

COMPETITION AUTHORITY DECISION

File No : 2018-3-090 (Investigation)
Decision No : **21-15/190-80**
Date of Decision : 18.3.2021

A. BOARD MEMBERS IN ATTENDANCE

President : Birol KÜLE
Members : Arslan NARİN (Deputy Chairman), Şükran KODALAK
Ahmet ALGAN, Ayşe ERGEZEN

B. RAPPORTEURS : Evrim Özgül KAZAK, İbrahim Hilmi KOÇAK, Ebru ÖZAKTAŞ,
Osman Can AYDOĞDU, Emre KARA

C. APPLICANT : - Requested anonymity.

D. UNDER

INVESTIGATION : - Unilever Sanayi ve Ticaret Türk AŞ
Representatives: Atty. Zümrüt ESİN, Atty. Sinan DİNİZ, Atty.
Ceren
SEYMENOĞLU, Atty. Ceren GÖKTÜRK, Atty. İsmail ÖZGÜN
Ebulula Mardin Cad. Gül Sok. No:2 Maya Park Tower 2
Akatlar Beşiktaş/İstanbul

(1) **E. SUBJECT OF THE FILE:** The claims that Unilever Sanayi ve Ticaret Türk AŞ. violated Articles 4 and 6 of the Act no 4054 on the Protection of Competition by establishing de facto exclusivity by means of preventing the sales of competing products at the final outlets via various practices.

(2) **F. SUMMARY OF THE CLAIMS:** In summary, the application made the following statements and requested that the necessary action be taken:

- Unilever Sanayi ve Ticaret Türk AŞ.'s (UNILEVER) ice cream business Algida (ALGİDA) has been holding dominant position in the industrial ice cream market for more than 20 years.
- Between 2021 and 2017, ALGİDA's total market share in terms of turnover rose from (.....)% to (.....)%, and in the same period, total market shares of the competing undertakings, (.....) dropped from (.....)% to (.....)%.
- By 2017, ALGİDA's market share was around (.....)% in terms of sales value and around (.....)% in terms of sales volume, while (.....) had a market share of around (.....)% and (.....)% in terms of sales value and sales volume, respectively.
- In order to increase product availability and the number of exclusive outlets, undertakings in the market had to make down payments to outlets as contract fees/signature fees, known as "concession fees" in the market. ALGİDA is estimated to pay a total of more than (.....) in concession fees in a year.
- In the industrial ice cream market with strong barriers to entry, these concession fees made it even harder for competitors to enter the market and increase their market shares.
- If discount stores are excluded, the industrial ice cream market as a whole, and

especially the traditional channel¹ shrank in terms of sales value during 2017 and 2018. However, in terms of turnover, the market has been growing due to price increases.

- The traditional channel is the most important sales channel, responsible for over 50% of the sales in terms of turnover, with the exclusionary practices of the dominant undertaking being felt most intensely and effectively in this channel.
- Since the Competition Board's (the Board) decision dated 15.05.2008 and numbered 08-33/421-147 (the 2008 Decision), the number of outlets in the traditional channel that do not sell ice cream decreased while the number of exclusive outlets increased. The 2008 Decision noted that the outlets that sold more than one brand or did not carry ice cream was around 39-48% of the traditional channel universe in total, while it is estimated that this ratio fell to 10-13% in 2017. Therefore, around 90% of the market was foreclosed to new entrants.
- According to estimates, ALGİDA is exclusive in around (.....) of the outlets within the traditional channel universe.
- ALGİDA primarily gain this exclusivity rate by providing free freezers to outlets and refusing to allow any other brands in those freezers.
- ALGİDA used its power to provide freezers and its ability to pay concession fees to the customers in order to steer outlets towards selling a single brand, and strengthened its dominance by ensuring that the most productive outlets worked with ALGİDA.
- As a result of these exclusionary practices, the presence of GOLF in the traditional channel saw a reduction of (.....)% in comparison to 2012, despite operating in the market for more than 15 years and holding the position of the second largest actor in the market with a share significantly lower than that of ALGİDA
- According to the data provided by GFK Araştırma Hizmetleri AŞ, the total awareness of the GOLF brand was 71% in 2009 and rose to 98% by 2017; therefore, it is estimated that outlets would start selling other brands if ALGİDA allowed it, or at least refrained from pressuring them.
- ALGİDA's aforementioned practices also harmed consumer welfare, particularly by significantly reducing product variety and increasing product prices.

(3) **G. PHASES OF THE FILE:** In response to the application, entered into the Competition Authority (Authority) records on 23.11.2018 with the number 8429, the First Examination Report dated 17.12.2018 and numbered 2018-3-090/İİ was discussed in the Board meeting of 27.12.2018, and Decision no 18-49/768-M was taken to launch a preliminary inquiry.

(4) During the preliminary inquiry, on-site inspections were conducted at the İstanbul headquarters of UNILEVER as well as at its regional offices in Ankara on 18.06.2019. With relation to the inspection in İstanbul, the Memorandum dated 25.06.2019 and numbered 2019-3-90/BN-01 stating that UNILEVER prevented and obstructed the on-site inspection was discussed in the Board meeting of 07.11.2019, and the Decision

¹ The traditional channel consists of grocers, buffets, dried nut and fruit sellers, etc.

no 19-38/584-250 was taken, imposing an administrative fine on UNILEVER at 0.5 per cent of its gross revenue in 2018 in accordance with Article 16.1(d) of the Act no 4054 on the Protection of Competition (Act no 4054).

- (5) During the preliminary inquiry, information requests were submitted to GOLF and PANDA on 9.06.2019 with the number 7128, and to UNILEVER with the date 0.07.2019 and number 8091. GOLF's response was entered into the Authority records with the date 26.06.2019 and number 4168; PANDA's response with the date 16.07.2019 and number 4647, and ALGİDA's responses with the date 01.07.2019 and number 4307, date 10.07.2019 and number 4555, date 16.07.2019 and number 4681, date 16.07.2019 and number 4680, date 16.07.2019 and number 4678, date 17.07.2019 and number 4707.
- (6) The Preliminary Inquiry report dated 16.07.2019 and numbered 2018-3-090/ÖA, prepared as a result of the preliminary inquiry, was discussed at the Board meeting of 24.07.2019, and Decision no 19-26/391-M was taken to launch an investigation on UNILEVER in accordance with Article 41 of the Act no 4054.
- (7) The Investigation Notification was received by UNILEVER on 05.08.2019, and the first written plea of the undertaking was submitted to the Authority within due time, with the date 04.09.2019 and number 5866.
- (8) The Memorandum dated 16.12.2019 and numbered 2018-3-90/BN-02, requesting an extension, was discussed at the Board meeting of 26.12.2019, and the Decision no 19-46/780-M was taken to extend the investigation period for six months on the expiration of the first six-month period.
- (9) As part of the investigation, an on-site inspection was conducted at the UNILEVER headquarters on 20.12.2019. In addition, GOLF and PANDA officials were interviewed at the Authority headquarters.
- (10) During the investigation period, information requests were sent to ALGİDA with the date 15.05.2020 and number 6379 as well as date 10.07.2020 and number 9100; to GOLF with the date 25.02.2020 and number 3218, date 15.05.2020 and number 6380, date 10.07.2020 and number 9099 , date 20.07.2020 and number 9507; to PANDA with the date 25.02.2020 and number 3217, date 15.05.2020 and number 6376, date 10.07.2020 and number 9098, date 20.07.2020 and number 9507; to Sanset Gıda Turizm San. ve Tic. AŞ (SANSET) with the date 15.05.2020 and number 6375; to BİM Birleşik Mağazalar AŞ (BİM), Şok Marketler Ticaret AŞ (ŞOK) and Yeni Mağazacılık AŞ (A101) with the date 15.05.2020 and number 6377; to the Ministry of Agriculture and Forestry with the date 28.05.2020 and number 6728; to Future Teknoloji Ticaret A.Ş (İSTEGELSİN) with the date 29.06.2020 and number 8386; to Yemek Sepeti Elektronik İletişim Tanıtım Pazarlama Gıda San. ve Tic. AŞ (YEMEK SEPETİ) with the date 13.07.2020 and number 9159; to Getir Perakende Lojistik AŞ (GETİR) with the date 15.05.2020 and number 6378, date 26.06.2020 and number 8199, date 08.07.2020 and number 8871; to Atatürk Forest Farm Directorate (A.O.Ç.) and BABAŞ Gıda San. Tic. Ltd. Şti. (BABAŞ) with the date 13.07.2020 and number 9130 sayı; to ETİ Gıda San. ve Tic. AŞ (ETİ) with the date 13.07.2020 and number 9130 as well as date 20.07.2020 and number 9645. The responses were entered into the Authority records were as follows: from ALGİDA with the date 17.01.2020 and number 526, date 20.05.2020 and number 4619, date 01.06.2020 and number 4981, date 15.06.2020 and number 5731, date 03.07.2020 and number 6760, date 16.07.2020 and numbers 7357-7370 as well as date 17.07.2020 and numbers 7424-7427-7428; from GOLF with the date 15.11.2019 and number 7992, date 02.03.2020 and number 2127, date

08.06.2020 and number 5394, date 23.06.2020 and number 6160, date 16.07.2020 and number 7309 as well as date 22.07.2020 and number 7595; from PANDA with the date 11.11.2019 and number 7867 (Document 31), date 03.03.2020 and number 2219 (Document 52), date 18.03.2020 and number 2794, date 22.06.2020 and number 6136, date 24.06.2020 and number 6232, date 17.07.2020 and number 7409, date 24.07.2020 and number 7727 as well as date 24.07.2020 and number 7729; from BİM with the date 01.06.2020 and number 4975; from SANSET with the date 04.06.2020 and number 5208, date 09.06.2020 and number 5480 as well as date 21.07.2020 and number 7580; from A101 with the date 09.06.2020 and number 5530; from ŞOK with the date 10.06.2020 and number 5597 as well as date 22.06.2020 and number 6134; from the Ministry of Agriculture and Forestry with the date 16.06.2020 and number 5868 as well as date 17.06.2020 and number 5962; from GETİR with the date 18.06.2020 and number 5997, date 06.07.2020 and numbers 6832-6830 as well as date 20.07.2020 and number 7483; from İSTE GELSİN with the date 06.07.2020 and number 6835; from YEMEK SEPETİ with the date 17.07.2020 and number 7431; from A.O.Ç. with the date 20.07.2020 and number 7521 as well as date 24.07.2020 and number 7739; from ETİ with the date 22.07.2020 and number 7617 as well as date 24.07.2020 and number 7726; and finally from BABAŞ with the date 24.07.2020 and number 7744.

- (11) The Investigation Report dated 24.07.2020 and numbered 2018-3-90/SR was received by the UNILEVER representative on 07.08.2020. In response to the request for an extension, entered into the Authority records on 10.08.2020 with the number 8294, the Board took the Decision dated 20.08.2020 and numbered 20-38/530-M, granting an extension for a period of 30 days following the expiry of the period specified for the second written plea. UNILEVER's second written plea was submitted to the Authority records with the date 06.10.2020 and number 10768.
- (12) The Memorandum dated 13.10.2020 and numbered 2018-3-90/BN-5, including a request for extension of the additional written opinion period for the second written plea, was discussed at the Board meeting of 15.10.2020 and the Decision no 20-46/635-M was taken, granting a 15 day extension for the additional written opinion period after its expiry.
- (13) With its letter entered into the Authority records with the date 27.10.2020 and number 11532, UNILEVER submitted a commitments package under Article 43 of the Act no 4054. In response, the Memorandum dated 02.11.2020 and numbered 2018-3-90/BN-06 was prepared, which was discussed at the Board meeting of 05.11.2020, resulting in the Decision no 20-48/652-M rejecting the commitments since they were insufficient to eliminate the competition issues.
- (14) The Additional Written Opinion dated 05.11.2020 and numbered 2018-3-090/EG, prepared after the extension decision of 15.10.2020 was received by UNILEVER on 18.11.2020. The request for an extension in the UNILEVER letter that entered into the Authority records with the date 19.11.2020 and number 12499 was discussed at the Board meeting of 03.12.2020, and the Decision no 20-52/724-M was taken, extending the deadline for the third written plea for 30 days following its expiry. The third written plea was submitted to the Authority on 18.01.2021, with the number 14519
- (15) Just before the expiry of the deadline for the third written plea, UNILEVER submitted its second commitments package under Article 43 of the Act no 4054, with the date 15.01.2021 and number 14477. Some misspellings and miscalculations in the commitments package were corrected with its letter of 18.01.2021, numbered 14493.

The application in question was rejected with the Board decision dated 28.01.2021 and numbered 21-05/55-M on the grounds that they were not appropriate at the present stage.

- (16) In accordance with Article 46 of the Act no 4054, the Board discussed the matter of holding a hearing at its meeting of 28.01.2021 and took the decision numbered 21-05/55-M(2) to hold the hearing on 09.03.2021. The hearing was held on the aforementioned date.
- (17) The final decision was rendered in accordance with the Report, Additional Opinion, collected evidence, written pleas and hearings as well as the file contents of the investigation conducted.
- (18) **H. RAPPORTEUR OPINION:** The relevant Report states the following:
1. UNILEVER holds dominant position in the industrial ice cream market as well as in the impulse and take-home markets.
 2. The aforementioned undertaking abused its dominant position through the discounts it implemented, and violated Article 6 of the Act no 4054; therefore, administrative fines should be imposed on the relevant undertaking as per Article 16 of the Act no 4054.
 3. In the agreement signed with GETİR, UNILEVER placed a non-compete obligation on this undertaking, banned under the 2008 Decision, violating Article 4 of the Act no 4054. Therefore, administrative fines should be imposed on UNILEVER under Article 16 of the Act no 4054.
 4. The exclusivity provision in the loan agreements regulating the use of the freezers owned by UNILEVER prevented competition in those outlets with less than 100 m² closed sales area and violated Article 4 of the Act no 4054. The relevant agreements could be granted individual exemption under Article 5 of the Act no 4054, provided the exclusivity provisions are struck out.
 5. In that framework,
 - a) For outlets with 100 m² or less closed sales area,
 - b) If there are no ice cream freezers directly accessible for the consumer other than those owned by UNILEVER,
 - c) The loan agreements of UNILEVER and/or its distributors regulating the use of the freezers owned by the undertaking in question should be amended to allow the use of 50% of the visible portion of the freezer and the total freezer volume at the outlet by competing products.
 6. The parties should be informed that the loan agreements UNILEVER and/or its distributors signs with outlets must be amended to comply with the arrangements introduced by the decision herein, this amendment must be notified to the dealers/distributors and final outlets by UNILEVER, and the undertaking concerned must certify before the Board that these obligations were fulfilled within 60 days following the notification of the decision, and that otherwise an investigation will be initiated on UNILEVER and action would be taken under Article 17 of the Act no 4054.

I. EXAMINATION, GROUNDS AND LEGAL BASIS

I.1. Parties under Investigation: UNILEVER

- (19) A fully public international company, Unilever pLc was founded in 1930 by a merger between British and Dutch companies. The Unilever Group is active in the fields of cosmetics, personal care, home care, ice cream, food and beverages. Its portfolio includes brands such as Dove, Knorr, Domestos, Hellman's, Lipton, Magnum, Persil, Wall's, P&G tips, Ben&Jerry's and Lynx.
- (20) UNILEVER is one of the companies under the Unilever Group, and in Turkey it is active within the fast moving consumer goods (FMCG) market, in the production, distribution and marketing of products in the food, home/personal care and cleaning categories. The following table shows the partnership structure of the undertaking:

Table 1- UNILEVER's Partnership Structure

Shareholder	Share (TL)	Share Ratio (%)
Unilever N.V.	(.....)	(.....)
Unilever Turkey Holdings B.V	(.....)	(.....)
Marga B.V.	(.....)	(.....)
Mavibel B.V.	(.....)	(.....)
Dosan Konserve Sanati ve Ticaret AŞ	(.....)	(.....)
Aliye Erim Ataman	(.....)	(.....)
Fatma Serpil Ataman	(.....)	(.....)
Mehmet Ali Ataman	(.....)	(.....)
Total	(.....)	100
Source: ALGİDA		

- (21) The ice cream business of UNILEVER, on the other hand, is operating in the Turkish industrial ice cream market since 1990 under the "ALGİDA" brand, which is a self-owned global brand. The following table shows the ice cream products and varieties in the ALGİDA portfolio in 2019, produced and sold by the company:

Table 2- Product Types Sold by ALGİDA

Product group	Type
Magnum	Low Fat Ice Cream
	Low Fat Flavored Ice Cream
	Full Fat Flavored Ice Cream
	Ice Milk with Vegetable Oil
Cornetto	Low Fat Flavored Ice Cream
	Ice Milk with Vegetable Oil
Snacks Nogger Frootie Classics Nogger Oreo Maraş Stick Maraş Cup Frigola Boom Boom Conbo	Low Fat Ice Cream
	Ice Milk with Vegetable Oil
	Ice Milk
	Sorbet
	Ice Water
	Ice Milk
	Fruit Ice
	Low Fat Ice Cream
	Ice Milk with Vegetable Oil
	Maraş
Carte d'Or	Ice Milk with Vegetable Oil
	Low Fat Ice Cream

	Fruit Ice
Keyif	Ice Milk with Vegetable Oil
Source: ALGİDA	

- (22) UNILEVER's total turnover for 2019 was 5,928,732,938 TL, and net turnover from ice cream sales made through ALGİDA was 2,045,324,225 TL.

I.2. Relevant Market

I.2.1. General Information on the Sector

- (23) There are two main legal regulations concerning the products produced and sold by ALGİDA and examined under the investigation. Intended to set out the characteristics of the relevant products in order to ensure that they are produced, prepared, processed, conserved, stored, transported and marketed in accordance with the technical and hygienic requirements, the first of the general regulations is the Turkish Food Codex (Türk Gıda Kodeksi - TGK) Ice Cream Communiqué no 2004/45 (TGK Ice Cream Communiqué). Article 4 of the Communiqué in question has the following definitions:

“Ice cream: the product prepared by the technical processing of the ice cream mix after heat treatment, which can be offered in the market soft or after hardening,

Ice cream mix: The liquid mix product in the form of an emulsion which is not yet frozen and which contains milk and/or milk products, drinking water, sugar and the approved additives and which may also include, according to flavor and variety, salep, eggs and/or egg products, flavorants and food ingredients which may give flavors as well as garnishes”

The rest of the same article explains the types of ice cream as follows according to presentation and composition:

“Plain ice cream: Ice cream produced from an ice cream mix which does not contain flavorants and garnishes, with the exception of milk and vanilla flavors,

Fruit ice cream: Ice cream produced by adding fruit, fruit juice, fruit concentrate, fruit puree and fruit mash to the ice cream mix,

Maraş-style ice cream: Ice cream produced according to the Maraş ice cream technique, containing milk, sugar, salep and/or other approved additives and/or garnishes,

Maraş ice cream: Ice cream produced according to the Maraş ice cream technique, containing milk, sugar, salep and/or other approved additives,

- (24) On the other hand, the Edible Ice Products Communiqué no 2005/43 of the Turkish Food Codex (TGK Ice Products Communiqué) includes the following definitions:

“Edible ice products: Ice mixes and ice milk products,

Ice mixes: Products prepared using drinking water, sugar and approved additives when required as well as casein, vegetable oil or milk fat, flavorants and garnishes,

Ice milk products: Products containing milk and/or milk products, drinking water, sugar, milk proteins, milk fat and/or vegetable oil and/or egg fat as well as approved additives, flavorants and garnishes when required.

Edible ice products are defined as follows according to presentation in the market and composition:

“Ice Water: Ice mixes containing fruit and/or flavorants with a minimum of 12% dry matter by weight, compliant with the general definition of ice mix,

Fruit Ice: Ice mixes with a minimum of 12% dry matter by weight and a minimum of 15% fruit by weight, compliant with the general definition of ice mix,

Sorbet: Ice mixes with a minimum of 12% dry matter by weight and a minimum of 25% fruit by weight, compliant with the general definition of ice mix,

Ice Milk: Ice milk products with a minimum 2.5% milk fat by weight and a minimum of 6% non-fat milk dry matter by weight which do not contain any non-dairy proteins or fats, compliant with the general definition of ice milk products,

Ice milk with vegetable oil: Ice milk products containing a minimum of 5% vegetable oil and/or milk fat and/or egg fat by weight, which do not contain any protein other than milk protein, and whose milk protein content is at least 2.2% by weight, compliant with the general definition of ice milk products.”

- (25) As mentioned in the 2008 Decision, consumers are not generally aware of the distinction between ice cream and edible ice products, and edible ice products are perceived as ice cream.
- (26) Within the total snacks market, whose size in 2018 was around (.....) TL, the category of ice cream has a share of (.....)%, which means it is one of the three categories with the largest share, the others being carbonated drinks and biscuits/cakes. According to the 2018 Euromonitor Turkish Ice Cream Sector Report, the size of the ice cream category reached (.....) TL, when ice cream products consumed at the HORECA (hotels, restaurants and cafés) channel (i.e. consumed on-site) were taken into consideration. In the same year, annual ice cream consumption per capita was 7.5 liters and 18 liters in the developed markets of Europe and United States respectively, while this number was lower in Turkey with 3.5 liters.
- (27) Ice cream consumption is seasonal in Turkey, which means more than 78% of the total consumption occurs during the spring/summer months, known as the “season” in the sector. The following table includes ice cream sales in Turkey according to season of the year.

Table 3- Ice Cream Sales in Turkey According to Season (2019)

Seasons	Share (%)
Fall	21
Winter	2
Spring	19
Summer	59
Source: ALGIDA (Nielsen)	

- (28) The main costs in ice cream production are raw materials, packaging, factory and warehouse costs, cold chain logistics network, freezer supply, hygiene, repair and replacement costs:

- The main raw materials of ice cream are milk and milk products, chocolate, sugar, fat and various dried nuts and fruits.
- Factory and warehouse costs include the cost of the logistics network established to transport the product to the buyers. The seasonal nature of ice cream consumption leads to a rapid increase in the capacity and active working hours of the factories.
- During the season, which starts in April, a “cold chain” distribution network is required to transport the products from the factory to the field and prepare them for consumption by the consumer. The cold chain distribution system preserves the ice cream below a certain temperature at each distribution level, from production to the consumer. If the required cold environment cannot be ensured during distribution, the product risks microbiological, physical and chemical spoilage.
- Since outlets in the traditional channel in particular do not have their own ice cream freezers, firms are forced to provide freezers for these outlets, maintain hygiene standards, and bear the repair and replacement costs in case of any issues with the freezer.

(29) Ice cream production can be divided into two: industrial and artisanal. Industrial ice cream is mass produced at large-scale facilities and offered to the market in specific packages; it is also referred to as “*factory-made ice cream*”. Artisanal ice cream, on the other hand, is produced by small-scale businesses (patisseries/ice cream shops) with simple machines; it is generally sold in cones and is known as “*bulk ice cream*” or “*patisserie ice cream*”. The main difference between the two types is the fact that artisanal ice cream is generally consumed at or around the place of production. Meanwhile, with industrial ice cream, undertakings establish a cold chain to transport their product to final outlets, and thus, to the consumers. The last link of the cold chain consists of the freezers placed at final outlets.

(30) The following table presents the development of the industrial and artisanal ice cream markets in Turkey:

Table 4- Size of the Industrial and Artisan Ice Cream Markets between 2017 and 2019, in terms of Volume (liters) and Turnover (1000 TL)

Ice Cream Market	2017 (Volume)	2017 (Turnover)	2018 (Volume)	2018 (Turnover)	2019 (Volume)	2019 (Turnover)
Industrial	200,853,136	3,192,521	202,476,173	3,699,103	184,885,835	4,388,073
Artisanal	17,601,000	602,594	17,746,000	698,297	18,272,000	917,865
TOTAL	218,454,136	3,795,115	220,222,173	4,397,400	203,157,835	5,305,938
Source ² : ALGİDA (Nielsen and Euromonitor) data						

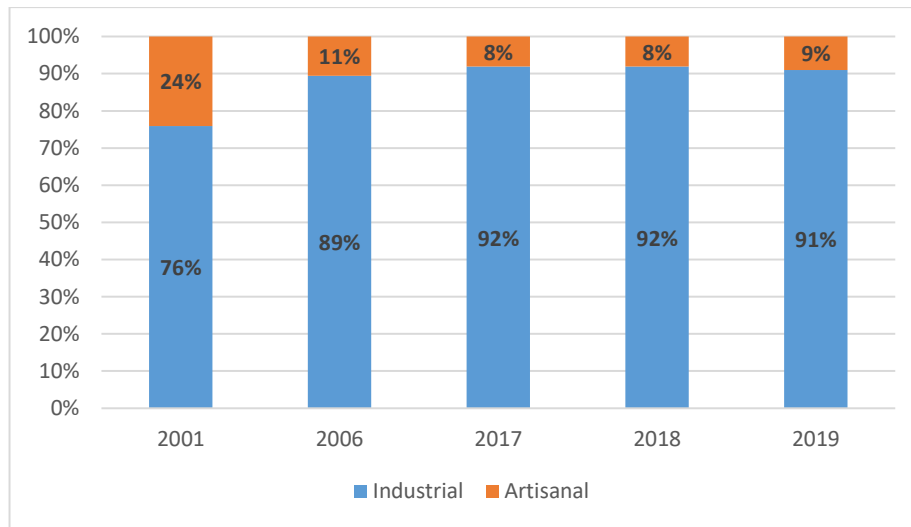
(31) An examination of the table above shows that, compared to the previous year, the ice cream market grew 16% in terms of turnover and 1% in terms of volume in 2018, while

² The letter sent by ALGİDA states that the data for the impulse and take-home channels of the industrial ice cream market were provided by Nielsen, that the catering channel data were estimated based on Euromonitor data, and artisanal ice cream data were also estimated based on Euromonitor data. Thus, industrial ice cream market data were based on those provided by Nielsen and Euromonitor. Catering products are those products consumed on-site that are packaged in bulk for mass consumption. These are consumed at outlets such as restaurants, patisseries and cafés, constituting a part of the service provided by these outlets.

in 2019 it grew 21% in terms of turnover while shrinking 8% in terms of volume, when compared to the previous year.

- (32) In terms of volume, the total ice cream market grew by 216% since 2001 and by 48% since 2006. The industrial ice cream market played a significant role in the growth in question. During the last 18 years, the industrial ice cream market grew by 279% and the artisanal ice cream market by 18%, while in the last 13 years this growth rate has been 51% in the industrial ice cream market and 26% in the artisanal ice cream market.
- (33) It is observed that, in terms of volume, the share of artisanal ice cream within the total ice cream sales has dropped to around 9% since 2006.

Chart 1- Shares of Artisanal and Industrial Ice Cream within the Total Market (by Volume)



Source³: Nielsen and Euromonitor data, and the 2008 Decision

- (34) Outlets are another factor that should be noted under the subject of market development. According to Nielsen Retail data, ice cream sales are divided into two separate channels: modern businesses and traditional businesses. Discount markets and supermarkets are in the modern channel while outlets such as grocers, dried nut and fruit sellers, buffets and gas stations are in the traditional channel. The following table shows the total number of outlets active in the traditional and modern channels as well as the number of outlets that sell ice cream.

Table 5⁴- Total Number of Retail Sales Channels (Traditional Retail, Supermarkets and Discount Markets) and Number of Outlets That Sell Industrial Ice Cream in 2017-2019

³ Data for 2001 and 2006 were taken from the 2008 Decision report.

⁴ There are differences/inconsistencies between the Nielsen data sent by ALGIDA and the outlets' data sent by producer undertakings. As a result, the number of outlets to which ALGIDA makes sales turns out to be higher than the universe Nielsen presents. A clarification was requested from ALGIDA on this point during the investigation process, and ALGIDA explained the differences in the data as follows:

- The Nielsen universe does not cover the whole ice cream market; according to the information supplied by Nielsen, it covers an estimated 84% of the real market in terms of the ice cream category,
- Nielsen's data sets are based on retailers only, excluding such outlets like military facilities or schools where ALGIDA sells ice cream, and neither does it cover outlets selling on-site consumption products; on the other hand, ALGIDA records have all of these customers under the traditional channel,
- Due to the differences in Nielsen's methodology for calculating the number of outlets, Nielsen considers the average of all months to work out the number of ice cream outlets in a year, while ALGIDA records all outlets it sells based on all outlets it visits during the high season or the rest

Sales Channel	2017	2018	2019
Total Number of Discount Markets	16,253	18,750	21,047
Number of Discount Markets Selling Ice Cream	15,075	17,422	20,030
Ratio of Outlets Selling Ice Cream within Discount Markets	%92,8	%92,9	%95,2
Sales Channel	2017	2018	2019
Total Number of Supermarkets	(.....)	(.....)	(.....)
Number of Supermarkets Selling Ice Cream	(.....)	(.....)	(.....)
Ratio of Outlets Selling Ice Cream within Supermarkets (%)	%94,4	%93,4	%92,9
Sales Channel	2017	2018	2019
Total Number of Traditional Retail	(.....)	(.....)	(.....)
Number of Traditional Retail Selling Ice Cream	(.....)	(.....)	(.....)
Ratio of Outlets Selling Ice Cream within the Traditional Channel (%)	%59,9	%59,4	%52,9
Sales Channel	2017	2018	2019
Total Outlets	(.....)	(.....)	(.....)
Total Outlets Selling Ice Cream	(.....)	(.....)	(.....)
Ratio of Outlets Selling Ice Cream (%)	%64,7	%64,7	%59,8
Source: Between 2017 and 2018 Nielsen and 2019 Nielsen			

- (35) Industrial ice cream can also be differentiated in terms of consumption patterns. Impulse ice cream is a product which the consumers mostly decide to buy when they see it and start to consume immediately after purchase; therefore is subject to unplanned shopping. Due to this feature, impulse products are sold in small packages, as stick or cone ice cream or in small cups. Products consumed at home (take-home), on the other hand, are put on the market in half-, one-, or one-and-a-half-liter packages for consumption at home or during house visits, which the consumers purchase for longer-term consumption.
- (36) Due to their nature, seasonality affects impulse products more than take-home products. Since impulse products are consumed outside, most of the sales occur during summer months while take-home products are consumed at home, which reduce their seasonality. Products consumed on the premises (catering), on the other hand, are produced in large packages suitable for bulk consumption. These are consumed at outlets such as restaurants, patisseries and cafés, making them part of the service provided by these outlets. Catering products are sold exclusively at on-premises consumption outlets, while impulse and take-home products are sold in the retail channel, where the traditional and modern channels exist concurrently. Impulse products are predominantly sold in outlets such as grocers, buffets, dried nuts and fruits sellers and mid-sized markets, all of which are described as the traditional

of the year without taking averages. In that context, even an outlet that purchased only once in January is recorded as an ALGIDA customer for that year. ALGIDA also stated that Nielsen collected data only once in the month of March and considered that data to be the same throughout the whole year.

channel. Meanwhile take-home products are sold mostly in the organized retail channel.

- (37) The following table shows the channel distribution of the total ice cream sales in the industrial ice cream market:

Table 6- Market Shares of Undertakings Operating in the Industrial Ice Cream Market within the Organized and Traditional Channels in the 2017-2019 Period (% in terms of Volume and Turnover)

Channel Distribution in the Industrial Ice Cream Market (%)						
	2017		2018		2019	
	Volume	Turnover	Volume	Turnover	Volume	Turnover
Traditional Retail	47	53	44	52	42	48
Discount Markets	31	22	35	25	38	28
Supermarkets	22	25	21	24	20	24
Total Retail	100	100	100	100	100	100

Source: Data acquired from ALGI DA

- (38) As the table shows, traditional retail makes up almost half of the market, in terms of both volume and turnover. In the organized retail market, on the other hand, discount markets and supermarkets split the market (.....) in terms of turnover, with the ratio increasing (.....) in favor of discount markets in terms of volume.
- (39) The following tables include the distribution of the total ice cream sales in the industrial ice cream market according to product groups (impulse, tak-home, catering).

Table 7- The Share (%) of Product Groups within the Industrial Ice Cream Products between 2017 and 2019, in Terms of Volume (liters) and Turnover (TL)

Product Groups	2017 (Volume)	2017 (Turnover)	2018 (Volume)	2018 (Turnover)	2019 (Volume)	2019 (Turnover)
Impulse-Immediate Consumption	43.1	46.5	42.9	47.7	43.2	46.2
Take-home-Home Consumption	46.2	30.4	46.4	29.2	44.7	28.2
Catering-On-Site Consumption	10.7	23.1	10.7	23.1	12.1	25.6
TOTAL	100.0	100.0	100.0	100.0	100.0	100.0

Source: Nielsen and Euromonitor data

- (40) In line with the information presented in Table 7, impulse products make up around 46% of the market, with the other half of the market consisting of take-home and on-site consumption.

I.2.2. Relevant Product Market

- (41) As noted above, ice cream is divided into two categories in terms of production type: industrial and artisanal ice cream. ALGI DA's practices under examination are conducted within the industrial ice cream market.
- (42) As explained in detail in the previous section, there are three types of ice cream in the industrial ice cream market, differing in terms of consumer demand as well as in terms of supply factors including product weight and packaging. Consequently, separate product markets can be defined for each of these three types known as "impulse products", "take-home" and "catering products". Since impulse products are mostly sold at the traditional channel, take-home products at the organized retail channel, and catering products at on-site consumption outlets, the distinction may also be made in terms of traditional, organized retail and on-site consumption channel.
- (43) Around a quarter of the sales of ice cream involve catering varieties of ice cream, consumed at on-site consumption outlets such as restaurants, patisseries or cafés.

These products are deemed to be a part of the service provided by those outlets, and therefore consumers focus more on the presentation of the product than on its brand. Besides, customers in the catering channel such as hotel chains, military facilities, and catering companies generally buy in bulk through tenders.

- (44) Consequently, competition between undertakings operating in the industrial ice cream market occurs most intensely in the traditional and organized retail channels, where they reach the consumer through their brands of impulse and take-home ice cream varieties.
- (45) In light of the information given above, the relevant product markets were defined as “industrial ice cream market,” as well as “impulse industrial ice cream market” and “take-home industrial ice cream market”.

I.2.3. Relevant Geographic Market

- (46) Relevant geographical market was defined as “Turkey,” since conditions of market entry, access to supply resources, production, distribution, marketing and sales do not show any regional differences for the ice cream product.

I.3. Decision dated 15.5.2008 and numbered 08-33/421-147 (2008 Decision)

- (47) With the Board Decision dated 20.09.2004 and numbered 04-60/864-M, it was decided that the agreements with non-compete obligations undertakings operating in the industrial ice cream market signed with outlets should be examined under the Block Exemption Communiqué on Vertical Agreements, no 2002/2 (Communiqué no. 2002/2), and that even if they benefited from the block exemption set out by the Communiqué, they should be assessed under Article 6 of the Communiqué no. 2002/2, titled “Revocation of Exemption”.
- (48) Within the framework of the *ex officio* examination launched in order to determine whether undertakings operating in the market signed exclusive agreements with outlets or whether they engaged in activities leading to *de facto* exclusivity, a market study was arranged through the independent research company GfK Türkiye concerning retailers and on-site consumption outlets smaller than 100 m², and a chain store survey was conducted by the Authority in order to examine the practices aimed at chain stores.
- (49) In the 2008 Decision, the following observations were made concerning ALGİDA:
- Brand recognition, ad expenses, cost of establishing a cold chain distribution network and access to sales channels constituted barriers to entry in the industrial ice cream market;
 - Due to long-time high market share and entry barriers, new entrants could only have a very limited effect on ALGİDA;
 - ALGİDA held dominant position in the industrial ice cream market and downstream markets;
 - Foreclosure rates in terms of exclusivity via agreements were low, however foreclosure rates stemming from freezer exclusivity and other types of *de facto* exclusivity were at significant levels in the market. Therefore, exclusivity provisions in the agreements ALGİDA and its distributors signed with outlets as well as their practices causing *de facto* exclusivity prevented the establishment of effective competition in the market.

- (50) In terms of freezer exclusivity, the Decision looked at whether opening the freezers to competitors would increase competition in the market. In that context, freezer exclusivity in the industrial ice cream market was compared to the carbonated beverages market and the results of the market study conducted into that market. The relevant decision observed:
- According to the market study, the demand for other brands were 2.05% at the outlets selling ALGİDA. In addition, 30% of the outlets working exclusively with ALGİDA wanted to stock competing products in the ALGİDA freezers while 70% stated that they would not stock competing products in the freezers even if ALGİDA allowed it. Thus the demand for the competitors' products was not particularly strong;
 - In the file of carbonated beverages⁵, on the other hand, there was a demand for competing products at 67% of the outlets where Coca Cola İçecek AŞ had exclusivity;
 - The data in question show that consumer demand was restricted through refrigerated cabinets in the carbonated beverages market but no such demand for competing products existed in the industrial ice cream market. Therefore, in light of the existing market and demand conditions, opening the freezers to competitors in the ice cream market would not change the current situation in this market;
 - At this stage, it was not necessary to remove freezer exclusivity for the cabinets provided by ALGİDA and/or its distributors to outlets, but the market could be re-examined if deemed necessary.
- (51) On the other hand, following the amendments introduced with the "Communiqué no 2007/2 Amending the Block Exemption Communiqué on Vertical Agreements," it was found that the agreements ALGİDA signed with outlets did not fall under the block exemption granted by the Communiqué no 2002/2.
- (52) In order to establish effective competition in the relevant market, a set of prohibitions were introduced, which ALGİDA had to comply with in its relationships with the final outlets. Accordingly, ALGİDA was prohibited from signing agreements including non-compete obligations with outlets, with the exception of Algida Shops, or from engaging in activities leading to *de facto* exclusivity. In addition, ALGİDA was also prohibited from stipulating that the outlets purchase a certain amount of product based on a set ratio of its sales in the previous year, or from providing advantages based on such stipulations. On the other hand, the relevant decision granted individual exemption for a period of no longer than one year to non-compete obligations in the agreements signed with on-site consumption outlets which were granted exclusive selling rights by public and/or private sector tenders. Another individual exemption was granted to sponsorship agreements aimed at supporting sports, arts or entertainments events in which ALGİDA participated as an ancillary element, provided these did not exceed 60 days within a year.

⁵ Bahsi geçen pazar araştırmasının gazlı içecekler pazarı ile ilgili kısımları, 10.09.2007 tarih, 07-70/864-327 sayılı Kurul kararında değerlendirilmiştir.

I.4. Information and Documents Acquired within the Scope of the File

I.4.1. Documents Obtained during the On-Site Inspection Conducted at the ALGIDA Premises⁶

- (53) The e-mail with the subject “Notes on the Tokat Province Visit,” sent by Local Retail Channel Director (.....) to ALGIDA employees on 24.03.2016, include the following statements:

“Dear friends,

I’m sharing my notes on the visit we made to the Tokat market last month below.

This year we took significant action in this region where there is an high availability of competitors. And we’re already planning further action.

We should especially thank (.....) for that. We have increased our availability in the downtown Tokat market and the main street to (.....)%. In addition, another achievement is the agreement signed with (.....), which we haven’t been working with for the last 4 years. All markets need to be like this. Still, we have a long way to go. That’s what we must keep at the top of our agenda every day. In my next visit we’ll tour each county.

In general, we have problems with our cabinet planograms. I believe you already held the necessary meetings and started supervision via market visits.

We also need to renew all cabinet displays. In particular, we definitely have to remove the old display for 2014.

Our MT⁷ market which we sell for 12 months has to be neat as a whistle year-round. Given our (.....)% market share, if there is 1 cabinet for the competitors at MT outlets with large sales areas, we must place 3 Algida cabinets. You need to check our MT route and management separately.”

- (54) The following statements are in an e-mail with the subject: “RE: Chicken fridges/actions related to Vispera/Çivril,” sent by ALGIDA Sales Inspector (.....) on 25.12.2017, which had Sales Director (.....) in the CC:

“Hello, Mr. (.....)

Çivril has the largest gt route of our warehouse,

Attached are the actions relevant to retrieving the chicken cabinets provided to customers that comprise (.....)% of the cumulative Çivril route, as well as the presentation prepared by (.....).

(.....), thanks very much for this important action, these are our most important equipment, they are our bread and butter. If we don’t look after them nobody will, good job.”

- (55) The e-mail with the subject “Migros Endcap Implementation – 2018,” sent by (.....), assistant manager in the national markets channel, to UNILEVER employees on 04.05.2018 included the following statements:

“...NOTE 1 : Central acquisitions can’t do anything either for those stores which are not physically suitable, which do not have the space. If such

⁶ Any spelling and grammar errors in the original documents are removed in the translated texts.

⁷ MT refers to domestic customers.

stores can't setup endcaps, let's discuss additional, suitable magnumizing cabinets or AOJ applications and try to convince them to set these up instead..."

(56) The e-mail with the subject "Competitor's Placement of Maraş Cabinets at our MVC Customers in 2018," sent by ALGİDA Sales Expert (.....) to ALGİDA Sales Manager (.....) on 06.03.2018 states that "...I prepared a study on our customers selling both ALGİDA and GOLF in 2018," and the study includes customer number, title, budget and image data.

(57) The relevant e-mail was forwarded by ALGİDA Sales manager (.....) to Regional Manager (.....) on 06.03.2018, with the following note:

"Hello Mr. (.....),

We found that this year, Golf Dondurma started to place additional Golf Maraşım cabinets at our potential customers in our region..."

(58) The same day, Regional Manager (.....) sent the following e-mail on the subject to (.....), copying (.....) and (.....). The e-mail sent includes the following statements:

"(.....),

There's an action like this in our SMB Urla market (Currently investigating others). There are things we can do in response.

For instance, we can also place pure Maraş cabinets everywhere they have placed a Maraş cabinet, etc., but I may need Maraş stickers (for example double-churned stickers) and some SBPs. Since consumption hasn't started it's not an urgent matter, but we do need to take action in April..."

(59) Later, the e-mail sent by (.....) to UNILEVER employees on 06.03.2018 with the subject "FW:Competitor's Placement of Maraş Cabinets at our MVC Customers in 2018" includes the following:

"Dear friends,

We'll first figure out how widespread this practice is, then we'll make a plan and take action. First of all, you need to figure out which customers are covered by this practice..."

(60) The following statements are in the e-mail sent by ALGİDA Regional Manager Assistant (.....) to UNILEVER employees with the subject "The Aegean Region-customer risk analysis":

"Dear friends,

First, we must identify your customers in this position within the Aegean Region. I would like you to please enter the information of our customers at whose stores we found cabinets of the other company until 17:00 on March 09, 2018 on the attached file, like in (.....)'s presentation.

If you do not enter this information until 17:00, I will take that to mean your operation does not have such customers."

(61) The e-mail sent by (.....) and copied to (.....), Sales Directors (.....) and (.....) on 18.10.2018 with the subject "East Anatolia CMI Report" has the following statements:

- *"... In addition to focusing on local players, in some cities **Golf and Panda** stand out with their Out-of-Home products in terms of freezer availability. For*

Home-Type products, local brands are more of a threat, but for Out-of-Home products we can see more familiar competition:

- *Our strongest local rivals are Dondurmacı Amca and Alpedo. These brands' portfolios consist mostly of maraş products and their cabinets have predominantly Home Type maraş products.*
- *Both Alpedo and Dondurmacı Amca offer **multi-serve products** in order to target the larger families in the East with packages that include a large amount of product and different flavors, as well as affordable prices.*
- *Dondurmacı Amca and Alpedo are among the top of the ranks as strong local players. For Home-type Maraş Products Alpedo offers a more affordable price range, but suitable prices are also a factor for consumer that prefer Dondurmacı Amca.*

...

*Watch out for **Golf!** Golf seems to have benefited from our losses, their freezer penetration has went up significantly compared to last year!! Golf gets lot of sales in the East with their Maraşım Keçi 500 as well as their 1750 ml Sizin İçin SKUs."*

(62) The e-mail with the subject "Algida & Happy Center 2018 Mid-year Assessment," sent by ALGİDA employee (.....) on 12.07.2018 and copied to Local Retail Channel Director (.....) includes the following statements: "...In those outlets where last year you worked with two suppliers (Algida+Golf) and this year you decided to go forward with a single supplier (Algida), Algida's total growth was 31.91% (+11.28% over the average)..."

(63) The e mail with the subject "SEASONAL CABINETS TO THE MIGROS STORES ON APRIL 1! (2019 SUPPLEMENTARY DSA PLAN), sent by ALGİDA's Black Sea Regional Manager (.....) on 25.03.2019 includes the following:

"...DSA will certainly guide us but I'd like to remind that the number of our cabinets in Migros stores are 2 times the DSA published each year.

For that reason we would like to request your support once again on creating an ADDITIONAL CABINET schedule for each region. Additional cabinets we'll place this year must once again be a twice the DSA, at a minimum..."

(64) The e-mail with the subject "FW:A101 Contact Information & Meeting Planning," sent by ALGİDA Southeast Anatolia Region Sales Inspector (.....) to Assistant Director (.....) on 13.03.2019 states:

"(.....), hello,

Attached are the information for Existing Stores in the Southeast Region as well as information on our Additional cabinet request.

Looking at the Gsv numbers, current numbers may mislead us because of new Prices and the bases of the stores that opened.

In short, as the weather gets warmer, changing the position of the cabinets will inevitably take us back in terms of sales.

However, as mentioned in the attachment, if we can leave our additional impulse cabinets closer to the registers, maybe we can make up for the loss Gsv we were afraid of.

We would appreciate your help with regards to the Additional cabinet agreements in our region and we hope that you'll be able to visit Our region as soon as possible."

- (65) The e-mail with the subject “On the Büyükada Customer,” sent by the On-Site Consumption Channel Director (.....) to Sales Director (.....) on 29.04.2019 states:

“Boss,

(.....) visited the outlet today. The customer only bought the blue ice cream from Golf. When they signed the agreement with us last year they apparently said they would only buy the blue from the competitor.

We have the blue (bluesky) but since its color is not regular blue and the customer does not think this product looks artisanal, they say they prefer the competitor’s.

They did this for a single product. All others are ours.

Their inventory cabinet is full of our products as well.

In order to create an artisanal display the customer pours our products into their transparent bucket, puts the 2 buckets on top of each other to make a single bucket and displays it like that in the cabinet [...]

(.....) talked about the blue ice cream. He’ll follow up. He’ll try to get that removed as well.”

I.4.2. Opinions Submitted by UNILEVER and Competitors

I.4.2.1. UNILEVER

- (66) Concerning the question of how should the tops and surroundings of the freezers be used to promote those products in the freezers which were not produced by Algida, if a portion of ALGIDA freezers were opened to the use of competitors,
- (67) UNILEVER stated the following:
- Eliminating cabinet exclusivity would lead to numerous potential problems and these problems has to be mentioned in any opinion on how the tops and surroundings of the freezers should be used for product promotion;
 - Placing promotion materials would, first of all, lead to free-riding and it would be unreasonable to place competitors’ ads on the freezers owned by ALGIDA, who bore the cabinet costs
 - This view was supported by the “Awareness Survey” commissioned to the independent research company Nielsen. In fact, (.....) of those who participated in the survey stated that ALGIDA’s ice cream cabinet was very effective in their choice to buy ice cream, while (.....) stated that it was “effective,” which means ALGIDA cabinets affected the purchase decisions of (.....) of the participants;
 - According to the same survey, in case a plain white freezer is used, (.....) of the participants stated they would purchase less, and (.....) stated they would purchase significantly less. Ice cream sold in the traditional channel are aimed at impulse consumption and white or plain freezers did not attract consumers.
 - Coloring the baskets would not be a solution since basket color would be invisible in horizontal cabinets. In such a situation, products could easily switch places and there would be confusion about which products belonged to which brands. Thus, each section of every basket would have to have stickers clearly identifying the producer;

- Unlike carbonated beverages and beer markets, the ice cream market has a lot of product diversity. As a result, consumers could think that competing products placed in the ALGIDA freezer were ALGIDA brand products and could choose them on that basis;
- Within the framework of the Awareness Survey, mixed freezers were introduced to consumers and the results were measured. Accordingly, before mixed freezers (.....) of the consumers considered ALGIDA to be the highest quality ice cream in the market, whereas that ratio fell to (.....) after mixed freezers;
- Joint use of the freezers would result in the consumer being unable to reach a sufficiently wide product portfolio, leading to free-riding problems as well as conflicts on certain technical subjects such as black-outs, breakdowns and legal liability;
- Consequently, cabinet exclusivity should not be eliminated and instead other remedies should be implemented.

(68) The undertaking also made the following remarks:

- If there were competing brand ice cream products in the freezer, in case of a freezer failure the brand responsible for the safety of those ice creams would be unclear during both the repair and the replacement process for the broken freezer. In addition since the competitors would have already sold their product to the outlet, such a failure would inevitably cause conflict between UNILEVER and the outlet;
- In case of black-outs, products are kept in a refrigerated truck that is brought to the outlet until the problem is solved. In such a situation, ALGIDA should not be expected to keep competitors' products in its trucks;
- At the season's end around (.....)% of ALGIDA's freezers are called back and most of the cabins that are not recovered are unplugged and left at the outlets. It would be unclear what to do with competitors' products in that situation;
- In case of potential cabinet sharing, repair and maintenance costs should also be shared between the companies jointly using the cabinet, yet there would be significant problems on how to implement such cost distribution plan, based on what criteria;
- If freezers were open to the use of competitors, either outlets would have to be visited more frequently, increasing the costs or visit frequency would be kept the same, restricting consumers' access to out-of-stock products;
- Competitors could damage ALGIDA products when they are placing their own products in the freezers;
- There were significant problems concerning how to allocate the occupation charges paid to the municipalities for freezers placed outside the outlets;
- Since the freezers are owned by UNILEVER, another significant problem would be how to allocate liability in case of a possible fire, etc.;
- The artisanal/industrial ice cream distinction was not very clear in the market and grocers in the traditional channel should not be expected to observe this distinction. Such ambiguity would allow local players such as patisseries to find themselves a place in ALGIDA freezers.

I.4.2.2. GOLF

(69) With relation to the industrial ice cream market, GOLF made the following observations:

- *There are the following barriers to entry in the industrial ice cream market:*
 - *Advertisement and marketing expenses for brand image (In return for concluding an agreement, various benefits are provided to final outlets, including cash payments, free products, electricity subsidies, umbrellas, dustbins, signboards, etc., which are known in the market as concessions; In addition, freezers are provided to the outlets, free-of-charge);*
 - *Visibility and availability costs (as a result of de facto exclusive practices, the traditional market is mostly closed to new entrants; undertakings in the market supply free-of-charge freezers to traditional outlets by loan agreements and prohibit them from putting any products other than those of the supplier undertaking within these freezers)*
- *ALGÍDA has an estimated de facto exclusivity rate of around (.....) at the outlets selling ice cream, most of which (at around (.....) of the outlets selling ice cream in total) ALGÍDA has two or more freezers;*
- *While awareness of and demand for GOLF products has been increasing, its availability is going down every year due to the exclusionary practices of the dominant undertaking (from (.....) in 2015 to (.....) in 2018);*
- *Among the outlets selling ice cream in the traditional channel, the ratio of outlets selling the products of more than one undertaking is estimated to be just 7-8%;*
- *However, the number of outlets does not increase. Outlets which do not sell ice cream are around 4-5% of the total traditional channel universe and – except for a limited portion – it does not seem likely for those to start selling ice cream due to a lack of space for the freezers or due to location.*

(70) The undertaking made the following remarks on the matter of freezer sharing:

- *The main tools for promotion of ice cream products are freezer dressings and price lists placed on the freezers. Umbrellas, dustbins, sunshades and similar material are also used for advertising. Freezer dressing costs below (.....) on average, and can be done jointly by the brands or could be brand-independent to ensure that none of the brands are highlighted.*
- *With relation to dressing, undertakings could jointly decide on two- or three-brand designs. According to the requirements of the decision, two brands could share 50%-50%, three brands 50%-25%-25% or two brands 70%-30%. If the competitors came to an agreement with the outlets, they could replace the dressing in accordance with the previously agreed-upon design, with the costs to be borne by themselves. In case a third brand is added or the second brand changes, the newcomer can also change the dressing, with the costs to be borne by the newcomer. If the freezer were too old or had to be replaced and if ALGÍDA were to send a new freezer to the outlets, they could deliver the freezer after setting up its dressing in accordance with the older one, and with the costs to be borne by ALGÍDA. Another method could be using magnets. The competing brand storing its product in the ALGÍDA freezer could place magnets*

with logos and similar images around its own portion of the freezer, which would be a more practical alternative.

- In terms of the Price Lists, in accordance with Article 54/1 of the Act no 6502 on the Protection of the Consumer, it is a legal requirement for price lists for all products to be easily visible. Therefore prices are attached to the freezers with a price list bar.
- For other promotional material, it would be sufficient for the outlets to be unconstrained.
- Currently, ALGİDA's products are placed in the same freezer with other brand products in supermarket channel, which shows that sharing the freezers should not lead to problems in principle. Questions such as who would deliver the dry ice or who would place the products in the freezers were simply intended to make excuses and cause difficulties.
- On the subject of sharing the space inside the freezer, a full ice cream freezer has ice cream varieties visible on the top and the inventory below them. The surface area is known as the "surface share", and the freezer sharing must be addressed in terms of "surface share" and "volume share". Some types of freezers have baskets in them, and for those freezers sharing could be based on the baskets themselves. However, for freezers without baskets, "surface share" and "volume share" factors have to be taken into consideration. In addition, there is limited space over the motor in most freezers, and as such these parts of freezers are not favored. If a brand was given space over the motor, they would be in a disadvantageous position, in terms of both product variety and inventory.
- With relation to the organization of the distribution network, in an arrangement where a portion of the freezers owned by ALGİDA are left to the outlets for use as they see fit and loan agreements are amended in this way, ALGİDA may start granting premiums over total product sales or turnover, may tie the purchase of some top selling products to the purchase of others, or some exclusionary practices may be presented as the decisions of the dealers themselves. Therefore, ALGİDA's distribution network must be controlled as well.

I.4.2.3. PANDA

(71) With relation to the industrial ice cream market, PANDA made the following observations:

- *As a result of the increasing competition as a result of entry into the market by foreign-capital companies in the 90s, the Turkish industrial ice cream market grew in size, but production costs as well as sales, distribution and marketing expenses increased in tandem.*
- *The exclusive agreements the dominant company signed with outlets and the increase in the payments it made in return for exclusive agreements put pressure on the other companies, including PANDA.*
- *In a sector where freezer/cabinet investment is unavoidable, outlets are visited before the high season and free product budgets are set for each outlet. In the general practice, the amount of free product provided corresponds to around (.....) of the annual turnover, but there may be budget agreements that vary between (.....).*

- *If undertakings try to resist signing these agreements, then the dominant company concludes agreements with the outlets for higher free product budgets than offered by the competitors.*
- *Until 1990, freezers were supplied to the outlets in return for a security deposit. However currently, due to pressure from the competitor, freezers worth (.....) each are supplied to the outlets free of charge, in addition trying to compete with the free product budget that the competitor offers in return for exclusive agreements.*
- *The dominant firm also applies price pressure on the products and channels where PANDA makes most of its sales. As an example, the Stix product, which was sold for 50 krs in 2003 is still sold for the same price in the current market conditions, and the price of the kornet product has not change since 2006.*
- *The dominant firm also puts pressure on the organized commerce (national chain stores) and on online shopping sites. It has exclusive agreements with certain channels, as well (when we contacted the firm Getir, one of the digital sales channels, it told us it worked exclusively with one of the actors in the market). In particular, entry costs for entering the organized commerce channel, discount rates and the marketing budgets required for brand uptake in these channels are significantly challenging.*

(72) PANDA made the following remarks on the matter of freezer sharing:

- *If the freezers were to be shared, the products and brands inside has to be visible from the outside. Outer dressing must include images by the competitors' showing the product variety within the freezer and the dressing must be evenly divided.*
- *Similarly, independent of how the space inside the freezer is shared, visual material of equal size such as boards, posters, pricing cards showing the competing products must be placed vertically beside the freezer in order to make the consumers aware of what brand/brands are placed within the freezer.*
- *The freezer must be organized such that when viewed by the consumer from the outside (from above or from across), the consumer must be able to see all of the varieties in the freezer.*
- *The visual materials must be placed to ensure that consumers perceive all of the choices equally.*
- *Every producer operating in the ice cream sector knows how to preserve the products in the freezer in case of a potential black-out or freezer failure.*
- *Currently ALGIDA and its competitors are placed in the same freezers in chain stores and discount stores, and this long-running practice did not lead to any technical problems.*

I.4.2.4. ETİ

(73) With relation to the industrial ice cream market, ETİ made the following observations:

- *The Turkish industrial ice cream market is not very attractive for new entrants. ALGIDA is the clear market leader with its distribution infrastructure, number of freezers, strong brands and strong communication support. Market entry and uptake require high investments and costs, with exclusive use of freezers in the*

traditional channel further aggravating the entry conditions. New entries must invest in freezers and must find space for the freezers in the outlets, but this does not occur at a sufficient level due to investment costs and the physical restrictions of the outlets;

- *The Alaska Frigo brand does not fall under the ice cream category according to the definition in the ice cream communiqué, but instead is defined as a cold sweet bar. However, since Alaska Frigo is stored at -18 degrees in freezers and since it is equivalent to ice cream for the consumers, Nielsen data measures it under the ice cream category. Even though the brand is not defined legally as an ice cream, it considers ALGİDA a competitor since they are also a snack that must be consumed cold.*
- *Due to lack of space it is generally not possible to place a second freezer at the outlets within the traditional channel, and very hard to find space in the existing freezer. Alaska Frigo has limited distribution, and if a decision were to be taken to distribute it throughout Turkey, the physical inadequacies of the outlets would have a negative effect on entry and growth in the market.*

(74) ETİ made the following remarks on the matter of freezer sharing:

- The price signboard on the freezer should have empty space for products other than ALGİDA or it should be possible to place more than one price signboard for companies other than ALGİDA.
- The internal space allocated to ALGİDA and other brands within the freezer must be physically delineated.
- Competing firms must be included on the sides of the freezer for outer dressing.

(75) Lastly, ETİ noted that Alaska Frigo brand products are produced at the Bozüyük factory, and offered to the market in the traditional channel, organized retail channel and in movie theaters by means of some investment in freezers. The following table shows number of freezers owned by ETİ between 2017 and 2019:

Table 8- Number of ETİ Freezers during 2017-2019 on the Basis of Channels

	2017	2018	2019
Organized Channel	(.....)	(.....)	(.....)
Traditional Channel	(.....)	(.....)	(.....)
Source: ETİ			

I.4.2.5. BABAŞ

(76) With relation to the industrial ice cream market, BABAŞ made the following observations:

- *Following the entry of SCHÖLLER ice cream into the market, ALGİDA started to foreclose the market to form a monopoly. As a matter of fact*
 - i. *Alaska Dondurma in İstanbul*
 - ii. *Geye Dondurma in Bursa*
 - iii. *Memo Dondurma in İzmir*
 - iv. *Sakız Dondurma in Samsun*
 - v. *Flaş Dondurma and Aliş Dondurma in Ankara*
 - vi. *Göneri Dondurma in Adana*

- vii. *Pendo Dondurma in Yalova as well as Lili Dondurma, Sedo Dondurma, Akdo Dondurma, Dido Dondurma, Akdoğan Dondurma, Aydo Dondurma, Dosa Dondurma in various provinces terminated their activities.*

- *ALGİDA continued its aggressive sales strategies through the years in order to ensure exclusive availability at the outlets. To that end, if an outlet sold, for example, 5,000 TL worth of the competing ice cream product in a season, ALGİDA offered it 10,000 TL to remove the other brand from the outlet. ALGİDA has become a total monopoly in Turkey and if no action is taken there will be no domestic ice cream producers left.*

(77) In addition, BABAŞ made the following remark:

- On the matter of joint use of the freezers, the phrase “meeting place of all other ice creams” could be added to the top left corner of ALGİDA freezers.

(78) BABAŞ also noted that they made freezer investments in the traditional organized and on-site consumption channels, with a total of (.....) freezers having been purchased. The distribution of these freezers are included in the tables below:

Table 9- Total Freezer Number of BABAŞ during 2017-2019

	2017	2018	2019	Total
Number of Freezers	(.....)	(.....)	(.....)	(.....)
Source: BABAŞ				

Table 10- Channel Distribution of BABAŞ's Total Number of Freezers

Traditional	(.....)
On-Site Consumption	(.....)
Organized Channel	(.....)
Total	(.....)

I.4.2.6. A.O.Ç

(79) With relation to the industrial ice cream market, A.O.Ç made the following observations:

- *Industrial ice cream is a product group with high profit margins within the food sector, both globally and in Turkey. A large majority of the products consumed in the market as industrial ice cream are estimated to be fruit ice. There are four factors affecting entry and uptake in the ice cream market in Turkey, which are: i) Product variety, ii) Distribution network or widespread dealer system, iii) Advertisements, and iv) freezer number. Higher number of freezers, in particular, increase sales and bring about market dominance.*

(80) A.O.Ç. made the following remarks on the matter of freezer sharing:

- All promotion material on the freezers advertising ALGİDA must be removed and replaced with images that do not include any company names; as an example all freezers could simply say “ICE CREAM.” However, price signboards previously used by ALGİDA could still be utilized in order to display the prices of the products in the freezer.

(81) Lastly, the undertaking noted that they invested in freezers in order to market their products to dealers, markets, market chains and public organizations, and currently had (.....) freezers.

I.4.2.7. PERNIGOTTI

(82) PERNIGOTTI stated that while they had invested in freezers in the past for the traditional, organized and on-site consumption channels, they stopped investing in freezers in 2016-2017 due to the following reasons:

- ALGIDA reserved the limited space of the outlets for their own freezer, and thus competing undertakings had trouble finding space for their freezers. Usually ALGIDA acquired a monopoly at the outlet and reduced the competitors' potential to compete;
- ALGIDA had a very large number of freezers, making it difficult for rivals to compete and enter the market.
- ALGIDA's freezers had an average volume of (.....) liters, while PERNIGOTTI tried to compete with freezers of (.....) liters, which harmed fair competition.

(83) The only reliable data they had on freezers was from 2018, which were also valid for 2017 and 2019.

Table 11- PERNIGOTTI's Total Number of Freezers in 2018

	Volume-Model						Total (number)
	100	200	300	420	1850	440	
Traditional Channel	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Organized Channel	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Freezer Volume Total	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)

Source: PERNIGOTTI

(84) PERNIGOTTI also stated that

- A certain portion of the ALGIDA freezers could be left empty for use by competitors and an image or sticker with the competitors' name, logo and products may be placed on the freezers

I.5. Assessment

I.5.1. Observations and Assessment under Article 4 of the Act no 4054

(85) According to Article 4 of the Act no 4054, "*Agreements and concerted practices between undertakings, and decisions and practices of associations of undertakings which have as their object or effect or likely effect the prevention, distortion or restriction of competition directly or indirectly in a particular market for goods or services*" are prohibited.

(86) As mentioned before, the 2008 Decision assessed ALGIDA's written agreements with final outlets including non-compete obligations as well as de facto practices under Article 4 of the Act as well as within the framework of the Communiqué no 2002/2. As a result of the examination conducted, it was concluded that the agreements ALGIDA and/or its distributors signed with the outlets fell under the block exemption of the

aforementioned Communiqué, but that the relevant undertaking could not benefit from the Block Exemption Communiqué on Vertical Agreements Amended with the Competition Board Communiqué no 2007/2 due to its market share. However, it was found that effective competition in the industrial ice cream market was prevented by the exclusivity clauses in the agreements ALGIDA and/or its distributors signed with the outlets as well as their practices that led to *de facto* exclusivity, and that the agreements with non-compete obligations ALGIDA and/or its distributors signed with final outlets other than ALGIDA shops should be prohibited in order to establish effective competition in the industrial ice cream market.

- (87) Within that framework, all of the currently valid agreements ALGIDA and its distributors signed with outlets were re-evaluated.

I.5.1.1. Contracts ALGIDA signed with Its Customers

- (88) ALGIDA reaches its customers/outlets through two different methods: distributors or direct sales. In that context, some examples of the agreements signed between ALGIDA and its customers are given below.

I.5.1.1.1. Contracts Signed with the National Channel, Discount Markets and Local Direct Customers

- (89) National customers, local customers and discounts stores are the customer groups with which ALGIDA works directly, and examining the sample agreements signed with them reveals the following:

- The sample agreement titled "Supply Agreement" signed with the national customer (.....) ((.....)) was intended to arrange the procedures and rules concerning the delivery, by the supplier, of the orders given by the retailer at the ordered amounts, to the specified outlets and within the determined time, and to set out the rights and obligations of the parties. On the other hand, the document titled "2019 (.....) Annual Agreement Terms" included premium rates to be paid according to the conditions laid out under the titles "Operational Productivity," "Business Development," and "Other". Accordingly premiums would be paid in return for criteria such as payment on due date, new-product listings and availability of the current portfolio, additional freezer placement (one and/or two additional cabinets other than the existing ones), working with freezers in front of the register, fair shelf share, data sharing, etc., in addition to a performance premium for growth based on the net purchase turnover of the previous year.
- The subject of the sample agreement, titled "Chain Stores Agreement" and signed with (.....), one of the local direct customers, was to determine the fundamental terms, special clauses and the respective rights and obligations of the parties in the trade relationship between the customer and UNILEVER throughout the duration of the agreement. The agreement would automatically renew each year and would be valid for a period of (.....). At the same time, the agreement had Annexes titled "Premium System," "Spoilt Product Return Procedure," "Annual Cabinet Plan," "Growth/Turnover Targets," "Additional Cabinet Space," and "Insert Plan". Similar to the previous agreement sample, the premium system was arranged in accordance with the criteria of payment on due time, effective cabinet placing, placing a cabinet before the register, 12-month ice cream sales, new product listing, insert participation (provision of additional cabinet space) data sharing and growth. Moreover, the parties signed

a Supplementary Protocol concerning the payments to be made to the customer under each of the titles above.

- The “Special Purchase Terms,” signed with the discount market (.....) laid out the premiums to be paid to the customer according to various criteria including payment on time, availability, availability during winter, availability of cabinets and additional cabinets, store participation (for selling the specified portfolio at the newly opened stores), growth rates, etc. Additionally, the “Supplementary Marketing Protocol” arranged between the parties included the terms of the payments to be made to the customer in return for posters to be placed on the outside as well as for the images to be used inside the store.

I.5.1.1.2. Contracts Signed with Indirect Local Customers

- (90) ALGIDA works with some local market chains through its distributors and groups them under the title “indirect local customers”. Some important provisions of the sample agreement, titled “Chain Stores Agreement” and signed with one of these customers, (.....), are included below:

“1. SUBJECT OF THE CONTRACT

The Contract herein is a general agreement which sets out the purchase and sale relationship/agreements between the parties and regulates the terms thereof, and will replace all other agreements signed between the Customer and the Seller. (...).

2. DURATION OF THE CONTRACT

The contract herein will become effective on January 01, 2018, and will remain in force for a period of (.....) by automatically renewing itself, provided it is not terminated by either of the parties in accordance with the provision of Article 13, titled Termination.

4. ORDERS/DELIVERY – RETURNS

...

e. The CUSTOMER shall not store foreign material other than the Products (including water, beverages, chicken, pizza, dough, etc.) in the Unilever-Algida cabinets.

13. TERMINATION

... In case any of the obligations set out in the contract is breached or is not fulfilled within due period, if the requirements of the notice given by the parties within a period (.....) are fulfilled, the other party has the right to immediately terminate the contract herein. Either of the parties may unilaterally terminate the contract without specifying a reason, provided they notify their intention to terminate in writing (.....) in advance at a minimum.

- (91) The Contract also had Annexes titled “Premium System,” “Spoiled Product Return Procedure,” “Annual Cabinet Plan,” “Growth/Turnover Targets,” “Additional Cabinet Space” and “Insert Plan.” The premium system was arranged in accordance with the criteria of payment on due time, effective cabinet placing, placing a cabinet before the register, 12-month ice cream sales, new product listing, insert participation (provision of additional cabinet space) data sharing and growth. In addition, the premium progress rates were laid out in accordance with the specified growth targets. One of the documents submitted, the “Supplementary Protocol” stated that premiums would

also be paid in return for extending the season and for additional Magnum and Maraş cabinets.

I.5.1.1.3. Contracts Signed with Customers in the On-Site Consumption Channel

- (92) ALGIDA works with the customers in the on-site consumption channel through its distributors. Some important provisions of the sample agreement signed with (.....), which is among the customers in this category, are included below:

“1. DEFINITIONS AND THE SUBJECT OF THE CONTRACT

The subject of the Contract herein is to establish the principles concerning the purchase and sale of Algida brand ice cream products between the SELLER and the CUSTOMER for the duration of the contract, as well as to set out the respective rights and obligations of the parties.

2. DURATION OF THE CONTRACT:

This contract shall be valid for a period of (.....) year(s) as of 10/04/2019. At the end of the duration the contract will terminate spontaneously.

...

9. TERMINATION:

In case one of the parties declares bankruptcy, composition or liquidation, the other party may immediately terminate the contract. Apart from the terms above, the CUSTOMER may terminate the contract at will, but in that case the CUSTOMER shall accept and undertake to fully pay in cash the investment amount specified in Article 5, together with the discount interest rates to accrue as of the date of the grant of the investment, within (.....) working days following the termination, at the latest.

I.5.1.1.4. Contracts Signed with Customers in the Traditional Channel

- (93) ALGIDA works with the customers in the traditional channel through its distributors. Some provisions of the sample agreement signed with (.....), one of the customers in that framework, are included below:

“1. DEFINITIONS and THE SUBJECT OF THE CONTRACT

...

The subject of the Contract herein is to establish the principles concerning the purchase and sale of Algida brand ice cream products between the SELLER and the CUSTOMER for the duration of the contract, as well as to set out the respective rights and obligations of the parties.

2. DURATION OF THE CONTRACT:

This contract was signed for a period of (.....) year(s) as of 01/01/2019. At the end of the duration the contract will terminate spontaneously.

...

5. SPECIAL TERMS

The SELLER has paid (.....) to the CUSTOMER to sell Algida brand ice cream in his store for the duration of the contract.

The CUSTOMER shall not store foreign material other than Algida brand products (water, beverages, chicken, pizza, dough, etc.) in the Algida cabinets.

...

9. TERMINATION:

In case one of the parties declares bankruptcy, composition or liquidation, the other party may immediately terminate the contract.

Apart from the terms above, the CUSTOMER may terminate the contract at will, but in that case the CUSTOMER shall accept and undertake to fully pay in cash the investment amount specified in Article 5, together with the discount interest rates to accrue as of the date of the grant of the investment, within (.....) working days following the termination, at the latest.

I.5.1.1.5. Contracts Signed with Customers in the E-Commerce Channel

- (94) Even though in its response ALGIDA stated that it did business with e-commerce customers through distributors, the “E-Commerce Cooperation Agreement” with Getir, submitted as a sample, is signed directly with ALGIDA on 29.06.2015. Some important provisions of the aforementioned agreement are as follows:

“3. Duration

The Contract herein shall become effective on the date of signature, and shall automatically renew under the same terms and conditions for one-year periods unless otherwise notified in writing by the Parties 15 days in advance.

5. Obligations Concerning the Ice Cream Cabinets

For the duration of the contract, exclusively Algida brand ice cream products or other products explicitly authorized in writing by Unilever shall be sold within the area of the business.

a) In order to store ice cream products, Unilever will supply a total of (.....) ice cream cabinets, (.....), ((.....)) on a complimentary basis, and the Operator shall be responsible for keeping the inventory in a good and hygienic condition. Ice cream freezers and cabinets shall be returned to Unilever in case the contract is terminated for any reason. Force majeure rights are reserved. Unilever may increase or decrease the number of ice cream freezers and cabinets as required.

b) In case of cabinet failure, Unilever must be immediately notified. Unilever is responsible for the maintenance and repair of the cabinets.

c) Cabinets shall be delivered to and received from Getir in return for a delivery receipt report.

15. Termination

In case of violation of any article of the Contract herein by one of the parties, the aggrieved Party reserves the right to unilaterally terminate the Contract herein.”

- (95) Annex-2 titled “Commercial Business Conditions” attached to the Contract states under the category of “Minimum Order Amount” that a premium at a rate of 0.5% would be paid in case “*the orders placed in the products and categories determined meet the amounts specified by Unilever ((.....))*”.

I.5.1.1.6. Loan Agreements

- (96) In addition to the agreements above, it has been noted that the cabinets at the outlets contacted through distributors belonged to UNILEVER and that these cabinets were delivered to the outlets/customers by the distributors with a loan agreement. The

provisions of the agreement in question, which is titled "Loan for Use Contract," are quoted below:

“1.SUBJECT

Establishment of the principles and conditions for the delivery of the deep-freeze cabinet owned by Unilever to the Seller as a loan for use, exclusively in the sales of ice cream varieties produced an/or sold and distributed by Unilever.

4.GUARANTEE

As a guarantee for the damages that may occur in case the loaned cabinet is lost, harmed or is not returned, the Seller accepts and undertakes to offer a guarantee to Unilever in a form that is acceptable for Unilever. The form and amount of the guarantee shall be updated each year according to current conditions.

5.PRINCIPLES OF USAGE FOR THE CABINET

a. The Seller is responsible for using the cabinet conscientiously, in compliance with the contract herein and the laws.

b. The Seller shall accept and undertake that it will place the cabinet to the place in their workplace it will determine together with Unilever and will use it exclusively to sell and store the varieties of ice cream produced by Unilever, and it will not transport the cabin anywhere other than their workplace.

...

f. The Seller shall accept and undertake to use the cabinet solely and exclusively for the sale and storage of the varieties of Unilever's ice cream, and to preserve the cabinet in accordance with the principles of goodwill, as a cautious shopkeeper/prudent tradesman. (..)

8. TERMINATION OF THE CONTRACT

Each of the parties has the right to terminate the contract herein at any time and without giving any reason, provided they submit a prior written notification. In such a situation, the Seller shall immediately return the cabinet to Unilever in clean and working condition, with the exception of any wear and tear caused by routine usage. If no damage is detected as a result of Unilever's inspection of the cabinet, the Seller's guarantee shall be returned. Otherwise, the cost of the damages are deducted and the remainder is returned. If the guarantee is insufficient to cover the damages, Unilever reserves the right to demand the balance from the Seller.

12. DURATION OF THE CONTRACT

This loan for use contract is valid for a period of (.....) following the date of signature. The parties agree that at the end of one year or at the end of the extension periods, the Contract shall be extended under the same terms and conditions for one further year, provided none of the parties submit a termination notice. However, the total duration may not exceed (.....) years, including extension periods. In case the duration of the contract reaches (.....) years in this manner, at the end of (.....) years, the parties shall discuss whether the contract shall be renewed, and if yes under what conditions.

(97) Loan agreements will be assessed in the following sections. An examination of the provisions concerning the other types of agreements revealed no other agreement with

exclusivity provisions, with the exception of the agreement signed with GETİR which is among the e-commerce customers.

I.5.1.2. Agreement Signed between ALGİDA and GETİR

- (98) According to the information provided by ALGİDA, customers in the e-commerce channel are categorized as indirect customers whose business is conducted through distributors, and only some of the limited number of e-commerce customers are handled via direct sales. ALGİDA's customers in the e-commerce channel are GETİR and İSTEGELSİN, with İSTEGELSİN's business being conducted via distributors, without a written agreement. On the other hand, ALGİDA is making direct sales to GETİR via the "E-Commerce Cooperation Agreement" signed.
- (99) YEMEK SEPETİ states that there are ongoing discussions between YEMEK SEPETİ and UNILEVER on a product supply agreement for the sale of ALGİDA products on the *Banabi* platform, and that currently they are doing business through (.....).
- (100) There is a "Cooperation Agreement" between ALGİDA and Glovoapp Turkey Teknoloji AŞ, however this agreement covers all UNILEVER products and does not contain any provisions specific to ALGİDA.
- (101) An examination of the agreements concerned shows that, with the exception of the agreement signed with GETİR, these agreements do not contain any provisions violating Article 4 of the Act no 4054. In that context, the next section will examine the AGREEMENT between GETİR and UNILEVER under the Act no 4054 and the secondary legislation.
- (102) GETİR provides a type of online supermarket service providing access to fast moving consumer goods to customers via its website and mobile applications. It is also an outlet that signs agreements with restaurants providing food and beverage services in order to market and sell the products of these restaurants.
- (103) Article 2 of the Communiqué no 2002/2 defines vertical agreements as "*Agreements concluded between two or more undertakings operating at different levels of the production or distribution chain, with the aim of purchase, sale or resale of particular goods or services*". In that sense, the AGREEMENT signed between GETİR and UNILEVER is a vertical agreement.
- (104) The 2008 Decision banned all agreements with non-compete obligations UNILEVER and/or its distributors signed with final outlets in order to establish effective competition in the industrial ice cream market, since these obligations prevented effective competition in the market.
- (105) Yet when the agreement between UNILEVER and GETİR is examined, the non-compete obligation in Article 5 and the provision on the duration of the contract draws attention:
- "For the duration of the contract, exclusively Algida brand ice cream products or other products explicitly authorized in writing by Unilever shall be sold within the area of the business."*
- "The Contract herein shall become effective on the date of signature, and shall automatically renew under the same terms and conditions for one-year periods unless otherwise notified in writing by the Parties 15 days in advance."*
- (106) In all of the loan product purchase agreements between UNILEVER and the outlets, the duration of the contract was limited to five years at the maximum, while the

AGREEMENT with non-compete obligations signed with GETİR was drawn up for an indefinite period of time.

- (107) Article 3 of the Communiqué no 2002/2 defines non-compete obligations as “as any kind of direct or indirect obligation preventing the buyer from producing, purchasing, selling or reselling goods or services that compete with the goods or services which are the subject of the agreement.” Article 5/a of the Communiqué no 2002/2 provides that the exemption of the Communiqué was inapplicable for non-compete obligations placed on the buyer for an indefinite period or for a period of more than five years.
- (108) At the same time, paragraph 40 of the Guidelines on Vertical Agreements states that “...Block exemption may not be applied if the duration of the non-competition obligation on the buyer is indefinite, as well. Non-competition obligations which can be implicitly renewed to exceed five years do not fall under the scope of the block exemption, either. ...” In that respect, the important aspect for the Communiqué no 2002/2 is the fact that at the end of the fifth year following the date of the agreement at the latest, the buyer may express its free will on whether to terminate the current agreement or to enter into discussions for renewing it for a further five years at the maximum. However, in line with the provision in Article 3 of the Agreement signed with GETİR, titled “Duration,” the written notification by the parties is required for terminating the agreement under examination. However, in accordance with the abovementioned Article 35 of the Guidelines in question, the explicit declaration of intent by the parties is required in order to maintain/renew agreements. Therefore, it is concluded that the non-compete obligation in the GETİR agreement is currently valid for an indefinite period.
- (109) Following the investigation notification stating that the provision concerned was taken under examination, UNILEVER informed the Authority that they revised the AGREEMENT signed with GETİR with a “Supplementary Protocol” on 24.11.2019. Accordingly, the new versions of the articles would be as follows:

“Article 3- ADJUSTMENTS”

3.1. The Parties agree that Article 5 of the Contract, titled “Obligations on the Ice Cream Cabinets,” only establishes the Parties’ obligations concerning the ice cream cabinets, and the Parties never considered it to be an exclusivity obligation with any further consequence.

3.2. However, in order to prevent third parties from misconstruing the intended meaning of the expressions in the first sentence of the relevant article, the Parties concluded that it would be appropriate to amend the first sentence of the article in question and revise it so as to reflect the real intent of the Parties concerning the Contract more clearly.

3.3. In that framework, with the Protocol herein, the Parties amend the first sentence of Article 5 of the Contract as follows:

‘Getir accepts and undertakes that it shall use the cabinets provided by Unilever exclusively for the sale and storage of Algida brand ice cream products.’

3.4. With the Protocol herein, the Parties amend Article 4 of the Contract, as well. Article 3 of the Contract has been amended as follows:

‘The Contract herein shall become effective on the date of signature, and shall automatically renew under the same terms and conditions for one-year periods unless otherwise notified in writing by the Parties 15 days in advance. At all events, the duration of the contract is limited to (.....) years. The Contract may be

extended by the mutual and explicit consent of the Parties at the end of the (.....) year, and will otherwise terminate if the Parties cannot come to an agreement.'

- (110) As mentioned above, the duration of the AGREEMENT revised with the Supplementary Protocol dated 25.11.2019 was limited to (.....) years. In addition, in Article 5 of the AGREEMENT titled "Obligations concerning Ice Cream Cabinets," the phrase "*within the area of the business*" was completely removed and the introductory sentence was updated to say "*Getir accepts and undertakes that it shall use utilize the cabinets provided by Unilever exclusively for the sale and storage of Algida brand ice cream products.*"
- (111) The reason for the amendments in the Supplementary Protocol quoted above was given as the fact that Article 5 of the AGREEMENT had only been intended to establish the obligations of the parties concerning the ice cream cabinets, and the parties themselves never understood it to refer to a non-compete obligation with any further consequence; however, in order to prevent misunderstandings by third parties, the first sentence of the relevant article was revised to show the actual intent of the parties more clearly.
- (112) In support of the explanation by UNILEVER, GETİR also stated that the relevant provisions were understood to refer to cabinet exclusivity, that the AGREEMENT provisions were revised with the Supplementary Protocol dated 25.11.2019 in line with UNILEVER's suggestion, that they started to work with the (.....)brand since July 2020, that they did not feel the need to work with a different brand previously, which was completely due to GETİR's own preference.
- (113) Article 2 of the AGREEMENT titled "Definitions" defines the terms seller, customer, practice, manufacturer/producer, advertiser, media, content, content provider and space provider, but it does not have a definition for the phrase "*within the area of the business*" in Article 5 of the AGREEMENT. As such, the phrase "*within the area of the business*" in the AGREEMENT may be understood to refer to the physical area where GETİR has its warehouses, or to the digital platform on which GETİR operates. However, it is concluded that the phrase "*within the area of the business*" can in no way be understood to refer to "*ice cream cabinets*".
- (114) There are no other examples where UNILEVER has signed direct agreements with its customers in the e-commerce channel such as GETİR; furthermore, it should be noted that an examination of the "Orders/Delivery>Returns" provision in the "Chain Stores Agreement" signed with those the outlets that operate as supermarkets while marketing ALGIDA products on their self-owned online platforms at the same time, including (.....), reveals that the articles specifying the obligations concerning the cabinets use the phrase "*inside Algida Cabinets,*" leaving no room for ambiguity.

4. ORDERS/DELIVERY-RETURNS

e. The CUSTOMER shall not store foreign material other than the Products (including water, beverages, chicken, pizza, dough, etc.) in the Unilever-Algida cabinets.

- (115) In addition to the agreements mentioned above, the "Loan for Use Contracts" related to the use of the cabinets at the outlets handled via distributors do not have an article with the phrase "*within the area of the business*" either, and instead utilize terms that clearly express cabinet exclusivity when establishing the obligations related to the cabinets.

- (116) According to the information supplied by GETİR, competing ice cream products were not sold over the GETİR sales platform after the date of 29.06.2015 when the AGREEMENT with UNILEVER was signed. Even though GETİR insists that it was their own choice not to sell competing products and the provision in question referred to cabinet exclusivity, the fact that competing products were not sold over the platform from 29.06.2015 when the agreement was signed until July 2020 shows that GETİR perceived the relevant provision as a non-compete obligation. Furthermore, the response submitted by PANDA during the preliminary inquiry process stated that when it contacted GETİR, GETİR told PANDA that it worked exclusively with one of the actors in the market.
- (117) Within the framework of the information above, it is concluded that the AGREEMENT signed between GETİR and UNILEVER was in violation of the Board's 2008 Decision. This is because the 2008 Decision banned ALGİDA from concluding agreements that include non-compete obligations with outlets other than Algida Shops, from any practices that could lead to *de facto* exclusivity, and from introducing a condition on the outlets to purchase an amount at a certain fraction of the previous year's sales or providing them benefits tied to such conditions.
- (118) The AGREEMENT between UNILEVER and GETİR was signed on 29.06.2015, and it was implemented for a period of close to 4 years and 5 months, including the version amended with the Supplementary Protocol of 25.11.2019. During this period, ALGİDA prevented the sale of competing brand ice cream products over the GETİR platform, and once the AGREEMENT was amended, GETİR started to work with the GOLF brand as well, beginning from July 2020.
- (119) Consequently, administrative fines should be imposed on UNILEVER under Article 16 of the Act no 4054, since the AGREEMENT with which UNILEVER placed non-compete obligations on its customer violated the 2008 Decision, as well as Article 4 of the Act no 4054.

I.5.2. Assessment under Articles 4 and 6 of the Act no 4054

- (120) The assessment under this heading first conducted a dominant position analysis on UNILEVER, followed by an examination of UNILEVER's cabinet exclusivity practices under Articles 4, 5 and 6 of the Act no 4054. Lastly, discount systems were examined under Article 6 of the Act.

I.5.2.1. Dominant Position Analysis

- (121) Dominant position is defined in Article 3 of the Act no 4054 as "*The power of one or more undertakings in a particular market to determine economic parameters such as price, supply, the amount of production and distribution, by acting independently of their competitors and customers*".
- (122) Guidelines on the Assessment of Exclusionary Abusive Conduct by Dominant Undertakings (Dominant Position Guidelines) states that, when assessing dominant position, the Authority should investigate to what extent the undertaking under examination can act independent of competitive pressure, and that the assessment in question must take into consideration the specific circumstances of each case. In addition, any assessment made in accordance with the Dominant Position Guidelines should also take the factors of
- Market positions of the undertaking examined and its competitors,
 - Barriers to entry and expansion,

- Bargaining power of the buyers

into consideration. In that framework, each of the abovementioned factors are evaluated in order to determine whether ALGİDA holds dominant position in the market.

- Market Positions of the Undertaking Examined and Its Competitors

- (123) Under this heading, a dominant position assessment was carried out in the “*industrial ice cream market*” in line with the relevant product market section, and evaluations on the relevant markets of “impulse products,” “take-homeproducts” and “catering products” were also included, since they could be defined as sub-categories of the market in question. At the same time, since each of the traditional, organized retail and on-site consumption channels where the product is sold displays different characteristics, evaluations concerning these consumption channels were given when necessary.
- (124) As mentioned in the Dominant Position Guidelines, market share is the primary indicator of the position of the undertaking examined within the relevant market. An overview of the distribution of total sales in the industrial ice cream market to distribution channels shows that on the basis of turnovers, (.....)% of the sales were in the take-home, (.....)% were in the catering, and (.....)% were in the impulse channels in 2009. Therefore, nearly half of the sales in the relevant market were impulse consumption, in other words, were consumed immediately. Since a large proportion of the impulse sales are made through small markets, grocers and buffets, known as the traditional channel, ALGİDA’s market share in that channel of consumption is important for indicating the power it holds over the traditional channel.
- (125) The table below includes the estimated market shares of the undertakings operating in the industrial ice cream market during the 2017-2019 period. As shown by the table, ALGİDA has the leadership position in the industrial ice cream market, and is followed by GOLF and PANDA, respectively.

Table 12- Market Shares of the Undertakings Operating in the Industrial Ice Cream Market during the 2016-2019 Period (%)⁸

Industrial Ice Cream Market								
	2016		2017		2018		2019	
	Volume	Turnover	Volume	Turnover	Volume	Turnover	Volume	Turnover
ALGİDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
GOLF	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
PANDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
PERNİGOTTİ	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
ETİ	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
A.O.Ç	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Private Label ⁹	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Other ¹⁰	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0

Source: ALGİDA (Nielsen)¹¹

⁸ Trade names of the previously unmentioned undertakings are Infinity Sağlık ve Gıda San. Tic (INFINITY), Kuzin Gıda San. AŞ (KUZİN GIDA) and Nestle Türkiye Gıda San. AŞ (MOVENPICK).

⁹ Information submitted by ALGİDA states that (.....)% of private label products are manufactured by GOLF.

¹⁰ Consists of MOVENPICK, KUZİN GIDA, INFINITY, BABAŞ and others.

¹¹ ALGİDA stated that the industrial ice cream market data was provided by Nielsen, but that Nielsen did not have the catering data and therefore the data shared did not include catering.

- (126) As shown in Table 12, ALGİDA's market share in the industrial ice cream market throughout the years has been in the range of (.....)% in terms of volume, and (.....)% in terms of turnover. When its market share reached (.....)% in 2019, its closest rival GOLF had a market share of (.....)%, with its second rival PANDA at (.....)% market share. In other words, ALGİDA has a market size (.....) times larger than its closest competitor.
- (127) On the other hand, the second and third largest players in the market, GOLF and PANDA, are losing market share. With the exception of private label products, the total market share of the undertakings operating in the market other than the top three was (.....)%, at best. Under the circumstances, in light of the rivals' position in the market, these rivals are quite far from putting any kind of competitive pressure on ALGİDA.
- (128) The following tables show the market shares of the undertakings operating in the market according to the categories of take-home products, impulse products and take-home products.

Table 13- Market Shares of the Undertakings Operating in the Take-Home Market during the 2016-2019 Period (%)

Take-Home								
	2016		2017		2018		2019	
	Volume	Turnover	Volume	Turnover	Volume	Turnover	Volume	Turnover
ALGİDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
GOLF	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
PANDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
PERNİGOTTİ	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
ETİ	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
A.O.Ç	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Private Label	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Other ¹²	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)

Source: ALGİDA (Nielsen)

- (129) Between 2016 and 2019, ALGİDA had a market share of over (.....)% in the take-home channel. Only private label products could increase their market shares in this channel.

Table 14- Market Shares of the Undertakings Operating in the Impulse Market during the 2016-2019 Period (%)

Impulse								
	2016		2017		2018		2019	
	Volume	Turnover	Volume	Turnover	Volume	Turnover	Volume	Turnover
ALGİDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
GOLF	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
PANDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
PERNİGOTTİ	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
ETİ	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
A.O.Ç	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Private Label	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Other ¹³	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)

¹² Consists of INFINITY, KUZİN GIDA, MOVENPICK, BABAS GIDA and others.

¹³ Consists of BABAŞ, INFINITY, KUZİN GIDA, MOVENPICK and others.

Source: ALGİDA (Nielsen)

- (130) In the impulse channel Algida consistently held a market share of around (.....)% between 2016 and 2018, but it increased its market share by (.....) points in 2019 and reached (.....)%. ALGİDA’s market share trend in impulse products is similar to its trend in the total industrial ice cream market. Indeed, one of the most significant causes for that may be the fact that a large portion of the market is made up of impulse products.¹⁴

Table 15- ALGİDA’s Market Share in the Catering Market during the 2016-2019 Period (%)

Catering								
	2016		2017		2018		2019	
	Volume	Turnover	Volume	Turnover	Volume	Turnover	Volume	Turnover
ALGİDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)

Source: ALGİDA (Euromonitor)

- (131) An examination of the table above reveals that ALGİDA increased its market share in the catering market. This increase is thought to stem from the fact that the HORECA channel started to sell relatively more ice cream produced industrially.
- (132) As shown by the tables, ALGİDA’s market shares in the industrial ice cream market and the industrial impulse ice cream markets in terms of turnover in 2019 were (.....)% and (.....)%, respectively.
- (133) The following table includes the shares of the undertakings operating in the industrial ice cream market under the sub-categories of organized retail (supermarkets and discount stores) and traditional retail markets:

Table16- Market Shares of the Undertakings Operating in the Industrial Ice Cream Market within the Organized and Traditional Channels during the 2016-2019 Period (in terms of turnover, %)*

	2016			2017			2018			2019		
	T	D	S	T	D	S	T	D	S	T	D	S
ALGİDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
GOLF	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
PANDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
PERNİGOTTİ	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
ETİ	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
A.O.Ç	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Private Label	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Other ¹⁵	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)

Source: ALGİDA (Nielsen)

*The traditional channel has been abbreviated as T, Discount Stores as D, and Supermarkets as S.

- (134) As shown in Table 16, in the last three years ALGİDA has had a consistent market share of over 80% in the traditional channel and supermarkets. Its lower share in discount markets should be taken in conjunction with the share private label products hold in discount markets. In that case, it can be seen that ALGİDA also owns almost all of the market share outside of the private label products. On the other hand,

¹⁴ ALGİDA stated that it could not access market share data for other undertakings in the catering market.

Consequently, the table only includes market share information for ALGİDA. The responses sent by GOLF and PANDA also do not contain market share data for the catering market.

¹⁵ Consists of BABAŞ, INFINITY, MOVENPICK and others.

ALGIĐA’s closest rival GOLF is losing market share in the traditional channel, which is the most important sales channel of the relevant market.

- (135) An undertaking having a high market share in a specific market constitutes a strong presumption for the existence of dominant position. The Commissions Hoffman-La Roche Decision¹⁶ states that the undertaking had a market share of between 70% to 90% in various relevant product markets, which was sufficiently high to “prove the existence of dominant position”. Therefore, ALGIĐA’s market share is evaluated as providing a strong presumption for the undertaking holding dominant position in the relevant market.
- (136) In the 2008 Decision, ALGIĐA’s share in the industrial ice cream market for the years 2003, 2004, 2005 and 2006 (first nine months) was given as 79.0%, 71.1%, 67.8% and 68.0%, respectively. Its market share for the take-home, impulse and catering categories for the first nine months of 2006 was 70.5%, 67.2% and 65.5%, respectively. As shown by the information above, ALGIĐA has maintained its current high market share for nearly 20 years. In addition to ALGIĐA’s high market share in the relevant market, its ability to maintain that share for a long period of time is an important factor in establishing dominant position, as well.

- Barriers to Entry and Expansion in the Market

- (137) At this juncture, the second step in dominant position assessment is to examine whether there are barriers to entry into the market for new undertakings or whether there are barriers to expansion for undertakings already operating in the market. Dominant Position Guidelines state that the potential of new entries could put competitive pressure on the behavior of the undertaking examined. However such pressure can only be possible if the growth or new entries are probable, can be realized in a suitable amount of time and are at a sufficient level.
- (138) The 2008 Decision examined the existence and levels of various barriers to entry, including brand power and advertising expenses, group advantages, distribution costs, access to sales channels, and portfolio strength. The findings of the Decision in question are still valid. In fact, the 2008 Decision was not appealed before the courts and the decision has been finalized. Accordingly, in the industrial ice cream market with high brand recognition, a new entrant may have to incur significant advertisement costs. On the other hand, since products in the relevant market requires cold chain for transportation and storage, these products are among those with the highest distribution costs. High cabinet and distribution costs and the necessity to advertise due to brand recognition are the most significant barriers to entry into the market.
- (139) The following table includes analyses on brand recognition:

Table 17- Unaided Brand Recognition in the 2nd and 3rd Quarters during the 2017-2019 Period¹⁷ (%)

Brand	2017	2018	2019
ALGIĐA			
Cornetto	(.....)	(.....)	(.....)
Magnum	(.....)	(.....)	(.....)
Carte d’Or	(.....)	(.....)	(.....)

¹⁶ Hoffman-La Roche Decision, Case 85/76, ECR 461, paragraph 38-40.
¹⁷ It is stated that brand scores were calculated by the independent consulting firm Millward Brown, and that the data was collected for the 2nd and 3rd quarters of each year. When calculating unaided brand recognition, the participants were asked the question: “Think about all of the ice cream brands you know. Which brands come to mind?” and percentages were calculated based on the responses.

Max	(.....)	(.....)	(.....)
Nogger	(.....)	(.....)	(.....)
Frigola	(.....)	(.....)	(.....)
Algida Maraş Usulü	(.....)	(.....)	(.....)
Algida Keyif	(.....)	(.....)	(.....)
GOLF			
Bravo	(.....)	(.....)	(.....)
Lungo	(.....)	(.....)	(.....)
Royal	(.....)	(.....)	(.....)
Golf Maraşım	(.....)	(.....)	(.....)
OTHER			
	2017	2018	2019
Panda Kornet/Sen&Ben	(.....)	(.....)	(.....)
Bulk Ice Cream	(.....)	(.....)	(.....)
L'era Fresca	(.....)	(.....)	(.....)
Pernigotti	(.....)	(.....)	(.....)
Source: ALGİDA (Millward Brown)			

Table 18- Brand Power Scores in the 2nd and 3rd Quarters during the 2017-2019 Period¹⁸ (%)

Brand	2017	2018	2019
ALGİDA			
Cornetto	(.....)	(.....)	(.....)
Magnum	(.....)	(.....)	(.....)
Carte d'Or	(.....)	(.....)	(.....)
Max	(.....)	(.....)	(.....)
Nogger	(.....)	(.....)	(.....)
Algida Classic	(.....)	(.....)	(.....)
Algida Maraş Usulü	(.....)	(.....)	(.....)
Algida Keyif	(.....)	(.....)	(.....)
GOLF			
Bravo	(.....)	(.....)	(.....)
Lungo	(.....)	(.....)	(.....)
Royal	(.....)	(.....)	(.....)
Golf Maraşım	(.....)	(.....)	(.....)
OTHER			
Panda <i>Catering</i>	(.....)	(.....)	(.....)
Source: ALGİDA (Millward Brown) (Document 73/13-15)			

- (140) The tables above show that ALGİDA brand ice creams are the most remembered brands when unaided. In parallel with the observations on ALGİDA's market share, ALGİDA seems to be the market leader in terms of consumer recognition, as well. Table 18 shows that when some brands are presented to the consumers, ALGİDA's Magnum ((.....)), Cornetto ((.....)) and Carte d'Or ((.....)) products have a recognition score nearly four times higher than those of its closest rival GOLF's Bravo ((.....)), Lungo ((.....)) and Royal ((.....)) products, which compete with the aforementioned products.

¹⁸ It was stated that the data was calculated by Millward Brown, that five questions were asked to consumers with the question screen displaying brands recognized by the interviewees, and that each question asked interviewees to evaluate the brand into the rank they deemed appropriate.

- (141) While high brand recognition and power strengthens ALGİDA's position in the relevant market, ALGİDA's availability rates in the sales channels may also be regarded as an indicator of dominant position, and the availability rates in question may be evaluated under barriers to entry and growth in the market. Availability can be divided into weighted and numeric distribution. Weighted distribution refers to a product's availability at the retail outlets which have a weighted share of the total sales in the category. In other words, it is the percentage share of the retail outlets where the relevant product is sold within total category sales. Numeric distribution, on the other hand, is the ratio of the outlets that sell a product (where the product is available) to the total number of retail outlets (universe).
- (142) The availability rates of the undertakings operating in the industrial ice cream market are included in the tables below:

Table 19- Availability Rates in the Industrial Ice Cream Market during the 2016-2019 Period (Numeric Distribution, %)*

	2016			2017			2018			2019		
	T	D	S	T	D	S	T	D	S	T	D	S
ALGİDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Total			(.....)			(.....)			(.....)			(.....)
GOLF	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Total			(.....)			(.....)			(.....)			(.....)
PANDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Total			(.....)			(.....)			(.....)			(.....)
PERNİGOTTİ	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Total			(.....)			(.....)			(.....)			(.....)
ETİ	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Total			(.....)			(.....)			(.....)			(.....)
A.O.Ç	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Total			(.....)			(.....)			(.....)			(.....)
Private Label	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Total			(.....)			(.....)			(.....)			(.....)
Other ¹⁹	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Total			(.....)			(.....)			(.....)			(.....)

Source: ALGİDA (Nielsen)

*The traditional channel has been abbreviated as T, Discount Stores as D, and Supermarkets as S.

- (143) In the relevant product market, ALGİDA has availability rates much higher than those of its rivals. ALGİDA has stated that the table above was prepared to include the outlets that sell ice cream. It is also observed that ALGİDA has much higher availability than its rivals in all sub-channels where its products are distributed. In light of the fact that the traditional channel is still very strong in ice cream sales, the availability rate of even ALGİDA's closest rival in the relevant channel remains quite low, with (.....)% in 2019.
- (144) The following table presents the weighted availability rates:

Table 20- Availability Rates in the Industrial Ice Cream Market during the 2016-2019 Period (Weighted Distribution, %)*

	2016			2017			2018			2019		
	T	D	S	T	D	S	T	D	S	T	D	S
ALGİDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Total			(.....)			(.....)			(.....)			(.....)
GOLF	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Total			(.....)			(.....)			(.....)			(.....)

¹⁹ Consists of BABAŞ, INFINITY, MOVENPICK and others.

PANDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Total	(.....)			(.....)			(.....)			(.....)		
PERNIGOTTI	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Total	(.....)			(.....)			(.....)			(.....)		
ETİ	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Total	(.....)			(.....)			(.....)			(.....)		
A.O.Ç	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Total	(.....)			(.....)			(.....)			(.....)		
Private Label	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Total	(.....)			(.....)			(.....)			(.....)		
Other	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Total	(.....)			(.....)			(.....)			(.....)		
Source: ALGİDA (Nielsen)												

*The traditional channel has been abbreviated as T, Discount Stores as D, and Supermarkets as S.

- (145) Looking at the weighted availability rates of the products sold in the industrial ice cream market, during 2016-2019 ALGİDA was present in the traditional and supermarket channels with a rate at and over (.....)%, and reached an availability of (.....)% and more for all sub-channels in 2019. It is observed that the availability rates of ALGİDA's closest rival, GOLF, decreased in the traditional channel during 2016-2019 (from (.....)% to (.....)%), but increased in discount markets. ALGİDA's second closest rival PANDA, on the other hand, has an availability only in the traditional channel at around (.....)%, and was not present in the organized channel, particularly from 2017 onward.
- (146) Lastly, the following table shows the availability rates for impulse products that are consumed immediately:

Table 21- Availability Rates in the Impulse Industrial Ice Cream Market During the 2016-2019 Period (Weighted Distribution, %)

	2016	2017	2018	2019
ALGİDA	(.....)	(.....)	(.....)	(.....)
GOLF	(.....)	(.....)	(.....)	(.....)
PANDA	(.....)	(.....)	(.....)	(.....)
PERNIGOTTI	(.....)	(.....)	(.....)	(.....)
ETİ	(.....)	(.....)	(.....)	(.....)
A.O.Ç	(.....)	(.....)	(.....)	(.....)
Private Label	(.....)	(.....)	(.....)	(.....)
Other	(.....)	(.....)	(.....)	(.....)
Source: ALGİDA (Nielsen)				

- (147) When weighted availability rates are calculated to include only impulse products, ALGİDA's availability can be seen to increase throughout the years, while PANDA's has been decreasing. The second largest player in the market, GOLF, has an availability rate of around (.....)%, which is much below ALGİDA.
- (148) Accordingly, ALGİDA's current availability rates seem to support the dominant position assessment of the previous section, which was based on market shares.
- (149) In the 2008 Decision, ALGİDA's availability as of June 2005 was (.....)% on average in the traditional channel, and (.....)% in the supermarket channel. In the same period, its closest rival GOLF had an availability rate of (.....)% on average in the traditional channel, and (.....)% in the supermarket channel. ALGİDA's availability in the traditional channel is still much higher than its rivals, with the closest competitor's availability falling from (.....)% to (.....)% in the traditional channel, and from (.....)% to around (.....)% in the supermarket channel. This analysis strengthens the dominant position analysis conducted, as well.

- (150) At this point, it would be beneficial to mention whether there were any new entries into the market through the years. The first ice cream producer engaged in industrial production in the ice cream market was İzmir Süt Mamulleri Sanayi ve Tic. AŞ (MEMO), based in İzmir. The first nation-wide industrial ice cream maker, on the other hand, was PANDA which entered the market in 1984. ALGİDA entered the Turkish market in 1990, GOLF in 1999. At the time GOLF was controlled by the Ülker Group, whose market share tripled after it acquired Schöller in 2003.²⁰
- (151) The following table includes the 2001-2006 market shares as listed in the 2008 Decision, calculated based on turnover:

Table 22- Impulse and Take-Home Market Shares in the Retail Channel during the 2001-2006 Period (%)

	2001	2002	2003	2004	2005	2006
ALGİDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
GOLF	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
PANDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Other	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Total	100.0	100.0	100.0	100.0	100.0	100.0

Source: 2008 Decision

- (152) The following table includes the market shares calculated during the examination process:

Table 23- Market Shares of the Undertakings Operating in the Industrial Ice Cream Market during the 2016-2019 Period (%)

	2016	2017	2018	2019
ALGİDA	(.....)	(.....)	(.....)	(.....)
GOLF	(.....)	(.....)	(.....)	(.....)
PANDA	(.....)	(.....)	(.....)	(.....)
Other	(.....)	(.....)	(.....)	(.....)
Total	100.0	100.0	100.0	100.0

Source: ALGİDA (Nielsen)²¹

- (153) ALGİDA, GOLF and PANDA are the first three big actors operating in the market for years, with PANDA and GOLF winning market share not from ALGİDA, but from each other. As the tables show, ALGİDA increased its market share of (.....)% in 2006 to (.....)% in 2019. During the same period, GOLF's share fell from (.....)% to (.....)%, and PANDA's from (.....)% to (.....)%. Currently, with the exception of the top three undertakings in question, there are no other undertakings in the industrial ice cream market with a market share of over (.....)%.
- (154) In addition, BABAŞ GIDA notes that undertakings mentioned in the 2008 Decision such as MEMO, Dinamik Gıda Üretim ve Pazarlama San. Tic. Ltd. Şti. (Alaska), Geye Dondurma Gıda San. ve Tic. AŞ and Özerişen Süt Gıda San. ve Tic. AŞ (Flaş), as well as other undertakings including Sakız Dondurma ve Süt Mam. Gıda San. Tic. AŞ and Defne Gıda San. Dış. Tic. Ltd. Şti. (Pendo Dondurma) were unable to find success in the market.
- (155) Thus, there were no successful entrants into the market except GOLF, and many smaller-scale firms left the market. The existence of barriers to growth in the market is

²⁰ 2008 Exemption Decision, para. 340.

²¹ ALGİDA stated that the industrial ice cream market data was provided by Nielsen, but that Nielsen did not have the catering data and therefore the data shared did not include catering.

also indicated by the unchanging market position of the rivals through the years as well as by the increase in ALGİDA's market share.

- Buyer power

According to Dominant Position Guidelines, buyer power emerges when the customers of the undertaking examined are relatively large, sufficiently informed on alternative sources of supply, and capable of switching to a different provider or creating their own supply within a reasonable period of time. The examination determined that ALGİDA has three types of buyers. The first group consists of ALGİDA's distributors, the second of national chains operating throughout Turkey, and the last of the local chains operating regionally. The following table has been prepared to determine whether ALGİDA was facing strong buyers in the industrial ice cream market in the customer groups listed above.

Table 24- Top Five Customers with the Largest Share in Terms of Turnover within ALGİDA's Customer Groups in 2018 (%)

Distributor Name	Share in the 2018 Turnover	Share in the 2019 Turnover
KARSAN GRUP	(.....)	(.....)
SMB GRUP	(.....)	(.....)
ZİRVE UNITRAK-ZİRVEGÜL	(.....)	(.....)
BAŞAK GRUP	(.....)	(.....)
ALDO GRUP	(.....)	(.....)
Name of the National Chain Customer		
A-101	(.....)	(.....)
MİGROS	(.....)	(.....)
ŞOK	(.....)	(.....)
CARREFOUR	(.....)	(.....)
BİM	(.....)	(.....)
Name of the Local Chain Customer		
ÇAĞDAŞ	(.....)	(.....)
HAKMAR	(.....)	(.....)
ÖZEN	(.....)	(.....)
HAPPY CENTER	(.....)	(.....)
YUNUS MARKET	(.....)	(.....)
Source: ALGİDA		

- (156) ALGİDA works directly with its customers in the organized retail channel, while in the traditional channel, it moves its products to the outlets via distributors. As a result, the final customers in the latter channel are the numerous outlets such as small markets, buffets and grocers, which purchase the products from the distributors. In that context, there can be no buyer power in the channel
- (157) As shown in Table 24, the largest customer of ALGİDA in the organized retail market, (.....), has a share of (.....)% in total sales, with the top five customers total share reaching (.....)%. The data in question proves that a level of buyer power that could create a sufficient amount of competitive pressure against ALGİDA's dominant position does not exist. Taken together with ALGİDA's brand recognition, these data reveal that it would be impossible for markets to remove these products from their inventory due to the strong demand for ALGİDA products.

(158) In light of all of the information listed above, it was concluded that ALGI DA held dominant position in the industrial ice cream market, which was identified as the relevant market, as well as the impulse ice cream and take-home ice cream markets, defined as the sub-categories of the relevant market.

I.5.2.2. Abuse of Dominant Position Assessment

(159) Article 6 of the Act no 4054, titled "Abuse of Dominant Position," declares that it is illegal and prohibited for one or more undertakings to abuse their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices. The second paragraph of the same Article lists some non-comprehensive instances of abuse as follows:

- *Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market,*
- *Making direct or indirect discrimination between purchasers with equal status by offering different terms for the same and equal rights, obligations and acts,*
- *Purchasing another good or service together with a good or service, or tying a good or service demanded by purchasers acting as intermediary undertakings to the condition of displaying another good or service by the purchaser, or imposing limitations with regard to the terms of purchase and sale in case of resale, such as not selling a purchased good below a particular price,*
- *Conduct which aim to distort competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market,*
- *Restricting production, marketing or technical development to the prejudice of consumers.*

(160) In the application of article 6 of the Act no 4054, it is not in itself an infringement for an undertaking to hold dominant position, and undertakings are allowed to become more prominent competitively as a result of their internal efficiencies. However, the aforementioned Act prohibits any practice of dominant undertakings that may reduce consumer welfare by exploiting the advantages of the market power they enjoy. In this respect, dominant undertakings are considered to have a "special responsibility" not to allow their conduct to restrict competition.

(161) In general terms, practices prohibited by Article 6 of the Act no 4054 may be grouped under exploitative, discriminatory and exclusionary practices. Exploitative practices are those in which the dominant undertaking aims to transfer value from its customers through exorbitant pricing or similar methods. By discrimination, the dominant undertaking tries to turn the competitive conditions of the relevant market to its own favor. Exclusionary practices are those in which the dominant undertaking tries to foreclose the market to its competitors.

(162) In this framework, the claims in the application alleging that ALGI DA created *de facto* exclusivity at the final outlets by preventing the sales of competing products through the use of cabinet exclusivity and discount practices must be assessed under exclusionary abuses in accordance with Article 6 of the Act.

I.5.2.2.1. Assessment on Cabinet Exclusivity

- (163) The standard loan for use agreement ALGIDA signs with outlets includes the provision: “*The seller shall accept and to use the cabinet solely and exclusively for the sale and storage of Unilever’s varieties of ice cream....*”. Consequently, ALGIDA’s practice involves the exclusive use of the freezer provided to the outlets by the loan of use agreement.
- (164) Ice cream is a product that, by its very nature, must be stored and sold to the consumer at a certain temperature. Therefore freezers are a must for getting the product to the consumer hygienically. It is not possible to offer ice cream without a freezer/on the shelves. Due to this characteristic of the product, the fact that there is generally only one freezer belonging to a company at the outlet, taken together with the freezer exclusivity practice mean that the outlet would be unable to sell products of another company (outlet exclusivity).
- (165) According to the market study conducted for the 2008 Decision, nearly all of the freezers at the outlets belong to the ice cream manufacturers. The outlets do not invest in freezers due to the free-of-charge freezers they receive and the high costs of purchase and maintenance. The reluctance of outlets to invest in freezers allow freezer exclusivity to lead to outlet exclusivity, resulting in a foreclosure effect.
- (166) According to the market study utilized in the relevant decision of 2008, the outlets do not wish to place additional freezers mainly due to a lack of space and electricity costs. The market study measured the average number of freezers at the outlets in the traditional channel as 1 (1.16), and the ideal number of freezers as 1 (1.25). In light of that information, it is concluded that outlets in the traditional channel that suffer from a lack of space do not have the capability to place any additional freezers in the store, as a result of which freezer exclusivity leads to outlet exclusivity.
- (167) The observation that freezer exclusivity led to outlet exclusivity for those outlets without sufficient space for a secondary freezer was also noted by the European Commission in its UNILEVER Decision²² of 1998 as well as in the Exemption Decision of 2008. Nevertheless, according to the 2008 Decision the survey results revealed that only 30% of the outlets would offer competing products, and that a significant portion of 70% stated that they would not offer competing products even if ALGIDA were to allow it. The Decision stated that, under the circumstances at the time, there was no demand for competing products, and therefore introducing a threshold to open freezers to competition in this market would not change the actual situation under the prevailing market and demand conditions.

A significant time has elapsed since that decision was taken in 2008, making it necessary to re-evaluate the market conditions. In order to identify the present market conditions, analysis must be conducted into various factors including the number of freezers and the number of outlets with product availability in the last three years for both ALGIDA and its rivals, so that the effects of freezer exclusivity on competition can be examined. Even though it is important to establish the status of the traditional channel in that analysis, for comparison purposes the information in question was collected for discount, national and regional stores as well.

²² Commission Decision (98/531/EC), Case Nos IV/34.073, IV/34.395, IV/35.436 Van den Bergh Foods Limited

- Assessment on the Number of Outlets and Freezers for Undertakings

- (168) The following tables show the number the outlets ALGİDA worked with in 2019 and the number of freezers at these outlets:

Table 25- ALGİDA's Total Numbers of Outlets and Number of Freezers as well as Its Average Number of Freezers, According to Customer Groups -2019

	Traditional Retail	Discount Markets	National Supermarket Chains	Local Chains
Total Outlets	(.....)	(.....)	(.....)	(.....)
Total Freezers	(.....)	(.....)	(.....)	(.....)
Average Freezers	(.....)	(.....)	(.....)	(.....)

Source: ALGİDA

- (169) As shown in the table above, ALGİDA products are available at (.....) outlets. According to Nielsen data, there are a total of (.....) traditional outlets, including those that sell and do not sell ice cream. That means ALGİDA is available in (.....)% of the channel.
- (170) The average number of ALGİDA's freezers support the findings of the 2008 Decision. The average number of freezers in the traditional channel is (.....). In terms of customer groups, the average number of freezers increase in parallel with the sales area of the store, as might be expected. At this juncture, a separate focus should be placed on discount stores. Among the undertakings active in the discount store business, A101 and ŞOK keep freezers of the supplier in their stores, while BİM only uses self-owned freezers. As a result, the average number of ALGİDA freezers in discount stores, which have a larger sales area than the stores in the traditional channel, are lower than all of the other sales channels.
- (171) In the traditional channel, ALGİDA had a total of (.....) freezers in 2019. The distribution of these freezers to different outlets are as follows:

Table 26- The Number of ALGİDA Freezers at Outlets for Each Customer Group- 2019

Number of Freezers	Traditional Retail	Discount Markets	National Supermarket Chains	Local Chains
1	(.....)	(.....)	(.....)	(.....)
2	(.....)	(.....)	(.....)	(.....)
3	(.....)	(.....)	(.....)	(.....)
4	(.....)	(.....)	(.....)	(.....)
5	(.....)	(.....)	(.....)	(.....)
6	(.....)	(.....)	(.....)	(.....)
7	(.....)	(.....)	(.....)	(.....)
>7	(.....)	(.....)	(.....)	(.....)

Source: ALGİDA

- (172) As the table above shows, ALGİDA works with a single freezer at more than (.....)% of the traditional outlets. This is thought to be due to the lack of space at the outlets in the traditional channel for additional freezers. In fact, as the table above makes clear,

ALGIDA provides two freezers to those outlets that can accommodate two, and more to those that can accommodate more.

(173) The following tables show the outlets where ALGIDA and rivals were available in the last three years:

Table 27- Number of Outlets That Have the Products of Ice Cream Manufacturers Available during the 2017-2019 Period

Year	Undertaking	Traditional Retail	Discount Markets	National Chain Customers	Local Chains
2017	ALGIDA	(.....)	(.....)	(.....)	(.....)
	GOLF	(.....)	(.....)	(.....)	(.....)
	PANDA	(.....)	(.....)	(.....)	(.....)
	TOTAL	(.....)	(.....)	(.....)	(.....)
2018	ALGIDA	(.....)	(.....)	(.....)	(.....)
	GOLF	(.....)	(.....)	(.....)	(.....)
	PANDA	(.....)	(.....)	(.....)	(.....)
	TOTAL	(.....)	(.....)	(.....)	(.....)
2019	ALGIDA	(.....)	(.....)	(.....)	(.....)
	GOLF	(.....)	(.....)	(.....)	(.....)
	PANDA	(.....)	(.....)	(.....)	(.....)
	TOTAL	(.....)	(.....)	(.....)	(.....)

Source: ALGIDA, GOLF, PANDA

(174) As the table shows, ALGIDA consistently increased the number of outlets where its product were available in each channel. On the other hand, the number of outlets that stock PANDA products, not available at discount and national markets, decreased consistently, both in the traditional channel and in local chains. Similarly, GOLF lost outlets in all sales channels, with the exception of discount markets.

(175) An examination of the table with regards to the traditional channel shows that ALGIDA is available in this channel at an average of five times as many outlets than its competitors, and that in the last three years the number of outlets at which ALGIDA was available went up while the availability of its rivals consistently decreased. Similarly, the table shows that the number of total retail outlets offering ice cream products are going down each year. The increase in the number of outlets offering ALGIDA products in contrast to the decreasing total number of outlets indicate that those outlets offering competing products are becoming ALGIDA outlets, and that ALGIDA’s increasing presence at those outlets do not stem from a growth in the market.

(176) The following table shows the number of outlets with freezers owned by the undertakings.

Table 28- The Number of Outlets with Freezers Owned by Ice Cream Producing Undertakings during the 2017-2019 Period

Year	Undertaking	Traditional Retail	Discount Markets	National Chain Customers	Local Chains
2017	ALGIDA	(.....)	(.....)	(.....)	(.....)
	GOLF	(.....)	(.....)	(.....)	(.....)
	PANDA	(.....)	(.....)	(.....)	(.....)
	TOTAL	(.....)	(.....)	(.....)	(.....)

2018	ALGIĐA	(.....)	(.....)	(.....)	(.....)
	GOLF	(.....)	(.....)	(.....)	(.....)
	PANDA	(.....)	(.....)	(.....)	(.....)
	TOTAL	(.....)	(.....)	(.....)	(.....)
2019	ALGIĐA	(.....)	(.....)	(.....)	(.....)
	GOLF	(.....)	(.....)	(.....)	(.....)
	PANDA	(.....)	(.....)	(.....)	(.....)
	TOTAL	(.....)	(.....)	(.....)	(.....)
Source: ALGIĐA, GOLF, PANDA					

- (177) The table above shows that the number of ALGIĐA freezers increased in all channels. On the other hand GOLF only increased its freezer availability in discount markets, while PANDA faced a decrease in both traditional channel and in chain markets, and was not available at all in discount and national markets.
- (178) An examination of the table with regards to the traditional channel reveals a constant increase in the number of outlets that have ALGIĐA freezers available, with a similar constant decrease in the number of outlets with the rivals' freezers. As noted before, in light of a lack of increase in the number of total outlets, it would not be wrong to submit that the rivals' freezers were replaced by ALGIĐA ones.
- (179) The following table shows the freezer numbers of undertakings:

Table 29- Total Number of Freezers Owned by Ice Cream Producer Undertakings at the Outlets during the 2017-2019 Period

Year	Undertaking	Traditional Retail	Discount Markets	National Chain Customers	Local Chains
2017	ALGIĐA	(.....)	(.....)	(.....)	(.....)
	GOLF	(.....)	(.....)	(.....)	(.....)
	PANDA*	(.....)	(.....)	(.....)	(.....)
	TOTAL	(.....)	(.....)	(.....)	(.....)
2018	ALGIĐA	(.....)	(.....)	(.....)	(.....)
	GOLF	(.....)	(.....)	(.....)	(.....)
	PANDA*	(.....)	(.....)	(.....)	(.....)
	TOTAL	(.....)	(.....)	(.....)	(.....)
2019	ALGIĐA	(.....)	(.....)	(.....)	(.....)
	GOLF	(.....)	(.....)	(.....)	(.....)
	PANDA*	(.....)	(.....)	(.....)	(.....)
	TOTAL	(.....)	(.....)	(.....)	(.....)
Source: ALGIĐA, GOLF, PANDA					

* PANDA indicated that it could not provide a number for total freezers due to their inventory system.

- (180) An overview of undertaking's total number of freezers at the outlets shows that ALGIĐA has significantly more freezers than PANDA and GOLF. The number of ALGIĐA freezers in the traditional channel remained the same, but it increased in all other channels. Conversely, the rivals' freezers numbers dropped down through the years, which resulted in an increase in ALGIĐA's share in all channels. The number of GOLF's freezers only increased in the discount store business channel.
- (181) When examined with regards to the traditional channel, the number of ALGIĐA freezers is observed to be four times that of its closest rival on average, with a

consistent decrease in the number of rivals' freezers while the number of ALGIDA freezers remained constant. As of 2019, (.....)% of the freezers in the traditional channel were owned by ALGIDA. That percentage was (.....)% in 2017 and (.....)% in 2018.

(182) As mentioned above, ALGIDA serviced an average of (.....)% of its outlets in the traditional channel with a single freezer, and (.....)% of these points had two or more freezers. In order to compare this with the other undertakings, first the outlets where the undertakings have more than one freezer are given below, followed by the number of freezers in those outlets:

Table 30- The Number of Outlets Where Ice Cream Producing Undertakings Have More Than One Freezer during the 2017-2019 Period

Year	Undertaking	Traditional Retail	Discount Markets	National Chain Customers	Local Chains
2017	ALGIDA	(.....)	(.....)	(.....)	(.....)
	GOLF	(.....)	(.....)	(.....)	(.....)
	PANDA	(.....)	(.....)	(.....)	(.....)
	TOTAL	(.....)	(.....)	(.....)	(.....)
2018	ALGIDA	(.....)	(.....)	(.....)	(.....)
	GOLF	(.....)	(.....)	(.....)	(.....)
	PANDA	(.....)	(.....)	(.....)	(.....)
	TOTAL	(.....)	(.....)	(.....)	(.....)
2019	ALGIDA	(.....)	(.....)	(.....)	(.....)
	GOLF	(.....)	(.....)	(.....)	(.....)
	PANDA	(.....)	(.....)	(.....)	(.....)
	TOTAL	(.....)	(.....)	(.....)	(.....)

Source: ALGIDA, GOLF, PANDA

(183) Examining the table shows that the number of outlets where ALGIDA has more than one freezer increased in the national and local chain channels, while the number of outlets with more than one freezer in these channels fell down for the competitors. With regards to the traditional channel, the number of outlets where ALGIDA had more than one freezer was, on average, five times that of its closest rival for all three years. As of 2019, ALGIDA caters to (.....)% of the traditional market in terms of outlets with more than one freezer.

(184) The following table includes the number of freezers at those outlets where undertakings have more than one freezer:

Table 31- The Number of Freezers at the Outlets Where Ice Cream Producing Undertakings Have More Than One Freezer during the 2017-2019 Period

Year	Undertaking	Traditional Retail	Discount Markets	National Chain Customers	Local Chains
2017	ALGIDA	(.....)	(.....)	(.....)	(.....)
	GOLF	(.....)	(.....)	(.....)	(.....)
	PANDA*	(.....)	(.....)	(.....)	(.....)
	TOTAL	(.....)	(.....)	(.....)	(.....)
2018	ALGIDA	(.....)	(.....)	(.....)	(.....)

	GOLF	(.....)	(.....)	(.....)	(.....)
	PANDA*	(.....)	(.....)	(.....)	(.....)
	TOTAL	(.....)	(.....)	(.....)	(.....)
2019	ALGİDA	(.....)	(.....)	(.....)	(.....)
	GOLF	(.....)	(.....)	(.....)	(.....)
	PANDA*	(.....)	(.....)	(.....)	(.....)
	TOTAL	(.....)	(.....)	(.....)	(.....)
Source: ALGİDA, GOLF, PANDA					

* PANDA indicated that it could not provide a number for total freezers due to their inventory system.

- (185) In those sales channels where undertakings have more than one freezer, it is observed that even though the number of ALGİDA freezers somewhat decreased in the traditional channel, the number of freezers owned by the undertaking increased in the other channels. The GOLF freezer numbers are more unstable, with a numerical decrease at all channels observed in 2019. However, this is less than the decrease in those outlets where GOLF had a single freezer.
- (186) Currently GOLF's total number of freezers have been decreasing and it has significantly fewer total number of freezers than ALGİDA at those outlets with more than one freezer, though within the traditional channel its number of freezers have been increasing at those outlets with more than one freezer. In that context, it is possible to say that if GOLF is currently available at an outlet with more than one freezer, it is able to maintain its position at that outlet, but it is forced out of those outlets where it has a single freezer.
- (187) In addition, within the traditional channel, the decrease in the total number of freezers at those outlets with more than one freezer, especially for ALGİDA, may show that the channel have been saturated in terms of multiple freezers, particularly in light of the lack of physical space.
- (188) However, ALGİDA's share and dominance is much more pronounced in terms of the total number of freezers at those outlets with more than one freezer. In fact, while ALGİDA has around (.....)% share in total freezers, but its share reaches to around (.....)% for freezers at those outlets with more than one freezer.
- (189) As mentioned above, particularly in the traditional channel, since those outlets lacking sufficient physical space are unable to place additional freezers, freezer exclusivity turns into outlet exclusivity. In addition to this existing situation, it is thought that placing two and/or more freezers owned by the same brand at the outlets will make it impossible for freezers of another company to find space at those outlets.
- (190) An assessment concerning refrigerators is included in the Board decision dated 10.09.2007 and numbered 07-70/864-327, examining the revocation of the exemption Coca-Cola İçecek AŞ (CCİ) and dealers enjoyed under the Communiqué no 2002/2 for the agreements they signed with the final outlets. The decision concerned states that the refrigerators provided to the outlets under loan agreements have an important function due to their effect of casing *de facto* exclusivity, that this exclusivity effect was limited for retail outlets larger than 100 m², and that the main factor in turning refrigerator exclusivity into *de facto* exclusivity was the available space of the outlet concerned. The decision also states that a limited number of refrigerators were

available within the traditional channel, where cold availability was important, due to a lack of space in the outlets, which made refrigerators a significant barrier to entry.

(191) In that framework, the aforementioned decision set out a number of rules for storing competing products in the refrigerators, and the decision introduced the following main arrangement with regards to refrigerators:

- For those outlets in the home channel with a net sales area of 100 m² and less, if an outlet does not have a refrigerator for non-alcoholic commercial beverages directly accessible by the consumer other than those owned by CCI, then loan agreements regulating the use of CCI refrigerators at that outlet must be arranged to allow the placement of competing products in the refrigerator covering 20% of the visible area of the refrigerator as well as the total refrigerator volume at the outlet.
- For those outlets in the on-site consumption channel, if an outlet does not have a refrigerator for non-alcoholic commercial beverages other than those owned by CCI that allows hygienic storage of beverages, loan agreements regulating the use of CCI refrigerators at that outlet must be arranged to allow the placement of competing products in the refrigerator covering 20% of the visible area of the refrigerator as well as the total refrigerator volume in the outlet.

(192) The Board decision dated 22.04.2005 and numbered 05-27/317-80 on the beer market includes the following provisions concerning refrigerators:

- It was decided that non-compete obligations (exclusivity clauses) and other limitations with this effect (exclusive purchasing obligations, minimum purchase/sale obligations, obligations tying the loans and other contributions such as discounts, etc. to the condition of selling a single brand) included in the exclusive purchase agreements Efes Pazarlama ve Dağıtım Ticaret AŞ (EFPA) and Bimpaş Bira ve Meşrubat Pazarlama AŞ'nin (BİMPAŞ) or their distributors/dealers signed with both on-premise and off-premise final outlets constituted a significant barrier to establish effective competition in the beer market.
- In order to establish effective competition in the market, the exemption granted with the Communiqué no 2002/2 to such exclusive purchase agreements EFPA and BİMPAŞ signed with on-premise outlets or off-premise outlets, either themselves or through their distributors/dealers, should be revoked under Article 13 of the Act.
- Prevention, by EFPA and BİMPAŞ, of final outlets from storing competing products in the refrigerators provided by the undertakings concerned or by their distributors/dealers constitute a significant barrier for establishing competition in the market, and therefore the practice of prohibiting the storage of competing beer products in these refrigerators should be terminated.

(193) The decision dated 22.04.2005 and numbered 05-27/317-80 did not place a restriction on the competing products to be stored in the refrigerators and did not clearly specify how much and which portion of the refrigerator was open for use of the competitor. Therefore, additional regulations were introduced in the Board decision dated 10.04.2008 and numbered 08-28/321-105.

(194) The decision dated 10.04.2008 and numbered 08-28/321-105, referenced the ruling in the Cola Decision, noting that if, in the home channel, outlets with less than 100 m²

sales area only had CCI refrigerator(s) on the premises, rival undertakings could place products in those refrigerators no more than 20% of the refrigerator capacity in order to prevent *de facto* exclusivity, and went on to remark that the 100 m² threshold would be useful to represent traditional channel outlets. It was stated that if those outlets with less than 100 m² sales area did not have alcoholic beverage refrigerators other than those owned by EFPA/BİMPAŞ directly accessible by the consumer, then the loan agreements regulating the use of these refrigerators in those outlets should allow the storage of competing products covering 20% of the visible portion of the refrigerator as well as the total refrigerator volume.

- (195) As made clear by the decisions quoted above, with respect to retail outlets, the fundamental criterion for storing competing products in the freezers owned by an undertaking is the size of the sales area (100 m²). On the other hand, there is no such limitation for the on-site consumption channel. Nonetheless, the decision in question makes it clear, for both on-site consumption and the home channel, that if the outlets have refrigerators belonging to more than one undertaking, then the obligation for storing competing products in the refrigerators concerned would not be applicable.
- (196) In the industrial ice cream market, similar to the cola and beer decisions, the concern that freezer exclusivity would result in *de facto* exclusivity is mostly related to those outlets smaller than 100 m², since they are unable to increase the number of freezers due to a lack of space. Moreover, unlike the cola/beer markets where the product can be offered warm/on the shelf, it is not possible to sell ice cream without a freezer, and therefore freezer exclusivity can easily turn into *de facto* exclusivity for those outlets with insufficient space, as a result of which the rivals would be completely unable to access the outlets concerned. On the other hand, the larger sales area in those outlets with more than 100 m² of space would limit freezer exclusivity, and therefore *de facto* exclusivity.
- (197) As mentioned previously, the ideal number of freezers in the traditional channel is 1.25 according to the market study conducted as part of the 2008 Decision. In the information submitted by ALGİDA the freezer average in the traditional channel is only 1.18, which goes up to 2.47 and 2.71 for national and local chains, respectively. Additionally, it must be noted that the traditional channel outlets submitted by ALGİDA also include those outlets with more than 100 m² space, the removal of which would result in a further reduction in the number in question.
- (198) In light of the information above, it becomes clear that the effects of freezer exclusivity in the industrial ice cream market are mostly seen at those points of sale with less than 100 m² of space, which may lack sufficient space for a second freezer. At this juncture, it would be beneficial to determine the total number of outlets with less than 100 m² space, and how many of those outlets exclusively offer ALGİDA products. It would thus be possible to determine how much of the sub-100 m² market ALGİDA foreclosed to rivals.
- (199) According to the documents and information in the file, since Nielsen does not classify outlets according to their sales area (m²), there is no data on how many traditional retail outlets are larger than 100 m² and how many are smaller.
- (200) Additionally, neither ALGİDA nor competitors provided information on those outlets that sell their products exclusively. As a result, both the number of outlets smaller than 100 m² and the exclusive presence of ALGİDA and rivals at those points were calculated based on a number of assumptions given below.

- (201) First of all, undertakings were asked to specify the outlets they do business with which are smaller than 100 m². Since ALGİDA's response did not provide this information, a second request was made which ALGİDA responded by stating that it could not provide such information, but could provide a study specifying which traditional channel customers were buffets, dried nuts and fruits sellers, fuel stations, etc. ALGİDA noted that buffets could generally be considered to be below 100 m², and customers like fuel stations and military canteens with significantly larger area that can have multiple cabinets can be considered to have a selling are of larger than 100 m².
- (202) Information provided by ALGİDA classified outlets into grocers & markets (Small), fuel stations, BP petrol, buffets & dried nuts and fruits sellers, *catering* cafeterias, e-commerce, ekomini, non-food, public institution canteens, LMT²³ Anatolia indirect, LMT Aegean direct, LMT Aegean indirect, normal retail business, school, mid-&large-size supermarkets, hotels, patisseries, bakeries, restaurants, Shell, sport/entertainment/recreation, and water distributors. Based on the explanations by ALGİDA representatives, it was concluded that BP petrol, kiosks & dried nuts and fruits sellers, *catering* cafeterias, e-commerce, ekomini, non-food, public canteens, LMT Anatolia indirect, LMT Aegean direct, LMT Aegean indirect, normal retail, school, mid-&large-size supermarkets, hotels, patisseries, bakeries, restaurants, Shell fuel stations and sport/entertainment/recreation outlets were larger than 100 m². However, non-food and normal retail outlets whose size were unclear were also assumed to be larger than 100m².
- (203) In light of the above, among the (.....) total points in 2017, there were a total of (.....) outlets which are thought to be smaller than 100 m². These numbers were calculated to be (.....) and (.....) respectively for 2018, (.....) and (.....) respectively for 2019.
- (204) According to the information provided by GOLF, the number of outlets smaller than 100 m² which offered GOLF products in 2017 to 2019 were, respectively, (.....) and (.....). Since PANDA could not offer any information, all outlets in the traditional channel offering PANDA products were assumed to be smaller than 100 m² (Information submitted by PANDA states that the number of outlets that have PANDA products available is the same as the number of points with PANDA freezers).

Table 32- Number of Outlets Smaller than 100 m² Where the Products of the Undertakings Were Available During the 2017-2019 Period

	ALGİDA	GOLF	PANDA	Total Outlets	ALGİDA(%)
2017	(.....)	(.....)	(.....)	(.....)	(.....)
2018	(.....)	(.....)	(.....)	(.....)	(.....)
2019	(.....)	(.....)	(.....)	(.....)	(.....)
Source: ALGİDA, GOLF, PANDA					

- (205) As shown in the table above, ALGİDA commands a significant dominance at the traditional outlets smaller than 100 m². In the last three years, ALGİDA was available at four time as many outlets as its closest rival. In addition, there is a constant increase in the number of ALGİDA outlets, while the rivals are continuously losing outlets. Assuming that each undertaking is the exclusive brand offered at the outlet in question, it may be said that from 2017 to 2019, (.....)%, (.....)% and (.....)% of the universe comprised of these outlets sold only ALGİDA products, respectively.

²³ LMT abbreviation is used to refer to local customers.

(206) It was previously mentioned that due to the lack of physical space at the outlets smaller than 100 m², these outlets mostly worked with a single freezer. As a result, it seems improbable that these outlets would have rival ice cream freezers available. On this matter, producers operating in the market stated that they had no information on how many outlets had only their freezers available, and how many had their freezers in addition to their rivals'. As such, another comparison between the undertakings could be made by assessing the number of outlets where they are present with a single freezer. In that framework, the comparison in the following table was made under the assumption that whichever freezer an outlet smaller than 100 m² had, that was the only freezer at that outlet.

Table 33- Number and Ratio of Sub-100 m² Outlets with a Single Freezer by the Undertakings during the 2017-2019 Period (%)

	ALGIDA		GOLF		PANDA	
	Quantity	Ratio (%)	Quantity	Ratio (%)	Quantity	Ratio (%)
2017	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
2018	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
2019	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)

Source: ALGIDA, GOLF, PANDA

(207) The table above shows that ALGIDA's dominance at those outlets smaller than 100 m² with a single freezer significantly increased throughout the last three years (by (.....)%, (.....)% and (.....)%, respectively, from 2017 to 2019). On the other hand, both of its competitors in the market lost outlets and therefore had to remove their freezers from the outlets in question. GOLF dropped by (.....), PANDA dropped by (.....) points, while ALGIDA went up by (.....) points in two years, from (.....)% in 2017 to (.....)%.

(208) Since it is impossible to sell ice cream without a freezer, a comparison of the freezer numbers of the undertakings in the traditional channel is important to show their presence at these outlets. This comparison took into account the number of freezers undertakings had in the traditional channel, with the following table presenting the total freezer number/ratio in that channel. The comparison assumes that all outlets in the traditional channel were smaller than 100 m².

Table 34- Ratio of Total Number of Freezers Owned by Ice Cream Producers at the Sub-100 m² Outlets during the 2017-2019 Period (%)

	ALGIDA	GOLF	PANDA	TOTAL
2017	(.....)	(.....)	(.....)	100
2018	(.....)	(.....)	(.....)	100
2019	(.....)	(.....)	(.....)	100

Source: ALGIDA, GOLF, PANDA

(209) The table above shows that, on average, around (.....)% of the freezers at the outlets with a sales area smaller than 100 m² belonged to ALGIDA in the last three years. ALGIDA's number of freezers at these outlets have consistently increased throughout the years ((.....)% - (.....)% - (.....)%).

(210) However, the total number of the second biggest actor, GOLF, has constantly fallen in the last three years. PANDA, on the other hand, has an inconsistent ratio, which did not manage to exceed (.....)% of the total.

(211) The analysis conducted in accordance with all three assumptions given above concluded that ALGİDA had exclusivity at (.....)% of the outlets smaller than 100 m² as of 2019, on average. In other words, (.....)% of the outlets smaller than 100 m² are foreclosed to competitors due to freezer exclusivity. According to the analyses, the number of outlets exclusive to ALGİDA has been constantly going up since 2017, while the number of outlets where the rivals are present has decreased. In light of the decreasing number of outlets in the traditional channel, it becomes clear that ALGİDA has been growing by acquiring the share of its competitors.

- Assessment of Cabinet Exclusivity under Article 4 of the Act no 4054

(212) The section above established that ALGİDA increased the number of outlets offering its products as well as the outlets using its freezers in the traditional channel, while its competitors constantly saw a decrease in both the number of outlets and the number of freezers. In addition, ALGİDA consistently increased its presence in the sub-100 m² traditional channel throughout the years while its competitors' presence decreased, and (.....)% of this channel was foreclosed to rivals in 2019 All these findings can be seen from the market share trends of the undertakings in the traditional channel:

Table 35- Market Shares of the Undertakings Operating in the Industrial Ice Cream Market within the Traditional Channel during the 2016-2019 Period (%)

Traditional Channel								
	2016		2017		2018		2019	
Undertaking	Litres	Turnover	Litres	Turnover	Litres	Turnover	Liters	Turnover
ALGİDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
GOLF	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
PANDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
OTHER ²⁴	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
TOTAL	~100.00	~100.00	~100.00	~100.00	~100.00	~100.00	~100.00	~100.00

Source: ALGİDA (Nielsen)

(213) As mentioned above, ALGİDA increased its market share from (.....)% to (.....)% in the last four years, while its competitors lost market share. However, it is remarkable that the competitors managed to increase their presence in other channels within the same period.

Table 36- Availability Rates in the Industrial Ice Cream Market during the 2016 and 2019 Period (Numeric Distribution, %)*

	2016			2017			2018			2019		
	T	D	S	T	D	S	T	D	S	T	D	S
ALGİDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
ALGİDA Total	(.....)			(.....)			(.....)			(.....)		
GOLF	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
GOLF Total	(.....)			(.....)			(.....)			(.....)		
PANDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
PANDA Total	(.....)			(.....)			(.....)			(.....)		
SANSET	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
SANSET Total	(.....)			(.....)			(.....)			(.....)		
ETİ	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
ETİ Total	(.....)			(.....)			(.....)			(.....)		

²⁴ Comprised of Sanset, Eti, A.O.Ç., BABAŞ and others.

A.O.Ç	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
A.O.Ç Total	(.....)			(.....)			(.....)			(.....)		
Private Label	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Private Label Total	(.....)			(.....)			(.....)			(.....)		
Other ²⁵	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Other Total	(.....)			(.....)			(.....)			(.....)		
Source: ALGİDA (Nielsen)												

- (214) As shown in the table above, the presence of rivals in general displays an upwards trend in other channels, while none of the rivals can manage to increase its presence in the traditional channel. The normal functioning of the market does not seem to explain this situation.
- (215) As known, competition between the firms mostly comes down to intra-outlet competition for impulse products. For this type of product where the demand generally occurs when the product is seen by the consumer, inter-brand competition completely disappears if the outlet is selling a single product, and the outlet in question only sees competition between different products of the same firm. In that case consumers cannot benefit from competition between the producers. Being unable to compare products during purchase, the consumer encounters a smaller variety of products and prices formed by weaker price competition.
- (216) The type of ice cream sold in the traditional channel is mostly consumed immediately (stick, cone or cup ice cream which is consumed close to the point of sale). Demand for this type of ice cream occurs on impulse (when the product is seen) and generally is not delayed. Mostly, products which are not available at the outlet are not bought, and the consumer does not visit other outlets for a different brands. In that sense, ALGİDA's freezer exclusivity restricts competition in the traditional channel where impulse ice cream is sold. Due to freezer exclusivity, ALGİDA is not affected by competition from brands which are not available at those outlets.
- (217) As shown in detail in the previous section, ALGİDA's freezer exclusivity leads to the competitors getting weaker and ALGİDA reinforcing its dominant position. In this way ALGİDA managed to increase its market share from (.....)% in 2006 to (.....)% as of 2019. On the other hand, in discount markets where freezers owned by the chain stores themselves are used jointly, ALGİDA's market share has remained at around (.....)% throughout the last three years.
- (218) Exclusive agreements by a dominant firm have the potential to significantly restrict competition, even when they involve only a small section of the market. Indeed, competition in a market with a dominant firm is already restricted. The level of competition in the market will inevitably fall even further if an undertaking that would already be the first choice of the sellers due to its dominant position also started tying outlets to itself via exclusive practices.
- (219) Similarly, industrial ice cream market in Turkey is one in which ALGİDA has been dominant for years and which therefore presents limited competition. In addition, as established with the Competition Board decisions dated 15.05.2008, numbered 08-33/421-147 and dated 17.03.2011, numbered 11-16/287-92, ALGİDA products are must stock products due to brand image and recognition. As the preferred brand, ALGİDA's practice of freezer exclusivity at those outlets where it is available

²⁵ Consists of BABAŞ GIDA, INFINITY, MOVENPICK and others.

completely closes the outlet to its rivals, thereby further weakening competition and reinforcing ALGIDA's dominant position.

- (220) Moreover, as mentioned in the previous section, foreclosure rate in the traditional channel is a rather high (.....)% due to freezer exclusivity. The undertakings' market share trends show that the traditional channel is almost completely closed to competition by rivals.
- (221) Additionally, in light of ALGIDA's brand power which would make outlets want to sell ALGIDA products, it would not be wrong to predict that ALGIDA will potentially continue to display even higher rates of foreclosure in the forthcoming period. This is clearly evidenced by the fact that ALGIDA has managed to constantly increase its market share in the traditional channel in the last four years.
- (222) Freezer exclusivity both restricts actual competition and prevents potential competition. Outlets in the traditional channel are important in terms of advertising the product, establishing a brand and therefore setting up consumer choice. In that sense, exclusivity in the traditional points of sale where visibility is important can potentially constitute a barrier to entry into the industrial ice cream market.
- (223) These restrictive effects of freezer exclusivity on competition were established by the European Commission in its decision²⁶ assessing whether UNILEVER subsidiary Van den Bergh Foods Limited abused its dominant position in the Irish industrial ice cream market. According to the Commission, since traditional channel outlets do not have sufficient space for a second cabinet, it is not possible to place a new freezer to these outlets owned by the rival or by the outlets themselves. This prevents rivals from selling at the outlets in question. The exclusive presence of a UNILEVER freezer at an outlet ties that outlet to UNILEVER and forecloses competitors from that outlet. As a result, according to the Commission, exclusive freezers at traditional outlets inevitably leads to the outlet exclusively working with the owner of the freezer and restricts competition between producers in the relevant market. In that framework, the Commission ruled that the exclusivity provision in the agreement between UNILEVER and the outlets was in violation of the European Union Competition Rules.
- (224) In light of all of the information above, it is concluded that competition was restricted in the industrial ice cream due to the agreements signed between UNILEVER and those outlets with 100 m² or less sales area which prevented the storage of competing products in the freezers by preventing the outlet from working with another undertaking. Therefore, it is assessed that the agreements in question are in violation of Article 4 of the Act no 4054.

- Assessment of Cabinet Exclusivity under Article 5 of the Act no 4054

- (225) In case all of the conditions listed in article 5 of the Act no 4054 are fulfilled, agreements between undertakings, concerted practices and decisions of associations undertakings may be exempted from the application of Article 4 provisions. An assessment of freezer exclusivity in terms of the conditions listed in Article 5 is included below.

a) Ensuring new developments and improvements, or economic or technical development in the production or distribution of goods and in the provision of services

²⁶ Commission Decision (98/531/EC), Case Nos IV/34.073, IV/34.395, IV/35.436 Van den Bergh Foods Limited

- (226) It may be said that the exclusive use of the freezer for UNILEVER products will provide UNILEVER certain efficiencies in its planning and logistics activities. On the other hand, the condition in question refers to an improvement that would positively contribute to the development of the market, instead of benefiting a certain firm. In that context, freezer exclusivity allows UNILEVER to maintain and reinforce its own position while significantly restricting rivals' ability to compete and preventing new entries, and thereby benefits a single firm (UNILEVER). As a result, it is not possible to consider it a practice that provides efficiencies and improvements in distribution.
- (227) As such, it is concluded that the exclusivity provision in the relevant agreements does not meet the condition of Article 5 (a) of the Act no 4054.

b) Consumer Benefit

- (228) Freezer exclusivity means that only UNILEVER products are sold at the outlets with no other freezer than those provided by UNILEVER. Essentially, for impulse products, a variety that is not available at the outlet is completely left out of the consideration of consumers. In addition, it is not possible to claim that the demand might be delayed for a different brand product as far as impulse ice cream is concerned.
- (229) In that sense, freezer exclusivity restricts the seller's freedom to sell other brand products, as a result of which the consumer has less access to those products. Unable to benefit from inter-brand competition, the consumer cannot access different product varieties and the prices the consumer faces are formed as a result of weaker price competition.
- (230) As a result, the exclusivity provision in the relevant agreements does not meet the condition of Article 5 (b) of the Act no 4054.

c) Not Eliminating Competition in a Significant Part of the Relevant Market

- (231) This condition states that the restriction of competition caused by the agreement, concerted practice or decision examined for exemption should not significantly eliminate competition in the relevant market.
- (232) As detailed above, freezer exclusivity does significantly restrict competition in the market by reinforcing UNILEVER's dominant position. In the current situation, inter-brand competition is non-existent in the traditional channel, and consumers are unable to benefit from competition between the producers.
- (233) As mentioned in detail in the previous section, (.....)% of the outlets smaller than 100 m² are closed to competitors in 2019, due to freezer exclusivity. As a result, freezer exclusivity has eliminated competition in a substantial portion of the relevant market.
- (234) According to the analyses, the number of outlets exclusive to ALGIDA has been constantly going up since 2017, while the number of outlets where the rivals are present has decreased. This means that the foreclosure rate in the market has been increasing though the years. In consideration of the fact that UNILEVER is a "must-stock" product, it becomes clear that foreclosure will increasingly continue. Foreclosure of these outlets not only prevent current actors from effectively creating competitive power in the market, but it also constitutes a significant barrier to entry for new undertakings.
- (235) In that framework, it is concluded that the exclusivity provision in the relevant agreements fail to meet the condition of Article 5 (c) of the Act no 4054.

d) Not Limiting Competition More Than What Is Compulsory for Achieving the Goals Set out in Sub-paragraphs (a) and (b)

- (236) The sub-paragraph in question involves not limiting competition more than what is compulsory for achieving the goals set out in sub-paragraphs (a) and (b). As mentioned above, in addition to failing to fulfill the provisions of the relevant sub-paragraphs, freezer exclusivity also restricts competition in the relevant market. Consequently, the exclusivity provision also fails to meet the condition of Article 5 (d) of the Act no 4054.
- (237) The evaluations above show that UNILEVER's freezer exclusivity does not meet the conditions of Article 5 of the Act no 4054 and therefore the agreements that include the relevant provision cannot benefit from individual exemption. As such, provisions in the agreements concerned related to freezer exclusivity must be removed from the agreements.
- (238) Before switching to other explanations concerning termination of freezer exclusivity, ALGIDA's reservations on the subject were evaluated.

- Evaluation of the Reservations concerning the Joint Use of the Freezers

- (239) Despite including the concerns put forward by ALGIDA concerning the joint use of freezers, the 2008 Decision did not analyze these concerns since it was not deemed necessary to eliminate freezer exclusivity in 2008. Evaluations of the relevant concerns are listed below.
- (240) On what would happen to the competing brand products stored in the freezer in case of a freezer failure or black out, ALGIDA stated that the products were taken for safekeeping and returned to the outlet after repairs or once the power is back on. In addition, ALGIDA noted that it distributed dry ice to the outlets if the blackout was expected to last a short time. ALGIDA emphasized that, in such a situation, it should not be ALGIDA's responsibility whether the competing firm would take the products in the freezer within the appropriate time, and if not, neither should it be ALGIDA's responsibility to protect competing products by providing dry ice for the freezer or replacing the freezer with a new one immediately.
- (241) On this matter, (.....) stated that ice cream products of all undertakings were stored in the same freezer in the organized channel, that the sales team and the outlet knew what to do in case of a blackout, that the sales team was trained for this situation, that a sales representative would quickly get to the outlet in case of a blackout, that they would intervene with dry ice in case of blackouts lasting 2 to 3 hours and would store the products in refrigerated cases for safekeeping in case the blackout lasted longer, that the products would be picked up within the day and disposed of if it was not possible to intervene within the aforementioned time period, that melted ice cream would not leak out of the wrapping since impulse products were wrapped with hot seal adhesives, and that plastic or plastic coated wire baskets could be used for product presentation within the freezers.
- (242) (.....) stated that if a sufficiently cold temperature could not be achieved due to a failure of the joint freezer, blackout or similar reasons, the measures to be taken and the procedures to be followed were not any different from the current situation; that nowadays, especially in larger cities and tourist regions, it was rare to risk melting the ice cream to such an extent as to require an intervention due to blackouts or similar reasons; that dry ice was used to prevent melting in case of blackouts or failures; that the products are returned and replaced with fresh ones if there is a delay in intervention and the product gets spoilt; that on the request of the outlet, (.....) would ensure

protection for all products in the freezer with dry ice if possible, even if its own products were in the minority within the freezer; that once the outlet is visited to provide dry ice, there was no significant difference in cost between providing enough dry ice for 10% or 100% of the products in the freezer; that the products would be taken into safekeeping if it is not possible to solve the problem with dry ice; that each producer would naturally take its own products into safekeeping; that the products would spoil if the producer does not take care of them and the outlet would return them to the producer; and that this should not be a concern for the competing producer.

- (243) In addition, (.....) noted that it would be against trade interests to cause harm to the outlet in such situations; that it would be more beneficial to offer appropriate solutions to ensure a continuing working relationship with the outlet; that it would be against the nature of commercial life to settle with covering its own products with dry ice or covering its own products with a piece of cloth to protect from the sun, neither of which would help maintain the temperature within the freezer. On the other hand, it added that it was not part of its practice to take the freezer itself into safekeeping in case of freezer failure or blackout, that failed freezers are mostly repaired at the outlet, that the freezer was replaced if repair was not possible, and that it was not reasonable for the outlet or the producer undertaking not to transfer all of the products to the new freezer.
- (244) On the matter of freezer failure, (.....) emphasized that all costs could be covered equally by all of the firms using the freezer or according to the share of use, that each producer using the failed freezer would be responsible on its own for any product spoilage caused by the failure.
- (245) On the concern that ALGIDA products could not be safely placed in the freezer if the freezer were to open to competition, ALGIDA stated that each company with products in the freezer would try to place its products towards the top to make them more visible, requiring ALGIDA sales personnel to re-arrange the freezer at every visit, leading to time loss. In addition, it stated that rival firm personnel could change the arrangement of ALGIDA products and intentionally deform them when placing their own products in the freezer.
- (246) Regarding what procedure to follow if there were competing products in the freezer in an unsellable condition, ALGIDA noted that they regularly visited the outlets to immediately retrieve and dispose of their unsellable products, if any, which ensured the safety of the remaining healthy products in the freezer. Moreover, it stated that any spoilt product in the ALGIDA freezer belonging to a competing firm could lead to consumer to think that the product belonged to ALGIDA; that ALGIDA has been trying for years to ensure that only ALGIDA products are stored in the freezers, and if exclusivity were to be removed, beverages, fruits, meat, etc. could also be stored in the freezer, which would bring an end to quality assurance.
- (247) Concerning both of these claims, (.....) stated that ALGIDA could also re-arrange ice cream products of competitors and damage them, that this was a risk for all parties concerned, and that such behavior would be impossible under the supervision and control of the outlets.
- (248) On the matter of withdrawing or collecting freezers, ALGIDA mentioned that freezers were collected from some outlets at the end of the season but only products were collected from others with the freezer left at the premises, that the freezer was completely removed from those points with insufficient sales, and that it is ambiguous what would be done with the competitors' products in such cases.

- (249) On this subject (.....) stated that the end of the season or on a return request by the outlet, products in the freezer were accepted as returns or into safekeeping by the producer company as a rule; that ALGIDA could give a certain amount of time to the producers of the products in the freezer and could deny responsibility for any products not taken back in due time; that such subjects were the matter of private law and could be solved by an agreement between the parties.
- (250) ALGIDA stated that the repair and maintenance costs of the freezers were totally covered by ALGIDA; that it would be unfair for competing firms to store their products in the freezer and wear the freezers out without contributing to the maintenance costs; that ALGIDA paid advertisement and occupation charges to the municipalities to place freezers at the outlets and it was not commercially appropriate for other companies to sell their products in these areas without placing freezers.
- (251) On this subject (.....) emphasized that storing competing products (ice cream) in the freezer would not wear the freezer out, however the Board decision could note that products like Meybuz which fall outside the definition of ice cream should not be stored in the freezer; that introducing a rule/condition concerning liability sharing, which is the subject of private law, would be against general commercial law principles and the flow of business life.
- (252) Concerning the problem of free-riding mentioned by ALGIDA, (.....) stated that free-riding problem was not a realistic problem in the market, which could be shown by the fact that there were more freezers at the outlets than the outlets (.....) and ALGIDA were currently available.
- (253) The information in the file are in support of (.....)'s claims. (.....) have had more freezers in the last four years than the number of points they were available in the traditional channel. On the other hand, these undertakings have lost outlets despite investing in freezers. This indicates that, currently, the aim of the competing undertakings is not to make use of ALGIDA freezers without payment, but to be available at the outlets in the freezers already placed at the outlets. It does not seem realistic to claim that competitors who are unable to use the freezers they have invested in would engage in free-riding.
- (254) On how to prevent under-the-counter products from being stored in the freezers, ALGIDA asked who would be responsible to the consumer if such products spoil the ice cream in the freezer, and stated that storing ice cream hygienically was directly related to the order, arrangement and cleanliness of the freezer, noting that such a system would allow many firms to intervene in the freezer and remove any possibility of guaranteeing the quality of the product.
- (255) On the matter of which products to store in the freezer, (.....) stated that such concerns could be easily eliminated by stipulating the exclusive storage of ice cream, milk ice and edible ice (ice cream) products in the freezer, which are industrially packaged ice cream products transported via cold chain and put in the ice cream cabinet at -18 degrees. In addition, the company stated that since ice cream products would be placed in separate baskets, each brand could easily be responsible for the hygiene and health of its own ice cream and each company would maintain the level of care it showed for its own products in the current situation.
- (256) On the matter of whether joint use of freezers would lead to health problems, (.....) stated that joint use would cause no health issues since there would be no product groups in the freezers other than ice cream, that ice cream and similar frozen foods

are placed in the freezer in their packages without breaking the cold chain and according to the Food Hygiene Regulations, maintaining cold chain during transport and storage was a legal obligation. Moreover, large supermarkets regularly stored ice cream from many different producers in freezers which were not owned by any of the brands themselves.

- (257) (.....) also noted that it was non-scientific to claim that ice cream from different producers stored in the same freezer would pose microbiological risk for each other; that one packaged product would not be spoilt or damaged by the fact that another packed product in the same freezer was spoilt or did not comply with hygiene and health principles; that an overview of the use of freezers in Turkey showed that supermarkets such as MİGROS, CARREFOUR, BİM, ŞOK and A101 sold different brand products out of the same freezer and no complaint or issue was ever received claiming that the hygiene or health conditions of these products were affected.
- (258) In addition, the opinions of BİM, A101 and ŞOK were requested on the subject. In its response BİM stated that all freezers in its stores were self-owned, and that different brand ice cream products were stored together in these freezers. BİM also indicated that storing different brand products in the same freezer did not lead to any drawbacks.
- (259) Similarly, ŞOK's response stated that they stored the products of all undertakings ŞOK worked with in the self-owned freezers in their inventory, while seasonal freezers owned by the undertakings were used to store each undertaking's own products.
- (260) A101, on the other hand, stated that all ice cream freezers were owned by the producer undertakings. However, A101 mentioned that joint use of the freezers by different producers should not cause any health problems.
- (261) During the investigation process, (.....) requested an opinion from the Bursa Technical University, Engineering and Natural Sciences Faculty, Department of Food Engineering on whether storing ice cream from different producers in the same freezer would pose any risk to human health, and the expert opinion received was included in the file.
- (262) In summary, the expert opinion presented by (.....) makes the following observations:
- The literature review made on the potential of microbiological contamination and the risks to the human health in case packaged ice cream from different brands were stored in and sold out of the same freezer, no scientific evidence was found suggesting cross-contamination between wrapped ice cream products,
 - An examination of the ice cream recall records of Food and Drug Administration (FDA) and European Food Safety Authority (EFSA), both of which are International Food Safety Authorities, found that none of the recall operations conducted due to the risk of pathogenic microorganism in the ice cream included recalls in line with the potential contamination vector in question (from one undamaged wrapped product to another),
 - The records showed that the main reason for microbiological contamination was production lines and/or input products used as ingredients, that none of the recalls in question included a case where microbial contamination from one wrapped product to another was observed, regardless of the brands concerned, rendering all of the products in the freezer a risk for human health.
- (263) Another matter pointed out by ALGİDA was the fact that, if the freezers were to be open to competition, ALGİDA would have trouble displaying its product portfolio at the

outlet, that it was a commercial requirement to stock a large variety of products in the freezer since children, teenagers and adults preferred different ice cream varieties, however not all products could be displayed even in a standard freezer, and that this possibility would be completely lost if the freezer were to be open to competition and the choices presented to the consumer would decrease.

- (264) As detailed above, freezer exclusivity does significantly restrict competition in the market by reinforcing UNILEVER's dominant position. In that sense, it is not possible to claim that benefits expected from competition in the market concerned were obtained. The present situation lacks any inter-brand competition in the traditional channel. In that case consumers cannot benefit from competition between the producers. Being unable to compare products during purchase, the consumer encounters a smaller variety of products and prices formed by weaker price competition. In light of its negative effects listed above, it is not possible to maintain freezer exclusivity based on concerns that eliminating it would reduce the product variety of a single firm (UNILEVER).
- (265) On this matter, (.....) stated that UNILEVER did not sell all of its products at all outlets anyway, that this was a problem for other brands as well, that they would also have to operate in a limited space, that each brand would have to replenish the products when the limited amount of products stored at the relevant outlets were sold.
- (266) ALGIDA also stated that there were numerous outlets in the traditional channel which did not sell ice cream (according to 2019 Nielsen data, there were a total of (.....) traditional outlets, (.....) of which sell ice cream), and that currently 47% of the traditional channel was free. This matter was also discussed in the 2008 Decision, which noted that the traditional channel had a freedom ratio of 45-49% in 2008. In the intervening 10 years, there was no change in the freedom rate of the traditional channel, but UNILEVER constantly increased its freezer numbers and market share, while its rivals consistently saw a decrease both in the numbers of their freezers and in their market share. In fact, UNILEVER's market share was 65-69% in the abovementioned Exemption Decision, yet it reached (.....)% as of 2019. Moreover, the number of outlets with freezers and the number of freezers for the rivals dropped down, while UNILEVER increased both.
- (267) In that context, it may be said that estimates based on the Nielsen data concerning that portion of the market open to potential entry were not consistent with the reality of the market. Besides, Nielsen data are not consistent with the data acquired from the undertakings within the framework of the present file, either. ALGIDA made the following remarks on the subject:
- The Nielsen universe did not cover the whole ice cream market; according to the information supplied by Nielsen, it covered an estimated 84% of the real market in terms of the ice cream category,
 - Nielsen's data sets were based on retailers only, excluding such outlets like military facilities or schools where ALGIDA sold ice cream, and neither did it cover outlets selling on-site consumption products; on the other hand, ALGIDA records had all of these customers under the traditional channel,
 - Due to the differences in Nielsen's methodology for calculating the number of outlets, Nielsen considered the average of all months to work out the number of ice cream outlets in a year, while ALGIDA recorded all outlets it sold based on all outlets it visited during the high season or the rest of the year without taking

averages. In that context, even an outlet that purchased only once in January was recorded as an ALGIDA customer for that year.

(268) During the investigation process, ALGIDA filed some objections concerning the challenges that might arise if the freezers were opened to their rivals. These objections were similar to those submitted within the scope of the 2008 decision, and can be summarized as follows:

- Free-riding would become an issue if freezer repair and maintenance as well as the related costs were covered by ALGIDA alone, but if they were covered jointly there would be practical problems related to how and on what criteria these costs should be divided.
- In the traditional channel in particular, free-riding would become an issue if the occupation charges paid to the municipalities are covered solely by ALGIDA. On the other hand, if they were covered jointly, it would be impossible to determine on what criteria these costs should be divided.
- Tangible problems would arise in terms of sharing legal liability in case of a fire or other damages caused by the freezer, since all liability would fall on ALGIDA due to ALGIDA being the owner of the freezer.
- In case of a freezer failure, there would be problems concerning which brand would be responsible for ensuring the safety of any rival ice cream products in the freezer during the repair or replacement process of the freezer.
- Another problem would arise concerning which brand would be responsible for storing any rival ice cream products in the freezer in case of a blackout.
- If competitors' employees were able interfere with the freezer, they could change the placement of ALGIDA products or otherwise deform ALGIDA packages when re-stocking their own products.
- The safety of the whole contents of the freezer would be at risk if in case of a spoilage of the rival products; the practice would allow under-the-counter products to be sold. Since producers start their seasons on different dates, outlets could store products other than ice cream in the space allocated to the producers who start their season at a later date, and all of these could damage the ALGIDA brand as the freezer owner.
- If competing products were stored in the freezers, they would need to place their own ad materials which would cause free-riding issues, causing non-solvable conflicts with competing producers.
- Currently, ALGIDA already has trouble displaying its wide product portfolio at the outlets, which would be exacerbated by opening the freezers to rivals. If only a certain percentage of the freezer were to be open to competitors, unlike beverage refrigerators, it would be hard to delineate this ratio within the freezer. Moreover, there would be uncertainties concerning who would be responsible for monitoring compliance with the ratio and who would be notified in case of non-compliance.
- Reduction of ALGIDA products in the freezers would require increasing the frequency of visits made to the outlets. The resulting increase in costs could lead to the closure of certain businesses, as well as distributors working with those businesses. The cost increase could also lead to an increase in prices,

which would harm the consumer as well as the outlets due to a possible reduction in demand caused by price increases.

- (269) Most of the concerns expressed by ALGIDA are similar to the claims submitted for the 2008 Decision, and the information and responses of the competitors and customers were already reported. However, those concerns by ALGIDA put forward for the first time must be evaluated as well.
- (270) ALGIDA claimed that if a certain percentage of the freezers were open to rivals, it would be difficult to delineate the ratio in question within the freezers, unlike refrigerators used for beverages. This is because the ice cream sector mostly uses horizontal freezers instead of vertical ones, and these types of freezers have baskets at the bottom and the top. In that context, a portion of the visible area of the freezers must be allocated to the rivals according to the ratios determined in line with the freezer volume. To that end, various solutions may be selected, including compartmentalizing the freezer with plates, changing the size of the baskets in the freezer and/or painting the baskets different colors according to the producer companies.
- (271) Another concern by ALGIDA was that reduction of ALGIDA products in the freezers would require increasing the frequency of visits made to the outlets. The resulting increase in costs could lead to the closure of certain operations, as well as distributors working with those operations. The cost increase could also lead to an increase in prices, which would harm the consumer as well as the outlets due to a possible reduction in demand caused by price increases.
- (272) As mentioned above, competition in the market is expected to increase following the opening of freezers to rivals. If there is effective inter-brand competition in the relevant market, it is clear that all undertakings including UNILEVER would engage in an actual price competition. If the cost increases are transferred to the consumers, this may disadvantage ALGIDA since rivals are stored in the same freezer. Moreover, if demand switches to the competitors the outlet may not face a loss in sales. In fact, as the BİM example shows, if competing products are sold out of the same freezer, rivals can achieve significant sale numbers and are able to direct consumer demand towards their own products.
- (273) Besides, the same issue would also arise if ALGIDA is assumed to operate its existing freezers with full capacity. However, under the assumption that the outlet ran out of product between ALGIDA's two visits to the outlet, ALGIDA would have to visit the outlet more frequently to reach the same figure due to the loss of volume in the freezer. Otherwise, it does not mean that ALGIDA would have to increase its frequency of visits for every outlet with a freezer open to competitors. In addition, there is no significant difference between the weekly frequency of visits made to the outlet for the producers in the market despite the difference in their sales per freezer.
- (274) As a result, it is not possible to agree with UNILEVER's concerns on the joint use of freezers due to the reasons listed above.

- Assessment of Consumer Choice

- (275) As detailed above, the analyses conducted has revealed that freezer exclusivity significantly prevented competition in the relevant market and restricted consumer choice. Due to freezer exclusivity, consumers are forced to choose from among the products of a single firm and to purchase at a price formed under less competitive conditions.

(276) As such, it is concluded that the freezers must be opened for use by rivals in order to increase competition in the market. The level of competition at the channels and outlets where freezers are currently in joint use would help illuminate the accuracy of this observation:

Table 37- Market Shares of the Undertakings Operating in the Industrial Ice Cream Market within the Organized and Traditional Channels during the 2016-2019 Period (Based on turnover, %)*

	2016			2017			2018			2019		
	T	D	S	T	D	S	T	D	S	T	D	S
ALGİDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
GOLF	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
PANDA	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
SANSET	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
ETİ	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
A.O.Ç	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Private Label	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)
Other ²⁷	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)	(.....)

Source: ALGİDA (Nielsen)

*The traditional channel has been abbreviated as T, Discount Stores as D, and Supermarkets as S.

(277) As the table above shows, ALGİDA's market share may drop down to (.....)% in the discount store channel, where its products are offered together with GOLF and private label products. Moreover, this did not happen for only one year, but consistently for four years. This shows that opening the freezers to competition may lead to the development of a significant consumer demand for competing products and allow rivals to dramatically increase their market share.

(278) Examination of BİM's sales reveal a similar result. BİM does not have freezer exclusivity and sells ALGİDA products together with GOLF products, with the following shares for the last two years:

Table 38- Internal Shares of ALGİDA and GOLF at BİM, Sold from Joint Freezers (%)

	2018	2019
ALGİDA	(.....)	(.....)
GOLF	(.....)	(.....)

Source: BİM

(279) As shown by the table above, despite falling significantly behind ALGİDA in terms of market share, GOLF can be preferred by the consumer and catch up with ALGİDA when their products are in the same freezer.

(280) It should be noted that this calculation only looked at branded products. BİM sells private label products, as well. Sales of the private label products out of the same freezers are still quite higher than the sales of both GOLF and ALGİDA. Addition of the private label product sales to the table above results in the following shares:

Table 39- Shares of the Ice Cream Brands Sold in Joint Freezers at BİM (%)

	2018	2019
Private Label	(.....)	(.....)

²⁷ Consists of BABAŞ GIDA, INFINITY, MOVENPICK and others.

ALGIDA	(.....)	(.....)
GOLF	(.....)	(.....)
Source: BİM		

- (281) The table above is important in the sense that it shows rivals can become effective competitors for ALGIDA if more than one undertaking's products are stored in the freezers. Similarly, the table in question is also interesting since it shows that, when faced with more than one brand of ice cream products, consumers mostly choose the cheaper ones.
- (282) In addition, the letter submitted by (.....) states that the total recognizability of (.....) brands increased from 71% in 2009 to (.....) in 2017, and therefore it is thought that final outlets would start selling other brands if ALGIDA allowed them or refrained from putting pressure on them. Indeed, as evidenced by the table above, consumer choice can clearly change if the competitors are stored in the same freezer.

- Assessment on Opening Freezers to Rivals

- (283) As a result of the assessments above, it is concluded that UNILEVER's freezer exclusivity must be terminated in order to establish competition in the industrial ice cream market. Rivals have also requested the elimination of freezer exclusivity.
- (284) When asked its opinion on freezer exclusivity, (.....) stated that the use of joint freezers was a requirement for the products of all firms to be available especially in those outlets with limited space, that the use of joint freezers would allow outlets to offer products from all firms in the freezers, and that undertakings similar to (.....) would have a chance for growth in the market.
- (285) One of the undertakings which made suggestions concerning the re-assessment of the Exemption Decision, (.....) had the following requests:
- Around 20-30% of the freezers should be open to rivals, and rivals should be allowed to store their products in 20-30% of the freezer's visible area and total volume,
 - A definition should be made for industrial wrapped ice cream,
 - Only "industrial wrapped ice cream" products should be allowed in the freezers
- (286) (.....) stated that it was more likely for outlets smaller than 100 m² not to be able to accept additional freezers due to lack of space, etc. If different regimes were to apply to different outlets, (.....) thought it was critically important for outlets smaller than 100 m² to have freedom. Especially at those outlets which lack freezers owned by the outlet or another producer, dressing the freezers equally would be appropriate, similar to the examples from abroad, in order to establish effective competition under equal terms.
- (287) In its decision assessing freezer exclusivity of Bird Eye Wall's Limited (BEW), UNILEVER's British undertaking active in the ice cream business, the UK Competition Commission stated that 50% of BEW's freezers should be open to rivals²⁸. In this decision, CC noted that larger contestable space was needed to increase competition in the market, that keeping 50% of the freezers exclusive while making the remaining 50% contestable would be easier to monitor and implement, both for BEW and the Office of Fair Trading, and for those rivals who wish to take their place in the 50%

²⁸ The supply of impulse ice cream: A report on the supply in the UK of ice cream purchased for immediate consumption, Cm 4510, January 2000.

portion. Briefly, CC's assessment in the report which forms the grounds for eliminating freezer exclusivity are as follows:

- (288) In the Report for 2000 prepared with an aim to protect competition in the ice cream market in the UK, CC observes that BEW's freezer exclusivity restricted its rivals' access to retail outlets, and that rivals would remain very unlikely to increase their market share or become effective competitors for BEW if BEW's existing practices related to freezer exclusivity continued.
- (289) There were numerous regional and national producers and providers in the UK ice cream market, including BEW, Mars and Nestle. In the UK ice cream market BEW had a share of 55% in impulse ice cream and 55% in wrapped impulse ice cream on its own, the inclusion of Nestle and Mars in the calculations changed the percentages concerned to 72% and 86%, respectively. The report also noted that only BEW could consistently operate with a profit. The report stated that, as of 1998, BEW had 87,000, Nestle had 20,000, Mars had 25,000 and around 30 other ice cream producers had a total of 9,500 exclusive ice cream freezers at the outlets.
- (290) In addition, a survey conducted within the framework of the Report in question found that 65% of patisseries/liquor stores/buffets and grocers and 74% of fuel stations had a single freezer. However, around 60% of the patisseries/liquor stores/buffets and grocers and around 30% of sports and recreation facilities with a single exclusive freezer stated that they would sell other brand ice cream, if not for the exclusivity clause. Out of the businesses that participated in the survey, these numbers comprised around 16% of the patisseries/liquor stores/buffets and grocers, around 21% of the fuel stations, and around 8% of the sports and recreation facilities.
- (291) Moreover, when asked what they would do if exclusivity was terminated, around 3% of the patisseries/liquor stores/buffets and grocers, around 4% of the fuel stations and around 6% of the sports and recreation facilities participating in the survey stated that they would stop selling ice cream. Concerning the question of what would happen if freezer exclusivity was terminated, Mars conducted a series of test studies which involved replacing exclusive freezers at the outlets with industry freezers where many producers could sell their products, and shared the results of this study with the public. According to the studies, tests based on large outlets replaced exclusive BEW freezers at some outlets with freezers where BEW, Mars and Nestle products could be sold together and then compared with those outlets which still had exclusive BEW freezers as a control. The test group stocked only BEW ice cream at the beginning, but once the freezer was replaced, they stocked ice cream from each of the three brands during the test period. According to the data gathered from the five test points and 10 control points, which provided consistent data, the sales of the test group went up by 27% in comparison to the sales of the control group. Variance between the test and control groups was also examined, and it was noted that the statistical hypothesis that there was no difference between the test group and control group averages could not be refuted, with a significance level of 95%.
- (292) On the other hand, tests based on patisseries/liquor stores/buffets replaced Nestle ice cream freezers selling impulse ice cream products from Nestle and Mars as well as Nestle's take-home ice cream products were replaced with an industry freezer selling impulse ice cream and a Nestle ice cream freezer selling Nestle's take-home ice cream. The test group sold only Nestle and Mars ice cream during the base period, with BEW, Nestle and Mars ice cream products being sold during the test period. According to the test results, sales went up by 21% in the 10 test points, in comparison

to the 10 control points. Variance between the test and control groups was checked again, and it was noted that the statistical hypothesis that there was no difference between the test group and control group averages could be refuted, with a significance level of 95%.

- (293) The report concerned asked all shareholders in the sector their opinion on freezer exclusivity and the effects of eliminating exclusivity. Mars noted that BEW was the market leader and only BEW could operate with a profit, that Mars and Nestle were limited in their operations, and that this was evidenced by the difficulty in entering the market and responding profitably as well as by the drop in advertising expenditures resulting from the decreasing profitability. Nestle, on the other hand, stated that they could not compete with BEW without freezer exclusivity when its whole product range was taken into consideration. Some small producers also stated that freezer exclusivity was required for them to be able to compete. However, a majority of the producers opined that prohibiting freezer exclusivity would lead to an increase instead of a decrease in sales, both for themselves and for the market in general. Some private distributors remarked that freezer exclusivity negatively affected inter-brand competition and price competition. BEW stated that freezer exclusivity was a business model preferred by retailers and should not be seen as a barrier to entry.
- (294) After evaluating the claims of the actors and stakeholders in the market, CC noted that freezer exclusivity provided financial advantages to the outlets, that Mars and Nestle had to suffer significant losses to maintain their market share even with the current market levels, that the number of outlets selling a single brand decreased compared to the previous years which was affected by the large investment by Mars and others, even if there was no return on it, and that freezer exclusivity hindered the growth and development of smaller producers. As well, freezer exclusivity would have negative effects on competitiveness for smaller ice cream producers who did not have a large product portfolio, and in fact their cost would increase if they wished to implement freezer exclusivity at the outlets with their weaker brands and limited product ranges. On the other hand, BEW was in a very strong position with its strong brands, especially for those points with enough space for a single freezer, and BEW constituted an estimated 80% of the sales of patisseries/liquor stores/buffets.
- (295) However CC also remarked that BEW's sales in non-exclusive outlets were lower, an important indication of which was its low multi-packed ice cream sales in non-exclusive supermarket freezers, and that this might constitute a potential entry point for the products of other producers. In the decision, CC concluded that BEW's freezer exclusivity restricted rivals' access to retail outlets, and that rivals would remain very unlikely to increase their market share or become effective competitors for BEW if BEW's existing practices related to freezer exclusivity continued.
- (296) Moreover, CC noted that it did not believe the agreements BEW signed with the points would improve competition, even in the long-term, that this would not result in a benefit like that obtained from intellectual property rights, and that freezer exclusivity would simply remain a barrier to entry to and growth in the market. CC pointed out that freezer exclusivity of Nestle and Mars, in addition to BEW, affected competition between the producers, but freezer exclusivity by smaller producers did not prevent, restrict or distort competition between the producers.
- (297) Emphasizing that BEW provided more than 60% of the freezers in the UK on its own, that Mars started its exclusive freezer practices after BEW and could only compete with BEW this way, that Mars' exclusive freezer practices also restricted and distorted

competition for smaller producers but its benefits to ensure effective competition against BEW outweighed this restriction and distortion effect, CC observed that Nestle provided around 10-15% of the exclusive freezers in the UK, that it needed exclusive freezers in which it could store all of its product range in order to be able to compete with BEW, and that most of its products would be unable to compete if they were displayed beside BEW products. Similarly, it noted that Nestle could use exclusive freezers to effectively compete with BEW, and that due to its limited market share, the benefits of any level of competitiveness it could achieve as a result of exclusivity would outweigh any restriction or distortion effects on competition stemming from the exclusivity. On the other hand, freezer exclusivity practices by BEW, together with its market position, prevented rivals from entering the market in a cost-efficient way, thereby reducing competition and negatively affecting consumer choice, product prices, product quality and innovation.

- (298) Concluding that the agreements signed with outlets forcing them not to store products of other producers in the freezers provided to them were preventing other distributors and producers from competing and were against public interest, CC stated that freezer exclusivity led to restrictions on the consumers' and outlets' wrapped ice cream choices and to reduction in production quality and innovation, resulting in prices higher than they would otherwise be.
- (299) As a solution, CC presented to the public opinion its suggestion that 40% of the sales area and visible portion of BEW's freezers be open for use by competitors and that the ban on exclusivity concerned apply to all producers, including Nestle and Mars, whose revenue from impulse ice cream sales exceeded 10 million Pounds.
- (300) The relevant decision stated that there had to be a ban on freezer exclusivity for BEW in order to encourage the sale of competing products by retailers, and that this ban had to be applied to all freezers used at the retailer outlet, used for displaying or storing impulse ice cream. However, the decision noted that a full ban on exclusivity for the whole freezer was not necessary for BEW freezers, that it was sufficient for a reasonable portion of the freezers to be contestable, that this would allow other producers to promote their products and retailers would be able to trial new products without needing additional freezers.
- (301) The CC first assessed and collected opinions on whether BEW should have 60% of the sales area and visible portion of the freezers, and finally decided that the no more than 50% of the freezer display area should be allocated to BEW. In this decision, CC noted that larger contestable space was needed to increase competition in the market, that keeping 50% of the freezers exclusive while making the remaining 50% contestable would be easier to monitor and implement, both for BEW and the OFT, and for those rivals who wish to take their place in the 50% portion²⁹.
- (302) On the other hand, CC stated that outside of the visible portion of the freezers, BEW should not have the right to put aside a storage space for the delivery of its products, and that the outlet should decide completely on its own how it should allocate the storage space.
- (303) CC also noted that the outlet could stock as many BEW products in the remaining portion of the freezer as it wanted under the normal circumstances. The outlet should have complete freedom to decide which products to store in the empty part of the

²⁹ For instance, it was suggested that ice cream baskets in the freezer could be painted in different colors to easily monitor the space allocated to BEW.

freezer and it should not be under pressure to place other producers' products in the freezer. BEW should not be able to place any direct or indirect obligations on the outlet concerning which products to place in the freezer. However, despite being unable to place direct or indirect obligations on the outlet, BEW could still contractually prohibit outlets from signing agreements with other producers to bring restrictions to this space. BEW should not be able to restrict any advertisement/promotion material for the products stored in the freezer, regardless of whether these materials are on the freezer or not. In addition, BEW should not be able to engage in any practices³⁰ which could reinforce exclusivity.

- (304) In that context, CC ruled that BEW could not place obligations on outlets concerning the storage and/or display of impulse ice cream products that involve exclusivity for more than 50% of the visible area of freezers and for 100% of the storage space. With relation to the access of a rival producer to the contestable area, BEW could not introduce any obligations for the non-exclusive portion of the freezer, could not prevent the access of rivals to this area (with the exception of preventing the outlet from allocating this space to another producer), could not stipulate which products to store in the exclusive area, could not restrict the promotion of competing products stored in the freezer by the outlet, and could not use more than 50% of the total visible area around the four sides of the freezer and the area on top of the freezer reserved for the signboard.
- (305) It would be beneficial to provide information in this section on the commitments submitted by UNILEVER to the Portuguese Competition Authority within the framework of the examination conducted with relation to freezer exclusivity. Immediately after the launch of the aforementioned examination, UNILEVER committed to open (.....)% of the freezers to rivals in order to eliminate any anti-competitive concerns, and the authority approved this commitment. The details of the decision are as follows:
- (306) In summary, the complaint application submitted by Masterfoods Portugal, Inc. (Mars) to the Portuguese Competition Authority (PA) on 28.02.2007 stated that:
- Unilever Jeronimo Martins, Lda. (UNILEVER) introduced freezer exclusivity for the impulse ice cream freezers it provided to the retailers and only allowed the storage of products supplied by UNILEVER in these freezers;
 - Outlets exclusivity was created by introducing an obligation on the outlets to sell a single brand of wrapped impulse ice cream;
 - UNILEVER and the other party to the investigation, Ola Ice-Cream Production and other Food Associated Products, S.A. (OLA) set up an exclusive distribution system by prohibiting the use of the vehicles they owned to provide storage and distribution services to third parties;
 - Competing products should be allowed to be stored in UNILEVER freezers;
 - The complainant should be allowed to participate in the UNILEVER supply chain in return for a reasonable fee;
 - UNILEVER should be obligated to notify all outlets about the preventive measures to be taken in order to open the market to effective entry.
- (307) Within the framework of the investigation launched in response to the complaint,

³⁰ For instance, BEW should not be allowed to stipulate placing those products that are less favored by the consumers in the exclusive area and more favored products in the contestable area.

UNILEVER submitted a document titled “*Action Plan To Improve the Competitive Conditions in the Portuguese Impulse Ice Cream Market*” to the PA on 14.05.2007. According to the plan in question, those retailers with a single freezer provided by UNILEVER would be granted the right to use 20% of the physical space of the freezer to store other products if they wish. This right would not cover “those customers who adopted a tender-based supply method”. In line with the action plan submitted to the Authority, loan agreements signed for UNILEVER freezers were amended to include the following provision: “*concerning the equipment constituting an important part of the cold chain required for the sale of impulse ice cream, if an outlet that borrowed a freezer owned by Unilever Jeronimo Martins has a single freezer in its store for ice cream sales, the outlet shall allocate 80% of the volume of this freezer provided by Unilever Jeronimo Martins exclusively to Unilever Jeronimo Martins products.*” Moreover, the previous provision prohibiting promotion materials and price boards for other brands was removed from the agreement. The arrangement concerned would be implemented within the framework of a multi-step plan by which UNILEVER estimated that agreements with a number of customers representing 75% of the impulse ice cream turnover would be amended within two years.

(308) On 02.05.2008, the complainant withdrew its complaint, on the grounds that the measures submitted would ensure competitive conditions. The decision of the PA makes the following observations concerning the ice cream product:

- The brand had a significant role in impulse ice cream sales in the sector, which showed the legitimacy of the sizable investment made into advertisements and other promotion activities, which are closely related to sales.
- Since the production and sale of impulse ice cream required high investments at different levels, they were generally carried out by companies owned by large international groups throughout Europe.
- Outlets generally preferred to work with a single provider and avoid placing more than one ice cream freezer in their stores. When asked if they wished to work with more than one impulse ice cream provider, 70% of the outlets replied in the negative. When asked if they wished to switch providers, 73% of them stated that they could switch providers under certain circumstances.

(309) The market shares of the undertakings in the Portuguese market for impulse ice cream production and marketing during the investigation period are as follows:

Table 40- Market Shares in the Portuguese Impulse Ice Cream Market (%)

Undertaking	2004	2005	2006
Unilever (Olá ice cream)	80.36	81.68	81.57
Nestlé (Camy / Nestlé ice cream)	13.70	12.62	12.67
Menorquina (Menorquina ice cream)	1.55	1.52	1.49
Masterfoods (Mars ice cream)	1.03	1.17	1.30
General Mills (Häagen Dazs ice cream)	0.76	0.69	0.73
Gelados Águia, Lda. (Águia ice cream)	0.24	0.22	0.22
Frígida Olhanense (Gelvi ice cream)	0.22	0.18	0.18
TOTAL	~100.00	~100.00	~100.00
Source: PA Decision			

- (310) UNILEVER is the leader in the Portuguese impulse ice cream market, with a market share of around 82%. It was found that at least 38% of the outlets selling “Ola” brand ice cream are exclusively selling this brand. The decision stated that, in light of the contractual obligations and lack of incentives for owners of the outlets to work with more than one provider, it was unlikely for the market positions of many producers to change. However, a large majority of the retailers stated that they could switch ice cream suppliers under certain circumstances. Therefore, market entry and/or market growth may be potentially possible for other businesses, provided the structural restrictions in the market are eliminated.
- (311) In the decision dated 07.08.2008, it was concluded that, within the framework of the facts related to the characteristics of the Portuguese impulse ice cream market stated above, the UNILEVER practice under investigation violated Articles 4 and 6 of the Act no 18/2003, dated June 11, as well as Articles 81 and 82 of the EC Treaty. Nevertheless, the PA took into consideration the adoption of the measures included in the action plan proposed by UNILEVER and the periodic submission of the reports on the implementation of these measures, as well as the fact that the complainant withdrew its application and none of the other rivals of UNILEVER put forward a significant concern, and decided that the conditions required for establishing a competitive environment in the Portuguese impulse ice cream market were established, and that the investigation could be concluded.
- (312) UNILEVER was charged with submitting annual reports to the PA in order to assess the effectiveness of the measures adopted under the decision. The reports would be prepared by an independent organization nominated by UNILEVER and approved by the PA.
- (313) As mentioned above, the TCA decided to eliminate exclusivity from the refrigerators of undertakings with a dominant position in the carbonated beverages and beer markets, on the grounds that the practice significantly restricted competition in the relevant markets. This decision opened the refrigerators at the traditional channel outlets smaller than 100 m² to competition, by stipulating that 20% of the refrigerator should be usable by the rivals. In consideration of the fact that carbonated/non-carbonated beverages and beer can be offered on the shelves in addition to the refrigerators while ice cream cannot be sold outside of a freezer, a larger portion of the ice cream freezers must be open to rivals in order to establish effective competition in the relevant markets.
- (314) Moreover, the Board previously decided that 30% of the sales area must be open to the use of rivals with regard to raki and similar alcoholic beverages, which, unlike ice cream, can be stored in the shelves in addition to the refrigerators. In the Board decision on Mey İçki San. ve Tic. AŞ (MEY İÇKİ), dated 16.02.2017 and numbered 17-07/84-34, which assessed the claims that MEY İÇKİ complicated the activities of competing undertakings by putting pressure on raki outlets through concessions and certain practices, it was found that MEY İÇKİ abused its dominant position via practices with the aim and effect to complicate the activities of its competitors in the raki market, and administrative fines were imposed on the undertaking. The conclusion of the relevant decision included certain arrangements under Article 9.1 of the Act no 4054 concerning the termination of the violation by MEY İÇKİ. In that framework, it was decided that *“In terms of the shelves carrying raki at the MEY İÇKİ outlets in the traditional channel, MEY İÇKİ should be able to make arrangement recommendations only for 70% of the visible area of the shelf and the other raki display spaces at the*

outlet (such as modules, stands, etc.), that its recommendations should only concern MEY İÇKİ raki products, and that it should not make recommendations to the outlets concerning the arrangement of rival products on the shelves.”

- (315) The UK Competition Authority decision detailed above also specifies that more contestable area was needed to increase competition in the market and that 50% of the freezer should be open for use by competitors on practical grounds.
- (316) As mentioned in detail in the previous chapters, UNILEVER holds a market share of (.....)% in the immediate consumption ice cream market, which is predominantly sold in the traditional channel, and the analyses conducted show that it is exclusively available at around (.....)% of the traditional outlets. UNILEVER is (.....) times larger than its closest competitor in this channel. Its second largest competitor in the traditional channel has a market share of just (.....)%. As such, in light of the market conditions in Turkey, it is concluded that 30% of the freezers should be open to rivals in order to increase the weak competitiveness of the relevant market and to establish competition therein. Besides, this percentage can allow a fast adoption of the practice in the market, since it would be easy to both implement and monitor.
- (317) On the other hand, the sellers should be fully independent to decide whether to open 30% of the freezers to rivals, and if yes, which undertaking or undertakings should be placed in the portion open to rivals. UNILEVER should not be able to influence the sellers on this issue, either directly or indirectly.
- (318) Similar to the current practice, UNILEVER may continue to promote its products on the sides and top of the freezer, however it should not prevent the placement of advertisement/promotion materials for the competing products around the freezer or at any other placed deemed appropriate by the seller, regardless of whether those products are stored in the freezer.
- (319) Within the framework of all of the information above, it was concluded that, for outlets with a closed sales area of 100 m² or less, UNILEVER and/or its distributors must amend the loan agreements regulating the use of ice cream freezers owned by UNILEVER so as to allow the storage of competing products in 30% of the visible area of the freezer and of the total freezer volume at the outlet, provided there are no freezers directly accessible by the consumer other than those owned by UNILEVER.

- Allowing competing products to be stored in ALGİDA freezers in outlets with an area of 100m² and below

- (320) With respect to opening 30% of ALGİDA freezers to competing products, which products will be stored in the freezers is important.
- (321) As stated above in the section on sectoral information, when the regulatory framework regarding the products that ALGİDA produces and sells is taken into account, Turkish Food Codex (TGK) Ice Cream Communiqué and Turkish Food Codex Ice Products Communiqué are relevant. The said communiqués define ice cream, ice cream types and edible ice products. In addition, within the framework of the file, the opinion of the Ministry of Agriculture and Forestry (the Ministry), Food and Control General Directory was taken. In line with the information given by the Ministry, the products manufactured in the relevant market are subject to the following provisions in general:
- (322) Article 14 of the TGK Ice Cream Communiqué and TGK Ice Products Communiqué titled “Transport and Storage” includes the following provision: “the transport and storage of the products that are covered by this Communiqué should be in compliance with the rules stated under the Transport and Storage of Food Products section of the

Turkish Food Codex Directive”. Article 10 of the Turkish Food Codex Directive, which the said communiqués refer to, states that the rules laid down in Food Hygiene Directive and the Directive on Special Hygiene Rules for Animal Source Food should be complied with.

- (323) The Ministry monitors the activities regarding food, and substances and materials that contact with food according to the Act no 5996 on Veterinary Services, Plant Health, Food and Feed (the Act no 5996) and the secondary legislation issued depending on that act. Within this scope, the products should comply with the rules laid down in TGK Directive on Substances and Materials that contact with Food
- (324) The Directive on Registration and Approval Process for Food Establishments (Registration and Approval Process Directive), issued on the basis of the Act no 5996, regulates the procedure and principles regarding the registration and approval process of food companies. Food Hygiene Directive and the Directive on Special Hygiene Rules for Animal Source Food regulate the general rules regarding food hygiene that food companies should comply with starting from the first production of food to supply to the end consumer and the special hygiene requirements that food enterprises producing animal source food such as milk and milk products should comply with beside the abovementioned rules.
- (325) Products are categorized according to dominant type and content of the product with respect to food codex and the product nature is stated on its package according to TGK Directive on Food Labeling and Informing Consumers.
- (326) Considering the relevant provisions of the said regulations, it is concluded that there are not special provisions regarding ice cream and/or iced products apart from TCF Ice Cream Communiqué and TGK Iced Products Communiqué. Beside the special provisions related to other products, there are regulations such as transportation of products with suitable vehicles, prevention of contamination to other products in the same vehicle and prevention of neglecting hygiene products. In the answer of the Ministry regarding this issue, it is stated that article 15(2) of TGK Draft Ice Cream Communiqué includes the provision “The temperature shall be -18°C at the highest during the transporting, storing and supplying the products to the end consumer”. Although there is not a degree for transporting and storing temperature for ice cream and edible ice products in the legislation in force, taken into account product safety, it is stated that transporting and storing temperature should be - 18 degrees at the highest for frozen products in order to protect cold chain.
- (327) In line with this information, within the scope of opening ice cream cabinets to competing undertakings operating in the industrial ice cream market, it is understood that the products of undertakings which operate in compliance with the legislation issued by the Ministry can be stored in ice cream cabinets.
- (328) The products which are defined in TCF Ice Cream Communiqué and TGK Iced Products Communiqué and sold in compliance with those communiqués can be classified as follows:

Table 41- The Products included in the Industrial Ice Cream Market

Ice cream	Edible iced products
Plain Ice Cream	Water Ice
Fruit Ice Cream	Fruit Ice
“Maraş” style Ice Cream	Sorbet

"Maraş" Ice Cream	Ice Milk
	Ice Milk with Vegetable Oil
Source: TGK Ice Cream Communiqué, TGK Iced Products Communiqué	

- (329) All products of the biggest three players operating in the relevant product market are covered by those definitions.
- (330) On the other hand, Alaska Frigo produced by ETİ and Clasigo produced by KUZİN GIDA are classified as cold sweet bars according to TGK Directive on Food Labeling and Informing Consumers. Considering the issue from competitive law perspective, the most important point is how consumers perceive the products.
- (331) The concept "competitor" is defined in the Communiqué no 2002/2 as providers operating or having the potential to operate in the same product market. The relevant product market is consisted of all goods and services which are regarded as the same by the consumers with respect to price, intended use and characteristics. The characteristics and intended use of the products in the industrial ice cream market are the main factors that determine the substitutability relation in the relevant market.
- (332) According to the survey by Nielsen, consumers regard all products that are sold in freezers/cold cabinets (-18 degrees) as ice cream and substitutes for ice cream. Therefore ETİ's sales are measured by Nielsen in the ice cream market. Moreover, players in the market state that they see ETİ as a competitor and ETİ states that it regards ALGİDA as a competitor.
- (333) Some of the findings of a survey commissioned to Ipsos by ETİ in October 2017, regarding Alaska Frigo brand, are as follows:
- When consumers were asked which category they placed those products without help, between (.....)% and (.....)% of the consumers answered that the four products of the brand were ice cream while approximately (.....)% of the consumers answered that they were frozen chocolate.
 - Almost (.....)% of the consumers liked the flavor and freshness of the products.
 - Consumers stated that they could consume the four products mostly in summer when the weather is hot instead of ice cream.
- (334) As stated in the decision dated 2008, consumers regard edible ice products as ice cream. Likewise, the products that are classified as cold sweet bars are regarded as a substitute for ice cream by consumers because they give a fresh taste; they are consumed in summer and stored in ice cream cabinets.
- (335) At this point, even if those products are not covered by ice cream or edible ice product definitions, the facts that they are consumed cold, they are distributed in the same operational process as ice cream products in all sales channels and the experience they create for the consumers show that those products are substitutes for ice cream.
- (336) Although ALGİDA and its competitors are not currently producing those products, they can produce different types of products and market those in ice cream cabinets in line with consumer choice and undertakings' strategies in the future. Therefore, stating that the products which are produced in compliance with the Ministry regulations but not defined in those regulations cannot be stored in freezers may prevent possible innovations in the relevant market and create negative results for all undertakings including UNILEVER as well as consumers.

(337) In line with this information, as a result, ice cream and edible iced products, and products that are regarded as substitutes by consumers for those products and that are produced and distributed according to the relevant legislation will be considered as competing products and can be stored in cabinets owned by UNILEVER at (.....)% rate.

I.5.2.2.2. Assessment on Creating De Facto Exclusivity By Means Of Discount Systems

I.5.2.2.2.1. UNILEVER's Methods of Working with Customers and its Discount and Concession Practices

(338) In the explanations about investment support and similar advantages (support in cash, donation, premium, electricity subsidy, free products, sunshade, light panel, etc.) granted to outlets by ALGIDA, it is stated that there is not a standard "concessions system" for all outlets, one or more of the following concessions are granted in order to work with an outlet:

- Special cooling cabinet,
- Below invoice discount,
- Functional visibility materials for storing the products such as sunshade, umbrella, dustbin, etc.
- Cabinet shelters against theft for cabinets placed outside,
- Free products for customers who open earlier and/or close late, outside the peak season,
- Discounts for supporting the seasonal discounts and insert activities made by the retailer to the consumer,
- Free products for supporting electricity costs.

(339) Moreover, ALGIDA states that

- The customer portfolio is divided into three general categories: traditional channel, local market chains and national customers,
- ALGIDA works with some of its customers directly and with some of them through distributors,
- Especially for the traditional channel, various concessions may be given according to the location of the outlet, during how many months it can make sales, its growth potential, total turnover if they worked with the outlet before; its estimated sales potential, growth potential and targeted customers if they did not work with the outlet before. Those concessions are especially freezing cabinets, below invoice discounts, functional visibility materials for storing products such as sunshade, umbrella, dustbin, etc., cabinet shelters against theft for cabinets outside, free products for supporting customers who opens earlier and/or closes late, outside the peak season, free products for supporting electricity costs.
- In the local customer channel, generally, premiums are granted under the following titles: operational efficiency (payment on time), business development (cabinet, insert, season) and other (growth, B2B data sharing),
- In the national customer channel, mostly the same premiums as the local customer channel are granted.

The customers, which ALGİDA is working directly and indirectly with, are stated in the table below:

Table 42- ALGİDA's method of working with its customers

	Customer group	Customer example
Directly	Distributor	Karsan etc.
	National channel and discount markets	Migros, ŞOK, A-101, Metro etc.
	Direct local customers	MOPAŞ, Çağrı, Yeni Çağdaş etc.
Indirectly (By means of distributors)	Indirect local customers	Özpaş, Şov Mağazacılık, Hit Gıda etc.
	Traditional channel and on premise consumption, e-trade	Schools, military posts, grocers, buffets, dried fruit and nut sellers, hotels, etc.
Source: ALGİDA		

- (340) As seen from the explanations above, UNILEVER works with customers in different channels in different ways, may grant different type of discounts to each outlet and may give different discounts/concessions peculiar to each outlet.
- (341) Discount systems are generally considered according to discount types in competition law. It is generally accepted that while retroactive, gradually increasing and personalized growth and target discounts lead to higher loyalty-inducing effects, discounts with a fixed rate and standard target create lower loyalty-inducing discounts. However, regardless of the type, the basic question regarding discounts is whether the discounts granted by a dominant undertaking ensure loyalty.
- (342) Discount systems may be analyzed in different ways on the basis of each undertaking and each case. Therefore, there are differences both in the literature and in the enforcement by competition authorities and courts. There is not a single prominent method. For instance, Italian Competition Authority³¹ decided in its decision concerning UNILEVER's discount system that UNILEVER's commercial policy depends on complicated practices that cannot be adequately captured and measured by an as-efficient-competitor test or a similar economic analysis and UNILEVER's practices as a whole is a part of a strategy that indents to prevent the existence of competitors in the market.
- (343) With respect to the subject of the file, the number of traditional outlets that are being analyzed for discount systems is very high and those outlets have different characteristics. Therefore, UNILEVER applies different discounts to each of these outlets taking into account a lot of criteria such as customer segment, sales potential, location and size. The structures of those discounts are variable.
- (344) It is important to show the dominant firm's intent in giving discounts; in other words, the discount strategy's aim in such a sophisticated system because in case the system is disintegrated and analyzed, it might be impossible to draw a conclusion regarding the whole system as the system is consisted of many parts and the parts are different from each other in nature. Therefore, with respect to this file, it is thought that it is necessary to handle with the total discount amounts given to outlets on a case-by-case

³¹ [https://one.oecd.org/document/DAF/COMP/AR\(2018\)39/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2018)39/en/pdf)

basis rather than to disintegrate the discounts in order to identify the strategy more clearly.

(345) With respect to the subject of the file, the characteristics of the outlets in the traditional channel are as follows:

- There are a lot of active outlets.
- The contracts and discounts to be given to outlets in line with those contracts cover one-year period.
- Buyers are widespread and financially small-volume.
- Each outlet has a different customer portfolio. Therefore outlets' demands for industrial ice cream are different. For instance in a small grocer where mostly children buy products, products for fast consumption at prices such as 50 kr and 1 TL are consumed rather than industrial ice cream product portfolio, whereas in areas where mostly young people live, industrial ice cream products at higher prices are consumed.
- The discounts given by the providers to each outlet are different. Providers may give discounts or concessions in different ways according to the potential and location of the outlets. There are discount types such as free products, below invoice discounts, support depending on availability outside the season, discounts according to having a freezing cabinet and contribution to electricity costs.
- Having a freezing cabinet is important for selling industrial ice cream products.

(346) The most prominent feature of the market stated above is the necessity of having a freezing cabinet for selling products. Moreover, in traditional channel, outlets' sales areas are limited. At those outlets, it is not possible to place an additional freezing cabinet in order to increase consumption, decrease root numbers and thus ensure efficiency in distribution or place another brand in the outlet. Therefore, which firm has a freezer or whether the freezer is replaced by another firm is important in outlets with limited areas. Thus, the discounts given to such outlets are not structured independently of the number or volume of freezers.

(347) Within this framework, while showing the effects of UNILEVER's discount system, the criteria "increasing the volume of the freezer in the outlet" or "increasing the number of the freezers", which mean the sales to the outlet are increased, should be taken into account in the first place. As shown in the section on cabinet exclusivity, UNILEVER is present in most of the outlets that do not have adequate space for a second freezer in the traditional channel and maintains its presence in such outlets through cabinet exclusivity. As a result, the outlets where UNILEVER may try to exclude its competitors by using discount systems will be outlets where the volume or the number of freezers can be increased, in other words, where its competitors may enter. Thus, while analyzing UNILEVER's discount systems, it is necessary to accept the universe as the number of outlets where "there is a potential to exclude the competitor", "the volume or the number of freezers are increased" so that the analysis will produce realistic results.

(348) As stated before, in the traditional channel, the number of outlets where UNILEVER has more than one freezer and the number of freezers at those outlets are increasing. As seen from the table below, ALGIDA has (.....)% of the traditional outlets with more

than one freezer. (...)% of the total freezers in those outlets with more than freezers belongs to UNILEVER.

Table 43 - The rate of the number of traditional outlets where there are more than one freezer of ice cream producers during 2017-2019 period (%)

	2017	2018	2019
ALGIDA	(...)	(...)	(...)
GOLF	(...)	(...)	(...)
PANDA	(...)	(...)	(...)
Total	100.00	100.00	100.00

Source: ALGIDA, GOLF, PANDA

Table 44 - The rate of the number of freezers in traditional outlets where there is more than one freezer of ice cream producers during 2017-2019 period (%)

	2017	2018	2019
ALGIDA	(...)	(...)	(...)
GOLF	(...)	(...)	(...)
PANDA*	-	-	-
Total	100.00	100.00	100.00

Source: ALGIDA, GOLF, PANDA

* PANDA indicated that it could not provide a number for total freezers due to their inventory system.

- (349) Most of the outlets in the traditional channel work with a single freezer due to limited physical space. However, some of the outlets can work with more than one freezer. UNILEVER's dominance in the freezer number is high in outlets with more than one freezer compared to outlets with a single freezer. This shows that it is much more difficult to enter outlets with more than one freezer for competitors who are already experiencing difficulty in entering outlets with a single freezer.
- (350) It can be inferred that outlets having more than one freezer in a limited space may have a significant sales volume or may be so attractive for producers in terms of location that a second freezer is needed. Within this scope, presence in such outlets is important for each producer with respect to both availability and sales volume. However, as it is stated in the relevant sections of the decision, the number of the outlets where the competitors are already operating is decreasing rapidly; besides, the competitors have to leave such outlets. This shows that they are not efficient competitors against UNILEVER.
- (351) At this point, evaluating average sales per freezer and per freezer volume will be beneficial:

Table 45 - Sales amount per freezer and per freezer volume at outlets according to customer groups during 2016-2018 period (Liter)

	Customer Groups	Sales amount per freezer (L)	Sales amount per volume (L)*	Sales amount per freezer (L)	Sales amount per volume (L)
2016	NATIONAL CHAIN CUSTOMERS	(...)	(...)	(...)	(...)
	DISCOUNT MARKETS	(...)	(...)	(...)	(...)

	LOCAL CHAIN	(...)	(...)	(...)	(...)
	TRADITIONAL RETAIL	(...)	(...)	(...)	(...)
	TOTAL	(...)	(...)	(...)	(...)
2017	NATIONAL CHAIN CUSTOMERS	(...)	(...)	(...)	(...)
	DISCOUNT MARKETS	(.....)	(...)	(...)	(...)
	LOCAL CHAIN	(...)	(...)	(...)	(...)
	TRADITIONAL RETAIL	(...)	(...)	(...)	(...)
	TOTAL	(...)	(...)	(...)	(...)
2018	NATIONAL CHAIN CUSTOMERS	(...)	(...)	(...)	(...)
	DISCOUNT MARKETS	(...)	(...)	(...)	(...)
	LOCAL CHAIN	(...)	(...)	(...)	(...)
	TRADITIONAL RETAIL	(...)	(...)	(...)	(...)
	TOTAL	(...)	(...)	(...)	(...)
2019	NATIONAL CHAIN CUSTOMERS	(...)	(...)	(...)	(...)
	DISCOUNT MARKETS	(...)	(...)	(...)	(...)
	LOCAL CHAIN	(...)	(...)	(...)	(...)
	TRADITIONAL RETAIL	(...)	(...)	(...)	(...)
	TOTAL	(...)	(...)	(...)	(...)
Source: ALGİDA					

(352) The sales amount per cabinet differs among customer groups significantly, especially in the traditional market. This raises the question whether this difference stems from the fact that the average sales amount decreases because UNILEVER puts an additional freezer in the traditional channel where spaces are limited physically. Another striking point in the table is the sales rates per freezer volume. Except discount markets, there are decreases in the sales in proportion to freezer volumes in all customer groups. This situation shows the possibility that UNILEVER may place bigger freezers than needed at the outlets.

(353) Another analysis for sales amount per freezer is made by using the data related to total sales amount made with total number of freezers at outlets in 'AN-ANADOLU' region found in the Excel file titled "Market Cabinet Analysis" attached to the e-mail with the subject "Re: Market Cabinet Analysis", which was taken during on-site inspection.

Figure 1- TRADE SECRET

Source: Documents obtained during on-site inspection

(354) According to the excel file, the number of outlets with UNILEVER cabinet is (.....) whereas the total number of freezers is (.....). Those outlets made totally (.....) TL sales and accordingly average amount of sales per freezer is calculated as (.....) TL. The important issue here is that (.....) % of outlets (.....)(number) made sales below that number and (.....)% of those outlets have two and/or more freezers.

- (355) All the information given above shows that it is necessary to analyze the number of freezers given to outlets or the outlets where the freezer volume has been increased in order to detect whether UNILEVER abused its dominant position by means of excluding its competitors from outlets through discounts.
- (356) In line with this, the analyses first look into traditional channel outlets where the number or volume of UNILEVER freezers has changed. This analysis is based on two periods: 2016-2017-2018 and 2017-2018-2019. Secondly, common outlets for the relevant periods are identified. As the third step in the analysis, among the outlets in 2016-2017-2018 period, the outlets whose turnover in 2017 was lower than 2016 but where the concessions given as well as the number and volume of freezers were increased at the beginning of 2018 (the same method applies for the other period) are detected. As stated in the plea, the turnover obtained from outlets affects directly UNILEVER's discount and freezer cabinet policy in the following period. Moreover, despite the decrease in the turnover, more discounts were given to the outlet, which might be regarded as contrary to the natural flow of trade. Taking into account that turnover decrease might have occurred as a result of competitors' sales, competitors' previous positions and their positions shaped by UNILEVER's discount/freezer practices at the said outlets should be shown. To this end, the analysis assessed the presence of competitors in the said outlets as the last step. In this way, whether the said discounts and freezer cabinets lead to de facto exclusivity (whether they are given to prevent the competitor from entering to the outlet or excluding an existing competitor) is evaluated.
- (357) When the discounts given by UNILEVER and close competitors per outlet in the traditional channel are compared, UNILEVER's discount/turnover rate is lower than its competitors, which should be noted. It is thought that UNILEVER can make more sales by giving lower discounts in percentage, which indicates that it is "must-stock product" for outlets and competitors give higher discounts compared to UNILEVER to be placed in outlets. On the other hand, considering total discount expenditures, it is seen that UNILEVER is superior. The increase in UNILEVER's expenditure in 2019 compared to 2017 is higher than even the sum of two competitors' total expenditure in 2019. Meanwhile, PANDA's total discount expenditure between 2017 and 2019 remained almost the same whereas GOLF had a loss of (.....)% in 2019 compared to 2017. The increase in UNILEVER's discount expenditure is (.....)%.

Table 46- Average turnover per outlet, average discount per outlet and discount amount-turnover rate pertaining to ALGİDA, GOLF, PANDA in the traditional channel

	2017			2018			2019		
	ALGİDA	GOLF	PANDA	ALGİDA	GOLF	PANDA	ALGİDA	GOLF	PANDA
Average turnover per outlet	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)
Average discount per outlet	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)
Discount-turnover rate	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)
Total discount expenditure	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)

Source: Rapporteurs' calculations

- (358) The outlets where UNILEVER made changes in freezer cabinet number and/or volume are evaluated in a single period covering 2016-2017-2018³². In line with this, it is found that there are totally 35.146 common outlets in the traditional channel during the relevant period.
- (359) It is found that in 8.151 outlets out of those 35.146 outlets, the turnover in 2017 is lower than that of 2016. When the outlets that were not worked with in 2017 are omitted, the number is 6,832. To show the situation in 2018, when the outlets which continue to work are omitted, the number is 4,250. The following table is related to the said outlets:

Table 47 - Outlets whose turnover decreased in 2017 and the situation in 2018

	2017 Gross Turnover (TL)	2017 Discount (TL)	2017 Sales Amount (number)	2017 Total Freezer Volume (L)	2017 Total Freezer Number
6,832 Outlets	(...)	(...)	(...)	(...)	(...)
Per outlet	(...)	(...)	(...)	(...)	(...)
	2018 Gross Turnover (TL)	2018 Discount (TL)	2018 Sales Amount (number)	2018 Total Freezer Volume (L)	2018 Total Freezer Number
4,250 Outlets	(...)	(...)	(...)	(...)	(...)
Per outlet	(...)	(...)	(...)	(...)	(...)

Source: Rapporteurs' calculations

- (360) When the general situation is analyzed for outlets with decreasing turnover, it is seen that freezer volume per outlet can be regarded stable. However, while the number of outlets is decreasing by (...)% , the number of freezers per outlet decreases only by (...)% and while the number of discounts given to outlet increases by (...)% , gross turnover increases at a lower rate, by (...)% . The discount rate of the relevant outlets did not change significantly in 2018, increasing from (...)% to (...)% .
- (361) Out of 8,151 outlets, the number of outlets, whose freezer numbers/volumes are increased in 2018 and whose turnover in 2017 is lower than that of 2016, is 2,235. In order to make an exact comparison, when the outlets that were actively working in 2017 and 2018 among those 2,235 outlets are taken into account, the number is 1,130 for 2017 and 2018. It means that at 1,130 outlets, which UNILEVER worked with, concessions were given and investments were made for freezer volume/number in 2018 even if the turnovers in 2017 are lower than the turnover in 2016. The following table is related to the said outlets:

Table 48- Data pertaining to 2017-2018 for the outlets whose discounts and freezer number/volume increased in 2018 although their turnovers decreased in 2017

	2017 Gross Turnover (TL)	2017 Discount (TL)	2017 Sales Amount (number)	2017 Total Freezer Volume (L)	2017 Total Freezer Number
1,310 Outlets	(...)	(...)	(...)	(...)	(...)

³² There are data regarding 89.280 traditional channel outlets for 2016-2017 period and 86.045 traditional channel outlets for 2017-2018 period. This data covers approximately (...)% of traditional retailers who have ALGIDA freezer.

Per outlet	(...)	(...)	(...)	(...)	(...)
	2018 Gross Turnover (TL)	2018 Discount (TL)	2018 Sales Amount (number)	2018 Total Freezer Volume (L)	2018 Total Freezer Number
1,310 Outlets	(...)	(...)	(...)	(...)	(...)
Per outlet	(...)	(...)	(...)	(...)	(...)
Source: Rapporteurs' calculations					

- (362) It is seen that the number of freezers increased by (...) % and volume of freezers increased by (...) % in 2017 (when the turnover decreased) and in 2018 (when additional investments were made) in the said outlets whose discounts and freezer number/volume increased although their turnovers decreased. The discount rate given was (...) % in 2017 and (...) % in 2018.
- (363) Considering the situation per outlet, the discounts per outlet increased by (...) % whereas turnover per outlet increased (...). In other words, UNILEVER, gained nearly (...) TL turnover in 2017 and (...) TL turnover in 2018 in return for 1 TL discount. It is noteworthy that this happened when the productivity of the outlet decreased (the turnover in 2017 was lower than the turnover in 2016). Moreover, although supported by the extra investments in 2018, productivity did not increase as expected. In addition, presence of excluded competitors at those outlets should be questioned. Whether the practice excluded the competitor in outlets where the competitor was present should be evaluated. The evaluation can be found in the following sections.
- (364) The outlets where UNILEVER made changes in freezer cabinet number and/or volume were evaluated in a single period covering 2017-2018-2019³³. In line with this, it is observed that there were totally 33,678 common outlets in the traditional channel during the relevant period.
- (365) It is found that in 7,609 outlets out of those 33,678 outlets, the turnover in 2018 is lower than that of 2017. When the outlets that were not worked with in 2018 are omitted, the number is 5,952. To show the situation in 2019, when the outlets that continue to work are omitted, the number is 3,678. The following table is related to the said outlets:

Table 49 - Outlets whose turnover decreased in 2018 and their situation in 2019

	2018 Gross Turnover (TL)	2018 Discount (TL)	2018 Sales Amount (number)	2018 Total Freezer Volume (L)	2018 Total Freezer Number
5,952 Outlets	(...)	(...)	(...)	(...)	(...)
Per outlet	(...)	(...)	(...)	(...)	(...)
	2019 Gross Turnover (TL)	2019 Discount (TL)	2019 Sales Amount (number)	2019 Total Freezer Volume (lt)	2019 Total Freezer Number
3,678 Outlets	(...)	(...)	(...)	(...)	(...)
Per outlet	(...)	(...)	(...)	(...)	(...)
Source: Rapporteurs' calculations					

³³ There are data regarding 86,045 traditional channel outlets for 2017-2018 period and 85,944 traditional channel outlets (including the canteens in military facilities, police stations and public offices) for 2018-2019 period. This data covers approximately (...) % of traditional retailers who have ALGIDA freezer.

- (366) To show the general situation for outlets with decreasing turnover, it is seen that freezer volume per outlet can be regarded stable. However, while the number of outlets is decreasing by (.....)%, the number of discounts given to outlet increases by (.....)%, gross turnover increases at a higher rate, by (.....)% The discount rate of the relevant outlets did not change significantly in 2018, decreasing from (.....)% to (.....)%.
- (367) Out of 7,609 outlets, whose 2017 turnover was lower than that of 2016, the number of outlets, whose freezer numbers/volumes were increased in 2019, was 2,305. In order to make an exact comparison, when the outlets that UNILEVER stopped working are taken into account, the number is 1,096 in 2018 and 2019. It means that at 1,096 outlets, which UNILEVER worked with, concessions were given and investments were made for freezer volume/number in 2019 even if the turnovers in 2018 is lower than the turnover in 2017. The following table is related to the said outlets:

Table 50- Data pertaining to 2018-2019 for the outlets whose discounts and freezer number/volume increased in 2018 although their turnovers decreased in 2018

	2018 Gross Turnover (TL)	2018 Discount (TL)	2018 Sales Amount (number)	2018 Total Freezer Volume (L)	2018 Total Freezer Number
1,096 Outlets	(...)	(...)	(...)	(...)	(...)
Per outlet	(...)	(...)	(...)	(...)	(...)
	2019 Gross Turnover (TL)	2019 Discount (TL)	2019 Sales Amount (number)	2019 Total Freezer Volume (L)	2019 Total Freezer Number
1,096 Outlets	(...)	(...)	(...)	(...)	(...)
Per outlet	(...)	(...)	(...)	(...)	(...)

Source: Rapporteurs' calculations

- (368) It is seen that the number of freezers increased by (.....)% and volume of freezers increased by (.....)% in 2018 (when the turnover decreased) and in 2019 (when additional investments were made) in the said outlets whose discounts and freezer number/volume increased although their turnovers decreased. The discount rate given was (.....)% in 2017 and (.....)% in 2018.
- (369) When the discounts per outlet are calculated, the discounts per outlet increased by (.....)% whereas turnover per outlet increased (.....)%. In other words, UNILEVER, gained nearly (.....)TL turnover in 2018 and (.....)TL turnover in 2019 in return for 1 TL discount applied for the said outlets. It is noteworthy that this happened when the efficiency of the outlet decreased (the turnover in 2018 was lower than the turnover in 2017). Moreover, although supported by the extra investments in 2019, efficiency did not increase as expected. In addition, presence of excluded competitors at those outlets should be questioned. Whether the practice excluded the competitor in outlets where the competitor was present should be evaluated. The evaluation can be found in the following sections.
- (370) As the demand of the final consumer affects the performance of the outlet, it is possible to obtain negative results despite the investments for freezers. Moreover, it is regarded exclusionary that investments as well as the number and volume of freezers increased for some outlets, whose turnover or sales amount decreased.
- (371) It is clear that such discounts given by the dominant undertaking will produce exclusivity effects in the traditional channel. There is exclusivity with respect to freezers

and the ability to place additional freezers in outlets for each time in order to have/sell more products is limited due to physical capacity (sales area-m2) in the traditional channel.

- (372) Increasing the volume or the number of freezers will prevent competitors' entry to outlets by affecting outlets' incentive to get products from competitors even for the part open to competition. The outlet will be closed to competitors or competitors will have to exit from the outlet because of an increase in both number and volume of freezers. From this point of view, it is thought that the increase in discounts given to outlets analyzed aim to exclude competitors from those outlets.
- (373) The presence of competitors at those outlets is analyzed in order to make a detailed evaluation. Within this scope, GOLF and PANDA were requested information about whether they made sales at the said outlets. After analyzing the answers, the table below was prepared:

Table 51- Competitors' presence in 1,310 and 1,096 outlets

1,310 Outlets	2017	2018	Loss
PANDA	(...)	(...)	(...)
GOLF	(...)	(...)	(...)
TOTAL	(...)	(...)	(...)
1,096 Outlets	2018	2019	Loss
PANDA	(...)	(...)	(...)
GOLF	(...)	(...)	(...)
TOTAL	(...)	(...)	(...)

Source: Rapporteurs' calculations

- (374) From the table above, first, it is understood that UNILEVER mostly works without GOLF and PANDA. Moreover, during the period analyzed, the presence of competitors in the year when the turnover decreased is noteworthy. In the following year, that is when UNILEVER increased the discounts as well as number/volume of freezers, many outlets who were selling GOLF and PANDA products stopped getting products from those undertakings. While GOLF was working with (.....) customers in 2017, that number fell to (.....) in 2018. While GOLF was working with (.....) customers in 2018, it worked with (.....) customers in 2019. With respect to PANDA, it continued to work with (.....) customers out of (.....) customers in 2017 and (.....) customers out of (.....) customers in 2018.
- (375) Thus, the discounts granted to exclude the competitor, showed the intended effect. The most important indicator of this fact is that the presence of the competitor in such outlets weakened suddenly.
- (376) In 2017, (.....)% of the analyzed outlets worked with only UNILEVER, this number is (.....)% in 2018. The rate of the outlets analyzed for the other period which worked only with UNILEVER is (.....)% in 2018 and (.....)% in 2019. In the overall market, with respect to traditional retail, the presence of GOLF and PANDA in 2017-2019 period was respectively (.....)%-(.....)%, (.....)%-(.....)% and (.....)% -(.....)% (Table 20). GOLF and PANDA were present in (.....)% of totally 1,310 outlets. In 2018, when discounts as well as the volume and the number of freezers increased, they were present only at (.....)% of the universe. Similarly, with respect to 1,096 outlets, the presence of competitors was (.....)% in 2018, but the presence of the competitors was (.....)% in

2019, when discounts as well as the volume and the number of freezers increased. Consequently, while the presence of competitors was higher than that of the overall market, that rate dropped suddenly. Therefore, competitors could not enter to the outlets, where discounts as well as the volume and the number of freezers increased. Only UNILEVER was sold at those outlets.

(377) UNILEVER's competitors lost most of the few outlets they could enter due to the practices mentioned above. As a result of UNILEVER's investigated practice, GOLF lost (.....)% of the outlets it was present in the first period and (.....)% of the outlets it was present in the second period. Similarly, those rates were (.....)% and (.....)%, respectively, for PANDA.

In light of that information, it was concluded that the discounts UNILEVER applied in the traditional channel had the objective and effect of complicating its competitors' activities; thus UNILEVER abused its dominant position by means of the said discounts and violated article 6 of the Act no 4054.

I.5.2.2.2. General Assessment about the Discount System

(378) As the demand of the final consumer affects the performance of the outlet, it is possible to obtain negative results despite the investments for freezers. Moreover, the fact that increasing discounts were given to some outlets where the number or volume of freezers increased but turnover or sales amount decreased is noteworthy. The discounts given to the said outlets are not regarded as commercially reasonable.

(379) It is clear that such discounts given by the dominant undertaking will produce exclusivity effects in the traditional channel. There is exclusivity with respect to freezers and the ability to place additional freezers in outlets for each time in order to have/sell more products is limited due to physical capacity (sales area-m2) in the traditional channel.

(380) Increasing the volume or the number of freezers will prevent competitors' entry to outlets by affecting outlets' incentive to get products from competitors even for the part open to competition. The outlet will be closed to competitors or competitors will have to exit from the outlet by preventing the entry of competitor to the outlets because of an increase in both number and volume of freezers. From this respect, it will not be a mistake to say that the increase in discounts given to outlets analyzed aim to exclude competitors from those outlets.

(381) In order to assess whether this object produced effects, whether the competitors were present at those outlets was analyzed. Within this scope, ALGIDA was asked whether competing products were sold in the said outlets. In the answer, it was said that information about competitors was not kept. Consequently, GOLF and PANDA were requested information about whether they make sales at the said outlets. After analyzing the answers, the table below is prepared:

Table 52-Competitors' presence in 2,171- 1,851 and 1,517 outlets

2,171 Outlets	2016	2017	Loss
PANDA	-	73	-
GOLF	114	76	38
1,851 Outlets	2017	2018	Loss
PANDA	51	33	18
GOLF	114	42	72
1,517 Outlets	2018	2019	Loss
PANDA	51	22	29

GOLF	68	27	41
Source: PANDA and GOLF			

* PANDA could not share the information about the said year as it made a systematic change.

- (382) From the table, it is understood that ALGIDA mostly works without GOLF and PANDA. At the same time, in the following year, some of the outlets who were selling GOLF and PANDA products stopped getting products from those undertakings. In 2019, GOLF worked only 26 of the 114 customers it was working with in 2016; in 2019, it worked only 19 of the 114 customers it was working with in 2017. With respect to PANDA, it lost 29 outlets out of 51 outlets, which worked with PANDA in 2017.
- (383) Thus, the discounts granted to exclude the competitor, showed the intended effect. The most important indicator of this fact is that the presence of the competitor in such outlets was weak. Most of the outlets in question worked with only UNILEVER in all of the years analyzed.
- (384) In 2016, (.....)% of the analyzed outlets worked with only ALGIDA, this number is (.....)% in 2017 and (.....)% in 2018. Thus, competitors could not enter to the outlets where the volume or number of freezers increased and increasing discounts were granted although the sales did not rise. Only ALGIDA was sold at those outlets.
- (385) Competitors lost most of the few outlets they could enter as shown above. As a result of ALGIDA's investigated practice, GOLF exited from (.....)% of the outlets where it was present in 2016. In 2019, PANDA lost (.....)% and GOLF lost (.....)% of the outlets where they were present.
- (386) In cases where the dominant undertaking is an indispensable trade partner for an important part of the customer demand, even a short-term exclusivity can cause anticompetitive foreclosure effects.
- (387) As stated before, the contracts in the traditional channel are made for one year. The annual analyses made, as stated below, showed that competitors were excluded from the market. Moreover, ALGIDA products were defined as must stock products in the Board decisions dated 15.05.2008 and numbered 08-33/421-147, and dated 17.03.2011 and numbered 11-16/287-92. Therefore, taken into account the seasonal nature of the product, even short-term practices may create anticompetitive foreclosure effects.
- (388) In addition, the Board decision dated 15.05.2008 and numbered 08-33/421-147 assessed the effects of ALGIDA's exclusivity agreements and practices in the retail level. It was emphasized that exclusivity conditions and practices creating de facto exclusivity in the agreements signed with outlets prevented effective competition in the market. ALGIDA was banned from granting advantages on condition that competing products would not be sold or practices creating de facto exclusivity such as free products, discounts, quotas and obliging outlets to buy at a rate of the sales in the previous year in a certain time or granting advantages tied to that obligation to the final outlets in the relevant markets.
- (389) In light of that information, it was concluded that the discounts UNILEVER given in the traditional channel had the object and effect of complicating its competitors' activities; thus UNILEVER abused its dominant position by means of the said discounts and violated article 6 of the Act no 4054.

I.5.2.2.3. The Decisions of Other Competition Authorities Regarding UNILEVER's Discount Systems

- (390) Lastly, this section mentions the decisions taken by competition authorities regarding UNILEVER's discount systems.
- (391) In its decision dated 31.10.2017, Italian Competition Authority (AGCM) ruled that UNILEVER violated article 102 of TEFU by means of exclusionary activities to prevent its competitors' growth in the ice cream market and imposed 60 million Euro administrative fines. AGCM found that UNILEVER's exclusionary activities including widespread exclusivity practices, loyalty practices and commercial activities that disadvantaged its competitors restricted the competition in the market.
- (392) In the decision, it was stated that UNILEVER was dominant in the impulse ice cream market³⁴ and UNILEVER's trade policy, which was characterized with its practices covering exclusivity clauses³⁵, cabinet exclusivity obligations³⁶ and loyalty discounts, excluded its competitors from the market. Moreover, according to the decision, UNILEVER's distributors acted like UNILEVER's auxiliary unit; thus distributors' activities can be attributed to UNILEVER, UNILEVER's contractual and actual practices (single brand obligations, cabinet exclusivity obligations, target discounts, portfolio discounts) foreclosed the market and exclusivity terms were applied to retailers, who are subject to competition at the most, in a selective way.
- (393) As a result, AGCM stated that UNILEVER's practices of ensuring that its customers sell only its products restricted the availability of competing products that could be preferred by consumers due to their quality and taste, and concluded that UNILEVER abused its dominant position by means of a complicated system consisted of many contractual or actual practices that foreclosed the market.³⁷
- (394) AGCM's decision was approved by the Court of First Instance in May 2018³⁸.
- (395) Lastly, Brazilian Competition Authority (CADE) made an investigation in 2018 about UNILEVER. In its investigation, CADE analyzed the exclusivity terms especially in small and medium sized outlets, cabinet exclusivity practices and minimum sales targets for outlets. As a result of its assessments, CADE concluded that UNILEVER had 60-70% market share in Sao Paulo, which was the subject of complaint, 80-90% in Rio de Janeiro and 60-70% at national level, there were important entry barriers, UNILEVER carried out de facto exclusivity practices at significant levels and discounts granted to outlets resulted in de facto exclusivity even if there was not a written

³⁴UNILEVER's market share was calculated as 60%.

³⁵ It was concluded that exclusivity term covered 30-40% of the market.

³⁶ Free freezers in return for not storing competing products.

³⁷ <https://www.osborneclarke.com/insights/italian-competition-authority-fines-unilever-for-exclusivity-obligations-and-fidelity-inducing-rebates-in-the-ice-cream-sector/>

<https://www.jonesday.com/files/Publication/ef6ded3a-98b4-4997-a592-10105dc7ca4c/Presentation/PublicationAttachment/2365bb89-752c-4638-8f99-be59cdf2119e/ICA%20Fines%20Unilever%20Algida.pdf>

<https://en.agcm.it/en/media/press-releases/2017/12/alias-2441>

[https://one.oecd.org/document/DAF/COMP/AR\(2018\)39/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2018)39/en/pdf)

³⁸ Last accessed 13.07.2020

exclusivity term. CADE imposed 29.4 million Brazil Real (nearly 8.1 million Dollars) administrative fines³⁹⁴⁰.

I.6. Assessment of UNILEVER's Plea

- Pleas related to the structure of the market and articles 4 and 6 of the Act no 4054

The arguments in the plea are as follows:

- Industrial ice cream market in Turkey has a stable growth tendency, growing at a rate of 15% on a turnover basis and 4% on a liter basis annually between 2010 and 2018. In, addition annual ice cream consumption per person (3.5 liter) in Turkey is very low compared to Europe (7.5 liter) and US (18 liter). As of 2018, almost 17% of total retail outlets did not sell ice cream, therefore the market has a significant growth potential for new entries. Indeed, ETİ's Frigo brand entered the market in 2015 and Toksöz Holding entered the market in 2014 with L'era Fresca brand and added Pernigotti brand into its portfolio. The relevant market has growth potential and open to new entries.
- Discount markets have been the fastest growing retail chains. Discount markets such as BİM, A101 and ŞOK carry out activities especially with private labels. With respect to ice cream BİM and ŞOK prefer private label products and work with GOLF. GOLF carries out almost the whole production of private label ice cream in the market (.....%). The market share that GOLF gains by means of private label products is much more than the market share that it loses in overall market.
- Ice cream category covers only 3% of the total FMCG retail sector; in 2018 the share of ice cream in total retail market was ...%, its share in discount markets was ...%, in supermarkets ...%, and in traditional channel ...%. Taking into account those shares, in contrast to the findings in the Investigation Notification, there is buyer power, especially in the organized channel; organized retailers' need for ALGİDA products is less than ALGİDA's need for selling those products at the said outlets and this is without doubt a disadvantage for ALGİDA's bargaining power. It is not possible for ALGİDA to impose certain terms within the scope of a contract unilaterally to such customers.
- The Board concluded in the Investigation Notification that the contracts, except those with GETİR, were in compliance with article 4 of the Act no 4054. The article containing an exclusivity provision in the agreement with GETİR was misunderstood due to an unclear expression. As understood from the title of the provision (Obligations related to ice cream cabinets) and its content, the exclusivity in the contract was related to cabinet exclusivity applied within the scope of the decision dated 2008 and should be evaluated within this scope. Moreover the expression "in the area where the enterprise is located" in the AGREEMENT is meaningless for GETİR, which is a platform offering services online, as GETİR does not offer services from a physical outlet.

³⁹ <https://www.internationallawoffice.com/Newsletters/Competition-Antitrust/Brazil/BMA-Barbosa-Mussnich-Aragao/Just-desserts-CADE-fines-company-for-exclusivity-practices-in-ice-cream-market?redir=1>

⁴⁰ Last accessed 13.07.2020

- ALGİDA's concession/discount systems should be analyzed separately on the basis of traditional and organized retail channel. Support and concessions are granted unconditionally in the traditional channel. All the players in the sector carry out activities with concessions due to the nature of the sector. Depending on the concessions granted, the outlet can work with one or more brands. Although the tendency to work with a single provider is higher in this channel (compared to organized retail channel), even in cases where the outlets work with more than one provider, it is easy to change the provider one year later. ALGİDA did not grant different concessions to outlets who work with more than one brand compared to other outlets, therefore the concession practice in the sector is a simple price comparison and there is not a potential to foreclose the market to an as-efficient competitor.
- Contrary to the arguments in the Investigation Notification, the size of the concessions is not meaningful alone as an indicator of foreclosure. According to the Investigation Notification, the ratio of concessions to the turnover went up from (.....)% to (.....)% between 2016 and 2018 in the traditional channel and this increase is very low. This rate is much higher in the supermarket segment, ALGİDA has lost market share while its closest competitor GOLF has increased its market share. Therefore, discount system practices do not create effects foreclosing the market or restricting competition.
- ALGİDA carries out activities in most of the outlets in the traditional channel with a single cabinet. Additional cabinets may be needed at those outlets due to the increase in demand during the season. Although impulse product group is sold intensely in the traditional channel, when the outlets want to sell catering products, a separate cabinet for catering products may be necessary for protecting the availability of impulse products. With respect to organized retailing, there are many suitable areas in stores for freezing cabinets, those outlets try to have a wide product range and in this scope, there are cabinets peculiar to both take home and impulse products (Maraş ice cream, Magnum cabinet). There are reasonable commercial grounds for placing more than one cabinet and wider cabinets compared to the previous ones in the outlets in both the traditional channel and organized retail channel. Those grounds are to meet the consumer demand, to ensure the availability of the product portfolio which has grown during the years and to minimize distribution costs. There is not an intention to prevent competing ice cream producers' entry.
- Taken into account the effect of ALGİDA's discount practices for outlets in the organized retail channel on consumer welfare, discount systems per se cannot be regarded as illegal categorically. In order to constitute an abuse, an effect-based economic analysis is needed. While analyzing discount systems it is necessary to look whether the practice in question creates exclusionary effects in the market and there should be a causality link between the alleged exclusivity and the discount system. This link should be established by means of as efficient competitor test and in a way to meet the proof standards. In the Board decision dated 17.03.2011 and numbered 11-16/287-92, it was stated that ALGİDA's discount system was in compliance with the competition law. Considering the fact that there have not been significant changes in the discount system since 2011, the assessment in the abovementioned decision is still valid.

- The “performance/growth premium”, which was found risky in the Board decision dated 17.03.2011 and numbered 11-16/287-92, is included in the Investigation Notification. It is stated that performance/growth premium creates effects that increase loyalty because it is personalized and it enables discounts with an increasing amount. However, the share of “performance/growth premium” in the discounts granted by ALGİDA is very small. In the total of (.....)% premiums granted to MİGROS – one of the two biggest customers of ALGİDA – the performance premium corresponds to maximum (.....)% while in the total of (.....)% premiums granted to A101, it is lower than (.....)%.

Pleas related to the documents included in the Investigation Notification

- E- mail dated 25.03.2019 with the subject “SEASONAL FREEZERS TO MIGROS ON APRIL 1 (2019 DSA PLAN)”
- (396) It is stated in the plea that DSA is a term used by MİGROS and means valuable sales area. Competition is strong regarding placing cabinets/products in valuable sales areas in a store (such as in front of the counter). A customer such as MİGROS can request an additional cabinet for various reasons, especially in order to meet the increasing demand during the peak season there may be such cases.
- E-mail sent by (...) on 25.12.2017 with the subject “RE: Actions within the scope of chicken refrigerators / Vispera / Çivril”:
- (397) It is stated in the plea that it was not true that ALGİDA gave chicken refrigerators to outlets to complicate placing cabinets by other undertakings, in contrast, outlets placed chickens in the cabinets for storing ice cream and when ALGİDA became aware of that it took back the cabinets.
- E-mail dated 24.03.2016 with the subject “Tokat Market Visit Notes”:
- (398) It is stated in the plea that the said e-mail is related to outlets in the organized retail channel with sufficient sales areas, the practices written in the e-mail are competitive trade actions that can be expected from any undertaking in the relevant market, it is not possible that the said practices will create exclusionary effects for competitors.
- E-mail sent by (...) to (...) on 09.04.2019 with the subject “About Büyükada Customer”:
- (399) It is stated in the plea that the outlet mentioned in the e-mail operates in impulse consumption channel, within the scope of cabinet exclusivity, ALGİDA has right to request that only ALGİDA products be displayed in ALGİDA’s own cabinets.
- E-mail dated 12.07.2018 with the subject “Algida & Happy Center 2018 Semi-Annual Evaluation”:
- (400) It is stated in the plea that the customer requested information from ALGİDA about invoicing procedure in the stores. The customer prefers to work with a single firm in some of the outlets due to its own commercial decision. In such outlets the growth has been higher compared to other outlets. This situation cannot be regarded as a pressure to sell only ALGİDA or a result of the discount system.
- (401) In addition to the abovementioned statements, ALGİDA submitted an economic analysis which evaluates both national discount system (MT) and the discount system applied to local supermarkets (LMT). The economic analysis prepared by RBB Economics LLP (RBB), which provides economic consultancy services, evaluated the growth discounts applied by ALGİDA to organized/modern channel and whether as efficient competitor can compete against the system especially by offering a price that does not fall below cost.

- (402) The aim of the as efficient competitor test (AEC Test) used in the analysis is to decide whether the dominant undertaking's as efficient competitors can compete against the said discount practices in a way to meet their costs if the dominant undertaking and its as efficient competitors direct the entire part of the demand where they can realistically compete (the part open to competition) to themselves.
- (403) The economic analysis is based on the following data and hypotheses:
- ALGİDA provided transaction data and the details of the discount system regarding four MT customers (Abi, Migros, Carrefour, ŞOK) and five LMT customers (Çağrı, Özdilek, Happy, Kim, Akyurt) for the years 2017, 2018 and 2019. Within this scope, an economic analysis was made for 12 MT customer-year combination and 15 LMT customer-year combination.
 - The selected customers correspond to nearly (...) % of ALGİDA's modern channel sales in 2019 in terms of value, thus this sample presents the whole modern channel segment in general.
 - Average avoidable costs are taken as a basis with respect to ALGİDA's costs.
 - The analysis is based on the estimates regarding the contribution cost per customer. Contribution cost measures the contribution of each customer to not only the cost of the products sold but also to fixed costs reserved for serving a specific customer such as equipment cost, trade promotions, sales team cost. ALGİDA calculates the customer contribution cost with the following formula:
Customer contribution cost = the cost of the product sold + the structure of the commercial conditions ± customer sales equipment + outlet expenditure + trade development expenditure + salary, promotion and other sales commissions
- (404) According to the economic analysis, ALGİDA's growth discounts pass as-efficient-competitor test in all 12 MT (four customers, three years) and 15 LMT (five customers, three years) scenarios. As a result of the analysis, in summary:
- Those discounts are not gained systematically, especially by LMT customers, the existence of growth discounts alone is not loyalty-inducing,
 - In many customer year combinations, ALGİDA's price is above the cost in all possible sales volumes and market shares, and an as-efficient-competitor can compete at prices above the cost for obtainable market shares.
 - In cases where the prices fall below the cost for some of the sales, this rate is very low and the minimum switching share is significantly below the part of the market that is open to competition. Therefore, although it is true that an as efficient competitor cannot direct a small part of the customer demand to itself profitably, the said competitor can easily overcome such obstacle by competing for a bigger share obtainable by ALGİDA's competitors.
- (405) Within this scope, as a result of the economic analysis, it is concluded that ALGİDA's discount system applied to national and local chains will not lead to anticompetitive foreclosure concerns.
- (406) In fact, it is not necessary to make an explanation about the economic analysis because the discounts given in the modern channel are not analyzed. Moreover, it should be noted that the applicability of as-efficient-competitor test to the file that is the subject of the investigation is questionable.
- (407) With respect to the investigated file, the fact that there are many products at various prices in a lot of outlets with various sizes complicates determining the demand open to competition, the minimum switching share and the efficient price that the competitor has to offer especially in the traditional channel. Even if those are determined, they

may prevent to reach a healthy result by using the said test. Moreover, as stated before, Italian Competition Authority, in its decision regarding UNILEVER's discount systems⁴¹, concluded that UNILEVER's discount system was based on too complicated practices to be captured or measured by an as-efficient-competitor test or a similar economic analysis and did not accept as-efficient-competitor test submitted during the investigation as valid.

(408) The explanations about ALGIDA's plea mentioned until now are given in the sections above, thus this section only covers the objections. Other arguments in the plea and evaluation thereof are given below:

- The arguments in the plea: Cabinet exclusivity, which was granted exemption within the scope of the decision dated 15.05.2008 and numbered 08-33/421-147 (2008 Decision) is regarded as a violation without depending on concrete evidence, UNILEVER, who continues cabinet exclusivity that was evaluated and found to be compliant by the Board in 2008, is accused of violating the Act no 4054, a decision can be taken to withdraw the exemption.

(409) 2008 Decision did not grant exemption to cabinet exclusivity. Exemption is granted as a result of an evaluation with respect to the conditions listed in article 5 of the Act no 4054. Within this framework, it was decided that

- Provided that they do not exceed one year, individual exemption shall be granted to non-compete obligations in agreements signed with on premise consumption outlets to whom exclusive sales rights are granted as a result of private or public tenders that are open for all undertakings, organized in a competitive manner with transparent and objective conditions.
- Individual exemption shall be granted to sponsorship agreements by UNILEVER, which are made to support a specific sport, art or entertainment event, and where ice cream supply is an auxiliary element for advertisement purposes, provided that they do not exceed 60 days in a year.

Therefore, it is not true that "cabinet exclusivity is a right given to UNILEVER by 2008 Decision". Since cabinet exclusivity is not exempted, it is obvious that a decision for withdrawal of exemption cannot be taken.

(410) It is stated in 2008 decision that

"Regarding the freezer cabinets that Unilever San. ve Tic. Türk AŞ. provides to outlets for storing its products, it is not necessary, at this stage, to withdraw cabinet exclusivity, however, it shall be convenient to assign the Presidency to request the data required for monitoring the market regularly from the undertakings in the sector at the periods deemed necessary by the Department within the framework of article 14 of the Act."

Thus, it is only stated in the decision that it is not necessary to withdraw cabinet exclusivity as of 2008.

(411) Upon the complaint, market conditions as of 2020 were analyzed and it was found that cabinet exclusivity turned out to outlet exclusivity by eliminating actual competition in the market. From this aspect, it is concluded that UNILEVER's cabinet exclusivity that is found to cause de facto exclusivity is contrary to the Act no 4504. This is in compliance with the finding in 2008 decision that *"Exclusivity clauses in the agreements signed by Unilever San. ve Tic. AŞ.'s and/or its distributors with outlets*

⁴¹ [https://one.oecd.org/document/DAF/COMP/AR\(2018\)39/en/pdf](https://one.oecd.org/document/DAF/COMP/AR(2018)39/en/pdf)

and its practices leading to de facto exclusivity prevented efficient competition in industrial ice cream market.”

- The arguments in the plea: The Board made field studies for measuring consumer demand within the scope of 2008 decision, contrary to the method followed in 2008 decision and many other Board decisions, Investigation Committee did not base its evaluations on concrete parameters such as market inquiry but on short cut analytical hypotheses; within this framework, it is expected that the basic tools would be used to concretize violation allegations within the scope of this file.

(412) The field study that is alleged to be made for 2008 decision but not made for the relevant report is a survey asking traditional channel outlets whether they sell competing products. According to the survey, 30% of the outlets said that they could place competing products whereas 70% said that they would not place competing products even if ALGIDA allowed. Depending on those answers, it was seen that there was not demand for competing products so it was concluded that opening freezer cabinets to competitors would not change the result. The analyses made as of 2019 within the scope of the investigation used market share data at BİM outlets where UNILEVER is sold together with the competitors, which was not in question in 2008. At those outlets, consumer demand was mostly towards other undertakings. UNILEVER's market share in 2017 was only (...)% and in 2018 (...)%. Contrary to answers based on intention in the survey, the ability of sales results - which are real numbers - to reflect the truth is unquestionable. Therefore, a survey to measure consumer demand was not regarded necessary. On the other hand, it is not possible to say that outlets, who said that they would not sell competing products even if UNILEVER allowed, would not sell competing products if they had a better discount from competitors in a scenario where it was possible to store competing products in freezers. In fact, after finding that competition is restricted, it is clear that the necessary regulations should be made to increase competition at those outlets.

(413) In addition, the Board makes field study or has it made in some files, but this method may not be preferred in every file. Otherwise, it would be expected that the Board would make field study or has it made in every file where measures would be used. The Board concluded in its decision dated 18.03.2020 and numbered 10-24/331-119 that BİMPAŞ would be granted individual exemption within the framework of article 5 of the Act for single brand restrictions not exceeding five years in type contracts to be made with outlets as a result of the developments in the market without making any field study. (Exemption was previously withdrawn from BİMPAŞ in the beer market with the decision dated 22.04.2005 and numbered 05-27/317-80).

(414) Moreover, in this file, competitive dynamics in the market are evaluated within the framework of concrete data such as UNILEVER and its competitors' traditional channel freezer numbers, the number of outlets they are present, the number of outlets they are present with one/more than one freezer, presence rate and market shares. Cabinet exclusivity is analyzed in detail according to the conditions listed in article 5 of the Act. European Commission's and other competition authorities' findings about cabinet exclusivity and sharing are included. Therefore, the argument that basic tools are not used to concretize the violation allegations within the scope of this file does not reflect the truth.

- The following arguments: whether a possible measure to end cabinet exclusivity will create the desired competitive effects in the market and such

measure's possible results/functionality should be taken into account. A decision that will result in overregulating the market should not be taken. Whether opening the cabinets will create effects desired by the Board should be analyzed.

(415) Within the framework of the file, it is found that UNILEVER's exclusive presence in freezers eliminated actual competition in the market and in order to prevent this, it is stated that UNILEVER's freezers should be open to competitors. "Opening freezers of the dominant undertaking" is a practice that has been applied to ensure competition in areas with an area below 100m² where a second freezer cannot be located. The Board previously took decisions to open the refrigerators of the dominant undertaking in outlets with an area below 100m² in beer and coke market. With respect to ice cream, the practice of opening the freezers of the dominant undertaking was applied by United Kingdom and Portugal competition authorities, as seen in the decision given by UNILEVER in the plea. The decision to open the freezers by the Portugal Competition Authority was taken as a result of a commitment submitted by UNILEVER to resolve the competition concerns and to end the investigation. Therefore, it is not possible to agree with the argument that the suggestion to open the freezers to increase competition in the market will lead to overregulation in the market.

- The arguments in the plea: A market inquiry was made⁴² by an independent agency to understand consumer demand and to see the expected effects of eliminating cabinet exclusivity in the market. The results showed that were not significant changes since 2008 decision with respect to consumer demand. The survey was an indicator showing that opening freezers would not solve the current market failure, produce the desired competition-increasing effects and there was not demand for competing products. The result was contrary to the approach that market conditions should have been changed in the contrary direction in order to leave the case law.

(416) As shown as a result of the analysis made, there has been a clear deterioration in the competitive structure of the market. Although competitors had freezers, they could not enter the market. It is thought that the answer "working with a second firm does not provide gains for me" is unclear and can have different meanings. Indeed, the outlets may have initiative to this end due to discounts and concessions granted to the outlets. The rate of the answer "customers do not prefer other products", which was credible, is only (.....)%. To draw such conclusion, the outlet must have worked with a second undertaking before and thought so. There is not any information in the inquiry made about whether this was asked. On the other hand, it was clearly shown that in freezers where UNILEVER and its competitors were displayed together, demand for competitors was (.....)%. In addition, even after the freezer is open to competitors, if the consumers do not demand competing products, the outlet can continue to work with UNILEVER. However, in a contrary scenario, competition in the market is completely restricted.

- The following arguments in the plea: A suggestion for opening (.....)% of ALGİDA freezers to competitors is baseless. United Kingdom decision, which is

⁴² It is stated that according to 920 traditional channel samples selected from all geographical regions of Turkey to represent the universe used in Nielsen Retail Index Services on 4-21 September 2020, the number of ALGİDA outlets who say "I will sell only ALGİDA products even if it is possible to place competing products in cabinets" is %70 in 2008 but today this rate is (.....), (.....) of those outlets who sell only ALGİDA products chose the option "working with a second firm does not bring economic return" and (...) of those chose "Customers do not prefer other products" as the first reason for working with a single firm.

a determinant factor in this suggestion, is de facto invalid, a similar decision taken in the United Kingdom before 20 years cannot enlighten the file's and the market's dynamics and requirements, this decision cannot be taken as a basis as a case law.

- (417) Opening (...) % of UNILEVER freezers is stated in the Investigation Report. The Board determines this rate as (...) %. On the other hand, a decision taken 20 years ago can certainly be used for evaluations. For instance, Hoffman-La Roche decision dated 1979 is commonly used in dominant position assessments.
- (418) What is important here is that United Kingdom Competition Authority took a decision to open (....) % of UNILEVER freezers and applied that decision. It is possible that the decision was changed or abolished after the market structure changed in the United Kingdom.
- (419) Indeed, the Board made the following observations in the decision dated 18.03.2010 and numbered 10-24/331-119: EFPA continues to hold a dominant position and increase its market share in the beer market. Import does not have potential to make competitive pressure in the market. Small actors in the market exited and increased the concentration in the market. While EFPA is increasing its market share BİMPAŞ is losing its market share and the number of sales by BİMPAŞ to on premise outlets and off premise outlets is decreasing. The Board concluded that BİMPAŞ would be granted individual exemption within the framework of article 5 of the Act for single brand restrictions not exceeding five years in type contracts to be made between BİMPAŞ and dealers/distributors and on premise outlets and off premise outlets. After a certain period, as a result of the changes in the market, the Board took the decision dated 09.11.2017 and numbered 17-36/583-256 that Tuborg Pazarlama AŞ's⁴³ (TUBORG) exemption shall be withdrawn with respect to off premise beer market and the contracts in this market could not benefit from block exemption on the following grounds: TUBORG regularly increased its market share, EFPA's lost market share switched to TUBORG, although off premise beer market was narrowing, TUBORG increased its share by means of its contracts without exclusivity clauses, which showed TUBORG's power, quantitative and weighted rate of availability of TUBORG products had an increasing tendency and was high as of the date of the decision.
- (420) Therefore, it is not possible to agree with the argument that United Kingdom Competition Authority's decision cannot be used as it was abolished. As it is stated in the plea, the said decision was not abolished but applied. The document submitted in the plea as a basis for that argument is related to an inquiry that the United Kingdom Competition Authority made in 2017 regarding UNILEVER's package offers. The fact that it was not necessary to open an investigation as a result of the inquiry was irrelevant to the subject of this investigation. The expression in the document "*CMA previously informed Unilever that after the restructuring made by the group companies, the legal personality that carries out Unilever's ice cream activity is not bound by the commitments submitted by Birds Eye Walls' Limited in 2000 (the commitments given in 2000) after Competition Commission's report concerning impulsive ice cream*" cannot be evaluated because the said commitments are not known. Even if it is accepted that this expression shows that "UNILEVER is not bound by the measures taken in 2000", this shows that the decision taken in the United Kingdom was valid until 2016. As stated before, what is taken into account with respect to the said decision is the content of the decision.

⁴³ BİMPAŞ's new title.

- Some of the data, which is taken into account while evaluating market closure effects of cabinet exclusivity is misinterpreted, the presence rate of ALGIDA in the traditional market is not (.....)% but (.....)%, (.....)% of the market is still open to competition, a lot of outlets enter and exit the market every year, the reason why competitors cannot enter to the part of the market that is open to competition is not UNILEVER's exclusionary activity but lack of consumer demand and that is verified by a survey.

(421) The findings showed that Nielsen data are not compatible with the data provided by undertakings. UNILEVER's explanations within this scope are included in this decision. All of the calculations regarding ice cream freezers and the number of outlets where undertakings sell ice cream and their presence are made using the data submitted by undertakings. According to the information submitted by UNILEVER, UNILEVER's presence rate in the traditional channel is (.....)% and this is in compliance with the market share over (.....)% in the traditional channel. Evaluations about survey results are mentioned above.

- The arguments in the plea: 100m² store area criteria is not realistic, it would be cutting corners to assume that the whole traditional channel is facing inadequate area problem

(422) In 2008 decision⁴⁴, retail channel where impulse and catering products are sold is divided. Supermarket channel with outlets of more than 100 m² area and outlets of less than 100 m² area are defined. The basic criterion in this categorization is that in the traditional channel mostly impulse products are sold whereas in supermarket channel mostly take-home products are sold. In 2011 Preliminary Inquiry decision⁴⁵, while the relevant product market is defined, it is stated that it is possible to make a distinction by regarding outlets with an area over 100 m² as supermarkets and outlet with an area below 100m² as the traditional channel. Similar to the 2008 decision, the basic criterion in this distinction is that in the traditional channel, generally impulse products are sold whereas in supermarket channel generally take-home products are sold.

(423) In the Board decision dated 10.09.2007 and numbered 07-70/864-327 concerning Coca Cola, the following evaluations are made: the refrigerators allocated to outlets within the framework of loan agreements have an important function due to their effects creating de facto exclusivity. The exclusivity effects are limited in outlets with an area over 100 m². The main factor in turning refrigerator exclusivity to de facto exclusivity is the size of the outlet. The decision includes findings and observations regarding outlets with a net sales area below 100 m².

(424) The Board decision dated 10.04.2008 and numbered 08-28/321-105 refers to the coke decision and emphasizes that 100 m² threshold is meaningful because it represents the outlets in the traditional channel.

(425) Thus, it is not possible to agree with the argument taking into account that evaluations regarding 100 m² criterion, which is included in the above mentioned decisions and in the file, reflects the reality of the market.

- The arguments in the plea: Cabinet exclusivity leading to de facto store exclusivity is explained by the limited area problem. Most of the stores use ice cream freezers outside the store. Depending on outlets' choices, it is possible to place more cabinets in the usable area inside or outside the stores with small

⁴⁴ Para. 460

⁴⁵ Board decision dated 17.03.2011 and numbered 11-16/287-92, Para. 120

cabinets. It is stated in the FMCG Retail Sector Analysis that medium markets are located on the main road or side streets, which indicates that the places outside the store on the road or street can be used. It is a good practice for selling ice cream.

- The arguments in the plea: Only in (.....)% of the outlets, it is not possible to display products outside. (.....)% of them has outside area less than (.....). Inside area is not a realistic criterion for measuring an outlet's sales potential. Mostly, cabinets are placed outside in order to attract passer-by's attention. According to Nielsen 2020 Market Survey, in outlets with inside areas less than 50 m², (.....)% of ALGIDA cabinets is placed outside and (.....)% of them are placed outside. In outlets with inside areas more than 50 m², (.....)% of ALGIDA cabinets are placed inside and (.....)% of them are placed outside. In outlets with areas less than 100 m², the number of ALGIDA cabinets per outlets is less than (.....) in inside and (.....) outside. This fact differentiates this file from coke decision. It is a more meaningful approach to take inside as a basis to measure the sales area in the coke decision. It is clear that outlets with areas more than 100 m² have sufficient place to have more than one cabinet. The assumption that an outlet with an area less than 100m² does not have sufficient place to have more than one cabinet is not accurate. Outlets mostly prefer to place the freezers outside. An outlet with a wide pavement area/outside area can easily place more than one cabinet independently from the inside area.

- (426) It is not possible to take into account the open areas with respect to sales area size for the outlets in the traditional channel because of the uncertainties. The following questions arise: whether the open sales areas in front of the outlets belong to the outlet, whether the outlet can use the open sales area continuously, whether the outlet may lose the open sales area as a result of a conflict with the municipality or local administration, whether each outlet has such open area, whether it is possible to measure or follow this factor. Due to those uncertainties regarding open sales areas, it is necessary that closed sales areas be used in this analysis because they are easy to measure and follow, outlets have the entire ownership and/or use and they have every right of use.
- (427) Information request was sent to competitors in the ice cream market, the Union of Municipalities of Turkey, Ankara Metropolitan Municipality, Çankaya Municipality and İzmir Metropolitan Municipality.
- (428) (...) stated the following issues: If outlets occupy some parts of public places such as a road, square, marketplace and pier, this occupation is subject to occupation charge. Occupation charges are subject to Municipality Law no 2464. If stores use the area in front of the stores by means of placing tables or chairs and/or for entertainment purposes without the authorization of a municipality, adequate compensation should be taken. It is also stated in article 52 of the Act no 2464 that "unauthorized occupation of the places listed above does not end liability." As understood from the provision, it is not a condition to take authorization from the municipality to collect the occupation charge. Moreover, those charges can change from municipality to municipality and location to location taking into account socio economic conditions. Each municipality has a separate directive for the obligation to pay the charge.
- (429) (...) added the following points: In case the outlet is located in the common area of a building, it is necessary to look how the area in front of the store is planned in the approved project. In construction projects, how areas can be used is determined. If an area is a common area and how this area can be used is determined, it can only be

used to that end. Common use areas can be used according to the land share of the owners. Changes can only be made by the affiliated municipality.

- (430) In addition, according to the Property Ownership Law it is stated that: As the areas belonging to the immovable are private properties, all rights of disposition belong to the property ownership of the building; within this framework, flat owners can use those areas as they wish; in case those areas are located in public places such as roadside and pavements, all citizens have equal rights to use those areas as allowed by the authorities; therefore it is not legally possible to limit the use of such areas by the residents or shop owners; thus outlets can rent the common areas of flat owners in accordance with the legal regulations mentioned above.
- (431) (...)’s explanations about the issue can be summarized as follows: According to article 52 of the Act no 2464, in order to make sales in parts of public places such as roads, squares, etc. within the borders of a municipality, it is necessary to take the permission of city or district municipalities and occupation charges must be paid. Otherwise, the relevant authorities may impose administrative fines according to article 38 of the Misdemeanor Act or ban some of the activities according to the Act no 1608 amending the Act no 486 on the penalty provisions regarding municipal affairs. In fact (...) supports some outlets to pay the occupation charge, the rate of outlets who pay this charge among the traditional outlets is very low.
- (432) Moreover, in case the outlet uses an apartment garden or a similar land subject to private property, the outlet can only use the outside area as a result of the permission or tolerance of the land owners, thus the grounds for using outside areas are not stable for most of the time.
- (433) The summary of the answer of the Union of the Municipalities of Turkey (TBB) is as follows: “Temporary” occupation of the places occupied in the places listed in article 52 of the Act no 2464 by having permission duly from the competent authorities for making sales or other purposes is subject to occupation charge. The article states that unauthorized occupation of the places listed in the article does not end liability. In line with this, it is a municipality’s duty and disposal to authorize, and abolish where necessary, a temporary occupation on public places. Municipalities make transactions regarding the temporary occupation of public places within the scope of the legislation and the decisions taken by content authorities, if any. As there is not a hierarchical structure between TBB and municipalities, they do not have any information about the decisions taken while applying the said provisions.
- (434) The answer of the Ankara Metropolitan Municipality (ABB) can be summarized as follows: Regarding the transaction under the scope of article 7(3) of the Act no 5216 on Metropolitan Municipalities, in accordance with the provision in article 52 of the Act no 2464 that “Temporary occupation of the following places within the borders of the municipality by having permission duly from the competent authorities for making sales or other purposes is subject to occupation charge...in order to occupy a part of the public places such as a road, square, marketplace, bridge...” district municipalities carry out the work and transactions such as occupation charge. According to article 7(d) of the Act no 5216 on Metropolitan Municipalities, regarding the occupation by buffets owned by the metropolitan municipality, Ankara Metropolitan Municipality Financial Services Department carry out the work and the transactions for concerning the detection of and occupation charge for the occupations within the scope of article 52 of the Act no 2464. According to the provision in article 7(g) of the Act no 5216 that “...building or having built the roads connecting the districts to town centers, squares,

boulevards, streets and main roads under the scope of the metropolitan municipality's powers, their repair and maintenance, cleaning and snow removal on the roads; in accordance with the city design projects, determining the obligations for the buildings that have frontage overlooking the roads; determining the places to put up announcements and advertisements as well as their shapes and sizes; determining the names and numbers of squares, boulevards, avenues and streets and giving numbers to buildings..." and the provision in article 7(k) of the same act that "...to carry out community policing services in places where the metropolitan municipality is authorized or managing...", although the town municipality collects the occupation charge regarding the occupation on the roads connecting districts to town centers, squares, boulevards, avenues and main roads (pedestrian ways and pavements), if community policing officials detect or a complaint is made, as per the provision in article 38 of the Act no 5326, "Any person who occupies squares, avenues, streets or pavements where pedestrians walk, without the express and written permission of the competent authorities, or who sells goods there, shall be fined an administrative fine of fifty Turkish Liras by the municipal community police officers", administrative fines shall be imposed. According to articles 13/a and 11/a of Municipality Misdemeanor Bylaw, Administrative Sanction Decision Report for the Situation Determined is prepared and submitted to the municipality council and the necessary legal transactions are made in line with the decisions taken by the council.

- (435) Ankara Çankaya Municipality stated that occupation charges are taken according to article 52 of the Act no 2464 and assessments are made about the use of the areas subject to occupation charge as a result of the inspections made.
- (436) İzmir Metropolitan Municipality (İBB) stated that occupation charges for the areas occupied by grocers, buffets, dried fruit and nut sellers and markets under the scope of municipality's sphere of duty, authorization and responsibility, are not collected by İzmir Metropolitan Municipality according to Municipality Council Decision dated 14.08.2015 and numbered 97509404.301.05.776 and occupation is not allowed. Administrative fines are imposed within the scope of article 38 of the Act no 5326 concerning the occupations that are not under the scope of the occupation charges fixed by town municipalities.
- (437) As seen from the answers of the municipalities, there are not clear and fixed practices regarding the use of public places. While occupation charges are collected regarding occupation by the buffets owned by ABB, occupation charges are not collected for the areas occupied by grocers, buffets, dried fruit and nut sellers and markets under the scope of İBB's sphere of duty, authorization and responsibility and occupation is not allowed. The fact that there are different regulations regarding occupation charge in ABB and İBB is sufficient alone to show that there is not legal certainty about the occupation of public places and collection of occupation charges. In case all the municipalities in Turkey are taken into account, there will be more differences.
- (438) Even if occupation charge regarding the occupation on the roads connecting districts to town centers, squares, boulevards, avenues and main roads (pedestrian ways and pavements) are collected by Ankara town municipalities, if occupation is detected or a complaint is made, administrative fines may be imposed as per the Act on Misdemeanors and an additional decision is taken by the municipality council. The differences in practices may cause ambiguity for outlets and eliminate their incentives to place freezers outside. On the other hand, permission is given to temporary and duly occupations within the scope of the Act no 2464 but this does not mean that

permanent occupation of outside areas by outlets is allowed. Therefore, the ability of UNILEVER to place cabinets outside the outlets by paying the occupation charge until now does not necessarily mean that it will be able to place cabinets permanently outside. Thus, it is not possible to agree with UNILEVER's argument that there is not a problem about adequate space in outlets because they usually place the freezers outside the outlets.

- (439) Although FMCG Retail Sector Inquiry states that medium markets in the traditional channel are located on main roads or side streets, it does not state that outlets can easily occupy those areas. Although occupying public areas for selling ice cream is an applicable practice in the market, it can conflict with public authorities' regulations on the basis of a specific case. Therefore, although the assessment that including the open areas to square meter calculation may lead to uncertainty and subjective evaluations is taken into account, making the square meter calculation depending on the closed area will ensure predictability for UNILEVER and other undertakings.
- (440) Another issue is the use of common areas of a building within the scope of open sales areas. In case the outlet is located in an apartment garden or a similar land subject to private property, common use area is used according to the shares of flat owners; according to the Property Ownership Law, the areas belonging to the immovable are private properties, all rights of disposition belong to the property ownership of the building, flat owners can use those areas as they wish, the outside area can usually be used as a result of the permission or tolerance of the land owners, in case those areas are located in public places such as roadside and pavements, all citizens have equal rights to use those areas as allowed by the authorities.
- (441) If the outside area is within the scope of not the municipality but the common use area of the building, if the outlet is not a flat owner, it cannot use the areas outside arbitrarily without permission, if it is a flat owner, it can use the area according to its share. In both situations, the outlet does not have the initiative for using the area outside; it can only use the area outside as much as its flat ownership share permits. Within this framework, permissions for using outside areas are subject to regulations independent of where they are located and beyond the outlet's initiative.
- (442) As a result, including open areas in the square meter calculation will increase uncertainty and lead to subjective evaluations. Making the area calculation depending on net closed sales area is in compatible with the general principles of law due to bringing an objective and predictable rule. Therefore, the evaluations should be made depending on net closed sales area like in coke and beer decisions.

- The arguments in the plea: regarding 100m² criterion, in an outlet with more than cabinets, it is unquestionable that there is a room for a second cabinet. In the investigation concerning Portuguese Group Company, UNILEVER submitted commitments to open 20% of the cabinets to the use of other companies in outlets with a single cabinet in order to terminate the investigation earlier. Portuguese Competition Authority stated in its decision that only outlets with single impulse ice cream cabinet would be under the scope of the commitments and accepted to exclude outlets with two cabinets from the commitments. Even if there are problems about sufficient area in some outlets, to narrow the scope of such intervention, UNILEVER should be allowed to refute, within the framework of objective criteria, the lack of area argument.

- (443) According to the survey commissioned by UNILEVER, most of the freezers are located in open sales areas in outlets where UNILEVER has two freezers. Therefore, it is not

possible to agree with the argument that there is not inadequate space problem in the sales areas with two freezers. In addition, concerning the suggestion by UNILEVER that inadequacy of areas in outlets should be proven according to objective criteria, it is unclear that who will determine the objective criteria and how. It is thought that it is not possible that UNILEVER, which is dominant in the market, can make an objective analysis of whether there is sufficient area for competitors in outlets.

- (444) As a result of the analysis made, it is concluded that if there is not another ice cream freezer apart from UNILEVER's freezer, (.....)% of the visible part and total freezer volume at the outlet should be opened to competitors at outlets with a net closed area below 100m². In case there is more than one UNILEVER freezer, other UNILEVER freezers should be opened too. As mentioned above, it cannot be argued that there is not limited space problem because freezers are located outside. It is not possible to know whether the freezers are located outside or control whether they are moved to outside continuously.
- (445) In the Portuguese Decision, it is stated that retailers would put freezer cabinets in a visible place outside the shop on the basis of loan agreements. Within this scope, open sales areas are not accepted as sales areas. Thus, this file is different from the said decision. In addition, there is not an explanation for choosing outlets with only one freezer. It is possible that the Authority might have taken into account different criteria due to Portuguese market.

- The arguments in the plea: Allowing competitors to enter 50% of ALGIDA freezers will eliminate competitors' incentive to put their freezers in such outlets; free riding will distort competition. Competitors' inability to enter the outlet without being able to compete with ALGIDA's not first but even second cabinet is the result of not a situation requiring a competition law intervention but competition process. Each outlet with more than one cabinet should be determined as much as possible and instead of allowing competitors to free ride at those outlets, encouraging the incentives to put their own cabinets will be more compatible with the fundamental principles and objectives of competition law.

- (446) Until the process of this file, manufacturers operate in the market with their own freezers. In case the freezers are opened to competitors, it will not be consistent with the realities of the market that undertakings working with a lot of stock code (SKU) give up their investments suddenly and target UNILEVER freezers. With respect to free riding, GOLF pointed out the following issues: Free riding is not a real problem. They have a lot of freezers in the traditional channel that are not active. Even if some part of ALGIDA freezers are opened, they will prefer to use their own freezers to display all products and continue their investments for freezers.
- (447) In large outlets with sufficient place, no measure will be taken and undertakings will continue to compete at equal terms. On the other hand, if manufacturers cannot offer their products to consumers at outlets with insufficient areas, their incentive to compete will fade away. Within this framework, opening freezers to competitors will enable manufacturers, who are wishing to enter the market but unable to do so, to offer their products to consumers; increase their presence and freezer investments in the medium and long run by directing the demand towards their products and contribute to competitive process. Besides, according to this decision, 30% of the total freezer volume of ALGIDA at the sale point will be allowed for competitors.

- The following arguments in the plea: Outlets' choice to work with a single manufacturer/market leader is a fundamental market dynamic. It is not peculiar to ice cream market. It is also seen in other product groups. FMCG Sector Inquiry Report also emphasizes this. The outlets have a tendency to sell leading products which they think consumers will demand. Indeed Nielsen 2020 market inquiry pointed out this fact. ALGIDA's (.....) market share at the outlets where all brands are sold explains why a traditional outlet's motivation to place competing products is low. The problem is not insufficient place but lack of as-efficient-competitor in competition law terms.

(448) The fact that outlets primarily and mostly work with the dominant undertaking and its products is self-evident and a reality of commercial life. Otherwise, the dominance of the relevant undertaking would be questionable. In addition working with the dominant undertaking does not mean that outlets cannot work with other undertakings. Otherwise, the relevant company would be a monopoly rather than a dominant undertaking. Therefore the dominant undertaking should not prevent, directly or indirectly, competing products known and chosen by the consumers to some extent from being available in the market. However, because of UNILEVER's cabinet exclusivity, competitors cannot enter to outlets. UNILEVER can continue to sell its products in the entire freezer if there is no consumer demand in an environment free of cabinet exclusivity.

- The arguments in the plea: Even very small outlets with sufficient turnover can work with two cabinets. The fact that outlets with below 100m² area in the traditional channel do not have sufficient space for a second cabinet is not a real dynamic. Outlets are trying to maximize their profits while working with firms and take decisions to this end. According to Nielsen Market Inquiry, only (.....)% of the outlets in the survey answered that the first reason for not having a second cabinet is insufficient area. (.....)% of them stated that they do not prefer to sell competing products because of no consumer demand. If an outlet can maximize its profits by placing a competing ice cream manufacturer's cabinet, it may waive its ALGIDA cabinet, dried fruit stands or one of the fizzy drinks cabinets. The reason why most of the traditional channel outlets are working only with ALGIDA is the lack of demand for competing products, not insufficient area.

(449) Naturally, outlets choose the most profitable products among the alternatives while making sales in a limited sales area. Similarly, it is possible that outlets can gain higher revenues from dominant undertaking's products or products under other categories that compete with respect to sales area. However, this does not mean that consumers who are the customers of the outlet do not demand competing products. The aim of the competition law is to ensure that there are many alternative undertakings in the market and in this way to keep innovation and price competition alive. Within this scope, alternative products should be kept if there is consumer demand even if they are less profitable. In case there is no demand from consumers, outlets will not have the said products even if they are highly profitable. Whether there is demand for such products can be measured in the best way by providing consumers and outlets with the opportunity.

- The arguments in the plea: Even if an outlet works with a single manufacturer, a process similar to a tender occurs. Manufacturers compete fiercely in order to sell their products at an outlet. Outlets can terminate a contract before they will face a disadvantageous position in the ice cream sector, which is very dynamic, thus foreclosure effects are not possible. Competition at the outlet continues

throughout the whole season. Even it works with a single manufacturer, it does not mean that the outlet is not a subject of inter brand competition.

(450) As stated in Board decisions dated 15.05.2008 and numbered 08-33/421-147 and dated 17.03.2011 and numbered 11-16/287-92, UNILEVER products are must stock products due to their brand image and recognition. In other words, outlets first choose UNILEVER. UNILEVER's cabinet exclusivity forecloses the outlet to competitors, weakens the competition in the market and strengthens UNILEVER's dominant position. It is not possible to agree with the argument that an outlet is open to competition from other manufacturers during the season it works with UNILEVER.

- The arguments in the plea: BİM's data, which the investigation refers to, does not reflect the general conditions in the industrial ice cream market or traditional channel dynamics. While impulse products are mainly sold in the traditional channel, mostly catering products are sold in the organized retail. Those products are regarded as different markets. Taken into account Competition Board decisions, organized retail customers cannot provide insights regarding traditional channel consumers. BİM is far from being a sample for a scenario where ALGİDA and GOLF products are sold together in the organized retail channel. Topbaş Group, who manages BİM, also manages GOLF partly. Due to this overlap in the partnership structure BİM sample is eccentric.

(451) Discount markets and supermarkets mostly sell take-home products but there are also impulse products. The fact that take-home products are sold at discount markets does not invalidate the analyses in the file. Outlets in the traditional channel also sell take-home products. The file shows how consumers react to the availability of competing products in the same freezer not how consumers make choices among different types of products. On the other hand, the fact that Topbaş Group manages both BİM and partly GOLF is irrelevant to the file. If what is meant here is BİM prefers GOLF instead of UNILEVER due to commercial concerns, it must be expected that BİM does not sell UNILEVER at all. However, UNILEVER entered to BİM stores in 2018 with a significant presence and increased its share in BİM.

- The rate of BİM's private label products is higher compared to private label products in other discount markets. BİM is regarded as a high discount market within the scope of the FMCG Retail Sector Inquiry Report. According to an independent agency survey, one of the reasons why BİM customers prefer BİM's private label products is that they are not aware of ALGİDA products being sold, ALGİDA products are not visible and outstanding in the white cabinets without brands on and visibility of ALGİDA products are minimum. Since there are not demand-inducing activities in BİM, ALGİDA sales grow more slowly compared to other discount markets. If the price card and informative material regulations included in the measure suggested by the Investigation Committee are realized, ice cream sales will fall.

(452) The file emphasizes that BİM works with private label products and the shares of manufacturers are presented after subtracting the private label products. The condition of not advertising and promoting products applies to UNILEVER as well as other manufacturers.

- ALGİDA started to be sold in BİM as of 2018 and has increased its market share in years. Taken into account GOLF has lost market share since ALGİDA entered to BİM, the assumption that GOLF has caught up ALGİDA in sales share in outlets where they are both present and in case cabinet exclusivity is ended, GOLF's performance will keep up with ALGİDA's performance is not true.

(453) The assumption that GOLF's performance will be at the same level as ALGIDA is related to the sales performance in BİM. It is not meant for the entire market. BİM is set as an example to show that if competitors have an area in a cabinet at equal terms as UNILEVER, they can have a certain amount of shares in line with consumer choice and if this is the case in the overall traditional channel, competitors can become efficient against UNILEVER. Therefore, BİM sample shows that opening freezers to competitors can increase the competition in the market.

- The arguments in the plea: BİM is used as a sample but the assessments are attributed to the whole organized retail channel. Organized retail channel covers both supermarkets and discount markets other than BİM. If the basis of the analysis is the competitive environment where ALGIDA and GOLF are sold together, this channel should be evaluated entirely. An analysis on the basis of BİM – the most exceptional customer – is misleading and incorrect in its current form. With respect to ALGIDA's market shares in discount markets where ALGIDA and other products are present together, ALGIDA's market share in ŞOK is (...) % and (...) in A101 in 2019. According to the market share data on the basis of turnover in the supermarket channel, where ALGIDA and competitors are present together, ALGIDA's market share is (...) % in the last three years. This fact alone is sufficient to refute the arguments that ALGIDA's market shares have fallen significantly when ALGIDA products are sold together with GOLF products. In Migros stores, which have the largest area and highest number of competitors, ALGIDA's market share is (...) % level. Predictions can be made depending on this and similar customer samples.

(454) BİM sample is not used for showing the environment in the supermarket channel or discount market channel alone. The reason for using BİM as a sample is the presence of manufacturing undertakings together. Naturally, in ŞOK, Migros or in other supermarkets in the organized channel, some of the manufacturers are placed in their own freezers and some of them are placed in markets' freezers all together. BİM is chosen as a sample because product manufacturers are placed together in all shops and all freezers. In case freezers are opened in the traditional channel, manufacturers will be placed together in the same freezer rather than different freezers. BİM sample is very meaningful in this sense and cannot be compared to organized channel, especially discount markets or supermarkets due to said reasons.

- The arguments in the plea: According to an OECD report, the measures to be taken by a competition authority should increase competition in the market. A competition authority should not be expected to take a decision based on the idea that it is better to make a regulation in any circumstances than taking no actions. The effects to be created by the measure form the legal borders of the measure. According to administrative law principle, the administration cannot make a transaction that is non-proportional to its objective. Likewise, a competition authority cannot decide to take a measure that is not eligible for producing the desired results. Within the scope of the investigation which argues that cabinet exclusivity should be ended, how the measure will increase competition in the market should be shown but it is not shown satisfactorily.

(455) As stated above, after 2008 Decision, concentration in the market has grown. While UNILEVER has increased its market share and number of freezers, competitors' both market shares and number of freezers have decreased. As ice cream cannot be sold without freezers, freezer exclusivity has turned out to be outlet exclusivity, especially in outlets with insufficient areas. BİM sample shows that in cases where freezers are

opened to competitors, competing products are also preferred and competing products can reach significant shares. This shows clearly that the suggested measure can increase the competition in the market. In addition, United Kingdom Competition Authority's decision, which opens (...) % of UNILEVER freezers to competitors to solve the competition constraints shows that opening freezers is a method applied by other authorities. As submitted in the second written plea, Portuguese Competition Authority prevents the competition constraints created by cabinet exclusivity by opening 20% of the freezers to competitors. In that decision, UNILEVER suggested opening 20% of freezers to competitors as a commitment to eliminate competition concerns in the market and to end the investigation and Portuguese Competition Authority accepted the commitments. In light of this information, it is not possible to argue that it is not a measure to increase competition.

- The measure will decrease UNILEVER's product variety. UNILEVER meets consumers' desire to reach different products by means of its innovations. However, opening freezers to competitors will impede UNILEVER's development of new products and negatively affect its motivation to carry out R&D activities, limit the number of UNILEVER's products for low income group. UNILEVER will be forced to display expensive products and results will be disadvantageous for consumers with respect to prices.

- (456) Inter-brand competition is important for consumers and the competition in the market rather than intra-brand competition. The objective of competition law is to ensure that consumers benefit from the competition between firms and encounter prices that are formed as a result of competition between firms.
- (457) Product variety, innovation and price levels are the expected benefits of competition in the markets. It is not possible to tolerate an anticompetitive practice on the basis of the argument that it will decrease product variety, R&D and innovation incentives of a single firm. Competition law is responsible for protecting the competition not the competitor. As known, the only process that can guarantee low prices, R&D and innovation incentives is competition per se. Therefore, it is expected that UNILEVER's product variety, R&D and innovation incentives will increase in a market where competition is boosted by opening freezers to competitors.
- (458) In the scenario where freezers are opened, the product types that cannot be offered by UNILEVER can be offered by competitors. If UNILEVER will have to sell more expensive products, competitors can react by selling cheaper products after the freezers are opened. It is a well-known fact that most suitable prices for consumers and product variety will be ensured and competing undertakings will increase their R&D and innovation investments in the market where well-functioning competition is established.
- (459) Not being able to display the entire product portfolio is a constraint for all manufacturers. Which products will be placed in the freezers should be determined under competitive conditions. It may be contrary to the Act no 4054 if the dominant undertaking tries to sell its entire product range at outlets by means of anticompetitive practices in the market because this may foreclose the market. Therefore it is not possible to accept freezer exclusivity because it is found to be contrary to article 4 of the Act no 4054 within the scope of the file. Moreover, there are no barriers to UNILEVER to increase its presence and SKU in freezers in case there is no consumer demand and outlet preference for competing products.

- ALGİDA's not being in half of the cabinets will increase outlet visit frequency. There will be problems stemming from the stock. Consumers will not be able to find the products they want. Even in the current situation, cabinets are insufficient with respect to ensuring ALİGDA products' availability completely. The cheapest ice cream throughout the world is sold in Turkey. ALGİDA sells cheaper products than GOLF, its closest competitor, in (.....) categories. There will not be favorable results with respect to price for consumers. Contrary to the argument in the Investigation Report, opening the freezers to competitors will be an artificial and short term solution which will protect competitors' interest instead of efficient competition and consumer welfare. This contradicts with the principle that competition law protects the competitive process not the competitor.

(460) The argument that findings and evaluations within the scope of the file protect the competitor not competition is not realistic. On the other hand, why the argument that UNILEVER is currently selling its products at cheaper prices than GOLF as a defense is submitted cannot be understood. GOLF may have to lower its prices in order to compete with UNILEVER. It is expected that non-price competition such as innovation, variety, and quality will flourish if competing products are in the same freezers for the same consumer group.

- Ending cabinet exclusivity will shrink the ice cream market in Turkey. While BİM (.....)% share in total food, it takes (.....)% from ice cream group. These figures are similar in A101 and ŞOK.

(461) There may be various reasons for why ice cream sales are (.....) in BİM (if the said argument is assumed to be true). It does not seem possible that an anticompetitive practice will shrink the ice cream market because competitors who could not enter to the outlets will be able to meet consumers. It is also expected that competitors will use their recognition in the traditional channel in increasing their sales in other channels. Outlets in the traditional channel are very important for advertising, promoting image and creating consumer preference for the product. Exclusivity in those outlets where visibility is very important has the potential to create entry barriers to industrial ice cream market. Thus, a growth is expected by eliminating the said barrier contrary to what is suggested.

- Ending cabinet exclusivity may cause under the counter products to enter the cabinets and jeopardize product quality. Only Label Directive will not guarantee that local players operating in artisan ice cream market will not enter ALGİDA freezers. The measure to open the cabinets can lead to health problems and the possibility to realize the measure during Covid-19 outbreak will engrave the situation.

(462) The decision describes in detail which products will be sold in freezers if the freezers are opened. Moreover, as outlets in the traditional channel have been selling only industrial ice cream both in UNILEVER's and competitors' freezers for a long time, outlets have a high level of knowledge about the difference between industrial ice cream and artisan ice cream. On the other hand, a connection cannot be made between Covid-19 outbreak and opening ice cream freezers.

- According to RBB's opinion, loan model in ice cream freezers provides productivity. In this model, retailers do not bear freezer's fixed cost and volume risk regarding freezer investment. Thus outlets are motivated to have more

freezers and supply increases. In Prof. Akman's opinion⁴⁶, loan model is regarded as a beneficial economic model for the market and not minimizing free-riding is criticized.

(463) Opening UNILEVER freezers to competitors requires that loan agreements be updated in areas where they restrict competition in the market not be totally annulled. There are detailed assessments about the arguments that loan agreements provide productivity and prevent free riding in the sections above. The defense of the undertaking in this sense is not found relevant.

- After the decision of the United Kingdom Competition Authority, the market narrowed, consumer welfare decreased, competitors' market share did not increase but decreased. In Competition Authority sources, it is regarded as a mistake that should not be repeated. However, the investigation committee's approach was the opposite and baseless.

(464) The alleged Authority source is Sinan BOZKUŞ's expertise thesis. On the first page of the thesis, it is emphasized that the opinions stated in the thesis belong to the author and do not reflect Competition Authority's views. It is meaningless to mention the said thesis as an Authority source. Sinan BOZKUŞ refers to Derek RIDYARD's article and findings thereof. Derek RIDYARD claimed that opening (.....)% of the freezers in 2000 led to shrinkage in the ice cream market in the United Kingdom as of 2005. Those claims are the author's view. It is not possible to argue that the decision did not have any positive effects in the market. The only point to be taken into account about that article for this investigation is that it shows that the decision was applied. Different authors may express different opinions about the decision. The developments in the markets after the decision to open the freezers to competitors vary from country to country. Authorities may intervene to this in different ways. Moreover, the author in question worked as an economist on behalf of UNILEVER in cases related to Commission's Van den Bergh Foods decision and United Kingdom Competition Authority's decision to open the freezers and obtained most of the data he used in the article from UNILEVER.

- The arguments in the plea: The exclusivity provision in the agreement with GETİR is related to only cabinet exclusivity, as understood from the title and wording of the provision. The title of the provision is written as "Obligations related to Ice Cream Cabinets" and includes regulations related to cabinets. ALGIDA accepts that the said article is relatively unclear and may lead to misunderstanding. The expression "in the area where the enterprise is located" does not mean anything to GETİR. If ALGIDA had wanted to bring exclusivity, the said article would not have been regulated under the title "Obligations related to Ice Cream Cabinets".

(465) Article 5 of the agreement with GETİR titled "Obligations related to Ice Cream Cabinets" includes the following provision: "*In the area where the enterprise is located, Algida brand ice cream products or other products that Unilever clearly and in written form authorizes will be sold exclusively during the term of the agreement.*" Thus, although the title of the article refers to cabinet exclusivity as ALGIDA argues, the expression "*the area where the enterprise is located*" is arranged in a way to prevent the sales of competing products. Although this expression does not mean anything to GETİR, which operates online, it can be said to refer to warehouses used by GETİR

⁴⁶ Prof. Pinar Akman's opinion "Opinion on Exclusive Dealing and Rebates In EU Competition Law", which ended on 6.01.2021 and which is submitted by UNILEVER together with the third Written Plea within the scope of the file.

for distribution. Lastly, it is argued that in the scenario if the aim was exclusivity, the aim would not be arranged under the title of cabinet exclusivity, in other words, exclusivity provision would be written more clearly and understandably. However, the current version of the agreement is capable of creating exclusivity.

- The arguments in the plea: GETİR's explanations are parallel to ALGİDA's plea. In spite of GETİR's explanations, the argument that the agreement is interpreted in a way to include exclusivity is baseless. This argument conflicts with many Board decisions⁴⁷ that take into account resellers' statements. It is necessary to depend on the statements of the customer, who is the addressee of the agreement, to analyze the objective and function of the article of the agreement when its wording is unclear and meaningless. One of the competitor's claim that GETİR is working exclusively with one of the players in the market is baseless and does not provide a reasonable ground.

(466) As stated in the plea the Board may resort to undertakings' statements in investigations. Those statements are taken into account after they are compared to declarant undertakings' behavior and practices, other market players' statements and the elements that vary from file to file. Within the scope of this file, GETİR's statements were considered. In addition, the wording of the said agreement was compared to other agreement samples. Also, whether GETİR was working exclusively in practice was considered, then a conclusion was made. GETİR stated in the letter dated 06.07.2020 that it did not sell industrial ice cream other than ALGİDA products until July 2020.

- The arguments in the plea: The agreement was revised by the Additional Protocol on 25.11.2019 but GETİR started to work with competitors seven months after the agreement was amended, as of July 2020. Thus the reason why GETİR started to sell competing products is not the amendment to the agreement with ALGİDA but product diversification due to the changes in business models during the outbreak. Therefore, GETİR's inclusion of competing products to its product portfolio is its own independent commercial decision.

(467) After it was notified with the Investigation Notification that the said article was being reviewed, the information that the agreement was revised was conveyed to the Investigation Committee. Accordingly "cabinet" was used instead of the expression "*the area where the enterprise is located*". The unlimited term of the agreement became limited to (.....) years. In order to make a comparison, ALGİDA's agreements with other customers were also analyzed, it was seen that those agreements did not include the expression "*the area where the enterprise is located*". The articles concerning the obligations related to freezers use "cabinet" or "freezer" clearly. According to the information GETİR provided, GETİR did not sell competing ice cream products after the agreement was signed. Thus it was concluded that the said provision was applied like exclusivity. The argument that GETİR waited for a while to sell competing products cannot change the findings of the file.

- The arguments in the plea: ALGİDA's awareness about the obligations brought with 2008 Decision is very high. It is beyond the realms of possibility that ALGİDA might have included such exclusivity provision in an agreement. ALGİDA has obligatory training activities regarding competition law regularly.

⁴⁷ The Board's following decisions: LB Börekçilik decision dated 14.11.2019 and numbered 19-40/646-27 Mey İçki decision dated 17.11.2011 and numbered 11-57/1476-532, İşbir Yatak decision dated 16.06.2011 and numbered 11-37/784-247, Yay Gıda decision dated 18.11.2009 and numbered 09-56/1327-333 and Vira Kozmetik 02.08.2007 and dated 07-63/767-275.

- (468) An undertaking's competition law compliance programs and awareness do not affect the validity of the findings made within the scope of a file. Undertakings' behavior in practice forms the basis of the evaluation.
- (469) **The arguments in the plea: It would not be commercially rational for ALGİDA to use an exclusivity provision in an agreement consciously with an undertaking whose turnover corresponded to (.....)% of its turnover in the year when the agreement was made. Considering GETİR's place in total ALGİDA sales, the benefits to be obtained from including such provision in an agreement and its implementation will be very insignificant⁴⁸ compared to the administrative fine to be imposed depending on the turnover of the previous year. It is not possible to argue that the agreement created an important effect in the market. Even if the provision were interpreted as a full exclusivity provision, it would be more appropriate with respect to legal predictability principle to regard the practice as individual and far from being systematic⁴⁹.**
- (470) Although 2008 decision clearly prohibited UNILEVER's agreements with outlets apart from Algida Shops, which included non-compete obligation or practices creating de facto exclusivity, the agreement with GETİR included expressions that may indicate exclusivity. Therefore, the agreement is directly contrary to 2008 decision. In this sense, it is not necessary to discuss whether the practice is individual, systematic or has few effects.

The arguments in the plea related to the documents obtained during the on-site inspection

- The e-mail with the subject "Migros Aisleway practice-2018" sent to ALGİDA staff by Can NİZAM, an executive assistant in the traditional market, is irrelevant with respect to the course of the investigation. The said document is related to organized retail channel. The investigation analyzes the traditional channel. The document is not related to the three claims of the investigation.
- Concerning the e-mail with the subject "Competing firm places Maraş freezer at our MVC customers in 2018" sent by ALGİDA sales expert (.....) to sales representative (...), it is said that GOLF gave high concessions to outlets and placed additional cabinets. The action offered by ALGİDA does not cover, in any sense, exclusion of GOLF cabinet from the outlet. ALGİDA tried to compete by placing ALGİDA's Maraş cabinet to the places where GOLF put its Maraş cabinet. In this sense ALGİDA's reaction to its competitor cannot be regarded as an infringement of competition law.
- In the e-mail sent by (.....) to (...), sales director (.....), and (.....) dated 18.10.2018, with the subject "East Anatolia CMI Report", it is stated that local brands are a threat in impulse products. Local players are incumbent in the market. The

⁴⁸ The following arguments are stated: The share of GETİR and other e-trade platforms in ALGİDA's turnover is very low. In the Board decision regarding TNet dated 09.02.2017 and numbered 17-06/53-20, with respect to market foreclosure, the part of the sales of the dominant undertaking which stems from exclusivity is taken into account. In the European Commission's GDF Decision dated 03.12.2009 and numbered COMP/39.316 and Distrigaz decision dated 11.10.2007 and numbered COMP/37.966, the volume that is closed to competition is emphasized specially, similar to the Board's enforcement and it is obvious that market foreclosure effect will be insignificant.

⁴⁹ The following arguments are stated: In Aygaz decision dated 16.11.2016 and numbered 16-39/659-294 (para. 137), it is concluded that even if it is assumed that Aygaz intervene to sales prices, this intervention concerns only one station and is not systematic. A similar approach can be adopted for this file.

expression “attention to GOLF” does not reflect an exclusionary practice. ALGİDA has a motivation to compete with its competitors. Following competitors’ actions and taking competitive actions against their moves does not include any anticompetitive elements or objectives.

- The e-mail dated 13.03.2019 with the subject “FW: A01 Contact information and Meeting Plan”, sent by ALGİDA South East Anatolia Region Sales Inspector (.....) to assistant director (.....) is related to organized retail, which is not under the scope of this investigation. Therefore, cabinet positioning and placing additional cabinets to the outlets in this channel cannot enlighten the arguments related to traditional channel. The documents related to organized retail should not be considered by the Board.

(471) There are not any evaluations based on the said documents. Therefore, it is not necessary to analyze or assess the relevant documents in response to those arguments in the plea.

- The arguments in the plea: It is claimed that UNILEVER’s practices are not commercially reasonable. There are not any evaluations showing whether parameters taken as an indicator of unreasonable practice is special to UNILEVER or related also to competitors. Placing more than one cabinet in outlets is commercially reasonable and useful. They use a freezer at a size that can be placed by competitors at those outlets while placing a second freezer. The rate of placing more than one freezer for competitors is similar to UNILEVER. Therefore such practice cannot be regarded as a commercially unreasonable practice or a practice with exclusionary objective.

(472) Discounts that can be given by other undertakings in the market may restrict competition in the market when given by a dominant firm. So, implementation by a dominant firm of a discount that can be given by competitors may violate the Act no 4054. Within this framework, taking into account the special responsibilities of a dominant firm, activities of a dominant firm cannot be tolerated because they are similar to those of its competitors’. Consequently, it is not necessary to question whether the investigated practice is also made by competitors.

- The arguments in the plea: UNILEVER’s discount system is said to be complicated and was not put under a detailed analysis. On the pretext that UNILEVER’s concessions in the traditional channel are “complicated”, the intention was analyzed. However, it is not possible to accept the methodology that approaches discount systems with respect to objective instead of effect in Turkish and EU competition law. Dominant Position Guidelines state that as-efficient competitor test should be made. It is an economic test that takes into account costs and sales prices. It is not a method that comes to a conclusion by depending on competitors’ loss in market share. Competition Board case law also shows that an economy-based approach using as-efficient competitor test should be adopted.

(473) It is not necessary to use as-efficient competitor test in every file investigating dominant undertakings. Whether there is an abuse of dominant position can be analyzed by different methods according to the requirements of each case. Therefore, there is not a single approach featuring in literature, competition enforcement or courts’ actions. For instance, Italian Competition Authority decided in its decision related to UNILEVER’s discount systems that UNILEVER’s discount system is based on complicated practices that cannot be captured or measured sufficiently by as-efficient

competitor test or similar economic analysis and UNILEVER's conduct is a part of a strategy that aims to prevent competitors' presence in the market as a whole.

- The arguments in the plea: There are not any similarities between Italian Competition Authority's decision and this file. Concessions are given in Turkey at the beginning of the season. In Italy target discounts are given at the end of the year or the beginning of the following calendar year. Therefore, the concessions in Turkey cannot be used as a discouraging mechanism on the outlet wishing to sell other providers' ice cream like the Italian case. In UNILEVER's concession practices in Turkey in the traditional channel, there are not target requirements. The terms of the agreements with customers vary between one and five years and prolong in Italy, which cannot be seen in Turkey. The decision of the Italian Competition Authority is not applicable in this file. There are not any facts that can justify the lack of economic analysis under the scope of the investigation anyway.

(474) Italian Competition Authority's decision is not given as a justification for not making as-efficient competitor test. The only reason for including the said decision is that it is an example of why competition authorities do not have to use as-efficient competitor test.

- The arguments in the plea: The Board analyzes the conditional discounts that depend on a certain target/obligation under the title of discount systems in ceramic decision. The Dominant Position Guidelines define discount systems as discounts in prices given to customers in return for a certain purchase. In 2011 Unilever decision, it is stated that the most prominent nature of discount systems is being conditional. In the first plea, it is stated that UNILEVER's concession system in the traditional channel does not have any sales target or conditional discount. Concessions in the traditional channel do not amount to a discount system as understood in the competition law theory. It is not possible for them to create loyalty-inducing effect. The established case law of the Authority supports this. UNILEVER's concessions are simply price competition. Unconditional discounts do not have the potential to foreclose the market to competitors. In the literature, UNILEVER's discounts can be defined as functional discounts. In the doctrine, it is stated that functional discounts do not constitute abuse of dominant position. 2011 Unilever decision analyzed concession system, showed the system's objectives and effects in detail and confirmed that UNILEVER's concession system was not contrary to competition law. UNILEVER is still using the very same concession system. The practices whose compliance with the legislation was confirmed cannot be regarded as a violation within the scope of the present investigation and they cannot be penalized for continuing those practices.

(475) The plea argues both that UNILEVER's discounts do not constitute a discount system in the sense of competition law and that UNILEVER's discount systems were investigated in 2011 and no violation was found about them. Those two claims are in conflict with each other.

(476) Undertakings make discounts to increase sales. Complication of competitors' activities in illegal ways by dominant undertakings is contrary to the Act no 4054. Within this framework, UNILEVER's discounts for traditional outlets can be analyzed within the scope of competition law. The methods to analyze discounts may differ on the basis of each file. While the discounts in the traditional channel were being analyzed, comparison of the discounts given to outlets selling ALGIDA and to outlets selling ALGIDA and competitors was sufficient in 2011 UNILEVER decision. Since the

discounts were not significantly different, it was concluded that there were not sufficient information and evidence showing that UNILEVER was trying to create exclusivity in final outlets. It is clear that the said conclusion does not mean that the compliance of UNILEVER's discount system is confirmed and will not be analyzed any more. In that case, a second inquiry cannot be made about any firm that has been investigated once. However, it is well known that undertakings are subject to Authority's monitoring constantly within the scope of the changing structure of the market, new developments and new complaints.

- The arguments in the plea: To regard placing more than one freezer as an exclusionary conduct is not convenient. Cabinet positioning strategy is to place cabinets to outlets with sales potential rather than to put an unnecessary cabinet to exclude a competitor. In the outlets whose cabinet numbers increased, GSV⁵⁰ increased by (.....)% and sales increased on a per unit basis by (.....)%. Nearly (.....)% of the outlets with increased cabinets/volume has also increased their turnovers. When the system is analyzed as a whole, there is (.....)% turnover increase approximately. Therefore, placing more cabinets to outlets is commercially reasonable. The gross sales increase obtained as a result of additional cabinet investment is high, (.....)% and profitable. Within the framework of the fundamental economic rules, the only indicator of whether UNILEVER's freezer investment is rational is whether the revenues obtained as a result of the investment is above the investment cost. It is proven that cabinet positioning is made in a rational and very profitable way. It is not possible to say that UNILEVER's cabinet positioning is "contrary to natural flow of commercial life" or related to the object of excluding competitors.

(477) Briefly, the findings in the file show how competitors are excluded from the outlets in the traditional channel where freezer volume/number as well as discounts increased in spite of falling sales. Although competing firms can also place additional freezers to outlets, it is clear that if UNILEVER's placing additional freezers is found to restrict competition, it violates the Act no 4054.

(478) It is not possible to argue that the only indicator of whether placing a second freezer is rational is whether the revenue obtained as a result of the investment is higher than the investment cost and thus placing a second cabinet is commercially rational due to the above-mentioned reasons. Under the scope of the file, it is shown that UNILEVER excluded its competitors out of the market by means of placing additional cabinets. Thus, UNILEVER's actions for placing additional cabinets can be prohibited even if they are not below cost.

- The arguments in the plea: "Possible effect standard" has taken more part in Board's Tırsan decision and the inquiries in the European Union. If there are no exclusionary effects on the competitor, no violation is detected. In the case law of the Board, it is stated that "effect" based analysis should be made. In Bekir KOCABAŞ's expert thesis –one of the Competition Authority Expert Thesis- it is stated that the effects of discount systems in the market should be shown on the basis of each file. Therefore, the methodology used to analyze UNILEVER's concession system is unacceptable within the framework of the secondary legislation issued by the Authority, the case law of the Board as well as the

⁵⁰ GSV is the abbreviation of gross sales value and means the gross sales amount where the discounts are not reflected.

established competition law doctrine related to discount systems. Intention based analysis is not connected to recent case law or doctrine.

(479) According to article 6 of the Act no 4054 “Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity, or actions aimed at complicating the activities of competitors in the market” by dominant undertakings is illegal and prohibited. Thus, it is sufficient to show the objective of the dominant undertaking. Moreover, the analyses and observations within the scope of the file show both the objective and effects of the practices of UNILEVER.

- The arguments in the plea: UNILEVER’s cabinet positioning policy or discounts in the traditional channel should be measured not on the basis of data sets which are artificially narrowed down but on the basis of an evaluation of the whole system. Making evaluations on the basis of a universe which is narrowed down artificially cannot be explained by means of competition law principles. In any case, it is possible to show that there are not any exclusionary activities through an in-depth analysis.

(480) As stated before, the number of outlets where competitors can enter is already low. The most important reason for this is UNILEVER’s freezer exclusivity becoming outlet exclusivity. As a result of the analysis made within the scope of the investigation, it is observed that as of 2019, (.....)% of the traditional channel is closed to competitors. Therefore, the number of outlets which UNILEVER will try to bind to itself via its discounts is already low.

(481) The analysis within the scope of the file is made by evaluating UNILEVER’s practices related to discounts together with practices related to freezing cabinets. The most important reason for this is the necessity to increase freezer volume or number in order to increase ice cream sales as ice cream must be sold in freezers. Therefore, discounts cannot be evaluated independently from freezer actions. Another reason is that UNILEVER has already foreclosed an important part of the traditional channel with freezer exclusivity. Due to this finding, outlets with increased freezer volume or number are chosen while analyzing discount systems. Within the framework of all the information given above, the number of freezers given to outlets or the outlets where the freezer volume has been increased were analyzed in order to detect whether discounts have led to UNILEVER’s abuse of its dominant position by means of excluding its competitors.

(482) As a result of the said systematic conduct, every year competitors have lost their presence at outlets, even in small rates compared to the overall market. The results can be seen in undertakings’ market shares given in the table below.

Table 53 - The market shares of undertakings operating in the industrial ice cream market in the traditional channel

Market shares in the traditional channel								
Undertaking	2016		2017		2018		2019	
	Liter	Turnover	Liter	Turnover	Liter	Turnover	Liter	Turnover
ALGİDA	(.....)	(...)	(...)	(...)	(...)	(...)	(...)	(...)
GOLF	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)
PANDA	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)
OTHER ⁵¹	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)

⁵¹ PERNİGOTTİ, ETİ, A.O.Ç., BABAŞ and others

TOTAL	~100	~100	~100	~100	~100	~100	~100	~100
Source: ALGIDA (Nielsen)								

- The arguments in the plea: The evaluations made by the rapporteurs regarding concessions do not constitute an impact analysis with respect to competition law doctrine. The evaluations are made on the basis of a universe corresponding to 1% of the relevant market. The fact that competitors left the analyzed outlets cannot be explained by UNILEVER's conduct. Competitors might have left the outlets for other reasons.

As stated before, the analyses made within the scope of the additional opinion looked into traditional channel outlets where the number or volume of freezers changed. In the analysis made taking two periods as a basis - 2016-2017-2018 and 2017-2018-2019 - common outlets were detected. For instance, for the first period, the outlets whose turnover in 2017 was lower than 2016 but where the concessions given as well as the number and volume of freezers were increased at the beginning of 2018 were detected. Later, the presence of competitors in the said outlets was analyzed. The same method applies for the second period. Within this scope, the rate of the analyzed outlets does not show that the analysis is not sound. According to competition law, proving a likely effect is sufficient. The said analyses showed that UNILEVER's practices led to de facto exclusivity.

- The arguments in the plea: In 2011 decision, when concessions given by PANDA and GOLF and concessions given by UNILEVER were compared, it was seen that the two brands gave higher concessions than UNILEVER. If UNILEVER had an objective to foreclose the market or exclude the competitors from the market through concessions, it would be expected that higher concessions would be given to outlets that sold brands other than ALGIDA. In order to say that the argument stated in the investigation is valid, first, it must be shown that outlets with additional cabinets are granted systematically more discounts but the report does not contain any data to this end. As seen from the table in the plea, outlets with increased number of cabinets did not have significant discounts proportionally but the concessions to such outlets in 2019 fell down proportionally. Similarly, there are not significant differences between outlets with more than one cabinets and outlets with a single cabinet.

(483) Within the scope of the file, discounts given by UNILEVER and close competitors are compared; it is found that UNILEVER's discount/turnover rate is lower than that of its competitors'. Thus, UNILEVER can make more sales by giving lower discounts compared to its competitors. It is thought that UNILEVER can make more sales by giving lower discounts in percentage, because it is "must-stock product" for outlets and competitors must give higher discounts compared to UNILEVER to be placed in outlets. Within this framework, the fact that UNILEVER's discounts are lower than its competitors does not indicate that they are in compliance with the Act no 4054. Again, the claim "if UNILEVER had an objective to foreclose the market or exclude the competitors from the market, it would be expected that higher concessions would be given to outlets that sold brands other than ALGIDA or to outlets with two cabinets" is not correct. It is possible that UNILEVER can foreclose outlets or place a second freezer due to ALGIDA's market position by means of lower discount rates.

- The arguments in the plea: The aim of pointing out the fact that an average sale amount has decreased after UNILEVER put an additional freezer is not clear. Also, it is confusing that the comparison is made on the basis of volume/liter. Generally, traditional channel is consisted of impulse and discount markets and

supermarkets channels are consisted of take-home products, which may mislead volume-based comparison. When a comparison is made on sales amount basis for traditional channel, there is a completely different picture. On the basis of sales amounts, traditional channel freezer productivity is far beyond supermarkets. Taken into account the consumer traffic between the traditional channel and supermarkets, obtaining such a result in spite of the difference, is an indicator how productive and rational the cabinet positioning policy in the traditional channel is planned. The findings in the investigation are far from showing any practice that is not commercially reasonable. There is a mistake in the calculations of the data in paragraph 330 due to an Excel error made while filtering outlets without sales/cabinets. Thus, evaluations are not valid. When correctly filtered, the GSV value of the outlets making sales over 0TL and having cabinets is (.....)TL, the number of outlets is (.....), the number of cabinets is (.....) and turnover per cabinet is (.....)TL.

(484) In the analysis made within the scope of the investigation, information about sales per freezer is given. It is indicated that sales amounts per cabinet significantly vary among customer groups especially in the traditional channel. It is also indicated that sales in proportion to freezer volumes have fallen in all customer groups except discount markets. The reason why the said comparison is made on a liter basis is that take-home and impulse products are sold together in traditional channel, supermarket and discount market channel. If an analysis made on an amount basis, as stated in the plea, take-home products will be assessed incorrectly. However, an analysis on a liter basis makes a healthier assessment and comparison by including each product according to its liter.

(485) In the Excel file used to form the Figure 1 above, in freezer number column, "0" is excluded and outlets with more than one cabinet are included. In the plea, it is stated that this evaluation should have been made by excluding outlets bigger than zero not excluding "0". The said Excel file is evaluated again. Accordingly, the number of outlets with UNILEVER cabinet is (.....) whereas the total number of freezers is (.....). Those outlets made totally (.....) TL sales and accordingly average amount of sales per freezer is (.....) TL52. The important issue here is that (.....)% of outlets ((.....)) made sales below that number and (.....)% of those outlets have two and/or more freezers. Therefore, findings and evaluations in the investigation are still valid after the proposed calculation is made.

- The arguments in the plea: Foreign Authorities' decisions are listed to discredit UNILEVER. United Kingdom Competition Authority's recent decision that UNILEVER United Kingdom group company's package discounts do not have exclusionary effects should have been included in the file. Decisions about UNILEVER Group's other companies' discount systems in other countries are used without considering whether there are similarities with the subject of the file to support the violation allegations and this is not acceptable.

(486) As a general practice, decisions regarding the investigated undertaking taken by the Board and other competition authorities are included in the investigation reports. Within this framework, decisions taken by other competition authorities regarding UNILEVER are included in a separate section. Other decisions taken by the Board about

⁵² In the Investigation Report, the relevant part is as follows: the number of outlets with UNILEVER cabinet is (...), total freezer number is (...) and total sales by those outlets is (...)TL. Accordingly the average amount of sales per freezer is calculated as (...)TL. It is concluded that (...)% of outlets (...) made sales below that number and (...)% of those outlets have two and/or more freezers.

UNILEVER are also included. Those decisions are summarized to give information not to support the violation allegations. Therefore the argument that decisions are used without considering whether there are similarities with the subject of the file to support the violation allegations and this is not acceptable is not true.

- The arguments in the plea: Although the investigation attributes a violation to UNILEVER, what UNILEVER should do to end this violation or not to face with such allegation in the future cannot be understood. Since granting unconditional discounts is not contrary to competition law, UNILEVER cannot understand which element of the system should be changed.

(487) It is not necessary to inform the undertaking about how the violation will be terminated in the Investigation Report or as a result of the inquiries made by the Board. The responsibility about how to change the practice that is regarded as a violation is on the undertaking. A practice such as the discount system which is the subject of this investigation should not be expected to be formalized by the Board.

- The arguments in the plea: UNILEVER's concession system in the traditional channel is commercially reasonable and profitable. UNILEVER cannot predict outlets' performance expectations. Concessions are given at the beginning of the season and cannot be withdrawn. Moreover, traditional retail is a very dynamic market with uncertainties. Every year nearly 25,000 outlets enter or exit the system. Thus, there is a margin of error regarding the concession system like freezer placement. Therefore, the concessions cannot produce the expected returns. If UNILEVER cannot take the return for concessions, it takes corrective actions such as lowering concession amounts and number of cabinets in the following year.

(488) The investigation evaluates discount practices in three periods: 2016-2017, 2017-2018 and 2018-2019. Although there are discounts shaped by product purchasing such as discounts below invoice among the discount practices, the representatives of the undertaking stated that most of UNILEVER's concessions were given at the beginning of the season and below invoice discounts had a small share in discount practices. Accordingly, the argument that UNILEVER evaluates outlets depending on their past performance is accepted and the relevant analysis is made on the basis of two periods covering 2016-2017-2018 and 2017-2018-2019.

- The arguments in the plea: The conditions for imposing separate fines to separate actions provided for in the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position (Fines Regulation) are not met in this file. According to article 4(1) of the Regulation, in case more than one independent behavior – in terms of market, nature and chronological process – detected, fines shall be given separately for each behavior. As also stated by the Council of State decisions⁵³, those three elements should exist together. Violation allegations made regarding UNILEVER can create a single administrative fine.

(489) According to article 4(1)(a) of the Fines Regulation *“In case more than one independent behavior – in terms of market, nature and chronological process – that are prohibited under Articles 4 and 6 of the Act are detected, the base fine shall be calculated separately for each behavior.”* Within the framework of the file, the following

⁵³ Council of State 13th Chamber, 2006/4605 E., D. 24.06.2008

conclusions are made: UNILEVER applies discounts that are not commercially reasonable, creates de facto exclusivity in the traditional channel which is limited with respect to physical capacity (sales area-m²) by means of placing additional freezers and increasing freezer volume and excluded competitors out of the market. UNILEVER abuses its dominant position by means of those activities and violated article 6 of the Act no 4054. With respect to article 4 of the Act no 4054, it is concluded that UNILEVER imposed non-compete obligation in the agreement with GETİR, contrary to 2008 Decision. Within the framework of the evaluation made under article 6 of the Act, the subject of the penalty is de facto exclusivity stemming from dominant position whereas according to the evaluation made under article 4, the subject of penalty is imposing non-compete obligation through the contract made with the outlet, which was prohibited by 2008 Board Decision. Within this framework, the actions have different “natures”.

- The arguments in the plea: With respect to a penalty to be imposed under the scope of a possible violation, domestic net sales turnover should be taken into account. The turnover should be calculated over ice cream sales, as the relevant market not over UNILEVER’s total turnover. Mitigating factors should be taken into account.

(490) Article 16 of the Act no 4054 on administrative fines states that an administrative fine by one in thousand of annual gross revenues of undertakings, which shall be determined by the Board, shall be imposed to those who committed behavior prohibited in Articles 4,6 and 7. As a result of the investigation, the Board took into account domestic net sales turnover excluding world sales. While calculating the fine, mitigating factors were considered according to the Regulation on Fines but no mitigating factor stated in the said regulation was found.

I.7. UNILEVER’s Commitment Application

I.7.1. First Commitment Application

(491) UNILEVER first submitted the commitment package including the remedies within the scope of article 43 of the Act no 4054, with the letter that was saved in the registry of the Authority on 27.10.2020, with the number 11532.

(492) In the commitment text, UNILEVER stated the following points: within the scope of the investigation, it is said that cabinet exclusivity evolved to store exclusivity. It was found that the reason for the evolving of cabinet exclusivity to store exclusivity and thus to a competition infringement was the limited space in outlets. Within this framework, the measure that (.....)% of the cabinets would be reserved exclusively for UNILEVER products and the other (.....)% part to competitors in outlets below 100 m² was not functional for resolving the market failure. This measure would negatively affect consumer welfare and lead to market shrinkage.

(493) UNILEVER also stated the following arguments: The measure suggested within the framework of the investigation would decrease product variety, negatively affect innovation and R&D activities, create stock problems. There would be legal responsibilities with respect to cabinets. Beside the measure would lead to problems such as sharing the occupation charge, free riding, displaying under the counter products in Algida freezers, damage to Algida’s image, misleading consumers, competitors benefiting from Algida’s image. Thus a measure to end cabinet exclusivity would be a regulation that protected the competitor but was contrary to the competition law’s object to maximize consumer welfare.

(494) UNILEVER's commitments are as follows:

Outlet/outlets: Outlet/outlets in the traditional trade channel with a sales area below 100 m²

If an outlet who operates with a single Algida cabinet wants to place competing ice cream products/cabinets in its store (under the hypothesis that it cannot be proven, with objective criteria, that there is room for additional freezer at the outlet), UNILEVER commits to take one of the two actions stated below to create a sales area corresponding to (.....)%⁵⁴ of the Algida cabinet present at the outlet.

- It will spare an area for a competing player to place its cabinet at (.....)%* of the area covered by Algida cabinet at the outlet by replacing the horizontal cabinet by a vertical cabinet.*
- It will make room for a competing player to place its cabinet at (.....)%* of the area covered by Algida cabinet at the outlet by reducing the current Algida cabinet's volume.*

** The space may correspond to more than (.....)% of the area covered by the current Algida cabinet according to the horizontal or vertical cabinet Unilever chooses. In case the space correspond to more than (.....)% of the area covered by the current Algida cabinet , Unilever will be deemed to fulfill the commitments stated above. In order to prevent misunderstanding, this expression cannot be interpreted to mean an obligation to make a space corresponding to more than (.....)% of the area covered by the current Algida cabinet.*

In order to prevent misunderstanding, if an outlet does not want to place a competing product, the actions above will not be taken.

(495) In addition, UNILEVER stated that it would fulfill the commitments provided that the prerequisites below are met together. In case any of the prerequisites is not met, the alternative remedies it suggested could not be evaluated within the scope of the commitments.

- The commitments are submitted on condition that a Competition Board decision is not taken against maintaining cabinet exclusivity for Unilever's Algida cabinets.*
- Outlets with more than one ice cream cabinet are out of the scope of the commitment. In other words, outlets where Unilever operates with more than one Algida cabinet, outlets with one or more ice cream cabinets belonging to competing ice cream providers or outlets with another cabinet that competitors can access, apart from Algida cabinet are out of the scope of the Commitments under any circumstances. Unilever submits the Commitments, which are explained in detail below, in relation to outlets with only single Algida cabinet and without another ice cream cabinet.*
- In case it is proven that there is sufficient space for placing more than one ice cream cabinet in outlets with a single Algida cabinet, the said outlets will not be*

⁵⁴ UNILEVER stated that (...) threshold was determined depending on the market share on the basis of volume in 2019 (...) in the traditional retail channel. In addition, the competitors' statements within the scope of the file were shaped towards a regulation parallel to the total market share.

evaluated under the scope of this Commitment.

(496) In relation with the procedure to be followed in the application of the commitments, UNILEVER made the following explanations:

- *After the Competition Board takes a decision to accept the Commitments by maintaining Algida cabinet exclusivity, Unilever will inform the outlets within the scope of the commitments thereof.*
- *Unilever will inform the outlet, which wants to sell competing products, about the alternative models to create additional sales area in the shop and the option that Unilever finds convenient.*
- *In case the outlet and Unilever agrees on the remedy proposed, Unilever will take the necessary steps (changing the current Algida cabinet with a vertical cabinet or a smaller horizontal cabinet) immediately.*
- *If the outlet, where the cabinet was changed for allowing a competitor, gives up selling competing products later, Unilever can replace the cabinet with one of the previous size.*

(497) Lastly, concerning the term of the commitments, UNILEVER stated that provided that a Board decision is taken to maintain cabinet exclusivity depending on the commitments, the commitments would be valid as of the date of the reasoned decision related to that Board decision. In addition if the Board later decides that commitments are not necessary to ensure efficient competition, the commitments will be terminated on the date such decision is taken.

(498) On the other hand, UNILEVER made the following explanations regarding the grounds and the method of the commitments: It is not possible to talk about an insufficient area and no room for competitors' cabinet in case there is more than one Algida cabinet in an outlet. There are other objective criteria to show the situation (for instance, an outlet's inside/outside area and ice cream combination is similar to the outlets with more than one freezer, the outlet has more than one cabinet in the last three years). The possibility that insufficient area argument can be refuted should be taken into account. Each outlet with sufficient area for more than one cabinet should be identified as much as possible. Encouraging the incentive to place its own cabinet to those outlets rather than allowing the competitors to free ride is more compatible with the fundamental principles and objectives of competition law.

(499) Moreover UNILEVER pointed out the following issues: The commitments are prepared under the assumption that the method to be applied will be determined by UNILEVER on the basis of each outlet because the commitments are related to issues such as the customer's shop area, negotiations with customers, sales performance for Algida, Algida's cabinet inventory and action's financial burden. UNILEVER will propose one of the alternatives in the commitment package to the said outlets. If an outlet accepts one of those proposals, UNILEVER will take the necessary action. Thus, UNILEVER's final action will be determined as a result of the negotiations with the outlet.

(500) The first alternative proposal is the replacement of horizontal cabinets with vertical cabinets and thereby making room for competitors if an outlet with an Algida cabinet wants to sell competing products but does not have sufficient area although a competitor has made a convenient offer. To explain the offer in more concrete terms UNILEVER stated that the (.....) horizontal cabinet with (.....) volume will be replaced

by a vertical cabinet, so the competitors will have an area in outlets to place (.....) and (.....) cabinets of (.....) and (.....) volume respectively.

- (501) According to the second alternative in the commitments, in case there is one Algida cabinet in an outlet, if the outlet informs UNILEVER that it wants to sell a competitor's or competitors' products but does not have room for additional cabinets, the outlet can make a room for competitors to place their cabinets by replacing (.....) cabinets with (.....) and (.....) cabinets with (.....) cabinets in their portfolio. As a result, UNILEVER can open (.....) area compared to the current situation at outlets if the commitments are realized.
- (502) According to the provision in article 43 of the Act that "Relevant undertakings or associations of undertakings may offer commitments in order to eliminate the competition problems under Article 4 or 6 which may arise during an ongoing preliminary inquiry or investigation process. If the Board decides that the proposed commitments can resolve the competition problems, it may render these commitments binding for the relevant undertakings or associations of undertakings, and decide not to initiate an investigation or to terminate an ongoing investigation. Commitments shall not be accepted for naked and hard-core infringements such as price fixing between competitors, region and customer allocation, or supply restriction..." it is understood that UNILEVER's commitment is within the investigation process and not under the scope of naked and hard-core infringements such as price fixing between competitors, region and customer allocation, or supply restriction. Thus, it is concluded that UNILEVER's commitments cannot be rejected with respect to procedure.
- (503) On the other hand, the timing of the commitments is important in order to gain the expected benefits. The commitment procedure aims to prevent possible anticompetitive losses by solving current competitive problems; thus, commitments should be submitted at earlier stages of an inquiry. It was concluded that the timing of UNILEVER's commitments was not suitable for obtaining the expected benefits as they were submitted when the additional opinion stage was about to end (at the end of the investigation stage).
- (504) UNILEVER's commitments were bound by some prerequisites. UNILEVER stated the following prerequisites: The commitments will be realized provided that a Board decision to end cabinet exclusivity is not taken. The commitments will be granted in relation to outlets with an area under 100m² and with only one Algida cabinet and without any other cabinet. In case it is proven that there is enough space for placing more than one ice cream freezer at outlets with one Algida cabinet, such outlets will not be covered by the commitments. In its explanations made about the subject UNILEVER pointed out the following arguments: It is not possible to talk about an insufficient area and no space for competitors' cabinet in case there is more than one Algida cabinet in an outlet. There are other objective criteria to show the situation (for instance, an outlet's inside/outside area and ice cream combination is similar to the outlets with more than one freezer, the outlet has more than one cabinet in the last three years). The possibility that insufficient area argument can be refuted should be taken into account.
- (505) According to a survey commissioned by UNILEVER, it is understood that most of the freezers at outlets with (.....) UNILEVER freezers are placed outside. Since only net inside sales areas will be included in the calculation for evaluating outlets' sales areas, it is not possible to agree with the argument that outlets with (.....) freezers will not have insufficient areas automatically.

- (506) With respect to outlets with Algida cabinet, the prerequisite that UNILEVER should show whether the outlets have sufficient area to place more than one ice cream freezer is not acceptable. It is unlikely that UNILEVER will make an objective analysis of whether there is sufficient space for competitors at outlets. It is not possible to leave a regulation that will affect undertakings' commercial activities in the market to an undertaking's guidance.
- (507) On the other hand, there are more than 100,000 outlets and their numbers, locations and sizes have been changing in years. Thus, the said prerequisite is not practically applicable because such analysis brings an important transaction cost to all parties. Also, it is difficult to monitor and realize it in a short time. According to the information provided by UNILEVER, UNILEVER has (.....), (.....) and (.....) freezers in (.....), (.....) and (.....) outlets in 2017, 2018 and 2019 in Turkey. In addition UNILEVER has one freezer in (.....), (.....), and (.....) outlets respectively in the said years. UNILEVER has one freezer in (.....)%, (.....)%, and (.....) % of outlets respectively in 2017, 2018 and 2019. The rate has increased over the years.
- (508) Within the framework of the commitment that horizontal freezers will be located vertically and thereby an area will be spared for competitors, UNILEVER only gives an example about the suggestion regarding (.....) freezers. Currently, UNILEVER has (.....) (.....) type freezers. However, taken into account that UNILEVER has totally (.....) freezers, the said (.....) freezers amount to only (.....) of UNILEVER's freezers. This is far from fulfilling the measure suggested to increase the competitive level in the market. In addition, for (.....) and (.....) freezers, whether it is possible to place horizontal freezers vertically. If so whether there will be sufficient space for competitors due to cabinet size is not substantiated.
- (509) UNILEVER stated the following issues: The method to be applied will be determined by UNILEVER by evaluating factors such as the customer's shop area, negotiations with customers, sales performance related to Algida, Algida's cabinet inventory and the action's financial burden. UNILEVER will propose one of the alternatives in the commitment package to the said outlets. If an outlet accepts one of those proposals, UNILEVER will take the necessary action. It is stated in the commitment text that UNILEVER will inform the outlet which wants to sell competing products about the alternative models to create additional sales area in the shop and the option that UNILEVER finds convenient. If the outlet and UNILEVER agree on realizing the remedy suggested, necessary steps will be taken.
- (510) At this point, the course of cases where UNILEVER does not find the alternative commitment chosen by an outlet convenient or if an outlet and UNILEVER do not agree on a remedy is unclear. Whether UNILEVER may find inconvenient and completely reject one of the alternative methods chosen by an outlet is not obvious. Thus, it is also unclear whether outlets' freedom to make a choice among alternative commitments is restricted. Within this scope, there is a risk that the commitment may not be realized on the grounds that an outlet does not want to come to an agreement in cases where UNILEVER does not find the alternative commitment chosen by an outlet convenient and an outlet and UNILEVER do not agree on a remedy.
- (511) It is understood that the commitments intend to maintain freezer exclusivity and not to open freezers to competitors. The commitments aim to open an area for a competitor's cabinet amounting to (.....)% of the area the ALGIDA cabinet covers by means of transforming ALGIDA cabinet type from horizontal to vertical or reducing cabinet

volume if UNILEVER finds that there is not enough space for an additional cabinet although the outlets want to sell competitors' products.

- (512) On the other hand, after the number of outlets where UNILEVER and its competitors are present, their market shares and presence rate in the traditional channel are analyzed, it is found that UNILEVER has increased its presence in the traditional channel with an area below 100m2 and as of 2019, (.....)% of this channel is closed to competitors. In fact the course of undertakings' market shares in the traditional channel reflects those findings.

Table 54 - The market shares of undertakings operating in the industrial ice cream market in the general channel during 2016-2019 period (%)

Traditional channel								
Undertaking	2016		2017		2018		2019	
	Liter	Turnover	Liter	Turnover	Liter	Turnover	Liter	Turnover
ALGİDA	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)
GOLF	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)
PANDA	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)
OTHER ⁵⁵	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)
TOTAL	~100	~100	~100	~100	~100	~100	~100	~100

Source: ALGİDA (Nielsen)

- (513) As stated above, in the last four years while competitors' market shares were decreasing, UNILEVER raised its market share from (.....)% to (.....)%. As of 2019, UNILEVER's size is (.....) times larger than its closest competitor. In addition, competitors increased their presence in other channels during the same period, which is remarkable.

Table 55 - Presence rates in industrial ice cream market during 2016-2019 period (Quantitative distribution, %)⁵⁶

	2016			2017			2018			2019		
	T	D	S	T	D	S	T	D	S	T	D	S
ALGİDA	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)
ALGİDA Total	(...)			(...)			(...)			(...)		
GOLF	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)
GOLF Total	(...)			(...)			(...)			(...)		
PANDA	(...)	-	(...)	(...)	-	(...)	(...)	-	(...)	(...)	-	(...)
PANDA Total	(...)			(...)			(...)			(...)		
SANSET	(...)	-	(...)	(...)	-	(...)	(...)	-	(...)	(...)	(...)	(...)
SANSET Total	(...)			(...)			(...)			(...)		
ETİ	(...)	-	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)
ETİ Total	(...)			(...)			(...)			(...)		
A.O.Ç.	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)

⁵⁵ SANSET, ETİ, A.O.Ç., BABAŞ GIDA and others.

⁵⁶ T represents traditional channel, D discount markets and S supermarket channel.

A.O.Ç. Total		(...)		(...)		(...)		(...)		(...)		
Private label	-	(...)	(...)	-	(...)	(...)	-	(...)	(...)	-	(...)	(...)
Private label Total		(...)		(...)		(...)		(...)		(...)		
Other ⁵⁷	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	(...)	
Other Total		(...)		(...)		(...)		(...)		(...)		
Source: ALGİDA (Nielsen)												

- (514) It is seen from the table that the presence of the competitors has a tendency to increase in other channels. However any of the competitors could not increase its presence in the traditional channel. It is not possible to explain this by the natural functioning of the market.
- (515) In fact, competition between firms regarding impulse product means intra-outlet competition. Generally, the demand for such products arises when a consumer sees the product. Inter-brand competition disappears when an outlet sells only one brand. Only different products of the same brand compete at the relevant outlet. In that case consumers cannot benefit from competition among the producers. The consumer cannot compare products during purchasing activity. Also, the consumer encounters fewer product types and prices determined as a result of weaker competition.
- (516) Mainly, impulse ice cream (stick, cone or cups, they are consumed at places close to where they are sold) is sold in the traditional channel. The demand for such ice cream occurs instantly (when the consumer sees the product) and generally it is not delayed. Generally, consumers do not buy the brands which are not available at the outlet and do not visit different outlets for another brand. In this sense, UNILEVER's freezer exclusivity restricts competition in the traditional channel where impulse ice cream is sold. Due to freezer exclusivity UNILEVER is not affected by the competition from brands that are not available at the outlets.
- (517) UNILEVER's freezer exclusivity leads to weakening competitors and strengthening UNILEVER's dominant position. In this way, UNILEVER increased its market share from (.....)% in 2016 to (.....)% in 2019. On the other hand, in discount markets where the freezer is commonly used, UNILEVER's market share was (.....)% during the last three years.
- (518) Even if the exclusivity agreements by a dominant firm cover a small part of the market, it is possible that they are likely to restrict competition significantly. Indeed, in a market with a dominant firm, competition is already limited. As it is dominant, sellers prefer the dominant undertaking primarily. If the dominant undertaking binds the outlets to itself with exclusivity agreements, this will certainly decrease the competition level in the market.
- (519) Similarly, in our country, industrial ice cream is a market where UNILEVER has been dominant for long years and competition has been limited. Moreover, as stated in the Board decisions dated 15.05.2008 and numbered 08-33/421-147, and dated 17.03.2011 and numbered 11-16/287-92, UNILEVER products are must stock products because of the brand image and recognition. As a most preferred brand, UNILEVER's freezer exclusivity at an outlet forecloses the outlet completely, weakens the competition in the market, and strengthens UNILEVER's dominant position.

⁵⁷ BABAŞ GIDA, INFINITY, MOVENPICK and others.

- (520) Foreclosure effect in the traditional channel is (.....)%, a very high level. As seen from the course of the undertakings' market shares, the traditional channel is almost foreclosed to competition.
- (521) In addition, taken into account that outlets, in any case, will want to sell UNILEVER products due to its brand power, it is possible to say that UNILEVER will potentially cause higher foreclosure rates in the future. It is also clear from the fact that UNILEVER has constantly increased its market share in the last four years.
- (522) Freezer exclusivity restricts actual competition, besides it prevents potential competition. The outlets in the traditional channel are important for advertisement, product image and for affecting consumer preference. In this sense, exclusivity in outlets in the traditional channel has the potential to create entry barriers.
- (523) Within the framework of the explanations above, it is concluded that the first commitment package submitted by UNILEVER will be rejected because it is not sufficient to solve competition problems detected in the file.

I.7.2. The Second Commitment Application

- (524) Before the third written plea term was about to end, UNILEVER submitted the second commitment package with remedies dated 15.01.2021 and numbered 14477 within the scope of article 43 of the Act no 4054. Although the Draft Communiqué on Commitments to be Submitted by Undertakings was issued, there are not any secondary legislation in force. According to the provision in article 43 of the Act that "Relevant undertakings or associations of undertakings may offer commitments in order to eliminate the competition problems under Article 4 or 6 which may arise during an ongoing preliminary inquiry or investigation process. If the Board decides that the proposed commitments can resolve the competition problems, it may render these commitments binding for the relevant undertakings or associations of undertakings, *and decide not to initiate an investigation or to terminate an ongoing investigation. Commitments shall not be accepted for naked and hard-core infringements such as price fixing between competitors, region and customer allocation, or supply restriction...*" UNILEVER stated that it could submit its commitments until the end of the investigation process and it could benefit from the Board's case law until the secondary legislation is put into effect, giving the Board decision concerning Arslan Nakliyat dated 28.07.2020 and numbered 20-36/485-212 as an example.

UNILEVER submitted commitments related to three issues detected as an infringement (cabinet exclusivity, rebate systems and the agreement made with Getir Perakende Lojistik AŞ (GETİR)). UNILEVER states that the commitments will be valid if the investigation is terminated with respect to all infringement claims. Moreover, it is stated that the commitment covers outlet/s in the traditional channel with a sales area below 100 m² (grocer, market, buffet) and with only UNILEVER cabinet within the scope of the freezer exclusivity and do not cover special outlets such as military facilities, schools and police stations or outlets with other ice cream producers' freezers apart from UNILEVER.

I.7.2.1. Commitments

I.7.2.1.1. Cabinet Exclusivity

- (525) Within the scope of the commitment text, with respect to cabinet exclusivity, UNILEVER submitted a set of actions that differs on the basis of outlets with an area under 100m² with one and more than one UNILEVER cabinets in the traditional

channel. It is stated that the reason for this difference is the different trade conditions in those two outlet groups. In outlets with one UNILEVER cabinet, the existing UNILEVER cabinet will be opened to competitors' use or additional cabinet will be placed so that competitors can reach the outlet in case the conditions are convenient to do so. With respect to the outlets with more than one UNILEVER cabinet, competitors will be allowed to reach the outlet by sparing an area in the smaller cabinet, if the smaller cabinet does not have enough area, in the smaller cabinet and in the main cabinet.

(526) Information about type, volume and number of visible parts of UNILEVER's cabinets are given in the table below:

Table 56: Information about UNILEVER's cabinets' volume and visible part

Cabinet type	Volume (L)	The number of visible parts
...
...
...
...
...
...
...
...

Source: Information submitted by the undertaking

(527) UNILEVER stated that it will open (.....)% of its cabinets (on average) in line with outlets' demand so that competitors can position their products; in outlets with one cabinet, it will open at least (.....)% of total visible parts and capacities according to cabinet type; if additional cabinets are placed, the area to be granted to competitors will vary from (.....)% to (.....)% in proportion to the existing visible parts and capacity.

(528) With respect to determining (.....)% threshold to be opened to competitors, UNILEVER made the following statements:

- In general meeting decisions and decisions of foreign competition authorities, the market share of the undertaking can be a threshold for sparing the shelf share to the dominant undertaking. A threshold (%(...)) which does not correspond to the entire outlet taking into account competitors' market share - (..)% in 2019 and (.....)%, the highest in the last ten years - and which is more tolerant for an equipment which the undertaking bear the costs can be expected. (.....)% area opened gives the competitors a rate, approximately two times higher than their existing market shares.
- Within the scope of detecting and confirming the opening rate, expert opinion was taken from RBB Economics (RBB), which carries out activities worldwide. Due to the hesitations in the current market share approach, a study was made about the channels where UNILEVER and its competitors are present together (supermarket, discount markets, e-trade platforms and outlets in the traditional channel). The market shares of competitors vary from (.....)% to (.....). The upper limit of this scale is marginal. The outlets where that rate is observed is a very small sample, so its statistical power is low. There are other arguments that indicate that those rates may not spread to the overall traditional channel.
- 20% threshold is regarded sufficient as an exclusivity condition in the Block

Exemption Communiqué no 2002/2 on Vertical Agreements and the Guidelines on Vertical Agreements. Moreover, in Board's case law related to beer market and coke market, 20% threshold is accepted consistently.

- Competitors say that in case a measure is taken to end cabinet exclusivity, (...) % of the cabinets can be opened.
- The market conditions in United Kingdom decision, which is the reference for (...) % opening rate, are different from Turkish market conditions. During the investigation period, UNILEVER's market share in the United Kingdom is (.....) % and its competitors market share is (.....) %. Those rates are (.....) % and (.....) % respectively in Turkey. The term of agreements in the United Kingdom is (.....) years not (.....) years like in Turkey. United Kingdom decision caused the market to shrink during 15 years as of 2000. At the end, the commitments in the United Kingdom decision were abolished by United Kingdom Competition Authority.

(529) On the other hand, a commitment by UNILEVER over visible part and capacity will lead to not gaining the return for the investments made and means subsidizing the competitors far beyond reasonable limits. Thus the commitments will not be applicable and maintainable. Also, such commitment will prevent certain products display in UNILEVER's portfolio and UNILEVER will have to make choices. UNILEVER will have to visit the outlets more often to prevent stock out at those points because the commitment will decrease the volume reserved to UNILEVER at the relevant outlets and this will negatively affect UNILEVER's costs by increasing distribution expenses. Besides, such commitment may eliminate UNILEVER's incentive to put bigger cabinets (due to costs) in the field.

- Outlets with one cabinet

(530) UNILEVER commits that the existing UNILEVER cabinet will be opened to competitors or additional cabinet to be placed at the outlet will be opened to competitors. In case of opening existing cabinets to competitors, UNILEVER states that at least (.....) %⁵⁸ of the total visible part and volume of the cabinet will be opened to competing industrial ice cream producers on the basis of outlet's demand therefor. Existing UNILEVER cabinet types at outlets and information about visible parts to be opened to competitors according to cabinet types are given in the table.

Table 57: UNILEVER cabinet types and information about visible parts to be opened to competitors

Cabinet type	Total visible part	Visible part to be opened	Total rate (%)	UNILEVER	Competitor
U100	9	(...)	(...)	(...)	(...)
U200	12	(...)	(...)	(...)	(...)
U300	16	(...)	(...)	(...)	(...)
U400	24	(...)	(...)	(...)	(...)
U500	28	(...)	(...)	(...)	(...)
U600	40	(...)	(...)	(...)	(...)
U700	48	(...)	(...)	(...)	(...)

Source: Information submitted by the undertaking

⁵⁸ The reason why this proportional distribution is not a fixed rate such as (...) % is that when the visible part number to be fitted into a cabinet with respect to all cabinet types is divided by a visible part number that is not fractional-by a whole number, this rate does not result in a whole number.

- (531) It is stated that in case UNILEVER cabinets are opened to competitors, the dressing of those cabinets will be made according to UNILEVER’s product advertisement format and suitable areas will be spared for displaying competitors’ price cards and visual applications on the cabinet, taking into account the following conditions: most of the products in the cabinets are UNILEVER products, it is not possible to know beforehand which products/brands will be placed in the cabinets, the products in the cabinet may be assorted many times in a year, it is not possible to dress the cabinets in the field, cabinet dressing involves operational difficulties and UNILEVER makes cabinet investments.
- (532) Moreover, it is stated that outlets will be informed at least 10 working days before the operation will start for picking up UNILEVER cabinets, in case cabinets are picked up because of commercial and unpredictable force majeure, the outlet will be informed in a reasonable time and the competitors will be requested to take their products out of UNILEVER cabinets.
- (533) UNILEVER also commits the following: within the framework of opening the additional cabinet to competitors’ products in the outlet, as far as it is suitable for UNILEVER (financial situation, capital cost for additional cabinets, operational expenses due to additional cabinets, cabinet stock, etc.), if the outlet requests and UNILEVER finds the request convenient, additional cabinets will be placed in the relevant outlet for competitors’ use. Within this scope, the table shows information about the cabinet type and additional cabinet to be placed according to cabinet types and visible parts.

Table 58: UNILEVER cabinet types and information about additional cabinets and visible parts

Cabinet type	Total visible part	Additional Cabinet type	Number of visible parts in additional cabinets	Visible parts given
U800	48	(...)	(...)	(...)
U600	40	(...)	(...)	(...)
U500	28	(...)	(...)	(...)
U400	24	(...)	(...)	(...)
U300	16	(...)	(...)	(...)
U200	12	(...)	(...)	(...)
U100	9	(...)	(...)	(...)

Source: Information submitted by the undertaking

- (534) UNILEVER stated that in this way, from (.....)% to (.....)% of visible part and capacity can be used of the visible parts and capacity in the outlet before the additional cabinet is placed. Moreover, an additional cabinet provides more space to a competitor compared to providing access to the same cabinet.
- (535) On the other hand, it is stated that if UNILEVER cabinet is outside, the additional cabinet will be placed outside, if UNILEVER cabinet is inside, the additional cabinet will be placed inside. Moreover, it is stated that UNILEVER reserves its right to collect all its cabinets, including additional cabinets, in the field and position cabinets differently according to its cabinet positioning it realizes at the beginning of each year while fulfilling the requirements of the commitment.
- (536) The additional cabinet will be kept as long as the main UNILEVER cabinet is placed at the outlet. If outlets with (.....) and (.....) cabinet type request smaller additional cabinet than (.....) and (.....) type due to their commercial preference, it is expected that

UNILEVER will be regarded as having fulfilled its cabinet exclusivity obligation with respect to such outlet. If an additional cabinet is placed in the relevant outlet, UNILEVER's existing cabinet will be allocated for only UNILEVER products and be closed to competitors.

- (537) Lastly UNILEVER emphasized the following points: The dressing of those cabinets will be made without brands and in accordance with generic "ice cream" visuality, and suitable areas will be spared for competitors' price cards and posters on the cabinet so that all competitors' products are displayed and communication will be possible, since it is not possible to know beforehand which products/brands will be placed in the additional cabinets unlike UNILEVER cabinet and the products in the cabinet may be assorted many times in a year.

- Outlets with more than one UNILEVER cabinet

- (538) At the outlets with more than one UNILEVER cabinet, in case there is not another cabinet used/owned by a competing undertaking, upon the outlet's request, a commitment is made to open an area corresponding to at least (.....)% of UNILEVER cabinet's visible part and volume. Availability of competing products will be ensured by opening UNILEVER cabinets to competing products.
- (539) If the outlet requests that UNILEVER cabinets be opened to competitors, a space in the cabinet corresponding to at least (.....)% of the total visible part and volume will be provided in the small UNILEVER cabinet (small cabinet) and competitors will not be able to put their products in the other UNILEVER cabinet (big cabinet). Commitment of (.....)% will be fulfilled by the small cabinet. If a space inside a cabinet cannot be provided through the small cabinet, remaining visible part and volume will be completed by allowing a space in the big cabinet.
- (540) The dressing of small cabinets will be in accordance with generic product advertisement format, and suitable areas will be spared for competitors' price cards and visual applications on the cabinet, since it is not possible to know beforehand which products/brands will be placed in the small cabinets and the products in the cabinet may be assorted many times in a year. On the other hand, if competitors have a space in the big cabinet, the big cabinet will be dressed according to ALGIDA brand and advertisement visual design.
- (541) On the other hand, it is stated that the cabinet will be kept in the outlet as long as UNILEVER cabinet is placed there that outlets will be informed at least 10 working days before the operation will start for picking up UNILEVER cabinets, in case cabinets are picked up because of commercial and unpredictable force majeure, the outlet will be informed in a reasonable time and the competitors will be requested to take their products out of UNILEVER cabinets.

I.7.2.1.2. Discount System

- (542) In order to resolve the exclusionary effects of cabinet investments made to outlets whose turnover has decreased, UNILEVER makes a commitment to adopt a system not increasing the number of cabinets in outlets where the turnover in the previous period decreased. In this way, the number of cabinets will increase only at outlets whose turnover increased in the previous period. UNILEVER will make an evaluation

about the turnovers of outlets at the end of each year. This evaluation will form the basis of the decision to increase cabinets in cabinet placement planning⁵⁹.

(543) In order to ensure that cabinet positioning decisions and actions are made in compliance with this method, UNILEVER will take the following actions:

- The infrastructure that enables the necessary controlling mechanism and reporting will be established and implemented immediately (in case the commitment is approved, within one month as of the official notification to UNILEVER that the commitment is approved).
- The relevant personnel will be fully informed about this decision so that it is realized completely and correctly in a way to prevent any hesitation, immediately and in the following period regularly to make it continuous in case the commitments are approved by the Board.

(544) Moreover, UNILEVER emphasizes that the additional cabinet to be placed in outlets within the scope of the commitments should not be regarded as foreclosure because additional cabinets will provide the competitors with sales opportunities at a certain rate.

I.7.2.1.3. Agreement with GETİR and Agreement Management

(545) UNILEVER makes a commitment that in addition to the competition compliance program in effect, UNILEVER will put into effect a specific written in house policy that requires all contracts to be made with customers in the future be approved by the legal department and/or independent competition law advisor if deemed necessary by the legal department in order to prevent misunderstanding or incompleteness and uncertainty causing competition law concerns within the scope of omitting ambiguous statements in the agreement with GETİR. It is added that this policy will only concern the agreements between UNILEVER and its customers and be valid for agreements to which only UNILEVER itself is a party.

I.7.2.2. The Effective Date of the Commitments

(546) UNILEVER states that the commitments will be realized within three months, at the latest, as of the official notification to UNILEVER that the commitments are accepted in order to make the necessary preparations (detecting likely problematic outlets, creating flow and protocols for the functioning of the system and preparing the necessary IT system, design and production of baskets and visuals, education of the field personnel, informing outlets, creating competitors' visual areas and being prepared to spread those to the field, etc.).

(547) With respect to the discount system, the following points are stated: the obligation related to the cabinet exclusivity is likely to affect a lot of outlets. Covid 19 outbreak, as an external and unpredictable factor, causes outlets to make sales in a way different from their ordinary performance. Thus, a control based on Covid 19 outbreak period will not produce meaningful results. Therefore, a control on the discount system will be made first taking into account the data pertaining to 2018 to 2019. In other words, the number of cabinets will not be increased in outlets whose turnover decreased in 2019 compared to 2018.

⁵⁹ It is stated that the change of a cabinet composition without exceeding the total cabinet volume in any outlet, (for instance replacing (...) with (...)) and in an outlet with a single freezer) cannot be regarded as increasing cabinet number.

(548) With respect to contract management, the steps stated in the commitments will be taken and documented to the Authority within two months after the official notification is made to UNILEVER that the commitments are accepted.

I.7.2.3. Implementation Period and Method of the Commitment

(549) It is stated that the commitments will be implemented for an indefinite time. A request may be made to the Board to abolish the commitments and/or revise the commitments especially with respect to cost sharing and commitment rate in case there is a substantial alteration in any of the factors on which the Board decision was based, on the basis of tools forming the basis of re-launching an investigation, as stated in article 43(4)(a) of the Act no 4054.

(550) The legal texts about cabinet exclusivity will be included in the contracts with outlets renewed every year. For 2021, it is predicted that most of the contracts will have been signed as of the date when the commitments are accepted. Thus, the commitment will be realized through a unilateral declaration of will (Notification). The Notification will be sent through tools and methods to inform the outlets completely about the subject.

(551) In order to implement the commitments in the most transparent way and efficiently under the coordination of the Authority, UNILEVER stated that

- Within the framework of the commitment related to cabinet exclusivity, the first request to sell competing products will be taken through channels where they can submit their request efficiently (online and/or call center) so that they are not affected by a human activity (impression, persuasion, reclamation, etc.) and/or to eliminate concerns about this issue.
- After the outlet submits the request, the transactions necessary for the outlet to sell competing products in a process defined end-to-end (opening the request, emptying the cabinet, sparing spaces for competing products' advertisement and promotion leaflets, placing additional cabinets if requested, etc.) will be realized within the framework of a service level commitment that will be reported by the Authority. Those standards can be revised if requested by the Authority.
- A call center will be established so that outlets will tell their problems and difficulties they encounter regarding the commitments and the problems can be handled immediately.

I.7.2.4. The Effect of the Commitments on the Market

(552) It is stated that essentially, the commitments will produce effects as a result of terminating cabinet exclusivity. In the organized retail, there are not any barriers in front of competitors to position their products. This channel has increased its share with respect to take-home products. Industrial ice cream is subject to e-trade more. Thanks to the commitments, the firms operating in the industrial ice cream market will have the opportunity to place their products in UNILEVER cabinets in the traditional channel without bearing cabinet, capital and operational costs (maintenance, etc.).

(553) The competitors will continue to place the cabinets and increase the number of their cabinets in the traditional channel and thus increase their market shares. Thanks to the economy of scale to be created by the opportunity given within the scope of the commitments and distribution efficiency created by the economy of scale, visit costs per outlet will decrease. As a result of the decreased costs, it will be possible to visit those points more often and customer satisfaction will improve as product availability is increased.

I.7.2.5. Monitoring the Compliance with the Commitments

(554) It is stated that information about the following issues will be saved and may be reported periodically to the Authority if requested: the total number of UNILEVER's cabinets and outlets, which points UNILEVER is present together with the competitors, at how many points it places additional cabinets, at how many points it opens one of the cabinets for its competitors, at how many points it lets the competitors in its cabinets, how many outlets request to sell competing products, and actions taken for those requests. Also, the systems necessary to monitor the obligations created within the scope of the commitments will be created within three months at the latest as of the official notification to UNILEVER that the commitments are accepted.

I.7.2.6. Evaluating the Commitment Package

(555) With respect to timing, taking into account that the secondary legislation is not put into effect yet, according to the provision in article 43 of the Act that "Relevant undertakings or associations of undertakings may offer commitments in order to eliminate the competition problems under Article 4 or 6 which may arise during an ongoing preliminary inquiry or investigation process. If the Board decides that the proposed commitments can resolve the competition problems, it may render these commitments binding for the relevant undertakings or associations of undertakings, and decide not to initiate an investigation or to terminate an ongoing investigation. Commitments shall not be accepted for naked and hard-core infringements such as price fixing between competitors, region and customer allocation, or supply restriction....." it is accepted that UNILEVER's commitments, which entered into the registry of the Authority before the third written plea can be evaluated.

(556) The aim of the commitment mechanism is to eliminate the concerns raised in the investigation notification without the burden to carry out the investigation process. In this way, public resources will be saved by the Authority. In addition, competition in the market will be established immediately. Therefore, it is important that the commitments be submitted by undertakings at the beginning of the investigation process. Also, they should be capable of resolving existing problems. UNILEVER's commitments are not acceptable with respect to their timing and content.

(557) First the commitments are submitted three days before the end of the investigation process - 18.01.2020, when the undertaking submitted its third written plea (15.01.2020). Thus, UNILEVER's commitments are not alternative remedies that aim to resolve the competition problems stated in the investigation notification and end the investigation process.

(558) The investigation started on 24.07.2019. In 1.5 years, the investigation report was prepared, on-site inspections were made and the undertaking submitted two written pleas. Last, UNILEVER submitted its third written plea on 18.01.2020. This plea seems to be rejecting all the points committed by the undertaking.

(559) Second, the commitments are not convenient with respect to content. The analysis regarding discount systems is related to the years 2016 to 2019. UNILEVER continued its practices during 1.5-year investigation process. Therefore, UNILEVER has been using its dominant position and complicating its competitors' activities for at least more than five years. The agreement with GETİR, which included exclusivity, was made on 29.06.2015 and was in effect until it was amended on 25.11.2019. Selling competitors' products over GETİR was prevented. It only became possible to sell competing products through GETİR in July 2020 as stated in the letter dated 06.07.2020 sent as

an answer to the letter dated 26.06.2020. Therefore, anticompetitive practices produced results and strengthened UNILEVER's dominant position.

- (560) UNILEVER did not take any actions to end the said practices but argued that they were not anticompetitive.
- (561) The commitments related to discount systems and the agreement with GETİR are related to terminating the practices regarded as anticompetitive in the investigation report and the additional opinion. It is the undertaking's responsibility to terminate those violations. The actions that UNILEVER is obliged to carry out are presented as commitments.
- (562) As a result, it is concluded that the commitment package submitted by UNILEVER was not proportional to the competition problems detected under the scope of the investigation, eligible to solve those or efficiently applicable.
- (563) Lastly, this section includes evaluations about certain issues in the commitment text.
- (564) UNILEVER refers to the finding, regarding which producers will have access within the scope of cabinet exclusivity "Ice cream production can be divided into two: industrial and artisanal. Industrial ice cream is mass produced at large-scale facilities and offered to the market in specific packages; it is also referred to as "factory-made ice cream". Artisanal ice cream, on the other hand, is produced by small-scale businesses (patisseries/ice cream shops) with simple machines; it is generally sold in cones and is known as "bulk ice cream" or "patisserie ice cream". The main difference between the two types is the fact that artisanal ice cream is generally consumed at or around the place of production. Meanwhile, with industrial ice cream, undertakings establish a cold chain to transport their product to final outlets, and thus, to the consumers. The last link of the cold chain consists of the freezers placed at final outlets." and stated that producers must have a cold chain established by themselves and freezing cabinets. The requirement that the producers should have a cold chain established by themselves and their own freezing cabinets will create important problems in entry into the market. An industrial ice cream producer may enter into the market by making an agreement with a distributor with a cold chain and present its products to consumers in UNILEVER freezers after the commitments by UNILEVER are applied, even if it does not have a freezing cabinet.
- (565) Another uncertainty in the commitment text is that it does not contain information about how spaces for displaying competitors' price cards and visual applications will be created for competitors to be placed in additional freezers without dressing and in UNILEVER freezers. The explanation section in the commitments should have included the method to display products in an easily noticeable way and objectively in UNILEVER freezers and freezers without dressing.
- (566) Within the framework of opening the additional cabinet in outlets with a single cabinet, it is uncertain what will happen to additional cabinets in the outlets who stop working with the competitors in a year. Collection and re-establishment of the additional cabinet in the outlet by UNILEVER if the outlet wants to work with the competitor again is not objectionable. However, it is uncertain whether UNILEVER continues to sell ice cream in the additional cabinets and in the said outlets who stopped working with the competitor in a year, without removing the additional cabinets. If the outlet begins to work with the competitor again, on which visible part number the calculation of 30% will be made and whether the additional cabinet will be taken into account for the cabinet increase within the scope of the discount system are unclear. Moreover, the

said practice is contrary to the effect and benefits expected from the commitment mechanism.

- (567) With respect to outlets with a single cabinet, it is stated in the explanation that if the existing UNILEVER cabinets are opened to competitors and the space opened for the competitors are not used by the competitors, the outlet can sell UNILEVER products in this space and if the outlet wants to sell competing products in that area, the said space will be opened for the competitors again. However, there is not a similar explanation regarding additional cabinets.
- (568) On the other hand, with respect to outlets with more than one UNILEVER cabinets, it is stated that convenient areas will be spared for competitors' price cards and visual applications on the small cabinet but if competitors are placed in the big cabinet, big cabinet will be dressed according to ALGIDA brand and advertisement visual design and it is not clearly stated that convenient areas will be spared for competitors' price charts and visual applications on the big cabinet.
- (569) It cannot be accepted that the additional cabinets to be placed in outlets with single cabinet and the small cabinet to be opened in the outlets with more than one UNILEVER cabinets will not be dressed. One of the expected benefits of placing competitors in UNILEVER freezers together with ALGIDA that competitors are placed in the same freezer as UNILEVER, not in any freezer, so that they have equal conditions.
- (570) Moreover, Nielsen Recognition Survey made with 600 people at the age of 15 to 50, attached to the letter sent by UNILEVER dated 06.10.2020 and numbered 10766 showed the following facts: when the participants are asked about ALGIDA brand cabinets' effects on their purchasing decision, (.....)% say that Algida cabinet has an effect. If the freezer is not Algida brand (a white freezer) (.....)% say that they are negatively affected with respect to purchasing motivation. When they are asked whether it is difficult to find a white freezer without ALGIDA brand/visuals in a store or grocer, (.....)% of the participants say that it will be difficult/very difficult to find the freezer. According to the study called "Decision Tree" by Ipsos, the decision to buy ice cream starts with choosing the firm unlike many other categories like the results obtained by Nielsen.
- (571) Within this scope, if the additional cabinets or small cabinets which will be opened to competitors are not dressed at the outlets, this will not produce the expected benefits with respect to competitive constraints and opening freezers to competitors. This point is stated in the letter of UNILEVER dated 06.10.2020 and numbered 10766.
- (572) Within the framework of the explanations above, UNILEVER's second commitment package is not acceptable with respect to timing and content and it is concluded that it will not contribute to eliminating competitive concerns.

I.8. Evaluations within the Scope of the Regulation on Fines

- (573) Article 16(3) of the Act no. 4054 includes the provision that "an administrative fine up to ten percent of annual gross revenues of undertakings and associations of undertakings or members of such associations to be imposed fines, which generate by the end of the financial year preceding the decision, or which generate by the end of the financial year closest to the date of the decision if it would not be possible to calculate it and which would be determined by the Board, will be imposed to those who committed behavior prohibited in Articles 4,6 and 7 of this Act." Article 1 of the Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and

Decisions Limiting Competition, and Abuse of Dominant Position explains the purpose the Regulation as follows “to provide for the procedures and principles relating to setting fines to be given to those undertakings and associations of undertakings or the members of such associations, as well as managers and employees thereof, that engage in behaviors prohibited under Article 4 and 6 of the Act No. 4054 on the Protection of Competition, pursuant to Article 16 of the same Act.”

- (574) Article 4(1)(a) of the Regulation on Fines states that first the base fine shall be calculated and following the calculation of the base fine, aggravating and mitigating factors shall be considered. Article 5 of the Regulation on Fines regulates the basic fine. Accordingly, while the base fine is being calculated, a rate between 2% and 4% for cartels, and between 0,5% and 3% for other violations, of the annual gross revenues of the undertakings which engage in violations is taken as a basis.
- (575) With respect to the violation of article 6 of the Act no 4054, as the practices in question are under the category of “other violations” according to article 5(1)(b) of the Regulation on Fines, it is necessary to take a rate between 0,5% and 3% of the annual gross revenues of UNILEVER, which is determined by the Board for the calculation of the basic fine.
- (576) According to article 5(2) of the same regulation, in the determination of the said rates, issues such as the market power of the undertakings concerned, and the gravity of the damage which occurred or is likely to occur as a result of the violation shall be considered. Within this framework, the basic fine is determined as (.....)%.
- (577) It is stated in article 5(3) of the Regulation on Fines that the amount of the fine determined according to paragraph one shall be increased by half for violations which lasted for one year to five years and by one fold for violations which lasted longer than five years. The discount systems under the scope of UNILEVER’s practices that violated article 6 of the Act no 4054 are analyzed for the years 2016, 2017, 2018 and 2019. There is not any information submitted showing that the discount system is amended in 2020, when the investigation continued. Thus, it is concluded that the discounts that are found to have restricted competition have been applied for longer than five years as of the date of the hearing (9 March 2021). The basic fine is increased by one fold according to article 5(3)(b) of the Regulation on Fines.
- (578) With respect to the violation of article 4 of the Act no 4054, the practices in question are under the category “other violations” according to article 5(1)(b) of the Regulation on Fines. Taking into account the issues listed in article 5(2) of the Regulation on Fines such as the market power of the undertakings concerned, and the gravity of the damage which occurred or is likely to occur as a result of the violation, the rate (.....)% is taken as a basis for the basic fine.
- (579) The said AGREENEFT was signed on 29.06.2015 and the term of the AGREEMENT was amended by the Additional Protocol dated 25.11.2019. Therefore, the basic fine determined for the violation of article 4 of the Act no 4054 is increased by half according to article 5(3)(a) of the Regulation on Fines since it is concluded that the infringement lasted longer than one year and shorter than five years

(580) Article 6 and 7 of the Regulation on Fines list the mitigating or aggravating factors for the basic fine. There are not any mitigating or aggravating factors within the scope of the file.

J. CONCLUSION:

(581) According to the Report prepared regarding the investigation conducted as per the Board decision dated 24.07.2019 and numbered 19-26/391-M and the Additional Opinion, evidence collected, written pleas, the explanations made during the oral hearing and the scope of the file examined, it was decided UNANIMOUSLY that

- 1- Unilever San. ve Tic. Türk AŞ is dominant in the industrial ice cream market, impulse ice cream market and take-home ice cream market,
- 2- Unilever Sanayi ve Ticaret Türk A.Ş. abused its dominant position by means of discounts it gave and violated article 6 of the Act no 4054,
- 3- In its agreement with Getir Perakende Lojistik A.Ş., Unilever Sanayi ve Ticaret Türk A.Ş. imposed Getir Perakende Lojistik A.Ş. a non-compete obligation, which was prohibited in the decision of the Competition Board dated 15.05.2008 and numbered 08-33/421-147, and violated the Act no 4054,
- 4- Therefore,
 - a) According to third paragraph of Article 16 of the Act and Article 5(1)(b), 5(2) and 5(3)(b) of the Regulation on Fines to Apply in cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position, at the rate of (.....)%, on the basis of the annual gross income accrued at the end of the financial year 2019 and determined by the Board, taking into account domestic net sales, by discretion, Unilever San. ve Tic. Türk A.Ş. shall be imposed 274.409.838,43 TL administrative fines for the infringement stated in article 2 of the decision,
 - b) according to third paragraph of Article 16 of the Act and Article 5(1)(b), 5(2) and 5(3)(a) of the Regulation on Fines to Apply in cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position, at the rate of (.....)%, on the basis of the annual gross income accrued at the end of the financial year 2019 and determined by the Board, taking into account domestic net sales, by discretion, Unilever San. ve Tic. Türk A.Ş. shall be imposed, 205.807.378,83 TL administrative fines for the infringement stated in article 3 of the decision.
- 5- The exclusivity clause in the loan agreements that regulate the use of freezers belonging to Unilever San. ve Tic. Türk A.Ş. prevented competition at outlets with less than 100 m² sales area and violated article 4 of the Act no 4054, the said agreements shall be granted individual exemption within the framework of article 5 of the Act no 4054 on condition that the exclusivity clause shall be omitted,
- 6- Within this framework, Unilever San. ve Tic. Türk A.Ş. and/or its distributors,
 - a) At outlets with net 100 m² or below closed sales areas,
 - b) If there are not any freezers directly accessible by consumers except for Unilever San. ve Tic. Türk A.Ş.'s freezer,

- c) Loan agreements regulating the use of freezers belonging to Unilever San. ve Tic. Türk A.Ş. shall be arranged in a way to ensure that competing products are allowed to use 30% of the visible part and total freezer volume at the outlet,
- 7- Loan agreements made between Unilever San. ve Tic. Türk A.Ş. and/or its distributors and outlets shall be arranged again in compliance with the requirements stated in this decision and Unilever San. ve Tic. Türk A.Ş. shall inform the dealers/distributors and final outlets thereof, and Unilever San. ve Tic. Türk A.Ş. shall document to the Competition Board that this obligation is fulfilled within 60 days as of the notification of the short decision, Unilever San. ve Tic. Türk A.Ş. shall be informed that, an investigation shall be initiated concerning Unilever San. ve Tic. Türk A.Ş. and a proceeding shall be made according to article 17 of the Act no 4054 in the contrary case.

The decision can be appealed before Ankara Administrative Courts within 60 days as of the notification of the reasoned decision.

Chairman
Birol KÜLE

Deputy Chairman
Arslan NARİN

Şükran KODALAK

Ahmet ALGAN

(On leave)
Hasan Hüseyin ÜNLÜ

Ayşe ERGEZEN