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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN TURKEY

-- 2009 --

This report is submitted by Turkey to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 16-17 June 2010.

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TABLE OF CONTENTS

Executive Summary	3
1. Changes to competition laws and policies, proposed or adopted	4
1.1 Summary of new legal provisions of competition law and related legislation	4
2. Enforcement of competition laws and policies.....	4
2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions	4
2.2 Mergers and acquisitions	12
2.3 Opinions.....	16
3. The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies	17
4. Resources of competition authorities	18
4.1 Resources overall (current numbers and change over previous year):	18
4.2 Human resources (person-years) applied to:.....	18
4.3 Period covered by the above information	18

Executive Summary

1. In terms of enforcement of competition rules, it is seen that the number of decisions taken by the Competition Board (the Board) has an upward trend since 1999 till 2008. However, this number having realised as 453 in 2008 has fallen nearly by %17 in 2009. The most outstanding reason of this fall can be attributed to the fall in the number of merger/acquisition/ privatisation cases which has decreased approximately by %43 compared to 2008. Moreover, the decreasing number of exemption applications, particularly those for individual exemption, in 2009 is also another reason of this decline, although it is observed that block exemption applications specific for usufruct rights in fuel industry have increased three times compared to 2008. On the other side, the overall effect of the striking decrease in the merger/acquisition/ privatisation cases and the relative fall in the exemption applications to the decrease in the total number of decisions have been moderated by the increase of decisions on anticompetitive conducts, particularly of dominant undertakings.

2. The sectors subjected to competition investigations (in relation to cartels, vertical restraints and abusive practices) have not changed radically compared to previous years. While food and beverage sector ranks first in this kind of investigations, the leading sectors where competition infringements were established in 2009 are telecommunications, transportation and fuel industry. This outlook fosters the Turkish Competition Authority (TCA) to introduce further effective remedies in terms of establishing co-operation mechanisms between legislative and sector-specific regulatory authorities.

3. In this framework, the TCA introduced two significant secondary legislations in February 2009. These are "Regulation on Active Co-operation for Detecting Cartels" (Regulation for Leniency) and "Regulation on Fines to Apply in Cases of Agreements, Concerted Practices and Decisions Limiting Competition, and Abuse of Dominant Position" (Regulation on Fines). As a result of these two legislations prepared for increasing transparency, objectivity, consistency and ensuring deterrence of anticompetitive practices, many undertakings have initiated leniency applications since the beginning of 2009. Meanwhile, the principles and basis adopted in this legislation have started to be applied by the Board to undertakings, associations of undertakings, members of these associations and members and employees of the relevant undertakings. The fines applied in this legal framework have increased significantly in 2009. Therefore, applying these two legislations effectively would also ensure making a long step towards increasing the effectiveness of competition law and detecting and deterring cartels in the following years.

4. The TCA gave special importance to competition advocacy in 2009. In this respect, the TCA sent formal opinions to different governmental agencies. Beyond these contributions, the TCA also continued its effort for enhancing the applications of regulatory impact assessment by attending regularly to all meetings about this issue and emphasising the importance of competition in administrative regulations in different platforms.

5. On the other hand, as part of its policy for relations with other governmental agencies, the TCA signed a protocol with the Public Procurement Agency in 7 October 2009 to build a co-operation framework between the two agencies. With this co-operation framework, both agencies aimed to deal with bid rigging effectively and make public tenders more competitive.

6. The TCA had a very active period of time in international relations in 2009. In this regard, the TCA actively contributed to the events/projects at multilateral platforms such as EU, OECD, ICN and UNCTAD as well as bilateral platforms. In respect of international relations, the most significant incident of 2009 was the preparations of the 9th Annual Conference of the ICN, which took place in Istanbul from April 27th to April 29th, 2010. As part of those preparations; four different working groups were generated, teleconferences and meetings were held with different countries, ICN Secretariat and ICN Board of Directors.

1. Changes to competition laws and policies, proposed or adopted

1.1 Summary of new legal provisions of competition law and related legislation

1.1.1 Regulations and Communiqués That Entered Into Force

- “Regulations concerning Making an Active Co-operation for Purposes of Unearthing Cartels”, which entered into force by having been published in the Official Gazette dated February 15, 2009 and numbered 27142.
- “Regulations related to Fines to be Imposed in case of Competition-Limiting Agreements, Concerted Practices and Decisions, and the Abuse of Dominant Position”, which entered into force by having been published in the Official Gazette dated February 15, 2009 and numbered 27142.
- “Communiqué related to an Increase in the Lower Limit of the Administrative Fine Provided for in Article 16 Paragraph One of the Act on the Protection of Competition No. 4054, Being Valid until 31.12.2010 (Communiqué No: 2010/1)”, which entered into force by having been published in the Official Gazette dated December 25, 2009 and numbered 27443.

1.1.2 Legislative Studies Being Conducted

- The draft Communiqué prepared for replacing the “Communiqué on Mergers and Acquisitions Calling For the Authorisation of the Competition Board No. 1997/1”

2. Enforcement of competition laws and policies

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

2.1.1 Description of significant cases, including those with international implications

- Naked ADSL Decision¹

7. The decision relates to the assessment of whether Turkish Telecommunications Inc.’s (Turkish Telecom) obliging the possession of a fixed telephone line for the ADSL connection is contrary to the Competition Act (Act On Protection of Competition No. 4054). As a result of the examination performed, the relevant product markets have been determined as the “market for fixed telephone services”, the “market for mobile telephone services”, and the “market for retail internet access services”. In the assessments made, the analysis of whether the offering of Naked ADSL service was technically possible has played an important role. As a result of the discussions made with sector representatives and the examination of foreign examples, it has been understood that this practice was technically possible.

8. That those services to be provided over the Internet, voice being in the lead, already form a threat as regards fixed line operators which lose traffic to mobile phone operators and that at the same time operators which obtain a certain scale of broadband internet subscribers as an Internet Service Provider (ISP) emerge as a competitor of incumbent operators in the area of fixed line operation business through means such as the Local Loop Unbundling (LLU), that they are able to be effective in the decrease of market shares of the operators in question are one of the establishments made within the scope of the file.

¹ Board Decision Dated 18.02.2009 and Numbered 09-07/127-38

9. Another issue handled within the scope of the decision is that the imperativeness of fixed telephone line subscription constitutes an adverse element as regards GSM operators as well. Because it happens that subscribers getting fixed telephone line for purposes of being able to use ADSL shift telephone calls they would make over GSM under normal conditions to the fixed telephone line to a certain extent. It has been concluded that this situation might result in larger losses of market share as regards GSM operators as a result of network effects brought about by it.

10. In this context, it has been established that Turkish Telecom used the dominant position held by it in the market for broadband internet access services, trying to strengthen its power in the voice transmission market, that as a result of it, besides consumer preferences' and benefit's being adversely affected, retail market activities of existing ISPs and GSM operators as well might be adversely affected.

11. In the report also a number of practices have been examined concerning under which conditions tying practices form an infringement of competition, and conditions required for such a practice to form an infringement have been listed as follows:

- Having a significant market share (particularly if based on an established infrastructure);
- Existence of high barriers to entry and/or transition costs in the relevant market;
- Having an extensive product portfolio than one's competitors;
- Selling a new product together with an already established product;
- Initiating the practice of tying products to each other in a market where this practice is not common;
- Realising products sold together, by large discounts, large volumes, market share rebates or special sales methods.

12. In the decision made consequently, it has been resolved that;

- Opening an investigation against Turkish Telecom was not required,
- a- However, in assurance of initiating naked ADSL practice by Turkish Telecom and thereby terminating the practice which was the subject of the complaint, a letter of opinion be sent to Turkish Telecom about the issues of filing the necessary application with the Information and Communication Technologies Authority (ICTA) within three months, documenting it to the Competition Authority, b- it be sent to the ICTA in order to be informed about this decision.

13. Following the infrastructural works made, the process required for the practice cited was initiated by means of offering to the public opinion the "Naked ADSL Reference Proposal" of Turkish Telecom by ICTA on 05.01.2010.

- Sanofi Aventis Decision²

14. The relevant decision of the Competition Board relates to the investigation completed directed at the claims that Sanofi Aventis İlaçları Ltd. Şti. (Sanofi Aventis Drugs Co. Ltd.) (Sanofi Aventis) committed practices directed at pushing out of the market small-scale pharmaceutical warehouses in the market for distribution of drugs, infringing article 6 of the Competition Act³.

² Board Decision Dated 20.04.2009 and Numbered 09-16/374-88.

³ Substantive Articles of the Competition Act: Article 4 (restrictive agreements and decisions), Article 5 (exemption), Article 6 (abuse of dominant position), Article 7 (merger control)

15. In the examinations performed, it has been seen that Sanofi Aventis drugs that took place in 30 separate relevant markets did not have a generic, that is, a pharmaceutical equivalent; and the drug named Ketek was under patent protection until 2015, within this framework, in the process of the practice, it was possible for any counterparts of 31 drugs of Sanofi Aventis having no generic to be sold neither by a pharmaceutical warehouse to pharmacies nor by pharmacists to patients. In the decision, it has been mentioned that maturities that were one of the most important competition conditions of the drug sector and that directly affected the activity and profitability of distribution channels in the sector were at the same time an important indicator in the demand and indispensability as to drugs in the market. When purchases of pharmaceutical warehouses after the practice from March 2008 until October 2008 were examined, it has been seen that 24 out of a total of 55 warehouses could not receive drugs from Sanofi Aventis in March; and when one came to October, 32 out of 56 operating warehouses did not make a purchase from Sanofi Aventis. It has been understood that out of those warehouses making a purchase from Sanofi Aventis, 12 in March and 9 in October made a purchase at maturities that were below the threshold, in other words, that did not conform to market conditions. Also, average profit margins of pharmaceutical warehouses (7%) and average profit margins of pharmacies (20%) have been compared; consequently the establishment has been made that pharmaceutical warehouses were much more dependent on maturities under market conditions.

16. In the decision it has also been seen that when the market was examined, maturities, discounts and excess goods in generic products and original products having a generic were close to the market average or above this average, and they remained below the average in products which had no generic; when it was considered that a producer had drugs which both had and did not have a counterpart, maturity in the market was also attained on the average.

17. Sales conditions of Sanofi Aventis that entered into force in March 2008 were examined, it has been seen that maturity over market conditions was provided to purchases over net NTL* 250.000 and at least over gross NTL 300.000, and the maturity was limited to 15 days in total purchases remaining below this figure; in addition to this establishment, pharmaceutical warehouses had almost no function in determining demand in the drug sector, and for this reason pharmaceutical warehouses exactly passed on to pharmacies purchase conditions they received from producers.

18. In the decision in question, it has been expressed that to be able to perform a net effect analysis particular to the practices of Sanofi Aventis, the grounds for the practice of the undertaking which was the subject of the examination were required to be handled together with their consequences. Within this framework, it has been concluded that the fact that those warehouses remaining below the threshold purchased Sanofi Aventis drugs at more adverse maturities than their competitors and therefore market conditions complicated the activities of the undertakings in question in the relevant product markets and for this reason caused them to relinquish selling these products in some situation, and in some other situation, to sell them nearly at no profit because of costs incurred by them. However, it has been assessed that as required by the structure of the drug sector, warehouses' inability to sell products of Sanofi Aventis which was an undertaking that had a relatively high market share and a large number of products with no counterpart adversely affected the activity of these undertakings not only in respect of the relevant product markets but also in respect of those markets other than them.

19. In this decision, the importance has been stressed that also one of the most important effects of sales conditions put into practice by Sanofi Aventis as of 1.3.2008 on the activities of distributing drugs would be their creation of significant barriers to market entry, the establishments have been included that with the sales conditions in question, warehouses entering the market newly would not be initially able to distribute drugs of important drug producers in the sector because of the similar sales conditions to be

* New Turkish Lira.

brought into life by the other producers, they would give rise to effects that would make these undertakings face important disadvantages than their competitors and even would be deterring upon many undertakings planning to enter the market; the market could stay under the joint control of certain undertakings for a long time because of both the current and likely practices; a few number of warehouses which were able to distribute all products could resort to the method of tying/loyalty discount in the name of rendering package purchases attractive and thanks to it, pharmacists could shift their purchases to them at a higher rate; activities of small-scale warehouses could further become difficult since it would not be possible for warehouses which were unable to realise the distribution of all products to make a similar practice because of products which could not be procured. In the light of the assessments made, it has been understood that the practice of Sanofi Aventis distorted competition in the area of pharmaceutical warehouse business primarily in respect of those markets where one was in dominant position, it gave rise to important harms as regards warehouses that could not reach these products, which could later amount to exiting from the market, besides, the practice harboured potentially within itself much more than its apparent harm because it enabled both rising the thresholds and setting the ground for their application by the other producers on similar grounds. It has been established that when adversities caused in the operational area of pharmaceutical warehouse business by the practice of Sanofi Aventis in maturity were also assessed together with savings or earnings hoped to be gained by this undertaking, there existed important imbalances, while the practice actually provided an earning to Sanofi Aventis, which had a negligible nature, it led or might lead to very serious harms. Therefore, within the framework of the net effect analysis made, an opinion has been reached that the foreseen acquisitions of the practice remained very insufficient than harms caused by it.

20. Consequently; it has been decided that Sanofi Aventis İlaçları Ltd. Şti. (Sanofi Aventis Drugs Co. Ltd.) which was in dominant position in the markets for drugs with the active ingredients of Risedronate, Leflunomide, Enoxaparin Sodium, Amiodarone, Dacarbazine, Acetazolamide, Propranolol, Oxaliplatin, Rasburicase, Deflazacort, Griseofulvin, Telithromycin, Insulin Glargine, Methocarbamol, Pimozide, Acepromazine, Riluzole, Vigabatrin, Levamisole, Amisulpride, Buserelin, Teicoplanin, Docetaxel, Clorazepic Acid, Articaine, Alfuzosin, Cefodizime distorted competition at the stage of wholesale distribution in the relevant markets of the drug sector through sales conditions put into effect by it in March 2008 and for this reason infringed article 6 of the Competition Act; the named undertaking be punished by an administrative fine of TL 3.648.045,58, being discretionally five per thousand of its gross revenue that formed by the end of the financial year 2008, by means of having regard to the issues included in article 16 of the same Act, due to such infringement of it and that it would terminate practices which were the subject of the infringement.

- Flat Iron & Steel Decision⁴

21. The decision concerns the investigation conducted on ArcelorMittal Ambalaj Çeliği San. ve Tic. A.Ş. (ArcelorMittal Packaging Steel Industry and Trade Inc. – ArcelorMittal Ambalaj), ArcelorMittal FCE Çelik Ticaret A.Ş. (ArcelorMittal FCE Steel Trade Inc. – ArcelorMittal FCE Çelik), Borçelik San. ve Tic. A.Ş. (Borçelik Industry and Trade Inc. – Borçelik) and Ereğli Demir ve Çelik Fabrikaları T.A.Ş. (Ereğli Iron and Steel Plants Inc. – Erdemir), within the market for flat iron and steel products.

22. Within the framework of the evidence gathered through the examinations conducted during the investigation process, it was established that the infringement of the Competition Act was realised via two independent practices that are separate from each other in terms of market and nature. These are the infringement of the Competition Act by the ArcelorMittal Group and Erdemir, and infringement of the Competition Act by Erdemir and Borçelik.

⁴ Board Decision Dated 16.06.2009 and numbered 09-28/600-141.

23. Concerning the infringement of the Competition Act by the ArcelorMittal Group and Erdemir, the decision establishes that there are structural links between "Erdemir" and "the ArcelorMittal Group" within the tin- and chromium-plated products market, formed by their shareholder status in ArcelorMittal Ambalaj; but that Erdemir had no control over ArcelorMittal Ambalaj.

24. The agreement between the parties regulates that Erdemir and API shall not operate within the "steel packaging products steel service centre" market, which is SAC's [ArcelorMittal Ambalaj] market, and they shall not compete in Turkey. The examinations conducted during the investigation showed that this agreement was implemented within the relevant market. It was also established that ArcelorMittal Ambalaj, by warning off the firms that made imports into Turkey, ensured the control of the market and imports, and thus the amount of supply in the relevant market was controlled.

25. Within this framework, it was found that the "Transfer of Shares Agreement," signed between the ArcelorMittal Group and Erdemir, as well as the "Commercial Agreement" attached and the practices connected to these agreements led to the co-ordination of competitive behaviour between the parties and had anti-competitive goals and effects, thereby violating Article 4 of the Competition Act. Thus, it was decided that administrative fines of TL 1,228,492.89 and TL 10,057,232.49 should be imposed on ArcelorMittal Ambalaj and Erdemir respectively; and that, in accordance with Article 9 of the Competition Act, for the re-establishment of competition, the relevant undertakings should be notified of the necessity, as per the commitment given, to terminate the shareholder status of Erdemir in ArcelorMittal Ambalaj and to document the situation to the Competition Authority within 12 months following the notification of the reasoned decision to the parties.

26. Concerning the infringement of the Competition Act by Erdemir and Borçelik, the decision first includes the observation that Borçelik is a joint-venture company co-managed by the Borusan Group and the ArcelorMittal Group. It is also mentioned in the decision that even though Erdemir holds 9.34% of the shares of Borçelik, this share ratio does not grant Erdemir any control over Borçelik; however that Erdemir has the right to appoint one member of the board of managers of Borçelik; that the operations of the two competing undertakings overlap in the production of "cold-rolled steel" and "galvanised steel". Lastly, it is concluded that the regular and intensive information exchange between Erdemir and Borçelik arose as a result of the shareholder status of Erdemir in Borçelik.

27. As the flat steel market has a small number of operating undertakings and has a structure with high concentration and barriers to entry, the decision states that the information exchanged between the parties was competition-sensitive information within the relevant markets, it limited competition and led to the co-ordination of competitive behaviour.

- Poultry (Chicken) Meat Decision⁵

28. As a result of the indications found in the *ex officio* preliminary inquiry conducted based on the news items published on 20.06.2008, suggesting an agreement between some undertakings producing poultry meat aimed at raising the prices and limiting the supply of poultry meat; it was decided to initiate an investigation concerning 27 undertakings operating in the poultry meat sector and the Poultry Meat Producers and Breeders Association (Beyaz Et Sanayicileri ve Damızlıkçılar Birliği Derneği – Besd-Bir) in order to determine whether there was an infringement of Article 4 of the Competition Act.

29. In the on-the-spot inspections conducted during the preliminary inquiry and investigation periods, lots of documents were found showing that some undertakings exchanged information on prices, held meetings on different dates and agreed on increasing the price of poultry meat. Based on these documents,

⁵ Board Decision Dated 25.11.2009 and Numbered 09-57/1393-362.

the dates of the agreements were determined, price lists and average sales prices of the undertakings parties to the agreement for before and after the period concerned were analysed for each agreement, and it was found that the undertakings raised their prices following the agreement date. In the decision, it was established that the following undertakings occasionally participated in the cartel that aimed to decrease competition between undertakings in violation of Article 4 of the Competition Act, in the period between 2003 and 2008:

- Abalıođlu Yem Soya Tekstil San. A.Ş. (Abalıođlu Feed Soy Textiles Industry Inc.)
- Banvit Bandırma Vitaminli Yem San. A.Ş. (Banvit Bandırma Vitamin feed Industry Inc.)
- Beypi Beypazarı Tarımsal Üretim Paz. San. A.Ş. (Beypi Beypazarı Agricultural Production Marketing Industry Inc.)
- CP Standart Gıda San. ve Tic. A.Ş. (CP Standard Food Industry and Trade Inc.)
- Erpiliç Entegre Tavukçuluk Üretim Pazarlama ve Tic. Ltd. Şti. (Erpiliç Integrated Poultry production and Trade Ltd.)
- Keskinođlu Tavukçuluk ve Damızlık İřlt. San. ve Tic. A.Ş. (Keskinođlu poultry and Breeding Business Industry and Trade Inc.)
- Pak Tavuk Gıda San. ve Tic. A.Ş. (Pak Poultry Food Industry and Trade Inc.)
- Őeker Piliç ve Yem San. ve Tic. A.Ş. (Őeker Poultry and Feed Industry and Trade Inc.)
- Őenpiliç Gıda Sanayi A.Ş. (Őenpiliç Food Industry Inc.)

30. It was found that the other undertakings under investigation were occasionally notified of the proposal to raise prices but it was unavoidable for them to follow the price increases of the leader organisations due to their small market shares and the conditions of the market. It was established that the projections created by Besd-Bir, formed by the sector representatives in order to find solutions to the problems of the sector, estimated weekly production amounts for each undertaking, making the poultry meat market even more transparent and facilitating co-ordination between the undertakings. In light of these assessments, it was concluded that Besd-Bir had a facilitating role in the formation of the cartel which aimed at decreasing competition between the undertakings operating in the poultry meat market by jointly setting the prices for poultry meat, limiting the supply of poultry meat and increasing the transparency of the poultry meat market.

31. As a result of the investigation, the Board decided that, for their practices violating Article 4 of the Competition Act, an administrative fine of 0.8% by discretion, of their gross income gained as of the end of 2008 should be imposed on the aforementioned nine undertakings in accordance with paragraph 3 of Article 16 of the same Act as well as with the Regulation on Fines; that the office of the President should render opinion to the Poultry Meat Producers and Breeders Association stating that it should avoid practices which facilitate anti-competitive practices; and that the Chairman of the Board of Directors of Pak Tavuk Gıda San. ve Tic. A.Ş. as well as that the President of the Poultry Meat Producers and Breeders Association, should be fined at 3% by discretion, of the fine imposed on Pak Tavuk Gıda San. ve Tic. A.Ş. in accordance with Article 16 of the Competition Act and the regulation on Fines since he had a decisive effect on the occurrence of the violation. In this aspect, the decision is the first example for the practice of imposing individual fines on the officials of undertakings who are found to have decisive effect on the violation concerned.

- Mobile Marketing Decision⁶

32. The decision evaluates the claims that, in spite of its declarations that its exclusive relationships with the firms with which it organised campaigns in the mobile marketing services area were terminated, Turkcell İletişim Hizmetleri A.Ş. (Turkcell Communication Services Inc. – Turkcell) continued this relationship in the campaigns where its own airtime minutes were awarded.

33. In the evaluation, it is stated that the market for mobile marketing that is under examination is a type of marketing which involves reaching final users through mobile/cellular phones in order to promote brands/products, give information about the brand/product, increase sales, effect the attitudes of consumers concerning the brand/product, etc. It is also mentioned that the GSM operators' infrastructure is used as the basic platform for the provision of the mobile marketing services to the subscribers and that, within this context, the market power which can be achieved by undertakings in the provision of mobile marketing services is basically determined by their power in the GSM services market; therefore these two markets are characterised as closely related markets.

34. As a result of the examinations conducted, the Board established that Turkcell held dominant position in the relevant product markets of "mobile marketing services" and "GSM services".

35. In light of the documents and findings included in the file, Competition Board decided that Turkcell created *de facto* exclusivity by

- Declining the participation of other operators to the campaigns where airtime minutes were awarded,
- Preventing other GSM operators from awarding any GSM benefits, including airtime minutes in the campaigns where airtime minutes were awarded,
- Refusing to implement channel and scale discounts to the buying firms in campaigns where airtime minutes were awarded by Turkcell in case there is no exclusivity,
- Granting discounts in exchange for the use of the "Turkcell Subscribers Win" logo in the promotion visuals,

36. and that these practices of Turkcell had to be seen as abuse of dominant position under Article 6 of the Competition Act.

37. It can be observed that, while assessing the case, the Board took into account the close relationship between the markets for mobile marketing services and GSM services, and also drew attention to the significant difference between the competitive structure of the market for mobile marketing and the competitive structure of the GSM services market, which may be seen as an important indicator for the former. The decision emphasises the importance of the fact that Avea and Vodafone, though significant competitors to Turkcell in the GSM Market, are only marginal competitors in the mobile marketing area which is closely related to the abovementioned market.

38. As a result of these findings, as per paragraph three of Article 16 of the Competition Act and the Regulation on Fines, the Board has decided to impose an administrative fine of TL 36,072,230,98 to Turkcell, at a ratio of 4.55% of its gross income.

⁶ Board Decision Dated 23.12.2009 and Numbered 09-60/1490-379.

- Marzinc Marmara Geri Kazanım Decision⁷

39. A notification was made to the Competition Authority concerning the request for the grant of a negative clearance certificate or exemption to the transaction of establishment of a recycling company under the name Marzinc Marmara Geri Kazanım San. ve Tic. A.Ş. (Marzinc Marmara Recycling Industry and Trade Inc. – Marzinc Geri Kazanım) by Çolakoğlu Metalurji A.Ş. (Çolakoğlu Metallurgy Inc.), Diler Demir Çelik End. ve Tic. A.Ş. (Diler Iron and Steel Industry and Trade Inc.), İçdaş Çelik Enerji Tersane ve Ulaşım San. A.Ş. (İçdaş Steel Energy Shipyards and Transportation Industry Inc.), Kaptan Demir Çelik Endüstrisi ve Tic. A.Ş. (Kaptan Iron and Steel Industry and Trade Inc.) and Kroman Çelik San. A.Ş. (Kroman Steel Industry Inc.)

40. Basically, Marzinc Geri Kazanım is a recycling company, jointly founded by five iron & steel producers operating in the Marmara region for the recycling of "flue dust" which is a by-product of iron and steel production, classified as a hazardous waste in the regulations issued by the Ministry of Environment and Forests. The notification form states that Marzinc Geri Kazanım would have an independent structure in relation to the iron and steel sector, which is the fundamental area of operation for its founding undertakings.

41. The five iron and steel producers which are the founding partners of Marzinc are among the leaders of the iron-steel sector. It is clear, under Article 8 of the Competition Act, that horizontal co-operation agreements between competitors may not be granted negative clearance certificates. However, they may be granted exemption, provided they fulfil the conditions listed in Article 5 of the Act.

42. Horizontal co-operation between competitors may lead to economic benefits as well as negative effects on the competitive setting. Within this framework, even though they are collaborations which bring competing producers together, environmental agreements are based on environmental regulations and aim at the removal and/or recycling of waste products that threaten environmental and human health; all of these are characteristics which may be taken into account while assessing the grant of an exemption. In the notification concerning the transaction, it is stated that, since this is a technology not practiced in Turkey, a know-how transfer agreement has been signed with a facility operating in Italy and a facility similar to the one in Italy would be established in Turkey.

43. From the information included in the file, it is understood that an obligation has been placed on iron and steel producers to make investments in the removal and recycling of "flue dust," which is generated as a by-product in iron and steel production plants and which is accepted as a "hazardous waste" by the relevant Regulation of the Ministry of Environment and Forests, and that within this context, Marzinc Geri Kazanım company was established by five iron and steel producers. When the conditions listed in Article 5 of the Competition Act are evaluated as a whole, it was deemed possible to grant an exemption to the relevant transaction under Article 5 of the Competition Act, especially in light of the facts that more than one undertaking participated in the venture because the establishment of such a facility required a high level of investment and a single iron and steel producer could not generate enough waste to feed such a facility; that the aforementioned transaction would lead to economic and technical developments through the know-how agreement signed with the foreign firm; that the zinc oxide to be generated from the waste flue dust would be a source of raw material which would both reduce the process costs and constitute an alternative to the ore production, thereby enriching resources of raw material and benefiting the consumers; that competition in the relevant market would not be significantly impeded; and that competition in the market for zinc oxide produced from flue gas would increase since a second player would be introduced to the relevant market, in which only Çinkom is currently in operation in Turkey.

⁷

Board Decision Dated 26.08.2009 and Numbered 09-39/946-233.

2.2 *Mergers and acquisitions*

- TGS-Joint Venture Decision⁸

44. The decision relates to the establishment of a joint venture under TGS Yer Hizmetleri A.Ş. (TGS Ground Services Inc.) within the framework of the Joint Venture Contract signed between Türk HavaYolları A.O. (Turkish Airlines Inc.) and Havaalanları Yer Hizmetleri Tic. A.Ş. (Airports Ground Services Trade Inc.). On 27.05.2009, the Competition Board decided that the said transaction be put to final examination pursuant to Article 10 paragraph one of the Competition Act.

45. When evaluated from the point of the consequences to be brought about by the vertical structuring, it was concluded that the acquisition was capable of having significant effects in the market structure. This is because, Turkish Airlines (THY) is positioned as a leading undertaking with significant market power in the market for domestic and international passenger transportation. The decision considered that, because THY is an important buyer in the market, this transaction to come into effect between the vertically-related undertakings might have the effect of foreclosing the largest customer of the market to actual and potential competitors (customer foreclosure); and when THY fully leaves the upstream market as a buyer after the agreement it is to conclude with TGS, due to economies of scale, the costs of firms that are currently providing services to it might increase, to the benefit of TGS, and thus those firms may exit the market, in which case the increase of costs and reduction of service quality likely to take place in ground services might negatively affect other airlines in the downstream market. On the other hand, it was stated that, in the event that THY, which has significant market power in the downstream market, had the joint control of TGS, which is in the upstream market, it might cause the costs of the rival downstream airlines to increase by complicating the provision of goods and services to competitors (by increasing prices) or not providing any goods or services.

46. At this point, the decision took into account the alternative sources of supply and potential entries as well. As concerns the said transaction, only two undertakings operate in the market for ground services, which is the upstream market. In the event that Çelebi leaves the market, no undertaking other than HAVAŞ and TGS, of which HAVAŞ has joint control, would remain in the market. Even though it was considered that the possibility of airlines to offer their own ground services (self handling) might create competitive pressure in the market, the fact that the minimum efficient scale required for offering ground services is above the capacity of the airlines and providing services to third parties is possible only with a group A license, is a factor making full vertical integration difficult for airlines.

47. When the effects of the joint venture on the basis of airports are looked at, considering that the market share of THY in ground service purchasing reaches significant levels in Istanbul and Ankara, it was envisioned that TGS's market share would be high because THY purchases all of its ground services from TGS. It was concluded that TGS would have a dominant position in Istanbul and Ankara considering that TGS would permanently have high levels of market share due to THY, the entry barriers and lack of physical capacity, and TGS's cost advantages against its competitors. The fact that HAVAŞ would not create sufficient level of competitive pressure was considered as another factor needed to be taken into account while assessing the dominance of TGS. This is because HAVAŞ and TGS would be able to have access to each other's competitive-sensitive information such as investment, production and price, and HAVAŞ would not create sufficient level of competitive pressure since HAVAŞ would have an interest in TGS. When the airports in İzmir, Antalya and Adana are looked at, considering also the insignificance, in these markets, of the strategic alliances and the purchases by Sunexpress, in which THY has joint control, it was concluded that a dominance in favour of TGS would not be created.

⁸ Competition Board Decision Dated 27.08.2009 and Numbered 09-40/986-248.

48. On the other hand, even though TGS was to enter a total of five airports in the beginning, which are Istanbul, Ankara, Antalya, İzmir and Adana, it was considered that it was likely to enter other airports in the future. As concerns the other airports, THY's purchases exceed 40% of the market in the airports such as Kayseri, Diyarbakır, Erzurum, Samsun, Gaziantep, Malatya, Kars, Mardin, Denizli, Kahramanmaraş, Erzincan, Hatay, Konya, Batman, Elazığ and Şanlıurfa, and considering that the likely market share of TGS may turn out to be high as well, it was concluded that a dominant position is highly likely to be created in such markets, in favour of TGS.

49. In the Protocol dated 20.08.2009 signed between the parties, the statement included in the previous version of the Contract dated 12.03.2009 under the heading "General Principles" Article 3/(a) subparagraph (v), which read "upon the expiry of the five-year contract...it may be extended for five more years", was removed in order to rule out the concerns of the Competition Board with regard to the transaction. Removal of the statement with the Amendment Protocol to the said Contract, which was related to the ability to enter into another five-year contract upon the expiry of the five-year contract with TGS, THY will be free to purchase ground services from actual and potential competitors besides TGS, when realising competitive purchases upon the expiry of the contract. Additionally, as concerns all airports where the total purchasing of THY exceeds 40%, not only in Istanbul and Ankara but in a way to cover the other geographical markets where TGS is likely to enter in the future, a commitment by THY to realise purchasing not directly from TGS but in competitive conditions after carrying out certain procedures, would prevent the creation of a dominant position likely to reduce competition in other markets as well. The Protocol dated 20.08.2009 stipulates that as concerns all airports where the purchases of THY exceed 40% of the total purchases at that airport, following the first five years, the contracts shall be concluded for a duration of "at least three years". In light of these findings, because the foreclosing of the market by a long-term agreement in such airports might significantly limit competition, the decision deemed it necessary that in order for THY to conclude a service purchasing contract for longer than three years, it should obtain the assent of the Competition Authority.

50. In conclusion, as concerns the notified transaction which falls in the scope of Article 7 of the Competition Act and the Communiqué No. 1997/1, which was issued based on that Act, it was decided that;

- Pursuant to the joint venture contract dated 12.03.2009, Turkish Airlines' purchasing its ground services from the joint venture contract company TGS Yer Hizmetleri A.Ş. for the first 5 years should be accepted as ancillary restraint,
- However, the transaction should be authorised on condition;
 - that the assent of the Competition Authority shall be obtained in case the purchasing of THY accounts for more than 40 percent of the total ground services needed at the concerned airport, and the duration of the ground services agreement to be signed with the said airport is more than 3 years, and
 - that, in addition to paragraph (a) of the section titled "General Principles" of the contract dated 12.03.2009, as amended with the commitment made in the Protocol dated 20.08.2009, as well as the first two subparagraphs of paragraph (b) thereof, are followed.
- Oyak-Lafarge Decision⁹

51. The decision is related to the notification that those shares in the companies Lafarge Aslan Çimento A.Ş. (Lafarge Aslan Cement Inc.) (Lafarge Aslan), Lafarge Ereğli Çimento San. ve Tic. A.Ş.

⁹ Board Decision Dated 18.11.2009 and Numbered 09-56/1338-341.

(Lafarge Ereğli Cement Industry and Trade Inc.) (Lafarge Ereğli) and Lafarge Beton A.Ş. (Lafarge Concrete Inc.) (Lafarge Beton) that are registered to Financiere Lafarge SAS (Lafarge), Agretaş and shareholding natural persons will be acquired by Ordu Yardımlaşma Kurumu (Army Solidarity Institution) (OYAK), and the request for authorisation for the said transaction under the Competition Act.

52. As a result of the evaluation made, the relevant product markets were determined to be cement, ready-mix concrete and aggregate. In the definition of relevant geographical markets, various methods, particularly such as SSNIP, were used. In the concentration analysis, various analyses including the method of Herfindahl-Hirschman Index (HHI) were taken into account. The SSNIP test was applied as follows:

- A starting region was determined to define a relevant geographical market for each of the facilities concerned by the transaction.
- By the assumption that all of the facilities established in the region were controlled by a monopoly, the total profits of the said monopoly for the first six months of 2008 and 2009 as a result of a 10% increase in the prices of the products manufactured in those facilities, were calculated.
- If the total profits calculated after the price increase exceeded the total profits prior to the price increase, the relevant geographical market was defined as limited to the starting region of the relevant geographical market.
- Where the price increase for the total shares of the monopoly decreased compared to the previous condition, the test was continued by adding new regions to the starting region. The addition of new regions was determined according to from which region the most product flow occurs into the starting region. By assuming that the producers in the newly added region were also controlled by the hypothetical monopoly, the impact of the price increase on total profits was re-evaluated.
- At a point where the price increase caused an increase in total shares compared to the previous condition, the addition of new regions was ceased and the area that also included the latest region added was defined as the “relevant geographical market”.

53. As a result of the SSNIP test, the relevant geographical markets for the cement product were determined based on the facilities concerned by the acquisition. In delineating the geographical market within the scope of ready-mix concrete, even though there was a general consensus in previous Board decisions on taking account of a distance of 50 km., it was seen that some practical problems could be faced in the calculation of concentration, such as the fact that the circle with a 50-km. semi diameter (the areas) where the facility concerned by the acquisition is located, at times, covered more than one province or only a certain part of a province (more than one sub-provincial districts). The main problems here were that, for Turkey, only the consumption figures of provinces were able to be estimated as concerns ready-mix concrete and the difficulties encountered in making a sound evaluation for regions covering more than one provincial border. In this framework, to eliminate the deficiencies of the analyses in question, two different, “firm” and “area” based, evaluations were made which were considered to be complementing each other. It was concluded that in the market for aggregate, the parties did not operate in a common geographical market.

54. In light of the evaluations made, the Decision ruled that,

- The acquisition by Ordu Yardımlaşma Kurumu (OYAK) of those shares in the companies Lafarge Aslan Çimento A.Ş. (Lafarge Aslan) and Lafarge Ereğli that are registered to

Financiere Lafarge SAS (Lafarge), Agretaş Agregā İnşaat, Lafarge Aslan and shareholding natural persons could not be authorised under Article 7 of the Competition Act, because the transaction is capable of resulting in the creation or strengthening of a dominant position, concerning the product of cement, for one or more undertakings and thus in significant lessening of competition, in the market of Zonguldak province which was determined by taking Lafarge Ereğli as the centre and the market made up of the region of Bolu and Düzce which was determined by taking OYAK Bolu as the centre,

- On condition that the relevant amendments are realised taking account of the commitment made in the Amendment Protocol that “the shares of Lafarge Ereğli Çimento San. ve Tic. A.Ş. that are owned by Agretaş Agregā İnşaat San. ve Tic. A.Ş. will be taken out of the scope of the acquisition and all of the shares of Lafarge Ereğli Çimento San. ve Tic. A.Ş. that are owned by Lafarge Aslan Çimento A.Ş. will be sold to Agretaş Agregā İnşaat San. ve Tic. A.Ş. prior to the completion of the transaction”, the acquisition by OYAK of those shares in Lafarge Aslan that are registered to Financiere Lafarge SAS, Agretaş Agregā and shareholding natural persons is not a transaction that would result in the creation or strengthening of a dominant position of one or more undertakings and thus in significant lessening of competition in the markets defined, and there is no prejudice in authorising the transaction within the framework of Article 7 of the Competition Act,
- Of the restricted non-compete areas stated in Article 8.6. of the Share Transfer Contract, the area concerning cement could be at most limited to “Istanbul, Kocaeli, Tekirdağ, and Balıkesir” and the area concerning aggregate could be at most limited to the “Marmara Region”, and within this framework, the geographical areas on which the parties agree based on the Second Amendment Protocol, concluded by the parties and notified to the Competition Authority, could be accepted as ancillary restraint.

- Burgaz Decision¹⁰

55. “Burgaz Alcoholic Drinks Commercial and Economic Entity” (Burgaz), which is consisted of Burgaz İçki Sanayi ve Ticaret A.Ş. (Burgaz Alcoholic Drinks Industry and Trade Inc.) (Burgaz İçki) and Burgaz Pazarlama ve Dağıtım Ltd. Şti. (Burgaz Marketing and Distribution Co. Ltd.) (Burgaz Marketing) was established upon the relevant decision of Savings Deposit Insurance Fund Board. In relation to the sale of the said economic entity, a preliminary notification was made to the Competition Board in September 2008, as of that date, it was understood that the transaction was not subject to preliminary notification; the announcement for the tender was published in the Official Gazette dated 02.07.2009 and No. 27276. To collect the receivables of Savings Deposit Insurance Fund through sale, the offer by Mey İçki Sanayi ve Ticaret A.Ş. (Mey Alcoholic Drinks Industry and Trade Inc.) (Mey İçki), the only participant of the tender organised on 05.08.2009, was accepted by Savings Deposit Insurance Fund and an application was made to the Competition Board in the context of final notification in order to obtain authorisation for the transfer.

56. In the examinations related to the acquisition by Mey İçki of Burgaz, the relevant markets were defined as “raki market” and “other high alcoholic drinks market”. In the decision, as a result of the analysis of the factors such as market share, entry barriers, the power to act independently of competitors and customers, it was found that Mey İçki held a dominant position in the raki market. It was concluded that it was possible that the acquisition by the dominant firm of Burgaz, which is a maverick firm in the context of behaviour affecting the market structure and product variety, and aggressive competition strategy, might negatively affect competition by resulting in unilateral effects as well as effects creating co-ordination.

¹⁰ Board Decision Dated 18.11.2009 and Numbered 09-56/1325-331.

57. Failing firm defence was also considered in detail in the context of the transaction. “Failing firm” defence in competition literature is a defence that enables the authorisation of a concentration transaction, which must be prohibited, by considering the economic gains resulted from preventing the exit of undertaking’s assets from the market through the acquisition of the failing firm by a dominant undertaking and that is accepted in exceptional circumstances. In the acceptance of this defence, the determinant condition is that the effects of the acquisition of the failing firm in the market are reasonable compared to the negative effects to occur when it exists the market.

58. In brief, in order to consider this defence, it has to be proved that the undertaking failing to fulfil its financial liabilities would immediately exit the market in the absence of the transaction, and afterwards the competitive market structure would not change whether the transaction is realised or not, in other words, there is not a causality link between the acquisition and the market becoming less competitive.

59. In the examination, it was found that Burgaz could not be seen as a financially unsuccessful firm in the light of its turnover, accelerating sale performance, capacity usage over sectoral average, plans for increasing capacity in the following period and financial data; however, Burgaz could be defined as a firm that fails fulfilling its financial liabilities not because of its failure in its commercial activities but because of the debts of the Group it is affiliated to. The analyses showed that even if it was assumed that Burgaz would fail to fulfil its financial liabilities and exit the market in a short time, the market structure without Burgaz would be more competitive than the market structure in case the transaction was authorised. As a result, failing firm defence could not be accepted in the context of the relevant transaction.

60. As a result of the findings related to the transfer of Burgaz to Mey İki, it was decided that the transaction would not be allowed within the framework of Article 7 of the Competition Act because it would result in strengthening the existing dominant position in the raki market and creating dominant position in market for high alcoholic drinks other than raki and thus in restricting competition significantly.

2.3 Opinions

61. In this section, examples are given from the opinions on practices or amendments to legislations given to several public institutions in 2009 within the framework of Articles 27(g) and 30(f) of the Competition Act.

2.3.1 Opinion of the Board related to the Draft Bylaw on the Amendments to the Bylaw on Raw Material and Sugar Prices

62. In the opinion, the fact that the Draft makes amendments due to reasons such as to eliminate the failures in practice, to accord with the developments and improvements in the sector is evaluated as a favourable development in general. Nevertheless, it is stated that certain amendments provided for in the Draft might restrict competition unduly in the relevant sector.

63. First of all, it is stated that within the framework of the new regulations related to planting areas, which are justified by aims to guarantee the provision of raw material for firms and to prevent damages to producers/firms, regulations defining beet planting areas on a factory/firm basis by the Board and prohibiting firms from getting beet from areas other than the planting areas designated for them might entirely remove alternative provision sources in the sugar beet purchase market. Secondly, regulating the production and sale conditions of beet, which would be used as a raw material in the production of final products that are not under the scope of the definition of sugar and that do not contain sugar, according to the said regulation is not reasonable.

64. Within this framework, it is stated in the opinion that:

- It is necessary that the definition of “Beet Planting Area” stated in subparagraph “t” to be added to Article 3 by the said article should be made in a way that would not create an impression that beet planting area is determined on firm/factory basis,
- In order to ensure that there are alternative provision sources in sugar beet purchase market, beet planting areas should be defined in general rather than on firm/factory basis and it should be ensured that contractual purchase can be made in those defined areas,
- It would be reasonable that the definition of “Beet Planting Area” is re-regulated in a way that would not create an impression that beet planting area is determined on firm/factory basis,
- The provision in the said Article stating that the Board shall designate planting areas on a firm/factory basis might restrict competition unduly in the sugar beet purchase market, the said regulation would confine producers to a single firm/factory and the relevant firm/factory would be given monopoly power in the area defined for it in the raw material purchase market,
- In addition, this restriction caused by the regulation to be applied is beyond the aim, the justifications of the said regulation, namely the aims to guarantee the raw material provision for firms and prevent damages to producers/industrialists can be realised by alternative regulations that are more appropriate for the functioning of free market such as the freedom of the producers to make agreements with the firm they want (and therefore the firm/factory will have the freedom to make agreements with the farmers they choose) without being limited to one firm/factory, it would be more reasonable if the Board defines the sugar beet planting areas in general and firms guarantee the provision of raw materials by agreeing with producers through making contracts within the borders of those areas,
- Regulating the production and sale conditions of beet, which would be used as a raw material in the production of final products that are not under the scope of the definition of sugar and that do not contain sugar, according to said regulation is not reasonable; when those products for which it is difficult to establish relations with the sugar market are in question, determination of production and sale conditions by the Sugar Board through intervening to the functioning of the free market would conflict with the aim and preamble of the Sugar Act.
- It would be reasonable that the expressions stating that the Board defines planting areas on a firm/factory basis and provisions prohibiting firms from getting beet from areas other than the planting areas designated for them and the provisions in relation to determining the production and sale conditions of beet, which would be used as a raw material in the production of final products that are not under the scope of the definition of sugar and that do not contain sugar are omitted from the text of the article.

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

65. The TCA signed an MOU with the Public Procurement Agency (PPA) with a view to establishing a co-operation framework via which the following is expected to achieve:

- detection of collusive bids on the basis of information provided by the PPA,
- designation of competitive tenders by the public agencies with a view to elimination collusion possibility.

4. Resources of competition authorities

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

4.1.1 Annual budget (in your currency and USD):

- 23.301.162,82 TL (15.060.213,82 USD)

4.1.2 Number of employees (person-years):

- Professional staff: 120
- All staff combined: 332.

4.2 Human resources (person-years) applied to:

66. The professional staff is responsible for the following activities:

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

4.3 Period covered by the above information

- 2009

ANNEXE: STATISTICAL INFORMATION FOR THE YEAR 2009

Table 1
Applications and Files Concluded

Year	File status¹¹	Infringements of competition	Exemption/Negative Clearance	Merger/Acquisition/ Joint Venture/Privatisation	Other	Total
2005	Opened	84	45	164	-	293
	Concluded	97	50	170	-	317
2006	Opened	108	36	199	-	343
	Concluded	108	33	186	-	327
2007	Opened	131	34	238	-	403
	Concluded	148	39	232	-	419
2008	Opened	166	65	249	-	480
	Concluded	132	57	255	9	453
2009	Opened	395	40	169	16	620
	Concluded	178	46	146	3	373

¹¹ The differences between opened files and concluded files result from the fact that certain files are still executed.

Table 2¹²**Files Concluded under the scope of Articles 4 and 6 of the Act ***

Year	Article 4	Article 6	Mixed (4 and 6)	TOTAL
2005	55	34	8	97
2006	65	30	13	108
2007	79	48	21	148
2008	67	38	27**	132
2009	73	70	35	178

* 3 files evaluated under the scope of “Articles 4 and 5” in the year 2009 are listed under Article 4 in this table.

** In the decisions dated 15.05.2008 and No. 08-33/411-137 and dated 18.09.2008 and No. 08-54/858-337 an evaluation was also made under the scope of Article 7.

Table 3***Horizontal and Vertical Agreements under the Scope of Article 4 of the Act¹³**

Year	Horizontal	Vertical	Mixed (H/V)	TOTAL
2005	55	34	8	97
2006	65	30	13	108
2007	79	48	21	148
2008	51	39	4	94
2009	56	35	17	108

* Files under the scope of “Article 4”, “Articles 4 and 5”, “Articles 4 and 6” are included in the table.

¹² Applications out of the scope among the information obtained under the scope of Articles 4 and 6 are not listed.

¹³ Related to the contents of Horizontal and Vertical Agreements; the difference between the numbers in the table giving details about horizontal and vertical agreements and the number of the files concluded under the scope of Article 4 of the Act stems from the fact that certain files examined under that article contain more than one type of agreements.

Table 4
Applications for Exemption and Negative Clearance and Results

	Negative Clearance Files			Exemption Files								
	Concluded Files			Concluded Files					Files under the scope of block exemption			Files where exemption is withdrawn
	Files granted negative clearance	Files granted conditional negative clearance	Files not granted negative clearance	Files granted individual exemption	Files not granted exemption and requested corrections	Files under the scope of block exemption*	Files granted conditional individual exemption	Files under the scope of conditional block exemption	Files not granted exemption			
2005	11	1	-	7	-	13	4	10	3	1	-	
2006	5	1	-	6	-	10	2	2	7	-	-	
2007	8	2	-	10	-	5	6	4	2	2	-	
2008	4	1	-	28	4	5	8	2	0	1	4	
2009	-	-	1	20	1	22	1	-	-	-	1	
Total	97	20	27	94	5	88	35	41	24	5	5	

* Opinions are also sent in 8 files.

Table 5
Number of Merger and Acquisition Files concluded

Year	2005	2006	2007	2008	2009
Merger	5	4	6	3	4
Acquisition	122	138	193	208	128
Joint Venture	8	23	22	20	12
Privatisation	35	21	11	24	2
TOTAL	170	186	232	255	146

Table 6*
Results of the Merger and Acquisition Files finalised

Year	Approval	Conditional approval	Rejection	Out of scope-under the threshold**
2005	130	6	1	33
2006	110	25	-	51
2007	171	17	-	44
2008	177	22	-	55
2009	110	4	1	31
TOPLAM	1037	84	4	448

* There is one decision that is included in the total Merger-Acquisition files but not reflected in Table-4. The reason is that the result of the file does not fall under the titles in the said table. The said decision is the decision dated 07.11.2008 and No. 08-62/1017-393, the transaction was abandoned.

** In the decision dated 08.01.2009 and No. 09-01/6-6 negative clearance certificate was given. In the decision dated 04.02.2009 and No. 09-04/90-30 a condition was applied on non-compete obligation.