

**TURKEY***(1999)*

1. The Act on the Protection of Competition, No: 4054, which aims at the protection of competition by ensuring necessary regulation, supervision and the prevention of abuse of dominant position by undertakings holding dominant position in the market, and the agreements, decisions and concerted practices which prevent, restrict or distort competition within the markets for goods and services within the territory of the Turkish Republic was approved by the Parliament on December 7, 1994 and entered into force pursuant to publication in the Official Gazette dated December 13, 1994. It was only 1997 when the Competition Board, the decision making organ of the Competition Authority which is responsible for the enforcement of the Act, was appointed on February 27, 1997 with a delay of 27 months. However, the Competition Authority completed its organisation within such a short period like eight months, and announced it to public by a Communiqué issued as per the Temporary Article 2 of the Act on November 5, 1997 and started to operate thereafter.

**1. Developments in competition law and policies**

2. In 1999, a basic change didn't occur in the Act on The Protection of Competition, No:4054 directly. According to the article about the increase on administrative fines which takes place in all Acts by the change made to the Turkish Criminal Act, the fixed administrative fines have been increased 8 times, which were arranged in the 16th and 17 the articles of the Act on The Protection of Competition.

3. Banking Act No:4389 which was accepted on 18.06.1999 has changed by the Act No:4491 accepted on 17.12.1999, and new regulations were brought into The Turkish Banking System by these Acts. The authority to transfer the banks which are in difficulty to Saving Deposit Insurance Fund was given to the Banking Regulation and Supervision Board, which will be established by the changes to the articles of the banking acts regulating the supervision of banks. With the regulations introduced in the paragraph 6 of the article 14 of the Act, which is entitled "Measures to be Taken As a Result of Supervisions", the Fund was empowered to transfer those in difficulty to the other volunteering banks or a bank to be established, or to merge them with another volunteering bank. In case of the practice of this authority, via the clause "... The articles 7,10 and 11 of the Act on the Protection of Competition No:4054 are not applicable provided that the sector share of the total assets of the banks which shall be subjected to a transfer and a merger does not exceed 20 percent.", brought by the same article, the power of the Competition Authority to control is limited in merger and acquisition transactions to be made by the Fund.

4. The Competition Authority prepared two communiqués, and put them into effect in 1999. These are as follows in chronological order:

- Communiqué No. 1999/1, entitled " Communiqué on Announcement of Increasing The Administrative Fines Provided in The Articles 16 & 17 of The Act on The Protection of Competition No:4054, Being Valid Until 31/12/1999", issued in the Official Gazette No. 23800 and dated August 28, 1999.
- Communiqué No. 1999/2, entitled "Communiqué Concerning The Amendment in The Group Exemption Communiqué Regarding Franchise Agreements", issued in the Official Gazette No. 23853 and dated October 21, 1999.

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### 2. Implementation of the competition act

#### 2.1. *Implementation of Competition Rules with Regard to Agreements, Concerted Practices, and Decisions Restricting Competition and Abuse of Dominant Position (Articles 4 and 6 of the Act No: 4054)*

5. Article 4 of The Act on the Protection of Competition, No: 4054 (hereinafter, referred to as “The Act”) which aims at preventing the distortion of competition because of the agreements or concerted practices among undertakings or decisions of associations of undertakings preventing, restricting or distorting competition within the markets for goods and services, and Article 6 of the same Act which aims at preventing the abuse of dominant position by the undertakings holding dominant position in the relevant markets are parallel with the Articles 81 and 82, respectively, of the Rome Treaty, which are the model rules for the Turkish Act. In case of infringement of the Articles 4 or 6 of the Act in markets for goods and services, upon an application or on its own initiative, the Board may decide to initiate an investigation directly or to initiate a preliminary inquiry in order to determine whether or not it is necessary to initiate an investigation regarding those undertakings which infringe competition, as per the Article 40 of the Act. In case where the Board takes a decision on the infringement of Articles 4 or 6 at the end of the investigation, as per Article 16 of the Act, it decides to impose an administrative penalty on the undertaking or association of undertakings, which infringes competition rules.

6. According to article 55 of the Act; “ Final decisions of the Board can be subjected to a judicial review before Council of State within the specified time period following the notification of the decision to the parties. The decision shall become final if no action is taken before the judicial organ within this time period.” As understood, Council of State is the appeal court for the review of Competition Board decisions. Some final decisions are under examination in the Council of State, therefore there has been no finalised decision until 31.12.1999.

#### 2.1.a. *An overview of the Activities of The Competition Authority*

Table 1: Activities Between January, 1 1999 and December, 31

1. Total : Activities between January 1, 1999 and December 31, 1999	274
Decision finalised	67
Applications under examination	74
Applications that are not within the scope of the act	133

Table 2: Breakdown of Applications for The Infringements of Competition Rules By Sectors

Sector	Number of applications
Printing and Publishing	12
Food and Beverages	25
Transportation	26
Electricity/Electronics	1
Financial Services	7
Electricity, gas, water	5
Agriculture and Livestock Breeding, Forest Products	3
Cement, Construction Equipment	6
Office Equipment and Computer	4
Chemistry and Chemical Products, Oil Products, Petroleum-	11
Land Vehicles, Aircraft, Sea Vessels and Railway Carriers	9
Optical Equipment	1
Mine and Mining	4
Health, Education, Sport and self-employment Activities	11
Telecommunications	4
Tobacco Products	1
Tourism	1
Textiles and ready-made clothes	2
Plastic and Rubber Products	1
Machinery and Equipment Manufacturing	3
Others	4
<b>TOTAL</b>	<b>141</b>

7. As can be seen in Table 2, the number of competition infringements in sectors such as food and beverages, printing and publishing, cement and education is higher in comparison with the other sectors. This situation is supposed to be due to actions taken by the other informed actors in the aforesaid sectors in which investigations were initiated and carried out pursuant to the announcement of the formation of the Authority's organisation.

8. Between January 01, 1999 and December 31, 1999, the Board made six final decisions regarding investigations pending. Below, a brief information is presented concerning the mentioned investigations, one of which is explained in detail and referred to as the "Cement Case".

#### 2.1.b Cement Case

9. In conclusion of the preliminary research carried out upon the application by Izmir Chamber of Commerce, claiming that cement producers in the city of Izmir act against The Act via practising parallel price, the Competition Board has taken the decision to initiate investigation against Akçansa, Batiçim, Çimentas and Denizli Çimento, and examine the case in detail on the grounds of the serious findings indicating serious competition violations in the cement market throughout the Aegean Region. Due to the findings acquired during the course of investigation, it was decided to take as well Batisöke A.S. under the scope of investigation, and thus the number of undertakings falling into the scope of investigation rose to five.

10. **Cement** forms the **relevant product market** with regard to the sector where acts of complaint were performed. Due to the reason that the effect of transportation costs of cement on unit cost is high, a

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territory, covering certain distances where cement can economically be sold should be determined as the geographical market. Although there is no complete agreement regarding the distance, the general view is inclined towards the idea that it should not exceed 200-300 kilometres. Under the light of the information and documents received from the on-site-investigations, the relevant geographical market has been bordered as the Aegean Region.

11. When sales numbers and market shares of the factories operating in the Region are examined, it is seen that the Aegean Region has an oligopolistic structure. It is known that regional factories, Batiçim and Çimentas, meet a certain\* percentage of the demand while other factories under investigation altogether meet another amount of percentage, and although little in size, non-regional factories carry out sales within the Region.

12. When supply and demand within the current oligopolistic structure of the Region are examined, it is observed that there is almost a 600 000 tons of excess supply, as the total production is 5 130 000 and total consumption is 4 445 000 tons. And when sales by non-regional factories in the Region is taken into account, it is obvious that this excess supply will increase.

13. Within the frame of the oligopolistic structure of the sector, it is well known that the market is naturally fragmented into territories due to the transportation cost of cement being high, and dispersion of factory locations over the country. Cement Market of the Investigated Aegean Region as well enjoys such grouping popped up by such dispersion, and factories are grouped in two, namely "regional" and "non-regional".

14. Within this frame, it was detected that in agreements made in the Region, **production and sales tonnages of the regional factories and the amount of cement permissible from out of the region are determined.** During the investigation carried out over the Aegean Region, in addition to the aforementioned market sharing agreements where sales of a whole year is determined, it was inspected that various times a year, other agreements had been made as well. A significant part of these are geographical market sharing and price fixing agreements made pursuant to frame agreements whose aim is to determine and protect factories' market shares in the Region, and aim at factories' maximum profit in addition to the protection of market shares.

15. Among regional factories under the scope of investigation, a text of agreement on primarily "protection of exclusive sales territories" was not detected. However, from the provisions regarding the subject that were found in market sharing, price fixing etc. agreements, from the mutual written notifications following factories' violation of the sales territories, and from the minutes of negotiations made with the cement dealers, it was found out clearly that there is a "gentlemen's agreement" on this matter.

16. As the production of factories exceeds the demand from the centre and nearby, geographical market sharing is not limited to factory centre and nearby. Whereas every factory could carry out sales activities at the other's centre and nearby, via dropping the prices and competing with the other, this is not the case as required by the agreement; so the factory carries out sales activities in determined common territories (buffer zones), and thus provides protection for the price in the centre. As an example, the town of Bodrum is where many factories carry out sales and there is high demand. Thus, prices in Bodrum are lower than those in protected territories. Bodrum and Izmir are located almost at the same distance from the city of Denizli. In this case, in case Denizli Çimento transfers cement to Izmir, then this will lead to a more profitable sale than sales at Bodrum. Vice versa is a true case as well. It means that from the perspective of all undertakings, a short disobedience to cartel looks highly profitable. However, retaliative

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\* The percentage figures are confidential, and therefore not published.

acts of undertakings which enliven competition in the market will in the long run lead to a drop in cement prices, and have negative effect on all undertakings. And even, the excess supply will accelerate the process so that this result will appear sooner. In this case, the most useful practice for undertakings is to carry on with the agreements. But from the domestic demand point of view, as even a rigid geographical dispersion of the market is theoretically not possible among undertakings in a sector of excess supply, the practice has been softened to some extent, and it is seen that excess production is utilised in the most profitable way for undertakings throughout the buffer zones, territories that are open to competition, and in case necessary in external markets via at least making high demand territories nearby the factories exclusive. What make the practice possible are the differing prices practised as per sales centres, and rigid monitoring mechanism on sales network.

17. In order to inspect the accuracy and popularity of the subject views, the inspection comity carried out negotiations with 21 cement vendors operating in the centre of Denizli, and prepared a negotiation minutes regarding the reason of high rated price fluctuations. According to the minutes, cement prices change within such short periods at significant rates, and there is hardship in explaining these over-fluctuations to cement users; and it has been stated that the only reason for these fluctuations are the agreements among factories, and been added that the said agreement aims at both sharing the market where cement sales would be carried out and not entering into each other's markets, and fixing prices as per the above-stated agreement.

18. Price comparison for Çimentas and Batiçim between the dates 01.01.1996 and 15.10.1997 was made, and it was detected that most price increases by the two firms encounter the same dates, and it was detected that even when there were 1-2 days of difference due to some private reasons, the increase was put into practice on the same day. However, within the frame of new evidence provided at the investigation stage and during the detailed examination on prices, it was concluded that to make an agreement was again the chosen way on price fixing.

19. Fixed prices deteriorate after a while due to drop in prices (as a consequence of disagreement or seasonal factors), and sometimes this drop in prices is responded by other factories; particularly, in winter season, excess stocks of the factories of interior regions may be sent to coast lines at highly discounted list prices, and this situation may be intensified in case responded by coastal factories. In consequence appears the necessity for every producer to make a new agreement for its own benefit. However, the agreement reached at the consequence of new negotiations and meetings may only survive for a short while in general due to excess supply, and in particular, due to the excess stock problem encountered by the factory.

20. In other words, the pressure created by excess supply to drop prices is kept at minimum through agreements between factories. And as the export cartel formed via compulsory imposing of some part of excess capacity on export is not enough to completely diminish excess supply, prices continuously fluctuate between excess supply and inclination towards agreement. One of the most important problems regarding the price of cement is the instability in the market that is due to the drop of prices in addition to high rate of increase in issued prices.

21. Due to the high transportation cost, cement is a product for which the following is true: the further the sales site located to factory, the lower the profitability is. What lies under the qualification of exported cement as "compulsory export" is the wide difference between domestic and export prices. The FOB price implemented in export is highly lower than the domestic price. In general, one ton of cement exported for around 30 USD is sold at 50-55 USD in the domestic market.

22. Despite this disadvantage of price, however, it is obvious that some of the production must be exported in order the balance that has been established by market sharing and price fixing in the domestic market to operate and be protected. The problem of excess supply is in a sense solved this way. But again,

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the fact that export prices are below artificial prices formed via domestic market agreement does not change. Despite the excess supply in the cement market today, when we have a look at high capacity increases initiated in the sector, and when projections of significant cement exporters are examined, we see that there is an effort towards decreasing export and getting more shares from domestic sales. Factories anticipate that in the future, export will bring less profit than domestic sales. Because the projections provide for an increase in cement consumption per person up to double today's amount.

23. Under the light of the evaluations carried out, the Competition Board in its meeting on 17.06.1999, determined:

- that AKÇANSA Çimento San. ve Tic. A.S., BATICIM Batı Anadolu Çimento San. A.S., ÇIMENTAS İzmir Çimento Fabrikası Türk A.S., DENİZLİ Çimento San. Tic. A.S. and BATISÖKE Söke Çimento San. ve Tic. A.S. obviously go for a market sharing, determining their sales in 1997 in the Aegean Region beforehand via agreement;
- that although examination of the sector covering the Aegean Region was initiated in 1997, subject undertakings determined sales for 1998 via agreements and shared the Aegean Region market;
- that as clearly and in detail understood from the documents indicating the agreement for the year 1998, subject market sharing agreements not only include points regarding sales in domestic market, but as well they show that an export cartel has been built up by undertakings under the scope of investigation aiming at the protection of profitability in domestic market, and that under the framework of the conditions given in the above-stated section where market sharing is explained in detail, the product named "excess clinker" is subjected compulsorily to export via agreements;
- that again aiming at the protection and increase of profitability at the domestic market, there has been a geographical market sharing, via leaving high demand territories where factories are based (centres) and their nearby to the factory or factories based in that territory, aiming at determining prices and other sales conditions of this territory in a monopolistic sense, so far away from the competitive structure; and that geographical market sharing has not only been limited to leaving stated high demand territories to local factory or factories but in addition to this, which factory will do how much sales at territories other than those, or how much its share is going to be from sales at subject settlement areas were determined via agreements;
- that at the conclusion of the detailed work regarding price formation carried out pursuant to the claim: " The Act has been violated in the sense of concerted practice, via parallel price practices in central towns of the City of İzmir.", and that price fixing covered not only central towns of the City of İzmir, but also, this violation covered the whole Region via agreements by undertakings - factories of the Region - under investigation;
- that none of the parties has made any valid exemption applications within the six months period of transition regarding agreements that fall under Temporary 2<sup>nd</sup> Article and Article 4 of the Act No: 4054, and which are in effect on 05.11.1997.

24. The above-stated acts obviously violate the general provision:

"The agreements and concerted practices of the undertakings and associations of undertakings and decisions of the associations of undertakings which cause or may have as their object the

prevention, distortion or restriction of competition in the market for goods and services are unlawful and prohibited." and in particular,

clause (a) "Fix purchase or selling prices, or the factors such as cost or profit which form the price, or all other trading conditions concerning purchase and sales;" clause (b) "Share the markets for goods and services, or share and control the sources and elements of markets;" and clause (c) "Control the quantities of supply or demand in the markets for goods and services, or determine these figures outside the market conditions;"

of the Article 4, entitled "Agreements, Decisions and Concerted Practices in Restraint of Competition", of the Act ,

and thus, decided to impose the following fines on undertakings under investigative scope as per Paragraph 2 of Article 16 of the Act:

a) Akçansa Çimento San. ve Tic. A.S.	251 631 855 000 TL
b) Batiçim Bati Anadolu Çimento San. A.S.	278 234 520 000 TL
c) Batisöke Söke Çimento San. Ve Tic. A.S.	72 196 470 565 TL
d) Çimentas •zmir Çimento Fabrikası Türk A.S.	200 949 949 290 TL
e) Denizli Çimento San. T.A.S.	71 159 004 329 TL

#### 2.1.c. *Private Schools Case*

25. In the decision of Competition Board dated February 11, 1999 and No. 99-6/48-17, in conclusion of the investigation initiated on the impute that decisions by the Private Schools' Association with regard to the determination of school fees violate The Act, it was decided that there is no violation of the aforesaid Act.

#### 2.1.d. *BIAK Case*

26. In the decision of Competition Board dated March 4, 1999 and No. 99-13/99-40, in conclusion of the investigation initiated on the impute that Article 2.1.8 of the Press Monitorisation and Research Contract (BIAK) undersigned by undertakings/associations of undertakings investigated, covering the provision:

"... In order to become a member of BIAK, approval by the establishing members is required for those media institutions using distribution channels other than those of the former ... ", was considered to be creating a barrier for entry to press monitorisation and research market created by BIAK, and that it is qualified to lead to effects limiting competition in printing media advertisement market, and that refusal of the application by Üiversal Yayincilik A.S. to BIAK membership on the grounds of Article 2.1.8 of the Contract violates The Act, it was found out that the subject provision was withdrawn from the contract within the 6-month notification period, and was concluded that there was no obvious violation of The Act, and thus it was decided not to impose the penalty envisaged in clause (c) of paragraph 1 of Article 16 of The Act.

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### 2.1.e *Bread Case*

27. In the decision of Competition Board dated October 27, 1999 and No. 99-49/536-337, in conclusion of the investigation initiated on the impute that associations of undertakings operating in Istanbul bread market violate The Act, it was concluded to impose administrative penalty as per Article 16 of The Act on Bahçelievler, Güngören, Büyükçekmece, Bağcılar, Beyoğlu, Samandıra, Atısalanı, Gaziosmanpaşa, Sisli, Avcılar, Ümraniye, Kadıköy, and Sultanbeyli Floor and Floor Product Production and Marketing Cooperatives, and Maltepe Bakers Delivery and Distribution Co-operative who were found to be violating The Act.

### 2.1.f *Cine 5 Case*

28. In the decision of Competition Board dated October 11, 1999 and No. 99-46/500-316, in conclusion of the investigation initiated upon the claim of BIMAS United Media Marketing A.S. that agreement between Turkish Football Federation and Cine 5 Film-Making and Production A.S. regarding publication of The Turkish First Professional Football League matches from TV Channels and practices based on the mentioned agreement, violated The Act, it was concluded to impose administrative penalty as per article 16 of The Act on Cine 5 Film-Making and Production A.S. who was found to be violating The Act.

### 2.1.g *IGTOD Case*

29. In the decision of Competition Board dated November 24, 1999 and 99-53/575-365, in conclusion of the investigation initiated upon the claim of IGTOD (Istanbul Wholesale Traders of Food Supplies) that The Act was violated, regarding the protection of competition in wholesale trading market of food and non-food non-durable goods of consumption, it was concluded to impose administrative penalty as per Article 16 of The Act on Benckiser Temizlik Malzemesi San. ve Tic. A.S., Sezginler Gıda San. ve Tic. A.S., Ülker Gıda San. ve Tic. A.S., Besler Gıda ve Kimya San. ve Tic. A.S., Eczacıbaşı Procter&Gamble Dagitim ve Satis A.S., Marsa Kraft Jacobs Suchard Sabancı Gıda San. ve Tic. A.S., and Unilever San. ve Tic. A.S. and LeverElida Temizlik ve Kisisel Bakim Ürünleri San. ve Tic. A.S. of Unilever Group who were found to be violating The Act .

## 2.2 *Exemptions and Negative Clearances*

30. Article 5 of The Act allows the Board to exempt an agreement, concerted practice or decision restricting competition from the provisions of Article 4 subject to the existence of certain conditions and upon the application of the parties concerned, and authorises the Board to issue group exemption communiqués for the agreements of a particular category. Also, under Article 8 of The Act, upon application of the concerned, a negative clearance certificate may be given, certifying that the agreements, decisions, concerted practices, or mergers and acquisitions of the undertakings or of associations of undertakings are not contrary to Articles 4, 6 and 7 of The Act.

31. Following is the exhibit of the distribution of a total of 66 exemption and negative clearance decisions by sectors, which are finalised by the Competition Board in 1999.

Table 3. Breakdown of Exemption/Negative Clearance Decisions  
By Their Sectors

Sector	Number of Decisions
Printing and publication, registered media such as records, cassettes	5
White Goods	3
Glass and Glass Products	4
Electricity-Gas-Water	1
Electricity and Electronics	1
Financial Services (Banking, Insurance etc.)	2
Paper and Paper Products	3
Land Vehicles, Aircraft, Sea Vessels and Railway Carriers	10
Chemistry and Chemical Products, Petroleum Products Fertiliser	2
Machinery and Equipment Manufacturing	4
Fired Clay and Ceramics	1
Plastic and Rubber Products	1
Health, Education, Sports, and Self- Employment Activities	1
Textiles and Ready-made Clothes	6
Transportation	1
Food and Beverages	18
Construction, Cement and other materials of production	3
<b>TOTAL</b>	<b>66</b>

32. In addition, below, a brief information about two of the decisions mentioned above is provided:

2.2.a *Rowenta Case*

33. Upon the application for granting negative clearance, under the article 8 of The Act, to the Production Agreement (“Renewal Agreement”) concluded between Elektrotek Electricity Industry and Trade Inc., Rowenta Werke GmbH and Rowenta France S.A., and to the agreement (“Agreement”) concluded between Tefal Istanbul Household Appliances Trade Inc., Elektrotek Electricity Industry and Trade Inc., Elektropak Electricity Industry Inc., Ileri Electricity Export and Trade Inc., Rowenta Werke GmbH and Rowenta France S.A.; the Competition Board decided in its meeting of 28.09.1999 to conditionally grant an exemption for 5 years to the agreements in question, as a result of negotiating the report prepared by the Reporters, and the evaluations performed. Below-mentioned are the relevant parts of the said decision.

34. It was expressed that:

“Among the agreements which are the subject of notification;

- With the Renewal Agreement, the aim is to extend until 2006 the exclusive right granted to Elektrotek, one of the companies of Cankurtaran Group, for producing and distributing some of Rowenta products in Turkey,
- With the provision for prohibiting competition introduced by the “Agreement”, the aim is to ensure that Cankurtaran Group does not compete with SEB Group during the renewed Production Agreement, or as long as its partnership with SEB Group in Tefal company

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continues, whichever is later, except for Rowenta products it produces and distributes in Turkey.”

Below-mentioned conclusions were reached as a result of examining the application with regard to the request for granting negative clearance to the Renewal and Non-Competition Agreements in question:

It is obvious that the “Renewal Agreement” and the “Agreement” infringe the article 4 of The Act due to involving provisions such as non-competition, introducing limitations as to the purchase and sale of products, and determining the territory. Therefore, the parties’ request in relation to negative clearance for the said agreements could not be fulfilled.

It is requested in the Notification Form that in case the Renewal Agreement and the Agreement which is its complementary cannot be granted a negative clearance, an exemption be granted. As a result of examining both agreements in terms of an individual exemption under the conditions which take place in the article 5 entitled “Exemptions” in The Act, it is realised that the Renewal Agreement satisfies all the conditions included in the article, and the Agreement shall fall within the scope of the same exemption under specific conditions as it is the complementary of the Renewal Agreement. Namely;

- Certain obligations and limitations listed in the articles of the Renewal Agreement generally ensure an improvement in the production of products and a development in technical process. These render patentholders more willing to license, and increase the inclinations of licensees to produce, use or introduce a new product, or make the necessary investments for utilising a new process.
- Licensor’s furnishing support in matters such as training besides its technical support, shall allow obtaining high efficiency by means of ensuring specialisation in production processes of the products in question. With an increase in efficiency and a decrease in costs, and its reflection on prices, the consumer shall have the opportunity to receive a more quality service in a cheaper way. Furthermore, via technical and training support provided, both continuity and trust shall be established in the provision of a service, and an upgrade shall be ensured in quality.
- When the relevant geographic market is considered as overall Turkey as a result of the agreement concluded between the parties, there does not happen a considerable change in the competitive conditions of the market. When it is taken into account that the concentration rate is low in the relevant product market, and there are no barriers to entry into the market, it is thought that competition is not eliminated in a significant part of the relevant market.
- Restrictions of competition imposed on the parties concern the licensor’s placing itself under guarantee in certain aspects despite granting such license, and preventing the abuse of technical information, formulas obtained as a result of long processes and its brands, and protecting the quality and standard of the product created by it. Thus, the restriction of competition introduced by the agreement is compulsory in order to achieve the goals in the sub-paragraphs listed above.

As for the Non-Competition Agreement, it is understood from the text of the article 1 of the Agreement that Cankurtaran Group companies agree and undertake not to conduct any commercial activities with regard to any goods likely to compete with the products distributed by Tefal, or work on behalf of another corporate body or natural person conducting such

activities, as long as the Production Agreement (Renewal Agreement) is in force, or Cankurtaran Group has a share in Tefal even though it expires. Limitations which take place in the article exceed the scope of those limitations imposed on the members of the board of directors of the company, which take place in the article 335 entitled “Competition Prohibition” in the Turkish Commercial Act, and constitute a violation under the article 4 of the Competition Act by means of creating an effect of eliminating competition between the undertakings producing, distributing and marketing the relevant products in the small electrical household appliances market which is the relevant product market. However, taking into account the feature that the agreement is a continuation of regulations to which the formerly existing production and distribution agreements were subject, it needs to be considered not alone but within the exemption conditions to which the Renewal Agreement as to the Production Agreement would be subject, and it is required to detect how the Renewal Agreement affects the relevant market with the de facto situation created by the Non-Competition Agreement.

Via the Non-Competition Agreement, as is included in the above paragraph, it was intended to guarantee that those companies producing and distributing a product group belonging to a particular brand would not conduct an activity damaging the right of brand of the company which is the actual owner of that brand, and they would not use the licensed technical information and procedures they employ in the production of a competing good. However, it is obvious that the non-competition obligations imposed are quite heavy, and they may pave the way for an effect of distorting competitive conditions in the relevant market. Likewise, except for Rowenta products produced and distributed by Cankurtaran Group in Turkey, the obligation to non-competition with SEB Group compares to the case of “...restricting that one of the parties competes with the other party, an enterprise affiliated with the other party in terms of research and development, production, use or distribution of the competing products” in the Commission Regulation numbered 240/96/EC as well, and it is mentioned in the Commission Regulation that an agreement introducing such limitations shall fall outside the scope of an exemption. But, when one takes into account the facts that Cankurtaran Group’s presently conducting the production, distribution and marketing activities of the products belonging to the same product group with Rowenta under the brand “Conti” owned by it and its continuing these activities in the future are excluded from the agreement in the article 1 of the Non-Competition Agreement, the concentration rate of the relevant market is low, it is an unsaturated market yet, there exists no barriers to entry, there is a great diversity of products and brands, and that prices differ considerably from one brand to the other, it shall be appropriate to realise that the reservation of non-competition shall not create an effect of distorting competitive conditions in the small electrical household appliances market, and to understand the non-competition obligation as mostly guaranteeing that the licensee does not employ the patent and know-how as long as they remain confidential, and does not use them in the research, development, production and distribution of the competing goods, as is also deemed appropriate by the relevant Commission Regulation. In this regard, it may be considered reasonable that SEB Group which is the actual owner of Rowenta brand and products aims to maintain the investment made by it in Turkey, and asks for certain assurances in view of the technology and accumulation of knowledge which it introduced to the market and which contributed to the diversification and development of the market, and the commercial credit and reliability gained by Cankurtaran Group by using the brand Rowenta.

Hence, the applicability of the Production Agreement is strengthened via the Agreement, and stronger sanctions are being imposed against the future violations of brands, patents and know-how. On the other hand, the acceptance of the Agreement in this form is only possible

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in case its duration is limited to the Renewal of the Production Agreement. Should the Agreement be modified such that it involves this change, it may be the subject of exemption as the continuity of the Production Agreement.

As a result of the foregoing evaluations;

It was decided that

The agreements in question could not be granted negative clearance as they expressly infringe the article 4 of The Act;

An exemption for five years be granted pursuant to the article 5 of The Act provided that the expression included in the first paragraph of the article 1 of the Agreement (the Non-Competition Agreement), which reads as “Elektrotek, Elektropak and Ileri, during the Production Agreement whose duration is extended until 31.12.2006, or as long as Cankurtaran Group or its affiliated companies are shareholders in Tefal, whichever is later” be modified as “Elektrotek, Elektropak and Ileri, during the Production Agreement whose duration is extended until 31.12.2006.”

### 2.2.b *Glass Case*

35. Upon the application for obtaining negative clearance, under the article 8 of The Act, to the "Manufacturing/Technical Assistance/Technical Data Agreement" ("Licence Agreement") concluded between Turkish Bottle and Glass Factories Inc. and Sierracin/Transtech (Transtech) which is a part of Sierracin/Sylmar Corporation; the Competition Board decided in its meeting of 28.09.1999 to grant an exemption for 5 years as a result of negotiating the report prepared by the Reporters, and the evaluations performed. Below-mentioned are the relevant parts of the said decision.

36. Via the "Manufacturing/Technical Assistance/Technical Data Agreement" signed between Sisecam and Sierracin/Transtech which is the subject of application, Sierracin/Transtech granted Sisecam an exclusive right for selling middle sheets and producing the agreement products in Turkey with regard to manufacturing non-aviation glass coated polycarbonate and laminate glass products, and a non-exclusive right for using and selling the agreement goods in all agreement territories with regard to the products and geographic markets directed at merely the usage areas mentioned in the agreement.

37. The company who granted a license pursuant to the following provision in the article II/A of the agreement entitled "Licensing" guaranteed that in Turkey it shall not grant a right of license to another company other than Sisecam in this area: "...Transtech grants to the licensee a non-exclusive right for using and selling the agreement products in the whole agreement territory, only with regard to the products and markets covered by the usage areas, and an exclusive right in order to manufacture the agreement products in Turkey". In paragraph B of the same article of the agreement, it granted to the affiliated companies of the licensee a non-exclusive right for using and selling the agreement products in the whole agreement territory, and the definition of an affiliated company is made in the article I/F of the agreement. However, the main addressee in this regard is considered as Sisecam which is the parent company.

38. Sisecam pioneered in the production in Turkey of polycarbonate bullet-proof glass which is an indispensable product for military armoured vehicles, and vehicles and places requiring high ballistic protection. Again as expressed in the foregoing sections, Sisecam shall continue maintaining and employing the information and technology it would obtain about the production of the product in question even after the expiration of the license agreement. With the production of polycarbonate bullet-proof glass

in Turkey, a new product having strategic importance, thus a new technology is introduced to our country. Besides, the agreement in question bears the conditions mentioned in the sub-paragraphs (b), (c) and (d) of the article 5 of The Act.

39. As to the "Manufacturing/Technical Assistance/Technical Data Agreement" concluded between Turkish Bottle and Glass Factories Inc. (Sisecam) and Sierracin/Transtech (Transtech) which is a part of Sierracin/Sylmar Corporation;

40. It was decided that the agreement in question be granted an exemption for five years as of 23.12.1998 considered as the date of application, due to the fact that granting an exclusive right with regard to the production of the agreement products in Turkey which takes place in the article II/A and subsequent articles of the agreement is one of the practices distorting competition which is defined in the article 4 of The Act, and that therefore the requested "Negative Clearance Certificate" could not be granted pursuant to the article 8 of The Act, and that it fulfils all of the conditions mentioned in the article 5 of The Act.

### 2.3 *Mergers and Acquisitions*

#### 2.3.a *Number and Categories of Mergers and Acquisitions Notified to the Competition Authority*

41. Between January 01, 1999 and December, 31 1999, there were 86 applications made to the Authority for mergers and acquisitions within the framework of Article 7 of The Act, and communiqués issued on the basis of this Article. The Board has taken decision regarding 72 of these applications. However, remaining 11 applications have not been concluded yet. The breakdown regarding total number of applications and categories of concluded mergers and acquisitions is provided below.

Table 4: General Information About Applications of Merger and Acquisition

Applications given permission (by way of privatisation 1)	32
Applications refused	1
Applications out of scope	42
Applications under examination	11
<b>Total</b>	<b>86</b>

Table 5: Breakdown of Categories of Concluded Mergers and Acquisitions

Mergers	3
Acquisitions	22
Joint Ventures	6
Mergers and Acquisitions by way of Privatisation	1
<b>Total</b>	<b>32</b>

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Table 6: Breakdown of Decisions Related to Mergers and Acquisitions By Sectors

Sectors	Mergers	Acquisitions	Joint venture	Privatisation	Total
Chemistry and chemical products, petroleum products, fertilizer	1	2	2	1	6
Construction, cement and other materials of construction		1			1
Printing and publication, registered media such as records, cassettes		1			1
Food products and beverages		5			5
Textiles and ready-made clothes		3	1		4
Machinery and Equipment	1	1			2
Manufacturing					
Financial services (banking, insurance etc.)		4	1		5
Land vehicles, aircraft, sea vessels and railway carriers		2	1		3
Telecommunications	1				1
Tobacco Products		1			1
Fired Clay and Ceramics		1			1
Medical and Optic Equipment		1			1
Furniture, White Goods, Jewellery			1		1
	3	22	6	1	32
Total					

### 2.3.b Sample Decisions Regarding Mergers and Acquisitions Taken by the Board

42. Among a total of 75 merger and acquisition cases resolved by the Board between January 1, 1999 and December 31, 1999, below-mentioned are the overviews of 4 sample cases selected considering the factors such as the type of the procedure, the relevant market, the extent of the examination, and the nature of the decision.

#### 2.3.b.1 Dusa/Kordsa

43. In the meeting of the Competition Board dated March 03, 1999, the acquisition in question was permitted as a result of the evaluation, and the discussion of the report prepared by the rapporteurs, upon the application related to authorisation to the take-over of DUSA Endüstriyel Iplik San. ve Tic. A.S. by KORDSA Kord Bezi San. ve Tic. A.S. Following are the related parts of the mentioned decision for permission:

“Related product markets that are subjects of the acquisition are "high desitex and enduring nylon fibre (nylon 6 and nylon 6.6) used in industrial applications, cord fabric manufactured from this said fibre, and industrial fabrics used in MRG (Mechanical Rubber Goods) production.

Markets, which shall be effected by the acquisition, are cord fabric produced by KORDSA, and wheel rubber and conveyor rubber used in the processes of the production of other industrial fabrics.

On the other hand, undertakings that are parties to the acquisition carry out their production and marketing activities all around Turkey. Regarding the related products, taking into consideration that there should not be any significant difference among regions with regard to competition conditions and entry barriers, relevant geographical market has been determined as Turkey in general.

DUSA, a party to the acquisition, markets its high desitex and enduring nylon fibre that is used in the production of cord fabric to only KORDSA.

With the acquisition of DUSA by KORDSA, production of high desitex and enduring nylon 6.6 industrial fibre by DUSA shall be transferred to KORDSA. Before the acquisition it was stated that KORDSA aims at using this production for its own production of cord fabric and industrial fabrics for MRG, and marketing the remaining production.

Vertical concentrations, which can be defined as the merging of undertakings who take place in different stages of production, directly change the market structure. In addition, they may lead to effects, which create serious entry barriers and disadvantages on competition.

The subject acquisition does not lead to a structural change in relevant markets. In the same way, only KORDSA, the acquiring undertaking, sells in the Turkish market the products of DUSA, the undertaking acquired and the supplier of KORDSA, and no sales takes place between other undertakings other than partners. Thus, subject acquisition has no effect to pull up market share, and in parallel to this, it is not qualified as a concentration, which leads to a significant decrease of competition in relevant markets. There are no elements hindering entry to market other than high technology and extent of the investment. Subject acquisition complies as well with the world tyre rubber producers markets' trend towards directly purchasing cord fabric instead of taking high desitex and enduring nylon 6.6 industrial fibre and exposing it to converter processes.

The acquisition will lead to the conclusion that "Sabanci Group" and "DuPont Group" who have between themselves a partnership in high desitex and enduring nylon 6.6 industrial fibre field will expand to industrial fabric markets for cord fabric and MRG, and that parties will mutually make use of each other's "know-how". Parties of a previously settled partnership will not change, but the scope of the partnership is expanding.

Where the acquisition of DUSA Endüstriyel Iplik San. ve Tic. A.S. by KORDSA Kord Bezi San. ve Tic. A.S. is an acquisition falling under the Communiqué No: 1997/1, entitled "the Communiqué on the Mergers and Acquisitions Calling for the Authorisation of the Competition Board", of the Turkish Competition Authority, it was concluded after evaluations that this procedure does not create a dominant position or strengthen any existing dominant position as to the meaning of Article 7 of The Act and as a result of this, it is not considered to be reducing competition throughout the whole country or a certain part of it, and on these grounds, authorisation for the notified acquisition is granted."

### 2.3.b.2 *E.I.DuPont/Tongkook*

44. In the meeting of the Competition Board dated January 28, 1999, the acquisition in question was permitted as a result of the evaluation, and the discussion of the report prepared by the rapporteurs, upon the application related to the acquisition of assets belonging to Tongkook Synthetic Fibres Co. Ltd. by E.I. DuPont de Nemours. Following are the related parts of the mentioned decision for permission:

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“In the conclusion of the acquisition, Tongkook Synthetic Fibres Co. Ltd. shall completely withdraw from the elastin market, and activities of the company in this market will completely be left to the control of E.I. DuPont de Nemours Co.

The acquisition falls under the scope of The Act, even though parties do not have production sites established in Turkey, but affect the Turkish market through export.

In the conclusion of the acquisition, it is assessed that market share of DuPont shall rise to at least around 45-50 percent, and its leadership at the market shall be strengthened. In addition to this, there appears no change either in market ranking or in the general structure of the market. And moreover, in case the acquisition does not take place, there shall be the case of Tongkook's withdrawal from the market.

Taking into consideration that the relevant product market in which acquisition takes place is highly dynamic, and various and many companies enter into and exit from it, and that the market structure shall not change significantly after the acquisition, and that the character of the market shall not be so different from the current look for the European and American firms who significantly hold market power in hand, it is concluded that this acquisition does not affect effective competition in the country or in a certain part of it.

In the conclusion of the subject acquisition, it was concluded that there shall be no significant reduction in competition, which in effect may create dominant position or strengthen an existing dominant position as stated in Article 7 of The Act, and on these grounds, authorisation for the acquisition of Tongkook Synthetic Fibres Co. Ltd., based in the South Korea, by E.I. DuPont de Nemours, based in the USA is granted.”

### 2.3.b.3 *Vateks/PGI Nonwovens B.V*

45. In the meeting of the Competition Board dated March 03, 1999, the acquisition in question was permitted as a result of the evaluation, and the discussion of the report prepared by the rapporteurs, upon the application related to acquisition of 51 percent of the shares of Vateks Tekstil San. A.S. by "PGI Nonwovens B.V.". Following are the related parts of the mentioned decision for permission:

“In the subject acquisition, 51 percent of the shares owned completely by Vateks shall be acquired by PGI based in the Netherlands. From the information and documents found in the file, the aims of the acquisition are found out to be strengthening the capital structure of Vateks by increasing the current capital - 1 trillion TL - to 2.7, rising the capacity of the production plants that are not currently running at full capacity to 100 percent running, co-operating technically and increasing the quality of the products of the parties, making new investments, creating new employment fields and thus contributing to country's economy.

Taking into consideration that turnovers of the aforementioned firms of acquisition are below the limit of twenty-five trillion, envisaged in the Communiqué, and the market share of Vateks is [.]<sup>\*</sup> percent in the hygienic nonwoven market, it is examined that the 25 percent market share limit is not exceeded within the provisions of the Communiqué; however, that Vateks holds [.]<sup>\*</sup> percent of the cleaning fabrics market, and [.]<sup>\*</sup> percent of industrial nonwoven market. In this case, due to the fact that the subject acquisition covers all of hygienic nonwoven, cleaning fabrics, and industrial nonwoven markets, and starting off with the idea that it would be the right step to

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\* The percentage figures are confidential, and therefore not published.

evaluate each three markets together, it is concluded that the subject acquisition falls under the Communiqué No: 1997/1, entitled "the Communiqué on the Mergers and Acquisitions Calling for the Authorisation of the Competition Board".

46. Mergers and acquisitions found out to be unlawful, and thus prohibited are those that lead to what is described in Article 7 of The Act as: "...which would create or strengthen a dominant position ... as a result of which competition would be significantly impeded in a market for goods and services in the whole territory of State or in a substantial part of it ...". Within this frame, pursuant to the acquisition, Vateks and PGI together, do not create a dominant position with regard to their positions, either in hygienic nonwoven, or in cleaning fabrics' market or in industrial nonwoven market. Taking into consideration the current and potential competition conditions in the nonwoven field, and the density of import in hygienic and industrial nonwoven markets, it is concluded that this acquisition would not result in a significant reduction of competition in the relevant product market.

47. It has been communicated that the subject acquisition shall be covering all confidential, technical information, procedures manuals, formulas, specifications, customer and market information, marketing and sales documents, brands, patents, know-how, ownership information, and all of the licence agreements.

48. When the text of the Shareholders Agreement of the acquisition, for which authorisation is required, is examined, Article 8 is found to be entitled: "Non-Competition Agreement". In this article, the following is stated: " PGI and all shareholders undertake that, during the course of their shareholdership in PGI Vateks, and during the course of three years pursuant to the termination of their shareholders title, they shall not invest on any present or future company or assets, which compete with PGI Vateks in Turkey."

49. In the acquisition-take over procedures of undertakings, it is generally the case that the acquiring party envisages the transferring party not to compete with it after the acquisition. This situation is particularly the case in acquisitions where the acquiring parties are unfamiliar with the subject market and transferring parties that have a customer portfolio and know-how in the current market. Due to the reason that certain time is required in order the acquirer to form the know-how and customer portfolio of its own, in other words in order to adapt itself to the market, it would be right to evaluate non-competition agreements as a necessity of commercial life.

50. Taking into consideration that all confidential, technical information, procedures manuals, formulas, specifications, customer and market information, marketing and sales documents, brands, patents, know-how, ownership information, and all of the licence agreements and customer portfolio fall under the subject acquisition, and that non-competition condition is imposed for a limited period of three years, it is considered that the provision entitled "Non-competition Agreement" envisaged by the parties to acquisition in the Shareholders' Agreement complies with subsidiary limitation criterion of the EC practices, and thus it should be considered as a subsidiary limitation.

51. In the conclusion of the subject acquisition, it was concluded that there shall be no significant reduction in competition, which in effect may create dominant position or strengthen an existing dominant position as stated in Article 7 of The Act, and on these grounds, authorisation for the acquisition of 51 percent of the shares of Vateks Tekstil San. A.S. by "PGI Nonwovens B.V." is granted."

#### *2.3.b.4 LPG Joint Venture.*

52. Upon the application for granting authorisation to the referred "joint venture", along the lines of the shareholders contract concluded between the parties, in order for the joint venture company to gain validity which is targeted to be established for supplying liquefied petroleum gas (LPG), the Competition

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Board, in its meeting of 27.05.1999, did not give authorisation to the transaction in question as a result of negotiating the report prepared by the Reporters, and the evaluations performed. Below-mentioned are the relevant parts of the said decision:

“Upon the notification registered in the records of the Authority on 02.11.1998 with the request for granting authorisation to the application regarding the referred joint venture, along the lines of the shareholders contract concluded between the parties, in order for the joint venture company to gain validity which is targeted to be established with the participation of 39 firms for purposes of supplying liquefied petroleum gas (LPG), it was expressed in the Preliminary Examination Report prepared by the Reporters and submitted to the Chairmanship of Competition Board that it could not be understood from the information and documents available in the file whether the joint venture which is the subject of file was a merger creating concentration under the article 7 of The Act, or an agreement creating co-operation that may be considered under the article 4 of The Act; the issue was closely related with the privatisation of TÜPRAS; there was a chance that following privatisation, the company to be established, at least de facto, could gain a position similar to the current dominant position of TÜPRAS; the merger of several firms in the supply market which are competitors in the distribution market could have reflections on the distribution market, and could considerably change the structure of the supply market, and therefore it would be appropriate to negotiate with the firms which are or are not party to the joint venture, and with the officials of TÜPRAS and Privatisation Administration, and to undertake a more in-depth examination in the relevant market.

The Preliminary Examination Report in question was discussed in the meeting of the Board dated 10.12.1998 and numbered 94, and it was decided that the application in question be subjected to final examination pursuant to the article 10/2 of The Act.

Besides the fact that the quorum as to taking decisions for the management of the joint venture which is the subject of file was not organised such that 29 LPG distribution companies having minority shares would have a word in strategic decisions, any provisions could not be noticed in the shareholders contract which ensure a right to veto for these companies. Within this framework, it is not possible to speak about a joint control, in other words to say that there formed a new will independent of the will of the individual parties concerned in the joint venture in question. Furthermore, it is observed that the financial and administrative structuralisation of the joint venture to be established and its position in the structure of the market are not independent of the parties, and that therefore, it does not bear the following condition sought in the sub-paragraph (c) of the article 2 of the Communiqué No. 1997/1, which lists the cases of mergers and acquisitions: “An independent economic entity such that it would possess the manpower and assets so as to realise its goals...”

53. The contract which is the subject of application should be considered as a co-operation agreement which the undertakings party to the joint venture made among themselves. Essentially, due to gathering the competing undertakings, this agreement is not only contrary to the essence of the article 4 of The Act, but also involves some particular cases which are expressly stated in the sub-paragraphs of this article, and restrict competition. As the price and other conditions of sale are determined between the parties via the agreement in question, the opinion reached was that the following violations of competition expressed would become practical: the subparagraph (a) of the second paragraph of the article 4 which reads as: “Determining the purchase or sale price of goods or services, elements constituting the price such as costs, profits, and any kind of terms of purchase or sale”; when it is taken into account that the large groups which are party to the company and may enter the supply market individually would easily control the supply and distribution of LPG in the market through the joint venture which already has a customer portfolio of about 92 percent in the distribution market, the sub-paragraph (b) of the same paragraph which

reads as: “Partitioning the markets for goods or services, and sharing or controlling any kind of market resources or elements.”; and the sub-paragraph (c) which reads as: “Control of the amount of supply or demand as to goods or services, or determining them outside the market.”

54. In the light of the foregoing information;

55. It was decided that:

- The transaction which is the subject of file did not emerge as an independent economic entity and had effects restricting competition, and therefore was not a joint venture under the following sub-paragraph (c) of the article 2 entitled “Cases Deemed as Mergers or Acquisitions” in the “Communiqué Concerning the Mergers and Acquisitions Calling for the Authorisation of the Competition Board”: “Those joint ventures which emerge as an independent economic entity such that they would possess the manpower and assets so as to realise their goals, and which have no goal or effect of restricting competition between the parties, or the parties and the joint venture.”
- Therefore, the transaction which is the subject of application was not a merger or an acquisition under the Article 7 of The Act, but rather a co-operation agreement restricting competition under its article 4;
- as a result of the negative clearance and exemption examination performed along the lines of the request which takes place in the notification form and reads as “...In case the Competition Board does not give authorisation to the transaction which is the subject of notification, we submit that the notification be considered as an application for negative clearance or a notification for individual exemption.”, the agreement in question could not be granted a negative clearance due to having effects restricting competition under the article 4 of The Act;
- the agreement in question had a nature likely to ensure economic development as joint investments bring certain physical and economic advantages to the parties; however, due to the fact that such economic benefit does not reflect on the consumer, and the agreement restricts competition in a significant part of the relevant market and in an unduly manner, it did not bear the conditions for exemption which take place in the sub-paragraphs (b), (c) and (d) of the first paragraph of the article 5 entitled “Exemptions” in The Act, and therefore could not be granted an individual exemption;
- the application be not given authorisation, which related to establishing a joint venture company with the title “LPG Provision Distribution Industry and Trade Inc” to operate in the LPG supply market under the shareholders contract to be concluded between the parties with the participation of 39 companies operating in the Turkish LPG distribution market.”

### **3. Role of the competition authority in the development and implementation of other policies such as regulatory reform, trade and industry policies**

56. Within the year 1999, the Competition Authority forwarded opinions to the Presidency of Privatization Administration, Ministry of Health, Ministry of Education, and Ministry of Trade and Industry, concerning the points which are under the scope of The Act. With the opinions forwarded, it was intended to make certain regulations of the said administrations in harmony with the Competition legislation.

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### 4. Resources of the competition authority

#### 4.1 Resources in General

##### 4.1.a Annual Budget (In Turkish Liras and US Dollars)

TL 21 trillions

USD 49 millions

##### 4.1.b Number of Employees

Economists : 45

Lawyers : 19

Other Professions : 106

Support Staff : 127

Overall Staff : 297

#### 4.2

57. Pursuant to Article 35 of The Act, “In order to be appointed to the position of Assistant Expert on Competition, one is required to graduate from the Law Department, Economics Department, Political Sciences Department, or Economics/Management Departments of Economics and Administrative Faculties, or Industrial Engineering/ Operational Engineering Departments of the Engineering Faculties or high education institutions abroad deemed equivalent.....”. Therefore, the task allocation among the assistant experts on competition whose number is 63 with different origins of profession is made regardless of any discrimination as to specialisation in a specific matter, and the tasks entrusted by The Act are carried out by all professional staff.