

**ANNUAL REPORT ON COMPETITION POLICY IN TURKEY***2002***Executive Summary****1. Changes to Competition Laws and Policies, proposed and adopted**

## 1. Summary of new legal provisions of competition law and related legislation

- Communiqué Announcing the Increase in Administrative Fines Provided in Articles 16 and 17 of the Act on the Protection of Competition No. 4054, Being Valid Until 31/12/2002 was published in the Official Gazette on 7<sup>th</sup>, February, 2002.
- Block Exemption Communiqué on vertical agreements was published in the Official Gazette on July 14<sup>th</sup>, 2002. This Communiqué entails vertical agreements related to purchase, sale and resale of goods and services. It is a legislation parallel to that of European Commission's Regulation No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices. It tries simply to show restrictions that should not be included in vertical agreements (only black list and no white list). The main aim is to let undertakings work in an environment of gradually increased certainty. The work on Guidelines on vertical restraints within the Turkish Competition Authority (Authority) has produced an internal draft document in early 2003 and the draft has been put on the website of the Authority for the submissions of the third parties.
- A draft communiqué on Research and Development Agreements has been put on the website of the Authority to gather comments of the third parties.
- A new block exemption legislation regarding motor vehicle distribution and servicing agreements is in review.
- In the third annual report of the Authority published in 2002 regarding its activities in 2001, some of the problematic areas observed in implementation of the Act on the Protection of Competition No. 4054 and need to be modified have been listed as;
  - In paragraph 2 of Article 55 of the Act on the Protection of Competition No. 4054, it is provided that fines can not be collected as long as the Turkish Competition Board's (Board) decision becomes final. As this finalisation means a legal clarification, the fines may only be finalised if the decision is not directed to Court, namely Council of State, within the certain time period, or - if directed - with the approval of Board Decision by the Court. When practice up to day is examined, it is seen that nearly all undertakings that were imposed a fine applied to the Court, and thus penalties have not been able to be executed. And the case, which is brought to the Court, cannot be finalised within a short term, owing to the intense workload of the Council of State. This seriously weakens the power of the Act on the Protection of Competition No. 4054 regarding sanctions. Undertakings imposed fines due to violation of competition forward the case to the Court, thus the fine is postponed, and by the time passed, the value of money decreases. This in conclusion provides an economic gain for the undertaking even though it makes the

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payment in the end. Within this context, paragraph 2 of Article 55 of the Act on the Protection of Competition No. 4054 should be amended in order to avail Board decisions take faster effect in the markets, and more effectively prevent violations of competition.

- Articles 14 and 15 of the Act on the Protection of Competition No. 4054 regulate the authorities of the Board for requesting information from undertakings or associations of undertakings, and carrying out on-the-spot investigations. However in practice, serious problems are encountered during the course of collection of proof. In order to overcome these problems, articles regarding requesting information and on-the-spot investigation should be re-regulated, and particularly with regard to on-the-spot investigations, the Board should be granted the authority to "search" through a regulation similar to that of Act No: 2499 regarding Capital Markets. Moreover, the fine regarding hindering on-the-spot investigation, regulated in Paragraph 1 of Article 16, has considerably been lowered. For this reason, undertakings hinder for a few days the investigation in order to delete proofs, and later on, let investigation be carried out and consent to pay the fine. This fine should be raised to such a level that the undertakings are discouraged to act so.
  - Since undertakings are informed about competition rules, they have begun to abolish proofs of violations, and make agreements etc. in secrecy. This creates hardship for the Authority to collect proofs at examinations and investigations. The case is similar to that in other countries, and it is well-known that decrease of or opt-out from the fine are solutions for the undertaking participating in the cartel, but notifying it or helping the proof of violation be collected. It is considered that such a provision be added to Article 16 of the Act on the Protection of Competition No. 4054 as well.
  - In Article 10 of the Act on the Protection of Competition No. 4054, an agreement is provided for to be notified to the Board within a period of one month as of its conclusion. This leads to an unwanted bureaucracy as to undertakings and a loss of time and energy as to the Authority. Thus, owing to similar reasons, notification obligation has been lifted as well in the EU. It is as well needed to be lifted in Turkish law.
  - In Section 4 of the Act on the Protection of Competition No. 4054 regulating "Inquiry and Investigation Procedures" certain time periods are stated. Some of these are so short to harden the work of the Authority. Thus, they need to be extended or determined as to "working days" basis.
  - Articles 56-59 of the Act on the Protection of Competition No. 4054 regulate Private Law Consequences of Restriction of Competition. In case a claim of violation is simultaneously brought before the courts and the Board, this probably may lead to complications and serious problems as to constitutional order. It is considered to be fruitful in case the "dilatatory question" as in Civil Procedures Law is added to the Act. This means, when a competition violation is brought to court, the Court forwards the case to the Board and pursuant to Board's decision, a regulation has to be made.
  - A team of professionals within the Authority has completed an internal document early in 2003 on the provisions of the Act on the Protection of Competition No. 4054 that need to be revised including but not limited to the items listed in the third annual report given above.
2. Other relevant measures, including new guidelines.
  3. Government proposals for new legislation.

4. In order to align its legislative framework with the *acquis* and the obligations of the Customs Union, Turkey has prepared a draft law concerning the monitoring and supervision of state aids. A working group established under the Secretariat General for the European Union Affairs has prepared draft law. This draft law has foreseen a new autonomous institution that could be in charge of the supervision and monitoring of the state aids.

5. The work on a new petroleum market law to restructure the Turkish petroleum market that has been accelerated in 2001 has remained idle in 2002 due to elections and therefore enactment of the petroleum market law has become an issue for 2003.

6. The Authority interprets the term “undertaking” in a very broad way entailing both the private and public undertakings. Therefore, the provisions about special or exclusive rights to undertakings should be revised in order to comply with the commitments arising from article 41 of the Association Council Decision No 1/95 related to the exclusive and special rights of undertakings. For this reason, a working group was established by the Secretariat General for the European Union Affairs to overcome this issue.

## 2. Enforcement of Competition Laws and Policies

7. Action against anticompetitive practices, including agreements and abuses of dominant positions

### 2.1 Summary of activities of:

- Competition authorities;
- Courts.

Applications and Decisions 5.11.1997 - 31.12.2002								
		1997	1998	1999	2000	2001	2002	TOTAL
<b>Violations of Competition</b>	Applications	22	177	220	255	213	265	<b>1152</b>
	Decisions	9	44	306	262	211	217	<b>1049</b>
<b>Mergers and Acquisitions</b>	Applications	8	59	80	103	82	115	<b>447</b>
	Decisions	5	52	76	101	88	102	<b>424</b>
<b>Exemptions &amp; Negative Clearance</b>	Applications	–	245	44	41	42	35	<b>407</b>
	Decisions	–	12	64	23	52	35	<b>186</b>
<b>TOTAL</b>	<b>Applications</b>	<b>30</b>	<b>481</b>	<b>344</b>	<b>399</b>	<b>337</b>	<b>415</b>	<b>2006</b>
	<b>Decisions</b>	<b>14</b>	<b>108</b>	<b>446</b>	<b>386</b>	<b>351</b>	<b>354</b>	<b>1659</b>

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<b>The Appearance of the Workload as of the End of the Year</b>			
<b>Year</b>	<b>Applications</b>	<b>Decisions</b>	<b>Transfers to the Following Year</b>
<b>1997</b>	30	14	16
<b>1998</b>	481	108	389
<b>1999</b>	344	446	287
<b>2000</b>	399	386	300
<b>2001</b>	337	351	286
<b>2002</b>	415	354	347

<b>Applications concerning Violations of Competition that are Decided</b>			
<b>Year</b>	<b>Decisions upon Preliminary Examination or Preliminary Inquiry/ Investigation</b>	<b>Rejection or those regarded as rejected without examination</b>	<b>Outside the Scope</b>
<b>1997</b>	5	1	3
<b>1998</b>	5	36	3
<b>1999</b>	32	38	236
<b>2000</b>	53	62	147
<b>2001</b>	41	40	130
<b>2002</b>	38	81	98

<b>Final Decisions taken following Preliminary Examination or Preliminary Inquiry/Investigation according to the relevant Article of the Act on the Protection of Competition No. 4054</b>				
<b>Year</b>	<b>Article 4<sup>1</sup></b>	<b>Article 6<sup>2</sup></b>	<b>Article 4 &amp; 6</b>	<b>TOTAL</b>
<b>1997</b>	2	3	-	<b>5</b>
<b>1998</b>	3	2	-	<b>5</b>
<b>1999</b>	9	10	13	<b>32</b>
<b>2000</b>	21	16	16	<b>53</b>
<b>2001</b>	12	19	10	<b>41</b>
<b>2002</b>	18	15	5	<b>38</b>
<b>TOTAL</b>	<b>65</b>	<b>65</b>	<b>44</b>	<b>174</b>

<sup>1</sup> Article 4 of the Act on the Protection of Competition No. 4054 prohibits agreements, concerted practices and decisions restricting competition.

<sup>2</sup> Article 6 of the Act on the Protection of Competition No. 4054 prohibits abuse of dominant position.

<b>Exemptions and Negative Clearance</b>					
<b>Year</b>	<b>Exemptions</b>	<b>Negative Clearance</b>	<b>Decisions upon Conditions</b>	<b>Outside the Scope</b>	<b>TOTAL</b>
<b>1997</b>	-	-	-	-	-
<b>1998</b>	1	11	-	-	<b>12</b>
<b>1999</b>	11	17	21	15	<b>64</b>
<b>2000</b>	5	8	6	4	<b>23</b>
<b>2001</b>	16	13	19	4	<b>52</b>
<b>2002</b>	14	13	7	1	<b>35</b>

8. In 2002, action has been taken before Council of State against 30 decisions of the Turkish Competition Board, all except one is pending. In 2002, the Council of State decided in favour of Turkish Competition Board in 4 cases whereas it ruled in disfavour of it in 8 cases including previous actions.

## **2.2 Description of significant cases, including those with international implications**

9. Summaries of decisions of Turkish Competition Board concerning Cement II, Fertilizer, TÜPRAŞ, and Karbogaz are given below.

### **2.2.1 CEMENT II**

10. Investigation on cement market was initiated by a decision of the Turkish Competition Board dated 20.06.2000. Following the investigation, Turkish Competition Board delivered its decision on 01.02.2002 and several undertakings were imposed a total fine of TL 4,888,447,294,331 due to a range of infringements such as price fixing, coordination of competitive behaviours, sharing geographical markets, clauses in distribution agreements restraining trade among territories reserved for different distributors.

### **2.2.2 FERTILIZER**

11. On 08.02.2002, the Turkish Competition Board fined Toros Gübre ve Kimya Endüstrisi A.Ş. (Toros Fertilizer and Chemistry Inc.-Toros Gübre), Bandırma Gübre Fabrikaları A.Ş. (Bandırma Fertilizer Factories Inc.-BAGFAŞ), Ege Gübre Sanayii A.Ş. (Ege Fertilizer Industry Inc.-Ege Gübre), Gübre Fabrikaları T.A.Ş. (Fertilizer Factories Inc.-GÜBRETAS), İstanbul Gübre Sanayii A.Ş. (İstanbul Fertilizer Industry Inc.-İGSAS), Türkiye Gübre Sanayii A.Ş. (Turkey Fertilizer Industry Inc.-TÜGSAŞ), the 6 undertakings acting in the market of production and distribution of chemical fertilizers, with an amount of TL 7,3 trillions as the said undertakings concluded a price fixing agreement, shared the market in the wholesale tenders for the procurement of fertilizers, created hardship for the importers rivalling themselves, and refrained from participating in the Autumn Tender of 1999 of Tarım Kredi Kooperatifleri Merkez Birliği (Central Union of Agriculture Credit Cooperatives-TKK) via a concerted practice thereby infringing Article 4 of the Act on the Protection of Competition No. 4054.

12. Having taken into consideration the demand and supply substitution, relevant product market, where the investigation was carried out, was defined as the market of nitrogen fertilizers, phosphate fertilizers, potassium fertilizers and compound fertilizers.

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13. The investigation proved that price fixing agreements were concluded in different ways in 1999, 2000 and 2001. First one of them was the price fixing agreement, which reflected the delays in governmental support payments to the sales price of fertilizers.

14. Fertilizer producers fixed the formula for price increase in case of 1 month, 1,5 and 2 months long delays in governmental support payments and fixed the novel prices for each type of fertilizers. The prices stated on invoices proved that the prices were started to be implemented as of the day of the price increases.

15. Fertilizer producers worked together to harmonise the prices implemented by their distributors and those of TKK. During the work, taking the prices formed at the TKK tender, the way to calculate sales prices to distributors and those of TKK to the farmers was determined.

16. Moreover, establishing the price relations among fertilizers, they decided that sales prices to the distributors to be above minimum levels such as DAP/NP20.20.0:1.45, which was determined collectively. For the year 1998, it was examined whether there was a minimum ratio of 1.40-1.45 for DAP/20.20.0 sales price ratio in the distributors' sales prices, and it was observed that the given ratio, minimum of which was 1.40, was preserved. It was understood that given ratios were taken as a reference point by the fertilizer producers and as bases for the price fixing agreements of 1998.

17. Particularly for excess supply of compound fertilizers, price fixing agreements increased in autumn months, the sales season for compound fertilizers, starting from July. Although certain fertilizer producers sometimes disobeyed the agreements in 1998 and 1999, 6 producers began to obey them following meetings to that purpose. To observe the implementation of the agreements, invoices of the producers were examined and unit prices were calculated and parallelism in prices and dates of price increases among producers were determined.

18. Another price fixing agreement of 1999 was that on 23.11.1999, concluded before TKK's Spring Tender of the year 2000. 6 fertilizer producers convened before the Spring Tender of 2000, and fixed the prices of the wholesales to TKK and all other terms of sales; in addition, they aimed to harmonise the price to occur in the Spring Tender of 2000 with the prices of sales to distributors and keep a certain margin among these prices. As a result of this, they aimed to achieve a common price in the distribution market. However, TKK did not accept the work prepared and presented by fertilizer producers. This does not affect the fact that fertilizer producers have concluded a price fixing agreement, and this agreement has fixed prices and other terms of sales and distorted competition in the tender and in the distribution market. Therefore, it was concluded that 6 fertilizer producers came together before TKK's Spring Tender of 2000 on 23.11.1999 and concluded a price fixing agreement.

19. It was as well established that through some articles of the "Fertilizer Supply Agreement", concluded between Toros Gübre and GÜBRETAS and establishing conditions of procurement of fertilizers, prices were fixed. The article in the fertilizer supply protocol, pronouncing "*The parties undertake not to sell the fertilizer, purchased from one-and-other, at prices below those the other party sells to its own distributors*" ties the prices of fertilizers that Toros Gübre and GÜBRETAS bought from each other, and thus enabled price fixing.

20. In addition, documents were found showing that price fixing agreements of 1998 and 1999 continued and pursued as well in the year 2000.

21. It was established that fertilizer producers negotiated before the wholesales procurement tenders of TKK and Turkish Sugar Factories Corporation on whether to bid, level of bids, and who to get what share. To establish whether fertilizer producers performed concerted practices to share markets and

quantities in the tenders of TKK and Turkish Sugar Factories Corporation, the identity of the winner, the city where it was awarded the tender and granting price in tenders were examined (for TKK between 1996-2000 and for Turkish Sugar Factories Corporation between 1996-1999); as well, for TKK, the number of firms participated in the tenders held in the regional union basis, between 1997-2000, and number of rounds of bids; and the shares of the undertakings and the amounts for each type of product. The investigation showed that producers were continuously awarded the tenders of TKK and Turkish Sugar Factories Corporation which were held either where their factories were located or near those locations, and that they were awarded at high prices the tenders in their own factory locations despite the transport advantages, and they offered more competitive prices in tenders in which the importers participated although the tender was held in distant locations and the rounds of decreasing bids lasted longer in such tenders.

22. The behaviour to rig bids can be interpreted as agreement to cooperate among the undertakings that participate in the tender and harmonise their bids.

23. As to the existence of bid-rigging from the perspective of competition law, the following examples can be cited:

- The winner's continuous subcontracting the business to its rivals;
- Bids that are far greater than others that cannot be explained by differences in cost and other ways;
- Same undertaking's always being the winning supplier in the same region or in a particular business;
- Decreases in the bids in case of a new participant.

24. Taking into account the coordination among the 6 producers before the TKK's and Turkish Sugar Factories Corporation's tenders as to participation, quantity sharing, common will and as well the tender results, it was concluded that the 6 producers shared certain regions and quantities in those regions via concerted practices in the tenders for wholesale fertilizer procurement.

25. 5 of the fertilizer producers except for GÜBRETAŞ controlled by TKK did not participate in Autumn Tender of 1999 as TKK excluded DAP fertilizer from the tender and did not do the changes in the tender specifications that were demanded. The reason of not participating in the tender was not an individual decision but a concerted decision of all 5 producers. With regard to tenders such as those held by TKK (open underbidding), it is very important to know the identity and number of the participants, and that such information has effects of distorting competition. Therefore, non-participation of 5 producers in the tender was of a nature to distort competition in the tender.

26. Although imports can bring competitive effects to the chemical fertilizers market, where cartel agreements are concluded, such effects remain limited because more than 70% of imports are realised by the fertilizer producers. Moreover, concerted decisions of the fertilizer producers to cause hardship for the importers' operations prevent the efficient existence of the importers.

27. Fertilizer producers have agreed to narrow the activities of importers and to implement sanctions whenever possible due to the disturbance owing to participation of importers in domestic wholesales tenders and sales by importers to distributors of producers. İGSAŞ blacklisted an importer 2.5 months after the meeting, and prevented it from participating in the tenders for fertilizer raw material.

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28. Owing to the above given reasons, the Turkish Competition Board decided that:

- Toros Gübre, BAGFAŞ, Ege Gübre, GÜBRETAS, İGSAŞ and TÜGSAŞ infringed Article 4 of the Act on the Protection of Competition No. 4054 by agreeing to fix sales prices of fertilizer;
- Toros Gübre, BAGFAŞ, Ege Gübre, GÜBRETAS, İGSAŞ and TÜGSAŞ infringed Article 4 of the Act on the Protection of Competition No. 4054 by sharing certain regions and quantities supplied within these regions in tenders of TKK and Turkish Sugar Factories Corporation for wholesale procurement of fertilizers between 1996-1999;
- Toros Gübre, BAGFAŞ, Ege Gübre, İGSAŞ and TÜGSAŞ infringed Article 4 of the Act on the Protection of Competition No. 4054 by not participating in the Autumn Tender of 1999 via concerted practice;
- Toros Gübre, BAGFAŞ, Ege Gübre, GÜBRETAS, İGSAŞ and TÜGSAŞ infringed Article 4 of the Act on the Protection of Competition No. 4054 by agreeing to cause hardship for the importers in 1998;

and ordered Toros Gübre, BAGFAŞ, Ege Gübre, İGSAŞ, GÜBRETAS and TÜGSAŞ to terminate all the infringements of competition and not to behave in coordination such as information exchange among themselves or through Association of Fertilizer Producers that may cause coordination of competition.

29. Following the investigation, Association of Fertilizer Producers asked for the opinion of the Turkish Competition Authority concerning the information published in its Monthly Bulletin of Statistical Information. The Opinion delivered by the Authority dated 08.08.2002 can be summarised as follows.

30. To prevent the emergence of potential infringements of competition and to sustain a competitive market in fertilizer industry, following principles should be adopted:

- Tables of data concerning amount (capacity, production, sales, imports, and exports) and the capacity utilisation rate should not include data on an individual undertaking basis. Moreover, fertilizer producers should send data in total rather than in detail such as the amount of sales to the distributors in a particular month.
- Apart from the statistical information, there should be no comments, analyses or recommendations that may affect the competitive behaviours of the undertakings.
- The tables about the quantities produced in a particular period should be in line with the principle not to unfold individual information.
- No information concerning prospective prices, production, sales and capacity utilisation rates should be published.
- Association should ensure that people in charge of gathering data and preparing tables should keep sensitive information (in particular individual quantity data belonging to undertakings) secret vis-à-vis the members of the Association and the third parties.
- Tables about the data should not be published earlier than two months as of the date that data belong to.

### 2.2.3 TÜPRAŞ

31. The activities of the Authority in 2002 concerning the petroleum market focus mainly on two preliminary inquiries on Turkish Petroleum Refineries Corporation (TÜPRAŞ) following two complaints. The public currently holds 34,24% of the shares of TÜPRAŞ whereas Turkish Privatisation Administration holds 65,76%. TÜPRAŞ's capacity to process crude oil is 27.6 million tons per year, and has a share of 86% in the capacity for refining crude oil in Turkey. TÜPRAŞ has a strong infrastructure to import crude oil, LPG and other petroleum products.

32. First complaint about TÜPRAŞ in 2002 was lodged by POAŞ, the leading firm in distribution of fuel-oil in Turkey. The complaint was about direct sales to the customers of POAŞ and other distribution companies below ex-refinery price. Inspections during preliminary examinations indicated that TÜPRAŞ supplied to end-customers fuel-oil at less price than distributing firms, particularly at the Batman Refinery. Turkish Competition Board decided that the normal commercial conducts of TÜPRAŞ could be assessed within the scope of Article 6 of the Act on the Protection of Competition No. 4054 concerning abuse of dominant position, however as the activities complained about aimed to avoid the problems in production planning resulting from state interventions such as subsidies for LPG and border trade and exceptional trade conditions to which the state did not bring a solution, Turkish Competition Board found it sufficient to warn TÜPRAŞ to be sensitive and not to apply dissimilar conditions to equivalent transactions and not to sell to final consumers below prices than those applied to the distribution firms and to bring its existing sales activities in line with the Act on the Protection of Competition No. 4054.

33. The other complaint triggering the second preliminary inquiry has been brought before the Turkish Competition Board by ALADDİN Middle East Company that deals with exploration for and production of petroleum. The complaint stated that TÜPRAŞ, which was dominant in fuel oil market, stopped buying crude oil from ALADDİN via unilaterally abolishing the Domestic Crude Oil Sale Agreement thereby causing hardship in ALADDİN's business. ALADDİN contended that because it was dependent on TÜPRAŞ for its sales, TÜPRAŞ abused its dominant position by terminating purchasing.

34. Batman refinery of TÜPRAŞ refines mainly the crude oil produced in the region. Although TÜPRAŞ is the main establishment which produces and imports crude oil in Turkey, some other firms such as ALADDİN also involves in the same activities. The main client of the Batman refinery is TPAO and it receives the product via pipeline. Although other firms generally prefer to import, they use the pipeline owned by TPAO in their sales to Batman refinery. Therefore, pipeline is the only means to bring crude oil to Batman refinery, the only exception of which is ALADDİN, which delivers crude oil through self-owned vehicles. The reason of the abolition of the agreement was to meet the security needs of refinery and avoid the risks of control, discharge and delivery by ground vehicles through using the discharge system instead. Taking into account that all other purchases, except for those from ALADDİN, were via pipeline, there was no differential treatment and discrimination. Although in some situations arbitrary demanding practices of dominant firms are prohibited for being assessed as abusing, here in this case the abolition of the agreement was totally a result of security reasons and the delivery restarted after a change only in the article of the agreement concerning security. Moreover, ALADDİN was already selling crude oil to TPAO under the "Domestic Crude Oil Sale Agreement" and the sale increased during the disagreement between ALADDİN and TÜPRAŞ. Therefore, it was evident that TÜPRAŞ was not the only alternative for ALADDİN and the subject of the complaint was due to a disagreement between the parties. Departing from the view that the aim of competition law is to protect competition rather than competitors, final decision of the Turkish Competition Board, regarded the complaint as a commercial issue rather than an abuse.

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### 2.2.4 KARBOGAZ

35. The investigation concerning the allegations that agreements concluded by Karbogaz Karbondioksit ve Kurubuz Sanayi A.Ş. (Karbogaz) infringe Act on the Protection of Competition No. 4054 and damage competition in the relevant market of liquid carbon dioxide has established that:

- The distribution agreements concluded between Karbogaz and its distributors infringe Article 4 of the Act on the Protection of Competition No. 4054 and therefore Karbogaz should be fined according to Article 16, paragraph 2;
- Taking into consideration the fact that such infringing terms were not implemented and this being a mitigating circumstance, the fine should be fixed to the minimum amount of TL 5.816.109.000 as provided in the Communiqué No 2002/1;
- The agreements in question are subject to notification because they include terms restrictive of competition and as they had not been notified as required, Karbogaz should be imposed an administrative fine of TL 1.454.027.000 as provided in Article 16, paragraph 2, subparagraph c and in Communiqué No 2002/1; each member of the management board of Karbogaz should be imposed 5% of the administrative fine amounting to TL 72,701,306;
- The agreements can benefit from block exemption granted by Communiqué No 2002/2 on Vertical Agreements, provided that infringing terms and the term named "Duration of the Contract", which makes the agreements tacitly renewable and therefore indefinite, are removed from the agreement;
- Supply agreements concluded between Karbogaz and customers infringe Article 4 of the Act on the Protection of Competition No. 4054 owing to the exclusivity clauses and those clauses to strengthen them, and the agreements are not within the scope of the block exemption of Communiqué No: 2002/2 due to the clause availing the agreements' tacit renewal and thus be for indefinite duration;
- Such supply agreements are subject to notification and as they had not been notified, Karbogaz should be imposed a fine of TL 1,454,027,000 as provided in Article 16, paragraph 2, subparagraph c and in Communiqué No 2002/1; each member of the management board of Karbogaz should be imposed 5% of the administrative fine amounting to TL 72,701,366;
- Karbogaz, which is dominant in the relevant product market, has abused its dominant position through creating entry barriers and causing hardship for competitors via long term exclusive supply agreements deliberately concluded particularly since 1997 and by means of other practices;
- Karbogaz should be fined with an amount of TL 311.353.350.819, 3% of its net sales in 2000, in accordance with Article 16 of the Act on the Protection of Competition No. 4054, when gravity of the infringement arising from hardship faced by the competitors, its effects in the market and its duration since 1997 are taken into consideration;
- With regard to supply and distribution agreements, to protect and develop competition in the relevant product market and in line with the Article 9, paragraph 1 of the Act on the Protection of Competition No. 4054,; Karbogaz is required to perform the following;

- Removing clauses banning passive sales and fixing minimum price in Article 3 of distribution agreements entitled "Annual Responsibilities of Supply and Purchase/Sale";
- Removing the clause in the Article entitled "Duration of the Contract" making the duration of both the distribution and supply agreements indefinite by tacit renewal;
- Limiting the duration of the agreements with 1 year if supply agreements are exclusive or envisage to supply at least 50% of the customer's requirements;
- Rearranging Article 3 entitled "Annual Responsibilities of Supply and Purchase/Sale" of the supply agreements about exclusivity in such a way to exclude the facilities of the customer to be established in the future and removing the article in the agreements in question entitled "Priority Right of Karbogaz";
- Removing the clause, "BOS shall purchase the remaining 20% of its liquid carbon dioxide requirements, apart from 80% that it would purchase from Karbogaz, only from abroad", in article entitled "Annual Responsibilities of Supply and Purchase/Sale" of the contract concluded between Bileşik Oksijen Sanayi A.Ş. (BOS) and Karbogaz;
- Removing the clause about "Review of Price" in Article 7 entitled "Price" in the supply contracts between Karbogaz and Fruko Meşrubat Sanayi A.Ş. and Pepsi Cola Servis ve Dağıtım A.Ş.;

and notifying the Authority:

- There is no need to ask other firms apart from Karbogaz to take the same measures that are applied to Karbogaz, save the clauses in the Communiqué No. 2002/2;
- The required changes to contracts of distribution and supply should be done within 60 days and then notified to the Authority by Karbogaz, otherwise these contracts would be void according to Article 56 of the Act on the Protection of Competition No. 4054, and the parties should be notified that there would be measures according to Article 16 and 17 and would face an investigation in case they continue to implement the contracts without the necessary changes;
- Fines as provided in Article 16, subparagraph b should not be imposed on the undertakings, which did not send the information requested by the investigation committee.

### **2.3 Mergers and acquisitions**

36. Statistics on number, size and type of mergers notified and/or controlled under competition laws;

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Number of Notifications	% 25+ <sup>3</sup>	Type of Those Subject to Approval <sup>4</sup>			Approval	Blocked	Outside the Scope
		Vertical	Horizontal	Conglomerate			
115	60	6	45	12	60	-	42

The nature of the mergers and Acquisitions				
	Mergers & Acquisitions	Privatisation	Joint Venture	TOTAL
1997	1	-	-	1
1998	20	8	3	31
1999	26	1	6	33
2000	41	6	3	50
2001	37	-	5	42
2002	55	-	5	60

Type of the Mergers and Acquisitions				
Years	Approvals	Conditional Approvals	Prohibitions	Outside the scope
1997	1	-	-	4
1998	25	6	-	21
1999	31	1	1	43
2000	46	3	1	51
2001	38	5	0	45
2002	54	6	0	42

37. Summary of significant cases

38. Decisions concerning Bemka, Sika/Deitermann, ATAŞ and Zorlu Family/Deceuninc are summarised below.

2.3.1 BEMKA

39. Merger of the activities of Emsan Emaye Tel Sanayi A.Ş. (Emsan), Kavi Kablo ve Emaye Bobin Teli Sanayi A.Ş. (Kavi), Botel Bobin Teli Kablo Sanayi ve Ticaret A.Ş. (Botel) and Bektaş Bakır Emaye

<sup>3</sup> Where total market shares of the undertakings that are parties to the merger or acquisition exceed 25% of the market in the relevant product market within the whole territory of Republic of Turkey or a part of it, or even though they do not exceed this rate, their total turnovers exceed TL twenty-five trillion, it is compulsory for them to take permission of the Competition Board.

<sup>4</sup> The numbers does not cover those notified by the Turkish Privatisation Administration as well as few notifications that are received in 2002, but Turkish Competition Board has not delivered its decision in 2002.

Kablo Sanayi ve Ticaret A.Ş. (Bektaş) under a joint venture, namely Bemka Emaye Bobin Teli ve Kablo Sanayi A.Ş. (Bemka), is requested to be authorised.

40. Following the establishment of joint venture, the share in domestic production of the undertakings Emsan, Kavi, Botel and Bektaş will be ...%.

41. Apart from the market share of the parties after the merger, conditions of competition in national market and international markets, imports and ease of market entry, power of buyers, existing and potential competitive power of the rival firms in the market have as well been taken into consideration.

42. Considering the features of enamelled coil wire, price level is understood to be the most important competitive power. Therefore, it is important to have a certain scale to keep costs at minimum level. From this perspective, the scales of domestic producers of enamelled coil wire are smaller when compared to those abroad. There are plants with 120,000 tons of capacity per annum in USA and 110,000 tons of capacity per annum in UK and it is accepted that minimum scale should be 15,000 tons per annum in the European Union. The domestic producer with the greatest scale has a capacity of ... tons per annum and most others have a capacity of ... per annum. Total capacity of the parties to the joint venture will be ... tons per annum.

43. To have a large capacity with respect to exports in enamelled coil wire is particularly important to do business with the large customers in Europe and to be able to make offers for these large customers.

44. As there are various diameters of wires, the assembly lines need to be switched on and off every time the size is changed. This increases the cost as well. Such modification leads to shrinkage for both the previous and the next product. Thus continuous production of a certain size of wire on one assembly line seriously provides an advantage with regard to cost. To be able to sell to the industrial producers in Europe who demand great amounts, the plants must have large capacities, which are bound to a continuous production of certain size wires. However, the established capacities of domestic producers are quite small. These producers pointed that they could not participate in the tenders of such large European industrial producers due to their small scales.

45. The expected benefits of the transaction are listed as achieving economies of scale and lowering input cost, the ability to make a proposal to the European customers' demands which can not be met by the existing capacities, supplying raw materials at more reasonable prices, reduction of labour costs, general costs and shrinkage.

46. There are no legal or actual barriers to prevent imports of enamelled coil wire. Most users declare that they can resort to imports when necessary since price is the most important determinant for the purchases of product in the industry. Domestic prices are at a competitive level compared to prices of imported products thus making imports less preferable.

47. Despite the absence of any legal or actual barrier to imports, there are some factors effecting preference of domestic products vis-à-vis the imported ones. These are transport costs, finance costs, customs and other bureaucratic costs, stocking costs arising from the obligation to import at certain amounts. Domestic producers and customers interviewed mentioned that costs deriving from imports raise the price around 3-7%, making imports preferable in case domestic price level increase 10% or more. It is obvious that this has pressurised domestic prices and will continue to do so. It is understood that most of the users of enamelled coil wire have international commercial contacts and therefore they will easily shift to imports in case of increase in domestic prices. In case imports becomes favourable, there shall be no barriers for the importers to import great amounts of enamelled coil wire and sell them at retail level.

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48. Production of enamelled wire does not require advanced technical knowledge and specialisation. Moreover, investment costs are not high. Per every thousand tons of wire, the investment cost is said to be average 1 million US dollars. The time necessary for investment is not long in the sense that a plant of middle size can be built less than a year. To increase the capacity is even easier for the undertakings already operating in the market. Even in the current situation, some competitors with their capacity and operations in the market can be important rivals for the joint venture. Furthermore, two of them claim that they can easily increase their capacities in a short period of time.

49. Most users of enamelled wire are those established with foreign capital, international undertakings with foreign associates or those operating in the international markets although established with domestic capital. Great amount of demand in enamelled coil wire is by these undertakings. 9 customers of enamelled coil wire interviewed under the scope of the examination consume one third of the domestic production. Consumption rises to 50% when other large buyers are added. When the foreign contacts and their chances of imports are taken into account, these users of enamelled coil wire are understood to be able to put pressure on the prices and sales policies of producers.

50. The fact that one of the parties to the joint venture, Bektaş, is within the same economic unit with Sarkuysan Elektronik Bakır Sanayi ve Ticaret A.Ş. (Sarkuysan) makes it necessary to assess the impact of the joint venture in the copper market. Examining the purchase of copper by Emsan, Kavi, Botel and Bektaş in the last 3 years shows that approximately 95% of copper is purchased from Sarkuysan and another firm Erbakır. Assuming that all the procurement will be done from Sarkuysan following the joint venture, Erbakır will be the one affected the most. Taking into consideration Erbakır's production of 60,000 tons per annum, its sales of copper to the joint venture parties are very low compared to its total sales.

51. However, the parties to the joint venture declare that they will not purchase all their requirements from Sarkuysan. During interviews with parties to the joint venture, it was claimed that purchase would be done from the undertaking who charge the most appropriate price, that it was risky to purchase all of the requirements from a single undertaking, thus there had always to be an alternative supplier, that it depended on the appropriate price and terms by Sarkuysan to purchase all the requirements from it, that Sarkuysan's share would be limited to the shares of Bektaş in the joint venture, therefore the priority would be to protect the interests of the joint venture.

52. With these facts in mind, it is concluded that Sarkuysan's economic tie with the joint venture through Bektaş would not cause any problems in the copper market.

53. As a result, despite the market share of ...%, owing to possibility and easiness of imports of enamelled coil wire, absence of legal or actual barriers before entry, actual and potential power of the competitors, availability of a certain degree of buying power and excess supply, the joint venture will lack market power to determine the economic parameters such as price, supply, quantity of production and distribution and therefore there will be no dominant position in the market and thus the transaction was authorised.

### 2.3.2 *SİKA DEITERMANN*

54. Acquisition of Addiment trade mark of Deitermann Mimsan Yapı Kimyasalları A.Ş. (Deitermann Mimsan Construction Chemicals-Deitermann) and the customer portfolio of that trade mark by Sika Yapı Kimyasalları A.Ş. (Sika Construction Chemicals-Sika) was notified for permission.

55. Addiment trade mark, which is the subject of the acquisition, covers concrete additives and mortar additives. Relevant product markets are defined as market of concrete additives and market of mortar additives.

56. The acquisition covers intellectual property rights, customer portfolio and the trade mark itself under the trade mark Addiment. Following the acquisition, Deitermann shall completely withdraw from the market of concrete additives, however owing to its other operations in the market of mortar additives apart from its Addiment trade mark, it shall pursue its operations.

57. As a result of the acquisition, Sika's market share in the market of concrete additives is expected to become ...%, whereas ...% in the market of mortar additives. Thus the total market shares of the parties exceed the 25% of the relevant product market, which is the market share threshold in the relevant Communiqué No 1997/1, and consequently, it is compulsory to seek the permission of the Turkish Competition Board.

58. Before the acquisition in the concrete additives market, the market share of Sika is ...% and that of Deitermann is ...%. Following the transaction, Sika is expected to be the largest undertaking in the market with a market share of ...%. It becomes imperative to do the analysis of dominance as the undertaking with the highest market share acquires one of its most important competitors. Analyses in the market establish that:

- There appears no customer loyalty for trade mark and therefore market shares are variable;
- There are 17 undertakings operating in the market of concrete additives all of which have their own formulas and produce their products according to these formulas, therefore there are no restraints in the market concerning intellectual property rights;
- Undertakings operating in the market of concrete additives sell their products via direct sales methods or through their distributors and each undertaking has its own distribution channel, thus acquisition has no restraining effect on distribution network.

59. As a result, although market share of Sika, the market leader, is expected to increase seriously following the acquisition, it is concluded under the above mentioned issues and market structure that the acquisition will not create or strengthen a dominant position.

60. In the market of mortar additives, Sika has a market share of ...% before the acquisition whereas that of Addiment trade mark is ...%. Following the acquisition market share of Sika is expected to be ...%. Market share of YKS, the biggest competitor of Sika, has a market share of ...%. Thus, taking into consideration the market shares and that the market structure of concrete additives are as well present in the mortar additives market, the acquisition has been concluded to not create or strengthen a dominant position in the market of mortar additives and thus the transaction has been authorised.

### 2.3.3 ATAŞ

61. An important decision of the Authority in the petroleum market is the acquisition of the assets and rights of MOBIL Refining Company, Exxon Mobil Oil Corporation and Mobil Petroleum Company in ATAŞ Mersin Refinery by BP Refining. ATAŞ is a servicing company not acting independently in either procurement of crude oil or marketing of the processed petroleum products. Rather, it is a firm rendering the service of refining crude oil brought by its shareholders into final product. ATAŞ is the only refinery built by private capital with 14% of the refining capacity of Turkey before the acquisition. MOBIL Refining Company Inc owned 51% of ATAŞ before the acquisition.

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62. Following the abolition of joint venture between BP and MOBIL, MOBIL decided to sell its share in fuel partnership to BP, and limit its operations in Turkey with aeroplane and naval fuel, and metallic oil. In this context, MOBIL sold 51% of its shares in ATAŞ Mersin Refinery, which was excluded from this partnership together with all its assets, rights and interests in ATAŞ to BP.

63. Although ATAŞ is an incorporated company, it is not considered as an independent undertaking under Act on the Protection of Competition No. 4054 since it has a structure of rendering services only and is not operating in the market. Therefore, the acquisition of shares of ATAŞ was not regarded as an acquisition of an undertaking but acquisition of the refining activities of MOBIL by BP Refining and it was authorised under Communiqué No 1997/1.

### 2.3.4 ZORLU FAMILY and DECEUNINC

64. The assessments in the formal decision (explaining the reasons and basis for the decision) of the Turkish Competition Board about the demand for negative clearance for "No-Compete Agreement" signed between Zorlu Ailesi (Zorlu Family) and Deceuninck are as follows.

65. The Parties to the Agreement are those real and legal persons who are founders and who have partnership relations with the firms that are subject to the acquisition. Those persons, as stated in the agreement, are the ones who have easy access to the trade secrets of the firm and other secret information and who are in professional relationship with the customers, suppliers, personnel and others that do business with the firms. Therefore, no compete obligation imposed on such persons can be regarded as the scope.

66. Another point to be mentioned here is that the parties to the agreement will undertake to ensure that the persons who are under the control of a group firm, and managers, members of the management board, and the key personnel of the group firms will not perform the transactions mentioned above. It is considered reasonable and necessary that such persons are bound by the no-compete obligation owing to their capabilities of having strategic information such as trade secrets, know-how, customer information, marketing techniques. It is not of importance under competition law whether the agreement is binding for those persons.

67. Restricted period has been defined as "*period of 10 years as of the date of conclusion*". The duration of no-compete obligation should not be longer than necessary for the buyer to acquire the physical assets and intangible assets developed by the seller such as commercial reputation and know-how with their full value. To satisfy this, buyer should be protected from competition of the seller to win the loyalty of the customers and to exploit the acquired know-how in full.

68. Within this context, it is concluded that period of 10 years of no-compete is more restrictive than necessary and in the light of the previous decisions of the Turkish Competition Board and claims of the parties, it is regarded as reasonable and proportionate if it is limited to 5 years and its scope does not exceed what is necessary.

69. No compete obligation should be restricted to the geographical field of activity of the seller before the acquisition in the relevant market or service. Protection beyond would be more than necessary and therefore could not be regarded as an ancillary restraint.

70. As the relevant geographical market is defined as the Republic of Turkey, no compete obligation undertaken by the parties to the agreement in this area will be evaluated as reasonable and necessary.

71. No-compete obligation in acquisitions should be restricted to the field of activity of the acquired undertaking. Arrangements exceeding this boundary can not be accepted as ancillary restraint for such

restraints, can not be regarded as necessary to enable the buyer to acquire the full value of the acquired undertaking and can not even be seen as directly related to the transaction.

72. Definitions of restricted business, product and service are reasonable and necessary in this context.

73. Arrangements preventing the seller to employ personnel of the sold undertaking or solicit the existent or ex-customers are also within the scope of the no-compete obligation and therefore ancillary restraint. Such terms in the agreement are directly related to and necessary for the acquisition.

74. The agreement foresees that a list of activities can not be done as principal, associate, assignee, shareholder, management board member, personnel, consultant or other ways whatsoever directly or indirectly, individually or together with another or in the name of another person. It is thought that this arrangement is wider than necessary. Although it is argued that the aim is not to prevent small investments, the arrangement forbids being shareholders of undertakings dealing with such business and therefore buying shares for investment purposes. It is obvious that share holding for mere investment purposes is not necessary for the given purpose. It is restriction beyond necessary. Therefore, the arrangement should be modified to exclude share holding for investment purposes.

75. In conclusion, the agreement as such can not be granted a negative clearance certificate, however it can be granted on conditions that period of 10 years of no-compete obligation is decreased to 5 years and share holding for investment purposes is taken out of the scope of the agreement.

### **3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies**

76. The Electricity Market Law, which came into effect in March 3<sup>rd</sup>, 2001, provided a preparatory period between 18 and 24 months. In this period, the Electricity Market Regulatory Authority<sup>5</sup> prepared the necessary secondary legislation and after their coming into force, free market conditions in the electricity market were achieved as of September 3<sup>rd</sup>, 2002. The undertakings have begun to apply for licences after this date and most of the applications have been processed and concluded thereafter to enable the undertakings to have licences at the end of 2002. Natural Gas Market Law, which came into effect in May 2<sup>nd</sup>, 2001, provided a preparatory period of 12 months that might be extended for 6 months by a decision of the Council of Ministers. The Energy Market Regulatory Authority made use of the entire 18 months to ensure a competitive market beginning from November 2<sup>nd</sup>, 2002. Starting from the end of the preparatory period, Energy Market Regulatory Authority has begun to receive applications for licences from the undertakings. Moreover, eligible consumers are given the right to choose the most appropriate supplier for their needs of natural gas that is regarded as one of the most important steps to ensure free market conditions in the natural gas market. Energy Market Regulatory Board seeks advice and opinion of the Turkish Competition Board for its regulatory legal instruments and the latter provides it with technical assistance in competition related matters despite the absence of any written arrangements to that effect. For instance in 2002, Energy Market Regulatory Authority consulted with the Turkish Competition Board on secondary legislation concerning licences, tariffs, eligible consumers, import and export, consumer services, principles about revenue and tariff regulations and reporting, network, accounting and financial reports in the electricity market and secondary legislation on licences, tariffs, distribution, consumer services, administrative specifications, call for tender in natural gas market. Moreover, Turkish Competition Board gave opinion on the secondary legislation concerning procedural and substantive rules on supervisions to be carried out in natural gas and electricity markets. It is expected that protocols and

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<sup>5</sup> Electricity Market Regulatory Authority has been renamed as Energy Market Regulatory Authority with the natural gas market law and its powers has been extended to cover natural gas market as well.

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guidelines be formulated to cover such cooperation following bilateral talks between the two Boards in 2003.

77. Telecommunications Authority and the Competition Authority signed a Protocol to inform each other and ask their respective opinions about competition related cases. However, because of the overlapping responsibilities arising from both the Telecommunications Act and the Act on the Protection of Competition No. 4054 concerning competition investigations, it still requires further clarification to determine who holds the real power in matters involving competition concerns.

78. In 2002, Turkish Competition Board expressed its opinions for two secondary legislation on procedural and substantive rules to be followed and the conditions required to set up firms to distribute and market fuel and Liquid Petroleum Gas (LPG) that are prepared by General Directorate on Petroleum Affairs within Ministry of Energy and Natural Resources. Basically, Turkish Competition Board opined that it would be appropriate to adopt the principle not to raise the existing minimum standards (except for the minimum capital amount), having taken into consideration that it was unnecessary to increase the entry barriers on the one hand and there might occur instability in case of new arrangements after the enactment of the Petroleum Market Law on the other hand.

### **4. Resources of Competition Authority**

#### **4.1 Resources overall (current numbers and change over previous year):**

- Annual budget in 2002 is TL 106,939,181,898,593; USD<sup>6</sup> 71 millions.
- Cost on personnel in 2002 is TL 8,314,230,621,159; USD 5,5 millions.
- Annual budget in 2001 is TL 75,734,864,719,063; USD<sup>7</sup> 61,8 millions.
- Cost on personnel in 2001 is TL 5,608,083,043,569; USD 4,5 millions.
- Number of employees (person-years):
  - Economists;
  - Lawyers;
  - Other professionals;
  - Support staff;
  - All staff combined.

79. According to Article 35 of the Act on the Protection of Competition No. 4054 assistant experts have to hold "a university degree in law, economics, political sciences, business administration, industrial engineering or in management engineering or any equivalent degrees obtained abroad". Currently there are 84 assistant experts on competition and experts on competition who are mainly responsible for competition investigations, assessment of mergers and acquisitions, exemptions and negative clearance. Apart from

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<sup>6</sup> Average exchange rate of US dollar in 2002 is taken TL 1,505,839.

<sup>7</sup> Average exchange rate of US dollar in 2001 is taken TL 1,225,411

those, there are 6 examination experts mainly responsible for decisions of the Turkish Competition Board with their reasoning, 4 lawyers mainly responsible to deal with cases before the Council of State and 4 assistant experts on research. The number is 316 when all staff is taken into consideration in 2002 whereas it was 318 in 2001.

#### **4.2 *Human Resources (persons-years) applied to***

- Enforcement against anticompetitive practices;
- Merger review;
- Advocacy efforts.

80. All tasks granted by the Act on the Protection of Competition No.4054 are carried out by personnel of profession who are experts on competition and assistant experts on competition total number of whom is 84.

#### **4.3 *Period covered by the above information***

81. The number of personnel of profession, that is 84, is valid for both 2001 and 2002, except for 12 assistant experts on competition, who have been employed as of December 2001.