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1. Law No. 4054 on the Protection of Competition, 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 Law, was appointed on February 27, 1997 with a delay of 27 months. However, the Competition Authority completed its organisation within such a short period of 8 months, and announced it to public by a Communiqué issued as per the Temporary Article 2 of the Law on November 5, 1997 and started to operate thereafter.

1. Developments in competition law and policies

2. After the Competition Authority had established its organisation, it had commenced the implementation of competition rules, and the secondary legislation, namely communiqués, which were rapidly prepared and put into effect in 1998. These are as follows in chronological order:

- Communiqué No. 1998/2, titled “Communiqué on the Amendment of the Article 4 of the Communiqué No: 1997/1 Concerning Mergers and Acquisitions Subject to the Authorization of the Competition Board” (regarding turnover and market share threshold), issued in the Official Gazette No. 23298 and dated March 26, 1998.
- Communiqué No. 1998/3, titled “Communiqué on Group Exemption Regarding Distribution and Servicing Agreements In Relation To Motor Vehicles”, issued in the Official Gazette No. 23304 and dated April 3, 1998.
- Communiqué No. 1998/4, titled “Communiqué Regarding the Methods and Principles to be Pursued During The Course of Pre-notifications and Applications for Authorization Made to the Competition Authority in Order the Acquisitions via Privatization to Be Valid”, issued in the Official Gazette No. 23461 and dated September 12, 1998.
- Communiqué No. 1998/5, titled “Communiqué Concerning the Amendment in the Communiqué Regarding the Methods and Principles to be Pursued During The Course of Pre-notifications and Applications for Authorization Made to the Competition Authority in Order the Acquisitions via Privatization to Be Valid”, issued in the Official Gazette No. 23527 and dated November 18, 1998.
- Communiqué No. 1998/6, titled “Communiqué Concerning the Amendment in the Communiqué on the Mergers and Acquisitions Subject to the Authorization of the Competition Board” (regarding turnover and market share threshold for financial institutions), issued in the Official Gazette No 23527 and dated November 18, 1998.

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- Communiqué No. 1998/7, titled “Group Exemption Communiqué Regarding Franchise Agreements”, issued in the Official Gazette No. 23555 and dated December 16, 1998.

2. Implementation of the competition law

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 Law No: 4054)*

3. Article 4 of Law No: 4054 on the Protection of Competition 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 Law which aims at preventing the abuse of dominant position by the undertakings holding a dominant position in the relevant markets are in parallel with Articles 85 and 86, respectively the Rome Treaty, which are the model rules for the Turkish Law. In case of infringement of the Articles 4 or 6 of the Law in markets for goods and services, upon an application or with its own initiative, the Board may decide to initiate an investigation directly or to initiate 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 Law. 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 infringe competition.

2.1.a. *Overview of the Activities of The Competition Authority*

Table 1: Activities Between January, 1 1998 and December, 31 1998

I. Total number of competition infringements	250
Operations Concerning which Preliminary Inquiry Decision is Taken	22
- With its own initiative	2
- Upon Primary Examination ¹	20
	250
Operations Concerning which Initiation of Investigation Decision is Taken	-
- With its own initiative	10
- Upon Preliminary Inquiry	9
- Those whose investigation still pending	1
- Investigations finalised	
Applications Under Examination	73
Applications Refused	26
Applications that are not within the scope of Law No: 4054	130
TOTAL	

4. As seen in Table 1, a total of 250 applications were made to the Competition Authority between January, 1 1998 and December, 31 1998. 130 of these applications have directly been considered as out of scope of the Law, 26 of them were refused or considered to have been refused by the Board. For 21 applications, which were within the scope of the Competition Law and against which actions were initiated, it was decided to conduct preliminary inquiry; for 10 of the preliminary inquiries initiated, decision was taken to initiate investigations.

5. However, as of December, 31 1998, the Board had made a final decision regarding only one investigation². Examination, preliminary inquiry, and investigations of the remaining 73 applications still continue.

6. The reason for such a high number (250) of applications, including complaints falling out of scope as well, could be said to be immediate actions taken by the concerned persons upon the formation of Competition Authority's organisation in our country where there had been no competition rules previously and the announcement of this formation.

7. The table exhibiting sector breakdown regarding 120 applications falling into the scope of the Law is shown below. (Table 2)

Table 2: Breakdown of Operations of Competition Infringements By Sectors

Sector	Number of applications
Printing and Publishing	10
Food and Beverages	19
Transportation	19
Electrics/Electronic	1
Financial Services	4
Gas	3
Agricultural Products	6
Cement	15
Office Equipment and Computer	3
Chemistry and Chemical Products	4
Land Vehicles	1
Optical Equipment	1
Petroleum-Chemistry	4
Mine and Mining	2
Education	14
Telecommunication	2
Cattle-breeding and Animal Products	2
Glass	1
Self Employment Activities	3
Construction Equipment	2
Iron-Steel	1
Others	3
TOTAL	120

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8. 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 are higher in comparison to 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.

9. As of December, 31 1998, the Board has made one final decision regarding 1 of the 10 operations on which decision to initiate investigation has been taken. Below, a brief information is provided concerning the mentioned investigation, which is shortly referred as the "LPG Case".

2.1.b. The LPG Case

10. in the complaint of Yücel Gaz San. ve Tic. A.^a. dated November 12, 1997 and in the petition submitted anonymous on behalf of the local retailers operating in the LPG market in the city of Adýyaman dated November 5, 1997; it was alleged that the companies Aygaz, Likidgaz, Milangaz and Ipragaz commenced selling tubed LPG of 12 kg at a price of 750.000 TL which was below the cost as of October 27, 1997 and that as a result of this practice, the local retailers encounter the risk of terminating their activities.

11. Upon the complaints, the following findings were made as a result of the examinations carried out by the Competition Authority:

- in LPG market of the city of Adýyaman, a significant part of the retailers determined the retail sales price of 750.000 TL for tubed LPG of 12 kg on October 27, 1997 and the other retailers followed them within two days. Cost to retailers varied between 875.000 TL and 1.155.000 TL, and before this practice, selling price varied between 1.260.000 TL and 1.360.000 TL;
- Ipragaz A.^a., Aygaz A.^a., Mogaz Petrol Gazlarý A.Đ., Likidgaz Tevzi ve Üretim San. ve A.Đ., Milangaz Tic. ve San. A.Đ. retailers advertised this practice by radio, posters and handouts, Mogaz A.Đ. had its handouts A.Đ. printed itself. Ipragaz A.Đ. retailer Rýza GÖZAYDIN could not provide documentation his advertisement expenditures. Aygaz Inc. retailer Nevres KETENCÝ was claimed not to obtain the consent of the undertaking referred for the radio announcements, though it was compulsory by the retailing contract. Likidgaz Inc. and Milangaz Inc. retailer Mehmet TEMEL did not accept the existence of handouts printed on behalf of himself, and the retailers could not explain the issue as the advertisements were financed by the distribution firms, based on all of these statements;
- while different prices were in question for tubed LPG of 12 kg in the relevant market before October 27, 1997 sudden formation of a price below the cost like 750.000 TL could not be evaluated as a result of normal functioning of competition, and although the practice was asserted to be initiated by a single retailer operating in the city of Adýyaman, the practice suddenly became common in the central town and in the other towns. Its effect not being observed in Panlýurfa, a city 100 km. away from Adýyaman, and in the other surrounding cities, was indication of an intervention in the market;

- while the undertakings for which investigation was initiated, evaluated the sales below cost in the relevant market as the practice within the normal functioning of the market, other local firms in the market declared that they incurred damages due to this practice;
- as a result of examining in detail the retailing contracts of the undertakings which were the subject of investigation, it was not possible for the retailers to be able to determine the product price and sales conditions at their own will, to engage in price competition in the relevant market, independent of the parent firms, within such restrictive provisions of contract;
- all undertakings under investigation claimed that after the withdrawal of Yücelgaz A.^a. from the market, they started selling below cost with the intention of increasing their market share. However, these claims were refuted by the statements of the same undertakings' retailers;
- the practice was terminated by Aygaz A.^a., Mogaz A.^a., Ipragaz A.^a. and Sihirgaz A.^a. on December 12, 1997 and on November 3, 1997 by Likidgaz A.^a. and Milangaz A.^a.,
- Aygaz A.^a., Demirören LPG Grubu, Ipragaz A.^a. and Sihirgaz A.^a. concluded an agreement in a meeting held via their representatives at Gaziantep Hotel Tilmen on June 24, 1997 which involved a number of decisions for the purpose of pushing the local firms out of the market;
- in relation to this practice which could be evaluated as a concerted practice by itself under Article 4 of the Law No: 4054, the agreement which was among the documents of Mogaz Petrol Gazları A.Ş. whose largest partner was Aygaz Inc. with a share of 99.99 percent, was included in the Preliminary Inquiry Report and Investigation Report. The agreement which was concluded by Aygaz A.Ş., Ipragaz A.Ş., Sihirgaz Tic. ve San. A.Ş., and Demirören Grubu representatives at Gaziantep Hotel Tilmen on June 24, 1997, had the purpose of preventing competition in the South and Southeast Anatolian Regions LPG market and revealed the below-the-cost sales practice;
- when the following points were considered, it can be concluded that Mogaz A.^a. participated in the said agreement: Aygaz A.^a. which attended the said meeting via its representative owned 99.99 percent of the capital of Mogaz A.^a., the fax message related to the agreement reached at Gaziantep Hotel Tilmen was found among the documents of Mogaz A.^a., and Mogaz A.^a. management was directly informed of this agreement;
- in this agreement, there existed provisions that predatory pricing practice would be commenced as soon as possible, with the aim of pushing the local firms out of the market, which were claimed to work “piratically” in some cities including Adýyaman;
- as a result of the said agreement, the undertakings Aygaz A.^a., Ipragaz A.^a., Mogaz Petrol Gazları A.Ş., and Sihirgaz Tic. ve San. A.Ş. practiced predatory pricing in the retail sales of tubed LPG of 12 kg in Adýyaman from October 27, 1997 until December 23, 1997, which was committed via their retailers with the aim of eliminating the local firms from the said market. Likidgaz Tevzi ve Üretim San. ve Tic. A.Ş., Milangaz Tic. ve San. A.Ş., and Milgaz Tic. ve San. A.Ş. joined the same practice on October 27, 1997, and they terminated the infringement one day before the announcement by the Competition Authority of its commencing operation;

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- not forthwith implementing the agreement had no importance in terms of the Competition Law, in fact the agreement was put into effect with the basic qualities preserved, despite some minor amendments; in other words, the practice in the city of Adýyaman was a result of this agreement, and bore its effects;
- no doubts were present concerning the existence of the agreement due to the following reasons: a copy of the agreement was available among the documents of Mogaz Petrol Gazlarý A.Đ. whose partner was Aygaz A.Đ., one of the parties, with a share of 99.99 percent; in the “sales report” with which it was enclosed, it was mentioned to be the minutes of a meeting about which they were not informed of; Mogaz Petrol Gazlarý A.Đ. did not deny the truthfulness of the document; the said company representatives accommodated at the Hotel Tilmen on the date of the meeting; all representatives arrived at the Hotel on June 23, 1997; they departed from the Hotel on June 24, 1997 except one of them; the other representative moved to another hotel in the same city one day later; Aygaz A.^a. stated that such a meeting might have been held;
- pleas such that the condition of form is not sought in agreements in terms of the Competition Law, therefore the persons attending the meeting held at Gaziantep Hotel Tilmen were not authorised to represent the firms concerned, and did not have signatures on the said agreement, did not rule out the existence of an agreement contrary to the Law No: 4054;
- pleas such that all agreements and decisions, which are in the scope of Article 4 of the Law No: 4054 and existent at the date of November 5, 1997 were to be notified within six months as per the Temporary Article of the Law; investigation was commenced for the agreement evaluated under the said scope before this term May 5, 1998 had expired, and therefore sanction could not be resorted, were deprived of legal grounds when the following points were considered:
 - the Hotel Tilmen Agreement could by no means be exempted from the application of Article 4 of the Law No: 4054, as first of all either of the parties did not make an application for exemption meanwhile, and what is more important, even though such an application existed, as the agreement had the intention of predatory pricing in order to push the competitors (local firms) out of that market (the city of Adýyaman) and thus included provisions directed at explicit infringement of competition, The agreement’s release from sanction could not be in question on the grounds that it was required to be notified within the period envisaged in the last paragraph of Article 16 of this Act Law to the same reason;
- the practices of some firms in the market aimed at making the activities of competitors difficult, or pushing them out of the market by determining price below cost via concerted practice or agreement, were practices prohibited *per se* in the Competition Law,
- the agreements and practices cited above are in contrary to subparagraphs (a) and (d) of Article 4 of the Law No: 4054 on the Protection of Competition, which prohibit the agreements, concerted practices and decisions of undertaking associations restricting competition, and subparagraph (a) says “to fix purchase or sales prices or the factors such as cost or profit which form the price or all other trading conditions concerning purchase and sales of goods and services”, while subparagraph (d) says “to impede or restrict the activities

of the competitors or to eliminate other enterprises operating in the market by boycotts or by other practices, or to apply dissimilar conditions to persons in the market”,

- therefore, Aygaz A.^a., Likidgaz Tevzi ve Üretim San. ve Tic. A.^a., Milangaz Tic. ve San. A.^a., Milgaz Tic. ve San. A.^a., Ipragaz A.^a., Mogaz Petrol Gazları A.Ş., and Sihirgaz Tic. ve San. A.Ş. should be punished in accordance with paragraph 2 of Article 16 of the Law No: 4054 on the Protection of Competition.

2.2 Exemptions and Negative Clearances

12. Article 5 of the Law No: 4054 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 Law, 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 Law.

13. Following is the exhibit of the distribution of a total of 220 exemption and negative clearance applications by sectors, which are under examination by the Authority.

**Table 3. The Distribution of Exemption/Negative Clearance Applications
By Their Sectors**

Sector	Number of applications
Plastics	2
Land Vehicles	39
Paper and Paper Products	3
Petroleum Products	17
Chemistry and Chemical Products	20
Transportation	4
Gas	33
Electricity and Electronics	6
Financial Services	2
Fertiliser	1
Others	1
Jewellery	1
Forest Products	1
Beverages	30
White Goods	6
Textiles	2
Construction	3
Cement and Ready Concrete	4
Machine Manufacturing	2
Printing & Publishing	6
Toys	1
Glass	34
Ready-made Clothes	2
TOTAL	220

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2.3. *Mergers and Acquisitions*

14. Pursuant to the statement in Paragraph 1 of Article 7 of the Law No: 4054 which states:

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

15. In the 2nd paragraph of the same Article, it is stated that communiqués shall be issued by the Board to announce the categories of mergers and acquisitions which, to be considered legally valid, require a permission by prior notification to the Board.

16. Upon the Article No: 7/2, the Board issued Communiqué No: 1997/1, titled “The Communiqué on the Mergers and Acquisitions Subject to the Authorisation of the Competition Board”, and within the scope of the provisions of this communiqué, the Board issued the Communiqué No: 1998/4, titled “Communiqué Regarding the Methods and Principles to be pursued during the course of Pre-notifications and Applications for Authorisation made to the Competition Authority in order the Acquisitions via Privatisation to Be Valid” regarding privatisation procedures carried out by Privatisation Administration; and then through the Communiqué No: 1998/5, requiring amendment on the aforesaid communiqué, it determines the principles to be pursued in privatisation procedures that shall be carried out by public institutions and organisations other than Privatisation Administration.

17. In addition to the aforesaid, the Board issued the Communiqué No: 1998/6, titled “The Communiqué concerning the Amendment to the Communiqué on the Mergers and Acquisitions Subject to the Authorisation of the Competition Board” and added a paragraph to Article 4, pursuant to third paragraph of the Communiqué No: 1997/1, which regulates the calculation of the threshold regarding the turnover of financial institutions.

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

18. Between January 01, 1998 and December, 31 1998, there were 72 applications made to the Authority for mergers and acquisitions within the framework of Article 7 of the Law No: 4054 and communiqués issued on the basis of this Article. The Board has taken decision regarding 63 of these applications. However, 7 of remaining 9 applications which are at the stage of preliminary examination, and 2 of 9 applications which are at the stage of final examination have not been concluded yet. The breakdown regarding categories of concluded mergers and acquisitions is provided below.

Table 4: Breakdown of Categories of Concluded Mergers and Acquisitions

Mergers	5
Acquisitions	43
Joint Ventures	6
Mergers and Acquisitions by way of	9
Total	63

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Table 5: The Distribution of Decisions Related to Mergers and Acquisitions By Sectors

Sectors	MergersS	Acquisitions	Joint Venture	Privatisation	Total
Chemistry and chemical products, petroleum products, fertiliser		4	1	2	7
Glass and glass products		1			1
Construction, cement and other materials of construction	1	6	1		8
Electricity, gas, water	1	2		2	5
Iron & steel				1	1
Printing and publication, registered media such as records, cassettes		4	2		6
Cellulose, paper and paper products		2			2
Office machines and computer		1			1
Food products and beverages	1	7	2		10
Textiles and ready-made clothes		3			3
Machinery and Equipment manufacturing		6			6
Agriculture and livestock breeding, forest products, water products		1			1
Financial services (banking, insurance etc.)	1	4		2	7
Tourism				1	1
Land vehicles, aircraft, sea vessels and railway carriers	1	2		1	4
Total	5	43	6	9	63

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

19. Among a total of 63 merger and acquisition cases resolved by the Board between January 1, 1998 and December 31, 1998, below-mentioned are the overviews of 5 sample cases selected considering the factors such as the type of the procedure, relevant market, the extent of the examination, and the nature of the decision.

2.3.b.1. Metro-Migros

20. In the meeting of the Competition Board dated March 19, 1998, the joint venture in question was permitted conditionally as a result of the evaluation, and the discussion of the report prepared by the Rapporteurs, upon the application to establish 5 separate joint ventures under an agreement between Migros Türk A.^a and Metro AG, signed on December 1, 1997. Following are the related parts of the mentioned decision for a permission with conditions:

“Within the information and documents involved in the Preliminary Examination Report;

It was understood that the establishment of 5 separate joint ventures was prescribed under an agreement between Migros Türk T.A.^a and Metro AG, signed on December 1, 1997, and that the procedures aimed at establishing the joint ventures in question would be realized as;

- the acquisition by the Migros Türk T.A.^a of 50% shares of Praktiker Yapı Malzemeleri A.Ş. whose 99.9996% of the total shares belong to Praktiker Bau und Heim Werkermaerkte AG controlled by Metro AG, and which has no activities in Turkey as of the date of notification, and shall operate in the market of building elements marketing,
- the acquisition by the Migros Türk T.A.^a of 50% shares of Adler Moda Tic. A.^a whose 99.64% of the total shares belong to Adler Modamaerkte GmbH controlled by Metro AG, and which has no activities in Turkey as of the date of notification, and shall operate in the market of clothing marketing,
- the acquisition by the Migros Türk T.A.^a of 50% shares of Real Market A.^a whose 99.64% of the total shares belong to Real SB Warenhaus GmbH controlled by Metro AG, and which has no activities in Turkey as of the date of notification, and shall operate food led retail trade market,
- it was understood that 90% shares of the companies entitled Metro Bakırköy Ltd., Metro Kadıköy Ltd., Metro Ankara Ltd., Metro Bursa Ltd. and Metro İzmir Ltd. operating as the limited companies under Metro AG formerly, and of Metro Adana Market which commenced operation later on, were transferred to Metro Grossmarket Bakırköy Alışveriş Hizmetleri Tic. Ltd. Şti. belonging to Metro Alışveriş Hizmetleri Tic. ve San. A.Ş., and that the procedures aimed at establishing the joint ventures in question would be realized as the acquisition by the Migros Türk T.A.Ş. of 50% shares of Metro Grossmarket Bakırköy Alışveriş Hizmetleri Tic. Ltd. Şti. which incorporates 6 markets in question, and operates food led retail trade market,
- it was understood that a company named “Ok Ucuzluk Marketleri A.^a would be established, involving the capital and activities of 77 markets having an average sales area of 300 m² and

operating food led retail trade market named “^aok” which had been operated by the Migros Türk T.A.^a. and had not had a legal entity prior to the agreement, and that the procedures aimed at establishing the joint ventures in question would be realized as the acquisition of 50% shares of this company by Metro AG,

And as a result of the evaluations and discussions, it was decided that

Among 5 separate joint ventures to be established by the Migros Türk T.A.^a. and Metro AG;

- 2 separate joint ventures to be established upon Praktiker Yapı Malzemeleri A.Đ. to operate in the market of building elements marketing, and Adler Moda Tic. A.Đ. to operate in the market of clothing marketing, are not in the scope of Article 7 of the Law No: 4054 on the Protection of Competition, and Article 4 of the Communiqué No: 1997/1, which was issued upon this Law, in terms of their total turnovers and market shares in the relevant product market,
- 3 separate joint ventures to be established upon ^aok Ucuzluk Marketleri A.^a., Real Market A.^a. and Metro Grossmarket Bakýrköy Alýþveriř Hizmetleri Tic. Ltd. Đti. to operate mainly in the food retail trade market, were joint ventures (mergers) under the “Communiqué on the Mergers and Acquisitions Subject to the Authorization of the Competition Board” No: 1997/1, which was issued upon Article 7 of the Law No: 4054, and entered into force on November 5, 1997, in terms of their total turnovers and market shares in the relevant product market; but due to intense competition experienced de facto in the food retail trade market, and the possibility of potential competition introduced by the fact that the entry barriers to the market are at insignificant levels, and increasing market share of large-scale retailers, significant decline of competition is not in question as mentioned in Article 7 of the Law No: 4054, not only on the basis of the cities where the parties exist together but also throughout Turkey, as a result of the mentioned joint ventures. On the other hand, it was decided that the presence of both of two parent companies (Metro AG- Migros Türk T.A.^a.) in the same geographical market (cities and central towns) with 3 separate joint ventures to be established by them upon ^aok Ucuz Marketler A.^a., Real Market A.^a. and Metro Grossmarket Bakýrköy Alýþveriř Hizmetleri Ltd. Đti., shall convert this joint venture to an agreement restricting competition, and giving rise to cooperation.

Therefore, **METRO AG- MIGROS TÜRK T.A.^a. joint venture procedures are permitted provided that** in accordance with paragraph 3 of Article 6 of the Communiqué No: 1997/1, as long as the joint venture agreement in question remains in effect, the parent companies (Metro-Migros) do not directly or indirectly enter the relevant product market, together, in the same geographical market with the joint venture. In other words, only one of Metro AG or Migros Türk T.A.^a. may operate in the relevant product market in any Turkish city or central town with the joint venture; and that **in case of non-compliance with this condition**, a notification be made that as of the date of non-compliance, the joint venture in question **shall be deemed to be an agreement restricting competition** under Article 4 of the Law No: 4054, **and a preliminary inquiry and/or investigation shall be started on the Board’s own initiative.”**

21. With regard to the relevant product market, the Report under discussion says that

“....Accordingly market chains start from 250 m² which is the optimum size in terms of

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- the diversity of products,
- proper shelf order,
- ensuring managerial effectiveness.

At the same time, market chain administrators stated that the market size had to be at least 250 m², and 3500 types of products had to be available in market chains. At this point, it is possible to say that in de facto state of the marketing market, the tendency of consumers towards “one-stop shopping” can be met in the markets having 3500 items of products. The size of a market that may have such diversity of products appears to be 250 m², considering proper shelf order, and effective shelf arrangement of products.

In the light of the above information, it would be right to say that the competition in the food-led retail trade market, takes place among the markets larger than 250 m². The smaller shops exhibit homogenous conditions of competition in terms of their customers and the level of service they provide, and fall outside the competition of the markets larger than 250 m².

Considering that the groceries smaller than 100 m² with an approximate market share of 60% in the food-led retail trade market have different place in the eyes of the consumers, and different position against other large retailers, it is understood that they can by no means compete with hypermarkets and supermarkets. It is clear that groceries and small markets form a separate group when the conditions of competition at retailing levels in production chains are examined. It is possible to list the reasons as follows:

- 1) One-stop shopping tendency of consumers, which increasingly intensifies, and now affects their shopping habits to a significant extent:

...

- 2) The inability of groceries to benefit from the advantage of purchasing in bulk:

...

- 3) Increased service expectation of consumers:

...

As it would be understood from the explanations above, in this examination, the relevant product market is formed of markets, supermarkets or hypermarkets of 250 m² and larger, where the food-led retail trade forms the upper market.

On the other hand, the joint ventures to be created upon Praktiker Yapı Malzemeleri A.Ş. and Adler Moda Ticaret A.Ş. are in the group of retailers which are specialty shops and specialized in specific goods. Therefore, each of these outlets is included in a separate market group in terms of its operation.”

2.3.b.2. Trakmak/New Holland N.V.

22. In the meeting of the Competition Board dated May 28, 1998, the acquisition in question was permitted conditionally as a result of the evaluation, and the discussion of the report prepared by the rapporteurs, upon the application related to the acquisition of a part of the shares of Koç Grubu, a partner of Trakmak Traktör ve Ziraat Makinaları Ticaret A.Ş., by New Holland N.V. which is the other partner. Following are the related parts of the mentioned decision for conditional permission:

“Decision:

Following the submission of the Preliminary Examination Report to the Chairmanship of Competition Board, which was prepared by the rapporteurs, upon the notification to the Authority on March 30, 1998 most recently, and signed by H.Oktay ERMAN, the Director of Financial Affairs, on behalf of Trakmak Traktör ve Ziraat Makinaları T.A.Ş. , with the request for permission for the firm New Holland N.V. established in England to take over a part of the shares (37.5%) of companies within Koç Grubu, which are the partners of Trakmak Traktör ve Ziraat Makinaları T.A.Ş. , a notice was received, involving quite different information than the information in the notification and its enclosures, and asserting that as a result of the acquisition procedure in question, the tractor and combine markets in Turkey would largely be owned by Koç Grubu-New Holland partnership, and in addition to the Preliminary Examination Report dated March 30, 1998, the Chairmanship proposal dated April 15, 1998 and numbered 20 expressed the view that the points in the notice need to be clarified.

The Chairmanship’s proposal in question and the enclosed report were discussed in the Board meeting dated April 16, 1998 and numbered 61, and in line with the view in the proposal, it was decided that the acquisition procedure, the subject of notification, would be placed under final examination in accordance with Article 10/2 of the Law No: 4054. The Chairmanship’s proposal dated May 26, 1998 and numbered REK.0.08.00.00/27 including the Final Examination Report dated May 25, 1998 and numbered D4/2/Ü.G.-98/6, arranged as a result of the examination made by the same rapporteurs upon this decision, was handled as the third item of the agenda of the Board meeting numbered 67.

As a result of the assessment of information/documents provided in the Final Examination Report, and the discussions;

It was concluded that creating a dominant position or strengthening the existing dominant position, thus decreasing competition to a significant extent are not in question for **the tractor and other agricultural tools and equipment** markets among the relevant product markets, under the provisions of Article 7 of the Act, and those of the Communiqué on the Mergers and Acquisitions Subject to the Authorization of the Competition Board No: 1997/1, but that in terms of **the combine market**, this acquisition shall be an acquisition strengthening the dominant position at purchaser level, and creating a dominant position at distributor level, should the acquisition in question is realized in this form, and that it should be open to alternative sources of supply other than Trakmak Traktör ve Ziraat Makinaları T.A.Ş. in order to prevent such negative results related to the environment of competition in the market.

It was decided that the acquisition by New Holland N.V. of a part of the shares (37.5%) of Koç Grubu which is a partner of Trakmak Traktör ve Ziraat Makinaları T.A.Ş. be permitted provided

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that regarding to the combine market, other firms fulfilling the same and reasonable conditions are also treated equitably, and granted distribution in case of request.”

2.3.b.3. Borusan/Mannesmannröhren

23. In the meeting of the Competition Board dated August 20, 1998, the said joint venture was permitted conditionally as a result of the evaluations, and the discussion of the report prepared by the Rapporteurs, upon the application related to setting up a joint venture by Borusan Holding A.^a., Borusan Yatırım ve Pazarlama A.Đ. and Mannesmannröhren Werke AG, named Borusan Mannesmann Endüstrileri ve Yatırım A.Đ. Following are the related parts of the mentioned decision for conditional permission:

“.... It was decided that the joint venture operation of setting up “Borusan Mannesmann Endüstrileri ve Yatırım A.Đ.” with a capital of 10 trillion TL by parties are stated as Borusan Birleşik Boru Fabrikaları A.Đ: (BBBF), Kartal Boru A.Đ. and Mannesmann Boru Endüstrisi T.A.Đ. (MSB), and whose 77% shall belong to Borusan Grubu and 23% to Mannesmann AG, is an acquisition under the “Communiqué on the Mergers and Acquisitions Subject to the Authorization of the Competition Board” No: 1997/1, issued upon Article 7 of the Law No: 4054, in terms of the parties’ total turnovers and total market shares, in the industry/profile, spiral and PP pipe subsectors among the relevant product markets, it is not a joint venture creating a dominant position or strengthening the existing dominant position, thus decreasing competition to a significant extent, as mentioned in Article 7 of the same Law, on the other hand, that in the installation/line and special pipe subsectors, it is a joint venture with a potential to create a dominant position and hence restrict sound competition, but that

- in each pipe subsector, at least 4-5 large firms and many small firms carry out their activities for long years,
- considering that within the last five years, many firms have entered the various subsectors of the pipe sector and have been continuing their existence, any structural or legal barriers to entry into or exit from the sector do not exist,
- Within the Customs Union established with the European Union (EU), the customs in the pipe sector are reduced to naught, and the Turkish pipe market is opened to intense competition arising from the EU, and therefore as a result of this joint venture, competition in the relevant product market shall not decrease to a significant extent,

the joint venture in question be permitted, but that this permission is given provided that

- being separate for each pipe subsector, monthly information including production, sales (domestic market and export) and price figures, and the market shares within this framework be notified to the Competition Authority every 6 months by Borusan Mannesmann Endüstrileri ve Yatırım A.Đ. Joint Venture

without the requirement for the Competition Authority to make any examination, investigation for a period of 5 years with condition of extension when needed, in order to examine the activities of Borusan Mannesmann Endüstrileri ve Yatırım A.Đ., and the effects of the joint venture on the sector, for the assessment of the potential effect of restricting competition....”

2.3.b.4 Körfezbank/Dođuđ B.V.

24. In the meeting of the Competition Board dated October 15,1998, the acquisition of 40 percent share of the Birleđik Türk Körfez Bankasý A.Đ. to the company entitled Dođuđ B.V.was permitted as a result of the discussion of the report prepared upon the application and as a result of the evaluations made. Following is the summary of the part of the said report prepared by the Rapporteurs, concerning the concepts of “control” and “economic unity”.

“...**undertaking** is accepted as a structure forming an economic integrity such that it also encompasses the affiliated undertakings in accordance with the European Union Competition Law legislation. Therefore, in terms of the Competition Law, one of the most important elements of being an undertaking is being able to decide independently. The most important result created by this kind of merger and acquisition cases is, in accordance with the definition of control, the exclusion of the procedures realized within the same economic unity, and deemed as mergers or acquisitions in the Turkish Commercial Law (TCL),

The concept of undertaking used in the Competition Law covers natural persons stated in Article 14 of the Commercial Law of our country, corporate bodies stated in Article 18, and trader defined as the Maritime Joint Venture in Article 19. In this respect, we face undertakings in the form of enterprises run by natural person traders, trading companies as corporate body traders, and the other enterprises listed in Articles 18 and 19 of TCL. It is required that those listed decide independently in order to be considered as an undertaking in the context of the Competition Law. And their ability to decide independently is possible through other undertakings’ not having an opportunity for a decisive influence on their decisions....

...In order to ensure legal control of the undertakings having the nature of natural person trader, ordinary company and personal company such that it also involves the change in the original contract, unanimity of the partners is required. Other decisions can be taken by the majority of the partners.

For the incorporations and limited companies with more than twenty partners, absolute control which also involves changing the original contract, can be obtained by owning two-thirds of the principal capital, except privileged positions. However, in cases which do not involve a change in the original contract, unless there is an otherwise provision in the original contract, the shareholders representing one-fourth of the capital, and if this ratio is not reached in the first meeting, even the shareholders present in the second meeting can have control. And in limited companies, the partners owning more than half of the principal capital can essentially obtain control.

In the light of the evaluations above, it is required that the means to ensure the control of an undertaking be handled separately on a case-by-case basis. In the acquisition which is the subject of notification, Dođuđ Holding A.Đ. that not only holds more than half of the capital but also has the power to use more than half of the voting rights, has the power to appoint more than half of the members of the Board of Directors, has the right to manage the business of the Birleđik Türk Körfez Bankasý A.Đ., and the affiliated companies of Dođuđ Holding A.Đ. constitute an economic unity, and have control over the Birleđik Türk Körfez Bankasý A.Đ. which is the subject of the acquisition. Therefore, the acquisition by Dođuđ B.V. of 40% share the Birleđik Türk Körfez Bankasý A.Đ. owned by foreign people, and bearing no preference, is not an acquisition under the Communiqué No: 1997/1....”

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2.3.b.5. TEDA^a

25. In the meeting of the Competition Board dated November 16, 1998, the said acquisition was permitted conditionally as a result of the evaluations, and the discussion of the report prepared by the Rapporteurs upon the application related to the transfer of operating rights of the electricity distribution facilities in 17 Work Territories belonging to TEDA^a Türkiye Elektrik Dağıtım A.Ş. to the firms concerned. Following are the related parts of the decision for the conditional permission referred

“That in the privatization procedures, which are deemed to be acquisition in terms of Law No: 4054, the undertaking acquired is a public entity, the current positions of public undertakings are generally not due to their individual performances in a competitive environment but is rather due to public power, and the effects to be raised in the relevant market by the acquisition of the said undertakings renders it necessary to evaluate such acquisitions different than those between two private undertakings.

Below listed are the provisions of these contracts which are found to be in contrary to competition rules, as a result of examining the uniformly prepared Concession Contracts that regulate the principles of acquisition procedures and are still being reviewed at the Council of State.

- ***Exclusivity:***

The concept of exclusivity is defined in subparagraph (e) of Article 8 of Concession Contracts which will be signed between the Authorized Companies and the Ministry of Energy as: “The company shall establish electricity distribution plants in its work territory and acquire those already established or being established by other institutions depending on the existence of certain conditions. The authorization to trade via purchasing from the third parties with the authorization to sell and selling of the electrical energy, belongs *exclusively* to the Company.” Other than this provision, there is no other provision either in the Law No: 3096 and relevant Regulations, or in Decisions of Council of Ministers and Concession Contracts that grant absolute monopoly right to the Company in Charge.

With regard to Competition Law, it is possible to categorize monopoly right formed on the basis of an agreement in 3 groups, starting with the weakest and ending with the strongest. The first condition is that the transferring party leaves production, selling or distribution of goods or services that are subjects of agreement or the utilization of a right (patent, know-how etc.) to a person in a certain territory, reserving its own right and being open to passive sales from other territories. This situation is called simple monopoly. In case the party transferring the right, undertakes not to produce and sell or not to utilize a right in the territory where it granted the monopoly right, then strengthened monopoly emerges. Agreements prohibiting passive sales as well as active sales, in other words, agreements that completely prohibit supplying from alternative resources, are called as monopoly agreements that grant absolute land (territorial) protection.

Considering the categories of monopoly stated above, which situation is preferred by the parties is not clearly understood from the Concession Contracts; however, in Article 8/e, stating “... the authorization to trade in electrical energy via buying and selling belongs *exclusively* to the company.”

It's seen that the monopoly right granting absolute land (territorial) protection has been adopted.

26. As a matter of fact, it is understood from the negotiations with high level officials from TEA^a, TEDA^a, Ministry of Energy and Authorised Companies that the Companies think they will obtain absolute monopoly right at Work Territories after acquisition procedure. The same issue is confirmed in the notification forms.

27. Besides, the points that electrical energy sector has characteristics unique to its own, it is a critical product bearing vital importance for the country's economy and there are still difficulties in meeting the demand, all impede the establishment of free competition conditions, they are not sufficient to justify the monopoly right which grants an absolute land (territorial) protection that's completely closed to competition. This means the continuation of the pre-privatisation situation in the same way. However, before the acquisition, the one that used the absolute monopoly right on behalf of the public was the state. The transfer of this right (concession) to a private institution without any modification and exactly in the same way, means the negligence of the competition side of privatisation. In the transfer of a state monopoly, with no doubt competition is expected to increase, in connection with the structure of relevant product and market when compared to the past.

28. As a matter of fact, as stated above, there are not any provisions stating that only one company can operate in one work territory in Law No: 3096, which is the legal basis for the transfer transactions, and in Regulations On Principles of Granting Office regarding Generation, Transmission, Distribution and Trading of Electrical Energy to Institutions other than Türk Elektrik Kurumu. On the contrary, in the provision of Article 4/f of the aforesaid Regulations, stating:

“The Ministry makes companies in charge, producing companies and public institutions and organizations separately or together to invest in a work territory which do not take part in the investment programs of the companies in charge, but considered by the Ministry as essential for country's requirements.”

It is implied that in one work territory there may be more than one company in charge.

- ***Exercising Fixed Price***

29. As stated above, the pre-condition to settle competition in electrical energy sector is the abolishing of absolute territorial monopolistic situation of Authorised Companies. However, demolishing absolute territorial monopoly, or in other words exclusivity, shall not be solely sufficient for ensuring competition in case it is not supported by other motivations that will provide competition, such as conditions directing consumers to Authorised Companies in the other territories, which are the alternative resources. Conditions or motivations that would direct consumers to alternative resources are generally provided via competition in price and/or quality. Quality with regard to electricity means fixed frequency and continuity in supply of electricity. In such a condition, the consumers shall direct themselves to companies providing cheaper service and/or service of higher quality.

30. In Article 9 of Law No: 3096 with the title Conditions and Tariff Principles for the Sales of Electricity, it is stated that:

“Energy tariffs shall become effective upon the offer by the company in charge and approval by the Ministry of Energy and Natural Resources”

31. As noticeable, this expression does not contain any provisions related to the structure of tariffs. How the tariffs and retail price to be applied to subscribers by companies are calculated is arranged in detail via Sales Agreements for Electrical Energy, to be signed between TEDA^a and Companies in Charge.

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With these arrangements, a fixed price for electricity sales to subscribers is determined. As it is known, determination of a fixed price is absolutely prohibited *per se* in Law No: 4054, on the Protection of Competition, due to the fact that its only aim is to restrict competition.

32. However, due to above stated characteristics unique to the electrical energy sector, price control is required in this sector. In other words, a total free pricing is inconvenient for the peculiarities of this product and structure of relevant market. But, this situation provides - although partial - competition based on price in the sector and thus should not form an obstacle for free price determination within certain limits.

- *Lack of Provisions Regarding Discriminatory Practices*

33. It is understood that relevant provisions of Concession Contracts are not satisfactory with regard to sanctions against practices of Companies in Charge, such as not providing energy continuously and at fixed frequency and not taking necessary measures in cases of failure, for the favour of its group companies and/or hardening the commercial activities of its competitors and/or; and it is understood that the interference of TEDA^a or the Ministry towards such problems does not contain factors deterrent enough, and under such circumstances measures to be taken against cases where those companies which are to be holding the monopolistic position in their territories use this dominant position against their competitors in other sectors, which are using electrical energy as input and against consumers, are insufficient.

34. On the other hand, besides after the Decision of the Council of Ministers regarding assignment, the view and the permission, regarding acquisition, of Competition Board are taken before the companies are granted duties, it is evident that for the acquisition by another undertaking or person of production and operation rights of the Companies to commence operation after acquisitions are performed, it is also necessary for them to be subject to permission of Competition Board.

Decision

35. As per the points explained above and the provision set forth in Article 6/1-a of the “Communiqué regarding Mergers and Acquisitions Subject to the Authorisation of the Competition Board”, numbered 1997/1 and issued on the basis of Article 7 of the Law No: 4054, on the Protection of Competition envisaging that “With regard to the structure of the relevant market and de facto and potential competition of those undertakings established within or out of the country, the necessity to protect and improve effective competition in the country should be taken into consideration” and as per Article 6/3 of the same Communiqué, permission is given unanimously for subject acquisition procedures with the following conditions:

1. removing the provision in Article 8/e of Concession Contracts that is related to exclusivity, and instead adopting a system which is open to alternative resources; for this aim, considering distribution and trading activities separate from each other, that their principles are determined by Supreme Board of Energy, until this Board is established to be determined by the relevant Ministry, and under the condition that the Competition Board is informed, for the first five years, aiming the consumers who use 1 MW or more electricity, the companies are given the right to sell electricity in the territories except their own territories with certain line utilisation price, in case there is demand; aiming that, trade section is opened to competition, even partially, and that the situation is re-evaluated by the Supreme Board of

Energy taking into consideration the application results and Turkey's electrical energy generation graphs at the end of 5 years;

2. abolishing fixed price practice arranged in detail via Energy Sales Agreements to be signed between Authorised Companies and TEDA^a, instead enabling the prices to fluctuate within a determined interval where the bottom and top limits are determined by the Supreme Board of Energy, and until this Board is established, to be determined by the relevant Ministry with the condition that Competition Authority is informed, and providing the companies to operate in their work territories within this certain interval, with the freedom to apply any price they want.
3. re-writing Paragraph (c) of Article 8 of Concession Contracts regarding services, and adding an expression preventing discrimination towards purchasers with equivalent position,
4. adding that the subject regarding the transfer of production and operation rights of companies, to operate after acquisitions are performed, to another undertaking or person should be subject to the permission of Competition Board; and within this frame, amending Article 31 of the draft "Concession Contract", to be signed between the Ministry of Energy and Natural Resources and each company in charge, entitled "Transfer of Authorization", stating "The company may transfer and convey – with the approval of the Ministry and under the same conditions - its distribution authorisation and whole or a part of its distribution rights emerging from this contract to institution providing loans for the project or to another person that they determine... Unless there is the approval by the Ministry, company partners, partnership shares cannot be changed and new partners cannot be accepted to the company." And adding as well the point that the permission of the Authority should be taken during these procedures.

3. Role of the Competition Authority in the development and implementation of other policies such as regulatory reform, trade and industry policies

36. Within 1998, the Competition Authority forwarded opinion to the Presidency of Privatisation Administration, Ministry of Health, Ministry of Environment, Ministry of Education, Ministry of Finance, Superior Board of Radio and Television, and Ministry of Trade, concerning the points which are in the scope of Law No 4054. With the opinions forwarded, it was intended to make certain regulations of the said administrations be in harmony with the Competition legislation.

4. Resources of the Competition Authority

4.1. Resources in General

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

TL 9.8 trillions

USD 37.6 millions

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4.1.b. Number of Employees

Economists	:	32
Lawyers	:	17
Other Professions		110
Support Staff		100
All Staff Combined		259

4.2.

37. Pursuant to Article 35 of the Law No 4054 sayılı Rekabetin Korunması Hakkında Kanun on the Protection of Competition numbered:

“In order to be appointed to position of Assistant Expert in Competition, one is required to graduate from Law Department or Economics Department or Social 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.....”.

38. Therefore, the task allocation among the assistant experts with different origins of profession is made regardless of any discrimination as to specialization in a specific matter, and the tasks entrusted by the Law are carried out by all professional staff.

NOTES

1. For one application among those for which preliminary inquiry was carried out upon the primary examination, it was concluded not to initiate investigation at the end of preliminary inquiry, and this application is indicated separately under the title “Those refused as per preliminary inquiry”.
2. The Law No: 4054 on the Protection of Competition, which was put into effect pursuant to issuance in Official Gazette dated December, 13 1994 and numbered 22140, the procedures to be carried out by the Board upon complaint, denunciation, or its own initiative are subject to certain periods. Stages related to these procedures are classified as preliminary inquiry, investigation and hearing.

Whereas the Board can decide to initiate investigation directly with its own initiative or upon denunciation and complaints, it might as well decide to initiate a preliminary inquiry in order to determine whether or not it is necessary to initiate investigation. Where a preliminary inquiry is decided to be initiated, the Chairman of the Board appoints one or more experts among the professional experts as rapporteur and the rapporteurs who are appointed to carry out preliminary inquiry informs the Board in writing within 30 days of all the information and evidence that is obtained together with their own views on the matter concerned. Within 10 days following the submission of the preliminary inquiry report, the Board convenes to decide whether or not to it is necessary to initiate investigation thereby assessing the information provided. Upon the decision on initiating an investigation, the Board determines the Board Member or the Members together with a rapporteur or rapporteurs to be authorised to carry out the investigation. The investigation is completed within no longer than 6 months. Where it is deemed necessary, this period may be extended by the Board only once, up to an additional six months. The Board informs the parties concerned, of the investigation initiated within 15 days following the date of the decision on initiating the investigation and request from the parties to submit the first defense arguments in writing within 30 days. The report prepared at the end of the investigation stage is notified to all the Board members and to the parties concerned. Those who are decided to infringe the Law are notified to submit their defence in writing to the Board within 30 days. This is the 2nd defense arguments in writing submitted by the parties concerned and upon the defense arguments, the experts authorized to carry out this investigation submit their additional views in writing within 15 days and this is also notified to all the Board members and parties concerned. The parties may reply to the additional views submitted in writing by the investigation committee within 30 days. This is the 3rd right to reply in writing granted to the parties. In cases where the parties justified reasons, this time period may be extended for only once and to maximum one fold. A hearing shall be held if the parties concerned have requested a hearing in their defense or reply petitions or with the Board’s own initiative upon the decision of the Board. Hearing is held within at least 30 days and no longer than within 60 days following the end of investigation stage. The invitations of the hearing are sent to the related parties within at least 30 days before the date of hearing. Hearings are concluded within no longer than five consequent sessions and several meetings held on the same day are considered as one session. The final decision is made on the same date and if this is not possible, together with its reasoning within 15 days following the hearing.

As explained above in detail, all stages of the investigation, from the initiation of examination to the final decision of the Board, do indicate a very long and detailed process in comparison to investigations regulated in other laws. Mainly, examples from other countries with radical traditions in the field of competition legislation are in parallel with this implementation. The most important reason for this is that the decisions influence not only the parties concerned but also the whole relevant market. This naturally requires a long and detailed working period.