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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN TURKEY**

-- 2005 --

*This report is submitted by the Turkish Delegation to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 8-9 June 2006.*

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## **1. Introduction**

1. The year 2005 represents a period in which the Turkish Competition Authority (TCA) has taken important decisions on competition infringements, mergers and acquisitions as well as privatisations. For instance, significant cartel cases handled within the TCA deserve mentioning. Moreover, it has continued to advocate competition via opinions it delivered.

2. The TCA did withdraw the benefit of block exemption from agreements including exclusivity clauses concluded by two leading beer producers with the sale points in the beer market. This case represents very well the policy of the TCA regarding foreclosure issues in concentrated markets.

3. Also in terms of merger review together with privatisations, the TCA dealt with the concentration issues in many sectors such as retailing, telecommunications, petroleum refining, ports etc. In this regard, Turk Telecom (incumbent telecom operator), TÜPRAŞ (dominant oil refining company), Mersin and İskenderun Ports which are important for Turkish foreign trade are among the most notable privatisation cases.

4. An important development in terms of the appeal process is that the High Administrative Court (the Council of State) annulled some of decisions of the Competition Board due to participation of Board members in the investigation teams. The Court ruled that it was contrary to the general principles of law that the Board members had a dual role both as a prosecutor and a decision-maker. However, it is important to state that the Law on the Protection of Competition No 4054 publicly mandated the involvement of the Board Members in the investigation team at that time. Law on the Protection of Competition No 4054 was amended in a way to remove the participation of the Board members in investigation teams and the Competition Board re-decided the cases annulled.

5. Finally, in the year 2005, the TCA has had a very active agenda in terms of international relations. The peer review of Turkey's Competition Law and Policy conducted by the OECD, hosting the 5<sup>th</sup> UN Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices and the initiation of official negotiations by the EU for Turkey to become a full member are the most important events for Turkey in this context.

## **2. Competition Infringement**

### **2.1 *Interbank Card Centre (BKM) Decision (dated 01.07.2005 and No. 05-43/602-153)***

6. Upon the complaint of Turkish Union of Employers of Gasoline Dealers and Gas Companies (TABGİS), the TCA initiated an investigation against Interbank Card Centre (BKM) in order to determine whether there is an infringement of competition through fixing clearing commission rate by the banks under the body of BKM. In the investigation process, BKM requested for exemption for its practice of fixing a common clearing commission and as a result, assessment for exemption is included in the investigation decision. In the Decision, the relevant market for fixing clearing commission rate is determined as "market for paying services by credit cards".

7. BKM is a joint stock company carrying out clearing transactions between banks in the card payment system. In card transactions, BKM's Board of Directors determines the clearing commission rate paid by the acquiring bank to the issuing bank. Issuing banks are those which publish credit cards and distribute them to customers; acquiring banks are those which provide point of sale (POS) terminals for member stores by means of making agreements with these stores against a certain amount of commission (member store commission). Clearing commission obtained by issuing banks from acquiring banks are reflected on acquiring banks as cost and acquiring banks reflect this cost to member stores as member store

commission. Clearing commission rate is equally applied among all of the banks. Essentially, clearing commission is a service cost reflected first by the issuing bank to the acquiring bank and then by the acquiring bank to the member store within member store commission; therefore it has a nature of price.

8. In card payment systems, clearing commission determined by banks together with financial institutions is a practice that takes attention of competition authorities and that has been the subject of a number of cases throughout the world. In this framework, in the mentioned decision of the Competition Board, international approaches are taken into consideration by assessing NaBanco Decision in USA, Visa International-clearing commission Decision of EU, Mastercard Decision by OFT in England and regulations by the Central Bank of Australia.

9. In the defences of BKM, it is generally argued that fixing clearing commission rates by BKM is not contrary to the Act No. 4054 and exemption should be given to the application of fixing common clearing commission rate. Moreover, it is argued that each of the items contained in the fixed clearing commission rate is an element of cost in terms of issuing banks. In this frame, it is stated that BKM needs a centralised clearing commission rate; in addition, payment guarantee provided by issuing bank includes risks such as fraud in the card market and as a result constitutes a high-cost item; besides, funding costs resulting from the period between shopping date and payment date are a burden for issuing banks.

10. During the investigation process, it is established that clearing commission fixes a part of the costs and the income of issuing and acquiring banks; determining a common clearing commission rate among banks affect competition at issuing and acquiring levels; issuing banks cannot follow an individual pricing policy for the services they provide for acquiring banks and that clearing commission which is the base price for member store commission is an important element of cost in respect of member stores. In this frame, it is concluded that BKM's fixing clearing commission rates in the framework of the authority within the Company's Main Agreement has a nature of a decision of an association of undertakings, which includes price fixing according to Article 4 of the Act No. 4054 and that this practice is contrary to the law.

11. In the assessment of exemption included in the Decision, it is stated that fixing common clearing commission rates in credit card payment systems, as seen in other countries, can be granted exemption generally in respect of competition law practices. In addition, it is evaluated that fixing a clearing commission rate through mutual agreements between banks included in the system requires a lot of agreements and is not practical and it is stated that fixing a clearing commission rate commonly can be granted exemption provided that a cost-based approach is adopted. Moreover in the investigation stage, BKM is required to have a consultancy firm make a clearing commission formulation study in order to fix clearing commission rate by a more objective method. For exemption assessment, the Competition Board predicates on this study, which is established to be more objective in comparison with previous clearing commission rate fixing methods. In this frame, it is stated in the Decision that certain cost items in the formula should be adjusted in order to grant exemption to the clearing commission formula proposed by the consultancy firm.

12. In this framework, as a result of the investigation made about Interbank Card Centre Inc. the decision dated 01.07.2005 and No. 05-43/652-153 is taken by the Competition Board. It is decided that:

1. fixing a common clearing commission by BKM's Board of Directors means a decision of an association of undertakings within the scope of the Act No. 4054 on the Protection of Competition and it is contrary to Article 4 thereof;
2. therefore, according to Article 16(2) of the Act (According to Communiqué No. 2005 /2 amended by the Communiqué No. 2005/3), BKM is imposed at discretion an administrative fine of 5.800 YTL which is the minimum fine amount;

3. as a result of peculiar conditions of card payment systems market, the application of fixing clearing commission rate commonly can be granted exemption within the scope of Article 5 if certain conditions are fulfilled; however in its present form, these requirements are not fulfilled;
4. in order to grant exemption to common clearing commission application within the scope of Article 5 of the Act, in case overnight interest rate determined by the Turkish Central Bank is taken as a basis in the formula applied by BKM for the calculation of funding cost and sunk cost is not taken into consideration in operational costs item, individual exemption might be granted;
5. these amendments should be made within 90 days and documented to the TCA, in case the practice continues without making the adjustments required by the TCA, an investigation will be initiated and the concerned party will be informed that proceedings will be carried out according to Article 16 and 17 of the Act No. 4054;
6. the period of exemption will be set as 2 years after fulfilment of necessary requirements is documented;
7. according to Article 19 of the Act No. 4054, it is irrelevant to impose, because of periods of limitation, the administrative fine which should be imposed on BKM according to Article 16(1)(c) of the Act No. 4054 since BKM has not notified, within due time, its decisions related to fixing a common clearing commission rate which have a nature of a decision of an association of undertakings;
8. in respect of proper functioning of credit card payment system, Competition Board opinion about the need to give Banking Regulation and Supervision Agency the power of regulating and monitoring related to the functioning of credit card system in the prepared draft of "Act on Debit Cards and Credit Cards" will be sent to Banking Regulation and Supervision Agency according to the Articles 27(g) and 30(f) of the Act;
9. competition Board opinion about abolishing the provision "where goods and services are bought with credit card, the seller or the provider cannot require an additional payment under commission or a similar name" included in Article 10/A (amended by the Act No. 4822) of the Consumer Protection Act No. 4077 will be sent to the Ministry of Industry and Commerce according to Articles 27(g) and 30(f) of the Act.

## **2.2 Siemens Decision (dated 10.3.2005 and No. 05-13/156-54)**

13. The TCA initiated an investigation against Siemens Sanayi ve Ticaret A.Ş. (Siemens) and its 14 dealers in order to determine whether they realise in tenders after dealership system and the system in question, might have anticompetitive effects and consequences in traffic signalisation market".

14. For the purposes of the investigation, relevant product markets are defined within the framework of points stated in the Decision as "traffic signalisation systems" and "led systems" which include in general traffic-controlling units. Geographical market is defined as "the boundaries of the Turkish Republic" because the products which are the subjects of the agreements and practices that are the subject matter of complaint are sold and marketed all over Turkey.

*Siemens Dealership System*

15. It has been seen that the dealership system formed by Siemens and its competitors in 2001 relating to the structure of the traffic signalisation market, and actions taken in this market by Siemens and the dealers have effects and consequences distorting competition. Taking account of the fact that the major buyer in this market is the public, that there is a small number of sellers having the nature of producers and that the purchases take place by means of tenders; within a market as such, formation of a dealership system with the competing undertakings and sharing regions in the dealership system whereby each dealer does not enter into tenders in regions other than those which require collusive bids, a cooperation among the dealers themselves and between the dealers and Siemens aimed at applying price discounts especially in cases where competitors take part in the tender, are only some of the said factors distorting competition.

16. In addition to these, making the use of production tools of the dealers impossible and furthermore given the 3-year non-compete ban contained in the dealership agreements signed between Siemens, which is to continue after the termination of the dealership, prevents potential competition likely to be created in case the existing dealers re-become producers, in such a market where there are already a small numbers of producers.

17. Offering collusive bids in tenders by means of the dealership system formed in such a market where the competition between undertakings is not within the market but for the market and where purchases and sales are realised by way of tenders, has become a continual practice of the dealership system and resulted in the distortion of the competitive environment in the market.

18. Withdrawal of the dealers from areas where Siemens carry out production operations and the fact that the agreements enter the scope of the group exemption are some expressions contained in the written plea of Siemens. On the other hand, the relevant Decision has specified that, considering Siemens and the dealers were competitors of one another at the stage of concluding the agreements and became potential competitors in the following stage, they were not entitled to the protection granted by the group exemption communiqués at the time when they concluded the dealership agreements. In other words, by assessing the formulated dealership system within the relevant product market, it was accepted that, in principle, the agreement had an attribute to result in horizontal rather than vertical effects at the time of the conclusion of the agreements.

19. Furthermore, it has been specified that the matter should not be perceived as a case where a single undertaking terminates its production and becomes a dealer of its competitor, and that the system in question is a collectively formulated one, that Siemens extended a dealership offer to most producers holding a competing position and that the dealership system is formed within the terms set forth (agreed upon) by Siemens and dealers. It has also been stated in the decision, that what lies beneath the system is not only establishing a network of dealership but also rendering the competing producers into dealers, and that this can be ascertained easily with conditions unprecedented in many dealership systems. Not a single dealer has terminated its production and “left the market” without accepting to become a dealer of Siemens. The reason why all dealers simultaneously terminated their production activities is the Siemens dealership system, which constitutes the subject of the investigation. To this effect, the system which ensured the gathering of a large number of producers (competitors) under one roof has been questioned, not that a single producing undertaking became the dealer of its competitor.

20. Furthermore, the provision of the 3-year non-compete ban contained in the agreement, by any standard, renders the agreements such that they have the nature of an agreement required to be notified. This provision was altered only after the investigation to be initiated.

21. The dealership system has been formed with agreements concluded among 7 competing undertakings. Competitors of Siemens have become its dealers with these agreements. The main purpose of the said system is increasing the profit as much as possible by limiting competition as much as possible. What is referred to at this point is why a dealership system has a function beyond that of a dealership system formed in any other market.

22. Siemens has specified that the main rationale of the dealership system was the difficulty of controlling at the centre since the customers are buyers throughout Turkey and the difficulty of the follow-up of the tenders since the form of purchasing is tenders. On the other hand the Decision draws attention to the fact that all of the dealers within the dealership system of Siemens are located in Ankara not in different regions of Turkey.

23. Siemens has put forward that it is difficult to follow up the tenders across Turkey, as the second justification for the formation of dealership. However, the Decision has taken account of the fact that the tenders are published in the Official Gazette and also announced over the internet, there are websites concerning tenders, and apart from this, the dealers are all located in Ankara, and it has established that the dealers are informed about the tenders in ways similar to those of Siemens, and it has expressed that there is no novelty brought about by the dealership system as regards the follow-up of the tenders.

24. Within this framework it has been seen that the arguments asserted by Siemens for the dealership system are void of any basis. However, in addition to what has been said, it has been specified in the Decision that the dealership system provides the following points:

1. competition has been eliminated both between Siemens and the dealers and among dealers themselves, with the dealership system;
2. although the dealership agreements provide exclusive protection to all dealers in their respective regions and the dealers are prohibited from entering tenders outside the region as required by the agreement, offering collusive bids in tenders through participation in some tenders by some dealers other than the one which the region belongs to outside the region, aims at keeping the tender within the system. In other words, the dealership system aims at eliminating competition especially in public purchases to the extent possible and ensuring that the tenders are awarded to the firms in the system at uncompetitive prices.

25. Therefore, in the dealership system formed, making use of the elimination of competition has been attempted to by:

- Siemens, both in terms of enjoying better prices and making more sales as well as reducing competition as much as possible, given that all dealers will supply the goods from it;<sup>1</sup>
- and Dealers, in terms of both obtaining tenders and obtaining them at a better price being free from any competition on the side of Siemens or other dealers, moreover with the assistance thereof.

26. As a matter of fact, according to the minutes of the dealership meeting dated 24.10.2001, there were talks about the fact that there were complaints by customers (who buy signalisation products from these undertakings and participate in public tenders), about increased prices.

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<sup>1</sup> For instance dealers make commitments for a certain amount of purchase in accordance with their dealership agreements. In this respect article 3 of the agreement and the annex protocol can be referred to. The purchasing commitment for 2003 was 350.000 Euros.

27. To this effect, it has been stated that the aim of the dealership system is;

- establishing a partnership by way of ending the competition among the 8 firms, in order for the public purchases to be obtained by the firms within the system;
- increasing the gained profit by means of obtaining tenders at higher bids as a result of decreased competition.

28. In order to accomplish these purposes; Turkey has been separated into certain regions and a region has been allocated to every firm taking part in the system and Collusive bids have been offered – as planned centrally –; in order to prevent the firms outside the system from obtaining tenders or in order to create the impression that the tender is competitive or in order to overcome regulations.

29. Upon the examination of the agreements concluded between Siemens and the dealers, and the dealership system as a whole, the conclusion that the agreements made between Siemens and the dealers have the nature of an agreement made between competitors with a view to restrict competition in the sense of Article 4 of the Act numbered 4054, rather than being mere dealership agreements, is what follows from the existence of the following issues:

1. allocation of exclusive regions;
2. the pool system where the amounts gained in the common regions are transferred and the payments to dealers to be made out of here;
3. purchasing commitment by dealers and guarantee checks given to Siemens;
4. provisions related to the non-compete ban;
5. annihilation of the production tools by the dealers and payments made by Siemens in return for this;
6. central coordination;
7. preparation of bids by dealers on behalf of each other;
8. collusive bids offered in order for the tenders to be obtained by the dealer owning the region, despite the prohibition of offering extra regional bids.

In this regard, the Decision also provides what is required to be done so that the competition violations contained in the dossier at hand are eliminated and are not repeated. Within this framework it has been stated that;

- Some de facto situations (such as collusive bidding) encountered in practice despite that they do not exist in the agreement are required to be terminated straight away,
- All undertakings taking part in the system are required to be punished for non-notification pursuant to Article 16 of the Act for failing to notify the TCA about the agreements which are contrary to the Act since the said dealership system and dealership agreements are formed as a result of the joint action and coordination reached by all the undertakings taking part in the dealership system.

30. It has been understood that the Integrator Agreements concluded between Ultra and Siemens and Ultra and dealers are agreements of vertical character just as the dealership agreements signed between Siemens and the dealers, and that they are not entitled to the exemption granted by the Communiqué. It has been set forth by evidence that the Integrator Agreement rendered Ultra into being the dealer of dealers in a way and that the aim was eliminating a competitor which previously offered low bids in the tenders.

31. Owing to these reasons and the other grounds specified in the Decision, it has been understood that the Integrator Agreements between Ultra and Siemens and ultra and dealers have as their purpose the prevention, distortion or restriction of competition among competitors in the signalisation market and are in breach of Article 4 of the Act. However, an annulment has taken place within the framework of the Annulment Agreement signed among the parties, and reciprocal debts have been deducted and Ultra's position in the Siemens dealership system has come to an end. At this point, the parties eliminated the violation on their own initiative. Within this framework, it has been accepted as a mitigating factor that the Integrator Agreement between Siemens and Ultra was applied between the dates 1.10.2003 and 5.5.2004, for a relatively shorter period than other violations involved in the investigation and that the violation terminated shortly after the information of the parties.

32. In addition to what is contained above, the Decision also evaluated the issue in relation to the Public Procurement Act numbered 4734. It has been mentioned that any kind of agreement concluded by the undertakings prior to, during or after the tender in order to obtain the public tenders caused:

- not only the competition in the relevant market to be prevented, distorted, and restricted;
- but also, the relevant authorities organising the tender (the public) to incur losses, due to the elimination of competition in the tender,

33. Also given the fact that there are differences of protected interests, systematics and punishment methods and purposes between the Act numbered 4054 and the Public Procurement Act it has been deemed necessary for purposes of safeguarding competition in the markets and the public authorities that these Acts should be enforced separately and in a complementary manner in actions of preventing competition in public tenders. To this effect, it has also been adopted to forward the Decision to the Public Procurement Authority as a requirement of its relevance.

#### *Ortana Dealership System*

34. When Ortana Dealership agreements are examined, it is seen that Siemens dealership agreements have been taken as an example in general terms. However, there is no evidence or finding indicating that the dealers had any kind of joint activity with Ortana at the stage of the conclusion of these agreements. Therefore, Ortana dealership system differs from Siemens dealership system at this point. The agreements are basically related to the products for led systems. Since the arrangement relating to price and competition ban regulations contained in Ortana dealership agreements exceeds the limitations provided by the Vertical Communiqué and since they violate article 4 of the Act numbered 4054, it has been decided;

1. that Ortana and the dealers shall be punished with administrative fines in accordance with the second paragraph of article 16 of the Act for failing to notify the TCA about the agreements even though they included provisions limiting competition;
2. Furthermore, that Ortana shall be punished with administrative fines in accordance with the subparagraph (c) of article 16 for failing to notify the TCA about the dealership agreements which were required to be notified in accordance with article 10 of the Act;
3. However, that the dealers shall not be punished for non-notification as regards Ortana dealership agreements because, as opposed to the Siemens dealership system, the dealers



did not have any sort of interference with the stage of preparing the agreements within the Ortana dealership system.

### *Establishment of AMBER*

35. AMBER joint venture is considered to be cooperative because of its fields of activity and since it operates in the same product and geographical market as the founding partners. This situation requires that the transaction should be treated within the scope of Article 4, without being necessary to analyse other elements.

36. Since the agreement includes the market where the main undertakings (partners) operate in competition with each other, it is considered to have a nature which might lead the competitors (EMT, TKS, TRASİN, SİNTEK), who are the parties of it, to approximate their pricing and trade policies related to traffic signalisation products they sell to each other and which, in this way, might eliminate competition among the parties. However, it is also stated that in case the field of activity is limited to selling and producing certain kinds of subsidiary products of goods and services that the parties sell and produce, as the parties argue, and in case arrangements that will ensure AMBER to continue its activities as an independent entity are made, the joint venture agreement will become a concentrative agreement; that is, an agreement falling the scope of Article 7 of the Act.

37. In this framework, it has been stated that the AMBER joint venture agreement is an agreement that may remove the competition between EMT, SİNTEK, TKS and TRASİN which are parties thereto and which are active in the smart traffic control systems market, and it may lead to some competition-distorting, -limiting or-preventing effects within the framework of Article 4; consequently, in order to end the coordination between the company and the founding partners which takes place within the main contract and which arises because of the joint fields of activity that lead to the limitation of competition between the company and the founding partners, legal person partners must transfer their shares out of their economic wholeness or the areas of activity of the Amber Elektronik İletişim Trafik Eğitim İnşaat Sanayi ve Ticaret A.Ş. and those of the legal person partners must be completely separated. It was found that the main contract is an agreement that limits competition within the context of Article 4 of the Act and it must be notified to the TCA, and in this context, administrative fines must be imposed on TKS, SİNTEK, EMT and TRASİN.

### *Conclusion*

38. As a result of the investigation, the TCA decided the following:

1. Siemens and its dealers infringed Article 4 of the Act No. 4054 with the Siemens dealership system established under the coordination of Siemens, and with the anti-competitive practices used in public procurements (tenders) after the aforementioned system as well as the competition limiting goals and effects of the integration of Ultra in that system by an integrator contract;
2. provider undertaking Ortana also infringed Article 4 of the Act No. 4054 because of the limitations included in the Ortana dealership contract which fall outside those permitted by the Vertical Communiqué No. 2002/2;
3. TKS, Trasin, Sintek and EMT infringed Article 4 of the Act No. 4054 because of the fact that the fields of activity of Amber Elektronik İletişim Trafik Eğitim İnşaat Sanayi ve Ticaret A.Ş.'s founding partners and those of AMBER itself overlap and in this sense, the aforementioned entity has the nature of a joint venture facilitating coordination;
4. imposition of fine under Article 16 on the undertakings which infringed the law.

39. Importantly due to its relevance, reasoned decision of the TCA was sent to the Public Tender Authority. Changes made in the contracts during the investigation process as well as the cooperation of Siemens in the investigation process were also taken into account in the determination of the fine. Also, the situations of Sinyalizasyon, which had an important role in unearthing the competition limitations in the market, and Ultra, which stayed within the system for a very short time even though it was included in the system later, were taken under consideration.

### **3. Exemption**

#### ***3.1 Efpa/Bimpaş (dated 22.4.2005 and numbered 05-27/317-80)***

40. The decision taken by the Board deals with exclusive purchasing agreements between breweries and/or their distributors on the one hand and on-premise and off-premise retail outlets on the other hand through which the breweries and retail outlets agree on the sale of only the brands of one brewery in a certain retail outlet. Such agreements normally benefit from the block exemption of the Communiqué concerning vertical agreements. But the Communiqué foresees that the benefit of block exemption can be withdrawn in case exemption conditions are proved to be missing. The Board defined two relevant markets as the sale of beer through on-premise outlets and the sale of beer through off-premise outlets in line with the European Commission's definition in its earlier cases. The beer market of Turkey is in general characterised by the existence of the two leading breweries whose total market share is around 99% (one of them is dominant with strong brands), difficulties in entry as a producer, the trivial level of imports, and the weakness of new entrants in bringing competition. After analyses of the markets and especially of the level of tied market share belonging to the two leading breweries (total tied market share is around 47% in the market concerning the sale of beer through on-premise outlets and around 20% in the market concerning the sale of beer through off-premise outlets in 2003), the Board withdrew the benefit of the block exemption for those exclusive purchasing agreements concluded between the two leading breweries and/or their distributors on the one hand and retail sale outlets on the other, because such agreements prevented efficient competition in the market. Moreover, the Board urged the parties not to prevent retail outlets from placing rival products into coolers supplied by them.

### **4. Mergers**

#### ***4.1 Migros/Tansaş Decision (dated 31.10.2005 and numbered 05-76/103-287)***

41. The TCA authorised the transaction of acquisition of Tansaş Perakende Mağazacılık Ticaret A.Ş. (Tansaş) (Tansaş Retail Store Business Trade Inc.) by Migros Türk T.A.Ş. (Migros) (Migros Turkish Trade Inc.) and Koç Holding Company. Migros which commenced operating in 1954 and is found within Koç Holding Company is the largest FMCG (Fast Moving Consumer Goods) retailer of Turkey with a total of 499 stores, 79 of them being in the M, 78 in the MM, 35 in the MMM, 306 in the discount store (ŞOK) and 3 in the hypermarket format. And Tansaş which was established by İzmir Municipality in 1973 passed to the constitution of Doğuş Group in 1999. The total number of stores of TANSASAŞ is 206, 110 of them being MINI, 69 being MIDI, 32 being MAXI and 6 being MACROCENTER.

42. While the relevant product market was determined in the Migros/Tansaş Decision, a dual separation was resorted to, being the retail market and the supply (purchase) market. In determining the relevant product market in the retail market, the Competition Board held the discussions in the CarrefourSa/Gima Decision, and highlighted that in the modern FMCGs retailing market, those stores above 1000 square meters differentiated in the eye of consumers due to services offered by them (such as the variety of products, largeness of the car park capacity, offering miscellaneous side services), emphasising that the one above the threshold referred to can be determined as a distinct market. On the

other hand, in examinations performed under the transaction referred to, particularly in those regions where concentration was experienced, the establishment made was that stores below 1000 square meters could also take place within the scope of the relevant market. Therefore, even though the threshold has been determined as 1000 square meters, the analysis of dominant position was also made for the market definition where the threshold referred to was lowered to 300 square meters.

43. In the Decision, a separate emphasis was put on the necessity that the supply market be defined on the basis of the group of products. The reason is that the critical factors in the purchase market as regards the producer are the flexibility for the producer to modify its production and to be able to sell its production in different channels. It is not possible to expect from producers to produce all products sold in a supermarket setting and therefore to speak about a single supply market. In this regard, it is required that the examination to be performed in relation to the purchasing power be done so by means of defining as separate markets the groups of products where products which substitute for each other within the meaning of production come together. Consequently, when FMCGs sold in a supermarket setting are taken into account, the purchase market was defined as separate relevant product markets, being meat and meat products, white meat and egg products, bakery products, dairy products, beer, wine and alcoholic drinks, non-alcoholic drinks, hot beverages (coffee and tea), confectionery products (such as chocolate, cake), basic foods (such as flour, sugar, rice), frozen products, baby foods, domestic animals feeds, body care products, and house cleaning products.

44. As was in the CarrefourSa/Gima Decision, the Board stressed that the geographic market could be made on a provincial basis in its broadest sense due to the reasons such as consumers' transport opportunities, quality of the product and the highness of research costs in the retail market, and it narrowed the geographic market down to the level of administrative districts in certain regions. Within this framework, in the Decision, Aliağa, Dikili, Çeşme, Ödemiş, Balıkesir, Ayvalık, Burhaniye, Edremit (including Altınoluk and Akçay), Aydın, Nazilli, Kuşadası, Söke, Didim, Bodrum, Marmaris, Turgutreis, Antalya, Manavgat, Kemer, Alanya, Manisa, Akhisar, Denizli, Sakarya, Kocaeli, Niğde, Eskişehir, Uşak, Bolu, Urla, İzmir, Ankara and İstanbul where Migros and Tansaş operated together were determined as distinct geographic markets. For the purchase market, the geographic market was determined as the

45. Republic of Turkey on the grounds mentioned in the CarrefourSa/Gima Decision. When the market formed by retailers larger than 1000 square meters that are defined above is taken into consideration, total market share of Migros and Tansaş in geographical regions, Çeşme, Edremit, Nazilli, Kuşadası, Marmaris and Eskişehir reaches significant amounts. According to this market definition market share of the parties is 100% in Çeşme, 72% in Edremit, 100% in Nazilli, 100% in Kuşadası, 66% in Marmaris and 69% in Eskişehir. In case the threshold used in the relevant market definition is reduced to 300 square meters, total market share of the parties become 74% in Çeşme, 60% in Edremit, 46% in Nazilli, 67% in Kuşadası, 52% in Marmaris and 39% in Eskişehir. In the dominant position analysis, market entry opportunities gain importance as well as market shares. In this framework, competition level and market entry opportunities in the mentioned regions have been analysed in detail.

46. In on-the-spot investigations carried out in Çeşme, Edremit, Nazilli and Kuşadası regions, where a dominant position is possible to exist after the acquisition, it has been established that there are building sites that are convenient for founding a store larger than 1000 square meters. Moreover, the fact that it is easy to find a place for opening a store larger than 300 square meters or to switch another activity field to a FMCG retailer in the centers of these regions has been considered as factors that strengthen potential competition. In cases where the relevant market is defined as more than 300 square meters, potential competition opportunities increase. In this frame, it has been concluded in the Decision that the acquisition will not result in competition restriction by creating a dominant position in relevant markets.

47. Mergers/acquisitions in retail sector will directly lead to concentration in purchase (supply) market between producers and retailers in addition to retail market. Therefore, concentration rates at the national level in sale market gains importance as they directly affect purchase market. The increase in purchasing power as a result of the concentration in sale market will enable parties to purchase in more favorable terms and when they reflect this on their prices, their market shares, in other words their shares in sale market, will increase. This situation so-called spiral effect continues until creating a dominant position in the market. As competition in sale market decreases, advantages generated by purchasing power might not be reflected on consumers. In the Decision, frozen food and detergent products are chosen among 16 different purchase markets as the markets where it is most possible to see the effects of purchasing power. According to AC Nielsen rating, frozen food and detergent group products are sold mainly in supermarkets. In detergent group, Unilever and P&G, being the leaders, Henkel, Hes Kimya (Hes Chemistry) and Hayat Group are operating. After the acquisition, it is seen that Migros/Tansaş realises 10% of the total sales of the undertakings alone. Moreover, total shares of the parties in chain sales reach above 30%. In the Decision, it is established that it is not possible to create dominant position even if purchasing power has increased after the acquisition. When firms supplying to domestic market among Kereviş Gıda (Kereviş Food), Dardanel Gıda (Dardanel Food), Penguen Gıda (Penguen Food) and Merko Gıda (Merko Food), which operate in frozen food market, are taken into consideration, total share of Migros/Tansaş in total sales is 18.1%. Even if a higher level is reached compared to detergent group, it is not possible to talk about a dominant position against producers in this market. When data related to both markets are taken into account, it is seen that creation of a dominant position in purchase market between producers and retailers is out of question. This assessment is also valid for other product groups in purchase market. In conclusion, the Competition Board has permitted the acquisition of Tansaş by Migros since it does not lead to creation of a dominant position within the frame of Article 7 of the Act.

## **5. Privatisation (mergers)**

### **5.1 Privatisation of TÜPRAŞ (dated 21.10.2005 and numbered 05- 71/981-270)**

48. In its meeting on 21.10.2005, the Competition Board authorised that Türkiye Petrol Rafinerileri A.Ş. (TÜPRAŞ) (Turkish Petroleum Refineries Inc.) be transferred to KOÇ-SHELL Joint Venture Group which was the highest bidder in the privatisation tender.

49. It is seen that TÜPRAŞ which mainly operates in the refinery market also takes place in markets related to the petrochemistry sector due to its activities in the Gulf Petrochemistry Complex, and that it also operates in the field of transport when the activities of DİTAŞ (Deniz İşletmeciliği ve Tankerciliği A.Ş.) (Marine Operation and Tanker Business Inc.) are taken into consideration.

50. The total crude oil processing capacity in Turkey receded from 32 million tons to 27,6 million tons a year after having transformed ATAŞ refinery in Mersin to a storage facility in 2004, and TÜPRAŞ remained as the only producer in the refinery market. Approximately 70 % of the country's consumption is met from the production of TÜPRAŞ, and the remaining part from import. When it is taken into consideration that it is the only refinery company operating in Turkey, the transfer of TÜPRAŞ to the private sector via the method of privatisation is a transfer transaction subject to the authorisation of the Competition Board as regards both the market share and the turnover thresholds.

51. KOÇ Group which took place in the highest bidder joint venture group in the privatisation tender operates with OPET Petrolcülük A.Ş. (OPET) (OPET Petroleum Business Inc.) in the Turkish liquid fuel markets and with AYGAZ A.Ş. (AYGAZ Inc.) in the LPG markets. OPET engages in retailing and wholesale activities in the liquid fuel distribution market together with its participations, produces and markets mineral oils, and deals with the international trade in marine fuels and petroleum products. OPET whose terminal capacity (storage) is above 351.343 cubic meters is a liquid fuel company which has the

second largest storage capacity in Turkey. AYGAZ which is in the position of the leading LPG distribution company of Turkey serves residences, commercial and industrial customers in providing, stocking, filling and distributing LPG. Shell Overseas B.V. (SHELL) which is the other party to the joint venture group is an energy firm with a global scale, and operates in the Turkish energy markets with its side organisations, the distribution of black and white products, LPG and mineral oils being in the lead.

52. In assessments made under the competition law, the “refinage market” where TÜPRAŞ, the subject of transfer, operated was considered as the relevant product market; however, the “affected markets” were separately identified to be used in assessments of the transfer transaction as regards vertical integration. The affected markets in question are the following:

1. the distribution of “land vehicle fuels sold in liquid fuel and autogas stations” such that they include gasoline, diesel fuel and autogas;
2. the distribution of “household and business fuels” composed of radiator fuel, fuel oil no: 6, natural gas, cast LPG and coal;
3. the distribution of jet fuel;
4. the distribution of kerosene;
5. the distribution of light wax;
6. the distribution of mineral oil.

53. In assessments made under article 7 of the Act, the structure of partnership forms the first important point. Namely, in assessments made, establishments reached were that SHELL had only a 10 % share in the partnership in question and even though it had a right to appoint one member to the Board of Directors with such rate of share, a veto right indicating the existence of joint control was not granted to SHELL, and that therefore, merely the integration of KOÇ group and TÜPRAŞ was required to be taken into consideration in assessments directed at the concentration.

54. When the acquisition transaction was handled under article 7 of the Act after such establishments, the evaluations were that the import was competing with the production of TÜPRAŞ and in this regard, OPET and AYGAZ were directly competing with TÜPRAŞ with the import-oriented storage capacity held and import realised by them, and that therefore, the existing dominant position of TÜPRAŞ would strengthen with the acquisition of TÜPRAŞ by KOÇ; however, it was concluded that the integration in question would not result in “a significant decrease of competition” with regard to the supply of liquid fuel products (refinage and product import). Grounds employed while reaching such establishment may be listed as follows:

55. The market for the distribution of liquid fuel products has a competitive structure: POAŞ which was a public undertaking in the past and which has the most widespread dealership network and at the same time storage capacity throughout Turkey is in the position of the market leader. Furthermore, there exist in the market BP, SHELL and TOTAL which have a long history in the Turkish market and which continue their activities in the world petroleum industry in a vertically integrated structure. Within this structure, OPET has the 4th largest market share in white products and the 2nd largest market share in black products pursuant to 2004 data.

56. When one looks at the market as regards the existing storage capacities, also firms having small shares in the distribution market such as Aytemiz and Delta have a storage capacity larger than some leading undertakings in the market share order.

57. With the Petroleum Market Act No. 5015, barriers to entry stemming from legislation have been removed via means such as the elimination of the obligation for distribution firms to procure a certain proportion of their consumption from domestic refineries, and the liberalisation of import.

58. Under the activities of “Licensed Warehouse Operator’s Business” introduced again with the Act No. 5015, it is understood that storage activities would increasingly develop when it is taken into consideration that besides distribution companies, undertakings whose sole work is to store petroleum products shall emerge and licensed warehouse operators shall operate such that they serve all distribution companies.

59. Despite the fact that due to such establishments, the Board reached the conviction that the acquisition transaction would not result in a significant decrease of competition in the relevant markets in respect of the liquid fuel supply, it only authorised the acquisition transaction conditionally as regards the LPG market. Before proceeding with the condition as to the facilities for the LPG import, which take place in İzmir Refinery, it is useful to have a look at the establishments in relation to the LPG markets.

60. Mainly LPG is an intermediate product for TÜPRAŞ, differently from the other liquid fuel products, and it is an area where requirement surplus is offered to the market as a final product. When one looks at the past years as well, TÜPRAŞ came on the forefront in the LPG sector with its importer identity rather than in production. However, the orientation of the LPG distribution companies to direct import in the recent years has caused a fall in the LPG import quantities of TÜPRAŞ. But at this point, when one looks at which firms carried out the LPG import to the country other than TÜPRAŞ in 2004, it is seen that the largest importer firm is AYGAZ.

61. As was also mentioned earlier, the conclusion reached was that despite the fact that the share of TÜPRAŞ in import increasingly diminished vis-à-vis the large LPG distributors, the position of TÜPRAŞ did not change in the LPG import directed at the Aegean Region in particular as a result of logistic problems which had emerged in the LPG supply in the past and that the integration of TÜPRAŞ and AYGAZ would result in a significant decrease of competition in the LPG supply as regards this region in case no measures were taken. That was why the condition that the facilities for the LPG import, which took place in TÜPRAŞ İzmir Refinery, be opened to use such that they also enabled distribution companies to make direct import during 3 years following the transfer transaction was imposed as a condition for KOÇ-SHELL partnership to acquire TÜPRAŞ.

## **5.2 *The Privatisation of TEKEL Saltpans (dated 08.12.2005 and numbered 05-82/1120-321, 05-82/1121-322, 05-82/1122-323)***

62. In 2003, the Presidency of Privatisation Administration filed a preliminary notification for privatising as a whole the saltpans under the Salt Establishment of TEKEL. The Competition Board which took into account that a large part of Turkey’s need for raw salt was met by three lake saltpans located in the Salt Lake (Tuz Gölü) emphasised that the passage of control of these three lake saltpans to a single undertaking would considerably hinder the establishment of competition in the raw salt market, deciding that it would be appropriate to transfer Kayacık, Kaldırım and Yavşan lake saltpans to undertakings independent of each other.

63. It has been seen that the opinion of the Competition Board had been taken into consideration in the final notifications filed by the Privatisation Administration by the end of October 2005. In the applications, it was stated that Kayacık, Kaldırım and Yavşan lake saltpans had been separately privatised, and undertakings bidding in the tenders were notified. And in tender specifications, it has been stated that each saltpan would be transferred to undertakings independent of each other. In examinations performed, the opinion reached was that due to the fact that undertakings bidding in each of the three tenders did not

operate in the raw salt market, the transfer of each of the three salt pans would not constitute a problem as regards the Act No. 4054. However, the important point here is the emergence of the likelihood that each of the three salt pans passes to the control of a single undertaking since it has been detected that some undertakings participating in the tenders had also taken part among the first three in two or three tenders. For instance, the acquisition of two salt pans by a single undertaking also bears the likelihood of creating a dominant position within the meaning of article 7 of the Act No. 4054. While deciding, the Board took into account the probabilities for conclusion of the salt pan tenders, making a separate assessment for each undertaking participating in the tender, and those undertakings participating in more than one tender were not allowed to acquire two or three salt pans.

#### TABLES

**Table 1- Applications and files concluded**

<b>Year</b>	<b>Status of File</b>	<b>Infringements of Competition</b>	<b>Exemption/ Negative Clearance</b>	<b>Merger/ Acquisition</b>	<b>TOTAL</b>
<b>1999</b>	Opened	41	28	77	<b>146</b>
	Concluded	11	13	68	<b>92</b>
<b>2000</b>	Opened	43	27	102	<b>172</b>
	Concluded	40	11	100	<b>151</b>
<b>2001</b>	Opened	44	21	81	<b>146</b>
	Concluded	40	27	86	<b>153</b>
<b>2002</b>	Opened	55	29	110	<b>194</b>
	Concluded	53	26	103	<b>182</b>
<b>2003</b>	Opened	70	44	113	<b>227</b>
	Concluded	54	36	106	<b>196</b>
<b>2004</b>	Opened	78	62	118	<b>258</b>
	Concluded	91	76	122	<b>289</b>
<b>2005</b>	Opened	84	45	164	<b>293</b>
	Concluded	97	50	170	<b>317</b>
<b>Total</b>	Opened	415	256	765	<b>1436</b>
	Concluded	386	239	755	<b>1380</b>

**Table 2 - Files brought to a conclusion under articles 4 and 6 of the Act**

<b>Year</b>	<b>Article 4</b>	<b>Article 6</b>	<b>Mixed (4 and 6)</b>	<b>TOTAL</b>
<b>1999</b>	4	6	1	<b>11</b>
<b>2000</b>	14	12	14	<b>40</b>
<b>2001</b>	17	14	9	<b>40</b>
<b>2002</b>	23	19	11	<b>53</b>
<b>2003</b>	26	18	10	<b>54</b>
<b>2004</b>	49	26	16	<b>91</b>
<b>2005</b>	55	34	8	<b>97</b>

**Table 3 - Horizontal and vertical agreements under Article 4 of the Act**

<b>Year</b>	<b>Horizontal</b>	<b>Vertical</b>	<b>Mixed (H/V)</b>	<b>Total</b>
1999	3	2	0	5
2000	16	11	1	28
2001	18	8	0	26
2002	28	5	1	34
2003	26	9	1	36
2004	42	22	1	65
2005	47	15	1	63
<b>Total</b>	<b>180</b>	<b>72</b>	<b>5</b>	<b>257</b>

**Table 4 - Contents of horizontal and vertical agreements examined under Article 4 of the Act**

<b>Year</b>	<b>Files of Horizontal Agreements</b>		<b>Files of Vertical Agreements</b>	
	<b>Agreements</b>	<b>Decision of Association of Undertakings</b>	<b>Resale Price Maintenance (RPM)</b>	<b>Files Outside the Scope of RPM</b>
<b>1999</b>	3	0	1	2
<b>2000</b>	12	5	2	11
<b>2001</b>	9	10	2	7
<b>2002</b>	20	10	0	6
<b>2003</b>	19	10	3	8
<b>2004</b>	35	11	2	22
<b>2005</b>	35	17	3	15
<b>Total</b>	<b>133</b>	<b>63</b>	<b>13</b>	<b>71</b>



Table 5 – Application for Exemption, negative clearance, and their results

Year	Applications	Files of Negative Clearance					Files of Exemption				
		Files Concluded					Files Concluded				
		Files Granted Negative Clearance	Files Granted Conditional Negative Clearance	Files Denied Negative Clearance	Files Granted Exemption	Files Granted Block Exemption	Files Granted Conditional Exemption		Files Denied Exemption	Files Where Exemption Has Been Withdrawn	
					Files Granted Conditional Individual Exemption	Files Granted Conditional Block Exemption					
1999	28	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	44	12	5	6	4	3	6	5	3	0	
2004	62	19	4	15	8	18	1	13	9	1	
2005	45	11	1	0	7	13	4	10	3	1	
<b>Total</b>	<b>256</b>	<b>80</b>	<b>16</b>	<b>26</b>	<b>30</b>	<b>46</b>	<b>18</b>	<b>33</b>	<b>15</b>	<b>2</b>	

**Table 6 - Number of merger and acquisition files concluded**

Year	1999	2000	2001	2002	2003	2004	2005
<b>Merger</b>	5	13	6	14	7	7	5
<b>Acquisition</b>	56	70	73	83	76	88	122
<b>Joint Venture</b>	5	11	7	6	9	8	8
<b>Privatisation</b>	2	6	0	0	14	19	35
<b>TOTAL</b>	68	100	86	103	106	122	170

**TABLE 7 - Results of merger and acquisition files resolved**

Year	Authorisation	Conditional Authorisation	Rejection	Out of Scope-Below Threshold
<b>1999</b>	23	1	0	44
<b>2000</b>	49	2	2	47
<b>2001</b>	39	2	0	45
<b>2002</b>	65	0	0	38
<b>2003</b>	77	2	0	27
<b>2004</b>	86	3	0	33
<b>2005</b>	130	6	1	33
<b>TOTAL</b>	469	16	3	267

## 6. Competition advocacy

### 6.1 *Opinion on Draft of Regulation Concerning the Procedures and Principles of Legislation Preparation*

64. The opinion of the TCA on “Draft of Regulation Concerning the Procedures and Principles of Legislation Preparation” was requested by the Prime Ministry of Republic of Turkey, Presidency of Administration Development.

65. The TCA suggested that **a provision that stipulates that the opinion of the TCA be requested should be added** to the Draft, in light of the reasons stated in detail below.

66. Within the framework of the experience gathered after the Competition Board went into operation, it has become clear that effective application of the Act no. 4054 on public undertakings and private undertakings is not sufficient.

67. It is seen that, in particular, some provisions of the legislations that came into force before the adoption of the act on the Protection of Competition are either directly in contradiction with the provisions of Act no. 4054 or with the general principles of market economy, and consequently, of competition law. For instance, owing to the concessions granted to various undertakings by law or to the practices of the professional organisations such as chambers, commodity exchanges, etc. based on the authority granted to them by their own laws, there have been some difficulties concerning the establishment and maintenance of competition in the market, and this fact has decreased the efficiency in the application of the Act.

68. Similarly, it has been noted that various legislations concerning the regulation of the markets include provisions which may cause conflicts on the jurisdictions of different Authorities as well as provisions which may allow undertakings to infringe the Act no. 4054.

69. In order to remove the aforementioned inconveniences, a circular was issued by the Prime Ministry General Directorate of Personnel and Principles in 1998, requiring the opinion of the TCA to be sought in relation with legislation studies such as laws, by-laws, regulations and communiqués which concern competition law, fall into the jurisdiction of the TCA and include provisions that may affect the competition conditions of the goods and services markets in Turkey; also in a letter issued by the same institution in 2001, it was stated that public institutions and organisations must show due diligence in requesting the opinion of the TCA on the aforementioned subjects. However, problems in the implementation of the aforementioned communiqué persist and this situation, on one hand, decreases the efficiency of the application of Act no. 4054 and on the other hand becomes the cause of well-deserved criticisms within the framework of the European Union harmonisation process and on the international platforms. For example, this subject was mentioned in the Report prepared as a result of the Regulatory Reform study carried out together with the OECD and the necessity of requesting the opinion of the TCA during the preparation stage of the related legislation was emphasised. Similarly, a parallel suggestion is included in the recommendations contained in the Peer Review report on Turkey's Competition Law and Policy prepared by the OECD.

70. In parallel to the aforementioned points, this subject was mentioned under the Competition Policy title of the European Union's Progress Report published in 2004 and it was stated that the opinion of the TCA should be sought concerning the draft legislations which may distort competition in the markets.

71. In light of the information and evaluations above, it is thought that adding the statement,

*“that of the TCA on regulations that will affect the conditions of competition in goods or services markets or that grant concessions to public undertakings or private undertakings”* to the Draft Regulation Concerning the Procedures and Principles of Legislation Preparation is necessary.

**6.2 *Opinion on the privatisation of İzmir, Mersin, Derince, İskenderun, Bandırma and Samsun Ports, operated by the Republic of Turkey State Railways Administration, through methods other than “Granting Right of Operation”, “Leasing” and/or transfer of possession.***

72. Upon the request by the Presidency of Privatisation Administration, the TCA delivered its opinion on the privatisation of İzmir, Mersin, Derince, İskenderun, Bandırma and Samsun Ports, operated by the Republic of Turkey State Railways Administration, through methods other than “Granting Right of Operation”, “Leasing” and/or transfer of possession. This delivery was made under pre-notification procedure envisaged by the a “*Communique Regarding the Methods and Principles to be Pursued During the Course of Pre-Notifications and Applications for Authorisation Made to the Competition Authority in order Acquisitions via Privatisation to be Judicially Valid No:1998/4*”.

73. The opinion of the TCA contains the following recommendations:

- *Concerning the İzmir Port*
  - a. in order to prevent the creation of a dominant position after privatisation for the area within the Port where container handling services are provided, to facilitate by the competition to be created the formation of service costs within the market conditions, and to ensure the efficiency of the services; the area composed of three docks and 10 terminals (4-3-3) should be privatised by dividing the area and back area used in container handling into two in a manner that service by two separate undertakings is enabled by means of leaving one of its docks to the operation of a separate undertaking, such that it shall not distort the integrity of the other two docks;
  - b. there is no inconvenience in transferring the operation of the dock and its back area designated for conventional load handling and passenger liner dock and its facilities to the same undertaking and/or association of undertakings, and consequently the aforementioned docks, back area and facilities may be privatised together.
- *Concerning the Mersin Port*
  - a. in order to ensure that the docks and their back areas designated for container load handling are not under the dominance of a single undertaking, docks no 7-8-9-10-11 and 12-13 together with their back areas should be privatised in one package and docks no 20-21 with their back areas as well as the dock and its back area, adjacent to the area used by the Coast Guard and for which area concreting and combing processes are completed, should be privatised in a separate package; such that they are transferred to the operation of two different undertakings and/or associations of undertakings,
  - b. there is no inconvenience in transferring the operation of the docks and their back area designated for conventional load handling and passenger liner dock and related facilities to the same undertaking and/or association of undertakings, and consequently these may be privatised together,
- *Concerning the İzmir and Mersin Ports*
  - a. in the privatisation of the container handling areas in İzmir and Mersin ports, because of the fact that in case the right of operation for container docks is acquired by the same undertaking and/or association of undertakings -or by those belonging to the same economic union- a dominant position in favour of the aforementioned undertaking and/or association of undertakings will be created, İzmir and Mersin ports should not be transferred to the operation of an undertaking or associations of undertakings belonging to the same economic union,
  - b. nonetheless, out of the parts related to container handling to be formed after the partitioning of the İzmir Port, there is no inconvenience in:
    - the acquisition, by the undertaking or association of undertakings which has acquired the rights of operation for the docks having a relatively more number of terminals, of the rights of operation for the docks established in the Mersin Port that have a relatively less number of terminals, or;

- the acquisition, by the undertaking or association of undertakings which has acquired the rights of operation for the docks having a relatively less number of terminals, of the rights of operation for the docks established in the Mersin Port that have a relatively more number of terminals, or;
  - the acquisition, by an undertaking or undertakings which belong to the same economic union, of the rights of operation for the docks having a relatively less number of terminals in both ports;
- c. in case the undertaking or associations of undertakings that shall acquire the rights of operation for the docks with relatively more terminals out of the container handling units established at the İzmir and Mersin ports, each include those engaged in shipping and/or freight transport and those within the same economic union with them; the undertakings of the aforementioned nature, alone or together, must not possess means that directly or indirectly ensure control in the undertaking/associations of undertakings that shall acquire the rights of operation.

- *Concerning the İskenderun Port*

74. Under the provisions of Article 3 of the Communiqué no.1998/4, there is no need to state any points at this stage,

- *Concerning the İskenderun and Mersin Ports*

75. There is no inconvenience in the acquisition of the rights of operation for İskenderun Port by the undertaking or associations of undertakings that shall acquire the rights of operation for any of the partitioned container handling units established in Mersin Port.

- *Concerning the İzmit Derince Port*

76. Under the provisions of Article 3 of the Communiqué no. 1998/4, there is no need to state any points at this stage.

- *Concerning the Samsun Port*

77. In order to prevent a vertical integration with a potential to hinder competition, the right of operation for Samsun Port must not be transferred:

- a. to an undertaking and/or associations of undertakings engaged in Ro-Ro transport;
- b. to a consortium in which the undertaking/associations of undertakings with the abovementioned nature possess means that ensure direct or indirect control.

- *Concerning the Bandırma Port*

78. Under the provisions of Article 3 of the Communiqué no. 1998/4, there is no need to state any points at this stage.

- *The subject shall be re-evaluated in accordance with Article 7 of the Act no. 4054 and Communiqués no. 1997/1 and 1998/4 after the purchaser candidates are determined.*

## **7. Legislation**

79. The Act No:5388<sup>2</sup> which amends the Turkish Competition Law, was passed by the Parliament and taken into force as of 12<sup>th</sup> of July 2005. The Act No: 5388<sup>3</sup> has amended some articles of the TCL.

80. First of all, compulsory notification of agreements, concerted practices or decisions that are within the scope of Article 4 is abolished.

81. Secondly, the maximum duration of five years for individual exemption is abolished and the Board is now empowered to grant an exemption for a definite time.

82. Thirdly, the Board is empowered to impose fine in case undertakings do not provide any information requested by the TCA.

83. Fourthly, wording of Article 16 is amended to abolish the fine applicable in case of failure to notify an agreement, concerted practice or a decision in due time. Moreover, wording of the 16 is also clarified to enable imposition of fine for realisation of a merger or acquisition that is subject to the Board's permission without that permission.

84. Fifth, the number of the Board members is decreased to seven. Sixth, the amendments in first paragraphs of Articles 43 and 44 excluded participation of Board members in the investigation committees ending the criticisms that general principles of law are violated.

## **8. International relations**

85. The year 2005 represented a period that was quite active in terms of international relations for the TCA.

86. The very first event in this respect is the peer review report of the OECD that was discussed during the Global Competition Forum meeting held on 18<sup>th</sup> February 2005. The meeting proved to be a success with the contribution of OECD Committee secretariat, delegates and examiners. While the report mentions about the practice of the TCA with praise, importantly it presents certain recommendations both for the Government and the TCA with a view to improving the Turkish competition policy. Soon after the report was publicised, the draft bill to amend the Turkish competition law was opened to public discussion on the website of the TCA. Importantly, some of the recommendations of the Peer Review Report were realised by the Act No:5388.

87. The second event is the organisation of the 5<sup>th</sup> UN Competition Review Conference in Antalya from 14<sup>th</sup> to 18<sup>th</sup>, November 2005. The Conference was organised outside Geneva for the first time. Delegations from several UN member States and International Organisation participated in the Conference. The Conference was regarded as a success by mainly all participants.

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<sup>2</sup> The title of the Act No:5388 is "the Act on an Amendment to Particular Articles of the Act on the Protection of Competition"

<sup>3</sup> The title of the Act No:5388 is "the Act on an Amendment to Particular Articles of the Act on the Protection of Competition"

88. Thirdly, as of 3<sup>rd</sup> of October 2005, the EU initiated official negotiations with Turkey for EU membership. A screening phase has been initiated as part of negotiation process. The screening meetings (explanatory and detailed) on competition policy chapter of Acquis Communautaire were held respectively on 8-9 November 2005 and 1-2 December 2005 in Brussels.