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MARMARA ÜNİVERSİTESİ

AVRUPA BİRLİĞİ ENSTİTÜSÜ

AVRUPA BİRLİĞİ HUKUKU ANABİLİM DALI

THE ANALYSIS OF COMPETITION INFRINGEMENTS IN RORO TRANSPORTATION IN THE LIGHT OF SAMPLE CASES FROM EU AND TURKEY

Yüksek Lisans Tezi

HURİYE DİLBESTE TOMUR

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ÖZET

Deniz taşımacılığı farklı metodlarla yük taşınmasını elverişli hale getirdiğinden önemi son yıllarda artmıştır. Avrupa Birliği üye ülkelerinde deniz taşımacılığı alanında faaliyet gösteren şirketlerin artması ile deniz taşımacılığı önem kazanmıştır. Türkiye'de ise Avrupa Birliği kuralları ile uyumlaşmayı sağlamak için deniz taşımacılığı önemli hale gelmiştir. Buna bağlı olarak çeşitli rekabet hukuku ihlalleri de görülmeye başlanmıştır. Bu çalışma deniz taşımacılığının bir alt türü olan RORO taşımacılığına odaklanmıştır. Çalışmanın amacı rekabet ihlallerinin RORO taşımacılığında görünümlerini incelemektir. Hakim durumun kötüye kullanımı ve kartel oluşumu bu ihlallerin en tipik örnekleridir. Hakim durumun tespiti ve kötüye kullanımının belirlenmesi için şirketlerin pazar payı, faaliyet gösterdikleri ilgili pazar ve ekonomik davranışları incelenmiştir. Kartel oluşumunda ise şirketlerin ekonomik kararlarının, ilgili pazarı ve rakip firmaların faaliyetlerini etkileme düzeyi incelenmiştir. Etkili bir RORO taşımacılığı için bu ihlallerin yukarıda anılan unsurlar ışığında değerlendirilmesi gerekmiştir. RORO taşımacılığında adil ve etkili rekabetin sağlanabilmesi için ihlallerin yaptırımlara bağlanarak caydırıcı olması gerekmektedir. Avrupa Birliği ve Türkiye'den örnek dava analizleri ile bu sonuç pekiştirilmiştir.

Anahtar Kelimeler: RORO taşımacılığı, hakim durumun kötüye kullanılması, kartel

ABSTRACT

In recent years, maritime transport has gained more importance as it is favorable in the carriage of products with different methods. The number of companies which deal with the marine carriage in the European Union has increased, and the maritime transport has started to play an essential role within the EU Member States. Aiming to achieve the harmonization of EU rules as a candidate state, Turkey has started to take cognizance of marine transport. Accordingly, various competition infringements have been occurring in this field. The thesis is primarily focused on RORO transport as a subbranch of maritime transportation. The thesis aims to examine the competition infringements in RORO transport. Abuse of a dominant position and cartel infringements are the most known types of such competition breaches. The market shares of the companies, relevant market, and economic behaviors are analyzed to detect the dominance as well as the abuse of a dominant position. The financial decisions of firms are examined under the cartel infringement, whether such decisions are able to affect the market and the competitors negatively. To ensure effective RORO transport, the elements mentioned above must be analyzed. The protection of fair competition and an effective competitive environment requires various sanctions as a disincentive. This requirement is underpinned by the sample cases from the EU and Turkey.

Keywords: RORO transport, abuse of a dominant position, cartel

TABLE OF CONTENTS

ABBREVIATIONS

BIMCO : Baltic and International Maritime Council

CMI : Comite Maritime International

ConRO : Roll on-Roll off Container

DG COMP : Directorate General for Competition

DG MOVE : Directorate General for Mobility and Transport

DG : Directorate General

DSS : Deep Sea Shipping

EACI : Executive Agency for Competitiveness and Innovation

EC : European Community

ECR : European Court Reports

EFTA : European Free Trade Association

EU : European Union

FCL : Full Container Load

FEFC : Far Eastern Freight Conference

ICC : International Chamber of Commerce

ILO : International Labor Organization

IMO : International Maritime Organization

LCL : Less Than Container Load

NCA : National Competition Authority

OECD : Organization for Economic Co-operation and Development

OJ : Official Journal

P&I : Protection and Indemnity

Reg. **:** Regulation

ROPAX **:** Roll on-Roll off Passenger

RORO **:** Roll on-Roll off

SSNIP **:** Small But Significant and Non-Transitory Increase in Price Test

SSS **:** Short Sea Shipping

TAA **:** Trans-Atlantic Agreement

TACA **:** Trans-Atlantic Conference Agreement

TFEU **:** Treaty on the Functioning of the European Union

UNCTAD **:** United Nations Conference on Trade and Development

WTO **:** World Trade Organization

INTRODUCTION

The maritime transport plays a critical role in the EU as it contributes to the high volume of trade in within the Member States as well as between the EU and other countries. Although there are many types of maritime transport regarding various subjects such as the routes and carriage of the goods, the RORO shipping is worth to be examined in a detailed way due to its unique characteristics. The RORO shipping mainly refers to the transportation of the products with wheeled vehicles. Thus, unlike the other transport types such as container shipping, the loading and unloading procedures in the harbors become more convenient as there is no need to use cranes.

Moreover, the negative aspects of the voyage such as wind and watertight are eliminated because the products are carried securely inside the vehicles. Also, the RORO shipping is the more efficient and cost-friendly way to cargo the goods from one port to another compared to the other methods of maritime transport as one does not need to rent an export warehouse. In other words, the cargo handling is conducted efficiently by port workers.

Due to these features, the RORO transportation is preferable in the maritime sector and still in progress to extend its position. Hereunder it is inevitable that the behaviors of the firms related in the RORO transport as players may cause competition infringements.

In order to implement and sustain a competitive environment, the breaches against the competition have to be eliminated. These violations can exist in various forms such as predatory pricing and excessive pricing under the abuse of a dominant position, in addition to any practice which prevents, restricts or distorts competition. Ultimately, the cost-effective marine transport service is achieved by tackling this sort of breaches.

The first chapter examines the notion of maritime transport in conjunction with the other related terms in the logistics sector by referring to the descriptions of international organizations as well as the legislation. The differences in the various types of marine transportation are illustrated, and their role in the trade sector is analyzed. The function of RORO shipping is explained through comparison with the other methods of shipping by, for instance, juxtaposing the benefits of both methods. The first part mainly gives the description of as well as the general information on the maritime transport as a whole and specifically the RORO transport.

The second chapter deals with the competition law and the anti-competitive behaviors of the companies. Article 101 TFEU aims to prevent anti-competitive arrangements between the firms in the same marketplace. Thus, the firms provide high-quality services at lower prices and the consumers decide the best choice for themselves among various price-quality options.

Article 102 deals with the abuse of a dominant position which occurs when the economically powerful companies negatively affect the competition level in the market by their operations. The crucial point behind Article 102 is that being a dominant firm among competitors is not forbidden. Indeed, it is expected that the economically most efficient company will gain dominance in the marketplace. However, when the dominant firm uses the dominance against its rivals to wipe them out of the market, the firm's actions are evaluated as an infringement of Article 102. The reason behind that is that the dominance of a single firm triggers low-quality goods at high prices when compared to a scenario in which the regular competition conditions are met. The dominant firm's abusive practices against its rivals may result in market foreclosure for the other competitors. The abusive practices and possible resolutions to eliminate the adverse effects of a dominant position will be discussed comparatively in the light of the European and Turkish competition.

Additionally, Article 4, which corresponds to Article 101 TFEU, and Article 6, which corresponds to Article 102 TFEU, of the Law on the Protection of Competition No. 4054 are elaborated. The thesis will examine how these Articles perceive cartel infringements as well as the abuse of a dominant position in order to compare how these issues are handled in the Turkish Competition Law with the EU regulations.

Lastly, the prominent cases from both the EU and Turkey are examined in conjunction with the explanations on the previous chapters. Hence, this thesis evaluates the cartel infringements and abuse of a dominant position on the grounds of sea freight, particularly in the RORO transportation.

The thesis primarily concentrates on the elimination and prevention of the competition infringements. The principal objective of the research subject is to examine the competition rules especially in RORO shipping. It then intends to explain the roots of the violations within the scope of sample cases from the EU and Turkey. In addition to the previous researches which focuses on the breaches against competition on the sea freight and how to reduce these violations, this research also aims to concentrate on the Turkish Competition Authority's perspective on the competition infringements.

CHAPTER I: THE MARITIME TRANSPORT

1. LOGISTICS AND TRANSPORT IN A NUTSHELL

1.1. Logistics

The logistic activities are in progress today in conjunction with the global transactions. In a strict sense, the term of logistics is described as a process of transportation and storage of goods.[1] However, this description comes up short considering today's trade improvements. According to another view, the term is defined as a method of allocation of resources and source control in the procurement, manufacturing and distributing operations.[2]

Another aspect supports that logistics not only provide the movement of goods from the producer to the consumer but also the coordination and the plan of the transportation.[3] In another saying, commodities such as raw materials, fabricated materials, and final products are transferred efficiently to the consumers through logistics.

Some scholars state that the implementation of a plan or an operation in a detailed way can be ensured by logistics.[4] Hereunder, the primary purpose of logistics is to provide the optimum utilization of resources and investments in addition to good quality customer service and to gain competitive advantage.[5]

The Council of Supply Chain Management Professionals (CSCMP) defines logistics more precisely as below:

"The process of planning, implementing, and controlling procedures for the efficient and effective transportation and storage of goods including services, and related information from the point of origin to the point of consumption for the purpose of conforming to customer requirements."[6]

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[1] Emine Koban and Hilal Yıldırır Keser, **Dış Ticarette Lojistik,** Bursa: Ekin Yayınevi, 2007, p.43.
[2] Murat Canıtez and Tümer Güçlü, **İthalat ve İhracatta Lojistik Uygulamalı İthalat İhracat ve Dokümantasyon,** 3rd edition, Ankara: Gazi Kitabevi, 2005, p.153.
[3] Leila Sujeta *et al.*, "International Logistics System Influence on the National Economics", **Yasar University Second International Conference on Business, Management and Economics,** İzmir, 15-18 June 2006, p.2.
[4] Metin Çancı and Murat Erdal, **Lojistik Yönetimi Freight Forwarder El Kitabı 1,** 2nd edition, İstanbul: UTİKAD Yayınları, 2003, p.35.
[5] Michael Quayle and Bryan Jones, **Logistics: An Integrated Approach,** 2nd edition, Liverpool Academic Press, 1999, p.85.
[6] Supply Chain Management Terms and Glossary, 2013, https://cscmp.org/CSCMP/Educate/SCM_Definitions_and_Glossary_of_Terms/CSCMP/Educate/SCM_Definitions_and_Glossary_of_Terms (14.11.2018).

The Directorate General for Mobility and Transport's (DG MOVE) point of view illustrates that logistics include organization and management of various services like purchasing, production, warehousing, and distribution.[7]

Although some scholars define logistics by referring to the foreign trade, and thereby limit the meaning of the term[8], it cannot be exclusive of domestic trade. In other words, logistics covers all operations to flow goods from the producer to the final consumer regardless of domestic or foreign commerce.

Many beneficial effects arise from the procedure of logistics such as minimizing the cost and making the time management more effective. The flow of goods envisages a certain level of standards and quality. Moreover, the adaptation to the evolving conditions in trade can be realized through logistics.

Even though the activities of logistics can be classified under three main headings, transportation, stock, and warehouse management[9], only the transport actions will be examined within the scope of the thesis.

1.2. Transport

The notion of transport refers to the translocation.[10] Additionally, it can be described as a way to move persons or goods by fulfilling such requirements in transport which would bring benefit in time and place.[11] In general meaning, transportation introduces passenger transport or cargo handling; however, the explanations specifically engage with freight shipment within the concept of the thesis. Therefore, the descriptions below will clarify the transportation issue related to the cargo.

As one of the primary activities of the logistics, transportation describes the transfer of products which corresponds to the flow of goods from the place of production to the place of consumption. In a strict sense, the term of transportation focuses on the transfer of goods from

[7] Logistics and Multimodal Transport: Logistics, https://ec.europa.eu/transport/themes/logistics-and-multimodal-transport/logistics_en (14.11.2018).
[8] Canıtez and Tümer, p.153.
[9] Donald Waters, **Logistics an Introduction to Supply Chain Management,** Palgrave Macmillan, 2003, p.12-13.
[10] Hüseyin Ülgen, **Uluslararası Taşımacılık ve Hukuki Sorunları,** İstanbul: İstanbul Ticaret Odası Yayın No: 1988-27, 1988, p.1.
[11] Süleyman Barda, **Münakale Ekonomisi,** İstanbul: İ.Ü. İktisat Fakültesi Yayını No: 154, 1964, p.5.

one place to another[12]; however, transportation also includes the elements such timing, expedition, safety, and economy in broad terms.[13]

The determination of transport in a broad sense requires the countries to take measures which link to the transport policy. The main objectives of transportation relating to social, economic and environmental development, can be achieved through the transport policies.[14] In this regard, transport strategies underpin the truly-functioning transportation.

The countries regulate their transport arrangements to make them more efficient and current as international trade progresses. The governments choose the regulation or deregulation process while adopting their transport strategies.

The first method grants more competence to the government as compared to the latter one. Governments perceive themselves as primary actors in the transport policies since they provide public services, thus they are mostly involved in the legal arrangements process.[15]

Secondly, the deregulation method requires the private actors to be more active in the decision-making process. The changing conditions of trade in conjunction with the globalization result in the deregulation process, which becomes inevitable, especially in maritime transportation.[16]

1.2.1. The Purpose of Transport Policy

As transport is one of the critical factors that shapes[17] the countries in economic, social and political aspects, national governments have an objective to apply the available transport policies for themselves. Indeed, the methods, systems, and networks of transport enable countries to take national strategies more efficiently.[18] In this respect, the relevant fields with the transport will be listed and explained below.

[12] Koban and Yıldırır Keser, p.92.
[13] ibid., p.92.
[14] Jean Paul Rodrigue, **The Geography of Transport Systems,** 3rd edition, Routledge, 2013, p.280.
[15] Rodrigue, p.280.
[16] ibid., p.280.
[17] Kafkas Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi, "Transportation Sector in Turkey: Future Expectations Regarding the Railway", Vol.5, Issue 8, 2014, p.101.
[18] Meserret Nalçakan, "Ekonomik Gelişmelerin Demiryolu Taşımacılık Sektörüne Etkileri, **Girişimcilik ve Kalkınma Dergisi,** Vol.4, Issue 1, 2009, p.34.

First of all, national security is pursued by the governments while passengers or freights are carried within the borders. The vast and increasing amounts of passenger and freight traffic necessitate taking measures to secure the national boundaries.[19]

Hence, transportation methods, routes, and information systems can meet national security requirements.[20] Not only does the readiness of transportation have to be maintained, but also the disruptions in transport have to be reduced in order to ensure national security needs. The flow of goods or passengers has to be observed to prevent illegal drug traffic or illegal immigration.[21]

The compliance of the transport policies in harmony with the national borders' security will positively affect the passenger and freight traffic from the port of departure to the port of entry.[22]

Secondly, public safety and environment issues are also regulated under the scope of transport policies. The public safety covers the matters of the limitation of working hours, the requirement of driving licenses, the establishment of speed limits, and other control mechanisms to prevent accidents. The pollution in the air or high seas which derives from the transport can be prevented by the policies reflecting the environmental concerns. Thus, environmental awareness can be raised for the elimination of the negative impacts of transport.

Moreover, transport policy deals with firms' behaviors which lead to the monopolistic tendency in trade. The infringements in a competitive marketplace may cause the restriction and distortion of competition. The firm which holds the dominant power compared to other competent prevents efficiently-functioning competition.

As a result, the prices of the transport services increase, but the options for high-quality services remain low because of the market foreclosure effect of the dominant firm. In order to eliminate this type of adverse effects in competition, the transport policies should be regulated in compliance with the competition rules.

Lastly, the governments want to balance the foreign and national ownership; in that respect, the governments have some limitations and restrictions to control the amount of foreign

[19] Jean Paul Rodrigue and Brian Slack, "Logistics and National Security", https://pdfs.semanticscholar.org/36c0/a4013f269dcb98f726ec480cbd8ddb7d7887.pdf (20.11.2018), p.1.
[20] ibid., p.2.
[21] ibid., p.2.
[22] Rodrigue, p.281.

ownership.[23] One can unequivocally state that the governments have to take the matters mentioned above into consideration in order to regulate the transportation policy accordingly.

1.2.2. Transport Policy in the European Union

The European Union determines its policies on several topics such as the economy, transportation, education, politics and justice regarding the Member States' interests. In other words, the priorities and the social welfare of the Member States are taken into consideration by the Union.[24]

The transportation policy in the EU is one of the vital factors in the Union's economic and social integration.[25] Basically it is aiming to promote the completely liberalized internal market and free movement provisions. Concerning that Article 3 of the Rome Treaty states that the Union has to adopt common policies to harmonize the Member States' procedures regarding the transportation.[26]

The European Union secures the free movement provisions for persons and goods while transporting from one country to another without facing any border restrictions.[27] Meanwhile, the sustainable development model is guaranteed by the Union's transport policies.[28]

The sustainable development is defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs" by the United Nations General Assembly.[29]

Therefore, one can conclude that the notion of sustainable development "provides a framework for the integration of environment policies and development strategies" as stated in the United Nations General Assembly.

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[23] ibid., p.281.
[24] Murat Erdal, **Küresel Lojistik,** İstanbul: UTİKAD Yayınları, 2005, p.99.
[25] Sinan Kuşçu, "Avrupa Birliği Ulaştırma Politikası ve Türkiye'ye Yansıması", **Gazi Akademik Bakış Dergisi,** Vol.5, Issue 9, 2011, p.78.
[26] Transport Policy of the European Union, https://www.ab.gov.tr/chapter-14-transport-policy_79_en.html (22.11.2018).
[27] Kuşçu, p.78.
[28] T.C. Ulaştırma Bakanlığı, "Hedef 2023" 10. Ulaştırma Şurası, 2009, www.tasam.org/Files/Icerik/File/10.Ulaştırma_Şurası_-_Hedef_2023_-_T.C_ULAŞTIRMA_BAKANLIĞI.pdf_04259458-5838-4e36-928d-0c61c55d6263.pdf (22.11.2018), p.102.
[29] United Nations General Assembly, "Report of the World Commission on Environment and Development: Our Common Future", 1987, mom.gov.af/Content/files/Bruntland_Report.pdf (23.11.2018), p.43.

The Union's policies promote the improvement of trade in internal and external aspects as well as the competitive advantage.[30] The framework of the European Union's transport policy[31] can be illustrated in four main headings: shifting the balance between the transportation modes, eliminating bottlenecks, placing users at the central of transport policy, and achieving the globalization of transport.

First of all, the regulated competition is one of the crucial elements in order to achieve the Union's transport policy. The assumption that the competition is not regulated between the transport modes inevitably causes greater imbalances among the different sorts of transport.[32] For instance, road haulage may emerge as a monopolistic transport mode. As a solution, the growth rate of the transport methods has to be examined, and other modes have to become common as competitive alternatives.

Furthermore, the transport policy focuses on the process of linking up the different transportation modes in order to make them more useful. The main problem is the lack of interconnection between sea, rail, and inland waterways.[33] In other words, the interchangeability within the modes does not bring real alternative solutions. While the water transport is cost-friendly and does less damage to the environment compared to other modes, it is still in progress. Despite its shortcomings, however, most of the Union countries have a chance to transfer goods within sea freight.

For instance, maritime transport approximately holds two-thirds of all trading volume within the Union and the rest of the world.[34] This amount of trade volume is an indispensable source of income for the Union. In return, the cabotage rules, which grant specific rights to a country's citizens to carry goods within the borders of that country, did not have an important role in trade issues.[35] As a result, the integration of various transport modes is crucial in order to provide a transportation service performed in harmony.

The mere legal arrangements in the transport policy are not meaningful to accomplish future management in transportation. In another saying, the objectives of transport policy can

[30] Murat Erdal, "Avrupa Birliği Ulaştırma Politikaları", **Maritime Forwarding Logistics,** Vol.1, Issue 3, 2004, p.72.
[31] European Commission, **White Paper- European Transport Policy for 2010: Time to Decide**, 2001, https://ec.europa.eu/transport/sites/transport/files/themes/strategies/doc/2001_white_paper/lb_texte_complet_en.pdf (24.11.2018).
[32] ibid., p.21.
[33] ibid., p.41.
[34] ibid., p.41.
[35] ibid., p.41.

be achieved through other means like the financial support, namely funds. To exemplify, the infrastructure projects for roads, railways or ports require a capital.

While overcoming the funding problem not only the public and private authorities should be active but also the innovative methods must be applied.[36] The pooling of funds which is created by at least two investors[37] can be deemed as an innovative method that serves to finance the future investments in transport and infrastructure development.

1.2.3. Transport Policy in Turkey

As a candidate country, the requirement of harmonizing its policies with that of the Union emerge as a principal matter for Turkey. The harmonization process can be achieved through the national programs for the adoption of the acquis[38] and accession partnership documents.[39]

Turkey's motive to harmonize its transport policy with the Union is to gain progress in transportation. According to such harmonization, all of the users have to be able to access comfortable, fast and reliable services since one of the primary purposes of a useful carriage is to eliminate inequalities between the urban and rural areas of the country. Additionally, the policy ensures not only the security of the transportation but also the public safety by controlling the products that are carried or bringing quotas to specific goods.

As the environmentally friendly transportation methods must be preferred and exhorted by national authorities, the adverse effects of transportation on nature will decrease instinctively in Turkey as the Union policies are adopted. Consequently, the renewable energy sources will become prevalent as an alternative to the unrenewable sources that we constantly used today. The tendency to utilize alternative resources not only reduces foreign dependence on energy but also lowers the cost as one of the expenditure items.

The transportation network enables the strong international relations and foreign trade, which means that there are some political aspects prevalent in the of transportation policy as well. The transport policy facilitates the use many methods in a harmonized way which

[36] ibid., p.58
[37] https://www.investecassetmanagement.com/en/glossary/#letterP (23.11.2018).
[38] See also: Avrupa Birliği Müktesebatının Üstlenilmesine İlişkin Türkiye Ulusal Programı, December 2008, www.mfa.gov.tr/data/DISPOLITIKA/AB/up2008_tr.pdf (01.02.2019), p.23.
[39] See also: https://www.ab.gov.tr/files/AB_Iliskileri/AdaylikSureci/Kob/Turkiye_Kat_Ort_Belg_2003.pdf (24.11.2018), p.12.

eliminates the regional differences in terms of the level of development, which ties back to the social impacts of transport.

The properly operating transportation system adds value to countries in different ways such as in the economy and politics. Considering Turkey's geographical location, which cannot be isolated from the economic, social, political, military or demographic changes in its neighbor countries, it is expected that the transport policies play in important role in national strategy. In another saying, the ongoing changes in Turkey's neighborhood countries create a competitive landscape in the transport sector.[40]

The geographical position of Turkey as a bridge between the Asia, Africa and Europe underpins the necessities of truly-performing transport policies.[41] Turkey has the chance to carry the goods or people with sea freight as a peninsula. With its shores and harbors, Turkey has a great potential in carriage by sea. Additionally, its broad hinterland provides opportunities to carry goods from ports to the lands easily.[42] Also, Turkey's transport policy is gaining importance in accordance to the economic expansion and the population growth.[43]

However, Turkey's position in trade should be reinforced regarding its transport policies. By evaluating Turkey's potential as a prime transportation center, the rate of international trade within Turkey can be increased. Therefore, the main factors which should be taken into consideration in the transportation policy are as listed below[44]:

The issues of planning highly-cost infrastructure and its financing should be regarded in the transport policy. As the investments of infrastructure require a large monetary fund, many companies or enterprises cannot afford the costs single-handedly. Consequently, this kind of high-cost investments is usually funded by the public.[45] This strategy also brings an additional benefit of balancing the negative and positive externalities to the economy. It should be borne in mind that the mobility of goods and services are increasing perpetually; for this reason, the alternative ways and modes are considered by the national governments by taking their

[40] Nalçakan, p.37.
[41] Kafkas Üniversitesi İktisadi ve İdari Bilimler Fakültesi Dergisi, "Transportation Sector in Turkey: Future Expectations Regarding the Railway", Vol.5, Issue 8, 2014, p.102.
[42] ibid., p.102.
[43] Transport in Turkey – Major Trends and Issues, 2015, www.europarl.europa.eu/RegData/etudes/BRIE/2015/540362/IPOL_BRI(2015)540362_EN.pdf (25.11.2018), p.1.
[44] Dilek Dileyici, Coşkun Can Aktan, İstiklal Y. Vural, **Altyapı Ekonomisi: Altyapı Hizmetlerinde Serbestleşme ve Özelleştirme,** Ankara: Seçkin Yayıncılık, 2005, p.18.
[45] Ergül Han and Ayten Ayşen Kaya, **Kalkınma Ekonomisi Teori ve Politika,** Eskişehir: ETAM A.Ş. Matbaa, 2002, p.248.

necessities into account. As in relation to the preceding one, multiple forms of transport must be conducted suitably to carry goods or passengers.

The major needs in the transport sector require an immense focus on some main aspects such as infrastructure and funding in order to harmonize the transport policy with the EU. The improvements in infrastructure not only helps to reduce traffic but also provide fast, non-costly and environment-friendly carriage.

Therefore, the infrastructure issue has to be covered to reach an adequate level of transportation throughout the country. According to Turkey's near plans, the government will engage in many projects by being more productive and developing the transport services until 2023 which is the country's centennial year.[46]

Thus, it is inevitable that the infrastructure requires vast amounts of funding and infrastructure projects cannot be merely financed by the government or national investors. The transport projects cannot be supported by the national budget, either. Even when the private companies take the initiative to conduct transport services and build infrastructure, the country's dependence on foreign financial support is one of the economic obstacles that the country faces. Specifically, the government deals with the public debt when its primary purpose is to reduce the budget deficit.[47]

Considering the fact that the Turkish trade volume with EU approximately holds 38% among its total trade, Turkey's trade with EU has an important place.[48] Accordingly, proper and effective trade policies are essential.

The transport strategy for Turkey must cover the matters of effective use of transport facilities, training of qualified staff for better management, the extension of transport with new investments, harmonization of the current national regulations with the international arrangements, observation of the developments and evaluation of the policies accordingly, and the management of the funding issues for new infrastructure or build investments.[49]

[46]Transport in Turkey – Major Trends and Issues, 2015, www.europarl.europa.eu/RegData/etudes/BRIE/2015/540362/IPOL_BRI(2015)540362_EN.pdf (25.11.2018), p.1.
[47] ibid., p.1.
[48] ibid., p.1.
[49] Murat AKAD *et al*, **A Transportation Plan Strategy For Turkey,** www.iasi.cnr.it/ewgt/16conference/ID125.pdf (27.11.2018), p.483-484.

2. MARITIME TRANSPORT

2.1. Maritime Transport in a Nutshell

The notion of maritime transport refers to the ability to transfer large amounts of cargo over long distances through specific routes.[50]

The maritime transport sector is mainly made up of freight shipment, passenger transportation, and port management. The passenger transportation may be conducted in a national or global level; moreover, the transport may be provided by cruise which is a subbranch of tourism. Owing to the freight shipment, different types and forms of goods can be carried effortlessly. For instance, some ships are allocated to transmit liquid cargo or bulks. Cargo, ro-ro, container and alike transport are available under the notion of maritime transport. Lastly, the services of towage, cargo handling, storage, and customs procedures are provided to the clients through the port management. Besides, the services that are related to the ship brokerage are deemed to be in the content of maritime transport.[51]

2.2. The Elements of Maritime Transport

The carriage service is provided in conjunction with the four main components namely; the frequency of a voyage, the reliability of transport, service costs, and swiftness.

Firstly, the frequency of the voyage becomes important when the goods have to transfer in a limited time. For instance, perishable goods such as fresh fruits and vegetables have to be transferred as fast as possible.

Therefore, the agreement on the international carriage of perishable foodstuffs and on the special equipment to be used for such carriage (the ATP) has been accepted by many countries including most of the EU Member States and the USA.[52] The agreement covers safe transport to the perishable foodstuff[53] such as dairy, meat, and frozen products by regulating the temperature of the transport vehicles, the adequateness of the equipment and so on.

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[50] Jean Paul Rodrigue, **Ports and Maritime Trade,** https://people.hofstra.edu/jean-paul_rodrigue/downloads/Ports%20and%20Maritime%20Trade.pdf (29.11.2018), p.1.
[51] Rekabet Kurumu, Rekabet Raporu, Ankara, 2012, p.31.
[52] Giovanni Cortella and G. Panozzo, **Standards for Transport of Perishable Goods are still Adequate?: Connections Between Standards and Technologies in Perishable Foodstuffs Transport,** https://www.researchgate.net/publication/223186484_Standards_for_transport_of_perishable_goods_are_still_adequate_Connections_between_standards_and_technologies_in_perishable_foodstuffs_transport (30.11.2018), 2008, p.432.
[53] Cortella and Panozzo, p.436-437.

Secondly, the reliability of transport is both essential for the charterer and carrier. As the transportation system consists of many steps from loading to unloading process, this complexity can be solved by reliability.[54] It not only helps to transfer the goods without affecting impairment or insecurity but also expedites the implementation of the official formalities in harbors.[55]

Thirdly, the service cost covers both the payments for the carriage of goods from one place to another and the investments for better transportation.[56] Moreover, the charges of shipping operation cover crewing, bunker and ship registration.[57]

Last of all, the swiftness of the carriage takes a vital role as one of the precise requirements of the business life for whom desire to launch its product expeditiously into the market. The swiftness has to be covered the course of a period from lading port to the port of destination. Hence, the new technology systems which are mainly based on the flow of information is applied in marine.[58]

Through the sharing of information, all parties who engage in marine transport can conduct their operations. The proceedings in harbors work efficiently as the port authorities have up to date information about the ships and navigation. The captain also can get information about the availability of the port in order to load or unload the products.

2.3. The Positive Effects of Maritime Transport

The carriage of a vast amount of goods can be accomplished through maritime transport in a more convenient and secure manner compared to the other transport methods.[59] Therefore, carrying of goods via maritime within long or short distances play an essential role in trade as well as international transport.[60]

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[54] M. Xie *et al*, "A Study of Safety and Reliability of Maritime Transportation Systems", **Life Cycle Reliability and Safety Engineering**, Vol.1, Issue 1, 2012, p.35.
[55] Alan E. Branch, **Economics of Shipping Practice and Management**, London: Springer, 1988, p.118-120.
[56] Selda Ulukaya**, Deniz Ulaştırmasında Rekabet Hukuku Sorunları,** İzmir, 2014, p.4.
[57] UNCTAD Secretariat, **Review of Maritime Transport,** 2015, p.48.
[58] Taking Maritime Transport Into the Digital Age Safety-Environment-Efficiency, www.sjofartsverket.se/pages/36039/MONALISA%202_0%20web.pdf (29.11.2018), p.3.
[59] Ulukaya, p.3.
[60] Sadık Özlen Başer, **Deniz Taşımacılığı Ekonomisi,** İstanbul: Beta Basım A.Ş., 2013, p.61. See also: Rekabet Kurumu, **Rekabet Raporu,** 2012, p.31.

2.4. The Difficulties in Maritime Transport

Although sea freight has many positive effects on the transport sector, it also maintains some obstacles because of the existence of specific requirements for maritime transport. The vessel's speed is limited as compared to the other transport modes.[61]

Additionally, the loading and unloading process tends to be time-consuming and results in delay at ports. Especially when bulk-cargo is being handled, such delays may even be as long as a couple of days. These drawbacks become crucial when the goods are carried within short distances or carriers necessitate the service delivers immediately.[62]

2.5. The Marco Polo Program

Reaching an efficient level in the transport sector is the lifeblood for the European Union as the transfer of goods from the producers to the consumer throughout Europe has to be fast, affordable, more reliable and environment-friendly.[63] Although the road transport is the more common way compared to the other transport modes, it should decline in popularity because of the drawbacks such as increasing volume of road traffic, more pollution, and the incremental costs in the future.[64]

Herein, the Marco Polo Program was launched by the Executive Agency for Competitiveness and Innovation (EACI)[65] on behalf of the European Commission's Directorate General for Energy and Transport in order to eliminate the drawbacks. The program mainly focuses on the objectives that reduce traffic congestion on roads and preserve the environment as much as possible from the harmful effects of transportation. Marco Polo resolves the issue of traffic by shifting the carriage of freights from roads to other methods of transport. The carriage is conducted in a connected way of many modes; however, road transport has to be

[61] Rodrigue, *Ports and Maritime Trade*, p.1.
[62] ibid., p.1.
[63] The achievement of these objectives used to be reached through the PACT Program (Pilot Action For Combined Transport) which was introduced in 1992. After the ending of the program in 2001, the Commission sought a solution to conduct the same aspirations and promote intermodality throughout the Member States. Thus, the PACT program was replaced with the Marco Polo. See also: European Commission, **White Paper-European Transport Policy For 2010: Time to Decide**, 2001, p.47.
[64] **Lightening The Load Marco Polo Leads The Way,** https://ec.europa.eu/inea/sites/inea/files/download/MoS/mp_projectbrochure_en_web_final.pdf (29.11.2018), p.2.
[65] The program has been handled by the Innovation and Networks Executive Agency (INEA) instead of EACI since 2014. See also: **Marco Polo - New ways to a green horizon,** https://ec.europa.eu/transport/marcopolo/ (30.11.2018).

used as rarely as possible. In other words, the combination of rail, road, and sea transport known as intermodality is an essential part of this program.

While the roads suffer from traffic because of over-capacity, the alternative modes of transport, namely the sea, rail, and inland waterways, can be used effectively thanks to their ample capacity. Moreover, the risk of pollution can be eased more in comparison with the road haulage. Not only does Marco Polo provide a greener alternative in the carriage but it also gives rise to powerful marketing and quality service for the customers.[66]

Furthermore, the Marco Polo Program promotes vigorous competition among the participants by enhancing service quality and using innovative technics. The Commission takes many steps to make the fleets more competitive through the program.[67]

From the transport companies' point of view taking appropriate measures to ensure the compatibility with the needs of the program may put financial risk upon them. Therefore, the program provides financial support to the companies in their start-up period in order to eliminate the risks and adopt the policies in the short term. It can be stated that the program is conducted on the grounds of various features of each company, thus it is based on a performance-related structure. When the potential participants believe that they can undertake the commitments, they can submit their application through the web page of the program and gain financial support from the Union's budget.

The funding does not bring any burden to the companies to pay it back; it is outright. The only requirement to enjoy the outright is to discharge the commitments and reach a useful new modal carriage which is underpinned by the results.[68]

The Marco Polo Programme accomplished its objectives from 2003 to 2006 which is also called MP I with approximately € 102 million budget[69]; therefore the second edition of the program was launched as MP II and conducted between the years of 2007 and 2013[70] with more

[66] **Lightening The Load Marco Polo Leads The Way,** https://ec.europa.eu/inea/sites/inea/files/download/MoS/mp_projectbrochure_en_web_final.pdf (02.12.2018), p.2.
[67] European Commission, **White Paper- European Transport Policy for 2010: time to decide,** 2001, p.47.
[68] **Marco Polo,** https://ec.europa.eu/inea/en/marco-polo (03.12.2018).
[69] **Evaluation of the Marco Polo Programme (2003-2006)** https://ec.europa.eu/transport/sites/transport/files/facts-fundings/evaluations/doc/2007_marco_polo_1.pdf (05.12.2018), p.12.
[70] **Marco Polo Programme,** https://ec.europa.eu/inea/en/connecting-europe-facility/motorways-sea-one-stop-help-desk/mos-financial-support/marco-polo (04.12.2018).

extension in scope and budget compared to the former version.[71] The program not only reduces the traffic congestion on the highways but also preserves the environment.[72]

In the sequel of the Marco Polo I and II program, the shipping and rail transport have become substantial elements in the combination of modes as these two affect the transport positively.[73]

3. THE INTERNATIONAL AND NON-GOVERNMENTAL ORGANIZATIONS IN MARITIME TRANSPORT

The maritime transport sector does not concern sovereign countries individually; instead, it is an international endeavor. Therefore, the coordination and interaction in a global sense is essential.[74] In that regard, many countries bind themselves with international agreements and take measures to warrant the safety of the marine trade and the protection of the environment. The international organizations which have supervisory roles to ensure the effectiveness and persistence of the rules can be founded by the national governments or the non-governmental organizations. Many objects such as legal, environmental, and economic purposes can trigger the establishment of maritime organizations.

The extent of the international organizations as well as their impacts on and contributions to the maritime matters will be illustrated below.

3.1. International Organizations

3.1.1. International Maritime Organization (IMO)

From a historical perspective, the requirement to provide an effective maritime policy brings multiple countries together to establish an international organization which falls under the United Nations. In this respect, the Inter-Governmental Maritime Consultative Organization

[71] **Evaluation of the Marco Polo Programme (2003-2006),** https://ec.europa.eu/transport/sites/transport/files/facts-fundings/evaluations/doc/2007_marco_polo_1.pdf (05.12.2018), p.12.
[72] **Evaluation of the Marco Polo Programme 2003-2010 Final Report,** https://ec.europa.eu/transport/sites/transport/files/facts-fundings/evaluations/doc/2011_marco-polo-programme-2003-2010.pdf (04.12.2018), p.5.
[73] https://ec.europa.eu/transport/marcopolo/ (07.12.2018).
[74] Ümit Çevik, **Uluslararası Denizcilik Sözleşmeleri,** 2nd edition, İstanbul: Birsen Yayınevi, 2004, p.2.

(IMCO) was founded in 1948, Geneva. In 1958, the Convention came into force, and the Organization's first meeting was held in the following year.

The name of the organization was changed to the International Maritime Organization (IMO) in 1982, and the headquarters of IMO is now located in London.

According to Article 1/a of the Convention, the primary purposes of the Organization are ensuring the cooperation between the governments, facilitating the general standards for maritime safety, and preventing the environmental pollution. In this regard, the Organization has adopted various conventions such as SOLAS[75] and MARPOL[76] to achieve its aims in maritime transport.

The organization comprises of the Assembly, the Council and the Committees[77] The Assembly includes all Member States as a governing body and meets two times a year. The tasks of the Assembly are approving the programs and keeping the budget. Additionally, the financial support for the programs is provided by the Assembly's financial arrangements. The Council has a supervisory role in the structure of the Organization. The Assembly elects the Council which functions as the executive organ to serve for a two-year period. The Committees deal with different sub-branches of maritime transport such as safety, legal issues and arrangements, matters on technical support and marine protection. The Committees work in harmony with the subcommittees in order to achieve the objectives of the Organization.

3.1.2. Organization for Economic Co-operation and Development (OECD)

The Organization for Economic Co-operation and Development (hereinafter: OECD) has been serving actively for decades; however, the idea behind this organization goes back to the era of World War II. The European leaders found that the best way to maintain the peace among many countries could be achieved by cooperation rather than punishment and destruction which were implemented by their predecessors in the era of the World Wars.[78]

OECD is concerned with a wide range of topics from competition to the economy in order to obtain the economic and social development of its member countries. The

[75] Convention for the Safety of Life at Sea, Adoption: 1 November 1974; Entry into force: 25 May 1980
[76] International Convention for the Prevention of Pollution from Ships, Adoption: 1973 (Convention), 1978 (1978 Protocol), 1997 (Protocol - Annex VI); Entry into force: 2 October 1983 (Annexes I and II).
[77] www.imo.org/en/About/Pages/Structure.aspx (09.12.2018).
[78] www.oecd.org/about/history/ (09.12.2018).

improvements in science, technology, and industry and the impacts on the economy are envisaged by OECD. Also, the Organization holds discussions to accommodate the developments in the fields mentioned above as well as in the transport. In this sense, OECD conducts many projects related to maritime transport, notably in the matter of elimination of the restrictive practices of competition.[79]

The decision-making mechanism and the application of the resolutions in OECD are conducted by a composition of three main organs, namely the Council, the Secretariat and the Committees. The Council, which is the decision-making organ in OECD, consists of the member countries' representatives as well as the European Commission. The meetings of the Council are held regularly, and decisions are taken by consensus. The head of the Secretariat chairs the Council, which presents the connection between the national delegations and the Secretariat. The Secretariat has a staff made up of people in different occupation clusters, for instance, the lawyers, economics, and scientists. The Committees include many subbranches which specialize in several subjects from financial markets to trade. The Committees work with the expert groups to discuss specific issues and implement various solutions in the context of the objectives of OECD.[80]

3.1.3. International Labor Organization (ILO)

ILO mainly aims to enhance the working conditions of the labors and to ensure the consistency of the rules which regulate the rights and obligations of the labors. The countries come together to discuss the labor laws, standards, policies, and statistics to envisage the development of social justice and the eradication of poverty.

ILO makes arrangements with the purpose of providing a standard in the field of maritime, especially for the ship's crew and dockers.[81] Maritime Labor Convention also known as "MLC, 2006" entered into force on 20 August 2013 and it has been a binding force in the international arena ever since. The convention illustrates the minimum working standards for the ship's crew. Moreover, the countries guarantee to provide the field of active and fair competition.[82]

[79] Çevik, p.8.
[80] www.oecd.org/about/whodoeswhat/ (09.12.2018).
[81] Çevik, p.8.
[82] https://www.ilo.org/global/standards/maritime-labour-convention/what-it-does/lang--en/index.htm (10.12.2018).

3.1.4. United Nations Conference on Trade and Development (UNCTAD)

UNCTAD exists within the structure of the United Nations and is primarily concerned with the subjects of trade and development. The meetings which are organized by UNCTAD provide a chance to discuss several topics together with the Member States, the stakeholders, and other experts.[83]

Alongside the projects of UNCTAD in the field of trade and investment, the organization has numerous projects and arrangements in relation to the maritime. For instance, the Working Group on International Shipping Legislation conducts projects related to maritime.[84]

3.1.5. World Trade Organization (WTO)

Generally, WTO can be described as a place for the countries to face the trade issues between themselves by negotiating each other while doing this the countries also bring resolutions to reach an effective level of trade. The settlement of the trade matters can be resolved under the Organization by respecting and applying the rules of WTO. In other words, the Organization works with its Members on the basis of cooperation and harmonization.

One of the essential tasks that the Organization performs is to make trade negotiations. The trade agreements can cover various topics such as selling goods, providing services and concerning intellectual property rights. All kind of agreements is negotiated by the member countries within the concept of liberalization, elimination of the customs duties and trade barriers. While the trade conditions and the responses of traders to the changing trade environment require adaption fastly to the new situations, therefore the agreements will also affect, and they cannot be static. The Member countries renegotiate the agreements periodically to adapt the new challenges in trade.

Moreover, the Organization has envisaged that the rules are transparent and sufficiently clear to accommodate by its Members. The effective application of the rules necessitates the monitoring process by the Organization. The implementation of the trade policies by the

[83] https://unctad.org/en/Pages/DTL/TTL/Legal.aspx (09.12.2018).
[84] Çevik, p.9.

Member countries is considered periodically by the organs of the Organization such as the council and committees.

Besides, the dispute settlement, as one of the activities of WTO, is a vital process to resolve the matters in a mutuality manner. The country which alleges that its rights are breached by the provisions of the agreement that it signed with another country/countries, may bring the dispute before the Organization to be resolved. The dispute is determined by the independent experts; thus, they solve the matter by taking into consideration the agreement, the interpretation of the provisions if needed and the commitments of each of the countries.

Furthermore, the Organization provides different options to its Member countries on the basis of their level of improvement for the adoption of the trade policies. For example, the implementation of the agreements may relatively take longer time for the developing countries. Thus, the developing countries enjoy the long time periods for the fulfillment of the commitments in which derive from the agreements. While the Organization brings some privileged provisions to the developing countries, the expansion of the trade capacity of these countries will adjust to the developed countries.

WTO is always keeping in contact with the other non-governmental organizations and international organization in order to inform the public on the activities that the Organization has conducted. By doing so the cooperation and awareness will increase on the grounds of the trade operations which mainly arise from the trade agreements between the countries, and other relevant documents.

It may not be easy to understand the content of the documents and agreements that the Organization had made; however, all kinds of the WTO documents can be clarified in the light of some fundamental principles.[85] Firstly, a country's discriminative practices to its trading partners cannot be accepted. The discrimination between national and foreign products, services are also inadmissible. Secondly, the elimination of trade barriers is essential in order to encourage trade. Lowering such barriers including the customs duties, tariffs, and quotas stimulate efficient commerce.

Thirdly, the arrangements and rules which regulate the trade matters have to be predictable for the investors. Fourthly, the Organization aims to prevent unfair practices by making rules concerning the limitations and differences of fair and unfair behaviors of the firms

[85] https://www.wto.org/english/thewto_e/whatis_e/what_stand_for_e.htm (12.12.2018).

in order to provide an efficiently working marketplace. For instance, the firms may suffer from the additional duties on imports which possibly affect the market shares of the businesses; hence it requires to compensate the damages. Fifthly, the Organization's provisions give a chance to the countries to adopt the trade policies of WTO as most of the Members are developing countries. In another saying, the adjustment of the policies within the structure of the Organization and its Member countries is beneficial for the less developed or developing countries while the policies provide more flexible and privileged options to the improvement of the trade both in local and global terms.

Lastly, the Organization envisages and ensures the conservation of the environment, specifically public health, animal, and plant health. The crucial point is that the Members cannot apply the rules which aim to protect the environment in a different aspect to local and foreign traders. The rules must be applied both of the traders equally without bringing some burden to the foreign traders, that situation is also closely associated with the first-mentioned principle namely the non-discrimination.

3.1.6. International Chamber of Commerce (ICC)

International Chamber of Commerce performs its trade activities by reflecting the opinions of public and private sectors.[86] The needs of the players which engaged with the international trade are taken into consideration.

The mission of ICC is to support the trade and investments in a global way which are the main elements to provide the improvement and prosperity of the countries. This platform conducts its activities on the basis of multilateralism which requires the cooperation between the players in the field of commerce in order to deal with the global challenges on commerce efficiently.[87]

[86] https://iccwbo.org/about-us/who-we-are/ (11.12.2018).
[87] https://iccwbo.org/about-us/who-we-are/our-mission/ (11.12.2018).

3.2. Non-Governmental Organizations

3.2.1. Comite Maritime International (CMI)

CMI is established in 1897, Antwerp as a non-governmental organization for dealing with maritime law and related matters. In other words, the objective of CMI is to contribute appropriate activities, hold events, and exchange information by means of yearbooks, minutes and other kinds of publications between the participants from different countries to uniform the maritime law regarding its whole perspectives. In this way, the unification of maritime transport, and the determination of the incompatibilities related to the marine can be achieved.

3.2.2. The Baltic and International Maritime Council (BIMCO)

The Baltic and International Maritime Council (BIMCO) was established in 1905 since that day the marine service is provided to the ship owners, brokers, agents, protection and indemnity insurance (P&I Clubs), insurance companies, and banks.[88] The provisions of agreements on maritime transportation especially the charters are provided by BIMCO as printed forms.

3.3. Other Organizations

The organizations that mentioned below cannot entirely be deemed as international or non-governmental organizations due to their features. However, they cover some structures of international organizations and NGO's as well.

International Chamber of Shipping (ICS) is a trade organization for merchant ship operators. The ship owners and operators can protect their rights and interests through this association. ICS not only develops the shipping industry but also represents more than 80 percent of the world's merchant fleet.

The International Association of Independent Tanker Owners (INTERTANKO) conducts its activities as a membership association since 1970 for the representation of the independent tanker owners in local and global arenas. Independence refers to either not being an oil producer or not being under the governance of any state. The main objectives of

[88] https://www.bimco.org/about-us-and-our-members (10.12.2018).

INTERTANKO can be illustrated as providing safe transport, eliminate pollution, and the protection of free competition.

4. THE DIFFERENT TYPES OF MARITIME TRANSPORT

4.1. Whether the Transport Conducts on the Extend of a Short or Long Distances

4.1.1. Short Sea Shipping (SSS)

Short Sea Shipping mainly refers to the movement of goods or persons within short distances, namely transfer among the coastal or inland waterways. By another saying, the SSS can be described as a way to conduct marine transportation without crossing an ocean, and it often combines with different types of transport such as road and railway.[89]

However, the description of the term is interchangeable depending on many different perceives of the scholars. For instance, some critics claim that the description of the term by referring to the distance is not decisive[90] so that the SSS has to be defined on the grounds of many elements such as the different types of ships and the various cargo handling techniques.[91] On the contrary, some identify the SSS as a method of carriage goods or persons in relatively short distances.[92] In that regard, one can unequivocally state that the concept of "relatively short distances" is ambiguous and it needs to compare with another notion (like deep sea shipping which will be mentioned below) in order to be clarified.

Furthermore, some of them express the SSS as a modern way of coastal shipping.[93] The coastal shipping is identified as trade along the same coast or between the ports within the same country. That country in which sea transport is conducted has exclusive rights to operate sea traffic within its national borders.[94] In other words, the sea cabotage legislations which grant exclusive rights to the sovereign countries promote the domestic shipping, and the SSS emerged as a modern definition of the coastal shipping.

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[89] **Short Sea Shipping Define, Defend and Promote,** 2014, www.interferry.com/wp-content/uploads/Day2_SG1_Presentation_Lewis-Manning.pdf (13.12.2018), p.5.
[90] Ancor Suárez-Alemán, "Short Sea Shipping in Today's Europe: A Critical Review of Maritime Transport Policy", **Maritime Economics and Logistics, International Association of Maritime Economists (IAME),** Vol.18, Issue 3, p.333.
[91] A.C. Paixão and P.B. Marlow, "Strengths and Weaknesses of Short Sea Shipping", **Marine Policy** Vol.26, Issue 3, 2002, p.167-178.
[92] L. Henesey and M. Yonge, "Short Sea Shipping in the United States: Identifying the Prospects and Opportunities", **TRB 85th Annual Meeting 2006, p.16-32.**
[93] Deniz Öztürk *et al*, A General Framework for Short Sea Shipping, **GİDB,** Issue 9, 2017, p.60
[94] M. Igbokwe, Advocacy Paper for the Promulgation of a Nigerian Maritime Cabotage Law, 2001, http://www.mikeigbokwe.com (17.12.2018), p.1.

Diversely, some academics claim that the SSS covers both the national and international way of transport; therefore, the term cannot merely be described on the basis of global trade. For example, the EU perceives the concept of SSS in the broader sense while sea transport has overstepped the bounds of the national borders of each Member States.[95] From the EU's point of view, the SSS not only provides maritime transport between the ports in the Member States, candidate countries and EFTA countries but also includes the ports which have proximity[96] to the other ports situated within the EU.[97]

As a conclusion, even there are various attitudes regarding the explanation of the term, one can state that the SSS contributes the seaborne by eliminating the traffic congestion on roads especially on short distances, enhancing environmental performance and efficient transport.[98]

4.1.2. Deep Sea Shipping (DSS)

Along with the globalization of trade the deep sea shipping gains importance as a way of transfer products on intercontinental routes in the seaborne trade.[99] It can be stated that the DSS has emerged by virtue of global trade which also underlined the importance of international distribution.[100]

The explanations of DSS can be understandable on the basis of previous descriptions of the SSS as both are opposed terms. In this sense, the DSS refers to the maritime transport by crossing oceans and it transfer goods over the relatively short distances.

While the worldwide supply and demand movements can provide within the DSS, it competitively serves lots of markets as compared to the SSS.[101] In other words, the DSS maintains the free movement of products to overseas without struggling with the entry barriers.

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[95] Short Sea Shipping, https://www.ecsa.eu/sites/default/files/publications/ECSA_SSS_Download%201_0.pdf (15.12.2018), p.3.
[96] Marie Doueta and Jean François Cappuccillib, "A Review of Short Sea Shipping Policy in the European Union", **Journal of Transport Geography,** Issue 19, 2011, p.968–976.
[97] https://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Short_sea_shipping_(SSS) (17.12.2018).
[98] Francesca Medda and Lourdes Trujillo, Short-sea Shipping: An Analysis of its Determinants, https://www.researchgate.net/publication/248989077_Short-sea_shipping_An_analysis_of_its_determinants (19.12.2018), p.286.
[99] Gouvernal, Slack and Franc, Short Sea and Deep Sea Shipping Markets in France, https://www.researchgate.net/publication/240418476_Short_sea_and_deep_sea_shipping_markets_in_France (19.12.2018), p.98.
[100] Peter Dicken, Global Shift: Mapping the Changing Contours of the World Economy, London: Sage, 2003
[101] Dry Bulk Market: Shall we trade Short Sea or Deep Sea?, https://opensea.pro/blog/short-sea-vs-deep-sea (20.12.2018).

Through the DSS not only vast amounts of products can carry in one time but also the time in voyage can lower just because of the ships transfer the goods without stopping any other harbor before the destination port.[102]

On that sense, the DSS aims to achieve the efficient level of transport in long distances just like the SSS's positive effects on the short distance seaborne trade.

4.2. Whether the Transport Conducts by One or More Transport Modes

4.2.1. The Unimodal Transport

The unimodal transport refers to the carriage of goods that is conducted by only one mode of transportation through one or more carrier. Even there are many alternatives to transport products particularly, the road, railway, sea, and air, one of them can be used solely throughout the voyage.[103]

In sea transport, the carriage of goods from one port to another by a carrier is called unimodal. Besides, if the ship stops at a port which is different from the port of departure and final destination port, this type of transportation is also evaluated under the notion of the unimodal transport.

4.2.2. The Transmodal Transport

The transmodal transport ensures the movement of freight within the same mode of transport. Even though this type of transport does not commonly prefer by taking into account today's requirements in trade such as swiftness and efficiency, the purpose of transmodal transportation is to assure continuity during the journey.[104]

While the intermodal transport conducts between the modes, the transmodality refers to only one mode; thus the intermodality and intramodality have emerged as opposing terms.

[102] Henry C. Co et al, "A Continuous-Review Model for Dual Intercontinental and Domestic Outsourcing", **International Journal of Production Research,** Vol.50, Issue 19, 2012, p.5460.
[103] Çancı and Erdal, Uluslararası Taşımacılık Yönetimi Freight Forwarder El Kitabı 2, p.271.
[104] Rodrigue, The Geography of Transport Systems, p.112.

Regarding the maritime transport, this term refers to the shipment which performed on a single plan by the transport operator.[105]

4.2.3. The Multimodal Transport

In accordance with UNCTAD, the multimodal transport refers to the carriage of goods on the grounds of a multimodal transport contract[106] from a place in which the products are taken to the place of delivery.[107]

The multimodal transport can be described as a combination of different modes to carry freight within the worldwide having the objective of providing an optimum level of cost in trade.[108] In this sense, it aims to achieve the economies of scale in the long-distance travel.

Even the multimodal transport mainly defines as mentioned above; some scholars have different explanations by referring to the features of the notion and comparing it with other related terms as will be illustrated below. For instance, some scholars claim that the multimodal transport can be deemed as a substitute to the unimodal transport since the high volume of products can be carried through the long distances.[109]

Some of the studies state that there is no difference between the multimodal and combined transport hence these two terms are interchangeable and cover the same concept.[110] However, the only common feature is that both of the terms demonstrate the requirement of at least two modes has to be used in trade. The different characteristics of the combined transport will be explained later.

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[105] Aleksandr Kirichenko and Elena Koroleva, "Transmodal Shipment: Definition and Formulation of Optimisation Problems", **The 14th International Conference Reliability and Statistics in Transportation and Communication,** Latvia, 2014, p.102.

[106] Following the UN Convention on International Multimodal Transport of Goods, the transport operator is obliged to procure and perform the multimodal transport, in return of that he takes the payment of freight. See also: **United Nations Conference on a Convention on International Multimodal Transport**, https://unctad.org/en/PublicationsLibrary/tdmtconf17_en.pdf (21.12.2018), p.6.

[107] **United Nations Conference on a Convention on International Multimodal Transport,** https://unctad.org/en/PublicationsLibrary/tdmtconf17_en.pdf (21.12.2018), p.5.

[108] Aman Dua and Deepankar Sinha, The Multimodal Transportation: Research Trend and Literature Review, https://www.researchgate.net/publication/306250928_The_Multimodal_Transportation_Research_Trend_and_Literature_Review (23.12.2018), p.5.

[109] Bontekoning, Macharis and Trip, "Is a New Applied Transportation Research Field Emerging?—A Review of Intermodal Rail–Truck Freight Transport Literature", **Transportation Research Part A: Policy and Practice,** Vol.32, Issue 1, 2003, p.2.

[110] Dua and Sinha, p.3.

Another point of view is underpinned that the multimodal and combined transportation cannot be equivalent, because of the notion Multimodal represents the system itself rather than solely depicting the link between two different ways of a carriage.[111]

Under the general belief, many scholars have emphasized that the multimodal transport can be conducted in combination with two or more means of transportation. According to the point of view, multimodality refers to the mixture of various modes from the origin to the destination[112] whereas; another aspect indicates a process of moving goods door-to-door within a technical, legal and commercial framework.[113] While some scholars affirm that the different ways of transport linked in a sequence to move freights from the point of origin to the point of destination[114] others illustrate that several modes of transportation have to be involved during a single journey.[115]

As a conclusion, the multimodality in transport primarily refers to a method in which at least two different modes are bringing together and having the objective of reaching a sustainable transport. By another saying, the movement of goods with the combination of various methods (such as the road-rail or the maritime-road) not only supports to use the infrastructure more efficiently but also reduce the transport costs in an optimum level.[116]

4.2.4. The Intermodal Transport

Today, modern maritime transport is progressively integrated with the highway, railway, and airway modes as a requirement of intermodality rather than a standard carriage from port to a port.[117] Concordantly, the concept of intermodality becomes essential as well as its connection and differences between the multimodal transport.

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[111] Adib Kanafani and Rui Wang, "Measuring Multimodal Transport Level of Service", **University of California Transportation Center,** 2010, p.9.
[112] H. Min, International Intermodal Choices via Chance-Constrained Goal Programming Transportation Research, 1991, p.351-362.
[113] G. D'Este, "An Event-Base Approach to Modelling Intermodal Freight Systems", **Proceeding of 7th WCTR,** Vol.4, 1995, p.3-13.
[114] Frank Southworth and Bruce E. Peterson, "Intermodal and International Freight Network Modeling", **Transportation Research Part C: Emerging Technologies,** Vol.8, Issue 1-6, 2000, p.147-166.
[115] Jones, Cassady and Bowden, "Developing a Standard Definition of Intermodal Transportation", **Transportation Law Journal,** Issue 27, 2000.
[116] **Thematic Research Summary Multimodal Transport,** www.transport-research.info/sites/default/files/thematic-analysis/20150430_165442_15840_TRS13_fin.pdf (25.12.2018), p.28.
[117] T.C Başbakanlık ve Devlet Planlama Teşkilatı, **9. Kalkınma Planı Denizyolu Ulaşımı Özel İhtisas Komisyonu Raporu,** Ankara, 2007, p.1. See also: Başer, Deniz Taşımacılığı Ekonomisi, p.61.

First of all, the notion of the intermodal transport refers that the various modes have to be brought together in order to carry freight in a suitable manner. In other words, the intermodalism is conducted by having the objective of the optimal use of various modes of transport.[118]

Although the word "suitable" has many connotations, in that case, it mainly related to the swiftness of delivery, the safety of products and navigation, the handling and packaging requirements in the ports which are under the operational practices. Also, a suitable way of transport can be chosen regarding the protection of the environment and orientating the environmental policies.

Further, the intermodal transportation indicates that the movement of goods which will be provided within the same loading unit as containers during the carriage.[119] Even though the intermodality requires that the transfer has to be conducted more than one modes, the products will remain in the same transport units.

Despite the fact that both the intermodal and multimodal transport has in common regarding the combination of more than one modes of transportation; the number of contracts, the responsibility of the carrier and the advantages of each type has differentiated the two terms.

In the intermodal transport, the operators of each mode are responsible for themselves through individual contracts[120], whereas the responsibility in the multimodal transportation arises from a single contract. In other words, more than one carrier is under the obligation to conduct a single journey by signing individual agreements that are independent of each other regardless of the existence of different modes.[121]

Through the intermodal transport, the shipper has a chance to choose the carriers for each leg of the shipment by taking into account the price or service.[122] Therefore the shipper is more flexible as compared to the multimodal transport in which he can end the delivery at any point for any reason.

Nevertheless, in the multimodal transportation, there is one contract with the carrier which covers the whole journey regardless of the involvement of various modes. The single

[118] OECD, **Intermodal Freight Transport: Institutional Aspects,** 2001, p.12.
[119] Jason Monios and Rickard Bergqvist, **Intermodal Freight Transport and Logistics,** CRC Press, 2017, p.3.
[120] Rodrigue, **The Geography of Transport Systems,** p.112.
[121] ibid., p.113.
[122] Yuri Yevdokimov, **Measuring Economic Benefits of Intermodal Transportation,** 2000, https://www.researchgate.net/publication/242306981_Measuring_Economic_Benefits_of_Intermodal_Transportation1 (27.12.2018).

carrier who signs the contract does not have to conduct all services through the entire carriage modes; however, he will be legally liable for the entire process.

The multimodal transport has many advantages such as the sufficiency of one contract to tracking a shipment and the responsibility of one carrier to meeting the delivery requirements.

Hence, it can be stated that the distinction between the inter and multimodal transport exists on the grounds of the number of contracts and correspondingly the responsibility of the movement as mentioned before.

4.2.5. The Combined Transport

The combined transport mainly defines as the carriage of goods in one and equal loading unit or means of conveyance by using at least two different transport modes.[123] Another definition emphasized the elements of using the same loading unit throughout the journey and combination of more than one modes.[124]

The combined transport is a limited form of intermodal transportation[125] as the most part of a carriage is conducted by using a railway or seaway while the highway has to be used as short as possible during the journey.[126]

The means of transportation, terminals and the transport units are brought together in an efficient way; hence many benefits have emerged.[127]

For instance, costs and the time in transport operations will reduce. Moreover, the procedural requirements will ease as the number of transport documents decreases.[128] Thus, the swiftness in the carriage can be achieved through the combined transport.

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[123] Çancı and Erdal, **Uluslararası Taşımacılık Yönetimi Freight Forwarder El Kitabı 2,** p.272.
[124] **UNCTAD Implementation of Multimodal Transport Rules,** 2001, https://unctad.org/en/Docs/posdtetlbd2.en.pdf (26.12.2018), p.5.
[125] **UNECE Combined Transport and Logistics,** https://www.unece.org/fileadmin/DAM/trans/events/2014/EuroMed/EuroMed_2014_Presentation_09.pdf (26.12.2018).
[126] Çancı and Erdal, **Uluslararası Taşımacılık Yönetimi Freight Forwarder El Kitabı 2,** p.272.
[127] Branza Gratiela, "Economical Aspects Regarding Combined Transport in Europe", **Maritime University Annals,** Vol.24, Issue 16, p.179.
[128] Çancı and Erdal, **Uluslararası Taşımacılık Yönetimi Freight Forwarder El Kitabı 2,** p.274-275.

4.3. Whether the Continuity of the Transport Service

4.3.1. Tramp Shipping

The carriage of goods through the tramp shipping is conducted without having a specific schedule or route from any port to any port as the ships have operated in which the available demand exists.[129] Even though each voyage is planned individually in accordance with the type of cargo and the specific requirements of the load[130], it cannot contradict with the definition of tramp shipping as the planning are dedicated to each of the cargoes.

By another saying, the essential element in this sort of shipping is the occurrence of the freight; it is a flexible way of the carriage notwithstanding a schedule or itinerary which was planned before. Through the tramp shipping, the ships have carried irregular cargo such as petrol, coal or mineral ore which did not fit with the regular services.[131]

The main purpose of the tramp shipping is to carry as much as possible freight through the ports in a most efficient, timely and convenient manner.[132] By doing so the tramp operators search for the available options within the cargoes in order to maximize their profits from the carriage.[133] Therefore, one can inevitably state that the carriage cannot be conducted in a permanent way as the shipping schedule is related to the presence of freight.

4.3.2. Liner Shipping

Liner shipping envisages the carriage of goods within the regular routes and the fixed schedules. Under the function of liner shipping, the ships visit the ports regularly in accordance with the plan[134] which is profitable for themselves.[135]

The schedule is one of the essential factors in the liner shipping; hence, the vessels visit ports on a specific time basis. Another element is the planning of routes which can be specified for a region regarding the customer needs, that is also crucial for the effective liner shipping.[136]

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[129] Vilhelmsen, Larsen and Lusby, "Tramp Ship Routing and Scheduling - Models, Methods and Opportunities", **DTU Management Engineering,** 2015, p.1.
[130] Lane C. Kendall, **The Business of Shipping,** 5th edition, Springer, 1986, p.12.
[131] "The Tramp Shipping Market", **Clarkson Research Studies,** 2004, p.10.
[132] Kendall, p.12.
[133] Vilhelmsen, Larsen and Lusby, "Tramp Ship Routing and Scheduling - Models, Methods and Opportunities", **DTU Management Engineering,** 2015, p.914.
[134] Martin Dockray, **Cases & Materials on the Carriage of Goods by the Sea,** Routledge, 2004, p.6.
[135] Volker Windeck, **A Liner Shipping Network Design Routing and Scheduling Considering Environmental Influences,** Springer, 2012, p.79.
[136] Kevin Tierney, **Optimizing Liner Shipping Fleet Repositioning Plans,** Springer, 2015, p.9.

Through the liner shipping, huge amounts of products can be carried by crossing the oceans; thus, liner shipping contributes the expansion of the international trade.[137] The liner vessels mainly exist in the form of container or RORO ships which will be mentioned later.

5. THE CONTAINER SHIPPING

The container shipping, as a type of liner shipping, emerges a new way of packaging goods[138] to move them within the containers; hence the exchange between different transport modes in order to deliver the goods door-to-door become applicable in a suitable manner.

Also, the container shipping can be deemed as an industrialized and developed version of sea transport by responding to the technological changes in trade and demands of the people.[139]

The carriage is conducted through the containers which are designed in accordance with the international standards, namely the ISO (International Organization for Standardization) criterion. The criterion for the shape, size, and material of the containers can differentiate by taking the features of the freight into account.

The carriage within the containers mostly preferred as they can use more than one time and carry various kinds of products inside the same loading unit in a secure way without affecting the perils of the sea during the journey. In other words, this type of carriage is more reliable, brings less damage to the cargo, and provides more security compared to other forms of freight transport.[140]

While global transport policies promote the swiftness and in relation to that the door-to-door shipping gain importance, the container shipping meets that necessitates. The operations in the ports such as handling, storing, loading or unloading of the cargo can be achieved as fast as possible when the products are carried within the containers. Additionally, the delivery of the cargo from the port to the hinterland becomes effortless via the container shipping.[141]

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[137] Brouer, Karsten and Pisinger, **Optimization in Liner Shipping,** Springer, 2018, p.205.
[138] Mary R. Brooks, **Sea Change in Liner Shipping Regulation and Managerial Decision-making in a Global Industry,** Pergamon, 2000, p.4.
[139] Ateş, Karadeniz and Esmer, "Dünya Konteyner Taşımacılığı Pazarında Türkiye'nin Yeri", **Dokuz Eylül Üniversitesi Denizcilik Fakültesi Dergisi,** Vol.2, Issue 2, 2010, p.83.
[140] Brooks, p.4.
[141] Rodrigue and Notteboom, **Dry Ports and the Maritime Hinterland: Gaining Momentum,** 2011, https://people.hofstra.edu/Jean-paul_Rodrigue/downloads/PT50-04_2.pdf (29.12.2018).

Due to the fact that the container shipping has lots of benefits, it is commonly used through international trade. The container shipping does not only supports the transfer of goods between different transportation of goods in a convenient manner[142], but also serves the lower transportation costs.[143]

5.1. FCL (Full Container Load) Shipment

FCL shipment is a kind of container shipping in which a container is exclusively used only for the carriage of single products. By another saying, the container is not shared with other cargoes; each container is allocated to a single shipment.[144] Even the container is not entirely filled to the brim; it can be still preferable due to the advantages[145] of FCL shipment on the marine transportation.

For instance, the carriage in a shorter time period and the delivery of the goods on time can be achieved by using FCL shipment. As the container is allocated to the carriage of a specific cargo without shared with other cargoes, even the ship stops more than one port throughout the voyage the containers do not have to be opened and reworked on each port. Thus, the carriage can be conducted without consuming too much time on the ports for the port operations such as handling, and the costs are reduced[146] as the containers can be transferred easily to other transport modes such as a roadway or railway.

5.2. LCL (Less Than Container Load) Shipment

LCL shipment is a term which refers to the carriage of various goods in the same container, unlike the FCL shipment. In other words, each container is carried different products which have more than one consignee; therefore the goods are packaged in a consolidated way

[142] Chao, Yu and Hsieh, **Evaluating the Efficiency of Major Container Shipping Companies: A Framework of Dynamic Network DEA with Shared Inputs, www.elsevier.com/locate/tra** (30.12.2018), p.44.
[143] Xu and Itoh, "Density Economies and Transport Geography: Evidence from the Container Shipping Industry", **Journal of Urban Economics,** p.121.
[144] Cheong, Bhatnagar and Graves, "Logistics Network Design with Supplier Consolidation Hubs and Multiple Shipment Options", **Journal of Industrial and Management Optimization,** Vol.3, Issue 1, p.51-69.
[145]**Global Less-Than-Container-Load (LCL),** https://www.damco.com/~/media/files/damco/solution-concepts/lcl_solution-concept_.pdf (30.12.2018), p.1.
[146] **The Rippling Benefits of Origin Consolidation,** https://www.miq.com/wp-content/uploads/2014/06/MIQ_ORIGINCONSOLIDATION_WHITEPAPER.pdf (30.12.2018), p.2.

by sharing the same loading unit. When the ship arrived in the port of destination, the containers are unloaded in the custody of the customs officer and delivered to each of the consignees.

The importance of LCL shipment is increased in conjunction with the challenges of international trade such as the growing interest in e-commerce and the need for more frequent shipping. Hence, the carriage of different type of products which are subject of e-commerce to various consignees can be achieved efficiently via the FCL shipment.[147]

LCL shipment can be preferred when the goods are not sufficient to cover the entire of the container. Also, it enables to lower the warehousing costs in the case of the necessity to stock the products until accommodate an FCL shipment. Through the FCL shipment, the customers enjoy the faster delivery of the products to the destination port as the timing of the shipment is planned in an effective and transparent manner.[148]

6. RORO SHIPPING

6.1. RORO Shipping in General Aspects

RORO[149] transport is a type of liner shipping, indicates the carriage of goods through the vessels which are specifically designed to move wheeled cargo with cars, trucks, and trailers. In other words, the RORO ships are allocated to carry the goods within vehicles which can be moved by its wheels.[150] The term "RORO" refers explicitly to the feature of the goods which is the subject of the carriage, so the goods have the ability to move or ability to move with another vehicle.[151]

The RORO shipping also brings advantage to the carrier by simply rolling on and off the cargo from the port of loading to the port of destination in an efficient way.[152] Today it can

[147] Greg Knowler, "Less is More Changing Nature of Trade Increasing Demand for LCL Shipping", **The Journal of Commerce,** 2018, p.14.
[148] Greg Knowler, **Forwarders Offer New LCL Service to Meet Rising Demand,** 2018, https://www.joc.com/international-logistics/new-lcl-services-forwarders-jump-rising-demand_20180606.html (29.12.2018).
[149] The abbreviation of Roll on-Roll off. See also: **Glossary of Port and Shipping Terms,** www.seinemaritime.net/suports/uploads/files/Glossary%20of%20Port%20and%20Shipping%20Terms.pdf (26.12.2018), p.373.
[150] Murat Yorulmaz, **Deniz Taşımacılığı ve Deniz Sigortaları,** İstanbul, 2009, p.62.
[151] Burak Çakaloz and Soner Esmer, "Ulaştırma Sistemleri İçinde RO-RO Taşımacılığının Önemi", **5. Ulusal Lojistik ve Tedarik Zinciri Kongresi Bildiriler Kitabı,** Mersin, 26-28 May 2016, p.90.
[152] Eivind Wathne, "Cargo Stowage Planning in RORO Shipping Optimisation Based Naval Architecture", **NTNU Trondheim Norwegian University of Science and Technology Department of Marine Technology,** 2012, p.4.

be deemed that the extension of RORO shipping derives from the easiness of shifting cargo from land to sea or vice versa.[153]

The idea behind the RORO shipping emerges as a requirement of the integration between the highway and seaway[154] to provide fast and efficient door-to-door service.[155]

The fact that the RORO transport encourages the short sea shipping throughout various countries by easing the international trade and flowing of goods speedily, the transport policy that the EU aims also coincides with that fact. In this regard, The White Paper published by the EU in 2001 which implies the future transport policies for the Union by focusing on the importance of intermodal transportation. Accordingly, the combination of different transport modes extends sea transportation within the Union, especially the short sea shipping and RORO shipment become prominent.[156]

The tendency of using RORO ships in short distances is quite active within the Union[157] namely, in the Baltic Sea, the North Sea and the Aegean Sea as it can be observed by the number of routes and the firms which engage in the RORO transport.[158]

The RORO shipping in Turkey is evaluating gradually[159] by considering the fact that the geographical position of the country as a peninsula.[160] The geographical importance of the country is caused the emergence of the RORO transport, which envisages the combination of sea and roadways during the carriage, as a choice to the direct road transport.

The RORO shipping not only preferred widely in the trade and carriage at a national level but also in the international trade. The number of routes which departs from Turkey and the trade volume through the RORO ships mostly tend to rise through the years as in parallel with the increasing demand in the RORO shipping industry.[161]

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[153] Louise Andreasson and Shan Liu, "European RORO Short-sea Shipping – What can Ship Operators do to Unleash its Potential? Case studies in Norway and Sweden", **University of Gothenburg School of Business, Economics and Law,** https://gupea.ub.gu.se/bitstream/2077/22601/1/gupea_2077_22601_1.pdf (03.01.2019), **p.1.**
[154] Kadir Sarıöz, **Gemi İnşaatı Ders Notları (Gemi Ön Dizaynı),** 1st edition, İTÜ, 1995, p.1558.
[155] A. P. Casaka and P. Marlow, "The Impact of the Trans-European Transport Networks on the Development of Short Sea Shipping", **Cardiff Business School Maritime Economics and Logistics,** Vol.9, p.318.
[156] RO-RO Transportation in Turkey, **Marine and Commerce,** 2008, p.61.
[157] The Master Plan and The Feasibility Study on the Establishment of an Asean Roll-On/Roll-Of (RO-RO) Shipping Network and Short Sea Shipping Final Report, **Literature Review and Field Surveys,** Vol.1, 2013, p.2-21.
[158] Seyfettin Engin Hülagü, **RO-RO Taşımacılığı ve Türkiye'deki Uygulamalar,** 2007, p.24-25.
[159] The expected number of vehicles which will be the subject of the RORO transport is increasing within years. See also: Çakaloz and Esmer, p.93.
[160] ibid. p.93.
[161] Hülagü, p.63-73.

6.2. The Elements of the RORO Shipping

6.2.1. The Features of a RORO Ship

The design of RORO ships includes many factors in order to operate the transportation service in a more effective manner. First of all, the lanemeter[162] is one of the important points while planning the vessel having high-capacity of an area for cargoes.

Generally, a RORO ship can be identified by approximately 3200 lanemeters, and that equals to the carriage of about 440 containers or 850 containers in the case of carrying on double-stackers.[163] Today, these numbers have changed remarkably in correspondence with the increasing demand from the market, thus; the vessels have already designed which have 8500 container capacity, and the ships which can carry 12000 containers is still under discussion.[164]

Additionally, the amount of cargo carried on the deck is also crucial as the main goal of the carriage is to manage to carry the highest possible amount of products.[165] The carriage on the freeboard deck also increases the number of cargoes carried on the vertical extension of the ship.[166]

The designing of the RORO ships both brings additional costs and requires much time as the period of construction is detailed because of its features which mentioned before. The losses in cost and time can only be amortized by operating the ship regularly.[167] Even the depreciation of the RORO ships is envisaged around 10-15 years, most of them can be used in transportation service at least 20 years which is a sufficiently enough time period to amortize the costs during the construction of the ship.[168]

6.2.2. The Types of Vehicles Carried

RORO ships can carry various types of cargo which are able to move via the vehicles, also known as a wheeled cargo, such as trailers, semi-trailers, trucks, and cars. The loading and unloading processes become easier as these vehicles are able to move on their wheels or able

[162] The lane meter is described as an indicator of the capacity of cargo in a RORO car carrier. See also: **Glossary of Shipping Terms.**
[163] Stefan Krüger and Thomas Stoye, **First Principle Applications in RORO-Ship Design,** www.ssi.tu-harburg.de/doc/webseiten_dokumente/ssi/veroeffentlichungen/Prads04_FirstPrinciple.pdf (04.01.2019).
[164] ibid.
[165] ibid.
[166] ibid.
[167] J. Telle, "Design Of RO-RO Ships and Ferries", **DNV Paper Series,** 1987.
[168] ibid.

to carry with tow trucks. Moreover, the tracked vehicles and graders can be transported as they have their own drive system which enables the vehicles to move comfortably.

Also, the carriage of cars and the passengers over the short sea or oceanic distances can be achieved by RORO shipping. Even cars have different sizes; they are commonly transferred by the RORO ships.[169]

The ships which are allocated to the carriage of passengers in short distances have sufficient equipment to carry the passengers' cars. In other words, this type of vessels have a facility to carry passengers and cars within a ship, and they are alias passenger ferries or ROPAX vessels.[170] The upper decks are designed for the passengers whereas the cars are carried on the lower floors.

Additionally, the carriage of containers within the trucks or trailers can be transferred by RORO ships also called as ConRO vessels. While the containers are carried upper decks and the wheeled vehicles are located on under decks.[171]

The vehicles are positioned on the ship in accordance with the principle of "first-in-last-out" which indicates that a vehicle which is loaded at first into the vessel has to be unloaded later.[172] The planning of loading requires that the vehicles have to follow each other sequentially on the port of call while disembarking the ship.

Consequently, the RORO shipping becomes more popular while different types of vehicles and cargoes can be transported within the vessel. Even there are many capacity inside the ship in order to facilitate the handling and movement of loads, and this can be deemed as a drawback; the RORO vessels are still able to carry huge volumes of cargo compared to its weight.[173] On that sense, the preference of RORO ships is growing from time to time while the benefits of RORO shipping override such shortcomings.

6.2.3. The RORO Terminals and the Operations

Principally, the RORO terminals can be defined as an environment in which the main operations of the cargoes are conducted in conjunction with the flow of information and

[169] S. C. Misra, **Design Principles of Ships and Marine Structures,** CRC Press, 2015, p.326.
[170] ibid., p.326.
[171] ibid. p.326.
[172] ibid. p.326.
[173] ibid., p.327.

planning of each procedures.[174] The RORO terminals can also be identified as a place in which the ships carry the trucks, semi-trailers, or other types of rolled cargo as well as move the ferries and cars.[175]

The RORO terminal operations described below are quite active during the export, import or transshipment procedures to making more easier the carriage of products.[176] The importance of the efficiently-working operations in the RORO terminals can be realized while locating the products into the ship, transferring vehicles from a vessel to another one, examining the documents which are related to the carried products, and any procedures that required to the carriage.

6.3. The Benefits of the RORO Shipping

The RORO shipping is commonly preferred in trade either national or international level, due to its advantages on the matter of transportation. Firstly, speediness of the carriage can be provided by RORO shipping[177] while the goods load to a vehicle one time during the journey and moves to the port of destination.[178] The swiftness in the port operations, especially in the loading procedures of the cargo, affect the overall speediness of the carriage. In other words, if the port operations can be conducted in an efficient and harmonized way, the time of the voyage from departure to the destination will lower. As the RORO shipping is a way of the carriage of wheeled cargo, the port operations related to the cargo will become easier. The swiftness in shipping also positively affect the economy, while the costs of the carriage is reduced.[179] The economic benefits can be seen in many aspects mainly in the matters of decreasing the transport expenses, lowering the depreciation of the road vehicle such as cars, trucks, and trailers and expanding the economic life of road networks.[180]

Besides, the traffic volume on the highways and the accident risk can be reduced because of the RORO shipping envisages the combination of road and sea transport during the

[174] Raffaele Iannone *et al*, **Proposal for a Flexible Discrete Event Simulation Model for Assessing the Daily Operation Decisions in a Ro–Ro Terminal,** p.31.
[175] Morales-Fusco, Saurí and Spuch, **Quality Indicators and Capacity Calculation For RoRo Terminals,** Routledge, 2009, p.698.
[176] Iannone, p.32.
[177] J. Sullivan, **The Practice of Professional Shipping Business,** The Norwegian Shipping Academy, 1978.
[178] Cenker Çoban and Eda Turan, "Marmara Denizinde Ro-Ro Taşımacılığı Birim Maliyetlerinin İncelenmesi: Ambarlı – Bandırma Hattı Örneği", **GMO SHIPMAR,** Issue 211, 2018, p.64.
[179] **RO-RO Gemileri Dizaynındaki Özellikler,** Gemi İnşaatı Teknik Kongresi, 1989.
[180] Sullivan, 1978.

journey. While the drivers' of the cargo trucks no more transfer the goods by solely themselves and have a chance to rest during the part of sea carriage by RORO ships, the road accidents which derive from the long working hours will be reduced. Thus, through the RORO shipping, the cargoes can be moved in a more reliable and rapid manner compared to the land route when the highway is preferred as a unimodal mode of transport.[181]

Additionally, the cargoes can be protected from the risks which derive from the seawater throughout the journey as they loaded under a deck in the RORO ships. The carriage of vehicles in the deck of the vessel is the best way to secure the cargo while the floor of the ship is windy and watertight.[182] The damage risk of the cargo is reduced substantially because of the loading and unloading processes of products is conducted within the vehicles. In other words, the loads are directly driven or towed on and off the ship by using the ramps of the vessel or shore-based slopes.[183]

As a conclusion, the tendency of transport by RORO ships become more common from time to time because of its various beneficial effects as mentioned before. The evaluation and success behind the RORO shipping mainly derive from the ability to integrate different modes of transport and to conduct the operations and the whole voyage speedily.[184] The reliable and secure transport of goods from point of departure to the end of destination can be achieved by RORO shipping in a cost and time friendly manner.[185]

6.4. The Importance of the RORO Shipping

Through the RORO shipping, the swiftness in the carriage as well as the port operations are achieved while the products are carried within the vehicles and securely located in the ship during the voyage. Today, the swiftness in trade, especially in the transport sector emerges as a distractive factor for the companies. The time-reduction carriage also decreases the costs on the companies. As the RORO shipping is preferable due to such benefits, it is necessary to assure the maintenance of fair competition in RORO.

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[181] ibid.
[182] **Auto Shipping: RORO Vs. Container — Which is Better?,** https://www.universalcargo.com/auto-shipping-roro-vs-container-which-is-better/ (01.10.2018).
[183] **Roll-On Roll-Off (RO-RO) Ship and Dock Safety,** 2010, https://www.osha.gov/Publications/3396roll-on-roll-off-ship-dock-safety.pdf (12.10.2018), p.5.
[184] **IMO and RORO Safety,** 1997, www.imo.org/en/OurWork/Safety/Regulations/Documents/RORO.pdf (15.10.2018), p.1.
[185] S. Yıldırım, "RO-RO Taşımacılığında Yer Seçimi Problemine Yönelik Bir Çözüm Geliştirilmesi ve İstanbul İli İçin Uygulanması", **Yıldız Teknik Üniversitesi, Fen Bilimleri Enstitüsü,** 2006.

The primary purpose of the competition law can be envisaged in the transport sector as providing a reliable and rapid manner of a carriage to the users by reducing the costs as much as possible. In other words, the cost and time friendly transportation is a reason of preference for the companies which wish to conduct their businesses in the transport sector. Therefore, the degree of competitiveness is envisaged by the rules and accordingly with the case law both in the EU and Turkey. The competition rules, which will be mentioned in a detailed way in the next chapter, mainly have the purpose of providing a fair degree of competition between the players in a marketplace, and ultimately aiming of consumer welfare.

Firstly, the anti-competitive behaviors of the firms which actually or potentially affect a competition environment are eliminated which will be explained briefly in the next chapter. For instance, the tacit collusion between the shipping companies based on information exchange and thereby determination of their competition strategies may have adverse effects on the marketplace, namely in the maritime transport.

Secondly, the abusive behaviors of a firm which have the dominance are prevented in order to provide that the rivals are able to conduct their businesses in an efficient way. For instance, the pricing strategies of the dominant firm might be detrimental to its competitors. The different pricing strategies for the same service cannot be acceptable in principle; due to the discriminatory pricing have negative effects on many firms. In a competitive environment, it is expected that the quality of the services can be perceived in conjunction with the price that one has to pay to obtain the service. Therefore, it can be stated that if the transport services are identical on the grounds of route, day, and time of the voyage, the substantially different prices to the same quality level of services cannot be fair under the notion of competition.

Hereunder, the other types of competition breaches will be explained with the related Articles in EU and Turkish law.

CHAPTER II: THE COMPETITION LAW

1. THE ANALYSIS OF THE COMPETITION LAW

1.1. The Notion of Competition

The competition can be described as a rivalry between the firms with the aim of providing benefit to the consumers.[186] This notion has emerged in conjunction with the increasing importance of the liberal economy while many countries were adopting the liberal economic system.[187] The notion of free competition is an essential element of the liberal economy as the efficient use of resources, the price depression, and the promotion of innovation can be achieved in a competitive market.[188] Thus, not only the economic progress is provided, but also the consumers take advantage of this development in the economy.

Moreover, the notion of competition refers to a marketplace in which the sellers and buyers come together by considering their interests in the market.[189] The seller desires to price their products as high as possible to make a profit from their business activities whereas the buyers want to purchase more products at lower prices. Therefore, the determination of the price emerges as a contradiction between the two sides.

The competition between the sellers in a marketplace leads to lowering the prices or decreasing the costs of a product. The first strategy emerges as a pressure for the sellers to conduct their businesses in a competitive field. The second one not only decreases burdensome on the buyers to counterbalance the costs but also forces the sellers to use more effective steps to produce a product. The differentiation of a product from the others in a marketplace can be achieved by taking the innovative steps which lead to the promotion of its quality.

It can be stated that each entrepreneur has a chance to launch its products or services by taking innovative steps through the notion of free competition. Thus, they evaluate the entry to and expansion in a new market as well as provide their target customers better and cheaper options compared to their competitors. Today, the advertising strategies of the producers to gain profit are directly capable to affect the market shares, selling volumes and profits of the firm's

[186] Richard Whish, **Competition Law,** 6th edition, Oxford, 2008, p.3.
[187] Yılmaz Aslan, **Rekabet Hukuku,** 2nd edition, Ekin, 2001, p.1.
[188] ibid., p.1.
[189] Morit Lorenz, **An Introduction to EU Competition Law,** Cambridge, 2013, p.3.

own.[190] The progress in the competitive field directly affects the consumers as they meet their needs in lower prices and good quality. On that sense, the competition helps the interests of producers as well as the consumers.

1.2. The Objectives of Competition Law

The competition law regulates various industries with an objective of underpinning and preserving the process of competition. When the purposes of competition law are achieved, the economic efficiency is increased.[191] The concept of workable competition emerges as an important objective of competition law that have to be reached. In order to achieve workable competition, many conditions have to be met.

Firstly, any businesses have to enter the marketplace without facing the obstacles. As contrary to this, any firm is able to remove freely from the market. In this case not only the actual competition is protected but the potential competition is preserved.[192]

Another condition is that the elimination of any practices which are restricting, distorting, or preventing competition between the competent as it is harmfulness for the workable competition. Moreover, controlling the behaviors of the firms which have a dominance is required while there is a risk for the marketplace, namely the abuse of a dominant position may emerge. Though the dominance of a firm cannot be deemed illegal under the competition law, however, the company's economic behaviors which may trigger the abusive practices by using its dominance have to be eliminated in order to achieve a workable competition.

Even the elimination of competition infringements is beneficial for the rivals that might affect from the anti-competitive practices in the marketplace, the main purpose of competition law is to ensure the competitive environment working effectively.[193] The protection of the rivals who cannot meet the conditions of a competitive environment substantially leads to the competition not functioning properly. Therefore, the elimination of a component which is not

[190] Gary M. Erickson, **Dynamic Models of Advertising Competition,** 2nd edition, Springer, 2003, p.1.
[191] Ali Cenk Keskin, **Uluslararası Rekabet Hukuku,** 1st edition, Onikilevha Yayıncılık, 2016, p.52.
[192] Erdal Türkkan, **Nasıl Bir Rekabet Hukuku Vizyonu Cilt I,** 1st edition, Ankara: Rekabet Kurumu, 2009, p.16.
[193] ibid., p.354.

able to string along with the needs of competition is a natural result of a competitive environment.

The rivals which are economically influential in the marketplace directly affect the variety and the quality of the products in a positive way. Also, the producers have forced themselves to take innovative steps to meet the needs and wants of the consumers. The existence of various options in supply and demand results to make choices which fit each buyer and seller. Overall, in conjunction with all of these facts the social welfare is improved as an ultimate desire of the competition law.[194]

1.3. The Benefits of the Competition Law

The process of competition is beneficial for both the producers and the consumers. Some of the beneficial effects can be directly perceivable by consumers such as lower prices, high quality, more innovation, and more options for the consumers. But, some of the effects can only be seen as a secondary result while they are not as solid as the former ones.[195] The competitive environment promotes the equality of opportunity and freedom of enterprise[196] whereas social welfare has emerged as a secondary result in conjunction with the improvements in competition. The efficiently working competition has to be achieved in order to provide consumer welfare as a subsequence of the perfect competition.[197]

1.3.1. The Economic Aspects

One of the essential results of the competition enables to buy products or services at lower prices. The prices can be decreased as long as they bear the costs and it can be provided in three ways. Firstly, the competitive pressure forces companies to lower their profit margin which means that the businesses are not able to convert their resources into profits efficiently.[198] Additionally, the new firms which entered the market cause the increase in supply, hence the prices decrease. Lastly, through the competition pressure, the companies reduce their costs as

[194] ibid., p.18.
[195] ibid., p.23.
[196] Aslan, p.2.
[197] Whish, p.4.
[198] Neil Kokemuller, **What Does a Low Profit Margin Mean?,** 26 September 2017, https://bizfluent.com/info-12101301-low-profit-margin-mean.html, (09.01.2019).

the changes in the costs and prices affect each other. The cost reduction can be achieved while increasing the efficiency of the labor force and procurement the inputs in lower values.[199]

However, the price competition is changeable regarding the various marketplaces; therefore, the lowering of prices cannot be possible in each case. In other words, the effect of competition to lower the prices is easier under the higher price flexibility.[200] The potential to decrease the costs is much possible while the products can be substituted.

Another economic result of the competition concerns about the efficient allocation of resources, while the sources such as the raw material, labor force, and the capital are limited; therefore, they have to be used most efficiently through the manufacturing process.[201] When the manufacturing of a product is increased, another production has to be decreased because of the fact that the sources are not limitless. Thanks to the competition the manufacturing process is conducted by considering the needs of consumers as well as expanding the producer's profits.[202]

Moreover, the competition has underpinned the utilization of innovative technologies while the key to success in a competitive market is to reduce the costs. For this reason, the companies desire to find new manufacturing technologies which gain themselves more profit compared to their rivals and increase their market share.[203]

1.3.2. The Social Aspects

The truly-working competition has many positive effects on consumers as well as the companies. The elimination of anticompetitive practices in the marketplace grants right to consumers while they can meet their needs within many options in high quality. Thus, consumers have an active role in the market by using their right of choice, and this leads to the importance of consumer as well as the protection of consumer rights.[204]

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[199] Türkkan, p.23.
[200] ibid., p.23.
[201] Aslan, p.3.
[202] Whish, p.5.
[203] Aslan, p.3. For this reason, the agreements which limit the innovation are deemed as an infringement to the competition. On the other hand, the agreements which based on a cooperation between the firms in order to promote the research in technology is underpinned under the competition law.
[204] Aslan, p.5. The competition policies underline the notion of consumer protection. Even the general rule is to eliminate the competition infringements; some anticompetitive practices can be acceptable under the competition law as they provide benefit to the consumers. See also: Article 5 Act no 4054 on the Protection of Competition dated December 7, 1994. See also: Article 101(3) TFEU.

The competitive environment promotes high quality in goods and services by taking the consumers expectations and wants into account. If there is no competitive environment, the producers do not force themselves to produce better products or provide better services.[205] Thus, the high quality in products and services emerges as an indispensable factor for the rivals. Even though increasing the quality brings more burden to the companies financially, if the consumer is satisfied enough with the enhanced version of the product or service, it is possible to persuade the customer to pay more.

Also, the competition has many effects in favor of the producers. In a broad sense, the advantages of competition for the consumers are acceptable for the producers while each producer has to buy intermediate goods in order to manufacture its final product.[206] While the companies desire to increase their trade capacity and market share, they challenge not only themselves but also the rivals to take innovative steps and upgrade their businesses.[207] Thus, the strong rivals in a marketplace improve the economy as well as the social welfare.

1.3.3. The Political Aspects

The free competition can be deemed as a base for the idea of democracy regarding the political attitude. The philosophy of democracy envisages granting rights to individuals in order to have the right to comment on any issues that somehow relate to them. The reflection of this philosophy can be seen in a competitive environment while consumers enjoy their rights to make choices in financial issues and shape the economy. In other words, the consumers have a determinant role as they affect the output of the firms by their demands and affect the prices via the bargaining power.[208]

On the contrary, the choices of the consumers and their ability to shape the market in accordance with their demands will possibly disregard in a market in which the anticompetitive practices exist. The monopolistic structures in the economy will influence politics as well. While the monopolies being active on the economic field, this power leads to the monopolization in political aspects.[209]

[205] Türkkan, p.24.
[206] ibid., p.25.
[207] Michael E. Porter, **On Competition,** Boston: Harward Business Review, 1998, p.155.
[208] Aslan, p.7.
[209] ibid., p.7.

Moreover, free competition is assured many rights to regulate the competitive environment for the benefit of consumers, entrepreneurs, and companies. There are no entry barriers in which the free competition is provided. Any new company or individuals can start a business without dealing with the obstacles to enter a market where the competition is working efficiently.[210]

The restriction of the rights which grants to the consumers or companies such as the right of choice or freedom of trade has also deemed an infringement under the notion of competition. Therefore, the restriction of the rights cannot be accepted, and they prevented in order to preserve the competitive environment.

2. THE HISTORICAL DEVELOPMENT OF THE COMPETITION LAW

2.1. The Developments in the European Union

The grounds of the competition can be founded in the Rome Treaty[211] especially in the articles that regulate the fundamental principles. The basis of the European competition policy is identified in the Treaty[212] through the related provisions[213] by emphasizing the elimination of restrictive agreements and the prevention of abusive practices of the dominant firms. As the roots of the competition policy in the Union derives from the Rome Treaty, it can be deemed as an economic constitution[214] in which the financial purposes and the main principles are established via the provisions of the Treaty.

In the late '90s, the EC Treaty[215] has regulated the practices that might lead to a monopolistic power and abusive behaviors of a dominant firm which were incompatible with the free competition just like ruled in the Rome Treaty. These subject matters of the EU competition policy will respectively evolve to Article 101 and 102 in TFEU[216] in the late 2000s.

[210] ibid., p.7.
[211] Giuliano Amato, **Antitrust and the Bounds of Power,** Hart Publishing, 1997, p.43.
[212] The treaty dated 25 March 1957 also known as creating the European Economic Community which is the first step of today's European Union.
[213] EEC Treaty Article 85 et seq.
[214] Wolf Sauter, **Competition Law and Industrial Policy in the EU,** Oxford, 1997, p.32.
[215] Treaty establishing the European Community (Nice consolidated version) Official Journal C 325, 24/12/2002 P. 0033 – 0184 / Official Journal C 340, 10/11/1997 P. 0173 - Consolidated version.
[216] Consolidated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012, p. 47–390

The determination and control of the monopolistic power in the Union, namely the cartel policy has consisted of three main steps.[217] Firstly, the Directorate General IV starts prosecution against the potential cartel members in the case of there is a suspicion of infringement Article 81 of the EC Treaty. Secondly, the Commission inflicts administrative punishments on the firms when the cartel presence is proved. Lastly, the members of a cartel are able to submit an appeal to the Court of First Instance[218].

In the late 2000s, the application of cartel policy within the Union remained the same in general terms; however, the individuals are encouraged to challenge the cartel issues behind the courts by launching legal proceedings against the suspected companies in order to demand their losses which derive from the cartel agreement.[219] Even the Commission showed its intention to eliminate competition infringements in a more effective manner, the reality did not meet this expectation because of the high legal service fees, lengthiness of the legal procedures, and the difficulty to prove the actual losses.[220]

Also, there was a change of the institutions, namely the Directorate General for Competition (DG COMP) and the General Court[221] replaced their predecessors respectively.[222]

On the national level, the application of cartel policy requires that the shared competence between the Commission and the National Competition Authorities (NCA) is essential[223] as the modernization EU competition policy necessitates the decentralization[224] of competencies.[225]

Today the cartel enforcement on the national level is conducted in conjunction with the decentralization process as the NCAs are under the obligation to apply Article 101 TFEU in harmony with their national competition laws. For this, the information exchange and cooperation[226] between the Union and national levels play an essential role.

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[217] Dzmitry Bartalevich, **EU Competition Policy and U.S. Antitrust: A Comparative Analysis,** European Journal of Law and Economics, Vol.44, Issue 1, 2017, p.96.
[218] Today known as the General Court.
[219] ibid., p.97.
[220] ibid., p.97.
[221] Until the entering into force of the Lisbon Treaty, the General Court was called as Court of First Instance. See also: Paul Craig and Gráinne de Búrca, **EU Law Text, Cases, and Materials,** 6th edition, Oxford, p.59.
[222] Bartalevich, p.96.
[223] ibid., p.96.
[224] Regulation 1/2003 para 3 and para 4, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1–25
[225] Laurent Warlouzet, "The Centralization of EU Competition Policy: Historical Institutionalist Dynamics from Cartel Monitoring to Merger Control", **Journal of Common Market Studies,** Vol.54, Issue 3, 2016, p.725.
[226] The cooperation in competition policy requires the harmonization of the Member States' domestic laws with the Union. See also: Andrew T. Guzman and Alan O. Sykes, Research handbook in International Economic Law, Edward Elgar Publishing, 2007, p.439.

Throughout the historical developments of the Union's competition policy, there were various approaches regarding the assessment of an abuse of a dominant position. In accordance with the first view which is also called a dominance-based approach, dominance is defined by the Commission in accordance with the volume of the market share of a firm. Hereunder, the firms which hold at least 40% of the overall market share were deemed dominant.[227] The firm which has a market share above the threshold is considered and treated differently compared to its rivals.[228] In other words, the dominant companies are under a special responsibility, and their economic behaviors are analyzed in a more detailed way in order to examine whether its practices are incompatible with the competition law.

The second method, also known as effects-based approach is applicable today and states that the dominance of a firm cannot be per se illegal under the competition law; however, there is a potential to foreclosure the market to its rivals which is considered as an infringement of free competition.[229] The dominant firm has to engage in abusive practices in order to maintain or strengthen its position in the marketplace.

It can be concluded that the second approach requires more economic analysis by concentrating on the effects of a dominant firm's behaviors. Even though the thresholds are vital to determine the dominance just like being in the former approach, it is not a sufficient condition pro se. The effects of dominance can be observed when the dominant company is able to behave separately from its competitors.[230] In other words, it is essential to ascertain that the abuse of dominance has actual or potential anticompetitive effects on the marketplace.

2.2. The Developments in Turkey

The fairly-working competition in the Turkish economy has started to gain importance in the perspective of aiming full membership of the European Union.[231] The association

[227] Daniel J. Gifford and Robert T. Kudrle, "Antitrust Approaches to Dynamically Competitive Industries in the United States and the European Union", **Journal of Competition Law & Economics,** Vol.7, Issue 3, 2011, p.716.
[228] Bartalevich, p.103.
[229] ibid., p.102.
[230] ibid., p.103.
[231] Türkkan, p.19.

agreement[232] between Turkey and EU, envisages the harmonization and implementation of whole national law with the EU level as well as the competition policy.[233]

The notion of international competitiveness has emerged as one of the main determinations of a country's economic welfare in conjunction with improvements in Turkey-EU relations.[234] The international competitiveness can be described as a production potential with high income and a full employment level, which enables a country to compete with others on the elements of price, quality, the reliability of a product and delivery on time as well.[235]

Even the roots of the Turkish competition policy are based on close relations with the EU, the legal basis of the Turkish competition regime has emerged with the adoption of Law on the Protection of Competition and the establishment of Turkish Competition Authority respectively.[236] The Competition Authority established as a regulatory organ to assure the implementation of competition rules and business affairs by the actors of the marketplace ultimately in favor of the consumers.[237]

The Turkish Competition Law[238] is arranged in the light of EU acquis[239] and case law.[240] The purpose of the Turkish competition policy mainly covers the harmonization of economic rights and freedoms with global standards as well as imposing sanctions to the competition infringements.

For instance, the assurance of freedom of enterprise is provided by the competition rules. As the Turkish Constitution[241] envisages the elimination of monopolistic powers and cartels[242] which threatens the effective-working competition environment, these objects can be achieved

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[232] The agreement dated 12 September 1963 establishing an Association between the European Economic Community and Turkey. See also: trade.ec.europa.eu/doclib/docs/2003/december/tradoc_115266.pdf (18.01.2019).
[233] Ayşe Mumcu and Ünal Zenginobuz, **Competition Policy in Turkey,** 16 November 2001, www.econ.boun.edu.tr/content/wp/ISS_EC_01_17.pdf (15.01.2019).
[234] Yenal Kesbiç and İbrahim Tokatlıoğlu, "Uluslararası Rekabet Gücü Ölçüm Problemi ve Önemi: Türkiye için bir Model Denemesi", **Rekabet Düzenlemeler ve Politikalar Kongresi, Muğla Üniversitesi,** 25-26 September 2003, p.77.
[235] ibid., p.78.
[236] Umut Aydın, "Between Domestic Factors and the EU: Explaining the Emergence of the Turkish Competition Regime", **The Antitrust Bulletin,** Vol.57, Issue 2, 2012, p.303.
[237] Tolga İşmen, **A Critical Assessment of Competition Policy in Turkey,** turkishpolicy.com/images/stories/2003-03-economyreloaded/TPQ2003-3-ismen.pdf (19.01.2019).
[238] Act no 4054 on the Protection of Competition dated December 7, 1994.
[239] For instance, Article 4 and Article 6 Law on the Protection of Competition is which regulates the decisions and practices that restrict the competition, and the abuse of a dominant position is equivalent to Article 101 and 102 TFEU respectively. See also: www.mevzuat.gov.tr/Metin.Aspx?MevzuatKod=1.5.4054&sourceXmlSearch=&MevzuatIliski=0 (15.01.2019).
[240] Ayşe Odman Boztosun, "Türkiye İçin Nasıl Bir Rekabet Mevzuatı ve Uygulaması? Rekabet Kurumu İçin Yeni Açılımlar", **Rekabet Hukukunda Güncel Gelişmeler Sempozyumu- VII,** Kayseri, 17-18 April 2009, p.72.
[241] Constitution of the Republic of Turkey, The Constitution was adopted by the Constituent Assembly on October 18, 1982 to be submitted to referendum and published in the Official Gazette dated October 20, 1982 and numbered 17844; republished in the repeating Official Gazette dated November 9, 1982 and numbered 17863 in the aftermath of its submission to referendum on November 7, 1982 (Act No. 2709)
[242] Article 167 Constitution of the Republic of Turkey.

by the competition rules.[243] In this case, the Competition Authority is obliged to take necessary measures and impose sanctions in order the prevent the incompatibilities against the competition conditions.

In conclusion, the harmonization of Turkish competition policies with those of the Union in the framework of the association agreement can be achieved both thanks to the duties in which the Competition Law is envisaged and through the enforcement of these rules by the Competition Authority.[244]

3. THE ANALYSIS OF ARTICLE 101 TFEU

3.1. Article 101(1)

Article 101 TFEU mainly deals with the anti-competitive behaviors that derive from the cartels.[245] In this regard, any agreement, decision, or concerted practices become automatically void as long as they have adverse effects on trade between the Member States. The main purpose of Article 101 is to eliminate the economic behaviors which may negatively influence the competitive environment by restricting, distorting or preventing the competition. The practices of the firms have solid negative impacts on the efficiently working competition as well as the object of the firms.

In the first paragraph of Article 101, the behaviors that incompatible with the competition are listed. The list illustrates what kind of behaviors are deemed as an infringement under the notion of competition. Since the list is not exhaustive, Article 101 has to be analyzed in an extensive way to comprehend the logic behind it.

3.1.1. Undertakings

The undertaking as the subject of the competition infringements is not defined under Article 101.[246] However, its definition holds a critical role to challenge the behavior of any entity under the scope of Article 101. The perception of EU courts and competition authorities facilitate to determine the undertakings. While the purpose of Article 101 is to catch

[243] https://www.rekabet.gov.tr/en/Sayfa/About-us/turkish-competition-authority (17.01.2019).
[244] https://www.rekabet.gov.tr/en/Sayfa/About-us/turkish-competition-authority (17.01.2019).
[245] Craig and de Búrca, p.1002.
[246] Whish, p.82.

anticompetitive behaviors and eliminate them, the definition of an undertaking has to be considered as broad as possible to provide efficient application of Article 101. In a general sense, an undertaking can be described as an entity which engages in the economic activity.[247] Thus, any entity such as the cooperation, trade associations or partnerships can be followed by Article 101, without considering their legal status and the way they financed.[248]

In some cases, an entity has more than one activity as some of them fall under a purely economic activity whereas others related to the power of a public authority. The importance of functional approach emerges in this kind of situations and emphasizes that all activities of an entity have to be analyzed separately to reach an accurate solution.[249]

Moreover, an organization that conducts its activities without considering any economic purpose does not mean that its actions are not economic. The determination of the activities are still necessary as it was stated in the case law.[250]

The different approaches regarding the definition of an undertaking not only provides a broad explanation but also enhance the applicability of Article 101.

3.1.2. Agreements, Decisions and Concerted Practices

Article 101 requires the analysis of the agreements, decisions, and concerted practices. Some competition infringements emerge by the agreements between the undertakings in a more formal and explicit way, while the others can be seen in the form of economic decisions as well as the concerted practices which are less precise compared to the agreements.

The agreements are legally enforceable and binding for the contracting parties. Also, they cover a compromise of litigation in case of conflict which derives from the applicability and the provisions of a contract between the signing parties. Gentleman's agreements do not entirely have these features, even they called as an agreement. The main difference between the gentleman's arrangements and the contracts derives from the lack of obligation in the enforcement procedure of the provisions. In other words, the gentleman's agreements are not legally binding as opposed to the contracts.[251] The intention of the firms to act in harmony with

[247] Case C-41/90, *Höfner and Elser v Macroton GmbH*
[248] Craig and de Búrca, p.1003.
[249] Case T-155/04, *SELEX Sistemi Integrati SpA v Commission of the European Communities*, para. 54, 2006, ECR II-4797.
[250] OJ [1992] L 326/31, [1994] 5 CMLR 253, para. 43.
[251] Whish, p.98.

each other to the detriment of their competitors in a marketplace leads to the existence of an agreement. It is not necessary for the firms to sign a paper which illustrates their intention to infringe the competition; therefore, Article 101 can cover the oral contracts[252]. The agreement reflects the intention of the enterprises and points out the existence of a consensus between them; the participants cannot allege that they forced to sign a contract.[253] In other words, the lack of legally binding feature of the arrangements between the undertakings does not give a chance to the participants to justify themselves by alleging their unwillingness.

The infringements against competition can also be derived from the decisions of undertakings. The association of undertakings, which consist of a few firms, may infringe the competitive environment more easily as the observation of the other firms' behavior is simple. The small number of firms in an association can comply with the rules and monitor each other's compliance in an effective manner compared to the entities with large numbers of firms.[254] The application of Article 101 to the decisions requires the liability of the association or the responsibility of its members.

The concerted practices require the harmonization between each participant, especially by taking decisions on the subjects of price, supply, and market shares. The proving the collusion between the participants is quite difficult as the parties may get rid of the paper evidence as well as not committed anything on the paper. Therefore, the impacts of concerted practices in the marketplace have to be taken into consideration.[255] For instance, producing the same product by different firms does not lead to parallel pricing in a competitive market whereas the costs and other burdens for the companies will change from one to another. Hence, it can be stated that the concerted practices between the participants may negatively affect other competitors in a market and destroy the effective competition.

The case law also emphasizes that the undertakings have to be conducted independently[256] from each other as all firms have different structures and their reaction to economic changes will not be the same. Moreover, the parallel conduct of the firms which emerge uniformly and simultaneously cannot be deemed as a concentration.[257] This kind of

[252] Case 28/77, *Tepea v Commission,* [1978] ECR 1391.
[253] Case 16/61, *Modena v High Authority*, [1962] ECR 289.
[254] Whish, p.102.
[255] Craig and de Búrca, p.1007.
[256] Case 40/73, *Suiker Unie and others v Commission*, [1975] ECR 1663.
[257] Case T-36/91, *Imperial Chemical Industries Plc v Commission*, [1995] ECR II-1847.

economic behaviors has to analyze in the perception of the European Court of Justice whether there is a plausible explanation for the conduct.

The ultimate version of the concerted practices between the firms is known as cartels.[258] The firms which engage in a cartel are acting together as one firm to determine the prices, the number of sales, and distribution of the market. The cartels are prohibited under the competition law because the participants increase the prices of the products and their profits by restricting the competition. The participants of a cartel do not bring any substantial benefit for the compensation of their infringement.[259]

The prohibition of cartels can be achieved by Article 101 by observing the firms' economic behaviors even though the determination of cartel is not very clear as the cartels have a complex structure and conduct their activities on a long time basis.[260]

3.1.3. Object or Effect of Preventing, Restricting or Distorting Competition

The purpose of Article 101 is to eliminate the agreements which have an object or effect of preventing, restricting, or distorting the competitive environment; thus, the market structure and workable competition can be preserved. Such agreements can be seen in two different forms as horizontally and vertically; however, Article 101 is applied to all types of contracts regardless of their varieties. The structure of horizontal agreements requires that the contracting parties have to be at the same level, whereas the vertical agreements have to be confirmed between the different level of undertakings. Article 101 has listed the prevention, restriction, or distortion in an alternative way rather than being cumulative.

The object of distorting the competitive environment refers to a potential infringement rather than an actual impact. However, the prohibition of the agreements which have an objective to prevent competition is required the analysis of the participants' economic power as well as the agreement's potential to infringe the competitive environment.[261] Some agreements may give irreparable damage to the workable competition; therefore, they have to be challenged under Article 101 directly. In other words, if the object of an agreement negatively affects the

[258] Türkkan, p.255.
[259] Glossary of terms used in EU competition policy Antitrust and control of concentrations, pogestei.ius.bg.ac.rs/docs/Glossary%20Competition.pdf (13.01.2019), p.8.
[260] H. Gökşin Kekevi, "ABD, AB ve Türk Hukukunda Kartellerle Mücadele", **Rekabet Kurumu Lisansüstü Tez Serisi** No: 15, Ankara, 2008, p.12.
[261] Aslan, p.103.

proper functioning of the competition, it must be deemed per se illegal.[262] The agreements which envisage an infringement by their objects such as horizontal price fixing and market division falls under the ambit of Article 101. They are affirmed per se illegal by their objective without needing further analysis.[263]

The price-fixing agreements not only increase the profit of the companies being disadvantages to their rivals but also harm the consumer welfare. The object of the market division agreement cannot be justifiable under the notion of competition. EU competition policy aims to ensure the economic integration between the national markets without causing an obstacle to internal frontiers. Therefore, any agreements which restore the national divisions in trade between the Member States have to be eliminated as one of the primary purposes of the competition is to create a single market.

On the other side, the effect of the incompatibilities can be seen clearly directly or indirectly by evaluating each case. The behaviors of the firms have to be assessed by creating the equivalence between the agreement's positive and negative effects on the competitive environment. The agreement will be caught by Article 101 when the unwanted sides of a contract are more predominant than the positive ones.

3.1.4. The De Minimis Doctrine

Some agreements even affect the competition cannot be caught by Article 101, as the adverse effects of them are not significant.[264] In other words, the incompatibilities of an agreement can be neglected because the competitive environment is not appreciably affected by the infringements. The de-minimis doctrine refers that an agreement has minor importance on the workable competition, and it can be applied to all types of agreements which have an object or effect to restrict the competition.

Some factors such as the market shares and the annual turnover of the firms help to determine whether to apply the de-minimis doctrine.[265] For instance, the firm's anticompetitive behavior cannot be deemed incompatible with Article 101 if its market share does not exceed

[262] Craig and de Búrca, p.1017.
[263] Case C-8/08, *T-Mobile Netherlands and Others*, (N 37) [28] - [29].
[264] Whish, p.137.
[265] **The "de minimis" rule concerning agreements in the EU,** www.europedia.moussis.eu/books/Book_2/5/15/03/01/?all=1 (16.01.2019).

the 10% threshold. Moreover, the economic practices of small and medium enterprises can be negligible even they may infringe the competition as long as their annual turnovers remain under the limits.[266]

3.1.5. The Leniency Program

The infringement of competition by the companies requires to impose financial sanctions on them in order to eliminate the breaches. The vast amounts of penalties might be burdensome for the companies. Principally, companies that are the participants of a cartel cannot reduce or avoid a financial sanction. However, the participants have a chance to reduce or avoid the fines under the leniency program.

The leniency program[267] enables companies to have immunity to fines if the companies provide sufficient information to the Commission so that it can reveal the existence of a cartel during the investigation. If a company desires to have total immunity to the fines, then it has to be the first one which informs the Commission on the existence of a cartel. The Commission evaluates the information and documents which are provided by the company and decides whether the materials are sufficient to prove the cartel infringement.

The companies which are able to provide significantly important information to the Commission may benefit from a decrease of fine. In this case, the Commission evaluates the documents by taking their ability to prove breaches of competition into account. Even the Commission has enough material to launch a legal procedure against the participants of a cartel, the added information by the companies and their intention to terminate the cartel should be praised. Each company earns a certain amount of reduction in fines based on the significance of their contribution to the process of eliminating the cartels.

3.2. Article 101(3)

Article 101(3) illustrates the exemptions of Article 101; thus, the companies can benefit from certain exceptions in case of a cartel infringement. The provision covers four conditions which have to be fulfilled cumulatively by the companies.[268] In other words, all requirements have to be met to provide the applicability of Article 101(3). Firstly, the infringements can be

[266] ibid.
[267] **Leniency,** ec.europa.eu/competition/cartels/leniency/leniency.html (18.01.2019).
[268] Craig and de Búrca, p.1026.

negligible if they bring additional improvement and progress in production or distribution. Secondly, there must be a further benefit for the consumers in conjunction with the developments in the process of production and delivery. Thirdly, the restrictions of competition can only be accepted if they are imperative for the achievement of the agreement's objectives. If an agreement brings positive effects to the competitive environment by infringing some of the competition rules, then it is necessary to balance the infringements and the additional positive results of the agreement.

Some cases refer that the effects of agreements cause to the negligence of the competition breaches. Lastly, the infringements cannot lead to the elimination of competition in an important part. There are two types of exceptions in Article 101 which will be explained below, individual and block exemptions as well.

3.2.1. Individual Exemption

Today, the application of the competition rules is achieved by the contributions of the national courts and competition authorities. Since 2003, the Commission is not the unique power to grant exemptions under Article 101(3).[269] The Commission published guidelines on the application of Article 101(3) by illustrating the limitations of Article 101, as well as the conditions for granting exemptions to the competition breaches. The guidelines mainly deal with adjusting the positive and negative effects of competition in order to decide whether the exceptions are necessary or not.

First of all, the competition restrictions can be neglected if the limitations bring additional efficiencies[270] such as the lower costs, the development of new production methods, and the reduction of the expenses.[271] There must be a causal link between the competition infringements and the efficiencies to apply Article 101(3).[272]

Moreover, consumers can enjoy the fair share of the benefits or at least the negative impacts of the competition restriction can be compensated for the sake of consumer interest.[273]

[269] ibid., p.1027.
[270] Commission Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C101/97, [50].
[271] ibid., [64]-[68].
[272] ibid., [51].
[273] ibid., [85]-[86].

The determination of the efficiencies on consumers can be comprehended by analyzing the overall impact on the customers.[274]

Additionally, the restrictions on the competitive environment have to be indispensable.[275] In other words, the restrictive agreement has to be inevitable to reach the efficiencies as well as the individual restraints have to be reasonably necessary to the achievement of the efficiencies.[276]

Lastly, the agreement in question should not cause the elimination of competition to a significant extent. Thus, the protection of the competitors and the competitive environment can be provided as the primary objectives of competition rules. Even some restrictions of competition can be deemed as an exemption under Article 101(3), the limitations cannot harm the competitive environment in an irreversible manner.[277]

3.2.2. Block Exemption

Block exemptions allow that the inapplicability of Article 101 to a certain category of agreements. The block exemptions aim to define the generic type of agreements which are incompatible with Article 101 but brings more benefit to the competitive environment. Unlike the individual exceptions, the block exemptions can be provided to specific categories of agreements. Therefore, the determination of block exemptions does not require any analysis or conditions as mentioned before, and the concept of block exemption is alike to the per se rules as both of them do not necessitate further examination. The agreements which enjoy the block exemption provide substantial and remarkable benefits to the efficiently-working competition as well as the consumers.[278] The block exemptions can be seen in various types of agreements such as research and development[279], vertical restraints[280], and technology transfer.[281] These agreements are in common with their purpose which is bringing additional benefits to the

[274] ibid., [87].
[275] The case law implies that the breaches in the competitive environment have to be imperative for the attainment of the objectives of the agreement. See also: Case 258/78, *LC Nungesser KG and Kurt Eisele v Commission*, [1982] ECR 2015).
[276] Commission Guidelines on the Application of Article 81(3) of the Treaty [2004] OJ C101/97, [73].
[277] ibid., [105].
[278] Craig and de Búrca, p.1030.
[279] Reg 1217/2010 [2010] OJ L335/36.
[280] Reg 2790/99 [1999] OJ L336/21.
[281] Reg 316/2014 [2014] OJ L93/17.

competitive environment; therefore, that kind of agreements deserve to benefit from the exemptions which are illustrated in Article 101(3).

4. THE ANALYSIS OF ARTICLE 102 TFEU

The rationale behind Article 102 is to control the market power in order to prevent the undesired results of monopoly power namely the higher prices and lower output. The purpose of Article 102 can be achieved by prohibiting the abusive practices of a company which holds the market power. In other words, the market power does not automatically lead to a competition infringement. The firms are competing for each other in order to gain more benefit for themselves and increase their total share in the marketplace. The dominance position of a firm is an expected result of competition if a company become successful in the marketplace compared to other rivals.

The analysis of Article 102 mainly focuses on the explanation of the relevant market, the market share of a firm, and certain economic behaviors of the dominant firm. The determination of the relevant market is a pre-condition that helps to analyze the dominance of each company in each marketplace. Moreover, the market share of a company can be a determinant which closely related to the firm's dominance. Besides, the determination of the behaviors of a firm is essential whether they are abusive or not. Since all these factors play a vital role to decide the applicability of Article 102, it is inevitable that the judicial decisions mostly based on such matters.

4.1. Defining the Relevant Market

Article 102 illustrates that one or more undertakings have a dominant position. The notion of dominance has to be assessed in conjunction with the relevant market, namely the product and the geographic market as mentioned below.

4.1.1. The Product Market

The dominance of a firm can be determined by taking into account the market in which the firm conducts its economic activities. The narrower definition of a marketplace leads to reach more accurate results on the dominant position of a firm. Therefore, it is essential to define the notion of the relevant market to analyze Article 102[282] in conjunction with the provision's objectives. The product market can be understood more precisely regarding the specific features of the marketplace as well as the characteristics of the products.[283]

The level of interchangeability of the products is higher in a relevant product market.[284] The interchangeability means that the demand side of the market has a more flexible structure in accordance with the changes in supply sides. In other words, if a product's price increases, then the buyers switch their preferences in a significant manner by choosing the substitute products. In this sense, the SSNIP test[285] emerges as an indicator to determine which products are substitutable to each other. This test mainly focuses on consumer reactions in case there is a small increase in price. If the consumers switch their preferences to other products as a reaction to the price increase, the firms cannot make a profit from the price rise.[286] As a result, the products which can be substitutable in the eyes of consumers are deemed in the same product market.

The behavior of the consumers leads that the products which can be a substitution for each other are part of the same market.[287] The interchangeability of the products not only determined by the consumer's behaviors but also the physical characteristics[288] of the product. If the products are in common with their features, the consumer's preference will be more flexible.

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[282] The Law on the Protection of Competition no 4054 also mentioned the product and service markets separately in the related articles. See also: Articles 1, 2, 4, 6, and 7 on the Law no 4054.
[283] Guidelines on the Definition of Relevant Market, para.18, https://www.wipo.int/edocs/lexdocs/laws/en/tr/tr131en.pdf (15.01.2019), p.7.
[284] Craig and de Búrca, p.1056.
[285] The abbreviation of "Small But Significant and Non-Transitory Increase in Price Test".
[286] İlgili Pazarın Tanımlanmasına İlişkin Kılavuz, para.9 and 10, https://www.rekabet.gov.tr/Dosya/kilavuzlar/ilgili-pazarin-tanimlanmasina-iliskin-kilavuz1.pdf (15.01.2019), p.3.
[287] Robert W. Werth, "Determination of the Relevant Product Market", **Ohio State Law Journal,** Vol.26, Issue 2, 1965, p.248.
[288] Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, [1978] ECR 207.

4.1.2. The Geographic Market

The analysis of a firm's dominance under Article 102 is closely concerned with the bounds of the relevant geographic market.[289] The application of Article 102 requires that the undertakings in a marketplace have to face the same conditions and these conditions have to be related to the same products or services.[290]

The geographic market refers to a territory where all firms conduct their business in relatively similar conditions.[291] The trading conditions do not have to be completely homogenous, the similarity in the requirements is sufficient to define a specific territory as a geographic market. The conditions of competition have to be remarkably different from the other marketplaces in order to introduce the extent of the geographic market.[292]

Also, the products or services which are provided by the companies in a marketplace have to be similar as both of them may affect the characteristics of a market. If the homogeneity of a market can be achieved, the bounds of the relevant geographic market determine more efficiently in conjunction with the customer's behaviors to the differences in price. In other words, the determination of a geographic market is related to the customer's demand. The crucial point is that whether the customers can bear the negligible costs and switch their demand to different markets in which the other firms produce similar products or provide related services.[293]

4.2. The Dominant Position

4.2.1. Single Firm Dominance

The analysis of Article 102 necessitates the assessment of a dominant position following the evaluation of the relevant market. The dominant position illustrates the economic strength of an undertaking by granting the company to behave independently in an important extension to its rivals.[294] The dominance of a firm may cause the prevention of effective competition when

[289] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004], OJ C031, [27].
[290] Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, [1978] ECR 207, [44].
[291] Commission notice on the definition of relevant market for the purposes of Community competition law, OJ C372 [1997].
[292] Case 85 /76, *Hoffmann-La Roche*, [1979] ECR 461.
[293] İlgili Pazarın Tanımlanmasına İlişkin Kılavuz, para.19, https://www.rekabet.gov.tr/Dosya/kilavuzlar/ilgili-pazarin-tanimlanmasina-iliskin-kilavuz1.pdf (15.01.2019), p.5.
[294] Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities*, [1978] ECR 207, [65]

the firm uses its power to foreclosure the market to its competitors or eliminate its rival's effectiveness in a competitive environment. Through the dominance position, the firm not only increases its profits but also affect the rival's behaviors and influence the competition conditions in the marketplace.[295]

Even the market share of a firm is a significant factor in determining the dominance it is not decisive.[296] The market share of a dominant firm may change from case to case[297]; therefore, the crucial point is whether the market share of a firm is sufficient enough to breach the competition by making up the barriers to entry or expansion. The barriers to entry emerge as an additional indicator to analyze Article 102 when the market share of a firm is not adequate to present the dominance. The barriers to entry have to be sufficient to foreclose the market to potential rivals; hence the level of competitiveness negatively is affected as there are few players in the market.

4.2.2. Collective Dominance

The dominant position is not always held by a single firm as mentioned before; also, more than one firms can hold dominance by bringing together as part of a corporate group or economic unit. In this case, the group of firms occupies the dominant position together and acts independently in a remarkable manner against their rivals.[298] The companies do not have to be legally dependent on each other; the crucial point is that the companies have to cooperate with each other from an economic point of view.[299] The cooperation between the companies which have a collective dominance on the market does not have to be identical in all respects. Instead a certain level of adoption of a common policy is sufficed.[300]

[295] Craig and de Búrca, p.1062.
[296] Silja Snäll, **Legal Test for Finding of a Collective Dominant Position under Article 102 TFEU**, Lund University Faculty of Law, 2012, p.10.
[297] Case 27/76, *United Brands Company and United Brands Continentaal BV v Commission of the European Communities.*, Case 85/76, *Hoffman-La Roche.*, Case C-62/86, *Akzo Chemie BV v Commission*, [1991] ECR I-3359, [60]., Case T-228/97, *Irish Sugar plc v Commission*, [1999] ECR II-2969, [70].
[298] Cases T-68 and 77-78/89, *Re Italian Flat Glass: Società Italiana Vetro v Commission*, [1992] ECR I-1403 [358].
[299] Case T-193/02, *Laurent Piau v Commission of the European Communities*, [2005], [110].
[300] DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses, 2005, para.44.

The economic link between the undertakings has to be adequate to illustrate the existence of collective dominance. It also has to enable companies to take financial decisions without being under the influence of customers or competitors.[301]

4.3. Examples of Abuse of a Dominant Position

4.3.1. Price Discrimination

Article 102 prevents the application of different conditions to the same economic activities. The price discrimination is one of the infringements which is incompatible with the objectives of Article 102, and it can be seen in many different ways regarding the features of the products, the market structure and the financial ability of the buyers. Firstly, the prices of similar products remain the same even there are differences in cost. The competitive environment envisages that the rates have to be determined in conjunction with the expenses that the firm have to bear during the manufacturing. Therefore, the equivalence in prices cannot be expected in a competitive market whereas there are differences in costs. Unlike the first way, the prices of the same product can be dissimilar while the expenses are the same.

Moreover, the price differences illustrate the level of quality of each product; it is expected that the customers have to pay large amounts of money to buy high-quality products. However, if the customers pay the same costs to differently qualified products, this can be deemed a type of price discrimination.[302]

The price discrimination can occur between similar products as well as the different local markets. If an undertaking changes the prices of a product in various markets in which the good is sold, it can be observed that there is a competition infringement through price discrimination in different geographic markets. The discrimination can also be seen by selling the products at different prices to various customers depending on their location as well as their gender or age.[303] The companies differentiate the buyers regarding their ability to pay higher

[301] Cases C-395-396/96, *P Compagnie Maritime Belge Transports SA, Compagnie Maritime Belge SA and Dafra Lines A/S v Commission*, [2000] ECR I-1365, [41]-[42].
[302]Fritz Machlup, **Characteristics and Types of Price Discrimination**, "Princeton University Press, Business Concentration and Price Policy", 1955, p.398.
[303] Eugenio J. Miravete, "Price Discrimination Theory", S. N. Durlauf and L. E. Blume (Ed.), **The New Palgrave Dictionary of Economics,** Palgrave Macmillan, 2nd edition, 2008, p.626.

prices to the same product[304]; thus, the firms have a chance to make more profit through the discriminative practices.

The price discrimination might reduce economic efficiency especially resulting in the misallocation of resources and money.[305] While the price discrimination infringes the objectives of a competitive environment; it has to be eliminated by the competition rules as in stated in Article 102.

4.3.2. Predatory Pricing

The predatory pricing means that an undertaking sells its products or provides services below the average costs by taking a risk to cover the losses in the short term.[306] The dominant firm reduces the prices under the costs by taking advantage of its dominant position against the interests of its competitors. Therefore, other companies cannot resist this price strategy for a long time. When the companies ultimately reach the point where they cannot bear the costs anymore, they get forced to quit the market. Even the dominant company restricts the economic activities of its rivals through the pricing strategy; the crucial point requires that the analysis of this policy by its object. The predatory pricing is able to provide benefit to the dominant firm to keep or strength its dominance.

Besides, there is an actual or potential exclusionary effect on the rivals of the dominant company.[307] In order to affirm that the predatory pricing has an exclusionary effect on the other firms, this pricing strategy has to be able to exclude a competitor who is as efficient as the dominant company. The purpose of the as-efficient-competitor test[308] is to illustrate the effects of abusive behaviors more precisely by considering whether a hypothetical competitor who is equivalent to the dominant firm would be affected by the price strategies or not.

Through the predatory pricing, the companies have an opportunity to strength their position in the marketplace and eliminate their opponents[309] by infringing the competition rules.

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[304] Simon P. Anderson and Régis Renault, **Price Discrimination,** University of Virginia, Department of Economics, 2008, http://economics.virginia.edu/sites/economics.virginia.edu/files/anderson/pricedisc080808_0.pdf (17.01.2019), p.5.
[305] Craig and de Búrca, p.1078.
[306] Raimundas Moisejevas, "Predatory Pricing: A Framework for Analysis", **Baltic Journal of Law & Politics**, Vol.10, Issue 1, 2017, p.126.
[307] Craig and de Búrca, p.1084.
[308] Raphaël De Coninck, "The As-Efficient Competitor Test: Some Practical Considerations Following the ECJ Intel Judgment", **Competition Law & Policy Debate,** Vol.4, Issue 2, 2018, p.74.
[309] Case C-62/86, *Akzo Chemie BV v Commission,* [1991] ECR I-3359 [71].

The rivals reduce the number of products that they sell in order to conduct their business by lowering the costs. Hence, the decrease in outputs can be deemed as a response to the predatory pricing by the dominance firm.[310] The customers will ultimately be affected this price wars between the companies as the outputs decrease whereas the prices increase.

The prices below the values may not only harmful for the actual competitors to conduct their business effectively but also have adverse effects for the potential opponents. It can be stated that one of the objectives of a firm which holds the market power is to eliminate its potential competitors while the new entrants of a marketplace desire to make a profit of the business activities. However, this expectation of the new undertakings is dismissed by the predatory pricing strategy of the dominant firm.[311] The new firms may abstain from entering the market as they doubt to bear the costs in which there is an existence of predatory pricing in the market. In other words, the abusive practices such as predatory pricing cause to the market foreclosure. The exclusion of the rivals in the marketplace breaches Article 102 as impeding the competitive environment and hindering consumer's interests.

4.3.3. Selective Pricing

The concept of selective pricing refers that an undertaking which has a dominance lowers the prices of the products or services without considering its costs. The price strategy focuses on some of the customers who have the potential to switch their preferences to the rivals of the dominant firm.[312] The dominant firm may take such economic steps like selective pricing to maintain its market power. The primary purpose of the dominant firm is to make difficult of its rivals' economic activities.[313] Hence, it can be stated the rationale behind the prohibition of selective pricing is to prevent the elimination of a competitor from the market.

There are different views on the analysis of selective pricing, especially whether it leads to competition infringement in EU and Turkish competition laws.[314] Therefore, the determination of selective pricing as a competition infringement is crucial in order to provide

[310] Donald J. Bourdreaux & Andrew N. Kleit, How The Market Self-Policies Against Predatory Pricing, 1996, http://www.cei.org/PDFs/predatorypricing.pdf (18.01.2019), p.4.
[311] https://web.stanford.edu/~milgrom/publishedarticles/PredatoryPricing.pdf (20.01.2019), p.937.
[312] Damien Geradin and Nicolas Petit, "Price Discrimination Under EC Competition Law: The Need for a Case-by-Case Approach", **GCLC Working Paper 07/05,** College of Europe Global Competition Law Centre, 2005, p.15.
[313] See also: Turkish Competition Board Decision no 04–76/1086–271, dated on 1.12.2004.
[314] Fethullah Güler, Selen Yersu Şahin and Can Taneri, "Seçici Fiyatlama: İhlal mi, Değil mi? Selective Low Pricing: Infringement or Not?", **Rekabet Dergisi** Vol.12, Issue 3, 2011, p.37.

legal certainty.[315] According to EU law, selective pricing can be deemed as a breach of competition in case of it exists together with other types of competition infringements. In other words, each behavior of the dominant firm has to examine in a detailed way to determine the effects of the abusive practices such as selective pricing on the competitors as well as the marketplace. However, the Turkish point of view is quite different as it is stating that the selective pricing itself is sufficient to breach the competitive environment. Even there are various approaches regarding selective pricing as mentioned above; it adversely affects the execution of the competition on the merits to the detriment of the competitors.

4.3.4. Refusal to Supply

In principle, the undertakings can freely decide the firms or individuals that they wanted to do business with in conjunction with the notion of freedom of contract. All firms regardless of dominating the marketplace have a right to choose their partners to do business. However, this right to choose is limited in order to prevent the risk that a dominant company is capable of controlling the supply products or services to certain undertakings to the detriment of the rivals of the dominant company, so that the refusal to supply emerges as a competition infringement.[316]

The refusal to supply has to concern with the output which is indispensable for the business.[317] In other words, there is no substitution of the products or services which the dominant firm refuses to supply its traders. The behavior of the firm which holds large amounts of market power is regarded incompatible if there is no logical excuse for the refusal to supply.

The only exception for the refusal of supply to regard it compatible with the competition rules is that if there are proper reasons such as the cost of delivery, inconvenience to sell the products or provide the services. Hence, the acceptable reasons for the dominant firm may lead to the permission of refusal to supply.

[315] Ümit Nevruz Özdemir, "Fiyatlamaya İlişkin Tek Taraflı Davranışların Değerlendirilmesinde Kullanılan Maliyet Ölçütleri", **Rekabet Kurumu Uzmanlık Tezleri Serisi**, Ankara, 2010, p.1.
[316] Cases 6 and 7/73, *Istituto Chemioterapico Italiano SpA and Commercial Solvents v Commission,* [1974] ECR 223 [25].
[317] Case C-7/97, *Oscar Bronner GmbH&Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH&Co. KG and Others.*

5. COMPETITION LAW AND MARITIME TRANSPORT

5.1. EU Competition Law and Maritime Transport

The reform of competition policies, especially the modernization of antitrust rules, has always been important in the EU. In this sense, it is inevitably necessary to regulate the maritime sector in conjunction with the Union's policies. Until today, many changes could be seen in the EU's competition policy through the regulations, decisions and case law. Moreover, the fair competition in maritime transport from the EU's perspective requires that the related regulations in the EU are in harmony with the objectives of international organizations such as IMO, and UNCTAD.

Regulation 4056/86[318] was being central in the marine sector by monitoring the behaviors of the players and imposing effective limitations to their activities which were incompatible with the objectives of competition. Previously the maritime sector was regulated by the initiatives of the players such as the shippers and carriers[319]; however, this was changed with the adoption of Regulation 4056/86.

The Regulation mainly examines the liner conferences between the shipping companies to prevent the competition incompatibilities. The liner (shipping) conference is an agreement between at least two companies aiming to provide scheduled cargo carriage or passenger service. The shipping service of goods or passengers is conducted in a particular trade route under the standard conditions which are agreed by the contracting parties. The crucial point is that the common terms which are accepted by the parties may be harmful to the competitive environment.

For instance, firms can lower the carriage prices following the liner conference; consequently, other companies apart from the contracting parties of shipping conference have no longer any reason to conduct their transport services.[320] Additionally, the contracting parties may refuse to supply services by decreasing the carrying capacity to the detriment of their competitors.

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[318] Council Regulation (EEC) No 4056/86 of 22 December 1986 laying down detailed rules for the application of Articles 85 and 86 of the Treaty to maritime transport, Official Journal L 378, 31/12/1986 P. 0004 – 0013. This Regulation was adopted as a supplementary of the UNCTAD Code of Conduct for Liner Conferences which had signed by EU Member States. https://unctad.org/en/PublicationsLibrary/tdcode13add.1_en.pdf (22.01.2019).

[319] Hongyan Liu, Liner Conferences in Competition Law A comparative analysis of European and Chinese Law, Springer, 2009, p.10.

[320] Mario Monti, "Maritime competition policy at the crossroads- A time for change?" **European Shipper's Council Speech 03/294**, 2003, p.3.

Regulation 4056/86 mainly deals with such issues as mentioned above with the objective of protecting the competitive environment in the maritime sector. However, the shipping companies which are the parties of a liner conference have some doubts about the interpretation of Regulation. In other words, the carriers tend to interpret the Regulation as broad as possible to obtain an excuse for their misconduct through the block exemption provisions. In that regard, the TAA[321], FEFC[322], and TACA[323] decisions are helpful examples to illustrate the different perceptions of the Commission, the Courts and the parties of the shipping conferences.

The common ground of all three cases is that they entirely concern about the application of Regulation 4056/86 to maritime competition issues. The matters of price fixing and carrying capacity are allowed by Article 3 of Regulation 4056/86. Even though the horizontal price fixing and limitation of output deemed as a breach of competition, they are acceptable under the scope of Article 3 as long as provide reliable and scheduled transport services.[324]

In TAA, TACA, and FEFC cases, the collective price fixing for the domestic transport operations was founded as a competition breach by the Commission whereas the parties of that liner conferences expected to grant an exemption for their conduct. The Commission argued that Article 1 of Regulation 4056/86 is applicable to international maritime services rather than the inland transport operations.[325]

Therefore, the Commission rejected the applicants' claims in cases mentioned above relying on the scope of Regulation. In other words, the Commission stated that the exemptions could not be interpreted broadly than the extent of Regulation.

Moreover, the capacity management on the ships was examined in TAA and TACA cases. The members of TAA decided not to use the ship capacity fully to increase the freight rates. If the supply is limited by using less than the whole capacity of a ship the prices can be raised. The Commission found that the limitation of output by reducing the available capacity of a vessel incompatible with Article 3 of Regulation 4056/86. According to the Commission's

[321] Commission decision of 19 October 1994 in Case No IV/34.446 – *Trans-Atlantic Agreement*, OJ L 376, 31.12.1994.
[322] Commission decision of 21 December 1994 in Case No IV/33.218 – *Far Eastern Freight Conference*, OJ L 378, 31.12.1994.
[323] Commission decision of 26 November 1996 in Case No IV/35.134 – *Trans-Atlantic Conference Agreement*.
[324] Eric Fitzgerald, "Recent Judgments in the Liner Shipping Sector", **Competition Policy Newsletter,** Number 2, 2002, p.41.
[325] Moreover, the scope of Regulation 4056/86 is restricted if there is a combination of transport modes. The Court stated that the Regulation applies only to the maritime services of intermodal transport operations. Thus, the parts of road transport are excluded from the scope of Regulation. See also: Case C-96/94, *Centro Servizi Spediporto Sri v Spedizioni Marittima del Golfo Sri*.

view, the capacity withdrawals can only be acceptable to deal with the short-term fluctuation by reducing the costs.[326] In this case, transport users endure the losses of the firms by paying relatively high amounts of money to the transport services. In TACA case, the Commission also affirmed that the capacity withdrawals could be an exemption of competition in the low seasons such as Christmas and New Year.

The preamble of Regulation 4056/86 emphasizes that the conditions in Article 85(3) of the EC Treaty[327] have to be satisfied in order to make an exemption to companies under the scope of that Regulation.[328]

Although the liner conferences between the shipping companies aim to provide and maintain the stability in shipping services as well as encourage the reliable services, it does not seem necessary to make a block or individual exceptions to all shipping agreements.[329] In other words, the objectives of shipping conferences cannot prevail over the purposes of competition rules. The competition infringements such as horizontal price fixing or capacity withdrawal have to be indispensable to accomplish the objective of stability; thus the exemptions can be granted to the shipping companies. The indispensability of these breaches can be observed by balancing the adverse effects of the infringements and possible positive effects on the competitive transport environment.[330] The determination of whether the stability of shipping services can be achieved through less restrictive practices is an essential point.

One can be asserted that the Commission's approach to the maritime issues mainly predicates on the case law. The purpose of the Commission is to evaluate each case by taking into account the specific situations and apply the most convenient rules to them. The Court of First Instance emphasized the relation between Regulation 4056/86 and the related provisions of the EC Treaty. Because of the fact that regulation is secondary legislation, it has to be interpreted in conjunction with the Articles 85 and 86 of the EC Treaty.[331]

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[326] Eric FITZGERALD, "The Revised TACA Decision — The end of the conflict?", **Competition Policy Newsletter**, Number 1, 2003, p.57.
[327] Today, 101(3) TFEU.
[328] Alla Pozdnakova, **Liner Shipping and EU Competition Law**, Kluwer Law International, 2008, p.121. See also: Article 7 of Regulation 4056/86.
[329] Fitzgerald, 2002, p.42-43.
[330] Monti, p.6. The OECD also indicates the importance of cost-benefit analysis in order to decide to grant an exemption to anticompetitive practices. See also: http://www.oecd.org/EN/home/0,,EN-home-25-nodirectorate-no-no—25,00.html (25.01.2019).
[331] Today, Articles 101 and 102 of TFEU.

Today, the competition field is arranged by Regulation 1/2003[332] which has the same objectives with the previous Regulation 4056/86. Both regulations have in common by aiming the effective application of competition rules and ensuring the protection of the market structure. Regulation 1/2003 does not examine the competition infringements in maritime transport as detailed as Regulation 4056/86. The framework of competition infringements in general aspects is drawn by Regulation 1/2003; however, Regulation 4056/86 gives detailed information about how the competition policy is applied to the marine transport sector. Therefore, Regulation 1419/2006[333] entered into force as a current version of Regulation 4056/86 with the aim of arranging the maritime transport on the subject matters which mentioned above.

5.1.1. The Application of Article 101 TFEU to Maritime Transport Services

The Commission concerns with the enforcement of Article 101 to the maritime transport issues, therefore, many legal arrangements are published such as regulations and guidelines. In this sense, the Commission observes the cooperation agreements between liner shipping companies whether the agreement breaches the competition by its object. The liner conferences in maritime transport emerged as an attempt of the shipping companies which desire to protect their economic strength in the transport sector against the global trade. Therefore, the rationale behind the adoption of Regulation 4056/86 is to arrange the maritime transport in line with the competition rules.[334]

If the agreement encourages the information exchange between the contracting parties, this shift may be harmful to the rivals in the marketplace. The companies may take the necessary steps to improve their efficiency and market power by relying on the information that they receive about the other parties.[335]

The Commission does not allow the information exchange as the shared data has the potential to distort effective competition. The market structure, as well as the characteristics of

[332] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 001, 2003.
[333] Council Regulation (EC) No 1419/2006, OJ L 269, 2006.
[334] "The Future of the Commission Guidelines on the Application of Article 101 TFEU to Maritime Transport Services", **European Commission**, 2012, p.2.
[335] Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, OJ C 11, 2011, [57].

the information, have to be taken into account[336] assessing whether the information exchange can be caught by Article 101(1) TFEU. Hence, the exchange of information related to the investment capacity and the financial situation of the firms are prohibited by the Commission.[337]

The prevention of tacit collusion between the firms which are the signatories of the liner conferences is another objective of the Commission while the collusion infringes the antitrust rules as indicated in Article 101 TFEU. Moreover, Regulation 4056/86 eliminates the possible anticompetitive practices such as price fixing and capacity management through the liner conferences which are based on mutual cooperation between the signatory companies.[338] The cooperation agreements and their possible effects on the competitive environment are examined under Regulation 906/2009[339] in a more comprehensive manner. The consortia have deemed as a positive form of cooperation between the companies as long as it does not affect the competition adversely, ultimately serving the enforcement of the competition on its merits.

5.1.2. The Application of Article 102 TFEU to Maritime Transport Services

The application of Article 102 is firstly required the definition of the relevant market which is the core factor for analyzing the abuse of a dominant position. The abusive practices of a dominant firm can only make sense concerning a specific market.[340] Therefore, the description of the geographic market and the product market is essential.

The relevant geographic market can be described as a bounded area in which the competition conditions are almost homogenous. In other words, the competition conditions emerge as an indicator to differentiate the geographic market and its neighbor areas. From the maritime sector perspective, the geographic market includes the ports as well as the transport services between the particular ports or countries.[341] In other words, the geographic market covers the carriage of products from the lading port to the port of destination. The determination of the dominance may change regarding the relevant market analysis. For instance, under one

[336] Lowri Evans, "Competition Developments Affecting the Maritime Sector", **European Maritime Law Organization,** London, 2005, p.6.
[337] "The Future of the Commission Guidelines on the Application of Article 101 TFEU to Maritime Transport Services", **European Commission**, 2012, p.2.
[338] Competition: Repeal of block exemption for liner shipping conferences - frequently asked questions, europa.eu/rapid/press-release_MEMO-06-344_en.htm?locale=en 2006, (24.01.2019).
[339] Commission Regulation (EC) No 906/2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) OJ L 256, [2009]
[340] Yvonne Baatz, **Maritime Law**, 3rd edition, Routledge, 2014, p.515.
[341] ibid., p.516.

definition, a port may hold a substantial part of the market power whereas another market description may alter the dominance position of this port.[342]

The relevant product market is explained by the Commission and the European Courts by mainly focusing on the notion of interchangeability of one product with another. The interchangeability means that there is high cross-elasticity on the products.[343] In other words, one product can be substituted for another product in case there are price or quality differences. The level of interchangeability illustrates that the products are in the same relevant market. For instance, if one prefers to carry the products with RORO ships rather than the container ships as a response to the changes in price, then these shipment methods can be perceived in the relevant product market.

In maritime transport, the relevant market can be examined by considering the passenger traffic as well as the cargo transfer. The difference between the two markets derives from the fact that the passengers prefer to travel in short sea shipping, whereas the cargoes can be transported both in short and deep sea shipping. The interchangeability of the services indicates the relevant product market in the maritime transport sector. For instance, a port can conduct its services in many different product markets such as the passenger trade, the oil tanker trade, and the passenger car ferry trade.[344] As there is no interchangeability between the oil tanker trade and the passenger trade, the markets mentioned above are separately regarded as relevant product markets.

The application of interchangeability test can be quite difficult in a market in which the shipping companies conduct car and passenger carriage.[345] In this case, the level of interchangeability is high because of the similarity between the car and passenger vessels. Both ships can be substituted with each other; therefore, the analysis of the relevant market is challenging in case there are a car and passenger carriage.

The second step after determining the relevant market is the assessment of the dominant position. Article 102 TFEU mainly describes the dominant position as an economic strength of an undertaking. The dominant company enables to take economic decisions disregarding its

[342] *Irish Continental Group plc v Chambre de Commerce et Industries de Morlaix*, [1995] 19.02.2018, europa.eu/rapid/press-release_IP-95-492_en.htm (23.01.2019).
[343] Baatz, p.517.
[344] ibid., p.517.
[345] ibid., p.517.

competitors which may destroy and restrict the competition. The market share of an undertaking is the primary indicator to assess the dominance.[346]

If a company owns at least 40% of the whole market shares, it most likely has a dominant position. The lower thresholds also illustrate the dominance, particularly in the fragmented markets.[347] Therefore, the market share of a particular company has to be compared with the nearest competitor's market power in order to determine dominance, as there are no specific market share thresholds that explicitly illustrates the dominant position.[348]

Besides the market share, the undertakings financial and technical resources have to be taken into account whether the sources are sufficient for the company to maintain control of the marketplace.[349]

The abusive practices which have the purpose of eliminating the principal rivals of a dominant undertaking are regarded as a competition infringement. For instance, the predatory pricing which is conducted by the dominant undertaking by offering lower freight rates in the transport sector is anti-competitive behavior.[350] Moreover, the discriminatory practices of a dominant undertaking have to be eliminated as the firms which are equivalent to each other cannot enjoy the same level of fair conditions in the marketplace.[351]

The main reason behind the prevention of competition infringements which are particularly indicated in Article 1012 TFEU is to protect the relevant market from the adverse effects of the abusive practices of the dominant firms. The anticompetitive behaviors may negatively affect the entire market or the considerable part of it. Therefore, Article 102 is allocated to ensure the effective competition as well as the undistorted market structure.

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[346] If the company holds extremely large market shares, for instance at least 70% of the total market share, it is clear evidence that this company has a dominance. The relatively lower market shares which are held by an undertaking, for example, 60% of the entire market, illustrates a strong presumption of the dominant position. See also: Joined Cases T-24/93 to T-26/93 and T-28/93, *Compagnie maritime belge transports and Others v Commission,* [1996] ECR II-1201 (Cewal I).

[347] "The fragmented market is a marketplace in which no single company is able to lead the sector by using its dominance. There are many small and medium size of companies as well as the large undertakings in a fragmented market. When the small and medium companies come together, they have an ability to prevent the large undertaking's dominance." www.businessdictionary.com/definition/fragmented-market.html (25.01.2019).

[348] "Abuse of a dominant position in the light of legal provisions and case law of the European Communities", **Office for Competition and Consumers' Protection**, 2003, p.12.

[349] Baatz, p.518.

[350] ibid., p.519.

[351] Case C-18/93, *Corsica Ferries Italia Srl v Corpo dei Piloti del Porto di Genova,* [1994] ECR I-1783.

5.2. Turkish Competition Law and Maritime Transport

Turkish Commercial Law[352] can be admitted as the main regulation which deals with the maritime law in Turkey. In Turkey, there are no specific competition rules which are allocated to arrange the maritime sector.[353] Therefore, it can be stated that the competition breaches related to the maritime affairs can be resolved by the related provisions in Turkish Competition Law which are in harmony with the EU arrangements, as well as the case decisions of the Competition Authority.

Even though, various rules and codes have existed with the aim of arranging the specific areas which are related to the maritime law, these sources regulate the matters of maritime law in a narrower extent[354] compared to the related sections of Turkish Commercial Law.

Alongside the rules above which regulate the maritime sector at a national level, many regulations and standards control the marine issues at the global scale. The need for harmonizing the national and global rules[355] is essential in the maritime sector due to the fact that the ships trade internationally as well as nationally.[356]

The behaviors of the firms in the maritime transport sector are envisaged by the competition rules which ultimately aim to protect the level of competitiveness in the marketplace. Through the achievement of a fair competitive environment, the quality of shipping service is increased, and the marine transport is conducted with reasonable prices.[357]

5.2.1. The Application of Article 4 Act no 4054 to Maritime Transport Services

The anticompetitive behaviors through the agreements, decisions and concerted practices between the undertakings are eliminated under the scope of Article 4 on Law no

[352] Law no 6102, entered into force: 1 July 2012.
[353] Levent Kutoğlu, "Düzenli Hat Taşımacılığında Regülasyon ve Rekabet", Rekabet Kurumu Uzmanlık Tezleri Serisi, 5. Dönem Uzmanlık Tezleri, Ankara: Rekabet Kurumu, 2007, p.63.
[354] "For instance, the Maritime Labour Code and the Cabotage Code are respectively allocated to present the right and obligations of the employers and the employees who work in marine sector, as well as to regulate the shipping between Turkish ports." Zihni Bilgehan, Ekin Dünya Şahin and Emre Ersoy, "Chapter 42: Turkey", James Gosling and Tessa Jones Huzarski (Ed.), The Shipping Law Review (523-530), 3rd edition, p.52
[355] "The importance of integration of the national and international regulations is also stated in Turkish Commercial Law." **Doing Business in Turkey**, https://www.pwc.com.tr/tr/publications/arastirmalar/pdf/doing_business_in_turkey_-_dusuk.pdf (26.01.2019). See also: Kerem Cem Sanlı and Şahin Ardıyok, "The Legal Structure of Competition Policy in Turkey", Tamer Çetin and Fuat Oğuz (Ed.), **The Political Economy of Regulation in Turkey** (75-120), Springer, 2011, p.75.
[356] Sübidey Togan, "Policy Reform in Maritime Transport Sector: The Case of Turkey", **Economic Research Forum Working Paper Series**, Working Paper No. 0712, 2007, p.6.
[357] Muhsin Kadıoğlu, "International Journal on Marine Navigation and Safety of Sea Transportation", **Turkish Maritime Transport Policy (1960-2008),** Vol.4, Issue 2, 2010, p.248.

4054.[358] This provision mainly deals with the cartel infringements by aiming the similar objectives with Article 101 TFEU as mentioned before. In other words, the perception of competition and its goals are identical between the EU and Turkish level; the correspondence can be seen in the decisions of the Turkish Competition Authority as well.

The Turkish Competition Authority is competent to monitor the cartel infringements, and in case there is a breach of competition the Competition Board is authorized to conduct an investigation against the members of a cartel.[359] The actual and likely adverse effects of a cartel agreement such as the distortion or restriction of a competitive environment are envisaged extensively by the Competition Board. Conversely, to Article 101 TFEU, the application of the de minimis doctrine is excluded under the Turkish Competition Law.[360] In other words, there is no exemption for the cartel agreements regarding whether the agreement has significant negative effects on most of the market as all types of such deals infringes the competition in an actual or potential way.

The compliance of the marine trade matters with the competition rules is essential to provide an effective marine trade. The effectiveness in trade contributes to the national economic growth in the long run.[361]

5.2.2. The Application of Article 6 Act no 4054 to Maritime Transport Services

The abusive practices by the dominant undertakings in a marketplace are envisaged under Article 6 on Turkish Competition Law. The existence of abuse of a dominant position is required to apply Article 6. Contrary to Article 4, the undertakings in question do not necessarily conduct their activities through the agreements or the concerted practices with the other companies.[362] The economic behaviors of the dominant firms and the effects of the activities to the marketplace are sufficient to determine the competition breaches.

The economic activities of the dominant firms have to be observed cautiously as the firms which hold different levels of market power can be perceived differently under the notion

[358] Hereinafter referred as the Competition Law.
[359] **Cartel Regulation 2019**, 19th edition, Law Business Research, London, 2018, p.268. www.gurkaynak.av.tr/docs/8a7e8-cr2019turkey.pdf (27.01.2019).
[360] ibid., p.269.
[361] Gönenç Gürkaynak, The Academic Gift Book of ELIG, Attorneys-at-Law in Honor of the 20th Anniversary of Competition Law Practice in Turkey, 2018, p.180.
[362] Emir Berke Aktaş, "Avrupa Birliği ve Türk Rekabet Hukukunda Hakim Durumun Kötüye Kullanılması", Kadir Has University-The Institute of Social Sciences, 2011, p.48-49.

of competition. In other words, some of the firms' activities are not regarded as a competition infringement whereas the behaviors of the firms which have a dominance can be caught under the scope of Article 6. Therefore, it is expected that the undertakings which have significant market power envisage their economic activities whether they lead to an aggressive competition to the detriment of their rivals.[363]

6. COMPETITION IN LINER TRANSPORT SERVICES

The liner shipping refers to the carriage of cargoes within the container or RORO ships regarding the specific routes and timetables. The transport is conducted on a regular basis depending on a particular schedule which illustrates the tariffs and the journey time; thus, the liner shipping becomes as much as possible suitable for the users.[364] The carriers on the liner shipping sector are developed many methods to provide cooperation as well as to plan their trade strategies. Hence, the liner conferences and the consortiums emerge as indicators of collaboration between the carriers.

The liner conference refers an agreement between the carriers in which they agreed on similar conditions[365] such as common freight rates and other cooperative activities while conducting their transport services.

Due to the fact that the liner conference aims to determine the price and capacity of the shipping service, it has a potential to distort the competition, especially by the cartel infringement.[366] As the members of liner conferences make a commitment on the matters of price fixing and limitation of output, the trade conditions change the effective competition adversely.[367]

The consortiums replaced with the liner conferences[368] and emerged in conjunction with the development of container transport in deep-sea shipping. While the carriers could not individually handle the carriage of huge amounts of products on a constant basis collaborated

[363] Abel M. Mateus and Teresa Moreira, **Competition Law and Economics Advances in Competition Policy and Antitrust Enforcement,** Kluwer Law International, 2005, p.306.
[364] Gönenç Gürkaynak, Öznur İnanılır and Tuna Tanık, "Competition Law Practices in Maritime Transportation in European Union and Turkey", **Rekabet Dergisi**, Vol.13, Issue 3, 2012, p.94.
[365] Convention on a Code of Conduct for Liner Conferences, https://treaties.un.org/doc/Treaties/1983/04/19830406%2001-16%20AM/Ch_XII_6p.pdf (30.01.2019), Geneva, 1974, p.3.
[366] Gürkaynak, 2012, p.96.
[367] ibid., p.96.
[368] Anila Premti, "Liner Shipping: Is There A Way For More Competition?", **United Nations Conference on Trade and Development Discussion Papers**, No. 224, 2016, p.4.

through the consortiums. The carriers started to conduct the transport operations similar to the other members of consortia in order to ensure an efficient level of transport.[369]

However, the consortiums may affect the competitive environment negatively, even the primary purpose of the consortiums provide cooperation in the operations of the carriers.[370] When the signatories of a consortium are started to attach particular importance to their economic benefits to the detriment of their competitors; then the degree of competitiveness in the marketplace will decline correspondingly.

7. THE COMPETITION INFRINGEMENTS IN THE RORO TRANSPORT

The two cases from the EU and Turkey relating to the competition infringements in RORO transport can be illustrated as below by referring to the perceptions of the related authorities such as the Commission in the EU and Competition Authority in Turkey.

The first case[371], which is also known as Maritime Car Carriers, is evaluated under the EU law. There are many companies as the parties of the case namely, Mitsui O.S.K. Lines Ltd., MOL Ltd., Nissan Motor Car Carrier Co. Ltd. (From now on: together referred to as MOL), Kawasaki Kisen Kaisha Ltd. (referred as K Line), Nippon Yusen Kabushiki Kaisha (referred as NYK), WWL and EUKOR undertaking, and lastly Compañía Sudamericana de Vapores SA (referred as CSAV). These aforementioned companies conduct their business in the RORO transport sector by providing car carriage in specific routes in the deep sea shipping.

The loading, unloading, and shipment of the motor vehicles such as cars and trucks are provided by that companies through the deep sea shipping. These companies started to take common economic decisions on such subjects with the purpose of increasing their market share in the deep sea shipping.

The common economic decisions and practices that were taken by the companies were evaluated under the Commission's perspective whether the companies' behaviours breach the competition rules or not. In other words, the Commission investigated the agreement between

[369] Pozdnakova, p.176.
[370] Gürkaynak, 2012, p.100.
[371] Case AT.40009 — *Maritime Car Carriers*, 2018/C 314/09

the companies which aimed to take common steps while providing car carriage and whether these companies formed a cartel.

The Commission found multiple agreements between the companies allowing them to determine and apply common price strategies as well as to manage the capacity that they served. In other words, the members of such an agreement could freely increase the prices whereas the capacity is decreased. The companies were able to serve reduced number of place for car carriage. The prices of the car carriage for each consumer would increase as a response to the capacity withdrawal. Hence, the companies would have a chance to make more benefit as compared to their opponents. Moreover, the companies could allocate the customers and the place that they provide service between each other in accordance with the agreement that they signed. The cooperation between the companies would essentially be a detriment for their competitors who did not prefer to conduct their businesses under the standard terms of such an agreement.

Through the agreement between the companies, each firm could keep conducting their service to certain consumers on specific routes that they agreed before without struggling with any obstacles. As the competition was restricted between the companies, all of them could maintain their position in the marketplace without forcing themselves to provide the best services possible to their customers.

The Commission evaluated the case on the grounds that mentioned above and concluded that the competitive environment is infringed through the tacit collusion and cooperation between the companies in question to the detriment of their rivals as well as the customers. The Commission found that such agreement deemed as a cartel infringement and examined the case under Article 101 of TFEU. The effect of the agreement was able to restrict the free competition due to the fact that the excluded RORO transport companies did not follow such economic decisions. Hence, the cartel agreement was disadvantageous for the rivals as well as the consumers because of the unbalance in the price and the quality.

The Commission imposed fine sanctions to the companies because of the existence of a cartel and restrictive practices. WWL and EUKOR undertakings benefited from the application of turnover limits as their annual turnover were below the thresholds, they paid the lower fines respectively. Since MOL provided the related information and documents about the presence of a cartel infringement to the Commission earlier than the other members of the agreement, it gained full immunity from the fines. The Leniency doctrine envisages that the first company

who submits the relevant documents to the Commission can immune from the penalties. The other firms which also inform the Commission about the existence of cartel and provide reports may benefit from the reduction in fines proportionally. In this regard, K Line, CSAV, NYK, WWL and EUKOR undertakings benefited from the cuts in fine of 50%, 25%, 20%, and %20 respectively.

Like in the Commission's decision on MOL, such reduction in fines is implemented to dissuade companies from staying in cartels, yet inevitably some companies join in cartels for the sole purpose of exploiting these reductions while their competitors in the cartel get fined. Thus, they gain more power in the market by worsening their rivals' financial situation without technically disobeying the maritime laws. Therefore, it is important that the fine reductions are not given liberally but the agenda of the company in question is thoroughly examined to prevent any such exploitation.

The second case[372] is evaluated under Turkish law as a Turkish Competition Board decision. UN RORO Company (hereinafter: UN RORO), Ekol Logistics A.Ş. (hereinafter: Ekol) and ALTERNATIVE Transport (hereinafter: Alternative) are the parties of the case that will be explained below. UN RORO conducted its business in RORO transport sector as a pioneer company by providing its service to Ekol as well as Alternative on the specific routes namely, Pendik-Toulon and Mersin-Trieste. Ekol and Alternative dealt with the road transport services. Alternative conducted its business as a subbranch of Ekol, and its main purpose was carrying the vehicles that belonged to Ekol. In other words, the road transport market was dominated by Ekol and its sub company Alternative. However, the whole demand that Ekol received was not met by Alternative.

UN RORO provided its services on a regular basis to Ekol for a long time without facing with any problems about the payments deriving from the service procurement agreement between the parties. However, some obstacles, especially on the payments of the services, started to emerge between UN RORO and Ekol through the establishment of Alternative. UN RORO prevented the embarkation of the vehicles which belonged to Ekol, thus harming the commercial relationship which was conducted for many years between the parties. UN RORO deliberately refused the embarkation of the vehicles of Ekol whenever there was too much demand for RORO ships of UN RORO. In other words, if UN RORO necessitated rejecting to provide services to some vehicles due to the excessive busyness in demand, it firstly refused

[372] Turkish Competition Board Decision No. 17-26/402-179, Date of Decision: 09.08.2017.

Ekol vehicles. This situation, namely the refusal of Ekol's order, became a particular policy of UN RORO. Although Ekol desired to increase its capacity in the routes of Mersin-Trieste and Pendik-Toulon where the company conducted its business excessively, it was not possible to do so due to UN RORO's policy.

UN RORO's aforementioned practices against Ekol was examined by the Competition Board to determine whether they derived from the fact that there was an economic connection between Ekol and Alternative. UN RORO refused to provide its services to Ekol in order to weaken its competitor, namely Alternative, in the marketplace due to the economic unity between Ekol and Alternative. In other words, UN RORO aimed to foreclose the market to Alternative by refusing to provide services to Ekol which was the principal company in the aggregate corporation. Therefore, there was no acceptable excuse for the behavior of UN RORO, as Ekol necessitated UN RORO's services in the routes of Mersin-Trieste and Pendik-Toulon. In this case, there was no option for Ekol to conduct its trade in the ways mentioned above; hence, the behaviors of UN RORO contradicted with the objectives of a competitive environment and infringed the competition as well.

On these grounds, the Board evaluated the case under the notion of abuse of a dominant position through the discriminatory practices which were stated in Article 6 on the Law on the Protection of Competition to see whether UN RORO breached the related Article or not. The results of the investigation held by the Competition Board did not confirm the matters above.

The Competition Board stated that the existence of an abuse of a dominant position required the presence of the dominance of a firm as well as the abusive activities of that firm. In other words, these two conditions must have been met together to conduct an investigation against a company. The abusive behavior of a firm through the discriminatory practices may be seen in a market in which that firm conducts its business as well as in a marketplace in which there are customers of the dominant company even that firm ceases performing its business by its own.

The Competition Board stated that it is important to examine the parties and the operation in question while determining the existence of discriminatory practices. The actions of a dominant company against its competitors must be similar as well as the features of the competitors such as the economic strength must be equal. The discrimination in a marketplace can only be observed in a market in which the conditions and features are similar whereas the behaviors of a dominant firm against its competitors are dissimilar.

The discriminatory practices must affect the competitive environment to a considerable extent, and the effect must last for a long time in the marketplace. Also, the firm which is differentiated from the others through the discriminatory practices must hold a significant market share that is sufficient enough to become a prominent competitor of the dominant firm.

In this regard, the behaviors of UN RORO were not regarded as abusive in the marketplace. Instead, UN RORO's economic behaviors were deemed as a strategic move which did not affect the financial activities of Ekol in a remarkable way by the Competition Board. Alternative did not have sufficient market power, which meant that it was not a big competitor against UN RORO. In other words, UN RORO's behaviors as a dominator in the marketplace did not remarkably affect the market share and the economic strength of Alternative nor did they had to do such due to the economic weakness of Alternative. Even though the financial situation of Alternative was indeed affected by UN RORO, Ekol was capable of providing financial support to Alternative under the same economic unity. Thus, there was not a significant change on the economic strength of Alternative in total.

The determination of abuse of a dominant position requires an analysis that is based on the as-efficient-competitor test. According to that test, Alternative had to be as powerful as UN RORO in the marketplace in order to perceive UN RORO's economic decisions as an infringement. Moreover, the ultimate buyers still had various options to choose when it came to carrying the products through the RORO shipment as UN RORO did not actually became a monopoly in the market. In this case, even if UN RORO dominated the RORO transport, Ekol and Alternative remained to be other options for the consumers to compare the price and the quality matters offered by aforementioned companies. Therefore, the Competition Board stated that UN RORO's businesses could not be perceived as a competition infringement through the abuse of a dominant position. The Board evaluated the case under the notion of freedom of contract that enabled UN RORO to choose the company or companies which it wanted to conduct its business with and provide services to.

As seen in this case, the abuse of a dominant position and the freedom of contract may clash in situations where it is not obvious whether the operations of a company are purely malign and aim to foreclosure the market to less powerful companies or if they are simply a matter of lawful economical decisions. In such situation, it is important to examine the case well and decide in a way that enables more companies to stay in the market as well as encourages newcomers to take part in the marketplace. The decision of the Board on UN RORO's case perfectly exemplifies this notion. Eventually, UN RORO did not become a

monopoly, hence letting other companies such as Alternative to stay in the market. Therefore, we can conclude that the number of options the buyers had in the market did not decrease. On the other hand, the consideration of the freedom of contract in a case like this set up a precedent which is likely to encourage other companies to start business in this marketplace as they do not worry about the unjust fines and regulations they may be subjected to in a stricter market.

If the Board had fined UN RORO, UN RORO could have been forced to leave the market due to the excessive fines it would have had to pay or it could have simply lost interest in staying in the market because of such discouragement. Consequently, the market would have been left with fewer companies, thus also with fewer options for the buyers as well as less competition between the companies. Additionally, if the fine had been too excessive, this image could have discouraged other companies who might have been considering to join the market, which also would have hindered the possible options for consumers and the enhanced competition in the marketplace in the future.

All in all, it is safe to conclude that when it comes to evaluating such ambiguous cases, it is important to not only consider the parties who are involved in but also the precedent the case establishes which may or may not encourage the current and the future players in the market to be a part of it. By doing so, one can guarantee that the competition in the RORO transport sector is promoted as much as possible and the options the buyers are presented to are as abundant as possible.

The key objectives of competition law can be precisely seen in the cases mentioned above on the grounds of anticompetitive practices through the cartel infringement and abuse of a dominant position as well. The first case was founded anticompetitive by the Commission due to the cartel agreement between the firms brought a potential risk for the other companies while they conduct their business. The harmful effects of such a cartel agreement on the rivals and ultimate consumers as well cannot be tolerated in a competitive environment. Additionally, the second case was analyzed under the notion of abuse of a dominant position. Unlike the first case, the Competition Board did not find any infringement which contradicts with the objectives of a competitive environment. The Competition Board encourages the companies to conduct their business as freely as possible by balancing the requirements of trade and conditions of competition.

CONCLUSION

The marine transport, a subbranch of logistics, has played an important role in the evaluation of trade throughout the recent years. Many contributions and benefits can be provided to the economic progress of a nation by an effective logistic system. Firstly, each country's economic growth and the level of development tend to be in parallel with the impacts of logistics. Additionally, the contributions in the field of logistics can positively affect the consumers. The products and the way to serve them to the buyers continually changes because consumers' needs and wants must be taken into consideration. Therefore, the carriage of products in a most efficient manner regarding the type, features and forms of the products. The maritime transport emerges as a response to such considerations by providing different options for the date and the place of the shipment as well as the combination of different ways of logistics.

Moreover, the swiftness of the transportation can be accomplished not only by using other transport modes in a connected way, but also by reducing the time on the ports to packaging and storing of the products as well as by using alternative equipment or vehicles in order to carry the products rapidly into the vessel. Hence, the RORO transport becomes preferable as it enables the carrier to carry the products in a combination of sea and road or railway. Additionally, the RORO transport is conducted by minimizing the harmful effects of transport as it provides an environmentally- friendly method as much as possible through the whole journey.

The companies which engage with RORO transport must observe the specific rules which regulate the marine sector as well as the competition rules. The existence of such rules derives from the protection of a competitive environment which provides high quality products or services with optimum prices. Based on these rules, the transportation through RORO vessels must be served by affordable prices and the capacity of the vessels may be increased as much as possible. The rules also guarantee that the service of transporting the carriage from the port of lading to the port of destination and the carriage operations must be of a certain quality. Therefore, the competition rules play an important role in the RORO transport by both observing the economic behaviors of each company and the ultimate results of these activities in the competitive environment, competitors and consumers.

The competition breaches in RORO transport are examined on two titles regarding the cartel infringement and abuse of a dominant position. The existence of cartel between many companies has a negative effect on the opponent firms. When the companies in a cartel start to take common economic decisions such as the price of a product or service, other firms cannot adjust to such decisions by their own. Therefore, the market foreclosure is emerged for the rival firms who are not a part of the cartel. The abuse of a dominant position makes stronger firms more dominant to the detriment of its competitors. Hence, the market is exclusively directed by a single company's economic decisions.

Both infringements cannot be acceptable under the notion of an effective competition due to the fact that as a result, only a few, and in some cases just one, firms stay in the market as options for the consumers to buy products or services from. The price and the quality comparison cannot be done by the ultimate consumers because there are not many companies that conduct their business in the marketplace. Additionally, the firms are able to conduct their business through unjust practices such as predatory pricing, discriminatory pricing and refusal to supply as the numbers of players in the marketplace decrease significantly.

All in all, increasing the quality of services in RORO transport sector by keeping the costs at a minimum level as much as possible emerges a principal objective for the companies which conduct their business in RORO transport. The protection of a competitive environment and elimination of the competition breaches emerges as a unique way to keeping the balance between the quality and price of the service that offered by the RORO transport companies.

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