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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN TURKEY

-- 2004 --

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Executive Summary

1. In 2004, minor amendments to the law have taken place: In order to sthrengthen the efficiency of the Turkish Competition Authority (TCA), The Act on Making an Amendment to Certain Acts and the Statutory Decree (No. 5234) made amendments in the Act on the Protection of Competition No.4054 (the Competition Act), the details of which are given below. In addition to those amendments realised, the TCA has prepared a new amendment package to eliminate certain weaknesses in the Competition Act. Taking into consideration that the competition law and policy are still evolving throughout the world, and especially there were significant changes in the EU, it is seen that in order to strengthen the efficiency of the competition law in Turkey, a set of amendments is required. Proposals being debated for the last two years are to be finalised in 2005. One of the most important goals is to eliminate the burden of notification for the exemption of the agreements, decreasing the unnecessary burden of the TCA. Also, with an amendment in the article 4, the breach is going to be limited with the agreements, decision and practices that significantly effect competition, providing a room for de *minimis* applications. Article 7 is going to be amended, too, in order to harmonise the substance and assessment of the concentrations in line with the EU legislation. There are also going to be several amendments related to procedural issues in order to increase the efficiency of the TCA.

2. In 2004, number of cases opened under article 4 (horizontal and vertical agreements etc.) decreased while there is an increase in the number of the cases opened under article 6 (abusive practices), compared to 2003. It should also be noted that, the number of the cases regarding horizontal agreements decreased while the number of cases involving vertical restraints increased after 2002. The number of concentration cases is almost the same whilst notifications on exemptions and negative clearance increased, compared to 2003. On the other hand, the number of cases concluded (decisions of the Board) is increased about 50% from 135 to 194, reaching the highest figure since the TCA's foundation.

3. Food & drinks and telecommunications are the sectors in which the investigations took place most, followed by chemical products (esp. pharmaceutical) and transport sectors. In some of cases the Board withdrew the benefits of the group exemption communiqués from certain vertical agreements. Food & drinks and chemical products sectors also led in both exemption and concentration notifications.

4. In addition, the TCA also involved in several privatisation cases, including telecommunications and steel industries.

5. In 2004, in the field of competition advocacy, the TCA delivered 24 opinions on drafts for various legislations on petroleum, alcoholic beverages, credit cards, electronic communications, hyper-markets, trade secrets, and professional services.

6. The TCA organised certain activities with a view to contribute to competition culture. Out of these activities, an important one is the symposium on "The Relationship between Investment and Competition Law and Policy". On the same subject, but involving deeper sectoral studies, a World Bank-Turkish Association of Chambers of Commerce and Commodity Exchange -TCA project which was launched in autumn 2004 deepened the discussion. Another international development is the OECD peer review process that the TCA volunteered in February 2004, which is thought to provide an opportunity for the TCA by showing the weaknesses and points to improve.

I. Changes to Competition Laws and Policies, proposed and adopted

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

"The Act on an Amendment to Certain Acts and Statutory Decrees" No. 5234 (It was published in the Official Gazette dated 21.09.2004 and numbered 25590)

7. With article 29 of the Act No. 5234; the following sub-paragraph was added as sub-paragraph (c) to article 39 of the Act on the Protection of Competition No. 4054 (Hereinafter Competition Act No.4054), as to follow the annulled sub-paragraph (b). And the existing sub-paragraph (c) was made to follow uninterruptedly as sub-paragraph (d):

"Payments to be made by four per ten thousand of the capitals of all partnerships to be newly established with the status of an incorporated and limited company, and that of the remaining portion in case of capital increase,"

8. Pursuant to article 20 of the Competition Act No. 4054, the Competition Authority has been set up as an agency with administrative and financial autonomy. Such autonomy possessed by the agency is in compliance with the international general understanding. Furthermore, the Competition Authority's operating as an autonomous agency is also very important as regards the legislative alignment in the area of competition policy with the Acquis Communataire. As a matter of fact, this point was also importantly underlined in the Progress Report prepared by the EU Commission. One of the important pillars of the autonomy possessed by the agency is financial autonomy. Via the sub-paragraph added to article 39, it was intended to protect the financial autonomy in question, and consequently, the autonomy of the Authority.

9. With a view to decreasing the Authority costs, the clause of "in the Official Gazette", which takes place in article 53 paragraph two of the Competition Act No. 4054 has been changed as "on the internet page of the Authority"[1].

10. The clause of "one month", in article 55 paragraph two has been changed as "three months". With the amendment made by the Act dated 01.08.2003 and numbered 4971, a period of one month had been envisaged for the payment by undertakings of fines imposed by the Competition Board. However, it was realised that in practice, the one-month period in question embodied certain inconveniences, and it was seen that undertakings might face the risk of ending up in financial hardship during this period allowed. For this reason, the one-month payment period was extended to three months.

"Communiqué" No. 2004/1 "on the Announcement of an Increase in Administrative Fines Provided in Articles 16 and 17 of the Competition Act No. 4054, Being Valid until 31.12.2004" (Published in the Official Gazette dated 14.02.2004 and numbered 25373)

11. Administrative fines provided in articles 16 and 17 of the Competition Act No. 4054 have been raised as provided in the Communiqué, being valid from 01/01/2004 to 31/12/2004, by considering as the basis a 28,5 % (twenty-eight comma five) increase which is the revaluation rate for the year 2003, established in the General Communiqué for Tax Procedural Law with the serial number 325 (published in the Official Gazette dated 04.12.2003 and numbered 25306), in accordance with the procedure in Supplementary Article 2 of the Turkish Penal Code numbered 765, amended by the Act dated 28/07/1999 and numbered 4421.

[1] Article 53/2: Board decisions are publicised *on the internet page of the Authority* reserving commercial secrets of parties.

"The Decision About Amending The Competition Board Decision Concerning the Explanation of the Block Exemption Communiqué on Vertical Agreements No. 2002/2"

(The decision dated 25.12.2003 and numbered 03-83/1009-M was published in the Official Gazette dated 07.01.2004 and numbered 25339)

12. The 2nd paragraph of sub-paragraph (a) of article 5 in "The Block Exemption Communiqué on Vertical Agreements" No. 2002/2 was amended and the criterion of "35 % of the investment being an exception in this paragraph was removed[2]. Due to this amendment to the Communiqué No. 2002/2, "The Competition Board Decision Concerning the Explanation of the Block Exemption Communiqué on Vertical Agreements No. 2002/2", which had been published in the Official Gazette dated 09.08.2003 and numbered 25194 as regards the explanation of the Communiqué in question was also amended as provided in the decision.

2. Other relevant measures, including guidelines

13. In 2004, the Turkish Competition Authority (TCA) adopted an internal regulation regarding the principles and procedures governing the working of the TCA, which includes some deadlines concerning decisions.

3. Government proposals for new legislation

I. Enforcement of Competition Laws and Policies

14. The following tables show the statistical data regarding the enforcement of competition law by the TCA.

Table 1: Horizontal – Vertical Agreements Files by Year

		Horizontal	Vertical	Mixed (H & V)	Total
1999	**Initiated**	18	12	2	32
	Concluded	3	2	0	5
2000	**Initiated**	17	11	0	28
	Concluded	17	13	1	31
2001	**Initiated**	16	6	0	22
	Concluded	15	8	0	23
2002	**Initiated**	31	8	1	40
	Concluded	29	6	1	36
2003	**Initiated**	43	13	2	58
	Concluded	27	10	1	38
2004	**Initiated**	31	17	0	48
	Concluded	41	22	1	64
TOTAL	**Initiated**	156	67	5	228
	Concluded	132	61	4	197

[2] For further details regarding this amendment, please see "Annual Report On Competition Policy Developments in Turkey *(2003)*" available under DAFFE COMP(2004)12/20 on OLIS.

Table 2: Matters initiated by the Board ex-officio

	Article 4	Article 6	Mixed (4 and 6)	Merger	TOTAL
1999	4	0	0	1	**5**
2000	9	1	0	3	**13**
2001	8	2	1	1	**12**
2002	6	0	0	1	**7**
2003	5	0	0	1	**6**
2004	6	3	0	0	**9**
Concluded	38	6	1	7	**52**

Table 3: Horizontal – Vertical Agreements Files by Year

		Horizontal	Vertical	Mixed (H & V)	Total
1999	**Initiated**	18	12	2	32
	Concluded	3	2	0	5
2000	**Initiated**	17	11	0	28
	Concluded	17	13	1	31
2001	**Initiated**	16	6	0	22
	Concluded	15	8	0	23
2002	**Initiated**	31	8	1	40
	Concluded	29	6	1	36
2003	**Initiated**	43	13	2	58
	Concluded	27	10	1	38
2004	**Initiated**	31	17	0	48
	Concluded	41	22	1	64
TOTAL	**Initiated**	156	67	5	228
	Concluded	132	61	4	197

Table 4: Decisions on Negative Clearance/Exemption Applications

	Applied	**Negative Clearance**			**Exemption**					
		Concluded			**Concluded**					
		Granted	Conditional	Rejected	Granted (Individual)	Considered under the scope of block exemption	Conditional		Rejected	Withdrawn
							Individual	Block Exemption		
1999	26	7	0	2	1	3	0	1	0	0
2000	27	7	0	0	1	2	1	1	0	0
2001	21	12	3	2	5	3	4	1	0	0
2002	29	12	3	1	4	4	2	2	0	0
2003	43	13	5	6	4	3	6	5	3	0
2004	58	19	4	15	8	18	1	13	9	1
Total	**204**	**70**	**15**	**26**	**23**	**33**	**14**	**23**	**12**	**1**

Table 5: Fines

15. Before the table, following explanations deserve to be mentioned with respect to the relevant articles of the Competition Act. It should be borne in mind that the level of administrative monetary fines are revalued annually:

- **Fines under Article 16/1(a):** Undertakings and associations of undertakings and/or the members of such associations may be imposed hundred million liras in case misleading or incorrect information is provided in applications for exemption, negative clearance and permission as to mergers or acquisitions, and in notifications and applications in relation to agreements concluded before the entry into force of the Competition Act.

- **Fines under Article 16/1(b):** Undertakings and associations of undertakings and/or the members of such associations may be imposed hundred million liras in case incomplete, incorrect or misleading information is provided where there is a request for information by the decision of the Turkish Competition Board, or an on-the-spot inspection.

- **Fines under Article 16/1(c)** Undertakings and associations of undertakings and/or the members of such associations may be imposed fifty million liras in case a merger or acquisition, or agreements, concerted practices and decisions falling under article 4 are not notified within due period.

- **Fines under Article 16/2:** Fine is imposed up to ten percent of the annual gross revenue of undertakings and of associations of undertakings and/or the members of such associations in cases of existence of prohibited behaviours in Articles 4 and 6 and prohibited mergers and acquisitions in Article 7.

- **Fines under Article 16/3:** In case undertakings and associations of undertakings having legal personality are subjected to fines mentioned in Article 16/1, natural persons employed in managerial bodies of this legal personality are also fined personally up to ten percent of the fine imposed.

- **Fines under Article 17/1(a):** Undertakings and associations of undertakings may be imposed fines per day to be mentioned in the decision fifty million liras for failure to comply with the decision taken pursuant to article 9, concerning the termination of infringement, and other measures

- **Fines under Article 17/1(d):** Undertakings and associations of undertakings may be imposed fines per day to be mentioned in the decision twenty million liras for prevention of on-the-spot inspection by experts of the Turkish Competition Board in accordance with article 15.

Table 5: Fines

		Total	Art. 4 & 6	Art. 7	Art. 5
Art. 16/1 (a)	1999				
	2000				
	2001				
	2002	5.816.108.000	5.816.108.000		
	2003				
	2004				
Art. 16/1 (b)	1999				
	2000	55.036.038.540	55.036.038.540		
	2001				
	2002	2.908.054.000	2.908.054.000		
	2003				
	2004	25.754.593.000	25.754.593.000		
Art. 16/1 (c)	1999				
	2000	7.909.200.000	4.258.800.000		3.650.400.000
	2001	7.592.832.000	5.694.624.000		1.898.208.000
	2002	97.419.809.328	78.517.458.328	15.994.297.000	2.908.054.000
	2003	215.006.884.000	180.328.354.000	30.054.726.000	4.623.804.000
	2004	228.751.128.000	127.744.142.000	20.795.558.000	80.211.428.000
Art. 16/2	1999				
	2000	1.138.627.889.015	1.138.627.889.015		
	2001	9.068.063.180.237	9.068.063.180.237		
	2002	18.891.386.564.074	18.891.386.564.074		
	2003	47.856.133.193.773	47.856.133.193.773		
	2004	46.055.761.638.660	46.055.761.638.660		
Art. 16/3	1999				
	2000	2.918.560.000	1.640.920.000		1.277.640.000
	2001	1.579.641.600	1.200.000.000		379.641.600
	2002	66.739.839.748	62.232.356.048	2.471.845.900	2.035.637.800
	2003	26.124.531.800	15.952.163.000	8.091.657.000	2.080.711.800
	2004	67.095.442.750	58.777.219.550	1.188.317.600	7.129.905.600
Art. 17/1 (a)	1999				
	2000				
	2001	264.721.712	264.721.712		
	2002				
	2003	38.620.322.000	38.620.322.000		
	2004				
Art. 17/1 (d)	1999	4.320.000.000	4.320.000.000		
	2000				
	2001				
	2002				
	2003	160.349.850.000	160.349.850.000		
	2004	17.824.725.000	17.824.725.000		
TOTAL	1999	4.320.000.000	4.320.000.000		
	2000	1.204.491.687.555	1.199.563.647.555		4.928.040.000
	2001	9.077.500.375.549	9.075.222.525.949		2.277.849.600
	2002	19.064.270.375.150	19.040.860.540.450	18.466.142.900	4.943.691.800
	2003	48.296.234.781.573	48.251.383.882.773	38.146.383.000	6.704.515.800
	2004	46.395.187.527.410	46.285.862.318.210	21.983.875.600	87.341.333.600

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

a) Summary of activities of Courts

16. In the year 2004, 197 cases were brought before the Council of State (10. Department) as the first instance court. The Council of State took 16 decisions. One decision partially rejected the application by the parties. 12 decisions were favourable for the TCA and 3 decisions were unfavourable. In this year, 29 decisions of the Council of State as the first instance court were appealed before the Counselling Office (the appealing Board for the decisions of Council of State's 10. Department). 2 decisions were finalised following the appealing procedure and they are unfavourable.

b) Description of Significant Cases, including those with international implications

17. Summaries of selected decisions of the Turkish Competition Board are given below.

Ceramic case (Date 24.02.2004, No: 04-16/123-26)

18. In *Ceramic* case (Date 24.02.2004, No: 04-16/123-26), the Board found the existence of a single continuing agreement and concerted practice beginning from December 14th, 1994 among 32 undertakings in the ceramic market. All 32 undertakings in the market participated in the agreement and concerted practice, albeit in different times, which aimed to fix sale prices and conditions; control quantity of supply and exchange sensitive information as to competition. Therefore, the undertakings formed a hard-core cartel. Fixing sale price and conditions and controlling quantity of supply are per se violations of competition.

19. As to exchange of information, some principles that the Board established previously were taken into consideration before finding infringement.

20. For instance, the Board in its opinion concerning exchange of information in the cement market by the association of cement producers provided the following guidance to avoid infringement of principles of competition law:

21. Systems of exchange of information as to quantity by each undertaking have the potential, considering the oligopolistic nature of the cement market, to facilitate some organisations and behaviour that are wanted to be prevented by competition law practice. Frequent exchange of detailed information in such markets may be used to create artificial market conditions with abnormally transparent and stable flow of goods that remove the flexibility of the behaviours of the economic units and abolish the risks inherent in the nature of competition. There is the possibility that the commercial behaviours of the undertakings are to be determined according to factors other than individual choices under free competition conditions, market behaviours are co-ordinated, and functioning of organisations contrary to competition law is supervised as a result of detailed commercial information of undertakings contained in similar systems of information exchange. Therefore:

- Tables including quantities as to production, sales, stocks, exports etc. should be prepared in a way not to disclose the quantities realised by each undertaking or economic unit. Therefore, tables should include total quantities regarding production, sales, imports, exports, and stocks on the basis of each geographical region. In case the number of undertakings or economic units is less than three in a region, the data regarding that region should be combined with those of a neighbouring region in order to avoid calculation of individual data.

- No tables comparing undertakings on the basis of any data group should be prepared.
- The statistical data should not be discussed by the representatives of the undertakings in their meetings.
- The statistics that are distributed should not be accompanied by any comment, analysis or recommendations that might affect the mutual competitive behaviours of the undertakings.
- Tables including the quantities produced for each product type in a certain period should be prepared in line with the principles in this list regarding not to disclose individual data. Therefore, the product types should be divided into no more than three groups and be published in sum.
- No estimates should be made regarding prospective prices, production, sales and capacity utilisation rate.
- The associations of undertakings should ensure that their employees responsible for the sensitive information regarding competition (especially individual quantities collected from undertakings) should keep them confidential vis-à-vis members of the association and third parties.
- In case it is likely that sensitive information regarding competition belonging to a certain undertaking is to be understood, then even the sum or summary of the information should not be published.
- Tables including monthly data should not be distributed before two months passed beginning from the relevant month.
- Relationship with the public authorities requesting statistical data can be kept as usual.

22. Some of the above-given principles were repeated by the Board in another case regarding association of fertiliser producers (date 08.08.2002 and no 02-47/586-M.) Within the framework of the Board's principles with respect to exchange of information, the exchange of information in ceramic case was regarded as violating competition in the ceramic market.

23. Moreover, per se violations of competition such as fixing prices and sale conditions and control of quantity of supply via regular meetings were considered as increasing the severity of fault of the undertakings. The documents found during on the spot inspections proving that the relevant undertakings were aware of the Turkish competition rules were seen as evidence of the existence of intent. The fact that infringements were very comprehensive and the duration of the agreement was long resulted in severe damages. These criteria were considered relevant while determining the amount of fine. The maximum fine imposed to one undertaking is nearly 2 million Euros, equal to 2% of its turnover in 2001.

Anadolu Cam[3] Decision dated 01.12.2004 and numbered 04-76/1086-271

24. On 02.10.2003, the Competition Board opened an investigation for purposes of establishing whether the pricing policy of Anadolu Cam Sanayii A.Ş.[4] (Anadolu Cam) in Tekel Tütün, Tütün

[3] Anadolu Glass.

[4] Anadolu Glass Industry Inc.

Mamulleri, Tuz ve Alkol İşletmeleri Anonim Şirketi[5] (Tekel) tender of 09.06.2003 might be considered as an abuse of dominant position with its nature of complicating and even excluding the market activity of Marmara Cam San. ve Tic. Ltd. Şti.[6] (Marmara Cam)[7].

25. The subject of the investigation is the application of a pricing policy by Anadolu Cam that would complicate the market activity of Marmara Cam which is perceived as a threat by it against its "overwhelming superiority" in the glass packaging market, but that would also not reduce the overall proceeds sought to be attained by it. In other words, two goals are intended to be attained as a result of this practice:

1. Complicating the market activities of Marmara Cam,

2. The absence of reduction in the overall proceeds sought to be attained while complicating the market activities of Marmara Cam.

26. It would be consumers who would suffer under both goals.

27. Under the first goal, the competitive process defined in article 3 of the Competition Act No. 4054 as *"the contest between undertakings in markets for goods and services, which enables to take economic decisions freely"* would be distorted; this situation would affect consumers in the long term and when analysed ultimately.

28. On the other hand, the second goal prevents Tekel from benefiting as well. In other words, should Anadolu Cam had made a reduction in other products too, Tekel and consequently consumers would have benefited from it as well in the short term and when analysed ultimately.

29. As a result, both goals were attained in the relevant event, and consumer loss emerged due to both the distortion of the competitive process and the increased purchasing cost of the relevant buyer; therefore, the welfare of the society at large diminished.

30. In literature, the elements of selective pricing are generally listed as follows:

1. the undertaking in dominant position should have the opportunity of being able to complicate the activities of its competitors with strategic behaviour independent of costs;

2. the relevant undertaking should explicitly be in dominant position;

3. the undertaking in dominant position should have only one competitor;

4. there must be evidence indicating the goal of the undertaking to complicate the market activity of its competitor.

31. It is obvious that all the 4 elements above exist in the subject of the examination:

1. Anadolu Cam has the opportunity, owing to the structure of the tender, to apply a price policy complicating the activity of Marmara Cam without incurring a significant cost and without being required to sell below the cost.

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5 Tekel Tobacco, Tobacco Products, Salt and Alcohol Enterprises Incorporated Company.

6 Marmara Glass Industry and Trade Co. Ltd.

7 Marmara Glass.

2. That Anadolu Cam is in dominant position is even acknowledged by the representatives of the undertaking.

3. The only competitor of Anadolu Cam in the tender is Marmara Cam.

4. Evidence indicating the goal was found during the on-the-spot inspection made at Anadolu Cam. Moreover, this intention is also acknowledged in the defence of Anadolu Cam.

32. Within the framework of such statements, the Competition Board decided that the price policy of Anadolu Cam in Tekel tender of 09.06.2003 be considered as an abuse of dominant position by having committed actions with a view to complicating the market activity of Marmara Cam, and that Anadolu Cam which had undertaken behaviour prohibited in article 6 of the Act No. 4054 be punished in accordance with article 16 paragraph 2 of the same Act.

2. Mergers and Acquisitions

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

Table 6: Merger/Acquisition Applications Concluded

	Permitted	**Conditional**	**Rejected**	**Out of Scope & Under Thresholds**
1999	22	1	0	48
2000	49	2	2	45
2001	40	2	0	45
2002	64	0	0	40
2003	77	2	0	27
2004	86	3	0	33
TOPLAM	338	10	2	238

Table 7: Merger Decisions by Type

	1999		**2000**		**2001**		**2002**		**2003**		**2004**	
	Open.	Concl.	Open.	Concl.	**Open.**	**Concl.**	Open.	Concl.	Open.	Concl.	Open.	Concl.
Merger	7	3	12	5	**6**	**3**	13	11	6	7	8	7
Acquisition	60	37	76	37	**70**	**40**	87	79	83	76	82	88
Joint Venture	8	5	8	7	**5**	**7**	9	5	6	9	10	8
Privatisation	2	2	7	6	**0**	**0**	1	0	18	14	15	19
TOTAL	77	47	103	55	**81**	**50**	110	95	113	106	115	122

b) Summary of significant cases

The Competition Board Decision with regard to the acquisition, by Enron Power Holdings (Turkey) B.V. (Enron Türkiye)[8], of 9 % of the shares of Trakya Elektrik Üretimi ve Ticaret A.Ş.[9] (Trakya A.Ş.)[10] whose 50 % is held by it, from Wing International Ltd. (Wing Ltd.)

33. Enron Türkiye and Wing Ltd., together with their parent companies, had signed a share transfer contract for purposes of transferring to Enron Türkiye a total of 9 % share of Wing Ltd. at Trakya A.Ş.

34. The contract referred to was examined, and it has been realised that 100 % rate of share was required for certain strategic decisions (abolition of the company, election of the independent members of the Board of Directors, determination of those decisions requiring unanimity in the Board of Directors) to be taken at the General Assembly, and 85 % rate of share for some (amendment to the main contract, appointment/dismissal of the general manager, company merger), and that in other words, no shareholder might hold sole control in the strategic decisions of the General Assembly or the Board of Directors before or after the acquisition. Therefore, it is required that the shareholders act jointly and establish joint control in order to be able to take certain strategic decisions.

35. Within this framework, it has been realised that the transaction referred to was not an acquisition under article 2 of the Communiqué No. 1997/1, since joint control did not change in Trakya A.Ş. before and after the acquisition transaction.

36. Pursuant to article 5.7. of the Contract signed between the parties, entitled "Limitation on Competition for Sellers", the seller and the parent company of the seller are prohibited, for a period of 2 years, from directly or indirectly owning activities similar to the activity conducted by Trakya A.Ş. in Turkey, and from dealing with such activities, without obtaining the express written authorisation of the buyer. Sellers were only permitted to buy 5 % or less of the shares of public companies conducting similar activities.

37. The most important necessary condition to deem as an "ancillary restraint" the prohibitions on competition imposed on parties with mergers and acquisitions is that they should be able to bear the criterion of "being directly related to a concentration, and being necessary for the ability to carry out a concentration." In case they do not meet this criterion, the prohibitions on competition in question are considered as a limitation on competition under article 4 of the Competition Act No. 4054.

38. Since the share transfer in question could not be accepted as an acquisition under the Communiqué No. 1997/1, it was also not deemed possible to consider as an ancillary restraint the prohibition on competition provided in the contract referred to.

8 Enron Turkey.

9 Trakya Electricity Generation and Trade Inc.

10 Trakya Inc.

39. Furthermore, the contract which could not be granted a negative clearance certificate due to such obligation was considered as an agreement limiting competition under article 4 of the Competition Act, and it was examined in terms of whether or not meeting all the conditions below, which are listed in article 5 of the Competition Act, for being able to exempt the prohibition on competition in question from the application of the provisions of article 4:

a. Ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services,
b. Benefiting the consumer from the above-mentioned,
c. Not eliminating competition in a significant part of the relevant market,
d. Not limiting competition more than what is compulsory for achieving the goals in sub-paragraphs (a) and (b).

40. In the acquisition transaction referred to, the relevant product market is the market for electricity generation and trade. The relevant product market in question is a market where it is intended to ensure competition, as is also mentioned in the Electricity Market Act No. 4628. However, TETAŞ[11] already holds the position of a buyer in dominant position. Therefore, yet it is not possible to speak about the existence of any business circle that would justify the prohibition on competition for the companies operating in the generation market. When such characteristics of the relevant product market are taken into account, the imposition of a prohibition on competition for the seller companies does not seem possible to bear the conditions listed in article 5 of the Competition Act No.4054. In this respect, it was decided that the prohibition on competition included in article 5.7. of the Share Purchase Contract, entitled "Limitation on Competition for Sellers", infringed article 4 of the Competition Act No. 4054, since it could not be accepted as an ancillary restraint, that the relevant Contract might also not be granted an individual exemption as such, and that in this respect, the article in question concerning the prohibition on competition be excluded from the Share Purchase Contract.

The Request for Authorising the Transaction of Transferring İstanbul Gübre Sanayii A.Ş.[12] (İgsaş) and Gemlik Gübre Sanayii A.Ş.[13] via Privatisation

41. The highest bidder companies in the privatisation tender for İgsaş have been Yıldız Entegre Ağaç Sanayi ve Ticaret A.Ş.[14], GAP Kimya ve Gübre Sanayi Ticaret A.Ş.[15], and Yılfert Gübre ve Kimya Sanayi ve Ticaret A.Ş.[16] respectively. The companies in question and the groups with which they are affiliated do not operate in the chemical fertilizer market. It has been realised that since in the production of forest products which was the main subject of occupation of Yıldız Entegre Ağaç Sanayi ve Ticaret A.Ş., one of the raw materials of glue consumed for bonding purposes was "urea", it was related with the fertilizer sector.

42. The opinion reached was that since the companies in question, which had been awarded the tender did not operate in the relevant product market, concentration would not be experienced in the market following the acquisition transaction, and that new market entry would contribute favourably to the competitive structure of the market.

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11 Turkish Electricity Wholesaler Company

12 İstanbul Fertilizer Industry Inc.

13 Gemlik Fertilizer Industry Inc.

14 Yıldız Integrated Tree Industry and Trade Inc.

15 GAP Chemistry and Fertilizer Industry Trade Inc.

16 Yılfert Fertilizer and Chemistry Industry and Trade Inc.

43. On the other hand, the highest bidder companies in the privatisation tender for Gemlik Gübre[17] were Yılyak Yakıt Pazarlama ve Ticaret A.Ş.[18], Albayrak Turizm Seyahat İnşaat Ticaret A.Ş.[19], and Gübretaş respectively. The companies other than Gübretaş do not operate in the chemical fertilizer market.

44. And Gübretaş does not produce nitrogenous fertilizer, and it produces and sells TSP fertilizer which is one of the phosphate fertilizers, and composite fertilizers such as DAP, 20.20.0, 15.15.15, 10.25.20, as well as selling nitrogenous fertilizers by supplying them from home and abroad. Due to the fact that Gübretaş is within an economic whole with the Central Union of Agricultural Credit Cooperatives (TKKMB) that has a wide distribution network, their activities in the fertilizer market need to be assessed together. The (sale) share of Gübretaş and TKKMB in the nitrogenous fertilizers market is 15 %, and their share in the composite fertilizers market is 15 % in production and 12 % in sale. In case Gübretaş acquires Gemlik Gübre which merely produces nitrogenous fertilizer, the market shares to be created in the nitrogenous fertilizers market are 25 % in terms of production capacity, 24 % in production and 25 % in sale.

45. In case the transaction is realised, Gübretaş would be positioned as a significant competitor against Toros Gübre[20] that is the leading undertaking in the market, and concentration would not be experienced in the market following the transaction. Also, since the other companies do not operate in the market, the transaction of transferring Gemlik Gübre via privatisation would not cause any dominant position in the market.

46. Taking into account that Yılyak Yakıt Pazarlama ve Ticaret A.Ş. which bids for Gemlik Gübre, and Yılfert Gübre ve Kimya Sanayi ve Ticaret A.Ş. which volunteers for İgsaş are within an economic whole, the market competition needs to be examined where İgsaş and Gemlik Gübre are acquired by the undertaking in question. The shares of İgsaş and Gemlik Gübre in the nitrogenous fertilizers market are 48 % in terms of production capacity, 54 % in production and 18 % in sale.

47. When it was also regarded that the company to newly enter the market possessed a wide distribution network throughout Turkey, and was required to keep a broad range of products, it has been realised that the market shares, prior to the acquisition transaction, of the companies to be acquired could not reveal the existence of a dominant position on its own.

48. The opinion reached was that the transaction of acquisition of İstanbul Gübre Sanayii A.Ş. by Yıldız Entegre Ağaç Sanayi ve Ticaret A.Ş., GAP Kimya ve Gübre Sanayi Ticaret A.Ş., and Yılfert Gübre ve Kimya Sanayi ve Ticaret A.Ş., and that of Gemlik Gübre Sanayii A.Ş. by Yılyak Yakıt Pazarlama ve Ticaret A.Ş., Albayrak Turizm Seyahat İnşaat Ticaret A.Ş., and Gübretaş Gübre Fabrikaları T.A.Ş.[21] did not have the nature of causing a dominant position in the nitrogenous and composite fertilizers market, and the acquisition transaction referred to was authorised.

17 Gemlik Fertilizer.

18 Yılyak Fuel Marketing and Trade Inc.

19 Albayrak Tourism Travel Construction Trade Inc.

20 Toros Fertilizer.

21 Gübretaş Fertilizer Factories Turkish Inc.

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

1. The opinion forwarded to the tobacco, tobacco products and alcoholic drinks market regulatory authority about "the principles and criteria to be adhered to in advertising and sales development in alcoholic drinks"

49. In the report prepared by the Tobacco, Tobacco Products and Alcoholic Drinks Market Regulatory Authority (TAPDK) in order to receive the opinions of firms and those concerned operating in the sector, it has been expressed that despite the fact that the principles and criteria to be applied to the advertising and sales development activities of producers of alcoholic drinks have been provided in the legislation via different provisions of law, undertakings in the sector could not create their self-control at the stage of bringing these criteria into life, and the sector's being under the control of the state monopoly for more than 60 years was very influential in it. In the following part of the report, it has been stated that with the entry into force of the "Regulations on the Procedures and Principles Concerning the Domestic and Foreign Trade of Alcohol and Alcoholic Drinks" on June 6, 2003, imports were left free, many drink brands of different categories entered the market in a short period, and these undertakings engaged in intense competition so as to be able to receive a share from the market, and it has been expressed that at this stage it did not seem possible for undertakings to determine, within a reasonable period, their self-control rules concerning the advertising and sales development practices. Therefore, some criteria were created by TAPDK for purposes of applying to the advertising and sales development activities of producers of alcoholic drinks.

50. When the report in question is examined, it is seen that in general the principles and criteria were attempted to be determined as clearly as possible, in conformity with the power and task of "…..*making regulations that shall prevent any kind of hazardous effects of public, social or medical nature, which stem from the consumption of tobacco and alcohol*", granted to TAPDK with article 3 paragraph 1 sub-paragraph (d) of the Act No. 4733. However, some criteria to be applied to the advertising and sales development activities of producers are excessively limiting, and have the likelihood of complicating the activities of undertakings operating in the market. Particularly, limitations that sale prices may not be lowered by holding campaigns, discounts in the product price may not be made by crossing the old price and highlighting the new price on the package of the product or on the labels at the shelf where the product is, campaigns whose gifts are alcoholic drinks may not be organised such that the second product is given for free or below the sale price to those who purchase one product, and that campaigns of the lottery or bonus type may not be organised, which necessitate the purchase of alcoholic drinks for being able to be a participant shall prevent undertakings from engaging in price competition which is the most important dimension of competition. In the event that the criteria mentioned in the report are brought into life exactly, undertakings to newly enter the markets besides undertakings operating in the alcoholic drinks market for years shall not be able to determine their prices as they wish, having difficulty in realising their marketing activities. In such a case, it will not be possible to actually bring into life the liberalisation process which commenced by the amendment to the Act in 2001. In other words, in an environment where undertakings to newly enter the alcoholic beverages market are not provided with the opportunity to promote and sell their products, one may not speak about opening these markets to competition.

51. Consequently, it is considered that during the control of the advertising and sales development activities of producers of alcoholic drinks, it should not be overlooked that this market which had been under the control of a few firms for long years has been recently opened to competition.

2. The Opinion About The Bill On Large Stores

On 12.04.2004, the Prime Ministry requested the opinion of the TCA about the "Bill on Large Stores". The following points were needed to be emphasised in the opinion communicated to the Prime Ministry.

52. In article 3 of the Competition Act No. 4054, entitled definitions, competition is defined as the contest which enables free economic decision-makings between undetakings in markets for goods and services. Therefore, when we consider competition as a contest, it is obvious that naturally all contestants should start the contest under equal conditions, and certain contestants should not be provided with an advantage. The bill in question provides certain enterprises (those under 400 m^2) with an advantage which is unfair and far from economic rationales. Since large stores which work with an efficiency resulting from economies of scale and scope experience intense competition between themselves, they cause that the margin between the producer price and the price paid by the consumer narrows, thus causing the consumer to pay a lower price. This bill which has the nature of preventing the growth of large stores and complicating the entry of new players to the distribution sector shall ultimately raise the price to be paid by the consumer. When it is taken into account that a legal regulation to this end shall adversely affect the consumer welfare and the ultimate purpose of the Competition Act No. 4054 is to increase the consumer welfare, it is considered that it shall be contrary to the spirit and principles of this Act.

53. On the other hand, it is realised that in the new bill, there are improvements in certain issues as compared with the previous bill[22]. Namely; it is a favourable development to have fully excluded certain provisions listed in article 5 to be among the authorisation criteria for establishment, which are not clear and whose objective criteria have not been specified. Another favourable development has been made in the article entitled prohibitions. In article 10 of the former bill, certain practices were prohibited, which were identified as being specific to large stores, such as exorbitant prices, excessive price discounts and pushing competitors out of the market. It is another positive development that provisions related to such practices already prohibited by article 6 of the Competition Act No. 4054 have been fully excluded.

54. Presented below are the assessments in the form of headings, concerning the points we consider to create problems under the Competition Act No. 4054 and the competition policy.

Sales by Large Stores with Their Own Brands (article 11/a)

55. In the provision which takes place both in the previous and the new bill, there is a regulation that the respective brands of Large Stores may not exceed 20 % of the total turnover. The new bill also expresses that this threshold of turnover may be increased or decreased by 50 % via the decision of the Council of Ministers. It is thought that the provision in question shall harm the competitive structure of the distribution sector. The likely harm is two-sided. Primarily, this limitation would affect consumers adversely. Because, retailer brands called as *private label* may mostly be sold quite cheaply than the products we call branded. Since advertising expenditures are not made in these products as compared with branded products, it becomes possible to be able to sell retailer brands cheaply. In Turkey where the purchasing power of consumers is lower than the EU countries, retailer brands gain more importance. When one looks at the EU countries, it is seen that retailer brands occupy an important place in the turnovers of large stores. This is also the tendency in Turkey. Retailer brands set an alternative to branded products, and increase competition in the market by taking place on shelves. It is evident that consumers would gain advantage from increased competition through low prices. Therefore, this provision has the nature of limiting intra-brand competition, and contradicts with the Competition Act No. 4054. Secondly, enterprises defined as KOBİ (small and medium-size enterprises) may suffer from this limitation. Small and medium-scale enterprises generally utilise their idle capacity for producing retailer brands, thus

[22] The Bill on the Large Stores Engaged in the Sale of Consumption Items and Necessaries.

increasing their production and consequently their employment. So as to sum up, in the competition between branded products and retailer brands, this limitation makes branded products gain an advantage against consumers. And this has the nature of harming the characteristic of competition as to contesting under equal conditions.

The Restriction of Discounted Sales (article 11/last)

56. In article 10 of the former bill, an obligation was imposed on large stores for discounted sales practices, with regard to receiving, before the practice, the authorisation of the chambers with which they were affiliated. In the new bill, the scope is narrowed by means of stating that sales campaigns may only be held in bairams and on special days, in cases of the liquidation of commercial activities and the change of workplace, by the end of the summer and winter season, and by the end of seasons, provided that again an authorisation be received. According to the new bill, holding discounted sales campaigns gets further difficult. Primarily, the Competition Act No. 4054 stresses free decision-making by undertakings while defining competition. Within this framework, those practices of undertakings that shall distort or adversely affect the market conditions may be considered under the Competition Act No.4054 referred to. This regulation proposed to be introduced in relation to discounted sale has the likelihood of setting an obstacle to dynamic competition of the said undertakings. It should be taken natural that large stores reflect on their prices, through making discounted sale, the opportunities, and cost and efficiency advantages obtained by them in the conditions of free market economy. Subjecting this sales strategy to authorisation may harbour the risk of eliminating dynamism which is the distinctive quality of the private sector. Moreover, the fact that consumers benefit from such discounts should not be overlooked.

57. If the reason for restricting discounted sales campaigns is the concern that these discounts would harm the other enterprises in the market (rather the small enterprises), and these undertakings would be pushed out of the market, it should be mentioned that this concern is irrelevant. Because, a practice to this end shall have the nature of the abuse of dominant position and shall be prohibited under article 6 of the Competition Act No. 4054, in case of the existence of the conditions. Therefore, it is considered that discounted sales campaigns are not required to be regulated in this bill.

3. The Opinion About The Bill On The Vocational Organisations Of Tradesmen And Craftsmen

58. On 09.08.2004, the Ministry of Industry and Trade stated that the works were completed, for redrafting and adapting to today's conditions the Tradesmen and Craftsmen Act No. 507 which had entered into force in 1964 and which was realised not to respond to today's conditions *("The Act No. 507"*), and it requested that the opinion of the TCA about the "Bill on the Vocational Organisations of Craftsmen and Tradesmen" (*"The Bill"*) be notified.

59. Before proceeding with the opinions and assessments about the Bill, it would be beneficial to briefly address the free market economy Turkey has been trying to implement since 1980's. As is known, in the free market economy, the determination of elements such as the amount of supply and demand, price and quality takes place within the own dynamics of the market, without a central decision unit. Undertakings operating in free market economies would have to work more effectively and efficiently as a result of the competition between them, and this would lead to cheapened prices and increased consumer welfare. However, letting markets function on their own does not always mean that the conditions of free market economy would be formed. Undertakings operating in markets may mostly prefer to engage in certain practices that distort or restrict the functioning of free market economy. At this point, it is required that an effective competition policy be pursued, creating a sound economic environment that enables the survival of most efficient undertakings in markets. The most important feature of a market where competitive conditions prevail is that undertakings operating in this market determine the elements such as

the amount of production, price and quality independently on their own, without engaging in concerted practice with their competitors in any manner.

60. Within the framework of these explanations, it is necessary to stress article 61 of the Bill, entitled "The way of setting price tariffs". In the article which grants to the Chambers with which tradesmen and craftsmen are affiliated the right to publish price tariffs for goods and services produced by these tradesmen and craftsmen, it is also provided how to process the appeals concerning price tariffs. This article which grants to the Chambers the right of determining a price tariff has been taken to writing in a quite similar manner with article 125 of the Act No. 507 which is intended to be abolished. In both articles, the right to determine price tariffs of tradesmen and craftsmen is explicitly granted to the Chambers and the Unions with which the Chambers are affiliated. In article 61 of the Bill, there is no explanation as to the maximum, minimum or fixed nature of the prices in question, like in article 125 of the Act No. 507. But, in the last paragraph of article 125 of the Act No. 507, The Turkish Confederation of Tradesmen and Craftsmen (*"The Confederation"*) is empowered to issue Regulations, with regard to regulating price tariffs.[23] Under this purview, the Confederation has issued the "Regulations on Regulating Price Tariffs of Goods and Services Produced by Tradesmen and Craftsmen" (*"Tariff Regulations"*), published in the Official Gazette dated 16.9.1992 and numbered 21347. Article 4 of the Tariff Regulations reads as *"Prices included in the tariff show the maximum limits"*, and article 10 reads as *"It is compulsory that the explanatory entry that prices determined in the tariff show the maximum limit be placed on tariffs"*.

61. Despite the fact that the Tariff Regulations has expressed that prices determined were maximum prices, it has been observed that the Chambers and the Unions of Chambers of tradesmen and craftsmen, and most importantly tradesmen and craftsmen perceived these prices announced as fixed prices the compliance with which was compulsory. So as to give an example, in the letter which was entered in the records of the TCA on 22.3.2002 with the number 1334, the Union of Chambers of Tradesmen and Craftsmen in Bursa expressed that uneasiness emerged due to the sales below the prices published by the Chambers, and requested the opinion of the TCA about price tariffs. In the letter forwarded to the said Union, it has been stated that price tariffs announced were maximum prices and were required to be applied accordingly. Again, at the end of a preliminary inquiry in relation to the bread market of the city of Antalya, the Competition Board decided in its decision dated 12.6.2003 and numbered 03-42/465-204 that in order not to perceive the bread price as a fixed price and the dealer profit ratio as a fixed ratio, which take place in the bread price tariffs approved by the Board of Directors of the Union of Chambers of Tradesmen and Craftsmen in Antalya, the Chamber of Bakers in Antalya and the Union of Chambers of Tradesmen and Craftsmen in Antalya be notified that the tariffs referred to should explicitly state that the bread price was the maximum price and the dealer profit ratio was the minimum ratio.

62. Essentially, the circular dated 2.4.2002 (the Circular no. 29), published by the Confederation demonstrates that prices mentioned in price tariffs published do not only determine the maximum limit. With the circular in question, it has been decided that hypermarkets established in metropolises sold bread below the cost and bakers were uneasy about this situation, and therefore the floor price besides the maximum selling price be also included in price tariffs published by the Chambers of Bakers. The Competition Experts expressed to the officials of the Confederation that the said regulation was contrary to the Competition Act No. 4054, and subsequently, the Confederation abolished the Circular no. 29 also enabling the inclusion of minimum prices in the bread price tariffs, with another circular issued by it (the Circular no. 23) on 19.2.2003. However, it has been observed that in practice, mostly a phrase that prices were the maximum did not take place in price tariffs, and on the contrary, such prices were reflected as if they were the fixed prices whose application by tradesmen and craftsmen was compulsory.

[23] In article 74 sub-paragraph (g) of the Bill as well, the power of issuing Regulations is granted to the Confederation, with regard to regulating price tariffs.

63. So as to sum up, despite the fact that in article 125 of the Act No. 507 which is intended to be abolished, there is no explanation concerning the quality of prices in price tariffs announced by the Chambers, it has been expressed in the Tariff Regulations published by the Confederation that such prices indicated the maximum limit. However, in practice, the fact that these prices showed the maximum limit has not been emphasised adequately, and tradesmen and craftsmen were led to conceive that they had to apply these prices exactly. Therefore, it is considered that it is compulsory to place in article 61 of the New Bill a phrase stating that prices in tariffs are the maximum prices, and also in the Regulations to be issued in accordance with article 74 sub-paragraph (g) of the New Bill, additional regulations be made, which shall ensure that tradesmen and craftsmen adequately perceive that prices in price tariffs indicate merely the maximum limit.

4. The Preliminary Opinion Of The Competition Board Concerning The Privatisation Of Tekel (Cigarette)

64. With regard to the privatisation of cigarette factories, cigar and cigarette brands belonging to Sigara Sanayi İşletmeleri A.Ş., and warehouses belonging to Sigara Pazarlama ve Dağıtım A.Ş. of TEKEL which has been placed under the scope and program of privatisation, the Opinion of the Professional Department of the TCA prepared upon the pre-notification of the Presidency of Privatisation Administration, dated 15.7.2004 and numbered 3897 was forwarded to the Prime Ministry Presidency of Privatisation Administration with the letter dated 17.8.2004 and numbered 3148, in accordance with article 3 paragraph 1 and article 4 paragraph 1 of the "Communiqué" No. 1998/4 "on the Procedures and Principles to be Pursued in the Pre-notifications and Authorisation Applications to be Made to the Competition Authority in order for Acquisitions via Privatisation to Gain Legal Validity". The opinion of the Presidency of Privatisation Administration prepared as required by the relevant provision of the Communiqué was entered in the records of the Competition Authority on 27.8.2004.

65. Article 4/2 of the Communiqué provides for that the relevant opinion of the Competition Board be formed and notified to the Presidency of Privatisation Administration within a total of 40 workdays from entering the pre-notification in the records of the Authority. In the Board meeting dated 7.9.2004, an additional period was granted in accordance with the relevant article of the communiqué, with the number 04-58/819-M.

66. The Opinion of the Professional Department of the TCA prepared upon the pre-notification related with the privatisation transaction which was the subject of the file, and the letter of the Presidency of Privatisation Administration notifying its opinion to the TCA were put on the agenda of the Board meeting, with the Presidency proposal dated 8.9.2004 and numbered REK.0.07.00.00/197.

67. As is known, the world cigarette market is in the position of a market where limited number of actors operate. Like throughout the world, there are significant barriers to entering this market in Turkey as well. Due to bans on advertisements which may be considered in this vein, the promotion of a product is quite difficult, and within this framework, it is seen that establishing a new brand in the market is not a fact to be easily achieved. Furthermore, the other barriers valid for this market may be listed as the requirement for a considerable capital, scale economies, product differentiation, legal and administrative obligations, and vertical integration. These barriers are the elements which prevent potential producers to enter the Turkish cigarette market from actually penetrating into the market, in other words, from creating a strong competitive pressure on the market.

68. On the other hand, actors who have been operating in the market for more than 10 years had the opportunity of promoting their products before the *"Act on the Prevention of Hazards of Tobacco*

Products" No. 4207, published on 26.12.1996. Many brands of the undertakings referred to, which already exist in the market were also present in the market prior to this Act, and made use of the said opportunity of promotion. Therefore, when it is taken into account that the undertakings to newly enter the market do not have such an opportunity, there emerges the importance of owning a well-known brand. As a matter of fact, it is seen that an undertaking on an international scale, which has recently entered the market could not reach a significant market share by the end of two years which lapsed, and that the incumbent actors in the market have difficulty in establishing new brands.

69. In the light of these information, it is thought that it will not be easy for an undertaking or undertakings to newly enter the market to take place in the market with strong brands. Within this framework, the privatisation of TEKEL and the structure to be set up as a result of privatisation present importance. The importance in question would provide an opportunity, within the context of sales in parts, for those undertakings which have inadequate financial power to purchase TEKEL as a block or which do not prefer it in strategic terms, but which want to acquire one or more than one brand of TEKEL by means of bidding for certain parts under the method of division. Moreover, such an approach may ensure that the market reaches a more competitive structure after privatisation, and this may serve as a determinant in the formation of a more appropriate market structure for new market entries. As a matter of fact, it is considered that in a market where there exist barriers to entry, the said preference is a fact which should not be overlooked with a view not to creating new barriers to entry.

70. Indeed, the brands of TEKEL known by consumers and the sales volumes of these brands are deemed as an appreciable fact in the cigarette market where the volume of production and distribution is crucial. Therefore, undertakings to newly enter the market under sales in parts, to be created as a result of division strategies may make use of the volume and familiarity of the brands of TEKEL, penetrating more readily into the market, may promote their own brands more easily, and the market may reach a more competitive structure.

71. Another point to be mentioned at this stage is that opening to competition a market where the state has been operating as the producer for years and which has the nature of a tight oligopoly with three actors is an important opportunity for the market to reach a competitive structure. The structure to be established within this framework also presents importance for the future development of the market. Therefore, it is thought that the choice of a model which shall create a market structure as competitive as possible should not be overlooked.

72. Another fact supporting the assertion that a more competitive market structure may be obtained in case Tekel Cigarette Enterprise is sold by dividing on the basis of brands is the current structure of the lower markets. The lower markets may be examined under five headings as the upper, middle-upper, middle-lower, lower and cheap markets. Among the lower markets referred to, merely the cheap market products have an oriental characteristic. Though all products which take place in the other lower markets contain different proportions of blend, they display a product characteristic of the American blend.

73. When the firm-based distributions of the lower market products are examined, it is seen that TEKEL operates with various brands in four lower markets. The point to be taken account of in terms of the lower markets is the shift of demand in recent years from the cheap and upper markets to the middle and lower markets. For this reason, it may be claimed that in the short to medium term, the middle and lower markets would become the centre of attraction both for the incumbent actors and the potential players.

74. When the lower market analysis on the basis of undetakings is deepened, it is observed that TEKEL is the dominant undertaking in the lower and cheap markets, and it owns brands having an important share in the other lower markets. Within this picture, it may be argued that all brands of TEKEL

hold important positions. In this regard, TEKEL brands provide the incumbent or potential players with the opportunity of operating in more lower markets, thus diminishing the risk.

75. In the light of the foregoing information: Should the cigarette brands of TEKEL are sold by dividing, it is considered that a more competitive structure may be obtained as compared with block sales, in this case it may be possible to obtain a market having three to four players in the American-blend cigarette market, and a market having two to three players in the Oriental-type market, and in the other case, a market structure enabling the elimination of competition would emerge. Besides, it is thought that while a more competitive market structure may be established via *ex ante* control instruments such as the control of concentrations, trying to regulate a market open to infringements of competition by *ex post* control mechanisms may not be considered as an efficient policy from a competitive viewpoint.

76. Consequently, the opinion reached was that in case the method of selling by dividing was preferred, it was likely for all brands of TEKEL to be in demand both by the incumbent players and the potential players, since while the brands referred to might enable to gain a dominant position in the market and offset the market leader in terms of the incumbent players, depending on the undertaking purchasing the brand, it might enable to create a scale effect and become an important player in the market at once in terms of the potential players, and that in case of selling by dividing, the cigarette brands of TEKEL would provide the opportunity of operating in more lower markets, thus diminishing the risk in terms of the incumbent or potential players.

77. As a result of examining the relevant Presidency proposal and its enclosures;

it was decided that the opinion of the Turkish Competition Board formed along the lines of the following be notified to the Presidency of Privatisation Administration, as required by article 4 of the Communiqué No. 1998/4.

1- In case the cigarette brands of TEKEL were sold by dividing, a more competitive structure might be obtained as compared with the sales to be made as a whole;

2- In case the method of sales as a whole was preferred, the requirement to know that the Board would suggest the models of division that might be realised in reasonable periods, depending on the market position of the acquiring undertaking/undertakings, or the models that would involve the disposal of the brand or brands owned;

3- Regardless of the method by which the transfer transaction would be realised, conditions and obligations related with the transfer might be imposed or the transfer might not be allowed, in the event that contrariness or inconveniences as to the relevant articles of the Competition Act No. 4054 were determined in the assessment to be made in accordance with article 5 of the Communiqué No. 1998/4, after the purchaser nominees became clear, and therefore, this fact needed to be mentioned in the tender specifications for purposes of submitting it for the information of the undertaking/undertakings to participate in the tender.

5. The Privatisation of the Turkish Telecommunications Inc.

78. The opinion of the TCA prepared and forwarded to the Privatisation Administration, which shall constitute the basis for the preparation of the document on tender conditions, concerning the one-shot block sales of at least 51 % of the Turkish Telecom. Below-mentioned are the assessments made accordingly.

79. When the characteristics of the telecommunications sector are taken into account, it is seen that operators to enter into this sector can conduct their telecommunications services in the event that they can access to infrastructures over which services can be offered. Therefore, the actual provision of liberalisation, accompanied with competition necessitates that access to infrastructures is made subject to tight rules.

80. Nonetheless, even that access to an infrastructure is subject to tight rules cannot be sufficient for fully establishing the targeted competition. Even if liberalisation is ensured in services, it does not seem possible to speak about the full realisation of benefits to be introduced by competition, as long as an infrastructure remains as monopoly de facto.

81. Though opening the telecommunications infrastructures to the share of other operators is an important step in terms of liberalisation, it does not essentially mean that an actual environment of *free competition* has been established. As long as competition is not ensured in infrastructures, operators would be in the position of being *dependent* on the infrastructure of the de facto monopoly, and therefore the monopoly and monopolistic conditions presented by it. For this reason, the full display of benefits of competition may indeed take place in case operators can offer services over different infrastructures.

82. The presence of investment barriers against the formation of telecommunications infrastructures, and particularly that of an alternative local telephone network, which may render it irrational in economic terms, seriously impairs the development of another local telephone network in competition with this infrastructure. Within this framework, the greatest barrier to liberalisation is the *bottlenec*k experienced in access to the local telephone network.

83. In overcoming this bottleneck, the existence of different infrastructures has an extremely critical importance and value. Therefore, the encouragement of the development of different infrastructures over which telecommunications services can be offered, and the elimination of legal barriers to setting up such infrastructures set one of the most important policies.

84. Within the framework of these explanations, the privatisation of the Turkish Telecommmunications Inc. (the Turkish Telecom) presents great importance as regards the liberalisation process being undergone by Turkey in relation to the telecommunications sector. It is required to display great sensitivity during the process of privatisation for purposes of the establishment and development of competition in the sector, and in this regard, the privatisation of the Turkish Telecom constitutes an event that concerns the interests of the entire nation, and that shall give rise to important future effects in the country's economy.

85. The privatisation of the Turkish Telecom is an opportunity for compensating for the time wasted in establishing competition in the sector, and if it is realised in a sound manner, it is the most important means that may be used as a springboard for making the sector have a competitive structure. And this fact obliges that a number of measures be taken in relation to privatisation. As a matter of fact, taking necessary measures is compulsory with a view to preventing disputes which may arise later, and as regards the requirements of momentum and legal certainty needed by the liberalisation process to which privatisation is also expected to contribute.

86. Under these statements, the Opinion of the Competition Authority's Professional Department, and the Reply of the Presidency of the Privatisation Administration were examined in the Competition Board meeting dated 2.9.2004 and numbered 04-57/797, and the conclusion and opinion reached, with regard to the privatisation of at least 51 % share of the Turkish Telecommunications Inc. were that performing privatisation in the line of the following would be beneficial for ensuring that a more competitive market structure be created in the future:

1. The infrastructure of cable TV be rendered a separate legal personality together with all rights related to the ownership and operation of this infrastructure, such that it shall be completed within the period of one year at the latest, following the transfer transaction of the Turkish Telecom, and the control of this legal personality be transferred,

2. The internet service provision activities of the TTNet be made to have a legal personality which is separate from the other business units, such that it shall be completed within the period of six months at the latest, following the transfer date of the Turkish Telecom,

3. The undertaking which is dominant in the market for GSM mobile telecommunications services not be allowed to participate in a tender alone; the likelihood for this undertaking to participate in a tender within any consortia be only possible in case this organisation does not have a direct or indirect controlling right over the Turkish Telecom; the likelihood for persons or groups who or which directly or indirectly control this undertaking to participate in the Turkish Telecom tender alone, together and/or separately within any consortia be only possible in case after the tender, they transfer, to a person outside their economic whole, all means granting a controlling right in this undertaking and/or any undertakings having a direct or indirect controlling right over this undertaking,

4. The inequality which arises between the Turkish Telecom and operators making use of infrastructures, due to the Special Communication Tax be relieved prior to the transfer.

III. Resources of Competition Authority

1. Resources overall (current numbers and change over previous year)

a) Annual Expenditure in 2004 is 14.564.043.284.812 TL; approximately 10,2 million USD[24]

b) Number of employees (person-years)

87. According to Article 35 of the Competition Act 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 81 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 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 3 experts on research. The number is 304 when all staff is taken into consideration in 2004.

2) Human resources (persons-years) applied to

a) Enforcement against anticompetitive practises, b) Merger review, c) Advocacy efforts

88. All tasks granted by the Competition Act No. 4054 are carried out by personnel of profession who are experts on competition and assistant experts on competition total number of whom is 81.

3. Period covered by the above information

89. The number of personnel of profession, that is 81, is valid for 2004.

[24] 1 USD = TRL 1.420.000

IV. Summaries of or references to new reports and studies on competition policy issues.

90. In 2004, Turkish Competition Authority supported with İstanbul Bar the colloquium entitled "The Current Problems of Competition Law in the light of the relationship between Turkey and the EU" and it organised a symposium entitled "Competition Policy and the Improvement of Investment Environment in the Process of Full Membership to the European Union".

91. Turkish Competition Authority organised the following Thursday Conferences in 2004:

1. Compromise and Peace between the European Commission and the Undertakings in EU Competition Law Practice;
2. Anti-competitive Behaviours in Electricity Sector;
3. Evidence and Proof in Competition Law;
4. The Obligation to Deal in Competition Law;
5. (Doctrine of Essential Facility in the Light of the Decisions of the Turkish Competition Board);
6. Ancillary Restraints in Mergers and Acquisitions;
7. Bureaucratic Organisations and the Principles of Effective Administration;
8. Appeal.

92. Turkish Competition Authority published the following books in 2004: 5th Annual Report, Symposium on Public Tenders and Competition, Symposium on Competition Policy and Control of Concentrations (Mergers and Acquisitions), Congress on Competition Arrangements and Policy, Decisions of the Board in 2003. Moreover, 2 Competition Journals, 17 thesis of expertise written by assistant experts on competition were published.

93. In 2004, as part of the educational activities, professional staff working for the Turkish Competition Authority participated in panels (Dominant Position: Procedures regarding Investigation and Examination in the Light of the relevant Decisions of the Turkish Competition Board), seminars (World Trade Organisation and Agreements on Trade), symposia (Current Events in Competition Law), training programs (Training for Trainers; European Community Law for Lawyers and Non-Lawyers; Electricity Markets), workshops (Application of Competition Rules in Professional Occupation; European Block Exemption Regime), meetings (Competition Law Arrangements regarding Maritime Transport), certificate programs (Energy Law). Several professional staff visited the US to be informed about the working of the Federal Trade Commission and the Department of Justice Anti-trust Division.

94. As an important part of the efforts to increase the awareness of competition rules, training programs targeting university students deserve to be mentioned. In 2004, 87 students from various universities participated in these programs. Moreover, as a response to a request from Ankara University, a group of 50 senior students were informed by the professional staff about the working of the Turkish Competition Authority and the Application of the Competition Act No 4054. Finally, a group of 10 competition experts were sent abroad to have master's degree in law and economics.