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1. The Act on the Protection of Competition No. 4054 was adopted by the Turkish Grand National Assembly on 07.12.1994, and entered into force after being published in the Official Gazette dated 13.12.1994, which was prepared to prevent agreements, decisions and practices hindering, distorting or restricting competition in the markets for goods and services within the borders of the Turkish Republic, and the abuse of dominance by the firms dominant in a market. The Competition Board which is the decisive body of the Competition Authority responsible for implementing the Act could be appointed on 27.02.1997 with a delay of almost 27 months. However, the Authority completed its organisation within a short period like 8 months, and in accordance with the Temporary Article 2 of the Act, it announced this situation to public with a communiqué issued on 05.11.1997, and as of this date, it rapidly commenced reviewing the applications. The year 2000 constitutes the third operational year of the Competition Authority. The activities of 2000 are summed up below.

**I. NEW DEVELOPMENTS IN COMPETITION LAW AND POLICIES**

2. There were not any changes to the Act on the Protection of Competition No. 4054 in 2000. In communiqués having the nature of secondary legislation describing the application of law, there have been changes as to form. Below-mentioned are these communiqués in chronological order.

3. Communiqué numbered 2000/1 Concerning the Announcement that Administrative Fines Provided in Articles 16 and 17 of the Act on the Protection of Competition No.4054 Have Been Increased Until 31/12/2000, which was published in the Official Gazette dated 4.4.2000 and numbered 24010.

4. Communiqué numbered 2000/2 Concerning an Amendment to the "Communiqué on the Mergers and Acquisitions Calling for the Authorisation of the Competition Board" numbered 1997/1 and "Communiqué of the Competition Board on the Procedures and Principles for Notification of Agreements, Concerted Practices and Decisions of Associations of Undertakings Pursuant to Article 10 of the Act" numbered 1997/2, which was published in the Official Gazette dated 21.8.2000 and numbered 24147.

5. Communiqué numbered 2000/3 Concerning an Amendment to the "Communiqué on Group Exemption Regarding Distribution and Servicing Agreements In Relation to Motor Vehicles", which was published in the Official Gazette dated 4.10.2000 and numbered 24190.

6. In 2000 preparatory works also continued as to communiqués named as secondary legislation and involving substantive elements in the application of the Act. Preparatory works have been carried out as to the following but they have not been published yet: the communiqué on Technology Transfer granting group exemption for patent, know-how, license, trademark agreements, the communiqué granting exemption for Research and Development agreements, and the communiqué as to the application of the rule *de minimis* which excludes from the scope of competition rules certain agreements, concerted practices and implementations of small and medium scale enterprises, having negligible effects in terms of competition in the markets; works concerning them have been carried out within the Authority.

7. Furthermore, works have been commenced in line with the Commission Regulation numbered 2790/1999 replacing group exemption regulations as to vertical agreements in the European Community,

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and the draft communiqué on group exemption for vertical agreements has been put forward for discussion.

### II. ENFORCEMENT OF COMPETITION LAW

#### II.1. The Application of Competition Rules Concerning Agreements, Concerted Practices, Decisions Restricting Competition, and the Abuse of Dominant Position (Articles 4 and 6 of the Act No. 4054)

8. Article 4 of the Act on the Protection of Competition No. 4054, which aims at preventing the distortion of competition by agreements or concerted practices between undertakings or decisions of associations of undertakings in the markets for goods and services, and Article 6 which aims at preventing the abuse of dominance by the firms dominant in relevant markets are parallel to Articles 81 and 82 of the Rome Treaty respectively which is the source legislation. In case articles 4 and 6 of the Act are violated in the markets for goods and services, the Board puts the matter under examination upon application or on its own initiative in accordance with article 40 of the Act, and decides to make a preliminary research for detecting whether it is necessary to open an investigation for the undertakings which committed the violation, or to open an investigation directly. Should the Board detects the presence of a violation under article 4 or 6 as a result of the investigations opened by it, it decides for the application of administrative fines for the undertakings or associations of undertakings which committed the violation, in accordance with article 16 of the Act.

9. Even if there exists an agreement, a concerted practice or decision restricting competition under article 4, in case certain conditions are fulfilled, upon the request of those concerned, article 5 of the Act No. 4054 provides the Board with the possibility of exempting such agreements, concerted practices or decisions from the application of the provisions of article 4, and empowers the Board to issue group exemption communiqués for certain types of agreements. Besides, upon the request of those concerned under article 8 of the Act, negative clearance certificate may be granted showing that agreements, decisions, practices or mergers and acquisitions of undertakings or associations of undertakings are not contrary to articles 4, 6 and 7 of the Act.

#### II. 1. a Overview of the Works of the Competition Authority

**Table 1: Works As to the Applications Made Between 05.11.1997 and 31.12.2000**

<b>I. Applications for violation of competition</b>	<b>758</b>
<b>Those decided</b>	<b>237</b>
• Investigations finally decided	19
• Those decided following preliminary examination	44
• Those decided following preliminary research	
• Those considered to fall under the Article 42/2 of the Act No. 4054	132
• Those processed under the Article 9 of the Act No. 4054	5
<b>Those still under examination</b>	<b>113</b>
• Those still under initial examination	10
• Those still under preliminary research	10
• Those still under investigation	17
• Those on the agenda of the board	13
• Those at the stage of review	51
• Those awaiting the result of investigations in progress	12

<b>Those outside the scope of the Act No. 4054</b>	<b>408</b>
<b>II. Applications for exemption/negative clearance</b>	<b>325</b>
Those decided	108
Those still under examination	217
<b>III. Applications for merger/acquisition</b>	<b>246</b>
Those decided	236
Those still under examination	10
<b>IV. Opinion</b>	<b>51</b>
<b>V. General Sum</b>	<b>1380</b>

10. As is seen on Table 1, a total of 540 applications have been decided between 05.11.1997 and 31.12.2000, 408 of them falling directly outside the scope and 132 of them rejected or deemed to be rejected by the Board. As of 31.12.2000, the number of applications still under examination is 113, and among them 10 are still under preliminary research and 17 are still under investigation.

11. Of the complaints for the violation of competition filed to the Competition Authority, final decision was issued for 110 applications between 01.01.2000 and 31.12.2000, which were not considered outside the scope. In 59 of these decisions the Board did not respond to the applications in due course and chose implicit rejection. While an investigation was not opened for 4 applications, it was decided to notify the parties concerned of how to terminate the violation of competition committed. Of 47 complaints examined, 19 were finally decided as a result of the initial examination and 16 as a result of the preliminary research, and applications involving claims of violation of competition were rejected.

12. Among the investigations continued in 2000, twelve were finally decided by the Board. The distribution of these decisions by sectors is shown on the following table.

**Table 2: The Distribution by Their Sectors of Cartel Practices Decided Following Investigation**

Sector	Number
Printing and Publishing, Reproduction of Records, Cassettes and Similar Media	5
Food Products and Beverages	1
Land Vehicles, Aircraft, Sea Vessels and Railway Carriers	1
Chemistry and Chemical Products, Petrochemistry, Petroleum Products, Fertiliser	3
Optical Instruments	1
Fairs	1
Total	12

13. The number of exemption-negative clearance applications examined and finally decided in 2000 is 21. The examination of a total of 217 exemption applications is in progress. As a majority of these applications still examined involves agreements of vertical nature, it is thought that they shall be resolved by termination of the works as to the Communiqué on Group Exemption for Vertical Agreements. The sectoral distribution of a total of 21 exemption and negative clearance applications decided by the Competition Board in 2000 is shown on the following table.

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**Table 3: The Distribution by Their Sectors of Exemption/Negative Clearance Applications Decided**

SECTOR	NUMBER
Printing and Publishing, Reproduction of Records, Cassettes and Similar Media	2
Electricity-Gas-Water	1
Financial Services (Banking, Insurance and Other Financial Organisations)	1
Food Products and Beverages	3
Construction, Cement and Other Construction Materials	1
Cellulose, Paper and Paper Products	2
Land Vehicles, Aircraft, Sea Vessels and Railway Carriers	6
Chemistry and Chemical Products, Petrochemistry, Petroleum Products, Fertiliser	1
Machinery and Equipment Manufacturing	3
Telecommunications	1
Total	21

14. Against the decisions of the Competition Board, Council of State having the nature of supreme court has been designated as the competent court, as a result of the specific regulation provided by article 55 of the Act on the Protection of Competition No. 4054. Though there are lawsuits against the decisions of the Competition Board, as of the end of 2000 there do not exist any decisions concluded.

### *II. 1. b The Summaries of Major Decisions*

15. As will be understood from the above-mentioned information and tables, among the concluded investigations concerning claims of violation of competition in 2000, five of them concern the events in the printing and publishing sector. Among these investigations, below-mentioned is the summary of BIRYAY-YAYSAT decision which involved the most extensive violations in the form of restricting competition via agreements in the market for the distribution of newspapers and journals, and the abuse of dominant position, and where requests for exemption were also reviewed.

#### *BIRYAY-YAYSAT Decision*

16. In the decision, the subject of the file was determined as follows: The violation of articles 4 and 6 of the Act by Birlesik Basın Dagitim A.S.<sup>1</sup> (Joint Printing Distribution Inc.), BIRVAY Birlesik Yayın Dagitim A.S.<sup>2</sup> (BIRVAY Joint Publication Distribution Inc.), and YAYSAT Yayın Satış, Pazarlama ve Dagitim A.S.<sup>3</sup> (YAYSAT Publication Sales, Marketing and Distribution Inc.), and the review of the negative clearance application dated 04.05.1998 related to BIRVAY Main Contract.

17. Following claims took place in the complaint petitions of Multimedya Basım ve Yayıncılık Ticaret A.S. (Multimedya Printing and Publication Trade Inc.), which were recorded in the entries of the Competition Authority on 04.05.1998, 26.06.1998 and 29.07.1998:

- YAYSAT and BBD which are almost entirely dominant in the distribution of Turkish newspapers and journals did not fulfil their obligations to notify BIRVAY jointly set up by them to the Competition Board in due course pursuant to Temporary Article 2 of the Act;

<sup>1</sup> Hereinafter referred to as "BBD" shortly.

<sup>2</sup> Hereinafter referred to as "BIRYAY" shortly.

<sup>3</sup> Hereinafter referred to as "YAYSAT" shortly.

- YAYSAT and BBD share in concerted manner via BIRVAY the requests from outside their own group. BIRVAY makes customers from outside the group accept the condition of higher commission, or increases the commission while proceeding with the distribution, or for purposes of limiting competition with its own journals, even though it receives the publications belonging to third parties, it does not partially or wholly distribute them or even if it makes the distribution, it diminishes the sales of such publications by not displaying them at points of sale, and with such a nature it infringes article 4 sub-paragraphs (a), (b), (c), (d), (e) and (f) of the Act No. 4054;
- YAYSAT and BBD have become dominant in the market by means of setting up BIRVAY. That these undertakings arbitrarily increase the distribution commissions of competing publications, do not distribute competing publications, or prevent the display or sales of competing publications at points of sale deter entrepreneurs from making investments for issuing newspapers and journals. Those groups forming YAYSAT and BBD prevent the entry of other undertakings to their fields of commercial activity, or render the activities of other undertakings difficult. With such a nature and its past actions, BIRVAY infringes article 6 of the Act No. 4054.

18. Having regard to the subject of the complaint and the fact that the major fields of activity of BBD, BIRVAY and YAYSAT which are the subject of the complaint is the "distribution of newspapers and journals", the relevant product market was considered as the "**market for the distribution of newspapers and journals**". Taking into account the fact that BBD, BIRVAY and YAYSAT distribute newspapers and journals throughout the country, the geographical market was considered as "**Turkey**".

19. As a result of the examinations, determinations, pleas and reviews, the grounds and legal bases of the decision have proven to be as follows.

A. The determination of and grounds for the violation of competition via agreements under article 4 of the Act

20. When the information received from the parties during the stage of investigation is examined, whereas both BBD and YAYSAT abolished all current contracts concluded by the customer publishing houses as of 01.06.1996, and declared that they assigned these contracts to BIRVAY, the customer publishing houses concluded contracts with BIRVAY on 01.06.1996 which generally involved heavier conditions compared with the precedents such as higher rates for distribution commissions and compensation figures, some of the customer publishing houses resisted to sign these contracts, and BIRVAY requested from BBD and YAYSAT to cease the distribution of publications of publishing houses which had not signed a distribution contract with it, it is understood that BBD and YAYSAT eliminated competition in the market by means of transferring to BIRVAY the customer publications in hand, partitioning the distribution market for newspapers and journals and making BIRVAY the only addressee for the customer publishing houses.

21. After commencing operation, BIRVAY apportioned between BBD and YAYSAT the distribution of publications belonging to the customer publishing houses which concluded a distribution contract with it. Therefore, besides the partitioning of market, customers are also partitioned via BIRVAY.

22. It is also evidenced in documents that BBD and YAYSAT made correspondences via BIRVAY and determined the fixed prices and commission rates to be received from the customer publishing houses.

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23. When the above statements and the determinations and documents in the findings section of the decision are considered, the opinion reached is that BBD and YAYSAT infringed article 4 of the Act by both

- partitioning the distribution market for newspapers and journals and customer publications via BIRVAY jointly set up by them, and
- determining jointly the amount of fixed prices and the distribution commissions to be received from the customer publishing houses via the Main Contract of BIRVAY and correspondences through BIRVAY.

24. Subsidiary dealership contracts concluded by YAYSAT and BBD involve anti-competitive provisions as they grant an exclusive region for one of the parties and restrict the freedom of the subsidiary dealer for resale and to display and sell competing goods, and therefore they are contrary to article 4 of the Act.

25. The parties mentioned in their initial pleas that the contracts in question conformed with the Group Exemption Communiqués, and that the provisions which seemed literally contrary were abolished following the relevant Communiqués. In articles 3/b and 3/c of the Communiqué numbered 1997/3 and article 3/b of the Communiqué numbered 1997/4, obligations likely to be imposed on an exclusive distributor and reseller are listed, and it is mentioned that any other restriction of competition may not be imposed. So, the supplier is not entitled to interfere with the exclusive distributor as to buyers, amount and purpose of goods to be sold in his own region. Therefore, it is not possible that dealership contracts BBD and YAYSAT concluded with the ultimate dealers benefit from the exemption granted by the Group Exemption Communiqués numbered 1997/3 and 1997/4.

26. In the contracts there exists the provision that "**Without the written consent** of the COMPANY, the DEALER shall not display and sell the publications of another distribution agency or publishing house". Sub-paragraph 3/b of the Communiqué numbered 1997/3 grants an exemption for restrictions of competition to be imposed on the exclusive distributor "not to produce or distribute goods competing with the subject goods", and sub-paragraph 3/b of the Communiqué numbered 1997/4 grants an exemption for restrictions of competition to be imposed on the reseller "not to produce or distribute goods competing with the subject goods". The company is free to impose the said restriction for the products of all third parties other than itself, or not to place such a provision in the contract. **However, the said restriction may not be associated with the written consent of the company or a similar condition as is in the example.**

27. Besides, though it is always theoretically possible for the parties to make agreements conforming with the Group Exemption Communiqués, due to the specific characteristics of the relevant product market, the presence of restrictions of competition in contracts to be concluded with subsidiary dealers, about not to produce, distribute or sell goods competing with the subject goods which may mean exclusivity, shall considerably render difficult the entry of suppliers to different stages of distribution. The presence of such a restriction of competition in contracts is a fact that shall exclude these contracts from the scope of exemption as a result of a Board Decision, pursuant to its conformity with the provision reading as "if, in the agreement region, the entry of other suppliers to different stages of distribution is considerably rendered difficult", which takes place in article 6 of the Communiqués, entitled Revocation of Exemption.

28. In the distribution chain extending from the publishing house to the last point of sale in the market for newspapers and journals, contracts concluded with subsidiary dealers make rather difficult the entry of other suppliers to the said market.

29. Consequently, it is understood that uniform exclusive dealership contracts where BBD and YAYSAT are the parties and where parent dealers and subsidiary dealers also take place involve provisions restricting competition and also do not fall under the Group Exemption Communiqués numbered 1997/3 and 1997/4, and that therefore article 4 of the Act is infringed by the said agreements.

B. The determination of and grounds for the abuse of dominant position under article 6 of the Act

30. During the conducts which are the subject of investigation, YAYSAT, BBD and BIRVAY's total market shares for the last five years reach 100 percent. Therefore, the relevant product market is of an oligopolistic and even a duopolistic nature when it is considered that BIRVAY is a joint venture of YAYSAT and BBD groups.

31. It is rather less likely that new companies enter into a market without much perspective for development and expansion such as the distribution market for newspapers and journals in Turkey, which is the subject of investigation, and therefore it is assumed that the companies in these markets shall maintain the market shares already hold by them. That the market shares on the date of signing the foundation agreement of BIRVAY (14.05.1996) and during the subsequent years did not change too much in terms of the joint venture and competing companies is indicative of the fact that balance of powers is somewhat maintained.

32. Competition in the market is considerably restricted due to the fact that the distribution market for newspapers and journals in Turkey was a quite busy market before the foundation of BIRVAY, there were only two firms which could actually distribute customer publications, and these two firms which were competitors set up a joint venture and made it compulsory to distribute customer publications via this joint venture.

33. That following the foundation of BIRVAY, price and commission rates for the firms (customer publishing houses) transferred to here by both distribution companies are determined by the agreement of both distribution companies, that in article 39 of the foundation contract of BIRVAY entitled "tariffs to be applied", tariffs to be applied for newspapers and journals are decided and prices are already set at the founding stage, that after the founding stage prices to be applied for new customer publishing houses are set by the agreement of both companies, that joint dealers exist, and that joint decision is taken not to make these dealers sell products from other distribution channels show that BBD, BIRVAY and YAYSAT act together in several matters.

34. It is rather less likely for a new undertaking to enter the market due to the fact that there is a very high rate of concentration in the said market and there are not any firms capable of competing with these two companies after concentration, that establishing a distribution company is costly, that it is not possible to enter the current networks of dealers, and that there is inability to reach enough number of publications to feed the new network of dealership to be set up. As customer publishing houses do not have any alternatives other than distribution companies jointly set up by firms with which they compete in the upper market (publishing market for newspapers and journals), their bargaining power is very low. Therefore, the price elasticity of demand is very low.

35. When the above statements are considered together, it is understood that YAYSAT, BBD and BIRVAY are jointly in dominant position in the distribution market for newspapers and journals.

36. When the determinations in the findings section are examined;

37. It is seen that publishing houses resist to conclude contracts with BIRVAY, or try to erase, cross out compensation figures which take place in the contracts they signed and which are important for

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BIRVAY. On the other hand, in order to ensure that these publishing houses "prefer" itself, BIRVAY requests from BBD and YAYSAT "to cease the distribution of publications of publishing houses and not to make payment to these publishing houses".

38. It is understood that BBD and YAYSAT which have a joint dominant position in the distribution market for newspapers and journals set up BIRVAY so that they can distribute "customer publications" i.e. publications which may compete with those issued by their own group under different conditions than publications belonging to their own group and force customer publishing houses to conclude contracts with BIRVAY, that publishing houses which do not wish to sign contracts with BIRVAY are exposed to the risk of not having their publications distributed and not receiving their payment, and therefore the risk of the prevention of their activities in the publishing market for newspapers and journals, that their activities in the publishing market for newspapers and journals are made difficult due to new commission rates and they are placed at a competitive disadvantage because of the intra-group publications of BBD and YAYSAT, that certain publications are tried to be pushed out of the market, thereby distorting the conditions of competition in the publishing market for newspapers and journals.

39. It is observed that the distribution contract between Özgün Medya A.S. (Özgün Media Inc.) publishing the Newspaper Siyah Beyaz and BBD was abolished by the formation of BIRVAY and a new contract was tried to be signed which involved aggravated provisions in terms of new commission rates, that the publishing house which did not want to sign the said contract with BIRVAY wished to deliver its publications to BBD under the previous contract with BBD but BBD did not accept these publications, that eventually the publishing house had to sign a contract with BIRVAY, however BIRVAY did not renew the contract after its expiration without indicating any grounds and rendered difficult the activities of the newspaper in the publishing market for newspapers and journals, and that the newspaper was pushed out of the market.

40. It is understood that following the foundation of BIRVAY, the activities of Uluslararası Moda Yayıncılık A.S. (International Moda Publishing Inc.), Üniversal Yayıncılık ve Ticaret A.S. (Üniversal Publishing and Trade Inc.) and Novamedya Tanıtım ve Yayıncılık Ticaret A.S. (Novamedya Publicity and Publishing Trade Inc.) which did not want to conclude contracts with BIRVAY under more different conditions were rendered difficult, and that the introduction of publications of these publishing houses which later accepted the contract terms of BIRVAY was delayed.

41. Notary minutes obtained are noteworthy, which concern the fact that the display and sale of the Newspaper Akşam and other publications in the same group at newsdealers are prevented or made difficult by BBD, YAYSAT and BIRVAY, and that dealership is offered in return for not selling the Newspaper Akşam. That the said minutes show similarities although they have been kept recently by numerous dealers in a wide variety of settlements in Turkey gives the impression that the practices are not individual cases.

42. It is thought that the above practices fit in actions aiming at the distortion of competition in another market in the context of article 6 of the Act.

43. It is seen that for purposes of rendering difficult the activities of Dost Basın Dağıtım A.S. (Dost Printing Distribution Inc.) (DBD) which is their competitor, BBD and YAYSAT attempted to eliminate DBD subsidiary dealers by turning them into "**BBD and YAYSAT group**" subsidiary dealership, and to push new DBD subsidiary dealers towards outskirts, that dealership was offered to DBD dealers in return for not selling publications distributed by Dost Basın Dağıtım, and that subsidiary dealers were made to sign backdated contracts in order to prevent Dost Basın Dağıtım from using the existing points of sale for newspapers and journals, and **within this framework**, the opinion reached is that **BBD and YAYSAT** jointly abused their dominant position by means of "*committing practices which aim at making difficult the activities of their competitors in the market*", and that therefore infringed article 6 of the Act.

C. The grounds for rejecting negative clearance/exemption request of BIRVAY under articles 8 and 5 of the Act

44. Characteristics to be borne by any formation in order for it to be considered a joint venture in terms of Competition Law are determined in the Communiqué on the Mergers and Acquisitions Calling for the Authorisation of the Competition Board numbered 1997/1. According to the said Communiqué, having manpower and assets so as to realise their goals, joint ventures which emerge as an independent economic entity and do not have a goal or an effect of restricting competition between the parties or between the parties and the joint venture company are deemed as mergers/acquisitions.

45. On the other hand, those joint venture agreements which do not bear the above conditions and have a goal or an effect of restricting competition fall under article 4 of the Act, and may be exempted if they bear the conditions listed in article 5.

46. In BIRVAY Main Contract, article 38 which envisages partitioning of the market and article 39 which provides price determination are **expressly** contrary to article 4 of the Act No. 4054, and a contract where there are such articles may not be granted a negative clearance or an exemption.

47. It may not be claimed that BIRVAY *"emerged as an independent economic entity having manpower and assets in order to realise its goals"*, because other distribution companies which operate in the same sector and established BIRVAY possess a system made up of regional directorates, many main dealers and thousands of subsidiary dealers/last points of sale, staff of about three hundred, buildings large enough to enable the parking of transport vehicles carrying publications and the storage of publications, the advantage of publication portfolio arising out of the groups with which they affiliate, and they could provide enough number of transport vehicles for the distribution of publications. However BIRVAY does not have a system made up of regional directorates, main dealers and subsidiary dealers, operates in a building which does not have a capacity enabling the distribution of publications, with about ten employees, does not have any transport vehicles enabling the distribution of publications, and makes BBD and YAYSAT distribute its publications. Besides, its publication portfolio consists of "customer publications" sent to it by BBD and YAYSAT in accordance with BIRVAY Main Contract. Therefore, though it has a legal personality independent in terms of law, it is not likely, in terms of economics, that it operates in the "distribution market for newspapers and journals", thereby realising its goal without BBD and YAYSAT.

48. It may not be claimed that BIRVAY *"does not have a goal or an effect of restricting competition between the parties or between the parties and itself"*. As is mentioned in the previous sections of the decision, the aim of the parties to set up BIRVAY are the partitioning of the distribution market for newspapers and journals and of customer publications, and the determination of commission rates to be received from the customer publishing houses. Even if the main contract did not have articles 38 and 39 related to these matters, due to its article 3, an undertaking set up by these two competing companies with the aim of operating in the same market with them would by all means bear effects of restricting competition between the founders. Because an effective competition of competing companies with the joint venture which is in the same market with them shall be at the disadvantage of either the joint venture or the founders. Likewise, competition of the founders with each other shall impair the joint venture which is in the same market with them and therefore the interests of the founders.

49. Establishment of a joint venture by two competing companies in a duopolistic market so as to operate in the same market with them shall not be economically rational as long as they do not restrict competition. The way for each of the three companies to obtain monopolistic profits is partitioning of the

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market. As long as the parties do not set their eyes on each other's actual or potential shares, each firm shall try to maximise its profit by assuming a quasi-monopoly position in its own market. It is understood that this is the actual purpose of the formation of BIRVAY. BIRVAY restricts competition which should exist between the parties and between the parties and itself. As long as BIRVAY operates in the distribution market, it shall continue to restrict competition between its founders.

50. Articles 38 and 39 of BIRVAY Main Contract eliminate competition in the distribution market for newspapers and journals. Even though the said articles did not take place in the contract, it is quite likely that BIRVAY would ensure co-ordination between BBD and YAYSAT. Taking into account that it is in the same market with its founders and that any firms other than its founders and itself do not operate in this market, as is described in paragraph 3 as well, it is always likely for this joint venture to "have an effect of restricting competition". Taking into account the provision of article 4 of the Act, which reads as "*...agreements...which have the aim or effect or potential effect of directly or indirectly ...restricting competition in a particular market for goods or services are prohibited*", it is clear that BIRVAY Founding Agreement infringes article 4 of the Act, and that therefore negative clearance may not be granted for the agreement in accordance with article 8 of the Act.

51. Review as to whether BIRVAY Main Contract bears all of the conditions specified in article 5 of the Act:

Conditions mentioned in article 5 of the Act are as follows:

- a. *Ensuring new developments and improvements or economic or technical development in the production or distribution of goods and the provision of services,*
- b. *Consumer's benefiting from it,*
- c. *Not eliminating competition in a significant part of the relevant market,*
- d. *Not restricting competition more than what is necessary for reaching the goals in subparagraphs (a) and (b).*

52. Applications bearing all of these conditions may be granted exemption for a period of five years at most.

53. Pleas such as the fact that after BIRVAY, publishing houses can reach more rapidly to sale figures of their publications, small publishing houses are not defeated, their publications are better displayed owing to news-stands and kiosks, all publications exist together in competition with each other, and that collections are received in a better way are found to be irrelevant with BIRVAY Main Contract or its implementation. The said improvements are based on reasons such as the fact that YAYSAT and BIRVAY merged their dealers, and commenced online connection by installing computers in their main dealers. That BIRVAY does not have any organic links with the dealers indicates that the said practices are not performed by BIRVAY. Therefore, BIRVAY and BIRVAY Main Contract are not required for making the improvements observed.

54. Plea that after BIRVAY, the consumer can find all publications he/she seeks in the same dealer, the reader is not supposed to go to separate dealers for buying each publication, and therefore competition among publications is ensured bears no relevance to setting up of BIRVAY and BIRVAY Main Contract. The developments in question are related with YAYSAT and BBD's forming joint dealers. That the distribution companies engage in BIRVAY-type structuralisations for forming joint dealers is accompanied with many negativities. Therefore it is not necessary to set up BIRVAY to be able to ensure the foregoing type of improvements.

55. As required by the foundation agreement of BIRVAY, competition in the relevant market has not only been restricted, but also been eliminated wholly.

56. In order to improve the exposition and sales of the goods named in articles (a) and (b), and in order the readers to find the publications distributed by different distributing companies at the same final seller, it is not necessary to limit - though partially - competition in the relevant market, to have BIRVAY Main Contract, to determine the commission rates to be received from customer publishing-houses, to share the relevant market, to completely lift competition in the relevant market.

57. Taking the above assessments into account, "BIRVAY Main Contract, which completely lifts competition in the relevant market" is against Article 4 of the Act, and thus the contract cannot be granted an exemption certificate as per Article 8 of the Act. Besides, it is not possible to give exemption to the said contract due to the reason that it does not comply with conditions envisaged in Article 5 of the Act.

58. The last paragraph of Article 16 of the Act reads as follows: "Conditional upon **not being in explicit breach** of any of the provisions of this Act, for the agreements and decisions which are not notified within the specified time period, no fines shall be imposed for the period until the date of final decision of the Board." And in cases where agreements, which are notified within the specified time period, are in explicit breach of the Act, these agreements should be punished.

59. Article 38 of the BIRVAY Main Contract, titled as Prohibition of Competition leading to market sharing by competing firms and Article 39, titled as Applicable Tariff permitting price fixing by competing firms **explicitly violate the Act No: 4054.**

60. Notification of the said Contract on time does not create an excuse for the applications by the parties of the agreement containing explicit infringements of the Act within the time period when the Board's response reach themselves.

61. It is a high probability for BIRVAY to arrange co-ordination between BBD and YAYSAT when it is in the same market or in the same upstream or downstream markets. In the newspaper and periodicals' distribution market, there is no possibility for the joint venture to act independently from founders, and for the founders from the joint venture or from one and other. Taking into account that there are only two firms effectively operating in the market, the presence of BIRVAY leads to the consequence that competition in the market is restricted.

62. Assessing simultaneously with the partnership structure, as BIRVAY's realisation of its goal shall be against the Competition Act, there left to be no probability for the implementation of Article 3 of BIRVAY Main Contract, and thus, it is therefore necessary to adapt the article in a way to comply with the Law.

63. Compliance with the Law here is to be established via BIRVAY's definitely ending its activities directly or indirectly related to distribution of periodicals, including as well the leasing of kiosks, and BIRVAY's non-operation in upstream or downstream markets relevant to distribution of newspaper and magazines. In case the partners want the company to operate in other fields, the new goal and subject of Activity are expected not to create violations of the Act No: 4054.

64. As the consequence, when taking into consideration that operation of BIRVAY, which has been founded by two competing firms operating in the relevant market with the aim to carry out the same operation with themselves in the same market, at the newspaper and magazines' distribution market or in upstream or downstream markets has been and will be against the Act No: 4054, and that operations of BIRVAY are specified in the Main Contract to "distribution and sales of newspaper and magazine", it is considered that Article 3 - titled "Aim" - of the BIRVAY Main Contract is necessarily to be modified as to

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comply with competition legislation, and that Article 38 - titled "Prohibition of Competition" and Article 39 - titled "Tariff to be Imposed" are against law thus prohibited as per Article 4 of the Act No: 4054 due to their restriction of competition, and that these articles should be deleted from the contract. Non-deletion of the above-mentioned articles from the contract and continuation of non-compliance of the Article "Aim" shall mean a continuous violation of the Act by the parties.

### D. Assessments regarding the establishment of Competition in the Relevant Market:

65. The obligation for every distribution company who wants to enter the market to form more than ten thousand final sales points is a serious obstacle before market entrance due to the reason that the substitution of present points is tough and economically non-rational.

66. The said obstacle is due to secondary dealership contracts that grant exclusivity to the final sales points and thus obstruct competitors to make use of final sales points. On the other hand, it is known that the two competing firms who prepare the said contracts make it for one and other possible to make use of each other's dealers; however, put forward the element of exclusivity for those who will enter the market. Therefore, it is not believable that formation of exclusive dealership is obligatory.

67. As every distribution company who wants to operate in the market will use the same sales points by "Clearing up" of final sales points from exclusivity, this will lead the dealers to feed themselves from different resources. Thus, another market entry obstacle, which is to feed the final sales points, shall as well be lifted.

68. Another consequence of the using of the same sales points by different distribution companies is the increase in competition in the market for publication of newspaper and magazines which is directly effected from distribution market.

69. Using of the same sales points by different distribution companies shall take newspaper and magazines' distribution completely out of being in national scale, lead to establishment of regional, local distribution companies and provide opportunity for them to carry out a more effective distribution activity and for local publication activities to develop. Thus, companies publishing nation-wide shall encounter with the opportunity to distribute in different regions under different conditions.

70. Thus, lifting exclusivity in this secondary dealership system, and providing all distribution companies with the opportunity to provide their publications to the present and future final sales points, and giving the final sellers the opportunity to simultaneously make contract with any distribution company and sell any publication are deemed necessary to open the market to competition.

71. Under the light of the assessments, following decisions were taken in the Competition Board meeting of 17.07.2000:

1. With regard to negative clearance/exemptions demand: that article 3 of the Main Contract establishing BIRVAY Birlesik Yayin Dagitim A.S. is against owing to its structure, and articles 38 and 39 are directly against Article 4 of the Act No: 4054, thus negative clearance cannot be granted to the said contract as per Article 8 of the Act No: 4054; that exemption conditions envisaged in Article 5 of the same Act are not established; that therefore negative clearance/exemption demands of the parties to be refused,

That, articles 38 and 39 of the BIRVAY Contract, which do not comply with Article 4 of the Act No: 4054 to be removed from the contract within 45 days pursuant to notification of reasoned decision to the parties,

That, as Article 3 of the BIRVAY Contract is against the competition law owing to the current partnership structure, of which undertakings operating in the distribution market are a part, this infringement be removed within 45 days pursuant to notification of reasoned decision to the parties,

2. With regard to Article 4 of the Act No: 4054: that co-ordination has been established through BIRVAY Birlesik Yayin Dagitim A.S., which has been co-founded by Birlesik Basin Dagitim A.S. and YAYSAT Yayin Satış Pazarlama ve Dagitim A.S., and via:
  - i) sharing newspaper and magazines' distribution market,
  - ii) sharing customer publications,
  - iii) co-fixing the fixed price that shall be taken from distributed publications and commission rates regarding newspaper and magazines' distribution of customers' publication houses,

That, paragraphs (a) and (b) of Article 4 of the Act are explicitly violated, and thus BBD and YAYSAT be imposed fines as per paragraph 2 of Article 16 of the Act,

3. With regard to Article 6 of the Act No: 4054: that, via co-abusing their (of Birlesik Basin Dagitim A.S., YAYSAT Yayin Satış Pazarlama ve Dagitim A.S. and BIRVAY Birlesik Yayin Dagitim A.S.) dominant positions, they have violated Article 6 of the Act through:
  - i) hardening activities of competing undertakings (4054/6-a)
  - ii) carrying out with activities distorting conditions for competition in markets for newspaper and magazines' publication, making use of financial, technological and commercial advantages in newspaper and magazines' markets (4054/6-d)

and therefore;

That, Birlesik Basin Dagitim A.S., YAYSAT Yayin Satış Pazarlama ve Dagitim A.S. and BIRVAY Birlesik Yayin Dagitim A.S. be imposed fines as per paragraph 2 of Article 16 of the Act No: 4054.

4. That, as distribution contracts of BIRVAY with publication houses fall under block exemptions, their notification is not required,
5. That, as distribution contracts of YAYSAT with Main Dealers are accepted to be under block exemptions, their notification is not required,
6. a) Provisions of Article 1 ("The dealer, during the course of the contract, cannot provide publications for anybody or any organisation around its address") and Article 2 ("The dealer shall not exhibit and sell publications of another distribution organisation or publication house unless it holds a written permission by the Company") of the contracts signed between BBD and YAYSAT and the secondary dealers are against Article 3/b of the Communiqué on the Exclusive Distribution Agreements, Communiqué No: 1997/3; and therefore, that dealership contracts shall not be able to make use of the block exemption and are of the nature of agreements to be notified; and that, due to not being notified, BBD and YAYSAT be punished as per Paragraph (c) of Article 16 of the Act No: 4054,
  - b) That, those persons who have been in the Boards of Directors of both undertakings as to May 5, 1998 be personally punished,

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- c) On the other hand, that, provisions alike to articles 2 of the same contracts ("The dealer shall not exhibit and sell publications of another distribution organisation or publication house unless it holds a written permission by the Company") are of a nature which will lead to the consequence of "a serious hardship before entry of other providers to different stages of distribution" and thus, this shall distort competitive arena when taking into consideration the structure of distribution market and the sales conditions of products of newspaper and magazines' market where this market serves, and therefore, that such agreements in newspaper and magazines' distribution market shall not be able to take opportunity of the exemption provided by communiqués of the competition Board if they include a provision, which creates an exemption such as "not to sell or distribute competing products",
- d) That, to remove articles 1 and 2 of the contracts between BBD and YAYSAT and secondary dealers and immediately terminate practices alike,
7. In such a way to include sales activities of newspapers and magazines, with regard to entry to relevant market, taking into consideration the importance of kiosks established by the municipalities or leased to 3<sup>rd</sup> persons by municipalities or municipality authorised persons, that the relevant decision of the Board be notified to relevant authorities in order them to make required regulations that would "avail the sales of newspapers and magazines - no matter from which distribution company they come - complying with legislation and laws, against a moderate price or rate of commission",

### 8. Fines:

- 8.1. a) That, as per sub-paragraph (c) of Paragraph 1 of Article 16 of the Act No: 4054, BBD and YAYSAT be imposed a fine, mounted to 608.400.000 TL., determined by the Communiqué No: 2000/1 for their not notifying in time the contracts they have done with secondary dealers,

To impose on the ..... persons in the Board of Directors of YAYSAT as to May 5, 1998, at a rate of five percent of the above-stated fine, which corresponds to 30.420.000 TL.,

- b) That, to take into account turnovers of 1998 while determining fines to be imposed as per Paragraph 2 of Article 16 of the Act No: 4054,

### 8.2. As the consequence of paragraph 2 of Article 16 of the act No: 4054:

- a) Due to violations of Article 4:

- To BBD	268.662.251.500.- TL
- To YAYSAT	495.126.185.000.- TL

- b) Due to violations of Article 6:

- To BBD	268.662.251.500.- TL
- To YAYSAT	495.126.185.000.- TL

in grand total, which amount to:

- For BBD	537.324.503.000.- TL
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- For YAYSAT 990.252.370.000.- TL

c) Due to violations of Article 6:

- To BIRVAY 128.427.640.000.- TL  
fines have been imposed.

## **II.2. Applications on Mergers and Acquisitions**

### **II.2.a. Number and Types of Mergers and Acquisitions Decided upon by The Competition Board**

**Table 4: General Info on Mergers/Acquisitions**

Applications authorised (Appli. On Privatisation 1)	48
Applications not authorised	1
Out of scope	51
Ongoing examinations	10
Total	110

72. Between 01.01.2000 and 31.12.2000, 100 merger and acquisition applications out of 110 have been concluded by the Competition Board under the framework of Article 7 of the Act No: 4054 and relevant Communiqués issued as per the said article of the said Act. The remaining 10 have not yet reached a conclusion. Following table indicates the distribution of merger and acquisition procedures as to types and sectors:

**Table 5: Distribution of Merger and Acquisition Procedures as to Types and Sectors (decision given):**

Merger	3
Acquisition	36
Joint Venture	3
Privatisation	7
Total	49

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**Table 6: Distribution of Merger and Acquisition Procedures as to Sectors (concluded)**

SECTORS	MERGER	ACQUISITION	JOINT VENTURE	PRIVATISATION	TOTAL
Chemistry and chemical products, oil products, fertilisers	2	13		2	17
Electricity, gas, water		3		1	4
Construction, cement and other construction materials		1			1
Iron-Steel		1		1	2
Office equipment and computer		2			2
Food and beverages		6			6
Textile and ready-made clothing			1		1
Machinery and equipment manufacturing		2			2
Financial services (banking, insurance etc.)	1		1		2
Land vehicles, aircraft, sea vessels and railway carriers		5	1		6
Telecommunications		1		1	2
Metals other than iron		1			1
Glass and glass products		1			1
Paper and paper products				1	1
Transportation				1	1
<b>TOTAL</b>	<b>3</b>	<b>36</b>	<b>3</b>	<b>7</b>	<b>49</b>

### ***II.2.b. Examples of Merger and Acquisition Cases about which Decision is given by the Competition Board***

73. In 19 cases out of 49 about which the Board issued a decision between 01.01.2000 and 31.12.2000 there are activities of international companies. Cases were mergers and acquisitions realised in the international arena but assessed as per their effects in our country, and all were given authorisation. Among the merger and acquisition applications concluded in 2000, the unique case, which was not given authorisation regards to privatisation of 99.98 percent of the shares of İstanbul Gübre Sanayii A.S. (IGSAS) (İstanbul Fertilisers Industry Co.). And the decision is given in summary below:

#### *IGSAS Decision*

74. With regard to the acquisition of İstanbul Gübre Sanayii A.S. by Toros Gübre ve Kimya Endüstrisi A.S., and upon the authorisation application by the Presidency of Privatisation Administration under the Prime Ministry of T.R., the following assessments were made and decision was given.

75. While determining the relevant product market, types of fertilisers were assessed with regard to the field, aim, period and styles of utilisation, vegetable food stuff they contain, production processes (with regard to supply substitution), prices, distribution, possibilities to provide it, consumer preferences and habits. As the result, nitrogenous fertilisers market and composite fertilisers market were defined as

distinct markets. Relevant geographical market was accepted as the territories of the Republic of Turkey, taking into account that the cost of transportation is not at such a level to obstruct the firm to reach consumers at different regions of the country, and that prices do not express variations over the country.

76. Acquisition via privatisation, which was subject to notification was assessed with regard to possible effects on competition in markets for nitrogenous fertilisers and composite fertilisers due to the reason that IGSAS had been operating in the production and/or import of fertilisers such as AS, AN, urea, DAP, 20.20.0 and 15.15.15. The procedure becomes important for the eyes of nitrogenous fertilisers market when we see that IGSAS holds a significant position in the market for nitrogenous fertilisers and that it more than 80 percent of its sales is composed of nitrogenous fertilisers. However, at the same time, general factors such as “market entry barriers”, which could influence the relevant product market and be common in the fertilisers’ sector were as well taken into consideration. Concentration that would appear among suppliers, market structure and effects of the procedure on distribution system were discussed during the course of assessment of the acquisition from the viewpoint of competition law.

77. In the nitrogenous fertilisers market, where established capacity is limited and demand shows a tendency to increase, a significant part of sales is formed by import, which is the only way to meet the part of demand that could not be met by production. But, it is not simple to be active as importer in the fertilisers’ market, where entry barriers are high. Thus, most of the import of manufactured fertilisers is again carried out by the producers.

78. According to production and capacity numbers, the total size of IGSAS and Toros Gübre shall result with leadership in market. And when sales values are evaluated, it is seen that the total weight of IGSAS and Toros Gübre is far higher than their competitors. Size as per vegetable food stuff was in 1997 47.75 percent, in 1998 48.76 percent, in 1999 46.22 percent; and these numbers are quite higher than market shares of TÜGSAŞ, which changes around 20 percent, and particularly of those other producing firms (Ege Gübre, Gübretaş, and Bağfaş) which does not exceed five percent, and this indicates that the procedure shall pave the way to a dominant position.

79. Despite market shares of some firms have not been included in the calculation, as per the HHI assessment where we have reached such a high value of 2538.348, the nitrogenous fertilisers' market is considered to be highly concentrated due to the fact that the value 1800 has seriously been exceeded. When taking into consideration that the increase in the index pursuant to acquisition is far above 100 units (928.699), it is understood that the process shall develop concentration and strengthen the oligopolistic structure of the market. Thus, it becomes evident that the possibility for the process to create or strengthen market power is quite high.

80. In case Toros Gübre acquires IGSAS, then this would mean that Toros Gübre shall gain strength in as well sales by dealers by means of expansion and effectiveness of distribution network (total share of parties in 1999 with regard to sales by dealers is 42.5 percent in BBM), and in the meantime, distribution shall become a more significant market entry barrier for import companies.

81. Under the framework of market in general and detection on parties, it has been detected that Toros Gübre shall pass to a dominant position in the nitrogenous fertilisers market, as still the oligopolistic structure of the fertilisers market where entry barriers are high gains strength, and thus, entry to and operating in market becomes harder; as Toros Gübre, - who performs approximately 1/3 of nitrogenous fertilisers import - changes to market leader as to sales and production amount and established capacity; as more than half of sales of urea and AN fertilisers, whose use increase gradually among nitrogenous fertilisers, shall be performed by Toros Gübre shall mean that Toros Gübre shall have the opportunity to grow in the market and expand its network for dealers, and make this more effective and thus take a

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serious advantage before its competitors and improve more and more its bargaining power in vertical relation.

82. As to the end of 1999, the share of IGSAS in the composite fertilisers market is about 6 percent. In case Toros Gübre acquires IGSAS, its market share shall increase up to around 30 percent (under the presupposition that all share of IGSAS in the composite fertilisers market shall transmit to the acquirer). Under this circumstance, Toros Gübre shall step forward with 2-3 percent difference in market share when compared to Gübretaş, and become the market leader. However, when taking into consideration either the fact that the market share of Toros Gübre shall jump significantly up pursuant to the acquisition or the weight of its competitors in the market, it is understood that the procedure shall not create a dominant position in the market for composite fertilisers.

83. Under the light of the above given information, the Competition Board decided as follows in its meeting held on 03.11.2000:

84. In case İstanbul Gübre Sanayii A.S. is acquired by Toros Gübre ve Kimya Endüstrisi A.Ş:

1. dominant position shall not be created in the composite fertilisers market
2. but, Toros Gübre ve Kimya Endüstrisi A.S. shall transmit to dominant position in the nitrogenous fertilisers market due to:
  - its becoming market leader as to sales, production, established capacity and import
  - on the grounds that it shall be performing a significant part of the sales of AN (33 percent N) and urea (46 percent N) whose part in the sales of total nitrogenous fertilisers have been increasing, that it shall take opportunity to improve its weight in the market,
  - the oligopolistic structure of the market, whose entry barriers are high, shall significantly be empowered, and thus, entry to market shall become harder,
3. and thus, the subject acquisition subject to notification be not permitted, due to the fact that it is considered to be unlawful and prohibited as per Article 7 of the Act No: 4054, Regarding the Protection of Competition.

### **III. The role of competition authority in the formation and implementation of other policies such as regulatory reform, trade and industrial policies**

85. In the year 1998, views were notified to Privatisation Administration, Ministry of Health, Ministry of Environment, Ministry of National Education, Ministry of Finance, the Supreme Board of Radio and Television, Ministry of Industry, with regard to issues falling under the Act No: 4054. Aim here is to harmonise regulations by those administrations with competition legislation.

### **IV. Resources of the competition authority**

#### ***IV.1 General***

86. The budget of the Authority as per Article 39 of the Act No: 4054 is formed of:

- Appropriation in the budget of Ministry

- 25 percent of the fines imposed by the Board on the grounds of Articles 16 and 17
- Publications and other

87. In addition to these, it is envisaged in Article 29 of the Act No: 4077, Regarding the protection of Consumers, 95 percent of the capitals of all partnerships in the status of newly established incorporate companies or limited liability companies, and in the case of capital rise, 2 per thousand of the increase are envisaged to be utilised by the Competition Authority.

***IV. 1. a. Annual Budget (In TL and US Dollars)***

- Cost on personnel: 3.666.180.715.129 TL; 6.047.019 US\$
- General expenditure: 12.859.286.810.590 TL; 21.210.180 US\$.

***IV.1.b. Number of Employees***

Economist: .....	44
Lawyer: .....	23
Other professions: .....	74
Supportive personnel: .....	166
Total: 3 .....	07

***IV.2.***

88. As per Article 35 of the Act No: 4054, Regarding the Protection of Competition, it is a must to be a graduate of the following departments or their accepted equivalents in a foreign country, in order to become an assistant expert on competition: School of Law, Economics, Political Sciences, Economics or Business Administration Departments of Faculty of Social and Administrative Sciences, or Industrial or Business Administration Engineering of Faculty of Science. Thus, when duty is distributed among assistant experts on competition, all tasks granted by the Act are carried out by personnel of profession, regardless of specialisation.