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# The Changes And Transformations in the Socio-Economic and Political Structure of Turkey Within the EU Negotiations

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**"AB MÜZAKERE SÜRECİNDE TÜRKİYE'NİN SOSYO-EKONOMİK VE SİYASİ YAPISINDAKİ DEĞİŞİM VE DÖNÜŞÜMLER "**

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**Şaban ESEN**  
Öğretim Görevlisi

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## ARE TURKISH COMPETITION LAW AND POLICY COMPATIBLE WITH EU ACQUISITIONS IN EU PROCESS ?

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### Abstract

In this study, in which EU and Turkish Competition Law Applications were compared, Competition Law of EU, its objectives, sources, scope and prohibited activities will be explained and then the same subjects will be evaluated in Turkish Competition Law system. Afterwards, a comparison will be made and differences and shortcomings will be demonstrated.

**Key words:** EU competition law, Turkish competition law, government aids,

### Introduction

European Coal and Steel Community (ECSC) which was founded in 1952 and European Atomic Energy Community (EAEC) were the bases of today's European Union. With the Rome Treaty in 1957 European Economic Community was founded. The six founders of this community were West Germany, France, Belgium, The Netherlands, Italy and Luxembourg. These six countries were at the same time the founders of European Coal and Steel Community, founded in 1952. The EU process of Turkey, which started on 31<sup>st</sup>, July 1959 with the application for partnership with European Economic Community, had a turning point on 14<sup>th</sup>, April 1987 with the application for full membership. The European Union, which was founded then to maximize joint economic profits, is a united state today consisting of partners having a joint constitution.

On 3<sup>rd</sup> October, 2005, Turkey got the right to start negotiations with EU for full membership. It is accepted that negotiations for full membership will be a very hard process and Council of Europe reminds that negotiations may partly be frozen during the membership process. EU froze the negotiation process several times with some countries which were admitted to EU previously.

Turkey was aware of all these hardships when it started negotiations and it will overcome these hardships. It is expressed by the experts that the negotiation process with EU will last at least ten years in the most optimistic estimations.

During this process, 35 main subjects will be handled and adapted to EU Acquisitions. One of these main subjects is Competition Law. Turkish Competition Law, which was accepted in 1994 and put into practice in 1997 was in fact constituted in accordance with the norms of EU Competitions Law. An important difference of Turkish Competition Law from that of EU is that government aids which are thought to be a part of competition policy are mentioned in EU Competition Law. However, in the law about the protection of competition numbered 4054, government aids aren't mentioned.

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In this study, after the examination of EU and Turkish Competition Law, the differences will be demonstrated and shortcomings of Turkey in EU process and ways to overcome the shortcomings will be discussed.

## Material and Method

This study is not an empirical one. The data used in the study are secondary data. In the study, as the material, the data from the EU Secretary General working under the command of Prime Minister, from the Competition Authority and secondary sources have been used.

### 1. Competition Policy in EU

The basis of EU Regulations which are mandatory and super national was formed with European Coal and Steel Treaty in 1951, European Atomic Energy Community Treaty and European Economic Community Treaty known as Rome Treaty in 1957<sup>1190</sup>.

EU Competition rules are involved under the title of "The Policies of the Community" in Rome Treaty which went into effect on 1<sup>st</sup> January, 1958 as the joint rules to be imposed on business undertakings. These rules can be considered as one of the objectives that ensure the achievement of the general objectives of EU. Keeping this in mind, the 2<sup>nd</sup> and 3<sup>rd</sup> articles of Rome Treaty, which include the basic objectives should be taken into account in order to determine the place and quality of competition laws in EU Law and to interpret these rules according to EU Law<sup>1191</sup>.

Competition Law of European Community is involved in 85-90<sup>th</sup> articles of Rome Treaty which is the foundation treaty of EU<sup>1192</sup>.

85<sup>th</sup>, 86<sup>th</sup> and 90<sup>th</sup> articles of Rome Treaty describe the rules of competition so as to ensure the free movement of goods and services among the member countries and to set up an intensive competition atmosphere within the common market. In the 85, 86 and 90<sup>th</sup> articles of the founding treaty, administrative law, directives, opinions, announcements of the Council and the Commission and interpretations of European Communities Justice Commission and Lower Courts all constitute the acquisitions (content) of the Competition Law of the Community<sup>1193</sup>.

#### 1.1. The Aim of EU Law

The main aim of ECT (European Community Treaty) is both to unite member countries and to set up a common market by approximating the economy policies of member countries to each other gradually within the framework of the principle of free movement of goods and services<sup>1194</sup>. Here, competition policy is one of the most important means

<sup>1190</sup> TEZCAN, Ercüment (2000), Avrupa Birliği Hukukunda Devlet Yardımları: Yeni Düzenlemelere ve İçtihatlarla İlişkin Değerlendirmeler, Rekabet Dergisi, Vol.3 p.30.

<sup>1191</sup> DPT (2000), Sekizinci 5 Yıllık Kalkınma Planı, Rekabet Hukuku ve Politikaları, Özel İhtisas Komisyon Raporu, p.8. Ankara.

<sup>1192</sup> In 1997, the numbers of the articles were amended as 81-89 with Amsterdam Treaty. In this study the previous numbering was taken into account.

<sup>1193</sup> ESİN Arif (1998), Rekabet Hukuku, ESC Yayınları, Birinci Baskı, p.1. İstanbul.

<sup>1194</sup> WESSELING, Rein (1997), Subsidiary in Community Antitrust Law: Setting the Right Agenda, ELR, Vol:22, p.38.

that aim at realizing the objective mentioned above<sup>1195</sup>. The objectives of the competition policy of the community can be summarized as follows;

- to set up an open and common market in which free movement of goods and services can be ensured,
- to set up an appropriate market system that will bring about the basic function (achieving the economic and technical development; ensuring the distribution of the production resources of the community in the most fruitful way, realizing the production of goods and services which are cheap and high quality etc.) of competition,
- to make the principles of "openness" and "honesty" dominant in the markets. Policies such as the prohibition of getting government aids, supporting the small and medium scale undertakings and protecting the consumers can be regarded as the requirements of the principle of "honesty".

### **1.2. The Scope of EU Competition Policy**

The concept of "being affected of the trade among the member states" draws the limits of sharing the authority among the national competition rules and authorities of member states and the competition rules of EU and the Commission. If the trade among the member states is affected by unfair competition, EU competition rules will be applied; if not, national competition rules of the member country in question will be applied<sup>1196</sup>.

EU competition policies, as a requirement of the principle, are applied to all the sectors of economy and all undertakings without making a discrimination between private and state sector. However; agreements and decisions that contribute to the development of the production and distribution of goods, acceleration of technical and economic advancements and welfare of consumers may be excused individually or in groups on condition that they don't violate competition rules on a great scale.

In EU Competition Law, "de minimis" principle is one of the main principles. According to this principle, even if a agreement, decision or behavior violate the rules of competition law, EU competition rules are not applied unless it has a significant effect on the competition in common market. The purpose of this principle is to facilitate cooperation among small and medium scale undertakings by excluding these undertakings that don't have a significant effect on the market in the scope of competition law and not to occupy EU competition Authorities with unnecessary workload.

### **1.3. Prohibited Behaviors in EU Competition Law**

EU competition law is based on the legal framework of Rome Treaty. The prohibitions in the 85 and 86<sup>th</sup> articles of Rome Treaty are the basic prohibitions.

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<sup>1195</sup> MASSEY, Patrick (1997), Reform of EC Competition Law: "Substance, Procedure and Institutions" in HAVK, Barry E., International Antitrust Law & Policy, p.100, London

<sup>1196</sup> KARLUK, Rıdvan (2000), Türkiye Ekonomisi, Tarihsel Gelişim, Yapısal ve Sosyal Gelişim, Beta Yayınları, 6th ed. p. 2. İstanbul

The 85<sup>th</sup> article is concerned with agreements, concerted behaviors and decisions that violate competition and decisions of labor unions, 86<sup>th</sup> article is concerned with abuse of the dominant position<sup>1197</sup>.

The organ applying the competition rules in EU is the Commission which is at the same time executive organ of the Union. The members of the Commission are independent and they don't serve for the benefit of the country they represent but for the benefits of the Union<sup>1198</sup>.

#### 1.4. Government Aids in EU

Government aids which are used as means of intervention to support some public undertakings or production within the framework of economy policies violate and risk competition<sup>1199</sup>. This harms the operation of the common market. In this case, government aids may act as financial obstacles against competition. In this way, undertakings and government institutions have a more positive competition atmosphere due to government aids. Rome Treaty determined the regulations about government aids and authorized the commission to audit whether the member countries fulfil the requirements of the regulations exactly. Audition of government aids is at present one of the main principles of competition policy<sup>1200</sup>. The article concerning government aids (Rome treaty article 92, Single European Act article 87) is as follows<sup>1201</sup>.

*Article 87: 1.* Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market.

2. The following shall be compatible with the common market:

- a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
- b) aid to make good the damage caused by natural disasters or exceptional occurrences;
- c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, in so far as such aid is required in order to compensate for the economic disadvantages caused by that division.

3. The following may be considered to be compatible with the common market:

- a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

<sup>1197</sup> AŞÇIOĞLU ÖZ, Gamze (2000), Avrupa Topluluğu ve Türk Rekabet Hukukunda Hakim Durumun Kötüye Kullanılması, Rekabet Kurumu Lisans Üstü Tez Serisi Vol;4, p.47, Ankara, DPT, 2000, p.10-11.

<sup>1199</sup> KARLUK, Rıdvan (2005), Avrupa Birliği ve Türkiye, 8.Bası, Beta Yayınları, p.408, İstanbul

<sup>1200</sup> KÖKSAL, Tunay (2001), Avrupa Birliğine Tam Üyelik Sürecinde Türkiye'de Devlet Yardımlarının Hukuki Çerçevesi, Rekabet Dergisi, Vol.7 p.3

<sup>1201</sup> ASLAN, İ. Yılmaz (1998), Avrupa Topluluğu Rekabet Hukuku, p.7, Ankara



- b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
- c) aid to facilitate the development of certain economic activities or of certain
- d) areas, where such aid does not adversely affect trading conditions to an extent economic contrary to the common interest;
- e) aid to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest;

such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.

**Table 1. European Community Competition Policy**

Institutions Concerning Competition	Superintendent in charge of relations with the Commission and Parliament and competition General Directorate of Competition(DG4)		
Laws Concerning Competition	85 <sup>th</sup> article of Rome Treaty	86 <sup>th</sup> article of Rome Treaty	European Regulation concerning the densities 21 <sup>st</sup> December, 1989
Subject	Treaties	Abuse of Dominant Position	Mergers and takeovers
Policies that Firms may follow	Voluntary Announcement		Lower limit of mandatory announcement: The ones the annual sales of which are 5 billion ECU (this was reduced to 2 billion in 1993) -the sales in Europe of one of these firms should be over 250 million ECU and -more than one third of the sales of at least one undertaking should occur outside one member state
Analysis of markets	DG4	DG4	
Assignment	Commission: Complaints and self intervention	Commission: Formal request of a member country or self intervention	
Authorities and means of investigation	Authorities of investigation and sanction: Permission for investigation		
Decision Authorities		Commission: Public benefit criteria can be taken into consideration on the basis of competitive balance and economic development	
Decisions	Individual or group exemptions (Only for 85th article) fines or prohibitions without fines	Permission, prohibition and reduction of density	
Protest	Primary Court (Luxemburg) European Justice Commission (Luxemburg)		
Enforcements Authorities of Decisions	DG4 (Enforcement of the decision of Rome Treaty)		

Source: Dumez and Jeunemaitre(1999:253)

## 2. Competition Law in Turkey

Competition laws have been applied in USA since 1890. In Turkey, the necessity of a competitive atmosphere was stated in 1970s, serious and determined attempts were made for a fair competition in 1980s and eventually the law about the protection of competition numbered 4054 was accepted on 7<sup>th</sup> December, 1994<sup>1202</sup>.

Although the acceptance of the law was seen to be a requirement of the economic conditions of Turkey, it was accepted also as a requirement of the relevant article (Article 167) of the constitution and the decisions of the Partnership Council dated 1/95 that determine the rules concerning the application of the final phase of Customs Union signed in 1995<sup>1203</sup>.

### 2.1. The Aim of the Competition Law

The aim of the law about the protection of competition numbered 4054 was explained in the first article as "to prevent agreements, decisions and practices preventing, distorting or restricting competition in markets for goods and services, and the abuse of dominance by the undertakings dominant in the market, and to ensure the protection of competition by performing the necessary regulations and supervisions to this end".

The activities within the law about the realization of this purpose can be grouped under three main categories;

- 1- Agreements, practices and decisions that impede, distort and restrict the competition among any type of undertaking which is active in goods and services markets within the borders of Turkish Republic and which affects these markets,
- 2- Abuse of dominant position by the dominant undertakings in the market,
- 3- Any type of legal transaction like a merger or acquisition aiming at creating a dominant position or strengthening an existing dominant position which consequently decreases competition to a significant extent.

Even though the aim of the competition law is stated to cope with the probable negative cases explained above, Gürkaynak (2003) suggests that the competition law is in a confusion of purposes and it should have only one certain purpose which should be "ensuring the economic dynamism"<sup>1204</sup>.

### 2.2. The Scope of the Competition Law

When the scope of a law is mentioned, it is the application field that is meant. The application field of Competition Law should be considered separately in terms of Turkish territory and sector<sup>1205</sup>. In the broad sense, competition law covers other than breaking of law as a result of the activities of undertakings, matters such as government aids and

<sup>1202</sup> CANTÜRK, İsmet, (2001), Rekabet Ortamı ve Rekabet Kurulu Kararları, Çimento İşverenleri Sendikası Dergisi Özel Eki, Vol. 1, p.13.

<sup>1203</sup> SANLI, Kerem Cem (2000), Rekabetin Korunması Hakkındaki Kanunda Öngörülen Yasaklayıcı Hükümler ve Bu Hükümlere Aykırı Sözleşme ve Teşebbüs Birliği Kararlarının Geçersizliği, Rekabet Kurumu Lisans Üstü Tez Serisi no;3, p.20, Ankara

<sup>1204</sup> GÜRKAYNAK, Gönenc (2003), Rekabet Hukuku Uygulaması için Hukuk ve İktisat Perspektifinden Amaç Tartışması, Rekabet Kurumu, Ankara

<sup>1205</sup> TOPÇUOĞLU, Metin (2001), Rekabeti Kısıtlayan Teşebbüsler Arası İşbirliği Davranışları ve Hukuki Sonuçları, Rekabet Kurumu Lisansüstü Tez Serisi no;7, p.83, Ankara

public purchases that violate competition and anti dumping applications when the international trade is concerned<sup>1206</sup>.

In the narrow sense, the subject of competition law and policies consist of prohibition of agreements among undertakings, concerted behaviors and abuse of the dominant position with the decision of undertaking unions.

The second article of the law about the protection of competition numbered 4054 draws the limits of the law as follows; "Agreements, decisions and practices which prevent, distort or restrict competition between any undertakings operating in or affecting markets for goods and services within the boundaries of the Republic of Turkey, and the abuse of dominance by the undertakings dominant in the market, and any kind of legal transactions and behavior having the nature of mergers and acquisitions which shall decrease competition to a , significant extent, and transactions related to the measures, establishments, regulations and supervisions aimed at the protection of competition fall under this Act"<sup>1207</sup>.

### **2.3. Prohibited Activities as a Requirement of Competition Law**

In the first part of the first section of the competition law, prohibited activities are listed. However, as will be explained below, prohibited activities aren't listed one by one, only sample cases are given and prohibited activities aren't limited by saying "this and similar cases"

#### **2.3.1. Concerted Practices, Agreements and Decisions that Restrict Competition Among Undertakings**

This case is the first of three basic practices prohibited by the law about the protection of competition numbered 4054. The main aim of it is to prevent the restrictions in a particular goods or services market by means of agreements and concerted activities<sup>1208</sup>.

In the 4<sup>th</sup> article of the competition law, it is stated that practices which aim at distorting or restricting competition by means of agreements among undertakings, concerted activities and direct or indirect prevention of competition in a certain market by union of undertakings are prohibited.

In the article, the practices that can be considered as concerted activity are also stated. According to the article, in the cases in which the existence of an agreement can't be proved, it is concluded that the undertakings are involved in a concerted activity if price variations and supply and demand balance in the market and activity fields of undertakings resemble to those in the markets where the competition is,

- impeded
- distorted or
- restricted.

<sup>1206</sup> Aşcıoğlu Öz, 2000, p.18

<sup>1207</sup> TÜSİAD (1998a), (Türk Sanayicileri ve İşadamları Derneği), 4054 Sayılı Rekabetin Korunması Hakkında Kanun'un Uygulama Esasları, Yayın no:Tüsiad-T/98-12/245, p.26. İstanbul

<sup>1208</sup> EGE, Yavuz (2000), "Dünyadaki Uygulamalar Işığında Rekabet Politikası ve Özelleştirme", Hazine Dergisi, Vol,13, p.242.

However, each of the undertakings are given the right to get rid of responsibility by proving that they aren't involved in concerted activity providing fair and convincing excuses<sup>1209</sup>.

### 2.3.2. Abuse of Dominant Position

According to the law about the protection of competition numbered 4054; "The abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or through concerted practices, is illegal and prohibited" (article 6).

To have a dominant position in a market means that undertakings can determine the amount of production and/or selling conditions without taking into account rivals and buyers (demand) and set the selling conditions of the commodity or service in question individually in a particular market or in Turkey.

### 2.3.3. Exemption

Competition Board may decide that the application of the 4<sup>th</sup> article of the competition law can be excused when all the conditions below apply.

- a- Ensuring new developments and improvements concerning the production and distribution of goods and provision of services and economic and technical developments in the market,
- b- Consumers, benefiting from this activity, not allowing to destroy competition in a considerable part of the market in question,
- c- No restriction on competition except for the obligatory one to reach the objectives stated in the (a) and (b) clauses of the competition law.

What should be kept in mind here is that exemption cases are valid only for 4<sup>th</sup> article and when the conditions mentioned above are met.

## 2.4. Government Aids

The rules of the government aids in the community that aim at ensuring that the trade within the community isn't affected by government aids constitutes a considerable part of competition policy<sup>1210</sup>.

Turkey, in its National Program that it has prepared on the way to full membership to EU; has undertook "adapting its aids to rules in EU" and forming "the Council of Government Aids and Supervision that will judge the suitability of government aids to the criteria noted in EU Acquisition<sup>1211</sup>".

The authority that will monitor and audit government aids will judge whether the aids distort competition in the market. It is thought that this duty should be carried out by Competition Board. However, the 2005 progression report of both OECD and EU state that there isn't any development concerning government aids. In EU progression report this case was reported as follows; "Turkey hasn't performed any developments on government aids since the last report (report in 2004) regarding especially the fulfillment of transparency obligation mentioned in bilateral treaties".

<sup>1209</sup> TÜSİAD (1998b), (Türk Sanayicileri ve İşadamları Derneği), Gümrük Birliği Çerçevesinde Rekabet Hukuku, Yayın no:Tüsiad-T/98-12/242, p.38. İstanbul

<sup>1210</sup> TEKİNALP, Ünal, Gülören TEKİNALP (1997), Avrupa Birliği Hukuku, İstanbul

<sup>1211</sup> Köksal, 2001, p.24.

In spite of making the competition law, delaying the regulations regarding government aids causes negative affects on the competition process in the markets. Because, it is not logical to think that government aids affect only the companies to which the aids are granted. The competitors in the market can be affected directly and thus an unfair case emerges for the companies which get no aids. These companies suffer from great troubles to keep their competitive power and they are indirectly damaged by the aids granted by the government. Indeed, in such a case, the whole market will be damaged<sup>1212</sup>.

### **2.5. Implementation of the Competition Law and Competition Board**

Competition law is implemented by Competition Board. The Ministry that the board is related to is The Ministry of Industry and Trade. The board is independent while working. No organ, authority, person or institution can give instructions and commands to affect the final decision of board. The center of the board is Ankara. The board consists of the competition committee which consists of 7 members totally, one of whom is the chairman and one is the second chairman

Legal supervision of the decisions of the committee board is fulfilled by the Council of State. So, the sides can apply to the Council of State about the final decision and fines after the notification of the decision<sup>1213</sup>.

### **3. Comparison of EU and Turkish Competition Laws**

As it was stated before, Turkish Competition Law complies with EU Competition Policy to a great extent. As the main headlines<sup>1214</sup>;

- The agreements, concerted behaviors and decisions that distort competition are in the 85 th article of Rome Treaty and in the 4 th article of Turkish Competition Law.
- The opinion involved in the 90th article of Rome Treaty concerning the applicability of competition rules to public undertakings, is defined under the concept of undertaking including public institutions in the "definitions" part and no distinction is made between public and private undertakings. So, the opinions of the competition law cover public institutions as well.
- As regards the mergers and acquisitions, the opinion concerning the mergers and acquisitions is mentioned in the 7<sup>th</sup> article of Turkish Competition Law. The ideas of the board regarding mergers that may lead to monopolies in the whole or a part of the country or the undertakings the ownership of which will pass from public to private as a result of privatization are important. In EU, the 85 and 86<sup>th</sup> articles of Rome Treaty were interpreted widely first, and later (after 1990) regulations were made concerning mergers and the framework of mergers and acquisitions were determined according to the rules involved in the regulations.

<sup>1212</sup> İKTİSADİ KALKINMA VAKFI (2002), Avrupa Birliği Rekabet Hukuku Politikaları, p.15.

<sup>1213</sup> DPT, 2000, p.15

<sup>1214</sup> DEVELLENES Yves (1998), Türk Rekabet Hukuku ve Rekabet Kurumunun AB ve AB'ye Üye Ülkelerle Mukayesesi, Rekabet Kurumu'nun 1.Yılı dolayısıyla düzenlenen Toplantı ve Paneli, 5 Mart 1998, p.16. Ankara

**Table 2: Comparison of EU and Turkish Competition Laws**

	Rome Treaty ( Article)	4054 Competition (Article)	Numbered Law
Restrictions on concerted behaviors and agreements that restrict competition	85/1	4	
Invalidity of contracts contravening the law	85/2	56	
Exemption Exemption Regulation	85/3	5 1997/2,3,4;...	
Prohibition of Abuse of the Dominant Position	86	6	
Prohibition of Mergers and Acquisition that Restrict Competition		7 1997/1	
Article regarding the involvement of State-owned Economic Enterprises in the scope of the law	90	2	
Article about government aids	91	-	

Source:TÜSİAD,1998b:14

### 3.Conclusion

Competition policies aim at preventing the crowding of companies in the market, protecting the competitive structure of the market, sustaining the activities of small and medium scale undertakings in the presence of large scale ones and as a consequence of this consumers' getting the maximum benefit in the systems where free market economy is valid to protect the economic independence of undertakings.

It is obvious that Turkey has started competition law applications too late compared to EU. However, with the acceptance of the law about the protection of competition in 1994 and foundation of competition board which started examining competition violations in 1997 ; it can be said that Turkey has fulfilled the performance criteria expected of it in a period of 8 years. Although this case was confirmed in Turkish Competition Law and Policies Report (2005) prepared by OECD and in EU 2005 Progression Report, it was stated that there were some shortcomings. Some of these shortcomings are the ones that must be carried out by the political authority and some are the ones that must be carried out by Competition Board. The most important shortcoming of the government is that there is no organ to supervise government aids. As regards the shortcomings of the Competition Board, the main shortcoming is that a more organized approach should be determined to adapt Turkish Competition Law to that of EU. In sum, there is not a considerable shortcoming in EU process regarding the competition law.

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