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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN TURKEY

-- 2010 --

This report is submitted by Turkey to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 29-30 June 2011.

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Executive Summary

1. With respect to the activities of the Turkish Competition Authority (TCA) in year 2010, 252 files were finalized as a result of examinations, preliminary inquiries and investigations under the scope of Articles 4[1] and 6[2] of the Act No 4054 on the Protection of Competition (the Competition Act). The number of negative clearance/exemption decisions is 96 while the number of mergers/acquisitions is 276 in the same period.

2. The number of finalized files regularly rose from 1999 to 2008. After a decline in 2009, there was a remarkable increase in this number in 2010. In fact, while the number of finalized files was 444 in 2008, 370 in 2009, it rose up to 624 in 2010. It has been observed that the 68% increase in 2010 compared to the previous year, particularly stems from merger/acquisition/privatization files. Moreover, the number of competition infringement and negative clearance/exemption files has notably increased as well.

3. When the statistics about competition infringements, which have a major share in the activities of the TCA, are taken into account, it can be seen that the number of finalized files has risen from 178 to 252. With respect to the sectoral breakdown of decisions, food products and beverages, transport, petroleum, petrochemistry, petroleum products and telecommunications sectors respectively have the biggest shares in investigations made upon infringement claims. At this point, it is observed that although the number of investigations has changed in time, the sectors where investigations are concentrated have not changed much.

4. With respect to the sectoral breakdown of merger/acquisition/privatization applications concluded, applications regarding the energy sector constitutes one fourth of the files, followed by food products, chemistry and chemical products[3], financial services and healthcare. In terms of negative clearance/exemption files, more than half of the files consist of applications regarding petroleum, petrochemistry, and petroleum products.

5. Accordingly, cooperation mechanisms between the legislator and the public authorities in charge of sectoral regulation for structural measures addressing the sectors, where there are frequent infringements in spite of the investigations of the TCA and measures taken depending on those investigations, are needed.

6. As to new secondary legislation, Communiqué No 2010/2 on Hearings held vis-à-vis the Competition Board and Communiqué No 2010/3 on the Regulation of the Right of Access to File and Protection of Trade Secrets have been put into effect after being published in the Official Gazette in 2010. Moreover, Communiqué No 2010/4 concerning the Mergers and Acquisitions calling for the Authorization of the Competition Board has been published in the Official Gazette in 2010 to enter into force as of January 01, 2011.

7. The Communiqué No 2010/2 provides for the procedures and principles about hearings vis-à-vis the Competition Board, which is the decision making body of the TCA, whereas the Communiqué No 2010/3 explains the procedure and principles for determining whether information obtained during the implementation of the Competition Act qualifies as trade secret, and for protecting those information and documents that have been classified as trade secret.

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1 Article 4 prohibits anti-competitive agreements, concerted practices and decisions.

2 Article 6 prohibits abuse of dominant position.

3 Fast Moving Consumer Goods sector excluded.

8. On the other hand, imposing new principles and procedure concerning the mergers and acquisitions calling for the authorization of the Competition Board, the Communiqué No 2010/4 provides for a new notification system based on the turnovers of undertakings instead of the old system based on market share and turnover laid down in the Communiqué No 1997/1.

9. Today, one important function given to competition authorities in developed economies such as EU and US is to consult for the government while preparing and/or implementing legal and administrative regulations, which shape market structures, in order to create the structure that minimizes market failures stemming from undertakings' conduct. Under the scope of this duty, which is called competition advocacy, market structure is shaped in line with the advice of competition authorities on a micro scale; therefore, economic efficiency is guaranteed by preventing possible failures. The Competition Board included this function in its main policies and priorities and gave opinion to other agencies and institutions on various subjects in 2010.

10. Beside the aforementioned developments, a cooperation protocol was signed between Public Procurement Agency and the TCA with a view to act jointly so that a fair and sound competition environment in public procurements is established, developed and protected. Moreover, there have been efforts to sign protocols with Energy Market Regulatory Authority and Information and Communication Technologies Authority in order to cooperate, exchange information, give opinions and coordinate for establishing, improving and maintaining a free and healthy competition environment in energy and electronic communications markets.

11. In 2010, relations with the EU, the OECD, the ICN and the UNCTAD continued as in the past. Especially, 9th Annual Conference of ICN, which was the most important event with respect to multilateral relations, was successfully hosted by the TCA with the participation of more than 100 countries in Istanbul. The TCA performed active cooperation and participation during the preparation of and carrying out the Conference. Within the scope of multilateral relations, contributions were made to all related ICN workshops organized in 2010. Oral and written contributions in the meetings of the said organizations enabled the practices of the TCA to be evaluated internationally. With respect to bilateral relations, the TCA carried out activities such as exchanging information and experience, technical assistance, participating in events, etc. first with countries, which signed cooperation protocols, and with other countries. In addition to the existing ones, cooperation protocols were signed between the TCA and the competition authorities of Mongolia and Bosnia Herzegovina.

12. Finally, training activities that have a special place for the TCA should also be noted. As in the previous years, internal training programs as well as training programs for the promotion of the TCA were noteworthy. Under the scope of training activities towards the promotion of the TCA and competition rules, universities were given support for courses related to competition law and policy, presentations were made in bars, and a comprehensive internship program was provided to university students. Moreover, 8th Symposium on the Recent Developments of Competition Law, which had been continuously organized in Erciyes University for seven years, was held on May 14-15, 2010, whereas 3rd Symposium on Competition Economics and Policy was held on October 8-9, 2010 in Pamukkale University, Denizli.

13. Consequently, when the activities of the TCA in 2010 are taken into account, it can be observed that efforts in professional issues as well as supplementary services have a tendency to improve qualitatively and quantitatively.

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 "Communiqué No 2010/2 on Hearings held vis-à-vis the Competition Board", which was put into effect after being published in the Official Gazette dated April 24, 2010 and numbered 27561

14. The Competition Act provides for rules on hearing. In this context, by considering the principles of efficiency, transparency and legal certainty, the Competition Board adopted the Communiqué No 2010/2 in order to clarify the principles and procedures of hearing with a view to ensuring use by the parties of their rights with respect to hearing in a complete and effective manner; determining and announcing participation in hearings of parties, complainants and other interested persons and the issue of secrecy; and avoiding problems that might be encountered in practice. Communiqué No 2010/2 includes, inter alia, provisions on those entitled to a hearing, participation of the complainants and third parties, publication of date of hearing, public nature of hearing and in camera sessions, physical infrastructure, and recording of the hearing.

1.1.2 "Communiqué No 2010/3 on the Regulation of the Right of Access to the File and Protection of Trade Secrets", which was put into effect after being published in the Official Gazette dated April 18, 2010 and numbered 27556

15. The Competition Act provides for right to access to file and protection of trade secrets. Within the framework of the rules in the Competition Act, the Communiqué No 2010/3 aims to determine the principles and procedures regulating right to access to file and identifying and protecting trade secrets. Accordingly, the Communiqué No 2010/3 includes, inter alia, explanations on access to file such as those entitled to access to file, documents and information to which access is granted, the timing of access to the file, definition of trade secrets, examples for trade secrets, and protection and disclosure of trade secrets.

1.1.3 "Communiqué No 2010/4 Concerning the Mergers and Acquisitions calling for the Authorization of the Competition Board", which was published in the Official Gazette dated October 07, 2010 and numbered 27722

16. There was a significant amendment in the secondary legislation related to mergers and acquisitions in the last quarter of 2010 and the "Communiqué No 2010/4 concerning the Mergers and Acquisitions calling for the Authorization of the Competition Board" was published in the Official Gazette dated October 07, 2010 and numbered 27722 to replace the "Communiqué No 1997/1 concerning the Mergers and Acquisitions calling for the Authorization of the Competition Board" as of January 01, 2011. As of the effective date of the Communiqué No1997/1, the developments in both the Competition Act and in the economy of Turkey and deficiencies and failures found by the Competition Board in light of its experience raised the need for this amendment.

17. The new Communiqué No 2010/4 aims to ensure legal certainty by providing for turnover threshold instead of the threshold system including market share. In addition, the Notification Form attached to the Communiqué has also been amended enabling undertakings to make applications more easily by abolishing the obligation for mergers and acquisitions that are unlikely to cause competition concerns to fill certain parts of the Notification Form.

18. Additionally, following the entry into force of the Communiqué No 2010/4, concentration transactions that have been notified to the Competition Board will be announced on the website of the TCA including the undertakings concerned and their fields of activity. Within this framework, the transactions notified to the Competition Board will be disclosed to the public and opinions concerning these transactions will be obtained. Last but not least, a commitment mechanism in relation to concentration transactions has explicitly been provided for by the Communiqué No 2010/4.

1.1.4 Communiqué No 2011/1 on the Increase of the Lower Thresholds for Administrative Fines specified in Paragraph 1, Article 16 of the Act No 4054 on the Protection of Competition, to be Valid Until 31/12/2011, which was put into effect after being published in the Official Gazette dated December 18, 2010 and numbered 27789

19. The Competition Act provides for fines in case of certain procedural violations such as provision of false and misleading information, obstruction of on-the-spot inspections, realization of mergers and acquisitions that are subject to authorization without the authorization of the Competition Board. The minimum amount of the fine is revalued each year by the Competition Board via communiqués. Communiqué No 2011/1 revalues the minimum amount of the fine for 2011.

2. Enforcement of competition laws and policies

2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions – Summary of significant cases

2.1.1 Dialysis Devices Market

Investigation related to the Agreement between Undertakings in the Dialysis Devices Market	
The claim that 19 undertakings operating in the market for dialysis devices and consumables violated the Competition Act by colluding was analyzed under the scope of the investigation. *Conclusion:* 5 of the undertakings were imposed administrative fines varying from 1,2% and 3%, 14 of the undertakings were not punished due to the lack of evidence showing infringement of the Competition Act.	**Decision Date and Number:** 23.12.2010 10-80/1687-640

- **Market**: Dialysis Devices and consumables

  Hemodialysis, a method used in the cure of renal failure, is the process where the blood of the patient is taken by a device and given back after cleaning. During this process, consumables such as dialyzer, artery-venous set, fistula pin, salt and solution are used. Although it is possible to define a separate product market for each, the relevant markets were defined as "market for dialysis devices" and "market for dialysis consumables" taking into account that dividing the relevant market into sub-groups would not affect the results of the investigation.

- **Findings**: The structure of the said markets and their susceptibility to tacit collusions were analyzed considering the number of competitors, entry barriers, product homogeneity, symmetric costs, the fact that the market was mature/the number of demands, purchase frequency/volume and interaction with other markets. It was found that in both markets

  - The number of major competitors was low and the degree of concentration was high,
  - Entry into market was difficult with respect to devices but relatively easier with respect to consumables,
  - Even though differentiation was observed with respect to Fresenius Medikal Hizmetler A.Ş., one of the suppliers in the device market, consumables were homogeneous,
  - The market was saturated especially for devices, the demand was stable and predictable,
  - Buyers were small-sized and made small purchases, and parties were interacting in the market for dialysis devices and in the market for dialysis services.

As there was intensive information flow between the parties, this criterion took an important place in the investigation. Within this framework, it was found that the following factors led to information flow among the parties:

- The undertakings were engaged in intensive commercial relations,
- They authorized their competitors in tenders to sell their products,
- They periodically shared information about commercial activities,
- Market players had close personal contacts with each other,
- DİADER, established by dialysis centers, facilitated interaction between undertakings
- Purchases via tenders had an important place in the market, bids and winner of tenders were evident and the parties were in contact while specifications were prepared.

Within this framework, it was understood that the market was favorable for tacit collusion. However, there were not any infringements found with regard to the market structure or information exchange.

As a result of the evaluation of information and documents obtained during on the spot inspections, it was understood that allocation of public procurements was a result of a wider cooperation among the parties. This cooperation appeared as concerted practices in public tenders and sometimes in sales to private sector. As a result, it was concluded that the aim of the cooperation was to determine and apply general commercial strategies. Cooperation was sometimes made among providers, sometimes among dealers and sometimes between suppliers and dealers.

- **Conclusion:** As a result of the evaluation, it was decided that five undertakings violated Article 4 of the Competition Act via collusion. Therefore, they would be imposed administrative fines amounting to 1,2 - 3 % of their annual gross revenues accrued at the end of 2009, other 14 undertakings would not be imposed fines due to the lack of sufficient evidence that they violated the Competition Act, according to Article 16 of the same Act.

2.1.2 Cargo Firms

Investigation on Price Agreement Among Cargo Firms	
The preliminary inquiry made upon the complaint filed to the TCA, raised concerns that Aras Kargo Yurtiçi Yurtdışı Taşımacılık A.Ş., Fillo Ürün Odaklı Taşımacılık A.Ş., MNG Kargo Yurtiçi ve Yurtdışı Taşımacılık A.Ş. and Yurtiçi Kargo Servisi A.Ş. simultaneously and collusively made excessive increases in their prices. *Conclusion:* Undertakings were imposed administrative fines on the grounds that they violated the Competition Act by making agreements with the object and effect of restricting competition between 2006 and 2008.	**Decision Date and Number:** 03.09.2010; 10-58/1193-449

- **Market**: Cargo Transportation
- **Findings:** As a result of the investigation, it was understood that the officials of Aras Kargo, MNG Kargo and Yurtiçi Kargo met several times from February 2006 to August 2008, exchanged views about competition issues, shared competition sensitive information and concluded anticompetitive agreements about prices and supply conditions for their services.

It was seen in the agreement made at the beginning of 2006 that undertakings agreed to keep discounts to be made on list prices under a certain limit. Moreover, Fillo Kargo, a subsidiary of Aras Kargo, was also a party to the agreement together with Aras Kargo, MNG Kargo and Yurtiçi Kargo. The agreement established an arbitration mechanism to ensure undertakings' loyalty and a person was entrusted against remuneration, which was important to show the willingness of undertakings to prevent deviations and maintain the cartel.

According to the existing evidence, anticompetitive conduct by the parties continued after 2006. Within this framework, it was understood that undertakings discussed issues related to price and supply conditions and consequently reached an agreement called "Results of Overall Evaluation Meeting on Common Problems of the Cargo Sector". Although there was not a clear provision as to the date of the agreement, it was found depending on the statements in the document that it was concluded before 01.07.2008.

Undertakings came to an understanding on price increases on transport lists, limits of discounts to be made on transport lists, creating a common piece rate list, methods for applying piece rates, collusive bidding in important tenders, determining insurance compensation limit for individual and corporate firms, determining due dates for collection of receivables as well as general problems in the sector under the agreement called "Results of Overall Evaluation Meeting on Common Problems of the Cargo Sector".

Anticompetitive meetings between MNG Kargo, Aras Kargo and Yurtiçi Kargo continued after 08.07.2008. The meeting dated 17.07.2008 held in the office of the Chairman of MNG Kargo Board of Directors was particularly important. It was understood from the document titled "Memorandum of Understanding" related to the said meeting that the Chairman of MNG Kargo Board of Directors, the Chairman of Yurtiçi Kargo Board of Directors, the Chairman of Aras Kargo Board of Directors and the Director General of MNG Kargo reached an agreement that regulated price and supply conditions and stipulated market and customer allocation.

Under this agreement, a monitoring mechanism was established; the Chairman of Yurtiçi Kargo Board of Directors was given the duty to monitor the application of the agreement. Fillo Kargo also participated to this agreement among Aras Kargo, MNG Kargo and Yurtiçi Kargo.

Moreover, a document titled "Opinions given in the Meeting dated 24.07.2008 made in MEF Schools (Criticisms and Proposals for the issues laid down in the Memorandum of Understanding prepared in the meeting held in MNG Holding on July 17, 2008 at 17.00) was obtained. In the said document there were detailed and clear explanations regarding each topic in the "Memorandum of Understanding".

Consequently, it was found that the agreements among MNG Kargo, Yurtiçi Kargo and Aras Kargo made between 2006-2008 violated Article 4 of the Competition Act by reaching an understanding on especially issues such as price increases in list prices, dates of price increases, the units to be taken as a basis for determining list prices, limits for discounts to be made on list prices, piece rate lists, the rate of discounts to be made on such lists, bids in tenders and allocation of tenders, which were the fundamentals of competition between the parties.

- **Conclusion:** It was decided that Aras Kargo Yurtiçi Yurtdışı Taşımacılık A.Ş., Fillo Ürün Odaklı Taşımacılık A.Ş., MNG Kargo Yurtiçi ve Yurtdışı Taşımacılık A.Ş. and Yurtiçi Kargo Servisi A.Ş. were imposed administrative fines amounting to 1,5% of their annual gross revenues accrued at the end of the year 2009.

2.1.3 Peugeot and Citroen Investigations

Price Agreements Between Dealers: Peugeot and Citroen Investigations	
With respect to Peugeot, documents attached to a complaint submitted to the TCA and with respect to Citroen, documents obtained during the inquiries about another brand led to concerns that some of the authorized sellers and services of the said brands fixed prices in the sale of new cars and repair-maintenance services. As a result, the Competition Board launched an investigation on its own initiative. *Conclusion:* As a result of the investigations among 56 Peugeot dealers, 44 of them and among 42 Citroen dealers 13 of them were imposed administrative fines.	**Decision Date and Number:** Peugeot: 06.08.2010 10-53/1057-391; Citroen: 23.09.201010-60/1247-480

- **Market**: Automobile sales and aftermarket

  In both decisions, the product market was defined as distribution, sales and marketing of new automobiles of the brand concerned and the market for spare parts, repair and maintenance services after sale.

- **Findings in the Peugeot Decision:** In Peugeot investigation, it was found that Peugeot Turkey Dealer Council was established in 2005 and operated until September 2008. The administration of the Council consisted of a chairman, a vice-chairman and five regional representatives, who communicated with dealers in their respective regions. At the beginning the Council only included dealers engaged in sales of new cars, spare parts and authorized service activities (3S). With the second structuring in February 2007, it covered the dealers engaged in the sale of spare parts and/or authorized service activities (2S and 1S) and increased the number of Council members to 56 in time.

  It was found that the Council structure has two objectives: 1. Gathering Peugeot dealers under a body and becoming more powerful against the provider and enabling communication with Peugeot Otomotiv Pazarlama A.Ş. (POPAŞ) 2. Restricting competition among dealers with efforts to make price agreements.

  Depending on the information and documents obtained during the investigation, it appeared that the said undertakings reached an agreement on factors such as prices and discounts regarding retail and fleet vehicle sales as well as labor rates, spare part prices and supply conditions, especially against insurers, regarding aftermarket services. Moreover, it was understood that the undertakings engaged in allocation of territories as well as price fixing agreements.

  In order to monitor compliance with the agreement, the Council agreed with an undertaking titled "Method Research Company", which contacted with dealers under the scope of mystery shopping system and kept voice records and prepared reports for the Council. As a result of these inspections, the Council decided to impose fines on undertakings that diverged from the decision and the said fines were collected from some of the undertakings. The sanctions for violating price agreements were not limited to fines, documents showing that the staff concerned was fired in the infringing dealers were also obtained.

- **Findings in the Citroen Decision:** It was found in Citroen investigation that dealers began price fixing activities in the first months of 2007 under the title "price stability", Dealer Council was used as a roof, the participants were dealers in Istanbul and in neighboring cities such as Kocaeli and Tekirdağ as well as the dealer in Samsun, who served as the chair of the Council for a certain period.

It was seen that the outline of the price fixing was drawn under the documents called "Issues deemed as Destabilizing Activities". It was stated in those documents that "all kinds of bonuses and discounts" that would affect prices were deemed as "destabilizing" in order to ensure price fixing. Under the scope of price fixing, fuel checks/bonuses and bonuses in insurance sales, discounted or free maintenance, non-imposition of late interest and organizing campaigns without permission from the Council were prohibited; besides, minimum prices for accessories and maximum discount rates for spare parts and labor rates were determined.

With respect to monitoring deviations, a decision was taken stating that dealers might control each other, they would be awarded "TL 400 for each trapping" and voice and video recording would be used as evidence. In addition, in order to facilitate monitoring, measures were taken such as showing accessory prices separately in the invoice. An agreement was made with the undertaking "Duyar Danışmanlık" to control whether dealers comply with the rules. The said undertaking telephoned to or visited dealers four times a month like a customer and submitted voice records and reports related to its contacts. It was also found in the investigations that dealers infringing the price agreement were given TL 7,500 fine and those fines were collected.

- **Conclusion:** 44 Peugeot dealers and 13 Citroen dealers, which were found to have infringed Article 4(a) and (b) of the Competition Act were imposed administrative fines.[4]

2.2 Mergers and acquisitions – Summary of significant cases

2.2.1 Boğaziçi Elektrik, Gediz Elektrik, Trakya Elektrik and Dicle Elektrik

Privatization of Boğaziçi Elektrik, Gediz Elektrik, Trakya Elektrik and Dicle Elektrik	
As a result of the evaluation regarding the privatization of Boğaziçi Elektrik Dağıtım A.Ş. (Boğaziçi Elektrik), Gediz Elektrik Dağıtım A.Ş. (Gediz Elektrik), Trakya Elektrik Dağıtım A.Ş. (Trakya Elektrik) and Dicle Elektrik Dağıtım A.Ş. (Dicle Elektrik), some of the transfers were allowed whereas some of them were not authorized on the grounds that they would result in creation of dominant position. An important point in the Competition Board decision is that a member of the bidding joint ventures MMEKA Makine İthalat Pazarlama ve Ticaret A.Ş. (MMEKA) and one of the bidders, Aksa Elektrik Perakende Satış A.Ş. (AKSA) were considered under the same economic entity. The Competition Board uses 30 % rate as a threshold guide in the assessment of horizontal concentrations on distribution and retail level and used that threshold for dominant position assessment. *Conclusion:* It was decided that two of Boğaziçi Elektrik, Gediz Elektrik and Trakya Elektrik could be acquired by MMEKA and/or AKSA at most; and three of Boğaziçi Elektrik, Gediz Elektrik, Trakya Elektrik and Dicle Elektrik could be acquired by Eti Gümüş A.Ş.-Söğütsen Ser. San. İnş. Mad. İth. İhr. A.Ş. O.G.G. (Eti-Söğütsen) at most.	**Decision Date and Number:** 16.12.2010 10-78/1645-609

- **Market**: Electricity distribution and electricity retail sale and service

In the decision "*sales to distribution companies"* were defined as a distinct market taking into account the bilateral agreements in the current situation. Other markets under the scope of the file

[4] Article 4(a) prohibits agreements, concerted practices and decisions fixing the purchase or sale price of goods or services, elements such as cost and profit which form the price, and any terms of purchase or sale whereas Article 4(b) prohibits partitioning markets for goods or services, and sharing or controlling all kinds of market resources or elements.

were the market for electricity distribution, and regarding electricity retail sales and services "large industrial consumers" and "sales to households and small sized industrial/commercial consumers".

- **Findings:** First of all, the decision defined "undertaking" and "economic entity" concepts in detail. Considering family ties and common economic interests, one member of bidding joint ventures, the shareholders of MMEKA, except Stargate Gayrimenkul Yatırım İth. İhr. ve Tic. A.Ş. (Stargate) controlled by Mehmet Emin Karamehmet, were in the same economic entity with Kazancı Holding A.Ş. and therefore with AKSA. As a result, they were regarded as one undertaking.

  In the following parts of the decision, the bidders were evaluated according to Article 4 and 7[5] of the Competition Act.

  One of the members of bidding joint ventures, MMEKA, was jointly controlled by Kazancı Group and Stargate. Although Kazancı Group operated in the electricity market, MMEKA was not under the scope of Article 4 because Stargate did not carry out activities in that market at that time. Moreover, it was stated in the decision that the shares of MMEKA and the electricity distribution firms to be transferred should be structured in a way that would enable their independency from the parent companies and their sustainability and in case Stargate and Karamehmet Group started operations in the electricity market alone or together with other partners, the risk to coordinate competitive conduct would occur as both parties to the joint venture were operating in the market, which would fall into the scope of Articles 4 and 5[6] of the Competition Act.

  In the evaluation according to Article 7 of the Competition Act a simultaneous and interrelated assessment was made with regard to Boğaziçi, Gediz, Trakya and Dicle electricity distribution regions and this part of the decision focused on considerations regarding horizontal concentration, vertical integration and potential competition.

  The decision noted that Turkish electricity market was experiencing the first stages of liberalization and private sector initiatives, although privatization in distribution were at the final stage, privatizations in production were just at the outset, therefore, state-owned production facilities were in majority, and those facts should be taken into account. Within this framework, a dominant position test which aimed to create a competitive structure for the future and which had the function to design the market in a sense must be different from a test to be made in a functioning market. As result of these requirements, certain market shares in certain areas needed to be used as indicators. Consequently, it was stated that 30% rate should be regarded as a guidance to determine dominant position in the concentration files regarding distribution until important stages ended in the liberalization period such as the completion of privatizations and realizing legal divestitures.

- **Conclusion:** As a result of the investigation, it was decided that two of Boğaziçi Elektrik, Gediz Elektrik and Trakya Elektrik could be acquired by MMEKA and/or AKSA at most; three of Boğaziçi Elektrik, Gediz Elektrik, Trakya Elektrik and Dicle Elektrik could be acquired Eti-Söğütsen at most, and all other acquisitions were deemed allowable.

5 Article 7 prohibits mergers and acquisitions creating or strengthening a dominant position that result in significant lessening of competition.

6 Article 5 provides for conditions for exemption from the prohibition by Article 4 on anti-competitive agreements, concerted practices and decisions.

2.2.2 Acquisition by Novartis of the Shares belonging to Nestlé in Alcon Inc.

Acquisition by Novartis of the Shares belonging to Nestlé in Alcon Inc.	
Novartis would acquire the control of Alcon by purchasing 52,5 % Alcon shares controlled by Nestlé and be in dominant position or strengthen its dominant position in S1B and S1G ATC-3 medicine groups. The fact that Social Security Institution (SGK) has an important buyer power and there are not entry barriers based on patent does not prevent anticompetitive effects resulting from high market share and other entry barriers. *Conclusion:* Acquisition by Novartis of Alcon was authorized on condition that Efemoline and Zaditen, which are under S1B and S1G ATC-3 groups, would be transferred to third parties.	**Decision Date and Number:** 08.07.2010 10-49/929-327

- **Market**: Each ATC-3 group where medicines subject to transfer are included

  In order to determine the substitutability of the products, medicines' indications were taken into account like in the previous Competition Board decisions about the sector. The classification of medicines according to their indications is made according to Anatomical Therapeutic Chemical Classification (AT-3) by European Pharmaceutical Marketing Association (EphMRA). Accordingly, medicines with the same intended use are under the same ATC-3 class, although there are exceptions.

- **Findings:** The competitive analysis in the decision focused on the markets for the following where there were overlaps between the activities of the parties: *S1A–Ophthalmologic anti-infectives, S1B– Ophthalmologic Corticosteroids, S1E–Miotics and Antiglaucoma Medicines, S1G–Ocular Antiallergics, Decongestants and Antiseptics, S1K–Artificial Tears and Ocular Lubricants, S1L–Contact Lens Solutions, S1R-Ophtalmic Non-Steroid Anti-inflammatories (NSAID)*.

  For the dominant position test, IMS-based market share data was taken into account. These data were assessed regarding competitive factors in the pharmaceutical sector. Within this framework, entry barriers in the pharmaceutical sector were analyzed. According to the information given by market players, the time required for having license to enter the market was calculated as approximately 685 days. Being in the Reimbursement List of the SGK, which is the biggest buyer of pharmaceuticals in Turkey, provides important competitive advantages and it was found that it takes approximately 156 days to enter into that list. In addition, as promotion and advertisement opportunities are limited in the pharmaceutical sector, advertisements for doctors are important and this forms an important part of firms' market power.

  On the other hand, patent-protected medicines of the parties, Alcon and Novartis, were analyzed and it was found that although Vigamox and Tobrex were patent-protected, Novartis had no patent-protected product in the relevant product markets and the market shares of Alcon's patent-protected products were not high, therefore this was not regarded as a serious entry barrier.

  In the evaluation, each relevant product market was subject to competitive analysis with respect to positive and negative results of the concentration. Accordingly, positive aspects were the existence of alternative procurement sources, the purchasing power of SGK, limited number of patent-protected medicines, and the existence of other undertakings with market power. Negative aspects were high market shares as a result of the merger, the fact that no competitor entered into the relevant market for the last five years, low growth potential of the market, entry barriers encountered by the equivalent pharmaceutical producers. As a result of the analyses made for each relevant market, it was concluded that in the markets for *S1B–Ophthalmologic*

Corticosteroids and S1G–Ocular Antiallergics, Decongestants and Antiseptics negative outcomes would outweigh positive outcomes and it was likely that dominant position would be created or strengthened.

Within this framework, there were not any competitive concerns with respect to other markets but in the markets for *S1B–Ophthalmologic Corticosteroids and S1G–Ocular Antiallergics, Decongestants and Antiseptics* the transaction would result in creating a dominant position, or strengthening the existing dominant position as specified in Article 7 of the Competition Act and thus in decreasing competition in the country or in a part of it.

- **Remedy:** Commitments offered by Novartis during the investigation were deemed sufficient to resolve competition concerns. According to the commitments, Novartis would realize legal transfer (full ownership transfer or license transfer for an indefinite time) of all of the rights of Efemoline in the *S1B–Ophthalmologic Corticosteroids* market and of Zaditen in *S1G–Ocular Antiallergics, Decongestants and Antiseptics* market within one year as of the decision date to third parties.
- **Conclusion:** The Competition Board authorized the transaction directly in relevant markets where there were not any concerns and conditionally in the markets for *S1B–Ophthalmologic Corticosteroids and S1G–Ocular Antiallergics, Decongestants and Antiseptics*.

2.2.3 Decision on the Acquisition of Invitel by Türk Telekom

Decision on the Acquisition of Invitel by Türk Telekom	
As a part of an international acquisition, Türk Telekom, which has the widest terrestrial infrastructure in telecommunications sector, would strengthen its dominant position by acquiring one of two alternative infrastructure operators serving on its infrastructure in the market. Except from the infrastructures held by public institutions, entry into the market is not possible in near future due to technical and administrative reasons. Moreover, one of the undertakings operating in mobile telecommunications would be dependent on its two competitors with respect to infrastructure. *Conclusion:* Acquisition by Türk Telekom of Invitel was authorized conditionally within the framework of the commitments offered.	**Decision Date and Number:** 16.09.2010 10-59/1195-451

- **Market**: Infrastructure Services provided on Fiber Optic Cables

  The investigation was about infrastructure services provided through fiber optic cables and infrastructure services provided through fiber optic cables abroad. The relevant market was determined in line with a previous Competition Board decision. For the evaluation, fiber optic cables carrying data directly abroad were regarded as a separate market than those that did not have such facility. The geographical market was determined depending on the route where fiber optic cables of Invitel were placed in line with previous decisions of the Competition Board.

- **Findings:** In the decision, routes used by Türk Telekom for carrying data abroad, the number of fiber optic cables (cores) placed on those routes, the capacities established on those infrastructures and revenues accrued were taken into account. As a result of the analysis, it was concluded that Türk Telekom was dominant in both markets.

  During the investigation period, Türk Telekom offered commitments to increase the number of players in the market from two to three again. Accordingly, Vodafone would be given 18-year allocation, covering total expected life of fiber optic cables to be transferred in the routes where

Invitel were serving Vodafone and in additional routes. Vodafone would have the power to act as an owner to use and to benefit from the cables allocated to it.

Within the framework of its assessment with respect to strengthening dominant position, the Competition Board concluded that although Memorex (Invitel's firm that had the said lines in Turkey) would lose its status as an independent player as a result of the acquisition, Vodafone would be able to enter the market thanks to the fiber optic cables it would obtain. The Competition Board decided that competition concerns within the boundaries of Turkey would be eliminated by the facts that Vodafone was engaging in telecommunication operations through Borusan Telekom it held, additional fiber optic connections were enabled in addition to the optic fibers under the scope of the commitments, and Vodafone would exploit the rights related to those cables without any interference right of Türk Telekom.

Moreover, the Competition Board held that given the number of players in the relevant market would not change as a result of the transaction and Borusan Telekom had a certain customer base in its portfolio, Vodafone would be an efficient competitor in infrastructure operation.

With respect to strengthening dominant position, the Competition Board took into account the existence of infrastructures belonging to public institutions.

- **Conclusion:** :The Competition Board decided that the transaction shall be authorized on condition that the commitment was fulfilled, in case of failure to fulfill the commitment the transaction would be subject to final investigation according to Article 10(1) of the Competition Act.

  The parties notified the fulfillment of the commitment and the Competition Board declared that the commitment was fulfilled in its decision dated 25.11.2010 and numbered 10-73/1526-584.

2.2.4 Acquisition by Mey İçki of Burgaz controlled by the Saving Deposit Insurance Fund (TMSF)

Acquisition by Mey İçki of Burgaz controlled by the Saving Deposit Insurance Fund (TMSF)	
Mey İçki, the biggest producer of high alcoholic drinks, would be dominant in vodka market and strengthen its dominant position in raki and gin markets. It did not seem likely that possible entries into the market would exert competitive pressures on Mey İçki. *Conclusion:* Acquisition by Mey İçki of Burgaz was authorized conditionally within the framework of commitments given for raki, vodka, gin and liqueur markets.	**Decision Date and Number:** 08.07.2010 10-49/900-314

- **Market**: Production and sales of high alcoholic drinks

  The investigation was about the acquisition by Mey İçki of Burgaz, whose activities overlapped in raki, vodka, gin and liqueur markets. With respect to raki markets, the findings in previous Competition Board decisions remained, besides, in determining the market for high alcoholic drinks, vodka, gin and liqueur markets were identified as separate relevant product markets unlike the decisions in the past. The relevant market analysis explored demand transition and price movements for each product in detail.

- **Findings:** Firstly**,** the assessment regarding entry barriers in the decision was remarkable. Given the fact that a strong position was required in raki market in order to enter into other high alcoholic drinks markets, entry barriers were considered particularly with respect to raki market and it was accepted that entry barriers in the raki market directly influenced entry into other markets.

It was concluded on the following grounds that there were high entry barriers in the raki market:

- "Yeni Rakı" branded product belonging to Mey İçki was a must-have product for retailers and consumers identify it with raki,
- The importance of economies of scope in distribution in the market,
- Brand loyalty,
- Product differentiation,
- Raki consumption was following a fixed line in years,
- Excess capacity,
- Availability problems in distribution,
- Increasing restrictions on advertisements,
- Limited innovation possibilities due to legislation in the market.

Depending on the fact that a strong position was required in raki market in order to operate strongly in other high alcoholic drinks markets, it was emphasized that there were entry barriers in vodka, gin and liqueur markets.

In addition to entry barriers, dominant position and concentration tests were made in the relevant markets based on market share, price movements, the power to act independently from competitors and customers and HHI concentration index. First, it was noted, depending on also previous Competition Board decisions, Mey İçki would strengthen its dominant position.

The analyses showed that Mey İçki was not dominant in vodka market due to competitive conduct of Burgaz. However, after the transaction, it would be dominant by acquiring İstanblue brand of Burgaz, which was the strongest competitor and the second biggest player in the market. In gin market, Mey İçki, which was dominant before the transaction, would strengthen its dominant position by acquiring its competitor, which was the second biggest undertaking and which was affecting its price strategy to some extent. Regarding the liqueur market, it was found that Mey İçki would not be dominant. Lastly, it was noted that potential competition was not sufficient to eliminate competitive concerns.

- **Decision:** Acquisition of Burgaz, controlled by TMSF, by Mey İçki, which would be dominant in vodka market and strengthen its dominant position in raki and gin markets according to Article 7 of the Competition Act, was not authorized.
- **Remedy:** Commitments offered by Mey İçki during the investigation were not found sufficient to eliminate competitive concerns; nevertheless, the transaction was authorized conditionally depending on some additional requirements. The basic remedy to solve the competition concerns was to divest by Mey İçki in a certain time limit, of business lines that had competitive power in vodka, raki and gin markets by protecting their competitive powers. The basis of this commitment was the divestiture by Mey İçki of all raki, gin and liqueur brands as well as vodka brands, except İstanblue, belonging to Burgaz and its brand Votka 1967 within a certain period.
- **Conclusion:** The Competition Board conditionally authorized acquisition by Mey İçki of Burgaz controlled by TMSF and the divestiture period, provided for in the decision, still continues.

2.3 Opinions provided by the Turkish Competition Authority

20. 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.[7]

2.3.1 Opinion on the Tender Specifications of Turkish Football Federation (TFF)

21. TFF made an application to the Competition Board on January 5, 2010 and requested opinion about the draft tender specifications related to the transfer of broadcasting rights and title sponsorship of "TFF Super League" and "TFF 1st League" during four seasons as of 2010-2011 season.

22. While preparing its opinion about the specifications, the TCA examined power spheres of TFF and previous decisions, and accordingly considered the provisions of the tender.

23. As a result of the assessment related to the power sphere of TFF, it was found that the central marketing power and issues related to broadcasting rights were based on its power given by the Act No 5894. On the other hand, it was stated that areas falling out of TFF's power sphere might be evaluated under the Competition Act.

24. The opinion covers assessments related to the substance of the specifications. The assessment particularly focused on two issues. First was to ensure that discrimination among firms demanding videos should be prevented in the sale of news-purpose videos and that the broadcaster, which was the sole provider, should not carry out exclusionary actions. The second one was to ensure via agreements that firms demanding news-purpose videos could have the match videos they wish without having to buy other match videos. Reviewing the specifications especially with regard to those two points, the Competition Board concluded that the specifications "are in compliance with the issues emphasized in previous decisions" and they did not include "provisions violating the Competition Act".

25. In addition it was stated that the period for transfer of rights to broadcast football matches are generally 3 years in EU practice in order to sustain competition between firms operating in paid broadcasting market. In this context, it was noted that taking into those periods account while determining the transfer period was advisable.

2.3.2 Opinion about the Draft Law on the Amendments to the Act on the Electricity Market

26. The Competition Board emphasized the role and importance of the Act No 4628 (Act on the Electricity Market) in the liberalization process of electricity markets and stated the issues to be focused on during this process with respect to the Act No 4628 and the Draft in its opinion about the Draft Law on the Amendments to the Act on the Electricity Market (the Draft). Within this framework, it was suggested that "competition" and "regulation" should be used complementarily during the process, and following the process, regulation should be replaced by deregulation in areas where competitive structure was established. The opinion expressed that given the liberalization process of Turkish electricity markets, even if there was certain progress in privatizations, a functioning competitive structure had not been established yet, and therefore the amendments to the Act No 4628 should cover improvements to make existing regulations more efficient rather than improvements meaning deregulation.

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[7] Article 27(g) empowers the Competition Board to opine, directly or upon the request of the Ministry of Industry and Trade, concerning the amendments to be made to the legislation with regard to the competition law whereas Article 30(f) empowers the Presidency of the TCA to opine about decisions to be taken as to the competition policy, and the relevant legislation.

27. The Opinion was consisted of four titles about the amendments, namely, supply activities, market thresholds, last resort supply obligation and divestiture. The opinions under those four titles can be summarized as follows:

- *Wholesale and Retail Sale replaced by Supply Activities:* It was suggested that this amendment be made by supporting the lowering eligible consumer limit to zero through determining the related schedule.

- *Market Thresholds:* It was stated that with respect to the abolishment of market share restrictions regarding production capacity and sales, restrictions on the size of market players should be maintained in the electricity market, which was at the beginning of the transition period, during privatizations and until a functioning competitive structure was established after privatizations.

- *Last resort supply obligation:* It was stated that electricity was a product regarded under the scope of universal services and it must be ensured that especially consumers consisted of households buy electric power at an acceptable price. However, particularly EU member states' experiences showed that giving this obligation to the incumbent distribution firm for an indefinite time negatively affected new entries and was not advised in order to establish a competitive market. Within this framework, the introduction of the concept "last resort supply obligation" was welcomed; besides, the content and scope of the concept should be clarified in a joint study by the Ministry of Energy and Natural Sources, Energy Market Regulatory Authority and the TCA by taking into account the experiences of other countries.

- *Divestiture of Distribution Activities:* Although it appeared from the Act No 4628 and the Draft that legal separation of distribution firms' activities from other market activities was aimed, it was noted that the statements were not sufficient; the concepts such as functional divestiture and legal divestiture should be included within the framework of first and secondary legislation in the electricity market. With regard to the divestiture of distribution activities, it was suggested that an expression stating that distribution companies should act as an independent economic entity should be added to the relevant article.

2.3.3 Opinion about the Draft Bylaw of TAPDK on the Procedure and Principles of Sale and Display of Tobacco Products and Alcoholic Drinks

28. The Draft Bylaw on the Procedure and Principles of Sale and Display of Tobacco Products and Alcoholic Drinks, prepared by TAPDK (Tobacco and Alcohol Products Regulatory Authority) included provisions prohibiting all exclusive agreements and campaigns, activities or gains based on sales volumes in alcoholic drinks market with respect to retailers of alcoholic drinks.

29. Prohibition of all exclusive agreements in alcoholic drinks market might restrict competition significantly by preventing efficiencies to be caused by exclusivity in the long run. In practice, when small undertakings are allowed to use exclusive agreements as a tool against strong competitors to stay in the market in markets with a dominant undertaking, oligopolistic/duopolistic structure and high concentration rates, possible anticompetitive effects such as market foreclosure are generally low and such agreements do not unduly restrict competition.

30. Moreover, exclusive agreements made by undertakings operating in alcoholic drinks market and having a market share less than 40% with their customers benefit from exemption via the Block Exemption Communiqué No 2002/2 on Vertical Agreements, which was adopted by the Competition Board, as long as non-compete obligation is limited to 5 years, except two undertakings whose exemption was withdrawn. In addition, prohibiting campaigns and promotions by alcoholic drinks retailers as well as gains and discounts

based on sales volume are assessed in the same way since vertical restraints that do not cause exclusivity give less harm to competition than those that cause exclusivity. In previous decisions, the TCA did not prohibit promotions and discount campaigns that do not result in exclusivity by undertakings whose exclusive agreement and practice were not given exemption.

31. In this context, it was stated in the opinion that the said provisions of the Draft Bylaw might cause problems such as conflict of the legislations and powers between authorities and legal uncertainty for undertakings. Therefore, it was suggested that the Draft Bylaw be harmonized with Competition Board decisions and secondary legislation by being prepared again so that agreements between undertakings in alcoholic drinks market and their customers might benefit from exemption granted or to be granted by the Competition Board within the scope of Article 5 of the Competition Act, benefit from block exemption according to the Block Exemption Communiqué No 2002/2 on Vertical Agreements and they might offer campaigns, activities or gains based on sales volume.

3. The role of the Turkish Competition Authority in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies

32. Beside the aforementioned developments, a cooperation protocol was signed between Public Procurement Agency and the TCA with a view to act jointly so that a fair and sound competition environment in public procurements is established, developed and protected. Moreover, there have been efforts to sign protocols with Energy Market Regulatory Authority and Information and Communication Technologies Authority in order to cooperate, exchange information, give opinions and coordinate for establishing, improving and maintaining a free and healthy competition environment in energy and electronic communications markets.

4. Resources of the Turkish Competition Authority

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

4.1.1 Annual budget (in TL and USD):

33. Revenues of the TCA are determined by the Competition Act as follows in Article 39. According to this article, revenues of the TCA set up the budget of the TCA, and they are made up of the following items of revenues:

- The subsidy to be allocated in the budget of the Ministry of Industry and Trade,
- Payments to be made by four per ten thousand of the capitals of all partnerships to be newly established with the status of an incorporated and limited company, and that of the remaining portion in case of capital increase,
- Publication and other revenues.

34. Revenues belonging to the TCA are collected in an account to be opened in the Central Bank of the Republic of Turkey or a state bank.

35. The revenue of the TCA in year 2010 is TL 26,145,082.20; approximately USD 17 million.

36. Moreover, although it is provided for in Article 39 of the Competition Act, there has not been a subsidy in the budget of the Ministry of Industry and Trade and the TCA has not taken any aid from the general budget transfer scheme since its establishment in 1997.

4.1.2 Number of employees (person-years):

- Professional staff: 116
- All staff combined: 326

4.2 Human resources (person-years) applied to:

37. 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

- 2010

ANNEX: STATISTICAL INFORMATION FOR THE YEAR 2010

Table 1. Files Concluded

Year	Infringements of competition	Exemption/Negative Clearance	Merger/Acquisition/ Joint Venture/Privatization	Total
2009	178	46	146	370
2010	252	96	276	624

Table 2[8]. Files Concluded under the scope of Articles 4 and 6 of the Competition Act

Year	Article 4	Article 6	Mixed (4 and 6)	TOTAL
2009	73	70	35	178
2010	99	111	38	248

Table 3[9]. Horizontal and Vertical Agreements under the Scope of Article 4 of the Competition Act

Year	Horizontal	Vertical	Mixed (H/V)	TOTAL
2009	56	35	17	108
2010	11	59	67	137

Table 4. Applications for Exemption and Negative Clearance and Results

	Negative Clearance Files Concluded Files			Exemption Files Concluded Files							
	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	Files where exemption is withdrawn	Files where individual and block exemption is evaluated together
2009	-	-	1	20	1	22	1	-	-	-	1
2010	9	1		23	-	41	13	1	3	-	4
Total	**9**	**1**	**1**	**43**	**1**	**63**	**14**	**1**	**3**	**-**	**5**

[8] Although being under infringements of competition, four decisions on "the rejection of interim measures" were not considered in the total for 2010.

[9] These statistics also include files covering assessments under both Article 4 and Article 6.

Table 5. Number of Merger and Acquisition Files concluded

Year	Merger	Acquisition	Joint Venture	Privatization	TOTAL
2009	4	128	12	2	146
2010	3	202	5	66	276

Table 6*. Results of the Merger and Acquisition Files finalized

Year	Approval	Conditional approval	Rejection	Out of scope-under the threshold**
2009	110	4	1	31
2010	177**	9		89***
TOTAL	**745**	**77**	**1**	**270**

* In the decision numbered 10-44/760-244, the transaction was withdrawn.
** In the decision numbered 10-18/202-77, there is a separate conclusion declaring "not subject to authorization".
*** In the decision numbered 10-16/182-69 there is a separate conclusion related to "authorization".

Table 12. Fines (TL)*

	Year	Total	Infringements	Merger/ Acquisition	Exemption/ Negative clearance
Fines related to substance	2009	91,120,700	91,120,700		
	2010	39,401,476	39,401,476		
Fines imposed on executives	2009	35,227	35,227		
	2010				
False or misleading information in the application	2009				
	2010	47,120		47,120	
False or misleading information during on the spot inspection	2009	32,892	32,892		
	2010	11,446	11,446		
Realizing the transaction without permission of the Competition Board/Failure to notify within due date	2009	2,011,008		2,011,008	
	2010	213,835		213,835	
Incompliance with the decision of the Competition Board related to Article 9	2009				
	2010				
Hindrance of on the spot inspection	2009	123,207	123,207		
	2010				

* The table does not reflect new fines in the files annulled by the Council of State, the high administrative court against decisions of the Competition Board, and taken again by the Competition Board and takes into account the subparagraphs of Articles of the Competition Act amended by the Act dated 23.01.2008 and numbered 5728.