will not be considered as a merger according to the Merger Communiqué (Art. 3(1)(b) of the Merger Communiqué).

240 Ahmet Kirman, *Bank Mergers and Acquisitions: Problems, Measures and Suggestions*, at 10 (June 2000) (*in Turkish*) (describing Banks Association of Turkey's opinion after a conducted survey) available at <<http://www.tbb.org.tr/turkce/arastirmalar/tbb%5Fbirlesme%5Fonerileri.doc>>

241 Art. 18(1) of the Banks Act amended by the art. 10 of the Act Amending the Banks Act (Act No. 4672) O.J., No. 24416, Date: 5.29.2001.

242 Art. 19(1) of the Banking Act (Act No. 5411. O.J., No. 25983, Date: 11.1.2005).

243 See OECD (The Role of Competition), supra note 35, at 22.

244 *Ibid.*.

245 The FDR and the DOJ has concurrent authority over the bank mergers in the U.S. The FTC does not have authority over bank mergers.

246 See OECD (The Role of Competition), supra note 35, at 31. See also See OECD (Peer Review 2005), supra note 83, at 43.

Table 3: Asset Size of the Turkish Banking Sector (2005)

	Bank	Type	Asset Size
1	Agriculture Bank	Government	18.70%
2	Is Bank	Private	12.70%
3	Akbank	Private	11.20%
4	Garanti Bank	Private	9.00%
5	YKB	Private	8.40%
6	Halk Bank	Government	7.40%
7	Vakifbank	Government	6.80%
8	Kocbank	Foreign	3.10%
9	Finansbank	Private	2.60%
10	Disbank	Private	2.40%
11	Denizbank	Private	2.10%
12	Oyak Bank	Private	2.00%
13	HSBC	Foreign	1.70%
14	Eximbank	I&D (Government)	1.60%
15	Pamukbank	SDIF	1.30%
16	Other 65 Banks	Various	7.80%

Source: Fortis²⁴⁷

Asset size is not an useful test. For example, assets of government banks and markets share may not be proportional due to inefficiencies. The threshold is not consistent with the market share threshold in the Merger Communiqué and contemporary merger analysis in the developed countries. For instance, DOJ's HHI calculation utilizes deposits not asset size.²⁴⁸ Because of this inconsistency, dominance may result in submarkets.

OECD and some commentators note that this provision is a *de facto* exclusion of the mergers in banking sector from the jurisdiction of the Competition Authority.²⁴⁹ BSRA also does not intend to change this provision as it kept the exception in BRSB initiated reforms of banking law.²⁵⁰ E.U. views that the prudential interests and competition policy might conflict. The E.U. Council's

247 See Fortis, supra note 167, at 7.

248 See McCarthy, supra note 140, at 898.

249 See OECD (Peer Review 2005), supra note 83, at 15; Mumcu & Zenginobuz, supra note 85, at 12.

250 See art. 19 of the Draft for Financial Services Act and art. art. 22(2) of the Draft for Credit Institutions Statute (version prepared for the 3rd review with the IMF) available at <http://www.bddk.org.tr/turkce/mevzuat/duzenlemetaslari/KKKTT_19_08_2004.doc#_Toc80685558> (in Turkish). Former BRSB regulations required banks to obtain permission from the Competition Authority in order the merger to be affirmable in the shareholders' meeting (See also, Art. 16(2) of the Regulation Regarding Mergers and Acquisitions of the Banks [BSRA], O.J., No. 24445, Date. 27.06.2001 (repealed)).

Merger Directive provides that E.U. member states may adopt appropriate measures in order to protect prudential interests.²⁵¹ Nonetheless, this provision does not bring elimination of merger control in banking mergers. OECD urged that the exception in Banking Act is not in consistent with the European Merger Regulations. Although, Turkey is under no obligation to follow the E.U. merger law, elimination of merger control is not desirable. Competition policy in banking is very important as access to finance problems may create an entry barrier to other sectors.²⁵²

Despite Competition Authority's urging, a bill was not introduced to Parliament to repeal the statutory exception.²⁵³ This fact probably stimulated Competition Authority to step forward in order to advocate competition policy. In *Textilbank* case, Competition Authority decided that it will narrowly construe the exception in Banks Act of 1999. This case involved acquisition of 35.45% shares of a bank by a holding company that fell under the Banks Act exception. Competition Authority indicated that Banks Act of 1999 exception is only applicable to consolidations among banks. Therefore, other transactions including change of control continue to be under jurisdiction of the Competition Law.²⁵⁴ Although Competition Authority's declaration of jurisdiction is not consistent with the statutory language excluding "acquisition of banks" from Competition Law's jurisdiction, *Textilbank* decision renders that bank acquisitions by non-bank companies continue to be subject to Competition Authority review. In another case, Competition Authority ruled that Competition Act will continue to apply to bank affiliates for instance if they satisfy merger tests.²⁵⁵ Nevertheless, Competition Authority could not give a decision amounting to a total bypass of the statutory exception. That would exceed its authority. Consequently, only merger transactions between two banks fall under the Banks Act exception. This case hardening gives hope for the future of the Turkish competition policy in banking.

3. Substance of the Merger Control

The merger analysis regarding the banks has particularities in the U.S. Board of

251 See art. 21(4) of the E.U. Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings (the EC Merger Regulation).

252 See OECD (Peer Review 2005), supra note 83, at 43.

253 See *Id.*, at 15.

254 *Textilbank*, Decision No. 02-38/419-177, Date: 6.13.2002.

255 *Fortis Bank's acquisition of Dış Bank's Financial Leasing Subsidiary*, Competition Authority, Matter No. 2005-4-92, Decision No. 05-32/437-102, Decision Date: 5.15.2005, p. 3. Dissenting opinion in Competition Commission objects application of tests to each bank affiliate independently rather than considering them as a whole. Dissent thinks merger transactions of bank affiliates should be analyzed in the same manner as banks (*Dissenting Opinion of Commissioner Süreyya Çakın, Fortis Bank's acquisition of Dış Bank's Financial Leasing Subsidiary*, Competition Authority, Matter No. 2005-4-92, Decision No. 05-32/437-102, Decision Date: 5.15.2005, p. 4-5).

Governors of the U.S. Federal Reserve System may not approve a merger if the consolidated entity would control 30% of the deposits in any U.S. state or 10% of the entire U.S.²⁵⁶ There is no maximum market share limit for the banks operating in Turkey.²⁵⁷ Lack of limitation leaves a space for Competition Authority's policy-making. The substantive test for merger control is dominance pursuant to Competition Law. The Law prohibits mergers creating dominant position resulting in a significant decrease in competition.²⁵⁸ This is similar to the new E.U. substantive test looking for transactions "significantly impede effective competition". For Turkey, it is unclear which mergers constitute significant impediment on competition in banking. As Customs Union Resolution is silent on merger control, Turkey may look at abundant U.S. precedents in merger control on banking.

§ 5. Restructuring Program

Banking crises cost lost years. Savings and loan collapse in the U.S. was the most costly financial collapse in American history and resulted in the largest spending program in financial industries.²⁵⁹ The global recession is still costing an unprecedented GDP loss. Likewise, the systematic banking crisis did cost 19.3% of the GDP of Turkey.²⁶⁰ IMF approved Turkish economic plan under a standby agreement of February 2002.²⁶¹ Turkish government submitted a total of 19 *Letters of Intent* and 2 *Memorandum of Economic Policies* to the IMF. Neither the letters of intent, nor memorandum of economic policies articulates anything

256 Thomas C. Baxter, Jr. & James H. Freis, Jr., *SYMPOSIUM: COMPETING COMPETITION LAWS: DO WE NEED A GLOBAL STANDARD?: Panel Two: A Wider World: Other Anti-Competitive Activities and Visions: Fostering Competition in Financial Services: From Domestic Supervision to Global Standards*, 34 *New Eng. L. Rev.* 57, 61 (Fall, 1999) (citing 12 U.S.C. § 1842(d)(2) (1994)).

257 However, Turkish government imposed a maximum market share at a few utility sectors. For instance, total market share of a single private electric generation company and its affiliates shall not exceed 20% of the total installed capacity in Turkey which has been published in the preceding year (Art. 2(a)(2) of the Electric Market Statute (Act No. 4628) (O.J., No. 24335, Date. 3/3/2001)).

258 According to art. 7 of the Competition Law, merger of two or more undertakings, aimed at creating a dominant position or strengthening their dominant position, as a result of which, competition is significantly decreased in any market for goods or services within the whole or a part of the country, or acquisition, except acquisition by way of inheritance, by any undertaking or person, of another undertaking, either by acquisition of its assets or all or a part of its partnership shares, or of other means which confer it/him the power to hold a managerial right, is illegal and prohibited.

259 Timothy A. Canova, *The Transformation of U.S. Banking and Finance: From Regulated Competition to Free-Market Receivership*, 60 *Brooklyn L. Rev.* 1295 (Winter, 1995).

260 BRSA, *An Overview of the BRSA and its Activities*, at 32 (Nov., 2002) available at <http://www.bddk.org.tr/english/publicationsandreports/BRSA_activities.ppt#256,1>

261 These so-called mandate/duty losses constituted 56% of state bank assets as of 2001. Turkish Parliament cleaned up these losses from balance sheets of state banks with a statute enacted at 2001 (See, Ekmen, supra note 33, at 54 (citing BRSA, *Progress Report on Banking Sector Restructuring Program*, No. 4 (April 2003) at 3)). <http://www.imf.org/external/np/tre/tad/extransl.cfm?memberKey1=980&endDate=2005%2D02%2D28&finposition_flag=YES>

on competition policy. These documents focused on the economic efficiency in the banking sector.

I. Reorganization & Privatization of the Government Banks

Government banks still play a significant role in the Turkish banking sector. As of 2005, share of government banks in Turkey (33%) is much higher than E.U. countries (10%) and E.U. candidate countries (24%).²⁶² This result is due to the slow privatization process.

Government banks have a tendency not to focus on profitability. Their profit/capital ratio is very low. For instance, total assets and loans of government banks amounted to 33% of the total banking sector in 1999. However, they produced only 10% of total industry profits in the same year²⁶³ and began to incur significant losses thereafter initiating an economic crisis.²⁶⁴ “Mandate/duty losses” term is coined to describe economic losses incurred by government banks while they were trying to achieve their statutory mandates.²⁶⁵ So-called “mandate losses” term perfectly describes and covers up the mandate of government banks to incur financial loss. Private banks suffered from policies of government banks as well. BAT reports that the government banks injure competition due to their operations on low profit margins.²⁶⁶ Turkish government shall privatize government banks to bring market forces back to banking industry.

a. Privatization of Government Banks

Government consumption of financial resources²⁶⁷ and state predation problem distort bank competition in Turkey. Turkish Privatization Act states that privatization of government banks has priority over non-bank privatizations and banking sector privatizations shall be implemented promptly.²⁶⁸ Privatization Act

262 See Pazarbasioglu, *supra* note 113, at 15.

263 See BAT (Bank Mergers), *supra* note 240, at 5.

264 The government did not have concerns on profitability state banks before the 2001 economic crisis. Government banks became a burden on the Turkish economy. Government banks duty losses increased from 44% of the GNP to 58% of the GNP by the end of 1999 (art. 4 of Letter of Intent to the IMF (Dec. 9, 1999)).

265 Government banks duty losses increased from 44% of the GNP to 58% of the GNP by the end of 1999 (art. 4 of Letter of Intent to the IMF (Dec. 9, 1999)).

266 See BAT (Bank Mergers), *supra* note 240, at 5. The Agriculture Bank, a government bank, offered significant higher levels of interest to deposit distorting competition. Sometimes, government banks' interest rates reached to 20 percentage different than private banks' (C. Emre Alper & Ziya Onis, *Soft Budget Constraints, Government Ownership of Banks and Regulatory Failure: The Political Economy of the Turkish Banking System in the Post-Capital Account Liberalization Era*, Working paper available at <<http://www.econ.boun.edu.tr/staff/kaytaz/courses/ec344/readings/softbudget.pdf>> (Jul. 2002)).

267 See Ekmen, *supra* note 33, at 52, 77-78 (reporting that banks engaged in money market transactions to finance Turkish Treasury rather than extending loans).

268 Art. 2(f) of the Privatization Law.

ordered Privatization Administration to reorganize the government banks until the end of 1996.²⁶⁹ Despite statutory priority, Turkish government extended this transitory period until 1999.²⁷⁰ Privatization Administration could privatize only four banks within the transitory period. SDIF seized two of the privatized banks seized back in 2000 and disposed again in 2002. To address 1999 economic crisis, Turkish Parliament enacted legislation in 2000 ordering largest three government banks be reorganized and privatized.²⁷¹ Statute of 2000 envisaged completion of privatization until 2003.²⁷² However, the Government could not fulfill statutory mandate. Then, the Government extended privatization period again until 2005.²⁷³ Consequently, since the financial market liberalization of 1981, the market share of private banks has not increased.²⁷⁴ Turkish banking industry has not progressed in terms of competition.²⁷⁵

Privatization Act ordered the Privatization Administration to create preferential/privileged shares for Turkish government in privatized enterprises operating in strategic fields. Privatization Administration has the authority to designate strategic industries.²⁷⁶ Privatization Act specifically designates that if more than 49% share of the largest two government banks (People's Bank of Turkey and Agriculture Bank) can only be privatized with preferential/privileged shares.²⁷⁷ It is hard to understand the strategic value of the banking sector.

Turkish Parliament enacted redundant statutory exceptions to the merger control for individual consolidations between banks during IMF program. IMF Program required one of the weak government banks be merged with other adequate-capitalized government banks.²⁷⁸ Government accomplished this consolidation through legislation, which provides an exception to the

269 Central Bank, People's Bank and Agriculture Bank is excepted from privatization that time (See temporary art. 3 of the Privatization Law).

270 Temporary art. 16 of the Privatization Law.

271 See Act No. 4603 ("*Türkiye Cumhuriyeti Ziraat Bankası, Türkiye Halk Bankası Anonim Şirketi ve Türkiye Emlak Bankası Anonim Şirketi Hakkında Kanun*") O.J., No. 24241, Date: 11/25/2000. The reorganization process will be prescribed by the Council of Ministers (art. 2(1)(2) of the Act No. 4603). The Council of Minister also can not give the banks any assignment without paying consideration (art. 3(1)). Turkish Government established a commission to reorganize the banks before their privatization (Decision No: 2001/2202 (O.J., No: 24362, Date: 4.3.2001)) and Decision No: 2000/1698 (O.J., No. 24259, Date: 12.13.2000)).

272 Council of Ministers can extend this until 2005 (art. 2(1)(2) of the Act No. 4603).

273 Art. 7(1)(b) of the Act No. 5230 (O.J., No. 25539, Date: 7/31/2004).

274 See Ekmen, supra note 33, at 64, 68.

275 See *Ibid.*

276 See art. 2(f) and 13(a) of the Privatization Law.

277 See Art. 13(b) of the Privatization Law.

278 The assets of the Real Estate Bank of Turkey was consolidated with the other two government banks and liquidated due to a condition for the completion of the 8th review with the IMF (See art. 11 of Memorandum of Economic Policies to the IMF (May 3, 2001); Art. 15 of the Letter of Intent to the IMF (Jul. 31, 2001)).

Competition Act on merger control.²⁷⁹ However, merger control does not apply to the transactions within the same undertaking. SDIF took over a private bank (Pamukbank) and merged that into a government bank (People's Bank of Turkey).²⁸⁰ Government completed this consolidation through another piece of legislation containing the same exception.²⁸¹ Competition Authority's Merger Communiqué already excludes Acquisition by a Government Organization pursuant to a Statute with the aim of liquidation or privatization from merger control.²⁸² Merger Communiqué already exempts SDIF acquisition of private banks. The subsequent transfer to the People's Bank also did not also require a statutory exception as it was already exempt. Drafters of these legislations did not check on coherence and redundancy.

b. Joint Management of Government Banks

In order to ease control over the government banks and due to promises given to IMF, Turkish government appointed joint board of directors managing largest three government banks.²⁸³ The joint management was reporting to Turkish Treasury and expected to prepare the banks for privatization.²⁸⁴ The existence of joint management confirms that the government banks are in the same undertaking. At a national newspaper, former president of Competition Authority criticized the joint board of directors as a direct restriction on competition.²⁸⁵ Government banks are under the jurisdiction of Competition Authority for abuse of dominance cases. Shareholders meeting of these banks held on April 12, 2005 ended the joint management era.²⁸⁶ However, with or without joint management, government banks' collaboration is a substantial impediment to competition in the banking sector.

279 See Art. 7, 10 and 11 of the Competition Act did not apply to the transfer of the Real Estate Bank of Turkey by a statutory exception See temporary art. 3(6) of the Act No. 4603 inserted by art. 2 of the Act No. 4684 (Statute Regarding Amendment of Some Statutes), Date of Passage: 6.20.2001).

280 art. 3 of the Statute on Transfer of Pamukbank to the People's Bank of Turkey and Amending Certain Laws (Act No. 5230) (Date of Passage: 7.16.2004).

281 Banking legislation exempted this transfer is also from the application of Arts 7, 10 and 11 of the Competition Act (See art. 4 of the Act No. 5230).

282 See art. 3(1)(b) of the Merger Communiqué (Competition Authority).

283 See Art. 10 of Memorandum of Economic Policies to the IMF (May 3, 2001).

284 BRSA, *Towards A Sound Turkish Banking Sector*, at 12 (May 15, 2001) available at <http://www.bddk.org.tr/english/publicationsandreports/brsareports/annex_report_towards_a_sound_turkish_banking_sector%20.doc>. The new management undertook significant downsizing (See Art. 11 of Memorandum of Economic Policies to the IMF (April 3, 2002); Art. 21 of the Letter of Intent to the IMF (Jul. 30, 2002)).

285 Aydın Ayaydın, *Joint Management in the Government Banks Create Unfair Competition*, <<http://www.sabah.com.tr/2005/04/01/yaz1356-30-131.html>> (04/01/2005) (in Turkish)

286 New CEO of the People's Bank is from Albaraka <<http://www.sabah.com.tr/eko112.html>> (Last visited, April 13, 2005).

II. Reorganization of the Depository Banks

In order to strengthen and resolve the depository system, SDIF seized and reorganized 20 private depository banks in 1997-2002.²⁸⁷ Similar to the joint management in government banks, SDIF decided to establish joint management on SDIF banks according to the BRSA's action plan on the sale and resolution of SDIF banks.²⁸⁸

Turkish Parliament brought a separate statutory exception for SDIF on merger control in 1999. If SDIF seizes depository banks, then merger control does not apply if the total asset of the affected bank(s) does not exceed 20% of the total sector.²⁸⁹ This separate exception is no different than the general exception. Therefore, Banking Act of 2005 eliminated this separate exception, as its contents are not different from the general exception stated at the banks legislation. Competition Authority's Merger Communiqué already exempts SDIF transactions *ab initio*. Acquisition by a Government Organization pursuant to a Statute with the aim of liquidation or privatization does not fall to the scope of merger control according to Competition Authority's own Merger Communiqué.²⁹⁰ In short, Competition Authority had already waived merger control for SDIF without a statutory authorization.

SDIF banks represented 16% of total assets and 15% of total deposits of the system when the financial restructuring program initiated.²⁹¹ SDIF assets have not exceeded 20% threshold until 2005.

287 The government consolidations were as follows. Three banks (Egebank, Yurtbank, Yaşarbank, Bank Kapital, Ulusal Bank) have been consolidated with the Sümerbank. Two banks (Interbank, Esbank) consolidated under Etibank. Etibank merged with the Bayındırbank which is the bridge bank. 4 more banks (İktisat Bankası, Kentbank, EGS Bank, Toprakbank) merged with the bridge bank. Sitebank, Tarişbank, Pamukbank and Sümerbank have been put to sale (See BRSA (An Overview), *supra* note 217, at 19). A bridge bank was established in order to reorganize the other seized banks to meet the structural performance criterion in Sept. 2000 (Art. 5 of the Letter of Intent to the IMF (Jan. 30, 2001).; Art. 12 of the Letter of Intent to the IMF (Apr. 3, 2002)). SDIF has seized 2 more banks in Oct. 27, 2000 and one more in Dec. 6, 2000 (Art. 49 of the Letter of Intent to the IMF (Dec. 18, 2000)).

288 Art. 1(5) of the "Action Plan on the Sale of SDIF Banks" (11/17/2000) provided establishment of joint management of the 8 SDIF banks in order to: (1) Rehabilitation of banks, (2) Solution of the problems such as providing good management and following up the rights, accounts receivables and litigation of the banks, (3) Implication of the action plan by all SDIF banks in harmony, (4) Effective implication of BRSA and SDIF decisions in harmony. It should be noted that the language that "implication of the action plan" is duplicative as the action plan is also a BRSA decision.

289 Banks Act art. 14(7)(2) (*repealed*) inserted by the art. 7 of the Act No. 4491, An Act Amending the Banks Act. See also art. 53(1) of the SDIF Regulation (O.J., No. 24482, Date: 8/3/2001).

290 See art. 3(1)(b) of the Merger Communiqué (Competition Authority).

291 The BRSA, Banking Sector Restructuring Program Action Plan, <http://www.bddk.org.tr/english/publicationsandreports/brsareports/BSRP_ACTION_PLAN.doc> (Sept. 25, 2001)

Table 5: Asset Sizes in the Turkish Banking Sector (2000-2004)²⁹²

	Dec. 2000	Dec. 2001	Dec. 2002	Dec. 2003	Dec. 2004
1 SDIF Banks	8.5%	3.6%	4.4%	2.8%	0.6%
2 Foreign Banks	6.5%	3.1%	3.1%	2.8%	3.4%
3 I&D Banks	4.5%	4.7%	4.4%	4.1%	3.7%
4 Government Banks	34.2%	31.9%	31.9%	33.3%	34.9%
4 Private Banks	46.3%	56.7%	56.2%	57.0%	57.4%

Turkish government extended unlimited deposit insurance after the economic crisis of 1994. Commentators indicate that this unlimited deposit insurance served as a de facto exit barrier and consumers continued to deposit their money to untrustworthy banks.²⁹³ Unlimited deposit insurance prevented a bank run in 2001 crisis.²⁹⁴ The asset test is not an appropriate criterion for an exception as a bank run may diminish the assets of the seized banks after the SDIF takes over a depository bank.

III. Aftermath of the Restructuring Program

Restructuring program significantly distorted competition in the banking sector. Restructuring program decreased the number of banks through consolidations and liquidation. Concentration ratio was low before the restructuring program. Pre-restructuring program studies calculated HHI index as 957.2 for the Turkish banking sector in 1994 and as 710.2 in 2000.²⁹⁵ Other studies report HHI index (asset size) as 2,247 for year 2000 and 1,950 for 2003.²⁹⁶ HHI index (deposits) is 3,060 for 2000 and 2,161 for 2003.²⁹⁷ For loans, HHI index is 742 for 2000 and 1,203 for 2003.²⁹⁸ In short, concentration in the banking sector increased significantly after the restructuring program²⁹⁹ and it is diminishing.

The test employed by Competition Authority is also decisive in the concentration ratios. If the Competition Authority evaluates the government banks and the SDIF as a single undertaking, then the government banks' asset share will be 35.8% of

292 Prepared with the data from the Turkish banking sector financial tables available at <http://www.bddk.org.tr/english/publicationsandreports/yayinlarveraporlar_eng.htm#3>

293 See Ekmen, supra note 33, at 50.

294 A bank run did not occur even in the midst of 2001 crisis. Tevfik Bilgin, BRSA President, reminded banks of this fact and asked banks to take public opinion into account (milliyet.com.tr (9.16.2010) (in Turkish)).

295 R. Gaston Gelos & Jorge Roldós, *Consolidation and Market Structure in Emerging Markets Banking Systems*, IMF at 8 (May 2002) available at <http://www.worldbank.org/research/conferences/financial_globalization/consolidation2.pdf>.

296 See Ekmen, supra note 33, at 65.

297 See *Id.*, at 66.

298 See *Id.*, at 67.

299 See Competition Authority 2001 Report, supra note 54, at 112.

the total banking sector in 2005. This position clearly indicates a dominant position as largest private bank (İşbank) only had the 18.7% assets of the sector. HHI Index (assets) amounts to 990.24 for 2005.³⁰⁰ According to author's calculation, HHI index will jump to 1815.64 for 2005 if government banks are deemed as one undertaking. This fact indicates a highly concentrated market under the U.S. DOJ-FTC Horizontal Merger Guidelines.³⁰¹ Privatization of government banks will decrease the concentration ratios below 1000 in HHI Index terms.

§ 6. Conclusion

The competition policy in Turkey is relatively young. Competition Authority began their operations in 1997 and BRSA in 2000. Competition would be less burdensome in banking sector if the government adopted competition policy earlier.³⁰²

It would be more desirable if Competition Authority opened credit history market to competition as in America and applied more flexible market definition tests. Still, Turkish Competition Authority is successful in non-banking sectors. Turkish Competition Authority took brave decisions against statutory constraints to advocate competition policy and eliminated exclusive arrangements in installment cards sector. Competition Authority decision based on non-competition law rendered tying arrangements absolute. Competition Authority could not show its zealous advocacy of competition policy in merger control due to statutory restrictions.

Statutes brought numerous "exceptions" to Competition Act. Nevertheless, structure of the Competition Act modeled after Europe renders these statutory exceptions redundant. Competition policy will be more effective if BRSA and Competition Authority increase cooperation while drafting laws, rules and regulations and taking decisions.³⁰³ Turkish Parliament cleaned up the complex banking legislation enacted under emergency conditions but kept the merger control exception. As of 2005, Turkish banking sector operated with a HHI score of over 1800. Anticompetitive practices in banking reduce supply and cause credit crunch.³⁰⁴ The Prime Minister of Turkey and several members of the Turkish Cabinet openly criticized banks for financial crunch. What they ask for is competition on merits in banking. Market forces can start to work after privatization and abolishment of statutory exceptions to merger control.

300 This calculation is made according to the figures in Table 4. See supra.

301 See U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, at 15 (April 8, 1997).

302 See Mumcu & Zenginobuz, supra note 85, at 2.

303 OECD recommended considering prudential issues with relevant competition issues altogether (See OECD (The Role of Competition), supra note 35, at 31).

304 See Ekmen, supra note 33, at 1.